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TABLE OF CASES REPORTED.

Albuquerque, City of, etc., Appellant, v. O. A. Matson, ect., Appellee 135
Andrews, Edgar, Appellant, v. Rio Grande Livestock Co., et al, Appellees 529
Aragon, J. J., etc., Appellant, v. Lincoln County, etc., Appellee, ... 467
Archuleta, Daniel, Appellant, v. Territory, Appellee 219
Arizona & Colorado Railroad Co., etc., Appellee, v. D. & R. G. R. R. Co., Appellant 281
A. T. & S. F. Railway Co., Appellant, v. Citizens Traction and Power Co., Appellee 154, 163
A. T. & S. F. Railway Co., Appellant, v. Jordon Rodgers, Appellee 120
A. T. & S. F. Railway Co., Appellant, v. Padilla, Valentina Chaves de, etc., Appellee 576
Bank of Commerce, Appellee, v. Jaspar N. Broyles, et al, Appellants 414
Barela, Unknown Heirs of, et al, Appellees, v. George W. Bond, et al, Appellants 660
Bateman, Ursinus Sidney, et al, Appellants, v. Julius J. Gits, et al, Appellees 441
Beck, William P., et al, Appellants, v. George V. Stoneroad, et al, Appellees 754
Benjamin, Charles M., et al, Appellants, v. Board of Trustees, etc., Appellees 692
Berry, Patrick, Jr., etc., Appellee, v. Peter Ross, Jr., Appellant 778
Board of Trustees, etc., Appellees, v. Ex Parte George E. Priest, et al, Appellants, ... 692
Bond, George W., et al, Appellants, v. Unknown Heirs of Juan Barela, et al, Appellees 660
Broyles, Jaspar, et al, Appellants, v. Bank of Commerce, Appellee 414
Burtner & Ramsay, Appellants, v. Oliver Typewriter Co., Appellee 271
Caledonian Coal Co., Appellee, v. Rocky Cliff Mining Co., et al, Appellants 517
Carter, Harry, Fred G. Nickel, Milton H. Edwards, Lina Edwards, D. Rankin, J. F. Haines, Appellants, v. Gustave Leusch, Appellee 28
Cerrillos Coal Railroad Co., Defendant in Error, v. Solomon Luna, Plaintiff in Error 71
Cheney, Oscar F., Appellant, v. Territory, Appellee 476
Children's Home Society, etc., Appellee, v. William G Sargent, etc., Appellant 276

Citizens Bank of Aztec, et al, Appellees, v. Current, et al, Appellants 642
Citizens Traction and Power Co., Appellee, v. A. T. & S. F. Railway Co., Appellant.....154, 163
Citizen's National Bank, Appellant, v. George A. Davisson, et al, Appellees 689
Coast Lines Hospital Association, et al, Appellants, v. J. H. O'Rielly, Appellee 647
Colbert, John W., et al, Appellants, v. J. H. O'Rielly, Appellee, ... 647
Collins, Mary E., Appellant, v. Julia Schump, et al, Appellees, ... 537
County Commissioners Lincoln County, etc., Appellees, v. Aragon, etc., Appellant..... 467
Current, et al, Appellants, v. Citizens Bank of Aztec, et al, Appellees 642
Current, L. etc., v. D. H. Pickering, et al, Relators..... 37
Dale, J. J., et al, Appellees, v. Tularosa Townsite, etc.200, 750
Dale, J. J., et al, Appellees, v. Tularosa Townsite, etc..... 200
Davisson, George A., et al, v. Citizen's National Bank Appellant 689
D. & R. G. R. R. Co., Appellant, v. Arizona & Colorado R. R. Co., Appellee..... 281
Destree, Louis J., et al, Appellees, v. J. D. Lyons, Appellant, ... 327
DiPalma, Richard, et al, Appellees, v. J. A. Weiuman, et al, Appellants..... 302
Donahue, Jack, Appellant, v. Territory, Appellee..... 17
Dougherty, Harry M., et al, Appellees, v. Fannie V. Van Riper, Appellant 600
Dye, Sarah Ellen, etc., Appellee, v. Ora Butler Meece, Appellant 191, 297
Eastern Railway Company of New Mexico, Appellant, v. City of Roswell, Appellee..... 685
Edwards, Milton H., Fred G. Nickel, Lina Edwards, Harry Carter, D. Rankin, J. F. Haines, Appellants, v. Gustave Leusch, Appellee..... 28
El Paso Brick Company, Appellant, v. John H. McKnight, Appellee 721
Enriquez, Jose, Appellee, v. Joseph Brown Oliver, et al, Appellants 322
Ex Parte George E. Priest, et al, Appellants, v. Board of Trustees, etc., Appellees,..... 692
Eyles, Otto J., Appellant, v. Territory, Appellee..... 657
First National Bank of Albuquerque, Appellee, v. J. H. Haverkampf, etc., Appellant..... 497
First National Bank of Artesia, Appellee, v. Home Insurance Co., Appellant..... 66
Foxworth, W. L., Appellee, v. Straus, Appellant..... 442

Friday, Harry Slocum, Appellee, v. Santa Fe Central Ry. Co., Appellant 434
Furman, L. B., et al, Defendant in Error, v. J. Turley, et al, Plaintiff in Error 253
Gallup Electric Light Co., Appellee, v. Pacific Improvement Co., et al, Appellants, ... 86, 279
Gessler, E. R., et al, Appellants, v. L. B. Howey, et al, Appellees 319
Gits, Julius J., et al, Appellees, v. Ursinus Sidney Bateman, et al, Appellants 441
Gonzales, Candido G., et als, v. Vincenta Montoya, et als, Appellants 349
Gonzales, Juan, Unknown Heirs of, et als, Appellants, v. Candido G. Gonzales, et als, Appellees 349
Goode, James, et al, Appellants, v. Colorado Investment Loan Co., Appellee 461
Gradi, L., et al, Appellants, v. Price, et al, Appellees 1
Grande, Caesar, Appellant, v. Rafael Tagliaferri, Appellee 486
Gray, S. T., et al, Appellants, v. Robert H. Taylor, et al, Appellees 171
Griffith, John E., et al, Appellees, v. Fanny Van Riper, Appellant 600
Hagerman Irrigation Co., Appellee, v. J. F. McMurray Appellant 172
Haines, J. F., Fred G. Nickel, Milton H. Edwards, Lina Edwards, Harry Carter, D. Rankin, Appellants, v. Gustave Leusch, Appellee 28
Hardwick, E. F., et al, Appellants, v. Riverside, etc, Co., Appellee 479
Hartman Stock Farm, et al, Appellees, v. L. Current, et al, Appellants 642
Haverkampf, J. H., etc., Appellant, v. First National Bank, etc., Appellee 497
Herbert, F. C., et al, Appellees, v. Houston-Hart Lumber Co., Appellant 197
Holt, Herbert B., et al, Appellees, v. Fanny V. Van Riper, Appellant 600
Home Insurance Co., Appellant, v. First National Bank, Appellee 66
Houston-Hart Lumber Co., Appellant, v. Harry Neal, et al, Appellees 197
Howard, Thomas, et al, Appellees, v. J. D. Lyons, Appellant 327
Howey, L. B., et al, Appellees, v. Gessler, E. R., et al, Appellants 319
Hubbard, A. M., et al, Appellants, v. Citizens' Bank of Aztec, et al, Appellees 642
Hurt, Young E., Appellee, v. Territory, Appellant 152

Justice of the Peace, etc., v. D. H. Pickering, et al, Relators 37
Kingston, J. H., et al, Appellees, v. J. W. Walters, Appellant 59
Klock, George S., etc., Appellant, v. Edward A. Mann, Appellee 211, 744
Knight, E., etc., Appellees, v. Tularosa Townsite, etc., Appellant 200, 750
Las Vegas Board of Trustees, etc., Appellees, v. Ex Parte George E. Priest, et al..... 692
Leusch, Gustave, Appellee, v. Fred G. Nickel, Milton H. Edwards, Lina Edwards, Harry Carter, D. Rankin, J. F. Haines, Appellants..... 28
Lincoln County, County Commissioners of, Appellee, v. Aragon, et al, Appellant..... 467
Lockhart, Henry, Appellee, v. Washington Gold and Silver Mining Co., et al, Appellants..... 223
Lucero, Jose Refugio, Appellant, v. Territory, Appellee,.. 652
Luna, Solomon, Plaintiff in Error, v. Cerrillos Coal Railroad Co., Defendant in Error..... 71
Lyon, Louis F., et al, Appellees, v. Toti & Gradi, Appellants 1
Lyons, J. D., Appellant, v. Thomas Howard, et al, Appellees 327
Mahoney, W. D., et al, Appellees, v. J. W. Walters, Appellant 59
Mann, Edward A., Appellee, v. Territory, etc., Appellants 211, 744
Martinez, Reyes P., et al, Appellants, v. Colorado Investment Loan Co., Appellee 461
Martinez, Telesforo, et al, Appellants, v. Colorado Investment Co., Appellee 461
Matson, O. A., Appellee, v. Territory, etc., Appellant.... 135
McBee, W. D., Appellee, v. Pat O'Connell, et al, Appellants 469
McGrath, Lizzie, Appellant, v. Territory, Appellee..... 202
McKnight, John H., Appellee, v. El Paso Brick Company Appellant .....
McMurray, J. F., Appellant, v. Hagerman Irrigation Co., Appellee 172
McNabb, Edward, Appellant, v. Territory, Appellee..... 625
McVeigh, James, Appellant, v. A. C. Veig, et al, Appellee, 453
Meece, Ora Butler, Appellant, v. Sarah Ellen Dye, etc., Appellee 191, 297
Miller, J. A., etc., Appellant, v. First National Bank etc., Appellee 497
Milleson, B. H., et al, Appellants, v. Bank of Aztec, Appellees 642
Mills, Melvin W., v. Territory, Appellee..... 555

Montoya, Vincenta, etc., Appellants, v. Candido G. Gonry Carter, D. Rankin, J. F. Haines, Appellants, v. Moore, Frank H., etc., Appellee, v. Western Meat Co., Appellant, ... 107
Neal, Harry, et al, Appellees, v. Houston-Hart Lumber Co., Appellant, ... 197
Nickel, Fred G., Milton H. Edwards, Lina Edwards, Harry Carter, D. Rankin, J. F. Haines, Appellant, v. Gustave Leusch, Appellee 28
North British and Mercantile Co., Appellee, v. W. W. Shoucair, Appellant 563
O'Connell, Pat, et al, Appellants, v. W. D. McBee, Appellee 469
Oliver, Joseph Brown, et al, Appellants, v. Jose Enriquez, Appellee 322
Oliver Typewriter Co., Appellee, v. Burtner & Ramsey, Appellants, ... 271
O'Rielly, J. H., Appellee, v. John W. Colbert, et al, Appellants 647
Owens, Etta, et al, v. Citizen's National Bank, Appellant. 689
Pacific Improvement Co., et al, Appellants, v. Gallup Electric Light Co., Appellees 82, 279
Padilla, Valentina Chaves de, etc., Appellees, v. A. T. & S. F. Railway Co., Appellant..... 576
Perkins, Mrs. Mary Bell, Appellant, v. City of Roswell, Appellee 185
Pettine, Antimo, Appellant, v. Territory, Appellee,..... 40
Pickering, D. H., et al, Relators, v. Current, etc..... 37
Pierce, Robert H., Appellant, v. Territory, Appellee..... 10
Price, Milbert F., et al, Appellees, v. Toti & Gradi, Appellants 1
Priest, George E., et al, Appellants, v. Board of Trustees, etc., Appellees 692
Puritan Manufacturing Company, et al, Appellees, v. Toti & Gradi, Appellants..... 1
Putney, R. E., Appellant, v. Franz Schmidt, et al, Appellees 400
Quick, Melvin W., et al, Appellants, v. Board of Trustees, etc., Appellees 692
Ramsey, Burtner &, Appellants, v. Oliver Typewriter Co., Appellee 271
Rankin, D., Fred G. Nickel, Milton H. Edwards, Lina Edwards, Harry Carter, J. F. Haines, Appellants, v. Gustave Leusch, Appellee..... 28
Renehan, Alois B., et al, Appellant, v. Tina Haffner Retsch, et al, Appellee..... 541
Retsch, Tina Haffner, et al, Appellee, v. Alois B. Renehan, et al, Appellant..... 541
Riggle, J. G., etc., Appellee, v. White, etc., Appellant 713

Riverside Sand & Cement Manufacturing Co., Appellee, v. E. F. Hardwick, et al, Appellants..... 479
Rio Grande Livestock Co., et al, Appellees, v. Edgar Andrews, Appellant..... 529
Rocky Cliff Mining Co., et al, Appellants, v. Caledonian Coal Co., Appellee..... 517
Rodgers, Jordon, Appellee, v. A. T. & S. F. Railway Co., Appellant 120
Romero, Secundino, et al, Defendants in Error, v. Alvin E. Woodling, Plaintiff in Error..... 55
Ross, Peter J., Appellant, v. Patrick Berry, Jr., etc., Appellee 778
Roswell, City of, Appellee, v. Mary Bell Perkins, Appellant 185
Roswell, City of, Appellee, v. Eastern Railway Co., Appellant 685
Roswell, Mayor and City Council of, Appellant, v. Stockard, etc., Appellee..... 340
Ruppe, et al, Appellees, v. Weinman, J. A., et al, Appellants 302
Salazar, Enrique, et al, Defendants in Error, v. Alvin E. Woodling, Plaintiff in Error,..... 55
Santa Fe Central Ry. Co., Appellant, v. Harry Slocum Friday, Appellee..... 434
Santa Rita Mining Company, et al, Appellants, v. U. S., Appellee 3
Santa Rita Store Co., et al, Appellants, v. U. S., Appellee 3
Sargent, etc., Appellant, v. Territory, etc., Appellee..... 276
Schmidt, Franz, et al, Appellees, v. R. E. Putney, Appellant 400
Schump, Julia et al, Appellees, v. Mary E. Collins, Appellant 537
Shoucair, W. W., Appellant, v. North British and Mercantile Co., Appellee..... 563
Simmons, E. H., et al, Appellants, v. Tularosa Townsite etc., Appellees 200, 750
Stevens, Charles A., etc., Appellee, v. White, etc., Appellant 713
St. Louis Land & Cattle Co., et al, Appellants, v. George W. Stoneroad, et al, Appellees 754
Stockard, J. W., Appellee, v. Roswell, Appellant..... 340
Stoneroad, George W., et al, Appellees, v. William P. Beck et al, Appellants 754
Story, C. H., et al, Appellees, v. R. E. Putney, Appellant, 400
Straus, A., Appellant, v. W. L. Foxworth, Appellee..... 442
Summers & Co., et al, Appellee, v. James McVeigh, Appellant 453
Sutherland, W. A., et al, Appellees, v. Fanny V. Van Riper, Appellant 600

Tagliaferri, Rafael, Appellee, v. Caesar Grande, Appellant 486
Taylor, Robert H., et al, Appellees, v. S. T. Gray, et al, Appellants 171
Territory, Appellant, v. Young E. Hurt, Appellee..... 152
Territory, etc., Appellant, v. Lincoln County etc., Appellee 467
Territory, etc., Appellant, v. O. A. Matson, etc. Appellee, 135
Territory, etc., Appellant, v. Riggle, J. G., etc., Appellee 713
Territory, etc., Appellant, v. Charles A. Stevens, etc., Appellee 713
Territory, etc., Appellant, v. T. W. Watson, etc., Appellee, 713
Territory, etc., Appellant, v. M. M. Witt, Appellee..... 335
Territory, Appellee, v. Daniel Archuleta, Appellant..... 219
Territory, Appellee, v. Oscar F. Cheny, Appellant..... 476
Territory, Appellee, v. Jack Donahue,, Appellant..... 17
Territory, Appellee, v. Otto J. Eyles, Appellant,..... 657
Territory, Appellee, v. Jose Refugio Lucero, Appellant.. 652
Territory, Appellee, v. Lizzie McGrath, Appellant..... 202
Territory, Appellee, v. Edward McNabb, Appellant..... 625
Territory, Appellee, v. Melvin W. Mills, Appellant..... 555
Territory, Appellee, v. Antimo Pettine, Appellant..... 40
Territory, Appellee, v. Robert H. Pierce, Appellant..... 10
Territory. etc., Appellee, v. Roswell, Appellant..... 340
Territory, etc., Appellee, v. William G. Sargent, etc, Appellant 276
Territory, Appellee, v. Malcom Trapp, Appellant..... 700
Territory, Appellee, v. Sylvestre Torres, Appellant..... 615
Territory, Appellee, v. Jim Walker, Appellant..... 607
Territory, ex rel. George S. Klock, Appellee, v. Edward A. Mann, Appellant..... 744
Territory, etc., Appellant, v. Edward A. Mann, Appellee.. 211
Thomas, W. R., et al, Appellees, v. Edgar Andrews, Appellant 529
Tipton, W. D., et al, Appellees, v. Tularosa Townsite, etc., Appellant 200, 750
Torres, Sylvestre, Appellant, v. Territory, Appellee..... 615
Toti, B., et al, Appellants, v. Price, et al, Appellees,..... 1
Trapp, Malcolm, Appellant, v. Territory, Appellee..... 700
Tularosa Townsite, etc., Appellant, v. Tularosa Ditch, etc., Appellees 200, 750
Turley, J., et al, Plaintiff in Error, v. L. B. Furman, et al, Defendant in Error..... 253
Unknown Heirs of Juan Barela, et al, Appellees, v. George W. Bond, et al, Appellants..... 660
U. S., Appellee, v. Santa Rita Store Co., et al, Appellants, 3
Vanderwart, S., et al, Appellants, v. Colorado Investment Loan Co., Appellees..... 461

Van Riper, Fanny V., Appellant, v. Harry M. Dougherty, et al, Appellee 600
Veig, A. C., et al, v. James McVeigh, Appellant 453
Vigil, Montes, Unknown Heirs, et al, Appellants, v. Candido G. Gonzales, et als, Appellees 349
Walker, Jim, Appellant, v. Territory of New Mexico, Appellee 607
Walters, J. W., Appellant, v. J. H. Kingston, et al, Appellees 59
Washington Gold and Silver Mining Co., et al, Appellants, v. Henry Lockhart, Appellee 223
Watson, T. W., etc., Appellee, v. White, etc., Appellant .. 713
Weaver, S. J., Appellant, v. A. M. Weaver, Appellee, ... 98
Weinman, J. A., et al, Appellants, v. Richard Di Palma, et al, Appellees 302
Welter, A. J., etc., Appellant, v. Witt, M. M., Appellee .. 335
Western Meat Co., Appellant, v. Frank H. Moore, etc., Appellee 107
White, W. R., etc., Appellant, v. J. G. Riggle, etc., Appellee 713
White, W. R., etc., Appellant, v. Charles A. Stevens, etc., Appellee 713
White, W. R., etc., Appellant, v. T. W. Watson, etc., Appellee 713
Witt, M. M., Appellee, v. Welter, etc., Appellant 335
Woodling, Melvin E., Plaintiff in Error, v. Secundino Romero, et al, Defendants in Error 55
Zeiger, Charles, Estate of, etc., Appellee, v. Western Meat Co., Appellant 107

NEW MEXICO CASES CITED.

Albright v. Territory, 13 N. M. 64 749
Albright v. Cunningham, 7 N. M. 445 754
Albuquerque L. & I. Co., 10 N. M. 197..... 181
A. & C. R. R. Co. v. D. & R. G. R. R. Co., 13 N. M. 357.... 288
Armijo v. Baca, 3 N. M. 391 754
Baca v. Anaya, 14 N. M. 382..... 366
Baca v. Bernalillo County, 10 N. M. 438..... 143
Bank v. Lesser, 10 N. M. 700..... 508
Bank v. Stewart, 13 N. M. 551..... 507
Bank of Commerce v. Baird Mining Co., 13 N. M. 431..... 81
Barnett v. Barnett, 9 N. M. 205..... 691
Canavan v. Dugan, 10 N. M. 316..... 528
Candelaria v. Miera, 13 N. M. 360 .....118, 179, 606, 743
Chaves v. Lucero, 13 N. M. 368..... 559
Conklin v. Cunningham, 7 N. M. 445 754
Corcoran v. Albuquerque Traction Co., 15 N. M. 9..... 624
Costilla Land Co. v. Allen, 15 N. M. 528..... 171
Crabtree v. Segrist, 3 N. M. 500 559
Crary v. Field, 10 N. M. 257..... 691
Cunningham v. Springer, 13 N. M. 259.....376, 623
Dame v. Cochiti R. & M. Co., 13 N. M. 10.....170, 462
Davisson v. Bank, 15 N. M. 680..... 690
DeBaca v. Wilcox, 11 N. M. 352..... 466
Deemer v. Falkenberg, 4 N. M. 149 58
Di Palma v. Weinman, 15 N. M. 68.....304, 308
Dye v. Crary, 13 N. M. 439 289
Early Times Distillery Co. v. Zeiger, 11 N. M. 221 473
Eaton v. Territory, 13 N. M. 79 207
Exchange Bank v. Tuttle, 5 N. M. 427 322
Finane v. Hotel Company, 3 N. M. 411.....199, 331
Ford v. Springer Land Association, 8 N. M. 73.....199, 331
Fruit Exchange Co. v. O'Donnell, 9 N. M. 366 439
Gregory v. Cassan, 15 N. M. 496..... 289
Gutierrez v. Territory, 13 N. M. 30 168
Hagerman Irrigation Co. v. McMurray, 16 N. M. 172..376, 504
Hamilton Mining Co. v. Hamilton, 14 N. M. 272....376, 504
Ilfeld v. Baca, 13 N. M. 32..... 511
Ilfeld v. Baca, 14 N. M. 65..... 512
Jenkins v. Maxwell Land Grant Co., et al, 15 N. M. 281.. 389
Keeney v. Carillo, 2 N. M. 480..... 180
King v. Tabor, 15 N. M. 488 280
Kingston v. Walters, 14 N. M. 368 .....64, 69
Kitchen v. Schuster, 14 N. M. 176 510
Laird v. Upton, 8 N. M. 409 439
Lockhart v. Leeds, 10 N. M. 568 230

Lynch v. Grayson, 5 N. M. 488 ..... 83, 296
Melini & Eakin v. Friege & Bro., 15 N. M. 455 482
Miera v. Territory, 13 N. M. 192 632
Millheiser v. Long, 10 N. M. 99 180
Minor v. Marshall, 6 N. M. 199 331
Mora v. Schick, 4 N. M. 301 58
Neher v. Armijo, 11 N. M. 67 462
Oliver v. Henriquez, 16 N. M. 322 503
Patterson v. Hewitt, 11 N. M. 1 555
Pearce v. Strickler, 9 N. M. 467 440
Pinkerton v. Ledoux, 3 N. M. 410 478
Probst v. Trustees, 3 N. M. 378 53
Radcliffe v. Chaves, 15 N. M. 258 ..... 81, 495
Sacramento Valley Irrigation Co. v. Oliver M. Lee, 15 N. M. 567 194
Sandoval v. County Commissioners, 13 N. M. 543 143
Sanitorium v. Van Stone, 14 N. M. 437 104
Savings Bank v. Woodruff, 14 N. M. 502 116
Schofield v. Territory, 9 N. M. 534 440
Territory v. Alarid, 15 N. M. 165 54
Territory v. Anderson, 4 N. M. 213 14
Territory v. Archibeque, 9 N. M. 404 ..... 53, 55
Territory v. Armijo, 14 N. M. 202 ..... 106, 216
Territory v. Ashenfelter, 4 N. M. 93 211
Territory v. Ayer, 15 N. M. 581 50
Territory v. Baker, 4 N. M. 236 14
Territory v. Beall, 1 N. M. 507 14
Territory v. Caldwell, 14 N. M. 535 ..... 50, 623, 632
Territory v. Chaves, 6 N. M. 455 14
Territory v. Chaves, 9 N. M. 282 ..... 53, 55
Territory v. Chrisman, 9 N. M. 587 ..... 53, 55
Territory v. Cordova, 11 N. M. 374 624
Territory v. DeGutman, 8 N. M. 92 623
Territory v. Digneo, 15 N. M. 157 ..... 142, 719
Territory v. Emilio, 14 N. M. 147 ..... 47, 477
Territory v. Fewel, 5 N. M. 43 223
Territory v. Garcia, 12 N. M. 98 478
Territory v. Garcia, 12 N. M. 87 ..... 613, 632
Territory v. Gonzales, 14 N. M. 35 50
Territory v. Gonzales, 11 N. M. 315 ..... 477, 301
Territory v. Guillen, 11 N. M. 209 ..... 49, 53, 55
Territory v. Hendricks, 13 N. M. 311 223
Territory v. Kinney, 3 N. M. 656 622
Territory v. Leary, 8 N. M. 182 ..... 477, 612
Territory v. Leslie, 15 N. M. 240 53
Territory v. Livingston, 13 N. M. 327 478
Territory v. McFarlane, 7 N. M. 425 612
Territory v. Mills, 13 N. M. 174 557
Territory v. O'Donnell, 4 N. M. 196 ..... 49, 50, 439
Territory v. Padilla, 12 N. M. 5 612

Territory v. Price, 14 N. M. 262 .....14, 623
Territory v. Sais, 15 N. M. 171 705
Territory v. Taylor, 11 N. M. 588 209
Territory v. Watson, 12 N. M. 420.....50, 612, 623
Territory v. West, 14 N. M. 557.....53, 55
Territory v. Yarberry, 2 N. M. 454 .....49, 53
Territory v. Ye Dan, 7 N. M. 443..... 612
Thomas v. Gavin, 15 N. M. 660 93
U. S. v. Biena, 8 N. M. 105 47
U. S. v. deAmador, 6 N. M. 178 50
U. S. v. Densmore, 12 N. M. 96.....27, 478, 632
U. S. v. Rio Grande D. & I. Co., 9 N. M. 292 181
U. S. v. Sena, 15 N. M. 187 210
Vanderwork v. Hewes, 15 N. M. 439 .....261, 270
Weaver v. Weaver, 15 N. M. 104
Zeiger, in re, 15 N. M. 150 115

CITATIONS.

Constitution, Article 5, Section 13 339
Article 6, Section 26 339
Article 22, Section 4 339
Enabling Act.....Sections 4 and 5..... 339
Section 5..... 335

NEW MEXICO STATUTES.

Compiled Laws, 1884....Section 81..... 389
Compiled Laws, 1897....Section 8..... 493
Section 17..... 493
Sections 52, 53..... 493
Section 68 152
Section 79 609
Section 255..... 557
Section 633 717
Section 884 259
Section 1122 659
Sections 1431-1433 105
Section 1698 338
Section 1792 338
Sections 1983, 1985-1987 297
Section 2217 198
Section 2221 330
Section 2304 453
Section 2315..... 722
Section 2402 .....145, 685
Section 2403 145
Section 2419 146
Section 2420 146
Section 2424 135
Section 2452 150
Section 2462..... 145
Section 2467 145
Section 2544 38
Section 2552 461
Section 2556 .....214, 746
Section 2580 .....215, 746
Section 2582 219
Section 2685, Sub-Section 33.... 496
Section 2685, Sub-Sec. 35..... 457
Section 2685, Sub-Sec. 48..... 105
Section 2685, Sub-Secs. 59, 85... 437
Section 2685, Sub-Sec. 89.....35, 646
Section 2685, Sub-Sec. 98..... 646
Section 2685, Sub-Sec. 137..... 106

	Section 2762	139
	Section 2832	293
	Section 2875	106
	Section 2894	429
	Section 2900, Sub-Sec. 7	38
	Section 2908	429
	Sections 2937, 2938	349
	Section 2942	550
	Section 2953	511
	Section 2964	696
	Sections 2981, 2986, 2987	622
	Section 2993	317
	Section 2994	27
	Section 2996	40
	Section 2997	40, 210
	Section 2999	71
	Section 3138	368
	Section 3139	40
	Section 3148	279
	Section 3182	349
	Section 3224	338
	Sections 3230, 3232, 3337	337
	Section 3243	338
	Section 3244	38
	Section 3367	39
	Section 3431	25
	Sections 3846-3848	157
	Sections 3931, 3943, 3944, 3945, 3947, 3952, 3953, 3964, 3968-3970	473
	Section 3939	473
	Section 3953	469
	Sections 3953, 3955	510
	Section 3965	486
	Sections 4010, 4011	695
Laws 1858, Chapter 17		377
Laws 1893, Chapter 61,	Section 5	557
Laws 1899, Chapter 22,	Section 23	449
	Section 25	447
	Section 31	442
	Section 34	448
Chapter 63		387, 533
Laws 1901, Chapter 62		474
	Section 12	71
	Section 22, Sub-Sec. 8	105
	Section 24	782
Laws 1905, Chapter 33,	Section 2	214, 747
Chapter 84,	Section 1	205
	Section 6	209
Laws 1903, Chapter 38,	Section 1	717
Chapter 98		493

Laws 1907, Chapter 57, Section 22 210
Laws 1905, Chapter 33, Section 2 214
Chapter 76 393
Chapter 79 157
Section 102 461
Chapter 97 154
Section 13 166
Chapter 105 219
Chapter 106 149
Laws 1907, Chapter 36 710
Chapter 49 255
Sections 1, 12 .....262, 270
Sections 25, 27 260
Section 32 .....257, 261
Section 42 179
Sections 46, 47 .....258, 261
Section 50 258
Section 63 257
Chapter 57 106
Section 21 .....2, 319
Section 22 210
Section 24 782
Sections 24, 25, 26 780
Section 34 55
Section 37 40
Section 38 496
Chapter 83, Section 55 430
Section 130 66
Chapter 87 717
Chapter 107, Section 198 33
Section 225 28
Section 226 29
Laws 1909, Chapter 22, Section 1 747
Chapter 57, Section 4 2
Chapter 63, Section 26 650
Chapter 57, Section 4 2
Chapter 120, Section 1 1
Section 2 2
Section 4 782
Chapter 122, Section 3 135
Chapter 127, Sections 2, 11 276
Ordinances, City of Roswell, No. 213, Section 3 685
Organic Act, C. L., page 43 106

JUDGES AND OFFICERS

OF

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

(Compiled by José D. Sena, Clerk of the Supreme Court.)

CHIEF JUSTICES.

By the Organic Act, the Supreme Court consisted of a Chief Justice and two Associate Justices. In 1887, a third Associate Justice was added; in 1890, a fourth; in 1904, a fifth, and in 1909 a sixth, making seven justices of the Supreme Bench of the Territory, each presiding over a judicial district.

	Appointed.
Joab Houghton, by General S. W. Kearney, died January 31, 1876	1846
Grafton Baker	1851
J. J. Davenport	1858
Kirby Benedict, died at Santa Fe, N. M., 1875	1858
John P. Slough, died at Santa Fe, N. M., Dec. 7, 1867	1866
John S. Watts, died in Indiana, in 1873	1868
Joseph G. Palen, died in Santa Fe, N. M., Dec. 1875	1869
Henry L. Waldo, resigned	1876
Chas. McCandless, resigned	1878
L. Bradford Prince	1879
Samuel B. Axtell, died at Morristown, N. J., 1893	1882
William A. Vincent	1885
Elisha V. Long	1885
James O'Brien	1889
Thomas Smith	1893
William J. Mills	1898
William H. Pope	1910

JUSTICES, FIRST DISTRICT.

The First District from 1846 to 1860, included the counties of Santa Fe, Santa Ana and San Miguel; in 1860, the counties of Mora, Colfax, Taos and Rio Arriba were added. In 1887, the First District was made to include the counties of Santa Fe, San Juan, Rio Arriba and Taos, and in July, 1909, the First District was designated as including the counties of Santa Fe, San Juan, Rio Arriba, Taos and Torrance, with headquarters at Santa Fe, N. M.

	Appointed.
Joab Houghton, from New Mexico	1846
Grafton Baker	1851
J. J. Davenport	1853
Kirby Benedict, from Illinois	1858
John P. Slough, from Colorado	1866
John S. Watts	1868
Joseph G. Palen, from New York	1869
Henry L. Waldo, from New Mexico	1876
Chas. McCandless, from Pennsylvania	1878
L. Bradford Prince, from New York	1879
Samuel B. Axtell, from California	1882
Reuben A. Reeves, from Texas	1887
Wm. H. Whiteman, from New Mexico	1889
Edward P. Seeds, from Iowa	1890
Napoleon B. Laughlin, from New Mexico	1894
John R. McFie, from New Mexico	1898

JUSTICES, SECOND DISTRICT.

The Second District, from 1846 to 1860, was composed of the counties of Bernalillo, Valencia and, as soon as organized Socorro, Dona Ana, and Arizona. In 1860 the District was constituted of the counties of Bernalillo, Valencia and Socorro. In 1889 Socorro was transferred to the Fifth District, and (as soon as organized) the counties of McKinley and Sandoval were added, and in July, 1903, Torrance county was also added. In 1909, the Second District was made to consist of the counties of Bernalillo, McKinley and Sandoval, with headquarters at Albuquerque, N. M.

	Appointed.
Antonio J. Otero, from New Mexico	1846
John S. Watts, from Indiana	1851
Perry E. Brocchus, from Maryland	1857
W. F. Boom	1859
Sydney A. Hubbell, from New Mexico	1861
Perry E. Brocchus, from Maryland	1867
Hezekiah S. Johnson, from New Mexico	1870
John I. Reddick, from Nebraska	1876
Samuel B. McLin, from Florida	1877
Samuel C. Parks, from Illinois	1878

	Appointed.
Joseph Bell, from New York	1882
William H. Brinker, from Missouri	1885
William D. Lee, from New Mexico	1889
Nedham C. Collier, from Georgia	1893
Jonathan W. Crumpacker, from Indiana	1898
Benjamin S. Baker, from Nebraska	1902
Ira A. Abbott, from Massachusetts	1905

JUSTICES, THIRD DISTRICT.

The Third District, from 1846 to 1860, consisted of the counties of Taos and Rio Arriba, with headquarters at Taos. In 1860, after the organization of Dona Ana county, these counties became a part of the First District. In 1887 the Third District was reorganized so as to include Dona Ana and Grant counties, with headquarters at Las Cruces. In 1884, Sierra county was added and in 1899, Otero county. In 1895, Silver City was designated as headquarters and in 1898, Las Cruces was again designated as headquarters. In 1904, the Third District was reorganized to consist of the counties of Dona Ana, Grant, Socorro, Luna and Sierra, and on July 1st, 1909, it was changed to include the counties of Dona Ana, Grant and Luna, with headquarters at Las Cruces, N. M.

	Appointed.
Chas. Baubien, from New Mexico	1846
Horace Mower	1851
Kirby Benedict, from Illinois	1853
Wm. G. Blackwood, from South Carolina	1858
Joseph G. Knapp	1861
Joab Houghton, from New Mexico	1865
Abraham Berger, from Minnesota	1869
Benjamin J. Waters, from Missouri	1870
Daniel B. Johnson, from Missouri	1871
Warren Bristol, from Minnesota	1872
Stephen F. Wilson, from Pennsylvania	1884
Wm. F. Henderson, from Arkansas	1885
John R. McFie, from New Mexico	1889
Albert B. Fall, from New Mexico	1893
Gideon D. Bantz, from New Mexico	1895
Frank W. Parker, from New Mexico	1898

JUSTICES, FOURTH DISTRICT.

The fourth district was organized in 1887, consisting of San Miguel, Colfax, Mora and Lincoln counties. In 1890, Lincoln county became part of the Fifth District, and in 1891, Guadalupe county was added; in 1893, Union county, and in 1903, Quay County. On July 1, 1904, upon the creation of the Sixth District, Quay and Guadalupe were included in

that district. July 1, 1909, the District was designated to include the counties of San Miguel, Colfax, Mora and Union with headquarters at Las Vegas, and was presided over by the Chief Justice.

	Appointed.
Elisha V. Long, from Indiana	1887
James O'Brien, from Minnesota	1889
Thomas Smith, from Virginia	1893
Daniel H. McMillan, from New York	1898
William J. Mills, from New Mexico	1898
Clarence J. Roberts, from New Mexico	1910

JUSTICES, FIFTH DISTRICT.

This District was created in 1890, consisting of the counties of Socorro, Lincoln, Chaves and Eddy, with headquarters at Socorro. In 1903, Roosevelt county was added. In 1904, the District was reorganized to include only Chaves, Eddy and Roosevelt counties with headquarters at Roswell. In July, 1909, Curry county was added.

	Appointed.
Alfred A. Freeman, from Washington, D. C.	1890
Humphrey B. Hamilton, from New Mexico	1895
Charles A. Leland, from Ohio	1898
Daniel H. McMillan, from New York	1901
William H. Pope, from New Mexico	1903

JUSTICES, SIXTH DISTRICT.

This District was created in 1904, consisting of the counties of Otero, Guadalupe, Lincoln, Quay and Torrance. In July, 1909, it was changed to consist of the counties of Otero, Lincoln, Guadalupe and Quay, with headquarters at Alamogordo, N. M.

	Appointed.
Edward A. Mann, from New Mexico	1905
Alford W. Cooley, from New Mexico	1909
Edward R. Wright, from New Mexico	1910

JUSTICES, SEVENTH DISTRICT.

This District was created in the year 1909, and in July, 1909, it was designated to be composed of the counties of Socorro, Sierra and Valencia, with headquarters at Socorro, N. M.

	Appointed.
Merritt C. Mechem, from New Mexico	1909

CLERKS OF THE SUPREME COURT.

(Appointed by the Court.)

	Appointed
James M. Giddings, from Missouri	1852
Louis D. Sheets, from Missouri	1854
Augustine de Marle, from New Mexico	1856
Samuel Ellison, from Kentucky	1859
Wm. M. Gwyne, from Ohio	1866
Peter Connelly, from New Mexico	1867
Samuel Ellison, from Kentucky	1868
William Breeden, from Kentucky	1869
Marshall A. Breeden, from Kentucky	1872
Rufus J. Palen, from New York	1873
John H. Thompson, from Missouri	1877
Frank W. Clancy, from New Hampshire	1880
Charles M. Philips, from New Jersey	1883
Ruel M. Johnson, from Indiana	1886
Robert M. Foree, from Kentucky	1887
Summers Burkhart, from West Virginia	1889
Harry S. Clancy, from New Hampshire	1891
Page B. Otero, from New Mexico	1893
George L. Wyllys, from Virginia	1894
Jose D. Sena, from New Mexico	1898

UNITED STATES ATTORNEYS.

	Appointed.
Frank P. Blair, Jr., from Missouri	1846
Hugh N. Smith, from New Mexico	1847
Elias P. West	1851
Wm. H. H. Davis, from Pennsylvania	1853
Wm. Claude Jones	1855
Richard H. Tompkins, from New Mexico	1858
Theodore D. Wheaton, from New Mexico	1860
Merrill Ashurst, from Alabama	1861
Stephen B. Elkins, from New Mexico	1867
S. M. Ashenfelter, from Pennsylvania	1871
Thomas B. Catron, from New Mexico	1872
Sidney M. Barnes, from Arkansas	1878
George W. Prichard, from New Mexico	1883
Joseph Bell, from New Mexico	1884
Thomas Smith, from Virginia	1885
Eugene A. Fiske, from New Mexico	1889
J. B. H. Hemingway, from New Mexico	1893
W. B. Childers, from New Mexico	1896
W. H. H. Llewellyn, from New Mexico	1905
David J. Leahy, from New Mexico	1907
S. B. Davis, from New Mexico	1912

ATTORNEYS GENERAL.

Appointed by the Governor, confirmed by the Legislative Council.

	Appointed.
Hugh N. Smith, of Missouri	1846
Elias P. West	1848
Henry C. Johnson, of Pennsylvania	1852
Merrill Ashurst, of Alabama	1852
Theodore D. Wheaton, of Missouri	1854
Richard H. Tompkins, of Kentucky	1858
Hugh N. Smith, of Missouri	1859
Spruce M. Baird, of Texas	1860
Richard H. Tompkins, of Kentucky	1860
Charles P. Cleaver	1862
Stephen B. Elkins, of Missouri	1866
Charles P. Cleaver	1867
Merrill Ashurst, of Alabama	1867
Thomas B. Catron, of Missouri	1869
Thomas F. Conway, of Missouri	1872
William Breeden, of Kentucky	1873
Henry L. Waldo, of Missouri	1878
William Breeden of Kentucky	1878
Edward L. Bartlett, of Kansas	1889
John P. Victory, of New York	1895
Albert B. Fall, of New Mexico	1897
Edward L. Bartlett, of New Mexico	1897
Geo. W. Prichard, of New Mexico	1904
William C. Reid, of New Mexico	1906
George W. Prichard, of New Mexico	1907
Albert B. Fall, of New Mexico	1907
James M. Hervey, of New Mexico	1907
Frank W. Clancy, of New Mexico	1909

UNITED STATES MARSHALS.

	Appointed.
Richard Dallum	1846
John G. Jones	1851
Charles L. Rumley	1853
Charles H. Merritt	1854
Charles Blummer, from New Mexico	1856
Charles P. Cleaver, from New Mexico	1858
Abram Cutler, from Kansas	1861
John Pratt, from Kansas	1866
John Sherman, from Ohio	1876
A. L. Morrison, from Ohio	1881
Romulo Martinez, from New Mexico	1885
Trinidad Romero, from New Mexico	1889
Edward L. Hall, from New Mexico	1893
C. M. Foraker, from New Mexico	1898

SUPREME COURT REPORTERS.

	Appointed.
Charles H. Gildersleeve	
A. J. Abbott	1908
Paul A. F. Walter	1909

STATE OF NEW MEXICO.

The Constitution of the State of New Mexico adopted by the people of the Territory on the 21st day of January, 1911, and duly approved by the President of the United States and Congress, on the 6th day of January, A. D. Provides for a Supreme Court consisting of three members and divided the State into Eight Judicial Districts for which offices Judges were dul yelected at the General election held on the 7th day of November, A. D., 1911, as follows:

Supreme Court.

Clarence J. Roberts, C. J. Term expires January 1, 1917.
Richard H. Hanna, Justice. Term expires January 1, 1919.
Frank W. Parker, Justice. Term expires January 1, 1921.

Clerk Supreme Court.

Jose D. Sena.

DISTRICT COURTS.

First Judicial District, composed of the Counties of Santa Fe, Rio Arriba and San Juan.

Edmund C. Abbott, Judge. Term expires January 1, 1919.

The Second Judicial District is composed of the Counties of Bernalillo, Sandoval and McKinley.

Herbert F. Raynolds, Judge. Term expires January 1, 1919.

The Third Judicial District is composed of the Counties of Dona Ana, Otero, Lincoln and Torrance.

Edward L. Medler, Judge. Term expires January 1, 1919.

The Fourth Judicial District is composed of the Counties of San Miguel, Mora and Guadalupe.

David J. Leahy, Judge. Term expires January 1, 1919.

The Fifth Judicial District consists of the Counties of Eddy, Chaves, Roosevelt and Curry.

John T. McClure, Judge. Term expires January 1, 1919.

The Sixth Judicial District consists of the Counties of grant and Luna.

Colin Neblit, Judge. Term expires January 1, 1919.

The Seventh Judicial District consists of the Counties

of Socorro, Valencia and Sierra.

Merritt C. Mechem, Judge. Term expires January 1, 1919.

The Eighth Judicial District consists of the Counties of Taos, Colfax, Union and Quay.

T. D. Lieb, Judge. Term expires January 1, 1919.

The probate or county clerk is made ex-officio clerk of the District Court, until such time as the Legislature shall otherwise provide.

LIST OF ATTORNEYS.

Practicing in the Supreme Court of New Mexico between 1846 and 1909. Compiled by Jose D. Sena, Clerk of the Supreme Court.

*Removed. †Dead.

Abbott, A. J.
Abbott, Edmund C.
Abbott, Ira A.*
Adair, John S.
Adams, B. F.
Akerman, Frank.
Aldredge, C. H.
Alexander, A. C.
Alexander, Silas.†
Alford, R. C.
Allen, C. F.†
Allen, Samuel T.*
Ancheta, J. A.†
Appel, Oscar A.
Armstrong, John W.
Ashenfelter, S. M.†
Ashurst, Merrill†
Askern, Oscar A.
Atkeson, J. B.
Atkinson, H. M.†
Axtell, S. B.†
Ayers, Fred H.
Baca, Elfego
Baca, Felix
Baca, Manuel C. de
Baca, Marcos C. de
Bacon, Wallace W.
Bail, John D.†
Baker, Benjamin S.*
Baker, B. H.*
Baker, Martin R.
Baker, William F.
Bantz, Gideon D.†
Barber, Geo. B.
Barnes, Sidney.†
Barney, Willard A.*
Bowers, Renzo D.
Barnes, R. P.
Bartlett, Edward L.†
Barth, Isaac.
Bateman, U. S.
Bell, Chas. G.
Bell, John J.†
Belknap, Willard.
Berger, Wm. M.
Bethune, Fanueil, D. L.
Bickley, Howard L.
Blacker, Allen*
Blair, Frank P.
Bonham, J. F.
Boon, H. S.*
Bowman, Harry S.
Bowman, W. C.*
Breeden, Marshall.*
Breeden, William.*
Brewer, Miss Nellie C.
Brice, Charles R.
Bristol, Warren†
Brown, Jas. Fulton.
Bruington, Geo. F.
Brumback, E. B.†
Bryan, D. J.†
Bryan, R. W. D.
Buchanan, Francis.
Buck, Henrietta.
Bujac, Etienne de P.
Bunker, William B.
Burdic, Frank A.
Burg, E. E.
Burg, John B.

Burgan, Fred L.
Burkhart, Summers .
Burns, Harris.*
Burns, William†
Burt, L. J.
Bushman, Sam.
Cameron, J. O.*
Campbell, A. C.*
Campbell, Frank T.
Campbell, John H.*
Carter, Powhatan E.
Cartwright, Forest H.
Catron, C. C.
Catron, Thomas B.
Caypless, Edgar.*
Chacon, Eusebio*
Chaffee, E. A.
Chaves, Donaciano†
Chaves, E. V.*
Chaves, Francisco J.†
Chaves, Francisco P.†
Cheetham, Francis T.
Childers, William B.†
Clancy, F. W.
Clancy, Harry S.
Clark, Chas. T.*
Clark, Herbert W.
Clarke, Fred W.*
Clayton, William Moore.
Cleveland, Chester D.
Collier, N. C.*
Collins, Hugh J.
Compton, Jr., C. M.
Compton, J. C.
Compton, J. W.
Comwell, F. D.
Conway, Thomas F.†
Cooley, Alford W.
Coores, W. E.†
Coors, Jr., Henry G.
Cornell, H. B.
Cowan, W. H.*
Craig, Geo. R.
Crampton, Edwin C.
Crane, William F.*
Crew, Robert H.
Crist, J. H.
Crumpacker, J. W.†
Curns, Frank J.
Curtin, Thos. E.†
Cutlip, J. D.
Davidson, Chas. C.
Davies, E. P.
Davis, James C.
Davis, Stephen B. Jr.
Davis, Wm. W. H.*
Dawson, M. M.†
Dezendorf, Chas. F.*
Dillard, Jas. M.
Divelbiss, F. P.
Dobson, E. W.
Dougherty, H. M.
Douglas, Thomas G.*
Dow, Hiram M.
Downs, Chas. P.
Downs, Francis.†
Dunlavy, Melvin T.
Dunne, Edmund F.*
Dunn, W. A.
Duval, Harvie.†
Dye, James M.
Easley, Chas. F.
Easley, Ralph R.
Easterwood, Oliver P.
Eaton, W. J.
Eden, J. W.
Eds, Gano*
Edward, A. M.
Edwards, K. W.
Eldridge, J. B.
Elliott, A. B.
Elliott, D. W.
Ellis, Geo. F.*
Ely, Ralph C.
Emmett, LaFayette†
Enloe, E. L.
Espey, J. Reimer.
Espinosa, Jose C.
Evans, Geo. W.
Evans, J. F.
Evans, J. T.
Ewing, Chas. F.*
Ewing, W. R.*
Faircloth, Frank.
Fall, A. B.
Farrington, C. E.*
Fergusson, H. B.
Fergusson, Robert C.
Ferree, Simpson E.
Field, Neill B.

Fielder, Idus L.†
Fielder, Jas. S.
Finical, Thomas A.†
Fiske, Eugene A.†
Fitch, J. G.
Fitzhugh, Jas. H.
Fletcher, Allen G.*
Flint, H. P.
Forbes, Eugene.*
Foree, Robert M.
Foree, Robert M.*
Forester, A. M.
Fort, L. C.†
Fountain, A. J.†
Foutz, Stanley A.
Fowler, Matt.
Fox, Geo. W.*
Franklin, John A.
Franklin, Blake.
Franks, E. B.*
Frazer, John R.*
Freeman, A. A.*
Freeman, Hugh†
Frenger, N. C.
Frost, Max.†
Fullen, Louis O.
Garner, J. W.*
Gary, Joseph E.*
Gatewood, W. W.
Gavin, C. J.*
Geikie, William F. A.*
Geikie, Wm. F. A.
Gibbany, Ed. S.
Gilbert, D. L.
Gildersleeve, Chas H.†
Gill, Joseph.
Gillam, Walter L.*
Gillenwater, W. A.
Gillett, S. B.*
Goldman, W. E.*
Good, Arthur C.*
Goodwin, Jesse C.*
Gortner, R. C.*
Grace, Oscar.
Grant, Frank B.
Graves, Robert L.
Graves, William C.*
Green, T. A.*
Griffith, John E.
Grimshaw, Ira.
Guyer, John R.* Disbarred.
Gwin, John M.
Hall, James A.
Hall, J. L.*
Hall, Joseph.
Hall, R. F.
Hall, George W.
Hamilton, H. B.†
Hamilton, H. B., Jr.
Hamilton, R. F.
Hanna, Richard H.
Hannett, Arthur T.
Hardy, Rufus Guy.
Hardy, Thomas Clinton.
Harllee, A. H.†
Harris, Jack S.*
Harrison, Ramon B.
Hart, T. C.
Hartley, Cobley G.†
Hartman, W. W.
Hawkins, W. A.
Hayden, John S.
Haydon, W. G.
Hazeldine, Wm. C.†
Heacock, W. C.
Hedgcock, Charles G.
Heflin, Henrie.
Heflin, Thos. S.
Hemingway, J. B. H.†
Hendricks, Charles C.
Hendrix, William F.
Henry, C. L.*
Henry, L. L.
Heron, Frank W.
Hervey, James M.
Havener, W. A.
Hewitt, J. Y.
Hickey, M. E.
Higgins, C. N.*
Hill, J. F.
Hittson, Charles H.
Hittson, W. J.*
Hockenhull, A. W.
Holloman, Reed.
Holly, Wm. R.
Holmes, Edward.
Holt, H. B.
Hopps, Daniel V.
Houghton, Joab.†
Howard, Francis H.†

Howard, Geo. Hill.†
Howard, G. Volney.
Howard, E. J.
Howard, Findley B.
Hoyt, Abram G.†
Hubbell, Sydney A.†
Hudspeth, Andrew H.
Hulbert, E. W.
Humbert, G. F.
Huncker, Chester A.
Huncker, Geo. H.
Hunt, Thomas S.
Hurd, Harold.
Huston, H. E.*
Hutchison, F. P.*
Ilfeld, Louis C.
Jackson, Clifford L.
Jaffry, James R.
Jameson, Harold B.
Jaramillo, J. A.†
Jennings, Frank T.
Johnson, Chas. P.
Johnson, Henry C.*
Johnson, John Lewis.
Johnson, Joséph L.
Johnson, R. M.†
Johnston, E. A.
Johnston, Geo. W.†
Johnson, Chas. A.
Jones, A. A.
Jordan, Arthur N.
Jordan, James H.
Kaune, Quintus A.
Keator, Myron B.
Kelley, W. E.
Kelso, Arthur I.
King, Hawley S.*
Klein, Louis.*
Klock, Geo. S.
Knaebel, Geo. W.*
Knaebel, Earnest.*
Knaebel, John H.†
Knollenburg, Fred C.
Koogler, John H.*
Lange, Lewis Edgar.
Larrazolo, O. A.
Laughery, Lowell.
Laughlin, N. B.
Lavan, Frank J.
Law, Chas. A.
Lawson, Lee.
Leahy, D. J.
Leahy, J.
Lee, William D.†
Leib, T. D.
Lemon George*
Leonard, Frank A.*
Leonard, Ira E.*
Lenoir, Lewis W.*
Lester, Felix H.
Lindsey, W. E.
Llewellyn, M. O.
Llewellyn, W. H. H.
Loesch, F. J.*
Logan, A. V.
Long, E. V.
Loomis, H. W.*
Love, Albert L.
Lowe, Lawson D.†
Lowe, J. A.
Lucas, W. J.
Lund, Robert E.
Lusk, James B.*
Lyng, T. C.†
Macdonald, Alex. R.
Maddison, Thos. K. D.
Major, H. H.
Mann, Edward A.
Marron, O. N.
Martin, E. A.
Martinez, C.
Martinez, Q. A.
Masterson, Murat.*
Mathers, Harold V.
Mathews, Sidney F.*
Matteson, J. E.†
Mattison, Frank C.†
Mayers, Walter W.
Mayes, John W.
Mayo, E. A.*
McBee, William D.
McClure, John T.
McComas, Chas. C.*
McComas, H. L.*
McCrary, Geo. W.
McCreath, Albert.
McDonald, A. James.
McDonald, J. M.*
McDonald, Fred W.
McElroy, Harry H.

McFie, John R.
McGill, W. R.
McGinnis, C. E.
McGuiness, M. J.
McHenry, R. C.
McKean, William.
McMillen, A. B.
McMillan, Daniel H.†
McPherson, W. J.*
McSherry, Cyp. W.
Mears, Thomas E.
Mechem, Merritt C.
Mechem, Edwin.
Medler, E. L.
Mell, J. D.
Metford, Peter.
Meyers, Robert S.
Milburn, Geo. R.*
Miller, J. A.
Mills, Melvin W.
Mills, T. C.†
Mills, W. J.
Mitchell, A. J.*
Moice, C.*
Money, Geo. P.*
Montoya, Tomas C.†
Moore, Frank W.
Moore, Horton†
Moore, Robert L.
Moore, Vin W.
Moore, Leroy O.
Morgan, G. C.
Morningstar, A. W.
Morrison, A. L.
Morrow, John.
Moulton, Harry D.
Mullen, Chas. R.*
Neal, E. E.
Neblitt, Colin.
Neis, C. J.
Nesbet, Alexander J.
Nesbit, Roscoe.
Newcomb, S. B.†
Newell, J. Benson.
Norment, J. W.
Nowlan, H. J.
O'Brien, James M.
O'Bryan, H. J.*
O'Bryan, J. D.*
Oliver, Geo. W.
Ortiz, Hilario L.
Ortiz, M. C.
Osburn, J. G.
Owen, Harry P.
Pace, John A.
Pacheco, Manuel C.
Palmer, J. M.
Palmer, J. Pillams.*
Palmer, Wm. A.
Pardue, Jas. E.
Parker, Frank W.
Parsons, H. R.
Patton, Emmett.
Patton, Henry L.
Paxton, J. H.
Peacock, J. M.
Peeler, W. L.*
Pendleton, Granville,.†
Perea, Abel.
Pettijohn, Henriette.*
Pickett, H. L.*
Pierce, Edward.
Pierce, E. W.*
Pierce, W. W.*
Pierce, Harold.
Pino, Pinito.†
Pollard, Amos W.
Pollock, Andrew*
Pope, William H.
Posey, G. Gordon*
Preston, George G†
Price, Edward V.*
Prichard, Geo. W.
Prince, L. Bradford.
Purday, James H.*
Quinn, James H.*
Raynolds, Herbert F.
Raynolds Chas A.
Read, Alexander.
Read, Benjamin M.
Read, Larkin G.†
Reading, A. B.
Reber W. R.
Reese, G. L.
Reid, Jas. W.
Reid, Robert C.
Reid, William C.
Remley, Geo. E.
Renehan, A. B.
Reynolds, James R.*

Richardson, G. A.
Riley, Chilion.*
Risque, John B.*
Ritch, Wm. G.†
Robbinson, P. Q.*
Roberts, C. J.
Roberts Albin B.
Robertson M. M.
Roderick, Hugh M.
Rodey, B. S.*
Rogers, Albert T. Jr.
Rogers William E.
Rood, John C.*
Rose, Nathan S.
Rowells, R. E.
Ruis, Alfred.
Russell, D. C.*
Ryan, John J.
Ryan Raymond R.
Rynerson, Wm. L.*
Salazar, Miguel.†
Saxon, Edgar F.
Schmidschulte, H. J.
Scott, K. K.*
Seaberg, Hugo.
Sedillo, Antonio A.
Sena, Jose D.†
Seward, E. B.
Sherman, Fred.
Sherman, Sam D. J., Jr.
Sibebottom, E. E.*
Shaw, James M.*
Shearon, Frank W.†
Sherry, Prosper.
Sherry, Byron.
Shield, David P.*
Skinner, Wm. C.*
Sloan, Andrew B.*
Sloan, W. B.†
Smith, B. J.
Smith, C. E.*
Smith, G. Pittman.*
Smith, Derwint. H.†
Smith, W. M.†
Smith, Olin E.*
Smith, Thomas.*
Smith, Henry V. B.
Sniffen, John S.*
Snyder, Karl A.*
Solignac, Gustave.*
SoRelle, W. E.
Spence Geo. W.
Spencer, Charles.
Spicer M. C.
Spier, Alexander M.*
Spiess, Chas. A.
Spolding, Luther P.
Springer, Chas. A.
Springer, Frank.
Staab, Julius.
Stearns, DeWitt C.*
Sterry, C. N.†
Stevens, Benjamin.*
Stingle, John H.†
Stone, W. S.*
Strange, Berry L.
Strong, Heber.*
Stroup, A. B.
Studley, E. E.
Sulzbacher, Lewis.*
Sutherland, Wm. Alex.
Sutherlin, John H.*
Sutton, G. D.*
Swan Harry
Sweezy, Wm. B.
Taylor, H. L.*
Taylor, T. C.
Teed, Frank A.†
Tempke, A. A.
Temple, D. D.
Templeton, R. H.*
Terrell, H. D.
Terrill, William C.*
Thomas, D. J.
Thompson, R. H.
Thompson, F. A.†
Thompson, John W.
Thompson, Mark B.
Thornton, W. T.*
Thresher, W. E.
Tiffany, Isaac S.*
Tipton, Leo M.
Tittman, Edward L.
Todd, Davis R.*
Tompkins, Richard H.†
Toombs, O. T.
Townsend, John R.
Trimble, L. S.†
Tuley, Murray F.*
Turner, R. M.

Twitchell, R. E.
Venable, John.
Van de Veer, P. L.†
Veeder, Elmer E.
Veeder, John D. W.
Vellacott, F. W.
Victory, J. P.†
Vigil, Manuel U.
Vincent, Wm. A.†
Voorhees, A. C.
Waddill, R. S.
Wade, E. C.
Wade, Jr., Edward C.
Wade, R. R.
Waitman, Hanson.*
Waldo, Henry L.
Walker, J. Ellis.
Walter, Paul A. F.
Walton, William B.
Ward, Chas. W. G.
Warner, Milton J.†
Warren, Henry L.†
Wasson, W. D.
Watson, William.*
Watts, John.†
Weatherby, William H.
Weilep, Franklin John.
Welch, Edward G.
West, Elias B.*
Wetmore, Ira P.
Wharton, J. E.*
Wheaton, Theodore.*
White, Alvan N.
White, John A.
White, John M.
Whitehead, E. S.
Whiteman, Wm. H.†
Whitherspoon, Donald.
Wickes, Maye.*
Wielandy, John F.†
Wight, F. L.
Wight, Jas. A.
Wiley, Moses.*
Wilkerson, T. N.
William, Frank.
Williams, Herbert.
Williams, Jas. A.
Williams, O. S.*
Williams, W. S.†
Williamson, James A.*
Wilson, Eugene H.
Wilson, Francis C.
Wilson, John W.
Wilson, Lewis S.
Wilson, Percy.
Wilson, W. T.†
Winger, D. H.*
Winter, W. H.
Wolford, Howard A.
Wood, David W.
Wood, Francis E.
Woodward, Jesse B.*
Woodwell, William A.
Wolcott, Herbert W.
Wright, Edward R.
Wright, Francis J.
Wrigley, W. C.†
Wycoff, A. H.
Yeaman, Caldwell.*
Young, Arthur H.
Young, J. Morris.
Young, R. L.
Young, W. O.

INDEX.

Acknowledgement.—Necessity.—Record.

An acknowledgement of a deed or other writing, affecting real estate by the party whose real estate is affected, in the manner established by statute, is a necessary prerequisite to its being recorded under Section 3953, C. L. 1897.—McBee v. O'Connell, et al, 16 N. M. 469.

Adverse Possession.—Cestui Que Trust.

If there is no privity between the cestui que trust and the trustee, if the cestui does not hold under the title of the trustee, he can hold adversely to the trustee. His possession of the estate must be in subserviency to the legal title and being in recognition of it, his possession of the land enures to the title under which he claims.—Andrews v. Thomas, et al, 16 N. M. 529.

Appeal.

A question disposed of upon a former appeal becomes the settled law of the case.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Appeal.—Procedure.—Injunction.

Court assumes for purposes of this case that the procedure is proper as both sides admit injunction to be the proper remedy.—Gray v. Taylor, 16 N. M. 171.

Appeal and Error.

The trial judge is not authorized to settle a bill of exceptions tendered less than ten days before the return day and his failure so to do does not constitute good cause for appellant's failure to file transcript and assignment of errors within the statutory period.—Puritan Co. v. Toti & Gradi, 16 N. M. 1.

Assignment not argued in the briefs will not be considered.—Riverside Co. v. Hardwick, 16 N. M. 479.

Each error relied upon must be separately assigned.—Bank v. Haverkampf, 16 N. M. 497.

A motion by appellee to docket and affirm will be granted where appellant has failed to file his transcript at least ten days before the return day or has failed to file assignments of errors on or before the return day, unless "good cause" be shown excusing the default.—Puritan Co. v. Toti & Gradi, 16 N. M. 1.

A verdict will not be set aside on appeal when it is supported by substantial evidence.—Territory v. Trapp, 16 N. M. 700.

A finding supported by a substantial preponderance of evidence will not be disturbed on appeal.—Bank v. Haverkampf, 16 N. M. 497.

Findings of fact by a trial court without a jury will not be disturbed by this court on appeal, if they are based on substantial evidence.—Irrigation Co. v. McMurray, 16 N. M. 172.

Appeal and Errors.—Assignments of Error.

An assignment of error that the court erroneously admitted the deposition of a given witness questions the admissibility of the deposition as a whole, and not the admissibility of isolated answers therein.—Railway v. Rogers, 16 N. M. 120.

Only such assignments of error can be presented to the appellate court as were brought to the attention of the trial judge so as to permit of their correction by him.—Territory v. Mills, 16 N. M. 555.

Appeal and Error.—Assignments.—Evidence.

Assignments of error on the admissibility of testimony must, to be cognizable by this court, point out specifically the testimony deemed objectionable.—Friday v. Railway Co., 16 N. M. 434.

Under the rules of practice just stated an assignment alleging error in the reception of the testimony, upon a given point, of some seven witnesses, whose testimony upon that point went in under different circumstances and against varying objections, is too general to be entertained and is contrary to rule 14 of this court requiring each error to be stated in a separate paragraph.—Friday v. Railway Co., 16 N. M. 434.

Appeal and Error.—Conflicting Evidence.—Review.

Findings of the trial court based upon conflicting evidence will not be disturbed upon appeal.—Dougherty et al v. Van Riper, 16 N. M. 600.

Appeal and Error.—Costs.—Execution.

Under C. L. 1897, sec. 3148, appellants having prevailed in the Supreme Court, they were entitled to recover their costs against appellee and to have execution issue therefor and no specific order was necessary.—Light Co. v. Improvement Co., 16 N. M. 279.

Appeal and Error.—Damages.—Review.

The question of exemplary damages is addressed to the discretion of the jury, or the court trying the cause without a jury, where the evidence legally warrants such damages; and this court will not, ordinarily, at least, undertake to control that discretion by requiring the assessment.—Irrigation Co. v. McMurray, 16 N. M. 172.

Appeal and Error.—Evidence.—Equity.

A new trial will not be granted merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if on the whole facts and circumstances the court is satisfied that justice has been done or that the result ought not to have been different, if such testimony had been rejected in the one case or received in the other.—Putney v. Schmidt, 16 N. M. 400.

Appeal and Error.—Exceptions.

This court will not review instructions not excepted to in the trial court.—Friday v. Railway Co., 16 N. M. 434.

Appeal and Error.—Exceptions.—Instructions.

This court will not consider any alleged error in the omission to give instructions unless exception is duly taken and unless a resquest is made for such instruction.—Territory v. Torres, 16 N. M. 615.

Appeal and Error.—Execution.—New Trial.

Under C. L. 1897, sec. 3148, the Supreme Court Clerk should not have included in the execution for costs, the costs incurred in the district court prior to the rendition of the erroneous judgment, the appealing party having secured a reversal and new trial entitling him to all the costs occasioned by the erroneous judgment, including those accruing both in the district and in the Supreme Courts.—Light Co. v. Improvement Co., 16 N. M. 279.

Appeal and Error.—Exception.—Objectionable Remarks of Counsel.

Counsel and court considered that admonition by the court cured the objectionable remarks of the prosecuting attorney, and counsel cannot now be heard to question such ruling in the absence of a specific exception.—Territory v. Torres, 16 N. M. 615.

Appeal and Error.—Final Judgment.—Appeal.

A judgment of a district court purporting to vacate a previous judgment of that court which, although it may be voidable, is not void, is a final judgment, and an appeal from such judgment lies to this court.—Weaver v. Weaver, 16 N. M. 98.

Appeal and Error.—Findings.

Findings based upon substantial evidence will not be disturbed by this court.—Lockhart v. Mining Co., 16 N. M. 223.

There being substantial evidence to sustain the findings of the lower court the appellate court will not weigh the evidence.—Current, et al, v. Bank, 16 N. M. 642.

Where there appears to be sufficient evidence to sup-

port the finding of facts in the lower court they will not be disturbed.—Putney v. Schmidt, et al, 16 N. M. 400.

Appeal and Error.—Harmless Error.—Evidence.

The refusal of the court to permit defendant to prove on cross examination of plaintiff the execution of a contract by the latter is, if erroneous, not prejudicial, where plaintiff's pleadings admit execution of such instrument.—Railway v. Rogers, 16 N. M. 120.

Appeal and Error.—Judgment.

Where a proceeding is rendered nugatory by reason of the fact that the judgment as rendered below fails to embody a conclusion of law inevitably resulting from the case as presented, but which is necessary to effectuate the proceeding, this court will modify the judgment below by inserting such conclusion and will affirm the judgment as so modified.—Tagliaferri v. Grande, 16 N. M. 486.

Appeal and Error.—Printed Record.—Dismissal.

Under Rule 4, Section 2, of this court requiring the filing of the printed record on or before the return day, the absence of such a printed record on the call of the case for argument will, unless good cause be shown for the omission, result in the dismissal of the writ of error.—Woodling v. Romero, et al, 16 N. M. 55.

Appeal and Error.—Prior Appeal.

A decision in a prior appeal is the law of the case and upon a subsequent appeal nothing is before the court for revision but the proceedings subsequent to the mandate.—Davisson v. Bank, 16 N. M. 689.

Appeal and Error.—Record.—Assignment of Errors.

Under the provisions of Section 21, Chapter 57, Laws of 1907, requiring that each error relied upon shall be stated in separate paragraphs, an assignment of error that the court erred in rendering judgment on the complaint and evidence, raises only the question of variance between the pleadings and proof, and no variance being apparent upon the record, the assignment is not well taken.—Howey v. Gessler, 16 N. M. 319.

Appeal and Error.—Record.—Libel.

In an action for libel the amount of damages alleged and claimed in the complaint fixes "the value of the property in dispute" for the purposes of Laws 1907, Chapter 57, Section 34, which requires the record to be printed, where the amount in dispute exceeds one thousand dollars.—Woodling v. Romero, et al, 16 N. M. 55.

Appeal and Error.—Record.—Motion to Dismiss.—Evidence.

Where motion to dismiss was at the conclusion of appellee's case, and before the appellants had offered any testimony whatever, and it nowhere appears in the record that the appellants had rested their case prior to making the motion to dismiss, the appellants, upon a denial of the motion to dismiss, had the right to proceed with their case and introduce evidence, and it was error to render judgment for appellee without ruling upon the motion to dismiss or giving defendant's attorney notice of the court's action.—Typewriter Co. v. Burtner & Ramsey, 16 N. M. 271.

Appeal and Error.—Review.—Evidence.

Testimony erroneously received will not, in a case disposed of by the court upon peremptory instruction to the jury, be deemed a ground of reversal unless it appears that the court considered such in reaching its conclusion.—Tagliaferri v. Grande, 16 N. M. 486.

Appeal and Error.—Review.—Evidence.—Examiner.

Where evidence is taken by examiner, who does not report findings of fact to the court the same will be reviewed on appeal.—Light Co. v. Improvement Co., 16 N. M. 86.

Appeal and Error.—Review.—Exception.—Improper Argument.

In order to secure review by an appellate court of improper argument before the jury, by counsel, the attention of the trial court must be immediately called to the objectionable remarks and request be made for the interference of the court, and, in case of refusal, an exception be noted.—Territory v. Torres, 16 N. M. 615.

Appeal and Error.—Review.—Findings of Fact.—Directed Verdict.

When each party asks the court to instruct a verdict in its favor, it is equivalent to a request for a finding of facts, and, if the court directs the jury to find a verdict for one of them, both are concluded by the finding made by the court upon which the resulting instruction of law was given and this court is limited on appeal to a consideration of the correctness of the finding on the law, and must affirm if there is any substantial evidence in support thereof.—Moore v. Meat Co., 16 N. M. 107.

Appeal and Error.—Review.—Objections.—Witness.

Objections not made in the court below to questions propounded to witness will not be considered on appeal.—Railway v. Rogers, 16 N. M. 120.

Appeal and Error.—Review.—Pleadings.

That the court erroneously declined upon defendant's motion to order an election as to which of the two counts plaintiff would proceed upon, is harmless where a verdict resulted against defendant as a matter of law upon one count and no judgment went against him as to the other.—Tagliaferri v. Grande, 16 N. M. 486.

Appeal and Error.—Review.—Verdict.

Verdict and findings of jury reached upon conflicting evidence present no question for review by this court.—Riverside Co. v. Hardwick, 16 N. M. 479.

Appeal and Erorr.—Supersedeas.—Mandamus.

The remedy for an erroneous refusal of an appeal or supersedeas is by mandamus and not by error.—Railway v. Traction Co., 16 N. M. 163.

Appearance Bond.—Bond.

Bond executed for the payment of any judgment which might be rendered constitutes an appearance.—Leusch v. Nichol et al, 16 N. M. 8.

Attachment.—Bond, Discharge on.—

Bond given under laws of 1907, chapter 107, sub-section 225, to perform the judgment of the court, dissolves the attachment, releases the property from the attachment and therefore motion to dissolve attachment does not lie after such discharge.—Leusch v. Nickel, et al, 16 N. M. 28.

Appeal and Error.—Review.—Verdict.

Verdict and findings of jury reached upon conflicting evidence present no question for review by this court.—Riverside Co. v. Hardwick, 16 N. M. 479.

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The remedy for an erroneous refusal of an appeal or supersedeas is by mandamus and not by error.—Railway v. Traction Co., 16 N. M. 163.

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A verdict will not be set aside on appeal when it is supported by substantial evidence.—Territory v. Trapp, 16 N. M. 700.

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Attachment.—Judgment.—Bond.

Laws 1907, chapter 107, sub-section 226, authorizes the court to render judgment against the sureties upon the bond given to dissolve the attachment.—Leusch v. Nickel, et al, 16 N. M. 28.

Attachment.—Priorities.—National Bank Stock.

Under the Federal Statutes the rights of a transferee of national bank stock under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice.—Bateman v. Gits, 16 N. M. 441.

Bills and Notes.—Action.—Evidence.

Where it appears from the transcript that the complaint was sworn to and contained copies of the notes and mortgage sued upon, the execution of all of which was admitted by the failure of the defendants to deny the execution, and it also appears from the decree that the plaintiffs exhibited the notes sued upon to the court, there was proof sufficient to sustain the decree.—Howey v. Gessler, 16 N. M. 319.

Bills and Notes.—Drafts.—Acceptance.

By the provisions of Section 130, Chapter 83, Laws 1907, known as the "Negotiable Instrument Act," it is provided that where the drawer and drawee are the same person a draft may be treated as a promissory note, thus requiring no acceptance.—Bank v. Insurance Co., 16 N. M. 66.

By the provisions of Section 12, Chapter 62, Laws 1901, every contract in writing imports consideration.

Bills and Notes.—Drafts.—Acceptance.

In an action brought to recover on a draft, the complaint alleged that the draft was drawn by an agent on his principal by authority of the principal; that the draft was presented, payment refused, and that same is still unpaid, held, to be good on a demurrer for failure to state facts sufficient to constitute a cause of action, for the reason that "a draft drawn by an agent on his principal by authority of the principal, is equivalent to a draft drawn by the principal himself, and need not be accepted by the drawee in order to bind it."—Bank v. Insurance Co., 16 N. M. 66.

Bills and Notes.—Fraud.

To render a fraudulent misrepresentation securing the signing of a promissory note available in defense against it it must be shown that the defendant was damaged by such misrepresentation.—Bank v. Broyles, 16 N. M. 414.

If defendant had signed notes after the signatures of other co-signers against whom fraud was practiced had been attached to the same, and if the latter be relieved from liability thereon, then such fraud makes the notes voidable as to the former, though they did not participate in, and were ignorant of, such fraudulent conduct at the time they signed the note.—Bank v. Broyles, 16 N. M. 414.

Where the plaintiff by knowingly false statements secured the signing by the defendants of a certain note but this latter was in satisfaction of a former note then due from the defendants for the same amount and on the same terms, which latter note thereby became and was cancelled and retired, such misrepresentation constitutes no defense to a suit on such second note, since the misrepresentation led simply to the defendants paying a debt due by them and they were thus in legal contemplation not damaged thereby.—Bank v. Broyles, 16 N. M. 414.

However, if the signers against whom fraud was practiced signed the notes after their execution by their co-signers, and these latter executed the notes with no contemporaneous agreement of any kind that such notes were to have further or other signers, the release of any subsequent co-signers, because of fraud in the obtaining of the signatures of such subsequent co-signers, does not disturb the equality of burden as to the original signers, and it was incumbent upon these original signers to prove injury to themselves because of the fraud practiced upon their subsequent co-signers in order to relieve themselves from liability because of such fraud. The record in the case at bar fails to do so.—Bank v. Broyles, 16 N. M. 414.

Bond.

A bond is a contract by specialty.—Territory v. Mills, 16 N. M. 555.

Boundaries.—Evidence.—Estoppel.

Testimony tendered considered and held to constitute no such evidence of estoppel as would render it admissible. —Tagliaferri v. Grande, 16 N. M. 486.

Boundaries.—Description.—Water Courses.—Acequias.

A description in a written instrument calling for an acequia as a boundary carries title, (in the absence of some words clearly importing a different intention) to the center of such acequia.—Tagliaferri v. Grande, 16 N. M. 486.

Cancellation.—Fraud.—Defenses.

A recovery will not be denied appellant on the ground that she executed the conveyance to defraud creditors, when in fact there were no creditors, and no one was or could have been injured by the transfer. The mere fact that her

husband was indebted to the bank would not create any liability on her part.—Collins v. Schump et al, 16 N. M. 537.

Carriers.—Damages.—Common Law Liability.

Under the laws and decisions of Kansas the common law liability of railroads as common carriers is to make the shipper whole by payment in full of property lost or damages to the extent of injuries sustained, and a contract limiting this liability is void unless made by permission or order of the State Board of Railroad Commissioners.—Railway v. Rodgers, 16 N. M. 120.

Carriers.—Livestock.—Damages.—Proof.

Applying the principle as stated, where the statute of a foreign state tendered by the plaintiff against the defendant railroad company provides that no such company shall be permitted, except as otherwise provided by regulation or order of the board of railway commissioners, to change or limit its common-law liability as a common carrier, the burden is not upon the shipper to show that no such permission exists, but is upon such company to show that permission was given it to make such a contract.—Railway v. Rodgers, 16 N. M. 120.

Carriers.—Liability.—Interstate Shipments.

The provisions of the Act of Congress of June 29, 1906, 34 Stat. 595, known as the Hepburn Act, did not displace the previously existing state statute restricting the right of a common carrier to limit liability upon interstate shipments. Latta v. Chicago, etc. Ry. Co., 172 Fed. 850, followed. Railway v. Rodgers, 16 N. M. 120.

Carriers.—Livestock.—Contract.

The use by the shipper of a contract as a basis for transportation accompanying animals shipped does not estop him to deny the validity of a provision of that contract limiting the carrier's common law liability where such contract obligates him to accompany such animals so as to feed, water and otherwise attend them.—Railway v. Rodgers, 16 N. M. 120.

Chattle Mortgage.—Insurance.

Failure to disclose chattle mortgage upon insured property at time policy was issued broke conditions of the policy and the policy became void.—Shoncair v. Insurance Co., 16 N. M. 563.

Complaint.—Departure of Findings.

Departure of finding from allegations of complaint held to be such departure merely in form but not in substance. —Lockhart v. Mining Co., 16 N. M. 223.

Conspiracy.—Attorney.—Privileged Communications.

Communication to attorney by conspirators who gave advice in aid and furtherance of the conspiracy, are not privileged.—Lockhart v. Mining Co., 16 N. M. 223.

Conspiracy.—Evidence.

Evidence to show the existence and consumation of a fraudulent conspiracy, held to be competent.—Mining Co. v. Lockhart, 16 N. M. 223.

Certain acts and declarations of alleged conspirators held to be harmless.—Lockhart v. Mining Co., 16 N. M. 223.

Conspiracy.—Evidence.—Mining Location.

Any fact occurring during any part of the ninety day period for perfecting the location which tended to establish any feature of the conspiracy was competent.—Lockhart v. Mining Co., 16 N. M. 223.

Conspiracy.—Mines.—Complaint.

Held that conspiracy did extend to the delivery of possession to the conspirators and that irrespective of other allegations in complaint, plaintiff is entitled to the relief sought.—Lockhart v. Mining Co., 16 N. M. 223.

Continuance.

Continuance properly denied.—Territory v. Torres, 16 N. M. 615.

Continuance.—Absent Witnesses.—Statute.

The statute regulating continuances because of absent witnesses is mandatory and when the application for continuance complies with the statute there is no room for the court to exercise any discretion.—Territory v. Torres, 16 N. M. 615.

Contracts.

Under a contract not to engage in business in competition with the purchaser of property, the party bound is not precluded from loaning money to others, even though they may use it to embark in business in competition with the purchaser.—Light Co. v. Improvement Co., 16 N. M. 86.

Contracts.—Breach.—Liability.

It is error to enter judgment for damages against parties not bound by the contract, even though the parties may have aided and abetted the contracting party in violating the contract.—Light Co. v. Imp. Co., 16 N. M. 86.

Contracts.—Construction.

The validity of a contract executed in a sister state will be determined by the courts of this jurisdiction according to the laws of such sister state as construed by the highest

court of such state, unless the intention of the parties appears that a different construction shall prevail, or unless such a construction conflicts with some settled policy of this jurisdiction.—Railway v. Rodgers, 16 N. M. 120.

Contracts.—Recission.—Fraud.

Where a party received something of value under a contract, if he seeks to rescind the same upon the ground of fraud, he must immediately, upon discovering the fraud, restore, or offer to restore, all that he has received under the contract, as a condition precedent to his right to rescind the same.—Putney v. Schmidt et al, 16 N. M. 400.

Contracts.—Recission.—Fraud.—Affirmance.

Where an affirmance is relied upon, it should appear that the party having a right to complain of the fraud had freely and with full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract and waive any remedy he might have for the deception.—Putney v. Schmidt, et al, 16 N. M. 400.

Corporations.—Business.

The plaintiff, a Colorado corporation, made the defendants a loan and took a mortgage on real estate situated in this Territory; the mortgage being executed within this Territory. The defendants answered that the plaintiff had not complied with the law of this Territory governing foreign corporations, and had no right to transact business in this Territory: Held, the doing of a single act of business by a foreign corporation does not bring it within section 102, chapter 79, Laws 1905, providing that: "Every foreign corporation except banking, insurance and railroad corporations, before transacting any business in this Territory shall file in the office of the Secretary of the Territory a copy of its charter." Following Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727.—Good et al v. Loan Co., 16 N. M. 461.

County Officers.—Justices of the Peace.

Justices of the Peace in the Territory of New Mexico must be considered as precinct and not county officers within the terms of the Enabling Act, sec. 5, Act of June 20, 1910. Territory v. Witt, 16 N. M. 335.

County Seat.—Removal.

In cases where there is a removal, or attempted removal, of a county seat, a time is fixed when the offices of the old county seat shall be transferred to the new and such offices shall not be removed until a court house and jail shall be completed at the new county seat.—Territory v. Riggle, 16 N. M. 713.

Criminal Law.—Abatement.—Former Acquittal.—Reply.

Where the district attorney based his motion to strike on the ground that the allegations of the plea of former acqittal were in contravention of the record itself, an issue was presented which could have been tried only by an inspection of the record and the record disclosing the fact that the plea impeached it, the plea must fail because the record must stand.—Territory v. Donahue, 16 N. M. 17.

Criminal Law.—Appeal.—Instructions.

The giving of an instruction which, although a correct statement of law, may be outside of the evidence in the case, it is not good ground for a new trial or reversal if on other matter covered by the indictment there was evidence to warrant a conviction.—Territory v. Walker, 16 N. M. 607.

Criminal Law.—Appeal.—Invited Error.

Appellant cannot be heard to complain of error invited by himself.—Territory v. Trapp, 16 N. M. 700.

Criminal Law.—Appeal.—Record.—Instructions.

Instructions are not a part of the record unless embodied in a bill of exceptions and certified by the court, except in those jurisdictions where the rule has been modified by statute.—Territory v. McGrath, 16 N. M. 202.

All papers regularly filed in a cause with the clerk of the district court include only such papers which by statute, or rule, or order of court are required or directed to be filed in a cause.—Territory v. McGrath, 16 N. M. 202.

Criminal Law.—Character Evidence.

Evidence of the reputation of a defendant for truth and veracity is not admissible, (prior to any attack upon such reputation), except where such reputation or trait of character has reference to the nature of the charge against him.—Territory v. Pierce, 16 N. M. 10.

Criminal Law.—Continuance.

Under the circumstances disclosed by the record in the case it was clearly within the discretion of the trial court to refuse to grant a continuance to the defendant.—Territory v. Walker, 16 N. M. 607.

Criminal Law.—Deputy Constable.

A citizen has a right to go, if requested, with a constable to make an arrest.—Territory v. Trapp, 16 N. M. 700.

Criminal Law.—Embezzlement.—Evidence.—Breach of Trust.

Careful examination of the record shows that evidence upon question of agency and intent is so meagre as not to justify a verdict of embezzlement and nothing more serious than a breach of trust.—Territory v. Eyles, 16 N. M. 645.

Criminal Law.—Evidence.

A question which calls for an expression of the opinion of the witness as to the "guilt" of a person involved in an alleged breach of the peace was properly excluded.—Territory v. Archuleta, 16 N. M. 219.

In the trial of a cause with a jury for the alleged violation of a city ordinance which made it unlawful for any "person, firm or corporation, to erect, keep, maintain or operate any private hospital, sanitorium or health resort institution" within the limits of the city, evidence was introduced by the plaintiff, against objection, to the effect that, it was "common knowledge in the neighborhood" that the defendant was running the place in question: Held, that the evidence was inadmissible and necessarily prejudicial to the defendant.

The repeal of a city ordinance without any saving clause abates all prosecutions under it which may be pending.—Perkins v. Roswell, 16 N. M. 185.

A question whether, at a certain juncture, the defendant "had his pistol drawn on" the man who was killed, does not call for an opinion of the witness which is open to objection.—Territory v. Archuleta, 16 N. M. 219.

Criminal Law.—Evidence.—Court.

The power of a trial court over the order of introduction of evidence is not absolute and does not include the right to reject admissible evidence when offered on the ground that the defendant on trial had not himself testified and laid a foundation for the testimony rejected it appearing that the same foundation would be laid by the witness then offered —Territory v. McNabb, 16 N. M. 625.

Criminal Law.—Evidence.—Expert Evidence.

On a trial for assault with intent to commit rape, and taking and detaining a female unlawfully with intent to compel her to be defiled, where the defense is that the defendant is suffering from senile impotency and hence incapable of forming the intent necessary to constitute either offense, a medical expert may testify as to whether or not, in his opinion as an expert, the conduct of the defendant, set out in a hypothetical question, indicated senile impotency.—Territory v. Pierce, 16 N. M. 10.

Criminal Law.—Evidence.—Insanity.—Witness.

The opinion of a non-expert witness, who has had wide opportunity for observation, is admissible on the question of the insanity of a defendant on trial for murder, although the witness may be unable to give in detail all the circumstances and appearances which led her to think there had been a change from sanity to insanity. The duty of the trial court to pass beforehand on the qualification of such a witness to testify is to be exercised with due regard to the rights

of the defendant, and its decision may be reversed when it is clear that through it the defendant was deprived of what was essential to a fair trial.—Territory v. McNabb, 16 N. M. 625.

Criminal Law.—Evidence.—Irrationality.—Insanity.

While the word, irrationality, is sometimes used as a synonym for insanity, the admission of evidence of the irrationality of the defendant did not cure the rejection of evidence offered for his "insanity," under the circumstances stated in the opinion.—Territory v. McNabb, 16 N. M. 625.

Criminal Law.—Evidence.—Judicial Notice.

Courts will take judicial notice of matters which are so notorious that the producing of evidence would be unnecessary.—Territory v. McGrath, 16 N. M. 202.

Criminal Law.—Flight.

Flight does not raise a presumption of guilt.—Territory v. Lucero, 16 N. M. 652.

Criminal Law.—Instructions.

Instruction complained of, held not to be before the court.—Territory v. McGrath, 16 N. M. 202.

Instructions examined and found fairly and completely to cover everything in the refused instruction.—Territory v. Torres, 16 N. M. 615.

Criminal Law.—Instructions.—Exceptions.

If the court, in criminal cases, fails to instruct the jury fully and fairly as to the law of the case, it is the duty of counsel for defendant to ask the court to give such instructions as he thinks should be given, and in order that defendant may take advantage of such error he must, at the time the jury is instructed, except to the failure of the court so to instruct.—Territory v. Pettine, 16 N. M. 40.

Criminal Law.—Instruction.—Agreement of Jury.

Instruction to jury that reported that they were unable to agree, sending it out for further consideration held to be correct. Allen v. U. S., 164 U. S. 492-501.—Territory v. Donahue, 16 N. M. 17.

Criminal Law.—Instructions.—Objections.—Exceptions.

Under C. L. of 1897, secs. 2996 and 2997, and Laws 1907, Chapter 57, Section 37, reenacting C. L. 1897, Section 3139, the motion for a new trial in the case at bar is wholly insufficient to advise this court as to what was presented to the lower court and by the lower court expressly decided.—Territory v. Pettine, 16 N. M. 40.

Criminal Law.—Instructions.—Repetition.

It is not error to refuse a requested instruction even if correct in law, if the instructions given by the court on its own motion fully cover the law of the case.—Territory v. Pierce, 16 N. M. 10.

Criminal Law.—Instruction.—Testimony of Accused.

Held to be error to refuse requested instruction correctly construing statute as to competency of witness to testify in his own behalf, the instruction given narrowing the terms of the statute.—Territory v. Donahue, 16 N. M. 17.

Criminal Law.—Jury, Discharge of.—Record.—Objection.

Where the objection and exception to the manner of the discharge of the jury was never made a part of the record by a bill of exceptions, the objection not appearing on the record proper nor by bill of exceptions, and as far as the record is concerned, it appears that the jury was discharged without objection and with the implied consent and in the presence of the appellant, the stenographer's record will not be received to control the record in the case. District of Columbia v. Woodbury, 136 U. S. 450-456.—Territory v. Donahue, 16 N. M. 17.

Criminal Law.—New Trial.

The ordinary function of a motion for a new trial is to call the attention of the court to errors committed on the trial and thus preserve the questions for review in the higher court. Included therein are both errors of law and errors of fact, or of matters within the discretion of the trial court.—Territory v. Pettine, 16 N. M. 40.

Criminal Law.—New Trial.—Discretion.

There was not abuse of discretion by the trial court in the case at bar, an examination of the record showing that there was ample evidence to warrant a conviction eliminating the testimony of a witness who made an affidavit that he had testified falsely.—Territory v. Pettine, 16 N. M. 46.

Criminal Law.—Objection.—Appeal.

No objection having been made or exception saved to remark of judge on trial, the appellate court will not consider it.—Territory v. McGrath, 16 N. M. 202.

Criminal Law.—Review.—Change of Venue.

An order of a District Court denying a motion for a change of venue, will not be reversed by this court unless the record shows an abuse of discretion, which in this case, it does not.—Territory v. Cheney, 16 N. M. 476.

Criminal Law.—Sanity.—Reasonable Doubt.—Burden of Proof.

The burden of proving beyond a reasonable doubt the guilt of one on trial for crime, including the degree of sanity legally essential to the commission of the crime charged, is on the prosecution throughout the trial, but the presumption of sanity stands as a fact established for the prosecution, unless there is sufficient evidence of insanity on one side or the other to create a reasonable doubt of sanity.—Territory v. McNabb, 16 N. M. 625.

Criminal Law.—Trial.—Exceptions.

The defendant should not only call the specific error to the court's attention by proper objection and exception, but it is also his duty specifically and definitely to set out such alleged error in his motion for a new trial.—Territory v. Pettine, 16 N. M. 40.

Criminal Law.—Trial.—Form of Verdict.

Five forms of verdict as to manslaughter submitted by court to jury examined and found correct.—Territory v. Trapp, 16 N. M. 700.

Damages.—Competent Evidence.—Account Book.

Plaintiff introduced in evidence a cash book containing an account of their monthly cash receipts during the term of the Weinman lease, and one of the plaintiffs was allowed to testify from said book as to plaintiffs' cash sales. It was insisted by defendant that the book was not competent, because plaintiffs had been in business in Albuquerque for a number of years before they leased the Weinman building and the receipts included collections for sales made by plaintiffs prior to their occupancy of the Weinman building: Held, that this fact did not destroy the evidentiary value of the book, for the reason that if the receipts during the occupancy of the Weinman building were increased by an unknown amount and the receipts thereafter until the end of the term of the Weinman lease were increased by a like amount, the difference, the object of the inquiry, would not be affected. —Di Palma v. Weinman, 16 N. M. 302.

Damages.—Counsel Fees.

Counsel fees, as a mere element in determining the amount of damages, should not be taken into consideration, whether the action is one ex contractu or ex delicto.—Railway v. Traction Co., 16 N. M. 163.

Damages.—Evidence.

Plaintiffs, lessees of defendant Weinman, were compelled, by the tortuous acts of defendant, to abandon Weinman's building in which they were carrying on a retail drug trade, and for the remainder of the term of their lease continued

their business in less desirable locations. They proved a loss in average daily, weekly and monthly sales, that their percentage of profits was 40% in gross sales and the monthly expenses of carrying on the business in each place: Held, that where damages are claimed for loss of sales of goods, it was not necessary for claimants to introduce evidence as to (a) the amount of stock they carried, (b) the accounts of the individual partners, (c) the amount of capital invested, or (d) to produce books from which a bookkeeper could ascertain the percentage of profits realized from the business.—Di Palma v. Weinman, 16 N. M. 302.

Damages.—Evidence.—Competency of Witness.

The plaintiff, Ruppe, over the objection of the defendants, was permitted to testify as to the relative desirability for trade purposes of the Weinman building and the location to which plaintiffs removed: Held, that the witness's use and occupancy of the buildings qualified him to testify. Following Union Pacific Ry. v. Lucas, 136 Fed. 374; 69 C. C. A. 218; and that the question as to whether the witness was qualified to give his opinion was for the trial judge to determine and his decision, not being clearly erroneous as a matter of law, will not be disturbed. Following Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520.—Di Palma v. Weinman, 16 N. M. 302.

Damages.—Evidence.—Profits and Loss.—Destruction of Account Book.

The defendants insist that the plaintiffs should not have been allowed to put in the testimony they did as to loss of profits, because it appeared that the plaintiff, Ruppe, after the cause of action had accrued, voluntarily destroyed plaintiff's invoices, check books, cancelled checks and bank pass book. The evidence examined and, Held, that no error was committed, because the destruction of the invoices, etc., was compatible with good faith on the part of plaintiffs.—Di Palma v. Weinman, 16 N. M. 302.

Damages.—Measure of Loss.—Profits.

The plaintiffs were damaged by being deprived of an opportunity to sell goods, their loss was the net profits they would have made on such sales: Held, it was immaterial whether plaintiff's business was on the whole profitable or unprofitable.—Di Palma v. Weinman, 16 N. M. 302.

Damages.—Objections.—Evidence.—Witness.

Plaintiffs were permitted, over objection of defendants, to ask a witness if he had not, prior to the commencement of the excavation which caused the plaintiff's damage, drawn plans for a building to cover Weinman's lot. Though the answer of the witness was favorable to defendants, they com-

plain that the court committed error in allowing the question to be asked, because it showed a deliberate purpose on the part of plaintiffs to injure defendants by showing that they caused the damage intentionally: Held, no error was committed, because (a) even if the question was improper, it was rendered harmless by the witness's answer, and (b) the verdict does not show but that the jury gave plaintiffs a verdict for compensatory damages only.—Di Palma v. Weinman, 16 N. M. 302.

Deeds.—Record.—Real Property.

An executory contract for the sale of real estate is, when duly executed and acknowledged, a writing entitled to record within the meaning of Section 3953, C. L. 1897.—McBee v. O'Connell, et al, 16 N. M. 469.

Depositories.—Public Funds.—Bond.—Surety.

Where by bond the liability of sureties for a bank to the territorial treasurer for territorial funds on deposit in said bank, was limited to the sum of $10,000, whatever deposit was made by the treasurer above the amount to which the bank was entitled was made by him as an individual depositor upon his own responsibility, but such excessive deposit could not have been made with reference to the bond and could not affect the liability of the surety any more than a deposit made by another individual.—Territory v. Mills, 16 N. M. 555.

Dismissal and Nonsuit.—Co-debtors.

A dismissal seasonably entered by leave of the court as to one of a number of defendants severally liable does not discharge from liability his co-obligors and co-defendants.—Bank v. Broyles, 16 N. M. 414.

Disorderly House.—Evidence.

Testimony examined and found ample to establish the charge that defendant did set up and keep a house of prostitution.—Territory v. McGrath, 16 N. M. 202.

Disorderly House.—Indictment.

Count in which it is charged that the defendant, on a certain day, at a certain place, did, unlawfully, set up and keep a house of prostitution in a certain town, within 700 feet of a certain theatre, contrary to the form of the statute, etc., sufficiently conforms with the statute.—Territory v. McGrath, 16 N. M. 202.

Disorderly House.—Prosecution.—Evidence.

Evidence by which an establishment may be proved a house of prostitution not limited to a proof of only the facts mentioned, but other evidence is admissible and sufficient to establish the fact that a place is a house of prostitution.—Territory v. McGrath, 16 N. M. 202.

District Attorney.—Officers.—Appointment.—Governor.

The Governor of New Mexico is without power to remove a District Attorney, appointed for a fixed term, before the expiration of such term. Territory v. Ashenfelter, 4 N. M. 93, followed.—Klock v. Mann, 16 N. M. 211.

District Attorney.—Term of Office.

There would be no vacancy until such time as the Governor and Legislative Council should unite in an appointment and the previous incumbent of the office, being entitled to hold until such appointment was duly made, would continue in such office unless removed pursuant to law.—Klock v Mann, 16 N. M. 744.

District Attorney.—Term of Office.—Vacancy.

Where provision is made by statute for an officer to hold over until his successor is duly elected and qualified, the hold-over is regarded as in all respects a de jure officer and the expiration of his term does not produce a vacancy which may be filled by the authority having the power to fill vacancies.—Klock v. Mann, 16 N. M. 744.

Election of Remedies.

"No act is decisive so as to constitute a conclusive election unless the remedial right, upon which such act is based, is irreconcilable with the remedial right which the subsequent action or suit is brought to enforce."—Dye v. Meece, 16 N. M. 191.

The action of appellant in filing her second petition in the probate court did not constitute an election of remedies on her part.—Dye v. Meece, 16 N. M. 191.

Equity.—Laches.—Defense.

There being no evidence that the position of the parties had so changed that equitable relief could not have been afforded without doing injustice, the defense of laches is not available. Following Penn. Mutual Life Insurance Co. v. Austin, 168 U. S. 685.—Retsch v. Renehan, 16 N. M. 541.

Error.—Assignments.

Assignments of error not considered in the briefs or upon oral argument will be deemed to have been abandoned.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Evidence.

It is not necessarily true that secondary evidence is not legal evidence.—Territory v. Torres, 16 N. M. 615.

The evidence held to support a finding by the trial court that plaintiff is entitled to recover 12½ cents per ton for the coal taken by defendants.—Coal Co. v. Mining Co., 16 N. M. 517.

Evidence.—Book Accounts.

One of the plaintiffs testified, as to the monthly expenses of the business, that they kept no account of the expenses, but that he could state the same from memory: Held, that in the absence of any record of the items of expense, the witness was competent to state from memory the expenses of the business.—Di Palma v. Weinman, 16 N. M. 302.

Evidence.—Books of Account.

Defendants complain of the refusal of the trial judge to send the books introduced in evidence: Held, that the defendants should have taken such steps as the law provides for having the books sent up.—Di Palma v. Weinman, 16 N. M. 302.

Evidence.—Business Profits.

One of the plaintiffs testified that he had been a pharmacist for thirty-five years, for over thirty years had been engaged in the profession in Albuquerque and that plaintiffs had been in the retail drug business for sixteen years and that he knew how much gross profits plaintiffs made on the goods they sold: Held, that the witness was competent to testify what the gross profits of the business were.—Di Palma v. Weinman, 16 N. M. 302.

Evidence.—Damages.

The proof offered by plaintiffs of loss on account of damage to goods, is no stronger than that offered at the previous trial and should have been excluded. 15 N. M. 68; 103 Pac. 789.—Di Palma v. Weinman, 16 N. M. 302.

Evidence Ex parte Affidavit.

Ex parte affidavit was worth nothing as evidence generally unless it complied with the statute.—McKnight v. Brick Co., 16 N. M. 721.

Evidence.—Insurance.

Parole evidence cannot be heard as to occurrences prior to the issuance of an insurance policy.—Shoucair v. Insurance Co., 16 N. M. 563.

Evidence.—Judicial Notice.

Judicial notice is taken of the counties composing a Judicial District and of the county in which known railroad stations or points on a railroad line at known distances from such stations are located.—Friday v. Railway Co., 16 N. M. 434.

Evidence.—Presumption.

Where a negative condition lies peculiarly within the knowledge of the other party the averment of such condition

is taken as true unless disproved by such other party.—Railway v. Rodgers, 16 N. M. 120.

Evidence.—Record.—Muniments of Title.

Muniments of title, prior to that immediately into the party having use for such at a trial, are presumptively in the possession of the persons to whom made and such presumption of fact stands prima facie as a sufficient showing, justifying the use of the record of such title papers, under Compiled Laws 3965, allowing the use of the record where the original is not in the hands of the party wishing to use it. —Tagliaferri v. Grande, 16 N. M. 486.

Exceptions, Bill of.—

The bill of exceptions, especially when it includes the evidence in a case, can only be settled by the trial judge who presided at the trial.—Ross v. Berry, 16 N. M. 778.

Motion at this time by appellant to settle the transcript of evidence and bill of exceptions by adding thereto the certificate of the trial judge, overruled. In so far, however, as said motion may be construed as a motion in diminution of the record for the purpose of having the findings of fact and conclusions of law, together with the exceptions thereto made a part of the record proper, the same will be granted. —Ross v. Berry, 16 N. M. 778.

Exceptions, Bill of.—Dismissal.

Motion to strike bill of exceptions containing the transcript of the evidence and the findings of fact and conclusions of law, signed and settled by the presiding judge of the district, but not by the trial judge, sustained.—Ross v. Berry, 16 N. M. 778.

Exceptions, Bill of.—Transcript.

It was not necessary for the appellant to have had the transcript of evidence signed and settled as a bill of exceptions in order to have made the same a part of the record.—Ross v. Berry, 16 N. M. 778.

Execution.—Sale.

Where, at a sale under execution, a sheriff causes to be made out of a judgment debtor's property illegal and improper charges, the sale is fraudulent and voidable.—Retsch v. Renehan, et al, 16 N. M. 541.

Execution.—Sale.—Purchase.

Where real estate is bid in at an execution sale by the attorney of the judgment creditor for himself and not for his client he is charged with notice of the fraudulent acts of the sheriff in the conduct of the sale.—Retsch v. Renehan, 16 N. M. 541.

Fraud.—Evidence.—Equity.

Evidence reviewed and it clearly established fraud on part of appellees. A court of equity should, therefore, give appellant relief.—Collins v. Schump et al, 16 N. M. 537.

Fraud, Statute of.—Written Contract.—Parole.

The time of performance of a written contract within the statute of frauds may be enlarged by a subsequent oral agreement.—Kingston et al v. Walters, 16 N. M. 59.

Finding.

Finding of court below will not be disturbed if made on substantial evidence.—McKnight v. Brick Co., 16 N. M. 721.

Findings, Inconsistent.—Verdict.

Special questions were put to the jury and the answers made to them were inconsistent: Held, that where special findings are inconsistent, they neutralize each other and the general verdict controls.—Di Palma v. Weinman, 16 N. M. 302.

Garnishment.—Exemptions.

A resident of the territory and the head of a family is exempt from garnishment of his wages, except for debt incurred for the necessities of life.—O'Rielly v. Colbert et al, 16 N. M. 647.

Good Will.—Contract.

A contract not to engage in business is a personal contract, and can only bind the parties to it.—Light Co. v. Imp. Co., 16 N. M. 86.

Parties not signing the contract can not be enjoined from engaging in their own behalf in business in connection with bound party, in competition with purchaser or his assignee.—Light Co. v. Imp. Co., 16 N. M. 86.

Grants.—Community Grant.—Title.

The title papers of the town of Tome grant examined and held to be a community grant of the nature described in United States v. Sandoval, 167 U. S. 278; Rio Arriba Company v. United States, 167 U. S. 298, and United States v. Pena, 175 U. S. 500.—Bank et al v. Barela et al, 16 N. M. 648.

Grants, Spanish.—Quieting Title.

That section 2937, supra, was enacted by the legislature as a statute of repose for the purpose of settling the titles and preserving the rights of the pioneer settlers who in good faith settled upon, improved and cultivated vacant lands of the Spanish and Mexican grants within the territory

the ownership of which was unknown.—Montoya v. Heirs, 16 N. M. 349.

Grant, Spanish.—Real Estate.—Title.—Deed.

Section 2937, Compiled Laws of 1897, construed and held to grant affirmative relief in the nature of a fee simple or statutory title in addition to the bar of the statute, in favor of persons being in possession of tracts of land within the boundaries of Spanish or Mexican land grants, for ten years under a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple upon compliance with the terms of the section, and possession of any part of the tract thus conveyed extends to the exterior boundaries of the lands described in such conveyance.—Montoya v. Heirs, 16 N. M. 349.

Holidays.—Judicial Acts.

In absence of statutory provisions, judicial acts, including judgments on holidays, are valid.—Pickering v. Current, 16 N. M. 37.

Homicide.—Appeal.—Instructions.

Counsel for defense wholly failing to point out error complained of as to any of the instructions excepted to, none of these alleged errors are properly before this court for review.—Territory v. Pettine, 16 N. M. 40.

Homicide.—Evidence.—Conversation of Victim.

Alleged conversation of deceased with one of the defendants properly excluded as antagonizing the rule against showing specific acts of violence and requiring proof of general reputation.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Evidence.—Irrelevance.

Evidence properly excluded because of irrelevance.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Evidence.—Threats of Victim.

Alleged threats of deceased properly excluded as at that time no evidence had been presented from which the attitude and conduct of the deceased was in doubt.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Instruction.

Requested instruction faulty because it entirely omitted the fundamental requirements that the circumstances must be viewed by the jury as they reasonably appeared to the defendants.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Instructions.

Jury not misdirected because of the omission in the instruction of the negative words "without malice," as it in no way decreased the amount of proof required to convict but

was an omission in defendant's favor and of which he cannot complain.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Instruction.

Requested instruction not correct statement of law, as it was not necessary to verdict, for defendant to have provoked the quarrel in which the homicide occurred.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Instructions.—Manslaughter.

The evidence reported would not have warranted an instruction to the jury that a verdict could properly be rendered finding the defendant guilty of manslaughter.—Territory v. Archuleta, 16 N. M. 219.

Homicide.—Instructions.—Self-defense.

The instructions to the jury by the trial court, on the right of self-defense, as affected by appearances from the defendant's standpoint, were appropriate and sufficient when taken together.—Territory v. Cheney, 16 N. M. 476.

No different and proper instruction more fully covering the law of self defense being requested, there is no error in the given instruction objected to, which as far as it went was correct.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Justification.

It is not true as a matter of law that a person may resist illegal arrest to the extent of taking life in the absence of an attempt on the part of the person killed to take life or to do great bodily harm.—Territory v. Trapp, 16 N. M. 700.

Homicide.—Searches and Seizures.

Searches and seizures provided against in the Constitutional guarantee are those of the government or the states under state constitutions and are not the unlawful acts of individuals.—Territory v. Trapp, 16 N. M. 700.

Indictment.

If a statute makes criminal the doing of this, or that or that, mentioning several things disjunctively, there is but one offense, which may be committed in different ways; and, in most instances all may be charged in a single count.—Territory v. McGrath, 16 N. M. 202.

Where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed.—Territory v. McGrath, 16 N. M. 202.

Indictment.—Conviction.

Defendant cannot be convicted under three separate in dictments for one single act.—Territory v. McGrath, 16 N. M. 202.

Indictment and Information.—Statute.—Duplicity.

An indictment for larceny under C. L. 1897, sec. 68, which reads: "And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said Young E. Hurt, the said horse, of the goods, chattels, and property of the said Carrizozo Cattle Ranch Company, Limited, of the value aforesaid, then and there, in the manner and form aforesaid, did then and there unlawfully and feloniously steal, take and carry away," held not to be demurrable for duplicity..—Territory v. Hurt, 16 N. M. 152.

Indictment.—Superfluous Allegations.

Objectionable matter was merely descriptive and though superfluous, was not prejudicial or perplexing.—Territory v. McGrath, 16 N. M. 202.

Injunction.—Damages.—Counsel Fees.

Counsel fees may not be recovered, as an element of damage, by the plaintiff, where he is compelled to institute injunction proceedings to protect some right which he has, and which is being violated by a defendant.—Railway v. Traction Co., 16 N. M. 163.

Injunction.—Specific Findings.

Upon conflicting testimony in an action for an injunction, and specific findings of fact having been made in the court below, this court will not inquire further.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Instructions.

The instructions of the court to the jury upon their bringing in an ambiguous verdict examined and, Held, not to have invited the jury to add to their verdict.—Di Palma v. Weinman, 16 N. M. 302.

Insurance.—Waiver.

There was no waiver by insurance company of provision in insurance policy requiring property assured to be unincumbered, by company failing to ascertain by interrogation of the assured or by examination of the record whether there was any incumbrance on property assured.—Shoucair v. Insurance Co., 16 N. M. 563.

Intoxicating Liquors.—Regulation.—Municipal Ordinance.

By the eighteenth sub-section of section 2402, C. L. 1897, cities are granted the following power: "To have the right to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor within the limits of the city." Held, that Sec. 3, ordinance No. 213 of the City of Roswell, which provides that: "On and after the first day of June, 1910, it shall be unlawful for any person or common carrier to knowingly bring intoxicat-

ing liquors from any city, town or village, or other place, within the Territory of New Mexico, into the City of Roswell," is an attempt to exercise a power neither expressly nor impliedly granted by the eighteenth sub-section of Sec. 2402, C. L. 1897, and therefore void.—Roswell v. Railway Co., 16 N. M. 685.

Jeopardy.—Self Incrimination.—Grand Jury.

That appellant was subpoenaed and compelled to appear before the grand jury was not a violation of his constitutional rights, nor is the fact that he was sworn before such body and there testified to facts that did not incriminate himself. —Territory v. Torres, 16 N. M. 615.

If appellant was compelled over his protest to be a witness against himself before the grand jury and was compelled to testify to matters and things over his protest incriminating or tending to incriminate himself, it was a direct violation of his constitutional rights guaranteed him.—Territory v. Torres, 16 N. M. 615.

Judgment.—Default.

The record disclosing the fact that the defendants served had failed to answer or plead within the time limited by law, judgment was properly rendered upon the note sued upon.—Leusch v. Nickel et al, 16 N. M. 28.

Judgment.—Error.—Evidence.

Erroneous rulings of a court as to the admissibility of evidence in a case tried by the court without a jury, are not necessarily sufficient to call for a vacation of the judgment of the court below.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Judgment.—Joint Liability.

The fact that one of the defendants had not been served in the attachment suit would be entirely immaterial as to the indebtedness due upon a note in as much as the contract evidenced by the note is joint and several under the statutes and could be maintained against the defendants served.—Leusch v. Nickel et al, 16 N. M. 28.

Judgment.—Jurisdiction.

By their fourth assignment of error, defendants claim that the court erred in giving judgment for plaintiff: Held, it not appearing from the record that the judgment is fatally defective on account of lack of jurisdiction, we will not consider this assignment of error. Following Neher v. Armijo, 11 N. M. 67.—Good et al v. Loan Co., 16 N. M. 461.

Judgment.—Vacating.

A district court of this Territory is without jurisdiction to set aside or vacate a judgment rendered by it which,

although voidable, is not void, after one year from the rendition of such judgment has elapsed.—Weaver v. Weaver, 16 N. M. 98.

Justices of the Peace.—Summons.—Service.—Sufficiency.

Under C. L. 1897, sec. 3244, requiring that service of writ be made five days before the return day, the day of service or the return day being excluded in making up the five days, service at any hour of November 19 was sufficient for any hour of November 24 as return day.—Pickering v. Current, 16 N. M. 37.

Landlord and Tenant.—Adverse Possession.—Limitation.

A purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure with the knowledge of the landlord, was a forfeiture of his term; that his possession became so adverse, that the act of limitation would begin to run in his favor, from the time of such forfeiture; and the landlord could sustain ejectment against him without notice to quit.—Andrews v. Thomas, 16 N. M. 529.

Landlord and Tenant.—Presumption.

Where title to real estate is shown in the plaintiff, together with the fact of occupation by the defendant; the law will refer that possession to a rightful rather than a wrongful title, and, where nothing more is shown, the relation of landlord and tenant will be presumed, and a contract for rent implied.—Moore v. Meat Co., 16 N. M. 107.

Landlord and Tenant.—Rent.

The defendant and its predecessor, claiming possession of real estate under an unauthorized contract to purchase made with an assignee of an insolvent estate, are charged with knowledge of the fact that such contract was a nullity, and, having used and occupied the premises thereunder, are liable for the reasonable rental value in a suit for use and occupation of such premises.—Moore v. Meat Co., 16 N. M. 107.

Larceny.—Evidence.

In an indictment for larceny it is not necessary to allege that the owner of the property, the larceny of which is charged, is a corporation and if that allegation is made and if it is thereby made necessary to prove the existence of the corporation, evidence of its de facto existence is sufficient.—Territory v. Walker, 16 N. M. 607.

Limitation.—Real Estate.—Title.

Section 2938 does not purport to confer fee simple title as is provided for in section 2937, but simply raises the bar of the statute against the bringing of actions for the possession of lands held adversely for ten years under color

of title and with payment of taxes, and is inapplicable to the present case.—Montoya v. Heirs, 16 N. M. 349.

Mandamus.—Relief.

A city is the party "beneficially interested" in a suit to compel its treasurer to deposit the money in his hands belonging to it in a bank designated by an ordinance of the city, from which it would receive interest on the money so deposited.—Territory v. Matson, 16 N. M. 135.

Master and Servant.—Fellow Servants.

The federal employer's liability act of June 11, 1906, is valid as to the Territory of New Mexico. Following El Paso & N. E. Railway Company v. Gutierrez, U. S. Sup. Court, decided November 15, 1909.—Friday v. Railway Co., 16 N. M. 434.

Mechanics' Lien.

When a person is employed by the owner of a lot in an incorporated city to construct a sidewalk in front of the same, and he purchases materials to be used, and which were used, in the construction of such sidewalk, the purchase of such materials will be considered as having been made at the "request" of the owner, within the meaning of Section 2218, Compiled Laws 1897, so as to entitle the material man to a lien therefor under the mechanics' lien law. —Lumber Co. v. Neal, 16 N. M. 197.

Mechanics' Lien Law.

The mechanics' lien law is remedial in its nature and equitable in its enforcement and is to be construed liberally. —Lyons v. Howard & Destree, 16 N. M. 327.

Mechanics' Lien Law.—Affidavit.

It is not necessary that there should be an affidavit to the claim of lien under the mechanics' lien law. It is sufficient if the claim is signed by the party, and that the notary or other proper officer, under his signature and seal, says that it is sworn to by the person signing it.—Lyons v. Howard & Destree, 16 N. M. 327.

Mechanics' Lien Law.—Verification.

A substantial compliance with the mechanics' lien law as to the verification of a claim filed thereunder is all that is required in the absence of any statutory requirement as to the form of the verification.—Lyons v. Howard & Destree, 16 N. M. 327.

Mines.—Annual Labor.—Proof.

The proof of annual labor prescribed by C. L. 1897, sec. 2315, would enure to the benefit of the locator filing the same in any kind of action in which it was material to establish

the performance of such labor.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Contract.—Grubstake Prospector.

Contract providing that any fraud on part of grubstake prospector should result in forfeiture of his one-third interest to the plaintiff was enforcible.—Lockhart v. Mining Co., 16 N. M. 223.

Mines.—License.

A license to mine coal does not convey or grant to the licensee any interest in the coal until the licensee has mined it.—Coal Co. v. Mining Co., 16 N. M. 517.

Mines.—Location.

The principle that no valid location can be made of land in the actual adverse possession of another can have no application to the case at bar.—Riverside Co. v. Hardwick, 16 N. M. 479.

Mines.—Location.—Conspiracy.

The object of defendants was to acquire the right to possession by location and it can not be said that the conspiracy was complete until all the acts necessary to complete right to exclusive possession has been performed.—Lockhart v. Mining Co., 16 N. M. 223.

Mines.—Location.—Dummy Locators.

The fraud of locating by means of dummies is a fraud upon the government and the government alone can complain.—Riverside Co. v. Hardwick, 16 N. M. 479.

Mines.—Location.—Notice.

Other acts besides posting a notice are required to obtain exclusive right to possession of a mining claim. The claim must be marked on the ground so that its boundaries can be traced and within ninety days a shaft must be sunk and the notice recorded.—Lockhart v. Mining Co., 16 N. M. 223.

Held that previous mining claim had no legal existence where locators merely posted notices and no other act of location is shown and where such notice is removed with knowledge of locators.—Lockhart v. Mining Co., 16 N. M. 223.

Mines.—Location.—Number of Placer Claims.

There is no limit to the number of placer claims which may be located by one person or association of persons.—Riverside Co. v. Hardwick, 16 N. M. 479.

Mines.—Location.—Performance.—Abandonment.

While failure to perform necessary acts of location results in forfeiture as against the subsequent qualified loca-

tor, it falls far short, under the facts in this case, of establishing abandonment.—Lockhart v. Mining Co., 16 N. M. 223.

Mines.—Location.—Principal and Agent.

Held that portion of original locators and owners of mining claim who were represented in the location of the claim in dispute, by the other portion of such locators, were bound by the knowledge of the latter locators.—Lockhart v. Mining Co., 16 N. M. 223.

Mines.—Monuments.—Location.

Monuments found upon the ground at the corners of a placer claim may be adopted by the locator as his own and will meet the requirements of marking on the ground by substantial monuments.—Riverside Co. v. Hardwick, 16 N. M. 479.

Mines.—Patent.

The judgment of the U. S. Land Department, holding appellant's application for patent void because the officers of the local land office were without jurisdiction, is binding in this case.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Cancellation.—Patent.

The cancellation of a mineral patent does not of itself render the ground embraced by it subject to location.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Patent.—Final Receipt.

Even though a final receipt or the equitable title thereby attained may have been the result of fraud and therefore voidable, yet, until avoided it will be valid and existing.—McKnight v. Brick Co., 16 N. M. 721.

The decision of the trial court that the final receipts relied upon by appellant were void, nullities and of no effect, was correct.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Patent.—Receipt.

A final receipt of mineral lands issued upon a valid application for patent, vests the purchaser with an equitable title to the land and so segregates it from the public domain.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Proof of Annual Labor.

The mere statement that the appellant had performed annual labor was prima facie proof, unless it was further shown by what person the labor was performed.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Proof of Labor.—Affidavit.

If owner of mining claim will not file affidavit of proof of labor, it places upon him the burden of showing that he has complied with the law, such compliance being necessary

to the maintenance of his estate.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Proof of Labor.—Evidence.

When the burden by non-compliance with the statute was placed upon the appellant it could have been shifted or met by proof either of the annual labor done at the proper time or work done before the location of appellee. The proviso of the statute calls for an affirmative showing by the original locator.—McKnight v. Brick Co., 16 N. M. 721.

Mines.—Taxes, Sales for.—Annual Labor.—Incumbrances.

Under the statutory provisions declaring improvements to be real estate and that upon sale of real estate for delinquent taxes the owner has the right to retain possession until the expiration of the three years for redemption, improvements upon a mining claim become upon a sale thereof for taxes so associated with the realty as to constitute an incumbrance thereon within the meaning of C. L. 1897, sec. 2304, allowing the holder of an incumbrance to perform the annual labor so as to prevent re-location.—McVeigh v. Veig et al, 16 N. M. 453.

Mines.—Trespass.—Action.

Coal and mineral in place are land and their removal by a trespasser constitutes a permanent injury to the freehold for which the owner of the fee is alone entitled to recover damages.—Coal Co. v. Mining Co., 16 N. M. 517.

Mines.—Trespass.—Damages.

The evidence in this case examined and held, that the trial court committed error as to the amount of coal for which a recovery was allowed.—Coal Co. v. Mining Co., 16 N. M. 517.

The plaintiff entered into possession of the land pursuant to an agreement or understanding with the owner for the purchase of the same. It knew in August, 1904, that defendants had, and were then taking coal from the land. On April 11th, 1905, it took a deed from the owner for the land: Held that, in the absence of a binding contract between plaintiff and its vendor for the purchase of the land, prior to the discovery by plaintiff that the defendants had taken coal from the land, it could not recover for the value of the coal taken by defendants prior to the date it acquired title.—Coal Co. v. Mining Co., 16 N. M. 517.

Mines.—Trespass.—Title.

Proof of more than simple possession of the land upon which trespasses complained of are committed, is necessary to support an action brought to recover the value of coal unlawfully extracted by trespassers and converted to their own use.—Coal Co. v. Mining Co., 16 N. M. 517.

Mines.—Trespass.—Title.—Contract.

Where A goes into possession of land in pursuance of an agreement to purchase the land of B., the owner thereof, and with B.'s consent, begins to mine coal therefrom, A.'s possession is that of a mere licensee.—Coal Co. v. Mining Co., 16 N. M. 517.

Monopolies.—Conspiracy in Restraint of Trade.

In a prosecution for violation of the anti-trust act; (Act July 2, 1890, Chapter 647, Section 3, 26 Stat., 209 U. S. Comp. St. 1901, p. 3200); held, that a conspiracy between two corporations cannot be formed by the acts and thoughts of one person acting as the agent of both corporations. "The union of two or more persons, the conscious participation of two or more minds, is indispensable to an unlawful combination." Per Sanborn J., Union Pacific Coal Company v. United States, 173 Fed. 737.—U. S. v. Santa Rita Co., 16 N. M. 3.

Monopolies.—Restraint of Trade.

A contract, which is the mere accompaniment of the sale of property, and entered into for the purpose of enhancing the price at which the vendor sells it, and which is collateral to the sale, and where the main purpose of the contract is the sale of the property, does not come within the inhibition of the Act of Congress of July 2, 1890, even though the contract restrains trade to some extent.—Light Co. v. Imp. Co., 16 N. M. 86.

Mortgages.—Foreclosure.—Counsel Fees.

Defendants by their answer allege that they were compelled to employ an attorney to defend the action and a reasonable fee for such attorney is two hundred and fifty dollars: Held, this paragraph was properly stricken, because in the absence of allegation of any agreement, counsel fees cannot be awarded. Following Dame v. Cochiti R. & I. Co., 13 N. M. 10, 79 Pac. 296.—Good et al v. Loan Co., 16 N. M. 461.

Mortgage.—Fraud.

The doctrine of absolute fraud arising in a mortgage on merchandise, from the mortgagors retaining possession with the power of disposal in the usual course of trade, is contrary to sound principles of jurisprudence.—Bank v. Haverkampf, 16 N. M. 497.

Mortgage.—Record.—Fraud.

The failure to record mortgage promptly does not constitute a fraud in law as to subsequent creditors.—Bank v Haverkampf, 16 N. M. 497.

Municipal Corporations.

A city ordinance requiring the treasurer of a city to deposit all moneys in his hands belonging to the city in such

bank, or banks, as shall qualify as provided in the ordinance, but not attempting to restrict in any way the paying out by him, under the provisions of law, of such moneys by his own checks, would not operate to deprive him of the "custody" of such moneys within the meaning of section 2424, C. L. 1897.—Territory v. Matson, 16 N. M. 135.

Municipal Corporations.—City Treasurer.—Statute.

Section 3, of Chapter 122, of the Session Laws of 1909, providing that municipal and county treasurers are required to designate depositories in which the funds coming into their hands shall be kept, is manifestly and totally repugnant to the provisions of Sec. 2424 of the Compiled Laws of 1897, providing that city councils may designate a place of deposit for city funds, and may require the city treasurer to keep all moneys in his hands belonging to the corporation in such place of deposit, and operates to repeal Sec. 2424.—Territory v. Matson, 16 N. M. 135.

Municipalities.—Commission Government.

The relator, and upwards of five hundred others, electors and residents of the City of Roswell, signed and presented to the Mayor and City Council of said city, a petition for an election to determine whether Roswell would establish the commission form of government, so called, under the provisions of Chapter 8, Acts of 1909, of the Assembly of New Mexico. The petition was referred to a committee of members of the council. Under the circumstances recited in the statement of the case, which follows: Held, that the withdrawals from the petition there described were effectual, and that the peremptory writ, which was granted, pro forma, should have been refused.—Territory v. Roswell, 16 N. M. 340.

Negligence.

Failure to exercise due care in approaching a railroad crossing amounts to contributory negligence.—Padilla v. Railway Co., 16 N. M. 576.

Examination of the evidence fails to disclose that deceased was guilty of contributory negligence.—Padilla v. Railway Co., 16 N. M. 576.

Negligence.—Burden of Proof.

The burden of showing contributory negligence is on the defendant.—Padilla v. Railway Co., 16 N. M. 576.

Negligence.—Evidence.

Examination of record discloses that evidence complained of was not admitted for purpose of showing consciousness on part of defendant company of antecedent negligence.—Padilla v. Railway Co., 16 N. M. 576.

Negligence.—Instructions.—Railroad Accident.

Examination of instructions discloses that court in its instructions gave both as to the burden of proving contributory negligence and as to the presumption that due care and caution was exercised by deceased in approaching railroad crossing, fully and fairly expressed law applicable.—Padilla v. Railway Co., 16 N. M. 576.

Notice, Judicial.—Records.

A trial court cannot in one case take judicial notice of its records in another and different case, even though between the same parties and in relation to the same subject matter.—Oliver v. Enriquez, 16 N. M. 322.

Novation.

Statement of facts comprise a complete novation.—Dougherty et al v. Van Riper, 16 N. M. 600.

Novation means the substitution of one debtor by mutual agreement for another.—Dougherty et al v. Van Riper, 16 N. M. 600.

Novation.—Statute of Frauds.

A contract of novation is not obnoxious to the Statute of Frauds or governed by it.—Dougherty et al v. Van Riper, 16 N. M. 600.

Partition.—Judgment.

A judgment in a partition suit which declares the rights of the parties and orders partition, is interlocutory only and is under the control of the court until final decision, and may be modified or rescinded at any time prior to final judgment or decree.—Montoya v. Heirs, 16 N. M. 349.

Partition.—Real Estate.

Under Section 3182, Compiled Laws 1897, the owner of the whole or any part of the premises sought to be partitioned may, whatever the origin of the title, intervene for the settlement of his rights.—Montoya v. Heirs, 16 N. M. 349.

Payment.—Issues and Proof.

Payments subsequent to the filing of suit are not provable under the general issue that must be set up by supplemental pleading.—Bank v. Broyles, 16 N. M. 414.

Pleading.—Abatement.

Pleas in abatement are dilatory pleas and are subject to the most technical rules of pleading and the greatest accuracy and precision are required in framing them.—Territory v. Torres, 16 N. M. 615.

Pleadings.—Amendment of Answer.—Interlineation.

Amendment of answer by interlineation permissible, but if it was error, it was harmless error.—Current v. Bank, 16 N. M. 642.

Pleadings.—Answer.

The allegations in the plea are at best mere conclusions. The facts themselves must be stated and so clearly and definitely set forth as not to leave unobviated any supposable special answer.—Territory v. Torres, 16 N. M. 615.

Pleading.—Answer.—Trial.—Amendment.—Set-Off.

The request of the defendant in the trial court for leave to amend its answer by pleading a set-off to the cause of action alleged in the complaint, made after the jury had been empaneled and all of the evidence had been introduced, and both plaintiff and defendant had moved for an instructed verdict, was properly denied.—Moore v. Meat Co., 16 N. M. 107.

Pleading.—Complaint.

Even though the prayer for damages is in a specific sum, the court may look to the complaint itself to determine upon what the claim for damages is based.—Railway v. Traction Co., 16 N. M. 163.

Pleading.—Complaint.—Venue.

The record in this case, (especially when aided by our statute as to amendments of the record in formal matters even after repeal) sufficiently shows the injuries alleged to have occurred in the First Judicial District.—Friday v. Railway Co., 16 N. M. 434.

Pleadings.—Corporations.—Publication.—Proof.

Pleadings not having put in issue the question of publication of articles of incorporation and return of proofs to the Secretary of the Territory, the court did not err in refusing to give requested instruction requiring the jury to find that all the formalities of law had been complied with in regard to the organization of the appellee corporation.—Riverside Co. v. Hardwick, 16 N. M. 479.

Pleading.—Demurrer.—Disposition.

The filing of the supplemental complaint had the effect of disposing of the demurrer filed to the original complaint in-as-much as the same was not renewed as to the supplemental complaint.—Leusch v. Nickel et al, 16 N. M. 28.

Pleadings.—Evidence.

Upon the disputed question of fact the plaintiff was entitled to be heard and to introduce evidence in support of its contention.—Tularosa Ditch Case, 16 N. M. 200.

Pleading.—Inconsistent Defenses.—Demurrer.

Objections to an answer that it states inconsistent defenses may not be made by demurrer.—McVeigh v. Veig et al, 16 N. M. 453.

Pleading.—Reply.

No claim of surprise and no application for continuance being presented appellants cannot complain on appeal of action of trial court in permitting reply to be filed to the answer during the progress of the trial.—Riverside Co. v. Hardwick, 16 N. M. 479.

Principal and Agent.

Principal was bound by agent's knowledge of fraud.—Lockhart v. Mining Co., 16 N. M. 223.

Principal and Surety.—Contract.—Concealment.—Fraud.

Appellant's representative having undertaken to give the proposed sureties information in regard to Broyles' financial condition, he should have disclosed all the facts and circumstances, affecting the risk within his knowledge.—Putney v. Schmidt et al, 16 N. M. 400.

Principal and Surety.—Contract.—Recission.—Fraud.

Where a party receiving nothing under the contract, acted merely as a trustee for another, the contract, remaining wholly executory as to the party claiming fraud, there was nothing which he could return and he had a right to await suit upon the contract, and then set up fraud as a defense.—Putney v. Schmidt et al, 16 N. M. 400.

Prohibition.

Prohibition is an extraordinary judicial prerogative writ to be used with great caution and forbearance for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy.—Pickering v. Current, 16 N. M. 37.

Prohibition.—Certiorari.

Defendants had adequate remedy through appeal, or writ of certiorari and if they were misled to their injury by respondent, they may have had a good cause of action against him for damages.—Pickering v. Current, 16 N. M. 37.

Public Lands.—Adverse Claims.—Burden of Proof.

To establish its claim of title to an undivided interest of the overlap of two grants, the intervenor introduced the Act of Confirmation by Congress and the patent issued thereunder. To avoid the apparent effect of this proof the appellees must accept the burden of establishing a perfect legal

title or right independent of their title by the Act of Confirmation.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Contract for Survey.—Grant.

The fact that a contract for survey had been first let for the Beck grant could not operate to render nugatory an Act of Congress which confirmed equally to the Perea grant and to the Beck grant the interest of the government in the lands involved.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Grant.

The giving of juridical possession in 1825 to the Beck grant did not constitute a circumstance granting a feature of superiority, although no juridical possession was conferred to the Perea grant.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Grant.—Confirmation by Congress.

The claimants of the Preston Beck grant had no equitable right or title previous to the Act of Confirmation. The Act of Confirmation should not, as to the Preston Beck grant, be given effect by relation as of an earlier date, so as to take priority over the Perea grant. Both are equal in time. The intervener and appellee holding by the same Act of Congress so far as their grants conflict or overlap, have each an equal undivided moiety of the lands within the conflict.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Grant.—Plan of Iguala.

Upen the cession of New Mexico to the United States all the laws of Mexico relating to subjects non-political in their character remained in force, but were administered by officers appointed and controlled by the United States. Likewise, in Mexico, after the independence of that country by the plan of Iguala and the other acts referred to, the laws of Spain in force at that time of a non-political character were continued and remained in force and the officers of Spain having in charge the enforcement of those laws were made the officers of the Mexican nation.—Stoneroad v. Beck, 16 N. M. 754.

The Preston Beck and Perea grants being both void grants owe their validity to the Act of Congress confirming them.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Grant.—Treaty.

Even though when the treaty was signed there was a license to occupy in favor of the Beck grantees, this license or permissive possession was revoked ipso facto by the treaty and when the treaty was signed these properties passed to the United States as public domain to be dealt with by Congress.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Patent.

The right to a patent once vested is treated by the government, when dealing with public lands, as equivalent to a patent issued. When in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening rights. The above rule can have no application to the case at bar, because it cannot be said, either upon the application to the Surveyor General or upon his favorable report upon the application, did a right to patent vest.—Stoneroad v. Beck, 16 N. M. 754.

Public Lands.—Surveyor General.

The mere circumstance that one claimant reached the Surveyor General's office first in order to present his claim cannot be considered as affecting the rights of other parties. —Stoneroad v. Beck, 16 N. M. 754.

Quieting Title.—Defenses.—Laches.

The plaintiff having been in possession of the land, laches will not be imputed to her.—Retsch v. Renehan, 16 N. M. 541.

Quieting Title.—Proceedings.—Parties.

If it be sought in such a case to bar the known confirmee of a grant such confirmee should be sued by name in the proceeding and not under the description of an unknown claimant.—Priest et al v. Las Vegas, 16 N. M. 692.

The rule last stated applies notwithstanding the confirmee named is an unincorporated town, the latter being by the congressional confirmation recognized and designated as an entity capable of receiving the title.—Priest et al v. Las Vegas, 16 N. M. 692.

Quieting Title.—Process.—Publication.

Statutory provisions for the service of process upon unknown claimants by publication in actions to quiet title will be strictly construed.—Priest et al v. Las Vegas, 16 N. M. 692.

Quo Warranto.—Irrigation.

The remedy for the unlawful assumption of the right to act as a corporation and the exercise of corporate rights ultra vires, is by quo warranto and not in equity.—Tularosa Ditch Case, 16 N. M. 750.

Quo Warranto.—Writ of Ouster.

The writ of ouster does not reinstate the one legally entitled to the office or actually put him in possession thereof, but in the case at bar the decision of the court in the quo warranto proceeding decided that the respondent was not entitled to the office. This left the relator as the de jure

officer entitled to the possession and legally qualified to fill the office.—Klock v. Mann, 16 N. M. 744.

Railroads.—Crossings.—Jurisdiction.

Laws 1907, Chapter 97, invests in the court the right to determine and regulate the place and manner of crossing by one railroad of the tracks of another.—Railway v. Traction Co., 16 N. M. 154.

Railroads.—Negligence.—Crossing.

There is presumption, in the absence of evidence to the contrary, that person killed in crossing a railroad stopped, looked and listened.—Padilla v. Railroad Co., 16 N. M. 576.

Railroad.—Right of Way.—Location.—Survey.

To constitute a valid location of a proposed railroad in New Mexico, there must be: 1. A survey and actual staking of the proposed line upon the ground. 2. The adoption of such survey by the board of directors as its permanent line or right of way.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Evidence held to establish that surveys were actually made and the proposed line of railroad staked and marked upon the ground and that the said line had been adopted by the company's board of directors.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Railroad.—Right of Way.—Trespass Injunction.

Proof of a prior and better right to the occupancy of the right of way in dispute is sufficient to make railroad's action for injunction against trespass or interference by another railroad cognizable in equity.—A. & C. R. R. v. D. & R. G., 16 N. M. 281.

Sheriff.—Fees.—Real Estate.

The statute does not authorize a sheriff to charge or collect fees for the custody of real estate under levy of an execution.—Retsch v. Renehan et al, 16 N. M. 541.

Specific Performance.—Delay of Plaintiff.—Estoppel.

If one who is entitled to a payment within a time fixed by a written agreement between himself and others for the sale of real estate, assures those who are to make the payment, before it becomes due, that they can have a longer time within which to make it than that stipulated in the agreement, and they, relying on that assurance, fail to make the payment within such stipulated time, the payee is estopped from claiming a breach of the agreement because of such failure.—Kingston et al v. Walters, 16 N. M. 59.

Statute.—Construction.—Appropriation.

Laws 1909, Chapter 127, sec. 2, provides an appropriation of $5,000 to the Children's Home Society, "for the purpose

of providing a receiving home which shall be constructed, or obtained through the supervision of said society and shall not be considered an appropriation for maintenance. And it is hereby specially understood that the said society shall at no time in the future call upon the Territory for any further appropriation of any kind or character." Laws 1909, Chapter 127, sec. 11, provides: "Whenever any subsequent legislature shall fail to pass an appropriation act, the same appropriation made for the 61st and 62nd fiscal years are hereby extended for each and every fiscal year thereafter, unless otherwise provided by law." Held, that the appropriation in question was not a continuing one; that it was for definite purposes and not for maintenance.—Territory ex rel. v. Sargent, 16 N. M. 276.

Statutes.—Repeal.

The use, as a part of the repealing clause of a statute, of the words "all acts and parts of acts in conflict herewith" repeals nothing which could not be repealed by implication without those words.—Territory v. Matson, 16 N. M. 135.

Statutes.—Repeals.—Construction.

Repeals by implication are not favored and where two statutes can be construed together and preserve the objects designed to be obtained by each, they should be so construed. —Territory v. Riggle, 16 N. M. 713.

Stipulations.—Construction.

Written stipulations between counsel when fairly entered into should be enforced, but such are not by strained construction to be given an effect beyond their terms.—Railway v. Rodgers, 16 N. M. 120.

Street Railroads.

Laws 1905, Chapter 97, applies to electric railroads as well as to steam railroads.—Railway v. Traction Co., 16 N. M. 154.

Street Railroad.—Crossings.—Injunction.

Under the facts of the case, it was perfectly proper for the court to issue a mandatory injunction commanding the appellant to restore the status quo, but the court could not enjoin the appellant from interfering with the appellee in the laying of its tracks across appellant's railroad, save by agreement between the parties, or, upon application and determination by the court of the manner and place of crossing.—Railway v. Traction Co., 16 N. M. 163.

Taxation.—Tax Sale.—Tax Certificate.

A tax certificate issued under Laws 1899, Chapter 22, Section 31, providing for the sale without judgment of court, of property for delinquent taxes for amounts less than

twenty-five dollars, vests a title in the purchaser which can be invalidated only on the grounds that the taxes, penalties, interest and costs had been paid before the sale, or that the property was not subject to tax, and not for irregularities in the proceedings leading up to the sale, unless they are fraudulent or amount to jurisdictional defects.—Straus v. Foxworth, 16 N. M. 442.

Title.—Real Estate.—Mixed Possession.

The doctrine of mixed possession as laid down in Hunnicutt v. Payton, 102 U. S. 333, examined and held to be inapplicable.—Montoya v. Heirs, 16 N. M. 349.

Trespass.

A right of action for a trespass to land is not assigned by a subsequent conveyance of the land. Following U. S. v. Loughren, 172 U. S. 206.—Coal Co. v. Mining Co., 16 N. M. 517.

Trial.—Demurrer.—Evidence.

The demurrer to the evidence of the plaintiff being sustained by the lower court, the testimony introduced on behalf of the plaintiff is deemed to be true and every conclusion which tends to prove it must be admitted.—Collins v. Schump et al, 16 N. M. 537.

Trial.—Direction of Verdict.

A motion for a peremptory instruction by both parties does not constitute a final waiver by either of jury trial where the evidence is conflicting and where after adverse ruling upon his request for peremptory instruction such party thereupon insists upon a trial by jury.—Bank v. Broyles, 16 N. M. 414.

Trial.—Direction of Verdict.—Evidence.

It is the duty of the court to direct a verdict where it would be bound to set aside a contrary verdict for want of testimony to support it.—Bank v. Broyles, 16 N. M. 414.

Trial.—Evidence.

It is error for the court to withdraw a case from the jury where the evidence as to liability is conflicting or the inferences on that subject to be drawn from the testimony are divergent.—Bank v. Broyles, 16 N. M. 414.

Trial.—Findings of Facts.

If, at the trial of a cause without a jury in a District Court, the party requests the court to make findings of fact as provided by Section 2999, C. L. 1897, and in any appropriate way, before the rendition of the judgment, makes known to the court that he desires specific findings, and on what points he desires them, the court should make findings of the essential or determining facts on which its conclusion

in the case was reached, specific enough to enable this court to review its decision on the same ground on which it was made.—Luna v. Coal R. R. Co., 16 N. M. 71.

Trial.—Instructions.—Pleading.

The rule last stated is not rendered inoperative because the court may erroneously and over objection have admitted testimony upon such extraneous issues.—Bank v. Broyles, 16 N. M. 414.

Trial.—Instructions.—Special Issues.

The proper practice requires the submission only of such issues to the jury as would determine the ultimate or constitutive facts.—Putney v. Schmidt, 16 N. M. 400.

Trial.—Instructions.—Pleadings.

It is not error to refuse to submit to the jury issues not raised by the pleadings.—Bank v. Broyles, 16 N. M. 414.

Usury.—Contract.

By their contract the plaintiff and defendants agreed that the law of the contract should be the statutes of the State of Colorado. The defendants answered that the contract called for the payment of more than twelve per cent. interest per annum, contrary to Section 2552, C. L. 1897: Held, the allegation did not constitute a defense, the contract being governed by the laws of the State of Colorado.—Good et al v. Loan Co., 16 N. M. 461.

Vendor and Purchaser.—Consideration.

One is not a purchaser for a valuable consideration where the consideration is antecedent debts without surrender or cancellation of any written security by the creditor.—Retsch v. Renehan et al, 16 N. M. 541.

Vendor and Purchaser.—Notice.—Record.

An acknowledgement of an assignment on the back of an executory contract for the sale of real estate to which the assignment refers for particulars and purposes of description is not, under the circumstances given in the following statement of the case, an acknowledgement of the contract itself; and although the contract was copied into the land records by the proper recording officer, that did not make it of record, and thereby constructive notice to a subsequent purchaser having no actual knowledge of it.—McBee v. O'Connell et al, 16 N. M. 469.

Verdict, Ambiguous.—Damages.

The jury brought in a verdict in favor of plaintiffs and assessing "their damages at five thousand dollars, at six per cent. interest:" Held, that the verdict was ambiguous and that the court committed no error in ordering the jury to

retire and bring in another verdict.—Di Palma v. Weinman, 16 N. M. 302.

Verification.—Mechanics' Lien Law.

Verification in case at bar deemed sufficient.—Lyons v. Howard & Destree, 16 N. M. 327.

Waters and Watercourses.—Appropriation.—Irrigation.

Until the time within which an application to beneficial use must be made to complete an initiated appropriation of water for purposes of irrigation was fixed by statute, it was necessary that such application be made within a reasonable time.—Irrigation Co. v. McMurray, 16 N. M. 172.

Waters and Watercourses.—Irrigation.—Corporation.

In this Territory a corporation has the right to make an appropriation of water from a natural stream and distribute it to those who may require it for purposes of irrigation, whether it has land connected with such irrigation system or not.—Irrigation Co. v. McMurray, 16 N. M. 172.

Waters and Water Courses.—Irrigation.—Damages.

The evidence did not require a finding of any more than nominal damages for the plaintiff.—Irrigation Co. v. McMurray, 16 N. M. 172.

Waters and Water Courses.—Irrigation Ditches.—Jurisdiction.

A project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the head gate, and about six miles of the irrigation ditch are in Colorado, is not within the jurisdiction of the territorial engineer of New Mexico, and he is without authority to issue a permit for such a project.—Turley v. Furman, 16 N. M. 253.

Waters and Water Courses.—Irrigation.—Injunction.

The plaintiff complained that the defendant had taken forcible possession of its dam, by means of which and a connected canal it had undertaken to supply and was supplying water from the Rio Hondo for irrigating crops, then growing, to a large number of farmers, who were dependent on it for water; that the defendant was taking water from its reservoir for his own use by removing flashboards from its said dam, so as to allow the water to flow down to his land on said stream, and that its business of supplying water, as aforesaid, would be irreparably injured by the acts of the defendant, if they should be continued: Held, that the matter was properly cognizable in a court of equity; that a preliminary injunction, and, after trial, a permanent injunction, were properly issued against the defendant.—Irrigation Co. v. McMurray, 16 N. M. 172.

Waters and Water Courses.—Personal Property.

The water of a natural stream, when impounded and reduced to possession by artificial means, is personal property. —Irrigation Co. v. McMurray, 16 N. M. 172.

Waters and Water Courses.—Riparian Rights.

The common law doctrine of riparian rights in natural streams has been superseded in New Mexico by that of prior appropriation and application to beneficial use of waters of the streams.—Irrigation Co. v. McMurray, 16 N. M. 172.

Wills.—Probate.—Guardian ad Litem.—Infant.

Under Sections 1983, 1985, 1986, 1987, C. L. 1897, it is the duty of the District Court, on appeal from a judgment of the Probate Court dismissing a petition to revoke the probate of a will, to appoint a guardian ad litem for an infant petitioner whose infancy is first disclosed at the trial, and a motion to dismiss the proceedings should not be sustained, notwithstanding the infant refused to apply for such appointment. —In re Dye v. Meece, 16 N. M. 297.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

JANUARY TERM, 1911.

[No. 1361, January 24, 1911.]

MILBERT F. PRICE and LOUIS F. LYON, Partners doing business under the firm name and style of PURITAN MANUFACTURING COMPANY, Appellees, v. B. TOTI and L. GRADI, Partners doing business under the firm name and style of TOTI & GRADI, Appellants.

SYLLABUS (BY THE COURT).

1. A motion by appellee to docket and affirm will be granted where appellant has failed to file his transcript at least ten days before the return day or has failed to file assignments of errors on or before the return day, unless "good cause" be shown excusing the default.

2. The trial judge is not authorized to settle a bill of exceptions tendered less than ten days before the return day and his failure so to do does not constitute good cause for appellant's failure to file transcript and assignment of errors within the statutory period.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Associate Justice. Motion to docket and affirm granted.

T. N. WILKERSON for Appellants.

FELIX H. LESTER for Appellees.

OPINION OF THE COURT.

POPE, C. J.—The appeal was allowed in the cause on February 26, 1910. Under Laws of 1909, Chapter 120,

Section 1, the return day was one hundred and thirty days later, to-wit: July 6. On July 23, the return day was extended to August 22. No further extension was given. No transcript or assignment of errors having been filed on or before November 19, 1910, appellee moved to dismiss the appeal for failure to file each of these. Since, under Laws 1907, Chapter 57, Section 21, the transcript must be filed at least ten days before the return day, the assignments of error on or before such return day, the motion is on its face well taken. The appellant admits non-compliance with the statute in each of the respects urged, but claims that there exists such "good cause" for the omissions as, under Laws of 1907, Chapter 57, Section 21, and Laws 1909, Chapter 120, Section 2, excuses the default. The excuse tendered is the fact that the trial court refused to settle the bill of exceptions when tendered. Waiving the suggestion that this refusal, if improper, was a matter for correction at the time by mandamus, we
1 are of the opinion that upon the record the action of the trial court was proper. The bill of exceptions was tendered after five days notice for approval on August 13, less than ten days before the extended return day, which latter, as we have seen, was August 22. This tendered it too late for approval. Laws of 1907, Chapter 57, Section 21, requires the appellant to file his transcript at least ten days before the return day, which necessarily requires the bill of exceptions to be settled before that time. The tender was likewise too late for any order extending the time for settling the bill of exceptions, since Laws 1909, Chapter 120, Section 4, prohibits such extension of time unless application therefor shall be made at least ten
2 days prior to the return day. The trial judge had, therefore, no alternative but to refuse to settle the bill of exceptions so tardily presented.

Appellee's motion to docket and affirm is granted.

[No. 1216, January 26, 1911.]

UNITED STATES OF AMERICA, Appellee, v. SANTA RITA STORE COMPANY and SANTA RITA MINING COMPANY, Appellants.

SYLLABUS (BY THE COURT.)

1. In a prosecution for violation of the anti-trust act; (Act July 2, 1890, Chapter 647, Section 3, 26 Stat., 209 U. S. Comp. St. 1901, p. 3200); held, that a conspiracy between two corporations cannot be formed by the acts and thoughts of one person acting as the agent of both corporations. "The union of two or more persons, the conscious participation of two or more minds, is indispensable to an unlawful combination." Per Sanborn J., Union Pacific Coal Company v. United States, 173 Fed. 737.

Appeal from the Third Judicial District Court before FRANK W. PARKER, Associate Justice. Reversed and remanded.

HARLEE & BARNES and W. B. CHILDERS for Appellants.

"The existence or nature of a conspiracy cannot be established by the acts or declarations of one conspirator in the absence and without the knowledge and concurrence of the other. 3 Enc. of Ev. 411 h; 1 Green on Ev., 13 ed. 134, sec. 111; 26 Fed. Cas. No. 15,685, p. 1106; U. S. v. Newton, 52 Fed. 285; Benton v. Minneapolis Tailoring and Mfg. Co. 267; Reisan v. Mott, 42 Minn. 49, 43 N. W. 691; U. S. v. Smith, 26 Fed. Cas. 1144, Case No. 16,322.

Principal and Agent. Scope of Agency. Notice. 7 Words and Phrases 6356; Goodloe v Mem. & Char. R. Co., 29 L. R. A. 729; Stockwell v. U. S., 13 Wallace 548; Schreiber v. Sharpless, 6 Fed. 175; McDonald v. Hearst, 95 Fed. 656; Railway Co. v. Prentice, 147 U. S. 101; Commonwealth v. Morgan, 107 Mass. 199; Meridian Water Co. v. Schulherr, 17 So. 167; Diffenbaugh v. Paper Co., 79 N. W. 197; Baird Lumber Co. v. Devlin, 27 So. 425; Sweetser v. Shorter, Ala., 26 South. 298; U. S. v. Newton, 52 Fed. 275; Park Hotel Co. v. Fourth National Bank, 86 Fed. 742; Bank of Commerce v. Baird Mining Co., 13

N. M. 424; Washington Gas Light Co. v. Lansden, 172 U. S. 534; Warner v. Mo. Pac. R. Co., 112 Fed. 114; 3 Clark and Marshal on Corp., sec. 700, p. 2118; Mechem on Agency, secs. 714, 750; Henry v. Pittsburg etc. R. Co., 21 At. 157; Ware v. B. & L. Canal Co., 35 Am. Dec. 192, note; Linblom v. Ramsey, 75 Ill. 246.

It is not the existence of the restriction of competition, but reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade. Malice. Minnesota v. Northern Securities Co., 194 U. S. 48; Northern Sec. Co. v. U. S., 193 U. S. 360; Dueber Watch Case Mfg. Co. v. Howard Watch and Clock Co., 66 Fed. 644; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; Payne v. R. R. Co., 49 Am. Rep. 666; Chamberlain v. Baldwin, 91 Ky. 11 L. R. A. 550; 44 N. E. 1081; 167 Mass. 107; Com. v Hunt, 4 Metc. 111; Bowen v. Matthewson, 14 Allen 497; Chipley v. Atkinson, 11 Am. St. Rep. 71; Cohens v. Virginia, 6 Wheat. 264; Harriman v. Northern Securities Co., 197 U. S. 291; Field v. Barber Asphalt Co., 194 U. S. 623; Hopkins v. U. S., 171 U. S. 578; Addyson Pipe Co. v. U. S., 175 U. S. 211; Swift & Co. v. U. S., 196 U. S. 396; Aikens v. Wisconsin, 195 U. S. 194; Commonwealth v. Peaslee, 177 Mass. 267; Leloup v. Port of Mobile, 127 U. S. 640; Crutcher v. Kentucky, 141 U. S. 47; U. S. v. E. C. Knight Co., 156 U. S. 1; Kidd v. Pearson, 128 U. S. 1; Sedgwick Statutory and Const. Law, 2 ed. 309; Dwarris on Statutes, 653; Hyde v. Cogan, 2 Doug. 702; 1 Eddy on Combinations, secs. 47, 48, 560, 570; 2 Eddy on Combinations, secs. 68, 726, 727, 800, 802, 807; Boyer v. W. U. Tel. Co., 124 Fed. 248; Toledo & A. A. & M. Ry. Co. v. Pa. Co., 54 Fed. 738; Payne v. Atl. R. R. Co., 49 Am. Rep. 666; In re Greene, 52 Fed. 104; U. S. v. Joint Traffic Assoc., 171 U. S. 567; Hopkins v. U. S., 171 U. S. 578; Whitwell v. Continental Tobacco Co., 125 Fed. 455; Phillips v. Iola Portland Cement Co., 125 Fed. 594; Anderson v. U. S., 171 U. S. 604; Smith v. Ala., 124 U. S. 465; Prescott, etc. Ry Co. v. A. T. & S. F. Ry. Co., 73 Fed. 438; West Va. etc. Co. v. Standard Oil Co., 88 Am. State Rep. 896; Mogul S. S. Co. v. McGregor, 21 Qb. Div. 544; Continen-

tal Ins. Co. v. Underwriters of the Pacific, 67 Fed. 314; McCauley v. Tierney, 33 Atl. 2; Heywood v. Tillotson, 75 Me. 225, 46 Am. Rep. 373; Bohn Mfg. Co. v. Hollis, 55 N. W. 1119, 21 L. R. A. 337; Chambers v. Baldwin, 11 L. R. A. 545; 19 A. & E. Enc. of Law 625; Boyson v. Thorn, 98 Cal. 583, 33 Pac. 490; McCune v. Norwich City Gas Co., 50 Conn. 524; Orr v. Home Mutual Ins. Co., 12 La. Ann. 255; Crow v. Building Trades Council, 97 N. W. 763, 63 L. R. A. 759; Ertz v. Produce Exchange, 81 N. W. 837, 40 L. R. A. 90; Cote v. Murphy, 159 Pa. 433, 28 Atl. 190; Smith v. Johnson, 76 Pa. St. 191; Glender v. Uhler, 75 Pa. St. 467; Payne v. Chandler, 34 N. Y. 385, 32 N. E. 18; People ex rel Burnham v. Flynn, 100 N. Y. Supp. 31; Phelps v. Noland, 72 N. Y. 39; Chambers v. Baldwin, 91 Ky. 121, 11 L. R. A. 545; Bourlier v. McCauley, Ky., 11 L. R. A. 550; Jenkins v. Flower, 24 Pa. St., 11 L. R. A. 545.

In criminal cases, charging in the language of the statute is not sufficient. 26 Stat. L. 209; in re Greene, 52 Fed. 104; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Cook, 17 Wallace 158; U. S. v. Carl, 105 U. S. 613; U. S. v. Armstrong, 2 Curt. 446; U. S. v. Coppersmith, 4 Fed. Rep. 198; U. S. v. Simonds, 96 U. S. 360; U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. Rep. 512; U S. v. Trumbull, 46 Fed. Rep. 755; 2 Story, Const., sec 1875; Commonwealth v. Clifford, 8 Cush., Mass. 215; Comm. v. Bean, 11 Cush. 414, 14 Gray 52; Com. v. Milburn, 119 Mass. 297; U. S. v. Patterson, 55 Fed. 605; U. S. v. Milner et al, 36 Fed. 890; Com. v. Hunt, Mass., 4 Met. 111; in re Corning, 51 Fed. 205.

Public Policy. 26 Stat. L. 209; 8 Words and Phrases 7038; U. S. v. Patterson, 55 Fed. Rep. 640; Queen Ins. Co. v. State, 22 L. R. A. 490; Sedgwick on Statutory and Const. Law, 2 ed 309; Continental Ins. Co. v. Underwriters, 67 Fed. 314; Cote v. Murphy, 159 Pa. St. 420, 25 At. 190; Boyer v. Western Union Tel. Co., 124 Fed. 248; Payne v. Ry. Co., 49 Am. Rep. 670; Allen v. Flood, 1 Eddy, sec. 482; Sharp v. Whitside, 19 Fed. 156; Carroll v. Giles, 9 S. E. Rep. 423.

The business of a rival may be lawfully purchased for the purpose of getting rid of competition. Gamble v. Queens Co. Water Co., 123 N. Y. 91; Diamond Match Co. v. Roebe, 106 N. Y. 473; Rufferty v. Buffalo Gas Co., 37 N. Y. App. Div. 618; Trenton Potteries Co. v. Olymphant, 56 N. J. Eq. 680; Oakdale Co. v. Garsh, 18 R. I. 484; Minnesota v. Northern Securities Co., 194 U. S. 48; Northern Sec. Co. v. U. S., 193 U. S. 332; U. S. v. Joint Traffic Assoc., 171 U. S. 571.

Instruction asked to find defendants not guilty. U. S. v. Hamilton, 26 Fed. Cas. 90, Case No. 15,288.

Instructions requested and refused. U. S. v. Newton, 52 Fed. 282; People v. Powell, 63 N. Y. 88.

Errors in giving instructions. 2 Thompson on Trials 1682, sec. 2326; People v. Powell, 63 N. Y. 92; Continental Ins. Co. v. Underwriters, 67 Fed. 319; Oliver v. Hutchinson, 69 Pac. 139; People v. Dumar, 5 N. Y. Cr. Rep. 55; State v. Smith, 71 Pac. 767; State v. Boyle, 28 Iowa 522.

W. H. H. LLEWELLYN, Special Assistant to the U. S. Attorney General, and D. J. LEAHY, United States District Attorney, for Appellee.

Any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy may be given in evidence against himself or his co-conspirators. 4 Elliott on Evidence 203, secs. 2934, 2939; 8 Cyc. 679, 682; Kelly v. People, 52 N. Y. 565; Tucker v. Finch, Wis., 27 N. W. 817; U. S. v. Newton, 52 Fed. 285; U. S. v. Cassidy, 67 Fed. 698; U. S. v. Lancaster, 44 Fed. 896; McKee v. State, 111 Ind. 378, 12 N. E. 510; Riehl v. Evansville Foundry Assoc., Ind., 3 N. E. 633; People v. Saunders, 25 Mich. 119; 2 Wigmore on Evidence 1282, sec. 1079; Wharton's Criminal Evidence, 9 ed. 599, sec. 698 a; McClain Crim. Law, sec 989; State v. Thompson, 69 Conn. 720, 38 Atl. 868; State v. Jackson, 82 N. C. 565; Luttrell v. State, 31 Tex. Crim. 493, 21 S. W. 248; State v. Bolden, 109 La. 484, 33 So. 571; State v. Winner, 17 Kan. 298; State v. Miller, 35 Kan. 328, 10 Pac. 865; Harris v. State, 31 Tex. Crim.

411, 20 S. W. 916; Cox's case, 8 Tex. App. 254; State v. Jackson, 82 N. C. 565; State v. Raiter, 52 W. Va. 132, 43 S. E. 238; Cain's Case, 20 W. Va. 679; Amery v. State, 10 Tex. Crim. App. 199.

The acts of an agent of a corporation, if done within the apparent scope of the agent's general authority, are the acts of the corporation even to the extent of rendering the corporation criminally responsible for such acts. Com. v. Proprietors of New Bedford Bridge, 2 Gray, Mass. 339; Clark and Marshall on Private Corporations 648, secs. 246-257; State v. Louisville & Nashville R. Co., 91 Tenn. 445; Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678; Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109; Adams Mining Co. v Senter, 26 Mich. 73; Phillips & Buttorf Mfg. Co. v. Whitney, Ala., 20 So. 333; U. S. v. Freight Assoc., 166 U. S. 290; Addyson Pipe & Steel Co. v. U. S., 175 U. S. 211; State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25; 3 Greenleaf on Evidence, sec 21; 1 Wharton's Criminal Law, 10 ed., secs. 23 a, 188; Com. v. Mash, 7 Met. 472; Clark & Marshall on Crimes 78, sec 56 a; People v. Roby, 52 Mich. 577, 18 N. W. 365; People v. Blake, 52 Mich. 576, 18 N. W. 360; Com. v. Kelley, 146 Mass. 441, 5 N. E. 834; Com. v. Connelly, 40 N. E. 862; People v. Waldvogel, Mich., 13 N. W. 620; Clark & Marshall on Crimes 265; 11 Enc. P. & P. 246; Weller v. Hawes, 49 Iowa 45; Campbell v. Ormsby, 65 Iowa 518; Pierce v. Milloy, 62 Ill. 133.

Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman Act as now interpreted, restraint of trade. U. S. v. Swift & Co., 122 Fed. 529; Freight Association Case, 166 U. S. 290, 17 S. C. 540, 41 L. ed. 1007; Traffic Case, 171 U. S. 558, 19 S. C. 25. 43 L. ed. 259; Northern Securities Co. v. U. S., 193 U. S. 197; Stewart v. Transportation Co., 17 Minn. 372; U. S. v. Debs, 64 Fed. 724; in re Debs, 158 U. S. 564; Ellis v. Inman, Pouken & Co., 131 Fed. 183; State v. Rowley, 12 Conn. 101; State v. Buchanan, 5 Har. & J., Ind. 317; Com. v. Mifflin, 5 W. & S. 461; Twitchell & Norton v. Com., 9 Pa. St. 211; State v. Donaldson, 32 N. J. L. 151; King v. Leigh, 2

Macklin's Life 217; Clifford v. Brandon, 2 Camp. 358; King v. Eacles, 3 Douglass 337; Rex v. Cope, 1 Str. 144; 6 A. & E. Enc. Law, 2 ed. 861; Webb v. Drake, 52 La. Ann. 290, 26 So. 791; Hopkins v. Oxley Stove Co., 83 Fed. 912; Mogul Steamship Co. Ltd. v. McGregor, Gow & Co., 21 Q. B. Div. 544.

Penal laws are to be construed strictly but they are not to be construed so strictly as to defeat the obvious intention of the legislature. U. S. v. Wiltberger, 5 Wheat. 76; Northern Securities Co. v. U. S., 193 U. S. 197; McKee v. State, 111 Ind. 378, 12 N. E. 510; U. S. v. Newton, 52 Fed. 275; U. S. v. Cassidy, 67 Fed. 698; 8 Cyc. 685; Regina v. Murphy, 8 C. P. 297, 34 E. C. L. 744; U. S. v. Hopkins, 82 Fed. 529.

A conspiracy may and nearly always must be proven by circumstantial evidence. U. S. v. Newton, 52 Fed. 275; Archer v. State, 106 Ind. 426; Grimes v. Bowerman, 92 Mich. 458, 52 N. W. 751; Horton v. Lee, 106 Wis. 439, 82 N. W. 360; Patuode v. Westenhove, 114 Wis. 460, 90 N. W. 467; State v. Thompson, 69 Conn. 720, 38 A. 868; People v. Peckens, 153 N. Y. 576, 47 N. E. 883; Kelley v. People, 55 N. Y. 565; 4 Elliott on Evidence, sec. 2936; People v. Bentley, 75 Cal. 407, 17 Pac. 436; People v. Saunders, 25 Mich. 119; McKee v. State, 111 Ind. 378, 12 N. E. 510; U. S. v. Newton, 52 Fed. 275.

Sufficiency of indictment. Rev. St., sec. 5440; Wright v. U. S., 108 Fed. 805, 48 C. C. A. 37; State v. Berry, 21 Mo. 504; State v. Grant, 86 Iowa 216, 53 N. W. 120; 8 Cyc 667, 669; U. S. v. Gordon, 22 Fed. 250.

Public Policy. In re Greene, 52 Fed. 104; U. S. v. Cassidy, 67 Fed. 698.

OPINION OF THE COURT.

MECHEM, J.—1. The appellants, the Santa Rita Mining Company and the Santa Rita Store Company, were jointly indicted with one John Deegan and one William Young for a violation of Section 3, Act of Congress, approved July 2, 1890, Chapter 647, 26 Stat. at Large 209, which is as follows: "Sec. 3. (Trusts, etc., in Territories

or District of Columbia illegal — persons combining guilty of misdemeanor.) Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States x x x x x x x x x is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (26 Stat. L. 209). The appellants were convicted. Deegan and Young were acquitted.

The record shows that the appellants are New Jersey Corporations, the mining company owning and operating mines at Santa Rita, Grant County, New Mexico, and the Store Company carrying on a general merchandise business at the same place. Deegan was the general agent in charge of the business of both companies, and Young was an employee under Deegan. No other officer of either company lived or was in New Mexico during the period named in the indictment, or at any time thereafter. Deegan reported to one Broughton in New York, who had charge of the New York Offices of the Companies and no other officer of either company is mentioned in the record of this case. The indictment charged that the defendants conspired to coerce and compel the employes, lessees and tenants of the appellant to trade exclusively with the Santa Rita Store Company, and as an overt act further charged that on the 10th day of January, 1905, the defendants ordered the employees, lessees and tenants of appellants to quit trading with C. L. Turner & Son, of Santa Rita, a firm competing with the Santa Rita Store Company, with the threat that any employe would be discharged, and any lessee would be refused a renewal of his lease who failed to comply with said order. There was no evidence that any officer or agent of either of appellants, (other than Deegan) participated in or had knowledge of the acts of which complaint is made.

Undoubtedly, a conspiracy might be formed by two

corporations acting through agents, yet there must be more than one agent or more than one person actually engaged in the formation of the conspiracy. In this case a conspiracy was not formed because of a lack of persons. Deegan could not conspire with himself; neither could two or more corporations conspire alone by means of Deegan. Had some other officer or agent of either corporation participated in, or had knowledge of, the scheme, then a conspiracy might have been formed between the two defendant corporations. "The union of two or more persons, the conscious participation in the scheme of two or more
1 minds, is indispensible to an unlawful combination, and it cannot be created by the action of one man alone." per Sanborn, J., in Union Pacific Coal Company v. United States, 173 Fed. 737.

The trial court should have sustained the motion made by appellants for an instructed verdict. For the foregoing reasons, the judgment of the lower court is reversed and the case remanded.

Roberts, A. J., who was not a member of the Court when the case was submitted, did not participate in this decision.

[No. 1315, January 26, 1911.]

TERRITORY OF NEW MEXICO, Appellee v. ROBERT H. PIERCE, Appellant.

SYLLABUS (BY THE COURT.)

1. It is not error to refuse a requested instruction even if correct in law, if the instructions given by the court on its own motion fully cover the law of the case.

2. On a trial for assault with intent to commit rape, and taking and detaining a female unlawfully with intent to compel her to be defiled, where the defense is that the defendant is suffering from senile impotency and hence incapable of forming the intent necessary to constitute either offense, a medical expert may testify as to whether or not, in his opinion as an expert, the conduct of the defendant, set out in a hypothetical question, indicated senile impotency.

3. Evidence of the reputation of a defendant for truth

and veracity is not admissible, (prior to any attack upon such reputation), except where such reputation or trait of character has reference to the nature of the charge against him.

CHARLES A. SPIESS for Appellant.

A court may refuse to give the instruction in the exact language in which the request is made, but it must then give an instruction of its own which substantially directs the jury as to the law of the case. 1 Bishop's New Criminal Law, sec. 731; State v. Massey. 41 Am. Rep. 478.

The opinion of a medical man upon matters not of skill in his profession, or on questions of law, or on conclusions or inferences which it is the province of the jury to draw for themselves, or on matters of mere speculation, is inadmissible. Lawson on Expert and Opinion Evidence 146, rule 28.

The defendant accused of a capital crime should be permitted to show his good character. 3 Enc. of Ev. 6; Com. v. Cleary, 135 Pa. 64, 8 L. R. A. 301; 3 Rice on Ev., secs 371-380; Eddington v. U. S. 164 U. S. 363.

FRANK W. CLANCY, Attorney General for Appellee.

There was no error in refusing to give defendant's instruction.

There was no error in admission of opinion of medical man.

There was no error in refusing to permit defendant to show his general reputation for truth and veracity. 1 Greenl. Ev., secs. 54, 55; People v. Fair, 43 Cal. 137; State v. Bloom, 68 Ind. 56; Kee v. State, 28 Ark. 164; Whart. Am. Crim. Law, sec. 636; 1 Bish. Crim. Pr., sec. 489; People v. Chrisman, 135 Cal. 228; Kilgore v. State, 74 Ala. 7; State v. Dalton, 27 Mo. 16; Morgan v State, 88 Ala. 224; State v. Curran, 51 Iowa 116; State v. Kinley, 43 Iowa 296; 1 Philips on Ev. 643; 3 Greenleaf on Ev., sec. 25; Westbrooks v. State, 76 Cal. 713.

STATEMENT OF FACTS.

Robert H. Pierce, the defendant, was indicted by the grand jury of Bernalillo County; the indictment containing two counts, the first count charging an assault with intent

to rape, and the second taking and detaining a female unlawfully with intent to compel her to be defiled. Trial was had, and the defendant was convicted on the second count of the indictment, and, after a motion for a new trial being overruled, he was sentenced to imprisonment in the territorial penitentiary for a period of not more than four years nor less than two years. The motion for a new trial sets out nineteen assignments of error, all but three of which were abandoned for the purposes of this appeal. The three assignments of error which are urged upon appeal are as follows: 1. The court erred in refusing to give to the jury, at the request of the defendant, instruction Number Two of defendant's instructions. 2. The Court erred in permitting Dr. Tipton, over the objections of defendant, to give his opinion in answer to a hypothetical question, that the defendant in his opinion was not impotent. 3. The Court erred in refusing to permit the defendant to put in evidence, in his own behalf, his general reputation for truth and veracity in the community where he resides. These three assignments of error will be discussed separately.

The evidence in the case is too disgusting and revolting to attempt to set the same out or discuss it at any length. In brief, the evidence shows that the prosecutrix, Ada Hooker, was a blind girl and a student at the Territorial Asylum for the Blind at Alamogordo, New Mexico, and that in October, 1908, she, with other students, was in attendance on the Irrigation Congress and Territorial Fair at Albuquerque, New Mexico, in charge of the defendant, Pierce, who was one of the trustees of the institution. It was further shown that between seven and eight o'clock in the evening of October 2, 1908, he went to the house where the prosecutrix was lodging with another girl and took her for a walk about town, finally reaching a rooming house where he had a room. So far there is no dispute as to the facts. From this point the testimony of the prosecutrix shows that the defendant, Pierce, in order to get her to go to his room, told her that he was taking her to see the Territorial Delegate in Congress. with regard to some land matters in which she was in-

terested. He led her up stairs and along the hall to his room, the door of which he unlocked, and, taking her inside, he closed and locked the door behind them. The defendant kept the prosecutrix in this room for a period of nearly three hours during which time, by means of indecent familiarities, threats, and even physical force, he attempted to defile her. The evidence of what occurred in the room is too disgusting to be set out in detail, and it is not necessary for a determination of the points raised on this appeal. The appellant, for a defense, set up that whatever of indecent familiarities took place was begun by the blind girl, and not by him; that he was impotent and physically incapable of accomplishing any act of sexual intercourse, and therefore incapable of having any such intent as was set up in either count of the indictment.

OPINION OF THE COURT.

WRIGHT, J.—1. Refused Instruction No. 2, of which the appellant complains, is as follows: "If the jury believe from the evidence in the case, that the defendant had the intent, at the time of the alleged offense of assaulting or taking or detaining the complaining witness, as set forth in the indictment, not to rape her or to compel her to have sexual intercourse with him by force or menace or duress, but only to solicit or persuade her to consent to sexual intercourse with him, the court instructs the jury that the intent to accomplish such sexual intercourse by solicitation or persuasion does not prove the intent charged in the indictment, and it is their duty to find the defendant not guilty." A careful reading of the record will show that the court, on his own motion, fully instructed the jury with reference to the intent set out in the first count of the indictment, and, after having so instructed the jury with reference to the first count, proceeds as follows: "Such an intent is, however, essential to the commission of the offense charged, and unless you are so satisfied that the defendant had that intent and not merely an intent of some other kind, as, for instance, to persuade her to have sexual intercourse with him, or to get whatever sexual gratification he could from such embracing and handling

of Ada Hooker, as you may find from the evidence he did, or to accomplish any other purpose except the one charged in the first count, then, however reprehensible such other intent and purpose may have been, you should find him not guilty under that count." The court then continues, after setting out the necessity of the jury being satisfied beyond a reasonable doubt of that which was charged in the second count of the indictment, as follows: "Unless you are satisfied that the defendant took and detained Ada Hooker in said room by compulsion and against her will and that she did not stay there voluntarily and that he took and detained her there with the intent charged, and not with some other intent or purpose instead of that, you should find him not guilty on the second count." A mere reading of these instructions above quoted completely settles this question and shows that the court fully instructed the jury upon his own motion as to what intent must be shown before the jury was warranted in finding the defendant guilty upon either count. The court having frequently held that it is not error to refuse a requested instruction where the same matter in substance has been given in the main charge, this question needs no further discussion. Territory vs. Chaves, 6 N. M. 455, 30 Pac. 903; Territory vs. Anderson, 4 N. M. 213, 13 Pac. 21; Territory vs. Baker, 4 N. M. 236, 13 Pac 30; Territory vs. Beall, 1 N. M., 507, 518; Territory vs. Price, 14 N. M. 262, 91 Pac. 733.

2. The second assignment relates to the admissibility of the evidence of Dr. Tipton. The appellant in his brief objects to such evidence for the reason that the same was incompetent, in other words, that the matters as to which Dr. Tipton was asked to give his opinion as an expert were not matters as to which expert testimony could be given; that the hypothetical question stated to Dr. Tipton, which hypothetical question contained a brief statement of the testimony given by the prosecuting witness, called for a conclusion or inference which should have been left to the jury to determine. A careful reading of the record, however, discloses the fact that the main hypothetical question as stated to Dr. Tipton was objected to by counsel for

appellant for the reason that the hypothetical question as stated, did not embody all the facts in the case. No objection was taken as to the compentency of said question, and such objection cannot be heard for the first time on appeal. The question, after stating the facts from the testimony of the prosecutrix, concluded as follows: "Would or would not that conduct indicate senile impotency?" to which the Doctor responded: "I believe it does not indicate senile impotency." No motion to strike this answer was made, hence no objection to this answer can be urged in this court for the first time. The Doctor was then asked his reasons for his opinion. A general objection was made to the question as irrelevant, incompetent and immaterial. A reading of appellant's brief, however, discloses the fact that it is not the question, but the answer which is objectionable. In reply, the Doctor answered: "The action described showed sexual desire and a wish to gratify it." No objection was taken to this answer by way of motion to strike, and hence, if there is anything objectionable in the answer, it is not now here for review. However, a careful reading of the record in this case, discloses the fact that the defendant, as one of his defenses, offered medical testimony to prove that he was suffering from senile impotency, and that by reason of such senile impotency he was unable to form the intent necessary to commit the crime charged in either the first or second count. Having tendered this as a defense, it certainly was incumbent upon the Territory to meet the issue as best it could. The Territory met this issue by the testimony of Dr. Tipton. Dr. Tipton testified that he was a physician and surgeon and had been in the practice of his profession for over thirty years; that he had been medical superintendent of the New Mexico Insane Asylum and Surgeon General of the Territory for a number of years; that during the period of his professional experience he had had occasion to treat many cases of senile impotency. He then proceeded and described the condition that is ordinarily called senile impotency. All of this testimony was without objection by the appellant. Having so testified as to his experience and qualifications, he was then asked the hypo-

thetical question which is complained of. In our opinion, it is not necessary to discuss the matter, otherwise than to say that we believe the opinion of Dr. Tipton upon such
2 hypothetical question, together with the succeeding answer wherein he states his reasons for such opinion, were properly admitted as expert testimony.

3. The third assignment of error alleges that the court erred in not permitting the defendant to show his general reputation for truth and veracity in the community wherein he resided. There can be no question but that evidence of the character and reputation of a defendant charged with a crime is always admissible on behalf of defendant. This rule, however, is subject to the well established limitation that such evidence must be restricted to the trait of character which is in issue and ought to have some reference to the nature of the charge. In the case of Kilgore v. The State, 74 Ala. 7, quoted in appellee's brief, the court said: "In all criminal prosecutions, whether for felony, or for misdemeanor, the previous good character of the accused, having reference and analogy to the subject of the prosecution, is competent and relevant as original testimony; it is a fact which must be submitted to the jury, and ought to be considered by them in determining whether he is guilty of the offense with which he is charged." See, also, Greenl. Evidence, secs. 54 and 55; Phillips on Evidence, page 490; State v. Kinley, 43 Iowa 294; State v. Curran, 51 Iowa 112; People v. Chrisman, 135 Cal. 282; People v. Cowgill, 93 Cal. 596. Appellant, in his brief cites the case of Edgington v. The United States, 164 U. S. 363, as a case supporting his contention that the court erred in excluding testimony as to the defendant's general reputation for truth and veracity. A reading of this case, however, discloses the fact that it was a prosecution for the making of a false deposition in aid of a fraudulent pension claim. In other words, the very character of the crime itself makes relevant the reputation of the defendant for truth and veracity upon the question of whether it is likely or unlikely that he would be guilty of this particular crime of making a false deposition; in other words, false swearing. It thus plainly

appears that the very case upon which appellant relies comes strikingly within the limitations upon the general rule. The judgment of the court below is affirmed.

Roberts, A. J., not having been a member of the court at the time of the submission of this case did not participate in this decision.

[No. 1320, January 26, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. JACK DONAHUE, alias JOHN DONAHUE, Appellant.

SYLLABUS.

1. Where the objection and exception to the manner of the discharge of the jury were never made a part of the record by a bill of exceptions, the objection not appearing on the record proper nor by bill of exceptions, and as far as the record is concerned, it appears that the jury was discharged without objection and with the implied consent and in the presence of the appellant, the stenographer's record will not be received to control the record in the case. District of Columbia v. Woodbury, 136 U. S. 450-456.

2. Where the district attorney based his motion to strike on the ground that the allegations of the plea of former acquittal were in contravention of the record itself, an issue was presented which could have been tried only by an inspection of the record and the record disclosing the fact that the plea impeached it, the plea must fail because the record must stand.

3. Held to be error to refuse requested instruction correctly construing statute as to competency of witness to testify in his own behalf, the instruction given narrowing the terms of the statute.

4. Instruction to jury that reported that they were unable to agree, sending it out for further consideration, held to be correct. Allen v. U. S., 164 U. S. 492-501.

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

E. L. MEDLER, THOMAS N. WILKERSON and W. C. HEACOCK, for Appellant.

The defendant in a criminal prosecution has a right to be present in court at the time the jury is discharged before they have arrived at a verdict. The action of the court in discharging the jury in the manner set up in the plea constituted an acquittal of the defendant. State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719; 2 G. & H. 412, Sec. 94; State v. Hurlburt, 1 Root 90; State v. Braunschweig, 36 Mo. 397; Price v. The State, 2 Morris St. Cas. 1168; Dunn v. Commonwealth, 6 Pa. St. 384; Dougherty v. Commonwealth, 69 Pa. 266; Sneed v. State, 5 Ark. 431; Wharton Crim. Law, sec. 2999; Prince v. Commonwealth, 18 Pa. St. 103; Andrew v. State, 2 Sneed, 550; Jackson v. Commonwealth, 19 Grat. 656; 4 Bl. Com. 375; 2 G. & H. 420, sec. 122; People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; ex parte McLaughlin, 41 Cal. 212; Upchurch v. State, 36 Tex. Crim. Rep. 624; Bishop's Crim. Proc., sec. 272, sub-div. 2; Rudder v. State, 29 Tex. App. 262; State v. Sommers, 60 Minn. 90; State v. Alman, 64 N. C. 364; State v. Shuchardt, 18 Neb. 454; Finch v. State, 53 Miss. 363; State v. Smith, 44 Kan. 75, 8 L. R. A. 774; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Maden v. Emmons, 83 Ind. 331; State v. Leunig, 42 Ind. 541; ex parte Tice, 32 Or. 179, 192; Miller v. State, 8 Ind. 325; State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499; Jones v. State, 97 Ala. 77; Commonwealth v. Fitzpatrick, 1 La. Rep. Am. 452; Peiffer v. Com., 15 Pa. 468; McFadden v. Com., 23 Pa. 12; Alexander v. Com., 105 Pa. 1; Hilands v. Com., 1 Cent. Rep. 899, 111 Pa. 1; State v. McKee, 1 Bailey Law 651, So. Ca., 21 Am. Dec. 502; Bishop Crim. Law 608; O'Brien v. C., 9 Bush 333, 15 Am. Rep. 715; King v. P., 5 Hun. 297; Hines v. S., 24 Ohio St. 134; P. v. Webb, 38 Cal. 467; Gruber v. State, 3 W. Va. 699; Lee v. State, 26 Ark. 260; Bell v. State, 44 Ala. 393; State v. Callendine, 8 Iowa 288; People v. Horn, 70 Cal. 17; Pizano v. State, 20 Tex. Ap. 139; State v. Moon, 41 Wis. 684; ex parte Maxwell, 11 Nev. 428; Adams v. State, 99 Ind. 244; Foster v. State, 88 Ala. 182; Boswell v. State, 111 Ind. 47; Williams v. Com., 78 Ky. 93; State v. Kelly,

97 N. Car. 404, 2 Am. St. Rep. 299; Younger v. State, 98 Am. Dec. 791; Cook v. State, 31 Am. Rep. 31; State v. Epps, 76 N. C. 55; State v. Paylor, 89 N. C. 539; State v. Sheets, 89 N. C. 543; Price v. State, 36 Miss. 531, 72 Am. Dec. 195; Fight v. State, 7 Ohio St. 1, 28 Am. Dec. 626; 30 Am. Rep. 9; People v. Lightner, 49 Cal. 226; 9 E. P. & P. 636, 639; Wilson v. State, 45 Tex. 76; Shubert v. State, 21 Tex. Ap. 551; Troy v. State, 10 Tex. App. 319; State v. Johnson, 11 Nev. 273; Usher v. State, 42 Tex. Cr. 461, 60 S. W. 555; Woodward v. State, 58 S. W. 135; Smith v. State, 18 Tex. App. 329, 2 S. W. 883; Munch v. State, 25 Tex. Ap. 30, 7 S. W. 341; Grisham v. State, 19 Tex. Ap. 504; Kelly's Cr. Law, sec. 224; Thompson v. Commonwealth, 22 Grat. 912; State v. Huffman, 37 S. W. 797, 136 Mo. 58; 12 Cyc. 367, 368, 370; C. L. 1897, sec. 3422; Finch v. State, 53 Miss. 363, 44 L. R. A. 695; 1 Bish. on Cr. Law 621.

The defendant's right to have a true list of the jury is a substantial right. Logan v. U. S., 144 U. S. 263, 36 L. ed. 442; Territory v. Kelly, 2 N. M. 302; Laws 1905, ch. 116, secs. 9, 12, 24, 25; C. L. 1897, sec. 3425; 7 Cyc. 218; State v. Jenkins, 32 Kan. 477, 4 Pac. 809; Risner v. Com., 95 Ky. 539, 26 S. W. 388; State v. Love, 106 La. 658, 31 So. 289; Hewitt v. Saginaw, 71 Mich. 287, 39 N. W. 56; Kell v. Brillinger, 84 Pa. St. 276; 1 Thompson on Trials, sec. 15; Cox v. People, 19 Hun., N. Y. 430, affirmed, 80 N. Y. 500; Jones v. State, 3 Blackf., Ind. 37; Campbell v. State, 48 Ga. 353; People v. Lebadie, Mich., 33 N. W. 806; 1 Brickwood's Sackett on Instructions secs. 16 17.

Proceedings in issuing special venires and selection of jurymen therefrom, were irregular. Laws 1905, ch. 116, secs. 9, 12, 24.

Juryman challenged by defense was incompetent to try issue in case. People v. Joseph Damon, 13 Wend. 351; Gonzales v. State, 31 Tex. Cr. Rep. 508, 21 S. W. 253.

Juror without knowledge of defendant or permission of court separated from rest and visited his place of business. Defendant was entitled to a new trial. U. S.

v. Spencer, 8 N. M. 667; 1 Blashfield on Sackett, sec. 101; Wharton Crim. P. & P. 589; Jumpertz v. People, 21 Ill. 375; State v. Godfrey, Vt., Brayt. 170; Berry v. State, 10 Ga. 511; State v. Fertig, 84 Iowa 79, 50 N. W. 545; State v. McCormick, 84 Me. 566, 24 Atl. 938; Cochran v. State, 26 Tenn., 7 Hump. 544; People v. Shafer, 1 Utah 260; McQuillen v. State, 16 Miss. 587; Anderson v. State, 28 Ind. 22; State v. Brown, 36 Atl., Del. 458; Hampton v. State, 86 N. W. 596, 111 Wis. 127.

Court erred in refusing instruction "that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence." 2 Blashfield on Instructions, secs. 850, 854, 863; Vaughn v. Commonwealth, 85 Va. 671; Territory v. Baca, 11 N M. 559; Chitister v. State, 36 Tex. Cr. App. 635; Insurance Co. v. Mercantile Co., 13 N. M. 241; Territory v. O'Donnell, 4 N. M. 196; Territory v. Caldwell, 14 N. M. 535; C. L. 1897, sec. 3431; Wharton Crim. Ev., sec. 435; State v. Cameron, 40 Vt. 555; Beavers v. State, 58 Ind. 530; McKenzie v. State, 26 Ark. 334; People v. Tyler, 36 Cal. 522; State v. Grebe, 17 Kas. 458; Farrell v. People, 133 Ill. 244, 24 N. E. 423; State v. Landry, 85 Me., 26 Atl. 998; State v. Cameron, 40 Vt. 555; Thomas v. State, 36 So. 734, 139 Ala. 80; State v. Goff, 62 Kas. 104, 61 Pac. 683; reversing 10 Kas. App. 286 and State v. Evans, 9 Kas. App. 889; People v. Provost, 107 N. W. 716, 144 Mich. 17; Haynes v. State, 27 So. 601, Miss.; Matthews v. People, 6 Colo. App. 456, 41 Pac. 839; People v. Flynn, 73 Cal. 513, 15 Pac. 102; Foxwell v. State, 63 Ind. 539; Metz v. State, 46 Neb. 547, 65 N. W. 190; State v. Goff, 61 Pac. 683, 62 Kas. 104; Blashfield on Inst., secs. 276, 277.

Instructions not on the law of the case are error. C. L. 1897, sec. 2994; U. S. v. Densmore, 12 N. M. 99; 1 Brickwood's Sackett on Instructions, secs. 88, 93, 198.

Unauthorized interference with deliberations of jury. Territory v. Griego, 8 N. M. 138; People v. Harris, 43 N. W. Rep., Mich. 1060; McBean v. State, 53 N. W. Rep., Wis. 497; Swaggerty v. Caton, 1 Heisk., Tenn. 202; State

v. Keifer, 16 S. Dak. 190, 91 N. W. Rep. 1117; 1 Brickwood's Sackett, sec 91.

FRANK W. CLANCY, Attorney General, for Appellee.

The record of a court of competent jurisdiction imports incontrovertible verity as to all proceedings which it sets forth as having taken place, and is of so high a nature that no averment can be made against it. Wells v. Stevens, 2 Gray 117; Michener v. Lloyd, 16 N. J. Eq. 40; Wigmore on Evidence, sec. 2450; Fleming v. Clark, 12 Allen 198; Sayles v. Briggs, 4 Metc. 424; 1 Bishop on Crim. Proc., secs. 816, 818, 821, 825, 826; Atkins v. State, 16 Ark. 573; People v. Goodwin, 18 J. R. 187; People v. Olcott, 2 Johnson's Cases 301; People v. Barrett & Ward, 2 Caines' Cases 305; State ex rel. Battle, 7 Ala. 259; Nugent v. State, 4 Stewart & Port 72; State v. Garrigues, 1 Haywood 241; U. S. v. Perez, 9 Wheaton 579; Weinzoflein v. The State, 7 Blackf. Rep. 192; U. S. v. Shoemaker, 2 McLean's Rep. 120; People v. Barnett et al, 1 John Rep. 66; Commonwealth v. Cook, et al, 6 Serg. & Rawle 577; 1 Chitty's Crim. Law 459; Bailey v. State, 26 Ga. 580; State v. Wentworth, 35 N. H. 444; State v. Smith, 22 Vt. 74; Cook v Beale, 33 N. C. 33; Riley v. State, 43 Miss. 411; Bainbridge v. State, 30 Ohio St. 273; State v. Waterman, 87 Iowa 257; Walter v. State, 105 Ind. 573; Brown v. State, 72 Miss. 97; Roceo v. State, 37 Miss. 367; Tubbs v. U. S., 105 Fed. 61; Foerster v. U. S., 116 Fed. 862; U. S. v. Claflin, 13 Blatch. 180; Dunbar v. U. S., 156 U. S. 191; Kendall v. Powers, 4 Metc. 555.

A court is vested with the authority to discharge a jury from giving any verdict without thereby putting the defendant in jeopardy. Thompson v. U. S., 155 U. S. 274; Logan v. U. S., 144 U. S 297; Simmons v. U. S., 142 U. S. 149; U. S. v. Perez, 9 Wheat. 580; State v. Hall, 9 N. J. L. 257; State v. Redman, 17 Iowa 329; State v. Vaughn, 29 Iowa 287; Isham v. State, 1 Sneed 111; Hale v. State, 1 Cold. 167, 78 Am. Dec. 488; Wallace v. State, 2 Lea 30; State v. Staley, 3 Lea 565; Woods v. State, 14 Lea 460; Glidewell v. State, 15 Lea 133; Givens

v. State, 103 Tenn. 650, 55 S. W. 1180; Wilson v. State, 109 Tenn. 177.

No valid objection to the list of jurors served on defendant. C. L. 1897, sec. 3425; Territory v. Kelly, 2 N. M. 302.

No irregularity in calling of talesmen. Laws of 1905, ch. 116, secs. 12, 24.

Separation of jurors. Territory v. Edie, 6 N. M. 566, 7 N. M. 185.

Rulings of the court on giving or refusing of instructions fall within the scope of that which is required to be embodied in a bill of exceptions distinctly certified by the judge. Rogers v. Richards, 8 N. M. 662; Laird v. Upton, 8 N. M. 412; Territory v. Chaves, 9 N. M. 282; Territory v. Archibeque, 9 N. M. 404; England v. Gebhardt, 112 U. S. 505; Railway Co. v. Warren, 137 U. S. 348; Kerr v. Champitt, 95 U. S. 188; Hume v. U. S., 170 U. S. 211; Stewart v. Ranch Co., 128 U. S. 383; Lewis v. U. S., 146 U. S. 370; Tucker v. U. S., 164 U. S. 170; Hadden v. Joslin, 142 U. S. 676; Laws 1907, ch. 57, secs. 22, 24, 57, 46, 52. Thompson v. Riggs, 5 Wall. 675.

Instructions were correct. Comm. v. Tuey, 8 Cush. 2; Allen v. U. S., 164 U. S. 501; Territory v. Griego, 8 N. M. 135.

OPINION OF THE COURT.

MECHEM, J.—This is an appeal from a conviction of murder in the second degree.

1. Appellant complains of the action of the trial court in sustaining a motion to strike the material allegations of a plea of former acquittal made by him on April 13, 1909, when the case was called for trial a second time. The plea alleged that at a former trial thereof the case went to the jury about nine o'clock Saturday evening, November 7, 1908; that on the following day, Sunday, the 8th, about 2 p. m. Henry Westerfield, foreman of said jury, was allowed to separate himself from the rest of the jurors and, in charge of the bailiff, telephoned the judge of the court that the jury could not agree; that the judge told the foreman that they must try further and the jury

proceeded to again deliberate and ballot upon their verdict; that, after deliberating and balloting, they again on the same day told the bailiff they could not agree, and in a body went to the room in which there was a telephone, and by means of it, through their foreman, so informed the judge, at his residence, and thereupon by direction of the court the bailiff permitted the jury to separate and retire to their respective homes; that, after the separation of the jury, one of the jurymen telephoned to the judge to ascertain whether he should report for further duty as a juror, and he was informed by the court that he was drawn on a special venire for that case, and that he would not be held and need not report for further duty; that the defendant was not present, nor were his counsel, nor was his consent ever asked, or obtained to such separation, nor was a record made thereof, nor was the court actually in open session, nor was the court in recess, but an adjournment of the same had been taken on Saturday night, the 7th of November, until Monday morning, the 9th of November, 1908; that on Monday, November 9th, 1908, at 9:30 a. m., the regular hour of convening court, the jury which had been considering the case was called into the box at the direction of the judge, and, one of the jurors not appearing, he having been excused as above set forth, he was sent for and asked to come to court in order that the jury might be reconvened and formally discharged; that the jury was reconvened, and an order made discharging them and continuing the cause until a future time; that the discharge of the jury in this manner at that time was objected to and exceptions saved by the defendant. To this plea the territory moved to strike out those paragraphs which contained statements of the transaction which took place on Sunday, the absence of one of the jurors on Monday morning; his being sent for by the court, and the reconvening of the jury, upon the ground that these matters were "irrelevant, immaterial, redundant, and unauthorized, and were contrary to the record in the case." This motion was sustained, and defendant excepted. We are to pass upon this question on the record presented to us. The matters occurring on

Sunday set forth in the plea of abatement, the objection to the discharge of the jury on Monday morning, are not shown by the record. As to the objection to the discharge of the jury and the exceptions to the court's ruling on the same, the plea contained the following: "To the discharge of said jury in the manner aforesaid, the defendant, by his counsel, then and there objected and excepted, although such objection does not appear upon the court's record of the case, but does appear upon the stenographer's record of the proceedings in said cause and would appear of record in a bill of exceptions, if the same should ever be made." The objection and exception were never made a part of the record by a bill of exceptions. The objection not appearing on the record proper nor by bill of exceptions, as far as the record is concerned, it appears that
1 the jury was discharged without objection and with the implied consent and in the presence of the appellant. The stenographer's record will not be received to control the record in the case. District of Columbia v. Woodbury, 136 U. S. 450-467. The language used by Justice Brewer in the case of Evans v. Steetnisch, 149 U. S. 605, 607, in which a motion was made for a new trial, based on an affidavit that neither plaintiff nor his counsel were present at the trial at which the verdict was rendered and judgment entered in the case, when the record showed that the plaintiff was present, by his attorneys, is applicable here. He said in that case: "In the first place, only errors apparent on the record can be considered, and an affidavit filed for use on a motion is not of the record, any more than the deposition of a witness used on a trial, and only becomes a part of the record by being incorporated in a bill of exceptions. x x x The record imports absolute verity; an affidavit of a witness does not; and when the court, which, in addition, may be supposed to have personal knowledge of the fact, sustains the recital in the record as against the statement of the affidavit, its rulings cannot on review be adjudged erroneous."

Counsel for the appellant insists that the proper procedure upon the plea of a former jeopardy was for the territory to either have traversed or demurred to it; that

the motion to strike was not proper and should have been denied; that, if a traverse had been interposed, trial by jury was then proper to determine the truth of the allegations, and if found to be true by a jury, judgment should have been rendered and discharge ordered. If a demurrer had been interposed, the sufficiency in law of the facts stated would have been the issue; but the practice is that a prosecuting officer may join issue on such a plea by reply nul tiel record if he disputes the fact of the alleged acquittal, and upon a reply of nul tiel record, where the former proceedings are that of the court in which the plea of former acquittal is made, an issue is raised which is to be determined by the court on an inspection of its own records. Bassett v. U. S., 76 U. S. 38-40. In such case no evidence is required; only questions of law being presented. Peters v. U. S., 94 Fed. 127; 36 C. C. A. 105.

In the case before us, the district attorney based his motion to strike on the ground that the allegations of the plea of former acquittal were in contravention of the record itself. An issue was presented which could have been
2 tried only by an inspection of the record, and, the record disclosing the fact that the plea impeached it, the plea must fail because the record must stand.

2. The appellant did not testify in his own behalf, and the court gave the following instruction: "There is a statute law of this territory which is a part of the law of this case and is as follows, Sec. 3431, C. L., 1897: 'In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crime, offenses and misdemeanors in the courts of this territory, the persons so charged shall at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him.' That has been construed by courts generally to mean, and you are instructed, that attorneys for the prosecution have not the right to comment adversely on the failure of the defendant to become a witness in his own behalf, and, if there has been anything said by the attorneys for the territory in this case which amounted to adverse comment, you should disregard

it." To this instruction the appellant then and there objected and requested the following instruction: "The court instructs the jury that the defendant may, if he sees fit, become a witness in his own behalf; but the law imposes no obligation upon him to testify in his own behalf, or as to any material fact in the case, and the fact that the defendant may not take the stand and testify as a witness in his own behalf as to any material fact, is not to be taken or considered by you in arriving at your verdict, and no presumption whatever to be raised against him on account of the accused not testifying in his own behalf." Which was refused by the court. The instructions given narrowed the terms of the statute. The
3 instruction requested correctly construed the statute, and the court committed error in refusing to give it.

3. After the jury deliberated for at least twenty-four hours, they were called into court, and the judge inquired as to the probability of their agreeing. They reported to the court that they could not agree. Thereupon, the court, of its own motion, without any request, gave them the following instruction: "Gentlemen of the Jury: Upon your report that you are unable to agree in the cause which has been submitted to you, I think it my duty to remind you that this is the second trial of the cause; that each trial has, as a matter of course, been attended with large expense to the county; and presumably to the defendant; and that you should make another effort to agree. To aid you in the further consideration of the case, I instruct you that, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, not a mere acquiescense in the conclusions of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the question submitted to you with candor and with a proper regard and deference to the opinion of each other. You should consider that the case must at some time be decided; that you are selected in the same manner and from the same source from which any further jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to

decide it, or that more and clearer evidence will be produced on the one side or the other. And, with this view it is your duty to decide the case if you can conscientiously do so. In conferring together, you ought to pay a proper respect to each other's opinion, and listen, with a disposition to be convinced, to each other's arguments, and, on the one hand, if the larger number of your panel are for conviction or for conviction of a certain degree of murder or manslaughter a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression on the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, and with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for the defendant, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated; and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows." To the giving of this instruction the appellant made timely objection and assigns error, relying on the case of the United States vs. Densmore, 12 N. M. 99, as authority that it was erroneous because not within the province of the court to give, not being an instruction as to the law of the case. In that case, the jury had reported that they were unable to agree, and the judge sent them out for further consideration, remarking, (quoting from the report): "that the expense of the trial had been great, and that another trial must be an additional expense much greater than would be incurred by keeping the jury together for a further time." The point raised was that the instruction was given orally, when it should have been given in writing, in accordance with Sec. 2994, C. L., 1897, requiring the judge to instruct the jury in writing as to the law of the case," but this court held that, as the instruction, or rather the remark made by the trial judge, was neither an instruction as to the law or the facts of the case, it was not necessary to commit it to writing.

The instruction complained of in this case was taken literally from a charge in a criminal case which was approved by the Supreme Court of Massachusetts in Commonwealth v. Tuey, 8 Cush. 17, and by Supreme Court of Connecticut in State vs. Smith, 49 Conn. 376, and pronounced to be the law of the Supreme Court of
4 the United States in Allen vs. U. S., 164 U. S. 492-501. This assignment of error is not well taken.

Other questions argued by counsel need not be considered. For the reasons above stated the judgment of the lower court will be reversed and the case remanded for a new trial.

Associate Justice Roberts not having been a member of the Court when this case was argued did not take part in this decision.

[No. 1353. January 26, 1911.]

GUSTAVE LEUSCH, Appellee, v. FRED G. NICKEL, MILTON H. EDWARDS and LINA EDWARDS, HARRY CARTER, D. RANKIN and J. E. HAINES, Appellants.

SYLLABUS.

1. Bond given under Laws of 1907, chapter 107, subsection 225, to perform the judgment of the court, dissolves the attachment, releases the property from the attachment, and therefore motion to dissolve attachment does not lie after such discharge.

2. The filing of the supplemental complaint had the effect of disposing of the demurrer filed to the original complaint in-as-much as the same was not renewed as to the supplemental complaint.

3. Bond executed for the payment of any judgment which might be rendered constitutes an appearance.

4. The fact that one of the defendants had not been served in the attachment suit would be entirely immaterial as to the indebtedness due upon a note in-as-much as the contract evidenced by the note is joint and several under the statute and could be maintained against the defendants served.

5. The record disclosing the fact that the defendants

served had failed to answer or plead within the time limited by law, judgment was properly rendered upon the note sued upon.

6. Laws 1907, chapter 107, sub-section 226, authorizes the court to render judgment against the sureties upon the bond given to dissolve the attachment.

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

ISAAC BARTH for Appellants.

If sufficient affidavit is not filed, the attachment writ and all proceedings under it are void. Gowan v. Hawson, 55 Wis. 341, 13 N. W. 238; Riegelman v. Streisguth, 75 Wis. 212, 43 N. W. 1116; Mentzer v. Ellison, 43 Pac. 464, Colo.; Summers v. Allen, 28 S. E. 787; Reed v. McCloud, 18 S. E. 924; 18 S. E. 753; 15 S. E. 977; Laws 1907, p. 270; Meyers v. Black, 4 N. M. 352; Torlina v. Trorlicht, 6 N. M. 54; Evans v. Tucker, 59 Tex. 249; 4 Cyc. 497, 508; Staab v. Hersch, 3 N. M. 153, 3 Pac. 248; Seidentoph v. Annabil, 6 Neb. 524; Harrison v. King, 9 Ohio St. 388; August v. Sesskind, 6 Coldw., Tenn. 166.

Complaint insufficient and did not state cause of action. C. L. 1897, section 2685, sub-sec. 32; Gallegos v. Sandoval, 15 N. M. 216; Barney v. Vigoreaux, 28 Pac. 678; Parker v. Armstrong, 55 Mich. 176, 28 N. W. 892; Brown v. Broch, 55 How. Pr., N. Y. 32; Meade v. Mali, 15 How. Pr., N. Y. 347; Pforzheimer v. Selkirk, 71 Mich. 600, 40 N. W. 12; Douglas v. McDermott, 47 N. Y. Sup. 336; Scheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Eagle River v. Brown, 85 Wis. 76, 55 N. W. 163; Bisch v. Van Cannon, 94 Ind. 263; McGlynn v. Scamoore, 14 N. Y. St. 707; London Fire Ins. Co. v. Libes, 38 Pac. 691; Smith v. Roseboom, 41 N. E. 552; Wilson v. Ryder, 10 N. Y. Sup. 233; 1 Chitty Pl. 332; Fisher v. Brown, 4 Am. Dec. 726.

Bond insufficient. Laws 1907, sec. 265, sub-sec. 186.

Court acquired no jurisdiction. Staab v. Hersch, 3 N. M. 153; Dame v. Cochiti Red. Co., 13 N. M. 10, 79 Pac. 296; Laws 1907, sub-sec. 307, p. 296; St. Louis R.

R. Co. v. Johnson, 133 U. S. 566, 33 L. ed. 683; Fogg v. Blair, 139 U. S. 118, 35 L. ed. 104; Alabama v. Burr, 115 U. S. 413, 29 L. ed. 435.

If the attachment itself is illegal and therefore void so also must be the bond which takes it place. Bank of Boston v. Mixter, et al, 31 L. ed. 571; Carpenter v. Turell, 100 Mass. 450; Tapley v. Goodsell, 122 Mass. 176; English v. Redd, 25 S. E. 325; Murphy v. Montandon, 2 Ida. 1048, 35 Am. St. Rep. 279; Quine v. Mayes, 2 Rob., La. 510; Clark v. Bryan, 16 Md. 171; Cadwell v. Colgate, 7 Barb., N. Y. 253; Holman v. Binkerhoff, 1 Den., N. Y. 104; Shevlin v. Whelen, 41 Wis. 88; Rice et al v. Schofield et al, 51 Pac. 673.

Collins & Stroup for Appellee.

The court will look to the whole record to supply technical omissions. Miller v. Eastman, 27 Neb. 804, 43 N. W. 179; McClanahan v. Brack, 46 Miss. 246; State v. Foster, 10 Ia. 435; Shinn on Attachment, pp. 205, 207, 217, 230, 232, 236, 237, 251; Livengood v. Shaw, 10 Mo. 273; Simon v. Johnson, Pa. Com. Pl., 7 Kulp 166; 5 Shinn on Attachment, p. 202; Spitz v. Moore, 86 Wis. 387, 57 N. W. 41; Crew v. McClurg, 4 Green, Ia. 153; Crawford v. Roberts, 8 Ore. 324; Rosenheim v. Fifield, 12 Ill. Ap. 302; Lawver v. Langhans, 85 Ill. 138; McCollem v. White, 23 Ind. 43; Mayor v. Pingee, 18 Neb. 458; Ruhl v. Rogers, 29 W. Va. 779, 2 S. E. Rep. 798; Dunlap v. McFarland, 25 Kas. 488; Keith v. Setter, 25 Kas. 100; Mentzer et al v. Ellison et al, 43 Pac. Rep. 465.

Bond was substantial compliance with statute. C. L. 2685, sub-sec. 94; 1 Shinn on Attachments, secs. 178, 299, 302, 304; Lawver v. Langhans, 85 Ill. 138; Butney v. Jones, 1 Ia. 366; Bryant v. Hendee, 40 Mich. 543; Baltimore & Ohio R. R. Co. v. Taylor, 81 Ind. 24; Laws 1907, ch. 107; sub-secs. 198, 225; U. S. v. Ames, 99 U. S. 35; Carpenter v. Turrell, 100 Mass. 450; Inbusch v. Farwell, 1 Black U. S. 566; Fox v. McKenzie, 49 N. W. Rep. 386; Morrison v. Alphin, 23 Ark. 136; Inman v. Strattan, 4 Bush, Ky. 445; Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. Rep. 711; Rachelman v. Skinner, 46 Minn., 48

N. W. Rep. 776; Bunningman v. Wagner, 8 Am. Rep. 307; Miller v. White, 76 Am. Rep. 794.

Court had jurisdiction of property seized. 12 Enc. P. & P. 145, 173.

Judgment against sureties on bond. Laws 1907, ch. 107, sub-sec. 226.

STATEMENT OF THE CASE.

This is an attachment suit commenced by the filing of a complaint by the plaintiff in the district court of Bernalillo County on the 25th day of June, 1909. On the same day an affidavit and bond in attachment were filed and a writ of attachment issued. The defendants, Milton Edwards and Lena Edwards, were personally served, but the return of the Sheriff shows that the defendant Nickel was not found. The complaint shows that the suit was brought upon a promissory note for the sum of one thousand dollars, bearing six per cent interest, in favor of the plaintiff, signed by all of the defendants. This note is dated January 1st, 1909, and was to become due twelve months after date. The complaint and affidavit in attachment allege that this note was given for money loaned the defendants, but that the defendants obtained the money from the plaintiff by fraud, deception and false pretenses. As the complaint discloses, this suit was brought before the note sued on became due, but no judgment was rendered thereon until a considerable time after the note became due. On the 26th day of June, 1909, the bakery and other goods and property of the defendants were seized, under writ of attachment by the sheriff, but the defendants served entered into a bond with securities thereon to the sheriff and the sheriff released the property and restored it to the defendants, giving bond on the 9th day of July, 1909. On the 26th day of June, defendants, by their counsel, filed a motion to quash the attachment, and on the 15th day of July, demurred to the plaintiff's complaint. On the 11th day of Februray, 1910, counsel for the defendants filed a motion to dissolve the attachment, both of which motions were, on the 15th day of Februray, 1910, overruled by the court. On the 17th

day of Februray, 1910, counsel for the defendants filed a motion to dismiss the cause for want of jurisdiction of the person and the subject matter, which motion was overruled on the 14th day of March, by an order entered nunc pro tunc on the 19th day of March. On the 14th day of April, 1910, and after the note became due, the plaintiff filed his supplemental complaint, from which it appeared that the indebtedness sued for had become due and payable, and on the 11th day of May, Mr. Isaac Barth, Esquire, attorney for the defendants, admitted in writing the service of copy of the supplemental complaint, and that the same was served upon him on the 14th day of April, 1910. No answer or other pleading having been filed, as shown by certificate of the clerk of the court, default was adjudicated on the 11th day of May, 1910, and on the 27th day of May, 1910, judgment for the plaintiff for one thousand dollars and interest to the amount of twenty-seven dollars and costs, and also judgment sustaining the attachment, was rendered by the court against the defendants and the sureties on the attachment bond. By a supplemental transcript it is made to appear that on July 6th, 1909, a traverse of attachment was filed, and on the 26th day of February, 1910, an amended traverse of the attachment was filed by the defendants. On the 10th day of June, 1910, appeal was prayed for and granted and the cause is now in this court upon that appeal.

OPINION OF THE COURT.

McFIE, J.—There are six assignments of error contended for by the appellants, but under the views of the law and facts taken by this court it will not be necessary for the court to consider all of these assignments. While it may be true that some of the motions made by counsel for the defendants during the early stages of the case might have been considered well founded, if the same had been pressed and relied upon and preserved so as to be available on appeal, we are of the opinion that both as to the attachment issue and the judgment upon the indebtedness, the proceedings and rulings of the court upon the motions to quash and dissolve the attachment for defects

in the affdavit, the original attachment bond, and the demurrer to the complaint are not now before the court for consideration. Proceeding, then, to the consideration of the attachment feature in this case, the record discloses that the defendants gave a bond to the sheriff in which they and the sureties on the bond agreed to perform the judgment of the court in case judgment should be rendered against them, and the property was released
1 from the attachment and the attachment was thereby dissolved, as provided for in sub-sec. 225 of chapter 107, Laws of 1907, which section provides as follows: "Sub-Section 225. If the defendant or other person on his behalf at any time before judgment give a bond to be executed to the plaintiff, by one or more sureties, possessing the same qualifications required by sureties on bonds for the issuance of attachments, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged and restitution made of any property taken under it or proceeds thereof. Such bond shall also discharge any garnishee from liability in said cause." Chapter 107, above referred to, provides for two bonds. Sub-Section 198, provides for a bond to be given by the defendant, which, when given, authorizes the defendant to retain the possession of the property attached. The bond further provides that the property shall be forthcoming when the court shall direct, but the bond given was not a forthcoming bond under this section, but the bond provided for in sub-section 225 which provides for the payment of the debt, and has the effect of dissolving the attachment. The bond thus given stands in lieu of the rem and the action proceeds in personam.

In Shinn on Attachment, Section 304, pages 590, 591 and 592, it is said: "When, for the purpose of releasing attached property (or to prevent property from being attached), a bond is given to pay the judgment which the attachment plaintiff may thereafter procure against the attachment defendant, the principal effect of such bond is to dissolve the attachment (if levied) and discharge the property from the attachment lien, and the case will then

proceed as if originally begun by summons. The bond stands in lieu of the rem. The property is gone from the court's control. The bond is special bail and is a substitute for the property as regards all claims that may be made against it by the promoter of the suit. The attachment has expended its force and is no longer operative. The bond dissolves the attachment entirely. It is not given for the property itself, but for the payment absolutely of the judgment when recovered in the suit, whatever may be the amount, if within the penalty named in the bond. It is a security for any judgment which would have been satisfied out of the attached property. And this, although there may be, by leave of court a discontinuance as to all the defendants named in the bond except the administrator of one deceased. In fact, it has been said that a bond given to the plaintiff, to pay the judgment that may be recovered by him operates not only to release the levy, but to destroy the writ itself, and that thereafter a motion to dissolve the attachment as being irregular or improvidently issued will not be entertained. There is no levy to be quashed after the bond is given and the property is released." U. S. v. Ames, 99 U. S. 35; Carpenter v. Turrell, 100 Mass. 450; Inbusch v. Farwell, 1 Black, U. S. 566; Fox v. McKenzie, 47 N. W. Rep. 386; Morrison v. Alphin, 23 Ark. 136; Fergusson v. Glidewell, 48 Ark. 195, 2 S. W. Rep. 711; Rachelman v. Skinner, 46 Minn. 196, 48 N. W. Rep. 776.

By reference to the bond which was given in this case the following provisions clearly show that it was given for the purpose of securing the discharge of the attachment, and as an obligation to pay any judgment that might be rendered in the case: "Now, therefore, we, the undersigned residents of the county of Bernalillo, Territory of New Mexico, in consideration of the premises and in order that the attachment in such action shall be discharged and restitution made of any property taken under it or the proceeds thereof, do hereby jointly and severally undertake and promise to the effect that if the said plaintiff should recover judgment in said action we will pay to the said plaintiff upon demand the amount of said judg-

ment and promise that the defendants will in every manner perform the judgment of the court in said action. (Signed) Milton H. Edwards, Lena Edwards, Harry Carter, D. J. Rankin, J. E. Haines." There being a general appearance for the defendants in this case, and this bond having been entered into which the statute specifically says shall discharge and dissolve the attachment and the lien thereof, we are of the opinion that the assignments of error relied upon as to the attachment proceedings cannot be considered on this appeal.

The second and fifth assignments of error relate to the judgment rendered upon the indebtedness sued for. The second assignment is that the court erred in overruling the demurrer of the defendants to the complaint of the plaintiff. The record shows that a demurrer was filed to the original complaint, but the record does not show that the same was formally overruled by the court and exception taken to such ruling. The record further shows, however, that a supplemental complaint was filed by the plaintiff on the 14th of April, 1910, of which defendant's counsel admits service, and this supplemental complaint covered the entire cause of action, but discloses the additional fact that the indebtedness described in the original complaint had since the filing thereof become due and payable: C. L. 1897, Sec. 2685, Sub-section 89 of the Code of Civil Procedure, is as follows: "Sub-Section 89: In every complaint, answer or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading, may be set forth in said pleading, and which may be necessary to the proper determination of the action or defense." The filing of this supplemental complaint had the effect of disposing of
2 the demurrer filed to the original complaint in-as-
much as the same was not renewed as to the supplemental complaint so far as the record shows. Therefore this assignment would appear to be unavailing.

The fifth assignment of error is that the court erred in entering judgment for the reason that the court had no jurisdiction of either the party or the subject matter. This assignment does not appear to be well taken, first for the

reason that by a general appearance the parties were
3 certainly before the court, and this also appears from the bond executed for the payment of any judgment which might be rendered. The subject matter of the action was indebtedness evidenced by a promissory note, as to which there was no denial of the amount due and payable, nor is there any denial of the service of the defendants, Milton and Lena Edwards, the principals in the bond which was given for the payment of the indebtedness, and there was service of the supplemental complaint, as appears from the admission in writing of the attorney for the defendants. The fact that the defendant Nickel had not been served in the attachment suit, would be entirely immaterial as to the indebtedness due upon this
4 note, in-as-much as the contract evidenced by the note is joint and several under the statute, and could be maintained against the defendants served. In our opinion the conduct of the defendants themselves clearly conferred jurisdiction both as to the person and the subject matter of the action.

The record disclosing the fact that the defendants
5 served had failed to answer or plead within the time limited by law, judgment was properly rendered upon the note sued upon.

The sixth assignment of error goes to the rendering of judgment against the sureties on the bond, undertaking to pay the judgment, but there appears to be very clear authority for the rendition of judgment against the sureties under the statute of this Territory. Sub-Section 226, Chapter 107, Laws of 1907, provides as follows: "If upon the trial of said cause judgment shall be rendered against the defendant on the demand sued for, said judgment shall also be rendered against the sureties on said bond given for the discharge of said attachment; and the giving of said bond shall have the effect of conferring jurisdiction upon the court to render said judgment against the said sureties for the amount of the damage recovered against the defendant, without further process or notice." This

section refers specifically to a judgment in a case such as that now under consideration, and there can be no
6 doubt of the right of the court under this section to render the judgment against the sureties upon the bond given to dissolve the attachment.

The judgment of the court is affirmed, with costs. And it is so ordered.

[No. 1369, January 28, 1911.].

In the Matter of the Petition of D. H. PICKERING and MRS. D. H. PICKERING, Relators, v. THE JUSTICE OF THE PEACE in and for Precinct No. 2 of San Juan County, New Mexico, and L. CURRENT, Justice therein.

SYLLABUS.

1. Under C. L. 1897, sec. 3244, requiring that service of writ be made five days before the return day, the day of service or the return day being excluded in making up the five days, service at any hour of November 19 was sufficient for any hour of November 24 as return day.

2. In absence of statutory provisions, judicial acts, including judgments on holidays, are valid.

3. Defendants had adequate remedy through appeal, or writ of certiorari and if they were misled to their injury by respondent, they may have had a good cause of action against him for damages.

4. Prohibition is an extraordinary judicial prerogative writ "to be used with great caution and forbearance for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy."

Petition for Writ of Prohibition. Denied.

EDWARDS and MARTIN for Petitioners.

Respondent not present or represented.

PER CURIAM—This cause is here on an alternative writ of prohibition issued by one of the Justices of this

court on a petition filed with the Clerk, December 30, 1910, and made returnable on the first day of our present term. The respondent, who is a justice of the peace at Aztec, in San Juan County, a long distance from Santa Fe, and who presumably has no personal interest in the matter, has not appeared or made any return to the writ, and the petitioners have moved for judgment by default. Under the circumstances, we think it unnecessary to proceed by attachment against respondent and that we should determine from the allegations of the petition whether a writ of prohibition absolute should issue.

The allegations are that on November 17th, 1910, a summons was issued by L. Current, a justice of the peace of San Juan County, to the petitioners, directing them to appear before the said justice at Aztec, in said county, at ten o'clock a. m., November 24, 1910, to answer to a plea in assumpsit by one M. B. Scott, as assignee, that service was made on the petitioners at 3:30 p. m. of November 19th, and that judgment was rendered November 24th, between ten and eleven o'clock, less than five full days from the time of service, that the petitioners failed to appear in said cause for the reason that they were misled by the justice of the peace, and that, as judgment was rendered on a legal holiday, it was void.

Under section 3244, C. L. 1897, it was necessary that the service of the writ be made five days before the return day, the day of service or the day of return being excluded in making up the five days, sec. 2900, subd. 7; C. L., 1897.

Service at any hour of November 19th was, therefore,
1 sufficient for any hour of November 24th as a return day. There is a statute in this Territory providing that certain days shall be holidays for commercial purposes, Sec. 2544, C. L. 1897, but none prohibiting judicial proceedings on such days. In the absence of such
2 statutory provisions, judicial acts on holidays, including judgments, are valid. 21 Cyc. 442-5. But, if the petitioners were in any way wronged by the action of the justice of the peace complained of, the ordinary remedies were open to them. They knew of the alleged injurious acts on November 26th, as their affidavit in this cause

shows, and they then had the right to appeal, and, if that had become necessary, to a writ of certiorari, Sec. 3367, C. L. 1897, to preserve their rights, and if they
3 were misled by the respondent to their injury, they may have a good cause of action against him for damages. But the petitioners do not, even by the most liberal construction of their petition, bring this cause within the proper province of a writ of prohibition.

It is an extraordinary judicial prerogative writ, "to
4 be used with great caution and forbearance for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy." Sherwood v. N. Eng. King Co., 68 Conn. 543; Priddie v. Thompson, 82 Fed. 186. "It will lie only in cases of manifest necessity, and after a fruitless application for relief to the inferior tribunals." 32 Cyc. 602: Ex Parte Williams, 4 Ark. 537. "In general it will not issue where there is another adequate remedy x x x readily available to the applicant, either by appeal or writ of error, or by any other writ, motion or proceeding appropriate to the relief, as a writ of revivor, x x certiorari, x x action for trespass, x x motion to set aside, motion to stay the proceedings." "And, if the inferior court or tribunal has jurisdiction of both the subject matter and of the person, prohibition will not lie to correct errors of law, or fact, for which there is an adequate remedy by appeal or otherwise." 32 Cyc. 614-617. See also High's Extraordinary Legal Remedies, 3rd ed., secs. 770, 771 and 772.

The petition is denied, and a writ of consultation will issue, authorizing the respondent to proceed with the cause in regular course.

Since this opinion was written the respondent has filed with the clerk a statement addressed to the Court, in which he disclaims intentional wrong to the petitioners, explains how misunderstanding as to date occurred, and declares his willingness to follow any course this court may direct in this matter. There is nothing in the statement, however, to affect the conclusion we have already reached.

[No. 1306, February 1, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. ANTIMO PETTINE, Appellant.

SYLLABUS.

1. The ordinary function of a motion for a new trial is to call the attention of the court to errors committed on the trial and thus preserve the questions for review in the higher court. Included therein are both errors of law and errors of fact, or of matters within the discretion of the trial court.

2. There was not abuse of discretion by the trial court in the case at bar, an examination of the record showing that there was ample evidence to warrant a conviction eliminating the testimony of a witness who made an affidavit that he had testified falsely.

3. Counsel for defense wholly failing to point out the error complaind of as to any of the instructions excepted to, none of these alleged errors are properly before this court for review.

4. If the court, in criminal cases, fails to instruct the jury fully and fairly as to the law of the case, it is the duty of counsel for defendant to ask the court to give such instructions as he thinks should be given, and in order that defendant may take advantage of such error he must, at the time the jury is instructed, except to the failure of the court so to instruct.

5. The defendant should not only call the specific error to the court's attention by proper objection and exception, but it is also his duty specifically and definitely to set out such alleged error in his motion for a new trial.

6. Under C. L. of 1897, secs. 2996 and 2997, and Laws 1907, Chapter 57, section 37, reenacting C. L. 1897, Section 3139, the motion for a new trial in the case at bar is wholly insufficient to advise this court as to what was presented to the lower court and by the lower court expressly decided.

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

THOMAS B. CATRON for Appellant.

Instruction as to various degrees of murder. C. L. 1897, secs. 1064, 1065, 1070; Whart. Hom., sec. 159; Sanders v. State, 41 Tex. 206; Connor v. State, 23 Tex. App. 378; Sidberry v. State, 135 Ind. 690; Griggs v. U. S., 158 Fed. 578; 38 Minn. 439; 62 Mich 329; 25 Oregon 241.

Self-defense. 3 Wharton's Hom. 473, note 1; Carnes v. Com., 87 S. W. 1123; State v. Hudspeth, 150 Mo. 12; Arnold v. Com., 51 S. W. 483; State v. Ballou, 20 R. I. 607; People v. Lynch, 101 Cal. 229; Clay v. State, 44 Tex. Cr. 129; State v. Bartlett, 170 Mo. 658; Maiden v. State, 11 So. 488; Rowe v. U. S., 164 U. S. 546; Whart. Hom. 476, 477, 483; Perkins v. State, 78 Wis. 551; May v. State, 23 Tex. App. 146; Ball v. State, 29 Tex. App. 107; Harris v. People, 32 Col. 211; Ritchie v. People, 23 Colo. 314; Belle v. State, 17 Tex. App. 538; People v. Gonzales, 71 Cal. 569; State v. Mathews, 148 Mo. 185; Carnes v. Com., 87 S. W. 1143; Bohannon v. Com., 8 Bush. Ky. 482; Hitner v. State, 19 Ind. 48; Story v. State, 99 Ind. 413; Granger v. State, 5 Yerger 459; Erwin v. State, 29 Ohio St. 198; Stoneman v. Com., 86 Va. 525; Runyan v. State, 57 Ind. 83; Harris v. State, 30 Tex. App. 548.

Weight of evidence. C. L. secs. 2994, 3431.

New trial on account of new evidence. U. S. v. Biena, 8 N. M. 100; Dennis v. State, 103 Ind. 151; Lindly v. State, 11 Tex. App. 284; 3 Gra. & Wat. on New Trial 1043; Turnley v. Evans, 3 Hump. 224; G. F. M. Co. v. Mathes, 5 N. H. 577; Patterson v. Berry, 4 Minn. 481; Lindley v. State, 11 Tex. App. 284; Curtis v. State, 6 Cold. 9; Mec. F. & I. Co. v. Nicholls, 1 Harrison 410; Robbins v. Fowler, 2 Pike 133; Smith v. Matthews, 6 Mo. 600; Com. v. Williams, 2 Ashmead 69; Com. v. Murray, 2 Ashmead 41; Grover v. Woolsey, Dud. Ga. Rep. 85; Ables v. Donley, 8 Tex. 331; Patterson v. Barry, 4 Binn. 481; Fabrillas v. Cock, 3 Burrows 1771; G. F. & N. Co. v. Mathes, 5 Mc. 574; Carr v. State, 106 Ga. 742; Thompson v. State, 60 Ga. 619; Dale v. State, 88 Ga. 552; 1 Spelling on New Trials, sec. 221; Bussey v. State, 69 Ark. 547; Mann v. State, 14 Tex. 644; G. F. M. Co. v. Mathews, 5 N. H. 174; Richardson v. Fisher, 1 Benj. 145; People v.

Talmage, 114 Cal. 431; Territory v. Armijo, 7 N. M. 437; Faulkner v. Territory, 6 N. M. 490.

Malice aforethought is an essential ingredient in the crime of murder both in the first and the second degree. C. L. 1897, secs. 1060, 2054, 2997; Aguilar v. Territory, 8 N. M. 504; Territory v. Lucas, 8 N. M. 551; Maher v. People, 10 Mich. 212; Territory v. Caldwell, 14 N. M. 343; Territory v. Watson, 12 N. M. 420; Territory v. O'Donnel, 4 N. M. 208; Territory v. Yarberry, 2 N. M. 451; U. S. v. Amador, 6 N. M. 178; Territory v. O'-Donnell, 4 N. M. 208.

No assignment of error in criminal cases is required. C. L., secs. 1064, 2992, 2994, 2998, 2685, sub-secs. 119, 161, 171. Laws of 1907, ch. 57, secs. 37, 38, 46, 60; Suth. on Stat. Con., sec. 152; Territory v. Young, 2 N. M. 106; Territory v. Romine, 2 N. M. 125; Namaque v. The People, 1 Breeze, Ill. 149; People v. McKay, 18 Johns 212; U. S. v. Amador, 6 N. M. 178; Territory v. Nichols, 3 N. M. 110; 1 Bish. Crim. Pro., sec 908; Proff. Jury Trial, sec. 328; Whart. Crim. P. & P., sec. 709; Territory v. Friday, 8 N. M. 207; C. L. 1884, sec. 2054; Aguilar v. Territory, 8 N. M. 502; Territory v. Chamberlain, 8 N. M. 541; Territory v. Guillen, 11 N. M. 194; Williams v. The Commonwealth, 80 Ky. 314; Rhea v. U. S., 6 Okla. 258; K. P. Ry. Co. v. Nichols, 9 Kas. 176; Marbourg v. Smith, 11 Kas. 561; Kas. Pac. Ry. Co. v. Nichols, 9 Kas. 235; A. T. & S. F. Ry. Co. v. Repford, 18 Kas. 250; 9 Kas. 256; 25 Kas. 547; Bard v. Elston, 31 Kas. 276; Pelt v. Davenport, 42 Iowa 314; Hale v. Gibbs, 43 Iowa; Johnson v. Chicago Co., 51 Iowa 30; William v. Barnett, 52 Iowa 638; Williamson v. Chicago Co., 53 Iowa 143; Davenport Gas, Light & Coke Co. v. The City of Davenport, 13 Iowa 229; Territory v. Nichols, 3 N. M. 111; Territory v. Lopez & Casias, 3 N. M. 165; Territory v. Cordova, 11 N. M. 371; Armijo v. Armijo, 4 N. M. 65; Perea v. Colorado Bank, 6 N. M. 4; Reymond v. Newcomb, 10 N. M. 173; Bullard v. Lopez, 7 N. M. 563; McDonald v. Hovey, 110 U. S. 614; Pennock v. Dialogue, 2 Pet. 1; Probst v. Trustees, etc., 3 N. M. 378; U. S. v. DeAmador, 6 N. M. 178; Territory v. O'Donnel, 4 N. M. 66; Faulkner v. Ter-

ritory, 6 N. M. 479; Territory v. Friday, 8 N. M. 204; Territory v. Lucero, 8 N. M. 543; Territory v. Padilla, 3 N. M. 500; Territory v. Pino, 9 N. M. 603; Territory v. Perea, 1 N. M. 632; Hopt v. Utah. 110 U. S. 579; Reynolds v. Staab, 4 N. M. 606; Hack v. State, 124 N. W. 495, Wis.; Territory v. Sevalles, 1 N. M. 121; U. S. v. Schoemaker, 2 McLean 121; Crain v. U. S., 162 U. S. 643; Territory v. Watson, 12 N. M. 421; 11 Enc.. P. & P. 217.

Reasonable doubt. C. L. 1065; Territory v. Friday, 8 N. M. 210; Allen v. U. S., 164 U. S. 497.

The jury cannot disregard the testimony of a witness if it apears to be fair, is not unreasonable and is consistent with itself, and the witness has not been in any manner impeached except from mere caprice or without cause. City Bank v. Kent, 57 Ga. 283; Smith v. Grimes, 43 Ia. 356; Rockford R. I. & S. L. R. Co. v. Coultars, 67 Ill. 398; Oliver v. Pate, 43 Ind. 132.

Interest of witness in case. Unruh v. State, 105 Ind. 123; Dodd v. Moore, 91 Ind. 522; Woolen v. Whittaker, 91 Ind. 502; Nelson v. Vorce, 55 Ind. 555; Greer v. State, 53 Ind. 420; Hartford v. State, 96 Ind. 461; State v. Sutton, 99 Ind. 300; Territory v. Romine, 2 N. M. 129; Laws of 1880, chap. 6, sec. 23; Sec. 18, Act of July 12, 1851.

FRANK W. CLANCY, Attorney for Appellee.

The action of the trial court upon a motion for a new trial is a matter of such judicial discretion that it cannot be assigned as error in the appellate court. U. S. v. Biena, 8 N. M. 100; U. S. v. DeAmador, 6 N. M. 177; Territory v. Webb, 2 N. M. 156; U. S. v. Densmore, 12 N. M. 109; U. S. v. Lewis, 2 N. M. 462; Territory v. Romero, 2 N. M. 475; U. S. v. Biena, 8 N. M. 105

In criminal cases, if the court fails to instruct the jury fully and fairly as to the law, it is the duty of the counsel for defendants to ask the court to give such instructions as they think should be given, and in order that defendant may take advantage of such error, he must at the time the jury is instructed, except to the failure

of the court so to instruct. Territory v. Caldwell, 14 N. M. 543; Territory v. Gonzales, 14 N. M. 35; Territory v. Watson, 12 N. M. 420; Territory v. O'Donnel, 4 N. M. 208; Territory v. Yarberry, 2 N. M. 454; U. S. v. Amador, 6 N. M. 178; Territory v. Ayer, 15 N. M. 581; U. S. v. Densmore, 12 N. M. 106; Territory v. Garcia, 12 N. M. 98.

Murder. C. L. 1060-1065.

Reasonable doubt. State v. Morey, 25 Ore. 241; U. S. v. Stearns, 27 Fed. Cas. 16, 392, pp. 1313, 1314; U. S. v. Butler, 1 Hughes 491; U. S. v. Johnson, 26 Fed. 685; U. S. v. Jackson, 29 Fed. 503; U. S. v. Jones, 31 Fed. 724; U. S. v. Cassidy, 67 Fed. 782; Wallace v. State, 41 Fla. 580; Vann v. State, 83 Ga. 52; State v. Jefferson, 43 La. Ann. 995; People v. Guidici, 100 N. Y. 599; State v. Morey, 25 Ore. 256; Emery v. State, 101 Wis. 655; Butler v. State, 102 Wis. 868; State v. Serenson, 7 So. Dak. 282; Cohen v. State. 50 Ala. 108; Hodge v. State, 97 Ala. 37; Territory v. Ayer, 15 N. M. 581.

Self-defense. Allen v. U. S., 164 U. S. 497; 2 L. R. A. N. S. 49, note.

It is quite proper to call the attention of a jury to the interest which such a defendant has in the case. People v. Hitchcock, 104 Cal. 485; Dunn v. People, 109 Ill. 642; Keating v. State, 93 N. W. 980; People v. Petmecky, 99 N. Y. 421; Vaughn v. State, 58 Ark. 362, 24 S. W. 885; Jones v. State, 61 Ark. 101, 32 S. W. 81; State v. Turner, 110 Mo. 198, 19 S. W. 645.

Where the court has once instructed as to the reasonable doubt doctrine so that it is applicable to everything in the case, it is not necessary to repeat that instruction as to the different matters about which instructions are given. Territory v. Price, 14 N. M. 263; Carleton v. State, 43 Neb. 373; McCulley v. State, 62 Ind. 428; Carr v. State, 84 Ga. 250; State v. Rockett, 87 Mo. 666.

Whenever, a defendant, in such a case as the present one, offers evidence to show the bad character of the deceased, it is always competent in rebuttal for the pro-

secution to show his good character as a peaceable man and such evidence cannot be limited to mere reputation. 2 Bish. Crim. Proc., sec. 609.

STATEMENT OF FACTS.

The defendant, Antimo Pettine, was indicted for the crime of murder by the grand jury of Bernalillo County, the indictment alleging, in the usual form, that on the fourth day of February, 1907, the defendant killed and murdered Benedito Berardinelli. To this indictment defendant pleaded "Not guilty," and was tried before a jury, in November, 1908. The jury returned a verdict finding the defendant guilty of murder in the second degree. The Court gave seventeen paragraphs of instructions to the jury, to the giving of which instructions, (at the conclusion of the same) the defendant excepted in the following language: "To the giving of said instructions, and each and every one of them, and each paragraph thereof, the defendant then and there excepted." The defendant also moved the court to instruct the jury in instructions contained in nineteen different paragraphs, all of which requested instructions were refused by the court, except in so far as they were included in the instructions actually given by the court. "To the judgment and decision of the court in overruling said motion and refusing to give said instructions, or any one or any part thereof as prayed for, the said defendant then and there objected and excepted." After trial and verdict the appellant filed his motion for a new trial, setting up seven grounds of error. The first and second grounds of error relate to the admission and rejection of evidence, but the evidence is not set out, and these two objections are not urged upon appeal. The third, fourth and sixth grounds of error in the motion for new trial were as follows: "3. The court gave the jury illegal, wrongful, improper and misleading instructions in said cause, on the trial thereof, which were not asked for by the defendant, and which were objected to by the defendant at the time and exceptions taken to the overruling of the objection. 4. The court refused to give the jury legal, proper and pertinent and material

instructions which were asked for by the defendant on the trial of said cause, to which refusal the defendant then and there excepted." "6. The court did not instruct what were the essential elements of murder in the second degree, or what the jury must believe to find the defendant guilty from the evidence." The fifth ground of error related to the testimony of the witness Campagnoli. It appears from said assignment of error that Campagnoli made an affidavit, which is attached to the motion for a new trial, to the effect that certain testimony given by him upon the trial was false, and it is alleged that such false testimony influenced the verdict of the jury. The seventh and last assignment of error in the motion for a new trial is merely the general saving assignment added to all motions for new trial and need not be considered upon this appeal. The motion for a new trial was overruled, to which ruling of the court the defendant duly excepted.

OPINION OF THE COURT.

WRIGHT, J.—The first ground of error considered by appellant in his brief is the one referred to in the statement of facts as the fifth ground of error, and relates to the testimony of the witness Campagnoli. Upon the trial of the case the witness Campagnoli testified that the defendant, Antimo Pettine, came to his shop about three months after the death of the deceased, Berardinelli, and that upon entering the shoe shop said to him, Campagnoli, that he had killed Benedito Berardinelli, and that if he had a chance he intended to kill Ceasar Grande and Charlie Grande. or words to that effect. In the affidavit filed in support of the motion for new trial, the witness Campagnoli, sets out that on this occasion, when he had the conversation in his shoe shop, he had never before seen the party who made this statement; that at the time he did not know the defendant, Pettine, but he supposed it was Pettine; that at the time, he, affiant, was intoxicated, so that he could not clearly see the man to distinguish who he was; that after the trial was over, while he was on the train returning to Santa Fe, he met the defendant, Pettine, and that he then for the first time

knew and understood that Pettine was not the man who had come into his shop and made the statements as testified to by him at the trial, but such person was some man unknown to affiant. This assignment of error, if raised at all, is here upon the exception to the order overruling the motion for new trial. The ordinary function of
1. a motion for new trial is to call the attention of the trial court to errors committed on the trial, and thus preserve the questions for review in the higher court. Included therein are both errors of law and errors of fact, or of matters within the discretion of the trial court. With reference to matters in the motion addressed to the sound discretion of the court, this court, in the case of the Territory v. Emilio, 14 N. M. 147, has laid down the rule that the order overruling the motion for new trial is not reviewable. In the case cited, supra, Mr. Justice Parker collected and discussed practically all of the cases decided by this court bearing upon that point. If the rule laid down in the Emilio case is to be considered as controlling, no further discussion of this assignment is necesary. In the case of Territory v. Emilio, cited supra, the question considered related to the disqualification of a juror, and it was held in that case that such matters were addressed wholly to the discretion of the trial court, and while this case seems to lay down the broad general proposition that the appellant court cannot under any circumstances review, upon appeal, matters wholly within the discretion of the trial court, we will, in view of the fact that counsel have considered this assignment with reference to the rule laid down in the case of U. S. v. Biena, 8 N. M. 105, consider the case at bar in the light of the rule so laid down. In the Biena case this court laid down the rule that this court will not review upon appeal assignments of error based upon the discretion of the lower court in overruling a motion for new trial, unless gross abuse of such discretion appear on the face of the record. In that case the court uses the following language: "A trial judge is frequently called upon to rule on matters and material facts which he sees transacted before him, and of which he must take notice as substantial things in the case, but

do not and can not become a part of the record, and which the appellate court can have no knowledge of; and an appellate court should labor to affirm the findings of a jury, when it shall appear from the whole record that the trial court proceeded in the regular and orderly manner prescribed by law, and that the result arrived at by the jury was fair and substantial justice to all parties. The granting or refusing a new trial is a matter resting in the sound discretion of the trial judge to whom it is addressed, and it is not reversible, unless it shall plainly appear that such discretion has been grossly abused; and that does not here appear."

Admitting the power of this court, for the sake of argument, to review the discretion of the trial court in refusing to grant a new trial, there was no abuse of
2 discretion in the case at bar. An examination of the record shows that there was ample evidence to warrant a conviction, eliminating the testimony of Campagnoli entirely. The trial court, seeing the witness and his manner of testifying upon the stand, may well have taken the position that Campagnoli was not worthy of belief, and that his testimony could not, under any circumstances, have affected the verdict of the jury. In fact, the trial court may well have considered that his testimony was favorable to the defendant, rather than adverse. Such being the record in the case, it is not incumbent upon the court, at this time, to determine whether the case at bar should be said to be within the rule laid down in the case of Territory v. Emilio or the case of U. S. v. Biena, cited supra, as under either view of the rule the assignment of error is not well taken.

2. The second assignment of error discussed by the appellant relates to alleged error in the fourth instruction given by the court. The fourth instruction so given by the court is as follows: "Murder in the second degree is 'all murder which shall be perpetrated by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide, or which shall be perpetrated unnecessarily, either while resisting an attempt by the person killed to commit

any offense against person or property or after such attempt shall have failed. The absence of deliberate premeditated design is what chiefly distinguishes it from murder in the first degree.'" This instruction is based upon the statute as it existed prior to the amendment of 1907. An examination of the record in this case discloses that the court, in Instruction No. 2, defined murder, express malice and implied malice, and then followed, in Instruction No. 3, with a definition of murder in the first degree, as related to the circumstances of this case. In Instruction No. 6, he explained what is meant by the term 'deliberation' and 'premeditation' as related to murder in the first degree, and in Instruction No. 7, he explained justifiable homicide. To none of these instructions, including Instruction No. 4, above quoted, were any exceptions taken, except the general exceptions mentioned in the statement of facts; and in the motion for new trial defendant's counsel wholly fails to point out the error complained of as to any of the above mentioned instructions, including the fourth instruction defining murder in the second degree, above referred to. It appears, therefore, that none of these alleged errors are properly before this court for review. This court has repeatedly condemned such assignment of error and refused to consider the same upon appeal. Territory v. Guillen, 11 N. M. 209; Territory v. O'Donnel, 4 N. M. 208; Territory v. Yarberry, 2 N. M. 454. In the case of Territory v. Guillen, cited supra, this court used the following language upon this point: "Exceptions taken during the trial of a cause to the rulings of the court and to the instructions should specify wherein counsel contend that the court has erred, in order that the trial court may be given an opportunity to correct error prior to the close of the trial, if such has occurred, or, such errors should be pointed out in the motion for a new trial, that a new trial may be granted the unsuccessful party, in case error has actually occurred. In this case counsel have not attempted in their motions for a new trial and in arrest

of judgment, to direct the court's attention to any specific error in the instructions of the court, except to paragraph five which has been considered."

An examination of the record in the case at bar, shows further that counsel for appellant wholly failed to ask for any additional or different instruction defining murder in the second degree. This court has repeatedly held in criminal cases that, if the court fails to instruct the jury fully and fairly as to the law of the case, it is the duty
4 of counsel for defendant to ask the court to give such instructions as he thinks should be given, and in order that defendant may take advantage of such error he must, at the time the jury is instructed, except to the failure of the court so to instruct. Territory v. Caldwell, 14 N. M. 543; Territory v. Gonzales, 14 N. M. 35; Territory v. Watson, 12 N. M. 420; Territory v. O'Donnel, 4 N. M. 208; U. S. v. De Amador, 6 N. M. 178; Territory v. Ayer, 15 N. M. 581.

The sixth ground of error in the motion for new trial is addressed *to the failure of the court to instruct, and not to any inherent error in the instruction as given.* No other or more complete instruction was requested, and no exception was taken to the failure of the court to more fully instruct. This brings the sixth ground of error clearly within the rule laid down in the case of Territory v. Watson, cited *supra,* and such alleged error, never having been properly called to the attention of the lower court, cannot be considered upon this appeal. In other words, the defendant should not be permitted to gamble upon the verdict, to sit quiet and not call the attention of the trial court to points of alleged error, which, if called to the attention of the trial court at the time, might be easily corrected, and thereby a miscarriage of justice be avoided. Not only should the defendant, under our procedure, call the specific error to the court's attention
5 by proper objection and exception, but it is also his duty to specifically and definitely set out such alleged error in his motion for new trial, so that the court may at that time carefully consider the same, and, in event harmful error has been committed, immediately grant a new

trial. Under the old system of common law, every technicality was properly to be resolved in favor of the defendant; but under the modern system of criminal procedure, where rich and poor have a like standing in court, where the court will furnish counsel to a defendant without money; will grant compulsory process for witnesses; and where defendant can go upon the stand in his own behalf, all of these conditions have been changed, and the reason for the strict technicality of the common law has disappeared. In the case of Hack v. State, 141 Wis. 346, the supreme court of Wisconsin, in discussing the right of the defendant to sit quiet without calling alleged errors to the trial court's attention, used the following language: "Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right, which the court would at once give him, and then, when he had had his trial and the issue has gone against him, should he be heard to say that there was error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel, because the defendant has secretly stored up some technical error, *not affecting the merits,* and thus secure a new trial, because, forsooth, he can waive nothing? *We think not.* We think that sound reason, good sense, and the interests of the public demand that the ancient, strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned. We believe it has been laid aside in fact, (save for the single exception that trial by jury of twelve cannot be waived, unless authorized by special law) by the former decisions of this court. It is believed that this court uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law, which giveth life, rather than to the letter, which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here, he knows that the attempt has been honestly made."

3. The remaining errors complained of in the brief

of the appellant are before the court, if at all, solely upon the third and fourth grounds of error set forth in the motion for new trial. Both of these assignments came clearly within the rule of this court laid down in the case of Territory v. Guillen, cited supra, and will not be considered upon this appeal. The judgment of the lower court is affirmed.

OPINION ON MOTION FOR REHEARING

WRIGHT, J.—The original opinion in this case was handed down at the January sitting of this court. Motion for rehearing was duly filed. The motion for rehearing raises no question not fully considered in the original opinion, but appellant's brief on the motion for rehearing calls attention to a seeming confusion in some of the opinions of this court as to the meaning of Section 2997, C. L. 1897, which we deem worthy of consideration at this time.

"Sec. 2996. The court must read to the jury all the instructions it intends to give and none others, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words, Given, or, Refused, as the case may be, on the margin of each instruction.

"Sec. 2997. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record."

Appellant in his brief takes the position that the original opinion in this case holds that general exceptions to the giving or refusing of instructions taken at the time such instructions are given or refused, without therein stating the grounds of such exceptions, are not proper or sufficient to save any alleged errors in such given or refused instructions. The original opinion herein does not so hold. It is true that in the statement of facts attention is called to the manner in which the exceptions were saved, but this was done merely to emphasize the fact that the errors complained of on this appeal were never presented to the trial court in any manner what-

ever, so that they could be there considered and expressly decided. We think that a careful reading of the original opinion will indicate very clearly that the errors in the instructions assigned in this court were held as not properly before us for consideration, for the reason that the record and bill of exceptions wholly fails to disclose that any of such alleged errors (except the sixth ground in the motion for new trial, which is disposed of in the original opinion) were ever called to the attention of the trial court and by the trial court expressly decided. Counsel for appellant also criticizes several earlier opinions of this court which, according to the view taken in his brief, seems to be drifting away from the express terms of Section 2997 of the Compiled Laws, cited supra. Section 37, of Chapter 57, of the Laws of 1907, being in substance a re-enactment of the earlier statute of 1846, as compiled in Section 3139 of the Compiled Laws of 1897, provides that exceptions must be taken at the time of the decision "and no exception shall be taken in any appeal to any proceeding in a district court except such as shall have been expressly decided in that court." All of the former decisions of this court of which counsel for appellant complains, when carefully considered, will be found to be based upon the general proposition stated in the statutes last cited. Territory v. Guillen, 11 N. M. 209; Territory v. West, 14 N. M. 557; Territory v. Chaves, 9 N. M. 282; Territory v. Cristman, 9 N. M. 587; Territory v. Archebeque, 9 N. M. 404; Territory v. Leslie, 15 N. M. 240; and cases cited in the original opinion. The case of Territory v. Yarberry, 2 N. M. 454, which holds that specific exceptions to instructions are necessary, was decided by this court upon the terms of the statute then in effect, and has no bearing upon the construction of Sec. 2997, C. L. 1897, quoted *supra*. The case of Probst v. The Trustees, etc., 3 N. M. 378, which is to the same effect, was decided by this court in 1885 upon the authority of Territory v. Yarberry, cited *supra*. The statute under which Territory v. Yarberry had been previously decided, was repealed prior to the decision in the case of Probst v. Trustees, but by a rule of this court adopted in 1880

and in force until August 25, 1897, when the rules were changed to comply with the provisions of the new code, no Judge of the District Court could allow any bill of exceptions containing the charge of the court at large to the jury, in trials at common law upon any general exceptions to the whole of such charge; but the party excepting was required to state distinctly the several matters of law in such charge to which he excepted, and such matters of law, and those only, were to be inserted in the bill of exceptions and allowed by the court. It thus appears that neither of the two cases last cited have any bearing upon the present procedure. In the case of the Territory v. Alarid, 15 N. M. 165, this court, in construing the terms of Section 2997, cited *supra,* held that, "a general exception to an instruction and charge, though in part erroneous, is in part correct, cannot be sustained." It therefore follows that general exceptions taken to the instructions without stating any reason therefor, subject to the limitation pointed out in the case of Territory v. Alarid, cited *supra,* are sufficient under the present procedure, as defined by Section 2997, cited *supra.* It cannot be said, however, that the mere taking of general exceptions to instructions, without stating the grounds therefor, presents any question for decision to the trial court at the time such exceptions are taken; hence it follows that the alleged errors must be specifically called to the attention of the trial court and be by the trial court expressly decided. This can only be done by a motion for a new trial, wherein the errors to be relied upon on appeal are specifically and definitely set out and called to the attention of the trial court for its action. This brings us to the question passed upon in the original opinion, namely, are the grounds upon which the assignments of error in this court are predicated, sufficiently set out in the motion for new trial to bring them within the requirements of Section 37, Chapter 57, Laws of 1907? This question
6 was answered in the negative in the original opinion, and we can see no reason for changing our views at this time. Upon the necessity of a motion for new trial to preserve errors relied upon on appeal, we cite the fol-

lowing decisions of this court: Territory v. Chaves, 9 N. M. 282; Territory v. Christman, 9 N. M. 587; Territory v. Archibeque, 9 N. M. 404. As to the degree of particularity and certainty required in setting out the grounds of error in a motion for new trial, we cite the following: Territory v. Guillen, 11 N. M. 209; Territory v. West, 14 N. M. 557; R. R. v. Johnson, 114 Tenn. 641-2; French v. French, 215 Ill. 470; Call v. People, 201 Ill. 500. Tested by the rule laid down in the cases of Territory v. Guillen and Territory v. West, cited *supra,* the motion for new trial in the case at bar is wholly insufficient to advise this court as to what was presented to the lower court and by the lower court expressly decided. The assignments of error urged in this court (except the sixth ground in the motion for new trial disposed of in the original opinion) not being predicated upon any definite or specific grounds of error in the motion for new trial, we must adhere to our ruling in the original opinion.

[No 1335, February 1, 1911.]

MELVIN E. WOODLING, Plaintiff in Error, v. SECUNDINO ROMERO and ENRIQUE SALAZAR, Defendants in Error.

SYLLABUS (BY THE COURT).

1. In an action for libel the amount of damage alleged and claimed in the complaint fixes "the value of the property in dispute" for the purposes of Laws 1907, Chapter 57, Section 34, which requires the record to be printed, where the amount in dispute exceeds one thousand dollars.

2. Under Rule 4, Section 2, of this court, requiring the filing of the printed record on or before the return day, the absence of such a printed record on the call of the case for argument will, unless good cause be shown for the omission, result in the dismissal of the writ of error.

Appeal from the District Court for San Miguel County, before WILLIAM J. MILLS, Chief Justice. Writ of Error dismissed.

G. VOLNEY HOWARD and BOWMAN & DUNLAVY for Plaintiff in Error.

The value of the property involved in a suit for libel is not determined by the amount of damages asked by the plaintiff in his complaint. Dunlap v. Toledo Ry. Co., 50 Mich. 470; Works Jurisdiction of Courts 59; Wilson v. Daniel, 3 Dallas 403.

Statute requiring brief and transcript to be printed should not be oppressively or technically construed. Armijo v. Abeytia, 5 N. M. 537; Mora v. Schick, 4 N. M. 301; Deemer v. Falkenburg, 4 N. M. 149; Omaha Coal & Coke Co. v. Fay, 37 Neb. 68, 55 N. W. Rep. 211; citing Bazzo v. Wallace, 16 Neb. 290, 20 N. W. Rep. 315; Thompson v. Lea, 28 Ala. 458; Boone v. Poindexter, 12 Smedes & Marshall 640; Dayton v. McIntyre, 5 How. Pr. Rep. 117; Spencer v. Thistle, 13 N. W. Rep. 208; H. & G. I. R. R. v. Gregolds, 13 Neb. 279, 13 N. W. Rep. 403.

CHARLES A. SPIESS, C. W. G. WARD and LUIS C. ILFELD for Defendants in Error.

The word "property" in dispute is equivalent to amount or matter in dispute. Laws of 1907, Chapter 57, Section 34; Dunlap v. Toledo Ry. Co., 50 Mich. 470; Seaman v. Clarke, 69 N. Y. Supp. 1002; Powers v. Harlow, 57 Mich. 107; Cooney v. Lincoln, 37 Atl. 1031; Berger v. Jacobs, 21 Mich. 219; Leonard v. Pope, 27 Mich. 146; 32 Cyc. "property" 669; Work Jurisdiction of Courts 59; Wilson v. Daniel, 3 Dallas 403.

OPINION OF THE COURT.

POPE, C. J.—The present writ of error was sued out on June 10, 1910, a typewritten transcript of the record was filed October 20, 1910, and the cause was assigned for hearing on January 23, 1911. When reached in its order on the latter date, it was on stipulation of counsel passed for argument to January 30. No printed record having been then filed, defendant in error moves for a dismissal. The

Appellate Practice Act of 1907, (Laws 97, ch. 57, sec. 3) requires printing of the record when "the amount of the judgment to be reviewed or the value of the property in dispute shall exceed one thousand dollars." The damages alleged and claimed was five thousand dollars and the verdict was for the defendant. The plaintiff in error contends that the present controversy does not involve the statutory amount, for the reason that the property in dispute is an unliquidated claim for damages and its value is not necessarily in excess of one thousand dollars since the jury might find less. We cannot, however, accede to this contention. The plaintiff says by his complaint that he has been damaged in the sum of five thousand dollars. He so contends in the court below. Upon the present pleadings he would be committed to the same contention were the cause remanded. He will not be allowed to claim one amount for trial purposes and to minimize that amount for appellate purposes. By the measure of his pleadings he must be judged no less in this court than in the court below. We hold, therefore, first, that a claim for damages arising out of tort is "property in dispute" citing 32 Cyc. 669; Berger v. Jacobs, 21 Mich. 219; Cooney v. Lincoln, 20 R. I. 183, 37 Atlantic 1031. We further hold that in cases of this character the estimate put by plaintiff upon the amount of damages fixes the status for appellate purposes. We find nothing in the later authorities which changes the rule announced on this point in Wilson v. Daniel, 3 Dallas, 403-4, where it is said: "The nature of the case must certainly guide the judgment of the court, and, whenever the law makes a rule, that rule must be pursued. Thus in an action of debt on a bond for one hundred dollars, the principal and interest are put in demand, and the plaintiff can recover no more though he may lay his damages at ten thousand dollars. The form of the action therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion

to which, from the nature of the case, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action and not the plaintiff's demand must be regarded." We find nothing in Gordon v. Ogden, 3 Peters 33; Hilton v. Dickinson, 108 U. S. 165; and Barry v. Edmunds, 166 U. S. 550, which modifies Wilson v. Daniel as applicable to cases where, as here, a plaintiff claiming in excess of the jurisdictional sum appeals from the general verdict for defendant.

It is stated, however, that even if the statute requires printing, neither the statute nor our Rule 4, Section 2, (which requires the filing on or before the return day of printed copies of the record) imposes any penalty for non-compliance. However, a failure to comply with the rule has always been treated by this court, at least inferentially, as a ground for dismissal. Thus, in Mora v. Schick, 4 N. M. 301, a dismissal sought on this ground was refused solely because the record showed the amount involved to be less than one thousand dollars. Likewise in Deemer v. Falkenberg, 4 N. M. 149, a similar motion was denied because the record did not clearly show the amount involved to exceed one thousand dollars. We deem these cases as at least indicative of the views of this court upon this point. In the Federal Supreme Court the failure to print the record on or before the call of the case for argument is treated as a ground for dismissal. True, there is in that court a rule inflicting this penalty.
2 But we deem it, independent of a penalty fixed by rule, the proper sequence from a failure to comply with a rule reqiring a printed record that the writ should be dismissed if there be no printed record before the court at least when the case is reached for argument. To enforce the rule at all the court in the presence of such a condition must either dismiss or postpone the case, and the latter would often work a hardship upon a diligent defendant in error, who is entitled to have his cause disposed of. There may be cases where good cause shown will, as in the case of failure to file the record or to file assign-

ments of error, lead to a relaxation of the rule, but no such cause is shown in the present case. The writ of error is dismissed.

[No. 1341, February 1.]

J. H. KINGSTON and W. D. MAHONEY, Appellees, v. J. W. WALTERS, Appellant.

SYLLABUS (BY THE COURT).

1. The time of performance of a written contract within the statute of frauds may be enlarged by a subsequent oral agreement.

2. If one who is entitled to a payment within a time fixed by a written agreement between himself and others for the sale of real estate, assures those who are to make the payment, before it becomes due, that they can have a longer time within which to make it than that stipulated in the agreement, and they, relying on that assurance, fail to make the payment within such stipulated time, the payee is estopped from claiming a breach of the agreement because of such failure.

Appeal from the District Court for Chaves County before M. C. MECHEM, Associate Justice. Affirmed.

REID & HERVEY and J. M. O'BRIEN for Appellant.

Parol evidence of a contract within the Statute of Frauds is inadmissible in evidence. Alexander v. Cleland, 13 N. M. 524; Williams-Hayward Shoe Co. v. Brooks, Wyo., 64 Pac. 342; Harris v. Frank, 81 Cal. 280, 22 Pac. 856; Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. A. R. 823; Bacon v. McChrystal, 10 Utah 290, 37 Pac. 563; 20 Cyc. 313.

Agreement to extend time of written contract by parol is void. Emerson v. Slayter, 22 Howard, U. S. 28; Swan v. Seamans, 9 Wallace, U. S. 254; Kingston v. Walters,

14 N. M. 368; Platt v. Dearborn, 112 Cal. 634, 44 Pac. 1060; Blood v. Goodrich, 9 Wend., N. Y. 68, 24 Am. Dec. 121; Atlee v. Bartholomew, Wis., 33 N. W. 110; 5 Am. St. Rep. 103; Clark v. Fey, 121 N. Y. 470, 24 N. E. 703; Ladd v. King, 1 R. L. 224, 51 Am. Dec. 624; Ry. Co. v. Smith, 106 Ga. 864, 33 S. E. 28; Unruh v. Taylor, Del., 43 Atl. 515; Jones v. Chamberlain, 97 Ill. App. 328; Barton v. Gray, Mich., 24 N. W. 638; McIntire v. Ajax, Utah, 60 Pac. 552; Randolph v. Mitchell, Tex., 51 S. W. 297; Bowman v. Wright, Neb., 91 N. W. 580, 92 N. W. 580; Hildebrand v. Fallot, 92 N. Y. S. 804, 46 Misc. 615; Willingham v. Drew, 117 Ga. 850, 45 S. E. 237; Kellog v. Olmstead, 25 N. Y. 189; Stickler v. Giles, 9 Wash. 147, 37 Pac. 293; Alaska Co. v. Domenico, 117 Fed. 99, 54 C. C. A. 485; Arnold v. Scharbauer, 118 Fed. 1008; Ry. Co. v. Los Angeles Co., Cal., 61 Pac. 937; Barron v. Vanvert, 13 Ala. 232; Holliday v. Poole, 77 Ga. 159; State v. Davenport, 12 Iowa 335; Royal v. Lindsay, 15 Kas. 591; Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Price v. Cannon, 3 Mo. 453; Hunt v. Bloomer, 12 N. Y. Sup. 202; Kruger v. Klinger, Tex., 30 S. W. 1087.

Where an attempted extension or modification of a contract is void, the original contract must be performed. Barton v. Gray, Mich., 24 N. W. 643, and cases cited above.

Appellees cannot recover under the written contract. Boyd v. Camp, 31 Mo. 163; Kirchner v. Laughlin, 4 N. M. 394; Prestwood v. Eldridge, 119 Ala. 72, 24 So. 729; Lowell v. Rader, 2 Grant Cas. 426; McGrann v. Ry. Co., 29 Pa. St. 82; Malone v. Ry. Co., Pa., 27 At. 756; Dana v. Hancock, 30 Vt. 616; Briggs v. Ry. Co., 31 Vt. 211; Hydeville Co. v. Ry. Co., 44 Vt. 395; Stewart v. Griffith, 30 Supt. Ct. Rep. 528; Early Times Dist. Co. v. Zeiger, 11 N. M. 221, 67 Pac. 734; Ketchum v. Everton, 13 Johns, N. Y. 359; Wilcox v. Stitt, 65 Cal. 596, 4 Pac. 629; Cummins v. Rogers, 36 Minn. 317; Schmidt v. Williams, 72 Iowa, 317; 2 Warvelle Vendors, 2 ed., secs. 810, 828; Kimball v. Tooke, 70 Ill. 553; Cleary v. Folger, 84 Cal. 316, 24 Pac. 280; Grey v. Tubbs, 43 Cal. 359; 2 Warvelle Vendors, 2 ed., sec. 818.

Appellee is precluded from recovering the amount of payments which were made by appellees and accepted by appellant within prescribed time. Stewart v. Griffith, 30 Sup. Ct. Rep. 528; Hansbrough, v. Peck, 5 Wallace, U. S. 497; Grey v. Tubbs, 43 Cal. 359; Green v. Green, 9 Cowden, N. Y. 46; Donahue v. Parkman, 161 Mass. 412; Chrisman v. Miller, 21 Ill. 227; Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003; Cutler v. Powell, Eng., 2 Smith's Lead Cas. 1 and note; Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382; Hartley v. Decker, 89 Pac. 47.

Not a case in which equity should disregard the Statute of Frauds. Converse v. Blumrich, 14 Mich. 109; Hidden v. Jordan, 21 Cal. 93; Gillett v. Knowles, 108 Mich. 602, 66 N. W. 497; Ochsenkehl v. Jeffers, 32 Mich. 482; Damschroeder v. Green, 51 Mo. 100; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Willnik v. Vanderver, 1 Barbour, N. Y. 599; Sathre v. Rolff, Mont., 77 Pac. 431; Morrison v. Herrick, 130 Ill. 631; Koch v. Assoc., 137 Ill. 497; Martin v. Martin, 170 Ill. 639, 62 Am. St. Rep. 412; Montacute v. Maxwell, 1 P. Will. 618; Jenkins v. Eldridge, 2 Story, C. C. 290; Purcell v. Coleman, 4 Wall. 513; Dunphy v. Ryan, 116 U. S. 491; Pond v. Sheehan, Ill., 8 L. R. A. 417; Dicken v. McKinley, Ill., 45 N. E. 134, 54 Am. St. Rep. 471; Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157; Down v. Drew, N. H., 42 Atl. 177; Smith v. Phillips, N. H., 43 Atl. 183; Glass v. Aulbert, 102 Mass. 28, 3 Am Rep. 421; 29 Am. & Eng. Enc., 2 ed. 831; 20 Cyc. 296; Slayter v. Emerson, 19 How., U. S. 224; 3 Cyc. 427.

NISBET & NISBET and D. D. TEMPLE for Appellees.

The failure of one of the parties to perform a condition, will not in every case defeat his right to specific performance. Kingston v. Walters, 14 N. M. 371; Cheney v. Libby, 134 U. S. 68; Hennesy v. Woolworth, 128 U. S. 438; Seton v. Slade, 7 Ves. 265; Levey v. Lindo, 3 Marivale 81; Hudson v. Bartran, 3 Madd. 440; Lilley v. Fifty Associates, 101 Mass. 432; Potter v. Tuttle, 22 Conn. 512; Ahl v. Johnson, 20 How. 511; Swain v. Seaman, 76 U.

S. 254; Longfellow v. Moore, 102 Ill. 294; Fleming v. Gilbert, 3 Johns 597.

Where one party to a contract before the time for performance by the other has arrived, consents on his request to extend the time of performance until he gives notice of withdrawal, he is estopped to consider the latter in default though meanwhile the contract time has elapsed. Mayor, etc. v. Butler, 1 Barb. 337; Young v. Hunter, 6 N. Y. 204; Keating v. Price, 1 Johns 22; Esmond v. Van Beschotan, 12 Barb. 336; Clark v. Dales, 21 Barb. 42; Dodge v. Crandall, 30 N. Y. 306; Whittier et al v. Dana et al, 10 Allen 326; Norman v. Waite, 46 N. W. 639; Thompson v. Poor, 42 N. E. 13; Michels v. Omstear, 14 Fed. 219; Brown on Stat. Frauds, sec. 409, p. 423; 20 Cyc. 287; 9 Enc. Ev. 356.

Where the party consents to a part payment and the other party acts upon it he cannot recall it. Thompson v. Poor, 43 N. E. 13; Brown on Statutes of Fraud, 5 ed., sec. 437.

STATEMENT OF THE CASE.

On the day of its date the defendant, here the appellant, executed and delivered to the plaintiffs, here the appellees, this written memorandum: "McMillan, N. M., August 11, 1904. Received of John H. Kingston and W. D. Mahoney, $100.00 part payment for 400 acres of land located in Sec. 19 and 20 in Twp. 19, S. R. 26 E. There is to be $200,00 more paid on or before the 15th day from date. On payment of said $200.00 as stipulated the undersigned will place with the Citizens National Bank of Roswell, quit claim deed for said land to be delivered on payment of $900.00 on or before 90 days from date. Failure to make payment as stipulated works a forfeiture of amount paid. (Signed) J. W. Walters." The $100, the receipt of which it acknowledges, was actually paid at that time. Immediately afterwards, according to evidence for the plaintiffs, when the parties were about to separate and the train which the plaintiffs were to take was in sight coming toward the station where they were, the defendant, in response to a statement that fifteen days was too short

a time for Mr. Kingston, one of the plaintiffs who lived in Northern New York, to get home and send the next payment, said he could have "five or ten days" more, and those present were called to witness his statement. It appeared by undisputed evidence that the defendant had a nephew, Mr. Smith, who was employed in the Citizens National Bank of Roswell. That he told the plaintiffs, Mr. Smith would attend to the matter for him. That the plaintiff, Mahoney, sent $100, half of the payment of $200, which by the written memorandum was to be made within fifteen days, by telegraph to the defendant on August 26th, and received his receipt for it. That the defendant was absent from Roswell several days covering the latter part of August and the first part of September. That he left with Mr. Smith a copy of the memorandum given the plaintiffs, with instructions to accept the $100 to complete the second payment if it should be paid August 26th or within five days thereafter. That on August 31, the plaintiff, Kingston, sent a money order for $100 by telegraph to the defendant, in care of the Citizens National Bank, and that it was received at Roswell the same day. The manager of the telegraph company testified that he telephoned the Citizens National Bank after banking hours, August 31, that the money order was there, and Mr. Smith, replying, said Mr. Walter was at the East, and, it being after banking hours, he would call the next morning, which he did, but declined to receive the order on the ground that it did not arrive in time the day before. Mr. Smith testified that he was not notified of the arrival of the order until September 2, and that he then refused to receive it because it was past the time limit fixed by his instructions. On September 6, a draft for $100 was sent to the Citizens National Bank by the plaintiff Kingston, for the defendant, and the bank refused to accept it. On November 9, the plaintiffs tendered the defendant $1000, which he refused to accept. There was no evidence that the defendant absented himself from Roswell to prevent the plaintiffs from having the opportunity to make the payment of $100. The defendant claims and holds the $200 he received as a forfeit under the memorandum. The cause was tried with a jury, and a ver-

dict rendered for the plaintiffs. Judgment was rendered on the verdict, and the defendant appealed to this court.

OPINION.

ABBOTT, J.—It is made clear by the evidence that, after giving the plaintiffs the memorandum in question, the defendant did orally agree that they might have more than fifteen days for making the next payment required. The evidence is conflicting as to the number of days additional he agreed to give, but there was evidence which would have warranted the jury in finding that it was as many as ten days, which would have ended September 5. Before September 5, the defendant had refused to receive the $100 telegraphed him, on the ground that it came too late. If, then, the verbal agreement of the defendant to extend the time fixed by the written memorandum for making the second payment was valid, the verdict of the jury should stand, otherwise it should not.

This is the second appearance here of this cause, and the decision of this court in 14 N. Mex. 368, holding, in effect, that a subsequent verbal modification of the time of performance fixed by a written agreement for the sale of real estate, will be regarded, in a
1 court of equity at least, as valid, must stand as the law in this case, and we think the doctrine need not be limited to equity. It is stated in 20 Cyc. 287, that "An oral agreement for an extension of the time of performance of a written contract within the statute of frauds which does not, in effect, amount to making a new contract within the statute, is valid." And this view is sustained in Smith v. Loomis, 74 Me. 503.

But, in addition to what was then considered by the court, there is now before us the evidence from which it clearly appears that the defendant should be estopped
2 to set up the defense that the plaintiffs did not make the payment of $200 within fifteen days, as provided for in the written agreement, when they had his assurance, on which they relied and acted, that they might take more time. Where a representation as to the future relates to an intended abandonment of an existing right, and is made

to influence others, and they have been influenced by it to act, it operates as an estoppel, 10 Cyc. 752, citing Union Mutl. Ins. Co. v. Mowry, 96 U. S. 544; Faxton v. Faxton, 38 Mich. 159; Elliot v. Whitmore, 23 Utah 342; Johnson v. Blair, 132 Ala. 128. In the latter case the husband of the only heir of a deceased mortgagor of real estate inquired of the holder of the mortgage which was then five years overdue, but on which the interest had been regularly paid and accepted, whether she would allow the mortgage debt to stand a while longer, stating that it would be paid then if she required it, and that he did not wish to have to pay an attorney's fee for foreclosure. He was assured that if she decided to have it paid she would let him know so that he could pay it without an attorney's fee, and, relying on that, payment was not made and nothing more was said or done on either side until about a year later, when an attorney demanded payment and claimed an attorney's fee. It was held that the mortgagee was estopped from recovering an attorney's fee. See also: Swain v. Seamans, 9 Wall. 254; Clark v. Dales, 20 Barb. 42; Thompson v. Poor, 147 N. Y. 402, 42 N. E. 13. In Longfellow v. Moore and others, 102 Ill. 294, the court said: "The principle of estoppel would not permit the appellee to throw appellant off his guard and thus obtain an inequitable advantage by agreeing to extend the time of appellant to perform the contract and then insisting on it as it was written." The judgment of the District Court is affirmed.

POPE, C. J., having presided at the first trial did not participate, nor did MECHEM, A. J., who tried the cause.

[No. 1370, February 1, 1911.]

FIRST NATIONAL BANK OF ARTESIA, Appellee, v. THE HOME INSURANCE COMPANY OF NEW YORK, Appellant.

SYLLABUS (BY THE COURT).

1. In an action brought to recover on a draft, the complaint alleged that the draft was drawn by an agent on his principal by authority of the principal; that the draft was presented, payment refused, and that same is still unpaid, held, to be good on a demurrer for failure to state facts sufficient to constitute a cause of action, for the reason that "a draft drawn by an agent on his principal by authority of the principal, is equivalent to a draft drawn by the principal himself, and need not be accepted by the drawee in order to bind it."

2. By the provisions of Section 130, Chapter 83, Laws 1907, known as the "Negotiable Instrument Act," it is provided that where the drawer and drawee are the same person a draft may be treated as a promissory note, thus requiring no acceptance.

3. By the provisions of Section 12, Chapter 62, Laws 1901, every contract in writing imports consideration.

Appeal from the District Court for Eddy County, before WILLIAM H. POPE, Chief Justice. Affirmed.

DYE & DUNN for Appellant.

Appellant was not liable on written instrument on which his signature does not appear. Laws 1907, chap. 83, sec. 18; Luna v. Mohr, 3 N. M. 63; Webster v. Wray, Neb., 26 Am. Rep. 754; 1 Daniel Neg. Inst., 4 ed., sec. 409.

Special agent, who executed written instrument, had but limited authority and instrument was without consideration. Bank of Commerce v. Baird Mining Co., 13 N. M. 424; Baum v. Palmer, Ind., 76 N. E. 108.

Instrument had never been accepted by appellant. Laws 1907, chap. 83, sec. 127; Bank of Commerce v. Baird Mining Co., 13 N. M. 424; Shutt Imp. Co. v. Erwin, Kan., 71 Pac. 521; 1 Daniel Neg. Inst., 4 ed., secs. 479, 480.

Instrument sued on was not negotiable. Laws 1907, chap. 83, sec. 1, sub-sec. 2; Berenson v. London & Lancashire Fire Ins. Co., Mass., 87 N. E. 687; White v. Cushing, Me., 34 Atl. 164.

J. B. ATKESON for Appellee.

Where the name and the printed seal of an insurance corporation appear on a draft, drawn by one in his own name, followed by the word "special," and who is described in the instrument as "special agent," no formal written or printed signature of the company is necessary to bind it. Laws 1907, chapter 83, section 130; Ogden Neg. Inst. 33, 44; Lampkin v. State, 105 Ala. 1, 16 So. 595; Irvin v. Sterns, 26 Ga. 223, 71 Am. Dec. 204; Dow Law Bank v. Godfrey, 126 Mich. 521, 85 N. W. 1075; 86 Am. St. Rep. 559; Eaton & Gilbert on Com. Paper 91, 226; Hasey v. White Pigeon Beet Sugar Co., 1 Doug., Mich. 193; Marion & M. R. Co. v. Hodge, 9 Ind. 163; Baker v. Chambles, 4 Greene, 6 Iowa 428; Hitchcock v. Buchanan, 105 U. S. 416; Post v. Pearson, 108 U. S. 416; Falk v. Moeds, 127 U. S. 702; 4 A. & E. Enc. 11; Western Min. Co. v. Toole, 11 Pac. 119.

The agent's authority will be presumed. Eaton & Gilbert on Com. Paper 138; Cred. Co. v. Howe Mach. Co., 54 Conn. 357, 1 Am. St. Rep. 123; Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187; Great Western Tel. Co., Fed. Cas. 5, 740, 5 Biss. 363; Luna v. Mohr, 3 N. M. 63; Hypes v. Griffin, 89 Ill. 134; Mechanics Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326; Baldwin v. Bank of Newbury, 1 Wall. 234.

Where, in a bill of exchange, or a draft, the drawer and drawee are one and the same person, acceptance is not necessary to bind party. Eaton & Gilbert on Com. Paper 226; Marion & M. R. C. v. Hodge, 9 Ind. 163; Holsworth

v. Hunter, 10 B. & C., Eng. 449, 21 E. C. L., Eng. 110; Witte v. Williams, 8 S. C. 290, 28 A. Rep. 294; Hasey v. White Pigeon Beet Sugar Co., 1 Doug., Mich. 193; Laws 1907, chapter 83, section 130.

A bill of exchange, draft or promissory note wherein an amount certain is to be paid at a definite time, is negotiable, unless it is stated clearly thereon that the same is payable only upon some contingency. Eaton & Gilbert on Com. Paper, 162; Laws 1907, chapter 83, section 1; Ferress v. Tavel, 11 S. W. 93, 3 L. R. A. 414; Siegel v. Chicago Trust and Savings Bank, 23 N. E. 417, 7 L. R. A. 537; Miller v. Ottaway, 45 N. W. 655, 8 L. R. A. 428.

Evidence was admissible to show the real party to be bound. Eaton & Gilbert on Com. Paper 93; Hardy v. Pilcher, 57 Miss. 18, 34 Am. Rep. 433; Haile v. Pierce, 32 Md. 327, 3 Am. Rep. 139; McClellan v. Reynolds, 49 Mo. 312; Metcalf v. Williams, 104 U. S. 93; Kline v. Bank of Tescott, 50 Kan. 91, 31 Pac. 688; Benham v. Smith, 53 Kan. 495, 36 Pac. 997; Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583; Mechanics Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326.

Where a demurrer is interposed to a complaint, it admits all the facts stated therein, which are well pleaded to be true. Luna v. Mohr, 3 N. M. 63; Bryson v. Lucas, 84 N. C. 286, 37 Am. Rep. 634; Roger Williams Bk. v. Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170; Pa. Mutual Life Ins. Co. v. Conoughy, 54 Neb. 124, 74 N. W. 422; Peterson v. Honan, 44 Minn. 166, 46 N. W. 303, 20 Am. St. Rep. 564; Hypes v. Griffin, 89 Ill. 134; Mechanics Bank v. Bank of Columbia, 5 Wheat. 326; Baldwin v. Bank of Newbury, 1 Wall. 234; Bank of Commerce v. Baird Min. Co., Lim., 13 N. M. 424; Shutt Imp. Co. et al v. Erwin et al, Kas., 71 Pac. 521; Webster v. Wray, 56 Am. Rep. 754; Dan. Neg. Inst., 4 ed., secs. 409, 479, 480; Berenson v. London & Lan. Fire Ins. Co., 87 N. E. 687; White v. Bushing, 34 Atl. 164.

STATEMENT OF FACTS.

The appellee, hereinafter styled the plaintiff, brought suit against the appellant, hereinafter styled the defendant, to recover on a draft for nine hundred dollars. The second paragraph of the plaintiff's complaint is as follows, to-wit: "That on the 5th day of July, 1910, the defendant's special agent, Chas. Quitzow, for and on behalf of the defendant, and at the special instance and request of the defendant, as the act of the defendant, and while in the discharge of his duty as such special agent, according to the usage and custom of defendant made, executed and delivered a sight draft in writing, as such special agent and as the act of defendant, payable to the order of Amy Henry by defendant in the city of New York, in the sum of nine hundred and no-100 dollars ($900.00,) with a receipt attached, it being a part of the said draft, and attached to the said draft, with a copy of the corporation seal printed thereon, a copy of which said draft is in words and figures as follows, to-wit: $900.00. Los Angeles, Cal., July 5, 1910. The Home Insurance Company, New York. Pay to the order of Amy Henry, Nine Hundred and no-100 Dollars, being in full for loss and damage by fire under policy No. 536 of Artesia, New Mexico Agency as per receipt hereto attached. Chas. Quitzow, spc. Endorsed on back: 'Amy Henry.' 'This draft will not be paid if detached from receipt herein referred to.' 'The Home Insurance Company, New York. $900.00. Los Angeles, Cal., July 5, 1910. Received of Chas. Quitzow, Spc. Agent, a Sight Draft on The Home Insurance Company, New York, for the sum of Nine Hundred and no-100 Dollars which when paid will be in full of all claims and demands for loss and damage by fire on the 23rd day of May, 1910, to the property insured by Policy No. 536 issued at the Artesia, New Mexico, Agency of said Company, and in consideration of said payment the policy is hereby cancelled and surrendered to said Company. Amount of claim, $900.00. Interest, $——. Draft, $900.00. Amy Henry.' 'Duplicate of this receipt has been indorsed on the policy and signed by all parties in interest. Chas. Quitzow, Agent."

Then follow allegations of the transfer of the draft to the plaintiff for valuable consideration, to-wit, the sum of Nine Hundred Dollars; that the same was presented to the defendant in the City of New York and demand for payment made, payment refused, and draft protested; and is still due and unpaid and a prayer for a judgment. To this complaint the defendant interposed a demurrer on the ground that the complaint did not state facts sufficient to constitute a ground of action. The demurrer was overruled, the defendant refused to plead further, and elected to stand on the demurrer. Thereafter, upon a hearing, judgment was rendered in favor of the plaintiff for the amount of the draft and costs.

OPINION.

MECHEM, J—This court adopts the opinion delivered by the judge of the lower court in overruling the demurrer, which is as follows, to-wit: "The demurrer to the complaint is overruled. While under the provisions of the Negotiable Instrument Act an acceptance is necessary to bind the drawee on a draft, where the drawer
2 and drawee are the same persons, it is expressly provided by Sec. 130 of that act that a draft may be treated as a promissory note, and thus requiring no acceptance. The same principle of law is stated generally in 7 Cyc. 759. The allegations of the complaint of the present case make the drawer the agent of the insurance company, fully authorized to make the draft. This, under very respectable authority, makes it a case where the drawer and the drawee are the same. As is stated in Gray Tie Co v. Farmers' Bank, 60 S. W. 537, 'a draft
1 drawn by an agent on his principal by authority of the principal is equivalent to a draft drawn by the principal upon himself and need not be accepted by the drawee in order to bind it.' "

One question was not presented to the court below, nor passed upon by him in overruling the demurrer, and is now assigned as error, and it is that the instrument sued

on was without consideration. This, however, is disposed of by Section 12, Chapter 62, Laws of 1901, which
3 reads as follows: "Every contract in writing hereinafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done." So that for the purpose of the demurrer the instrument sued on sufficiently implied a consideration. For the reasons above stated the judgment of the lower court is affirmed, and it is so ordered.

[No. 1055. February 4, 1911.]

SOLOMON LUNA, Plaintiff in Error, v. CERRILLOS COAL RAILROAD COMPANY, Defendant in Error.

SYLLABUS (BY THE COURT).

1. If, at the trial of a cause without a jury in a District Court, the party requests the court to make findings of fact as provided by Section 2999, C. L. 1897, and in any appropriate way, before the rendition of the judgment, makes known to the court that he desires specific findings, and on what points he desires them, the court should make findings of the essential or determining facts on which its conclusion in the case was reached, specific enough to enable this court to review its decision on the same ground on which it was made.

Error to the District Court for the County of Santa Fe, JOHN R. MCFIE, Associate Justice. Reversed and remanded.

FRANK W. CLANCY for Plaintiff in Error.

The so-called findings of fact are insufficient. C. L. 1897, sec. 2999; C. L. 1884, sec. 2060; Laws 1887, page 216; Lynch v. Grayson, 5 N. M. 493; Hathaway v. Bank, 134 U. S. 497; Mammoth Co. v. Salt Lake Co., 151 U. S. 447; Haws v. Victoria Co., 160 U. S. 304; Chicago Tyre Co. v. Spalding, 116 U. S. 542; Allen v. St. Louis Bank, 120 U. S. 30; Smith v. Sac County, 11 Wall. 147; Young

v. Amy, 171 U. S. 184; Runkle v. Burnham, 153 U. S. 217; Neslin v. Wells, 104 U. S. 429; Saltonstall v. Birtwell, 150 U. S. 418; Chesapeake Ins. Co. v. Stark, 6 Cranch. 268; Barnes v. Williams, 11 Wheat. 415; Norris v. Jackson, 9 Wall. 127; Burr v. Navigation Co., 1 Wall. 102; Norris v. Jackson, 9 Wall. 127; McClure v. U. S., 116 U. S. 151; Ward v. Cochran, 115 U. S. 599; Duncan v. The Francis Wright, 105 U. S. 387; Greene v. Williams, 21 Kas. 68; Lynch v. Grayson, 5 N. M. 493; Haight v. Tyron, 112 Cal. 6; Edgar v. Stevenson, 70 Cal. 287; Wunderlin v. Cadogan, 75 Cal. 618; Prince v. Lynch, 38 Cal. 530; Tewksbury v. Magraff, 33 Cal. 246; Miller v. Steen, 30 Cal. 407; Hidden v. Jordan, 28 Cal. 305; Wrigglesworth v. Wrigglesworth, 45 Wis. 257; Mead v. Supervisors, 41 Wis. 209; Williams v. Lumber Co., 72 Wis. 489; Wetzler v. Duffy, 78 Wis. 174; Catlin v. Henton, 9 Wis. 492; Sanford v. McCreedy, 28 Wis. 107; Munroe Water Co. v. Frenchtown, 98 Mich. 436; Seeley v. Albrecht, 41 Mich. 527; People v. Littlejohn, 11 Mich. 62; Kahn v. Smelting Co., 2 Utah 382; Bradbury v. Bedbury, 31 Minn. 163; Huklin v. McClear, 18 Ore. 138; Noland v. Bull, 24 Ore. 481; Eakin v. McCraith, 2 Wash. Ter. 117; Searcy County v. Thompson, 66 Fed. 96; Chatham Furnace Co. v. Moffatt, 147 Mass. 406; Parham v. Gibbs, 24 Tenn. 296; Moore v. Barnett, 17 Ind. 349; Miller v. Linly, 1 Ind. App. 6; Stumph v. Miller, 42 Ind. 142; People v. Littlejohn, 11 Mich. 60; Bank of Fort Worth v. Stout, 61 Tex. 567; Hartlep et al v. Cole, 120 Ind. 247; Brundage v. Deschler, 131 Ind. 174; Hamilton v. Armstrong, 20 S. W. 1054; Smith v. Gale, 144 U. S. 510; Mining Co. v. Taylor, 100 U. S. 37; Levins v. Rovegno, 71 Cal. 275.

Spanish church records are evidence of the highest character. Blackburn v. Crawford, 3 Wall. 175; 1 Greenleaf on Evidence, sec. 493; Starkie on Evidence, 297; Jones on Evidence, sec. 522; Wharton on Evidence, sec. 649; U. S. v. Chaves, 159 U. S. 459; Fremont v. U. S., 17 How. 557; U. S. v. Perot, 90 U. S. 428; Crespin v. U. S., 168 U. S. 212; Diccionario of Escriche, vol. 2, ed. 1847, title "Registro Parroquial," page 806; Title "Naci-

miento" 630; title "Muerte" 622; title "Libros Parroquiales" 628; C. L. 1897, sec. 3030; R. R. Co. v. McGlinn, 114 U. S. 542.

Evidence insufficient to support defense under statute of limitations. Catron v. Laughlin, 11 N. M. 638; Trotter v. Cassady, 13 Am. Dec. 184; Barret v. Coburn, 3 Met., Ky. 513; Forward v. Deetz, 32 Pa. St. 72; Freeman on Co-Tenancy and Partition, sec. 221; Adams v. Ames Iron Co., 23 Conn. 235; Newell v. Woodruff, 30 Conn. 498; Warfield v. Lindel, 38 Mo. 581; 30 Mo. 283; Prescott v. Nevers, 4 Mason C. C. 330; Thorton v. York Bank, 45 Mo. 161; Bailey v. Trammell, 27 Tex. 328; Chandler v. Ricker, 49 Vt. 128; Buckmaster v. Needham, 22 Vt. 617; Roberts v. Morgan, 30 Vt. 617; Leach v. Beattie, 33 Vt. 195; Owen v. Morton, 24 Cal. 373; Wommack v. Whitmore, 58 Mo. 448; Squires v. Clark, 17 Kas. 84; Ball v. Palmer, 81 Ill. 370; Shumway v. Holbrook, 11 Am. Dec. 153; 13 Am. Dec. 140; McClurg v. Ross, 5 Wheat. 124; 1 Washb. Real Prop. 656; Brown v. Hogel, 30 Ill. 119; Bush v. Huston, 75 Ill. 344; Ball v. Palmer, 81 Ill. 370; Sontag v. Bigelow, 142 Ill. 144; Newell v. Woodruff, 30 Conn. 497; Roberts v. Morgan, 30 Vt. 323; Proprs. Kennebeck Purchase v. Springer, 4 Mass. Rep. 416; Small v. Proctor, 15 Mass. Rep. 495; Bates v. Norcross, 14 Pickering 227.

Where there are two confirmations of imperfect titles, the earlier confirmation takes the land regardless of the respective dates of the original title. Willot v. Sanford, 19 How. 79; LesBois v. Brammell, 4 How. 464; Henshaw v. Bissell, 18 Wall. 255; Miller v. Dale, 92 U. S. 474; Trenier v. Stewart, 101 U. S. 797; Adam v. Norris, 103 U. S. 591; U. S. v. McMasters, 4 Wal. 680; U. S. v. Hallet, 1 Wal. 439; U. S. v. Hancock, 133 U. S. 193; U S. v. Fossatt, 21 How. 449; Lafayette v. Kenton, 18 How. 199; Tameling v. U. S. F. Co., 93 U. S. 644; Comstock v. Crawford, 3 Wal. 396; Avegno v. Schmidt, 113 U. S. 293; Vanfleet on Collateral Attack, secs. 568, 570; U. S. v. Chaves, 175 U. S. 509.

THOMAS B. CATRON for Defendant in Error.

Findings of fact were sufficiently specific. C. L. 1897, sec. 2999; C. L. 1884, sec. 2060.

In the absence of a request for a specific finding of a particular fact no objection can be taken to a finding of ultimate facts which embrace the whole issue. Miller v. Stein, 84 Cal. 127; Prince v. Lynch, 38 Cal. 536; Tewksbury v. Magriff, 33 Cal. 237; Miller v. Steen, 30 Cal. 402; Hidden v. Jordan, 28 Cal. 305; Wunderlee v. Cadogan, 75 Cal. 286; Edgar v. Strum, 71 Cal. 286; Kahn v. Smelting Co., 2 Utah 382; Bradbury v, Bedbury, 31 Minn. 163; Noland v. Bull, 24 Ore. 479; Eakin v. McCrath, 2 Wash. Ter. 113; Monroe Co. v. Frenchtown, 98 Mich. 436; Williams v. Lumber Co., 45 Wis. 255; Kellogg v. Bessantz, 51 Kas. 418; Typer v. Sooy, 19 Kas. 596; People v. Littlejohn, 11 Mich. 61; Searcy Co. v. Thompson, 66 Fed. Rep. 96; Huklin v. McCleor, 18 Or. 138; Chatham Co. v. Furnace, 147 Mass. 406; Williams v. Lumber Co., 72 Wis. 487; Wetzler v. Duffy, 78 Wis. 174; Bainter v. Fults, 15 Kas. 330; Green v. Williams, 21 Kas. 64; Wrigglesworth v. Wrigglesworth, 45 Wis. 255; Parham v. Gibbs, 84 Tenn. 296; Moore v. Barnett, 17 Ind. 349; Miller v. Linly, 1 Ind. App. 6; Stemph v. Miller, 142 Ind. 142; People v. Littlegon, 11 Mich. 60; Bank of Fort Worth v. Stout, 61 Tex. 567; Hartlep et al v. Cole, 120 Ind. 247; Brundage v. Deschler, 131 Ind. 174; Hamilton v. Armstrong, 20 S. W. 1054.

Plea of the statutes of limitation was unnecessary and surplusage. C. L. 1897, sec. 3165; Hogan v. Kuntz, 94 U. S. 775; Reynolds v. Cook, 83 Va. 817; Sheldon v. VanVlick, 106 Ill. 45; Stubblefield v. Borders, 92 Ill. 287; Meiskoph v. Dibble, 18 Fla. 24; Horne v. Carter, 20 Fla. 45; Barco v. Fennell, 24 Fla. 380; Miller v. Beck, 68 Mich. 78; Holmes v. Kring, 93 Mo. 455; Fairbanks v. Long, 91 Mo. 631; Stocker v. Green, 94 Mo. 280; Bird v. Sellers, 113 Mo. 588; Kyser v. Cannon, 29 Ohio St. 361; Rhodes v. Gunn, 35 Ohio St. 391.

Pleadings and what they should contain. Phillips on Court Pleadings, secs. 11, 184, 185; C. L. 1897, secs. 2685, sub-sec. 32, 107, sec. 3164; 1 Chitty's Pl., 15 ed. 213; Cotton Oil Co. v. Shamblin, 101 Tenn. 263; Burn-

ham v. Ross, 47 Me. 459; Kilpatrick Dry G. Co. v. Pax, 13 Utah, 597; Smith v. Cottrell, 8 Bax., Tenn. 63; 22 A. & E. Enc. 837.

A finding of probative facts from which there can be but one conclusion as to the ultimate fact is good. Morris v. Jackson, 9 Wall. 127; 8 P. & P. 941, note 1; Van Riper v. Baker, 44 Ia. 450; McEwan v. Johnson, 7 Cal. 258; Breeze v. Doyle, 19 Cal. 105; Osment v. McElrath, 68 Cal. 466; Moore v. C. L. W. Works, 68 Cal. 146; Mach v. Works, 76 Cal. 305; Padden v. Goldbaum, 37 Pac. 759; McFadden v. Friendly, 9 Or. 224; Dougherty v. Ward, 89 Cal. 81; Knudson v. Curley, 30 Minn. 433; School District No. 73 v. Wraybeck, 31 Minn. 77; Caywood v. Farrell, 175 Ill. 481; Hamilton v. Spokane, 3 Idaho 167; Miller v. Smith, 7 Idaho 205; Downer v. Saxton, 17 Wis. 20; Trudo v. Anderson, 10 Mich. 357; Conlon v. Grace, 36 Minn. 276; Farmers L. & T. Co. v. Railway Co., 127 Ind. 250; People v. Hagar, 52 Cal. 171; Coveny v. Hale, 49 Cal. 552; Miller v. Luco, 80 Cal. 257; Carey v. Brown, 58 Cal. 180; Williams v. Hall, 79 Cal. 606; Myer v. School Dis., 4 S. Dak. 427; Union C. S. M. Co. v. Taylor, 100 U. S. 342; Merchants Ins. Co. v. Allen, 121 U. S. 72; Smith v. Gale, 144 U. S. 525; Duncan v. The Francis Wright, 105 U. S. 387; McGuire v. Lamb, 2 Idaho 378; Wilkinson v. Bethel, 13 Idaho 746; Ybarra v. Sylvaney, 31 Pac. Rep. 1114, Cal; Daly v. Socorro, 80 Cal. 367; Ervin v. Brady, 48 Mo. 561; Trope v. Kurns, 20 Pac. Rep. 84; Dyer v. Brogan, 70 Cal. 136; Malone v. County of Del Norte, 77 Cal. 218; Roberts v. Haley, 65 Cal. 402; Courtney v. Fortune, 57 Cal. 617; Porter v. Woodward, 57 Cal. 535; Hawes v. Clark, 84 Cal. 272; Dolliver v. Dolliver, 94 Cal. 642; Posachane Co. v. Standart, 97 Cal. 476; Malone v. Bosch, 104 Cal. 680; Tage v. Alberts, 2 Idaho, 249; Collins v. Dressner, 133 Ind. 290; McCandliss v. Kelsey, 16 Kas. 557; Bradbury v. Bedbury, 31 Minn. 163.

Admissibility of church records to prove genealogy or pedigree. C. L. 1897, secs. 2171, 3030; 4 Elizondo Pract. Univ. 243; Meyer on Vested Rights, sec. 380; Hickox v. Tillman, 38 Barb. 608; Fales v. Wadsworth.

23 Mo. 553; Sanders v. Greenstreet, 23 Kas. 425; Howard v. Moot, 64 N. Y. 262; Hand v. Ballou, 2 Kern 541; Cooley Con. Lim., sec. 367; Childers v. Cutter, 16 Mo. 45 Greenleaf Ev., sec. 115; Blackburn v. Crawfords, 3 Wall. 189.

It must appear that plaintiff had perfect grant. 20 A. & E. Enc. 715; Dow v. Howland, 8 Cow. 284.

A grant may be made by law as well as by patent pursuant to law. Tamerling v. Freehold Land & E. Co., 93 U. S. 663.

All deeds must be construed by a consideration of all of their parts and so as to give effect to every part thereof. Doren v. Gillum, 136 Ind. 140; Carson v. McCaslin, 60 Ind. 334; Edwards v. Beal, 75 Ind. 410; Prior v. Quakenbush, 29 Ind. 475; Wagner v. Wagner, 1 S. & R. 374; Henderson v. Mack, 82 Ky. 380; Collins, Adm. v. Lavelle, 44 Vt. 233; Flagg, Adm. v. Eames, 40 Vt. 16.

Acts of ownership amounted to disseisin of any cotenants. Fouke v. Bond, 41 N. J. L. 537; Prescott v. Nevers, 4 Mason 326; Bigelow v. Jones, 10 Pick. 161; Kittredge v. Lock Co., 17 Pick. 246; Parker v. Prop., 3 Met. 91; Marcey v. Marcey, 6 Metc. 360; Jackson v. Brink, 5 How. 483; Clapp v. Bromagham, 9 Cov. 531; Bradstreet v. Huntington, 5 Pet. 402; 5 Burr. 2604; 1 Atk. 493; 2 Atk. 632; Doe v. Reid, 11 East. 51; Richards v. Williams, 70 Wheat. 60; Doe v. Prosser, Cowp. 217; Bradstreet v. Huntington, 6 Pet. 439; Pawlett v. Clark, 4 Pet. 504; Williams v. Watkins, 3 Pet. 53; Thomas v. Pickering, 13 Me. 353; Alexander v. Kennedy, 19 Tex. 492; Law v. Patterson, 1 W. & S. Pa. 184; Crozier v. Andrews, 11 Tex. 170; Portis v. Hill, 3 Tex. 273; DeLeon v. McMurray, S. E. Rep. 1038; Pucket v. McDaniel, 28 S. E. Rep. 360; Mayes v. Manning, 73 Tex. 46; Church v. Waggoner, 78 Tex. 203; Long v. Stapp, 49 Mo. 508.

Running of Statute of Limitation in favor of defendant was not interrupted. Ballard v. Hansen, 33 Neb. 861; Bell v. Denson, 56 Ala. 444; Rayner v. Lee, 21 Mich. 384; Stettnische v. Lamb, 18 Nev. 619; Hughes v. Pickering, 14 Pa. St. 297; Hudgins v. Crowe, 32 Ga. 367; Fugate v. Pierce, 49 Mo. 441; Crispen v. Hanavan, 50

Mo. 536; DeLavega v. Butler, 47 Tex. 529; Harper v. Tapley, 35 Miss. 506; Haywood v. Thomas, 17 Nev. 238; Valley Co. v. Coppinger, 32 S. W. 442; Foundry Co. v. Cole, 130 Mo. 1; Pemberton v. King, 2 Nev. 276; Holmes v. Tremper, 20 John. 29; Railroad v. Kent & Co., 30 Md. 347.

The burden to show such occupation as to defeat statute of limitation is on plaintiff. 1 A. & E. Enc. 870; Sdg. & Waite Tr. Tit. to L., sec. 753; Hubbard v. Barry, 21 Cal. 221; Whitford v. Drexel, 118 Ill. 600; Schulz v. Arnot, 33 Mo. 172; Jackson v. Vermilyea, 6 Cow. 677; Shumway v. Phillips, 22 Pa. St. 151; Ralph v. Bayley, 11 Vt. 521; Tapscott v. Cobbs, 11 Grat. 172; Goewey v. Urig, 18 Ill. 238; E. St. L. Co. v. Nugent, 147 Ill. 254; Williams v. McAliley, Cheves, S. C. 200; Owen v. Goode, 3 Storb. S. C. 474; Davis v. White, 27 Vt. 751; Hodges v. Eddy, 38 Vt. 327; Hunt v. Wickliffe, 2 Pet. 212; Green v. Liter, 8 Cr. 229; McClain v. Smith, 106 N. C. 172; Green v. Harman, 4 Dev. N. C. 158; Hunnicut v. Peyton, 102 U. S. 333; Cline v. Catron, 22 Grat. 378; Turpin v. Saunders, 32 Gratt. 27; Messer v. Reginnitter, 32 Ia. 312; Rayner v. Lee, 20 Mich. 386; Cowles v. Hall, 90 N. C. 333; Elder v. McCloskey, 37 U. S. C. C. App. 37; New. on Eject., sec. 49; Duren v. Sinclair, 37 S. C. 366; Bell v. Dennison, 56 Ala. 444; Whalley v. Small, 29 Ia 290; Both v. Small, 25 Ia. 178; Society v. Pawlet, 4 Pet. 510; Howerson v. Griffin, 5 Pet. 157; Harvey v. Tyler, 2 Wall. 349; Byers v. Dauley, 27 Ark. 93; Ewing v. Burnett, 11 Pet. 52; Taggart v. Stanberry, 2 McL. 543; Thompson v. Felton, 54 Cal. 551; Pease v. Lawson, 33 Mo. 42; Ang. on Lim. 400; Kirk v. Smith, 9 Wheat. 288; Jackson v. Porter, 1 Paine, C. C. R. 457; Burnside v. Hune, 78 Ala. 138; Kincheloe v. Tracewells, 11 Grat. 588; Little v. Downing, 37 N. H. 367; Jackson v. Demont, 9 John. 55; Bradstreet v. Huntington, 5 Pet. 435; Dearmond v. Broking, 37 Ga. 5; Child v. Conley, 39 Ky., 9 Dana 385; Ring v. Gray, 6 B. Mon. 368; Swager v. Crutchfield, 9 Bush. 411; Jackson v. Vrendenburg, 1 John. 159; Williams v. Jackson, 5 John. 489; Van Vorhis v. Kelley, 65 How. Prac. 300; Nason v. Blaisdell, 17 Vt.

216; McMahan v. Bowe, 114 Mass. 140 S. C. Am. R. 321; Den v. Geiger, 9 N. J. L. 225; Livingston v. Proseus, 2 Hill 526; Poor v. Horton, 15 Barb. 485; Howard v. Howard, 17 Barb. 663; Hamilton v. Wright, 37 N. Y. 502; Brinley v. Whiting, 22 Mass., 5 Pick. 348; Tabb v. Baird, 3 Cal. 475; Phelps v. Sage, 2 Day 151; Michael v. Nutting, 1 Smith, Ind. 481; Stockton v. Williams, 1 Doug. 546; Van Housen v. Benham, 15 Wend. 164; Kenada v. Gardner, 3 Barb. 589; Hotchkiss v. R. R. Co., 36 Barb. 600; Wilson v. Nance, 30 Tenn., 11 Hump, 189; Key v. Snow, 90 Tenn. 603; Rood v. Willard, Brayt. 66; Edwards v. Roys, 18 Vt. 473; University v. Josyln, 21 Vt. 52; Hotkins v. Ward, 6 Munf. 38; Early v. Garland, 13 Grat. 1.

STATEMENT OF THE CASE

This is an action of ejectment brought to recover an undivided interest in the Mesita de Juana Lopez Grant. The complaint is in the form prescribed by statute, and, omitting the caption, is as follows: "Solomon Luna, a resident of the County of Valencia in the Territory aforesaid, complains of Cerrillos Coal Railroad Company, a corporation, in a plea of ejectment: For that whereas, heretofore, to-wit, on the 15th day of January, 1898, at the County of Santa Fe, aforesaid, plaintiff was entitled to the possession of that certain piece or parcel of land situated in the county of Santa Fe aforesaid and commonly known as, and called, the grant of the Mesita de Juana Lopez, being the same tract of land covered by private land claim No. 64, which was confirmed by an Act of Congress of the United States, approved January 28, 1879, which appears at page 592 of Volume 20, Chapter 3, of U. S. Statutes at Large; and afterwards, to-wit, on the day and year aforesaid, at the county aforesaid, defendant entered into said premises and unlawfully withheld and thence hitherto has unlawfully withheld, and still does unlawfully withhold, from plaintiff possession thereof, to his damage in the sum of $25,000; wherefore plaintiff brings suit and prays judgment for recovery of the possession of said premises and for the sum of $25,000, his

damages aforesaid and costs." The defendant pleaded not guilty, traversed the allegations of the complaint, but admitted possession of a portion of the grant, alleging that it had had rightful possession of such portion for more than ten years prior to January 15, 1898. It also pleaded the statute of limitations as a defense in different ways. The plaintiff replied, traversing the new matter set up by the defendant.

By agreement, the case was tried by the court without a jury, and the issues submitted were limited to the question of title raised by the pleadings, and no evidence was taken of the value of improvements of the mesne profits. At the trial it was developed that the plaintiff claimed under purchases from descendants of Apolonia Romero and Patricio Romero, who the plaintiff undertook to prove were children of Domingo Romero, one of the three to whom the grant was originally made in 1782. This the defendant denied. The defendant introduced evidence in support of its alleged right of possession of the Mesita de Juana Lopez Grant, and also through the Ortiz Mine Grant which was in conflict with the first named grant, to the extent of between eleven thousand and twelve thousand acres. It also introduced evidence in support of its defense under the statute of limitations.

At the trial the plaintiff requested the court to give its decision in writing, to be filed with the Clerk, and to "find the facts and give its conclusions of law pertinent to the case, in accordance with the requirements of Section 2999, C. L. 1897," and the court thereupon gave its decision and made its findings in writing as follows: "The above entitled cause having been tried before the court without a jury, the same having been duly waived by the parties, and the testimony on behalf of each party having been heard, after due consideration of said testimony and arguments by the court, the court being fully advised in the premises, finds, as the facts in said cause: "That said plaintiff, Solomon Luna, was not, on the 15th day of January, 1898, or at the time of the commencement of said action, to-wit, on the 11th day of February, A. D. 1898, entitled to the possession of the property described

in the said declaration or complaint, or any part thereof; that said defendant was at the time of the commencement of said action in possession of the said property; that said defendant did not, on the 15th day of January, A. D. 1898, enter into the said premises and unlawfully withhold the same from the plaintiff, nor did said defendant at any time after said 15th day of January, A. D., 1898, unlawfully withhold the same from the said plaintiff, nor did the defendant at the time of the commencement of said action unlawfully withhold the possession of said premises from said plaintiff in manner and form as alleged and charged against it in the declaration, or complaint, of said Solomon Luna, but that the said possession of said defendant of said property was lawful. As a conclusion of law the court finds: that plaintiff is not entitled to recover the possession of said property, or any part thereof, or any damages in said action, and that said defendant is not guilty of the said trespass or ejectment laid to its charge in manner and form as said Solomon Luna has complained against it.

"It is, therefore, considered by the court that said plaintiff take nothing by reason of the matters and things alleged in his said declaration or complaint, and that said defendant, the Cerrillos Coal Railroad Company, go hence without day and recover of said Solomon Luna its costs herein expended, to be taxed." The plaintiff objected and excepted on various grounds; one that the findings were not such as the statute contemplates, and specified numerous instances of failure to find facts alleged to be material. These objections the court overruled and the plaintiff excepted. He then filed a motion to have the findings made set aside and for a new trial, for the reason, with others, that, "The court erred in overruling the plaintiff's objections, and each of them, to the said findings of fact." The motion was denied, and the plaintiff duly excepted. All this was before judgment. Judgment was rendered on the findings made for the defendant, a bill of exceptions was allowed, and the case was brought to this court on a writ of error.

OPINION OF THE COURT.

ABBOTT, J.—We have first to determine whether the attorney for the plaintiff duly and seasonably made known to the trial court his desire to have the court make specific findings of fact. His written request was for findings required by the statute, Sec. 2999, C. L. 1897, without stating in so many words that he desired them to be specific. We understand the practice of the district courts of the Territory generally to be that in such cases, the trial judge asks the attorney who has requested findings, to make a draft of such findings as he desires, and submit it to the court and the opposing counsel. It does not appear that this course was followed in the present instance, but, instead, the court made the findings which have been cited from the record. To them the plaintiff's attorney filed objections so specific as fully to apprise the court of the findings he desired to have made, and when these objections were overruled, he excepted and moved to have the findings, which had been set aside, and for a new trial, on the ground, with others, that the findings were insufficient, which motions were overruled. All this was before judgment, and, we think, gave the trial court full opportunity to make specific findings, if it had thought proper to do so; and we think the plaintiff thereby became entitled to specific findings of fact, as he would have been upon a direct request for such findings. We are not unmindful of the many decisions from other jurisdictions brought forward in behalf of the defendant in support of its contention to the contrary. What we have to say on the subject, in discussing the other branch of the case, will apply in great measure on the question now under consideration. Besides the meaning of the provision in question has been twice considered by this court in recent cases. It was not necessary, in either case, to make a direct decision on the point now before us, but in Radcliff v. Chaves, 15 N. M. 258, the court said: "We have recently held in Bank of Commerce v. Baird Mining Co., 13 N. M. 431, that such failure (to file special findings of facts) where such findings are not specially requested, or the omission to make them called to the attention of

the court by some appropriate motion, cannot be availed of as error." By fair inference the meaning is that, if the attention of the court is properly directed to the omission, special findings should be made. We next inquire whether the findings made by the trial court satisfy the requirements of the statute when specific findings are requested. The material part of Section 2999 *supra,* is as follows: "Upon the trial of any question of fact by the court, its decision must be given in writing, and in such decision the court shall find the facts and give its conclusions of law pertinent to the case, which must be stated separately, but the finding of facts and the giving of conclusions of law may be waived by the several parties to the issue, by suffering default or by failing to appear at the trial, or by consent in writing, or by oral consent in open court, entered in the record. And upon the trial of any cause by the court, without a jury in common law cases, each party shall have the right to make all objections and take all exceptions that he might have made or taken, as if the trial had been before a jury; and upon a review, by a writ of error, in the supreme court, or by appeal, the said supreme court shall hear and determine the said cause in the same manner and with the same effect as if it had been tried before a jury."

The able and exhaustive brief for the defendant makes it clear that such findings have been held sufficient by some courts of last resort whose decisions are, in general, entitled to high respect. Indeed, we will not question that the weight of authority by decided cases is in favor of its sufficiency, and that the trial court, in view of that condition, was justified, in holding as it did on the question. But, by our decision in this case, we are to determine the practice for this jurisdiction on the point involved, as there has been no direct decision of the question by this court. Having a clean slate before us, what we are to write on it becomes of special importance. It should be dictated by reason, and not by precedent, if the two conflict. In the interest of uniformity and certainty, we must, of course, follow the decisions heretofore made by this court, until they are overruled, and the decisions

of the United States courts, which have appellate jurisdictions of decisions of this court, are of controlling force for us. But the mere fact that some courts, somewhere, have decided a certain question a certain way, should not coerce our judgment or blind our vision of the question itself. By this it is not meant that we should throw away or disregard the results of the researches of the many strong men, the fruits of whose labors as judges are the valued possession of all who use them, but only that we should not subject our own judgments to the spell of reverence for precedent simply because it is precedent. In this case we have the statute before us. What does it mean? Doubt as to its construction would hardly have obtruded, unless invited. Once introduced in some one of the numerous appellate courts of the country, the force of precedent has been sufficient to keep it on its travels until it has now arrived here. Its language seems clear in the light of the decisions of this court in Lynch et al v. Grayson et al, 5 N. M. 487, where it was held that, as the statute then was, the district judge who tried the case without a jury was justified in his refusal to make any findings of fact whatever. This case was tried in the District Court of Dona Ana county in 1886, and at the next session of the Assembly, in 1887, the statute in relation to jury waived cases was amended by the addition to it quoted. It is alleged by counsel for the plaintiff in error, in his brief, that the amendment was made because of the refusal to make findings in the Grayson case, and it seems to be conceded by counsel for the defendant in error, in his brief, that such was the case. Both appear to have been counsel in the Grayson case, and should be familiar with what occurred in connection with it. Under such circumstances should we not presume that the legislature meant to make a law that would remedy the condition which had been found open to such strong objection. to make a change which would be useful instead of useless? If it was the legislative intention that a general finding for one party or the other should be sufficient, the amendment was useless, for that was the law before, as the court held in the Grayson case, *supra*. In its opinion in that

case the court quoted the statute in force at the time of the trial in the District Court, and said that there was then no statute requiring specific findings in such a case, evidently taking it for granted that the clear intention of the legislature to require such findings by law had been accomplished at the time of the decision in 1891. It is a cardinal principle of construction that the intention of a statute shall be carried into effect by the courts. "The intention of the legislature in enacting a law is the law itself and must be enforced, when ascertained, although it may not be consistent with the strict letter of the statute." Lewis Suth. Stat. Con., 2 ed., vol. 2, sec. 347; 36 Cyc. 1106. That such a statute with such a meaning is essential in the review of a cause by the appellate court, is well illustrated by the case at bar. The findings made amount to no more by way of information to this court than would a verdict of not guilty, if the case had gone to a jury. We should have to search through the record of upwards of four hundred pages, to determine whether it contains anything which will support the judgment of the District Court, and, having done that, we should still be in the dark as to whether what we might conclude to be the determining facts are those which the trial court treated as such; or, in other words, whether we are reviewing the findings of fact really made by the trial court, or substituting others made by ourselves. In effect, the findings made are conclusions of law from facts which must have been found by the trial court in order to reach the conclusions announced, but which are not disclosed. As it is said in the brief for plaintiff in error: "For aught that appears in the record, the court may have believed that plaintiff had proved a complete title to an undivided interest in the grant, and it may have decided in favor of defendant on the ground that no action or suit was begun within ten years next after the right to begin the same had accrued; or on the ground that it and its predecessors in title had had possession of land, for more than ten years, which had been granted by the Government of Spain; or that it and its predecessors in title had had the statutory possession for more than ten years under a claim of right,

and under deeds purporting to convey an estate in fee simple; or that it had had like possession under that grant known as the Ortiz Mine Grant; or that it had had like possession under a claim of right and under a grant made by an act of Congress of the United States, approved January 28, 1879." And this list does not exhaust the reasonable possibilities of the case. Of the practical need of specific findings of fact in such cases, there can be no question. Ward v. Cochran, 150 U. S. 599, 606-8; Duncan v. The Francis Wright, 105 U. S. 387; secs. 649, 700, U. S. Revised Laws. "And these findings must be of the ultimate facts which the evidence is intended to establish, sufficient in themselves without inference or comparison, or the weighing of evidence, to justify the application of the legal principles which must determine the case." Burr v. Railroad & Navigation Co., 1 Wall. 102; McClure v. United States, 116 U. S. 151; Saltonstall v. Birtwell, 150 U. S. 418.

We conclude, then, that this court must either retry the case on all the evidence in the record, or remand it for specific findings of fact. Even if we were disposed to take the former course, and had the right to take it, it would not be just to the parties, since we should lack the great aid to judgment on the value of evidence, as to material facts in the case, which the trial court had through the presence before it of the witnesses as they gave the evidence. And if this case should be appealed to the Supreme Court of the United States, it is made clear by the opinion of the court in the Grayson case, *supra,* which appears under the title cited in 163 U. S. 468, that special findings which we should be practically unable to make would be absolutely essential to any adequate review of the case. The judgment of the District Court is reversed, and the case remanded for further proceedings in conformity to this opinion.

[No. 1217. February 4. 1911.]

GALLUP ELECTRIC LIGHT COMPANY, Appellee v. PACIFIC IMPROVEMENT COMPANY, ET AL, Appellants.

SYLLABUS (BY THE COURT).

1. A contract, which is the mere accompaniment of the sale of property, and entered into for the purpose of enhancing the price at which the vendor sells it, and which is collateral to the sale, and where the main purpose of the contract is the sale of the property, does not come within the inhibition of the Act of Congress of July 2, 1890, even though the contract restrains trade to some extent.

2. A contract not to engage in business is a personal contract, and can only bind the parties to it.

3. Under a contract not to engage in business in competition with the purchaser of property, the party bound is not precluded from loaning money to others, even though they may use it to embark in business in competition with the purchaser.

4. Parties not signing the contract can not be enjoined from engaging in their own behalf in business in connection with party bound, in competititon with purchaser or his assignee.

5. Where evidence is taken by an examiner, who does not report findings of fact to the court, the same will be reviewed on appeal.

6. It is error to enter judgment for damages against parties not bound by the contract, even though the parties may have aided and abetted the contracting party in violating the contract.

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

E. W. DOBSON and F. W. CLANCY for Appellants.

A contract not to engage in business is a personal contract and can only bind the parties to it. Kramer v. Old, 56 Am. St. Rep. 650, 119 N. C. 11; Jones v. Havens, L. R. 4 Ch. Div. 636; Reeves v. Sprague, 114 N. C. 647; Fleckenstein Bros. v. Fleckenstein, 57 At. 1025; Bird v. Lake, 1 H. & M. Ill.; Lumley v. Gye, 2 El. & Bl. 216; Emmert v. Richardson, 24 Pac. 480, 44 Kas. 268.

The person who has agreed not to engage in a similar business, must, in order to be held guilty of a violation of his agreement, so re-engage in said business as to receive a profit and a benefit to himself personally. Haley Grocery Co. v. Haley, 35 Pac. 595; Fleckenstein v. Fleckenstein, 57 Atl. 1025, 66 N. J. Eq. 255; 2 High on Injunctions, sec. 1176; Nelson v. Johnson, 36 N. W. 868, 38 Minn. 255; Bird v. Lake, 1 Hem. & M. 338, 71 Eng. Rep. 147; Harkinson's Appeal, 21 Am. Rep. 9, 78 Pa. St. 196.

The court has no jurisdiction at the suit of private parties to deprive a corporation of its right to use a franchise granted by a municipality. Clark v. Inter. Tel. Co., 101 N. W. 997; People v. City of Chicago, 77 N. E. 245; Bronson v. Albion Tel. Co., 93 N. W. 201; Stedman v. City of Berlin, 73 N. W. 57; Old Colony Trust Co. v. Wichita, 123 Fed. 762.

The contract on which this suit is founded is one in restraint of trade. Chitty on Contracts 736, 10 Am. ed.; 24 A. & E. Enc. Law 842; 9 Cyc. 523.

The contract is void under Act July 2, 1890, sec. 3. 26 Stat. at Large 209, 3 U. S. Comp. Stat. 3201; 7 Fed. Stat. Ann. 344; P. & R. R. Co. v. Pennsylvania, 82 U. S. 15 Wall. 232; W. U. Telegraph Co. v. Texas, 105 U. S. 460; U. S. v. Trans-Missouri Assoc., 166 U. S. 312; U. S. v. Joint Traffic Assoc., 171 U. S. 558; Northern Securities Co. v. U. S., 193 U. S. 331; Loewe v. Lawlor Adv. Sheets, U. S. S. C., Oct. Term, 1907, 304

THOMAS K D. MADDISON, REID & HERVEY, FERGUSON & CREW and W. B. CHILDERS for Appellee.

The court's findings are conclusive upon all the issues

tried. Gale v. Salas, 11 N. M. 211; Torlina v. Trorlicht, 5 N. M. 148; 6. N. M. 54; Newcomb v. White, 5 N. M. 435; Perea v. Barela, 6 N. M 239; Lynch v. Grayson, 7 N. M. 26; Romero v. Coleman, 11 N. M. 537; Rush v. Fletcher, 11 N. M. 557.

The organization of the Pacific Improvement Company was brought about by Page in an attempt to evade and dodge his contract. Harris v. Theus, 43 So. 131, Ala.; Fleckenstein v. Fleckenstein, 57 Atl. 1025; 16 A. & E. Enc. of Law 1109; Stone v. Goss, 55 Atl. 736; 2 High on Injunctions, 4 ed. 1107, sec. 1122; Emmert v. Richardson, 24 Pac. 480; Guerant v. Dandelet, 32 Md. 561; Thompson v. Andrus, 41 N. W. Rep. 683; Upriver Ice Co. v. Denler, 72 N. W. 157; Moore & Hanley Hardware Co. v. Towers Hardware Co., 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; Booth & Co. v. Seibold, 74 N. Y. Sup. 776; Beal v. Chase, 31 Mich. 490.

Violation of contract not to engage in business directly or indirectly. 2 High on Injunctions, secs. 1171, 1176; Nelson v. Johnson, 36 N. W. 868; Oregon Coal Co. v. Windsor, 20 Wall., U. S. 64; in re Greene, 52 Fed. 104; U. S. v. Joint Traffic Assoc., 171 U. S. 505; Dueber Watch Case Mfg. Co. v. Howard Watch Co., 66 Fed. 645; Booth v. Seibold, 74 N. Y. Supp. 777; Haley v. Haley, 25 Pac. 595; Fleckenstein v. Fleckenstein, 57 Atl. 1025; Harkinson's Appeal, 21 Am. Rep. 9; Beal v. Chase, 31 Mich. 490.

Evidence supports the findings. Quock Ting v. U. S., 140 U. S. 420; Kavanaugh v. Wilson, 70 N. Y. 177; Koehler v. Adler, 78 N. Y. 287; Wait v. McNeil, 7 Mass. 261; Rea v. Missouri, 17 Wall. 543; Castle v. Bullard, 23 How. 172; Kempner v. Churchill, 8 Wall. 369; Burch v. Smith, 15 Tex. 219; 4 Wigmore on Evidence, 3547, sec. 2498.

Relief for misrepresentations made by promoters of a proposed corporation. 2 Cooley on Torts 494.

Contract was not in restraint of trade. U. S. v. Trans-Missouri Association, 166 U. S. 293; U. S. v. Joint Traffic Assoc., 171 U. S. 567; Hopkins v. U. S., 171 U. S. 578; Northern Securities Co. Case, 193 U. S.

331; Field v. Barber Asphalt C., 194 U. S. 623; Booth v. Davis, 127 Fed. 875, 131 Fed. 31; Whitwell v. Continental Tobacco Co., 125 Fed. 455; Phillips v. Iola Portland Cement Co., 125 Fed. 594; Hopkins v. U. S., 171 U. S. 578; Chesapeake etc. Fuel Co. v. U. S., C. C. A., 155 Fed. 610; Robinson v. Suburban Brick Co., 127 Fed. 806; U. S. v. American Tobacco Co., 164 Fed. 701; Cavin v. Thomas, 15 N. M. 660.

STATEMENT OF FACTS.

This action was begun in the District Court of McKinley County, in the Second Judicial District, by the appellee, who was plaintiff in the lower court, to restrain and enjoin the defendant company and its stockholders from carrying on the business of generating, selling and distributing electricity for light and power purposes, and from furnishing electrical supplies and doing other work in connection with said business, and for damages alleged to have been sustained by appellee on account of appellants having engaged in such business. Appellee bases its cause of action upon a written contract, made and executed on the 18th day of October, 1905, between Gregory Page, one of the defendants, and E. C. Allen, which contract was thereafter assigned by said Allen to the Appellee. At the time of the execution of the contract, Page was the owner of all the capital stock of the appellee company, and sold said stock to said Allen and stipulated in said contract, among other things, as follows: "Said party of the first part (Gregory Page) further covenants and agrees that he will not engage in the business of generating electricity for light, power or other purposes, or in furnishing light, or in any way engage in business in competition with the business of said electric light company, in the town of Gallup, or its immediate vicinity." The complaint alleged that the defendant, Page, caused the Pacific Improvement Company, hereafter called the Pacific Company, to be organized for the purpose of generating electricity for light and power purposes; that Page furnished practically all the money which was invested in the business of said Pacific Company. That said Page controlled, operated,

managed and directed said company, and that the incorporators and subscribers to its capital stock were mere figureheads and had no subtantial interest therein, and permitted the use of their names for the purpose of enabling Page to fraudulently evade and violate the provisions of the contract above quoted, and that the defendant company is engaged in the generation of electricity in violation of said contract. That the defendant company had secured a franchise from the town of Gallup, authorizing it to use its business of furnishing electricity for light and power purposes, and that said company would not have been organized, except for the wrongful acts of Page. Damages were alleged and an accounting was asked for, as to the amount of lighting done by the Pacific Company, and an injunction was prayed against the defendant company and the individual defendants, restraining them from carrying on said business in violation of the terms of the contract made by Page, and for general relief. After the overruling of a demurrer, all of the defendants filed answers; defendant Page filing a separate answer, and the other defendants a joint answer, both answers being under oath. The Pacific Company and the defendants, other than Page, admitted that they were engaged in the generating of electricity, but denied that Page had contributed any money whatever to the said company, or that he owned any of its stock, or that he had anything to do with the management of the company and alleged that the incorporators of the company had contributed all of the money used in and about the business. Page, in his separate answer, denied that he had anything to do with the Pacific Company, or that he had contributed any money to enable it to begin or carry on its operations. The plaintiff filed no replies to either of the answers. The cause was referred, and a part of the proofs were taken by an examiner and a part by the court. The court signed a decree enjoining the Pacific Company, the incorporators thereof, and the defendant Page from operating the lighting plant, or from directly or indirectly engaging in the business of generating electricity in the town of Gallup, and it also enjoined the defendant com-

pany from assigning the franchise which it had obtained from the town of Gallup, authorizing it to use its streets, and also from selling its electric light plant, and rendered judgment against the Pacific Company, the stock holders thereof, Gus Mulholland, Joseph H. Coddington, J. A. Gordon, Palmer Ketner, and also against Grègory Page, for the sum of $3250.00. Other restrictions were imposed upon all the defendants, which it will not be necessary to set out in detail. From its decree this appeal is taken by appellants.

OPINION OF THE COURT.

ROBERTS, J.—There is some question as to whether this contract should not be held invalid, as being contrary to public policy, under the rule laid down in Charleston Gas Co. v. Kanawha Gas Co., 58 W. Va. 26, 50 S. E. 878, wherein the court says: "The supplying of illuminating gas is a business of a public nature, to meet a public necessity. It is not a business like that of an ordinary corporation, engaged in the manufacture of articles that may be furnished by individual effort. Hence, while it is justly urged that those public rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, yet in the instance of business of such a character that is presumably can not be restrained to any extent whatever, without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraints, however partial, because in contravention of public policy." To the same effect, and supporting the doctrine, are People ex rel Peabody v. Gas Trust Company, 130 Ill. 268; Gibbs v. Baltimore Gas Company, 130 U. S. 396; Chicago Gas Light & Coke Company v. Peoples' Gas Light & Coke Company, 121 Ill. 530; Greenwood on Public Policy, p. 2.

Counsel for appellee insists that the principle laid down in the above cases has no application to the contract now before the court; that so long as the contract to refrain from doing business is not in violation of a public duty or of a previous contract, there is no distinction

on account of the character of the business refrained from. Counsel for appellants concurs in this view, and, by reason of this situation, we shall give no further consideration to this question, and are not to be understood as expressing any opinion thereon.

Appellants urge the invalidity of the contract under Section 3 of the Act of Congress of July 2, 1890. The section is as follows: "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory or another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal." 26 Stat. at Large 209; U. S. Comp. Stat. 3201; 7 Fed. Stat. Ann. 344, and the cases of U. S. v. Trans-Missouri Association, 166 U. S. 327; U. S. v. Joint Traffic Association, 171 U. S. 558; and Northern Securities Co. v. U. S., 193 U. S. 331, are cited as supporting this proposition. It is true, that in the case of U. S. v. Trans-Missouri Association, the court used language that might support the contention that all contracts come under the Act of Congress of July 2, 1890. This, however, is not the proper construction of the case, as is shown by the following quotation from the opinion delivered by Mr. Justice Peckham, in the case of U. S. v. Joint Traffic Association, 171 U. S. 558: "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer or merchant, restrains commerce or trade, within any legal definition of that term; and the sale of good will of a business, with an accompanying agreement not to engage in a similar business, was instanced in the Trans-Missouri case as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his busi-

ness x x x x To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts, however indispensable and necessary they may be, because, as they assert, they will restrain trade in some remote and indirect degree is to make a violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court." It is very evident from the above quotation that such a contract as the one now under consideration does not come within the inhibition of the Act of July 2nd, 1890, and a careful reading of the opinion in the Northern Securities case, *supra,* discloses that the court held that the act only "embraces all direct restraint" imposed by any combination, etc. We do not believe there was any intention upon the part of Congress to include, within the prohibition of the act, a con-
1 tract which is the mere accompaniment of the sale of property, and entered into for the purpose of enhancing the price at which the vendor sells it, and which is collateral to such sale, and where the main purpose of the contract is the sale of the property. See Thomas v. Gavin, decided by this court, and reported in 15 N. M. 660. Contracts which only incidentally or indirectly restrict competition, while their main object and purpose are to increase the trade and business of those who make them, are not in restraint of trade. Whitwell v. Continental Tobacco Co., 125 Fed. 455; Phillips v. Portland Cement Co., 125 Fed. 594; Hopkins v. U. S., 171 U. S. 578.

While we must hold that the contract is not invalid by reason of the Act of Congress above set out, still this case must be reversed on account of other errors which are apparent in the record. Page was the only one of the defendants who signed the contract upon which this suit is based, and consequently was the only one bound
2 thereby. The contract was a personal contract and could only bind the parties to it. Allen, having transferred the contract to the Gallup Electric Light Company, that company had all the rights under the contract which Allen had, as against Page. We cannot read into the contract which Page signed, conditions which are not in it,

so as to make it more stringent than it otherwise would be. There is nothing in the contract which forbids
3 Page from loaning money to individuals, or corporations who desire to embark in the business of manufacturing electricity for sale in the town of Gallup. The loaning of money to other people to invest in an electric light plant, by Page, if he did loan it, is not "engaging in business" in competition with the business of said electric light company in the town of Gallup.

The court below not only enjoined the defendant Page from engaging in the electric light business, but enjoined the defendants, Gus Mulholland, Joseph H. Coddington, J. A. Gordon, Palmer Ketner and the Pacific Improvement Company, and gave judgment against them for damages. Appellee cites the case of Thompson v. Andrus, 41 N. W. 683, to support the judgment in this case against the parties not signing the contract, but the facts in that case are very different from the facts shown in the present case. The court says: "It is, however, apparent from the testimony that there was a complete understanding between the defendants to pursue the plan adopted for the very purpose of avoiding the binding force of the contracts with complainant." We have care-
4 fully examined the record in this case, and have not been able to find any evidence which shows that the defendants, other than Page, had any knowledge of the contract entered into between Page and Allen. Appellee claims, correctly, that the court's findings of fact upon matters within the issues, where there is any evidence to support them, are conclusive. There is no doubt that this rule is correct, where the court has the witnesses before it and is able to observe the appearance of the witnesses while upon the stand, and their manner of testifying. But in this case a large portion of the evidence was taken by an examiner, who reported the same to the court
5 without making any findings of fact or conclusions of law; consequently the trial court did not have the benefit of hearing all of the witnesses testify, or of noting their manner and conduct on the stand. The trial court stood, in regard to the evidence which it did not hear, in

just the position which we occupy on this appeal, and the decree entered into should not be affirmed unless it is sustained by substantial evidence which the court heard, unless the additional evidence taken by the examiner shows that the decree was properly made and sustains it by a preponderance of the testimony, and all the evidence should be considered by the court, on appeal, so as to determine whether or not the evidence sustains the judgment or decree. Appellants, other than Page, all deny, by their sworn answer, knowledge of the contract between Page and Allen, and those who testify in the case again deny any knowledge. They also deny that Page had any connection whatever with the organization of the Pacific Company. Appellee has not, in our judgment, shown knowledge on the part of these defendants of the contract between Page and Allen, or such circumstances as would justify an inference of such knowledge; consequently they should not have been enjoined. In the case of Kramer v. Old, 119 N. C. 11, the court held, where a sweeping injunction was issued, as in this case, that: "The judgment must be modified, so as to restrain only the three defendants who were parties to the original contract from engaging in, or from taking stock in or assisting in the organization of, a corporation formed with the purpose of carrying on the business of milling in the vicinity of Elizabeth City. The order must be vacated as to the other defendants." The Old case also holds that a party bound by such an agreement will not be restrained from selling or leasing his premises to others to engage in the business which he has agreed not to carry on, or from selling them the machinery or supplies needed in embarking in it. According to this doctrine Page had the right to lease to the Pacific Company a part of his building and the right to use his engines and boilers. Another case which seems to have been well considered, and in which the facts, briefly stated, were: That one Edward Fleckenstein sold his business and good will and covenanted not to engage as agent or servant in the bologna business. After making this agreement, he commenced the construction of a bologna factory and was enjoined from so doing, and then he leased

the factory to his wife and her brother, and plaintiff then sought to enjoin Mrs. Fleckenstein and her brother from carrying on the business of manufacturing bologna sausage. The court says: "The important question remains, what is the principle on which Rosena E. Fleckenstein and Nicholas Kerber, strangers to this contract, can be interfered with, in the prosecution of their lawful business, because of this contract which Edward Fleckenstein made? It would, I think, be a difficult proposition to maintain that persons not parties to such a contract as this are liable to an injunction in equity, at the suit of the covenantee restraining them from merely aiding or abetting the covenantee in the violation of this contract. If Edward Fleckenstein openly and honestly undertook to set up the bologna and provision business in Jersey City, in his own name, would the complainants be able to enjoin a third party from letting a bologna factory and shop to Edward Fleckenstein for the purpose of his business? One interesting feature of this situation is that an injunction goes against the convenantor to restrain him from committing a breach of the contract, while the third injunction, in the same suit, goes against a third party, a stranger to the contract, between whom and the complainant there is no privity, to restrain him from the commission of a tort, which tort consists in causing the covenantor to violate his contract." Fleckenstein v. Fleckenstein, 66 N. J. Eq. 255. The same rule is laid down in Emmert v. Richardson, 44 Kas. 268. Under the rule laid down in Fleckenstein v. Fleckenstein, *supra,* it would seem to make no difference whether the defendants, not parties to the contract, knew of the existence of the contract or not, but it is not necessary for us to go that far, as there is no evidence to show knowledge. Even if Page had loaned money to the Pacific Company, to be used in the purchase of an electric lighting plant, and had taken security upon the plant for the money loaned, he would not have violated his contract with Allen. 2 High on Injunction (2nd Ed.) Sec. 1176; Bird v. Lake, 1 Hen. & M. 338; Harkinson's Appeal, 78 Penn. St. 196. At the very most, the court should only have enjoined Page, and

should have ordered a sale of the stock which he owned, if the evidence showed that he owned any stock, in the Pacific Company, and should not have enjoined that company from competing with the Gallup Electric Light Company. We find no evidence in the record to sustain the finding of the court below that the Pacific Company was organized by Page through the other individual defendants in the case, although he may have loaned money to it or to some of its stock-holders, or that, in pursuance of a combination between Page and its individual stockholders, for the purpose of evading the contract, the Pacific Company applied to the trustees of the town of Gallup and secured a franchise authorizing it to use the streets and alleys of the said town for the purposes of carrying on its business. We think the court was in error in perpetually enjoining the Pacific Company from engaging in the business of generating and furnishing electricity for light and power purposes in the town of Gallup, and from transferring and conveying to any person or corporation its right to generate and sell electricity under its franchise or permit from the town of Gallup, and from assigning its license and permit to any other person or corporation, to be used in conjunction with or in connection with the defendant Page. This is virtually reading into the contract that Page could not buy power to run his laundry or ice business from the Pacific Company, or from any other company or individual to whom it might sell.

We also think the trial court committed error in entering judgment for $3250.00 against all of the defendants. If judgment was to be entered at all, it should only have been against the defendant Page, as he is the only one of the defendants who signed the contract. Even
6 though the court may have believed that the other defendants aided and assisted him in violating the agreement he had made, still, as they never covenanted not to go into the business of generating electricity in the town of Gallup, it was error to give any personal judgment against them. Even if the court was justified in giving a judgment against Page, we think the judgment would have been excessive. There was no showing as to what the

net profits of the Gallup Electric Light Company would have been on the business taken from it by the Pacific Company, nor what the net profit would have been on the wiring done by the Pacific Company. On account of the errors pointed out, this cause is, therefore, reversed and remanded to the District Court of McKinley County for further proceedings in accordance with this opinion. It is so ordered.

[No. 1291. February 4, 1911.]

S. J. WEAVER, Appellant, v. A. M. WEAVER, Appellee.

SYLLABUS (BY THE COURT).

1. A district court of this Territory is without jurisdiction to set aside or vacate a judgment rendered by it which, although voidable, is not void, after one year from the rendition of such judgment has elapsed.

2. A judgment of a district court purporting to vacate a previous judgment of that court which, although it may be voidable, is not void, is a final judgment, and an appeal from such judgment lies to this court.

Appeal from the District Court for Colfax County before WILLIAM J. MILLS, Chief Justice. Reversed.

JONES & ROGERS for Appellant.

When the court has entered the final decree it has no further jurisdiction over the subject matter and cannot re-assume it. Barnett v. Barnett, 9 N. M. 205; Hickman v. City of Ft. Scott, 141 U. S. 415; Dowell v. Applegate, 152 U. S. 327; Bronson v. Schulten, 104 U. S. 410; Philips v. Negley, 117 U. S. 665; ex parte Sibald v. U. S., 12 Peters 488; 3 Wheat. 591; 3 Peters 431; 12 Wheat. 10; Bank of U. S. v. Moss, 6 Howard 31; Grames v. Hawley, C. C., 50 Fed. 319; 2 Wash. C. C. 433; 89 Ill.

59; 10 Pet. 480; Gray v. Gates, 37 Wis. 614; 27 Wis. 488; C. L. 1897, sec. 2685, sub-sec. 137, sec. 3001; Laws 1905, chapter 26; Maynard v. Pereault, 30 Mich. 161; Allen v. Wilson, 21 Fed. 882; Banegus v. Brackett, 34 Pac. 344; Seymour v. Bailey, 66 Ill. 300; 6 Enc. P. & P. 200; Terry v. Commercial Bank of Alabama, 92 U. S. 454; Sloan v. Sloan, 102 Ill. 581; 5 Enc. P. & P. 1021; Evans v. Woodworth, 72 N. E. 1082, Ill.; Metzger v. Waddell, 1 N. M. 400; St. Paul Land Co. v. Dayton, 40 N. W. 66, Minn.; 16 Cyc. 514; 2 Enc. P. & P. 694; 23 Cyc. 909.

Defendant, by entering general appearance, waived all jurisdictional questions submitted to the jurisdiction of the court, cured all defects in issuance and service of process, and cured, ratified and validated the decree rendered. Atkins v. Disintegrating Co., 18 Wallace U. S. 298; Hill v. Mendenhall, 21 Wallace 453; Grantier v. Rosecranz, 27 Wis. 488; Anderson v. Coburn, 27 Wis. 564; Elliott v. Lawhead, 1 N. E. 577, Ohio; Fee v. Big Sand Iron Co., 13 O. St. 565; Leake v. Gallagley, 52 N. W. 825 Neb.; Carpenter v. Minturn, 65 Barb. 295, N. Y.; Burnett v. Corgan, 26 Kas. 104; Durham v. Moore, 29 Pac. 472; Sealy v. California Lumber Co., 24 Pac. 197, Ore.; Bankers' Life Ins. Co. v. Robbins, 80 N. W. 485, Neb.; Frank v. Ziegler, 33 S. E. 761, W. Va.; Shields v. Thomas, 18 Howard, U. S. 259; Fiske v. Thorp, 84 N. W. 80. Neb.; Henry v. Henry, 87 N. W. 522, S. Dak.

The decree of divorce was regular, final and conclusive in the district court and could not be set aside in that court. Laws 1901, chapter 62, sec. 22, sub-sec. 8; C. L. 1897, sec. 2685, sub-secs. 24, 48, 85, 86, 94; Denning v. Denning, 99 S. W. 1029; Sylvis v. Sylvis, 17 Pac. 912; Blondeau v. Snyder, 31 Pac. 591, Oreg.; Canadian etc. Co. v. Clarita L. & I. Co., 74 Pac. 301; Frankfurth v. Anderson, 20 N. W. 662; Voorhees v. Bank of U. S., 10 Pet. 449; U. S. v. Arrendo, 6 Pet. 729; Hop Bitters Co. v. Warner, 28 Fed. 577; Griswold v. Hazzard, 141 U. S. 260; 5 Enc. P. & P. 1016; Mayer v. Wilson, 76 N. E. 748, Ind.; Brown & Manzanares Co. v. Gise, 14 N. M. 282; 7 Enc. P. & P. 138; Bascom v. Bascom, 7 O. 125; Bingham v. Miller, 17 O. 445; Lewis v. Lewis, 15 Kas.

144; Lucas v. Lucas, 69 Mass. 136; Edson v. Edson, 108 Mass. 590; O'Connell v. O'Connell, 6 N. W. 467, Neb.; Parish v. Parish, 9 Ohio St. 534; Singer v. Singer, 41 Barbour, N. Y. 139.

The order was a final decision and reviewable. The People v. Ferris, 33 N. Y. 220; Hume v. Bowie, 148 U. S. 246; Philips v. Negley, 117 U. S. 665; 2 Enc. P. & P. 109; Octgen v. Ross, 36 Ill. 335; Guthrie v. Guthrie, 30 N. W., Ia. 779; Spencer v. Thistle, 13 N. W., Neb. 314; William Deering Co. v. Creighton, 38 Pac., Or. 710; Post v. Wallace, 20 Atl., Pa. 409; Mich. Ins. Co. v. Whittemore, 12 Mich. 311; Laws 1905, chap. 26; C. L. 1897, sec. 2875; Terry v. Commercial Bank of Alabama, 92 U. S. 454; Bronson v. Schulten, 104 U. S. 415; Philips v. Negley, 117 U. S. 665; Bank v. Hawley, 50 Fed 319; Maynard v. Perault, 30 Mich. 161; Allen v. Wilson, 21 Fed. 882; Barnett v. Barnett, 9 N. M. 205; 18 Enc. P. & P. 1012; Gray v. Moore, 7 Gray 215; 9 Enc. P. & P. 684; 7 Enc. P. & P. 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.

S. B. Davis for Appellee.

The district court had no jurisdiction to render the decree. C. L. 1897, sec. 1433; Tyler v. Murray, 57 Md. 418; Morton v. Morton, Colo., 27 Pac. 718; Yorke v. Yorke, 55 Mo. 1095; Laws 1901, chap. 62, sec. 22.

Action setting aside decree was correct. C. L. 1897, secs. 2875, 2685, sub-sec. 137, sec. 3001; Phillips v. Negley, 117 U. S. 665; Fowler v. Equitable Trust Co., 141 U. S. 384; Stocklager v. U. S., 116 Fed. 590; Laws 1901, chap. 11, sec. 2; McBlain v. McBlain, 77 Cal. 507; Simensen v. Simensen, N. D., 100 N. W. 708; Robertson v. Robertson, 9 Daly 44; Jewitt v. Jewitt, 2 N. Y. Supp. 250; Weatherbee v. Weatherbee, 20 Wis. 499.

Courts of Equity have inherent power to set aside and vacate judgments or decrees obtained through fraud or

rendered without jurisdiction. Black on Judgments, par. 321; Dial v. Farrow, 36 Am. Dec. 267; Edson v. Edson, 108 Mass. 590; Johnson v. Coleman, 23 Wis. 452; Crouch v. Crouch, 30 Wis. 667; Holmes v. Holmes, 63 Me. 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 Pa. 328; Boyd's Appeal, 38 Pa. St. 241; Whitcomb v. Whitcomb, 46 Ia. 437; Everett v. Everett, 18 N. W. 637: Cross v. Gould, 110 S. W. 672.

By entering general appearance the defendant did not waive all jurisdictional questions, cure all defects in the issuance and service of process, and ratify and validate the decree. The only effect of such an appearance was to give the district court jurisdiction of the person of the defendant from the date of the motion. Simensen v. Simensen, N. D., 100 N. W. 708; Yorke v. Yorke, 55 Mo. 1095.

The question of public policy goes not to the power of the lower court to set aside the decree but to the manner of the exercise of that power. Crouch v. Crouch, 30 Wis. 667; Whitcomb v. Whitcomb, 46 Ia. 437; Yorke v. Yorke, 55 Mo. 1095.

Supreme Court of Territory has jurisdiction to review proceedings in district courts. Act. Sept. 9, 1850, sec. 10; Laws 1907, chap. 57; Jung v. Myer, 11 N. M. 378; Cutter & Neilson Co. v. Hinman, et al, 14 N. M. 62; DeHarrison v. Perea, 11 N. M. 505; Machen v. Keeler, 11 N. M. 413; Board of County Commissioners v. Blackington, 11 N. M. 360.

A decree to be final for the purposes of an appeal must terminate the litigation between the parties on the merits of the case. 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. Phœnix 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; Terri-

tory v. Las Vegas Grant, 6 N. M. 87; Jung v. Myer, 11 N. M. 378; 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; Philips v. Negley, 117 U. S. 665; Staab v. A. & P. R. R. Co., 3 N. M. 606.

Courts of equity have inherent powers to set aside and vacate judgments or decrees obtained through fraud or rendered without jurisdiction. 1 Black on Judgments, par. 321; Dial v. Farrow, 36 Am. Dec. 267; Edson v. Edson, 108 Mass. 590; Johnson v. Clemens, 23 Wis. 452; Crouch v. Crouch, 30 Wis. 667; Holmes v. Holmes, 63 Me. 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, Pa. 328; Boyd's Appeal, 38 Pa. St. 241; Whitcomb v. Whitcomb, 46 Ia. 437; Everett v. Everett, 18 N. W. 637; C. L. 1897, sec. 2875; Nelson v. Meehan, 155 Fed. 1; Fowler v. Equitable Trust Co., 141 U. S. 384; Stocklager v. U. S., 116 Fed. 590.

STATEMENT OF THE CASE.

This case is here on appeal from an order of the District Court of the Fourth District, for Colfax County, setting aside a decree of divorce theretofore granted by that court on the complaint of S J. Weaver against A. M. Weaver, filed July 26, 1905. Notice of the pendency of the cause was published by order of the court, and, on September 23, 1905, the defendant, here the appellee, was defaulted, and the case sent to a referee to take proofs. On the report of the referee a final decree was rendered October 21, 1905, granting to the plaintiff, here the appellant, a divorce from the defendant. On October 8, 1908, the defendant filed a motion to vacate and set aside the judgment on the grounds that it appeared of record in the case that the affidavit on which the order of publication

was made, was not such as to warrant the order, and that no one of the statutory grounds of divorce was alleged in the complaint, for which reason, she alleged, the court never had jurisdiction to render the judgment. "For further grounds not apparent on the face of said record, the defendant shows to the court," in susbstance, that no service upon her had been made, that she did not know of the cause until December 30, 1906, when she received a letter from the clerk of the court notifying her of the decree; that she was, during all the time in question, a resident of Rochester, New York, where she and the plaintiff had lived as husband and wife, and where he, as she alleges, deserted her in the year 1900. And, while fraud is not charged in set terms, it is fairly to be inferred from the statements of fact that the defendant claimed the plaintiff used fraudulent means to prevent her from learning of the pendency of the cause. "And the defendant further shows to the court that she has a good defense to the above entitled cause on the merits; that she never deserted or abandoned the plaintiff, but, on the contrary, the plaintiff deserted her.....That she was never guilty of any cruel or inhuman treatment of plaintiff, and that this defendant never was finally convicted of any felony and never was imprisoned therefor in any penitentiary.....Wherefore defendant asks that the judgment rendered in the above entitled cause may be vacated and set aside, and that she be allowed to file her answer therein." To this plaintiff demurred. No separate action appears to have been taken on the demurrer; but on January 27, 1909, the court made an order vacating its decree, allowing the plaintiff thirty days in which to amend his complaint, and to the defendant twenty days after the expiration of that time, in case an amended complaint should not be filed within it, to plead to the original complaint. February 3, 1909, the plaintiff moved the court to vacate the order setting aside the decree of divorce, which motion was denied February 10, 1909. The plaintiff did not amend his complaint as permitted by the order of January 27, 1909, and on March 10, 1909, the defendant filed a demurrer to the original complaint, which is still pending

in the district court. April 17, 1909, the plaintiff appealed to this court from the order vacating the original decree. The defendant moved to dismiss the appeal on the ground that it was not an appeal from a final judgment. On the grounds stated in Weaver v. Weaver, 15 N. M. 333, this court declined to render a decision on the motion to dismiss the appeal until after hearing on the merits, which has since taken place.

OPINION OF THE COURT.

ABBOTT, J.—We have first to decide whether this cause is properly here on appeal, and, if we consider that it is, then, whether the action of the District Court in vacating the decree of divorce shall be approved. Although it is claimed, in the brief for the appellee, that the judgment of the District Court granting a divorce was void, the defendant has, apparently, treated it as voidable rather than void, since in her motion to have it set aside she has gone beyond the averments necessary to sustain it and set out matter which, she says, would constitute a defense on the merits, and asked to be allowed to answer after the vacation of the judgment. By that she submitted her person to the jurisdiction of the court, and, while we are not prepared to hold, as counsel for the appellant contend, that she thereby "cured, ratified and validated the decree" which she was asking to have set aside, we think she might fairly be held to have precluded herself from claiming that it is void for want of jurisdiction of her person, and, indeed, to have consented that the court have jurisdiction of the cause. B. Colo. Sanitorium v. Van Stone, 14 N. M. 437; Atkins v. Disintregating Co., 18 Wall. (U. S.) 298; Hill v. Mendenhall, 21 Wallace 453; Grantier v. Rosecrance, 27 Wis. 488; Burnett v. Corgan, 26 Kas. 104; Shields v. Thomas, 18 Howard, (U. S.) 259; Henry v. Henry, 87 N. W. 522 (S. Dak.) But, independent of that, we are of the opinion that there is nothing apparent of record to show that the judgment was void. That the court had jurisdiction of the subject matter is not questioned. It was a court of general jurisdiction, with power to grant divorces to persons who had

been residents of the Territory for a year next before instituting proceedings for divorce. "The residence of plaintiff, and not that of defendant, gives jurisdiction in divorce cases, although service of process is constructive." 14 Cyc. 588. See, also, 17 Cent. Dig. Title Divorce; secs. 1431-3, C. L. 1897.

It could obtain jurisdiction of the person of a non-resident defendant for the purpose of granting a divorce through publication of notice based on an affidavit as prescribed by law. The affidavit filed in this cause conforms to the requirements of the statute on the subject, in substance, so far as the record shows. The defendant objects to it that it did not state the street address in Rochester, New York, of the defendant, and did not state that any means had been taken to ascertain it. But the statute does not require that excuses shall be made unless there is a failure to state the residence of the defendant, and the residence was given as Rochester, New York, which made the affidavit complete in form in that particular. It is also objected that the affidavit could not properly be made by the plaintiff's attorney merely for the reason that the plaintiff was not in the county. But the statute allows that. Laws 1901, ch. 62, sec. 22, sub-sec. 8; C. L. 1897, sec. 2685, sub-sec. 48. In addition, an order was made by the court directing publication. That the affidavit was carelessly drawn and should have been more explicit, and that the same is true of the complaint, need not be denied, although the defendant seems to have had no difficulty in understanding the allegations of the complaint well enough to deny each of them specifically in her motion to vacate the judgment. But it is not until we get information from outside of the record that we have any ground for believing that the judgment was voidable and might have been properly vacated on a motion seasonably made. The essential distinction between void jugdments and those merely voidable must not be disregarded. "In any case where the court has jurisdiction of the subject matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers.

and the judgment in the case, though it may be marked by error which will cause its reversal by a higher court, is not for that reason void." Black on Judgments, (2nd ed.) secs. 170, 244. For ordinary cases, at least, the time within which a judgment can be vacated, is limited. If the court rendering a judgment has terms, its control of the judgment is usually limited to the term in which it was rendered. Bronson v. Schulten, 104 U. S. 410; Grames v. Hawley, 50 Fed. 319. But in this jurisdiction, in view of the provisions of sec. 2875, C. L. 1897, that the district courts in several counties "shall be at all times in session," for the numerous purposes named in the statute, it can hardly be said that there are terms of court, except for purposes connected with jury trials. Territory v. Armijo, 14 N. M. 202, 210. That condition may, possibly, have the effect of limiting the literal meaning of Chap. 26, Laws of 1905, fixing a limit of sixty days for setting aside a judgment rendered on default "out
1 of term time." But C. L. 1897, sec. 2685, sub-sec. 137, plainly applies to all judgments, and provides that they may be set aside for irregularity at any time within one year after rendition. In this case that limit had long been passed when the district court made the order to vacate the judgment. We do not wish to be understood to hold that a judgment which is absolutely void can not in any case be declared void by the court which rendered it, after one year from the time of its rendition; but, as we have said, the judgment now in question was not void, but at most only voidable at the time the
2 order to vacate was made. That being the case, the judgment was final. The authority of Phillips v. Negley, 117 U. S. 665, fully applies. The District Court was without jurisdiction to vacate the decree, and the appeal from its action is properly here under the provisions of the Organic Act, p. 43, C. L 1897, and ch. 57, Laws of 1907, and should be sustained. The motion to dismiss the appeal is denied, and the judgment of the District Court vacating its former judgment is reversed.

[No. 1333. February 4, 1911.]

FRANK H. MOORE, As Assignee of the Estate of Charles Zeiger, Insolvent, Appellee, v. WESTERN MEAT COMPANY, Appellant.

SYLLABUS (BY THE COURT).

1. Where title to real estate is shown in the plaintiff, together with the fact of occupation by the defendant, the law will refer that possession to a rightful rather than a wrongful title, and, where nothing more is shown, the relation of landlord and tenant will presumed, and a contract for rent implied.

2. The defendant and its predecessor, claiming possession of real estate under an unauthorized contract to purchase made with an assignee of an insolvent estate, are chargeable with knowledge of the fact that such contract was a nullity, and, having used and occupied the premises thereunder, are liable for the reasonable rental value in a suit for use and occupation of such premises.

3. The request of the defendant in the trial court for leave to amend its answer by pleading a set-off to the cause of action alleged in the complaint, made after a jury had been empaneled and all of the evidence had been introduced, and both plaintiff and defendant had moved for an instructed verdict, was properly denied.

4. When each party asks the court to instruct a verdict in its favor, it is equivalent to a request for a finding of facts, and, if the court directs the jury to find a verdict for one of them, both are concluded by the finding made by the court upon which the resulting instruction of law was given and this court is limited on appeal to a consideration of the correctness of the finding on the law, and must affirm if there is any substantial evidence in support thereof.

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

E. W. DOBSON, H. P. OWEN and GEORGE S. KLOCK for Appellant.

The mere fact that one is in possession of the lands of another does not of itself, establish a tenancy. The conventional relation of landlord and tenant is wanting. McAdam on Landlord and Tenant, vol. I, 3 ed., sec. 42; Bancroft v. Wardwell, 13 Johns, N. Y. C. L. Rep. 439; Smith v. Stewart, 6 Johns, N. Y. C. L. Rep. 46; West v. Smith, 8 How., U. S. 412; Lloyd v. Hough, 1 How., U. S. 157; Croswell v. Crane, 7 Barb. Rep. N. Y. 192; Hill v. U. S., 149 U. S. 598; Carpenter v. U. S., 17 Wall. 489; Kirtland v. Pounsett, 2 Taunton 145; Sylvester v. Ralston, 31 Barb., N. Y. 286; Preston v. Hawley, 101 N. Y. 587; Knox v. Spratt, 19 Fla. 817; Bardley's Appeal, Pa. S. C., 10 Atl. Rep. 40; Central Mills v. Hart, 124 Mass. 125; Flood et al v. Flood, 83 Mass. 217; City of Boston v. Binney, 28 Mass. 1; M. H. & O. Ry. Co. v. Harlow, 37 Mich. 554; Dalton v. Laudahan, 30 Mich. 349; Dixon v. Ahern, 14 Pac. 599; Ramsbottom v. Bailey, 56 Pac., Cal. 1036; Phillips v. Stewart, 87 Mo. App. 487; Young v. Rees, 145 Mo. 264; Harris v. Frink, 2 Lans., N. Y. 35; 4 Sutherland, Code Pleading, Practice and Forms, sec. 6654; O'Connor v. Corbett, 3 Cal. 320; Espey v. Fanton, 5 Ore. 423; Lankford v. Green, 52 Ala. 103; Atkins v. Humphrey, 52 Eng. C. L. 653; Selby v. Browne, 7 Q. B. 620, 53 Eng. C. L. 620; Belger v. Sanchez, 137 Cal. 614.

A. B. MCMILLEN for Appellee.

Taxes, repairs and insurance disbursed upon the property for which rent is claimed, should have been allowed. Henderson v. Langley, 76 Mo. 288; Shroyer v. Nichols, 55 Mo. 264; Evans v. Snyder, 64 Mo. 516; Sims v. Gray, 66 Mo. 614; Mably v. Nave, 67 Mo. 546; 3 Sutherland on Damages 349; Savings Bank v. Woodruff, 14 N. M. 502; in re Zeiger, 15 N. M. 150.

One who occupies the property of another, whether under contract or tortiously, is liable for the reasonable

rental value of the premises. Wormley v. Wormley, 8 Wheaton 450; Bigler v. Waller, 14 Wallace 297; Union Pacific R. R. Co. v. McAlpine, 129 U. S. 305; Lazarus v. Phillips, 152 U. S. 81; Carpenter v. U. S., 17 Wall. 493; Lloyd v. Hough, 1 How. 545; Hill v. U. S., 149 U. S. 598; Pomeroy's Remedies and Remedial Rights, secs. 572, 573; Bliss on Code Pleading, sec. 154; Warvelle on Ejectment, secs. 526, 530, 540.

The defendant in applying for leave to amend, must give some reasons for his omissions and must show perfect good faith in his application. State v. Homey, 44 Wis. 615; Allen v. Ransom, 44 Mo. 263; Gale v. Foss, 47 Mo. 276; Shemeker v. Thien, 11 Wis. 556.

A mere change from one company to the other, with the same stockholders, the same assets, the same liabilities, and without any agreement would have bound the successor. Williams v. Commercial National Bank, 11 L. R. A., N. S. 857; Atlantic & D. R. Co. v. Johnson, 11 L. R. A., N. S. 1119; Sharpless Co. v. Harding Creamery Co., 11 L. R. A., N. S. 863.

STATEMENT OF THE CASE.

This is an action brought by the plaintiff as assignee against the defendant to recover for the use and occupation of certain premises belonging to the plaintiff, held and occupied by the defendant from September, 1903, until March, 1908. The plaintiff's amended complaint alleges the ownership of the premises in one Weaver, the former assignee of the estate of Charles Zeiger, insolvent, and then in the plaintiff, Frank H. Moore, as the successor in trust, from September 1, 1903, until March 7, 1908; that the Blanchard Meat and Supply Company, a corporation, and the predecessor of the defendant, on the first day of September, 1903, *entered into the possession of certain* real estate in the County of Bernalillo and Territory of New Mexico; that in June, 1907, the Western Meat Company was organized for the purpose of taking over said Blanchard Meat and Supply Company, and to take over all its properties, including the premises above described, as the successor of said Blanchard Meat and Supply Com-

pany, and did then and there undertake to agree and assume, and did assume, all liabilities of said Blanchard Meat and Supply Company; that the reasonable value for the use and occupation of said premises and the reasonable rental value of said premises, was, during the whole of said period, the sum of $50.00 per month, payable in advance on the first day of each and every month; that demand had been made upon the defendant for payment thereof, and that neither the defendant nor its predecessor had ever paid either Weaver or Moore as assignee the sum or any part thereof. In the prayer for judgment plaintiff prayed judgment for $3067.87, with interest and costs. The answer admits the original appointment of Weaver as assignee and the title in said assignee by virtue of the deed of assignment made by Charles Zeiger, insolvent; admits the resignation of said Weaver as assignee and the appointment of Moore as his successor in trust, and further admits said assignees, Weaver and Moore, were successively the owners of the real estate described, down to the seventh day of March, 1908. The answer further admits that the Blanchard Meat and Supply Company transferred to the Western Meat Company certain of its real and mixed property, but denies turning over all of its property, and denies that in consideration of such transfer that this defendant undertook and agreed to assume all the liabilities of the Blanchard Meat and Supply Company, and particularly the liability existing, if any, for which this action was brought. The answer further admits that the defendant and its predecessor occupied the premises described from September 1, 1903, to the 7th day of March, 1908. By a trial amendment it is also denied that the reasonable value for the use and occupation of said premises and the rental value thereof was $50.00 per month, payable in advance on the first day of each and every month, or any sum whatever, and alleges that the Blanchard Meat and Supply Company, predecessor of defendant, entered into possession under an alleged contract of purchase made and entered into between said Weaver, as trustee, and the said Blanchard Meat and Supply Company, which said contract the defendant and its predeces-

sor were at all times ready and willing to complete and perform. The answer also admits that it did not pay assignee Weaver any rental for said premises or for the use and occupation thereof, admits demand and refusal to pay, and generally denies any liability whatsoever for rent for the reasonable use and occupation of said premises. A further trial amendment was sought and refused by the court during the progress of the trial, whereby the defendant sought to allege, as an offset, the payment of certain taxes and insurance and the expenditure of certain moneys for betterments during the period of its occupancy of the premises. At the conclusion of the testimony for the plaintiff, the defendant demurred to the evidence, and asked that a verdict be directed in favor of the defendant on the ground that the plaintiff had failed to make out a cause of action for use and occupation, contending, among other grounds, that the evidence failed to disclose that the conventional relationship of landlord and defendant tenant had ever existed between the parties or their predecessors. This motion was denied by the court. At the conclusion of the testimony, the defendant renewed its motion for an instructed verdict, which motion was denied, and the court, upon motion by the plaintiff directed a verdict in favor of the plaintiff in the sum of $3358.00, the same being reasonable rental value of the premises at $50.00 per month, with interest on each payment computed from the last day of each month.

OPINION OF THE COURT.

WRIGHT, J.—The defendant by its assignment of errors sets out seventeen alleged errors, but for the purpose of this appeal the same have been divided into four groups, and will be so considered in this opinion.

1. The first contention advanced by appellants relates to the refusal of the court to direct a verdict in favor of defendant at the conclusion of the plaintiff's evidence, for the reason that the plaintiff had failed to establish the conventional relationship of landlord and tenant between the plaintiff and defendant, which is a necessary element to maintain an action for use and occupation. Counsel

for appellant contends that the plaintiff in the lower court by his complaint and proofs attempts to bring a suit for the use and occupation, while, as a matter of fact, when tested by the rules applicable to such action, neither the complaint nor the evidence supports such cause of action. The complaint alleges ownership in the plaintiff and his predecessor, entry and occupation of the premises by defendant and its predecessors, the rental value of the use and occupation of such premises, demand for payment of rent, and refusal so to pay. The proofs offered by the plaintiff in the first instance are no broader than the allegations of the complaint. The question then arises: Do the facts, as alleged and proven, make out a prima facie case for use and occupation? If so, the complaint and proofs are sufficient, and the court properly denied the motion of defendant for an instructed verdict at the close of plaintiff's testimony. "There are authorities to the effect that one occupying land belonging to another is to be presumed for the purpose of supporting an action for use and occupation to be the tenant of such other, while there are occasional decisions to the contrary that the plaintiff in such action has the burden of showing the relation of tenancy." 2 Tiffany on Landlord and Tenant, sec. 317. Cases supporting the first doctrine: Oakes v. Oakes, 16 Ill. 106; Lathrop v. Standard Oil Co., 83 Ga. 307; Skinner v. Skinner, 38 Neb. 756; Page v. McGlinch, 63 Me. 472; Contra: Preston v. Hawley, 101 N. Y. 586. In the case of Skinner v. Skinner, cited supra, Mr. Justice Regan examines and considers all of the cases cited as in opposition to the doctrine that mere occupancy of the lands of another implies the existence of the conventional relationship of landlord and tenant, and deduces therefrom the following propositions: "1. To sustain an action for use and occupation of real estate the relation of landlord and tenant must exist between the parties, based on agreement, expressed or implied. 2. One in the exclusive possession of real estate of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission. 3. That the law, in the absence of all

evidence to the contrary, will imply the existence of the relation of landlord and tenant between two parties where one owns land, and by his permission it is used and occupied by the other. 4. That, if tenant's use and occupation has been beneficial to him, that is sufficient ground from which to imply a promise on his part to pay a reasonable compensation for such use and occupation in the absence of any evidence negativing such promise." In the case of Skinner v. Skinner, the allegations of the complaint when analyzed are practically identical with those of the complaint in the case at bar. In Lathrop v. Standard Oil Co., 83 Ga. 310, the court uses the following language: "True it is that where title is shown in the plaintiff together with the fact of occupation by the defendant, without more, the relation of landlord and tenant is to be presumed, and a contract for rent implied." In Page v. McGlinch, 63 Me. 472, the court says: "It is true, as contended by the defendants, that this action of assumpsit for use and occupation must be supported by such evidence as will show the existence of the relation of landlord and tenant between the parties, or that the defendant held the possession under such circumstances as will estop him from denying the existence of such relation. In other words, that the action can be based only upon a promise, either express or implied, and that it cannot be maintained against a disseizor. Goddard v. Hall, 55 Me. 579; Rogers v. Libbey, 35 Me. 200; Porter v. Hooper, 11 Me. 170. But we are of the opinion that, in the absence of testimony to repeal the presumptions naturally arising from the evidence produced on the part of the plaintiff, the jury would be justified in finding that the defendants went into possession under the letting by the plaintiff to their father, and kept it as his successors or assigns by permission of the plaintiff. In Doe v. Merless, 6 M. & S. 110, approved in Doe v. Williams, 13 E. C. L. R. 105, it seems to have been held that, 'the defendant being in possession, the law will refer that possession to a rightful rather *than a wrongful title,* and there is a course through which that title may be fully derived, viz: By supporting the defendant to be privy to the term granted to his father,' and that, 'if his

possession was referable to some other title, it was for him to show it for this must be a matter lying within his own knowledge.' In truth the correct doctrine seems to be that in such cases a contract must be implied so long as it is left to mere implication to determine whether the occupation is with the assent of the owner, and is submission to the legal title." The great weight of authority is in favor of the ruling laid down in the case of Skinner v. Skinner, and the case of Page v. McGlinch, cited supra. In the case at bar, therefore, the plaintiff, having proved the allegations of the complaint and rested, made out a prima facie case for use and occupation, and the motion for an instructed verdict at the conclusion of the plaintiff's testimony was properly denied.

The motion for an instructed verdict having been denied, the defendant, by leave of court, amended its answer so as to set out the facts relating to the entry into possession of the premises of the plaintiff by defendant's predecessor, the substance of such allegations being that defendant's predecessor entered into possession thereof and used and occupied the same under a contract of purchase thererefor made with plaintiff's predecessors in trust, which contract to purchase the defendant had been at all times ready and willing to perform. It also appears from the evidence that this contract was a nullity because the sale which it attempts was never authorized by the court as required by law. All of the facts were admittedly true, and, at the conclusion of the evidence, defendant renewed his motion for an instructed verdict, contending that the facts as established conclusively proved that the conventional relationship of landlord and tenant did not exist. The question now becomes: Is a vendee of land entering by reason of his contract before the conveyance to him has been executed, in event the contract to purchase is not carried out, to be regarded as a tenant of the vendor, and as such tenant liable for the use and occupation of the premises so entered. An examination of the authorities upon this point shows that there is a distinction made as to whether the failure to carry out the contract is due to the action of vendor or the vendee. The authorities are not uniform, but

the better rule of law would seem to be that an action for use and occupation will lie against the vendee of land entering by reason of his contract before the conveyance to him has been executed, and who, after so entering into possession, refuses or fails to comply with his contract. In these cases the contract or promise to pay rent is inferred from the circumtances. Woodbury v. Woodbury, 47 N. H. 11; 90 Am. Dec. 555; Dewight v. Cutler, 3 Mich. 566; 64 Am, Dec. 105; Gould v. Thompson, 45 Mass. 224. In the case of Woodbury v. Woodbury, cited supra, it is held that the action would lie either for use and occupation or for trespass for mesne profits. On the other hand, in case the contract of sale is not carried out owing to the fault of the *vendor*, as when his title is defective or he refuses to make the conveyance, it is very generally held that the purchaser is not liable for use and occupation. This same rule has also been adhered to when the contract of sale has been rescinded by agreement. Tiffany on Landlord and Tenant, vol. 2, sec. 306, and cases cited. In the case at bar the original contract of sale between the Blanchard Meat and Supply Company and Wiley M. Weaver, as assignee, the predecessor of the plaintiff herein, was made without authority or direction of the court, and was held by this court in a former case entitled: In re Zeiger, 15 N. M. 150, decided by this court in January, 1910, to be a mere nullity. The Blanchard Meat and Supply Company made this contract of sale with Wiley M. Weaver, as assignee of the estate of Charles Zeiger, insolvent, and is chargeable with full knowledge of the powers of such assignee or trustee. In other words, the Blanchard Meat and Supply Company, in the eyes of the law, entered into this contract of purchase with full knowledge of the fact that it acquired no rights whatever thereunder, and the best that can be said of their possession and use and occupation of said premises is that the same was a mere tenancy at will. It cannot be said, however, under any view of the facts that the entry and possession of the Blanchard Meat and Supply Company or the de-

fendant in this case was in any way tortious. The possession of the defendant being a mere tenancy at will and
2 the defendant and its predecessor being chargeable with full knowledge of the powers and limitations of the original assignee of the estate of Charles Zeiger, insolvent, and it affirmatively appearing from the testimony that the use and occupation of the premises by defendant was beneficial use and occupation, there necessarily follows an implied contract to pay rent therefor. Such being the case, the conventional relationship of landlord and tenant sufficiently appears for the purpose of supporting an action for the use and occupation of such premises. There was no error in the action of the court, therefore, in denying the motion to direct a verdict in favor of the defendant at the conclusion of all the testimony.

2. The second error complained of by appellant in its brief is the refusal of the court to permit the defendant to amend its answer as a trial amendment, setting up as a set off the payment of certain taxes, insurance and moneys for repairs and betterments to the premises during its occupancy thereof. Trial amendments are within the discretion of the court below, and, unless such discretion is abused, the refusal to allow such amendments would not warrant a reversal of the judgment of the lower court. Savings Bank v. Woodruff, 14 N. M. 502. An examination of the record in this case shows that the defendant made his request for a trial amendment after all of the evidence was in, and both plaintiff and defendant had moved the court for instructed verdicts. Furthermore, the defendant made no showing whatever of diligence, and gave no reason whatever why such matters of defense, if proper, had not been set out in the original answer. While it is true that the trial court should always grant reasonable trial amendments, it can easily be seen that an amendment of this character might seriously embarrass the plaintiff and prejudice his interests, as matters of this kind might, and probably would require time for investi-

gation, causing serious delay. In the absence, therefore, of any showing on the part of the defendant of why
3 such matters were not included in its original answer, we do not think that the court erred in overruling such request for a trial amendment.

3. The third error assigned is, that it was error for the court to permit the plaintiff to compute interest in advance on the amount claimed to be due monthly, with interest on each accruing installment of alleged rent. An examination of the record discloses that, while the first computation of interest was based upon payments due in advance, the court, expressing a doubt as to whether this was a proper method of computing interest, directed that interest be computed from the last of each month, and not in advance, and the judgment was entered accordingly. This alleged error, therefore, is not well taken.

4. The fourth ground of error complained of by the appellant is, that there was no evidence in the record to establish the assumption by the Western Meat Company of any liability of the Blanchard Meat and Supply Company to pay rent for the premises in question. As heretofore stated, at the conclusion of the evidence both the plaintiff and the defendant moved the court for an instructed verdict. The court denied the motion of the defendant, and granted that to the plaintiff. In the case of Beuttell v. Magone, 157 U. S. 154, the Supreme Court of the United States laid down the rule in such cases: "x x x x As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, con-
cluded from finding made by the court, upon which
4 the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reversing its action to the consideration of the correctness of the finding of the law, and must affirm if there be any evidence in support thereof. Lehnen v. Dickson, 148 U. S. 71; Runkle v. Burnham, 153 U. S. 216." This rule has been generally followed by the federal

courts and the courts of New Mexico. Merwin v. Magone, 70 Fed. 776; Magone v. Origet, 70 Fed. 778; Savings Bank v. Woodruff, 14 N. M. 511; Empire State Cattle Co. v. Atchison T. & S. F. R. R. Co., 210 U. S. 1. In the last case cited, supra, the rule laid down in Beuttell v. Magone, was limited to the facts therein shown, the court holding in 210 U. S., that the fact that both parties asked for an instructed verdict does not preclude them upon a denial of their motion from requesting a submission of any disputed fact to the jury under proper instructions. In the case at bar the defendant made no further request, but stood upon his request for an instructed verdict. While the United States rule denies the right of review where there is *any evidence* to support the finding or verdict, this court has denied the right to review where there is any *substantial evidence*. Candelario v. Miera, 13 N. M. 360. Both parties being precluded from questioning the finding of fact, and the only power of the court upon appeal being to consider the correctness of the finding on the law and to affirm if there be any substantial evidence in support thereof, it only remains for us to determine whether there is any *substantial evidence* in the record showing that the Western Meat Company assumed the liability of the Blanchard Meat and Supply Company to pay rent for the premises in question. We think a complete answer to this is contained in plaintiff's exhibits 3, 4, and 5, portions of which we quote: Plaintiff's Exhibit 3. "Resolved, that, in accordance with the resolutions adopted by the stockholders of this Company on the 22nd day of June, 1907, all the property of this company, real, personal, or mixed, except the property authorized to be conveyed by the board of February 23, 1907, be sold and transferred to the Western Meat Company, for and in consideration of fifty-two thousand shares of the capital stock of said company of the par value of one dollar each and said The Western Meat Company to assume the liabilities of this company. x x x And, in order to carry out the foregoing. It is resolved by the Board of Directors of the Blanchard Meat and Supply Company that it is for the best interests of said company to sell and convey said property for the

sum of ten dollars ($10.00), and George L. Brooks, President, and Francis J. Wilson, Secretary, of said Blanchard Meat and Supply Company, are hereby authorized and directed to make, execute and deliver, for and in behalf of the said Blanchard Meat and Supply Company, a conveyance of said property, described as follows: That certain lot or parcel of land and real estate, situate, lying and being in the county of Bernalillo and Territory of New Mexico. x x x Also the south half of lots 13 and 14, in block 8, of the original townsite of Albuquerque." Plaintiff's Exhibit 4. "That the vendor has sold, assigned, transferred and set over unto the company, its successors and assigns, all its right, title and interest in and to the following described property, to-wit: All that certain stock of goods, furniture and fixtures which the vendor has been carrying and using in connection with its business in the city of Albuquerque, including all its property and assets of every kind and description, real, personal and mixed, excepting only such property as was authorized to be conveyed by the vendor, at its directors' meeting held on the 23rd day of February, 1907; it being understood that the party of the second part is to assume the liabilities of the parties of the first part." Plaintiff's Exhibit 5. "The Western Meat Company. Certificate of Incorporation. x x x x x x x To acquire and take over as a going concern the business now conducted and carried on by the Blanchard Meat and Supply Company, at 113 South First Street, in the city of Albuquerque, New Mexico; and any and all of the assets and liabilities of the proprietors of that business in connection therewith."

The appellee herein has filed a motion to affirm the judgment with ten per cent damages. Such motion is denied in so far as it calls for ten per cent damages, and the judgment of the lower court is affirmed, with costs.

[No. 1336. February 4, 1911.]

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant, v. JORDON RODGERS, Appellee.

SYLLABUS (BY THE COURT).

1. An assignment of error that the court erroneously admitted the deposition of a given witness questions the admissibility of the deposition as a whole, and not the admissibility of isolated answers therein.

2. Objections not made in the court below to questions propounded to witness will not be considered on appeal.

3. The refusal of the court to permit defendant to prove on cross examination of plaintiff the execution of a contract by the latter is, if erroneous, not prejudicial, where plaintiff's pleadings admit execution of such instrument.

4. Written stipulations between counsel when fairly entered into should be enforced, but such are not by strained construction to be given an effect beyond their terms.

5. Where a negative condition lies peculiarly within the knowledge of the other party the averment of such condition is taken as true unless disproved by such other party.

6. Applying the principle as stated, where the statute of a foreign state tendered by the plaintiff against the defendant railroad company provides that no such company shall be permitted, except as otherwise provided by regulation or order of the board of railway commissioners, to change or limit its common-law liability as a common carrier, the burden is not upon the shipper to show that no such permission exists, but is upon such company to show that permission was given it to make such a contract.

7. The validity of a contract executed in a sister state will be determined by the courts of this jurisdiction according to the laws of such sister state as construed by the highest court of such state, unless the intention of the parties appears that a different construction shall prevail,

or unless such a construction conflicts with some settled policy of this jurisdiction.

8. Under the laws and decisions of Kansas the common law liability of railroads as common carriers is to make the shipper whole by payment in full for property lost or damages to the extent of injuries sustained, and a contract limiting this liability is void unless made by permission or order of the State Board of Railroad Commissioners.

9. The provisions of the Act of Congress of June 29, 1906, 34 Stat. 595, known as the Hepburn Act, did not displace the previously existing state statute restricting the right of a common carrier to limit liability upon interstate shipments. Latta v. Chicago, etc. Ry. Co., 172 Fed. 850, followed.

10. The use by the shipper of a contract as a basis for transportation accompanying animals shipped does not estop him to deny the validity of a provision of that contract limiting the carrier's common law liability where such contract obligates him to accompany such animals so as to feed, water and otherwise attend them.

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

RALPH E. TWITCHELL for Appellant.

Where a witness is a party to an action he may be asked on his cross-examination as to discrepancies between his testimony and sworn allegations in his pleadings. Hall v. C. R. I. & P. Ry. Co., 51 N. W. 150; Stamper v. Griffin, 12 Ga. 450; East River Natl. Bk. v. Romertze, 49 N Y. 577; McCullough v. McCullough, 12 Ind. 487; Johnson v. Armstrong, 12 Southern 73; Dawson v. Calloway, 18 Ga. 573; King v. Atkins, 33 La. Ann. 1057; Blackington v. Johnson, 126 Mass. 21; Com. v. Morgan, 107 Mass. 199; Ireland v. Railroad Co., 79 Mich. 163; People v. Barker, 27 N. W. 539; Hay v. Reid, 85 Mich. 296; State v. Soper, 148 Mo. 217; Railroad Co. v. Silve, 56

Mo. 265; State v. Allen, 11 S. E. 1016; Legg v. Drake, 1 Ohio St. 286; Kibler v. McIlwain, 16 S. C. 550; Sands v. Rd. Co., 64 S. W. 478; Pine v. Blake, 59 Tex. 240; Wentworth v. Crawford, 11 Tex. 127; Gilmer v. Higley, 110 U. S. 47; Chandler v. Allison, 10 Mich. 460.

The difference between an exception and a proviso in a statute is, that the first exempts absolutely from the operation of the enactment, whereas, the latter only defeats the operation of the enactment conditionally. 11 A. & E. Enc. Law 556; Simpson v. Ready, 12 M. & W. 736.

The measure of damages, if any, was the value of the animals at point of destination. 3 Hutchinson on Carriers, 3 ed., sec. 1360.

A stipulation concerning the proceedings in a pending case is an obligation unlike ordinary contracts between parties not in court, since no consideration is necessary to its validity, and no mutuality is required. Burnham v. N. C. Railroad Co., 88 Fed. 630; Howe v. Lawrence, 22 N. J. L. 105; Harlem Bridge R. Co. v. Westchester, 143 N. Y. 61; State v. Fooks, 65 Iowa, 452; State v. Polson, 29 Iowa 133; McGuire v. N. Y. Cent. R. Co., 6 Daley, N. Y. 170; in re N. Y. etc. R. Co., 98 N. Y. 447; Henderson v. Merritt, 38 Ga. 232; Mining Co. v. A. P. Mining Co., 78 Cal. 629; Murto v. McKnight, 28 Ill. App. 238; Whitehouse v. Halstead, 90 Ill. 95; Woodruff v. Thatcher, 117 Pa. St. 340; Mutual Ins. Co. v. Harris, 97 U. S. 331.

He who accepts and retains a benefit under an instrument is held to have adopted the whole and to have renounced every right inconsistent therewith. Matter of Peaslee, 73 Hun. 113; Fry v. Morrison, 159 Ill. 244; Kelle v. Stanley, 86 Ky. 240; Hainer v. Iowa, etc., 78 Iowa 252; Smith v. Guild, 34 Me. 443; Martin v. Ives, 17 S. & R., Pa. 364.

The law of the place where the contract is made must ordinarily, in absence of proof of the intention of the parties to the contrary at the time of the making of the contract, be looked to for the creation of, obligations imposed by, and interpretations of any rights arising out of it. Railway Co. v. Kavanaugh, 92 Fed. 56; Dyke v.

Railroad Co., 45 N. Y. 113; in re Released Rates, 13 I. C. C. R. 550; Hepburn Act, June 29, 1906.

The railway company will not be liable for a greater sum than that at which the property is valued in contract fairly and honestly entered into with the owner of the property sought to be transported, although the company's own misconduct has caused the loss. Hart v. Railroad Co., 112 U. S. 331; Brehome v. Dinsmore, 25 Md. 328; Graves v. R. R. Co., 144 Mass. 284; Zimmer v. Railroad Co., 137 N. Y. 460; Coupland v. Railroad Co., 15 L. R. A. 534; Jennings v. Smith, 106 Fed. 139; Met. Trust Co. v. Rd. Co., 107 Fed. 628; Doyle v. Rd. Co., 126 Fed. 844; MacFarlane v. Express Co., 137 Fed. 982.

MARRON & WOOD for Appellee.

Contract under common law liability. So. Pac. Ry. Co v. Arnett, 111 Fed. 849; 6 Cyc. 519.

Cross examination is limited to an inquiry into the facts and circumstances connected with the matter stated in the direct examination of the witness. 8 Enc. P. & P. 102-104, vol. 2, Supp. 324, 325; McKnight v. U. S., 122 Fed. 926; Mine etc. Co. v. Park & Lacy Co., 107 Fed. 881; Hemminger v. Western Assurance Co., 95 Mich. 355; Grubb v. State, 117 Ind. 277.

Section 5987, Chapter 84, General Statutes Kansas 1901, governs the transaction. Com. v. Jennings, 121 Mass. 27; U. S. v. Cook, 17 Wall. 168; Maxwell Land Grant Co. v. Dawson, 151 U. S. 605; St. Louis & S. F. R. R. v. Sherlock, 51 Pac. 899; Matter of Huss, 126 N. Y. 537.

A construction will be placed upon a stipulation which will render it reasonable and just to both parties, rather than unreasonable and unjust. 20 Enc. P. & P. 658; David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 987; Chicago Livestock Co. v. Fix, 78 Pac. 316.

That the plaintiff rode on the train with his stock, as he was obliged to, was no waiver of his rights. Latta v. C., St. Paul & O. Ry., 172 Fed. 855; St. Louis & S. F. R. R. Co. v. Gorman, 100 Pac. 647.

The contract and shipment being made in Kansas, the Kansas law governs and declares the rights of parties, even though it relates to interstate commerce. C. N. & St. P. Ry. Co. v. Solon, 169 U. S. 133; Martin v. P. & L. E. Ry., 203 U. S. 284; I. C. Ry. Co. v. Beebe, Ill., 43 L. R. A. 210; Meuer v. C. N. & St. P. Ry. Co., S. D., 25 L. R. A. 81; Davis v. C. N. & St. P. Ry. Co., Wis. 33 L. R. A. 654; Brockway v. Am. Ex. Co., 168 Mass. 257; Toledo Bank v. Shaw, 61 N. Y. 283; K. C. etc. R. R. Co. v. Simpson, 30 Kas. 645; A. T. & S. F. Ry. Co. v. Mason, Kas., 46 Pac. 31; Railway Co. v. Lockwood, 17 Wal. 357; K. C. & St. J. Ry. Co. v. Simpson, 30 Kas. 645; St. L. & S. F. Ry. v. Sherlock, 51 Pac. 899; 29 Cyc. 852; Erie R. R. Co. v. Pury, 185 U. S. 148; Dodge v. Cornelius, 168 N. Y. 242; Jacobi v. State, 187 U. S. 133; Latta v. C. St. P. N. & O. Ry. Co., 172 Fed. 850.

The contract was an attempted limitation of the common law liability of the defendant for negligence, and was, therefore, void, both at common law and under the Kansas statute. Hart v. Railroad Co., 112 U. S. 331; 6 Cyc. 398, 409; K. C. & St. J. R. R. Co. v. Simpson, 30 Kas. 645; St. L. & S. F. R. R. Co. v. Sherlock, 51 Pac. 899; St. L. & S. F. Ry. Co. v. Pribbey, 50 Pac. 458; Latta v. St. P. M. & O., 172 Fed. 850; Bermel v. N. Y. etc. Ry., 62 App. Div. 389, affirmed 172 N. Y. 639; Hooper v. Wells Fargo & Co., 27 Cal. 11.

STATEMENT OF THE FACTS.

The appellee, Jordon Rodgers, sued the appellant railroad company to recover the value of two jacks which Rodgers delivered to the appellant at Olathe, Kansas, on March 6, 1908, for transportation to San Marcial, New Mexico, and which it is alleged were killed en route near Newton, Kansas, through the negligence of the company's agents. The ownership of the animals, their value, and the defendant's negligence in causing their death were substantially the only allegations of the complaint put in issue by the answer. The latter set up as defensive new matter a written contract entered into at the time and

place of shipment limiting the liability of the defendant to one hundred dollars for each animal. The plaintiff replied, admitting the execution of the contract, but denying its validity as such because contrary to, and null and void under the laws of the State of Kansas where executed. Holding, in accordance with this contention, the court declined to permit the contract to go to the jury. A verdict was returned for the plaintiff in the sum of $2125.00, from a judgment upon which the defendant appeals.

OPINION OF THE COURT.

POPE, C. J.—(after making the foregoing statement of the facts.) Most of the errors alleged are upon the admissibility of evidence. It is said, first, that the court erred "in permitting to be read to the jury, over the objection of the defendant, the deposition of W. D. Gibson, of Blackwater, Missouri." This assignment upon
1 its face is an objection to the admissibility of the entire deposition, and not a portion thereof. Treating it as such it is a sufficient disposition of such exception to say that the only objection urged on the trial to the whole deposition was that it was taken without notice to counsel. This objection was, however, sub-
2 sequently withdrawn, so that the deposition as such went in finally without objection. Upon the trial and at this bar, however,—diverging from the assignment of error—it was urged that certain questions and answers contained in the deposition were improperly received. Waiving in the interest of a full consideration of the case the manifest insufficiency of the assignment to reach these rulings, we find that the following occurred on the reading of the depositions at the trial:

"6. Do you know what was the fair and reasonable value of the said jacks on the date of sale to the plaintiff? Counsel: I object to the interrogatory on the ground that the fair and reasonable value of the jacks on the date of the sale has nothing to do with the case and because it is immaterial and irrelevant. The Court: Objection overruled. Counsel: Exception. A. Yes.

"7. State your experience in the buying and selling of jacks as it existed on the third day of March, 1908, from which you gained the knowledge of value upon which you answered the preceding question? Counsel: I object to this as not being a relevant question and as incompetent and immaterial. The Court: Objection overruled. Counsel: Exception. A. I have been buying, raising and selling jacks for thirty (30) years and during this time I have handled quite a number of jacks. I have always attended the important jack sales made in my own neighborhood.

"8. State what was the fair and reasonable value of the said jacks on the day of the sale and delivery to the plaintiff? A. These jacks were worth fourteen hundred ($1400.00) dollars for the two.

"9. Assuming the jacks to be in the same condition as when delivered to the plaintiff, state, if you know, what was their actual value at Olathe, Kansas, on or about the 6th day of March, 1908? Counsel: I object to the answer of the ninth interrogatory on the ground that it is vague and not responsive to the question. The Court: Overruled. Counsel: Exception. A. They were worth fourteen hundred ($1400.00) dollars, plus expense and freight.

"10. State, if you know, whether or not there is any fixed market or definite market price for jacks at or near Blackwater, Missouri? Counsel: I object to the tenth interrogatory on the ground that it is immaterial and irrelevant whether there was any market value for jacks at Blackwater, Missouri. Opposing Counsel: I will withdraw the question on the objection."

It is clear that there was no error in the foregoing. Questions 6 and 7 were purely preliminary and went to the qualification of the witness to testify as to value, so that the objection that the value of the jacks at the time and place of sale was immaterial, was prematurely made. To question 8, which did call for such value of the animals at Blackwater, Missouri, there was no objection. To question 9, which asked the value at Olathe, Kansas, there was no objection, the point made being upon the answer

on the ground that it was vague and indefinite, neither of which objections was tenable. Question 10 was, upon objection, withdrawn. We find nothing, therefore, in the record, to invoke a decision as to whether the court correctly permitted evidence of value at points other than the destination, San Marcial, New Mexico. Were the matter before us much might, however, be said—in view of the fact that the defendant had inquired of plaintiff on his direct examination what he had paid for the jacks at Blackwater—to support the ruling of the court permitting testimony that the price paid was a low one according to market values at the place he purchased. Since the defendant was permitted to prove that the jacks cost only a thousand dollars, it would seem that plaintiff was entitled to reply by his testimony that, while this was true, he got them much below the actual value, all this, of course, to throw light upon the ultimate question, which was the value at San Marcial.

The remaining assignments are all connected with the special contract pleaded in the answer limiting liability to one hundred dollars and the Kansas statute which the reply sets up as rendering the contract ineffectual. Appellant complains that he was not allowed to prove by plaintiff on cross examination the execution of this contract. We
3 deem this ruling entirely without prejudice, however, for the reason that plaintiff's reply, as we read it, admitted the execution of the paper pleaded in the answer. We are unable to see how a refusal to permit plaintiff to testify to the execution of an instrument, which was mutually admitted, could in any sense be prejudicial.

A further assignment is that the court erred in not giving the stipulation tendered on the trial the effect of precluding the plaintiff from questioning the legal efficacy of the contract as limiting recovery for the animals. The stipulation was as follows: "It is hereby agreed between counsel for plaintiff and defendant, in the above entitled cause, that the paper hereto attached is an exact copy of the instrument in writing signed by Jordon Rodgers, of Olathe, Kansas, on the 6th day of March, 1908, for the shipment of two (2) head of jacks, and one stallion, from

Olathe, Kansas, to San Marcial, New Mexico, and that in the transportation of said livestock the said Jordon Rodgers used said instrument in writing as and for his transportation accompanying said stock, and that the said contract, Exhibit A, may be used in evidence in this case the same as if the representatives of the defendant, H. P. Phillips and J. A. Morrison, were here present and testified to the fact of the signing of said instrument in writing by said parties." The circumstances surrounding the execution of this stipulation, and, indeed, its very terms, show that it was intended to stipulate only to the genuineness of the instrument and its use by plaintiff for transportation, thus relieving defendant from the necessity of bringing to the trial the two witnesses named in it. It would be a strange and utterly unreasonable construction of this agreement to hold that the plaintiff assented thereby
4 to the validity of the contract as limiting his recovery and thus practically stipulating away his whole case. While stipulations fairly made between counsel ought to be enforced, they are not to be given effect beyond their terms.

Error is further alleged because the court erred in admitting a Kansas statute, the material portion of which is as follows: "Sec. 5987. Common-Law Liability. Paragraph 151. No railroad company shall be permitted, except as otherwise provided by regulation or order of the board, to change or limit its common-law liability as a common carrier." The specific objection was that the tender of the statute was not accompanied by "rules and regulations of the board of railway commissioners of the State of Kansas." The argument is that as the prohibition of the statute runs, except "as otherwise provided by regulation or order of the board," the burden was upon the plaintiff to establish that the present case was not within any exception; or, in other words, to establish that the defendant company had not been permitted by special order of the board to change or limit its common-law liability. We are, however, not of the opinion that this burden rested upon the plaintiff. The effect of the statute was absolutely to prohibit such limitation save

when in terms permitted and provided otherwise. Proof that no such permission had been given was proof of a negative. The existence of an order or regulation of the board especially permitting the railroad to impose such limitations was a matter peculiarly within the defendant's knowledge. To require the plaintiff to establish a negative proposition by presenting all of the orders and regulations of the board since its existence to show the absence of a permission, when the defendant by its peculiar knowledge was able readily to say whether or not such per-
5 mission had been given it, would be imposing a burden which the law does not place upon the plaintiff under such circumstances. The proper rule, and one which we believe the authorities fully countenance. is to consider the plaintiff's contention prima facie established by the
6 introduction of the statute, leaving it to the defendant to demonstrate, if it can, the existence of a condition taking it out of the general rule. Greenleaf on Evidence, sec. 79; Great Western R. R. Co. v. Bacon, 30 Ill. 347, 83 A. D. 199; McIntyre v. Ajax Mining Co., 20 Utah 323; Givens v. Tidmore, 8 Ala. 745. This, indeed, we infer from St. Louis etc. Railroad v. Sherlock, 59 Kans. 23, 51 Pac. 899, to be the rule of the Kansas courts in dealing with their own statute, and such a construction, upon a matter even of mere procedure, is entitled to great respect.

A further question raised in the case—both by exception to the refusal of the court to admit the contract in evidence, and by exception to certain instructions dealing with the contract—is whether the statute just considered renders the contract ineffectual as a limitation upon the company's liability. The present case proceeded upon the ground of the defendant's negligence in handling the animals shipped. There was evidence—practically uncontradicted—showing such negligence. Indeed, the present appeal does not question the verdict upon the point. It is claimed, however, that under the terms of the contract tendered the recovery should have been limited to the amount named therein, to-wit, one hundred dollars for each animal. While contracts have been permitted between

common carriers and shippers, relieving the former from liability as insurers and from other liability not flowing from negligence (York Co. v. I. C. R. R. Co., 3 Wall. 107; N. Y. C. R. R. Co. v. Lockwood, 17 Wall. 357), such contracts have been declared unreasonable and void in so far as they attempt to stipulate away liability for negligence. Express Co. v. Kountze Bros., 8 Wall. 342; The Kensington, 183 U. S. 268. It has been held, however, that the reasoning of this last does not apply to contracts, which, in consideration of a reduced freight rate, embody an agreed valuation of the article shipped, and thereby limit the amount of recovery therefor, and that this latter class of contract may be enforced. The leading American case upon this subject is Hart v. Railroad, 112 U. S. 331, wherein the rule and its reason are stated to be, that an agreement on the valuation of the property carried, with the rate of freight adjusted to such valuation and conditioned that the carrier assume liability only to the extent of such agreed valuation, in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing the due proportion between the amount for which the carrier is responsible and the freight received and of protecting the carrier against extravagant valuations. Still another line of cases will be found where it is held that contracts will not be enforced, which, under the guise of an agreed valuation, fix a purely fictitious value, and thereby amount to an attempt by the carrier arbitrarily to limit its liability. The class of contract last mentioned has been expressly described in Central Ry. Co. v. Hall, 124 Ga. 322, as attempting "an arbitrary pre-adjustment of the damages," and all such contracts whose legal effect is an arbitrary limitation of liability, rather than a fair agreement as to value based upon the corresponding rate for shipment, have been held invalid. The full subject has been considered in 13 Interstate Commerce Reports, page 551, "In the Matter of Released Rates," where, in an opinion by Commissioner Lane, the several classes of contracts limiting liability have been exhaustively discussed. The present case, however, does not call for a consideration of these distinctions nor the

settling of a rule for this jurisprudence as to the validity of such a contract as that herein involved limiting liability. This suit being upon a Kansas shipment, for injuries inflicted in Kansas, the cause of action is governed by
7 the laws and decisions of that state and the rights of the parties will be adjudged accordingly, unless contrary to the public policy of this jurisdiction. Liverpool etc. Steam Co. v. Insurance Co., 129 U. S. 397; Central of Georgia Ry. Co. v. Cavanaugh, 92 Fed. 56; Hanson v. Great Northern Ry., (N. D.) 121 N. W. 78. There being no settled public policy of this jurisdiction upon the subject, we accordingly proceed to interpret this contract and determine the plaintiff's rights according to the laws and decisions of Kansas. Under the holdings of the courts of that state interpreting the common-law and prior to
8 the statute to be presently considered, such a limitation as is here asserted was deemed void. Kansas City Co. v. Simpson, 30 Kas. 645, 46 Am. Reports 104, decided in 1883. However, by the Kansas statute introduced in evidence, passed in 1883, it was provided that no railroad company shall be permitted, except as otherwise provided by regulation or order of the board, to change or limit its common-law liability as a common carrier. As we read the decisions of that state, the doctrine of the Supreme Court of Kansas is that such a statute renders void a limitation as to value such as that here imposed, even though the same takes the form, as here, of an agreed valuation. St. Louis & San Francisco R. R. v. Sherlock, 59 Kan. 23, 51 Pac. 899; St. Louis & S. F. R. R. v. Tribbey, 6 Kans. App. 467, 50 Pac. 458. In the former case, after discussing the several rules on the subject of limitations upon liability, it is said: "It is not necessary, however, for us to undertake to determine it. What has been said as to the divergent views of the courts has been by way of introduction to a statement of the legislative enactment of this state, which determines for us the rule of decision to be made. Sec. 13, ch. 124, Laws 1883, sec. 17, chap. 69, General Statutes 1897, declares it in a single and emphatic sentence: 'No railroad company shall be permitted, except as otherwise provided by

regulation or order of the board (of railroad commissioners) to change or limit its common-law liability as a common carrier.' The common-law liability of railroads as common carriers was to make the shipper whole, by payment in full for property lost, or damages to the extent of the injuries sustained. If formerly this liability could be limited by contract with the shipper, it can be done so now, as a matter of legal right, only by the permission or order of the board of railroad commissioners. No such order or permission has been given; at least, the giving of it is not claimed. The judgment of the court below is therefore affirmed." Since this court will, in administering rights arising under the Kansas Law, follow the construction put upon that law by the highest courts of Kansas and consider such construction as a part of the statute, (Carroll Co. v. U. S., 18 Wall. 71; Amy v. Watertown, 130 U. S. 301), it results that the contract here pleaded and tendered in evidence was void under the Kansas statute and decisions interpretive thereof, and was thus not admissible to limit liability.

It is said by the defendant, however, that assuming such effect as last given to the Kansas statute, and assuming in view of Chicago Ry. Co. v. Solan, 169 U. S. 133; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92; and Martin v. Pittsburg Co., 203 U. S. 284, that said statutes may be applied to and control contracts for interstate shipments, still such statutes apply only until Congress in the exercise of its power over interstate commerce has otherwise provided, and that upon such provision being made the congressional act displaces the state statute. To support this last, Chicago Ry. Co. v. Solan, supra, is quoted to the effect that, "so long as congress has not legislated upon the particular subject, they (local laws) are rather to be regarded as legislation in aid of such commerce." And, also, Penn. R. R. Co. v. Hughes, 191 U. S. 477, wherein it is said that the states may regulate liability upon interstate shipments "in the absence of congressional action providing a different measure of liability." It is said, further, that under the rule just stated the Kansas statute has been superseded as to interstate shipments,

such as the present one, by the provisions of the act of congress designed to regulate commerce, approved June 29, 1906, 34 Stat. 595, and especially sec. 20, of that act, reading as follows: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed, provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." It is contended that this congressional act displaced the Kansas statute, rendering it immaterial in the present case, and making the contract set up in defense by the appellant company subject only to the test, as to its validity, imposed by the act of congress just quoted. A similar contention was, however, considered in Latta v. Chicago etc. Co., 172 Fed. 850, decided by the circuit court of appeals for this circuit, wherein it was contended, that in consequence of the act just quoted, the law of Nebraska, providing that the liability of railroad corporations as common carriers should never be limited, was rendered inoperative. The court said: "It plainly appears from a reading of the above language that congress has legislated upon the subject of the liability of railroad corporations as common carriers when engaged in interstate commerce. If it were not for the proviso accompanying the language above quoted, we should feel compelled to determine the validity of the contract in question with reference to the law of congress. We think that the proviso found in the law above quoted was placed therein to cover just such a case as is now presented. Congress, undoubtedly, was aware of the many conflicting decisions by the courts in reference to the question as to how far common carriers could limit their

common-law liability by contract, receipt, rule or regulation. It, therefore, was aware that the constitution of Nebraska, as interpreted by her Supreme Court, was in conflict with the rule established by the United States Supreme Court in Hart v. Railway Company, supra; and was also aware that the Supreme Court of Pennsylvania in Grogan v. Adams Express Co., 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, refused to follow the rule established by said case of Hart v. Railway Co., supra; and, therefore, in view of these conflicting opinions, very wisely provided, that the legislation by congress should not deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. We are, therefore, of the opinion that the right which the plaintiff in this case had, under the laws of Nebraska, to sue for the full value of his property was not taken away by the legislation of congress herein referred to, but was preserved to him, and that he may now enforce that right as he has attempted to do." This expression, coming from a court exercising appellate jurisdiction over our own in many matters, is entitled to great respect, and we feel
9 constrained to follow it, and accordingly to hold, that the act of congress did not displace the preexisting Kansas statute.

It is finally urged that because the plaintiff used the contract in question as transportation from Olathe, Kansas, to San Marcial, New Mexico, he is estopped to claim its invalidity in any respect. However, in accompanying to their destination the remaining animals not killed in transit, plaintiff was simply complying with a condition of the contract, inserted, doubtless, as much for the
10 benefit of the defendant as for the plaintiff, this condition being, that someone should accompany the animals in order to feed, water and otherwise attend to them. We are unable to see how a compliance by the shipper with this requirement of his contract renders operative another provision of the contract that the Kansas statute, to quote from the Latta case, "struck down x x x x x as soon as it was made."

The judgment is accordingly affirmed.

Associate Justice Roberts, who was not a member of the court when the case was submitted, does not participate.

[No. 1343. February 4, 1911.]

THE TERRITORY OF NEW MEXICO, Upon the Relation of the City of Albuquerque, Appellant, v. O. A. MATSON, City Treasurer of the City of Albuquerque, Appellee.

SYLLABUS (BY THE COURT).

1. A city is the party "beneficially interested" in a suit to compel its treasurer to deposit the money in his hands belonging to it in a bank designated by an ordinance of the city, from which it would receive interest on the money so deposited.

2. A city ordinance requiring the treasurer of a city to deposit all moneys in his hands belonging to the city in such bank, or banks, as shall qualify as provided in the ordinance, but not attempting to restrict in any way the paying out by him, under the provisions of law, of such moneys by his own checks, would not operate to deprive him of the "custody" of such moneys, within the meaning of Section 2424, C. L. 1897.

3. The use, as a part of the repealing clause of a statute, of the words "all acts and parts of acts in conflict herewith" repeals nothing which could not be repealed by implication without those words.

4. Section 3, of Chapter 122, of the Session Laws of 1909, providing that municipal and county treasurers are required to designate depositories in which the funds coming into their hands shall be kept, is manifestly and totally repugnant to the provisions of Sec. 2424 of the Compiled Laws of 1897, providing that city councils may designate a place of deposit for city funds, and may require the city treasurer to keep all moneys in his hands belonging to the corporation in such place of deposit, and operates to repeal Sec. 2424.

Appeal from the District Court for Bernalillo County, before MERRITT C. MECHEM, Associate Justice. Affirmed.

H. J. COLLINS and MARRON & WOOD for Appellant.

C. L. 1897 conferred ample authority on the city council to designate depositories of city funds and to require and compel the treasurer to place all city moneys in his hands in the depositories so designated. C. L., secs. 2456, 2403, 2462, 2467, 2420, 2424.

Where an act or word is susceptible of two meanings the court will give it such construction as will render the law effective and not nugatory. 26 Enc. 649; Mack v. Prince, 40 W. Va. 326; Suth. Stat. Const., sec. 348.

Custody. Roland v. Commonwealth, 82 Pa. 306; 22 Am. Rep. 759; Klemmer v. Mt. Penn Gravity R. Co., 30 Atl. 274, 163 Pa. 521; Com. v. Valsalka, 181 Pa. 17; People v. Githler, 78 Ill. Ap. 193; State v. Midland State Bank, 66 Am. St. Rep. 484; Meyers v. Board of Education of Clay Center, 37 Am. St. Rep. 263.

Section 2424, C. L. 1897, was not repealed by Chapter 122, Laws of 1909. Sutherland Stat. Cons., secs. 256, 267, 34; Redrock v. Henry, 106 U. S. 596; Wood v. U. S., 16 Peters 342; U. S. v. Tinon, 78 U. S. 153; Matter of Tiffany, 179 N. Y. 455; Baca v. Bernalillo County, 10 N. M. 445; 26 A. & E. Enc., 2 ed. 721, 725, 727, 646, 647, 602, 603, 604; in re Brooklyn, 185 N. Y. 171; Smith v. McCool, 66 U. S. 459; Brown v. McCormick, 28 Mich. 215; McAfee v. So. Ry. Co., 36 Miss. 669; State ex rel etc. v. Owen, 59 N. W. 886; Rhodes v. Weldie, 46 Ohio St. 242; Pitte v. Shipley, 46 Cal. 161; Laws 1884, chap. 38; C. L. 84, secs. 1669, 1707; Laws 1891, chap. 32; Laws 1901, chap. 13; People v. Gibler, 78 Ill. App. 193.

M. E. HICKEY, MANN & VENABLE, A. B. MCMILLEN for Appellee.

A mandamus can issue only on the information of the party beneficially interested. 28 Cyc. 258; Barnes v. District of Columbia, 91 U. S. 544; Commissioners v.

Lucas, 93 U. S. 114; Ottawa v. Carey, 108 U. S. 110; Dillon on Municipal Corporations, secs. 89-91; C. L. 1897, secs. 2762, 2456, 2403, 2462, 2467, 2420, 2424, 2419; Maloy v. Commissioners, 10 N. M. 638; State v. Whipple, 83 N. W. 921.

The city has no power to pass such an ordinance. Dillon on Municipal Corporations.

Custody. Roland v. Commonwealth, 82 Pa. 306; Laws 1909, ch. 122; C. L. 1897, sec. 2424.

An ordinance which is repugnant to a statute is void. Robinson v. Mayor of Franklin, 1 Hum. 156, 34 Am. Dec. 652.

Where two statutes on the same subject are repugnant in any of their provisions, the latter operates to the extent of the repugnancy, as a repeal of the former. Mersereau v. Mersereau, 51 N. J. Eq., 6 Dick. 382, 26 Atl. 682; Excelsior Petroleum Co. v. Embury, 67 Barb. 261; Territory v. Digneo, 15 N. M. 157; Sandoval v. County Commissioners, 13 N. M. 537; Baca v. Bernalillo, 10 N. M. 438; Geck v. Shepherd, 1 N. M. 346.

STATEMENT OF THE CASE.

The relator, the City of Albuquerque, appeals from a judgment of the Second District Court of Bernalillo County, dismissing the relator's petition for an alternative writ of mandamus, and the alternative writ issued thereon, on the relator's motion for judgment on the pleadings, the facts being correctly set forth therein. Briefly stated, the following are the facts alleged in the petition: On April 13, 1910, the city council of the city of Albuquerque, assuming to act under the authority conferred upon it by the general laws of the Territory, relating to municipal corporations, duly enacted ordinance No. 462 of said city, establishing and designating as depositories for public moneys belonging to the city, in the hands of the city treasurer, three banks in the city of Albuquerque, upon their compliance with the conditions specified, within fifteen days from its passage, and provided, that if any of said banks should fail to comply within the time limit, that the designation of such bank failing should stand

revoked, leaving the bank, or banks, specified which should comply with the ordinance, as the sole lawful depositories. The conditions contained in this ordinance were, in substance, that the banks should, within five days, give notice to the city treasurer of their intention to comply, and give bond in a sum specified by the treasurer, and to be approved by the council, for compliance with the ordinance and accounting for the money, and also, that they would pay to the city interest at three per cent, on daily balances on all city money held by them subject to check, and at four per cent on all city moneys so held, not subject to check. The ordinance further provided, that the balances in all three banks should be kept as nearly equal as convenient, and required the treasurer to deposit and keep all city funds in his hands in the banks qualifying under this ordinance. Only one of the banks specified, namely, the State National Bank, qualified under the ordinance. It gave notice to the treasurer of its intention to qualify, and the treasurer, refusing to fix the amount of the bond to be given by he bank, it tendered to the city council a bond in the penalty of three hundred and fifty thousand dollars, and the same was received and approved by the city council. A resolution was thereupon passed by the city council reciting that the State National Bank was the only bank qualifying, and that the amount of the funds it was entitled to receive would be in excess of one half of the penalty of the bond so approved, and, therefore, requiring the bank to give an additional bond to cover the excess, or, at its option, a new bond in the penalty of five hundred thousand dollars. The new bond was accordingly given, and approved by the council, which thereupon declared the State National Bank the sole lawful depository of public moneys belonging to the city under the ordinance. Due demand was made on the city treasurer by the city for the deposit of said funds, and, upon his failure and refusal to do so, an alternative writ of mandamus was sued out by the city against the treasurer to compel such deposit. The treasurer answered, not denying the allegations of the writ, but contending, in substance, first: that the city was not the proper party to

apply for the writ; second: that the council was without power to designate a depository; and, third: that the treasurer had a lawful right to select his depository and had designated the First National Bank of Albuquerque as such depository. The city thereupon moved for judgment in its favor on the pleadings, which the court denied, and instead, gave judgment for defendant, dismissed the writ, and allowed the relator an appeal therefrom. The relator, upon the appeal, has assigned the following errors: 1. Because the court erred in overruling the motion of the relator for judgment upon the pleadings. 2. Because the court erred in awarding final judgment, dismissing the proceedings upon the facts alleged in the petition and writ, and admitted by the answer. 3. Because the court erred in the judgment granted by it herein. The condition of the respondent below was based upon three grounds. First: That the city of Albuquerque is not the party beneficially interested in the proceedings. Second: That Section 2424 of the Compiled Laws, 1897, is the only section purporting to grant the right to the city council to designate depositories, and this section is contradictory and void. And, Third: That if the council ever were empowered by law to designate a depository of the city moneys that law was superseded and repealed by chapter 122, of the Laws of 1909, which requires the treasurer himself to designate such depository.

OPINION OF THE COURT.

WRIGHT, J.—The claims of the respondent that the relator, the city of Albuquerque, is not the party beneficially interested within the meaning of Section 2762, C. L. 1897, are negatived by the facts stated in the record.

1 It there appears that the city was the owner of a considerable sum of money, more than one hundred and seventy-five thousand dollars, and presumably about two hundred and fifty thousand dollars, in the hands of its treasurer, and that if it should be deposited in the bank designated by ordinance, the city would receive interest for it at the rate of three or four per cent. That certainly

creates a beneficial interest in the city to have the deposit made.

2. The question whether under Section 2424, C. L. 1897, a city had the right to designate a depository of its money in the hands of its treasurer, turns on the meaning of the word "custody," as used in the statute. The appellee claims that the provision: "He may be required to keep all moneys in his hands belonging to the corporation in such place of deposit as may be designated by ordinance," is contradicted and rendered nugatory by the words immediately following: "Provided, however, no such ordinance shall be passed by which the custody of such money shall be taken from the treasurer." It should be borne in mind that the money is all the time the property of the city, and not of the treasurer, that his duty is to receive it for the city and with it pay claims against the city which have been duly approved. Everything else is, or should be, subsidiary to this main object. In that connection, the word "custody" must mean immediate charge and control under the law, and not the final absolute control of ownership. Suppose a person to be carrying on a business through a manager, and that he directs him to deposit all the money he receives in a certain bank in his own name as manager, and subject only to his checks as manager—could it be said with any show of reason that the money is not in his custody because he did not select the bank of deposit? And is a prisoner any less in the custody of the jailer because he holds him in a jail provided by the county and designated by law as the place of confinement for such prisoner? If, by the ordinance in question, the city had, for instance, required the treasurer to deposit in the joint names of himself and some other officer of the city, and that payments from the desposit should be made only by checks signed by both such depositors, that, obviously, would have been calculated to deprive him of the custody of the money. But the mere designation of the bank in which he shall deposit, in his own name, and
2 subject only to his own checks, as treasurer, without in the least restricting his right to pay out the money according to law, is not depriving him of the custody of

the money. Roland v. Commonwealth, 82 Pa. 306, 319, 22 Am. Rep. 758; Klemmer v. Mt. Penn Gravity R. Co., 163 Pa. 521, 30 Atl. 274; Commonwealth v. Valsalka, 181 Pa. 17, 37 Atl. 405, 409; People v. Gibler, 78 Ill. App. 193. We conclude, then, that under the law, as it was in the compilation of 1897, cities did have the right to designate, by ordinance, the banks in which their treasurers should deposit the city funds received by them.

3. The city council having the right under Section 2424 of the Compiled Laws to designate by ordinance the banks in which their treasurers should deposit the city funds received by them, we must now determine whether they have since been deprived of that right by later legislation. If this right has been taken away from the city council, it is by Section 3, Chapter 122, of the Session Laws of 1909. We quote the two acts in full: "Sec. 2424. He may be required to keep all moneys in his hands belonging to the corporation in such place of deposit as may be designated by ordinance: Provided, however, no such ordinance shall be passed, by which the custody of such money shall be taken from the treasury. The treasurer shall keep all moneys belonging to the corporation in his hands, separate and distinct from his own moneys, and he is hereby expressly prohibited from using, either directly or indirectly, the corporation money or warrants in his custody and keeping, for his own use or benefit, or that of any other person or persons whomsoever. x x." "Chapter 122, An Act to provide for the furnishing of proper bonds by territorial, county and municipal officers, and for other purposes. Approved March 18, 1909." "Sec. 3. x x x All county and municipal treasurers are hereby required to designate one or more banks authorized to do business under the laws of the Territory of New Mexico, or under the laws of the United States, as a depository, or depositories, for the deposit and safe keeping of all funds coming into their hands as such treasurer. And upon the deposit by the treasurer in such depository of funds coming into their hands as such treasurers, they shall be absolved from any liability upon their official bonds for any loss of such moneys arising out of the failure of such de-

pository to repay said funds: *Provided,* That no moneys shall be deposited with any such depository until it shall have executed and delivered a good and sufficient bond in an amount equal to the amount of the bond required to be given by such treasurers under this act, equal to the proportionate amount of such moneys which said depository is to receive under its said designation, which said bond shall run to the Territory of New Mexico, and shall be approved as to the form and sufficiency by the judge of the district court of the district within which said treasurer resides and conditioned that such depository will faithfully perform all of its duties as such depository and will, upon demand of such treasurer, pay over all moneys deposited with it. The name or names of the depositories designated by the county treasurers shall be by said treasurers immediately certified to the traveling auditor of the Territory." While it is undoubtedly true that the title of Chapter 122 and the other provisions of the act indicate that the primary object of the act was to relieve municipal and county treasurers from the exactions of the trust and surety companies, we have no constitutional prohibition against including more than one subject in the same legislative act. Chapter 122, Session Laws of 1909, does not specifically repeal Section 2424, nor does the use, in the repealing clause, of the words, "all acts and parts of acts in conflict
3 herewith," add anything to the repealing effect of the later legislation. Can the two laws: Section 2424, of the Compiled Laws, and Section 3, of Chapter 122, of the Session Laws of 1909, be read together so that both laws may stand and be given their full effect? Repeals by implication are not favored, and it is the duty of the courts so to construe the acts, if possible, that both shall be operative. Lewis Sutherland on Stat. Cons., Sec. 247. But where two statutes on the same subject are manifestly and totally repugnant and contradictory in their provisions, the latter statute, to the extent of the repugnancy and contradiction operates as a repeal of the former. McCool v. Smith, 1 Black 459; Territory v. Digneo, 15 N. M. 157; Sandoval v. County Commrs., 13 N. M. 543; Baca

v. Bernalillo County, 10 N. M. 438. Under the provisions of Section 2424, cited supra, the city council, by ordinance, *may* designate a depository or depositories, and, in event they do so designate a depository or depositories, they *may* require the treasurer to keep all the moneys in his hands belonging to the corporation in such place or places of deposit. By the provisions of Section 3, Chapter 122, of the Laws of 1909, all county and municipal treasurers "*are hereby* required to designate one or more banks, etc. x x x x x Provided, that no moneys shall be deposited with any such depository until it shall have executed and delivered a good and sufficient bond," etc. We think that a mere reading of the two provisions clearly shows the legislative intent to place the designation of his depository wholly within the control of the municipal or county treasurer, as the case may be. Under Section 2424, cited supra, the action of the city council is optional. Under Section 3, Chapter 122, Laws of 1909, the action of the treasurer is made mandatory and he has no option whatsoever. While we are of the opinion that the language of the later act is so plain in its requirement that the treasurer is required to designate the depository for county and municipal funds as to leave no room for speculation as to the legislative intent, the fact that Section 2424 makes no provision whatever for the giving of a depository bond. thereby leaving the matter wholly within the control of the city council, while Section 3, of Chapter 122, Session Laws of 1909, specifically requires that a bond be given, and that same shall be approved as to form and sufficiency by the Judge of the District Court, indicates still more forcibly the legislative intent to place the power to designate county and municipal depositories in the hands of the county or municipal treasurer. While we must admit that the later act places *a power* in the hands of the treasurer that may be subject to grave abuses, and that Section 2424 is more in harmony with the entire scheme of municipal government, such considerations can have no weight with the courts where the terms of the later act are so *manifestly and totally repugnant* to the earlier act that by no reasonable rule of construction could the

two acts be read together so as to give effect to both laws. Counsel for appellant urges that the omission of the word, "city," in the third section of Chapter 122, of the Session Laws of 1909, when in the first section of the act the words, "county, city or municipality" occur twice, indicates a distinction in the legislative mind between the words, "city" and "municipality." While it is true, that there is a presumption that the meaning of a word repeatedly used in a statute is the same throughout, (Pitte v. Shipley, 46 Cal. 161), we think that the title of the act itself, wherein the words, "territorial, county and municipal officers" are used, taken together with our statutory definition of the words, "municipal corporations," Sec. 2452, C. L. 1897, clearly precludes any such distinction in the third section of Chapter 122, of the Laws of 1909. We must, therefore, hold that Chapter 122, of the Session 4 Laws of 1909, operates to repeal Sec. 2424 of the Compiled Laws of 1897. The judgment of the lower court is affirmed.

DISSENTING OPINION.

ABBOTT, J. (Dissenting)—I am unable to concur in the opinion of the court that by Chapter 122, of the Laws of 1909, it was the legislative intention to deprive cities of the right, which theretofore they had, to require their treasurers to keep the city funds in banks designated by the cities themselves. A casual reading of the statute would, it is true, naturally give the impression that such was the meaning of its makers. It is, however, a cardinal principle of statutory construction that after a statutory system, or policy, has been long established, and is well defined, it will not be lightly presumed to be departed from or abandoned. Lewis' Sutherland on Stat. Const., Sec. 581, and cases cited. In applying that principle, the Supreme Court of the United States, in Parsons v. The United States, 167 U. S. 328, went so far as to hold that Section 769, Revised Statutes U. S., "District attorneys shall be appointed for a term of four years, and their commission shall cease and expire at the expiration of four years from their respective dates," did not mean that dist-

rict attorneys were entitled to hold office four years, but that they should not hold more than four years, because to hold otherwise would be to run counter to the general purpose of Congress, gathered from other of its acts, that it would not undertake to interfere with the President's power to remove from office by creating a fixed term for an officer. It cannot be doubted that if the meaning of the statute in question is that claimed for it by appellee, it is in conflict with what has stood for many years as the policy of the Territory toward cities, and the principles on which that policy was based. The statute law of the Territory was clearly designed to give to cities practically complete self-government and control of the money they were authorized to raise by taxation. Section 2402, C. L. 1897, alone contains more than one hundred separate grants of power to cities, and other sections of the same chapter many more. Some of the more significant are: "Section 2424: The corporate authority of cities organized under this act shall be vested in a mayor and a board of aldermen to be denominated the city council, together with such officers as are in this act mentioned, or may be created upon its authority." "Section 2403: Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the Territory, for carrying into effect or discharging the powers and duties conferred by this act, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof." "Section 2462: The city council shall possess all the powers granted in this act, and (all) other corporate powers of the city, not herein, or by some ordinance of the city council conferred on some officer of the city; they shall have the management and control of the finances and all the property, real and personal, belonging to the corporation x x x." "Section 2467: The qualified electors of each city shall also elect, by a plurality of votes, a city treasurer, who shall hold his office for one year, and shall have such powers and perform such duties as are prescribed in this act, or by ordinance of the city council not in-

consistent herewith." "Section 2420: The treasurer shall receive all moneys belonging to the corporation, and shall keep his books and accounts in such manner as may be prescribed by ordinance x x x x x." "Section 2424: He may be required to keep all moneys in his hands belonging to the corporation in such place of deposit as may be designated by ordinance: Provided, however, no such ordinance shall be passed, by which the custody of such money shall be taken from the treasurer. The treasurer shall keep all moneys belonging to the corporation in his hands, separate and distinct from his own moneys, and he is hereby expressly prohibited from using, either directly or indirectly, the corporation money or warrants in his custody and keeping, for his own use or benefit, or that of any other person or persons whomsoever x x x x." "Section 2419: The treasurer shall give a bond to the city or town in its corporate name, with good and sufficient sureties, to be approved by vote of the council or board of trustees, in such sum as the council, or trustees, may require, and conditioned for the faithful performance of his duties as treasurer of such city or town so long as he shall serve as such treasurer, and that when he shall vacate such office, he will turn over and deliver to his successor, all moneys, books, papers, property, or things belonging to such city or town and remaining in his charge as such treasurer." With all the sections above quoted, the statute under consideration is at war, and that in a way clearly to promote injustice and dishonesty. It purports to direct a treasurer to designate a bank, organized under the laws of the United States or of New Mexico, as the depository of the city funds in his hands, and required of such depository a bond in half the amount of the collections of the preceding year, and then follows the extraordinary provision that the treasurer on depositing money with said bank, *of his own selection,* shall be exempt from liability if the depository fails to account for the money. There would be reason in exempting a treasurer from liability for money deposited in a bank selected by the city in which he is required by ordinance to deposit, but none, that we can perceive, for so exempting him when the selection is made by

himself. What might not unnaturally happen is easily perceived. There may be a national bank with a capital of only twenty-five thousand dollars. The amount of the bond required of the depository designated by the treasurer, in the present instance, based on the collections of the preceding year, as we understood from statements of counsel in argument which were not questioned, would be only fifty thousand dollars. Yet it appears that the treasurer of Albuquerque had in his hands, belonging to the city, more than one hundred and seventy-five thousand dollars, probably about two hundred and fifty thousand dollars, made up, in part, presumably, of some special fund, such as a city might have on hand for the construction of public works, and which probably would not fall under the head of "collections," for fixing the amount of the treasurer's bond. From a pecuniary standpoint, it might be profitable for a bank with a small capital to forfeit its bond, go out of business, and divide with the depositing treasurer the profits of the enterprise. Further, in the same line, it appears that under this statute it would be impossible for a city to obtain interest for the use of its money so deposited by its treasurer, since the money would be put wholly beyond its control, except for the payment of claims against it. The law prohibits a treasurer from using the money of the city in his hands for his own use or benefit, or that of any other person. Sec. 2424, supra, but it would be difficult to devise a system better calculated than the one it is urged this statute contains, to facilitate such a use without detection. It is suggested in the brief for the appellee, although it does not so appear in the record, that the depository designated by the defendant, the treasurer of Albuquerque, has given a bond in the sum of two hundred and fifty thousand dollars, and has paid the city three per cent for the use of the money deposited by the treasurer with it. But it was not required so to do by the statute. The fact, assuming it to be one, since it is not questioned, that the defendant treasurer and the depository designated by him are of unimpeachable financial standing and integrity, and would not, in any way, take advantage of the facilities for wronging the city, which the statute affords, that does not, in the

least, tend to prove that other treasurers and depositories would be as forbearing. Rather is this voluntary action of the depository bank, in going beyond the apparent requirements of the law, an admission of the inadequacy of the law properly to protect the interests of the city, and of the injustice of its provisions, taken literally, toward the city. But, it is said, "Statutes will be construed in the most beneficial way which their language will permit, to prevent absurdity, hardship or injustice, to favor public convenience, and to oppose all prejudice to public interests." Lewis' Suth. Stat. Cons., 2 ed., sec. 490. See, also, Lau Ow Bew v. United States, 144 U. S. 47; Tsoi Sim v. United States, 116 Fed. 920. "When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd, and which the legislature could never have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity." Lewis' Suth. Stat. Cons., Sec. 489; People v. Chicago, 152 Ill. 546, 552, 38 N. E. 744. "Consideration of convenience, justice and reasonableness, when they can be invoked against the implication of repeal, are always very potent." People etc. v. Raymond etc., 186 Ill. 407, 57 N. E. 1066. To the considerations which we have named, should be joined the familiar one that repeals by implication are not favored. "Repeals by implication are not favored." "It is the duty of the courts to so construe the acts, if possible, that both shall be operative." Lewis Suth. Stat. Cons., Sec. 247. And the use of a general repealing clause of "all inconsistent acts and parts of acts," adds nothing to the repealing effect of repugnancy itself. Lewis' Stat. Cons., Sec. 256. Plainly, then, we should next consider whether Chapter 122, of the Laws of 1909, is necessarily so repugnant to the provisions of Sections 2424 and 2462, C. L. 1897, as that the two cannot stand together, since otherwise both should be held effective. "There must be such a manifest and total repugnance that the two enactments cannot stand." McCool v. Smith, 66 U. S. 459. The fundamental rule in construing statutes is to ascertain

and give effect to the intention of the legislature. 36 Cyc. 1106. Closely allied is the rule that the spirit or reason of the law will prevail over its letter. Especially is this rule applicable when the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertance. 36 Cyc. 1108, 1109; Pond v. Maddox, 38 Cal. 572. Every statute must be construed with reference to the object intended to be accomplished by it. Our first inquiry, in order to ascertain the meaning of the legislature should be for the object of the statute. "It is indispensable to a correct understanding of a statute, to inquire first what is the subject of it, what object is intended to be accomplished by it x x x when the intention can be collected from the statute. Words may be modified, altered, or supplied, so as to obviate any repugnancy or inconsistency with such intention." Lewis Suth. Stat. Cons., Sec. 347. "The intention of an act will prevail over the literal sense of its terms." Lewis Suth. Stat. Cons., Sec. 348.

Fortunately, the object, or at least, the main purpose, of the statute in question is not in doubt. By Chapter 106, Session Laws of 1905, the treasurer of the Territory and county, and municipal treasurers, were required to give bonds with surety companies as sureties, whereas, before that time, personal sureties, who, as a matter of common knowledge, generally charged nothing for the favor, were accepted. The change imposed on the treasurers affected the burden of paying the surety companies, in many cases, considerable sums. The statute under consideration was clearly intended primarily to relieve treasurers from that burden. Obviously, it was drawn without the degree of care necessary to commend it to us as a clear expression of legislative intent. The repealing clause declares the repeal of Chapter 106, supra, and all acts and parts of acts in conflict "therewith," instead of "herewith," which was undoubtedly the word meant. It seems clear, too, that a provision requiring the depositories designated by municipal treasurers to give bonds to the Territory of New Mexico, was included by inadvertance in connection with the requirements that depositories designated by county treas-

urers should pursue that course. The requirement that the municipal treasurers themselves should give bonds to their respective municipalities was not changed, and no reason is perceived why the requirement for depositories should have been intentionally made different. Of more importance is the fact that it is left uncertain whether it was meant to include city treasurers under the phrase "municipal treasurers," in the third section of the act. Counsel for the appellant makes what is, at least, a plausible argument against that construction, mainly from the fact that in the first section of the act the words, "county, city or municipality," occur twice, indicating a distinction in the legislative mind between "city" and "municipality." While there is no presumption that the meaning of a word repeatedly used in a statute is the same throughout, (Rhodes v. Weldie, 16 Ohio St. 242; Pitts v. Shipley, 46 Cal. 161), I think that, in view of the statute definition of "municipal corporations," as including "cities and incorporated towns," Sec. 2452, C. L. 1897, and of the language of Chapter 106, Laws of 1905, in which city treasurers are distinctly named, and for which statute that of 1909 was clearly designed to be substituted, it would be giving too narrow a construction to hold that the statute was not meant to apply to city treasurers. It is proper, however, to allow these manifest defects of expression in the statute their due weight, in construing other portions of it to which doubt is attached. If there was clearly failure to express the meaning intended on some points, there is some degree of probability that there was a like failure as to other points.

It appears, then, that the construction contended for by the appellee would run counter to each of these several rules of construction referred to, and "courts will give cumulative effect" to such antagonism. State v. Lowry, Ind., 9 A. & E. Ann. Case 350. Lewis v. State, Id.

It remains then to determine whether the statute in question can properly be given a meaning not repugnant to that of the law requiring city treasurers to deposit the money of the city as directed by ordinance. Certainly, what

appears to be the chief object of the later statute, the exemption from the burden of paying for surety company bonds, would be accomplished in that way as fully as if the treasurers themselves selected the depositories, and if it be assumed that another object was to enable treasurers to escape liability for the default of the bank, that, too, would be effectuated by their designating as depositories the banks specified by the cities. Replying to the argument to that effect in the appellant's brief, the brief for the appellees asks, "why not the city council select the depository designated by the treasurer?" If the rights of the owner of property are not to be considered as paramount to those of the agent, or servant, to whom the property is entrusted for a definite purpose, nothing can be said in reply to that suggestion. If, however, the owner's rights are paramount and should be protected, then nothing need be said by way of reply. There remains no other object to be accomplished by the statute, unless it be, as already suggested, to enable treasurers to avoid the prohibition against using the public funds in their hands for their own benefit, and such an object is not to be attributed to the legislature. A construction "which enables one to profit by his own wrong" is not favored. Beal's Cardinal Principles of Legal Interpretation, pp. 345-9, citing Gowan v. Wright, (1886) 18 Q. B. D. 201. Said Lord Coleridge, C. J., in The Queen v. Clarence, 22 Q. B. D., 23 at p. 65 (1888), cited in Beal's Cardinal Principles, supra, pp. 326, 327: "If the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is, in my opinion, good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

[No. 1344. February 4, 1911.]

TERRITORY OF NEW MEXICO v. YOUNG E. HURT, Appellee.

SYLLABUS.

An indictment for larceny under C. L. 1897, sec. 68, which reads: "And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said Young E. Hurt, the said horse of the goods, chattels, and property of the said Carrizozo Cattle Ranch Company, Limited, of the value aforesaid, then and there, in the manner and form aforesaid, did then and there unlawfully and feloniously steal, take and carry away," held not to be demurrable for duplicity.

Appeal from the District Court for Lincoln County, before MERRITT C. MECHEM, Associate Justice. Reversed and remanded.

FRANK W. CLANCY, Attorney General, for Appellant.

The very wording of the indictment shows that no second offense was intended to be charged. 2 Bish. Crim. Proced., secs. 318, 319; Archibold's Crim. Pl. 275; C. L. 1897, sec. 68; Comm. v. Pratt, 132 Mass. 247; Rex. v. Johnson, 3 M. & S. 553; Rex. v. McGregor, 3 B. & P. 106; Rex v. Crichton, Russ. and Ry. 62; State v. Adams, 108 Mo. 211; State v. Lanier, 89 N. C. 519.

G. W. PRICHARD for Appellee.

The indictment is bad for duplicity, in that it charges two distinct offenses in each of the two counts. C. L. 1897, secs. 68, 79; State v. Wilson, 121 N. C. 650; Knopf v. State, 84 Ind. 316; Wharton's Cr. P. & P., sec. 343.

OPINION OF THE COURT.

PARKER, J.—This is a case in which the Territory has appealed from a judgment of the District Court of Lincoln County, quashing an indictment against defen-

dant. The indictment contains two counts, and the only ground urged against their validity was that two offenses were charged in each of the two counts. The indictment was drawn under Sec. 68, of the Compiled Laws of 1897, which provides that if any person shall brand an animal, the property of another, with any brand not the recorded brand of the owner, or shall efface, deface or obliterate any brand upon any animal, such person "shall be deemed guilty of larceny." The indictment charges in each of the two counts one of the two offenses specified in Sec. 68, and, after charging the statutory offense in the language of the statute, proceeds as follows: "And so, the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Young E. Hurt, the said horse of the goods, chattles, and property of the said Carrizozo Cattle Ranch Company, Limited, of the value aforesaid, then and there, in the manner and form aforesaid, did then and there unlawfully and feloniously steal, take and carry away." The demurrer to the indictment was based upon the theory that the first part of each count, setting up an offense in the words of the statute, and the additional language above quoted, charged two separate and distinct offenses, one, the offense described in the statute, and the other, larceny. In sustaining the demurrer, the court evidently fell into error. The language above quoted is inserted for the purpose of making the formal charge of larceny and is in accordance with the approved forms of criminal pleading. There was no attempt on the part of the pleader to insert another and separate offense, and the counts are in no sense duplicitous. This seems to be elementary, and requires no citation of authority. For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with instructions to overrule the demurrer of the indictment and to proceed in accordance herewith.

[No. 1345. February 4, 1911.]

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. CITIZENS TRACTION AND POWER COMPANY, Appellee.

SYLLABUS.

1. Laws 1905, Chapter 97, applies to electric railroads as well as to steam railroads.

2. Laws 1907, Chapter 97, invests in the court the right to determine and regulate the place and manner of crossing by one railroad of the tracks of another.

Appeal from the District Court for Bernalillo County, before MERRITT C. MECHEM, Associate Justice. Reversed.

E. W. DOBSON and R. E. TWITCHELL, for Appellant.

The court should have fixed and determined the manner and method of the crossing as required by the laws of New Mexico in case of disagreement between the railway companies concerned. C. L. 1897, secs. 3804-3925; 3847, sub-sec. 6; Central Pass. Ry. Co. v. Phil. etc. Ry. Co., 52 Atl. 752; People's R. R. Co. v. Syracuse, 22 Abb. N. C. 427; Buffalo, B. & L. R. Co. v. New York, L. E. & W. R. Co., 72 Hun. 583; N. Y. Laws 1882, chap. 676, art. 1, sec. 12; N. Y. Laws 1883, chap. 239; Mayor etc. v. Cowen, 41 Atl. 900; Railroad Co. v. City of Milwaukee, 72 N W. 1118; K. C. etc. Rd. Co. v. Jackson Co. Comrs., 26 Pac. 394.

Counsel fees should not have been taxed as costs. C. L. 1897, secs. 3148-3159; Price v. Garland, 5 N. M. 98; Dedekam v. Vose, 3 Blatchf. 153; Coggill v. Lawrence, 2 Blatchf. 304; Davis v. State, 33 Ga. 531; 5 Enc. P. & P., pp. 110, 115, note 1; Williams v. McDougal, 39 Cal. 80; Constant v. Matteson, 22 Ill. 546; Otoe Co. v. Brown, 16 Neb. 394; Blake v. Blake, 13 Iowa 40; Newel v. Sanford, 13 Iowa 463; Melancon v. Robichaud, 2 Martin, La., 242; Eimer v. Eimer, 47 Ill. 373; Strawn v. Strawn, 46 Ill. 412; Arcambel v. Wiseman, 3 Dallas 306; Oelrichs

v. Spain, 15 Wallace 211; Williamson v. Williamson, 58 Ky., 1 Metc. 303; Springfield v. Hirsch, 29 S. W. 609.

ISAAC BARTH for Appellee.

The lower court properly dissolved the temporary injunction. Pensacola R. Co. v. Sprat, 91 Am. Dec. 747; McGinnis v. Friedman, 17 Pac. 635; Cyc. 756 and cases cited.

The street railway did not violate any right of appellant in crossing appellant's tracks. People v. General C. R. Co., Ill. 129; Conover v. Ruckman, 32 N. J. Eq. 685; Saules v. Freeman, 24 Fla. 209; Chi. & Calumet R. Co. v. Whiting & Chi. St. R. Co., 26 L. R. A. 337; C. B. & Q. R. Co. v. West Chi. I. R. Co., 29 L. R. A. 485; Morris & E. R. Co. v. Newark Pass. R. Co., 51 N. J. Eq. 379; Old Colony R. Co. v. Rockland St. R. R. Co., 161 Mass. 416; A. T. & S. F. Ry. Co. v. General Electric Co., 50 C. C. A. 424; Pa. Co. v. Lake Erie R. Co., 176 Fed. 446; General Electric R. Co., 184 Ill. 588; West Jersey R. Co. v. Camden R. Co., 52 N. J. Eq. 31; S. E. & St. L. R. R. Co. v. Evansville & Mt. Vernon Co., 13 L. R. A., N. S. 918.

The court had no authority to fix and determine the manner and method of the crossing of the tracks of the appellant by the tracks of the appellee. C. L. 1897, secs. 3804-3925; Laws 1905, chap. 79; Front St. Cable R. Co. v. Johnson, 11 L. R. A. 693; State v. Duluth St. R. Co., 57 L. R. A. 63; Massillon Bridge Co. v. Cambria Iron Co., 52 N. E. 192; 36 Cyc. 1349; C. C. Term. R. Co. v. Whiting Hammond E. C. I. R. Co., 26 L. R. A. 337; C. B. & Q. R. Co. v. W. Chi. I. R. Co., 29 L. R. A. 485; N. Y., N. H. & Hartford Co. v. Bridgeport Traction Co., 29 L. R. A. 367.

It was proper for the court to allow attorney's fees upon dissolution of injunction. 22 Cyc. 1006; Chi. Door Co. v. Parks, 79 Ill. App. 679; Bank of Broken Bow v. Freeman, 87 Ill. App. 622; Jamison v. Housten, 21 So. 972; Kelly & Co. v. Meade, 101 N. W. 882, affirmed in 105 N. W. 736.

STATEMENT OF FACTS.

The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, doing business in New Mexico pursuant to the laws thereof, filed its bill of complaint in the court below against the Citizens Traction and Power Company, a corporation organized under the laws of the Territory of New Mexico, seeking to enjoin the latter company from interfering in any manner whatever with the tracks of the complaining company where the same cross the Tijeras road, a public street in the City of Albuquerque, until the court should determine the manner and place of crossing, and praying that the court proceed in the premises to determine and regulate the manner and place of crossing, under the provisions of Section 13, chapter 97, of the Session Laws of the 36th Legislative Assembly of the Territory of New Mexico. The complaint further alleged that the appellant had acquired the lawful right to cross said street in the operation of its railroad; that the appellee had a franchise from the City of Albuquerque, giving it the right to construct, operate and maintain a street-car line upon any and all the streets in the City of Albuquerque, and that under such franchise the appellee was proceeding to lay its tracks across the tracks of appellant.

A temporary injunction was issued. The traction company filed its demurrer, alleging that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, the temporary writ dissolved, and the Railway Company's bill dismissed with costs, including attorney's fees, assessed against the Railway Company.

OPINION OF THE COURT.

ROBERTS, J.—Error is assigned questioning the right of the court below to enter judgment against the plaintiff for an attorney's fee of two hundred and fifty dollars, to be included as costs in the case, but, as our conclusions in regard to the other facts in the case necessarily dispose of this contention, we shall not consider it. The questions necessary to be considered in determining this case are: First, Does paragraph 1, of Section 13,

Chapter 97, of the Session Laws of 1905, apply with equal force to steam, electric and other railways; and, second, does the right of the court to regulate and determine the place and manner of crossing under the statute, extend to railroad crossings upon the streets and highways of incorporated cities and towns, where the companies in such cities and towns are operating under a license or franchise? Section 13, of Chapter 97, of the Laws of 1905, is as follows: "Sec. 13. The Court shall have power: 1. To regulate and determine the place and manner of making connections and crossings, or, of enjoying the common use mentioned in the foregoing section. 2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and of the damages therefor. 3. To determine the respective rights of different parties seeking condemnation of the same property." Appellee claims that the act, of which this section is a part, was enacted solely for the purpose of providing a method for the condemnation of property, and that appellant owned no property right in the street crossed by its tracks, but simply an easement, which was subject to the rights of the general public to the use of the street, and appellee, having a franchise from the city council giving it the right to lay its tracks in the street, was not required to institute condemnation proceedings. It is further claimed that it was not a railroad company within the meaning of the act, and that the jurisdiction of the court could not be invoked. We do not believe that Section 13, of Chapter 97, supra, should receive the narrow construction contended for by appellee. While, it is true, the title of the act relates only to the condemnation of lands and other property, and does not refer to railroad crossings, the Organic Act does not require that the title of an act passed by the legislature, shall embrace, or express, all the objects or purposes of the proposed law. Is the appellee company a railroad within the meaning of the act referred to? The record before us does not disclose under what law the appellee company was incorporated. Sections 3846 to 3848, inclusive, of the Compiled Laws of 1897, provided for the incorporation of "railroad companies." The act is not

limited to steam railroads, nor does it affirmatively include "street railways." Chapter 79, of the Acts of 1905, of the Legislative Assembly of the Territory of New Mexico, provides for the "formation and government of corporations for mining, manufacturing, industrial and other pursuits." So far as we know, there was no other law, save one of the two above mentioned, under which the appellee company could have been organized. No distinction appears to have been made by the Legislature of New Mexico, between steam railroads and other railroads. The Court of Appeals of the State of Missouri, in Riggs v. Railroad, 120 Mo. App. 335, had before it for consideration a statute of the State of Missouri, which provides, that "every railroad corporation" should be required to fence its right-of-way. It is there held: "Indeed, it is a rule universally approved, that the meaning of the word 'railroad,' when employed in a legislative enactment can only be determined by reference to the context of the act and the manifest intention of the legislature. As said by Mr. Wood in his excellent work on the Law of Railroads, Vol. I (1894), Section 1: 'Thus it has often been a question whether the term would include a street railway. The answer must depend upon the character of the statute and the purpose for which it was provided.' The Supreme Court of Pennsylvania laid down a most reasonable and satisfactory rule on the subject in Gyger v. Railway Co., 136 Pa. St. 104, as follows: 'Railway' and 'railroad' are synonymous and in all ordinary circumstances are to be treated as without distinction, and, when either of them is used in a statute and the context requires that a particular kind of road is intended, that kind will be held to be the subject of the statutory provision. But if the context contains no such indication and either of the words are used in describing the subject matter, the statute will be held applicable to either species of the road embraced within the general sense of the word used." See, also, Mass. Loan & Trust Co. v. Hamilton, 88 Fed. 588. The Missouri Court of Appeals, in Riggs v. Railroad, supra, said: "The word employed in the statute is 'railroad,' which properly applies to either steam or street railroads, and we, therefore, ascertain that the defendant,

although organized as a street railroad company, is operating a railroad in this state, and, therefore, falls within the letter of the statute as well." 3 Elliott on Roads and Streets, Section 1135, says: "Street railways have a right to cross steam railroads. It has been held that the general statutes in force regulating the manner in which steam railways may cross each other are applicable in such cases." In Koken Iron Works v. Robertson Avenue Street Ry. Co., 141 Mo. 228, it was urged that street railroads were not within the intent of the Revised Statutes of 1889, Sec. 6741, giving a lien upon the "roadbed, station houses, depots, bridges, rolling stock, real estate and improvements," of "any railroad company" for which work or labor is done as aforesaid, by said section. The Supreme Court answered the argument by saying, in effect, that much of the statute appeared to be directed against the railroads operated by steam and the steam roads were generally designed by the act, and then said: "But the general terms of the law are also susceptible of application to street railroads, and we find nothing in any part of the enactment to indicate that such application is not intended. When we x x x consider the broad objects sought by such legislation, it seems clear that street railroads were not intended to be exempt from liability to respond to such lien claims in a proper case." See, also, St. Louis Bolt & Iron Co. v. Donahue, 3 Mo. App. 559. "Horse or street railroads, as far as they are employed in cities, serve the same uses and purposes for which railroads are used between distant points in the country; they possess the same essential features as servants of the public; the principal difference being tested by the peculiar character of the territory they are operated in, and the safety, comfort, and wants of the people in that territory." Jerman v. Benton, 79 Mo. 148. The case of Pennsylvania Railway Company v. Braddock Electric Railway Company, decided by the Supreme Court of Pennsylvania, in 1893, 25 Atl. 780, is a very instructive case on this subject. In February, 1891, the supervisors of Braddock township gave their written consent for the construction of defendant's electric railway on the public highway crossing plaintiff's railroad. The electric railway com-

pany was proceeding with the construction of its railroad at grade, and plaintiff brought suit to restrain the crossing at grade. By Act of June 19, 1871, the Legislature had provided, that courts of equity should have power to inquire into alleged injurious acts done by a corporation, etc. The second section of the same act declared: "Where such legal proceedings relate to crossing of lines of railroads by other railroads, it shall be the duty of courts of equity of this commonwealth to ascertain, or define, by their decree the mode of such crossing x x x and if, in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall, by their process, prevent a crossing at grade." May 14, 1889, the Legislature passed an act for the incorporation of electric railways, and, by the 18th section of the act, provided: "Any company incorporated under the provisions of this act shall have the right, in its construction, to cross at grade, diagonally or transversely, any railroad operated by steam now or hereafter built." The court held: "Nor do we think that the jurisdiction conferred by the second section of the Act of 1871 was in any manner restricted or limited by the Act of 1889. As we have seen, the latter is entitled, 'An Act to provide for the incorporation and government of street railway companies in this commonwealth.' This title conveys not the slightest intimation of any intention to interfere with the jurisdiction theretofore conferred on courts of equity relating to railroads crossing at grade x x x x. We have no doubt electric railways are within the purview of the Act of 1871. They are certainly within the mischief for which the second section provides a remedy." When we consider the modern development of electric railroads, and the speed at which it is possible to operate cars upon them, which is even greater than that of steam locomotives, and the large passenger cars which are operated upon electric railways, we cannot understand why there should be any distinction between electric railroads and steam railroads. The mere fact that appellee was not incorporated under the provisions of the statute for the incorporation of steam railroads, would not, in our judg-

ment, necessarily exclude the appellee from coming within the provisions of the statute referred to. (See Riggs
1 v. Railroad, supra). We conclude, therefore, that electric railways are included in the statute, and that under Section 13, the court has power, upon proper application, to regulate the manner and place of crossing.

The only remaining question is, as to whether or not the court has this power where the place of crossing is upon a public street, and the electric railway company has a franchise from the city giving it the right to lay its track in the streets. Appellee contends that appellant had no property right in the street where its tracks crossed Tijeras road, therefore, it was not required to institute condemnation proceedings, and that the right to demand compensation for the taking of property must exist in order to give the court jurisdiction to regulate and determine the place and manner of crossing. Prior to the Act of 1905, there was no law in force in the Territory of New Mexico which gave to the court the right to determine the manner and place of making connections and crossings between railroads. The right to cross was exercised under the general condemnation statutes, and there was no method by which the rights of the public could be protected and the safety of the passengers secured. A railroad could arbitrarily force its tracks, at grade, across the tracks of another railroad company, subject, of course, to the compensation which it was required to pay the first railroad company, and the general equity power of the court. With the modern development of railroads of all kinds, shall we conclude that in 1905 the legislative assembly, in enacting the provision in question, had in mind only the crossing of a railroad on private property, and that it did not intend to make any provision whatever for the crossing of tracks, where the first railroad company had only an easement in a public street or highway? To so hold would leave the determination of the manner and place of making the crossing wholly with the second railroad company, without any consideration as to the rights of the first railroad company, or the safety of the general public. We believe that Chapter 97,

should receive a broader and more general construction, and that the legislature meant to invest in the court
2 the right to determine and regulate the place and manner of crossing by one railroad of the tracks of another, not only for the protection of the rights of the first railroad company, but for the protection of the lives of the traveling public using both roads, and the court has the right to prescribe such system and safeguards as will, in its judgment, fully protect these rights. In the court both railroad companies have the right to present all questions to the court for its consideration. The court, after hearing the witnesses and the testimony of experts, can fix the rights of the parties and fully protect them, and, at the same time, safeguard the interests of the public.

In the case of Pennsylvania Railroad Company v. Braddock Electric Railway, supra, the court held, that even though the Electric Railway Company had a license from the borough, it was, nevertheless, the duty of the court to regulate the crossing.

It is to be presumed, that where a crossing is mutually agreed upon between the railroad companies, ample provision will be made for the safety of the passengers on both railroads. In fact, it would be to the interest of both railroads to see that such provisions were made for the protection of human life, because, by so doing, they would relieve themselves from loss and damages.

The manner and place of crossing the railroad company's tracks, under the provisions of the statutes, was a proper subject for the consideration and determination of the court. Central Passenger Railway Co. v. Philadelphia, etc. Railway Co., 52 Atl. 752; Mayor etc. v. Cowen, 41 Atl. 900; Railroad Company of Syracuse v. Syracuse, 22 Abb. N. C. 427. The cases cited by appellee in its brief, holding that the street railway company had the right to lay its tracks across the tracks of the steam railroad company, and that by so doing it did not violate any right of the appellant, are not in point, for the reason that statutory power had not been conferred upon the court to fix and regulate the manner of crossing. From these conclusions, it necessarily follows that the court erred in sutaining the

demurrer to appellant's complaint, and the cause is, therefore, reversed with instructions to overrule the demurrer.

Frank W. Parker, A. J., and Edward R. Wright, A. J., dissent.

[No. 1346. February 4, 1911.]

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant, v. CITIZENS TRACTION AND POWER COMPANY, Appellee.

SYLLABUS.

1. Under the facts of the case, it was perfectly proper for the court to issue a mandatory injunction commanding the appellant to restore the status quo, but the court could not enjoin the appellant from interfering with the appellee in the laying of its tracks across appellant's railroad, save by agreement between the parties, or, upon application and determination by the court of the manner and place of crossing.

2. The remedy for an erroneous refusal of an appeal or supersedeas is by mandamus and not by error.

3. Even though the prayer for damages is in a specific sum, the court may look to the complaint itself to determine upon what the claim for damages is based.

4. Counsel fees, as a mere element in determining the amount of damages, should not be taken into consideration, whether the action is one ex contractu or ex delicto.

5. Counsel fees may not be recovered, as an element of damage, by the plaintiff, where he is compelled to institute injunction proceedings to protect some right which he has, and which is being violated by a defendant.

Appeal from the District Court for Bernalillo County, before MERRIT C. MECHEM, Associate Justice. Reversed.

R. E. TWITCHELL and E. W. DOBSON for Appellant.

The manner and method of crossing the railway company's tracks, under the provisions of the statute, was a proper subject for the consideration and determination of the court. Central Pass. Ry. Co. v. Phila. Ry. Co., 52 Atl. 752; Mayor, etc. v. Cowen, 41 Atl. 900; Railroad Co. v. City of Milwaukee, 72 N. W. 1118; K. C. etc. Rd. Co. v. Jackson Co. Comrs., 26 Pac. 394; Railroad Co. v. N. Y. L. E. & W. Rd. Co., 72 Hun. 587; Laws 1882, N. Y., chap. 676, art. 1, sec. 12; People's Railroad Co. of Syracuse v. Syracuse, 22 Abb., N. C. 427; C. L. 1897, secs. 3804-3925, 3849, et seq., 3847, sub-div. 6.

The court erred in allowing counsel fees to appellee taxed as costs. C. L. 3148-3159; Price v. Garland, 5 N. M. 98; Coggill v. Lawrence, 2 Blatchf. 304; Dedekam v. Vose, 3 Blatchf. 153; Davis v. State, 33 Ga. 531; 5 Enc. P. & P. 110, 115, note 1; Williams v. MacDougal, 39 Cal. 80; Constant v. Matteson, 22 Ill. 546; Otoe Co. v. Brown, 16 Neb. 394; Blake v. Blake, 13 Iowa 40; Newel v. Sanford, 13 Iowa 463; Melancon v. Robichaud, 2 Martin, La. 242; Eimer v. Eimer, 47 Ill. 373; Strawn v. Strawn, 46 Ill. 412; Arcambel v. Wiseman, 3 Dallas 306; Oelrichs v. Spain, 15 Wallace 211; Williamson v. Williamson, 58 Ky., 1 Metc. 303; Stringfield v. Hirsch, 29 S. W. 609.

When the discretionary power is limited to certain cases the court is precluded from exercising discretionary power in all other cases. Laws 37 Leg. Assembly, chap. 57, secs. 16-18; 2 Cyc. 914; Mark v. Superior Ct., 129 Cal. 1; Elliott v. Whitmore, 37 Pac. 459; Mining Co. v. Fremont, 7 Cal. 130; Foster v. Superior Court, 47 Pac. 58; 2 High on Injunctions, sec. 1698a; Dewey v. Superior Court, 22 Pac. 333; Code Civil Proc., Cal., sec. 949.

ISAAC BARTH and MANN & VENABLE for Appellee.

Lower court properly dissolved temporary injunction because appellant had no rights which were being violated. Pensacola R. Co. v. Sprat, 91 Am. Dec. 747; McGinnis v. Freedman, 17 Pac. 635; Cyc. 756; People v. General

C. R. Co., Ill., 50 N. E. 158; Canover v. Ruckman, 32 N. J. Eq. 685; Saules v. Freedman, 24 Fla. 209; Chi. & Calumet R. Co. v. Whiting & Chi. St. R. Co., 26 L. R. A. 337; C. B. & Q. R. Co. v. West Chi. I. R. Co., 29 L. R. A. 485; Morris & E. R. Co. v. Newark Pass. R. Co., 51 N. J. Eq. 379; Old Colony R. Co. v. Rockland St. R. Co., 161 Mass. 416; A. T. & S. F. Ry Co. v. General Electric Co., 50 C. C. A. 424, 112 Fed. 689; Pa. Co. v. Lake Erie R. Co., 176 Fed 446; General Electric R. Co., 184 Ill. 588; West Jersey R. Co. v. Camden R. Co., 52 N. J. Eq. 31; S. E. & St. L. R. R. Co. v. Evansville & Mt. Ver. Co., 13 L. R. A., N. S. 918

The court had no authority to fix and determine the manner and method of the crossing of the tracks of the apellant by the tracks of the apellee. C. L. 1897, secs. 3804-3905; Laws 1905, chap. 79; Front St. Cable R. Co. v. Johnson, 11 L. R. A. 693; State v. Duluth St. R. Co., 57 L. R. A. 63; Massillon Bridge Co. v. Cambria Iron Co., 52 N E. 192; 36 Cyc. 1349, note 37; Chi., Calumet Terminal R. Co. v. Whiting Hammond E. Chi. I. R. Co., 26 L. R. A. 337; C. B. Q. R. Co. v. W. Chi. I. R. Co., 29 L. R. A. 485; N. Y., N. H. & Hartford Co. v. Bridgeport Traction Co., 92 L. R. A. 367.

It was proper for the court to allow attorney's fees upon dissolution of the injunction. 22 Cyc. 1006; Chi. Door Co. v. Parks, 79 Ill. App. 679; Bank of Broken Bow v. Freeman, 87 Ill. App. 622; Jamison v. Houston, 21 So. 972, 74 Miss. 890; Kelly & Co. v. Meade, 101 N. W. 882, aff. 105 N. W. 736.

In order to avoid a multiplicity of suits and dispose of the entire matter at once, equity may in addition to an injunction, decree the defendant pay damages to complainant for all past injury. 22 Cyc. 967; Mogollon v. Stout, 14 N. M. 245; Jewelers Mercantile Agency v. Rothschild, 6 N. Y. App. Div. 499; 39 N. Y. Supp. 700; Ludeling v. Garrett, 50 La. Ann. 118.

The trial court was right in refusing a supersedeas as to the mandatory part of the injunction. Chavez v. Lucero, 13 N. M. 368; Haverman Mfg. Co., 147 U. S.

525; Safford v. King, 90 Fed. 136; Gutierrez v. Territory, 13 N. M. 30.

STATEMENT OF FACTS.

The Atchison, Topeka and Santa Fe Railway Company is a Kansas corporation authorized to do business in New Mexico, and as the successor in interest of the New Mexico and Southern Pacific Railway Company, operated a steam railroad through the city of Albuquerque, New Mexico, and for more than twenty years has operated its trains on tracks passing through the city of Albuquerque, which tracks cross the street in said city known as Tijeras road, a public street in said city. The appellee, the Citizens Traction and Power Company, is a New Mexico corporation organized under the laws of the territory for the purpose of operating a street railway in the city of Albuquerque, and had a franchise from the city authorizing it to construct, operate and maintain a street railway, operated by electricity or other power which might be an improvement thereon, upon all the streets in said city not occupied by a street railway company. By virtue of said franchise, the Citizens Traction and Power Company proceeded to lay its tracks upon and along Tijeras road, and had ordered and had especially made for the crossing of the tracks of the appellant, certain steel crossings, and had notified appellant of its action. When the appellee was about to lay its tracks across those of the appellant, the appellant filed its bill in the district court, asking that an injunction be issued restraining the appellee from constructing its proposed street-car tracks across the appellant's tracks at said Tijeras road until the place and manner of said crossing had been determined and fixed by the district court, in accordance with section 13, chapter 97, of the Session Laws of the Thirty-Sixth Legislative Assembly of the Territory of New Mexico. A temporary writ issued and appellee appeared and filed a demurrer and motion to dismiss, which were heard by the court, and, upon intimation by the court that the demurrer would be sustained, appellant asked twenty-four hours in which to file an amended bill, which

request was granted. During the twenty-four hours allowed for filing the amended bill, appellant had changed the location of its tracks in such manner as to render useless the crossing which appellee had constructed for use in crossing the tracks of appellant. Appellee, thereupon, filed its bill against appellant, praying that appellant be enjoined from interfering with it in the construction of its crossing, and asked that a mandatory order be made by the court requiring the appellant to replace its tracks and switches at the crossing of Tijeras road, in their former condition, and alleged that it had been required to expend four hundred dollars attorney fees and fifty dollars in preparing maps and exhibits, and asked damages for four hundred and fifty dollars. The appellant answered, and appellee moved for judgment on the pleadings. The court granted the motion and entered its final decree requiring the appellant to replace its tracks and switches at the crossing of Tijeras road within twenty-four hours from the signing of the decree, in the same manner and condition as said tracks existed on the 21st day of June, 1910, before the same were changed, and that the apellee, within forty-eight hours after the completion of the said tracks by appellant, should place its crossings across the tracks and switches of appellant. Appellant was further enjoined from interfering with the appellee in the placing of its crossing across its tracks at Tijeras road, and it was further ordered and decreed that appellant pay to the appellee four hundred and fifty dollars damages, and its costs. Appellant appealed from the order and judgment entered.

OPINION OF THE COURT.

ROBERTS, J.—The main question at issue in this case has been decided adversely to the appellee in case No. 1345, Atchison, Topeka and Santa Fe Railway Company v. Citizens Traction and Power Company, decided at the present terms of this court. It is unnecessary to review in this case the law involved, as a reference to the case named will fully disclose the reasons for the holding.

The lower court, in the original action instituted by the appellant, having construed section 13, of chapter 97, of the Acts of 1905, as not applying to the crossing of the tracks of a steam railroad by the tracks of an electric railway, operating under a franchise from the city council, dissolved the injunction; or, having intimated that such would be the action of the court, it was highly improper for the appellant, under the guise of desiring the time to file an amended complaint, to take advantage of the appellee, and so change its tracks at the proposed point of crossing as to obviate the force and effect of the decision of the lower court. Having done so, it was per-
1 fectly proper for the court to issue a mandatory injunction commanding the appellant to restore the status quo, and, if the order had gone no further, the action of the lower court would have been proper, even under the decision of this court in the case of Atchison, Topeka and Santa Fe Railway Company v. Citizens Traction and Power Company, No. 1345; but, the court enjoined the appellant from, in any manner, interfering with the appellee in the laying of its tracks across appellant's railroad. This, we have held, appellee had no right to do, save by agreement between the parties, or, upon application and determination by the court of the manner and place of crossing.

The only additional errors assigned which need to be considered by the court are the fourth and fifth, which are as follows: "4th. The court erred in entering judgment against the appellant for costs, including costs for attorney's fees, in the amount named in the judgment, or in any other amount." "5th. The court erred in refusing to allow a supersedeas to appellant in-so-far as the mandatory part of the injunction is concerned." The fifth assignment of error is disposed of adversely to the contention of appellant, by the opinion of this court in the case of Thomas C. Gutierrez v. The Territory of New Mexico ex rel Y. J. Curran et al., 13 N. M. 30. The court there held that the remedy for an erroneous refusal
2 of an appeal for supersedeas, is by mandamus, and not by error, citing a great many authorities to sustain

the doctrine. Consequently, on this appeal, the fifth ground of error will not be considered.

The fourth ground of error presents more difficulties. The appellee, in its complaint, based its sole claim for damage upon the money which it was required to expend for attorney's fees and in preparing maps and exhibits. While, it is true, the prayer in the complaint is for damages in the sum of four hundred and fifty dollars generally, yet we must look to the complaint itself to determine upon what the claim for damages is based. Kingston v. Walters, 14 N. M. 368. The question, therefore, presents itself, as to whether or not attorneys fees can be awarded the plaintiff, either as costs or damages, in an action of this nature. In the case of Day v. Woodworth, 13 How. 362, which was an action in tort, the lower court instructed the jury as follows: "That, if they should find for the plaintiff on the first ground, viz: That the defendant had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then, the jury would allow in damage the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, *and not anything for counsel fees or extra compensation to engineer.*" This instruction was excepted to, one of the grounds being, that the court should have instructed the jury to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel fees and other expenses incurred in prosecuting the suit. The court held, that the instruction was proper, and, in passing on the question, said: "If the jury may, if they see fit, allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs de incremento, the defendants may be truly said to be in misericordia, being at the mercy, both of court and jury. Neither the common law nor the statute law of any state, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption, either by the courts or the legislature." In Oelrichs

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v. Spain, 82 U. S. 211, the court held that counsel fees were not recoverable on an injunction bond.

While there is some conflict of the authorities, the general rule, supported by the greater number of cases, undeniably is, that counsel fees, as a mere element in
4 determining the amount of damages, should not be taken into consideration, whether the action is one ex contractu or ex delicto. In Howell v. Scroggins, 48 Calif. 356, the court below had instructed the jury, that they were not limited, in assessing damages, to mere compensation, but might give exemplary damages, and could take into consideration the plaintiff's expenses in prosecuting the suit. The appellate court, after a review of the cases, reversed the judgment, and, in doing so, said: "The damages found by the jury were not excessive, but, if we could feel at liberty to disregard the court below or were satisfied that it did not influence the action of the jury, we should affirm the judgment." The doctrine of this case was reaffirmed as to the disallowance of counsel fees as element of damages, in an action of trespass in the case of Falk v. Waterman, 49 Cal. 224. In the case of Earl v. Tuppen, 15 Vt. 275, the court, through Whittier, J., said: "The great weight of authority seems to be opposed to the allowance of counsel fees and other expenses of litigation beyond taxable costs as an element of damages even in cases where exemplary damages are proper." See, also, Hogley v. Watson, 45 Vt. 289; Kelly v. Rogers, 21 Minn. 146; Fairbanks v. Whitter, 18 Wis. 301. See, also, Reggio v. Breggiotti, 7 Cush. 166, where it is said: "But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, anl they vary so much with the character and distinction of counsel that it would be dangerous to permit him to impose such a charge upon his opponent, and the law measures the expenses incurred in the management of a suit by the taxable costs." This court held in Dame v. Cochiti Reduction and Improvement Company, 13 N. M. 10, that, "In the absence of any allegation and proof of an agreement to pay counsel fees, such fees cannot, unless specially provided for by statute, be awarded as costs or otherwise."

We believe it would be establishing a bad precedent to say that counsel fees may be recovered, as an element of damage by the plaintiff, where he is com-
5 pelled to institute injunction proceedings to protect some right which he has, and which is being violated by a defendant. It might have been possible for the appellee to have cited the appellant for contempt of court; and, under the rule laid down by this court in Costilla Land and Investment Co. v. Allen, 15 N. M. 528, the court, perhaps, might have imposed a fine, and directed that the same be paid to the appellee by way of reimbursement. Under the greater weight of authority, it is apparent that the court erred in awarding damages, based solely upon the expense incurred by appellee for counsel fees and preparation for the hearing. For the reasons above stated this cause is reversed.

Frank W. Parker, A. J., and Edward R. Wright, A. J., concur in the result.

[No. 1350. February 4, 1911.]

(For Opinion see 15 N. M. 742.)

S. T. GRAY, ET AL, Appellants, v. ROBERT H. TAYLOR, ET AL, Appellees.

SYLLABUS.

Court assumes for purposes of this case that the procedure is proper as both sides admit injunction to be the proper remedy.

Appeal from the District Court for Lincoln County, before M. C. MECHEM, Associate Justice. Affirmed on rehearing. See opinion affirming on original hearing, 15 N. M. 742.

T. B. CATRON and GEORGE B. BARBER for Appellants. See 15 N. M. 742.

HEWITT & HUDSPETH for Appellee. See 15 N. M. 742.

ON REHEARING.

PARKER, J.—This case was decided at the last term by a divided court. A rehearing was had at the present term, and the cause resubmitted to all of the justices qualified to sit in the case, including Associate Justice Roberts, who has since the former hearing come upon the bench. In the former opinion a quaere was thrown out by the court as to whether the procedure by injunction was proper in cases of this kind, and calling attention to the case of Torres v. Board of County Commissioners, 15 N. M. 703, decided at the last term. In the argument on rehearing, counsel on both sides admit that injunction is a proper remedy in a case of this kind, and for that reason the court withdraws the intimation contained in the former opinion, and assumes for the purpose of this case that the procedure is proper.

In the former decision the court divided upon the question as to whether the petition for the election was in accordance with the act under which the county commissioners assumed to proceed. Upon this question the court has carefully re-examined the question, and finds no reason to recede from its former position.

All of the other questions in the case were fully examined in a former opinion, and have been re-examined by the court and on this rehearing the court adheres to its former decision.

William H. Pope, C. J., and Edward R. Wright, A. J., dissent.

J. R. McFie, A. J., not having heard the argument, did not participate in this decision.

[No. 1351. February 4, 1911.]

HAGERMAN IRRIGATION COMPANY, Appellee, v. J. F. McMURRY, Appellant.

SYLLABUS (BY THE COURT).

1. Findings of fact by a trial court without a jury will not be disturbed by this court on appeal, if they are based on substantial evidence.

2. Until the time within which an application to beneficial use must be made to complete an initiated appropriation of water for purposes of irrigation was fixed by statute, it was necessary that such application be made within a reasonable time.

3. The common law doctrine of riparian rights in natural streams has been superseded in New Mexico by that of prior appropriation and application to beneficial use of water of the streams.

4. The water of a natural stream, when impounded and reduced to possession by artificial means, is personal property.

5. In this Territory a corporation has the right to make an appropriation of water from a natural stream and distribute it to those who may require it for purposes of irrigation, whether it has land connected with such irrigation system or not.

6. The evidence did not require a finding of any more than nominal damages for the plaintiff.

7. The question of exemplary damages is addressed to the discretion of the jury, or the court trying the cause without a jury, where the evidence legally warrants such damages; and this court will not, ordinarily, at least, undertake to control that discretion by requiring the assessment of such damages.

8. The plaintiff complained that the defendant had taken forcible possession of its dam, by means of which and a connected canal it had undertaken to supply and was supplying water from the Rio Hondo for irrigating crops, then growing, to a large number of farmers, who were dependent on it for water; that the defendant was taking water from its reservoir for his own use by removing flashboards from its said dam, so as to allow the water to flow down to his land on said stream, and that its business of supplying water, as aforesaid, would be irreparably injured by the acts of the defendant, if they should be continued. Held: That the matter was properly cognizable in a court

of equity; that a preliminary injunction, and, after trial, a permanent injunction, were properly issued against the defendant.

Appeal from the District Court for Chaves County, before WILLIAM H. POPE, Chief Justice. Affirmed with correction.

EDWARD S. GIBBANEY and GEORGE H. PEET for Appellant.

An injunction will not issue to take property out of the possession of one party and put it in the possession of another. High on Injunction 1008; 16 A. & E. Enc. 345; Munyos et al v. Fillmore et al, 76 S. W. 257; 1 Beach on Injunctions, sec. 20; 2 Beach on Injunctions, sec. 998; High on Injunctions, 2 ed., secs. 698, 701, 728; 27 American Dig., secs. 82-85; Criswell v. Beakley, 67 S. W. 907; Powell v. Canadey, 69 S. W. 686; Gildersleeve v. Overstolz, 71 S. W. 371; Perkins v. Macon, 79 S. W. 987; 2 Farnham on Waters, 1663, 1843, 1853; Medacco Ditch Co. v. Adams, 68 Pac. 431; Shields v. Johnson, 79 Pac. 394; Lockhart v. Leeds, 12 N. M. 156; Crescent Min. Co. v. Silver King Mining Co., Utah, 54 Pac. 244; Lacassaigne v. Chapius, 144 U. S. 119; Arnold v. Bright, 41 Mich. 207; Romero v. Munos, 1 N. M. 314; Umatilla Irrigation Co. v. Umatilla Improvement Co., 22 Ore. 366; Sayre v. Johnson, Mont., 81 Pac. 389; Nephi Irrigation Co. v. Vickers, 81 Pac. 144.

An appropriator does not lose his right to the water diverted by a delay in applying the water to beneficial use where such delay is due to accident, as by the breaking of his ditch before the application of the water. Long on Irrigation, sec. 47; Wells v. Kreyenhagen, 49 Pac. 128.

Non-user alone, short of the period of limitation, is insufficient to show abandonment. Alamosa Creek Canal Co. v. Nelson, 93 Pac. 1112; Gardiner v. Wright, 91 Pac. 286; Long on Irrigation, par. 85; People v. Farmers High Line Canal Res. Co., 54 Pac. 626; Putnam

v. Curtis, 43 Pac. 1056; Ada County Farmers Irrigation Co. v. Farmers Canal Co., 51 Pac. 990; Tucker v. Jones, 19 Pac. 571; Gassert v. Noyes, 44 Pac. 959; Turner v. Cole, 49 Pac. 971.

An appropriator who has abandoned or forfeited his right may resume his right and avoid the effect of the abandonment or forfeiture, provided he does so before another appropriator has acquired any valid rights to the use of such water. Tucker v. Jones, 19 Pac. 571; Brook Resv. Co. v. St. Vrain Res. Co., 4 Pac. 1066.

As long as the appropriator does not abandon, but continues in good faith, the application of the water to his land, as rapidly as his means and circumstances will permit, he will be held to be within the limit of a reasonable time. Long on Irrigation, secs. 48, 90; Taughenbaugh v. Clark, 40 Pac. 153; Colo.; Arnold v. Passavent, 49 Pac. 490, Mont.; Moss v. Rose, 41 Pac. 666, Ore.; 17 A. & E. 518; 2 Farnham on Waters 1748; Anaheim Water Co. v. Semi-Tropic Water Co., 30 Pac. 623, Cal.; Egan v. Estrada, Ariz., 56 Pac. 721; Church v. Stillwell, 12 Colo. 43; North Powder Milling Co. v. Coughanour, 34 Ore. 9; Bowman v. Bowman, 57 Pac., Ore.; Lakeside Ditch Co. v. Crane, 22 Pac. 76; Hargrave v. Cook, 41 Pac. 18; Watts v. Spencer, 94 Pac. 39; Cave v. Crafts, 53 Cal. 135; Cox v. Clough, 70 Cal. 345; Baker v. Brown, 55 Tex. 377; 1 A. & E 875.

REID & HERVEY and JOHN I. HINKLE for Appellee.

Abandonment is a matter of intention and it is within the province of the court to determine whether abandonment has or has not taken place. Wiel on Water Rights, 2 ed. 351; Keeny et al v. Carillo et al, 2 N. M. 480; Cooper v. Shannon, 36 Col. 98.

Findings of fact will not be disturbed if based upon substantial evidence. Richardson v. Pierce, 14 N. M. 334; Eagle Mining Co. v. Hamilton, 14 N. M. 271; Hancock v. Beasley, 14 N. M. 239; Candelaria v. Miera, 13 N. M. 360; Ortiz v. Bank, 12 N. M. 519; Marquez

v. Land Grant Co., 12 N. M. 445; Carpenter v. Lindauer, 12 N. M. 388; Rush v. Fletcher, 11 N. M. 555; Romero v. Coleman, 11 N. M. 533; Gale & Farr v. Salas, 9 N. M. 211.

A corporation is entitled to appropriate water from streams without being owner of land or user of water for irrigation on the land. C. L. 1897, secs. 468-493; Laws 1905, chap. 79, sec. 131, par. 1; Irrigation Co. v. Gutierrez, 10 N. M. 177.

It was the duty of the court to assess punitive damages. Sample v. Fresno Co. et al, 129 Cal. 222.

The true measure of damage was the value of the water to the plaintiff. Heyneman v. Blake, 19 Cal. 579; Wiel Water Rights in the Western States, 2ed., secs. 153 et seq.; Hesperia etc. v. Gardiner, 4 Cal. App. 357; Bear Lake Co. v. Ogden, 8 Utah 494; Fallon v. O'Brien, 11 Q. B. D. 21; Parks Canal and Min. Co. v. Hoyt, 57 Cal. 44; North Point etc Co. v. Utah etc. Co., Utah, 63 Pac. 813; 4 Sutherland on Damages, sec. 1022, 3 ed.

Exemplary damages may be given. 4 Sutherland Damages, secs. 1031, 1032, 3 ed.; Snores v. Brooks, 81 Ga. 468; Best v. Allen, 30 Ill. 30; Farwell v. Warren, 51 Ill. 467; Raynor v. Nims, 37 Mich. 34.

Injunction was the proper remedy. Criswell v. Beakley, Texas, 67 S. W. 907; Powell v. Canadey, Mo., 9 S. W. 686; Wiel on Water Rights, 2 ed., secs 154, 155, 198-205.

It is for the court and jury to say what is reasonable time. Keeney v. Carillo, 2 N. M. 480; Smith v. Hawkins, 110 Cal. 122; Laws 1905, chap. 102, sec. 5; Laws 1907, chap. 49, sec. 42.

STATEMENT OF FACTS.

In November, 1885, Pat. H. Boone and Joseph C. Lea filed their articles of association, incorporating the Hondo Falls Ditch Company, and claiming an appropriation of water from the Rio Hondo. Boone had filed on his land adjoining in the fall of 1882, and in 1883 had built the dam on the site where it is now located, at a natural dam in the Rio Hondo. George Williams owned

a large tract of land in the neighborhood, which Lea managed, or owned an interest in. Boone first used the water on his land in 1883, and soon after he built the dam, Lea bought an interest in the project, which they then enlarged, and, in 1884, irrigated the lands of Boone and Lea from the dam, filing their articles of association in 1885, as above stated. Williams afterward conveyed his interest to Lea, and some of the land was put under cultivation. These interests of Boone and Lea were finally conveyed to the defendant, here the appellant. The appellant was, at the time of the acts complained of, the owner of land, bordering on the Rio Hondo below the dam, which he irrigated by means of the dam and the ditch connected with it, and on which crops were then growing, needing irrigation. In June, 1887, Pat. H. Boone, Pat. F. Garrett, C. D. Bonney, and A. H. Whetstone, incorporated as the Pecos Valley Ditch Company, the predecessor in title of the plaintiff, here the appellee. These articles of association were filed in the office of the Secretary of New Mexico on June 6, 1887, on the same day articles of incorporation of the Hondo Falls Ditch Company were filed for record. The dam of the Northern Canal, so called, was constructed by the Pecos Valley Ditch Company in 1890 and 1891, on the Rio Hondo, about one and three-fourths miles above the appellant's dam, and, by mesne conveyances, this canal, with the entire scheme of irrigation, of which it was a part, came to the plaintiff about March 1, 1907. The plaintiff had undertaken to supply water for irrigation by means of the Northern Canal project to some two hundred farmers, some of whose lands were as much as thirty-five miles away, and was so supplying water to them at the time of the acts of the defendant complained of; and the water released by the defendant from the plaintiff's reservoir was necessary to enable the plaintiff to supply the requirements of the farmers according to its agreements with them. In June, 1907, the defendant removed three of the flashboards from the dam, each about five and one-half feet long and five and one half inches wide, and let the water he claimed pass down the river to his dam, for irrigating

his farm; stationed an armed man at the plaintiff's dam who prevented the boards from being replaced, and kept the water running until stopped by the temporary injunction issued upon complaint filed by the plaintiff in this cause.

Each party claims, as against the other, prior appropriation and application to beneficial use of the water in controversy. The plaintiff also claimed that the predecessors in title of the defendant had abandoned whatever right to the water Boone and Lea originally may have acquired and that between its dam and that of the defendant, enough water came into the Rio Hondo from springs to irrigate all the land the defendant had the right to irrigate from the waters of the stream. The defendant claimed that, as riparian owner of the Rio Hondo, he had the right to its natural flow to his land, denied that the plaintiff corporation had the right to appropriate and impound the water of the stream for the purpose of selling the water-rights to water-users, alleged that the matters involved were not properly cognizable in a court of equity, and that the preliminary injunction should have been dissolved on his motion.

The trial court made the following findings: 1. Plaintiff is competent and has sufficient interest to prosecute this suit. 2. The pleadings are sufficient to support the prayer. 3. The defendant's predecessor is, as against the plaintiff's, the prior appropriator from the Hondo River, his appropriation having originated in 1883, whereas that of the plaintiff did not originate until 1888. 4. The plantiff's appropriation of 1888, took all the water of the Hondo River at the point of its dam. 5. The extent of the beneficial use of water under defendant's appropriation did not, during the twenty years following the original diversion, exceed an amount necessary to irrigate 100 acres. And, by reason of lack of diligence in applying to a beneficial use an amount greater than that, defendant's appropriation must be deemed confined to the amount necessary for 100 acres. 6. It appearing that defendant has, from sources below plaintiff's dam, water sufficient to irrigate said 100 acres, its appropriations must (independent of the defenses of abandonment and statute of

limitations) be considered as satisfied by said water below said dam, and the latter does not, therefore, interfere with defendant's rights, and plaintiff is, therefore, entitled to a perpetual injunction, as prayed, against any disturbance of it. 7. No damages, either actual or punitive, are awarded. There will be a finding of nominal damages. A decree may be drawn in accordance herewith. By inadvertance, probably, there was no finding of nominal damages included in the judgment. From the judgment rendered, the defendant appealed to this court, and plaintiff took a cross-appeal for the failure of the court to award actual or punitive damages.

OPINION OF THE COURT.

ABBOTT, J.—The findings of the trial court that, under the appropriation of water through which the defendant claims, there was not put to beneficial use for the first twenty years more than enough to irrigate one hundred acres, that there was water enough in the Rio Hondo, from springs between the two dams, to irrigate that amount of land, and, that in 1888 all the water of the Rio Hondo was appropriated by the predecessors in title of the plaintiff, at the point where the dam is, so far as that is a question of fact, are based on substantial evi-
1 dence, and will not be disturbed by this court. The case of Candelaria v. Miera, 13 N. M. 360 (84 Pac. 1020), in which are collated the previous decisions of this court on that point, has been so many times invoked, and so often followed, that it has become a classic and decisive authority in this jurisdiction. The question in this case is not one of abandonment, on the one side, or adverse possession, on the other. On the facts found by the trial court, there was never a completed appropriation by the defendant's predecessors in title, as against the plaintiff, for more than enough water to irrigate one hundred acres. It is now provided by statute, sec. 42, chap. 49, Laws of 1907, that the failure to beneficially use all or any part of the water for which a right of use has vested, for the purpose for which it was appropriated, or adjudicated, for a period of four years, shall cause the reversion of such

unused water to the public, and it shall be regarded as unappropriated public water. The statute was merely declaratory of the law as it had already been established in this jurisdiction by repeated judicial decisions, except that by those decisions the time within which the
2 application must be made was not any definite period, but a reasonable time, depending, to some extent, on the circumstances of the particular case. In Keeney et al v. Carrillo et al, 2 N. M. 480, a year was held to be a reasonable time for applying the water to use. If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated. To hold that a formal appropriation, without use, would hold for twenty years, twice the time necessary to obtain title to real estate by adverse possession in New Mexico, would be contrary to the essential nature of the law of waters as established here, which, as to this feature, has been summed up in the words now embodied in our statute law above referred to: "Beneficial use shall be the basis, the measure and the limit of all right to the use of water." Wiel on Water Rights, secs. 26, 138, 168, and cases cited; especially Millheiser v. Long, 10 N. M. 99; Wheeler v. North Irr. Co., 10 Colo. 582.

The assumption by the appellant that the title to real estate is involved, is not well founded. While water flowing in a natural stream is not the subject of private ownership any more than the fish in it, yet, when it
4 is impounded and reduced to possession by artificial means, it becomes personal property, as the fish do when caught, or, as the common, ownerless air does, when it is liquefied and held in a vessel. Water once reduced to possession and control may be the subject of purchase and sale, or of larceny; and it makes no differencee in that respect, whether the captured fluid is held in a skin or cask, by an itinerant water-vendor, or in the pipes of a modern acqueduct company. Wiel in his work on Water Rights in the Western States, secs. 153 et seq., and 269-282, has treated the subject exhaustively, and, among the decisions he cites, are two of the Supreme Court of the

United States: Achison v. Peterson, 20 Wall. 507, and the dissenting opinion in Spring Valley Water Works v. Schottler, 110 U. S. 347. Judge Field, who wrote the opinion of the court in the first case, and the dissenting opinion in the other, dealt with the subject of the ownership of water in his usual illuminating manner. See, also, Hisperia etc. v. Gardner, 4 Cal. App. 357; Bear Lake Co. v. Ogden, 8 Utah 494.

The claim of the appellant, that he was entitled, as riparian owner on the Rio Hondo, to have the water, which the appellee was diverting for purposes of irrigation, flow to his land in the channel of the stream is untenable. The doctrine of prior appropriation with application to
3 beneficial use has definitely and wholly superseded the common law doctrine of riparian rights in many of the jurisdictions in which irrigation is necessary to the growth of crops, and among them is New Mexico. The "Colorado Doctrine," as it is termed, first appears as a dictum in Coffin v. Left Hand Ditch Company, 6 Colo. 443, (1882). It declared that, on the ground of imperative necessity, no settler can claim any right aside from appropriation. The decisions of our courts, which had established that doctrine long before it was adopted by statute, have been approved by repeated decisions of the Supreme Court of the United States. Wiel's Water Rights in the Western States, secs. 23, 24, and cases cited; Keeney et al v. Carrillo, 2 N. M. 480, 492, (1883)—clearly portended the later decisions of this court, positively affirming the Colorado doctrine, which was especially emphasized in Albuquerque L. & I. Co. v. Gutierrez, 10 N. M. 197, 240. That case went to the Supreme Court of the United States, and received its approval in 188 U. S. 545, and an earlier New Mexico case on the subject, United States v. Rio Grande D. & I. Co., 9 N. M. 292-303, had been approved under the same title, in 174 U. S. 706. Indeed, riparian ownership, as known to the common law, has never, it would seem, been recognized in New Mexico. As pointed out in Albuquerque L. & I. Co. v. Gutierrez, 188 U. S. 545, by the Mexican law in force here at the time the United States acquired the territory, the use of

the water of the streams was not limited to riparian lands, but extended to others, subject to regulation and control by the public authorities. And the Mexican law, as well as the law of Indian tillers of the soil, who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems, did but recognize the law of things as they are, declaring that such must, of necessity, be the use of the waters of streams in this arid region. Albuquerque L. & I. Co. v. Gutierrez, supra, is, also, conclusive against the appellant's contention that the
5 appellee, because of its being a corporation and a mere purveyor of water to be used on the lands of others, had not the right to appropriate the water in question.

The question naturally next in order is, whether the appellant is right in his contention that his motion to dissolve the preliminary injunction granted in the cause, should have been sustained, for the reason, stated broadly, that no proper ground for equitable relief existed. The preliminary injunction is no longer really in question, since a permanent injunction was issued in place of it. But we prefer to assume, what does not clearly appear in the brief of the appellant, that the argument against the preliminary injunction is meant to apply to the permanent injunction as well. It appeared that the plaintiff had undertaken to supply water to about two hundred farmers, some of them at lands thirty-five miles away, for the purpose of irrigation, and that it would be unable to perform its agreements with them, if it should be deprived of the water which the defendant was taking for his own use. Clearly, that would amount, not merely to the loss of a certain amount of water for which compensation could be given in a suit for damages, but to injure the plaintiff's business so seriously as fairly to be considered irreparable. There can be no doubt that courts of equity should interfere to prevent such injury, and that without requiring every one injured to join in the
8 action instituted by one to whom the injury is immediate. And, where the damage of injury is imminent, a preliminary injunction should be granted. 22

Cyc. 765-6, 771-2, and cases cited; especially Diffendal v. Virginia Midland R. R. Co., 86 Va. 459; Wiel on Water Rights 198; Medano Ditch Co. v. Adams, 68
6 Pac. 341, (Colo). The evidence was not so clear and explicit as to require a finding of more than nominal damages. In its complaint the plaintiff alleged that the defendant "tore out and removed a portion of its dam and head-gate," and unlawfully diverted and appropriated a large volume of water from said dam; and those allegations, as to the facts stated in them, were sustained by evidence, but there was no evidence to show any more than nominal damages by the removal of the flash-boards, which, as a matter of common knowledge, are usually not a part of the structure of a dam, but can be taken out and put back without injury to the dam itself. And there was no evidence of the value of the water itself, for the conversion of which, as personal property, the defendant was probably liable in damages. But the water may have had no value there, except for use in the plaintiff's irrigation system. The plaintiff claimed damages on account of its impaired ability, through the acts of the defendant, to supply water to the farmers it had contracted to supply; and it is urged in the brief for the plaintiff that it was liable to such farmers for failure to perform its agreements with them. It was denied, in behalf of the defendant, that the plaintiff was so liable, as a matter of law; but, however that may be, there is no clear evidence that the plaintiff had failed to keep its agreements with the farmers dependent upon it for water, because of anything done by the defendant. The plaintiff was permitted to show damage to its "property, franchise or interests," distinct from its stock, but offered no evidence that any one had stopped taking water from it, or, that any one had refrained from entering into an agreement to take water from it, because of the diversion of water complained of; although it did offer evidence, apparently convincing to the trial court, that those and other injurious consequences would result, if the wrongful conversion should be continued. Counsel for the plaintiff corporation direct attention to the testimony of its president, on page 151

of the record, and say it is sufficient to establish their claim for compensatory damages. He testified that the "property, franchise or interests" of the plaintiff, distinct from its stock, were damaged "some four or five hundred dollars a day," while the water was diverted by the defendant, but, on cross-examination, he said, in response to the question: "Who do you mean was damaged that, namely, four or five hundred dollars a day?" "Well, I mean that the company, in being owned by the farmers almost altogether,—without exception, the stockholders are all farmers—and, taking all together, the farmers and stockholders were damaged, and the company in that way." Q. "The farmers and the stockholders were damaged, and that damaged the company?" A. "Well, I think it would, on account of it being all the same." The farmers and stockholders were not made parties to the suit, and their claims for damages, if they had any, were not in question.

If the case had been tried with a jury, the question
7 of exemplary damages would properly have been submitted to it. The brief for the appellee cites 4 Sutherland on Damages 1031, to that effect: "Such damages x x x x x are in the discretion of the jury, where the facts are such as legally to warrant them," says the author. As there was no jury in this case, it was for the court to decide whether the evidence called for exemplary damages, and, although the apparently high-handed course of the defendant, in taking and holding possession of the plaintiff's property, might have warranted the assessment of damages of a punitive nature against him, it would be an invasion of the province of the trial court, if we would undertake to control its judgment on that point.

The judgment, as rendered, may be corrected to include one dollar as nominal damages, in accordance with the finding of the trial court, and, as so corrected, the judgment is affirmed.

[No. 1352. February 4, 1911.]

MRS. MARY BELL PERKINS, Appellant, v. CITY OF ROSWELL, Appellee.

SYLLABUS (BY THE COURT).

1. In the trial of a cause with a jury for the alleged violation of a city ordinance which made it unlawful for any "person, firm or corporation, to erect, keep, maintain or operate any private hospital, sanatorium or health resort institution" within the limits of the city, evidence was introduced by the plaintiff, against objection, to the effect that, it was "common knowledge in the neighborhood" that the defendant was running the place in question. Held, that the evidence was inadmissible and necessarily prejudicial to the defendant.

2. The repeal of a city ordinance without any saving clause abates all prosecutions under it which may be pending.

Appeal from the District Court for Chaves County, before MERRITT C. MECHEM, Associate Justice. Reversed and remanded.

U. S. BATEMAN for Appellant.

C. L. 1897, sec. 2517, is not applicable.

City had right to regulate hospitals of the kind in question but has no authority to abolish the same. C. L. 1897, sec 2402, sub-secs. 45, 48.

Cities have a right to declare what shall be nuisances and to abate the same but C. L. 1897, sec. 2402, sub-sec. 45, does not authorize cities conclusively to declare a thing a nuisance that is not a nuisance by the common law or by statute, or is not a nuisance in fact. Hennessy v. City of St. Paul, 37 Fed. 566; Grossman v. City of Oakland, 41 Pac. 6; Denver v. Mullen, 3 Pac. 699; Harmison v. Lewiston, 38 N. E. 629; North Chicago City Rt. Co. v. Town of Lake View, 105 Ill. 207; Des Plaines

v. Poyer, 14 N. E. 678; Yates v. Milwaukee, 10 Wall. 497; Evansville v. Miller, 45 N. E. 1056; Quintini v. Bay St. Louis, 1 So. 627; 21 A. & E. Enc., 2 ed., 740.

Courts will review the question as to the reasonableness of ordinances passed under a grant of power general in its nature, and if any ordinance is found unreasonable will declare it to be void as a matter of law. 2 Abbott Mun. Corp., secs. 537, 545; Clark v. Chicago, 82 N. E. 370; McQuillin Mun. Ord., sec. 183; State v. Trenton, 20 Atl. 1077; 28 Cyc. 370; North Jersey St. Ry. Co. v. Jersey City, 67 Atl. 1073; Hume v. Laurel Hill Cemetery, 142 Fed. 563; Tony v. Macon, 46 S. E. 82 Ga.; Chicago v. Brown, 69 N. E. 66, Ill.; Robinson v. People, 42 Ill. 375; Champer v. Greencastle, 46 Am. St. Rep. 399, Ind.; Pittsburg C. C. & St. L. Co. v. Crown Point, 45 N. E. 587, Ind.; Anderson v. Wellington, 10 Am. St. Rep. 178, Kans.; People v. Armstrong, 16 Am. St. Rep. 581, Mich.; Tarkio v. Cook, 41 Am. St. Rep. 681, Mo.; State v. Birch, 85 S. W. 365, Mo.; Exparte Vance, 62 S. W. 569, Texas; Schillreff v. Schillreff, 97 Pac. 456, Wash.; Chicago & A. Ry. v. Carlinsville, 65 N. E. 732.

Ordinance was unconstitutional and the trial court erred in holding that appellant could not plead and prove its unconstitutionality. Helena v. Dyer, 42 S. W. 1072, Ark.; Corrigan v. Guage, 68 Mo. 541; Yick Wo v. Hopkins, 118 U. S. 356; Henderson v. New York, 92 U. S. 259; Chylung v. Freeman, 92 U. S. 275; ex parte Va., 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; 28 Cyc. 390; Carpenter v. Yeadon, 151 Fed. 882; McQuillin Mun. Ord. 27, 55, 310; Jersey St. Ry. Co. v. Jersey City, 67 Atl. 1073; Dobbins v. Los Angeles, 195 U. S. 223; Yick Wo v. Hopkins, 118 U. S. 356.

Court erred in holding that the innocence or guilt of defendant might be shown by the preponderance of evidence. 28 Cyc. 281; Peterson v. State, 112 N. W. 306.

Court erred in holding that common report or hearsay evidence, as to who was running the business conducted on the premises in question, could be received. Stevens v. San Francisco & N. P. R. Co., 35 Pac. 169; Wolfson

v. Allen Bros. Co., 94 Pac. 912; Hinds v. Keith, 57 Fed. 14; Bernard v. Beecher, 18 Pac. 599; Stewart v. McMurray, 3 So. 49; Shutte v. Thompson, 15 Wall., 82 U. S. 21, L. ed. 127; Abel v. State, 8 So. 760; Williamson v. State, 40 S. W. 286; Steed v. State, 67 S. W. 330; People v. John Mauch, 24 Howard Prac. 276; Henson v. State, 62 Md. 231; Allen v. State, 15 Tex. App. 220; McRae v. Cassan, 15 N. M. 496.

The unquestionable repeal of the ordinance in question nullifies this prosecution. McQuillin Mun. Ord., par. 206; 28 Cyc. 384, foot note 63; Abb. Mun. Corp., vol. 2, par. 551; Barton v. Gadsden, 79 Ala. 495; Kansas City v. Clark, 68 Mo. 588; City of Monnett v. Hall, 106 S. W. 581; Anderson v. Byrnes, 54 Pac. 821; Spears v. Modoc County, 35 Pac. 869; Napa State Hospital v. Flaherty, 66 Pac. 322; Ball v. Tallman, 67 Pac. 339; Sonora v. Curtain, 70 Pac. 674; Santa Monica v. Gidinger, 70 Pac. 432; Flannigan v. Sierra County, 122 Fed. 27.

H. M. Dow and K. K. Scott for Appellee.

In cases involving the violation of a municipal ordinance, written pleadings are not required. C. L. 1897, secs. 2405-3255; Crolot v. Maloy, 2 N. M. 198.

The law relating to demurrers to answers is the same as that which relates to demurrers to complaints or petitions. C. L. 1897, sec. 2685, sub-secs. 34-38, 43, 45.

When appellant proceeded to trial under the general issue she thereby abandoned and waived her exceptions to the action of the trial court in sustaining a demurrer to her "second defense by way of new matter." Overland Dispatch Co. v. Hugo Wedeles, et al, 1 N. M. 528; Bremen Min. Co. v. Mrs. D. A. Bremen, et al, 13 N. M. 111; Cleland v. Hostetter, 13 N. M. 43; C. L. 1897, sec. 2685, sub-sec. 34.

All that is required of a complaint is that degree of particularity which the defendant in a suit is called upon to answer, and not that particularity which is technically necessary to constitute a good indictment. Wood v. Town of Princeville, 23 Pac. 880, Or.; Mexico

v. Harris, 92 S. W. 505, Mo.; State v. Finnegan, 23 So. 621, La.; Kingman v. Berry, 20 Pac. 527, Kan.; West v. Columbus, 20 Kans. 633.

Question of nuisance not involved. C. L. 1897, sec. 2402, sub-sec. 48; Laws 1903, ch. 103, sec. 28; Milne v. Davidson, 16 Am. Dec. 189, La.; Commonwealth v. Charity Hospital, 47 Atl. 980, Pa.

Reasonableness of ordinance a question of law for court. 21 Am. & Eng. Enc. L., 2 ed. 988; Dillon Mun. Corp., 4 ed., vol. 1, secs. 327, 328; McQuillin Mun. Ord., sec. 185; 28 Cyc. 390; Lake View v. Tote, 6 L. R. A. 269.

Motives behind enactment of ordinances not subject to judicial inquiry. Dillon Mun. Corp., 4 ed., sec. 311; 28 Cyc. 375; Bennett v. Mayor, etc., 47 L. R. A. 278, Tenn.; Cooley Const. Lim. 186, 187; McQuillin Mun. Ord., sec. 161.

Preponderance of evidence sufficient to convict. Dillon Mun. Corp., 4 ed., sec. 411; McQuillin Mun. Ord., sec. 304; Peterson v. State, 112 N. W. 306; C. L. 1897, secs. 2405-2407.

Hearsay evidence. 1 Greenleaf on Ev., sec. 128.

Objections to exclusion of evidence not reviewable, Vurpillat v. Zehner, 28 N. E. 556; Judy v. Citizen, 101 Ind. 18; Higham v. Vanasdol, 101 Ind. 160; 2 Cyc. 697; Kern v. Bridwell, 12 Am. St. Rep. 409; Palatine Ins. Co. v. Santa Fe Merc. Co., 13 N. M. 241; Wittenberg et al v. Mollyneaux, Neb., 82 N. W. 842; Ladd v. Missouri Coal & Mining Co., 66 Fed. 880; Maxwell Land Grant Co. v. Dawson, 7 N. M. 133; Kelly v. Highfield, 14 Pac. 744, Or.; Cuthrell v. Cuthrell, 101 Ind. 375; Sohn v. Jarvis, 101 Ind. 578; Terre Haute v. Hudnut, 13 N. E. 686.

STATEMENT OF THE CASE.

On February 2, 1909, the city council of Roswell enacted an ordinance, which was approved by the Mayor February 3, 1909, and was to be in force by its terms, five days after its publication. It declared it to be unlawful to "erect, keep, maintain or operate any private hospital, sanatorium or health resort institution within the limits of the City of Roswell, whether same be used

for boarding, lodging and treatment of patients, or for boarding or lodging alone, and, for the purpose of this ordinance, a place shall be deemed to be a private sanatorium that is used or kept for the reception or use of the guests afflicted with" certain enumerated diseases. It was made the duty of the sanitary policeman to give notice in writing to the owner, agent or keeper of such a place, to discontinue such use, and, if the notice was not complied with within five days, to enter complaint before the proper court, and cause prosecution for the violation of the ordinance, which, it was provided, should be punished by a fine of not less than twenty-five dollars ($25) nor more than fifty dollars ($50). On February 13, 1909, notice was served on the defendant, here the appellant, as required by the ordinance, and, on February 19, 1909, a complaint was filed with a justice of the peace, charging the defendant with violation of the ordinance by keeping, maintaining and operating a private hospital, etc., after notice, and contrary to the ordinance. It appeared that the defendant was the record owner of a dwelling house and the land on which it stood in the City of Roswell, where she resided with her husband. She claimed, and offered evidence tending to show, including the testimony of her husband, that he paid for the house and land named; that he had erected on the land some small, cheap houses, which he rented, and that he had the rent, and she had no control of the rented houses; that she had formerly, but not after notice under the ordinance was served on her, furnished meals to tenants of the rented houses. The premises described were those of which the complaint was made on which the prosecution was based. The defendant was found guilty and sentenced to pay a fine of twenty-five dollars and costs, from which judgment she appealed to the district court, where, after some interlocutory proceedings, a trial of the case with a jury was had. The defendant was found guilty, a motion for a new trial was overruled, and judgment against the defendant was rendered, from which she appealed to this court. After the appeal had been taken and the term of court at which the trial occurred had been adjourned, the defendant filed a

motion to vacate the judgment on the ground that the ordinance had been repealed, which motion was "denied without prejudice," on the ground stated in the opinion filed by the judge of the district, that the alleged repealing ordinance had not gone into effect, and that the court lacked power to vacate, on motion, a judgment entered at a term which had been finally adjourned, "especially when, as here, the cause is in an appellate court on appeal."

OPINION OF THE COURT.

ABBOTT, J.—Of the various errors which the appellant assigns, a considerable proportion must be disregarded as not properly before us, and others need not be separately treated of, since they present questions of common occurrence on which the law is too well settled to require discussion, especially in view of the conclusion we have reached, that there was error prejudicial to the defendant in the admission of certain evidence by the trial court, namely, the attorney for the plaintiff put to a witness for the plaintiff the question: "State whether it is common knowledge that Mrs. Perkins runs a sanatorium?" To which the witness answered: "It is." The question was then put: "If you have stated that it is common knowledge as to who runs that sanatorium, please state who does run it?" To which the witness answered: "Mrs. Perkins runs it." To each of these questions the attorney for the defendant objected, in substance, on the ground that it was calling on the witness to give her opinion, and hearsay evidence, and he duly took exception to the action of the court in overruling the objections.

That proof of facts by evidence of reputation is admissible only on matters of public and general interest, is declared in 1 Greenleaf on Evidence, sec. 137; Wigmore on Evidence, sec. 1586; Jones on Evidence (2 ed.), secs. 301, 302. The cases cited in N. 26 to sec. 302, are especially informing: "Ownership or possession of property, or a modus concerning it, cannot be shown by reputation." 16 Cyc. 1212: "Title cannot be proved by neighborhood talk. Of course, what one does while in the possession of land is

admissible in testimony as to the character of the possession." Hiers v. Risher, 54 S. C. 405, 411; Crippen v. State, Ct. Crim. Appeals, Tex. 80 S. W. 372; "In prosecutions for permitting gaming in a house, ownership cannot be proved by reputation." See, also, Green et al v. Chelsea, 24 Pick. (Mass.) 71; Wendell v. Abbott, 45 N. H. 349. The evidence in question was admitted to prove that the defendant was maintaining a private hospital or sanatorium as a health resort institution; in effect, that she was the owner of the business, which she denied.
1 The evidence must have been prejudicial to her defense, and should have been excluded. The appellant's assignment of error, based on the overruling of the motion to abate the judgment on the ground that the ordi-
2 nance in question had been repealed, is not well founded for the reasons stated in the opinion of the district judge, which we have quoted in the statement of the case, and the fact, if it is one, that the ordinance has been repealed, has not been brought to our attention by the defendant in a way to warrant our giving any effect to it in the disposition of the case. The judgment of the district court is reversed and the cause remanded.

W. H. Pope, C. J., having ruled in the motion to quash the complaint herein, did not participate, nor did Mechem, A. J., who tried the cause.

[No. 1354. February 4, 1911.]

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SARAH ELLEN DYE, Deceased,—ISAIAH A. DYE, Executor, Appellee, v. ORA BUTLER MEECE, Appellant.

SYLLABUS.

1. "No act is decisive so as to constitute a conclusive election unless the remedial right, upon which such act is based, is irreconcilable with the remedial right which the subsequent action or suit is brought to enforce."

2. The action of appellant in filing her second petition

in the probate court did not constitute an election of remedies on her part.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Associate Justice. Motion to dismiss appeal overruled.

NEILL B. FIELD and MINOR STEWART for Appellant.

Appeal was seasonably taken and court had jurisdiction. Brockett v. Brockett, 2 Howard 241; Pearce v. Strickler, 9 N. M. 46; Slaughter-House Cases, 10 Wall. 289; Texas & Pacific Ry. Co. v. Murphy, 111 U. S. 488; Aspen Mining Co. v. Billings, 150 U. S. 31; Voorhees v. Man. Co., 151 U. S. 135; Southern Pacific R. R. Co. v. Holmes, 155 U. S. 137; Kingman v. Western Man. Co., 170 U. S. 675; Lockman v. Lang, 132 Fed. 1; Hurst v. Hollingworts, 94 U. S. 111; Plymouth Co. v. Amador, Co., 118 U. S. 264; Files v. Brown, 124 Fed. 132; Hooven v. Featherstone's Sons, 111 Fed. 81; McFadden v. Mountain View, 97 Fed. 670; Michels v. Olmstead, 157 U. S. 198; Newell v. Myendorf, 23 Pacific 335; Davis v. Wakelee, 156 U. S. 691; Bigelow on Estoppel 601.

No guardian ad litem was necessary. C. L. 1897, sec. 1459; Laws 1901, p. 113; Hall's Mexican Law, sec. 2013; Montoya v. Miller, 7 N. M. 289; U. S. v. Bainbridge, 24 Fed. Case 946.

Case could not be properly dismissed on the ground that appellant had not legal capacity to sue. C. L. 1897, secs. 1983, 900, 1981; Cohens v. Virginia, 6 Wheaton 407; Nations v. Johnson, 24 Howard 205; Park v. Higbee, 24 Pac. 524; Damouth v. Klock, 29 Mich. 289; 22 Cyc. 562; Johns v. Smith, 56 Miss. 727; Seaton v. Tohill, 53 Pac. 170; Lloyd v. Kirkwood, 112 Ill. 338; Ralston v. Lahee, 8 Iowa 17; Claxton v. Claxton, 56 Mich. 557; Drago v. Moso, 40 Am. Dec. 592; Hoskins v. White, 32 Pac. 163; Schemerhorn v. Jenkins, 7 Johns 373; Young v. Young, 3 N. H. 345; Blood v. Harrington, 8 Pick. 552; Billups v. Freeman, 52 Pac. 367; Kemp v. Cook, 18 Md.

130; Park v. Higbee, 24 Pac. 524; Teller v. Wetherell, 6 Mich. 45; Pickett v. Legerwood, 7 Pet. 144.

MARRON & WOOD for Appellee.

Guardian ad litem was necessary to conduct case for contestant. C. L. 1897, secs. 929, 1465, 1981, 1985, 2685, sub-secs. 8, 9; In re Gourand, 95 N. Y. 256; Hoyt v. Hoyt, 112 N. Y. 511; Bouvier's Law Dictionary; 15 P. & P. 467; Montoya v. Miller, 7 N. M. 289.

Court did not err in dismissing appeal. C. & C. Bridge Co. v. Brennan, 16 Ky. L. 126; Haines v. Oatman, 2 Doug. 430, Mich.; Keran v. Clouser, 5 Blackf. 604; Lumpkins v. Justice, 1 Ind. 557; Wolford v. Oakley, 43 How. Pr. 118, N. Y.; Fitch v. Fitch, 18 Wend. 513; Sutton v. Nichols, 20 Kas. 43; Blood v. Harrington, 8 Pick. 552; Sparkling v. Mack, 86 Ill. 125; 12 P. & P. 519.

OPINION OF THE COURT.

MECHEM, J.—This comes up upon motion of the appellee to dismiss the appeal, assigning as grounds of said motion to dismiss: First: That "the motion to vacate the judgment and reinstate the cause was not a motion for a new trial, did not suspend the judgment and, therefore, did not extend the time for taking an appeal," the basis of this ground being, that more than one year elapsed after the rendition of the judgment of the court below dismissing the action; that thereafter a motion to set aside and vacate said order of dismissal was made and taken under advisement for some months by the trial court before said motion was finally refused, and an appeal was taken within one year after the entry of an order overruling the motion to vacate and set aside the judgment of dismissal, but more than one year after the rendition of the judgment. The contention of the appellee is, that this motion to vacate and set aside the judgment was different from that of a new trial, in that it did not suspend the judgment, and, therefore, did not extend the time for taking an appeal. This point was settled adversely to appellee's contention by the recent decision of Sacramento

Valley Irrigation Company v. Oliver M. Lee, 15 N. M. 567; 113 Pac. 834.

Second: The second ground assigned for dismissal is that, "the appellant abandoned her right to appeal from the judgment of dismissal when she commenced her proceedings anew in the probate court." A short statement of the proceedings had in this case is necessary to show the basis of this objection. This was a case brought originally in the probate court by the appellant to revoke the probate of a will. The case was tried in the probate court, appealed to the district court, where, it being shown that the appellant was not of legal age, the court, for that reason, entered judgment of dismissal. Motion was made to vacate and set aside said order. The trial judge overruled the motion to set aside and vacate the judgment on the 24th day of May, 1909, and thereafter, on the 4th day of May, 1910, an order was entered granting the appeal. Upon the 4th day of October, 1909, the apellant, having become of age, instituted a new proceeding in the probate court to revoke the will. This proceeding was dismissed by the probate court upon the motion of appellee, in which motion grounds were assigned in support thereof, first, of the existence of this pending appeal, also of a pending appeal in the Supreme Court of the United States upon a writ of mandamus to compel the district judge to reinstate this cause in the district court, and, also, for the reason that, the petition to revoke the probate of the will was not commenced within one year, as provided by law. A petition is now pending in the district court for a mandamus to the probate court to reinstate the latter proceeding.

In their brief, in support of this motion, counsel for appellee cite the following from 2 Cyc. 659: "If a party after judgment against him prosecute another action based upon the same cause, he estops himself from appealing from the first judgment or from bringing error to review it." We believe that this statement of the law, and cases cited in support thereof, might apply to a case where an appellant or plaintiff in error has prosecuted another action to a conclusion; at least, this is the principle

which is to be deduced from the cases cited, and, we believe, none other can be drawn from them, except the case of Carr v. Casey, 20 Ill. 638, in which, at the time the appeal was dismissed, a new suit was actually pending in the court below. However, even if the cases cited do bear out the construction contended for by counsel, we are unwilling to follow them. In their reply brief on this motion, counsel for appellee say they think that the rules governing their motion are more analogous to those affecting election of remedies, though differing from their first contention and the doctrine of election in some particulars, and, they suggest, in support of this position, that the policy of the law is not to encourage litigation, or permit one party, "out of abundant caution," to harass another with prolific and vexatious litigation; that, when the trial court dismissed the appellant's proceedings, and especially when this court refused mandamus, her remedy was not in the least doubtful; that she had her appeal from the judgment of dismissal, or, she could accept that judgment as final and commence anew in the probate court; and, that the remedies are not consistent, and, therefore, she could not do both. "No act is decisive so as to constitute a conclusive election unless the remedial right, upon which such act is based, is irreconcilable with the remedial right which the subsequent action or suit is brought to enforce." 15 Cyc. 261.

Considering, then, this appeal and the new proceeding attempted to be instituted by appellant in the probate court, are they irreconcilable and inconsistent, and, if so, wherein? Nothing claimed by either, denied anything claimed by the other. Appellant brings this appeal to correct an error she says was committed to her injury by the lower court. She brought the new proceeding in the probate court to have the probate of her mother's will revoked. She can claim error in the judgment of the court below, and, at the same time, that there exists good and sufficient reasons why the probate of her mother's will should be revoked, without relying upon anything in the former proceeding that negatives or is incompatible with what she must assert to maintain the latter. And, while,

as suggested by counsel for appellee, the policy of the law is not to foster or to encourage litigation or to permit one party "out of abundant precaution" to harass another with prolific and vexatious litigation, yet, we do not think that appellant's course in this controversy subject to such criticism. By the decision of the district court the appellant was denied the right to maintain her suit, and, feeling herself aggrieved by being deprived of what she considered an undeniable right, she appealed and asks this court to restore to her that which she has been refused. But appeals cannot be disposed of immediately, and there is a statute which fixes a limitation of one year in proceedings to revoke the probate of a will, the time to run from the date of probate. It would be unjust to hold that, a party who "reasonably deemed" that a judgment against her was erroneous should be compelled to elect whether she would waive the error and commence anew, and thus admit the judgment was right, when she felt that it was wholly wrong, or stake her all upon an appeal. Her only safe course was to commence anew in the probate court, so, if the appeal was decided against her, she would still have the opportunity to enforce her rights, which opportunity the law is popularly supposed to afford to those living under it. Therefore, we hold that, the action of appellant
2 in filing her second petition in the probate court did not constitute an election of remedies on her part. For the foregoing reasons the motion to dismiss the appeal is overruled.

E. R. Wright, A. J., and C. J. Roberts, A. J., dissent.

[No. 1363. February 4, 1911.]

THE HOUSTON-HART LUMBER COMPANY, a Corporation, Appellant, v. HARRY NEAL and F. C. HERBERT, Appellees.

SYLLABUS (BY THE COURT).

1. When a person is employed by the owner of a lot in an incorporated city to construct a sidewalk in front of the same, and he purchases materials to be used, and which were used, in the construction of such sidewalk, the purchase of such materials will be considered as having been made at the "request" of the owner, within the meaning of Section 2218, Compiled Laws 1897, so as to entitle the material man to a lien therefor under the mechanic's lien laws.

Appeal from the District Court for Curry County, before WILLIAM H. POPE, Chief Justice. Reversed and remanded.

WILLIAMS & RYAN for Appellant.

The contractor being the statutory agent of the owner and purchasing and using the materials in the construction of the improvement implies that the work is being done at the request of the owner. C. L. 1897, sec. 2218; Pilz v. Killingsworth, 26 Pac. 305; Hill's Code, sec. 3676; Smith v. Wilcox, 74 Pac. 708; 27 Cyc. 90.

HARRY L. PATTON for Appellees.

The right to bind the land for materials furnished to be used in making improvements upon the street is not extended to the agent. C. L. 1897, secs. 2217, 2218; Fleming v. Prudential Ins. Co., 73 Pac. 752, Colo.; Seeman v. Schultze, 28 S. E. 378, Ga.; Coenen v. Staub, 36 N. W. 877; Ford v. Springer Land Association, 8 N. M. 37; Anderson v. Bingham, 28 Pac. 145.

OPINION OF THE COURT.

WRIGHT, J.—This was an action in the trial court, wherein the plaintiff, the Houston-Hart Lumber Company, was claiming a mechanic's lien for material furnished

and delivered to the contractor, who used such materials in the construction of a sidewalk built along, in front of, and adjacent to, certain town lots in the city of Clovis, owned by the defendants, Harry Neal and F. C. Herbert; the plaintiff's claim to the lien being based on Section 2218, of the Compiled Laws of 1897, on Mechanic's Liens, which reads as follows, to-wit: "Sec. 2218. Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the streets in front of, or adjoining the same, has a lien upon such lot for his work done and materials furnished." There is no controversy as to the facts in this case, and the only question involved is: "Does the purchase and use of material by the contractor in the construction of a sidewalk along and in front town lots, amount to the request of the owner for the purchasing of such materials, so as to bring the case within the provisions of said Section 2218?

Section 2217, being the section of the mechanic's lien law just preceding the section involved herein, after providing that every person performing labor upon, or furnishing materials to be used in, the construction, alteration or repair of certain structures, has a lien upon the same for the work or repair done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, provides that: "Every contractor, sub-contractor, architect, builder, or other person, having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this act." It appears from the record in this case that the Houston-Hart Lumber Company sold and delivered to, one, Adams, seventy-five sacks of cement, which cement was to be used in the construction of a sidewalk in front of the property owned by the appellees herein. It also appears from the record in the case that Adams had made and entered into a contract with the appellees for the construction of this sidewalk at a stipulated price. The question involved is: Did this contract,

so made by Adams with the appellees, authorize and empower Adams to purchase the necessary materials, to-wit, cement, to the extent that the purchase of such materials be considered as made at the request of the owners of the property sought to be charged with a lien, within the terms of Section 2218, above quoted? This court has held, in the case of Ford v. Springer Land Association, 8 N. M. 37, that the mechanic's lien law, being remedial in its nature and equitable in its enforcement, should be liberally construed, overruling the case of Finane v. The Hotel Company, 3 N. M. 417, holding the contrary. Such being the rule of construction of the mechanic's lien law in New Mexico, what is a reasonable construction to be placed upon section 2218? Adams, having made a contract with the appellees to construct this sidewalk, was clearly authorized to do all the acts necessary and proper to enable him to fulfill his contract, and the appellees must have understood when they made such a contract that Adams was not going to do all of the work with his own hands, and that, in all probability, he did not have on hand all the materials necessary to construct such sidewalk, but that he would necessarily have to employ other labor and purchase the necessary materials. By making this contract he was fully empowered to do all of these things. Such being the case, from the making and executing of such a contract, the implication necessarily follows that the owners of the property consented to the employment of necessary laborers and purchase of necessary materials by the contractor. It being a necessary implication from the making of such a contract that the consent of the owners was given to the employment of necessary labor and purchase of necessary materials, we are of the opinion that a fair and reasonable construction of the statute under consideration is that when the owner of property enters into a contract similar to the one in the case at bar, and the contractor employs laborers to assist him and purchases necessary materials, that the services of such laborers and the furnishing
1 of such materials must be considered as having been rendered at the request of the owners. Rockel on Mechanic's Liens, sec. 55, p. 139; Parker v. Bell, 7 Gray,

(Mass.) 429; Weeks v. Walcott, 15 Gray (Mass.) 54; Clark v. Kingsley, 8 Allen 543; Moore v. Erickson, 158 Mass. 71, 32 N. E. 1031; Pilz v. Killingsworth, 26 Pac. 305; Wilcox v. Turple, 74 Pac. 708; Norton v. Clark, 85 Me. 357, 27 Atl. 252. The decree of the court below must, therefore, be reversed and the cause remanded, with instructions to proceed in accordance with this opinion.

[No. 1360. March 3, 1911.]

THE COMMUNITY DITCH OR ACEQUIAS OF TULAROSA TOWNSITE, a Corporation, Appellant, v. THE TULAROSA COMMUNITY DITCH, W. D. TIPTON, E. KNIGHT, J. J. DALE, and E. H. SIMMONS, Appellees.

SYLLABUS (BY THE COURT)

1. Upon the disputed question of fact the plaintiff was entitled to be heard and to introduce evidence in support of its contention.

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

W. J. CONNELL and H. B. HAMILTON for Appellant.

Judgments and decrees are conclusive evidence only as between parties and privies to the litigation. 2 Black on Judgments, sec. 534; Wabash R. R. Co. v. Adelbert College, 28 S. C. R. 182; Wabash, St. L. & P. R. Co. v. Ham, 114 U. S. 587; Compton v. Jessup, 15 C. C. A. 397.

SHERRY & SHERRY and A. B. FALL for Appellees.

STATEMENT OF THE CASE.

Plaintiff in the court below filed its bill of complaint for a writ of injunction against the defendants enjoining them from interfering with the waters of the Tularosa River, or acequias and ditches of the plaintiff. To this

bill of complaint the defendants filed a special plea in bar, wherein they allege, in effect, that the matters and things attempted to be litigated by the plaintiff had theretofore been fully adjudicated in a certain cause numbered 293 on the docket of Otero county, between the Tularosa Community Ditch, a corporation, in behalf of themselves, and of the town lot owners and others of the town of Tularosa, as plaintiffs, and the Tularosa Land and Cattle Company, a corporation, and others, as defendants, and further alleging in said special plea that, the plaintiff in the case at bar was a party to said cause numbered 293 and bound thereby. To this special plea in bar the plaintiff filed a verified answer denying especially, among other things, that the plaintiffs in the case at bar were parties to, or, are in any way, bound by the decree entered in cause No. 293, above referred to. Upon motion this answer to the special plea in bar was, by the court, stricken from the files as not responsive to the special plea in bar, and judgment was thereupon entered upon the special plea in bar dismissing the bill of complaint.

It is from the action of the court, in so striking the plaintiff's answer from the files and entering judgment of dissmissal that the plaintiff in the court below appeals.

OPINION OF THE COURT.

WRIGHT, J.—The sole question for determination in this cause is whether the court erred in striking from the files the plaintiff's answer to the special plea in bar, as unresponsive, and entering judgment of dismissal thereon upon said special plea in bar. An examination of the pleadings shows that the plaintiff's answer to the special plea in bar raises a direct issue of fact upon the question of whether or not the plaintiff in this case was a party to the proceedings had in cause No. 293, wherein the Tularosa Community Ditch, a corporation, and others, were plaintiffs, and the Tularosa Land and Cattle Company, a corporation, and others, were defendants. Upon this disputed question of fact the plaintiff was entitled to be heard and to introduce evidence in support of its contention. The lower court by summarily striking the

answer from the files as not responsive, denied the plaintiff its right so to be heard upon the issue of fact. The action of the lower court, therefore, in striking plaintiff's answer to the special plea in bar from the files as unresponsive, and entering judgment of dismissal upon the said special plea in bar was error. This cause is, therefore, reversed and remanded to the district court, with instructions to proceed in accordance with this opinion.

[No. 1364. March 3, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. LIZZIE McGRATH, Appellant

SYLLABUS.

1. Where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed.

2. Count in which it is charged that the defendant, on a certain day, at a certain place, did, unlawfully, set up and keep a house of prostitution in a certain town, within 700 feet of a certain theatre, contrary to the form of the statute, etc., sufficiently conforms with the statute.

3. If a statute makes criminal the doing of this, or that or that, mentioning several things disjunctively, there is but one offense, which may be committed in different ways; and, in most instances, all may be charged in a single count.

4. Defendant can not be convicted under three separate indictments for one single act.

5. Objectionable matter was merely descriptive, and, though superfluous, was not prejudicial or perplexing.

6. Evidence by which an establishment may be proved a house of prostitution not limited to a proof of only the facts mentioned, but other evidence is admissible and sufficient to establish the fact that a place is a house of prostitution.

7. Testimony examined and found ample to establish the charge that defendant did set up and keep a house of prostitution.

8. Courts will take judicial notice of matters which are so notorious that the production of evidence would be unnecessary.

9. No objection having been made or exception saved to remark of judge on trial, the appellate court will not consider it.

10. Instructions are not a part of the record unless embodied in a bill of exceptions and certified by the court, except in those jurisdictions where the rule has been modified by statute.

11. All papers regularly filed in a cause with the clerk of the district court include only such papers which by statute, or rule, or order of court are required or directed to be filed in a cause.

12. Instruction complained of, held not to be before the court.

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

W. C. HEACOCK and MILLER & CRAIG for Appellant.

Where an offense is created by statute, it must be charged in the indictment in the language of the statute, or language of equivalent import. Humphreys v. State, 17 Fla. 381; State v. Stiles, 5 La. Ann. 324; State v. Vill, 2 Brev. 252, S. Ca.; State v. Morse, 1 Green 503, Iowa; State v. Fleetwood, 16 Mo. 448; State v. Ellis, 4 Mo. 474; Vaughn v. State, 4 Mo. 530; 25 Tex. 420; 10 Ark. 607; 18 Ark. 195; 4 Met. 357, Mass.; 19 Arg. 405; 2 Gray 356, Mass.; 4 Port. 395, Ala.; 6 R. I. 76; State v. Melville, 11 R. I. 417; 22 Cyc. 335; U. S. v. Clark, Fed. Cas. 14,804; Knowles v. State, 3 Day 103, Conn.; Morse

v. State, 6 Conn. 9; Snowden v. State, 17 Fla. 386; State v. McKenzie, 42 Me. 392; People v. Allen, 5 Denio 76, N. Y.; Boyd v. Commonwealth, 77 Va. 52; Kearney v. State, 48 Md. 16; McGahagan v. State, 17 Fla. 665; State v. Nelson, 8 N. H. 163; State v. Howe, 1 Rich. Law 260; State v. Shields, 8 Blackf. 151; State v. Weil, 89 Ind. 286; Commonwealth v. Powell, 71 Ky. 8; State v. Bach, 25 Mo. App. 554; Burgess v. State, 44 Ala. 190; People v. Suvise, 56 Cal. 396; People v. Clements, 35 Pac. 1022; U. S. v. Patley, 2 Fed. 664; State v. Pearce, 8 Nev. 291; People v. Lawrence, 137 N. Y. 517; McName v. People, 31 Mich. 473; State v. Kendall, 28 Neb. 817; State v. Sammets, 144 Mo. 68.

Failure of proof. Laws 1901, chap. 84, sec. 6; 8 A. & E. Enc. 980; Words and Phrases, sec. 2978; Roberts v. State, 58 N. E. 203, Ind.; People v. Ah Ho, 1 Id. 691; C. L. 1897, sec. 2685, sub-sec. 81.

Court should be most careful in admonishing counsel in presence of the jury. House v. State, 57 S. W. 825; State v. Stowell, 60 Iowa 535; Poole v. State, 76 S. W. 565, Texas; C. L. 1897, secs. 1343, 1347.

Instructions given after jury had been out was error. C. L. 1897, sec. 2994; U. S. v. Densmore, 12 N. M. 99; Brickwood's Sackett on Instructions, secs. 88, 93; Territory v. Griego, 8 N. M. 133; People v. Harris, 43 N. W. 1060, Mich.; McBean v. State, 53 N. W. 497, Wis.

FRANK W. CLANCY, Attorney General for Appellee.

Indictment is not bad for duplicity. 1 Bish. Crim. Pro., secs. 436, 586; Bish. Stat. Crimes., secs. 244, 759.

There was no failure of proof. 4 Wigmore on Evidence, sec. 2580.

It is the duty of the court to protect witnesses against unwarrantable attacks by counsel under the guise of cross examination. C. L. 1897, secs. 1333, 1347, 3025, 3026; 2 Wigmore on Evidence, sec. 983; Turnpike Coal Co. v. Loomis, 32 N. Y. 132.

Instructions are no part of the record of a case unless they are embodied in a bill of exceptions and certified by

the court. Thompson v. Riggs, 5 Wall. 675; Clune v. U. S., 159 U. S. 593; C. L. 1897, secs. 2994, 2997, 3405; Allen v. U. S., 1164 U. S. 501; Commonwealth v. Tuey, 8 Cush. 1; U. S. v. Densmore, 12 N. M. 99.

STATEMENT OF THE CASE.

The defendant and appellant was convicted of having set up and kept a house of prostitution in the City of Albuquerque, within seven hundred feet of the halls of the Masonic and Knights of Columbus orders and of the Pastime theatre, and she was fined $100.00 and costs, from which conviction she appeals. The statute appellant was convicted of violating is as follows: "That every person who shall set up or keep a brothel, bawdy house, house of assignation or prostitution, in any town, city or village in the Territory of New Mexico, within seven hundred feet of any school house, college, seminary or other institution of learning, or any church, opera house, theatre, hall of any benevolent or fraternal society, or other place of public assemblage, shall, on conviction thereof, be adjudged guilty of a misdemeanor," x x x x Laws of 1901, ch. 84, sec. 1, p. 16.

OPINION OF THE COURT.

MECHEM, J.—The indictment in this case contains two counts. By the first count it is charged that the defendant "did set up and keep a house of prostitution and ill fame at, and within, the city of Albuquerque." Then follow averments descriptive in common law pleading of a house of prostitution, at considerable length, and concluding with the averments that said house of prostitution was so kept and set up within seven hundred feet "of the regular hall and place of meeting and location of Temple Lodge No. 6, Ancient Free and Accepted Masons, being then and there a duly organized, chartered and acting benevolent and fraternal society in said city, and did then and there wilfully, wrongfully and unlawfully set up and keep and maintain said house of prostitution and of ill fame, at all the times alleged within seven hundred (700) feet of the Pastime Theatre and the place of location there-

of, said place of location being then and there a theatre building for theatrical and dramatic exhibitions, in the said city of Albuquerque, and did, then and there, and at all times alleged in this indictment, set up and keep and maintain said house of prostitution and of ill fame in the city of Albuquerque aforesaid, within seven hundred (700) feet of the regular hall and place of meeting and the designated location of the Knights of Columbus, a duly organized, acting and chartered benevolent society, in the city of Albuquerque, New Mexico, 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."

The second count is similar in all respects to the first count, except that defendant was charged with having set up and kept "a brothel, bawdy house and house of assignation."

Counsel for appellants demurred to the indictment. Their demurrer was overruled, and now they renew some of their objections so taken. They argue that the allegation that defendant did set up and keep "a house of prostitution and ill fame" is not sufficient to make it certain that the act charged is the act forbidden by the statute, which prohibits the setting up and keeping of "a brothel, bawdy house, house of assignation or prostitution." Counsel for appellant cite in their brief, and on the argument called our particular attention to, the opinion in Armour Packing Co. v. U. S., 82 C. C. A., (8th Cir.) 135, 153 Fed. 1, 14 L. R. A. 400-413, wherein, Judge Sanborn states the rule that must govern this court in passing upon the sufficiency of an indictment based upon a statutory offense. The learned judge says: "It is considered that, where a crime is a statutory one, the in-
1 dictment must set forth with clearness and certainty every essential element of which it is composed. It must portray the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the

same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction." Ledbetter v. United States, 170 U. S. 606, 610, 42 L. ed. 1162, 1163, 18 Sup. Ct. Rep. 774, and cases cited. Our statute denounces the setting up and keeping of a brothel, or a bawdy house, or a house of assignation, or a house of prostitution, in a city, etc., within seven hundred feet of certain public places to be an offense, and a count in which it is charged that the defendant, on a certain day, at a certain
2 place, did, unlawfully, set up and keep a house of prostitution in a certain town, within seven hundred feet of a certain theatre, contrary to the form of the statute, etc., sufficiently conforms to the rule above stated, and that is the charge contained in the first count of this indictment.

It is said that the first count is bad because it charges two seperate and distinct offenses, to-wit: "The setting up and keeping of a place prohibited by law." The statute says: "That every person who shall set up or keep a brothel, etc.," upon conviction, shall be adjudged guilty of a misdemeanor. This court, in Eaton v. Territory, 13 N. M. 79, adopted as the law in this Territory the following statement by Bishop in his work on New Criminal Procedure, vol. 1, sec. 586, (4 ed.) : "If a statute makes criminal
3 the doing of this, or that or that, mentioning several things, disjunctively, there is but one offense, which may be committed in different ways; and, in most instances, all may be charged in a single count. But the conjunction 'and' must, ordinarily, in the indictment take the place of 'or' in the statute; else it will be ill as being uncertain." And the same author, also, says: "By proper and ordinary construction a person who in one transaction does all, violates the statute but once, and incurs only one penalty," and, "therefore an indictment under such a statute may allege in a single count, that the defendant did as many of the forbidden things as the pleader chooses, using the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by

proof of any one of them." 1 Bish. New Crim. Proc., secs. 436, 586; Bish. Stat. Crimes, secs. 244, 759.

Another objection urged is that both the first and second counts charged three separate and distinct offenses in naming three separate and distinct places alleged to be within seven hundred feet of the house of prostitution. The attorney general, in his brief, replying to this objection, well says: "If it could be maintained that three offenses
4 could be committed by keeping one prohibited house, within the forbidden distance of three separate theatres, then it would follow that this defendant might be convicted under three separate indictments for one single act of setting up and keeping her house. This is simply unthinkable, and does violence to the language of the act. There is but one offense charged, and that is, the setting up or keeping of her house, and one conviction would be a bar to any other prosecution, no matter how many theatres or society halls might be within seven hundred feet." We think the reply of the attorney general disposes of this objection.

As before stated, the pleader set forth at great length matters descriptive of the house of prostitution and ill fame, using what appear to be allegations of a common law indictment for setting up and keeping a bawdy house, and counsel for appellant object to what they say are the "many, unnecessary, superfluous, meaningless, immaterial and inconsistent averments contained in the indictment. While, in general, superfluous matter contained in an indictment may be rejected and does not vitiate it, this is not true when such matter is perplexing to a person of ordinary intelligence, or of such nature as to be prejudicial to the rights of the defendant, or so prolific as to prejudice the defendant in making his defense." We do not, however, agree with counsel for appellant that, the superfluous matter objected to could be perplexing to a person of ordinary intelligence or prejudicial to the rights of the defendant, or so prolific as to prejudice the defendant in making her defense. The objectionable matter is merely de-
5 scriptive of the house of prostitution, and, though superfluous, we cannot think in any wise perplexed

the defendant or her counsel or was prejudicial to her rights.

Section 6, Chapter 84, Laws of 1901, provides that: "Any saloon, or other place where drinks are served, frequented by women having the general reputation of being prostitutes, shall be considered a bawdy house, brothel, house of assignation or prostitution, within the meaning of this act." This section does not limit the evidence by which an establishment may be proved to be a house
6 of prostitution to a proof of only the facts mentioned and no others, but other evidence is admissible and sufficient to establish the fact that a place is a house of prostitution, and this disposes of appellant's contention that there was lack of evidence to prove that the house defendant was shown to have kept was a house of prostitution, because the proof did not conform to the above section.

We have examined the testimony which is before us in the record, and find it ample to establish the charge that defendant did set up and keep a house of prostitution.
7 It was conclusively shown by the evidence that the house of defendant was within seven hundred feet of the halls of the Masonic and Knights of Columbus societies, but, it is claimed by her counsel that, there is an entire failure of proof that they, or either of them, are benevolent or fraternal societies. Courts will take
8 judicial notice of "matters which are so notorious that the production of evidence would be unnecessary." 4 Wigmore on Evidence, sec. 2565.

In their brief counsel complain of certain remarks made by the judge during the trial, but no objection was made at the time. The court was not asked to withdraw the remarks: "No objection having been made or ex-
9 ception saved to the remark, according to the well established rule in this territory, we will not consider it." Per Mills, C. J., in Territory v. Taylor, 11 N. M. 588-603.

After the jury had been out some time, they were called into court by the judge, and, upon his motion, they were further instructed, and to the instruction so given the applicant excepted and assigns error. It is insisted by

the Territory that the instruction is not before us for review, for the reason that it was not incorporated in the bill of exceptions, but it is included in the transcript made and certified to by the clerk. There can be no doubt but that instructions are not a part of the record, unless embodied in a bill of exceptions and certified by the
10 court, except in those jurisdictions where the rule has been modified by statute. Thompson v. Riggs, 5 Wall. 675; Clune v. U. S., 159 U. S. 593; United States v. Sena, 15 N. M. 187. If the rule has been changed in this jurisdiction it is by Section 22, Chapter 57, Laws of 1907, which provides: "Section 22. Record Proper: All entries, orders and rulings of record in the clerk's office, and all papers regularly filed in a cause with the clerk of the district court shall be considered a part of the record proper." Is an instruction a paper "regularly filed in a cause with the clerk of the district court?" "'Regularly' means constituted, appointed, or conducted in a proper manner, or conformable to law or custom." In re Liquor Certificate No. 14,111, 51 N. Y. Supp. 281: "The word 'regularly' is defined as meaning in a regular manner; in a way or method accordant to rule or established mode." City of Bellville v. Citizens Horse Ry. Co., 32 N. E. 585; Words and Phrases 6040. We hold that, "all papers
11 regularly filed in a cause with the clerk of the district court" include only such papers which by statute, or rule, or order of court are required or directed to be filed in a cause.

Section 2997 of the Compiled Laws of 1897, directs that "all instructions demanded must be filed and shall become a part of the record," but there is no statutory direction for the filing of instructions given by the
12 court on its motion, nor is there a rule to that effect, nor were the instructions in this case ordered by the trial judge to be filed. We, therefore, hold that the instruction complained of is not before this court for review. Finding no error, the judgment of the lower court is affirmed.

Frank W. Parker, A. J.—I dissent from the holding that the instructions are not before us for review.

[No. 1365. March 4, 1911.]

TERRITORY OF NEW MEXICO, EX REL. GEORGE S. KLOCK, Appellant, v. EDWARD A. MANN, Appellee.

SYLLABUS (BY THE COURT).

1. The Governor of New Mexico is without power to remove a District Attorney, appointed for a fixed term, before the expiration of such term. Territory v. Ashenfelter, 4 N. M. 93, followed.

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

JULIUS STAAB and SUMMERS BURKHART for Relator and Appellant.

The congressional construction of the President's power of removal under the constitution is not applicable to the governor's powers in that regard under the Organic Act. Constitution, Article 3, sec. 2; Organic Act; Blake v. U. S., 103 U. S. 227; McAllister v. U. S., 141 U. S. 174; Parsons v. U. S., 167 U. S. 324; Territory v. Armijo, 14 N. M. 205; Territory v. Ashenfelter, 4 N. M. 93; Territory v. Stokes, 2 N. M. 69; Marbury v. Madison, 5 Cranch. 137; U. S. v. Guthrie, 17 How. 284; Latter Day Saints v. U. S., 136 U. S. 1; First National Bank v. Yankton, 101 U. S. 129; People v. Field, 3 Ill. 91; Shurtleff v. U. S., 189 U. S. 313; U. S. v. Perkins, 116 U. S. 483; R. S., sec. 1858; in re Attorney General, 2 N. M. 54.

The Governor of New Mexico has no power under the laws of the United States to appoint any public officer in the recess of the legislative council without its concurrence except to fill a vacancy in a territorial office occasioned by death or resignation. Organic Act, sec. 8; in re Attorney General, 2 N. M. 54; Broom Legal Maxims, 664; C. L. 1897, sec. 2556; Fiske v. Rogers, 1 Mont. 252; Territory v. Stokes et al, 2 N. M. 67; Mormon Church v. U. S., 138 U. S. 1; Bank of Yankton, 101 U. S. 133; Shurtleff v. U. S., 189 U. S. 311; Blake v. U. S.,

103 U. S. 227; Parsons v. U. S., 167 U. S. 374; Kendall v. U. S., 12 Peters 524; Ex parte Hennen, 13 Peters 230; Reagan v. U. S., 182 U. S. 419; U. S. v. Perkins, 116 U. S. 483; People v. Healy, 231 Ill. 483; Parsons v. Bred, 104 S. W. 767; Chirsity v. Kingfisher, 76 Pac. 138; Hallgreen v. Campbell, 82 Mich. 260; Price v. Seattle, 81 Pac. 847; People v. Lathrop, 142 N. Y. 313; People v. Robb, 126 N. Y. 180; People v. Hill, 7 Cal. 97; Territory v. Ashenfelter, 4 N. M. 93; Speed v. Common Council, 56 N. W. 570; Todd v. Dunlap, 99 Ky. 449; Throop on Public Officers, secs. 344, 364, 368; Mechem on Public Officers, secs. 454, 445; Keenan v. Perry, 24 Tex. 253; People v. Bissell, 49 Cal. 412; C. L. 1897, secs. 2556, 2580.

The provisions of the Organic Act vesting executive power in the governor and imposing upon him the duty to take care that the laws be faithfully executed do not empower him to employ other than means provided by law in the exercise of that power or the performance of that duty. 29 Cyc. 1368, 1370; 23 A. & E. Enc., 2 ed., 342, 343, 404; in re Attorney General, 2 N. M. 49; Territory v. Stokes, 2 N. M. 63; Territory v. Ashenfelter, 4 N. M. 93; Territory v. Armijo, 14 N. M. 205; Marbury v. Madison, 5 U. S. 137; McAllister v. U. S., 141 U. S. 174; Parsons v. U. S., 167 U. S. 324.

The governor has no right to remove a district attorney under the territorial statutes. Laws 1889, chaps. 56, 144; C. L. 1897, secs. 2852, 2583a, 2580; Laws 1889, chap. 56, sec. 11; Laws 1905, chap. 93; 29 Cyc. 1400; 23 A. & E. Enc. 348; Territory v. Ashenfelter, 4 N. M. 134; U. S. v. Guthrie, 17 Howard 102; Hubbell v. Armijo, 13 N. M. 486.

This is not a proceeding in the nature of a private remedy but one to vindicate a public right. Territory v. Ashenfelter, 4 N. M. 93; Territory v. Albright, 13 N. M. 64; People v. Healy, 231 Ill. 629.

NEILL B. FIELD and E. W. DOBSON for Respondent and Appellee.

This proceeding is in the nature of a private civil

remedy, not one for the vindication of a public right. Albright v. Sandoval, 13 N. M. 64; High Ex. Leg. Rem., secs. 700 et seq; Commonwealth v. Cluey, 56 Pa. St. 270.

The doctrine stare decisis can not be invoked by the appellant in this cause. In re Attorney General, 2 N. M. 49; Conklin v. Cunningham, 7 N. M. 458; Eldodt v. Territory, 10 N. M. 148; Armijo v. Baca, 3 N. M. 490; Conklin v. Cunningham, 7 N. M. 445; Hubbell v. Armijo, 13 N. M. 482; Territory v. Stokes, 2 N. M. 63; People v. Vail, 2 Went. 12; Asher v. Texas, 128 U. S. 131; Territory v. Ashenfelter, 4 N. M. 124; Albright v. Sandoval, 216 U. S. 343; Territory v. Armijo, 14 N. M. 212; Albright v. Territory, 200 U. S. 9; Sandoval v. Albright, 13 N. M. 293.

The power of the governor in his sphere of duty is the same as that of the president in his. Territory v. Armijo, 14 N. M. 214; Elliot's Debates, 355; Parsons v. U. S., 167 U. S. 328; 1 Lloyd's Cong. Rep. 350; McCulloch v. Maryland, 4 Wheat. 422; Constitution, art. 4, sec. 3; Am. Ins. Co. v. Canter, 1 Pet. 542; U. S. v. Gratiot, 14 Pet. 537; Gibson v. Chouteau, 13 Wall. 99; Canfield v. U. S., 167 U. S. 525; Dred Scott v. Sanford, 19 How. 432; U. S. v. Guthrie, 17 How. 284; McAllister v. U. S., 141 U. S. 174; U. S. v. Fisher, 109 U. S. 143; Shurtleff v. U. S., 189 U. S. 311.

The power to remove is a necessary incident of the power to appoint. Mormon Church v. U. S., 136 U. S. 44; National Bank v. County of Yankton, 101 U. S. 133; Dash v. Van Kleek, 7 John 508; Spencer v. Levering, 8 Minn. 461; Tilford v. Ramsey, 43 Mo. 419; Black v. U. S., 103 U. S. 227; U. S. v. Corson, 114 U. S. 619; Mimmack v. U. S., 97 U. S. 426; Reagan v. U. S., 182 U. S. 419; Dullan v. Willson, 53 Mich. 392; Page v. Hardin, 8 B. Mon. 648; Willard's App., 4 R. I. 597; Com. v. Slifer, 25 Pa. St. 23; State v. Hawkins, 44 Ohio St. 98; Biggs v. McBride, 17 Ore. 640; Ham v. Boston, 142 Mass. 90; Ex parte Hennen, 13 Pet. 230; Parsons v. U. S., 167 U. S. 324; Shurtleff v. U. S., 189 U. S. 313.

The Organic Act did not withhold from the governor

the power to fill vacancies during a recess of the legislature. 17 Stat. at Large 335; 9 Stat. 449, sec. 8; McAllister v. U. S., 141 U. S. 174; Shurtleff v. U. S., 189 U. S. 315; Reagan v. U. S., 182 U. S. 424; Albright v. Sandoval, 216 U. S. 342; Territory v. Albright, 12 N. M. 293; Postmaster General v. Early, 12 Wheat. 148.

The power of the governor to appoint respondent is conferred by express provision of law. C. L. 1897, sec. 2556; Laws 1909, chap. 22; Constitution, art. 2, sec. 2; 9 Fed. Stat. Ann. 50; R. S. U. S., sec. 1769; in re Yancy, 28 Fed. 445; in re Marshalship of Alabama, 20 Fed. 379; in re Farrow, 3 Fed. 112; ex parte Henning, 13 Pet. 230; Parsons v. U. S., 167 U. S. 324; Shurtleff v. U. S., 189 U. S. 314; 2 Watson Const. 975; Territory ex rel Fiske v. Rogers, 1 Mon. 252.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, C. J.—The relator, Klock, was appointed and confirmed as District Attorney for the Sixth District Attorney's District on February 18th, 1909, for the term of two years and until his successor be duly appointed and qualified. (L. 1905, C. 33, sec. 2). On November 18th, 1910, the Governor of the Territory made an order in which, after reciting that the relator's continuance in office "would be a detriment to the territory," it is provided that relator's commission as district attorney be vacated, and that he be removed from said office. An order made on the same day recites that a vacancy exists in the office of district attorney for the Sixth District, and appoints the respondent, Mann, to fill such vacancy. Upon the proper showing, leave was granted to file information in the nature of quo warranto, and, upon the incoming of an answer to the information, judgment was, upon the proper motion, entered *pro forma* dismissing the information, from which relator has appealed. The record involves but a single question, the right of the Governor to remove. With the latter established, his power to fill the vacancy is clear under C. L. 1897, sec. 2556, providing as follows: "In all cases wherein the governor is or may be authorized by law to make

appointments, by and with the advice and consent of the council, he is hereby authorized to make temporary appointments during the recess of the legislative assembly, to continue until the meeting of the same;" and under C. L. sec. 2580, which reads as follows: "If any vacancy should occur in the office of any district attorney, the same may be filled by an appointment of a qualified person, by the Governor, to expire on the commencement of the next legislative assembly thereafter." At the threshold we are met by the fact that this court has in Territory v. Ashenfelter, 4 N. M. 93, in terms held against the claim of executive power here asserted. In that case Wade was district attorney under an appointment from the Governor duly consented to by the legislative council; his commission being dated March 11, 1884, and running for two years and until the appointment and qualification of his successor. On October 28, 1885, and thus before the expiration of Wade's term, the Governor appointed Ashenfelter to the same office. It was held by this court that the Governor had no power to appoint the latter, and that Wade was therefore entitled to the office. Some attempt is made to distinguish that case from the present one in the fact that there no order removing Wade was made by the Governor preliminary to the appointment of Ashenfelter, whereas here Klock was in terms removed be-
1 fore the Governor appointed Mann. We fail, however, to find in this any differentiating ground. The appointment of a successor was in effect the removal of the incumbent. Matter of Hennen, 13 Pet. 230; Blake v. United States, 103 U. S. 237. It is clearly immaterial to the legal question involved whether the removal was accomplished by express terms or by implication. The Governor could appoint only in event of a vacancy and in Territory v. Ashenfelter the distinct question was his power to create that vacancy by removal. We have thus a decision of this court rendered over twenty years ago distinctly deciding that the Governor had not the power here claimed. Unless that decision is to be overruled, the relator Klock must prevail. Courts are and should be slow to brush aside as authority decisions which have stood

as the law for decades. This results, of course, not from any pride of opinion for that would be to relegate to a secondary place the right of the matter. Such hesitancy results rather from the right of the public to have principles of law and rules of property once declared adhered to in the interest of certainty. The rule of *stare decisis* has been defined to be a canon of public good and a law of self preservation. Ellison v. Georgia Railroad Co., 87 Ga. 692. True, it was said by a great jurist in the case last cited, that where a grave and palpable error widely affecting the administration of justice must either be solemnly sanctioned or repudiated, the maxim which applies is not *stare decisis,* but *Fiat justitia ruat coelum.* But in determining what is the *justitia,* great deference should be paid to what the court has in its previous mature expressions declared to be the law, and the inquiry should be whether such are clearly wrong. Unless such previous declarations be contrary either to controlling authority elsewhere or repugnant to right, they should stand. It is contended by respondent's counsel, however, in their very thorough brief and argument that the Ashenfelter case is contrary to both authority and reason. It is said that it has been doubted in a subsequent case decided in this court, Territory v. Armijo, 14 N. M. 202, and that the premises upon which it proceeds have been shown to be clearly untenable in a number of federal cases decided since the decision. The cases principally relied upon to the latter effect are McAllister v. United States, 141 U. S. 174; Parsons v. United States, 167 U. S. 324; and Shurtleff v. United States, 189 U. S. 311. It is urged that the cases just cited establish, *first.* that the President has an inherent power flowing from the functions of his office as defined in the constitution to remove all officers appointed by him with the consent of the Senate except such as under the constitution enjoy a life tenure; *second,* that the Governor under the organic act has precisely the same powers as to officers appointed by him by and with the advice and consent of the legislative council; and, *third,* that, therefore, the Governor has the power of removal as to such officers within the territory just as the

President has within the nation at large. This contention has received the careful consideration its importance merits. An examination of the cases cited, however, does not carry us to the result for which respondent contends. In the Armijo case we find nothing from this court doubting the correctness of the Ashenfelter case upon the point here involved. That was a case involving the power of the Governor to remove a county officer elected by the people, and in it this court carefully reserves the question of whether the Ashenfelter case has been disturbed by later federal authority. Turning to the latter class of decisions, the McAllister case involved simply the question of whether a territorial judge in Alaska was "a judge of a court of the United States" so as to be exempt from the power of suspension expressly conferred upon the President as to all civil officers (except such judges) by the tenure of office act. The Supreme Court held that a territorial judge was not within the exception of the statute, and was thus by express act of Congress subject to suspension by the President. This case shows that the executive power of removal was deemed attributable to statute rather than to the constitution. In the Parsons case the court was dealing with the removal by the President of a district attorney appointed under a statute similar in terms to that under which the present relator was named. The court reviewed the history of the exercise by the President of the power of removal and the legislation affecting it, including the Act of May 15, 1820, C. 102, 3 Stat. 582, which expressly made district attorneys removable at pleasure, the implied repeal of this latter act by the first tenure of office act, March 2, 1867, C. 154, 14 Stat. 430, and the repeal of the latter act in 1887. The court held "in the light of the history of the subject," that the term of office of four years provided for district attorneys was a limitation, and not a fixture of tenure. But the court in that case expressly declined to decide "the question of the constitutional power of the President in his discretion to remove officials during the term for which they were appointed." This is very clearly pointed out by this court, speaking through Associate

Justice Abbott in Territory v. Armijo, supra, where the scope of the Parsons case is discussed to an extent such as to render further comment upon it here unnecessary. We content ourselves with saying that a decision based as was that upon a course of national history and legislation surrounding and peculiar to the exercise of presidential functions furnishes no proper basis upon which to deduce the powers of a governor of a territory. In the case of Shurtleff v. United States, supra, it is true that there are expressions to the effect that the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate. But the court was there dealing with the case of the appointment of a general appraiser, in which there was no length of tenure designated at all. It was confronted by the alternative that, if the President had no power of removal, the incumbent (subject only to good behavior) held for life. A life tenure for such an officer, placing him upon the same basis as the judicial officers provided for in the constitution, was held by the court to be manifestly not intended by Congress, and it held that his tenure, in the absence of any provision fixing it, was thus necessarily at the pleasure of the President. To a case such as the present, where the tenure is definite, Shurtleff's case can furnish no analogy enabling us to define the powers of the Governor. There being in our judgment nothing in any of the succeeding opinions of this court or of the Supreme Court of the United States necessarily contrary to the holding on this point in the Ashenfelter case, it only remains to determine whether that decision is so palpably contrary to reason and right as to lead to its being set aside at this time. That case in holding that there was no power of removal rejects as untenable the contention that it followed from the duty of the Governor "to take care that the laws be faithfully executed." It considers and adjudges not well taken the attempt made there, as here, to deduce from the President's power a similar authority in the territorial executive. It reviews the authorities on the question raised there, as it is here,

that the right to remove exists as an incident to the power to appoint, and holds that it does not apply where as in this case the tenure of the office is fixed. No reasons have been presented, as there have been no authorities, which constrain us to the view that these conclusions were wrong. The case was well considered. It has stood as the law of this Territory for over twenty years. It was within the power of Congress or the legislature to confer upon the Governor the power of removal in a case such as this. Neither has seen fit to do so. On the contrary, the only legislative action on the subject has been to place such power in the courts rather than in the executive (C. L. sec. 2582, as amended by Chapter 93 of the Laws of 1905.) We are not insensible to the argument that the inability of the Governor to remove may result in unworthy men remaining in office pending the expiration of their terms. The history of this territory since the Ashenfelter case does not, we believe, show this to be practically as great a menace to the public safety as counsel have suggested. But, however that may be, it is, to quote from Territory v. Rodgers, 1 Mont. 252, 256, "not the province of the court to legislate for a contingency." That may well be left to the proper department of the government.

The judgment is reversed.

Mechem and Parker, J. J., dissent.

[No. 1347. March 4, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. DANIEL ARCHULETA, Appellant.

SYLLABUS (BY THE COURT).

1. A question which calls for an expression of the opinion of the witness as to the "guilt" of a person involved in an alleged breach of the peace was properly excluded.

2. A question whether, at a certain juncture, the de-

fendant "had his pistol drawn on" the man who was killed, does not call for an opinion of the witness which is open to objection.

3. The evidence reported would not have warranted an instruction to the jury that a verdict could properly be rendered finding the defendant guilty of manslaughter.

Appeal from the District Court for Socorro County, before MERRITT C. MECHEM, Associate Justice. Affirmed.

A. A. SEDILLO and J. A. LOWE for Appellant.

Opinion evidence. Robinson v. State, 57 S. E. Rep. 315; Hill v. State, 34 So. Rep. 406; Elliott, secs. 833-853; Greenleaf, sec. 434; 8 Enc. P. & P. 80, 85; Stephens Dig. 588.

Leading question. Elliott, secs. 833-853; Stephens Dig. 588; 8 Enc. P. & P. 80-85; Wigmore, sec. 775; Greenleaf, sec. 434.

Res Gestae. Thompson v. State, 113 S. W. 536; Hull v. State, 100 S. W. 403; Smith v. State, 90 S. W. 638; Fonseca v. State, 85 S. W. 1069; Lyles v. State, 86 S. W. 763; People v. Linares, 75 Pac. 308; Robinson v. State 44 S. E. 985; Thomas v. State, 72 S. W. 178; C. L. 1897, sec. 2992.

Instructions. Territory v. Young, 2 N. M. 93; Territory v. Nichols, 2 Pac. Rep. 78; Territory v. Salazar, 5 Pac. 462; Territory v. Faulkner, 30 Pac. 909; Territory v. Friday, 42 Pac. 62; Territory v. Vialpando, 42 Pac. 64; Dadd v. Moore, 91 Ind. 522; Lehman v. Hawks, 23 N. E. 670; 6 Current Law 1948; 12 Current Law 1542.

FRANK W. CLANCY, Attorney General, for Appellee.

Errors urged not open to review in this court. Thompson v. Riggs, 5 Wall. 675; Clune v. U. S., 159 U. S. 593; Hack v. State, 124 N. W. 495.

Instructions as to manslaughter would have been erroneous. Territory v. Hendricks, 13 N. M. 311; Territory v. Clark, 99 Pac. 697; Territory v. Fewel, 5 N. M. 43.

STATEMENT OF THE CASE.

The defendant, here the appellant, was tried for the murder of Ysaias Carmody at the March Term, 1910, of the Seventh District Court for Socorro County, and found guilty of murder in the second degree. A motion for a new trial was made and overruled and an appeal taken to this court. It appeared from the evidence that the appellant and Carmody had a quarrel at a house of ill-fame, in Magdalena, at which a shot was fired by Carmody from a pistol which he somehow got from Archuleta, but there was a conflict of evidence as to whether it was fired accidentally, or purposely. Carmody went from there to a saloon, upwards of half a mile away, of which he was the proprietor. The appellant soon after went there and entered the saloon where Carmody was, with a pistol in his hand. A by-stander took him outside and got the pistol from him. He said he would get another pistol, come back and kill Carmody and the rest, or words to that effect. Thirty or forty minutes later he did return with a pistol, as Carmody and others were coming out of the saloon, called on Carmody to give him his pistol, to which Carmody replied: "Here it is," or "Here it is, you cuckold," taking it from his pocket, and the appellant then shot Carmody, inflicting a mortal wound. The pistol which Carmody held was discharged, but whether purposely, or accidentally when Carmody fell, was not made certain by the evidence.

OPINION OF THE COURT.

ABBOTT, J.—The first alleged error discussed in the briefs is that a witness for the Territory, who had testified as to what occurred at the house of ill-fame between the appellant and Carmody, should have been allowed, against objection, to answer the question put to him on re-cross examination: "Had there not been a breach of the peace committed prior to that time down at the house of the woman of ill-fame, in which a deadly weapon had been discharged, and from which breach of the peace the guilty man had gone away armed and was still armed?" The ground of objection was not specified

by the attorney for the Territory, but it is clear that
1 the question called for the opinion of the witness as to the guilt of the person referred to in the question, and was objectionable on that ground, if no other.

The second assignment of error is that a witness for the Territory was permitted, against objection, to answer the question whether or not the appellant "had a pistol drawn on Carmody" at the moment when he told the latter to give him his gun. No ground of objection was stated at the time, and for that reason we cannot, as this court has many times held, properly review the action of the court in overruling it, but even if we could, the ground now assigned, that it called for an expression
2 of opinion by the witness is untenable. The meaning of the question fully expressed was: Did he have his pistol in his hand pointed at Carmody? And the answer to that involved no expression of opinion beyond what is ordinarily found in statements as to what a witness has seen. If it had then been objected that the question was leading, the court might have required it to be put in different form, but it does not appear that any such objection was made.

The other assignment of error relating to the admission and exclusion of testimony, are not based on anything in the record which affords ground for the argument in relation to them in the brief for the appellant.

An assignment of error of a more serious nature is that which concerns the omission of the trial court to instruct the jury on manslaughter. It is not shown by the record we have that any objection was made at the time to this omission, or any request made to instruct on that point. But, even if that had been done, the evidence is not such as to warrant an instruction that the jury could
3 properly find the defendant guilty of manslaughter. The evidence made it clear that he did not kill Carmody "upon a sudden quarrel, or in the heat of passion," or "in the commission of an unlawful act not amounting to a felony," or "of a lawful act which might produce death in an unlawful manner, or without due caution and cir-

cumspection," so as to make the act "manslaughter," as defined in Chapter 36, Laws of 1907, People v. Turley, 50 Cal. 469; Allen v. United States, 164 U. S. 492, 496. If the court had instructed that the defendant could be convicted of manslaughter on the evidence and the jury had found him guilty of that crime, there would probably been a reversal by this court. Territory v. Hendricks, 13 N. M. 311; Territory v. Clark, 99 Pac. 697; Territory v. Fewel, 5 N. M. 43-4. The judgment of the District Court is affirmed.

[No. 1218. March 4, 1911.]

HENRY LOCKHART, Appellee, v. THE WASHINGTON GOLD AND SILVER MINING COMPANY, et al., Appellants.

SYLLABUS.

1. Evidence to show the existence and consummation of a fraudulent conspiracy, held to be competent.

2. Any fact occuring during any part of the ninety day period for perfecting the location which tended to establish any feature of the conspiracy was competent.

3. Other acts besides posting a notice are required to obtain exclusive right to possession of a mining claim. The claim must be marked on the ground so that its boundaries can be traced, and within ninety days a shaft must be sunk, and the notice recorded.

4. The object of defendants was to acquire the right to possession by location and it can not be said that the conspiracy was complete until all of the acts necessary to a complete right to exclusive possession had been performed.

5. Certain acts and declarations of alleged conspirators held to be harmless.

6. Communications to attorney by conspirators who gave advice in aid and furtherance of the conspiracy, are not privileged.

7. Principal was bound by agent's knowledge of fraud.

8. Held that portion of original locators and owners of mining claim who were represented in the location of the claim in dispute, by the other portion of such locators, were bound by the knowledge of the latter locators.

9. While failure to perform necessary acts of location results in forfeiture as against the subsequent qualified locator, it falls far short, under the facts in this case, of establishing abandonment.

10. Contract providing that any fraud on part of grubstake prospector should result in forfeiture of his one-third interest to the plaintiff was enforcible.

11. Findings based upon substantial evidence will not be disturbed by this court.

12. Held that previous mining claim had no legal existence where locators merely posted notice and no other act of location is shown and where such notice is removed with knowledge of locators.

13. Departure of finding from allegations of complaint held to be such departure merely in form but not in substance.

14. Held that conspiracy did extend to the delivery of possession to the conspirators and that irrespective of other allegations in complaint, plaintiff is entitled to the relief sought.

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

W. B. CHILDERS and E. W. DOBSON for Appellant.

Statements made before title accrued in the declarant will not be receivable. Lockhart v. Leeds, 10 N. M. 568, 195 U. S. 427; Phillips v. Laughlin, 58 Atl. Rep. 65, Me.; Fall v. Fall, 60 Atl. Rep. 718; 2 Wharton on Evidence, secs. 1156-1170, 1190, 1206; 2 Wigmore on Evidence, secs. 1081, 1082; 1 Greenleaf on Evidence, sec. 180; Taylor v.

Mather, 9 Gray 185; Noyes v. Morrill, 108 Mass. 399; Stockwell v. Blarney, 129 Mass. 396; Hutchins v. Hutchins, 98 N. Y. 64; Dan v. Brown, 4 Cowen 483; 63 Pa. St. 63; Cuyler v. McCarthy, 40 N. Y. 228; Shailer v. Bumstead, 99 Mass. 128; Lincoln v. Claflin, 7 Wall. 138; Belk v. Meagher, 104 U. S. 283; Lockhart v. Johnson, 181 U. S. 526; Lockhart v. Wills, 9 N. M. 355 .

The existence of a constructive trust as of a resulting one must be proved by clear, unequivocal evidence. 3 Pomeroy's Eq. Jur., sec. 1049, note 4 d.; Lalone v. U. S., 164 U. S. 255; Babitt v. Dotten, 14 Fed. 19; Rice v. Ridgley, 7 Idaho 115; Conard v. Nicoll, 4 Peters 296; Thompson v. Sprague, 14 Pac. 182; North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522; U. S. v. Arredondo, 6 Peters 716; Clark v. White, 12 Peters 196; 3 Roses Notes to Sup. Ct. Rep. 722; 9 Enc. P. & P.686; Lockhart v. Leeds, 195 U. S. 434; Story on Equity Pleadings, sec. 257; Pelkam v. Eddinger, 15 Fed. Rep. 262; Dillon v. Bernard, 21 Wall. 430; U. S. v. Ames, 99 U. S. 35; Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587; Ford v. Peering, 1 Ves. Jun. 72; Fogg v. Blair, 139 U. S. 127; Van Well v. Winston, 115 U. S. 237; Brooks v. Ohara, 8 Fed. 532; Phelps v. Elliott, 35 Fed. 453; LaFayette Co. v. Neely, 21 Fed. 744; Lockhart v. Leeds, 10 N. M. 598; 1 Daniels Chan. Pl. and Pr. 327; Montesquieu v. Sandys, 18 Ves. 302; Jackson v. Ashton, 11 Peters 229; Crockett v. Lee, 7 Wheat. 525; Jackson's Assignees v. Cutright, 5 Munf. 314; Wren v. Moncure, 95 Va. 375; Tripp v. Vincent, 3 Barbours Ch. 614; Austin v. Ramsey, 3 Tenn. Ch. 121; Slaright v. Payne, 2 Tenn. Ch. 176.

A mere cotenancy does not establish a partnership so as to establish a relation of trust and confidence. Bissell v. Foss, 114 U. S. 252; Tuck v. Downing, 76 Ill. 71; Cedar Can. Min. Co. v. Yarwood, 91 Am. St. Rep. 841; Bucher v. Mulverhill, 1 Mont. 305; Murley v. Ennis, 2 Colo. 300; Chadburn v. Davis, 9 Colo. 581; Pomeroy's Const., sec. 290; Hyer v. Richmond Traction Co., 168 U. S. 484.

A grub-stake contract does not constitute a partnership between the parties. Prince v. Lamb, 128 Cal. 120;

Cisna v. Mallory, 84 Fed. 851; Cooley on Partn., sec. 135; Craw v. Wilson, 22 Nev. 385; 2 Lindley on Mines, sec. 858; Johnstone v. Robinson, 16 Fed. 903.

Inference of abandonment. Creamery Pck. Mfg. Co. v. Sharples Co., 71 S. W. 1068; 2 Parsons on Contracts, 9 ed. 832; Davis v. Butler, 6 Cal. 510; St. John v. Kid, 26 Cal. 272; McKay v. McDougal, 87 Am. St. Rep. 395; Strang v. Ryan, 48 Cal. 33; Bissell v. Foss, 144 U. S. 252; Cedar Min. Co. v. Yarwood, 91 Am. St. Rep. 841; Saunders v. Mackay, 6 Pac. 361; Doherty v. Morris, 11 Colo. 12; Hunt v. Patchin, 36 Fed. 816; Davis v. Butler, 6 Cal. 510; Derry v. Ross, 5 Colo., 295; Ferris v. Coover, 10 Cal. 631; Mallett v. Uncle Sam Co., 1 Nev. 188; Dupuy v. Williams, 5 Mor. Min. Rep. 251; Rev. Stat., sec. 2324; 2 Lindley 1153, sec. 5; Belk v. Meagher, 104 U. S. 282; McGinnis v. Egbert, 8 Colo. 41; North Noonday Min. Co. v. Orient Min. Co., 6 Saw. 313; Jupiter M. Co. v. Bodie M. Co., 7 Saw. 114; Faxon v. Barnard, 2 McCrary 44; Zollars v. Evans, 2 McCrary 39; 6 Saw. 309; English v. Johnson, 17 Cal. 107; Table Mountain Co. v. Stranahan, 20 Cal. 209; 31 Cal. 390; Hess v. Winder, 30 Cal. 355; Rogers v. Cooney, 7 Nev. 219; Cambell v. Rankin, 99 U. S. 262; Trenouth v. San Francisco, 100 U. S. 251; Atherton v. Flower, 96 U. S. 513; Jupiter Min. Co. v. Bodie Co., 11 Fed. 66; Lockhart v. Johnson, 181 U. S. 527; 1 Lindley on Mines, secs. 217, 337, 345, 379; 2 Lindley on Mines, secs. 405, 651; Warnack v. DeWitt, 11 Utah, 324; Thompson v. Spray, 14 Pac. 181.

Contract in Equity not enforceable in equity. Cisna v. Mallory, 19 Mor. Min. Rep. 227; Prince v. Lamb, 128 Cal. 120; Rice v. Rigley, 7 Idaho 15; 4 Pom. Eq. Jur., 3 ed., sec. 1405; 6 Pomeroy's Eq. Jur., secs. 763, 764, 767, 774; Marbel Co. v. Ripley, 10 Wall. 359; Rusk v. Conard, 47 Mich. 449; 3 Pom. Eq. Jur., sec. 1293; 1 Pom. Eq. Jur., sec. 370.

Invalid because of prior location. 1 Jones on Ev., sec. 217; Burton v. Driggs, 20 Wall. 134; 1 Lindley on Mines, sec. 336; Book et al v. Justice Mining Co., 58 Fed. 106; U. S. Stat., sec. 2320; C. L. 1897, sec. 2298; Jupiter Mg. Co. v. Bodie C. Mg. Co., 11 Fed. 675; Eureka

Cons. Mg. Co. v. Richmond Mg. Co., 4 Sawy. 302; U. S. Mg. Co. v. Cheesman, 116 U. S. 536; Hyman v. Wheeler, 29 Fed. 347; Burke v. McDonald, 29 Pac. 98; Belk v. Meagher, 104 U. S. 284; Erhardt v. Boaro, 113 U. S. 527; Crossman v. Pendery, 8 Fed. 693.

When one party introduces and reads from such a record that which suits his purpose, the other party may read for his own benefit all that relates to that subject, or require the party introducing the record to do so. Tappan v. Beardsley, 10 Wall. 435.

Admissions in pleadings. 1 Jones on Evidence, sec. 276; Lockhart v. Wills, 9 N. M. 360; Belk v. Meagher, 104 U. S. 284.

Affirmative relief. 1 Jones on Ev., sec. 276; Belk v. Meagher, 104 U. S. 284; Wills v. Blain, 5 N. M. 238; 2 Lindley 1153.

The findings must be within the issues made by the pleadings. 8 Enc. P. & P. 944; Male v. Schaut, 69 Pac. 137; Comanche v. School Dist., 65 Pac. 301; Newby v. Myers, 24 Pac. 971; Johnson v. Hosford, 110 Ind. 572.

Privileged communications. Chirac v. Reineker, 11 Wheat. 294; McClellan v. Longfellow, 32 Mo. 494; Bacon v. Frisbie, 80 N. Y. 394; Aiken v. Longfellow, 27 Mo. 252; Tate v. Tate, 75 Va. 522; Betzhoover v. Blackstock, 3 Watts 20; Foster v. Hall, 12 Pick. 89.

Findings do not support the decree. Odgen v. Moore, 95 Mich. 290; Story on Eq. Pl., sec. 257; Pelkham v. Eddinger, 15 Fed. 262; 9 Enc. P. & P. 686; 1 Daniels Ch. Prac., sec. 327; Montesquieu v. Sandys, 18 Ves. 302; Crockett v. Lee, 7 Wheat. 525; Wren v. Moncure, 95 Va. 375; The Distilled Spirits, 11 Wall. 356; Lincoln v. Claflin, 7 Wall. 138; Cuyler v. McCartney, 40 N. Y. 228; Bissell v. Foss, 114 U. S. 252; Tuck v. Downing, 76 Ill. 71; Freeman on Cotenancy and Partition, sec. 172; Mahoney v. Van Winkle, 21 Cal. 582; Bank of Overton, v. Thompson, 118 Fed. 801; Bank v. Blake, C. C., 60 Fed. 78; Thompson Houston Electric Co. v. Capitol Electric Co., 132 C. C. A. 643; Bank v. Foote, 12 Utah, 157; Suit v. Woodhall, 113 Mass. 391; Startwell v. North, 144 Mass. 188; National Security Bank v. Cushman, 121

Mass. 490; Kennedy v. Green, 3 Myl. & K. 699; Espin v. Pemberton, 3 Deg. & J. 547; Rolland v. Hart, L. R. 6, Ch. 678; Re European Bank, L. R. 5, Ch. 358; Cave v. Cave, L. R. 15 Ch. Div. 639; Kittlewell v. Watson, L. R. 21 Ch. Div. 685; Inneraity v. Merchants Nat. Bank, 139 Mass. 332; Dillaway v. Butler, 135 Mass. 479; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268; Howe v. Newmarch, 12 Allen 49; Allen v. South Boston R. Co., 150 Mass. 206; Henry v. Allen, 151 N. Y. 1; Weisser v. Dennison, 10 N. Y. 68; Doe v. Ingersoll, 11 Smedes & M. 249; Russell v. Sweezy, 22 Mich. 235; Smith v. Dunston, 42 Iowa 48; Goodwin v. Dean, 50 Conn. 517; Pringle v. Dunn, 37 Wis. 449; Wittenbrock v. Parker, Cal., 24 L. R. A. 197; Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 337; Wilson v. Wall, 6 Wall. 83; Stanley v. Schwalby, 163 U. S. 276; 1 Lindley on Mines, sec. 233; Belk v. Meagher, 104 U. S. 283; Jones v. Van Doren, 130 U. S. 691; Halleck v. Collins, 10 How. 174; Plumb v. Fluitt, 2 Anst. 432; Ely v. Wilcox, 20 Wis. 523; Patten v. Moore, 32 N. H. 382; Ballington v. Welsh, 5 Bin. 129; Butler v. Stevens 26 Me. 484; Wright v. Wood, 23 Pa. St. 120; Boyce v. Williams, 48 Ill. 371; Meehan v. Williams, 48 Pa. St. 238; Holmes v. Stout, 3 Green, Ch. 492; McMechan v. Griffing, 3 Pick. 149; Hardwick v. Thompson, 9 Ala. 409; Townsend v. Little, 109 U. S. 504; Cambridge Val. Bank v. Delano, 48 N. Y. 326; Simmons Creek Coal Co. v. Doran, 142 U. S. 439; Lockhart v. Leeds, 195 U. S. 427.

H. B. Fergusson for Appellee.

If there is any evidence at all supporting the findings of fact by the court below in a case tried without a jury, such finding must stand. Badaracco v. Badaracco, 10 N. M. 761; Ortiz v. Bank, 12 N. M. 519.

Law of this case settled in U. S. Supreme Court. Lockhart v. Leeds, 195 U. S. 76.

This knowledge and means of knowledge is just as effective to bind one who came into the combination or conspiracy during its continuance and helped to accomp-

lish its purpose and shared in its proceeds as those who originally formed it. Lincoln v. Claflin, 7 Wall. 132; Commonwealth v. Rogers, 181 Mass; Lockhart v. Wills, 9 N. M. 263; 344; 181 U. S. 516.

A conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. King v. Silversmith, etc., Min. Co., 152 U. S. 222; 1 Lindley on Mines, secs. 44, 336; Rev. Stat. U. S., sec. 44; Erhardt v. Boaro, 113 U. S. 527.

Priority of discovery gives priority of right against naked location and possession without discovery. 1 Lindley on Mines, secs. 335, 339, 351, 353, 355, 379, 404; Crossman v. Pendery, 8 Fed. 693; Rev. Stat. U. S., sec. 2324; Wills v. Blain, 5 N. M. 238; 2 Lindley on Mines, sec. 688.

Work done on claims after statutory 90 days shall be deemed effective if done before the rights of others intervene. 1 Lindley on Mines, secs. 330, 390; Erhardt v. Boaro, 113 U. S. 527.

Sufficiency of evidence and findings to prove conspiracy. Redding v. Wright, 51 N. W. 105; 8 Cyc. 676, note 57; Livermore v. Horshchill, 3 Pick. 33; Hardy v. Trick, 65 N. Y. 89; Brison v. Brison, 27 Pac. 186, Cal.; Roberts v. Ball, 38 Pac. 949.

Part of pleadings containing admissions, may be put in evidence; then opposite party may put in evidence other parts of same pleading, provided such parts qualify parts first put in evidence. 1 Wharton's Evidence, sec. 832; 10 Wall. 435; 17 Cyc. 319, notes 56-58; Rouse v. Whited, 82 Am. Dec. 337; Granite Gold Mining Co. v. Maginnis, 50 Pac. 269; 16 Cyc. 968; 1 Jones on Evidence, secs. 274-276.

Notice to, and knowledge of, one partner, is notice to, and knowledge of, the other partners. 17 A. & E. E., 1 ed., 1080.

Constructive knowledge of the principal, which is based on his agent's knowledge had while acting in the transaction for the principal, is a conclusive presumption of law, 2 Pomeroy's Eq. Jur., secs. 669, 672; 3 Wigmore on Evidence. sec. 1763; 2 Wigmore on Evidence, secs. 1078.

1079, 1793; 1 Jones on Evidence, secs. 255, 256; Lincoln v. Claflin, 7 Wall. 132; The Distilled Spirits, 11 Wall. 356; McIntyre v. Pryor, 173 U. S. 52; Com. v. Rogers, 181 Mass. 184; Bispham's Principles of Equity, sec. 268; 2 Pomeroy's Eq. Jur., secs. 597, 606, 610, 614, 615, 665, 666, note 1, 667, 676; Jones v. Smith, 1 Hare 43; LeNeve v. LeNeve, 2 White & T. Lead Cas. 127; Brush v. Ware, 15 Pet. 93; Simmons Creek Coal Co. v. Doran, 141 U. S. 239; Wade on Notice, sec. 689; 1 Pom. Eq. Jur., secs. 431, 451; New Albany v. Burke, 11 Wall. 107; Fogg v. Tennessee Nat. Bank, 9 Heisk. 479; Holden v. N. Y. & E. Bk., 72 N. Y. 286; Ames v. N. Y., etc. Ins. Co., 14 N. Y. 253; Hart v. F. & M. Bk., 33 Vt. 252; Abel v. Howe, 43 Vt. 403; Dunbar v. Wilson, 32 Ill. 517; Hovey v. Blanchard, 13 N. H. 375; Porter v. Bank of Rutland, 19 Vt. 410; G. W. Ry. Co. v. Wheeler, 40 Mich. 419; May v. Boral, 12 Cal. 91; Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213; Nudd v. Burrows, 91 N. S. 426; C. L. 1884, sec. 1571; 1 Lindley on Mines, secs. 330, 380, 390, 404; Erhardt v. Boaro, 113 U. S. 527; 2 Lindley on Mines, secs. 642-645; 1 Pom. Eq. Jur., sec. 401; Lockhart v. Johnson, 181 U. S. 655; Lockhart v. Johnson, 54 Pac. 336; Wills v. Blain, 5 N. M. 238; Lockhart v. Leeds, 195 U. S. 76; Atlantic Cotton Mills v. Indian Orchard Mills, 17 N. E. 496, Mass.

Sufficient evidence of conspiracy. Commonwealth v. Rogers, 181 Mass. 184.

OPINION OF THE COURT.

PARKER, J.—This is a suit in equity brought by plaintiffs against defendants to charge them as constructive trustees *ex maleficio* and as such to hold the title to the Washington mining claim for the use and benefit of plaintiff. A decree in favor of plaintiff was rendered by the court below and defendants appeal. This same case was before this court in Lockhart v. Leeds, 10 N. M. 568, and the complaint was held insufficient to authorize any relief to the plaintiff. Upon appeal to the Supreme Court of the United States it was held by that court that the complaint was sufficient to authorize relief to plain-

tiff and that is now the law of the case. Lockhart v. Leeds, 195 U. S. 427. The cause was remanded to the district court of Bernalillo County where answer and replication were filed and trial had, resulting in the decree above mentioned. The complaint is voluminous, and it would seem to be necessary to a proper understanding of the case to set out portions of the same in full. A copy of the same, together with a copy of the findings and decree are set out in the margin.

Defendants had filed twenty-six assignments of error which may be disposed of in the manner in which they are treated in the briefs. It is urged that there is no legal evidence before the court of the alleged fraudulent conspiracy. That there is evidence before the court is not denied, but its competency is challenged on two grounds. The proof consists of the acts and declarations of the alleged conspirators. It is objected, first, that the same are inadmissible for the reason that they are in disparagement of defendants record title, made by
1 their predecessors in title. But the argument is clearly faulty and the principle invoked can have no possible application to the facts in this case. This evidence was intended to show the existence and consummation of a fraudulent conspiracy to deprive plaintiff of his rights in the mining ground in question. The consequences flow from the conspiracy, and the fact, if true, that the declarations amounted to a disparagement of title is simply incidental and can, from no point of view, render the proof inadmissible. It is objected, second, that the declarations shown were inadmissible for the reason that they were made before the alleged combination was formed or after the same was consummated. Concerning the principle relied on, there can certainly be no question. But when did this alleged conspiracy commence and when did it end? It is to be remembered that the conspiracy relied on by plaintiff is a conspiracy to defraud him of his rights in the mining ground in question and consisted in inducing the prospector to refrain from doing those acts of location required by law to perfect the location of the Sampson claim. Appellants

argue that the alleged conspiracy consisted in an agreement to relocate the ground after October 10, 1893, the date of the expiration of the ninety day period within which the Sampson location might be perfected. But this is clearly too narrow a view of the facts. It is alleged in the complaint, and the court found, that a material element of the conspiracy consisted in the agreement of the prospector, Pilkey, to refrain from doing the necessary acts of location of the Sampson claim, and which, otherwise, he would have performed, and in the delivery by him of the possession of the ground to the conspirators. It thus
2 appears that any fact occurring during any part of the ninety day period for perfecting the Sampson location which tended to establish any feature of the conspiracy, was competent. This disposes of all of the objections to the declarations and acts of the conspirators prior to the actual location of the Washington claim on October 23, 1893. Certain declarations and acts subsequent to October 23, 1893, were shown in the evidence. The court below found the conspiracy to be complete upon the above date. In a sense this is true. But other acts beside posting a notice are required. The
3 claim must be marked on the ground so that its boundaries can be traced before exclusive right to possession can be obtained, and within ninety days a shaft must be sunk and the notice recorded. The object of defendants was to acquire the right to possession by location, and we do not see how it can be said that the conspiracy was complete until all of the acts neces-
4 sary to a complete right to exclusive possession had been performed. If this is correct, the objections to the evidence of acts and declarations subsequent to October 23, and prior to December 30, 1893, the date of record of the location of the Washington claim, are of no avail. Certain other acts and declarations of the alleged
5 conspirators are shown subsequent to December 30, 1893, but they do not relate specifically to the subject matter of the conspiracy and are harmless.

It is urged, third, that the testimony of an attorney of one of the alleged conspirators was inadmissible be-

cause the communications to him were privileged. It is overlooked, however, by counsel for appellants that the communications to the attorney were by one of the conspirators and that his advice was obtained in aid,
6 and in furtherance, of the conspiracy. Under such circumstances no communication of client to attorney is privileged. 4 Wigmore on Ev., sec. 2298.

What has been said as to the admissibility of the evidence of acts and declarations of the alleged conspirators refers to the situation of only a portion of the original locators and owners of the Washington claim. As to them the court found specifically that they had knowledge of the rights of plaintiff and entered into the conspiracy relied upon to defraud him. Another portion of the original locators and owners are in a different position. As to them, the court found that the evidence failed to establish that they had actual knowledge of plaintiff's rights prior to October 23, 1893, the date of the location notice of the Washington claim, but that they had constructive notice of the same and were consequently bound thereby. The constructive notice to which they are held by the court arises out of the facts found that during the pendency of the conspiracy, and prior to October 10, 1893, the date of the ending of the ninety day period within which the Sampson location must have been perfected, they allied themselves with the other conspirators, furnished them money and supplies, and appointed them their agents to locate the ground in question for the mutual benefit of all. The court held them, consequently, chargeable with notice of the conspiracy, its scope and object, and all that the co-conspirators knew concerning the same. This proposition is vigorously combatted by counsel for defendants.

It is argued by counsel for plaintiff, in support of the decree, that there was constructive notice by reason of (1) the established agency to locate the ground and (2) the knowledge of facts sufficient to put upon inquiry. The agency comprehended the location of the ground in question and necessarily involved an examination of the same for mineral, evidences of prior location by others, if any, and investigation as to all the facts involved in a valid

location. At the time the agents were possessed of full knowledge of the rights of plaintiff. The situation, in principle, it seems to us, was the same as if the agents had been employed to purchase the ground from the plaintiff for the joint benefit of both principals and agents, and, in effecting the purchase, the agents had practiced a fraud on plaintiff of which he was entitled to complain. This would seem to bring the case squarely within the rule laid down in case of The Distilled Spirits, 11 Wall.
7 356, the leading case on the subject, in which it was held that the principal was bound by the agents knowledge of the fraudulent abstraction of the spirits without the payment of the tax. Counsel for appellant argue that the case at bar falls within one of the exceptions to the rule that notice to the agent is notice to the principal, viz: that where the agent is attempting or practicing some fraud on his principal, or is occupying some adverse position to him, the presumption that he informed his principal will not be indulged. 2 Pom. Eq. Jur., sec. 675; 31 Cyc. 1595; Electric Co. v. Electric Co.. 65 Fed. 341; Am. Surety Co. v. Pauley, 170 U. S. 133; Bank v. Thompson, 118 Fed. 798. It must be apparent that no such conclusion can be drawn from the facts. The agents were practicing no fraud on the principals and were taking no adverse position to them. The fraud was practiced on the plaintiff and the agents sought to give the principals the benefit of the same. We therefore, hold that the portion of the original locators and owners who were
8 represented in the location of the Washington claim by the other portion of such locators, were bound by the knowledge of the latter locators.

It is urged by appellants that plaintiff had abandoned the Sampson location and hence cannot maintain this suit. The abandonment, it is claimed, is established by the evidence that plaintiff knew that the required acts of location had not been performed before the expiration of the ninety day period, and still failed to perform the same. While such failure resulted in a forfeiture as against
9 the subsequent qualified locator, it falls far short, under the facts in this case, of establishing abandon-

ment. A sufficient answer to the argument of appellants on this point is found in the sixth finding of the court and which finds support in the evidence. Plaintiff produced evidence that Pilkey was claiming that he was progressing with the work on the claim in a satisfactory manner and that plaintiff was misled as to the facts by Pilkey, and that possession would have been resumed, even after forfeiture, but for the adverse possession by the locators of the Washington claim. This proof the court evidently believed and so found.

Appellants argue against the decree on the ground that the grub-stake contract under which the Sampson was located was incapable of specific enforcement. The contract provided that any fraud on the part of Pilkey should result in the forfeiture of his one-third interest to plaintiff. The court found that his interest in the Sampson and Washington claims was so forfeited. It
10 is argued that this amounts to a specific performance of the contract, and we assume that it does. Such contracts are enforcible. Cisna v. Mallory, 84 Fed. 851. It is argued that this contract is not enforcible because of lack of mutuality and insufficiency of consideration. We confess we are unable to follow the argument made. The contract was certain in terms and the subject matter thereof was identified by the location. The consideration was certain and evidently satisfactory to Pilkey when he made the contract. We see no reason why this contract cannot be enforced in equity. The objection that its enforcement amounts to the enforcement of a forfeiture is not urged by counsel.

Appellants complain of the failure to make thirty-one findings of fact requested by them. It is sufficient to say that the court could not make the findings because they would be inconsistent with the findings which the court did make upon the facts adduced at the trial. The same may be said in regard to appellant's objection to the findings which were made by the court. They were based
11 upon substantial evidence and will, of course, not be disturbed in this court.

It is urged that plaintiff never had any rights under

the Sampson location by reason of the fact that the ground was previously located by strangers to the record under the name of the San Salvador. An examination of the evidence discloses the fact that the alleged San Salvador locators merely posted a notice of location on the ground. The notice or its contents does not appear. No other act of location is shown. No discovery of mineral, no work on the ground. The alleged locators are not here complaining. It further appears that when the Sampson notice was posted the San Salvador notice was removed with the knowledge of at least one of the locators of the latter. No objection was heard from either locator. Under such circumstances it would seem that the San Sal-
12 vador may well be treated as having no legal existence.

It is argued that the case alleged and the case proved and found by the court are two entirely different cases, and that, consequently, the decree was erroneous. This raises an important question. It is alleged, in substance, that Pilkey after posting notice and marking on the ground the boundaries of the Sampson claim, commenced to sink a shaft as required by the local laws, and, upon information and belief, did sink the same within the ninety day limit. There is proof by at least one witness that this was true. But the court found, in effect, it was untrue under the third finding of fact. It found that Pilkey was induced to refrain from doing the preliminary requirements necessary within the ninety day period. It is claimed that this finding is a departure from the allegations of the complaint. It is, in form; but is it in substance? We think not. How can it be material to
13 defendants whether Pilkey ever commenced the work on the shaft by reason of the fraudulent conspiracy, or whether, after commencing, he refrained from completing the same by reason of the same conspiracy. The same notice to defendants of plaintiff's claims would be present, and the same evidence, would be relevant in either case.

It is further alleged that it was agreed that Pilkey should transfer, convey and deliver possession of the ground to the conspirators. The court found that the

conspiracy did extend to the delivery of possession to the conspirators. The court thus found one of the essential averments to be true. We have thus a case pleaded, proved and found by the court as follows: A prospector under 14 contract posts a location notice and initiates a location; he is charged with the duty of performing the several acts of location; he enters into a fraudulent conspiracy to refrain from perfecting the location and to cause a forfeiture thereby; he does refrain from doing said acts and, upon forfeiture, delivers possession to the conspirators. This certainly makes out a case, and, irrespective of the other allegations in the complaint, entitles the plaintiff to the relief sought. It cannot be contended that there is any departure in proofs or findings from the allegations.

This disposes of all of the contentions of appellants. The court is indebted to counsel on each side for the aid furnished by their respective briefs which are unusually able and exhaustive. For the reasons stated the decree of the lower court will be affirmed, and it is so ordered.

C. J. Roberts, A. J., not having heard the argument, did not participate in this opinion.

MARGIN.

(Complaint).

Henry Lockhart, a resident of the County of Bernalillo and Territory of New Mexico, by leave of the court files this amended (second) bill of complaint against, and complains of H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Samuel Dunlap, successor in interest of Frank Fagaly, deceased, the heirs and legal representatives of Lee Walker, deceased, William B. Childers, Edward W. Dobson, and Charles Bonsall, receiver, impleaded with the said defendants by leave of court first had and obtained, all residents of the said County of Bernalillo, defendants in this cause, and humbly complaining, shows unto your honor that heretofore, to-wit, on the seventh (7) day of May, 1893, a certain agreement in writing bearing said date was made and entered into by and between your orator and one Benjamin Johnson, by the name and description of Benj. Johnson, with

the defendant Charles S. Pilkey, a copy whereof is herewith filed and marked Exhibit "A," and made a part of your orator's Bill of Complaint; wherein and whereby the said Pilkey contracted and agreed with your orator and the said Benjamin Johnson to enter into a co-partnership with them for the purpose of discovering, locating and operating mining claims; and it was thereby contracted and agreed by and between said parties that the said Pilkey should prospect and locate such veins, lodes or placers as he might discover or know the existence of, containing valuable ores or minerals, in the name of and for the joint benefit of all the said parties to said agreement in the proportion of one-third interest to said defendant Pilkey, and an undivided two-thirds interest to your orator and the said Benjamin Johnson. And your orator and the said Benjamin Johnson, thereby contracted, in consideration of the premises, to furnish the said Pilkey at their expense, the following articles and tools; viz.: twenty-five pounds of Giant Powder, One Hundred feet of Fuse, One box of Caps, one Hammer, ——pounds of Drill Steel and One Pick; and when he should have sunk or driven a shaft or tunnel four feet by six feet from the lowest level of the surface at its mouth, upon such vein and locality as should be designated by them, he should receive in addition to the above property, the sum of Thirty Dollars ($30) less any money for provisions or other articles, except those above named, which should be furnished to him by them prior to the completion of said work; and it was thereby further contracted and agreed, that said work was to begin within twenty days from the date of said agreement, and should be prosecuted with due diligence to completion, and to the satisfaction of your orator and the said Johnson, and that the said Pilkey should furnish them from time to time, at their request, samples of all ores and minerals which should be discovered or be taken out of any workings by the said Pilkey; and it was thereby further contracted and agreed that it should be at the option of your orator and the said Benjamin Johnson to continue working or abandon any claim located in pursuance at any time they might deem proper, and that

the said agreement should continue in force and effect for one year from its date, and that all discoveries or locations made during that time by the said Pilkey should be included and covered by said agreement; and it was thereby further contracted and agreed that the said Pilkey should have no power to create any debt or make any contracts binding the said other parties unless by them in writing authorized so to do. And that any concealment by or on the part of the said defendant Pilkey of any discovery by him made or failure upon his part to locate any valuable mineral claim or claims for the purpose of evading the terms of said agreement, and defrauding your orator and the said Benjamin Johnson, should work a forfeiture of any right or interest direct or indirect, that the said Pilkey might have or afterwards obtain to and for the benefit of your orator and the said Benjamin Johnson.

And your orator further states that the agreement aforesaid was duly subscribed, executed and delivered by and between the said parties thereto and your orator, and the said Benjamin Johnson then and there delivered the said articles and provisions, and paid the said money, and divers other sums of money to and for the said Pilkey, and in all respects kept and performed the terms of the said agreement upon their part, and were at all times thereafter ready and willing and offered so to do.

Your orator further states that, at and prior to the date of said agreement, the said parties thereto had knowledge and information of the existence of valuable mineral deposits in the north-easterly portion of the said County of Bernalillo, in the vicinity of the town called Cochiti, and it was their purpose in pursuance of said agreement, that the said Pilkey should prospect, search for, discover, locate and acquire title to and hold possession of the same, for their joint use and benefit, in the proportion and upon the terms therein set forth.

And your orator further states, that, under and in pursuance of the terms of said agreement, the defendant Pilkey did thereafter proceed to the aforesaid portion of said County, and did on or prior to the tenth (10) day

of July, 1893, find and discover a certain valuable mineral bearing lead, lode, ledge, vein or deposit, bearing gold and silver, and it then and there enter upon and take actual, full and peaceable possession of fifteen hundred (1500) linear feet of, on and along the said mineral bearing lead, vein or deposit, and also of three hundred (300) feet of surface ground along and on each side of said fifteen hundred (1500) feet, which was necessary and convenient for the mining and working of said mineral deposit, which are, respectively, more particularly identified and described in the notice hereinafter mentioned, and posted thereon by said Pilkey, and which is referred to and made a part of this bill for a more particular description, for and on behalf of your orator and said other parties to the said agreement as claimants, discoverers and locators of the same, under and in pursuance of the terms of said agreement.

And as evidence of said discovery, claim and possession, the said Pilkey then and there posted, in a conspicuous place upon said lead, lode, ledge, vein or deposit, bearing mineral, a notice of location and possession thereof, bearing the said date, a copy whereof is herewith filed marked Exhibit "B," and made a part of this, your orator's bill of complaint; and marked the boundaries of said claim upon the ground in such manner that the same could be readily traced, and thereafter transmitted to your orator and the said Benjamin Johnson, at their request, samples of ore and minerals by him taken and extracted from the said mineral bearing lode, lead, or ledge so by him discovered and taken possession of as before stated, and did thereafter, in pursuance of the direction of your orator and the said Benjamin Johnson, commence to sink a shaft or cut upon said mineral bearing lode or ledge to the depth of ten feet from the lowest rim thereof; and your orator is informed, and believes, and so states, that he did so sink such shaft or cut thereupon to mineral in place, disclosing a large and valuable deposit of gold and silver bearing ore in place, within less than ninety days from the time of taking possession of said lode or ledge as aforesaid; and your orator states that they the said discoverers, loca-

tors and claimants of said mineral bearing lode, or ledge, not then knowing whether said mineral claim was situated upon public domain of the United States, and was free and open to location under the mining laws of the United States, performed the required acts of location under said laws and the laws of this Territory, and were ready, able and willing in all things to comply therewith, and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned.

Further complaining your orator shows unto your honor, that, on or about October first, 1893, the defendant Pilkey, while so in possession of said lead, lode or ledge, under and in pursuance of said agreement, wrongfully and fraudulently conspired, combined and confederated with the said defendants, H. C. Leeds, J. A. Johnson, Frank Fagaly, and Lee Walker, to defraud your orator and the said Benjamin Johnson of their interest in and title to the said mine and minerals discovered and possessed by them as aforesaid, and of which the said Pilkey as the partner of and co-owner with your orator, was then in possession under the agreement aforesaid, and in pursuance of said conspiracy and confederation, on, to-wit, October first, 1893, the precise date whereof being unknown to your orator, an agreement was made and entered into by the defendants Fagaly, J. A. Johnson, Walker and Leeds, the defendant Julia Johnson, being a party to and having some interest under the said agreement, and the defendant Pilkey being a party thereto, by which it was agreed that the said Pilkey in violation and fraud of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement, should transfer, convey and deliver possession of said mine to the last named defendants, without the knowledge or consent of your orator and the said Johnson, and that they should do and perform all other acts deemed necessary for that purpose; and complainant states that the said defendant Pilkey by an instrument in writing the precise terms of which are unknown to complainant, the same being in the possession of the said defendants or some of them, sold, transferred

and conveyed to the defendants, Fagaly, J. A. Johnson, Leeds and Walker, an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in secret trust for said Pilkey; and in pursuance of said fraudulent combination and conspiracy, the defendants, Frank Fagaly, J. A. Johnson, Lee Walker and H. C. Leeds, together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon said mine under said agreement, and to fail and neglect to record said location notice so by him posted thereon as aforesaid, and the said defendants or some one of them wrongfully removed said location notice from said claim, and said defendants covered up or concealed the said workings thereon heretofore done and performed by the defendant Pilkey, as aforesaid, and by collusion with the said Pilkey, and without the knowledge or consent of your orator and the said Johnson, entered into and upon the said lead, lode, ledge and deposit bearing gold and silver, and upon the said parcel of surface ground including the same, mentioned and described in the said location notice, and known as the "Sampson Mine," and denied and still denies that your orator had or has any interest therein, and thereafter, having so procured the possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record, in the office of the Recorder of said County, on, to-wit, December 13th, 1893, and caused the same to be recorded in Book "E," page 576, of Mining Records, a copy whereof is herewith filed and marked Exhibit "C," and made a part of this bill; and thereby the said defendants claim to have located the said lode or ledge bearing gold, silver and other minerals, so first discovered, located and held by the said Pilkey for the benefit of himself, your orator and the said Benjamin Johnson, and described by him in the said location notice by him thereon posted as aforesaid, as the "Sampson Mine;" for the benefit of themselves as locators under the mining laws of the United States, and called and designa-

ted the same as the "Washington" lode; and it was agreed in pursuance of said confederacy and for the purpose of concealing from your orator the interest of said Pilkey in the said pretended location, that each of the four last named defendants should be entitled to a one-fifth interest in said mine, and the said Pilkey should be entitled to the remaining one-fifth interest, but that the said last named interest should be claimed and held by said Walker in trust for said Pilkey.

Your orator further states that the said Benjamin Johnson has conveyed to him all his said interest in and to the said Sampson location and mine, and your orator has become and now is the owner of the title and interest of the said Benjamin Johnson.

x x x x x x x x x x x x x x x x x

Your orator avers that by virtue of said prior discovery, possession, working and location of said mine by the said Pilkey, acting under the agreement before mentioned, your orator became and now is equitably entitled to the said gold, silver and mineral therein contained, and in equity and in good conscience has a prior and paramount right and title in and to the same as against the said defendants or any or either of them. Your orator further states that the respective defendants, Wills, Childers, Dobson and Dunlap claim some right or interest in and to the said pretended mining location called and known as the Washington Mine derived under or through some of the other said defendants, but your orator states that the said Wills and the said Leeds, J. A. Johnson, Julia Johnson, Fagaly and Walker, and each of the defendants herein at and prior to the time of acquiring any interest in said mine, had full knowledge and notice of the rights of your orator and Benjamin Johnson in and to the said mineral deposit, and of their agreement with the said Pilkey hereinbefore mentioned.

Your orator further states that after the removal by the said defendants of the said location notice posted as aforesaid by said Pilkey of the said Sampson mine, a copy whereof was procured by your orator of which Exhibit "C" filed herein is a copy, and the same was recorded in

the office of the Recorder of said County of Bernalillo, on December 9th, 1893, in Volume "F," of Mining Records of said county at Folio seven (7). Your orator states that by virtue of the premises, he became and was and now is the equitable owner of the said mineral bearing vein, lead, lode and deposit hereinbefore described, and of the gold and silver ores therein contained, so discovered, possessed and located by the said Pilkey under the said agreement, and is equitably entitled as against the said defendants to the possession and enjoyment of the same and to the preferential right to acquire the legal title to the same from the United States; and that the said pretended location thereof under the name of the Washington Mine by and in the names of the defendants, Leeds, J. A. Johnson, Fagaly and Walker was and is wholly inoperative and void, and that the said defendant Charles Pilkey by reason of his participation in the said fraudulent conspiracy, combination and acts with the said defendants, under and in pursuance of your orator's said agreement with him, has forfeited all right or interest direct or indirect in and to the said Sampson mine; and your orator is equitably the owner of and entitled to the same; and your orator had well hoped that the defendant would recognize his prior right and title in and to the same, and surrender the possession to the same and release all claim thereto to your orator, but now so it is that the said defendants, excepting said defendant Bonsall as Receiver, combining and confederating together as aforesaid, give out and claim in speeches that the said pretended location and location notice of the said alleged "Washington" lode by the said defendants was and is a valid location against your orator, and that your orator has no title or interest in and to the said mine, bearing gold, silver and other minerals so discovered, possessed and located as the Sampson mine, by the defendant Pilkey as hereinbefore set forth; and refused to permit your orator to enter upon the said property, or to work the same, or to exercise any acts of possession or ownership thereon; and defendants respectively claim title to said mining property under and by virtue of said transfer and conveyance from said Pilkey

and said pretended location of said Washington lode hereinbefore mentioned.

x x x x x x x x x x x x x x x x

Your orator therefore prays that the said H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, and J. Q. Wills, Charles Pilkey, Samuel Dunlap, the heirs and legal representatives of the said Lee Walker, deceased, William B. Childers, Edward W. Dobson and Charles Bonsall, Receiver as aforesaid, be required to full, true and perfect answer make to all and singular the allegations of this your orator's second amended bill of complaint, but without oath, their respective answer under oath being hereby waived, and that a Receiver be appointed to take possession of the said lead, lode, ledge or deposit, bearing gold, silver and other metals, situated within the mining claim or location, in the Cochiti Mining District, Bernalillo County, New Mexico, called and known as the "Sampson" mine, and mentioned and described in the location notice thereof, made by Charles Pilkey, Benjamin Johnson and Henry Lockhart, dated July 10, 1893, and recorded in Vol. 5, of Mining Records of said County, at folio 7, on December 9th, 1893, to keep and hold possession thereof until the further order of this court, and that the said transfer and conveyance executed by said Pilkey to said Fagaly, Leeds, J. A. Johnson, and Walker, be decreed fraudulent and void as against your orator, and that the same be cancelled and annulled; and that the location and location notice of the said "Washington" lode, by and in the name of Frank Fagaly, Lee Walker, H. C. Leeds, J. A. Johnson be decreed to be void and of no effect as against your orator, and that the said defendants be enjoined from mining, working or removing from the said Washington lode, any ore or mineral, and that your orator be decreed to be the equitable owner of the said ore and mineral contained therein and entitled to the prior and preferential right to acquire the legal title thereto from the United States, by virtue of said prior discovery and appropriation thereof by said Pilkey, and for such other and further relief as may be equitable and proper in the premises.

And your orator prays as by his original bill of complaint he has already prayed.

FINDINGS OF THE COURT BELOW.

And Thereafter, on, to-wit, the 23rd day of March, 1907, there was filed in the office of the Clerk of said Court, in said cause, the Finding by the Court; are in the words and figures following, to-wit:

HENRY LOCKHART, v. THE WASHINGTON GOLD AND SILVER MINING CO., et al. No. 3888.

I.

On the 7th day of May, 1893, the defendant, Charles Pilkey, entered into a contract in writing with Henry Lockhart, the plaintiff, and one Benjamin Johnson, whereby said Lockhart and Johnson were to furnish certain provisions, supplies, money and tools to said Pilkey during the term of said contract, which was one year from the date thereof. By the terms of said contract, and for the consideration therein named, the said Pilkey was to prospect for, discover and duly locate, under and in accordance with the mining laws of the United States and of the Territory of New Mexico, in the joint names, and for the joint benefit, of said Lockhart and Johnson the said Pilkey, any veins, lodes, ledges or deposits of mineral bearing rock containing precious metals that might be found by said Pilkey in a certain designated portion of Bernalillo County, New Mexico, during the term of said contract. Pilkey was to furnish to said Lockhart and Johnson samples of ore taken from any vein of mineral discovered and appropriated under said contract, in order that its value might be determined; and any fraud by Pilkey was to forfeit his share, which was to be one-third in any mine discovered and located.

II.

In pursuance of said contract, Pilkey did, on the 10th day of July, 1893, in said designated section of Bernalillo County, discover, on the open. unappropriated public mineral lands of the United States, a certain vein,

lode, ledge or deposit of mineral bearing rock in place, bearing gold and silver, and did then and there enter into the possession of and appropriate the same, together with the lawful surface ground, for the benefit of, and in the name of said Lockhart and Benjamin Johnson and himself, the said Pilkey, and did post thereon, in accordance with law, the said vein and surface ground being then open, unappropriated mineral land of the United States, a location notice of the same as a mining claim, duly signed by the said Lockhart, Johnson, and Pilkey as locators, and named and known as the Sampson mine. And said Pilkey commenced to do the preliminary work on said Sampson claim required by law to be done on mining claims within ninety days from the location of the same, but did not finish such work.

III.

And thereafter, and prior to the completion of the preliminary work and requirements necessary to perfect said Sampson location, and prior to the expiration of the time limited by law within which a discovered and appropriated vein of mineral, together with the surface ground, is required to be perfected as to its location by disclosing mineral in place in the vein or deposit at least ten feet below the surface of the ground, by staking and monumenting said claim or location, and by recording a copy of the posted notice of location in the proper office, the said Pilkey conspired and confederated with the said defendants, Levi Walker, and Frank Fagaly, to defraud said Lockhart, the plaintiff, and Benjamin Johnson of their interest in and title to said Sampson mining claim, and fraudulently and secretly, without the knowledge or consent of said Lockhart and Benjamin Johnson, to acquire and vest in themselves the title of and interest in said Sampson mining claim. The said Pilkey, by the terms of said frudulent conspiracy, was to secretly, and without the knowledge or consent of said Lockhart and Johnson, fail and neglect to complete the preliminary requirements necessary by law to be completed within ninety days from the date of the location of said claim, and to permit said claim to be forfeited and to become public

domain, and was to deliver possession of said claim and vein and surface ground in due time to his said co-conspirators, so that the legal title to the same might be secretly acquired by the parties to said conspiracy.

IV.

Subsequently to the formation of said fraudulent confederation and conspiracy on the part of said Pilkey, Walker and Fagaly, but prior to the 10th day of October, 1893, or the expiration of ninety days from the location of said mining claim, and during the progress of said confederation and conspiracy, the said defendants, H. C. Leeds, James Q. Wills and J. Johnson, by J. A. Johnson, her husband, and agent in this transaction, entered into an agreement with said Pilkey, Walker and Fagaly, by which they undertook to furnish money and other assistance, and did so furnish such money and other assistance, to them, the said Pilkey, Fagaly and Walker, for the purpose of locating and perfecting mining claims in the district in which said Sampson claim was located, for the benefit and as the property of the above named parties to said agreement; and particularly what was represented to them by the said Pilkey, Walker and Fagaly as a rich mineral deposit, which was in fact the Sampson claim, although it was not affirmatively established by the evidence that its name was then made known to them, or that they had actual knowledge of the rights of the said Lockhart and Benjamin Johnson in the premises before the completion of the conspiracy, October 23, 1893, by posting of the location notice of the Washington mine on the Sampson claim. And thereby they authorize the said Pilkey, Walker and Fagaly to use their names in location notices and in their behalf to do all the acts necessary to locate and perfect mining claims in said district, including said Sampson claim.

V.

In pursuance of said fraudulent conspiracy, the said Pilkey concealed from said Lockhart and Benjamin Johnson what he knew as to the value of said Sampson mining claim, and especially what he and his co-conspirators, actual and constructive, knew in relation to the result of

an assay of certain samples of ores, which in September, 1893, he and said Fagaly took from said Sampson claim, without the knowledge or consent of said Lockhart and Benjamin Johnson, and which assay indicated great value in said Sampson vein or lode; and concealed all things touching said conspiracy, its existence, purpose and progress and with the knowledge of his said co-conspirators, actual or constructive, failed and neglected to do and perform fully the acts and requirements prescribed by law, above mentioned, in order to perfect said Sampson location, and failed and neglected to have recorded, as required by law, a copy of said posted location notice of said Sampson mining claim.

VI.

The said plaintiff and Benjamin Johnson, fully performed the said contract, dated May 7th, 1893, on their part, except so far as they were prevented by the said Pilkey from so doing, and were ready and willing to perfect said Sampson mining location within the time limited by law, and to prevent its forfeiture by completing the necessary legal requirements, and would have done so prior to the expiration of the time limited by law but for the wrongful, fraudulent and unlawful acts and concealments of said conspirators; and would have resumed possession, after the expiration of said time, for the purpose of completing said requirements, and thus preventing the forfeiture of said mining claim, but for the adverse possession of the same by said conspirators.

VII.

On or about the 10th day of October, 1893, and prior to the 23rd day of October, 1893, said Pilkey, in pursuance of said fraudulent conspiracy, delivered said Sampson mining claim, and said vein and surface ground comprising the same, without the knowledge or consent of said plaintiff and Benjamin Johnson, to his said co-conspirators, or to some one or more of them for the benefit of all of them, and placed them in complete possession of the same; and thereafter, on the 23rd day of October, 1893, said Frank Fagaly, being so in possession of said Sampson mining claim for himself and for and on behalf of

his co-conspirators, H. C. Leeds, J. A. Johnson, Julia Johnson, Levi Walker, Charles Pilkey and James Q. Wills, did post a location notice on said vein and surface ground previously located as the Sampson, and in said location notice named the same the Washington mining claim, and signed to said location the names of four of said conspirators, viz: H. C. Leeds, J. Johnson, Levy Walker and Frank Fagaly; but the actual, beneficial ownership in said Washington mining claim, as agreed and understood between said conspirators prior to and at the time of said location, was as follows:

Said Levy Walker was to hold the legal title to two-fifths, one-fifth for himself and one-fifth in secret trust for said Charles Pilkey; said H. C. Leeds, said J. Johnson, and said Fagaly were each to hold the legal title to one-fifth, but each to so hold only three-twentieths for himself, and each to hold one-twentieth in secret trust for said James Q. Wills.

VIII.

Said Benjamin Johnson duly conveyed his interest in said vein and surface ground and Sampson mining claim to plaintiff, Henry Lockhart, prior to the institution of this suit.

IX.

One T. S. Austin has acquired, since the institution of this suit, an interest with and under said plaintiff in said Sampson mining claim.

X.

All of said original defendants, Levy Walker, Frank Fagaly, H. C. Leeds, J. A. Johnson, Julia Johnson, Charles Pilkey, and James Q. Wills, held their respective interests in said Washington mining claim and location at the time of the institution of this suit, and by various conveyances and mesne conveyances and the operation of law and title of each and every of said last named defendants has become, pendente lite and with knowledge, vested in the defendants, the Washington Gold and Silver Mining Company, a corporation, and M. P. Stamm.

From the facts found, the Court deduces these conclusions of law.

First: The interest of the defendant Pilkey in the property called and known as the Sampson Mine, and later the Washington mine was forfeited to and become the property of the plaintiff, Henry Lockhart and Benjamin Johnson, under the terms of his agreement with them.

Second: The defendants, Leeds, Wills and Julia Johnson, through associating themselves with the defendants, Pilkey, Fagaly and Walker, and aiding them in the conspiracy to obtain said property, as it is found they did, became co-conspirators with them and had constructive knowledge of all that was done by them in furtherance of the conspiracy, and all they knew in relation to the subject-matter thereof, and in equity no one of the six obtained any interest in said property as against the plaintiff, Henry Lockhart and Benjamin Johnson.

Third: The plaintiff, Henry Lockhart, became, and is, the equitable owner of said property; and the present defendants are, in equity, the holders of the title and possession thereof for him as trustees ex-maleficio by succession to the legal title thereof, fraudulently obtained by the original conspirators.

IRA A. ABBOTT,
Judge Second District.

And thereafter, on to-wit, the 28th day of January, 1907, there was entered of record in the office of the Clerk of said Court, in said cause, the Final Decree; which said Decree is in the words and figures following, to-wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, sitting within and for the County of Bernalillo.

HENRY LOCKHART v. THE WASHINGTON GOLD AND SILVER MINING CO. ET AL.—No. 3888.

This cause coming on to be heard on the original bill filed by the plaintiff against the original defendants, Levy Walker, Frank Fagaly, Charles Pilkey, H. C. Leeds, J. A. Johnson, and Julia Johnson, his wife, James Q. Wills, Charles Bonsall, receiver, William B. Childers and Edward W. Dobson; and on the first and second amended

bills of complaint against said defendants and their successors in interest; and on the answer of the Washington Gold and Silver Mining Company, a corporation, and M. P. Stamm, and the replication of the plaintiff to the answer of said defendants, and the proofs, oral, documentary and written, taken and filed in said cause; and having been argued by counsel for the respective parties, and the court being fully advised in the premises:

It is therefore by the Court ordered, adjudged and decreed, that the plaintiff, Henry Lockhart, was and now is the equitable owner of said vein and surface ground and mining claim and the gold and silver ores therein contained, and is equitably entitled as against the said defendants to the possession and enjoyment of the same; that said Pilkey, under said agreement with plaintiff and said Benjamin Johnson, forfeited all right or interest in said vein and surface ground and mine, by reason of his participation in said fraudulent conspiracy, and that plintiff is the owner of, and equitably entitled to, such interest; and that said defendants acquired and hold the possession of, and the legal title to, the same under the name and designation of the Washington Mine, in fraud of the rights of the plaintiff therein and thereto, and that they are equitably the holders of such possession and legal title as trustees, ex maleficio, for the use and benefit of said plaintiff.

And it is by the court further ordered, adjudged and decreed that the said defendants, the Washington Gold and Silver Mining Company, by its proper officers, and in due form, and the said M. P. Stamm, in due form, execute a good and sufficient deed of conveyance of the said Washington Mine and mining claim to the said plaintiff, Henry Lockhart, and return the same into this Court within sixty days from the signing of this decree, to be approved by the Court and delivered to said plaintiff; and that said last named defendants, upon the delivery of said deed to said plaintiff, deliver also to the said plaintiff possession of said Washington Mine and mining claim; and in case of the failure of said defendants to execute said deed of conveyance as herein ordered, then and in

that event, John Venable, Esq., Clerk of said Court, is hereby appointed commissioner of this court for the purpose of executing such deed of conveyance vesting the legal title of and to said Washington Mine, by virtue of this decree, in said plaintiff, Henry Lockhart; the said John Venable, Esq., Commissioner as aforesaid, is directed and empowered to execute such deed of conveyance and return the same into Court to be approved as to form and sufficiency.

It is further ordered, adjudged and decreed, that plaintiff have and recover of and from said defendants, the Washington Gold and Silver Mining Company and M. P. Stamm, his costs in this behalf expended, to be taxed by the Clerk of this Court, and that he have execution therefor; and it is further ordered that a writ of possession issue in favor of said plaintiff against said defendants, the Washington Gold and Silver Mining Company and M. P. Stamm.

IRA A. ABBOTT,
Judge of the Second District.

[No. 1322. March 4.]

J. TURLEY, ET AL, Plaintiff in Error, v. L. B. FURMAN, ET AL, Defendant in Error.

SYLLABUS (BY THE COURT).

A project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the head gate, and about six miles of the irrigation ditch are in Colorado, is not within the jurisdiction of the territorial engineer of New Mexico, and he is without authority to issue a permit for such a project.

Writ of Error to the District Court for San Juan County, before JOHN R. MCFIE, Associate Justice. Affirmed.

HANNA & WILSON for Plaintiffs in Error.

Jurisdiction of territorial engineer. Laws 1907, chap. 49, secs. 4, 24, 27; Mills' Irrigation Manual, sec. 39.

Appropriation. Fort Morgan L. & C. v. South Platte D. Co., 18 Colo. 1; Farmers Ind. Co. v. Agricultural D. Co., 45 Pac. 444; Cast v. Thornton, 3 Colo. App. 475; Offield v. Thornton, 3 Colo. App. 475; Offield v. Ish, 57 Pac. 809; Wiel on Water Rights, 1 ed., 161; Wheeler v. Northern Colo. Irr. Co., 11 Colo. 582; Laws 1907, chap. 49, sec. 2; Farmers High Line Canal and Reservoir Co. v. Southworth, 13 Colo. 111; White v. Farmers High Line Canal and Reservoir Co., 43 Pac. 1028.

Limitation of police power. Grossman v. Cominez, 79 N. Y. Sup. 900; Lawton v. Steele, 152 U. S. 133; Colon v. Lisk, 60 Am. St. Rep. 609.

Appropriation of water from inter-state streams, at point in another state than the one in which lands to be irrigated are located. Willey v. Decker, 11 Wyo. 496; Perkins County v. Graff, 114 Fed. 441; Mills Irrigation Manual, secs. 42, 45. Constitution Colorado, Art. XVI, sec. 386; Lampson et al v. Vailes, 27 Colo. 201; Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11; Howell v. Johnson, 89 Fed. 556; Morris v. Bean, 123 Fed. 618; Anderson v. Bassman, 140 Fed. 14; Morris v. Bean, 146 Fed. 423; Bean v. Morris, 159 Fed. 651; Taylor v. Huiett, 97 Pac. 37, Idaho; Rickey v. Land & Cattle Co., v. Miller & Lux, 81 C. C. A. 207.

A water right is real property appurtenant to the lands to be irrigated thereby. Hull v. Blackman, 8 Idaho 272; Coventon v. Senfert, 23 Ore. 548; Frank v. Hicks, 4 Wyo. 502; Conant v. Deep Creek & C. Valley Irrigation Co., 23 Utah 627; Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11; Carpenter v. Strange, 141 U. S. 87.

E. C. Abbott, H. C. Allen, and J. M. Palmer for Defendants in Error.

Rights acquired by diversion and use of water governed and limited by statute. Laws 1907, sec. 1, page 73.

Water flowing in ditches, canals, or other artificial conduits cannot be appropriated. Mills Irrigation Manual, secs. 26-38; Cardelli v. Comstock Tunnel Co., 26 Nev. 284.

The place of appropriation is the point of diversion. Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582; Farmers High Line Canal C. & R. Co. v. Southworth, 13 Colo. 111; Albuquerque L. & I. Co. v. Gutierrez, 10 N. M. 177; Slosser v. Salt River Valley C. Co., 1 Ariz. 376; Gould v. Maricopa C. Co., 76 Pac. 598, Ariz.; Salt River Val. C. Co. v. Nelssen, 85 Pac. 117, Ariz.; Mills Irrigation Manual, secs. 42, 118.

Running water so long as it continues to flow in its natural course, cannot be subject to private ownership. Dalton v. Bowker, 8 Nev. 190; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582.

Water which the appropriator has taken from its natural channel and confined in his diverting works may be personal property. Bear Lake and River W. W. & I. Co. v. Ogden City, 38 Pac. 135; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582.

Statute under which territorial engineer acts. Laws 1907, p. 73, secs. 1, 2, 4, 24, 34, 42, 43, 46, 47, 48; Mills Irrigation Manual, secs. 63-67.

Jurisdiction of board of water commissioners limited to the appropriation of water in the Territory of New Mexico. Laws 1907, chap. 49, sec. 63; Lamson v. Vailes, 27 Colo. 201; Gen. Stat. 1883, Colo., secs. 1711, 1741, 1762, 1766, et seq.; Colo. Session Laws 1885, p. 259, sec. 26.

ABBOTT, J.—The essential question for determination here in this cause is whether the territorial engineer of New Mexico has jurisdiction under Chapter 49 of the Session Laws of 1907 to grant a license for the appropriation of water for the irrigation of lands in New Mexico from a stream, the Animas river, which flows from Colorado into New Mexico, the proposed point of diversion being in Colorado, about six miles from the line between Colorado and New Mexico, and the project including a

ditch from the diversion point across the state line, with a head gate at the point of diversion.

In the first section of the statute in question it is declared 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." The fourth section provides for a territorial engineer "who shall have general supervision of the waters of the territory and of the measurement, appropriation and distribution thereof." Obviously the waters of the territory here referred to are the same as those specified in the first section. Whether the power of the legislative assembly of New Mexico over those waters is as broad as by the act in question it was assumed to be is a question which has not been raised in this case, and need not now be considered. That the authority and jurisdiction of the territorial engineer are derived wholly from the statute, we understand is not questioned. The waters over which he has jurisdiction are specifically named in the portions of the statute above quoted, and we have only to determine the meaning of the words "natural waters flowing in streams and water courses * * * within the limits of the Territory of New Mexico." Unquestionably the waters of the Animas river when they enter New Mexico in their natural channel fall within the meaning of the statute. If those waters or any portion thereof are diverted in Colorado and come into New Mexico through an artificial ditch by means of which they are put to beneficial use on lands in New Mexico, are they such "natural waters" as the statute contemplates when they reach New Mexico? It is well settled that they lose that character at the point of diversion as soon, at least, as they are applied to beneficial use. Wiel on Waters, etc., sec. 153, et seq. But this is perhaps no more than a moot question at this time. No part of the waters of the Animas river has come into New Mexico except by the natural channel. The proposed ditch for bringing it in exists only on paper and may never have any more substantial being, and, if the territorial engineer has jurisdiction in any way extending into Colorado, it must grow

out of the nature of the rights which may exist in a natural stream.

We understand the contention of the plaintiffs in error to be that the right of one who has appropriated water, say from the Animas river, by putting it to beneficial use in New Mexico, which is undoubtedly independent of state lines and would be protected by the courts, although the point of diversion should be in Colorado, against subsequent attempts to appropriate it, is a part of the waters of New Mexico to which the statute applies But such rights are strictly private. They existed before the statute, and its repeal would not affect them. They run across the state line, but the permit by the territorial engineer of New Mexico cannot cross that line with them to impair or protect. It would not be claimed that any authority in Colorado would be bound to recognize in any way or give any effect whatever to any rights the New Mexico official might assume to give there. It may be said that the same would be true if the point of diversion were in New Mexico. But in the latter case the territorial engineer does not attempt to give or protect any rights in Colorado. He issues a permit to divert and use in New Mexico natural waters which have come into New Mexico in their natural channels.

By Section 63 of the act in question it is provided that there may be an appeal from any "decision, act or refusal to act" of the territorial engineer at any time within 30 days after notice of that from which an appeal is desired, but, unless such appeal is taken, "the action of the territorial engineer shall be final and conclusive." Assuming the statute to be valid, the courts of New Mexico would be bound to recognize such action, not duly appealed from, and those in whose favor it was taken would be assured of protection here which would be wholly lacking in Colorado as regards any action of the territorial engineer. That the legislative assembly of New Mexico did not mean to attempt to give the territorial engineer any authority extending beyond the boundaries of New Mexico we think is made clear by some of the provisions of the statute. In Section 32 it is provided that his fees and other charges

may be made a lien on works for the diversion, storage, or carriage of waters which are found to be unsafe. Our assembly could not have supposed it had power to subject property outside of New Mexico to liens. By the next section the territorial engineer and the district attorney of the county in which such unsafe works are located are required to prosecute owners who shall be guilty of "misdemeanor" of failing to make their works safe on notice. By Section 46 every ditch owner is required to maintain a "substantial head gate" at the point of diversion on request of the territorial engineer, and a "measuring device" satisfactory to him, and failure for 20 days to complete such device by the owner is a misdemeanor, and the territorial engineer may refuse to deliver water to him. Obviously he would be helpless in Colorado to carry out the design of the statute. By Section 47 one who interferes with, injures, or destroys any dam, head gate, etc., is guilty of a misdemeanor, and is also liable in damages. By Section 50 it is made a misdemeanor to obstruct authorized works for the appropriation of water. Suppose there should be such interference or obstruction outside of New Mexico, where is the remedy? These and other provisions indicate clearly that the legislature could not have had in mind any thought of extending the authority of the officers charged with the execution of the law beyond the borders of New Mexico, and, even if that had been their intention, we cannot see how it could be made effectual.

There can be no doubt that, if the waters of the Animas river should be needed in Colorado for power, light, mining, or other purposes, they could and probably would be appropriated accordingly, and that neither the territorial engineer, the water commissioners, nor the courts of New Mexico, nor all together, could prevent it. How would there be any redress anywhere if such appropriation in Colorado should be made, as it well might be, prior to any beneficial use in New Mexico? This case is one of practically new impression, and no decisions of other courts have been brought to our attention by counsel on either side which throw much light on the question of the juris-

diction of the territorial engineer in such a case. A Wyoming decision—Willey v. Decker, 11 Wyo. 496—is the only one dealing with the subject which has come to our notice. That goes to sustain the conclusion at which we have arrived, that the territorial engineer was without authority to approve the application in question, and issue a permit based on it. Since we find that he had not such authority, it becomes unnecessary to determine whether the project is feasible.

The judgment of the district court is affirmed.

Parker, Wright, and Mechem, J. J., dissent.

McFie, J., having rendered his opinion at the close of the argument, orally files herewith the reasons for his decision in the above case pursuant to Section 884, Compiled Laws of 1897.

This case grows out of a protest filed by L. B. Furman et al., who had made application for a permit for the appropriation of water for the irrigation of large portion of the same lands proposed to be irrigated by the Turley ditch, the Furman appropriation to be made through a head gate upon the Animas river near the north line of the Territory of New Mexico, which head gate and the entire line of the ditch were to be located within the territory, and the appropriation to be made of public waters of New Mexico after the same had entered said territory in the bed of the stream. The territorial engineer granted Jay Turley et al. a permit to appropriate water for the irrigation of the same lands covered by the proposed Furman appropriation and some additional lands, all in the Territory of New Mexico, through a ditch whose head gate was upon the Animas river in the State of Colorado, and six miles of the proposed Turley ditch was also in the State of Colorado and beyond the operation of the laws of New Mexico establishing the office of territorial engineer and defining his powers. The controversy was submitted to the district court of San Juan county at the November term, A. D. 1909, upon a stipulation as to the

facts, and was argued orally by counsel, and was decided orally by the court.

The two questions submitted for the court's decision were:

(1). The jurisdiction of the territorial engineer of New Mexico to grant a permit for an appropriation of water in the State of Colorado, which water had never entered within the territory in any of its streams, so as to become the public waters of the territory.

(2). The feasibility of such appropriation and project.

Upon the first question, that of jurisdiction, a pertinent inquiry is: For what purpose is the engineer given power to grant the permits or licenses provided for in the act creating his office and defining his powers and duties? Chapter 49, Laws of 1907. The answer is, that it is for the purpose of appropriation of waters. Section 24 says in part: "Any person, association or corporation, public or private, hereafter intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purpose, make an application to the territorial engineer for a permit to appropriate, in the form required by the rules and regulations established by him." Section 27 provides that: "When the engineer approves an application, the same becomes a permit to appropriate water." Appropriation of water is held to be "the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable purpose." Larimer Co. Res. Co. v. People, 8 Colo. 616. Thus diversion and application to a beneficial use are both factors of an appropriation, and these are more or less interdependent. The point of diversion is so important that Section 25 prohibits a change of the point of diversion, except with the approval of the territorial engineer. What power can the engineer of New Mexico have over a change in the point of diversion in the State of Colorado may well be considered here, especially as this section absolutely prohibits a change of the point of diversion in case prior rights are thereby affected, thus indicating the intent of the legislature to limit the opera-

tion of Chapter 49, supra, to the diversion of public waters within the territory as defined in the first section of the act of 1907. It must be, and indeed is, conceded in the negative opinion that the engineer cannot act officially beyond the limits of the territory, and yet, chapter 49, supra, teems with powers and duties which require official action by the engineer, and under rules and regulations to be made and executed by him, the enforcement of which cannot possibly operate outside the territorial boundaries. Many of these are police regulations, involving life, health, and property as provided in Section 32. Section 47 provides, among other things, that interference with the dam, head gate, wire, bench mark, or other appliances for the diversion, carriage, storage, apportionment, or measurement of water or interference with any person, etc., shall be a misdemeanor and warrant arrest; and it further provides that the territorial engineer or any of his assistants shall have power to arrest such offenders, and "deliver him to the nearest peace officer in the county." It would be idle to contend that such provisions could have any extraterritorial effect, so that it is abundantly apparent that in the enactment of chapter 49, supra, the Legislature intended to limit its operations to New Mexico alone, with no intention of making its provisions applicable to interstate irrigating ditches, whose head gates and points of diversion would necessarily be in a foreign jurisdiction and subject to the operation of foreign laws. To illustrate this, suppose persons were engaged in the destruction of the head gate of the Turley ditch at the point of diversion in the State of Colorado; could the territorial engineer or his assistants enter the State of Colorado and arrest the guilty parties, and "take them before the nearest peace officer in the county?" These considerations throw light upon the provisions of the first section of the act, wherein it is declared that the public waters over the appropriation of which alone the territorial engineer has jurisdiction are natural waters within the limits of the territory, and which have entered its limits following streams and water courses. In Vanderwork v. Howes, 15 N. M. 439, this court said: "Sec-

tion 12, c. 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 waters held in private ownership or by prior appropriation, 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."

The courts of Colorado have reached a similar conclusion. In the case of Lamson v. Vailes, 27 Colo. 201-204, the court said: "The statutes under which this proceeding was instituted, those creating the various water districts, and our entire irrigation law, must be taken together, and, if possible, the different provisions so interpreted as to give effect to all and make them harmonious the one with the other. It is not to be supposed that the state was legislating for the reclamation or irrigation of lands beyond its boundaries, or making provision by the way of police regulations (which we have held these statutes in some measure to be) over a territory beyond its jurisdiction. The different acts establishing water districts (1 Mills' Ann. Stat. sec. 2310 et seq.; Gen. Stat. 1883, sec. 1741 et seq.) either in terms declare or by implication assume that these districts are restricted to lands within the state; and the particular act creating district No. 33, the one in question, is: "That district No. thirty-three shall consist of all lands laying in the state of Colorado irrigated from ditches or canals taking water from the La Plata river, and its tributaries, which lie in Colorado." (1 Mills' Ann. Stat. sec. 2344; Session Laws 1885, p. 259, sec. 26). The earliest territorial acts expressly confine legisla-

tion relating to irrigation to lands situate in the territory. 1 Mills' Ann. Stat. sec. 2256, et seq.; Gen. Stat. 1883, sec. 1711. From these enactments it is altogether conclusive that in these proceedings, at least, the intention of the General Assembly was to limit the adjudication to ditches irrigating lands situate in this state, and not elsewhere. "Such being our conclusion, it is unnecessary, as we have said, to pass upon the other legal proposition pressed upon us. No complaint having been made of the quantity of water awarded for the irrigation of appellant's lands situate in Colorado, and the additional quantity to which they claim they are entitled being based upon their attempted diversion and appropriation for the benefit of lands in New Mexico, it becomes necessary to determine the assignment of error based upon an alleged erroneous award."

In an opinion of Hon. Frank W. Clancy, Attorney General of New Mexico, as to the limitations upon the territorial engineeer under Chapter 49, creating the office, and sustaining the engineer in his refusal to grant a permit for water of the Gila river to be diverted in New Mexico for the irrigation of lands in Arizona, the Attorney General said: "The first thing to strike the mind is that the territorial engineer cannot possibly have any jurisdiction over anything beyond the limits of the territory, nor is there anything in our legislation to indicate any purpose to provide for the needs of our neighbors beyond these limits." And he further says: "It cannot be possible that we ought to permit Arizona to come into New Mexico and take away out of our territory New Mexican waters for use elsewhere, when there are New Mexican lands upon which we can use it, and our local statute certainly does not contemplate any such suicidal proceedings. That statute alone is the source of all the authority and power of the territorial engineer and the board of water commissioners." If this is good law, and it seems to be such, the state of Colorado has certainly the same rights, and it is for the state of Colorado and not the territorial engineer of New Mexico, to determine whether or not there are lands in that state upon which the waters sought to

be diverted by the Turley project can be used beneficially, and the dictum of the engineer cannot deprive Colorado of this right.

The negative opinion presents this case as if it were untrammeled by our statute, and as if its diversion and appropriation of water in Colorado was made under the general law of prior appropriation. If such were the case, a different case would be before the court, but, when the diversion is made in Colorado under a permit authorized by a statute local to New Mexico, it is subject to all the limitations of that statute, and does not proceed under general law of prior appropriation. The difference in the result of the procedure is that, by obtaining permit under the territorial statute, Turley et al. is enabled to defeat the protestants from obtaining a permit to construct a ditch to irrigate much of the same lands, notwithstanding protestants' irrigation system, inluding the point of diversion and of beneficial use, was wholly within New Mexico and completely within the jurisdiction of the territorial engineer. This would not be the result of a diversion of water in Colorado under the law of prior appropriation, without regard to the territorial statute. If the point of diversion of the waters of a stream is in New Mexico, such waters are the public waters of New Mexico under the statute, and it is not doubted that rights thus secured may be protected by law, notwithstanding they may be diverted from an interstate stream, for, when such waters pass within our boundaries, it is an established fact that they are New Mexico water, and when appropriated that appropriation cannot be disturbed, but such local diversion is the basis of an adjudication of water rights for territorial lands in the courts of a foreign jurisdiction. When states organize irrigation systems by state laws, they are careful to limit their operation to their own boundaries. The state of Colorado has thus organized, and New Mexico is proceeding to organize also, as Chapter 49, Laws of 1907, indicates. The Animas and La Plata rivers flow from Colorado into New Mexico, and irrigation district No. 30 embraces the Animas river (involved in this case) to the New Mexico line, while dist-

rict No. 33 embraces the La Plata river. These districts are defined by the Colorado statutes in the following language:

District No. thirty.—Sec. 219. That district No. 30 shall consist of all lands lying in the State of Colorado irrigated from ditches or canals, taking water from that part of the Rio Las Animas river, and its tributaries, which lie in Colorado. Laws 1885, p. 259, sec. 23.

"District No. thirty-three.—Sec. 222. That district No. 33 shall consist of all lands lying in the State of Colorado irrigated from ditches, or canals, taking water from the La Plata river, and its tributaries, which lie in Colorado." Laws 1885, p. 259, sec. 26.

As the proposed Turley ditch locates its head gate on the Animas river six miles north of the Colorado and New Mexico line, this portion of his proposed ditch and its head gate is wholly embraced within the limits and jurisdiction of district No. 30 of that state, and subject to its rules and regulations.

Feasibility.—The feasibility of the Turley project is the second proposition for consideration. When it is understood that under this permit the period of construction may extend to five years, and not exceeding four years more for the application of the water to a beneficial use from date of permit, the question of feasibility is one of prime importance, one of which there should be absolutely no doubt. Many of the matters above set forth point directly to the non-feasibility of the Turley project; for it must be admitted that, so far as the New Mexico laws and permits are concerned, this ditch is headless and waterless, and beyond the power of New Mexico or its territorial engineer to make it otherwise. Under the Constitution and laws of Colorado, all water rights and priorities are to be adjudicated by the courts of that state, and fixed by a final decree thereof, and no such adjudication has been had settling the rights or priorities of the proposed Turley ditch in that state, and the application before the state engineer gives no assurance as to the action of the Colorado courts when an attempt is made by Mr. Turley to divert water in that

state for the irrigation of lands lying wholly in New Mexico. Certain it is, that if the Attorney General of Colorado coincides with the views expressed by the Attorney General of New Mexico, Mr. Clancy, the Turley irrigation project will be both waterless and valueless, a purely speculative proposition, obnoxious to irrigation laws. In line with this (Section 3186, Rev. St. 1908) the Colorado statute provides: "A certified copy of the map and statement thus filed in the state engineer's office shall be prima facie evidence in any court having jurisdiction, of the intent of the claimant or claimants to make such construction and to utilize such rights as are shown and described in the map and statement; provided, that nothing herein contained shall be so construed as to dispense with the necessity for due diligence in the construction of such projects, or to the injury of those having rights prior to those of the claimants; and provided, further, that nothing herein contained shall be construed as to prevent a proper adjudication of rights in accordance with existing statutes governing such adjudication." From this provision of the Colorado statute, as late as 1908, it will be seen that all the claimant acquires by the filing of his map and statement is prima facie evidence of his intentions. The validity of his rights, the question as to whether or not he has been diligent, all these and others, remain to be ascertained at some future date by the courts of Colorado in a proper proceeding. In a proceeding between ditches in different states the doctrine of relation would not apply, but the relative rights of the parties would date from the time when an actual appropriation was made by an application of the water to beneficial use. The Constitution of Colorado declares that all unappropriated water flowing in the natural streams of the state is for the use of its people.

"Appropriation.—Right of diversion and use guaranteed under Par. 5, Art. XVI of the Constitution." "Our Constitution dedicates all unappropriated water in the natural streams of the state 'to the use of the people,' the ownership thereof being vested in 'the public.' The same instrument guarantees in the strongest terms the right of

diversion and appropriation for beneficial uses." Wheeler v. Northern Colo. L. Co., 10 Colo. 587.

The head gate and several miles of the Turley ditch, the source of its water supply, being in the state of Colorado, it is possible that it will be declared a Colorado enterprise independent of the operation of the statute of New Mexico. "The water right is entirely distinct from the right to the ditch in which the water is conveyed. The latter is an easement. The former is an incorporeal hereditament, sui generis, and not an easement. The water right and ditch right may be conveyed separately or the one may exist without the other." Wiel on Water Rights, p. 126, sec. 64; Nevada, etc., Co. v. Kidd, 37 Cal. 282, 309; Zimmler v. San Luis, etc., 57 Cal. 221; McLear v. Hapgood, 85 Cal. 555; Mayberry v. Alhambra, etc., 125 Cal. 444. "A ditch is an artificial water course. It is an easement." Wiel on Water Rights, p. 230, secs. 150, 151, and cases; Schneider v. Schneider, 36 Colo. 518; Gibson v. Cann, 28 Colo. 499; D. P. & I. Co. v. D. & R. G. R. R. Co., 30 Colo. 204. A water right is further distinguished from the owners of the ditch or channel in Wiel on Water Rights, p. 232, sec. 152.

"Water in Artificial Water Course.—Water and Water Rights Distinguished.—The water in a reservoir or ditch or other artificial water course or appliance is private property as a commodity. A fundamental conception in the law of waters is here involved. We have given the fundamental theories a separate consideration elsewhere; but, for the consistence in the arrangement of material, we repeat somewhat here."

"The corpus of water in a natural stream is not itself property in any sense, but is without an owner. The corpus of water out of the stream and under private control ceases to be without an owner. It is in this that the distinction lies at the very basis of all legal conceptions of rights in water courses. The water out of the stream ceases to be without ownership, but is 'water without somewhat of a proprietary right.' * * * * *"

"The foundation of these rules, being the civil law proposition that the particles or aggregate drops of run-

ning water, so long as they flow in their natural course, are not property nor the subject of ownership, but are in a class with the air and those things which cannot be owned; we now follow the particles of the liquid from the stream into a ditch into which they have been diverted. Following the particles of the liquid from the stream into the ditch, there then has come a change in the 'wandering' (as Blackstone says) of the liquid that has been taken into the ditch. It is like the change regarding wild birds caught in a snare, wild animals caged, fish caught in nets. Before capture, none of these were regarded as property, real or personal, being wandering, ownerless things. While wandering at large they are nobody's property, but, after capture they become the private property of the taker. So with any specific particle of water that has passed into private control in a reservoir, ditch, or other artificial appliance. The particle has been taken from its natural haunts, so to speak, and passed into private possession and control and become private property. * * * *"

"154. Water in Artificial Water Courses is Personalty. —The individual particles of water so impressed by diversion into a ditch as to become private property possess none of the characteristics of immovability that go with ideas or real estate. They are still always moving though privately possessed, having, as particles, the characteristics of personal property. * * * *"

From the foregoing text and the authorities in support thereof, it must be conceded that the individual or corporation may construct a channel upon a right of way or land owned by him or it, without a permit from the engineer, so long as there is no intention to appropriate the waters of the territory, and, if water is procured from some other source, such water when it is in the ditch is private property, subject to the absolute control of the owner of the ditch or user of the water, and entirely removed from the jurisdiction or control of the territorial engineer or any of his subordinates. It has been argued that, should the Turley ditch be constructed, notwithstanding the fact that its head gate is in Colorado, the water flowing in the ditch as soon as it crossed the New Mexico

line would be subject to the jurisdiction of the territorial engineer. Such could not possibly be the case, for the corpus of this water has passed into private ownership and control before it ever came within the jurisdiction of the territorial engineer, and nothing can be found in the state giving him any jurisdiction over any other than the waters of the territory. True, an appropriation made in New Mexico is of such a character that the quantity of water so appropriated may be protected from interference by subsequent appropriations, clear to the headwaters of the stream, but this reasoning could not justify the claim that because these waters might, if undisturbed and permitted to flow in the natural channel become the waters of New Mexico, be taken by an appropriation under the New Mexico laws beyond the borders of the territory, and before they have ever become New Mexican waters.

Therefore, the following propositions are deducible:

(1). That there is no law authorizing the issuance of a permit by the territorial engineer for the proposed Turley ditch.

(2). That an attempt to issue such is beyond the jurisdiction of the engineer, and void.

(3). That, being void, he has encumbered his records with a permit of no value and over which he has no jurisdiction to the detriment of persons seeking to appropriate the waters of the territory, and are sound and within the proper construction of the irrigation code.

To one who has made a thorough study of irrigation laws, it needs no argument to demonstrate the fact that the public water official has no jurisdiction over the water, or its distribution, after it has passed from the natural channel into the private or artificial channel of the appropriator. It then becomes private personal property. The statute itself does not attempt to give the territorial officials any power except over the public waters and the appropriation thereof. After appropriation and the diversion of water from the stream this power ceases. In Cache La Poudre I. Co. v. Hawley, 43 Colo. 32, 37, the court says: "A water commissioner is not required, nor is it his duty, to make any diversion or distribution of water

between the users thereof from the same ditch. Neither has he any authority to interfere with the internal management of the affairs of a ditch company." Therefore, the Turley ditch, having its head gate in Colorado, making its appropriation under the laws of that state, reducing the waters of the natural stream, while they are the property of the state of Colorado, to possession and private ownership, removes all things over which the territorial engineer or his subordinates could possibly have any jurisdiction. In addition to the foregoing potent reasons why the engineer should not be permitted to incumber his records with this permit, and thus be in a position to refuse to grant a permit to a project entirely within the control of the territorial officials, is the fact that the Colorado courts refuse absolutely to give an appropriation such as the Turley ditch would have any standing whatsoever in the courts of that state. The interstate argument of the negative opinion, while no doubt sound in a proper case, I do not regard as applicable to the present case, as it is wholly outside the scope, purpose, and intent of our statute creating the office of territorial engineer, defining the waters over the appropriation of which he has jurisdiction and fixing his powers and duties. When in Section 1 of Chapter 49, supra, the Legislature said: "Section 1. 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"—it is obvious that the Legislature meant just what it said, and used the words "within the limits" advisedly, as relating solely to water in the streams and water courses within the boundaries of the territory, and not while such waters were subject to the Constitution and laws of the State of Colorado. To accomplish the latter result is a legislative, and not judicial, power. All this court has to do is declare the law as it now is. Section 12 of the Act, which seems to be relied upon to broaden the scope of the Act in the majority opinion does not do so, but, on the contrary, is controlled by Section 1, as this court declared in the case of Vanderwork v. Hewes, supra.

In view of these facts, I am forced to the conclusion, first, that the territorial engineer has exceeded his jurisdiction; second, that the Turley project in the light of all the weaknesses shown to exist is most unfeasible, and that it would be contrary to the best interests of the public, and would retard, instead of accelerate, the development and settlement of the country sought to be reclaimed.

[No. 1373. August 21, 1911.]

OLIVER TYPEWRITER COMPANY, Appellee, v. BURTNER & RAMSEY, Appellants.

SYLLABUS.

1. Where motion to dismiss was at the conclusion of appellee's case, and before the appellants had offered any testimony whatever, and it nowhere appears in the record that the appellants had rested their case prior to making the motion to dismiss, the appellants. upon a denial of the motion to dismiss, had the right to proceed with their case and introduce evidence, and it was error to render judgment for appellee without ruling upon the motion to dismiss or giving defendant's attorney notice of the court's action.

Miss NELLIE C. BREWER for Appellants.

Judgment rendered after notice to dismiss without notice of disposition of motion, and without allowing defendants to plead further, is void, and should have been set aside on motion. C. L. 1897, sec. 2685, sub-secs. 136, 137; Hungerford v. Cushing, 2 Wis. 305; Nevit v. Crow, 29 Pac. 749; Brady v. Lovell, 6 N. Y. S. 504; In re New York & Oswego Midland R. R. Co., etc., 40 How. Pr. 335; John Jay v. DeGroot, 28 How. Pr. 107.

Judgment rendered without giving defendants an opportunity to answer or be heard is void. Hovey v. Elliott, 167 U. S. 409; Galpin v. Page, 85 U. S. 350; Cooley Constitutional Limitations, 353; Dartmouth College Case, 17 U. S. 518; Windsor v. McVeigh, 93 U. S. 274; Lasere

v. Rochereau, 84 U. S. 437; Black on Judgments, sec. 220; Ogden v. Davidson, 81 Va. 757; Calvet v. Calvet, 8 Mart., N. S., 301; Coke 2 Inst. 46; 4 Blackstone Commentaries.

Due process of law means according to those rules and forms of procedure which have been established for the protection of private rights. Walker v. Sauvinet, 92 U. S 90; Pennoyer v. Neff, 95 U. S. 714; Taylor v. Porter, 40 Am. Dec. 274; Stuart v. Palmer, 74 N. Y. 183; Hovey v. Elliott, 167 U. S. 407; Windsor v. McVeigh, 93 U. S. 274.

R. W. D. Bryan for Appellee.

Legal capacity of appellee to sue. International Text Book Co. v. Pigg, 217 U. S. 91.

Appeals involving small sums are discouraged. Wagner v. Eaton, 2 N. M. 211.

Rendition and entry of judgment are entirely different things. C. L. 1897, sec. 2685, sub-sec. 136; 18 Enc. P. & P. 430; Gray v. Palmer, 28 Cal. 416; Schuster v. Rader, 13 Colo. 329.

Premature entry of judgment is not a jurisdictional defect. 23 Cyc. 838; Anders v. Devries, 26 Md. 222; Whitman v. Meissner, 34 Ind. 487; 23 Cyc. 895; Kemerer v. Bournes, 4 N. W. 921, Iowa; Schofield v. Territory, 9 N. M. 526; Liv. & L. G. I. Co. v. Perrin & Co., 10 N. M. 90.

It is presumed in absence of evidence to the contrary that the business of the court was proceeded with in a proper manner. Reynolds v. Nelson, 41 Miss. 83; Hunt v. Scobie, 45 Ky. 469; Territory v. Webb, 2 N. M. 147; U. S. v. DeAmador, 6 N. M. 173; Cushing v. Billings, 56 Mass. 158; Hagerty v. White, 34 N. W. 92, Wis.; Pomeroy v. State Bank of Indiana, 68 U. S. 592; Johnson v. Watson, 157 Pa. St. 454; Mulholland v. Heineman, 19 Cal. 605; Mulhall v. Keenan, 85 U. S. 342; A. T. & S. F. R. R. Co. v. Howard, 49 Fed. 206; Green v. Farlow, 138 Mass. 146; Conrad v. Belt, 22 Mo. 166; 23 Cyc. 964.

The discretion of the trial judge in conducting the trial will only be interfered with for manifest abuse. Col-

lins v. Karatopsky, 36 Ark. 316; Smith v. Billett, 15 Cal. 23; Snodderly v. Fairmount, 23 W. Va. 472; Witt v. Cuenod, 9 N. M. 143; Lincoln Lucky & Lee Min. Co. v. Hendry, 9 N. M. 149; Lamy v. Catron, 5 N. M. 373; Pearce v. Strickler, 9 N. M. 467.

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

STATEMENT OF FACTS.

This action was originally brought in the justice court of Precinct 26, Bernalillo county, to recover the sum of $13.30 freight charges upon four Oliver typewriters; the Oliver Typewriter Company, appellee herein, being plaintiff in the courts below. Judgment was rendered in the justice court dismissing the case "on the ground that a foreign corporation cannot enforce its contracts made in this territory without first complying with the statutes." Notice of appeal was given by the plaintiff and appeal duly taken to the district court on August 23, 1909. Upon trial *de novo* in the district court, at the close of appellee's case, appellants moved to dismiss the case upon the grounds "that plaintiff was a foreign corporation, not having complied with the laws of the territory, attempting to sue upon an alleged contract, which, if made at all, was made in the territory and hence no legal capacity to sue." This motion was made orally, was argued by counsel, and taken under advisement by the court. Several days therafter, to-wit, on the 17th of September, A. D. 1909, the court rendered judgment in favor of the appellee in the sum of $6.65; the said judgment being as follows: "Oliver Typewriter Co. vs. Burtner & Ramsey, 7970. The above cause coming on to be heard on the testimony adduced on the part of the plaintiff, jury having been waived by both parties and the Court having heard R. W. D. Bryan, attorney for plaintiff, and Miss Nellie C. Brewer, attorney for defendant Burtner, and the Court, being fully advised, finds the issues for the plaintiff. It is therefore ordered, adjudged

and decreed that the said plaintiff, the Oliver Typewriter Company, do have and recover from the said defendant firm, Burtner & Ramsey, and from the individuals composing the partnership, of O. A. Burtner and G. S. Ramsey, the sum of six and sixty-five hundredths ($6.65) dollars, together with the costs of this suit, and that execution issue therefor."

On October 2, 1909, the apellants moved to vacate and set aside said judgment. This motion was denied. From the action of the Court the appellants prayed an appeal, which was duly allowed. The Court also signed and settled a bill of exceptions setting forth the facts relating to the trial, and entering of judgment which were not otherwise of record. In such bill of exceptions, so signed and settled, appears the following statement of the proceedings had at that time: "That heretofore, and on the 23rd day of August, 1909, at the County of Bernalillo and Territory of New Mexico, this cause came on for trial in the district court before the judge of said court sitting in chambers, jury trial having been waived, upon an appeal from the Justice Court of Precinct 26, taken by the plaintiff herein; and, thereupon came the attorney for the plaintiff and presented his testimony to the Court, and thereupon, at the close of plaintiff's case, the attorney for defendants offered no evidence in open court, but orally moved to dismiss plaintiff's suit for the reason that, if the plaintiff was sueing upon any contract, it was upon a contract made in this Territory, and that plaintiff was a foreign corporation not having complied with the laws of the Territory of New Mexico, and hence had no legal capacity to sue; upon which said motion the Court heard counsel for plaintiff and defendants. And, thereafter, the Court in this cause rendered judgment on the 17th day of September, 1909, in favor of plaintiff, but that said defendants had no knowledge or notice that said judgment had been rendered and had no opportunity to except either to the ruling of the Court or to the judgment rendered until attorney for defendants returned to the city and found execution had been levied and collected, unless through the fact that E. W. Dobson, Esq., an at-

torney of this court in whose office Miss Brewer, the attorney of record for the defendants and who conducted the case throughout for them, was employed as clerk and stenographer, was in the court room at the time the judgment was rendered and was informed what judgment was rendered, the court mistakenly assuming that the case was his and that Miss Brewer was acting for him in the matter, as she had represented him many times in court, and this was her first contested case in this court on her own account; whereupon these defendants immediately and on the 2nd day of October, 1909, filed a motion to set aside judgment and excepted to the ruling of the court and rendition of judgment, and still excepts."

OPINION OF THE COURT.

WRIGHT, J.—Counsel for appellants assigns nine grounds of error, but an examination of the same discloses the fact that six of the assignments are to the same general effect, and can be disposed of as one assignment. The remaining three assignments are abandoned by counsel and need not be considered. The contention of counsel for the appellants is, that the judgment rendered by the Court, after the motion to dismiss had been taken under advisement, without notice of the disposition of the motion to dismiss, was void and should have been set aside on motion. An examination of the record in this case fails to show that the trial court ever made any disposition whatever of the motion to dismiss, unless it can be said, that the entry of the final judgment, in effect, denied the motion.

Under the facts in this case, however, we are of the opinion that the entry of final judgment, in the manner and form it was entered in this case, did not dispose of the pending motion to dismiss. It appears from the record and bill of exceptions that the motion to dismiss was made at the conclusion of the appellee's case, and before the appellants had offered any testimony whatever, and it nowhere appears in the record that the ap-

pellants had rested their case prior to making the motion to dismiss. Under such circumstances, the appellants, upon a denial of the motion to dismiss, would undoubtedly have the right to proceed with their case and introduce evidence. The Court, by entering the judgment set out in the statement of facts, without ruling upon the motion to dismiss, or giving notice to counsel for appellants, clearly deprived appellants of this right. For the reasons stated herein, judgment of the lower court is reversed and the cause remanded for further proceedings not inconsistent with the views expressed herein.

[No. 1391. August 21, 1911.]

TERRITORY OF NEW MEXICO, ex rel. THE CHILDREN'S HOME SOCIETY, a Corporation, Appellee, v. WILLIAM G. SARGENT, Territorial Auditor, Appellant.

SYLLABUS.

1. Laws 1909, Chapter 127, sec. 2, provides an appropriation of $5,000 to the Children's Home Society, "for the purpose of providing a receiving home which shall be constructed, or obtained through the supervision of said society and shall not be considered an appropriation for maintenance. And it is hereby specially understood that the said society shall at no time in the future call upon the Territory for any further appropriation of any kind or character. Laws 1909, Chapter 127, sec. 11, provides: "Whenever any subsequent legislature shall fail to pass an appropriation act, the same appropriation made for the 61st and 62nd fiscal years are hereby extended for each and every fiscal year thereafter, unless otherwise provided by law." Held, that the appropriation in question was not a continuing one; that it was for a definite purpose and not for maintenance.

Appeal from the District Court for Santa Fe County. before JOHN R. MCFIE, Associate Justice. Reversed and remanded with direction to set aside the peremptory writ.

FRANK W. CLANCY, Attorney General, for Appellant.

All public grants made to individuals or private corporations are to be strictly and not liberally construed. Laws 1909, ch. 127, secs. 2, 11.

MANN & VENABLE and M. E. HICKEY for Appellee.

The appropriation was a continuing one. Laws 1909, ch. 127, secs. 2, 11.

STATEMENT OF FACTS.

The relator in this cause is a private corporation, organized for benevolent and charitable purposes. The Thirty-Sixth legislative assembly made a donation to this corporation in the following language: "And for the Children's Home Society, a corporation, incorporated under the laws of New Mexico, for the purpose of the care of dependent and destitute children, payable to the proper officers thereof, the sum of $5,000.00. Provided, that it is hereby understood that the above appropriation hereby made is for the purpose of providing a receiving home which shall be constructed, or obtained through the supervision of said society and shall not be considered an appropriation for maintenance. And it is hereby specially understood that the said society shall at no time in the future call upon the territory for any further appropriation of any kind or character." Laws 1909, p. 351. The claim now made is that, on account of the failure to make any appropriation for fiscal years subsequent to the sixty-first and sixty-second, this appropriation becomes a continuing and permanent appropriation for each fiscal year thereafter, the legislative language upon which this claim is based being as follows: "Whenever any subsequent legislature shall fail to pass an appropriation act, the same appropriation made for the 61st and 62nd fiscal years are hereby extended for each and every fiscal year thereafter; unless otherwise provided by law. * * *" Laws 1909, p. 363. The society instituted this proceeding to obtain a mandamus to the Territorial Auditor to compel

him to cause a levy to be made sufficient to produce the revenue sufficient to meet this appropriation for the sixty-third fiscal year. The appellant answered the alternative writ, admitting that he refused to cause such levy to be made, denying that the appropriation continued for the sixty-third fiscal year, and asserting that the act of the legislature by its terms specifically excludes the appellee from having or asking any appropriation for the sixty-third fiscal year. The case was submitted upon the writ and answer and arguments of counsel, judgment was rendered in favor of the appellee, a peremptory writ of mandamus was issued, and the Attorney General of the Territory, who appeared on behalf of the appellant, took an appeal to this court.

OPINION OF THE COURT.

WRIGHT, J.—(After stating the facts as above). From the foregoing statement of facts it is apparent that there is only one question to be considered: Do the provisions of section 11, c. 127, Session Laws of 1909, extend the grant made to the appellee in Section 2 of said act to the sixty-third fiscal year? Section 11 (quoted in statement of facts) in extending the appropriations extends all appropriations in such act, "unless otherwise provided by law." There was no session of the Territorial Legislature held in 1911, and hence no other provision for the appropriation for the sixty-third fiscal year, except as contained in Section 11, cited supra.

Is the appropriation in question a continuing one, or is it an appropriation for a definite purpose granted for the sixty-first fiscal year only? Is there any limitation upon the original grant? If so, it is contained in the proviso at the end of Section 2 (quoted in the statement of facts.) If there appears that the money was appropriated for a definite and specific purpose, namely, the construction or obtaining of a receiving home, and not for the maintenance thereof. Even if there were nothing further in the act from which the legislative intent could be ascertained, we think, under the well-known rules of strict construction applicable to public grants to private

individuals or corporations, that the legislative intent to make one definite and specific grant for a definite and
1 specific purpose clearly appears, and that, when the original sum so granted was paid out, the grant was complete. We are still further strengthened in this view by the concluding sentence of Section 2: "And it is hereby specially understood that the said society shall at no time in the future call upon the territory for any further appropriation of any kind or character."

The judgment of the lower court is therefore reversed, and the cause remanded, with directions to set aside the peremptory writ of mandamus, and quash the alternative writ, and it is so ordered.

[No. 1217. August 26, 1911.]

GALLUP ELECTRIC LIGHT CO., Appellee, v. PACIFIC IMPROVEMENT COMPANY, et al., Appellants.

SYLLABUS.

1. Under C. L. 1897, sec. 3148, appellants having prevailed in the Supreme Court, they were entitled to recover their costs against appellee and to have execution issue therefor and no specific order was necessary.

2. Under C. L. 1897, sec. 3148, the Supreme Court Clerk should not have included in the execution for costs, the costs incurred in the district court prior to the rendition of the erroneous judgment, the appealing party having secured a reversal and new trial entitling him to all the costs occasioned by the erroneous judgment, including those accruing both in the district and in the Supreme Court.

E. W. DOBSON for Appellants.

REED & HERVEY for Appellee.

No briefs on motion to retax costs.

Appeal from District Court for McKinley County, before IRA A. ABBOTT, Associate Justice.

Execution recalled, costs ordered retaxed and motion of appellee denied.

OPINION OF THE COURT.

ROBERTS, A. J.—In the opinion in this case, heretofore handed down at this term, the judgment of the lower court was reversed and no specific order was made as to the costs. The Clerk of the Supreme Court issued executions for costs accruing in this court, and also for all costs that had accrued in the district court from the inception of the cause. The appellee has filed a motion for an order staying the enforcement of costs, because no specific order was made in that regard. In the case of King v. Tabor, 15 N. M. 488; 110 Pac. 601, this court held that the provisions of Section 3148, C. L. 1897, regarding costs, applies to the Supreme Court as well as to the district court. This being true, and appellants having prevailed in this court, they were entitled to re-
1 cover their costs against appellee and to have execution issue therefor and no specific order was necessary.

We do not think that the clerk should have included
2 in the execution the costs incurred in the district court, prior to the rendition of the judgment. The effect of the reversal of the judgment was to impose upon the appellee the payment of all costs occasioned by the erroneous judgment. This included the costs accruing in the district court after the rendition of the judgment and also those in the Supreme Court, including fees for transcript. The costs in the district court up to the time of the rendition of the judgment from which appeal was taken will abide the final determination of the suit, and be taxed against the unsuccessful party. See 11 Cyc. 210, and authorities cited. A statute, identical with our Section 3148, is construed in the case of Clifton v. Sparks, 29 Mo. Appeals, 560. The court says: "And all costs incurred consequent upon the erroneous action of the cir-

cuit court, which necessitated the appeal, would be properly taxable against the defendant, and would be recoverable under the judgment of reversal. This, we take it, is the common sense of the statute; and it certainly is expressive of a sense of justice. It would be palpably unjust to tax any costs against the appellants entailed by the illegal judgment which the Supreme Court reversed." The execution heretofore issued is recalled and the costs are ordered retaxed in accordance with the foregoing, for which execution will issue, and the motion of appellee will be denied.

[No. 1237. August 26, 1911.]

ARIZONA & COLORADO RAILROAD COMPANY OF NEW MEXICO, Appellee, v. DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.

SYLLABUS.

1. Assignments of error not considered in the briefs or upon oral argument will be deemed to have been abandoned.

2. A question disposed of upon a former appeal becomes the settled law of the case.

3. Proof of a prior and better right to the occupancy of the right of way in dispute is sufficient to make railroad's action for injunction against trespass or interference by another railroad cognizable in equity.

4. To constitute a valid location of a proposed railroad in New Mexico, there must be: 1. A survey and actual staking of the proposed line upon the ground. 2. The adoption of such survey by the board of directors as its permanent line or right of way.

5. Evidence held to establish that surveys were actually made and the proposed line of railroad staked and marked upon the ground and that the said line had been adopted by the company's board of directors.

6. Upon conflicting testimony in an action for an injunction, and specific findings of fact having been made in the court below, this court will not inquire further.

7. Erroneous rulings of a court as to the admissibility of evidence in a case tried by the court without a jury, are not necessarily sufficient to call for a vacation of the judgment of the court below.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Affirmed. See 13 N. M. 345.

FRANK W. CLANCY and E. N. CLARK for Appellant.

No collateral attack can be made upon corporate existence of defendant railroad. Wigmore on Evidence, sec. 2580.

A right of way is not a mere easement or right to use but something approaching a fee in the land itself. New Mexico v. Trust Company, 172 U. S. 181.

Where the charter of a corporation or a statute requires the keeping of a written record of the directors' proceedings, oral evidence of corporate acts not so recorded in writing is admissible against the corporation, but ought not to be admitted on behalf of the corporation against the interests of others. C. L. 1897, sec. 2832; Allis v. Jones, 45 Fed. 149; N & L. R. Co. v. B. & L. R. Co., 27 Fed. 825; Bay View Ass'n v. Williams, 51 Cal. 537; Bank v. Weaver, 31 Pac. 160, Cal.; Langsdale v. Bonton, 12 Ind. 469; Ross v. Madison, 1 Ind. 284; Cram v. Bangor House, 12 Me. 354; Zihlman v. Glass Co., 74 Md. 309; Edgerly v. Emerson, 23 N. H. 565-6; Morrill v. Segar Mfg. Co., 32 Hun. 544; Trustees v. Caggar, 6 Barb. 578, 580; Moss v. Averell, 10 N. Y. 454; Allison v. Coal Co., 87 Tenn. 65; Pickett v. Abney, 84 Tex. 647; Bay View v. Williams, 50 Cal. 353; Partridge v. Badger, 25 Barb. 146; Low v. Com. Ry. Co., 45 N. H. 370; Miller v. Wild Cat Co., 52 Ind. 51; People v. Ry. Co., 98 Cal. 665; Scott v. Church, 50 Mich. 528; Kalamazoo Co. v. Macalister, 40 Mich. 87; U. S. Bank v. Dandridge, 12 Wheat. 64; U. S. v. Fillebrown, 7 Pet. 47 Bridgford v.

Tuscumbia, 16 Fed. 913; Carey v. Philadelphia Co., 33 Cal. 696; Gordon v. San Diego, 108 Cal. 269; Richardson v. St. Joseph Co., 5 Blackf. 148; Tubbs v. Ogden, 46 Iowa 137; Zalesky v. Ins. Co., 102 Iowa 515; Troy v. R. R. Co., 11 Kans. 530; Holland v. Duluth Iron Co., 65 Minn. 334; Gilbert v. Boyd, 25 Mo. 29; Kane v. School Dist., 48 Mo. App. 414; State v. Lockett, 54 Mo. App. 208; Taylor v. Griswold, 14 N. J. L. 241; Bohan v. Avoca, 154 Pa. 410; Hutchinson v. Pratt, 11 Vt. 421; Kelly v. Board, 75 Va. 271; Randot v. Rogers Township, 99 Fed. 210; Beach v. Stouffer, 84 Mo. App. 398; Hospital Co. v. Thorndike, 24 R. I. 120; Board v. Tollman, 145 Fed. 771; Denver v. Spencer, 34 Colo. 374; State v. Farrier, 114 La. 586.

Erroneous rulings of a court as to the admissibility of evidence in a case tried by the court without a jury, are not necessarily sufficient to call for a vacation of the judgment of the court below. Lynch v. Grayson, 5 N. M. 488.

Instruments affecting the title to real estate in order to be entitled to record under the statutes of New Mexico must be acknowledged as the statute requires and should have definite description of the particular land sought to be affected. Ilfeld v. Baca, 13 N. M. 38; Lynch v. Murphy, 161 U. S. 253; Meegan v. Boyle, 19 How. 148; C. L. 1897, secs. 3953, 3965; Woods v. Garnett, 72 Miss. 78; Musgrove v. Bouser, 5 Or. 313; Hastings v. Cutler, 4 Foster 481; Lynch v. Murphy, 161 U. S. 253; Parrett v. Shaubhut, 5 Minn. 351; Reeves v. Hayes, 95 Ind. 523; 1 Story Equity, sec. 404; Beverly v. Burke, 9 Ga. 443.

Laches. 35 U. S. Stat. at Large 647; Columbia Valley R. Co. v. Portland R. Co., 162 Fed. 603.

In equity causes no exception is required C. L. 1897, sec. 3145; Laws 1907, ch. 57, secs. 24, 60.

Possession. 31 Cyc. 924.

CATRON & GORTNER, RITTER & BUCHANAN and H. B. FERGUSSON for Appellee.

The status which it was the duty of the court to maintain was that which rightfully and actually existed when the injunction was applied for, and not that which the defendant had wrongfully endeavored to create. Pittsburg Ry Co. v. Fiske, 123 Fed. 760.

The findings of facts made by the court below are binding in the appellate court if there be any evidence to support them. Runkle v. Burnham, 153 U. S. 225; St. Louis v. Rutz, 138 U. S. 266.

Possession. 31 Cyc. of Proc. 927; Wamman v. Hampton, 110 N. Y. 433; Heinze v. Butte, 126 Fed. 1; Sullivan v. Sullivan, 66 N. Y. 42; Fleming v. Maddox, 30 Iowa 241.

It is the survey and location of the road that constitutes the taking of the land for right of way. 1 Rorer 315; Troy & Boston R. R. Co. v. Potter, 42 Vt. 272.

It is proper for the owner to bring injunction against the possessor who is in possession as a trepasser, particularly when there is probability of irreparable injury, or inadequacy of pecuniary compensation or to avoid a multiplicity of suits. 1 High on Injunctions, sec. 697; Thorne v. Sweeny, 12 Nev. 251; Western Union Tel. Co. v. Judkins, 75 Ala. 428; McGregor v. Silver King Mining Co., 14 Utah 47; Byers v. Hawkins, 67 Ark. 413; Collins v. Sutton, 94 Va. 127; Moore v. Halliba, 72 Pac. 800; Clark v. Jeffersonville R. Co., 44 Ind. 248; Poughkeepsie Gas Co. v. Citizens Gas Co., 89 N. Y. 493; 22 Cyc. 428 b, 825-827; Kyser v. Dalton, 140 Cal. 167; Hicks v. Michel, 15 Cal. 107; Gaines v. Leslie, 1 Ind. Ter. 546; Hillman v. Hurley, 82 Ky. 626; Chesapeake Co. v. Young, 3 Md. 480; Henan v. Wade, 74 Mo. App. 339; N. J. Zinc Co. v. Trotter, 28 N. J. Eq. 3; Shubrick v. Guerard, 2 Desaus Eq. 616; Leroy v. Wright, 4 Sawyer 530; Florida R. Co. v. Pensacola R. Co., 10 Fla. 45; Northern C. R. Co. v. Harrisburg Elec. R. Co., 177 Pac. St. 142; Simmons Creek Coal C. v. Doran, 142 U. S. 417. Pomeroys Eq. Rem., sec. 465; D. M. Osborne & Co. v. Missouri Pac. R. R. Co., 147 U. S. 248.

Acts of a corporation are not invalid merely from

the omission to have them reduced to writing. U. S. Bank v. Dandridge, 12 Wheat 64.

The courts will not attempt to revise or interfere with a location for a railroad made in the discretion of a company. Cleveland etc., R. R. Co. v. Speer, 94 Am. Dec. 89; Fall River Co. v. Old Colony Co., 87 Mass. 221; Walker v. Madison River Co., 8 Ohio 39; Hentz v. R. R. Co., 13 Barbour 649; People v. Railroad Co., 74 N. Y. 304; Parks Appeal, 64 Pa. St. 140; Struthes v. Railway Co., 87 Pa. St. 286; Railway Co. v. Stoddard, 6 Minn. 97; Railway Co. v. Young, 9 Casey 175; Boston v. Midland Co., 1 Gray 362; Sioux City Ry. Co. v. Chicago Ry. Co., 27 Fed. 770; Titusville Co. v. Warren, 12 Pa. 642; Ohio River Co. v. Freedom Co., 53 At. 793; Kusheaka v. Pittsburg Co., 50 At. 169; C. & M. W. Ry. Co. v. C. & P. Ry. Co., 6 Biss. 219; Humeston Ry. Co. v. St. P. & K. C. Co., 75 Iowa 544; Packer Co. Ry. v. Newport Ry., 24 Atl. 707; C. D. & I. Ry. Co. v. C. Ft. M. & D. Ry., 58 N. W. 918; D. O. Ry. v. Butler Pass Ry., 56 Atl. 959; Atlantic Ry. v. Seaboard Ry., 42 S. E. 761; Hope v. Georgia Ry., 15 S. E. 134; A. T. & S. F. Ry. v. K. C. M. & O. Ry., 73 Pac. 99; Pittsburg etc., R. Co. v. Fiske, 123 Fed 760; S. P. Ry. v. Oakland, 58 Fed. 52; Weidenfield v. Sugar Run Co., 48 Fed. 618; Walker v. Emerson, 26 Pac. 968, Cal.; Lemon v. Guthrie Center, 86 Am. St. Rep. 361, Iowa; Camp v. Dixon, etc., Co., 52 L. R. A., 757; Fed. Cases No. 4313; Kilbourn v. Sullivan, 130 U. S. 514; C. L. 1897, sec. 3847; Laws 1905, chap. 97, secs. 12, 13; Lake Shore Co. v. Cincinnati Ry. Co., 116 Ind. 578; Elliott on Railroads, secs. 1119, 1120, 1122.

Recording of instruments not executed with formality required by law. 24 A. & E. Enc. Law 143; Woods v. Garnett, 72 Miss. 78; Musgrove v. Bonser, 5 Or. 313.

Erroneous rulings by the court as to the admissibility of evidence in a case tried by the court without a jury, are not necessarily sufficient to call for a vacation of the judgment below. Lynch v. Grayson, 5 N. M. 488; District of Columbia v. Woodbury, 136 U. S. 450; Frick v. Riegelman, 43 N. W. Rep., Wis. 1119; White v. White,

23 Pac. Rep. 234; Hathaway v. Bank, 134 U. S. 494; Zanz v. Stover, 2 N. M. 29; Kundinger v. Railway Co., 51 Mich. 185; Field v. U. S., 9 Pet. 182.

There was no laches. 3 Elliott Railroads, sec. 926; Lewis Eminent Domain, sec. 281; C. L. 1897, sec. 3874; Wheeling, etc., Ry. Co. v. Camden, etc., Co., 13 S. E. 369, W. Va.; Missouri Ry. Co. v. Shepherd, 9 Kas. 443; Laws 1901, ch. 11, sec. 2.

STATEMENT OF THE CASE.

May 25, 1905, the plaintiff filed its bill of complaint against the defendant in the district court for San Juan county, alleging, in substance, that it, the plaintiff, was a corporation organized under the laws of New Mexico in October, 1904, authorized to construct, maintain and operate a railroad in said territory from a point on the boundary line between New Mexico and Colorado near where Las Animas river crosses the same, through said county of San Juan and other counties of said territory, to a point on the boundary line between it and the Territory of Arizona, near a point where the San Francisco river crosses it, a distance in all of about 300 miles; that it had complied with the requirements of law, which are prerequisite to its entering upon the work and business for which it was incorporated, and had thereafter in said San Juan county, from said point in the boundary line between New Mexico and Colorado south to the town of Farmington, in said county, a distance of about 28 miles, completed its surveys for said portion of its proposed line of railroad, had fixed and determined its location, had marked and staked the same on the ground, had made for filing a map and profile thereof and was about to file the same as required by law, within a reasonable time, and that it had adopted such location. It further alleged that it had agreed with all but one of the private owners of the land on which its location had been fixed, as aforesaid, upon the compensation to be paid for the taking and use of said land and right of way, and that instruments in writing embodying such agreements had been made and executed between it and said several land-

owners, and notice thereof filed for record in the office of the clerk of said county; that its said work of surveying and marking its location on the ground, preparing maps thereof, securing the right of way therefor, and other things of like nature had been done at great expense; that as a result the route and location it had thus laid out and adopted was the best possible one for the construction and operation of a railroad between Farmington and the point of the northern boundary line of the territory from which it proposed to construct a railroad as above stated.

The plaintiff further averred that the defendant had full actual knowledge of all its, the plaintiff's, doings in the premises, as above set forth, including the agreements made with landowners, and that long after such proceedings by the plaintiff the defendant undertook and began the construction of a parallel line of railroad from a point near that to which the plaintiff's said location extends in the northern boundary line of New Mexico to said town of Farmington, and that, without necessity and wrongfully, it has entered upon the plaintiff's said location and sought to destroy its usefulness for the plaintiff by staking out a location for its own railroad upon portions of the plaintiff's said location; that, under the pretense of laying out necessary crossings over the plaintiff's said location, it has, although each end of its own proposed location is on the same side of and near the plaintiff's location, laid out its own proposed route to cross that of the plaintiff no less than 8 times in said distance of about 28 miles; and that such proposed crossings are not made at, or nearly at, right angles with the plaintiff's said location, but in some instances extend along it and occupy as much as a thousand feet of its length, and besides that, defendant proposes to make such pretended crossings at grades substantially different from those established at such points for the plaintiff's said location, all of which plaintiff says is done and threatened for the purpose. and, if permitted, will have the effect of substantially depriving the plaintiff of its said location, and rendering the same wholly useless as a route for the construction and practical operation of a railroad. It was also alleged that,

as one of the means to be employed by the defendant to deprive the plaintiff of its location, the defendant purposed and threatened to institute condemnation proceedings to secure a right of way and location for itself, including portions of the plaintiff's said location, and in such proceedings to ignore the plaintiff's rights and act without notice to the plaintiff, and only against the owners of the land on which the plaintiff's location was laid out. The plaintiff concluded with the usual allegations of the need of equitable relief, and with a prayer that the defendant be enjoined from continuing its alleged acts of encroachment. The defendant demurred to the complaint on the ground that facts were not stated sufficient to constitute a cause of action against the defendant for the relief prayed for, or any relief whatever. The demurrer was sustained by the district court and final judgment entered dismissing the complaint, with costs to the defendant. Appeal was taken therefrom to this court.

In this court the judgment of the lower court dismissing the complaint was reversed and the cause remanded, with instructions to reinstate the cause and overrule the demurrer. A. & C. R. R. Co. v. D. & R. G. R. R. Co., 13 N. M. 357. Answer was thereupon filed, which it will not be necessary to set out in detail, further than to say that it puts in issue every material allegation of the complaint and in particular the good faith of the plaintiff in locating its alleged line, the character of that line with reference to whether it was the best line possible, the ability of the plaintiff to construct its proposed line of railroad, the adoption, in accordance with law, of the alleged line of plaintiff, the knowledge of or notice to defendant of the pre-existence of any definitely located line of plaintiff before the defendant located its line and began construction thereof, and the plaintiff's right to maintain this action in equity. The court referred the issues as so made up to an examiner to take the proofs and report the same to the court. To this action of the court the defendant objected and excepted, but, upon this appeal, appears to have abandoned any question relative to the procedure of the court in so referring said cause. In

due course, the examiner's report, consisting of over two thousand pages of testimony and exhibits, was filed. Upon hearing before the court, some 273 objections to the referee's report, including objections to the admission and rejection of testimony, were ruled upon by the court. After full hearing, the court below made its findings of fact, and conclusions of law in favor of the plaintiff, and the decree was entered in accordance with such findings. The terms of the decree are not material to a determination of the issues involved herein. The case is now before this court on appeal from said decree.

OPINION OF THE COURT.

WRIGHT, J.—(After stating the facts as above). Appellant assigns 217 grounds of error, but, as is usually the case where assignments are so numerous, a large majority of same are merely variations of the same general proposition.

Under the oral argument of this case counsel confined themselves to a discussion of the assignments considered in the briefs filed herein. It will not be necessary, therefore, for us to notice in detail any of the assignments of error not so considered by counsel, as, under the well-established practice of this court, assign-
1 ments of error not considered in the briefs or upon oral argument will be deemed to have been abandoned. Gregory v. Cassan, 15 N. M. 496.

Upon a former appeal of this case—A. & C. R. R. Co. v. D. & R. G. R. R. Co., 13 N. M. 357—this court, speaking through Mr. Justice Abbott, held that the facts well pleaded established a vested interest in the plaintiff sufficient to enable it to invoke the jurisdiction of a court of equity. This question having been disposed of
2 upon the former appeal became and is the settled law of the case. Dye v. Crary, 13 N. M. 439. The cause is now before us upon the merits under the pleadings so determined to be sufficient upon the former appeal. With one exception, which will be considered separately, the appellant admits that the facts found by the court are sufficient to sustain the decree.

The first proposition advanced by the appellant is that *appellee was never in possession of its alleged right-of-way and had nothing, for the protection of which this suit could be brought.* Counsel for the appellant contend that this court upon the former appeal declared, as the law of this case, that it was necessary for the appellee to prove actual physical possession of the right-of-way in controversy, at the time of the alleged unlawful intrusion by the appellant, in order to support its action in a court of equity.

A careful reading of the opinion fails to disclose any such holding. Upon the former appeal the question was upon the sufficiency of the complaint. In its complaint appellee alleged that it was the owner of the location surveyed and staked out by it upon the ground and *in possession thereof,* and that such possession had been interfered with by wrongful acts on the part of the appellant and was jeopardized by the threatened continuance thereof. In passing upon the sufficiency of such allegations, the court says: "The defendant further urges that the title to the portions of the plaintiff's alleged location now in question is by the complaint shown to be in dispute between the plaintiff and defendant, and that the former must therefore establish its title at law, before it can have the aid of a court of equity to protect it. We do not so interpret the complaint. We understand it to charge that the defendant having actual notice and knowledge of the plaintiff's interest and rights in the premises, is, unlawfully and without any claim of right, seeking to deprive it of them by a series of wrongful acts already begun and threatened to be continued up to the point of the complete ouster, and dispossession of the plaintiff." In the case of Sioux City & D. M. Ry. Co. v. Chicago M. & St. P. Ry. Co., 27 Fed. 770, a case practically on "all fours" with the case at bar, Judge Shiras said: "There is but one controversy in the cause, and that is: Which company has the prior, and therefore better right to the occupancy of the premises in dispute, for the purpose of constructing and operating its line of railway. It is certainly equitable that a company, which in good faith surveys and locates

a line of railroad and pays the expense thereof, should have a prior claim for the right-of-way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior and better equity."

See, also, Ry. Co. v. Alling, 99 U. S. 463. It appears,
3 therefore, that proof of a prior and better right to the occupancy of the right-of-way in dispute is sufficient to make this action cognizable in equity. Did the appellee have such prior, and therefore better, right to the occupancy or possession of the right-of-way in dispute? In other words, did the appellee have a valid prior location of the right-of-way in question?

It is admitted by all parties that to constitute a valid
4 location of a proposed railroad, within this jurisdiction, there must be: 1st. A survey and actual staking of the proposed line upon the ground. 2nd. The adoption of such survey by the Board of Directors as its permanent line or right-of-way. The evidence establishes,
5 beyond any question, that the surveys were actually made, and the proposed line of railroad staked and marked upon the ground. The appellant contends, however, that the surveys, so made, were never adopted by the board of directors of the Arizona and Colorado Railroad Company of New Mexico, as required by law, and that therefore the appellee never had any title to or rights in its alleged right-of-way which the appellant was bound to respect. Upon this question the court below made the following finding of fact: "3rd. That immediately upon its organization as aforesaid the plaintiff company proceeded with the survey and location of a line of railroad down the said Animas Valley between the said points, and layed out, located and marked upon the ground by stakes set in the ground a line of railroad between the said points, to-wit, between the boundary line of the State of Colorado and the Territory of New Mexico, and the town of Farmington, in said Territory of New Mexico, and prior to the 1st day of January, 1905, adopted the said line so surveyed, located and marked upon the ground,

as the line of the definite location of its railroad between said last mentioned points."

The printed record in this case is very voluminous, containing twenty-five hundred pages, and as we deem this the question upon which this case must turn for affirmance or reversal, it is necessary, at this point, to state briefly the testimony bearing thereon. The plaintiff in the lower court, in support of its allegations, offered in evidence the records of the meetings of its Board of Directors, showing the adoption by resolution of various portions of its surveyed lines in San Juan County. It also placed upon the witness stand a witness, McFarland, the engineer in charge of its survey parties and who actually surveyed and staked out the right-of-way in question. The witness McFarland testified, *without objection*, that certain maps covering a surveyed line from the Colorado state line south along the valley of the Animas River to and through the town of Farmington, represented the right-of-way in question as *surveyed and adopted* by its board of directors. It was also in evidence that there were numerous surveys made at about this time in San Juan County, by the appellee, for the purpose of determining the best possible line between Durango, in the State of Colorado, and Farmington, New Mexico, and from thence south to the Arizona line, connecting with the lines of the appellee in Arizona. In at least two of these surveys, the engineer's station numbers began at zero in Colorado, running thence south, with consecutive numbers. It also appears that there were other engineer's station numbers commencing at "0" and running in consecutive order, from the south toward the town of Farmington. An examination of the resolutions from the minutes of the Board of Directors, introduced in evidence, discloses that the surveys were not adopted as a permanent line, as a whole, but that there were various resolutions covering different portions of the surveyed lines. In none of the resolutions does there appear any direct reference to any particular engineer's map. The entire distance from the Colorado state line south along the Animas River to and through the town of Farmington, being

the right-of-way in dispute, is about twenty-eight miles. No question is raised as to the adoption by the plaintiff company of the first fifteen odd miles from the state line of Colorado south, to and through the town of Aztec. This eliminates from the discussion two of the points of conflict, described and referred to in the testimony as the "Whitney and McEwen Crossings."

Taking the various resolutions offered in evidence, together with the maps, also in evidence, we find, using the engineer's station numbers as guides, that these numbers might be applied to different locations and are not absolutely limited to that portion of the survey between the towns of Aztec and Farmington, in dispute of this suit. Mr. McFarland, however, testified referring to the maps (mentioned above), that such maps indicated and described the right-of-way as surveyed and adopted. The witness McConnell also identified the lines described by McFarland as the survey adopted by the plaintiff company. Mr. McConnell also testified that after the line was adopted, he was employed to secure rights-of-way, and was furnished with maps and profiles showing the adopted line; such line being the same line testified to by the witness McFarland. All of these things occurred prior to the time that the defendant company took possession of any of those portions of the right-of-way in dispute in this suit. Counsel for the appellant argues that there is no resolution showing the adoption of that portion of the survey beween the towns of Aztec and Farmington, described as the "Revised Survey," and that the appellee, in offering the testimony of the witnesses McFarland and McConnell, was attempting to prove, by oral testimony, acts of the Board of Directors, which, by law are required to be kept in writing and as part of the records of the corporation. Counsel for appellant and counsel for appellee entered into a lengthy discussion of this question. Counsel for appellee cites the case of U. S. Bank v. Dandridge, 12 Wheat. 64. Counsel for appellant cites numerous cases, contending that where the statute requires the keeping of written records of directors' proceedings, (as is the case in New Mexico, Sec. 2832, C. L. of 1897),

oral evidence of corporate acts not so recorded is admissible against the corporation but ought not to be admitted on behalf of the corporation against the interests of others. While a consideration of this question might be very interesting, we do not find it necessary to a determination of the issues of this case to determine whether the evidence offered by appellee was an effort to establish corporate acts by parole or not, nor do we think it necessary to determine whether the resolutions of adoption offered in evidence by the appellee, as a matter of fact, do include *all of the line* so surveyed, located and marked upon the ground between the state line of Colorado and the town of Farmington.

From a careful examination of the testimony it appears conclusively that the resolutions of the board of directors show the adoption of all of the right-of-way except, possibly, that portion near the town of Aztec, referred to in the evidence and briefs as the "Revised Survey." This portion of the right-of-way includes "Young's Crossing," one of the disputed tracts, and the one of which appellant particularly complains as never having been adopted by the appellee as a part of its permanent right-of-way. It further appears, from the testimony and the findings, as to this particular tract, that the appellee was the owner of the same, by direct purchase, prior to the institution of this suit, and prior to any trespass thereon by the appellant. No legal steps whatever were taken by the appellant to gain possession of this particular tract until after the institution of the case at bar, and it further affirmatively appears from the testimony and findings, that, at the time of the threatened trespass, the appellant company had not complied with any of the requirements of the territorial statutes as to the adoption of *its line.* The appellee was the actual owner of the land known as "Young's Crossing," and until the appellant had paid for, or condemned the same appellant had no rights therein whatever, and the appellee could protect its rights to the same regardless of whether this particular piece of right-of-way had been actually adopted as a permanent location by specific resolution,

or not. The appellant, having no rights in that portion of the right-of-way known as "Young's Crossing," it becomes wholly immaterial, for the purpose of this discussion, to determine whether the court's finding of fact that, "prior to the first day of January, 1905, (the appellee) adopted the said line so surveyed. located and marked upon the ground as the line of the definite location of its railroad between said last mentioned points." Finding of Fact No. 3, quoted supra, is supported by the testimony in so far as it refers to "Young's Crossing."

The next proposition urged by appellant is, that the appellee's line, as located, is not the best obtainable line. Joined with this proposition is the contention that appellee at small expense can get a better line than the one claimed in this action, and that by reason of such facts appellee ought not to maintain this action in equity, having a complete remedy at law in damages. A great mass of testimony was introduced bearing upon these questions. Witnesses for the appellee testified that the line, as surveyed and adopted by appellee, in view of all the surrounding circumstances and conditions, was a practical line, and the best that could be obtained. Witnesses for the appellant testified to the contrary. Upon such conflicting testimony the court made definite and specific findings of fact in favor of the appellee. Under such a state of the record, this court will not inquire further.

Appellant further contends that appellee should not succeed for the reason that it is apparent from the testimony that interference by the appellant with the line claimed by appellee could not be avoided; also, that the allegations of good faith and ability on the part of the appellee to construct a railroad upon the right-of-way claimed are not sustained by the testimony, and, again, that the appellee ought not to succeed because appellee was guilty of laches. With reference to each of such contentions, the court specifically found against the appellant, and with reference to the interference with the right-of-way of the appellee the court specifically found that such interference by the appellant was willful and deliberate.

A sufficient answer is that each finding is based upon ample evidence to sustain the same.

Appellant also contends, even admitting that appellee had some rights to the right-of-way claimed, that appellant had no notice of appellee's claim, either actual or constructive. It appears from the brief of counsel for appellant that appellant's main contention as to the lack of notice is based upon the fact that the trial court admitted certain notices and options which were recorded in the office of the probate clerk of San Juan county, which said notices and options were not acknowledged in form to be entitled to record, and hence had no evidentiary value as records. Eliminating entirely from the evidence all such disputed evidence, an examination of the record discloses that there was ample evidence of actual notice to warrant the trial court in making the finding that the appellant had actual knowledge. It follows that the question of constructive notice is therefore immaterial.

The final contention advanced by appellant is that an examination of the record will show that the rulings by the court below upon evidence were such as to require the reversal of the judgment.

At the outset, counsel concedes as a general proposition in this jurisdiction that erroneous rulings of a court as to the admissibility of evidence in a case
7 tried by the court without a jury are not necessarily sufficient to call for a vacation of the judgment of the court below—citing Lynch v. Grayson, 5 N. M. 488, 25 Pac. 992. Counsel contend, however, that such rulings, when properly objected to and embodied in an assignment of errors, may be considered by the appellate court as indicating the condition of the judicial mind as to the case, and counsel insist that the rulings in this case indicate such a state of mind upon the part of the trial court as to impair confidence in the soundness of the conclusions reached by the court.

We have examined the record and the rulings of the court upon the objections to the referee's report; and, while we may not agree with the trial judge as to all of

the rulings so made, yet we find substantial, competent evidence to sustain each and every one of the findings made by the trial judge, and nothing in the rulings of the trial judge which indicates in the least degree that the trial judge was not absolutely fair and impartial in all of his rulings.

There being no error in the record, the judgment of the lower court is affirmed.

[No. 1354. August 26, 1911.]

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SARAH ELLEN DYE, DECEASED, ISAIAH A. DYE, Executor, Appellee, v. ORA BUTLER MEECE, Appellant.

SYLLABUS (BY THE COURT).

1. Under Sections 1983, 1985, 1986, 1987, C. L. 1897, it is the duty of the District Court, on appeal from a judgment of the Probate Court dismissing a petition to revoke the probate of a will, to appoint a guardian ad litem for an infant petitioner whose infancy is first disclosed at the trial, and a motion to dismiss the proceedings should not be sustained, notwithstanding the infant refused to apply for such appointment.

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

NEILL B. FIELD, MACO & MINOR STEWART for Appellant.

The appeal was seasonably taken. Brockett v. Brockett, 2 Howard 241; Pearce v. Strickler, 9 N. M. 46; Slaughter House Cases, 10 Wall. 289; Texas & Pacific R. R. Co. v. Murphy, 111 U. S. 488; Aspen Mining Co. v. Billings, 150 U. S. 31; Voorhees v. Manufacturing Co., 151 U. S. 135; Southern Pacific R. R. Co. v. Holmes,

155 U. S. 137; Kingman v. Western Manufacturing Co., 170 U. S. 675.

The law never requires, and courts ought never to demand, the conduct of futile proceedings. Lockman v. Lang, 132 Fed. 1.

The court had jurisdiction. Hurst v. Hollingworth, 94 U. S. 111; Plymouth Co. v. Amador Co., 118 U. S. 264; Files v. Brown, 124 Fed. 132; Hooven v. Featherstone's Sons, 111 Fed. 81; McFadden v. Mountain View, 97 Fed. 670; Michels v. Olmsted, 157 U. S. 198; Newell v. Meyendorf, 23 Pac. 335; Davis v. Wakelee, 156 U. S. 691; Bigelow on Estoppel 601.

The guardianship over men and women shall cease with their marriage. C. L. 1897, sec. 1459; Laws of 1901, sec. 5; Hall's Mexican Law, sec. 2013; Montoya v. Miller, 7 N. M. 289; U. S. v. Bainbridge, 24 Fed. Cases 946.

The only courts in New Mexico which under the statutes are invested with authority to invalidate a will are the district courts. C. L. 1897, secs. 900, 1981, 1983, 1986, 1987, 1988; Cohens v. Virginia, 6 Wheat. 407; Nations v. Johnson, 24 How. 205; Park v. Higbee, 24 Pac. 524; Damouth v. Klock, 29 Mich. 289; 22 Cyc. 562; Johns v. Smith, 56 Miss. 727; Seaton v. Tohill, 53 Pac. 170; Lloyd v. Kirdwood, 112 Ill. 338; Ralston v. Lahee, 8 Iowa 17; Claxton v. Claxton, 56 Mich. 557; Drago v. Moso, 40 Am. Dec. 592; Hoskins v. White, 32 Pac. 163; Schermerhorn v. Jenkins, 7 Johns 373; Young v. Young, 3 N. H. 345; Blood v. Harrington, 8 Pickering 552.

Writ of error coram vobis. Billups v. Freeman, 52 Pac. 367; Kemp v. Cook, 18 Maryland 130; Park v. Higbee, 24 Pac. 524; Teller v. Wetherell, 6 Mich. 45; Pickett v. Legerwood, 7 Pet. 144.

MARRON & WOOD for Appellee.

The proceeding to revoke probate of will is a new, separate and distinct action from that of resisting the probate of a will. C. L. 1897, secs. 929, 1985; In re

Gourand, 95 N. Y. 256; Hoyt v. Hoyt, 112 N. Y. 511; Bouvier's Law Dictionary, "to sue"; 15 P. & P. 467.

Marriage did not relieve minor from necessity of having a guardian ad litem. Laws 1901, sec. 5; C. L. 1897, secs. 1459, 1461, 1981, 2685, sub-secs. 8 and 9; Montoya v. Miller, 7 N. M. 289.

The failure to appoint guardian ad litem was ground for dismissal without plea. C. & C. Bridge Co. v. Brennan, 16 Ky. L. 126; Haines v. Oatman, 2 Doug., Mich. 430; Keran v. Clouser, 5 Blackf. 604; Lumpkins v. Justice, 1 Ind. 557; Wolford v. Oakley, 43 How. Pr., N. Y. 118; Fitch v. Fitch, 18 Wend. 513; Sutton v. Nichols, 20 Kas. 43; Blood v. Harrington, 8 Pick. 552; C. L. 1897, sec. 929.

Where a course suggested by one side is adopted by the other, it will not be permitted thereafter to claim the course suggested to be error. Sparkling v. Mack, 86 Ill. 125.

OPINION BY THE COURT.

PARKER, J.—A proceeding was instituted by appellant in the Probate Court of Bernalillo County to revoke the probate of the will of her mother, under Sections 1985, 1986, 1987 of the Compiled Laws of 1897, which are as follows: Section 1985. "When a will has been approved, any person interested may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he shall file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked."

Sec. 1986. "Upon the filing of a petition a citation shall be issued to the executor, and to all devisees and legatees named in the will residing in the Territory, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on the first day of the earliest term for which it is possible to give the required notice, to show some cause why the probate of the will

should not be revoked. Such citations shall be served in the same manner and for the same time previous to the hearing as hereinbefore provided as to the notice of the probate of the will, except that no publication shall be required."

Sec. 1987. "At any time appointed for showing cause the probate judge shall proceed to hear the proofs of the parties in like manner as upon the probate of the will. If any devisees or legatees named in the will shall be minors and have no guardians, or shall be of unsound mind, the court shall appoint some attorney to represent them. If upon such hearing the validity of the will shall be sustained, the contest shall be dismissed at the cost of the petitioner. If the probate judge shall be of the opinion that the probate of the will should be revoked he shall certify his opinion, with all the papers and proofs, to the district court, and the same proceedings shall thereupon be had as provided in section one thousand nine hundred and eighty-three."

Section 1983, referred to in section 1987, provides for a trial de novo in the district court.

The probate court tried the case, decided in favor of the validity of the will and dismissed the petition of appellant, who, thereupon, appealed to the district court. In the midst of the trial in that court it was disclosed that appellant was under twenty-one years of age. Thereupon appellee moved to dismiss the proceedings on the ground of the incapacity of appellant to sue in her own name. Appellant resisted the motion, but declined to apply for the appointment of a guardian ad litem and stood upon her objection to the motion for dismissal. The court sustained the motion and dismissed the cause.

No point is made in the briefs that a court may not at any time during the process of the trial, upon the disclosure of the disability of infancy of one or more of the parties, cause the pleadings to be amended so that the same may be properly prosecuted or defended by a next friend or guardian ad litem. Such seems to be the settled law. The defect is one of regularity and not of jurisdiction. 22 Cyc. 641, 646; 27 Cent. Dig., Infants, sec. 209.

The appellant, being an infant, was not authorized to appear by attorney and could not be bound by any act of his. A guardian ad litem must have been brought in before the proceeding could regularly go forward. Was it the court's duty, with or without the request of appellant, to appoint a guardian ad litem? We think it was. It may be stated generally that it is the court's duty to see that the rights of infants are looked after and protected in all proceedings before it, even in the absence of statute commanding the same. The guardian ad litem is merely the means by which the court accomplishes this result. 10 Ency. P. & Pr. 590. Nor is the consent of the infant necessary to the appointment. Biddinger et al. v. Smith et al., 13 S. W. 734; Brick's Estate, 15th Abb. Prac. (N. Y.) 12; Banta v. Calhoun, 2 A. K. Marsh. (Ky.) 166; Walker v. Hull, 35 Mich. 488; 22 Cyc. 656.

But in this jurisdiction, as has been seen, there is positive statutory requirement of the appointment of a guardian ad litem. Sec. 1987, C. L. 1897. It therefore became the imperative duty of the court, sitting on
1 appeal from the probate court and proceeding in a trial de novo, to appoint a guardian ad litem for appellant if she was under legal disability. It is to be said that it is easily understood how the court might well fall into error upon such a proposition as was presented in this case. Ordinarily, courts grant only such relief as is properly and regularly requested. A litigant who is sui juris must take the consequences of his own acts or failure to act. But in the case of infants a different rule applies and, under our statute, if not, indeed, without a statute, it is the duty of the court to appoint a guardian ad litem to protect the infant's rights.

It follows that the district court was in error in dismissing the petition of appellant instead of appointing a guardian ad litem and for that reason the judgment of the court below will be reversed with instructions to reinstate the cause upon the docket and to proceed in accordance with this opinion, and it is so ordered.

[No. 1359. August 26, 1911.]

RICHARD DI PALMA, ET AL., Appellees, v. J. A. WEINMAN, ET AL., Appellants.

SYLLABUS (BY THE COURT).

1. Plaintiffs, lessees of defendant Weinman, were compelled, by the tortuous acts of defendant, to abandon Weinman's building in which they were carrying on a retail drug trade, and for the remainder of the term of their lease continued their business in less desirable locations. They proved a loss in average daily, weekly and monthly sales, that their percentage of profits was 40% in gross sales and the monthly expenses of carrying on the business in each place. Held, that where damages are claimed for loss of sales of goods, it was not necessary for claimants to introduce evidence as to (a) the amount of stock they carried, (b) the accounts of the individual partners, (c) the amount of capital invested, or (d) to produce books from which a bookkeeper could ascertain the percentage of profits realized from the business.

2. The plaintiffs were damaged by being deprived of an opportunity to sell goods, their loss was the net profits they would have made on such sales: Held, it was immaterial whether plaintiff's business was on the whole profitable or unprofitable.

3. One of the plaintiffs testified that he had been a pharmacist for thirty-five years, for over thirty years had been engaged in that profession in Albuquerque and that plaintiffs had been in the retail drug business for sixteen years and that he knew how much gross profits plaintiffs made on the goods they sold: Held, that the witness was competent to testify what the gross profits of the business were.

4. One of the plaintiffs testified, as to the monthly expenses of the business, that they kept no account of the expenses, but that he could state the same from memory: Held, that in the absence of any record of the items of expense, the witness was competent to state from memory the expenses of the business.

5. Plaintiffs introduced in evidence a cash book containing an account of their monthly cash receipts during the term of the Weinman lease, and one of the plaintiffs was allowed to testify from said book as to plaintiffs' cash sales. It was insisted by defendant that the book was not competent, because plaintiffs had been in business in Albuquerque for a number of years before they leased the Weinman building and the receipts included collections for sales made by plaintiffs prior to their occupancy of the Weinman building: Held, that this fact did not destroy the evidentiary value of the book, for the reason that if the receipts during the occupancy of the Weinman building were increased by an unknown amount and the receipts thereafter until the end of the term of the Weinman lease were increased by a like amount, the difference, the object of the inquiry, would not be affected.

6. The defendants insist that the plaintiffs should not have been allowed to put in the testimony they did as to loss of profits, because it appeared that the plaintiff, Ruppe, after the cause of action had accrued, voluntarily destroyed plaintiff's invoices, check books, cancelled checks and bank pass book. The evidence examined and, Held, that no error was committed, because the destruction of the invoices, etc. was compatible with good faith on the part of plaintiffs.

7. The plaintiff, Ruppe, over the objection of the defendants, was permitted to testify as to the relative desirability for trade purposes of the Weinman building and the location to which plaintiffs removed: Held, that the witness's use and occupancy of the buildings qualified him to testify Following Union Pacific Ry. v. Lucas, 136 Fed. 374; 69 C C. A. 218, and that the question as to whether the witness was qualified to give his opinion was for the trial judge to determine and his decision, not being clearly erroneous as a matter of law, will not be disturbed. Following Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520.

8. Plaintiffs were permitted, over objection of defendants, to ask a witness if he had not, prior to the commencement of the excavation which caused the plaintiff's damage,

drawn plans for a building to cover Weinman's lot. Though the answer of the witness was favorable to defendants, they complain that the court committed error in allowing the question to be asked, because it showed a deliberate purpose on the part of plaintiffs to injure defendants by showing that they caused the damage intentionally: Held, no error was committed, because, (a) even if the question was improper, it was rendered harmless by the witness's answer, and (b) the verdict does not show but that the jury gave plaintiffs a verdict for compensatory damages only.

9. Special questions were put to the jury and the answers made to them were inconsistent: Held, that where special findings are inconsistent, they neutralize each other and the general verdict controls.

10. The jury brought in a verdict in favor of plaintiffs and assessing "their damages at five thousand dollars, at six per cent. interest:" Held, that the verdict was ambiguous and that the court committed no error in ordering the jury to retire and bring in another verdict.

11. The instructions of the court to the jury upon their bringing in an ambiguous verdict examined and, Held, not to have invited the jury to add to their verdict.

12. Defendants complain of the refusal of the trial judge to send the books introduced in evidence: Held, that the defendants should have taken such steps as the law provides for having the books sent up.

13. The proof offered by plaintiffs of loss on account of damage to goods, is no stronger than that offered at the previous trial and should have been excluded. 15 N. M. 68; 103 Pac. 789.

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

NEILL B. FIELD for Appellant Barnett.

The jury should not have been permitted to consider the evidence with reference to the damaged goods. DiPalma v. Weinman, 13 N. M. 226; 15 N. M. 68.

Actual damages must be actually proved and cannot be assumed as a legal inference. McSherry Co. v. Dowagiac Co., 160 Fed. 948; Seymour v. McCormick, 16 Howard 480; Philip v. Nock, 17 Wall. 462; Railway Co. v. Mfg. Co., 44 S. E. 893; Mineral Springs Co. v. Kuhn, 91 N. W. 510; Coal Co. v. Hartman, 111 Fed. 102; Boston R. R. v. O'Reilly, 158 U. S. 334; Swift v. Johnson, 138 Fed. 867; Richmond R. R. v. Elliott, 149 U. S. 266; Howard v. Mfg. Co., 139 U. S. 199; Giles v. O"Toole, 4 Barb. 261; Gildersleeve v. Overstolz, 90 Mo. App. 530; 3 Par. Con., 6 ed., 180; Iron City Toolworks v. Welisch, 128 Fed. 693; Gas Co. v. Siemens-Lungren Co., 152 U. S. 200; Mining Co. v. Humble, 153 U. S. 540; Casper v. Klippen, 61 Minn. 353; Central Trust Co. v. Clark, 92 Fed. 293.

Admission of prejudicial evidence. 4 Suth. Dam. secs. 1030, 1033; 3 Wig. Ev., sec. 1725, 1917 et seq.; 1 Wig. Ev., secs. 768 et seq.; Rogers Exp. Tes., sec. 1 et seq.; Ferguson v. Hubbell, 97 N. Y. 507; Pearson v. Alaska Co., 99 Pac. 753; Schmieder v. Barney, 113 U. S. 645; Milwaukee Ry. Co. v. Kellogg, 94 U. S. 469.

Having destroyed the invoices, checks, etc., plaintiffs should not have been permitted to give secondary evidence of facts which the destroyed instruments tended to prove. 2 Wig. Ev., secs. 1198 et seq.; Broadwell v. Stiles, 8 N. J. L. 58; Joames v. Bennett, 87 Mass. 169; Parker v. Kane, 4 Wis. 1; Wallace v. Harmstead, 41 Pa. St. 492; Riggs v. Taylor, 9 Wheat 483; Adms. of Price v. Adms. of Tallman, 1 N. J. L. 511; Wykcoff v. Wykcoff, 16 N. J. Eq. 491; Wilke v. Wilke, 28 Wis. 298; Bagley v. Adms. of McMickle, 9 Cal. 430; Gugins v. Van Sorder, 10 Mich. 522.

Instructions as to interest. 13 N. M. 226; C. L. 1897, secs. 2550, 3219; Parker v. Nickerson, 137 Mass. 487; Rochester v. Levering, 4 N. E. 203; Suth. Dam., secs. 355-366.

Surplusage. Meeker v. Gardella, 23 Pac. 837; Pat-

terson v. United States, 2 Wheat. 221; Relfe v. Wilson, 131 U. S. 186; Hattenback v. Hoskins, 12 Iowa 109; Haycock v. Greup, 57 Pa. St. 438; Parker v. Fisher, 39 Ill. 164.

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

Instructions as to damages erroneous. 3 Suth. Dam., sec. 864; 1 Sedgwick Dam. 128.

Independent contractor. Casement v. Brown, 148 U. S. 615; Chicago v. Robbins, 67 U. S. 418; Transportation Co. v. Chicago, 99 U. S. 635; Sulzbecker 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.

Construction of party wall did not necessarily involve trespass. 1 Taylor Land. and Ten., sec. 174; Nor. Trust Co. v. Palmer, 49 N. E. 555; Prond v. Hallis, 1 B. & C. 8; Penley v. Watts, 7 M. & W. 601; Shaw v. Comiskey, 7 Pick. 76; Peterson v. Edmunson, 5 How. 378.

Submission to jury on erroneous theory. Skally v. Shute, 132 Mass. 370; International Trust Co. v. Schumann, 158 Mass. 291; 3 Suth. on Dam., sec. 864, 3rd ed.; Bartlett v. Farrington, 120 Mass. 284; Royce v. Guggenheim, 106 Mass. 201; Bennett v. Bittle, et al., 4 Rawle 381.

EDWARD A. MANN for Appellant Weinman.

Actual damages. 13 N. M. 226; 15 N. M. 68; Central Coal & Coke Co., et al. v. Hartman, 111 Fed. 196; Howard v. Manufacturing Co., 139 U. S. 199; Cincinnati v. Siemens-Lungren Co., 152 U. S. 200; Simmer v. City of St. Paul, 23 Minn. 408; Griffin v. Colver, 16 N. Y. 489; 1 Sedg. Dam., sec. 183; Red v. City Council, 25 Ga. 386;

Kenney v. Collier, 79 Ga. 743; Greene v. Williams, 45 Ill. 206; Hair v. Barnes, 26 Ill. App. 580; Morey v. Light Co., 38 N. Y. Sup. Ct. 185; The Mayflower, 1 Brown Adm. 387; Sturgis v. Clough, 1 Wall. 269; The Conqueror, 166 U. S. 110; The Transit, 4 Ben. 138; The Emilie, 4 Ben 235; R. L. Maybey, 4 Blatchf. 439; The Clarence, 3 W. Rob. Adm. 286; Horres v. Berkley Chemical Co., 52 L. R. A. 45; Ill. & St. L. R. & Coal Co. v. Decker, 3 Ill. App. 135; Kentucky Heating Co. v. Hood, 22 L. R. A., N. S., 588; Miller v. Wilkesbarre Gas Co., 206 Pa. 254.

Special findings control general verdict. C. L. 1897, sec. 2993.

MARRON & WOOD and A. B. MCMILLEN for Appellees.

Legal evidence of loss of profits. 3 Suth. on Damages, 3 ed., secs. 867-869; 1 Suth. on Damages, 3 ed., sec. 70; City of Terre Haute v. Hudnut, et al., 112 Ind. 542; Di Palma v. Weinman, 15 N. M. 68; Wicker v. Hoppock, 6 Wall. 99; Hexter v. Knox, 68 N. Y. 561; Chapman v. Kerby, 49 Ill. 211; Smith 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; 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., 14 Mich. 508; Fradenheit v. Edmundson, 36 Mo. 226; Kemper v. City of Louisville, 14 Bush. 87; Gibson v. Fischer, 68 La. 29; Lawson v. Prince, 45 Md. 123; Oliver v. Perkins, 92 Mich. 304; Goebel v. Hough, 26 Minn. 252; Downell v. Jones, 52 Am. Dec. 194; Anvil Mining Co. v. Humble, 153 U. S. 459; Peshine v. Shepperson, Va., 94 Am. Dec. 474; Shile v. Brokhaus, 80 N. Y. 618; Loder v. Jayne, 142 Fed. 1020; Occidental & C. Mining Co. v. Comstock Tunnel Co., 125 Fed. 244; Pacific Steam Whaling Co. v. Alaska Packers' Ass'n., Cal., 72 Pac. 163; Lincoln v. Claflin, 7 Wall. 132; Wakeman v. Wheeler & Wilson M. Co., 101 N. Y. 205.

STATEMENT OF FACTS.

The appellees, hereinafter styled the plaintiffs, brought this suit against the appellants, hereinafter styled

the defendants, to recover ten thousand dollars as damages on account of the falling of a wall and the consequent destruction of part of plaintiffs' stock of drugs and merchandise and their enforced removal to another building; from a judgment of $7,738.00 based on the verdict for that amount by a jury, the defendants bring this appeal.

OPINION OF THE COURT.

MECHEM, J.—This is the third time this case has been before this court: Di Palma v. Weinman, 13 N. M. 226; 82 Pac. 360; 103 Pac. 782, 15 N. M. 68. The case was reversed the last time because of a lack of evidence to prove loss of net profits, loss on damaged goods and for an erroneous instruction as to interest. 103 Pac. 782; 15 N. M. 68. 1. On the question of lack of evidence to establish loss of profits this court said: "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 building premises, and at the location to which he moved his stock after the wall fell. True, the record shows that he referred to some memoranda to refresh his memory; but it nowhere appears what the memorandum was, nor when or by whom it was made, nor does it state that he knows, or even believes, it to be correct. This being true, it was error to submit the question of loss or profit to the jury, there being no sufficient evidence to sustain a verdict for such loss." At the trial, from which this appeal is taken, the witness Ruppe produced a cash book; several day books, a soda fountain book and a ledger kept by plaintiffs in the regular course of their business, and from these books, and especially from the cash book, the plaintiff Ruppe stated what were the cash receipts of the business of plaintiffs, for six and one-half months they occupied the Weinman building, and for the remainder of the term of their lease from Weinman, in the locations to which they were compelled to move. The witness Ruppe testified that he had been a pharmacist for thirty-five years and for

over thirty years had been engaged in that profession in Albuquerque and that he and Di Palma had been partners in the retail drug business there since 1894. In reply to a question as to what his gross profits on sale in the retail drug business had been, he said: "A good many of the medicines came with the prices marked thereon; others we figured the cost and what they were worth at retail is marked thereon; prescriptions are compounded and the profit is figured on the drugs and the time used in preparing the same. Certain goods such as sundries and articles of luxury are generally figured at a percentage ranging from fifty to one hundred per cent; prescription compounding must bring more than one hundred per cent; patent medicine profits range all the way from 25 to 35 per cent; in my experience as a druggist in figuring profits that I have made in my business, I figure that my business produced me on the average of 40 per cent. gross." As to the monthly expenses of the business, the witness testified that plaintiff's expenses were $434.00 per month. This he stated from memory and on cross-examination said that he had no record of any kind of the monthly expenses, but could and did state the same from memory solely. The defendants claim that these books, for various reasons, furnish no basis for an intelligent estimate, of profits derived from the business and cannot possibly corroborate the testimony of the witness. Their reasons are (a) the books contain no stock account; (b) they contain no account of Richard Di Palma and B. Ruppe as partners; (c) they contain no showing of the amount of capital invested; (d) they contain no account from which a bookkeeper could ascertain the percent of profits realized; (e) or how much merchandise was bought; (f) nor what the expense of conducting the business was.

2. It would seem that with respect to a case of this kind, where the injury sought to be compensated was a loss of profits, which flowed from but one fact, i. e., the diminution of the sales of a retail merchant, that it was first in order, to show that there was such diminution in

sales. In this case such diminution was established beyond a doubt. Then the next question presenting itself was, what profit did the merchant lose because of such diminution in sales; that is, net profits? In the case of Foster v. Goddard, 9 Fed. Cas. 4,970, it was said: "Net profits may be defined to be the gain made by the merchant in buying and selling goods, after paying all costs and charges for transacting his business." If plaintiffs' sales in the Weinman building amounted to so much per month, and they made a profit of 40 per cent. on the amount of such sales, and their monthly expenses of conducting their business amounted to so much, from these facts the amount of net profit made would be a mere matter of calculation; and if after the plaintiffs removed from the Weinman building, their average monthly sales were shown to be so much, on which their profits were 40 per cent., and their monthly expenses of conducting the business were shown to be so much, then their monthly net profit in the other building could be ascertained, and the monthly net profit in the Weinman building exceeding that resulting from carrying on the same business in the other building, such difference multiplied by the number of months remaining in the lease with Weinman would give loss of net profit suffered by plaintiffs, for which they sue. The factors necessary to be established were, amount of sales, gross profits on sales and expense of carrying on the business. These being established by competent evidence, the jury could estimate with reasonable certainty what loss, if any, was suffered by plaintiffs. It follows then that the amount of capital invested, the amount of stock on hand or invoice of stock purchased during the period, or the account between the individual partners or the ledger accounts from which a bookkeeper might have drawn a statement of the condition of the firm, though they might have been of some aid, yet were not so necessary that without them, the matter sought to be established could not be shown by other competent evidence.

In the case of Shepherd v. Milwaukee Gas Light Company, 15 Wis. 349, 82 Am. Dec. 679, on the point of how

damages on account of loss of profits should be estimated, it is said: "And it seems to me that the profits of an established business are quite as capable of being ascertained with reasonable certainty as the profits to arise from a single contract or adventure. There is, in the case of such business, the experience of the past to serve as a test. And the rule suggested by Jervis, V. J., in Flecher v. Taylour, 33 Eng. L. & Eq. 187, that the damages should be estimated 'according to the average precentage of mercantile profits,' could readily be applied and would seem just and reasonable." And the court in the same case, speaking further on the same point, said: "It is well established that an action exists in many cases for an injury to a person's trade. Actions for slandering one in his trade or profession are of this character; and the damages are based upon the assumption that such slander injures the party's business by diminishing it. But how does that damage him? Clearly, only by depriving him of the profits he would have made by the business, of which he had been wrongfully deprived. So also of private actions for a nuisance, the only injury being a diminution of the plaintiff's business. * * * * In Marquart v. La Farge, 5 Duer. 559, the defendant had wrongfully broken up the plaintiff's business in a restaurant. The plaintiff gave evidence of the extent of the business. 'And that one half of the receipts were profit.' The Court held the evidence was admissible. It said: 'Now, it was certainly competent to prove in some way, the nature and extent of the injury, and the value of the business was a proper subject of estimate for the jury.' They then said: 'It may be that the calculation of possible or probable profit, in view of the ordinary uncertainties of business, would not be allowable.' If by this the Court meant to exclude all consideration of the profits that would have resulted to the plaintiff according to ordinary course of business, it seems to me repugnant to what had previously been expressly allowed. They had allowed evidence of what the profits had been; they had said that the jury must estimate the value of the business, in arriving at the amount of the damages.

Now, I think it is impossible for any judge or jury to do this without considering the profits of the business."

For the purpose of this case only it may be said that the plaintiff's being damaged solely by being deprived of an opportunity to sell goods, they were then damaged
2 to the extent of the net profits they would have made on the lost sales; therefore, it was immaterial whether on the whole venture plaintiffs were making money or not, for suppose they were, on account of a large stock of shelf-worn goods or more capital invested than necessary, or because they were operating to such an extent on borrowed money, making but a small margin of ultimate gain, yet, surely they were damaged to the full amount of their net profits on the sales they lost by defendant's trespass. If by reason of any of the causes above stated, plaintiffs were conducting the business on the whole at an actual loss, could defendants be heard to say: "True, by our tortuous acts we have caused you to lose sales of goods, on which goods you would have made a profit, but because your business was an unprofitable one, you have not been damaged." All that was required in this case was to prove profits for a few months anterior to the destruction of the building, and for the remainder of the term of the lease with Weinman with reasonable certainty, 103 Pac. 782, 15 N. M. 68. The witnesses' testimony from the books was competent and admissible, and, if the jury believed it, sufficient to sustain the verdict.

In his brief filed in this case, the last time it was before this court, 103 Pac. 782, 15 N. M. 68, the eminent counsel for the defendant Barnett criticized the evidence of that trial as follows: "The witness Ruppe, who was the only witness as to damages, was allowed to state * * * * what were the net profits of the business, without showing the amount of daily, weekly or monthly sales, in the building before the accident, or the amount of like sales in the building to which they removed or what percentage of profit was usual in the trade, or, indeed, any tangible fact which defendants could by any possibility disprove." This

view was adopted by the court and plaintiffs have, in our opinion, met this criticism, by showing their daily
3 and monthly sales, both before and after their enforced removal, the percentage of profit they made in that trade and many tangible facts which the defendants might, if untrue, disprove. The case of Central Coal and Coke Co. v. Hartman, 111 Fed. 96-102; 49 C. C. A. 244, is not in point here because the testimony in that case consisted of the unsupported, naked statement of a witness about a transaction without producing any letters, books, checks, or other data to support it and for that reason the court held that such testimony ought not to be the foundation of a judgment in a case where the parties had books, letters, etc. 117 Fed. 540, Edward v. Bates Co. Neither is the case of the Conqueror, 166 U. S. 116, 41 L. ed. 937, in point. It did not turn on the competency of the evidence offered opinions of witnesses as to the loss of profits, but on the weight of the evidence. The court says of the witnesses' testimony that: "Their testimony falls far short of establishing such a case of loss of profit as entitled the libellant to recover this large sum for the detention of his yacht." And also in that case it was shown that the yacht in question was purchased by her owner for his own pleasure and that there was no definite evidence tending to show that he bought her for hire or would have leased her if he had been able to do so for any sum.

3. As to the objection that there was no record of the expenses of the business, it may be said, we think, that such items being regular in occurrence, more or less certain in amount and when sworn to so easily tested upon cross-examination, as to the items contained in amount tes-
4 tified to, that the witness Ruppe could well state the total amount and that it was competent. To hold otherwise would be tantamount to saying that the failure of a merchant under such circumstances to keep a regular set of books would deprive him of a remedy that the law gave him.

4. As to the objection to the evidence as to the gross

profits; the witness did not testify as to an opinion, but as to a fact within his knowledge, i. e., that the goods sold by the firm were sold at an advance of 40% above their cost. His evidence was admissible and competent and it was for the jury to say what weight was to be given it.

5. It is also insisted that the monthly cash receipts as shown in the cash book in evidence and from which the plaintiff, Ruppe, was allowed to state the amount of cash sales, cannot throw any light upon the profits during this period, because the record shows that plaintiffs were in the drug business in Albuquerque for many years before they ever entered into a lease with Weinman and how much of the gross receipts during the period to which Ruppe testified were for accounts collected on sales made prior to
5 their entering into the Weinman lease nowhere appears. Admitting this statement to be true, yet it does not destroy the evidentiary value of the book, because of the amount of the monthly net profits before and after the plaintiffs left the Weinman building, would be the same, if we admit that during the occupancy of the Weinman building, of the cash receipts an unknown percent. was for sales made prior thereto, we are compelled to make the same admission with regard to the period after the plaintiffs left the Weinman building. The net profits in each case being swelled the same per cent., the difference, the object of this inquiry, is unaffected.

6. The defendants insist that the plaintiffs should not have been allowed to put in the testimony they did, as to loss of profits, because it appeared that the witness Ruppe, after the cause of action had accrued, voluntarily destroyed plaintiff's invoices, check book, cancelled checks and bank pass book. This cause of action accrued June 30th, 1902; the complaint was filed August 26th, 1902, and this case has been before the trial court for hearing four times and before this court three times, and this last hearing was more than eight years after the suit was brought. The witness Ruppe testified that he did not know when the invoices, etc., were destroyed, or by whom, but

admits that they were destroyed by his order, but that he never knew that they would be required in the case. The question was then for the judge to determine whether such destruction was compatible with good faith on the part of the plaintiffs. Ruppe said that it was his custom as invoices, checks, etc., accumulated to have them destroyed to get them out of the way. Prof. Wigmore thus states the rule: "The view now generally accepted is
6 that (1) a destruction in the ordinary course of business, and, of course, a destruction by mistake is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise will equally suffice, provided the proponent first removes to the satisfaction of the judge, any reasonable suspicion of fraud." 2 Wigmore Evidence, sec. 1198. The case of Sturgis v. Clough, 1 Wall. 269, is not in point because in that case the "Libellant withheld the best evidence of his profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collission."

7. Counsel for the defendants assigns error to the admission by the trial court, of the testimony of the witness Ruppe, as to the relative desirability of the places to which the plaintiffs moved, as compared with the Weinman building. They say that such testimony was clearly opinion and should have been excluded. Admitting that such testimony was purely opinion, yet we still think the evidence was admissible, in view of the fact that the witness
7 had lived in Albuquerque thirty years, during which time he was employed in, or conducted a drug store; that he and Di Palma had been in business since 1894 in Albuquerque, or for a period of sixteen years at the date of the trial, and that he had occupied all three of the locations. Surely, if the rule, which requires those who testify as to the value of real estate, to qualify themselves by proof of knowledge of market value, derived from sales and purchases, does not apply to the owner of lands who has purchased and used them for himself, because his purchase.

his ownership and his use qualify him to give an estimate (Union Pac. Ry. v. Lucas, 136 Fed. 374; 69 C. C. A. 218), the witness Ruppe was qualified to give an estimate of the relative desirability of the locations in question. In any event, the question as to whether the witness Ruppe was qualified to give his opinion was for the trial judge to determine and his decision, not being clearly erroneous as a matter of law, will not be disturbed. Stilwell & B. Mfg. Co. v. Phelps, 130 U. S. 520.

8. The plaintiffs were permitted, over objection, to interrogate the witness LaDriere as to whether he had, prior to the commencement of the excavation, drawn plans of a building for Barnett which was intended to cover both lots. Though the answer of the witness was favorable to the defendants, they complain that even in allowing the question to be propounded, the court committed error, because it showed a deliberate purpose, on the part of the plaintiffs, to create in the minds of the jury the impression that, even before the party wall agreement was made, the defendants contemplated the construction of a building on both these lots, and thus to induce them to infer that defendants, at that time, contemplated the destruction of the building occupied by plaintiffs, and therefore such destruction was malicious. For the reason (a) that the
8 question, even if improper, was rendered harmless by an answer favorable to the defendants, and because (b) the verdict does not show but that the jury gave plaintiffs a verdict for compensatory damage only, this assignment of error is held to be bad.

9. The following special questions were put to the jury and answered as follows: No. 1. "Did the plaintiffs have reasonable grounds for apprehension that the wall of the building occupied by them might fall as the result of the excavation being made on Lot 1?" A. "No, sir." No. 2. "Could the plaintiffs by the use of means reasonably within their reach have protected themselves from damage by the falling of the wall of the building occupied by them?" A. "No, sir." No. 3. "What, if anything, did the plaintiffs do towards protecting themselves from the loss or damage to their property by the falling of the wall

of the building occupied by them?" A. "No, sir." No. 4. "Ought the plaintiffs as reasonable men have anticipated the fall of the wall of the building occupied by them?" A. "Yes, sir."

While when special findings of facts are inconsistent with the general verdict in a case, the former shall control the latter as provided by Section 2993, C. L. 1897, **9** yet where the special findings are themselves antagonistic as in this case, they neutralize each other and the general verdict controls. 2 Thompson Trials, sec. 2692.

10. After retiring, the jury brought in the following verdict: "We, the jury, find the issues for the plaintiffs and assess their damages at five thousand dollars at six per cent interest." The plaintiffs objected to this verdict and the court gave the following instruction: "Gentlemen: If by the verdict you have brought in, assessing the plaintiffs' damages against the defendants at five thousand dollars with six per cent. interest, you mean that something in the nature of interest up to the present time be added to the sum of five thousand dollars you name, you shall determine the amount under the instructions given you, and it will be a better way to add it to whatever other sum you may find, so as to make one total. If it is not your intention to add anything in the nature of interest up to the present time to said sum of five thousand dollars, you should make your meaning clear by your verdict. Another blank form for verdict will be furnished you to be filled out and returned as you have been instructed." After this charge the jury retired and thereafter brought in the following verdict: "We, the jury, find the issues for the plaintiffs and assess their damages at seven thousand seven hundred and thirty-eight dollars in total amount." If, as asserted by defendants, the verdict as originally returned was not ambiguous, but simply showed that the jury found all the damages which plaintiffs suffered would have been five thousand dollars it was their intention that that sum should thereafter draw six per cent., then the addition of the words "at six per cent interest" meant nothing for the judgment would have drawn six per cent

by force of statute. If, however, these words indi-
10 cated that the jury intended to give the plaintiffs in-
terest on their damages, then they certainly were ambiguous and the plaintiffs had a right then and there to have the verdict rendered certain.

11. The question then is, and it is raised by counsel for defendants, did the court's instruction as above set forth invite the jury to add to their verdict against
11 the defendants? We do not believe the instruction susceptible of any such construction. The verdict as returned included above the sum of five thousand dollars what would amount to about 7.15% on the amount of five thousand dollars from the date of the injury to the rendition of the verdict.

12. Complaint is made by defendants on account of the refusal of the trial judge to send up to this court some of the books offered in evidence. If these books would
12 have aided us in determining this cause they should be here and the defendants should have taken such steps as the law provides for having them sent up.

13. The proof as to damaged goods, that is, goods
13 not entirely destroyed, should have been excluded, as it is no more competent than at the former hearing in this case. That was for an item of $500.00.

Counsel for defendants have argued other points in their brief which we do not deem it necessary to discuss, as they have been disposed of by this court in former opinions. If the plaintiffs will file a remittitur of $770.00, being $500.00 on account of plaintiffs' claim of that amount for damaged goods and $270 interest thereon, the judgment of the lower court will be affirmed; if not it will be reversed.

[No. 1381. August 26, 1911.]

L. B. HOWEY, ET AL., Appellees, v. E. R. GESSLER, ET AL., Appellants.

SYLLABUS.

1. Under the provisions of Section 21, Chapter 57, Laws of 1907, requiring that each error relied upon shall be stated in separate paragraphs, an assignment of error that the court erred in rendering judgment on the complaint and evidence, raises only the question of variance between the pleadings and proof, and no variance being apparent upon the record, the assignment is not well taken.

2. Where it appears from the transcript that the complaint was sworn to and contained copies of the notes and mortgage sued upon, the execution of all of which was admitted by the failure of the defendants to deny the execution, and it also appears from the decree that the plaintiff exhibited the notes sued upon to the court, there was proof sufficient to sustain the decree.

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

JAMES R. JAFFRAY and D. D. TEMPLE for Appellants.

Sufficiency of complaint. Dame v. Cochiti R. & I. Co., 13 N. M. 10; 6 Enc. P. & P. 45, 117.

Memorandum written on face of note made contract referred to therein integral part of plaintiff's cause. S. S. Salt Co. v. Barber, 49 Pac. 524, Kans.; 1 Daniel Neg. Instruments 194; Wilson v. Roots, 119 Ill. 379; Gardt v. Brown, 113 Ill. 475; 16 Enc. P. & P. 943; 14 Enc. P. & P. 579; Titlow v. Hubbard, 63 Ind. 6; Busch v. C. C. Ger. Bdg. A., 75 Ind. 348; 7 Cyc. 628; Cushing v. Field, 35 Am. Rep. 293; Costello v. Crowell, 127 Mass. 293; Blake v. Coleman, 22 Wis. 416; Leeds v. Lancashire, 5 Maule & S. 25; Johnson v. Haegan, 23 Maine 329; Heywood v. Perrin, 10 Pick. 228; Cook v. Kelsey, 19 N. Y. 415; Wheelock v. Freeman, 13 Pick. 165; Palo Mfg.

Co. v. Parr, Neb. 379; 2 Parsons on Notes and Bills 539; 1 Randolph on Commercial Paper 129; Chitty on Bills 155; Byles on Bills 100; Parker v. American Exchange Bank, 27 S. W. 1071; Dilley v. Van Wie, 6 Wis. 206; Tooker v. Arnoux, 76 N. Y. 397; 14 Enc. P. & P. 529; Chicago Trust and Savings Bank v. Trust Co., 190; 16 Enc. P. & P. 943; John v. Clark, 5 Black 564; Klein v. Currier, 14 Ill. 237; Hank v. Crittenden, 2 McLean U. S. 557; 4 Enc. P. & P. 646; Birks v. Trippet, 1 Saund. 32; Douglass v. Howland, 24 Wend. 51.

Attorney's fees, although contracted to be paid, are not chargeable against defendant unless plaintiff has become liable for the same. Exchange Bank v. Tuttle, 5 N. W. 427; 3 L. R. A. 51, Ga.

J. B. ATKESON for Appellee.

Default judgment. C. L. 1897, sec. 2685, sub-sec. 106; Laws 1905, chap. 26, sec. 1.

Promissory notes are sufficient evidence in any suit. C. L. 1897, secs. 2931, 2984; 14 Enc. P. & P. 589.

Attorney fees called for in promissory note. Exchange Bank v. Tuttle, 5 N. M. 427.

Not necessary to plead notation on promissory note unless payment of note is clearly contingent upon terms of instrument. Joyce on Defenses to Commercial Paper 343; Eaten & Gilber on Commercial Paper 182; Ogden on Negotiable Instruments 46; 14 Enc. P. & P. 579; S. S. Salt Co. v. Barber, 49 Pac. 524, Kas.

OPINION OF THE COURT.

WRIGHT, J.—On the 8th day of July, 1910, appellees (plaintiffs below) filed suit in the District Court against the appellants on two promissory notes. Both of said notes were secured by a mortgage deed on certain real estate. Copies of the notes and mortgage were attached to the complaint as exhibits and made a part of the complaint. The complaint was duly sworn to. On July 27th, 1910, the defendants in the lower court paid the full sum of the two notes, together with interest due thereon, but

refused to pay the ten per cent. provided in said notes as attorney's fees. Proper endorsements were made upon the notes showing such payments, and the case thereupon proceeded for the recovery of said attorney's fees. On August 17th, 1910, the defendants filed a motion asking the court to require the plaintiffs to make their cause of action more definite and certain, which motion was overruled by the court August 24th, 1910. On September 16th, more than twenty days after such ruling, the defendants not having filed any answer or any further pleading, plaintiffs filed a motion for a default decree, which was granted and judgment was entered for the full amount of attorney's fees provided in said notes, together with interest and costs of suit. Thereafter, and within the time prescribed by law, the appellants filed a motion to set aside the judgment. This motion was overruled and the defendants appealed.

The plaintiffs assign four errors. The first is, that the court erred in rendering judgment by default on the complaint filed in this cause. The defendants having paid the amount of the claim, except attorney's fees, the sole question is whether the complaint states a sufficient cause of action upon which the court was entitled to enter judgment for the attorney's fees claimed. We do not think it necessary to discuss this matter further than to say that we have examined the complaint and find the same sufficient.

The second error assigned is, that the court erred in rendering judgment on the complaint and evidence. Under the provisions of Section 21 of Chapter 57, Session Laws of 1907, requiring that each error relied upon shall be stated in separate paragraphs, this assign-
1 ment is not well taken, unless it may be taken as raising a question of a variance between the pleadings and the proof. However, the decree in this case was entered upon a default taken against the defendants. The only thing in the record which shows what proofs were offered, appears upon the face of the decree. The decree recites that the notes were presented to the court and proofs offered and that upon such proofs the court

rendered judgment. There is no variance apparent, therefore, upon the record and this assignment is not well taken.

The third error assigned is, that the court erred in rendering judgment without hearing evidence. It appears from the transcript in this case that the complaint was sworn to and contained copies of the notes and mortgage sued upon, the execution of all of which was admitted by the failure of the defendants to deny the execution of the same. It also appears from the decree that the plaintiffs exhibited the notes sued upon to the
2 court at the time the decree was entered. This was undoubtedly sufficient proof to support the decree.

The fourth and last assignment of error is, that the court erred in not sustaining the motion to vacate said judgment. The motion to vacate the judgment raises but one question which has not already been disposed of, and that is, that the judgment for attorney's fees is void as contrary to public policy. This question has been disposed of by this court in the case of Exchange Bank v. Tuttle, 5 N. M. 427.

There being no error apparent upon the record, the judgment of the lower court is affirmed, and it is so ordered.

McFie, A. J., absent, did not concur.

[No. 1392. August 26, 1911.]

JOSEPH BROWN OLIVER, ET AL., Appellants, v. JOSE ENRIQUEZ, Appellee.

SYLLABUS (BY THE COURT).

1. A trial court cannot in one case take judicial notice of its own records in another and different case, even though between the same parties and in relation to the same subject matter.

Appeal from the District Court for Dona Ana County,

before E. R. WRIGHT, Associate Justice. Reversed and remanded.

WADE & WADE for Appellants.

Term time and vacation. Territory v. Armijo, 14 N. M. 202; Hendry v. Cartwright, 13 N. M. 384; Phillips v. Negley, 117 U. S. 665; ex parte Sibald v. United States, 12 Peters 488; Grames v. Hawley, 50 Fed. 319; Bronson v. Schulten, 104 U. S. 410; Weaver v. Weaver, 15 N. M. 333; Horton v. Miller, 38 Pa. St. 270; C. L. 1897, sec. 905; N. M. Laws 1851, Act of July 12, sec. 5; Prince's Laws 1880, p. 129; State ex rel. Root, et al. v. McHatton, 25 Pac. 1046, Mont.; C. L. 1897, sec. 2685, sub-secs. 103, 134, 137; U. S. v. Irrigation Co., 13 N. M. 386; U. S. v. Gwyn, 4 N. M. 635; 2 Daniel's Chancery Pleading and Practice 993; Laws 1901, chap. 11, p. 29; 25 Cyc. 907; Ellis v. Ellis, 92 Tenn. 471; Banegas v. Brackett, 34 Pac. 344, Cal.; People v. Davis, et al., 77 Pac. 651, Cal.; People v. Temple, 103 Cal. 447; Canadian etc. Co. v. Clarita etc. Co., 74 Pac. 301; Moore v. Superior Court, 86 Cal. 495; Young v. Fink, 50 Pac. 1060.

A court cannot take judicial notice of the files of its court in other cases. 16 Cyc. 918; Laws 1907, chap. 107, sec. 14; 23 Cyc. 1058; People v. Davis, 77 Pac. 651, Cal.; People v. Temple, 37 Pac. 416, Cal.; Ritchie v. Sayers, 100 Fed. 520; Paul v. Willis, 69 Tex. 261; Thomas v. American, etc., Mortgage Co., 47 Fed. 536; Hatch v. Fergusson, 68 Fed. 45; Crossman v. Vivienda Water Co., 89 Pac. 335; ex parte Lange, 85 U. S. 872; in re Bennett, 84 Fed. 324; Jones on Evidence, sec. 124; Elliott on Evidence, sec. 58; Ollschlager's Estate, 89 Pac. 1049, Ore.; Simon v. Durham, 10 Ore. 52; 17 A. & E. Enc., 2 ed., 926; Pacific Iron and Steel Works v. Georig, 104 Pac. 151, Wash.; Ralph v. Hensler, 32 Cal. 243; Arkansas v. Kansas & Texas Coal Co., et al., 183 U. S. 190; Thayer Evidence, chap. 7, p. 28; Banks v. Burnham, 61 Me. 76; Daniels v. Bellamy, 91 N. C. 78; Jones on Evidence, sec. 24; Murphy v. Bank, 100 S. W. 895, Ark.; Lownsdale v. Gray, etc. Co., 103 Pac. 833; 11 L. R. A., N. S. 616;

Kinsey v. Ford, 38 Barb. 195, N. Y.; 23 Cyc. 1532; 16 Cyc. 918; Lake Merced Water Co. v. Cowles, 31 Cal. 214; Streeter v. Streeter, 43 Ill. 155; Gibson v. Buckner, 65 Ark. 84; Ralphs v. Hensler, 97 Cal. 296; Stanley v. McElrath, 22 Pac. 673; People v. De la Guerra, 24 Cal. 73; Downing v. Howlett, 6 Colo. App. 291; Montreal Bank v. Taylor, 86 Ill. App. 388; Granger v. Griffin, 78 Iowa 759; Enix v. Miller, 54 Iowa 551; Baker v. Mygatt, 14 Iowa 131; State v. Bowen, 16 Kas. 475; Thayer v. Honeywell, 7 Kas. App. 548; Anderson v. Cecil, 86 Md. 490; Spurlock v. Missouri Pac. R. R. Co., 79 Mo. 67; Bank v. Burnham, 61 Mo. 76; Adler v. Lange, 26 Mo. App. 226; Grace v. Ballou, 4 S. D. 333; Goodwin v. Harrison 28 Tex. Civ. App. 7; McCormick v. Herndon, 67 Wis. 648; Commonwealth v. Hill, 11 Cush. 137, Mass.

Adverse possession. 1 Cyc. 983; Johnston v. City of Albuquerque, 12 N. M. 20.

Judgment. Laws 1907, chap. 57, sec. 38.

LLEWELLYN & MEDLER and W. R. REBER for Appellee.

Mere assertion made on appeal by plaintiff's counsel is not evidence against defendant. Laws 1907, chap. 57, sec. 38; Adams v. Savey House Hotel Co., 107 Wis. 109; Sanchez v. A. T. & S. F. R. R. Co., 90 S. W. 689, Texas; Force v. Hurd, 185 Mo. 583; McKenner Est. v. McCormick, 65 Neb. 595; Turpin v. Sudduth, 53 S. C. 295; Whetstone v. Livingstone, 54 S. C. 539.

Court had jurisdiction to set aside decree. 12 Enc P. & P. 162; U. S. v. Union Pacific, 160 U. S. 1; Leighton v. Young, 52 Fed. Rep. 439; U. S. v. Guglard, 79 Fed. Rep. 21; Brooks v. Stolley, 3 McLain 527, U. S.; Clark v White, 12 Pet. 188, U. S.; Oelrichs v. Spain, 15 Wall. 228, U. S.; Boyd v. Hunter, 44 Ala. 705; Vick v. Beverly, 112 Ala. 458; Fries v. Griffin, 35 Fla. 212; Street v. Smith, 15 N. M. 95; Territory v. Webb, 2 N. M. 147; Wagner v. Eaton, 2 N. M. 211; Territory v. Yarberry, 2 N. M. 391; U. S. v. de Amador, 6 N. M. 173.

Notice. Dame v. Cochiti Reduction, etc. Co., 13 N. M. 10; U. S. v. Irrigation Co., 13 N. M. 386.

Term. Weaver v. Weaver, 15 N. M. 333; C. L. 1897, sec. 2875; Territory v. Armijo, 14 N. M. 202; Laws 1905, chap. 26; C. L. 1897, sec. 2685, sub-sec. 137; Voorhees v. Bank, 10 Pet. 449, U. S.

Order setting aside decree cannot be attacked collaterally. Thompson v. Tolme, 2 Pet. 155, U. S.; Voorhees v. Bank, 9 Pet. 447.

If a judgment of a court is not absolutely void it is valid until vacated, reversed or altered, notwithstanding its manifest illegality. U. S. v. Orrendondo, 6 Pet. 709, U. S.; Voorhees v. Bank, 10 Pet. 449, U. S.; Thompson v. Tolme, 2 Pet. 155, U. S.; Cocke v. Halsey, 16 Pet. 71; People v. Sturtevant, 9 N. Y. 203; Erie R. R. Co. v. Ramsey, 45 N. Y. 637.

A court may notice its own records showing a disposition made of another case on which rights in the pending controversy depend. Poole Gilliam Co. v. Deney, 70 Iowa 275; Thornton v. Webb, 13 Minn. 498; Briston v. Fischer, 81 Mo. App. 368; Crawford v. Duckworth, 3 Ind. Ter. 10; Parker v. Panhandle National Bank, 35 S. W. 31; Avocato v. Dell'Ara, 84 S. W. 444; Butler v. Eaton, 141 U. S. 240; Cramer v. Eaton, 168 U. S. 129; Bresnahan v. Trip, 72 Fed. 922; Mach. Co. v. Goddard, 95 Fed. 666; Wood v. Cahill, 50 S. W. 1064, Texas; Scott v. Armstrong, 146 U. S. 573.

The court must take judicial notice of everything which the court whose judgment it is reviewing was bound to notice. Tichner v. Rutledge, 35 Wash. 285; March v. Commonwealth, 12 B. Mon. 25, Ky.; Steenerson v. Great Northern Ry. Co., 69 Minn. 353; Foley v. State, 42 Neb. 233; Smith v. City, 27 Kas. 528; Towne v. Velton, 35 W. Va. 217; Loyd v. Matthews, 155 U. S. 222; People v. Mays, 113 Cal. 618.

OPINION OF THE COURT.

MECHEM, A. J.—This is an action in ejectment brought by appellants. Judgment was entered against them on a verdict by a jury and they appeal. But for the

oversight of appellant's counsel, this case might have been before us on its merits. As it is, we are compelled to send it back for another trial, leaving untouched what is really the main contention between the parties. It seems that the appellants, in another action in the same court, obtained a final decree against the appellee quieting their title as against him to the land involved in this action. Appellee, a few days before the trial of this action, applied to Judge Wright for an order vacating the decree in the equity suit, which application was granted. When this action came on for trial, appellant's counsel offered in evidence the decree in the equity suit. Counsel for appellee objected, because the decree had been vacated. Counsel for appellants, in replying to this objection, called the court's attention "to the fact that its own record shows that no motion was filed on behalf of the defendant to set aside the decree in question until more than sixty days after such decree was entered of record; and that the order setting aside the decree was not made until four or five months after the decree was entered." The court then suggested that it would be better to "get an abstract of the record on that point offered in connection with this, so as to get it into the record of this case," to which counsel for appellants replied: "We will offer a certified copy of that in the morning and also the motion that was filed and show when it was filed." The court then denied the offer and appellants excepted and rested their case. The certified copy of the motion to set aside the decree was never put in the case, and, as far as the record before us is concerned, it stands as though the court below refused to allow appellants to introduce in evidence the equity decree, which was, to all intents and purposes, in full force. Obviously the court committed error, unless it could have taken judicial notice of the subsequent proceedings in the suit to quiet title, and such is the contention of appellee, and presents the only question for our determination.

We hold that a trial court cannot in one case take
1 judicial notice of its own records in another and different case, even though between the same parties and in relation to the same subject matter. 16 Cyc. 918; Mur-

phy v. Citizens Bank of Junction City, 82 Ark. 131; 12 Am. & Eng. Ann. Cases 535, and case note, p. 537.

The judgment of the lower court is reversed and the cause remanded.

[No. 1393. August 31, 1911.]

J. D. LYONS, Appellant, v. THOMAS HOWARD and LOUIS J. DESTREE, a Co-Partnership, doing business under the firm name of HOWARD & DESTREE, Appellees.

SYLLABUS.

1. The mechanic's lien law is remedial in its nature and equitable in its enforcement and is to be construed liberally.

2. A substantial compliance with the mechanic's lien law as to the verification of a claim filed thereunder is all that is required in the absence of any statutory requirement as to the form of the verification.

3. It is not necessary that there should be an affidavit to the claim of lien under the mechanic's lien law. It is sufficient if the claim is signed by the party, and that the notary or other proper officer, under his signature and seal, says that it is sworn to by the person signing it.

4. Verification in case at bar deemed sufficient.

Appeal from the District Court for Curry County, before WILLIAM H. POPE, Chief Justice. Affirmed.

H. W. WILLIAMS for Appellant.

Lien statement should have been verified by oath. Dorman v. Crozier, 14 Kas. 224; City of Atchison v. Bartholomew, 4 Kas. 124; Western Plumbing Co. v. Fried, 81 Pac. 396, Mont.; Long v. Pocahontas Coal Co., 117 Ala. 587; Florence Bldg. Assn. v. Schall, 107 Ala. 531; Cook v.

Rome Brick Co., 98 Ala. 409; Globe Iron Co. v. Thacher, 87 Ala. 458; Merchants' Bank v. Hollis, 84 S. W. 269, Texas; 27 Cyc. on Mechanic's Liens 198; Arata v. Tellurium, etc. Co., 4 Pac. 195, Cal.; Parke & Lacy Co. v. Inter., etc Co., 82 Pac. 51, Cal.

BOWMAN & DUNLEAVY for Appellees.

A defendant by answering over after his demurrer to the complaint has been overruled cannot afterwards assign the ruling of the court as error. Winn v. Dillard, 60 Ala. 369; Garlington v. Priest, 13 Fla. 559; Robinson v. L'Engle, 13 Fla. 482; Platt v. Curtis, 89 Ill. App. 575; McDavis v. Ellis, 89 Ill. App. 182; Meredith v. Lackey, 16 Ind. 1; Griffin v. Wattles, 119 Mich. 346; Leggett v. City, 137 Mich. 247; Jefferson City Assn. v. Morrison, 48 Mo. 273; Barkley v. B. C. A., 153 Mo. 300; Brady v. Donnelly, 1 N. Y. 226; Fudge v. Payne, 86 Va. 303; Overland Dispatch Co. v. Wedeles, 1 N. M. 531; Young v. Martin, 8 Wall. 357; Watkins v. U. S., 9 Wall. 762; Aurora City v. West, 7 Wall. 92; U. S. v. Boyd, 5 How. 29; Clearwater v. Meredith, 1 Wall. 42; Curran v. Kendall Boot & Shoe Co., 8 N. M. 417; Campbell v. City of Haverhill, 155 U. S. 612; Campbell v. Wilcox, 10 Wall. 421; Bell v. Mobile & O. R. Co., 4 Wall. 598; Stanton v. Embrey, 93 U. S. 548.

The motion for a new trial was improper, the appropriate motion would have been "in arrest of judgment." 1 Spelling New Trial and Appellate Practice 12; Spanagel v. Dellinger, 38 Cal. 278; 14 Enc. P. & P. 829, 831; Mayor v. Johnson, 84 Ga. 279; Wilbanks v. Untriner, 98 Ga. 801; Jacks v. Buell, 47 Cal. 162; Roger v. Lacey, 23 Ind. 507; Hendry v. Cartwright, 13 N. M. 384; Arrellano v. Chacon, 1 N. M. 269; 2 Enc. P. & P. 796, 799.

Assignment of error too general. U. S. v. Rio Grande Dam & Irrigation Co., 10 N. M. 617; Eagle Mining Co. v. Hamilton, 14 N. M. 271; Hancock v. Beasley, 13 N. M. 239; Mogollon v. Stout, 14 N. M. 245.

Verification was sufficient. C. L. 1897, sec. 2221; Ford v. Springer Land Assoc. et al., 8 N. M. 37; 42 L.

ed., U. S. 515; Fiane v. Hotel, etc. Co., 3 N. M. 411; Gilliam v. Gard, 29 Ind. 292; Bank of British America v. Madison, 99 Cal. 129; Nofzinger Lumber Co. et al. v. Solomon, et al., 110 Pac. 474, Cal.; Minor v. Marshall, 6 N. M. 194; 27 Cyc. 22; Jones v. Kruse, 138 Cal. 613; Seattle Coal Co. v. Thomas, 57 Cal. 197; Corbet v. Chambers, 109 Cal. 178; Garrison v. Board, 61 Cal. 54; Woods v. Vernum, 85 Cal. 640; Finley v. West, 51 Mo. App. 569; Laswell v. Presbyterian Church, etc., 46 Mo. 279; Crans v. Epworth Hotel etc. Co., 121 Mo. App. 209; Revised Ill. Sts. 1889, chap. 82, sec. 4; Grace v. Oakland Bldg. Assn., 166 Ill. 637; Chapman v. Brewer, 43 Neb. 890; Dorman v. Crozier, 14 Kas. 224; Globe, etc. v. Thatcher, 87 Ala. 458; Great Western Mfg. Co. v. Hunter, 15 Neb. 33; Phillips on Mechanic's Liens, sec. 366; Election Cases, 65 Pa. 20; Grey v. Vorheis, 15 N. Y. Sup. Ct. 612; Conklin v. Wood, 3 E. D. Smith, 662; Child v. Bostwick, 12 Daly 15; Kealy v. Murray, 61 Hun. 619; Priest v. State, 6 N. W. 468, Neb.; 2 Bouvier's Law Dictionary 248; Hargoaine v. Van Horn, 72 Mo. 370; Kazartee v. Marks, 16 Pac. 407, Ore.; Hill's Code, Ore., sec. 3673; Jones on Liens, sec. 1452; Virginia Code, 1887, sec. 2476; Taylor v. Netherwood, 91 Va. 88; 27 Cyc. 198; Turner v. St. John, 8 N. D. 245; Wheelock v. Hull, 124 Ia. 752; Jackman v. Gloucester, 143 Mass. 380; Dobson v. Thurman, 101 S. W. 310; 27 Cyc. 200.

Attorney's fee allowable in Supreme Court. C. L. 1897, sec. 2229.

STATEMENT OF THE CASE.

Appellees, plaintiffs in the court below, filed their bill of complaint to foreclose a subcontractor's lien against the property of appellant. One B. L. Kitchel, the original contractor, was also a party defendant, but did not appeal. The complaint was in the usual form, setting out the claim of lien sought to be foreclosed in full. Defendant Lyons, the appellant, demurred to the complaint on the grounds that the same did not state facts sufficient to constitute a cause of action, in that the claim of lien therein set out was "void and unenforceable for not being

legally and properly verified by a positive and unqualified oath as required by law, but is verified only upon information and belief." The verification in question is as follows: "I, Louis J. Destree, one of the partners of firm of Howard & Destree, of lawful age, being first duly sworn, upon oath say that I do make this verification for the firm of Howard & Destree, the claimants herein named; that I have read the within statement of lien and abstract of indebtedness, and know the contents thereof, and that the same is true and correct, to the best of my knowledge, information, and belief." This demurrer was overruled, to which appellant excepted. Later appellees answered by general denial, and the cause came on for hearing. Upon the cause being called for trial, appellant objected to the introduction of any testimony, for the same reasons set forth in the demurrer. This objection was overruled and appellant excepted. The cause proceeded without the appellant taking any further part therein. Decree was entered in favor of appellees. The appellant thereupon filed a motion, which he denominates a "motion for a new trial," wherein he renews his original objection, and prays that the "decision and judgment" of the court be vacated and set aside. This motion was overruled, to which action of the court appellant excepted. Notice of appeal was given and appeal granted.

OPINION OF THE COURT.

WRIGHT, J.—(After stating the facts as above). Appellant assigns four errors, none of which assignments would have stood the test of an exception duly taken thereto. The only question attempted to be raised by such defective assignments of error, however, being practically a jurisdictional one, we will consider the same.

Is the verification sufficient under the provisions of our statute? Section 2221 of the Compiled Laws of New Mexico of 1897, provides: "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, 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 condition 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 courts of New Mexico are committed to the doctrine that "the mechanic's lien law is remedial in its nature and equitable in its enforcement and is to be
1 construed liberally." Ford v. Springer Land Assn., et al., 8 N. M. 37-48, affirmed 168 U. S. 513. This case reversed the earlier case of Finane v. Hotel Co., 3 N. M. 411. It may be taken as axiomatic that, if there is any particular form of verification required by the M. L. Law, such form must be followed.

It also follows, in the absence of any statutory requirement as to the form of the verification; that a substantial compliance therewith is all that is required. Minor v. Marshall, 6 N. M. 199; Phillips on Me-
2 chanics' Liens, 2 ed., sec. 366a; Boisot on Mechanics' Liens, sec. 452. No particular form of verification is required by our statute, nor is it specifically required thereby that the verification shall be true to the knowledge of affiant.

Nor is it necessary in this territory that there should
3 be an affidavit to the claim of lien. "It is not necessary in this territory that there should be an affidavit to the claim. It is sufficient if the claim is signed by the party, and that the notary or other proper officer, under his signature and seal, says that it is sworn to by the person signing it. But a want of a verification, or of a sufficient verification, is a defect which goes to the whole claim and cannot be amended." Minor v. Marshall, cited

supra. It is to be noted that the case last cited was decided by this court under the earlier rule of strict construction laid down in the case of Finane v. Hotel Co., cited supra, which this court definitely repudiated in the later case of Ford v. Springer Land Assn., et al., cited supra. In support of his contention that the verification is not sufficient, appellant cites the following cases: Dorman v. Crozier, 14 Kas. 224; City of Atchison v. Bartholow, 4 Kas. 124; Western Plumbing Co. v. Fried, 33 Mont. 7, 81 Pac. 396; Long v. Pocahontas Coal Co., 117 Ala. 587, 23 South 526; Florence Bldg. Assn. v. Schall, 107 Ala. 531, 18 South. 108; Cook v. Rome Brick Co., 98 Ala. 409, 12 South. 918; Globe Iron Co. v. Thacher, 87 Ala. 458, 6 South. 366. Considering the four Alabama cases first, we find that the Alabama statute requires that the statement or claim of lien shall be verified by the oath of the claimant or some other person having knowledge of the facts. Code Ala. 1886, sec. 3022. No such restriction appears in our statute. The decision in the case of Merchants' Bank v. Hollis, 37 Tex. Civ. App. 479, was given under the rule of strict construction to which the courts of Texas have consistently held. In Montana the claim of lien must be verified by affidavit. Section 2131, Code Civ. Proc. An examination of the case of Western Plumbing Co. v. Fried, 33 Mont. 7, 81 Pac. 394, cited by appellant, disclosed that the holding in that case to the effect that a statement of lien on behalf of a corporation, verified by its president on information and belief, was insufficient, is based upon the holding in the case of Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424, 80 Pac. 1024, that a complaint verified upon information and belief was not an affidavit. The first Kansas cases cited, namely, City of Atchison v. Bartholow, 4 Kas. 124, holds that an application for an injunction verified on information and belief is not an affidavit within the statute requiring such application to be on affidavit. The case of Dorman v. Crozier, 14 Kas. 224, also cited by appellant, like the Montana case, cited supra, is based upon the holding in the earlier case that a verification on information and belief was not an

affidavit. It is apparent, therefore, that none of these cases have any bearing upon the question in this jurisdiction, where there is no particular form required, where no affidavit is necessary, and where the rule of liberal construction applies.

The verification of a claim of lien is not for the purpose of proving the lien. The statement of lien, verified as required by law, and recorded, is a mere notice that the claimant intends to avail himself of his right to a lien. As an evidence of his good faith in the matter, he must verify same on his own oath, or the oath of some other person. Nofziger Lumber Co. et al. v. Solomon et al., 13 Cal. App. 621, 110 Pac. 474. This court in the case of Ford v. Springer Land Assn., cited supra, in construing section 2221, C. L. 1897, quoted supra, held specifically that a substantial compliance with the statute was sufficient. Is the verification in question a substantial compliance with the lien law? The Missouri mechanics' lien statute requires that "where a lien is filed it should be verified by the oath of the person filing it, or some credible person for him." In the case of Finley v. West, 51 Mo. App. 569, the court held the following verification to be good as a substantial compliance with the statute:

"State of Missouri,

"County of Clay.—ss.

"J. E. Lincoln, agent and attorney for B. P. Finley, being duly sworn, on his oath says that he believes the foregoing is a just and true account, etc.

"(Signed) JAMES E. LINCOLN.

"Subscribed and sworn to before me this sixth day of October, 1890.

"_____."

Also in the case of Crane v. Epworth Hotel etc. Co., 121 Mo. App. 209, 98 S. W. 795, it was held that an affidavit on information and belief as to who was the owner of the premises was sufficient to support a lien. In Illinois, where affidavit is required, the court held the following verification sufficient: "Frank D. Hyde, being duly sworn, deposes and says that the foregoing statement

or account or demand due, by him subscribed, is true, to the best of his knowledge and belief." Grace v. Oakland Building Assn., 166 Ill. 646, 46 N. E. 1105. In passing upon the sufficiency of such affidavit the court uses the following language: "As said in Springer v. Kroeschell, 161 Ill. 358, certainty to a common intent is all that is required in stating a mechanic's claim, and as the statute merely says that the statement must be 'verified by an affidavit,' no good reason can be perceived why any greater certainty is required in the affidavit than in the statement or demand itself. Besides, it will be noticed that this affidavit does not purport to be made upon information and belief, but states in positive language that the statement subscribed by affiant is true, and then is added the additional phrase "to the best of his knowledge and belief."

In Oregon, where the statute provides:—Hill's Code, sec. 3673,—"which claim shall be verified by the oath of himself, or some other person having knowledge of the facts," the court in Kezartee v. Marks, 16 Pac. 407, held the verification sufficient when in the following form:

"Subscribed and sworn to before me, ———25, 1886.
T. R. SHERIDAN, County Clerk."

In passing upon the same, the court said: "This statute does not prescribe any particular form in which such verification shall be made. No doubt, the better practice would be in the form of an affidavit, to be annexed to the claim, to the effect that the facts therein stated are true; but, the statute not having prescribed the form, we do not feel disposed to say that a claim signed by the party and verified by his oath is invalid." In Taylor et al. v. Netherwood, 20 S. E. 888, the court, in passing upon the sufficiency of a verification, said: "As to the verification of the account, the statute requires that the account shall be verified by the oath of the claimant or his agent. It prescribes no particular form of verification. At the foot of the account filed in this case is appended the certificate of the notary that James Netherwood personally appeared before him and 'made oath to the correctness of the account'. This is a sufficient verification

under the statute." In Chapman v. Brewer, 43 Neb. 890, 62 N. W. 320, it was held that an oath to a claim of lien made upon information and belief was a compliance with the requirements of the mechanics' lien statute, wherein it states that the claim for lien should be filed, "after making oath thereto." From an examination of the foregoing cases it is clear that there is no real conflict in the decisions. Wherever the courts have held that the mechanic's lien laws were remedial in nature and equitable in enforcement, such laws have been liberally construed. Wherever mechanic's lien laws have been held to be in derogation of the common law, the rule of strict construction has prevailed to a greater or less degree.

Having elected to follow the rule of liberal con-
4 struction of mechanic's lien laws, we are constrained to hold the verification in this case sufficient. Any other construction would tend to defeat the very spirit of the law, and merely add to the already too numerous subtleties of the law.

There being no error disclosed in the record, the judgment of the lower court is affirmed.

[No. 1419. August 31, 1911.]

TERRITORY OF NEW MEXICO, Ex Rel. A. J. WELTER, Relator, Appellant, v. M. W. WITT, Respondent, Appellee.

SYLLABUS.

1. Justices of the Peace in the Territory of New Mexico must be considered as precinct and not county officers within the terms of the Enabling Act, sec. 5, Act of June 20, 1910.

Appeal from the District Court for Chaves County, before WILLIAM H. POPE, Chief Justice. Affirmed

W. C. REID, J. M. HERVEY and J. M. O'BRIEN for Appellant.

The jurisdiction of a justice of the peace extends over the entire county. Territory v. Weller, 2 N. M. 470; C. L. 1897, secs. 1231, 1676, 3230, 3232, 3330, 3335, 3337, 3343, 3344, 3349, 3267, 3243, 1774, 1797, 3449-3461, 3370, 3377, 3379, 3378, 3382; Ballantine v. Bower, 99 Pac. 869, Wyoming; Kerry v. State, 17 Tex. App. 178; 18 Am. Digest, sec. 40; State v. Chechester, 31 Neb. 325; Davenport v. County, 105 U. S. 107; Blair v. County, 111 U. S. 363; Nemaha v. Frank, 120 U. S. 41; Philadelphia v. Martin and Philadelphia v. Irvine, 125 Pa. 593; Sheboygan v. Parker, 3 Wallace 93, U. S.; State v. Kenyon, 7 Ohio 567; State v. Clark, 15 Atl. 831, N. J.; Neth v. Crofut, 30 Conn. 580; Iowa ex rel Nagle v. Coenzler, 9 Withrow 433, Ia.; Laws 1907, chap. 6; Words and Phrases, "County Officers."

DYE & DUNN for Appellee.

Justices of the peace are precinct, not county officers. C. L. 1897, secs. 617, 627, 1675, 1676, 1698, 1699, 3224, 3225, 1700, 1701, 2468, 3230, 3342; Laws 1903, chap. 38; Laws 1907, chap. 87; Laws 1899, chap. 19; Laws 1903, chaps. 7, 8, 27; Laws 1901, chap. 38; Laws 1909. chap. 6; Enabling Act, Act of June 20, 1910, secs. 4 and 5; New Mexico Constitution, art. 6, sec. 26; art. 5, sec. 13; art. 22, sec. 4; Meyer v. Culver, 35 Pac. 984, Ariz.; State v. Lovell, 12 So. 341, Miss.; Gertum v. Supervisors, 16 N. E. 328, N. Y. App.; People v. Garey, 6 Cowen 642; Leiber v. Argaubright, 105 Pac. 341, Okla.; Phillips v. Thralls, 26 Kas. 780; A. T. & S. F. R. Co. v. Rice, 14 Pac. 229, Kas.; ex parte McCullum, 1 Cow. 450; People V. Garey, 6 Cow. 642.

OPINION OF THE COURT.

WRIGHT, A. J.—This is a proceeding by information in the nature of quo warranto to try the title of appellee to the office of justice of the peace in precinct No 1, Chaves County, New Mexico. The judgment of the lower court was pro-forma. It appears that the appellant, A. J. Welter, was the duly elected, qualified, commissioned

and acting justice of the peace at and prior to the passage of the Act of Congress of June 20, 1910, known as the "Enabling Act." The appellee claims and now holds the said office as a result of an election held in January, 1911. The title of appellee to the office depends upon the validity of the election held in January, 1911. This election was called and held under the provisions of the statute of New Mexico, upon the regularly appointed day for such election. The contention of the appellant is that the Act of Congress to enable New Mexico and Arizona to form a state government, approved June 20, 1910, in section 5 thereof, continues in office until the admission of the commonwealth into the Union as a state, all territorial and county officers, and that a justice of the peace is a county officer within the terms of said section 5.

Section 5 of the Act of Congress of June 20, 1910, after providing for the first election under the new state government to be formed under the provisions of said act, provides: "Until the issuance of said proclamation by the President of the United States and until the said state is so admitted into the Union and said officers are elected and qualified under the provisions of the constitution, the county and territorial officers of said territory, including the Delegate in Congress thereof, elected at the general election in 1908, shall continue to discharge the duties of their respective offices in and for said territory; provided that no session of the territorial legislative assembly shall be held in 1911."

The contention of the appellant that a justice of the peace in New Mexico must be considered as a county officer is based upon various provisions of the statute regulating the conduct and jurisdiction of justices of the peace. Section 3230, C. L. 1897, provides that the jurisdiction of the justices of the peace shall be co-extensive with the limits of the county in which they shall be elected, with a proviso that they shall reside and hold their office in the precinct for which they may be elected. See, also, C. L. 1897, sec. 3232. This jurisdiction as to civil cases is apparently circumscribed in another section: Section 3337, C. L. 1897. All process by a justice of the peace is

directed to the "Sheriff or any constable of the proper county," and may be executed anywhere in the county. Sec. 3243, C. L. 1897. Justices of the peace are also required to make quarterly reports to the county commissioners. Sec. 1792, C. L. 1897. It is also unquestioned in New Mexico that a precinct has no corporate existence, but is a mere political sub-division of the county.

Arguing from the foregoing, counsel for appellant
1 contend that a justice of the peace is a county officer.

With this contention we cannot agree. There are numerous other provisions of the statutes which clearly recognize a distinction between county and precinct officers. Sec. 1698, C. L. 1897, establishes the Tuesday after the First Monday in November, of the even numbered years as the day of election of the Delegate to Congress, *all the county officers* required by law to be elected in this territory, and for members of the legislative assembly. Sec. 3224, C. L. 1897, provides for the election of justices of the peace in January of each odd numbered year. It also appears from the territorial statutes that registration is required for the general election, while none is required for justice of the peace elections. In the case of the general election for county officers, the expenses of such election are paid by the county, while no expenses of the justice of the peace elections are paid by the county or by anyone, except the candidates themselves. It is fair to presume, therefore, that Congress, when it enacted the provisions of the Enabling Act contained in Section 5, was well aware of the fact that justices of the peace, constables and other minor officers were not elected at the general election, and that the laws of New Mexico made a clear distinction between county and precinct officers. It also appears that the legislature has recognized justices of the peace to be precinct officers, as distinct from county or territorial officers, in the creation of the new counties of McKinley, Luna, Roosevelt, Quay, Leonard Wood, Sandoval and Curry. In each of the acts creating such counties, definite provisions are made for the election or appointment of all precinct and school district officers, as distinct from county officers. It is therefore, apparent

that the legislature has always recognized justices of the peace as precinct, and not as county or territorial officers. Nor can it be contended that Congress, in the Enabling Act, or the Constitutional Convention, in the new constitution, recognized justices of the peace as county, territorial or state officers. Secs. 4 and 5, Act June 20th, 1910; Constitution, Sec. 26, art. 6; Sec. 13, art. 5; Sec. 4, art. 22. Sections 4 and 5, Act of June 20th, 1910, prescribes that the constitutional convention shall provide for an election to be held upon proclamation by the governor, at which election officers for a full state government, including governor, members of the legislature, two representatives in Congress and such other officers as the constitutional convention shall prescribe shall be chosen by the people. The constitution provides for the office of justice of the peace, but expressly makes them precinct officers. Sec. 26, Art. 6. The constitution also provides for the election of all state and county officers at general elections to be held at fixed times subsequent to the first election to be called by the proclamation of the governor. The constitution, however, makes no provision for the election of justice of the peace, constables, school directors or other minor officials, but the Constitution, Sec. 4, Art. 22, does provide that all laws of the territory in force at the time of its admission into the Union shall remain in force as the laws of the new state until altered or repealed. It is fairly to be presumed, therefore, that both Congress and the framers of the constitution intended that the existing territorial laws should govern the election of such precinct and school district officials.

Adopting the argument of the court (with necessary changes in phraseology) in the case of Railroad Company v. Rice, 14 Pac. 229, (Kas.) we admit that justices of the peace are, in some sense, justices of the peace in their respective counties and also in the territory, but, with the exceptions mentioned in the statutes, a justice of the peace can perform his official acts only in his own precinct. His court, as a court, has no existence outside of the limits of his own precinct. It necessarily follows, therefore, that justices of the peace in this territory must be

considered as precinct, and not county officers, within the terms of section 5, of the Act of June 20th, 1910.

[No. 1420. August 31, 1911.]

TERRITORY OF NEW MEXICO, EX REL., J. W. STOCKARD, Appellee, v. THE MAYOR AND CITY COUNCIL OF ROSWELL, NEW MEXICO, Appellant.

SYLLABUS (BY THE COURT).

1. The relator, and upwards of five hundred others, electors and residents of the City of Roswell, signed and presented to the Mayor and City Council of said city, a petition for an election to determine whether Roswell would establish the commission form of government, so called, under the provisions of Chapter 87, Acts of 1909, of the Assembly of New Mexico. The petition was referred to a committee of members of the council. Under the circumstances recited in the statement of the case, which follows: Held, that the withdrawals from the petition there described were effectual, and that the peremptory writ, which was granted pro forma, should have been refused.

Appeal from the District Court for Chaves County, before E. R. WRIGHT, Associate Justice. Pro forma judgment reversed and remanded.

H. M. Dow for Appellants.

Where a petition of a certain number of rate-payers or residents is required to initiate proceedings for a public purpose, any person signing the petition has the absolute right to withdraw his name at any time before the tribunal has finally acted. Dutton v. Hanover, 42 Ohio St. 215; Littell v. Vermillion County, 198 Ill. 205; La Londe v. Barron County, 80 Wis. 380; People ex rel. Wm. B. Irwin, et al. v. Sawyer, 52 N. Y. 296; Davis v. Henderson, 104 S. W. 1099, Ky.; Irwin v. Mobile, 57 Ala. 6; Theurer v.

People, 211 Ill. 296; Kinsloe v. Pogue, 213 Ill. 302; Mack v. Polcat Drainage District, 216 Ill. 56; Snedeker v. Sims Special Drainage Dis., 24 Ill. App. 380; County Court v. Pogue, 115 Ill. App. 399; State v. Eggleston, 34 Kas. 714; Eggleston v. State, 15 Pac. 608, Kas.; O'Neal v. Minnery, 125 Ky. 571; Simpson v. Com., 97 S. W. 404, Ky.; New Orleans v. Stewart, 18 La. Ann. 710; Slingerland v. Norton, 59 Minn. 351; State v. Geild, 66 Minn. 266; State v. Board,, etc., 73 N. W. 631, Minn.; Sedalia v. Montgomery, 88 S. W. 1014, 127 S. W. 50, Mo.; Perkins v. Henderson, 68 Miss. 631; Hoffman v. Nelson, 95 N. W. 347, Neb.; State v. Nemaha County, 4 N. W. 373, Neb.; ex rel Hetzel v. Boord & Co., 8 Nev. 309; Matter of Taxpayers, 38 How. Pr. 515, N. Y.; People v. Peck, 42 How. Pr. 425 N. Y.; People v. Henshaw, 61 Barb. 409, N. Y.; Springport v. Teutonia Sav. Bank, 84 N. Y. 403; People v. Hatch, 65 Barb. 430, N. Y.; Hays v. Jones, 27 Ohio St. 218; Grinnell v. Adams, 34 Ohio St. 44; Dawson v. Barron, 9 Ohio Dec. 706; Webster v. Bridgewater, 63 N. H. 296; State v. Polk Co., 88 Wis. 355; State v. Seattle, 109 Pac. 309, Wash.; Parish v. Collins, 86 Pac. 557, Wash.; West v. Tolland, 25 Conn. 133; Green v. Smith, 11 Ia. 183; Willing v. Rye, 99 N. W. 158, Iowa; Black v. Campbell, 13 N. E. 409, Ind.; Hord v. Elliott, 33 Ind. 220; Noble v. Vincennes, 42 Ind. 125; Munson v. Blake, 101 Ind. 78; Ralston v. Beall, 30 N. E. 1095, Ind.; State ex rel. Andrews v. Boyden, et al., 21 S. Dak. 6; Misener v. Wainfleet Tp., 46 U. C. Q. B. 457, Canada; Halliday v. Ottawa, 10 Ont. W. Rep. 46, Canada; Stockyard v. Mullins, et al., in Fifth Judicial District, N. M., opinion by Chief Justice W. H. Pope, January 13, 1911.

Committee of city council had power to investigate the sufficiency of the signatures to the petition. Dutton v. Hanover, 42 Ohio St. 215; La Londe, et al. v. Board of Supervisors, 49 N. W. 960, Wis.; State ex rel. Hetzel v. Board of Com., 8 Nev. 309; Parish v. Collins, 86 Pac. 557, Wash.; State v. Seattle, 109 Pac. 309, Wash.; Hays et al. v. Jones, 27 Ohio St. 218; Eggleston v. State, 15 Pac. 608, Kas.; Sedalia v. Montgomery, 88 S. W. 1014,

127 S. W. 50, Mo.; Acts 38 Legislative Assembly, chap. 87, sec. 2.

DYE & DUNN and J. D. MELL for Appellees.

Petition for Commission Government. Laws 1909, chap. 87, sec. 2.

Mandamus an appropriate remedy. 26 Cyc. 272, 489, 491; Village of Glencoe v. People, 78 Ill. 382; C. L. 1897, sec. 2768; 13 Enc. P. & P. 788; State v. Crites, 48 Ohio St. 173.

Inconsistent defenses. Conklin v. Cunningham, 7 N. M. 127; 13 Enc. P. & P. 725; 31 Cyc. 78-80.

Petitioners should not be permitted to withdraw after petition is filed. Fischer v. Board of Supervisors, 120 N. W. 13, Mich.; 28 Cyc. 163; Sedalia v. Montgomery, 127 S. W. 50, Mo.; Armstrong v. Ogden, 43 Pac. 119, Utah, affirmed, 168 U. S. 224; Court v. Pogue, 115 Ill. App. 399; Loomis v. Bailey, 45 Iowa 400; 120 N. W. 8, Mich.; Bordwell v. Dills, 70 Ark. 175; State v. Gerhardt, 145 Ind. 439; Carr v. Boone, 108 Ind. 241; Patterson v. Mead, 148 Mich. 659; Koerber v. Board of Supervisors, 120 N. W. 8; Williams v. Citizens, 40 Ark. 290; McCullough v. Blackwell, 51 Ark. 164; Wilson v. Thompson, 56 Ark. 110; Sutherland v. McKinney, 146 Ind. 611; Orcutt v. Reingardt, 46 N. J. L. 337; Grinnell v. Adams, 34 Ohio St. 44; 17 A. & E. Law N. ed. 248; Bordwell v. Dills, 66 S. W. 646, Ark.; Jersey City Brewing Co. v. Jersey City, 42 N. J. L. 575; Vanderbeck v. Jersey City, 44 N. J. L. 626; Roebeling v. Trenton, 58 N. J. L. 40; Bachman v. Philipsburg, 53 Atl. 620, N. J.; Seibert v. Lowell, 61 N. W. 197, Iowa; Richman v. Board, 70 Iowa 630; 77 Iowa 513; State v. Boyden, 15 A. & E. Ann. Cases, 1125; Sim v. Rosholt, 11 L. R. A., N. S., 372, in re Jones' Law Petition, 30 Ohio C. C. Rep. 697, in re Central Drainage District, 113 N. W. 675, Wis.

Manner of withdrawal from petition. State v. Boyden, 15 A. & E. Ann. Cas. 1126; Hayes v. Jones, 27 Ohio St. 218; Dutton v. Hanover, 42 Ohio St. 215; Slingerland v. Norton, 61 N. W. 322, Minn.; State v. Geib, 68 N. W.

1081, Minn.; Bordwell v. Dills, 66 S. W. 646, Ark.; State v. Gerhardt, 44 N. E. 469, Ind.; Pavey v. Braddock, 84 N. E. 5, Ind.; Loomis v. Bailey, 45 Iowa 400; Willing v. Rye, 99 N. W. 158, Iowa; Green v. Smith, 82 N. W. 448; Sedalia v. Montgomery, 127 S. W. 50, Mo.; Koerber v. Board of Suprs., 120 N. W. 8, Mich.; Bachman v. Phillipsburg, 53 Atl. 620, N. J.; Sim v. Rosholt, 11 L. R. A., N. S. 372, N. Dak.; in re Jones Law Petition, 30 Ohio C. C. Rep. 697; Newton v. Emporium, 73 Atl. 984, Pa.; Armstrong v. Ogden, 43 Pac. 119, Utah, 168 U. S. 224; State v. Seattle, 109 Pac. 309, Wash.; in re Central Drainage District, 113 N. W. 675, Wis.; Littell v. Vermillion County, 198 Ill. 205; La Londe v. Barron County, 80 Wis. 380; People v. Sawyer, 52 N. Y. 296; Davis v. Henderson, 104 S. W. 1009, Ky.

Notice of withdrawal of name from petition. Newton v. Emporium, 73 Atl. 984, Pa.

STATEMENT OF THE CASE.

The respondents, here the appellants, were, on the 2nd day of May, 1911, and still are, the mayor and city council of the city of Roswell, and constituted the governing body of that city under the laws of New Mexico. At a regular meeting of said body, held on May 2, 1911, a petition for an election on the commission form of government, under chapter 87, Acts of 1909, of the Assembly of New Mexico, purporting to bear the signatures of 584 residents and electors of the city of Roswell, was presented, and was immediately referred to a committee of three members of the council, with instructions to investigate and report on the sufficiency of the petition. At the next regular meeting of the mayor and council, held June 9, 1911, the committee reported that, "after disregarding as signers the names of such persons as have petitioned for leave to withdraw, and names of persons not electors, residents of the city of Roswell, we find * * * that said 'Petition for Election' does not contain names of the requisite number of electors, residents of the city of Roswell, as required by law, and it is therefore insufficient to warrant the calling of an election pursuant thereto, and

so accordingly recommended that the same be denied. * * * *" The committee's report was accepted and approved, and the petition, in effect, denied. On June 13, 1911, a petition for mandamus was filed in the district court of Chaves county, to require the mayor and city council to call an election as prayed for in said petition, or show cause why they had not done so, and an alternative writ of mandamus was issued accordingly, to which the respondents duly made a return. The relator thereupon moved for a peremptory writ of mandamus, on grounds set out in the motion, and which, so far as necessary, are stated in the opinion. This motion was, by agreement, heard by the judge of the Sixth District, and by him sustained, pro forma, and a peremptory writ awarded, from which action the respondent appealed to this court.

OPINION OF THE COURT.

ABBOTT, J.—(After stating the facts as above.) In the brief for the relator, it is claimed that in the return of the respondents to the alternative writ inconsistent defenses were set up, and that therefore the peremptory writ was properly awarded. In the relator's motion to award the peremptory writ, that ground is not specified, and it is not therefore a question which was decided by the trial court, and is not here for review.

There remain but two questions between the parties for determination by this court, or one question with two branches, namely, whether an elector who signed the petition in question, and whose signature was on it when it was received by the mayor and council, had the right afterwards to withdraw from the petition, or, as stated in the briefs, "withdraw his name," so as to prevent it from being counted to make up the number requisite, by section 2 of the act referred to, to secure the calling of an election; and whether, if such a right exists, effectual withdrawals were made in this instance.

As to the latter branch of the question, it is contended that the committee to which the petition was referred had no power to accept or make such withdrawals. Undoubtedly it had not the power to accept withdrawals as a finality,

and it did not apparently attempt that, as the report does not state that leave to withdraw had been granted, or that the names of persons not electors had been stricken out, but, in effect, recommended that the mayor and council "disregard" such names and deny the petition. While the report does not recite that those names were presented with it to the mayor and council, it woud seem that such must have been the case, since the names of both classes are fully set forth in the return to the alternative writ of mandamus. It is true that in the return it is, in substance, stated, that the signatures "were withdrawn by the committee at the request and upon the order and authority of the persons so withdrawing," but that is more than the report itself states, and, taking the two together, the meaning appears to be that those persons had authorized the withdrawal of their names, and that by their report the committee undertook to execute that power. We are of the opinion that by the acceptance and adoption of the report it became the action of the mayor and council in all respects as fully as if they had acted without the help of a committee of their members. In the Minnesota cases cited for the appellee, the petition was in the hands of an independent officer when the withdrawals were attempted, and not, as in this case, in the hands of a committee, which was but an instrument of the mayor and council.

That brings us to the question when the right of withdrawal from such a petition expires. The appellee's contention is that it ends when jurisdiction of the petition is obtained by the body to which the law requires its presentation; the appellants', that it continues until final action on it by that body. In support of the former view, the attention of the court is called to what is termed the "imperative" nature of the statute, which provides that "upon a petition of not less than five hundred electors, residents of the city or town * * * the mayor shall, by proclamation, submit the question," etc. There was, counsel for the appellee say, such a petition submitted to the mayor and city council of Roswell, and it thereupon became the duty of the mayor to make proclamation under

the statute. It finally appeared, according to the return of the respondents, and counsel for the appellee concede, that of the 584 signers of the petition, whose names it bore when presented, 58 were not qualified to petition under the statute. But how would it be known by the mayor and council in advance of investigation that the number would not be as much as 85, which would have reduced the number of qualified signers below 500? And, obviously, the only practicable way to ascertain whether each of 584 signers was a resident elector of Roswell was through a committee, or some other person or persons acting for the mayor and council. However done, the work would require time; and in the time taken by the committee which in the present instance made the investigation, and which cannot be said to have been unreasonably long, 87 of the signers withdrew from the petition, if they had the power so to do.

Various objections against the validity of their action are urged in behalf of the appellee. It is said, for instance, that the right to withdraw under such circumstances would, in its exercise, be subject to great abuses. That is no doubt true; but it is probably true of all human devices for government which ever have been or ever will be put in operation. It is true of the right of petition itself, as it is a matter of common knowledge that people will sign petitions from caprice, good nature, thoughtlessness, malice, fear of injurious consequences to themselves if they refuse, expectation of favor or reward if they consent, as well as from more exalted and patriotic motives. Often they "sign in haste and repent at leisure." That may have been the case with the 87 who signified their desire to withdraw from the petition in question. The government of cities by commission is comparatively new. While it may be an improvement on previous systems, it cannot, in the very nature of things, prove to be a panacea for all the ills which affect the administration of municipal affairs through the country. It will doubtless have defects peculiar to itself, and, indeed, it is claimed that such defects are already apparent. It may be that information of such defects, real or supposed, had

come to some or all of the 87 who, at first, petitioned for the submission to vote in Roswell of the commission plan of government. At all events, they had, before the petition came up for final action by the mayor and council, ceased to be petitioners in the sense that they still desired the action for which they had asked, Their signatures were still there, but the will to petition had departed from them. On what ground or principle of which courts can take cognizance can withdrawal be denied them? The relator does not in this case allege that he has suffered damage or injury of which any recognized measure exists. He must, and as we understand does, rest his cause on the ground of public policy. But the public is not complaining. The Territory is only a nominal party. The legislature, which represented the public, could have limited the effect of withdrawal if it had seen fit to do so, in the statute authorizing the petition for an election.

We think the petitioners had the right to withdraw,
1 at least up to the time when the mayor and council acted on the report of the committee. And this conclusion, which seems to us the reasonable and just one, we think has also the better foundation in the authority of decided cases. As the case usually is, on a question reasonably open to debate, there are decisions by the courts of last resort of high standing on each side, and the research of counsel has brought to light and they have marshaled in their respective briefs, formidable arrays of opposing authorities. As counsel suggests, there are practically insuperable difficulties in the way of complete examination and comparison of them. In the first place, the petitions considered relate to many widely varying subjects, such as drainage, the sale of intoxicating liquor, the removal of county-seats, opening of highways, municipal contributions for building railroads, etc. In some of them it appears that the right of withdrawal is regulated by statute, which is not the case here. Many of them are based on statutes which are not accessible here. Some of them show that expense had been incurred, or rights had accrued through the signing of the petitions involved, and the petitioners were held to what they had done, on grounds

comparable to those which underlie equitable estoppel. Some of the cases which are most analagous to the one at bar, and which we think best sustain the view we adopt. are: People v. Sawyer, 52 N. Y. 296; Dutton v. Hanover, 42 Ohio St. 215; LaLonde v. Barron County, 80 Wis. 380; Davis v. Henderson, 127 Ky. 13, 104 S. W. 1009; Littlell v. Vermillion County, 198 Ill. 205; 65 N. E. 78. In the last named case, the court said: "Each petitioner acts upon his own responsibility, and if he should change his mind on the question of whether a new township would better serve the convenience of the inhabitants residing therein, or if he should be induced to sign under a misapprehension or through undue influence, he ought to have the right to correct his mistake, if he does so before the rights of others have attached by the final action on the part of the board. It may be, as suggested by counsel for appellants, that vacillating or designing parties will abuse that privilege; but courts are powerless to prevent in every case such abuses. * * * To absolutely prohibit a citizen from withdrawing his name from a petition voluntarily signed by him, at any time after it has been presented to a body authorized to act upon it, would be a harsh and unreasonable rule and also liable to work great hardship. Generally, parties act from honest motives, and it is for the protection of the rights of such parties that laws are enacted and construed."

The peremptory writ of mandamus, which was granted pro forma should be refused, and the judgment of the District Court is accordingly reversed, and the cause remanded.

We dissent: Merritt C. Mechem and E. R. Wright, J. J.

[No. 1325. September 1, 1911.]

VICENTA MONTOYA, Plaintiff, v. UNKNOWN HEIRS OF FRANCISCO MONTES VIGIL, Deceased; THE UNKNOWN HEIRS OF JUAN GONZALES, Deceased, AND ALL UNKNOWN OWNERS OF THE REAL ESTATE HEREINAFTER DESCRIBED, Defendants, Appellants, CANDIDO G. GONZALES, et als., Intervenors, Appellees.

SYLLABUS (BY THE COURT).

1. Under Section 3182, Compiled Laws 1897, the owner of the whole or any part of the premises sought to be partitioned may, whatever the origin of his title, intervene for the settlement of his rights.

2. A judgment in a partition suit which declares the rights of the parties and orders partition, is interlocutory only and is under the control of the court until final decision, and may be modified or rescinded at any time prior to final judgment or decree.

3. Section 2937, Compiled Laws of 1897, construed and held to grant affirmative relief in the nature of a fee simple or statutory title in addition to the bar of the statute, in favor of persons being in possession of tracts of land within the boundaries of Spanish or Mexican land grants, for ten years under a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple upon compliance with the terms of the section, and possession of any part of the tract thus conveyed extends to the exterior boundaries of the lands described in such conveyance.

4. That section 2937, supra, was enacted by the legislature as a statute of repose for the purpose of settling the titles and preserving the rights of the pioneer settlers who in good faith settled upon, improved and cultivated vacant lands of the Spanish and Mexican grants within the territory, the ownership of which was unknown.

5. Section 2938 does not purport to confer fee simple title as is provided for in section 2937, but simply raises

the bar of the statute against the bringing of actions for the possession of lands held adversely for ten years under color of title and with payment of taxes, and is inapplicable to the present case.

6. The doctrine of mixed possession as laid down in Hunnicutt v. Payton, 102 U. S. 333, examined and held to be inapplicable.

Appeal from the District Court for Bernalillo County, before IRA A. ABBOTT, Associate Justice. Affirmed in part and reversed and remanded as to remainder.

ALONZO B. MCMILLEN for Appellants.

Claim of title on account of adverse possession. C. L. 1897, secs. 2937, 2938; Laws 1899, chap. 63, sec. 2; Laws 1905, chap. 76, sec. 1.

Possession in accordance with the legal title is presumed. Gonzales v. Ross, 120 U. S. 605; Chesapeake, etc. Ry. v. Washington, etc. Ry., 199 U. S. 247; Evans v. Welch, 68 Pac. 79, Cal.; 1 Washburn Real Property 63; Mining Co. v. Taylor, 100 U. S. 37; McClung v. Ross, 5 Wheat. 116; Barr v. Gratz, 4 Wheat. 213; Armijo v. Neher, 11 N. M. 645; Stevens v. Martin, 168 Mo. 407; Freeman Co-Tenancy and Partition, secs. 166, 167, and 222; 1 Washburn Real Property 689; Brownsville v. Cavazos, 100 U. S. 138; Deputron v. Young, 134 U. S. 241; Ward v. Cochran, 150 U. S. 597; Hunneycutt v. Peyton, 120 U. S. 333; Bracken v. U. P. R. Co., C. C. A., 75 Fed. 347.

The decree of partition was a final judgment. Baca v. Anaya, 14 N. M. 389; 1 Freeman on Judgments, secs. 304, 307; 30 Cyc. 253; Keil v. West, 21 Fla. 508; Irwin v. Buckels, 148 Ind. 389; Janes v. Brown, 48 Ia. 568; Traverso v. Row, 11 La. 498; Allen v. Hall, 50 Maine 253; Ham v. Ham, 39 Me. 216; Patridge v. Luce, 36 Me. 16; Slingluff v. Stanley, 66 Md. 220; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Mt. Hope Iron Co. v. Dearden, 140 Mass. 430; Burghardt v. Van Deusen, 4 Allen 374; Brown v. Bulkley, 11 Cush. 168; Foster v. Jones, 17 Southern

893, Miss.; Hinds v. Stevens, 45 Mo. 209; Rockwell v. Decker, 5 N. Y. Civ. Proc. 62; Grimes v. Taft, 98 N. C. 193; Clemens' Appeal, 8 Pa. Cases, 321; Johnson v. Murray, 12 Lea 109; Petrucio v. Seardon, 76 Tex. 639.

Findings insufficient to support decree. Smith et al. v. U. S., 2 Wall. 219; Laws 1899, chap. 63; Laws 1905, chap. 76.

Where a statute requires payment of taxes as an element of adverse possession, it is necessary for the adverse claimant to show such payment of taxes during the full period necessary to establish adverse possession. Beaver v. Taylor, 1 Wall. 637; Warvelle on Ejectment, sec. 342; Wettig v. Bowman, 47 Ill. 17; Power v. Kitching, 10 N. D. 254; Raynolds v. Willard, 80 Cal. 605; Irwin v. Miller, 23 Ill. 401; Cofield v. Furry, 19 Ill. 183; Snowden v. Rush, 76 Tex. 197; Harden v. Gouveneur, 69 Ill. 140.

In order to constitute adverse possession it must be actual, visible, notorious, continuous, exclusive, hostile, and under claim of right. Johnson v. Albuquerque, 12 N. M. 20; Gentile v. Kennedy, 8 N. M. 347-354; Probst v. Trustees, 3 N. M. 373; Jenkins v. Maxwell Land Grant Co., et al., 15 N. M. 281; Armstrong v. Morrill, 14 Wall. 120; Hogan v. Kurtz, 94 U. S. 773; Ward v. Cochran, 150 U. S. 597; Clarks' Lessee v. Courtney, 5 Pet. 319; Barr v. Gratz, 4 Wheat. 223; Brownville v. Cavazos, 100 U. S. 138; Deputron v. Young, 134 U. S. 241; Bracken v. Union Pacific Ry., C. C. A., 75 Fed. 347; Bergere v. U. S., 168 U. S. 66; Whitney v. U. S., 167 U S. 529; Gatling v Lane, 17 Neb. 77; McKeighan v. Hopkins, 14 Neb. 361; French v. Pearce, 8 Conn. 439; Sparrow v. Hovey, 44 Mich. 63; Johnson v. Irwin, 3 S. & R. 291; Mercer v. Watson, 1 Watts 330; Overfield v. Christy, 7 S. & R. 173; Jackson v. Berner, 48 Ill. 203; Foulk v. Bond, 12 Vroom 527, N. J.; Cook v. Babcock, 11 Cush. 206; Horback v. Miller, 4 Neb. 31; Parker v. Starr, 21 Neb. 680; Ballard v. Hansen, 33 Neb. 861.

George S. Klock and A. A. Sedillo for Appellees.

Decree of partition was interlocutory and not final.

C. L. 1897, secs. 3197 to 3186; Laws 1907, chap. 107, sub-sec. 269; 30 Cyc. 252; Randels v. Randels, 63 Ind. 93; Aull v. Day, 133 Mo. 337; Warren v. Williams, 25 Mo. App. 22; Mingay v. Lackey, 142 N. Y. 449; Schweitzer's Estate, 4 Lans. L. Rev. 369, Pa.; Zittle's Estate, 4 Lans. L. Rev. 163, Pa.; 15 Enc. P. & P. 810; Hart v. Stedman, 98 Mo. 457; Halloway v. Halloway, 103 Mo. 284; 1 Black on Judgments, secs. 17, 39; 3 Black. Comm. 296; Green v. Fiske, 103 U. S. 518; Elder v. McClaskey, 17 C. C. A. 251; Gesell's Appeal, 84 Pa. 238; Beebe v. Griffing, 6 N. Y. 465; Temple v. Steptoe, 1 Munf. 339, Va.; Young v. Skipwith, 2 Wash. 300, Va.; Putman v. Lewis, 1 Fla. 465; Medford v. Harrell, 10 N. C. 41; Clester v. Gibson, 15 Ind. 10; Davis v. Davis, 36 Ind. 160; Curran v. Maginnis, 41 Ind. 398; Pipkin v. Allen, 49 Mo. 229; Durham v. Darby, 34 Mo. 447; Ivory v. Delore, 26 Mo. 505; Gates v. Salmon, 28 Cal. 320; Peck v. Vanderberg, 30 Cal. 11; Mills v. Miller, 2 Neb. 299; Murray v. Yates, 73 Mo. 13; Knapp on Partition 202; Emeric v. Alvarado, 64 Cal. 529; Booth Real Action 234; Daniel's Chancery Practice 2254; Ham v. Ham, 34 Me. 218; Robinson v. Glancey, 69 Pa. St. 89; Clarke v. Baird, 98 Cal. 642; Tompkins v. Hyatt, et al., 19 N. Y. 534; McKeen v. Officer, 127 N. Y. 687; 30 Cyc. 301; Baca v. Anaya, 14 N. M. 382.

Findings of fact warranted the decree. C. L. 1897, secs. 2937, 2938; Laws 1899, chap. 63, secs. 1, 2; Laws 1905, chap. 76; Tyler on Ejectment and Adverse Enjoyment 88, 872, 873; Wright v. Mattison, 18 How. 56, U. S.; Lea v. Polk County Copper Co., 21 How. 493; Wales v. Smith, 19 Ga. 8; Dickinson v. Breedon, 30 Ill. 279; Hanna v. Renfro, 32 Miss. 125; Bradstreet v. Huntington, 5 Pet. 402, U. S.; Ewing v. Burnett, 11 Peters 51; 3 Rose's Notes 637; Strothers v. Lucas, 12 Pet. 437; Ellicott v. Pearl, 10 Pet. 413.

Adverse possession. 1 Enc. of Ev. 685; Foulke v. Bond, 4 N. J. Law 527; Elder v. McClaskey, 70 Fed. 529; Packard v. Johnson, 57 Cal. 180; Dugan v. Follett, 100 Ill. 581; Sullivan v. Holmes, 8 Cush. 252; Enc. of Ev. 690; Berry v. Seawell, 65 Fed. 742; Allen v. Sea-

well, 70 Fed. 561; Campbell v. Bates, 39 So. Rep. 144, Ala.; Connerly v. Dickinson, 99 S. W. 82, Ark.; Rucker v. Dickson, 93 S. W. Rep. 750, Ark.; George v. Cole, 33 So. Rep. 784, La.; Santee River Co. v. James, S. C., 50 Fed. Rep. 360; Peden v. Crenshaw, C. C. A., Tex., 81 S. W. 369; Robertson v. Dowing Co., 120 Ga. 833; O'Brien v. Fletcher, 51 S. E. 405, Ga.; Van Gunden v. Virginia Coal & Iron Co., 52 Fed. 838; Bracket v. Person Unknown, 53 Me. 228; Green v. Irving, 54 Miss. 450; Little v. Downing, 37 N. H. 355; Black v. Tennessee Coal, Iron and R. R. Co., 93 Ala. 109; Waters v. Connelly, 59 Iowa 217; Taliaferro v. Butler, 77 Tex. 578; Hodges v. Ross, 6 Tex. Civ. App. 437; Brown v. O'Brien, 33 S. W. 267; Tex., Swift v. Gage, 26 Vt. 224; C. L. 1897, sec. 2937; 25 Cyc. 1449; Gay v. Parpart, 100 U. S. 27.

An unregistered deed is sufficient to constitute the bar of the Statute of Limitations. Lea v. Polk County Copper Co., 21 How. 493, U. S.; Packard v. Moss, 68 Cal. 128; Chastain v. Phillips, 11 Ired. 255; Hardin v. Barrett, 6 Jones 159; Krow v. Hinson, 8 Jones 347; Rawson v. Fox, 65 Ill. 200; Minot v. Brooks, 16 N. H. 374; Dickinson v. Greedon, 30 Ill. 279; Wooley v. Constant, 5 Johns. 54, N. Y.; 2 Cyc. 172, 173; Smith, et al. v. U. S., 2 Wall. 219; Chessman v. Whittemore, 23 Picker. 231; 13 Cyc. 721.

STATEMENT OF FACTS.

This action was brought for the partition of the entire Alameda Land Grant, situated in the counties of Bernalillo and Sandoval. The complaint was filed on the 12th day of June, 1906, and the defendants in the suit were designated as follows: "The unknown heirs of Francisco Montes Vigil, deceased; the Unknown Heirs of Juan Gonzales, deceased, and all Unknown Owners of the real estate hereinafter described," and the Grant is described as follows: "A tract of land known as 'The Alameda Land Grant,' bounded on the north by the ruins of an old pueblo, on the south a small hill which was the boundary of Luis Garcia, on the east by the Rio del Norte as it ran in the year 1710 near the eastern foothills,

and on the west a prairie and hills, and containing, according to the official survey thereof, 89,346 acres of land, as will more fully appear from the record of said survey on file in the office of the Surveyor General of New Mexico, reference to which is made for more particular description." The complaint further alleges that the grant was made by authority of the King of Spain to Francisco Montes Vigil in consideration of military services rendered on the 2nd day of January, 1710, juridical possession being given on January 27th, 1710. That Vigil sold and conveyed the grant to Captain Juan Gonzales on the 18th day of July, 1712, the conveyance being approved by the governor and captain general on the 18th day of September, 1713. The complaint further alleges that the grant was afterwards confirmed by the Court of Private Land Claims to the heirs, assigns and legal representatives of Francisco Montes Vigil and Juan Gonzales, and, "That the plaintiff, together with the defendants other than the unknown heirs of Francisco Montes Vigil, deceased, are the owners and possess as tenants in common the tract of land known as the Alameda Land Grant." The complaint further alleges that the unknown heirs of Vigil claim some right, title or interest in the said lands, but denies the claim, alleging that Vigil sold and conveyed all his right, title and interest therein to Captain Juan Gonzales." Plaintiff further alleges: "That a portion of said tract of land in the Rio Grande Valley lying east of the foothills and below the irrigating ditches is occupied by various persons and claimed in severalty by reason of original allotments or by adverse possession, the amount of which said land so occupied and the names of the persons claiming to own said lands in severalty and the description of the land so occupied are to plaintiff unknown. "That all of the lands lying west of the irrigating ditches and foothills, and also a portion of the lands lying east of said irrigating ditches and foothills in the Rio Grande Valley, are held and occupied by said plaintiff and the defendants other than the unknown heirs of Francisco Montes Vigil, as tenants in common." The judgment prayed for is that the defendants be re-

quired to set up or prove their respective interests in the premises or be forever barred; that partition be granted according to the rights of the several parties, and if material injury would result from partition, that the premises be sold and the proceeds divided as the rights of the respective parties may require.

The service made was by publication of notice by the clerk of the District Court and first proof of publication was filed on the 6th day of August, 1906. As there is some question as to the sufficiency of this proof of publication, it will be set out in full, as follows:

"AFFIDAVIT OF PUBLICATION.

"Territory of New Mexico,
"County of Bernalillo.—ss.

"W. T. McCreight, being duly sworn, declares and says that he is business manager of the Albuquerque Weekly Citizen, a newspaper published and having a general circulation in the City of Albuquerque and County of Bernalillo and Territory of New Mexico; that the publication, a copy of which is hereto attached, was published in said paper, in the regular and entire issue of every number of the paper during the period and time of publication, and that the notice was published in the newspaper proper and not in a supplement, for four times, consecutively, the first publication being on the 23rd day of June, 1906, and the last publication on the 14th day of July, 1906.

"(Signed) W. T. McCreight,
"Business Manager."

On the 21st day of September, 1907, another proof of publication was filed, as follows:

"PROOF OF PUBLICATION.

"Territory of New Mexico,
"County of Bernalillo.—ss.

"William F. Brogan, being by me first duly sworn, deposes and says that he is the business manager and also the editor of the Albuquerque Weekly Citizen; that said

Albuquerque Weekly Citizen was at the times hereinafter mentioned and now is published in the City of Albuquerque, County of Bernalillo aforesaid, and had and now has a general circulation in said city and county, and Territory of New Mexico. That the notice of suit in the above cause, a copy of which is attached to a proof of publication filed in said cause on the 6th day of August, 1906, was printed and published in said Albuquerque Weekly Citizen once a week for four consecutive weeks; and that said notice was so printed and published in said Albuquerque Weekly Citizen on the 23rd day of June, 1906, and the 30th day of June, 1906, and the 7th day of July, 1906, and the 14th day of July, 1906; that said publications of June 23rd, 1906, June 30th, 1906, July 7th, 1906, and July 14th, 1906, were in regular issues of said Albuquerque Weekly Citizen, and all the issues of said Albuquerque Weekly Citizen from the 23rd day of June, 1906, to the 14th day of July, 1906, both dates inclusive.

WM. F. BROGAN.

"Subscribed and sworn to before me, a notary public within and for said county of Bernalillo, by William F. Brogan, this 20th day of September, 1907.

"(Notarial Seal) ADELA C. HOLMQUIST,
"Notary Public."

On the 9th day of August, 1906, and prior in time to the filing of the second proof of publication, the following order was entered: "This day this cause came on to be heard upon the complaint, proof of publication and certificate of default and was submitted to the court for approval of publication. Whereupon the court, being fully advised in the premises finds that said publication of notice to said defendants was in all respects regular and in accordance with law, and that said defendants and each of them were duly served by publication of notice and are in default for want of appearance within the time provided in said notice. It is therefore ordered, adjudged and decreed that the service of notice by publication and said publication of notice be, and the same hereby is, approved. It is further ordered, adjudged and decreed that the

said complaint be, and the same hereby is, taken as confessed by said defendants." And the order then provides for the appointment of Harry P. Owen, referee, to take proofs and report the same to the Court, together with his findings of fact and conclusions of law.

March 16th, 1907, the following answer was filed: "Come now the defendants, Bonifacio Montoya, Candelario Montoya de Castillo, Adelberto C. de Baca, Francisco Montoya, Victoriana Montoya, Juan Antonio Rodarte, Rosa Maldonado, Abelino Maldonado, Manuel Gonzales, Nestora Gonzales de Sanchez, Leopoldo Sanchez, Felicita Sanchez, Sofia Sanchez, Raymunda Sanchez de Gonzales, Alfredo Gonzales, Erlinda Gonzales, Araigapita Gonzales, Aurelia L. de Gonzales, Leopoldo Gonzales, Florencio Gonzales, Esoyla Gonzales, Prospero Gonzales, Epamimondo Gonzales, Aurora R. Gonzales, Maria Sanchez de Martinez, Melquiades Martinez, Felix Tafoya Gonzales, Pedro Sanchez, Merced Gonzales, Fabiana Gonzales, Dolores Griego de Cordova, and for answer to plaintiff's complaint, says that each of them claims an interest in the real estate described in said complaint and joins in the prayer of said complaint for partition of said real estate. (Signed) A. B. McMillen, Attorney for Defendants."

On the following day, March 17th, 1907, a judgment in partition was rendered, confirming the report of the Referee, subject to the rights of certain persons as therein specified, and partitioning the premises among some four hundred and fifty persons whose fractional interests are therein set out, if the same can be partitioned without injury, etc. The decree does not extend to the entire Alameda Grant, but only extends to such portion thereof as is described as follows: "Territory of New Mexico, being a tract of land known as the Alameda Land Grant, bounded on the north by the ruins of an old pueblo; on the south by a small hill which was the boundary of Luis Garcia; on the east by the Rio del Norte as it ran in the year 1710 near the eastern foothills, and on the west a prairie and the hills, and containing, according to the official survey thereof, eighty-nine thousand three hundred and forty-six acres of land as will more fully appear

from the record of said survey on file in the office of the Surveyor General of New Mexico. And the court further finds that the lands so partitioned are subject to the rights of claimants in severalty in that portion of the Alameda Land Grant in the Rio Grande Valley lying east of the foothills and below the irrigating ditches, in accordance with the exception in plaintiff's complaint; and that said claims in severalty are not determined in this proceeding."

The decree awards to Mr. A. B. McMillen a fractional interest of 26857-60480 in the lands partitioned, for legal services rendered and by purchase. On the 5th day of July, 1907, commissioners were appointed to make partition of the lands, but they reported that, "Owing to the nature of the land, most of which is fit only for grazing purposes, and owing to the large number of owners, there being more than five hundred, and to the fact that the interests in many instances are very small, that partition of said premises cannot be made consistently with the interests of the estate or the rights of the persons found to own interests therein, and that a division thereof would be manifestly prejudicial to the owners thereof."

At this point in the progress of the case, and before any sale of the lands had been ordered or had taken place, on the 20th day of July, 1907, George S. Klock and A. A. Sedillo entered a special appearance, and, on behalf of a large number of persons, claimants of interests in severalty, filed a motion for leave to intervene in said cause and for leave to answer the plaintiff's complaint in the main case. In pursuance of this motion the Court made the following order: "It appearing to the court that the persons who filed a special appearance in this action, by motion, on the 20th day of July, 1907, claim to be interested in the premises described in the complaint herein, and it further appearing that this suit and proceeding is still pending: It is hereby ordered that each and all of said persons so appearing by special motion in this action filed in this cause on July 20th, 1907, as aforesaid, be and they hereby are allowed to appear and answer the complaint of the plaintiff in this action

by way of intervention, and that said persons may assert any right, with the same force and effect as though said persons had been made parties in the first instance in this action, to which order plaintiffs excepted. It is further ordered that each and all of said persons so allowed to answer by way of intervention, as aforesaid, be and they hereby are allowed twenty days within which to file their said answer. Done in court this 20th day of November, 1907."

On the 29th day of November, 1907, counsel for some ninety or more intervenors filed a voluminous answer, denying all of the relief prayed for by the plaintiff and the defendants answering in the main case, and setting forth affirmatively the rights of the intervenors. This intervention and answer so clearly states the case relied on by the intervenors, that it will be set out in full here, beginning with paragraph 4. "4. Defendants admit that a portion of said tract of land in the Rio Grande Valley lying east of the foothills and below the irrigation ditches is occupied by various persons and claimed in severalty; but they deny that they claim the same in severalty by reason of original allotments or by adverse possession only, and allege that they also claim the same in severalty, because they have owned and held the same by themselves and their predecessors in title for more than fifty years last past, holding and claiming the same under and by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit in law or equity effectually prosecuted has been set out or made to said lands and separate holdings within the aforesaid time of more than fifty years. And defendants deny that all or any of the land lying west of the irrigating ditches and foothills or a portion of the land lying east of said irrigation ditches and foothills in the Rio Grande Valley, or that any lands whatsoever of the tract of land known as the Alameda Grant and involved in this action, are held and occupied by the plaintiff and the defendants other than the unknown heirs of Francisco Montes Vigil, or by any other person or persons whatsoever, as tenants in common. 5.

Defendants deny each and every allegation contained in paragraph 7 of plaintiff's complaint. 6. And by way of defense, these defendants allege: That they are the owners in severalty and in possession respectively of diverse tracts of lands situate within the boundaries of the tract of land described in plaintiff's complaint, and that they and diverse other persons are the owners in severalty and in possession of diverse tracts of land situate within the boundaries of the tract described in said complaint, which said diverse tracts of land so owned and held in severalty constitute all of the tract of land known as the Alameda Grant and described in plaintiff's complaint; that they and their predecessors in title have had possession thereof respectively for more than fifty years last past, holding and claiming the same by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit, in law or equity, effectually prosecuted has been set out or made to said lands within the aforesaid time of more than fifty years. 7. That they are the owners in severalty and in possession, respectively, of diverse tracts of lands situate within the boundaries of the tract of land described in plaintiff's complaint, and that they and their predecessors in title have had possession of each of said tracts of land respectively, for more than fifty years last past, holding and claiming the same by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit, in law or equity, effectually prosecuted has been set out or made to said lands within the aforesaid time of more than fifty years. 8. These defendants further allege that portions of the lands lying west of the irrigating ditches are not susceptible of irrigation and are only valuable and can only be used for grazing purposes; that the tracts of land owned and held in severalty as herein alleged, embrace the lands lying west of the irrigating ditches, and also the lands lying east of said irrigating ditches, portions of which are also not susceptible of irrigation and are only valuable and can only be used for grazing purposes; that portions of said lands lying east and west of the irrigating ditches

are susceptible of irrigation, that they are parts of the same lands and are embraced and described as such in the assurances of title aforesaid; that these defendants and their predecessors in title and the other diverse persons and their predecessors in title have been in the open, actual, hostile, exclusive and continuous possession of each and all tracts of land owned and held by them in severalty as aforesaid, and that all of the tract of land known as the Alameda Land Grant, and described in plaintiff's complaint, has been so owned and held for more than fifty years last past; that during all said period of time these defendants and their predecessors in title and the said diverse other persons and their predecessors in title, respectively, have occupied, cultivated and improved those portions of said lands susceptible of irrigation, cultivation and improvement and have used the remainder thereof for grazing purposes, and claiming to own the whole of their individual possessions and holdings and the whole thereof, by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple to each and all of said lands respectively. 9. Defendants further allege that each and all of the lands owned and held in severalty by them as aforesaid, respectively, are so owned and held by them in fee simple, and that the said plaintiff and any and all other persons whatsoever have no right, title or interest therein, either as tenants in common or in any other manner whatsoever. 10. Defendants further allege that the plaintiff, Vicenta Montoya, was the owner of a certain tract of land thirty-four varas wide from north to south and in length extending from about three hundred yards east of Corrales lower ditch to the west boundary line of the said Alameda Grant, bounded on the north by lands of Rafaèla Gutierrez de Gonzales, on the south by lands of the heirs of M. S. Otero, deceased, on the east by lands of E. M. Sandoval, and on the west by the west boundary line of said Alameda Grant, which said tract of land she inherited from one Jose Antonio Montoya, her grandfather, and that she owned and held the same in severalty; that on the — day of March, 1907, she con-

veyed the same to one Abenicio Perea in fee simple; and these defendants allege that the said tract of land was and is the only land that plaintiff owned in said grant, and that plaintiff had never had any other interest, either in common or otherwise, in any lands in said grant, and these defendants allege that plaintiff is not an interested party in this action. Wherefore, these defendants pray that the prayer in plaintiff's complaint be denied; that the title of defendants to any and all lands owned by them in severalty or otherwise be declared and established and duly and forever quieted, and they be hence dismissed with their costs in this behalf expended."

Candido G. Gonzales, another intervenor, filed a separate answer setting up his claims, which were in all respects similar to the above answer except that Gonzales claimed several tracts of land. Counsel for the plaintiff, and the defendants, represented by A. B. McMillen in the original cause, filed answers to the above petitions of the intervenors, simply denying each and every allegation thereof, and Alonzo B. McMillen answered alleging ownership by him of the lands awarded him by the judgment in partition, and joins in the prayer for partition. By a stipulation in writing signed by the attorneys for all the parties, numerous other claimants in severalty were authorized to appear as original interveners. The cause being submitted to the court for decision on the pleadings, oral and documentary, proofs and arguments of counsel for the respective parties, the Court rendered a decision in favor of the interveners and against the plaintiff, as well as the defendant. On the 4th day of January, 1910, the Court entered final judgment in favor of the interveners, awarding to each of them certain tract or tracts of the land, describing each tract by the number of varas in width and running the entire length of the premises from east to west, declaring the owner of each tract and including in the judgment voluminous findings of fact. The judgment concludes as follows: "It is therefore ordered, adjudged and decreed that the said intervenors above mentioned are entitled to hold the tracts of land set off to them in the foregoing decree in severalty, free from

all claim or claims of the plaintiff in this action and her co-tenants or their successors or assigns. And the said plaintiff, her co-tenants and their successors or assigns are enjoined and forever barred from claiming any right, title or interest in or to any of the said lands above described, whether under the decree of partition heretofore entered in this cause or otherwise. It is further ordered, adjudged and decreed, that the said intervenors recover from the said plaintiff their costs herein, to be taxed."

McMillen and other defendants who united with the plaintiff in the original cause, and confirmed the report filed by the commissioners to the effect that the lands could not be partitioned. A formal judgment was entered, a portion of which is as follows: "And the court having announced its decision in the intervention proceeding of Candido G. Gonzales and other interveners represented by George S. Klock and A. A. Sedillo and of the intervener Jacobo Yrisarri, favorable to the respective intervenors, but the decree fixing the rights of said interveners not having been entered of record, and it appearing advisable that the respective decrees in favor of interveners should be separately entered. It is ordered, that the order of sale herein, and the sale to be made in pursuance thereof, shall be subject to the rights of said interveners, respectively, as established by such order, judgment and decree as shall be finally made in favor of said intervenors, respectively, either in this court or in any proper appellate court on appeal; and it is further ordered that said sale be made subject to the exceptions and reservations heretofore made in the decree of partition, and subject to the rights of George Hill Howard in and to the lands set forth in his intervening petition heretofore filed in this cause, in accordance with the written stipulation on file in this cause. And this cause coming on to be further heard upon the report of said commissioners, the court being fully advised in the premises, doth order, adjudge and decree that the premises hereinafter described be sold at public auction, at the front door of the County Court House of Bernalillo County, to the highest and best bidder for cash; subject, however, to the exceptions, conditions and reservations

hereinbefore mentioned; which said premises are situate in the counties of Bernalillo and Sandoval, Territory of New Mexico, and described as follows, to wit: A tract of land known as the Alameda Land Grant, bounded on the north by the ruins of an old pueblo; on the south by a small hill, which was the boundary of Luis Garcia; on the east the Rio del Norte, as it ran in the year 1710, near the eastern foothills, and on the west a prairie and the hills, and containing, according to the official survey thereof, 89,346 acres of land, as will more fully appear from the record of said survey on file in the office of the Surveyor General of New Mexico, reference to which is made for more particular description." Exceptions were properly saved to the findings and judgment of the court below and the cause was brought to this court by an appeal prayed for and granted to the plaintiff and defendants, to whom interests were awarded by the judgment in the original partition proceeding.

OPINION OF THE COURT.

M'FIE, J.—It appears from the elaborate statement of the proceedings, that the plaintiff in the court below filed a complaint seeking the partition of a portion of the Alameda Land Grant, situated in both Bernalillo and Sandoval counties. There were no individual defendants when the cause was instituted, but the defendants were denominated, "Unknown heirs and unknown owners," claiming interests in that grant. The only service had was by publication. After publication for service had been made numerous individuals represented by plaintiff's counsel, Mr. A. B. McMillen, and Mr. McMillen a claimant of a large amount of the lands by purchase or otherwise, appeared as defendants, but confessing the allegations of the complaint and alleging heirship, they joined the plaintiff in the prayer for partition. Judgment by default was taken and Harry P. Owen was appointed referee to take proofs and genealogy, and report to the court. Testimony was taken before Mr. Owen, conducted by Mr. McMillen, attorney for the plaintiff and the defendants for whom he appeared, and the referee reported a genealogy and a state-

ment of the respective undivided interests of some four hundred and fifty or more persons found by him to be heirs and owners of interests in the Alameda Grant. This report was confirmed and a judgment rendered by the court declaring those persons entitled to undivided interests as stated in the Referee's report. In the last clause of the judgment three commissioners were appointed to make partition of the lands among the respective parties, and, if partition cannot be made without manifest prejudice to the interest of the parties, that the commissioners shall so report. The judgment was filed June 17th, 1907, but, while the commissioners made a report on the 5th day of July, 1907, that the premises could not be partitioned without manifest prejudice, the report was not confirmed and a sale ordered until March 11th, 1909, nearly two years after the preliminatry judgment in partition was rendered. As will be seen by the statement of the case, the application for leave to intervene was made July 20th, 1907, and the order allowing intervention was granted November 20th, 1907. Between the time of the entry of the judgment in partition, July 5th, 1907, and the order confirming the Commissioners' report and for sale of the premises, March 11th, 1909, the issues being joined between the parties and the rights of the respective parties, both as to the partition and intervention,—the same being practically consolidated,—were fully litigated and a final decree was rendered in favor of the interveners declaring them to be the owners of the lands claimed by them, and defining the amount to which each of the interveners are entitled, the terms of the final decree being set forth in the statement of the case.

The first assignment of error is upon the order of the court allowing intervention. In the decision of this cause it should be understood that it is conceded by all of the parties to the litigation that the Alameda Grant is a perfect grant and was so declared by the Court of Private Land Claims in 1892. This litigation, therefore, does not involve a contest between the sovereign and individual heirs or claimants, but is a contest between individual claimants who assert ownership of interests in the land of

the grant, as heirs, assigns, purchasers, long continued possession and use by those claiming under deeds, conveyances, devise; grant or other assurances purporting to convey an estate in fee simple, in which the sovereign has no interest. Counsel for appellants, both in oral argument and by brief, deny the right of intervention, insisting that a final decree had been rendered in their favor in the partition suit awarding them the land; that the decree was binding as against all adverse claimants and effectually barred any right of intervention to assert rights of ownership in the lands in litigation. Under the partition statute of this territory intervention is specifically provided for in section 3182, Compiled Laws 1897, as follows: "During the pendency of any such suit or proceeding any person claiming to be interested in the premises may appear and answer the petition and assert his right by way of interpleader, and the court shall decide upon their rights as though they had been made parties in the first instance." It will be observed that persons claiming to be interested in the premises may intervene during the pendency of a suit or proceeding having for its object the partition of lands. No limitation as to the time of intervention is prescribed, except that it must be during the pendency of the suit. In the order of the court allowing the claimants to intervene, it is stated that the suit was still pending at the time the order was made, and, being so, it was the duty of the court to grant the application; there was no discretion to grant or refuse the right, as it was a statutory right during the pendency of the proceeding. Baca v. Anaya, 14 N. M. 382.

It thus appearing that the intervention was in apt time, the next inquiry is whether or not the first decree in the partition proceeding was final, and deprived the interveners of any claim or interest in the lands involved, for the settlement of which a right of intervention existed. The interveners in this case, claim the ownership of the lands sought to be partitioned in the original suit. If they are the owners of the land the partition proceeding, if unopposed, would effectually deprive them of that ownership. In fact, that, in substance, is the contention of ap-

pellants' counsel; that the preliminary decree already rendered had the effect of quieting the title to the lands claimed by both parties, in appellants. Such is the logical result of the contention, that no right of intervention exists because of the rendition of the preliminary decree. That title to real estate claimed by different parties may be determined in a partition suit, and that intervention is a proper proceeding by which to accomplish this result, was settled by this court in Baca v. Anaya, supra, in which case, the court, after reviewing numerous decisions of other courts, said: "We concur with all that is said by these courts, and hold that under our statute the owner of the whole or any part of the premises sought to be partitioned may, whatever the origin of his title, intervene for the settlement of his rights." In this jurisdiction, and under our statute, it cannot be successfully main-
2 tained that the default decree or judgment, as it is called, is a final decree having any such effect as is contended for. Partition proceedings in a large number of states in which statutes are similar to our own, are peculiar in that two decrees are necessary to a final vesting of title to the lands in individual ownership. In such jurisdictions the first decree declaring the interests of the parties in the lands sought to be partitioned and appointing commissioners, is designated preliminary or interlocutory. Many of our statutes are practically the same as those of the state of Missouri, and seem to have been taken therefrom for the purpose of making our procedure similar to the settled and adjudicated procedure of that state. The decisions of that state, therefore, are of value to us in partition suits, as the procedure is similar to our own. In Aull v. Day, 133 Mo. 337, after citing numerous cases to the same effect, the court said: "A judgment in a partition suit which declares the rights of the parties and orders partition is interlocutory only, and is under the control of the court until the final decision of the suit, and may be modified or rescinded at any time before final judgment, even after the expiration of the term at which it was rendered." And the Court further said in that case, that even in a case where the answer admitted the allega-

tions of the petition, the judgment would still be interlocutory only. In the State of New York the procedure under the Code is of the same nature. In Mingay v. Lackey, 142 N. Y. 49, the Court said: "The judgment of April 8, 1893, was interlocutory and not final. It declared the then existing rights and interests of the parties to the litigation in the land. But it divested no title. It directed a reference for sale, for inquiry, for computation, and for accounting. It provided for a distribution of the proceeds of the sale based upon the several interests in the land which should be included in the sale. But the sale would become binding only upon confirmation by the court, and until confirmation the purchaser would not be required to pay the purchase money, and until the purchase money was paid or secured there would be no fund for distribution. The practice in partition proceedings of entering in the first instance an interlocutory judgment, to be followed by a final judgment upon the termination of the proceedings authorized by the interlocutory judgment, prevailed in chancery and is expressly authorized and required by the Code." It seems wholly unnecessary to multiply citations in support of this view, but a reference to Section 3138, Compiled Laws 1897, authorizes a similar preliminary judgment. The next section, however, clearly indicates the necessity and grants authority for a final judgment, and the record shows the rendition of a final judgment by the court. We have examined the authorities referred to in appellants' brief as to this point, but find that they do not sustain the contention of counsel, with one or two exceptions, but the diverging cases are from states where by statute or code a different procedure is provided for. Take, for instance, the case of Petrucio v. Seardon, 76 Tex. 639. This case is in line with counsel's contention, but the state of Texas has a different procedure. "In two states the power of the court to make partition directly and without the aid of commissioners has been affirmed, and in another that the court may direct the mode of partition. These decisions stand alone. The general rule is to the contrary." Cyc. vol. 30, p. 250. The three states above referred to are

Texas, Tennessee and Louisiana. The judgment relied upon by appellants was interlocutory, and, as the record shows that no final judgment or decree was ever rendered in favor of the appellants, but, on the contrary, the final decree was in favor of the appellees, the interveners, hence no error was committed by the court in allowing the intervention, notwithstanding the interlocutory decree.

The remaining seven assignments of error all go to the merits of the case, each of them challenging the correctness of the final decree rendered by the court in favor of the intervening appellees and against the appellants. That a clear understanding of the scope of the present controversy as presented in the lower court and also by the record on this appeal, may be had, it must be kept in mind that the Alameda Grant includes some 89,346 acres of land; that a considerable portion of these lands are situated in the Rio Grande Valley above the City of Albuquerque, and a large part of the valley lands are, and for a great many years have been, occupied, improved and cultivated. These occupied lands lie between the Rio Grande and the foothills on the west side of the valley. These lands are divided in strips, some of which are inclosed and some are not. As to these strips of occupied and cultivated land, the original petition contains the following allegation: "Plaintiff further alleges that a portion of said tract of land in the Rio Grande Valley lying east of the foothills and below the irrigating ditches is occupied by various persons and claimed in severalty by reason of original allotments or by adverse possession, the amount of which said land so occupied and the names of the persons claiming to own said lands in severalty and the description of the land so occupied are to plaintiff unknown. Plaintiff further asks that partition hereinafter prayed for be made subject to the rights of said occupants in severalty." The interveners in their interpleader and answer as to these same strips of land allege: "That they are the owners in severalty and in possession, respectively, of diverse tracts of land situate within the boundaries of the tract of land described in plaintiff's complaint, and that they and their predecessors in title have had posses-

sion of each of said tracts of land, respectively, for more than fifty years last past, holding and claiming the same by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple, and that no claim by suit, in law or equity, effectually prosecuted, has been set out or made to said lands within the aforesaid time of more than fifty years." The lands sought to be partitioned by all of the parties is a large body of uncultivated and unimproved grazing land extending from the ditches on the west side of the cultivated lands to the western boundary of the grant. As to this land, the petition for partition alleges: "That all of the lands lying west of the irrigating ditches and foothills, and also a portion of the lands lying east of said irrigating ditches and foothills in the Rio Grande Valley, are held and occupied by said plaintiff and the defendants other than the unknown heirs of Francisco Montes Vigil, as tenants in common." While the interveners make the following allegations: "These defendants further allege that portions of the lands lying west of the irrigating ditches are not susceptible of irrigation and are only valuable and can only be used for grazing purposes; that the tracts of land owned and held in severalty as herein alleged, embrace the lands lying west of the irrigating ditches, and also the lands lying east of said irrigating ditches, portions of which are also not susceptible of irrigation and are only valuable and can only be used for grazing purposes; that portions of said lands lying east and west of the irrigating ditches are susceptible of irrigation, that they are parts of the same lands and are embraced and described as such in the assurances of title aforesaid; that these defendants and their predecessors in title and the other diverse persons and their predecessors in title have been in the open, actual, hostile, exclusive and continuous possession of each and all tracts of land owned and held by them in severalty as aforesaid, and that all of the tract of land known as the Alameda Land Grant and described in plaintiff's complaint, has been so owned and held for more than fifty years last past; that during all said period of time these defendants and their predecessors in title

and the said diverse other persons and their predecessors in title, respectively, have occupied, cultivated and improved those portions of said lands susceptible of irrigation, cultivation and improvement and have used the remainder thereof for grazing purposes, and claiming to own the whole of their individual possessions and holdings and the whole thereof, by virtue of deeds of conveyance, devise, grant and other assurances purporting to convey an estate in fee simple to each and all of said lands respectively."

From these allegations it is apparent that both parties claim the ownership of those mesa or grazing lands, the appellants as the heirs of Captain Juan Gonzales, and the appellees by fee simple title under "conveyances, devise, grant and other assurances purporting to convey an estate in fee simple," as provided for in Section 2937, Compiled Laws 1897. At the conclusion of the trial of the cause the same was submitted upon the pleadings, proofs and arguments of counsel for the respective parties, the court rendered a final decree with voluminous findings of fact, a separate decree in favor of each of the interveners, and a general decree in favor of all the interveners and against the parties to the original cause, and appearing by way of intervention, in terms as follows: "It is therefore ordered, adjudged and decreed that the said interveners above mentioned are entitled to hold the tracts of land set off to them in the foregoing decree in severalty, free from all claim or claims of the plaintiff in this action and her co-tenants or their successors or assigns. And the said plaintiff, her co-tenants and their successors or assigns are enjoined and forever barred from claiming any right, title or interest in or to any of the said lands above described, whether under the decree of partition heretofore entered in this cause or otherwise." Exceptions were properly saved by appellants' counsel to this decree. There being 86 findings of fact, a few of which are general, substantially applying to all, while the remaining findings apply to each of the claims of the interveners, it is impractical to set them out in full in this opinion, but it will suffice to set out in full one or two of the general findings,

and one of the findings as to the separate tracts, as all of those are substantially the same. "Finding No. 1. The interveners claim strips of land within the Alameda Grant very narrow in proportion to their length, most of them being only a few yards in width, each, and extending from the Rio Grande west to the ceja, or ridge, dividing the watershed of the Rio Grande from that of the Rio Puerco, and forming the western boundary of the grant, a distance of about sixteen miles. Most of them include land between the Rio Grande and the foothills at the west of the valley, which is adapted to cultivation, and the land exending from the foothills to the ceja of the Rio Puerco, which is adapted to grazing only. Most of the interveners live on the easterly ends of the strips of land they claim, and cultivate such portions of the bottom lands between the river and the foothills in the respective strips as they require. Near the river the land is what is termed bosque; that is, land covered with a growth of brush, trees and wild grass, and is used for pasturage. In the valley the strips of land are to some extent separated by fences and to some extent the bosque is separated in that way from the cultivated lands. From the foothills west there are no fences, nor are there any fences at the western boundaries of the strips or of the grant. By stipulation between the parties the titles to the lands between the river and the foothills are not to be determined in this action, but that does not exclude the evidentiary bearing, if any, which the use, occupation and claims of possession and ownership of these lands by interveners, respectively, so far as they appear in evidence, may have on their use, occupation and claims of possession, respectively, of the lands extending westerly from the foothills. The last named land bears a scanty growth of grass and other herbage and is without water, it being customary and necessary to have the animals pastured there go to the Rio Grande for water at intervals of three or four days, except for short and infrequent periods when their needs are supplied by rain or snow. By agreement, or common understanding, which has ripened into a general custom, the interveners and their predecessors in claim of

ownership have used those westerly portions of the strips they claim, in common with each other and with others claiming ownership in the grant, no one attempting to keep his animals exclusively on the land he claimed nor requiring others claiming ownership to keep their animals off such land. To some extent those who were not claiming ownership of any land within the grant pastured their animals on the portion of it in question west of the foothills and on the strips claimed by the interveners with the other animals pastured there, without objection by those who claimed the strips, but without their consent, except as they failed to take active measures to prevent such intrusion. This method of use was the one most convenient, economical and advantageous to the interveners and as to all the strips, except the northern one of Gonzales, the only practicable one because of the size and shape of the respective strips which would make the expense of fencing them greatly disproportionate to their value, the character and location of the land, the scantiness of herbage and the lack of water upon it, and for no other reasons appearing in the evidence." Separate Finding No. 7. "Jose Chaves, one of the interveners, claims a strip of land situated within the Alameda Land Grant, extending from the Rio Grande on the east to the ceja of the Rio Puerco on the west, and containing 80 varas in width from north to south, and bounded on the north by land claimed by Concepcion Trujillo de Sandoval, and on the south by land claimed by Noyola Chaves; which said strip corresponds to strip No. 10 of the list of strips hereinafter referred to, and is claimed by intervener and his predecessors in title by virtue of certain unrecorded deeds of conveyance purporting to convey an estate in fee simple thereto, for more than ten years next preceding the beginning of this action, and consists of bottom land between the Rio Grande and the foothills and the mesa, or upland, extending west from the bottom land to the ceja of the Rio Puerco. Of the latter land he and his predecessors in title have had such possession as that described in Finding 1 of Fact herein for more than ten years next preceding the beginning of this action. On the

easterly portion of said strip, that between the Rio Grande and the foothills, said intervener and his predecessors in title have lived in houses which they built, and they have built on, fenced and cultivated such portions of said valley land as they required for their purposes, crops and stock, for more than ten years next preceding the beginning of this action; and in connection with it, they used the portion of said strip extending from it to the ceja of the Rio Puerco, as set forth in said Finding 1 of Fact herein." Finding No. 82. "That Captain Juan Gonzales lived upon said Alameda Land Grant, and that there has always been a large number of the heirs of said Captain Juan Gonzales living within the boundaries of said Alameda Land Grant. A portion of the heirs of said Captain Juan Gonzales who lived within said boundaries were: Mariano Gonzales, who is now living upon said grant and has lived there all his life; his father Jose Gonzales; his grandfather Santiago Gonzales; and his great grandfather Juan Gonzales, who lived on said grant all their lives; also Juan Antonio Rodarte, who has lived on said grant all his life; also, Merced Gonzales, and her father Miguel Gonzales, who have lived on said grant all their lives; also, Fabiana Gonzales and her father, Jesus Gonzales, who have lived on said grant all their lives; also, Candido G. Gonzales and his brother, Conrado A. Gonzales, and his father, Ignacio Gonzales, and his mother Abelina Garcia de Gonzales; also, his grandfather, Santiago Gonzales, and his great grandfather, Juan Gonzales, all of whom lived on said land grant all their lives; also, Florencio Gonzales, before he went to Lincoln county; also, Jose Gonzales and Manuel Gonzales and Sixta Gonzales, brothers and sister of Ignacio Gonzales, who lived on said grant all their lives." Finding No. 83. "It appeared, however, and is so found, that from a time farther back than the memory of any witness extended, the greater part of the land within the limits of the grant has been claimed and occupied in strips, as set forth in Finding of Fact 1, the land from the foothills to the ceja of the Rio Puerco in common for pasturage, and the bottom lands generally by those claiming the ownership of them separately, as set forth in said

finding. It did not appear that the heirs of Captain Juan Gonzales or any of them living within the boundaries of the grant had ever claimed or asserted any right to, or interest in, any portion of said land grant except such strips as they claimed respectively until and except as appears from warranty deed from Juan Antonio Rodarte to A. B. McMillen for an undivided one-twenty-fourth part of said grant, dated January 8th, 1907, and by warranty deed from Merced Gonzales de Romero and Fabiana Gonzales for the undivided one-fifty-sixth part of said grant, dated February 27th, 1907; and it did not appear that they or any of them occupied or used any portion of said grant except as others within the grant occupied and used the strips they claimed, the bottom lands in severalty and the grazing lands in common, as set forth in said Finding of Fact 1." Finding No. 74 gives a list of 162 separate strips of land, together with the name of the owner, the number of varas wide from north to south, and a number is given each tract. The terms of the separate decrees in favor of the interveners is: "It is further considered, adjudged and decreed that the intervener, Jose Chaves, is the owner in fee simple, absolute and in severalty of the following described strip, tract and parcel of land situate within the limits of the Alameda Land Grant, bounded and described as follows: Containing 20 varas in width from north to south, and in length extending from the Rio Grande on the east to the ceja of the Rio Puerco on the west, and bounded on the north by land claimed by Felix Tafoya y Gonzales and on the south by land claimed by Jose Gonzales y Montoya; and which said strip corresponds to strip No. 20 of the list of strips referred to in the findings of fact in said cause and in the list of strips annexed hereto and made a part of this decree." The court, in Nos. 76, 77 and 78, found that the grant was made to Francisco Montes Vigil; that he conveyed the land to Captain Juan Gonzales, on the 18th day of July, 1712, as alleged, and that the grant was confirmed as a perfect grant. The record contains translations of exhibits 28, 28A and 28B, purporting to be deeds and a will under which Candido G. Gonzales claims ownership of one certain tract, also, exhibits 65,

65A and 65B, purporting to be conveyances under which Francisco Lucero y Montoya claims ownership. No other testimony, either oral or documentary, is found in the record. The conveyances referred to in the findings of fact, under which interveners claim ownership, are not found as exhibits in the record, nor is there any evidence tending to dispute the findings that the interveners and their predecessors in title claimed the lands by virtue of "certain deeds of conveyance, purporting to convey an estate in fee simple." Where the record does not bring up the evidence for examination by the court, the findings of the court upon questions of fact will not be disturbed in this court. Cunningham v. Springer, 13 N. M. 290.

There being no specific assignment of error raising this question, and in view of the statement in the brief of counsel for appellants that "no one of the interveners, by any instrument of writing introduced in evidence, showed title in himself coming from Captain Juan Gonzales" * * * * * and the further statement that, "while in some cases the length of the possession was questionable, the appellants did not question the right of the interveners to the land actually cultivated or inclosed by them, it must be assumed that the conveyances under which the respective interveners claimed title were before the court, and, together with such other evidence as may have been introduced, supported the findings of the lower court," we are of opinion that the fintlings of the trial court are within the principle announced by this court in the cases: Hamilton Mining Co. v. Hamilton, 14 N. M. 272; Hagerman Irrigation Company v. McMurray.

This brings us to the consideration of the main question in this case, and, in view of the large amount of litigation which has arisen and will no doubt continue to arise in this territory, the decision of the case will be of great importance. Counsel on both sides seem to desire that the case shall be decided upon its merits and not upon technical grounds, that the rightful owners of the land in controversy may have their titles passed upon and set at rest. In the partition proceeding, and prior to the setting up of the claims of the interveners, the court

had rendered a preliminary decree declaring the rights of the partition claimants (the heirs of Captain Juan Gonzales), to be as follows: "The parties hereinafter mentioned and to whom the respective undivided interests in said lands are decreed, are the owners of said tract of land in fee simple, as tenants in common, in proportions as indicated by the fractions set opposite their respective names, and that no person or persons other than said parties hereinafter mentioned have any interest in, or title to, said land or any part thereof, in possession, remainder, reversion or otherwise, except as hereinbefore excepted," but at the close of the case, after rights of the interveners had been fully litigated, the court rendered the following final decree: "It is therefore ordered, adjudged and decreed that the said interveners above mentioned are entitled to hold the tracts of land set off to them in the foregoing decree in severalty, free from all claim or claims of the plaintiff in this action and her co-tenants or their successors or assigns. And the plaintiff, her co-tenants and their successors or assign are enjoined and forever barred from claiming any right, title or interest in or to any of the land above described, whether under the decree of partition heretofore entered in this cause or otherwise." Obviously these decrees are in direct conflict, inasmuch as they relate to the same land, at least to a considerable extent, and the court, recognizing this, set aside the former decree.

The vital question presented by this appeal, then, is, did the court err in rendering the latter decree? The answer, as disclosed by the learned discussion in the briefs of counsel, and in oral arguments as well, must be found, so far as the interveners' rights are concerned, at least, in the intent and purpose of the legislature of the territory in the enactment of Chapter 17 of the Laws of 1858. Section one of this chapter, now section 2937, Compiled Laws 1897, is set out in full later on. For forty-one years this section remained in its original form, and but one unimportant amendment has been made to it. In 1899 the legislature made the following amendment by way of substitution, beginning with the first proviso:

"Provided, that if any person entitled to commence or prosecute such suit or action is, or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other." The only changes made by this amendment was to modernize the language of the substituted portion; limit the disabilities for which time to sue is given, to those imprisoned, of unsound mind or under the age of 21 years, and to reduce the time in which suit must be brought after removal of disability from three years to one. It may be said, therefore, that this section is still substantially as it was originally enacted in 1858. It becomes a pertinent inquiry, at this point, as to what were the conditions existing at the time necessitating or making desirable the enactment of such a statute, and in order that we may have a better understanding of the intent and purpose of the legislature in drafting its provisions we will put the inquiry in an interrogative form; what beneficial purpose was such a statute designed to subserve? We have been impressed with the observations of counsel for the appellees as to the conditions then existing and which demanded a solution such as this law affords, taking the view that this section was not intended to be a statute

3 of limitation and repose merely, but was also intended to grant affirmative relief by way of conferring title upon the pioneer agricultural settlers as a reward of honest toil and diligence, indicating good faith in the settlement and improvement of what was at that time a comparatively barren and sparsely settled section, as, indeed, the whole territory was at that time, for that matter. Going back of the time of the enactment of this statute, an historical reference would seem to be appropriate. The Republic of Mexico, following the achieve-

ment of its independence from the parent country, had continued the policy of granting lands to individuals. These grants were dormant and useless until population made settlement thereon. In the possession of the titled grantee (and we refer to a military title) they were a source of weakness rather than of strength to the province. Prior to the enactment an increasing number of people from year to year were seeking settlement upon these grants and were making use thereof by a civilized cultivation. Transfers of lands embraced within land grants had been made with considerable frequency. This is evident from the very large number of exhibits in the case at bar. Some of the grantees of the grant, when the contest between the Republic of Mexico and the United States in the War of 1846-47 came on and was ended by the Treaty of Guadalupe Hidalgo, doubtless abjured the province of New Mexico and remained citizens of the Republic of Mexico. The people of this territory were thoroughly familiar with the existing conditions and with the prior traditions and practice. It was within the decade following the acquisition of New Mexico by the United States. American and European settlers were coming this way. The native population was also increasing and it was obvious to the people and the law-making power, that efforts would be made, as such efforts are now being made, to disturb grantees, occupiers, heirs, and devisees in their respective possessions held by written evidence of title. Possession that these claimants had lawfully acquired and for which they had paid a consideration. These settlers and occupiers had defended the soil and the people occupying it from the incursions of the Indians. This had been done at a very great sacrifice. The law making power, confronted with these conditions and appreciating the necessity for legal protection, not only from fictitious claimants, but from claimants who had long slept upon their rights as well, enacted this statute and thus assured protection to persons possessing land described in their deeds, assurances and devises, in their bona fide claim or ownership. The legislature, therefore, enacted the statute in question

and intended to create, and did create, a right and title as to real property acquired in a land grant and provided another and different rule of limitation as to real property which might be adversely acquired under Section 2938. It should be understood that, in so far as this case is concerned, the construction placed upon Section 2937, supra, is made applicable to Spanish or Mexican land grants only, as the grant lands herein described are within such a grant. The grants of lands by the United States, which might be of a very different nature, are not deemed pertinent to the decision of this case.

Before adverting to Section 2938, the section which appellants insist is controlling as to appellee's claims we will examine Section 2937 somewhat more in detail. It is not, and cannot be successfully denied, that the section provides an absolute limitation of the right to bring suit, either in law or equity, after the lapse of ten years, as against those in possession within the terms of the act, except where disability to sue exists, when suit may be brought within one year after the disability has ceased to exist. We need not further consider that provision of the section. But there is much more in this section, for the act is made specifically applicable to lands "granted by the governments of Spain, Mexico and the United States, or by whatever authority empowered by said governments to make grants to land." The Alameda Grant, being an individual grant, in private ownership, there can be no doubt of the application of this section to the lands embraced in the Alameda Grant, which had been in existence for one hundred and forty-eight years at the time this statute was enacted. Even at the time this law was passed these grants were largely owned by heirs and assigns of original grantees, and these heirs would, naturally, be widely separated from each other and few, if any, of them in actual occupation of the lands. The lands, being unoccupied and uncultivated, induced settlers to enter upon them and for many years before and after the American occupation these settlers have been occupying, cultivating and grazing these lands and purchasing, selling and devising and assigning them by deeds, wills and other docu-

ments and in good faith, claiming the ownership of the lands, notwithstanding these title documents may not be traceable to the real heirs or owners of the grant. Now this act provides that all of those persons, their children, heirs or assigns who were in possession of portions of these lands for ten years, claiming them under the provisions of the act at the time of its enactment or at any time thereafer *"shall have a good and indefeasible title in fee simple to such lands, tenements and hereditaments."* This fee simple title is conferred upon all those who have complied with the conditions prescribed by the act. The conditions imposed are set forth in the act in clear and unambiguous language, as follows: "In all cases where any person or persons, their children, heirs or assigns, shall at the passing of this act or at any time thereafter, having had possession for ten years of any lands, tenements or hereditaments which have been granted by the governments of Spain, Mexico or the United States or by whatsoever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten years, then and in that case, the person or persons, their children, heirs or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in his, her or their deed of conveyance, devise, grant or other assurance as aforesaid, in preference to all, and against all, and all manner of person or persons whatsoever; and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten years to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this territory, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the per-

son or persons, their children, heirs or assigns so holding or keeping possession as aforesaid by the term of ten years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments." Comparing the requirements of this section with the evidence as disclosed in the findings of fact, some of which are set out in full in a former part of this opinion, it cannot be doubted that the interveners, with possibly two exceptions, to be referred to later, have met all of the requirements of the statute, and even more than the statutory requirements. These settlers have been in possession for the time required, cultivating and improving the valley lands, although the statute is silent as to that, nor does it define the character of possession as prescribed by Section 2938, as amended, in relation to title by adverse posesssion. Appellees were holding and claiming certain described strips of land a certain number of varas wide from north to south and extending from the eastern to the western boundaries of the grant, claiming the lands under deeds of conveyance purporting to convey to them a fee simple title, and no suit has been either instituted or prosecuted by the appellants or any other person as provided for in the act. Indeed, it is not insisted that any such suit was instituted by the appellants, except the present action. The contention of appellants that the interveners did not show written title from the heirs of Captain Juan Gonzales, falls to the ground under this section, for the reason that only color of title is required. Color of title has been repeatedly defined by both text writers and the courts: "The courts have concurred, it is believed, without on exception in defining 'color of title to be that which in appearance is title, but which in reality is no title.' They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or claim has been made in good faith. The authorities seem to be conclusive to the point, that a claim to property, under conveyance, however inadequate to carry the true

title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet, a claim asserted under the provision of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statute of limitations, other requisites of those statutes being complied with. This subject was somewhat recently before the Supreme Court of the United States, and the former decisions of that court upon the question were elaborately examined, and the conclusion was declared in accordance with these views, and it was decided that what is color of title is matter of law, and when the facts exhibiting the title are shown, the court will decide whether they amount to color of title. But good faith in the party, in claiming under such color, is a question of fact for the jury." Tyler on Ejectment and Adverse Enjoyment, pp. 872, 873. In Wright v. Mattison, 18 How. 50, the court says: "We deem it unnecessary to examine in detail the numerous decisions adduced in the argument for the plaintiff in error, to define and establish the meaning of the phrase, 'color of title.' The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or a colorable title; the inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." The above case is a leading one and is supported by a long line of cases, both in the United States and state courts. Schrimpscher v. Stockton, 183 U. S. 298; Cameron v. United States, 148 U. S. 307. In the case of Lea v. Polk County Copper Co., 21 How. 493, the court says: "Where a person was in possession, this was sufficient notice to a claimant of an adverse title; and whether the deed under which this person claimed, was registered or not was of no importance to the claimant. The act of limitations of the State of Tennessee protects persons in possession of land under the following

circumstances: 'First, they must have had seven years possession of land granted by the state; second, they must have held or claimed the land by virtue of a deed of conveyance, or other assurance, purporting to convey an estate in fee simple; third, no claim by suit in law or equity, effectually prosecuted, should have been set up or made to said lands within that time.' Under the second head, an unregistered deed is sufficient to constitute the bar. The deed, when recorded, related back to its date." We refer to this case, not only to support the doctrine of color of title, but because of the declaration therein that it is immaterial whether the claimant's deed is recorded or not. In the findings of fact in this case it is shown in some cases that the deed of conveyance under which certain interveners claimed title had not been recorded. Packard v. Moss, 68 Cal. 128. The court found that Captain Juan Gonzales and a large number of his heirs lived within the boundaries of the Alameda Grant and a few of them are mentioned in one of the findings; but the court further finds, in No. 83, that: "It did not appear that the heirs of Captain Juan Gonzales or any of them living within the boundaries of the grant, had ever claimed or asserted any right to or interest in any portion of said land except such strips as they claimed, respectively, until and except as appears from warranty deed from Juan Antonio Rodarte to A. B. McMillen for an undivided one-twenty-fourth part of the grant, dated January 8th, 1907, and by a warranty deed from Merced Gonzales de Romero and Fabiana Gonzales for the undivided one-fifty-sixth part of the grant, dated February 27th, 1907; and it did not appear that they or any of them occupied or used any portion of the grant except as the other strip owners occupied and used theirs." It was also found that from a time farther back than the memory of any witness extended, the greater part of the land within the grant has been claimed and occupied in strips, as set forth in Finding No. 1.

Persons of the same name appear in the lists of claimants on both sides, and, under the above finding, they may be the same persons. The record does not in-

form us upon this point. An examination of Section 2937 shows that the fee simple title provided for ripens, even against the rightful heirs or true owners of the grant. The section provides that it shall accrue "against all, and all manner of person or persons whatsoever, and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten years, to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this Territory, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred." This language is not ambiguous, it needs no construction, and there is no reservation or limitation in it which would protect the heirs of Captain Juan Gonzales, admitting that they were the true owners of the grant, from the operation of this provision and from the maturing of a fee simple title against them. The rule of law is well settled that where one is in actual possession of a portion of the tract under color of title, his
3 possession will be presumed to extend by construction to the limits of the land described in his deed. This is too well settled to require the citation of authorities to support it. Indeed, appellants' counsel, in his brief, concedes this in almost identical language. Applying this doctrine to the interveners in this case, it being admitted that they actually occupied and cultivated that portion of their strips of land lying in the valley, such possession would extend to the entire tract described, including the grazing lands on the mesa. And the court finds that they actually used the lands other than cultivated for pasturage and grazing, the only use of which the lands were susceptible, so that their possession does not rest alone upon the legal presumption of possession.

From the review of the case thus far, it is difficult to see how the court in the final decree rendered in this case committed error unless Section 2937, supra, be either ignored or declared void. No attack is made upon the validity of the section, nor any suggestion that it has been repealed, but a different construction is contended

for. The construction sought to be placed upon this section by appellant's counsel is, in his own language, as follows: "Our view of the meaning of that statute is that no one can claim under it except those who are claiming through a grant from Spain, Mexico, or the United States, and that in order to show that he has such claim he must trace by documents a derivative chain of title from one of those sources. In no other way can the peculiar wording of this statute be given meaning, in other words, it is the purpose of that statute to cure titles which are imperfect, because some deed in the chain of title is imperfect." This construction seems to require so much more than the section specifies, as to place it in direct conflict with it. The conveyances required by the section are "deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple." One deed or a devise by will seems to meet the requirement, provided it purports to convey a fee simple title. Indeed, the construction contended for, carried to its logical conclusion, would render it impossible to obtain any benefit whatever under the statute, and it seems to us that such a construction is plainly inconsistent with the remedial purpose and intent of the legislature which enacted it, as indicated by the unambiguous language used. Where language used in a statute is plain and unambiguous, it is not the subject of construction. It is further contended, "that in order to acquire title by adverse possession all of the requirements above mentioned are absolutely essential, and the courts of this territory have steadily adhered to that rule. That in order to constitute adverse possession it must be actual, open, visible, notorious, continuous, exclusive, hostile, and under claim of right." This is a correct statement of the law as to the acquirements of title by adverse possession under ordinary limitation statutes such as are commonly enacted, where title enures simply by reason of a limitation and not by virtue of a fee simple title provided as an affirmative right, as in Section 2937. Section 2938, Compiled Laws 1897, is a general statute of limitation, pure and simple, with direct application to titles sought to be ac-

quired by adverse possession for the same length of time required by Section 2937, and both of these sections formed parts of Chapter 17, Laws 1858. Section 2938 was Section 2 of Chapter 17, Laws of 1858. This section has been materially amended by two legeislatures, and, as amended, is as follows: "Section 2938. No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against any one having adverse possession of the same continuously in good faith, under color of title, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments so held, shall be commenced within ten years next after the cause of action therefor has accrued: Provided, that if any person entitled to commence or prosecute such suit or action is, or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action, but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued, and to no other. 'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another; and in no case must 'adverse possession' be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes, territorial, county and municipal, which during that period have been levied upon the land or interest claimed, whether assessed in his name or that of another." This section was amended by Chapter 63, Laws 1899, but the only substantial change made was the addition of the fol-

lowing provision: "Against any one having adverse possession of the same continuously in good faith, under color of title, and who has paid taxes lawfully assessed against the same," and fixing one year instead of three as to those under disabilities specified. In 1905, this section was further amended by the addition of the significant clause beginning with the definition of adverse possession in the section above quoted. It will be seen, therefore, that while section 2938 has been amended so as to require color of title in good faith, payment of taxes, and made specifically an adverse possession statute, and the term 'adverse possession' has been defined by the statute, not one of these provisions have been inserted by amendment in Section 2937. The latter section remains practically unchanged. Counsel for appellants insist strenuously that the only title appellees have is by adverse possession. It appears, however, that the section under which they claim, makes no mention of adverse possession, notwithstanding the companion section of the same act has been amended to so provide. There seems to be no foundation for this contention by appellants, so far as the statute indicates, as the reverse seems to have been the intention of the legislature. Nor are the interveners tenants in common as among themselves, as they claim in severalty and independently of each other; nor are they tenants in common, or co-tenants with the heirs of Captan Juan Gonzales, as they do not claim to own the grant or any interest in the grant as such, as heirs of undivided interests. and they deny that they are tenants in common with appellants, who claim to be the true owners of the grant in undivided interests. Consequently, the possession of the interveners cannot be possession at all, in the sense that the possession of one co-tenant is the possession of all other co-tenants. Interveners claim in severalty separately described tracts of land, to which title in fee simple has ripened in each of them under Section 2937, supra, and not by adverse possession except in a general sense. They hold under a statute which provides that when they have complied with the terms of the statute they shall have a fee simple title, and *"they shall be entitled to keep*

and hold in possession such quantity of lands as shall be specified and described in his, her or their deeds of conveyance, devise, grant or other assurance as aforesaid in preference to all and against all and all manner of person or persons whatsoever."

The contention of appellant's counsel, which is deserving of most serious consideration, is that announced in the case of Hunnicutt v. Peyton, 102 U. S. 333, in which the court says: "Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession, and where the possession is mixed, the legal seisin is according to the legal title, so that in the case at bar there could be no constructive possession on the part of the defendant or his grantors, even if that might exist if he has had actual possession of a part, and no one had been in posession of the remainder." This doctrine has been adopted and announced by this court in the case of Jenkins v. The Maxwell Land Grant Co. et al., 15 N. M. 281, 107 Pac. 739, and other cases. It seems to have been applied by the courts in all of the applicable cases which have been examined wherein claimants have sought, by adverse possession to hold lands, even against the owner of the true title. It will be observed, however, that these are cases where the assertion of title by adverse possession is based upon statutory provisions similar to those of Section 2938, supra, which bars a right by action after the statutory period of time has elapsed. The claimants by adverse possession in these cases do not assert title, but merely the bar of the statute denying a right of action even to the owner of the true title. Section 2938, Compiled Laws 1897, is the law of this territory upon which claims of adverse possession are based, and is purely
5 a statute of limitation which does not purport to give an affirmative title in fee simple, as does Section 2937, above referred to. The case of Probst v. Presbyterian Church, 129 U. S. 182, is instructive upon this point. This case arose in the City of Santa Fe, under Section 81, Compiled Laws of 1884, which is identi-

cal with Section 2938, Compiled Laws 1897, prior to its amendment. At this time this section did not require either color of title or payment of taxes to be shown in support of the claim of adverse possession. The Supreme Court of New Mexico substantially held that possession for the statutory period was insufficient, but that color of title was also required. The Supreme Court of the United States, upon appeal, reversed the lower court, using the following language: "Nor is it necessary that the defendant shall have a paper title under which he claims possession. It is sufficient that he asserts ownership of the land, and that this assertion is accompanied by an uninterrupted possession. It is this which constitutes adverse possession, claiming himself to be the owner of the land. This is a claim adverse to everybody else, and the possession is adverse when it is held under this claim of ownership, whether that ownership depends upon a written instrument, inheritance, a deed, or even an instrument which may not convey all the lands in controversy. If defendant asserts his right to own the land in dispute, asserts his right to the possession, and his possession is adverse and uninterrupted, it constitutes a bar which the statute intended to give to the defendant." The latest declaration of this court upon this subject is in the case of John Jenkins v. The Maxwell Land Grant Co. et al., 15 N. M. 281, which case is also instructive upon the question of mixed possession. While the case was a comparatively recent one, it was claimed that the inception of the adverse possession was prior to the amendment of the statute requiring color of title and payment of taxes to be shown, and this was not questioned. Upon the question of mixed possession, however, the defendants invoked the doctrine laid down in the case of Hunnicutt v. Payton, supra, and it was sustained and applied. From the facts in that case it appeared that Jenkins lived and made small improvements upon a tract of about thirty acres of land, cultivated about five acres, but in addition he claimed, by adverse possession, more than six thousand acres of timber and grazing lands, not by fencing or marking the boundaries thereof, but because he and his

family rode around what he claimed to be his boundaries and drove the stock of other parties from the lands. It further appeared, however, that the Maxwell Land Grant Company was the owner of the true title and that during all of the years Jenkins resided there the company had headquarters and agents in Raton, which was upon the grant, and that the agents of the company mined and prospected for coal, and permitted other parties to do so also, upon the land and near Jenkins' house; that they leased portions of the Jenkins land, as well as other portions of the grant, grazed large herds of stock upon the lands, in short, the agents of the true owner used the lands as freely as if Jenkins had not been there. The court properly held in that case that the owner of the true title, by its agents, was in actual possession of a portion of the grant and therefore its seizin extended to all of the grant not actually occupied by Jenkins, which could not in any event extend to more than the thirty acres upon which Jenkins lived. As was said in the Hunnicutt case: "The reason is plain. Both parties cannot be seized at the same time of the same land under different title. The law, therefore, adjudges the seizin of all that is not in the actual occupancy of the adverse party, to him who has the better title."

Appellants claim the ownership of what they denominate the common lands, under deeds of conveyance from Juan A. Rodarte, Merced Gonzales de Romero and Fabiana Gonzales, of date 1907, to Alonzo B. McMillen, upon the theory that Montoya and the grantors of Mr. McMillen, being heirs of Captain Juan Gonzales, deceased, and in possession of a part of the Alameda Grant, were owners of the true title to those lands; that the common lands are not in the actual, but only in the constructive possession of the interveners and are therefore drawn to the true title by conclusive presumption, conceding a mixed possession to have existed. Finding of Fact No. 1 described the nature of the possession and use of the lands involved, as follows: "The interveners claim strips of land within the Alameda Grant very narrow in proportion to their length, most of them being only a few yards in width each, and

extending from the Rio Grande west to the ceja, or ridge, dividing the watershed of the Rio Grande from that of the Rio Puerco, and forming the western boundary of the grant, a distance of about sixteen miles. Most of them include land between the Rio Grande and the foothills at the west of the valley, which is adapted to cultivation, and the land extending from the foothills to the ceja of the Rio Puerco, which is adapted to grazing only. Most of the interveners live on the easterly ends of the strips of land they claim, and cultivate such portions of the bottom lands between the river and the foothills in the respective strips as they require. Near the river the land is what is termed bosque; that is, land covered with a growth of brush, trees and wild grass, and is used for pasturage. In the valley the strips of land are to some extent separated by fences and to some extent the bosque is separated in that way from the cultivated lands. From the foothills west there are no fences, nor are there any fences at the western boundaries of the strips or of the grant. By stipulation between the parties the titles to the lands between the river and the foothills are not to be determined in this action, but that does not exclude the evidentiary bearing, if any, which the use, occupation and claims of possession and ownership of these lands by interveners, respectively, so far as they appear in evidence, may have on their use, occupation and claims of possession, respectively, of the lands extending westerly from the foothills. The last named land bears a scanty growth of grass and other herbage and is without water, it being customary and necessary to have animals pastured there go to the Rio Grande for water at intervals of three or four days, except for short and infrequent periods when their needs are supplied by rain or snow. By agreement, or common understanding, which has ripened into a general custom, the interveners and their predecessors in claim of ownership have used those westerly portions of the strips they claimed, in common with each other and with others claiming ownership in the grant, no one attempting to keep his animals exclusively on the land he claimed nor requiring others claiming ownership to keep

their animals off such land. To some extent those who were not claiming ownership of any land within the grant pastured their animals on the portion of it in question west of the foothills and on the strips claimed by the interveners with the other animals pastured there, without objection by those who claimed the strips, but without their consent, except as they failed to take active measures to prevent such intrusion. This method of use was the one most convenient, economical and advantageous to the interveners and as to all the strips, except the northern one of Gonzales, the only practicable one because of the size and shape of the respective strips which would make the expense of fencing them greatly disproportionate to their value, the character and location of the land, the scantiness of herbage and the lack of water upon it, and for no other reasons appearing in the evidence." If the interveners relied upon adverse possession under Section 2938, there can be little doubt but that the circumstances under which these mesa lands were held would constitute constructive possession, such as would, by legal presumption, adhere to the true title. If, however, the conclusions of the court in the construction of Section 2937, are correct, as we regard them, this is not a proceeding in adverse possession under Section 2938, so far as the interveners' rights are involved, but is a proceeding under Section 2937, in which interveners rely upon a fee simple title by deeds under the terms of the statute. As we have seen, a fee simple title matured under Section 2937, divests the title of the true owner as well as all others, and such being the case, the law as laid down
6 in the case of Hunnicutt v. Peyton, supra, would seem to be inapplicable to the case now under consideration. It is true, there is an adverse possession required to mature title under Section 2937, but it is not the same as under Section 2938. This section was amended by Section 2, chap. 63, Laws 1899, so as to require color of title and payment of taxes, as above stated, and by Chapter 76, Laws 1905, was again amended as follows: "'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under

a color of title and claim of right inconsistent with and hostile to the claim of another; and in no case must 'adverse possession' be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes, territorial, county and municipal, which during that period have been levied upon the land or interest claimed, whether assessed in his name or that of another."

Now, the fact that neither of these amendments were made applicable to the next preceding section, but were made specifically applicable to Section 2938, is quite significant and we think indicates the intention of the legislature not to make these requirements applicable to the section of the statute which confers a fee simple title as provided for in Section 2937.

In this case, under the findings of fact, the interveners claim, severally, strips of land "under deeds of conveyance purporting to convey an estate in fee simple," accompanied by residence and cultivation as to bottom lands, and the timber and grazing lands were used for the only purpose for which they were suitable, as the findings state, for more than ten years. These conveyances define the boundaries of such strips, from which it appears that the timber and grazing lands are included in the boundaries, as well as the residence and cultivated lands. The interveners, being actual occupants and in possession of the lands embraced in their deeds, would have the right to use them in such manner as they saw fit, and we see no reason why they should not use them as other owners of deeded lands may do.

The final decree has a provision as to each of the interveners similar in terms to that of Jose Chavez, which is as follows: "It is further considered, adjudged and decreed that the intervener, Jose Chavez, is the owner in fee simple absolute and in severalty of the following described strip, tract and parcel of land situate within the limits of the Alameda Land Grant, bounded and described as follows: Containing 20 varas in width from north to south, and in length extending from the Rio Grande on

the east to the ceja of the Rio Puerco on the west, and bounded on the north by land claimed by Felix Tafoya y Gonzales, and on the south by land claimed by Jose Gonzales y Montoya; and which said strip corresponds to strip No. 20 of the list of strips referred to in the findings of fact in said cause and in the list of strips annexed hereto and made a part of this decree." The interveners, by this decree, hold their respective tracts of land as "owners in fee simple absolute and in severalty" to the exterior boundaries of the description given in this deed, there being no limitations in the deeds.

In order to invoke the doctrine laid down in the case of Hunnicutt v. Peyton, supra, it is essential that the owner of the true title, or his heirs or agents, shall be in actual possession of some part of the lands while claiming the whole of the lands. It is clear, from Finding of Fact No. 83, that the heirs of Juan Gonzales who resided on this land, did not claim to own the whole grant, nor even the common lands. Upon this point the court found as follows: "It appeared, however, and is so found, that from a time farther back than the memory of any witness extended, the greater part of the land within the limits of the grant has been claimed and occupied in strips, as set forth in Finding of Fact 1, the land from the foothills to the ceja of the Rio Puerco in common for pasturage, and the bottom lands generally by those claiming the ownership of them separately, as set forth in said finding. It did not appear that the heirs of Captain Juan Gonzales or any of them living within the boundaries of the grant had ever claimed or asserted any right to or interest in any portion of said land grant except such strips as they claimed respectively until and except as appears from warranty deed from Juan Antonio Rodarte to A. B. McMillen for an undivided one-twenty-fourth part of said grant, dated January 8th, 1907, and by warranty deed from Merced Gonzales de Romero and Fabiana Gonzales for the undivided one-fifty-sixth part of said grant, dated February 27th, 1907; and it did not appear that they or any of them occupied or used any portion of said grant except as others within the grant oc-

cupied and used the strips they claimed, the bottom lands in severalty and the grazing lands in common, as set forth in said Finding of Fact 1." From this finding it appears that Vincente Montoya, appellant, and the grantors of McMillen were strip owners only and never made any claim to ownership of any lands of the Alameda Grant other than described in the small strips on which they respectively resided. In other words, they held their lands just as they held their tracts. Therefore, they did not claim to own the whole grant, or all the common lands thereof as heirs of Captain Juan Gonzales, but only claimed to own and be in possession of the small strip upon which their residences were. If this is true, they were not in position to invoke the presumption insisted upon by appellant's counsel, nor are they within the doctrine announced in the Hunnicutt case. Indeed, the interveners, being in possession of a part, claiming certain strips of land described in deeds of conveyance, are the parties to whom the benefit of this presumption would enure to the extent of the lands embraced within the exterior boundaries of their respective deeds.

There are two tracts of land claimed by Candido G. Gonzales and Francisco Lucero y Montoya as to which the findings are somewhat different, in this: that neither of them ever lived upon or improved any portion of the lands described in the conveyances under which they claim ownership. As to the Gonzales tract, which is the last of several tracts he claims, the following finding of fact was made by the court: "The Rio Grande now runs close to the foothills by this land, and there is practically no meadow land between the foothills and the river. Formerly there was a strip of bottom land between the Rio Grande and the foothills which formed a part of the tract herein claimed by the intervener, but neither he nor his predecessors in title, nor any other person so far as the evidence shows, ever cultivated, enclosed, erected buildings or lived upon any part of said tract, or made any use of it except for grazing, as set forth in Finding of Fact 1. The court further finds that the description of the real estate in said Exhibit No. 28 was originally

of a tract of land 610 varas wide, and that said description was so altered as to describe the land as being 1610 varas wide; but the court is unable to find when said alteration was made, except that it was made after the original instrument was written, in a different ink, and was made some time prior to the year 1883." While it may be that lapse of time may have cured defects suggested by appellant's counsel to the documentary evidence of title admitted at the trial, the fact that no actual possession was ever established on any portion of this tract we are disposed to regard as fatal to a recovery by Gonzales of this particular tract, and the same may be said of the Lucero y Montoya tracts covered by Exhibits 65, 65A and 65B, as no actual possession of any part of those lands was established although part of the lands were capable of cultivation. We have just sustained the possession of the interveners to the mesa lands adjoining the valley land, by reason of its use for grazing purposes, but this was done upon the ground that by reason of actual residence, cultivation, improvements, and other visible occupancy of a part of the lands embraced in their deeds, by conclusive legal presumption this possession extended to the whole tract embraced in the conveyances. But, even under Section 2937, deeds alone are not sufficient, unaccompanied by actual occupation of at least a part of the tract, to mature a fee simple title in ten years. The possession is as essential to that end as the deed, but both are necessary. As to those tracts, there never has been actual visible possession of any part of the lands, therefore, conceding that the conveyances were valid, fee simple title could not mature under the circumstances of this case. Bergere v. U. S., 168 U. S. 66; Whitney v. U. S., 168 U. S. 529.

A peculiar and quite unusual situation exists in this case. A decree of partition was entered and the unoccupied lands were declared to be the property of the appellant and a large number of the heirs and assigns named in the decree. The decree did not state that they were in possession of the lands, but did declare them to be owners of certain interests therein. This decree was entered be-

fore the rights of the interveners were declared. This decree was not formally set aside by the court, but, in effect, was modified to the extent of the lands awarded to the interveners in the final decree upon the intervention. The effect of the decree in partition is to award to the partition claimants the ownership of all lands involved in this proceeding not carved out of the Alameda Grant by the decrees in favor of the interveners. Fee simple title not having matured in favor of Candido G. Gonzales and Francisco Lucero y Montoya to these particular tracts, the decree in partition is operative upon those lands and awards them to the partition claimants, hereby divesting those interveners, Gonzales and Lucero, of any interest therein.

We do not deem it necessary to consider the other questions raised as to these lands. The assignments of error will be overruled insofar as they challenge the correctness of the decree of the court in favor of the interveners and the decree will be affirmed insofar as it relates to all of the tracts owned by the interveners, but will be sustained as to the two last mentioned tracts and as to those the decree will be reversed and the cause will be remanded for further proceeding in accordance with the views herein expressed.

[January 2, 1912.]

MEMORANDUM OPINION ON REHEARING.

SYLLABUS.

1. Section 2937, Compiled Laws, is constitutional, and does provide for due process of law. It is more than an ordinary statute of limitation and provides for certain affirmative relief following the expiration of the period of limitation.

OPINION OF THE COURT.

M'FIE, J.—The motion for rehearing in this case raises but one question, and that the unconstitutionality of Section 2937, Compiled Laws of New Mexico, and the court having considered this question, together with the oral arguments and briefs of the respective counsel, ad-

heres to the opinion heretofore rendered. Counsel for appellants is in error in the suggestion that the court holds in the original opinion that Section 2937, supra, is not a statute of limitation, as it is apparent from the original opinion that this section is a statute of limitation, but goes further and points out that it is not solely a statute of limitation in the same sense as is that provided for in Section 2938, Compiled Laws 1897, but, being limited to a specific classification of lands, that of land grants, it is more than an ordinary statute of limitation and provides for certain affirmative relief following the expiration of the period of limitation, such as is deemed specifically applicable to the condition of grant lands as the same existed at the time Section 2937, supra, was enacted. The period of ten years, fixed in the statute for all those seeking to avoid its operation, is deemed a reasonable time and meets the suggestion that this section does not provide due process of law. We are of the opinion that the fact that this section has been in existence in substantially its original form for about sixty years, whereas Section 2938 has been substantially amended, indicates that Section 2937, supra, was enacted to meet the peculiar conditions existing in this territory in that early day concerning the particular land classified in the section, and, as applied to the peculiar conditions existing at the time, this section of the statute is not obnoxious to the constitutional objections sought to be raised in the motion for rehearing. The original opinion, therefore, will be adhered to as the opinion of the court in this case.

DISSENT.

WRIGHT, J.—In view of the matters raised on the rehearing, I am unable to adhere to the former opinion and therefore withdraw my concurrence and here indicate my dissent because of the question raised upon reargument.

[No. 1362. September 1, 1911.]

R. E. PUTNEY, Appellant, v. FRANZ SCHMIDT and C. H. STORY, as Individuals, and also as Partners doing business under the firm name and style of Schmidt and Storey, and SCHMIDT & STORY, a Co-Partnership, Appellees.

SYLLABUS.

1. Where there appears to be sufficient evidence to support the finding of facts in the lower court, it will not be disturbed.

2. Appellant's representative having undertaken to give the proposed sureties information in regard to Broyles' financial condition, he should have disclosed all the facts and circumstances, affecting the risk, within his knowledge.

3. Where a party received something of value under a contract, if he seeks to rescind the same upon the ground of fraud, he must immediately, upon discovering the fraud, restore, or offer to restore, all that he has received under the contract, as a condition precedent to his right to rescind the same.

4. Where a party received nothing under the contract, acted merely as trustee for another, the contract, remaining wholly executory as to the party claiming fraud, there was nothing which he could return and he had a right to await suit upon the contract and then set up fraud as a defense.

5. Where an affirmance is relied upon, it should appear that the party having a right to complain of the fraud had freely and with full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract and waive any remedy he might have for the deception.

6. A new trial will not be granted merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if on the whole facts and circumstances the court is satisfied that justice has been done or that the result ought not to have been different, if such testimony had been rejected in the one case or received in the other.

7. The proper practice requires the submission only of such issues to the jury as would determine the ultimate or constitutive facts.

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

T. B. CATRON for Appellant.

A party to a contract who has opportunity to obtain knowledge with reference to representations and facts connected with the contract equal with that possessed by the other party, cannot claim immunity from the obligations of the contract if he did not avail himself of his opportunity and acquire the knowledge of facts constituting fraud or concealment which he could have readily obtained had he sought to do so. Slaughter v. Gerson, 13 Wall. 383; Grimes v. Sanders, 93 U. S. 61; Farnsworth v. Duffer, 143 U. S. 47; Farriar v. Churchill, 135 U. S. 615; Shipperio v. Goldberg, 192 U. S. 214; So. Dev. Co. v. Silva, 125 U. S. 247; City National Bank v. Hickox, 5 N. M. 32; The Metano, 57 Fed. 880; Bement v. Ledoux, 66 Fed. 188; Cobb v. Wright, 42 Minn. 85; Long v. Warrin, 68 N. Y. 482; Lake v. Tyree, 90 Va. 724; Burk v. Johnson, 146 Fed. 262; Brown v. Smith, 109 Fed. 31; Moore v. Howe, 115 Iowa 64; Garrison v. Tech. Wks., 59 N. J. Eq. 444; Luddington v. Rennick, 7 W. Va. 273; 2 Pom. Eq. Jur., sec. 892; Bartlett v. Stanton, 2 Ala. 181; McDonald v. Trafton, 15 Me. 225; Judge Cooley on Torts, 2 ed. 570; 31 Cyc. 1189; Maxwell Land Grant Case, 121 U. S. 281; Rockfellow v. Baker, 41 Pa. St. 321; Brown v. Beech, 109 Mass 360; Hibbs v. Parker, 31 Me. 152; Schwabacker v. Riddell, 99 Ill. 346; Collins v. Jackson, 54 Mich. 192; Lalone v. U. S., 164 U. S. 265; Vensalor v. Seaberger, 35 Ill. App. 598; Martin v. Hartwell, 115 Ga. 156; Castenhouse v. Keller, 82 Wis. 30; Nash v. Mill Q. I. & T. Co., 159 Mass. 437; Meek v. State, 117 Ala. 116; Hubbard v. Long, 105 Mich. 442; Johnson v. Bemey, 9 Ill. App. 64; Hellier v. Dickerson. 154 Mass. 504; Stum v. Griffith, 97 Fed. 855; Morrill

v. Florida, 60 Fed. 19; Leicester v. Front Royal Co., 55 Fed. 119; Paige on Contracts, secs. 119, 120; Stran v. Griffith, 97 Fed. 854; Merrill v. Improvement Co., 60 Fed. 17; Leicester Co. v. Improvement Co., 55 Fed. 190; Stewart v. Lansing, 104 U. S. 505.

A party desiring to rescind a contract on the ground of fraud must, upon the discovery of the fact, announce his purpose at once and adhere to it. Grimes v. Sanders, 93 U. S. 62; Bach v. Truch, 126 N. Y. 53; Pom. Eq. Jur., sec. 897; Story Eq. Jur., sec. 1551; Bement v. Ladelle, 66 Fed. 193; Mining Co. v. Waterous, 61 Fed. 186; Sceftell v. Hayes, 58 Fed. 457; Pense v. Langdon, 99 U. S. 579; Rugal v. Sabine, 63 Fed. 415; Johnson v. Mining Co., 148 U. S. 370; Schapperio v. Goldberg, 192 U. S. 242; Richardson v. Low, 149 Fed. 625; Clamwell v. Ashfert, 99 Va. 651-2; Tolette v. Brown, 188 Ill. 253-4; Hauck v. Jordanson, 127 Ill. App. 205; Hurt v. Blanton, 89 Ind. 39; Sieveking v. Litzer, 31 Ind. 13; Traver v. Garvis, 33 W. Va. 100; Stockton v. Adams, 96 Ill. App. 161; Simon v. Goodyear Shoe Co., 105 Fed. 667; Burns v. Burns, 137 Fed. 800; Vandervelden v. Railway Co., 61 Fed. 60-61; Mortimer v. McMillen, 202 Ill. 412; Cassett v. Salazar, 43 N. W. 145; Burk v. Johnson, 146 Fed. 211; Schroder v. Welch, 143 Ill. 403; Mellier v. Dickinson, 154 Mass. 503; Watson v. Castell, 68 Ind. 476; Krutz v. Craig, 63 Ind. 561; Moon v. Baum, 58 Ind. 194; Deford v. Erbine, 48 Ind. 221; Meadows v. Brady, 92 Va. 78-90; Tramwell v. Ashfort, 99 Va. 651; 2 Addison on Cont. 772; Tracy Spec. Perf., sec. 7031; Wheeler v. McNeil, 101 Fed. 38; Kinne v. Webb, 54 Fed. 38; McLain v. Clapp, 141 U. S. 429; The Ernest M. Munn, 66 Fed. 357; Freyfogle v. Wash, 80 Fed. 177.

Wilfull misrepresentation. Robbins v. Barton, 50 Kas. 126; Rope v. Sangamon Lodge, 91 Ill. 519; Ham v. Greeves et al., 34 Ind. 19.

A person may testify to anything as a fact which necessarily must be made up of a different number of items. DeWolf v. Williams, 69 N. Y. 622; Nelson v. Iverson, 24 Ala. 9; Chicago & S. P. Co. v. Gilbert, 52 Fed. 711; Mercy

v. Obering, 107 Iowa 547; Wolfe v. Underwood, 97 Ala. 375; Rocke v. Meiner, 2 Jones & S. 158.

Where fraud is alleged the facts which are made the basis of the wrong should be proved as stated. Collins v. Jackson, 54 Mich. 190.

MARRON & WOOD and HOLT & SUTHERLAND for Appellees.

The court will not disturb findings of fact of a court or jury where there is sufficient evidence to support such findings. Ortiz v. Bank, 12 N. M. 519; Candelaria v. Miera, 13 N. M. 360; Territory v. Sais, 15 N. M. 171; Hancock v. Beasley, 14 N. M. 239.

Caveat Emptor. Grimes v. Sanders, 93 U. S. 61; Farnsworth v. Dufner, 142 U. S. 47; Farrer v. Churchill, 135 U. S. 69; Southern Development Co. v. Silver, 125 U. S. 247; Shappirio v. Goldberg, 192 U. S. 232; Meade v. Bunn, 32 N. Y. 275; Eaton v. Winnie, 20 Mich. 156; Pennsylvania R. R. Co. v. Ogier, 35 Pa. St. 72; Gordon v. Grand St. R. R. Co., 40 Barb. 550; Ernst v. Hudson River R. R. Co., 35 N. Y. 28; Strand v. Griffith, 97 Fed. 856; 9 Cyc. 429; 20 Cyc. 49, 77; Ensley v. Johns, 120 Ill. 469; Schwabacker v. Riddle, 99 Ill. 343; Bigelow on Frauds, sec. 67; Hingston v. Smith, 144 Fed. 294; Daly v. Bernstein, 6 N. M. 380; Paige on Contracts, secs, 119, 121, 159; McGee v. Manhattan Life Co., 92 U. S. 93; Griswold v. Hazard, 141 U. S. 260; 1 Story Eq. Jur., secs. 234, 215; Franklin Bank v. Cooper, 36 Me. 180; Smith v. Bank of Scotland, 1 Dow. 272; Railton v. Matthews, 10 Clark & F. 934; Small v. Currie, 2 Drew. 102; Phillips v. Foxall, L. R., 7 Q. B., 666; Davis v. London Ins. Co., 8 Ch. Div. 469; Daniel on Negotiable Instruments, 4 ed., sec. 1309; Owen v. Homan, 3 MacN. & G. 378; Cashin v. Perth, 7 Grants Ch. 340; Blest v. Brown, 4 DeG. & J. 367; Remington Machine Co. v. Kezertee, 49 Wis. 409; Franklin Bank v. Cooper, 36 Me. 179; Warren v. Branch, 15 W. Va. 21; Harrison v. Lumbermen, etc. Co., 8 Mo. App. 37; Pom. Eq. Jur., sec. 901; 9 Cyc. 413; Stewart v. Wyoming, 128 U. S. 383.

Notice of recission. Bennett v. LaDow, 66 Fed. 193;

Shappirio v. Goldberg, 192 U. S. 242; Pom. Eq. Jur. 897, sec. 401; Story's Eq Jur. 1551, secs. 137, 817; Richardson v. Lowe, 149 Fed. 625; Kingsman v. Stoddard, 85 Fed. 750; Bernett v. Smith, 4 Gray 50; Cooley on Torts 505; Joyce on Defenses to Commercial Paper, sec. 116.

Contract of surety may be avoided if principal induced sureties to sign by fraud. Ward v. Branch, 15 W. Va. 21; Paige on Contracts, sec. 161; Pom. Eq. Jur., sec. 909.

In equity cases the court may in its discretion, accept or reject the findings of the jury and decide the cause on its own view of the evidence. Bernett v. Montgomery etc. R. Co., 51 Ala. 557; Newlock v. Newlock, 1 Edw. Ch. 14; Harrison v. Rowan, 4 Wash. 32, U. S.; 11 Enc. P. & P. 728; Post v. Mason, 91 N. Y. 539..

Special verdicts should find the ultimate or constitutive facts. Thompson on Trials, sec. 2652; Cresman v. Murray, 64 S. W. 711, Tenn.; 3 Daniel's Chancery Pr., 5 ed. 2254; Puterbaugh's P. & P. 607; Bean v. Herrick, 12 Me. 262; Kelly v. Perrault, 48 Pac. 45.

STATEMENT OF FACTS.

This action was begun by the appellant to foreclose a chattel mortgage, executed by the appellees, to secure the payment of a promissory note made by Jaspar N. Broyles, the appellees, Schmidt and Story, and H. Newman and Charles Lewis, the plaintiff; the last four parties mentioned being sureties for Broyles. Schmidt and Story, the appellees, were the only parties made defendants, and judgment on the note was asked. The defendants answered generally, admitting the execution and delivery of the note and mortgage, and that the same was unpaid, but set up as an affirmative defense that they were executed by the defendants as sureties for Broyles, the principal debtor, and that defendants were induced to execute them by false and fraudulent representations as to the financial condition of Broyles, made by the agents and attorneys of the plaintiff, and also that the plaintiff and his agents and attorneys falsely and fraudulently concealed Broyles' true financial condition from the appellees. The same allegations were

repeated in substance by the way of cross-complaint and appellees asked an affirmative judgment; that the note and mortgage of the plaintiff be declared fraudulent and void as to the appellees and be surrendered up for cancellation and discharge. To the answer and cross-complaint the plaintiff replied, putting in issue generally the allegations of fraud and also alleging laches on the part of the appellees in failing to disaffirm the note and mortgage on discovery of fraud.

The cause being at issue, the appellees moved the court below to state and settle issue of fact for submission to a jury upon the allegations of fraud contained in the pleadings. The motion was granted and the court stated the following issues for submission to the jury: 1st. "Were the defendants induced to execute the note and mortgage in suit, by false and fraudulent statements concerning the financial condition of Jaspar N. Broyles, made to them for that purpose by the plaintiff's agents or representatives? 2nd. Did the plaintiff's agents or representatives fraudulently conceal the real financial condition of Broyles from the defendants for the purpose of inducing them to execute mortgage and note? 3rd. Did the defendants execute the mortgage and note believing and relying on the statements, if any, made by plaintiff's agents, and in ignorance of Broyles' real financial condition? 4th. Were the signatures of Charles Lewis and H. Newman or either of them, secured to the note in suit by fraudulent misrepresentation or concealment by plaintiff's agents or representatives of the real financial condition of Broyles?"

After the trial was begun, at the request of counsel, the court submitted the following additional questions to the jury: 5th. "Did the defendants exercise such care as men of ordinary prudence should have exercised under all the circumstances to learn for themselves the facts as to the financial condition of Broyles? 6th. Did H. Newman and Charles Lewis exercise such care as men of ordinary prudence should have exercised under all the circumstances to learn for themselves the facts as to the financial condition of Broyles?" The jury answered all the foregoing questions, or issue, in the affirmative.

Appellants filed a motion for a new trial upon the ground of errors committed by the court and jury upon trial of the issues, and also submitted a request to the court to make seventy-two proposed findings of facts contrary to the findings of the jury. This motion came on for a hearing before the court and the court made and filed findings approving and adopting the findings of the jury upon the issues so submitted, finding some additional facts upon the basis of the evidence adduced at the trial, overruled the motion for a new trial and entered judgment that the complaint be dismissed upon the merits. Judgment was entered upon these findings dismissing the complaint on the merits and adjudging the mortgage and note fraudulent and void as against the defendants, from which this appeal is taken.

OPINION OF THE COURT.

ROBERTS, A. J.—The appellant has questioned the sufficiency of the evidence to sustain the findings of facts in the lower court upon the issue of fraud, but, when we consider the positive proof offered and the facts fairly deducible from the circumstances proven, we cannot say that the lower court was not justified in concluding that the fraud had been established, even to the degree which appellant claims was required, under the decision of the Supreme Court of the United States in the Maxwell Land Grant case found in 124 U. S. 381. The jury found that fraud had been proven, after hearing all the evidence and having had the opportunity of seeing the witnesses upon the stand and observing their demeanor and manner while testifying; the findings of the jury were adopted by the court and made the findings of the court; the proof satisfied
1 the conscience of the trial court, and, as there appears to be sufficient evidence to support the finding it will not be disturbed.

Appellant contends that this case comes within the rule laid down by the Supreme Court of the United States in the case of Slaughter v. Gerson, 13 Wallace 383, to the effect that a party to a contract who has opportunity to obtain knowledge with reference to representations and facts

connected with the contract equal with that possessed by the other party, cannot claim immunity from the obligations of the contract if he did not avail himself of his opportunity and acquire the knowledge obtainable, had he sought to do so. This case, and all kindred cases cited by appellant, had to do with sales and similar contracts and merely illustrate the rule of caveat emptor as applied in equity. If the principle contended for, however, did apply as between principal and surety, even if the appellees had investigated for themselves, they would only have been more greatly deceived. The expert bookkeeper who prepared a statement of Broyles' affairs, and upon which the alleged fraudulent statements were based, testifying for appellant said that Broyles' books only disclosed about $30,000 of his indebtedness, and that there was no book to be found showing the time certificates of deposit in his bank; that the amount of his indebtedness was largely made up from Broyles' own statements to him; that the statement was not accurate and that it was not possible for him to prepare an accurate statement; that he had included in the assets something like $50,000 of store accounts, notes and overdrafts in bank, without knowing anything as to whether they were collectable or not. But the appellees were not contract creditors, they were sureties to the appellant for the debt of Broyles and the rules applicable to them, and to their relations so formed, are entirely separate and distinct from the rule contended for by appellant. "A surety," says Mr. Justice Swayne in McGee v. Manhattan Life Insurance Co., 92 U. S. 93, "is a favored debtor; his rights are zealously guarded, both at law and in equity, and the slightest fraud on the part of the creditor, touching the contract, annuls it." In Griswold v. Hazzard, 141 U. S. 260, Mr. Justice Bradley quoted with approval the following from Story's Equity Jurisprudence: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will

undoubtedly furnish a sufficient ground to invalidate the contract. Again: If a party taking a guaranty from a surety, conceals from him facts which go to increase his risk and suffers him to enter into the contract under false impression as to the real state of the facts, such a concealment will amount to a fraud, because a party is bound to make this disclosure." The Supreme Court of Iowa, in the case of Barnes v. Century Savings Bank, 128 N. W. 541, only recently decided, says: "From our own case of Bank of Monroe v. Anderson Co., 65 Iowa 700, 22 N. W. 933, we also quote the following, which is in exact harmony with that announced by the Minnesota case: 'We have thought it proper to lay down what we conceive to be the true rule as to the duty of a creditor, who is about to accept personal security for a debt due him, to inform the surety of facts within his knowledge which would have the effect to increase the risk or the undertaking of the surety. The contract of suretyship as a general rule is for the benefit of the creditor, while the surety derives no advantage from it. Hence the law imposes upon the creditor the duty of dealing with the surety at every step of the transaction with the utmost good faith. If the surety applies to him before the entering into the contract for information touching any matter materially affecting the risk of the undertaking, he is bound, if he assumes to answer the inquiry at all, to give full information as to every fact within his knowledge, and he can do nothing to deceive or mislead the surety without vitiating the agreement. And whether he is bound before accepting the undertaking of the surety and without being applied to by him for information on the subject to inform him of facts within his knowledge which increase the risks of the undertaking depends on the circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being mislead or deceived, or that he is entering into the contract in ignorance of the facts materially affecting its risks, the creditor is not bound to seek him out, or, without being applied to, communicate to him information as to the facts within his knowledge. But in such case he may assume that the surety has obtained information for his guidance from

other sources, or that he has chosen to assume the risks of the undertaking, whatever they may be. But if he knows or has good grounds for believing, that the surety is being deceived or mislead, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity before accepting his undertaking to inform him of such fact, good faith and fair dealing demand that he should make such disclosure to him; and, if he accepts the contract without doing so, the surety may afterwards avoid it. This view of the duty of the creditor is supported by the following authorities: Pidcock v. Bishop, 2 Barn & Co. 605; Owen v. Homan, 4 H. L. Cas. 997; Railton v. Matthews, 10 Clark & F. 934; Hamilton v. Watson, 12 Clark & F. 109; Franklin Bank v. Cooper, 39 Mo. 542; Franklin Bank v. Stevens, 39 Mo. 532; Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23 (19 Am. Rep. 50); Stone v. Compton, 5 Bing (N. C.) 142; Booth v. Stoors, 75 Ill. 438; Ham v. Greve, 34 Ind. 18. See, also, Conger v. Bean, 58 Iowa 321, 12 N. W. 284; Savings Bank v. Boddicker, 105 Iowa 548; 75 N. W. 632; 45 L. R. A. 321; 67 Am. St. Rep. 310; Coles v. Kennedy, 81 Iowa 360; 46 N. W. 1088, 25 Am. St. Rep. 503; Melick v. Bank, 52 Iowa 94; 2 N. W. 1021; Harworth v. Crosby, 120 Iowa 612; 94 N. W. 1088; Crossley v. Stanley, 112 Iowa 24, 83 N. W. 806; 84 Am. St. Rep. 321.

There is proof in this case showing that Schmidt asked appellant's representative if $10,000 would pay all of Broyles' debts and he replied that it would; that it would put him on Easy Street. This was denied by appellant's representative, but he admits that he probably told appellees that the statement prepared by the expert bookkeeper showed that Broyles was $52,000 or $42,000 to the good; having volunteered this information, admitting that his version of the conversation is true, he owed it to the appellees to disclose to them fully just how the statement was made up; how the totals were arrived at. Having undertaken to give the proposed sureties information in regard to Broyles' financial condition, he should have disclosed all the facts and circumstances, affect-

ing the risk, within his knowledge. He knew that more than $50,000 of the assets shown on the statement were made up of store accounts, notes and over drafts in bank, good, bad and indifferent; he knew that all Broyles' real estate was mortgaged to the State National Bank of Albuquerque; that all his acceptable paper was held by the Bank of Commerce as collateral security; that the value placed upon the property was merely Broyles' own estimate and the liabilities were largely Broyles' own figures. Appellees also testified that appellant's representative told them that the $25,000 Bank of Commerce note was a demand note, and that while it was amply secured by collateral, the bank might nevertheless attempt to make trouble for them, but if there was a mortgage on their stock the bank would be more apt to rely on their collateral; that if they would make the mortgage, he would protect them from the Bank of Commerce free of charge; that is, force the bank to rely on its collateral, which was amply sufficient, and not trouble them. This was denied by appellant's representative, but, if no representations of any kind had been made to them, we cannot understand why he was so particular to see that the notary asked the appellees if they signed the mortgage without being influenced by any representations made to them by appellant or his representatives.

The appellant contends that by reason of Schmidt, with Story's consent, having taken charge of all Broyles' property and business, including $1,000 of actual cash which appellant had advanced on the note in question, appellees waived the right to any defense. We do not believe there is any merit in this contention. Schmidt took charge of the property only in a representative capacity; he was trustee for all the creditors.

Appellant has cited many authorities to show that the appellees, as soon as they discovered the fraudulent character of the representations which had induced them to sign the note and mortgage, should have given notice to the appellant of their intention not to be bound. We think the appellant misapprehends the principle of the cases cited.

It is not disputed that where a party received some-
3 thing of value under a contract, if he seeks to rescind the same upon the ground of fraud, he must immediately, upon discovering the fraud, restore, or offer to restore, all that he has received under the contract, as a condition precedent to his right to rescind the same. If he fails to do this, or if, after discovering the fraud, he takes any steps in affirmance of the contract, he will be held to have elected to affirm the same and will not thereafter be granted relief in equity from the burdens of the contract. In every case cited by appellant the parties claiming to have been defrauded had received something under the contract which they were retaining, or which they had kept and accepted the benefits of, for an unreasonable time after discovering the fraud. In no case cited, and, we believe, none can be found, was delay held a defense where the party defending had received nothing which it was in his power to restore. In Grimes v. Sanders, 93 U. S. 62, chiefly relied on by the plaintiff, the parties claiming fraud had purchased a mine, had continued to work it for some months after discovery of the alleged fraud. They had not rescinded or tendered back the deed to the property, and there were other strong equities in favor of the other party. Where a party, as in the present instance, received nothing under the contract, acted merely as
4 trustee for another, the contract remaining wholly executory as to the party claiming fraud, there was nothing which he could return and he had a right to await suit upon the contract and then set up fraud as a defense. Mr. Page in his work on Contracts says, at Section 136: "If the contract is executory as to the liability of the defrauded party, he may avoid liability thereunder and interpose the defense of fraud in an action brought against him on the contract at law. This is in one sense informal recision since no decree in equity is necessary. It differs, however, from what is ordinarily termed informal recision in that injured party is not seeking to recover what he has parted with under the contract, but is seeking to avoid further liability thereunder." Speaking of the duty to place the adversary party in statu quo, he says: Section 137. "The

party seeking relief need not restore anything not received by him under the contract, which he is seeking to avoid. * * * * If the defense of fraud is interposed in an action on an executory contract. it is not necessary as a condition precedent to making such defense to place the adversary party in statu quo." In Section 139, the same author says: "The conduct relied on as ratification, must be such as unequivocally shows the intention of the defrauded party to be bound by the contract." We think the principle covering this case is well stated in Kingsman v. Stoddard, 85 Fed. 750, which is quoted with approval in the case of Richardson v. Lowe, 149 Fed. 625: "We think it fallacious to say that one defrauded may so deal in respect to an executory contract after knowledge of the fraud that he shall lose his right of defense when sued for the consideration and yet may have his action for deceit. The remedy by way of defense is allowed to avoid circuity of action and it is grounded upon, and is governed by, the same principles as the action for deceit. If the one can not prevail, the other must fall. If the one can be sustained, the other is upheld. Judgment in the one case is res adjudicata and concludes the right. Bernet v. Smith, 4 Gray, 50."

Appellant insists that Schmidt, by a letter which he wrote to appellant, after he took charge of Broyles' property as trustee, shows an affirmance of the contract. We do not think so. Judge Cooley, in his work on Torts, (star page 505), says: "Where an affirmance is relied upon, it should appear that the party having a right to com-
5 plain of the fraud had freely and with full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract and waive any remedy he might have for the deception." Measured by this rule the letter falls far short of evincing any intention on the part of Schmidt to be bound by the contract. He was asking appellant to take over all of Broyles' property, suggesting that he might be able to settle with Broyles' creditors on the basis of 25 cents on the dollar.

Appellant has assigned as error the rejection of certain evidence offered by him and the admission of evi-

dence, over his objection on behalf of appellees, but, this being an equity case and from all the facts and circumstances shown on the trial, it is apparent that the lower court was justified in arriving at the conclusion that substantial justice had been done and that the result would not have been different if such testimony had been received in the one case, or rejected in the other. "A new trial will not be granted merely on the ground that
6 the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if on the whole facts and circumstances the court is satisfied that justice has been done or that the result ought not to have been different, if such testimony had been rejected in the one case or received in the other." 11 Ency. Pl. & Pr. 728, and authorities cited. As we are satisfied that the findings of the lower court are right and are supported by the evidence, it will not be necessary for us to consider the error claimed in the instructions to the jury. See 11 Enc. Pl. & Pr. 729; Post v. Mason, 91 N. Y. 537.

Appellant contends that the findings of fact made by the jury were defective and not sufficient, even if supported by the evidence, to justify a judgment against the appellant. The proper practice required the submission only of such issues to the jury as would determine the
7 ultimate or constitutive facts, and we believe the issues submitted, and the findings thereon, covered the matters in dispute. See Thompson on Trials, sec. 2652; Cresman v. Murray, 64 S. W. 711 (Tenn.); Daniel's Chancery Practice, 5 ed., vol. 3, p. 2254. We find no error in the record, and the judgment of the lower court is affirmed, and it is so ordered.

William H. Pope, C. J., concurs in the result.

[No. 1248, February 28, 1910.]

[On Rehearing, December 21, 1911.]

THE BANK OF COMMERCE, Appellee, v. JASPAR N. BROYLES, et al., Appellants.

SYLLABUS (BY THE COURT.)

1. A motion for a peremptory instruction by both parties does not constitute a final waiver by either of jury trial where the evidence is conflicting and where after adverse ruling upon his request for peremptory instruction such party thereupon insists upon a trial by jury.

2. It is error for the court to withdraw a case from the jury where the evidence as to liability is conflicting or the inferences on that subject to be drawn from the testimony are divergent.

3. It is the duty of the court to direct a verdict where it would be bound to set aside a contrary verdict for want of testimony to support it.

4. To render a fraudulent misrepresentation securing the signing of a promissory note available in defense against it it must be shown that the defendant was damaged by such misrepresentation.

5. Where the plaintiff by knowingly false statements secured the signing by the defendants of a certain note but this latter was in satisfaction of a former note then due from the defendants for the same amount and on the same terms, which latter note thereby became and was cancelled and retired, such misrepresentation constitutes no defense to a suit on such second note, since the misrepresentation led simply to the defendants paying a debt due by them and they were thus in legal contemplation not damaged thereby.

6. It is not error to refuse to submit to the jury issues not raised by the pleadings.

7. The rule last stated is not rendered inoperative because the court may erroneously and over objection have admitted testimony upon such extraneous issues.

8. Payments subsequent to the filing of suit are not provable under the general issue but must be set up by supplemental pleading.

9. A dismissal seasonably entered by leave of the court as to one of a number of defendants severally liable does not discharge from liability his co-obligors and co-defendants.

Appeal from the District Court for Socorro County before FRANK W. PARKER, Associate Justice. Affirmed.

HOLT & SUTHERLAND, J. F. BONHAM, MARRON & WOOD for Appellants.

The contract of suretyship is a contract whereby one person engages to be answerable for the debt, default or miscarriage of another. 27 Enc. 431; Smith v. Sheldon, 24 Am. Rep. 533; McGee v. Manhattan Life Insurance Co., 92 U. S. 93; Griswold v. Hazard, 141 U. S. 260; 1 Story Eq. Jur., secs 234, 215; Franklin Bank v. Cooper, 36 Me. 180, 196; Smith v. Bank of Scotland, I Dow. 272, 292; Railton v. Matthews, 10 Clark & F. 934, 943; Small v. Currie, 2 Drew. 102, 114; Phillips v. Foxall, L. R. 7 Q. B. 666, 672; Davis v. London Insurance Co., 8 Ch. Div. 469; Daniel on Negotiable Instruments, 4 ed., sec. 1309.

In weighing the evidence on a directed verdict it must be considered in the light most favorable to the party against whom it is directed. Every fact or inference which the jury might have drawn therefrom must be considered as established in his favor. Mt. Adams, etc., Ry. Co. v. Lowery, 74 Fed. 463; N. Pa. Ry. Co. v. Commercial Bank, 123 U. S. 727.

Where a party intending to become a surety, requests the information, a creditor owes to the prospective surety the duty to make full disclosure of every fact material to the risk, and that for a failure to do so, the surety would not become bound. Owen v. Homan, 3 MacN. & G. 378; Casin v. Perth, 7 Grants Ch. 340; Blest v. Brown, 4 DeG. F. & J. 367; Remington Machine Co. v. Kezertee,

49 Wis. 409; Franklin Bank v. Cooper, 36 Me. 179, 39 Id. 542; Warren v. Branch, 15 W. Va. 21; Harrison v. Lumbermen, etc. Co., 8 Mo. App. 37; Etting v. Bank of U. S., 11 Wheat. 59.

"An alteration, whether material or not, in a contract which a third party has agreed in advance, to guarantee, will relieve him from liability on the guaranty." Page v. Krekey, 137 N. Y. 307; Martin v. Thomas, 65 U. S., 24 How. 315; Miller v. Sewart, 9 Wheat. 702; Neg. Inst. Law, sections 14, 52, 125; Boyhm v. Bank, 72 Ala. 262; Union Bk. v. Meeker, 4 La. An. 189.

Upon the issue of fraudulent representation, the whole of the conversation is competent as illustrative and explanatory of the transaction and intent. Wilburn v. Prior, 32 Atl. 474; Pedree v. Porter, 5 Allen, 324; Averill v. Wood, 78 Mich. 342; Thurman v. Mosher, 1 Hun. 344; Shelton v. Healey, 74 Conn. 255, 50 Atl. 742; Kingman v. Reineman, 166 Ill. 208; Bloomer v. Gray, Ind., 37 N. E. 819; Sullivan v. Langley, 128 Mass. 435; Cole v. High, 173 Pa. St. 590.

If defendants knew and consented to joining and becoming liable with the other parties, either as joint makers or co-sureties, then the conduct of the plaintiff releasing one of them from liability, constituted a material alteration of the note and operated to discharge the others. Daniel on Negotiable Instruments, 4 ed., sec. 1387; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Hamilton v. Hooper, 46 Iowa 516, 26 Am. Rep. 161; Lunt v. Silver, 5 Mo. App. 186; Houck v. Grayham, 106 Ind. 195, 55 Am. Rep. 727; Gardner v. Welch, 5 El. & B. 82; Neg. Inst. Law, secs. 55, 125; Hodge v. Smith, 110 N. W. 192; Aukland v. Arnold, 111 N. W. 212.

Where by means of representations or otherwise, one person has intentionally led another to believe that a certain state of facts existed, and the other has rightfully acted on this belief, so that he will be prejudiced if the person so representing is permitted to deny the existence of such facts, such person is conclusively estopped to interpose a denial thereto. 11 Enc. Law 421; 22 Enc. 903 and cases cited.

Where property is placed in the hands of a debtor as collateral the amount thereof, if realized, lost or otherwise made applicable, must be applied upon the debt as against a person who is actually a surety, though appearing on the instrument as principal debtor. Grow v. Garlock, 97 N. Y. 81; Dibble v. Richards, 171 N. Y. 135; Brown v. Bank, 112 Fed. 901.

If one party owes another a debt and pays him money, the presumption of law is, that the money was intended to apply on the debt. Douglass v. Aspinwall, 2 Doug. 679; Hansen v. Kirthy, 11 Iowa 565; Daugherty v. Deeney, 45 Iowa 443; Succession of Hymel, La. An., 19 So. 742.

Sufficiency of defendant's answer. Morgan v. Southern Pac. Ry. Co., 17 L. R. A. 71; Maryland Insurance Co. v. Wood, 6 Cranch. 29; Elsie v. Metcalf, 1 Denio, 323; Stanton v. Wetherwax, 16 Barb. 259; Roger v. Murray, 3 Bosw. 357; Currie v. Crowells, 6 Id. 460; Rayl v. Hammond, 95 Mich. 22, 54 N. W. 696.

A party may ask for a peremptory instruction in his favor without depriving himself, if the court decides he is not entitled to it, of the right to have the jury pass on the controverted issue of fact in the case. Winchell v. Hicks, 18 N. Y. 558; Shults v. Sickles, 147 N. Y. 704; Bank v. Weston, 161 N. Y. 520; Minahan v. G. T. Ry., 138 Fed. 37, Mich.; McCormick v. National City Bank, 142 Fed. 132, Tex.; Beuttell v. Magone, 157 U. S. 154, Sup. Ct. 566, 39 L. ed. 654; Farnum v. Davidson, 3 Cush. 232; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Rev. St. U. S. secs. 649, 700, U. S. Comp. St. 1901, pp. 525, 570; Calder v. Crowley, 74 Wis. 157, 42 N. W. 266; Thompson v. Brennan, 104 Wis. 564, 80 N. W. 947; Sabotta v. Insurance Co., 54 Wis. 687, 12 N. Y. 18; Calder v. Crowley, 74 Wis. 157, 42 N. W. 266; Plankington v. Gorman, 93 Wis. 560, 67 N. W. 1128; Richter v. Leiby's Estate. 101 Wis. 434, 77 N. W. 745; German Savings Bank v. Bates, 111 Iowa 432, 82 N. W. 1008; Hartford Life Ins. Co. v. Unsel, 144 U. S. 439; Schwinger v. Raymond, 105 N. Y. 648; Peak v. Bell, 7 Hun. 454; Hodges v. Easton, 106 U. S. 408.

The defenses of payment and release of one party is

available to the defendants on this appeal. Mines v. Bank, 2 Ala. 294; Rogers v. James, 33 Ark. 77; Smith v. Carley, 8 Ind. 451; Calahan v. Bank, 78 Ky. 604; Taylor v. Newman, 77 Mo. 257; Ketellas v. Meyers, 3 E. D. Smith, 83; Penn. Nat. Bk. v. Soap Co., 161 Pa. St. 241; Fisher v. Phelps, 21 Tex. 551; Frisch v. Caler, 21 Cal. 71; Stafford v. Davidson, 47 Ind. 319; Brown v. Brown, 11 Ky. Law. 579.

DOUGHERTY & GRIFFITH, JAMES G. FITCH for Appellee.

The findings having been submitted to the court below, the appellate court is limited in reviewing its action and the consideration of its correctness of the findings of law. Buettel v. Magone, 157 U. S. 154; Lehen v. Dickinson, 148 U. S. 71; Runkel v. Burnham, 153 U. S. 216; Empire State Mutual Co. v. The Atchison R. R. Co., 210 U. S. 1; Bankers' Mutual Casualty Co. v. State Bank of Goff, 150 Fed. 78; City of Defiance v. McGongle, 150 Fed. 689; Insurance Co. v. Wisconsin Central Ry., 134 Fed. 794; Phoenix Insurance Co. v. Kerr, 129 Fed. 723; Kutz v. Peck, 113 N. Y. 226; Sutter v. Vandeveer, 122 N. Y. 652; Stanford v. McGill, 38 L. R. A. 775 and cases cited.

The binding effect of a note cannot be affected by contemporaneous parole agreement that it need not be paid. Payne v. Mutual Life Insurance Co., 141 Fed. 339.

In an action for deceit the plaintiff must set out the representations and allege the falsity thereof. Enc. Pl. & Pr., 906 and cases cited, 897 note 5, 902 and cases cited, 899, 912; Goming v. White, 33 Ind. 175; Hoffman v. Hoffman, 33 Ind. 172; 20 Cyc. 13; Holmes v. Clark, 10 Iowa 424; Specht v. Allen, 12 Ore. 117, 6 Pac. 494; London Etc. Insurance Co. v. Liebes, 105 Calif. 203; Sample v. Hager, 27 Calif. 165; Williams v. McFadden, 23 Florida 143; Hayes v. Otto, etc., R. Co., 61 Ills. 425; Haynes v. Berlam, 94 Ind. 311; Smith v. Rosebum, 13 Ind. App. 287; Crane v. Elder, 48 Kans. 259; Bayard v. Holmes, 34 N. J. Law 297; Star Steamship Co. v. Mitchell, 1st

Abbots Prac., N. Y. C. Pl. 402; Ming v. Woolfolk, 116 U. S. 599; Marshall v. Hubbard, 117 U. S. 416; Stratton v. Dines, 126 Fed. 978; 20 Cyc. 42; First National Bank v. Maxfield, Me., 22 At. 479; Parker v. Jewitt, Minn. 55 N. W. 56.

The proof must correspond with the allegations of the pleading. 28 Amer. Enc. Law, 1st ed. 58; Pomeroy on Code Pleadings, secs. 448-452; Owen v. Meade, 104 Calif. 179, 37 Pac. 923; Winterburg v. Winterburg, 52 Kan. 402, 34 Pac. 971; Dickey v. Northern P. Ry. Co., 19 Wash. 350, 53 Pac. 347; Kelley v. Cable Co., 13 Mont. 411, 34 Pac. 611; Noland v. Great Northern Ry. Co., 71 Pac. 1098, Wash.; Agers v. Wolcott, 92 N. W. 1036, Neb.; Central R. R. & Bank Co. v. Hotkiss et al., 17 S. E. 838, Ga.

The plaintiff having chosen to sue them all, he could at any time take a non-suit as to one or more. Code of Civil Procedure, sec. 2685, sub-sec. 7; Enc. Pl. & Pr., vol. 6, pp. 834, 835; United States v. Parker, 120 U. S. 95; Gardiner v. Mich. Central Ry., 150 U. S. 356; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 124.

Common law plea of "Puis Darrein Continuance." Smith v. Carrol, 12 L. R. A. 301; Yeaton v. Linn, 5 Peters 224; Longworth v. Flagg, 10 Ohio Rep. 301; Hall v. Olney, 65 Barber 27; Vol. 1, Enc. Plead. & Prac. 576, 577 and notes.

It is not incumbent upon the plaintiff to aver non-payment, and the fact of payment is new matter and must be specifically pleaded. Pomeroy on Code Remedies, sec. 576; Bates on Pleadings, Parties and Forms, vol. 1, p. 305; Bliss on Code Pleading, secs. 357, 358 and cases cited; Glasscock v. Ashman, 52 Cal. 495; Heglar v. Eddy, 53 Cal. 597; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Hummel v. Moore, 25 Fed. 380; Ferguson v. Davidson, et al., Mo., 59 S. W. 88; M. & I. Bank v. Child, Minn., 78 N. W. 1048; Mullen v. Morris, Neb., 62 N. W. 74; Cady v. S. Omaha Nat'l Bk., Neb., 65 N. W. 906; C. I. & W. Power Co. v. Cox, Neb., 1897, 73 N. W. 9; Mealing v. Togerton L. Co., Wis. 1902.

STATEMENT OF THE CASE.

The plaintiff bank brought suit upon two notes. These are identical in form except that the first is for ten thousand dollars, and the second for only five thousand. On the latter note a credit is alleged of fifteen hundred dollars on April 16, 1908. The first of these notes is as follows:

"$10,000.00 Albuquerque, New Mexico, April 9th, 1908.

On demand after date (without grace) we jointly and severally promise to pay to the order of the Bank of Commerce, at the office of said Bank, in Albuquerque, New Mexico, Ten Thousand & No-100 Dollars with interest at the rate of ten per cent per annum from date until paid, principal and interest payable in United States Gold Coin, for value received, and if the same shall not be paid when due, we jointly and severally agree to pay all costs of collection, including reasonable attorney's fees, if suit be brought on this note, or if attorneys are employed to collect the same.

G. P. ANDERSON,
CHAS. LEWIS,
H. EVANS,
J. N. BROYLES,
FRANZ SCHMIDT & STORY,
CHAS. M. CROSSMAN,
E. W. BROWN."

G. P. Anderson one of the signers of the notes is impleaded as William E. Pratt, that being apparently his real name. The defendant Broyles suffered default. The remaining defendants answered, alleging in substance that they received no consideration for the notes and were merely accommodation signers thereon for the defendant Broyles; that their signatures were obtained by certain false and fraudulent representations made by plaintiff, which representations were in effect *first,* that the defendant Broyles was solvent and amply able to pay off all his just debts and liabilities, and *second,* that said notes were amply secured by collateral deposited by Broyles with plaintiff bank. There were also allegations that at the time the defendants signed the notes plaintiff promised that Broyles

could and would take care of them and defendants would never hear of them again. It was also alleged that the date of payment was at that time left blank and the defendants were falsely and fraudulently informed by plaintiff that Broyles was to be given such time as he might require to pay the indebtedness and that defendants were left in ignorance that the notes were to be made payable on demand. A reply put the new matter at issue and the case was tried to a jury. On the trial, testimony was received on behalf of both plaintiff and defendants and at the close of the case in rebuttal plaintiff moved for an instructed verdict. The defendants did the same. The court thereupon announced that it sustained the motion of plaintiff as against all of the defendants except Lewis. Upon this announcement the plaintiff dismissed as to Lewis and the jury by direction of the court then brought in a verdict against all of the remaining defendants for the full amount claimed in the complaint. A motion for a new trial was overruled and judgment entered pursuant to the verdict. Defendants thereupon appealed.

OPINION OF THE COURT.

POPE, J.—(After making the foregoing statement of fact.) The chief assignment of error is that there was an issue of fact which the court should have sent to the jury. At the outset we are met by the contention of appellee that this alleged error of the court in withdrawing the case from the jury cannot be considered because both sides requested a peremptory instruction and must therefore be considered as having stipulated that there was no issue of fact for the jury. The record upon this point, as above partially indicated, shows that upon the close of the testimony plaintiff moved for an instructed verdict because the defense as pleaded was not sufficient and was not permissible under nor in conformity with the pleadings. Defendants likewise moved for a peremptory instruction, their ground being that the notes were signed in blank with the understanding that they were to run from four to six months and that having been filled out on demand they were therefore not collectable under sec-

tion 14 of the Negotiable Instruments Act of 1907. Upon the announcement of the court that it sustained the motion for a peremptory instruction against all of the defendants but Lewis and after the court had permitted a nonsuit as to the latter, the defendants insisted that "not only Lewis but his co-defendants are entitled to a decision at the hands of the jury in this case." This contention was overruled, and a verdict against the defendants, except the defendant Lewis, instructed by the court. We are of the opinion that upon this state of the record 1 the request by both sides for a peremptory instruction does not preclude the assignment of error made. It is true that in Buettell v. Magone, 157 U. S. 154, it was said:

"As, however, both parties ask the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts and the parties are therefore concluded by the findings made by the court upon which result the instruction of law was given."

We deem the full import of this holding developed, however, by the recent case of Empire State Company v. Atchison Company, 210 U. S. 1, where it was said:

"It was settled in Buettell v. Magone, *supra,* that where both parties request a peremptory instruction, and do nothing more, they thereby assume the facts to be undisputed, and in fact, submit to the trial judge the determination of the inferences proper to be drawn from them; but nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury where the evidence is conflicting or the inferences to be drawn from the testimony are divergent."

In McCormick v. National City Bank, 142 Fed. 132, it was pointed out that Buettell v. Magone was a case where there was no disputed question of fact, and it was there stated:

"The decision in that case should not be extended to

cases in which there are disputed questions of fact nor to cases in which the parties ask other instructions in the event the peremptory instructions asked by them respectively are not given."

So in Minehan v. G. T. Ry., 138 Fed. 37, it was said:

"But it would seem that the decision [Buettell v. Magone] cannot be regarded as furnishing a rule for cases where the evidence is conflicting and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case which repel the implication that the party had consented to a submission of the facts to the court."

We think the language used by defendants' counsel after their request for a peremptory instruction had been denied was equivalent to a demand for a jury and, in the language of the case last quoted, repelled "the implication that the party had consented to a submission of the facts to the court," and constituted, under Empire State Company v. Atchison Company, *supra,* 'an insistence by appropriate requests upon the submission of the case to the jury.'

Believing, therefore, the question properly before us, we proceed to determine whether the court upon the testimony erred in withdrawing the case from the jury. The rule in such matters, to quote further from Empire Company v. Atchison Company, *supra,* is that the case is one for a jury where the evidence as to liability is con-
2 flicting or the inferences on that subject to be drawn from the testimony are divergent. Or as it is stated somewhat differently in McGuire v. Blunt, 199 U. S. 142:

"It is clear that where the court would be bound to set aside a verdict for the want of testimony to support it, it may direct a finding in the first instance and not
3 await the enforcement of its view by granting a new trial."

Was there any view of the testimony under which the defendants or either of them could properly have been awarded a verdict by the jury? The defense, as we have seen, was principally that the signing of the notes was procured by fraud. There was undoubtedly evidence

that the defendants Anderson, Evans, Brown and Lewis were told by plaintiff's representative prior to signing the notes that Broyles was solvent and were further told that plaintiff had ample collateral for the notes, and there was also evidence from which the jury might have concluded that the defendants signed the notes in reliance upon these representations. We find also upon the record room for a conclusion by the jury that these statements were untrue and that they were known when made to be untrue. Indeed the trial court recognized this, for as to Lewis, in whose favor the testimony on this point was no stronger than on behalf of Anderson, Evans and Brown, the court held that the matter was one for the jury. Eliminating therefore Lewis, as to whom there was a dismissal and the defendants Schmidt, Story and Crossman, in whose favor there was no testimony as to representations inducing their signature, was there ground for a verdict relieving from liability either Anderson, Evans or Brown? The testimony shows that the notes sued on, together with an additional one of ten thousand dollars of the same date and not here in controversy, took the place of overdue notes of precisely the same amounts and tenor, dated November 20, 1907, signed by Broyles, Anderson, Evans and Brown. Upon the giving of the present notes these former notes were surrendered by plaintiff bank and destroyed. No suggestion was made either on the trial or upon the argument before us that these first notes were not valid obligations of these three defendants nor that in retiring them by the new notes of precisely the same amounts defendants were not simply ridding themselves of a perfectly valid outstanding obligation of as great an amount as the new notes signed. Applying these undisputed facts to those which the proofs left in controversy, were these defendants defrauded in the making of these notes? Were actionable fraudulent representations simply the making of false statements knowingly to another whereby the latter is led to act, there would doubtless be here a case for the jury. But there is of course a further essen-
4 tial element. The party must have been led to act *to his injury*. As stated in Randall v. Hazelton, 12 Allen 412, quoting 3 Bulst 95:

"It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur there an action lies."

So in 1 Story's Eq. Jur., Section 203.

"The party must have been misled to his prejudice or injury, for courts of equity do not any more than courts of law sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked that to support an action at law for a misrepresentation there must be a fraud committed by the defendant and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth by a very learned judge in equity, that fraud and damage coupled together will entitle the injured party to relief in any court of justice."

So in Morrison v. Lodds, 39 Cal. 385, it is said:

"It is well settled that a party to a contract cannot rescind or avoid a contract on the ground of a false representation of the other party unless he shows in addition to the false representation that he will be damaged by the performance of the contract."

In Story v. Conger, 36 N. Y. 673, 93 A. D. 546, it was said:

"Upon his own statement of the contract the defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to to induce him to perform that duty there is no remedy. In its result the case stands where and as it ought to stand."

In a later case from the same state, Deobold v. Oppermann, 111 N. Y. 531, 7 A. S. R. 760, it was held that there was no legal loss when the parties were "subjected to a liability which they agreed to assume in the event which is now alleged as the cause of their misfortune."

In First National Bank of Skowhegan v. Maxfield, 22 Atlantic 479, the Supreme Court of Maine went to the extent of holding that a mortgage securing a just debt, even if obtained by fraud, was enforcible, the following being the language:

"The payee by giving such mortgage merely secured his own debt and the representation to him by the bank as an inducement to give the mortgage that the bill was unpaid if untrue is harmless and not fraudulent."

Further authority to the same effect will be found in Ming v. Woolfolk, 116 U. S. 599; Parker v. Jewett, Minn., 55 N. W. 56; Pheteplace v. Eastman, 26 Ia. 446; Michigan v. Phoenix Bank, 33 N. Y. 9; Marriner v. Dennison, Cal., 20 Pac. 386; Snyder v. Heagan, 40 S. W. 693; and cases cited to support the text in the following reference works: 17 Encv. P. & P. 814; 20 Cyc. 42; 14 A. & E. Ency. Law, 2nd ed., 137, et seq.

We deem the present case well within the rule above declared. Even assuming the notes to have been given as the result of a wilful misrepresentation they added no new burden to these defendants. The latter were obligated thereby to no greater duty than previously rested upon them. What they are called upon to do as a result
5 of giving the notes they were equally under obligation to perform before the notes were given. Applying the test in Morrison v. Lods, *supra,* they will "not be damaged by the performance of the contract," and under the rule in Story v. Conger, *supra,* "the result stands where and as it ought to stand," and under the rule in Deobold v. Oppermann, *supra,* they are in the matter of results simply "subjected to the liability which they agreed to assume." Upon the undisputed facts, therefore, the jury could not have found for the defendants and the trial court was right in so holding.

It is further claimed that the cause should have gone to the jury upon an issue as to whether the blank in the note as to time of payment had been filled in differently from what was agreed to at the time of signature. The testimony for the defense taken over objection that it was not warranted by the pleadings was to the effect that the time in the notes was left blank when they were signed and that it was the agreement that these were to be filled in at six months. The plaintiff's testimony in rebuttal was that the notes were filled out payable on demand, before signature. But while this was over plaintiff's objection,

made an issue on the proofs, it is not so upon the pleadings. We find nothing in the answer having the semblance of the defense that the notes were altered after signature or that they were filled in contrary to what was agreed at the time. It is true that the answer alleges the understanding to be that Broyles was to be given such time within which to pay the debt "as he might require." But this allegation would seem to go rather to the manner of enforcing collection than the form of the obligation. At most it was an allegation of an undertaking that the notes should be finally filled in for payment when Broyles got ready. But an allegation of even such an improbable provision for a promissory note is a different matter from that here quoted to the effect that the note was to be filled in at six months. It needs no argument to demonstrate the difference between an agreement to exact payment at a time indefinite and one at six months. Neither is the matter aided by the further allegation in the answer that the defendants "were left in ignorance of the intention to make the note payable on demand." Manifestly ignorance of an intention to make notes payable on demand is not tantamount to an agreement that they should be dated at six months. We are of the opinion therefore that this defense was not open to the defendants upon their pleadings and that the trial court did not therefore err in withholding from the jury the determination of an issue not properly before it. It is urged however by the appellants that the court admitted proof upon this question over plaintiff's objection that it was not within the pleadings and that plaintiff not having taken an appeal from such ruling it should not be heard now to sustain the judgment upon a theory held against it on the trial. Morgan v. Southern Pacific Ry. Co., Cal., 17 L. R. A. 71, and Wrangler v. Swift, 90 N. Y. 38, are cited to support this position. But how could plaintiff appeal from an adverse ruling on the testimony? Appeals, of course, lie only from final judgments and that judgment was in its favor. The defendants were notified by repeated objections on the trial—their brief says "something like one thousand"—that the plaintiff relied among other things upon defects

6

in the pleading. Indeed one of the grounds of plaintiff's very motion to instruct, which the court sustained, was that "the defense is not admissible under the state of the pleadings and does not conform thereto and the issues which have been raised thereby are not issues which have been raised by the pleadings." This was a further and definite notice that inadequacy in the pleadings was claimed as against defendants' contentions. The latter therefore in failing to amend proceeded at their peril and cannot now be heard to complain because the terms of their answer failed to justify the submission to the
7 jury of an issue upon which defendants desired the jury's judgment. The rule that proof must be based upon pleadings is too well established to be made to yield to the contention here made.

The same observations apply to several other defenses which defendants complain the court, by giving the peremptory instruction, failed to entertain. It is contended that the notes sued on were materially altered after signature by certain of the makers, by the addition of other parties thereto. But such a defense is not even remotely hinted at in the answer. It is stated that the court failed to give credit for four payments, one made before the note was given, the other three all since the suit was brought. Clearly however, the first could not have been a payment on this note and equally clear is it that in the absence of the proper plea these last were not matters for consideration. Even if, contrary to the current of authority, it be said that the code system permits proof of payments under the general issue, it is clear that such
8 proof is restricted to payments before and not after suit. Glasscock v. Ashman, 52 Cal. 495; Heigler v. Eddy, 53 Cal. 597.

These latter must be set up by answer in the nature of a plea *puis darrein continuance*. The universal rule is stated in Philips on Code Pleading, section 363, where it is said:

"Payments made pending the action can be asserted only as new matter and by means of a supplemental pleading."

Some reference is made to the payment of one thousand dollars alleged to have been made between the execution of the note and the filing of the suit but aside from the matter of the absence of any answer setting up such payment we discover in the record no testimony that would have justified a finding that such payment was made.

The only remaining assignment of error that we deem material is the contention that the granting of a non-suit as to the defendant Lewis operated as a discharge of the remaining defendants. The plaintiff however had a right under Compiled Laws 2908 to dismiss as to Lewis, the cause not having been submitted to the jury. This dismissal was simply a discontinuance of the action, not a discharge of the party. The obligations sued on both by their terms and by Compiled Laws 2894 were several. We fail to see how a non-suit as to Lewis affected the liability of his co-defendants, nor do we see how under the record it could have resulted to their benefit for his portion of the case to have been carried forward to verdict. The judgment is affirmed.

9

Associate Justice Mechem did not hear the argument and took no part in the decision.

ON REHEARING.

SYLLABUS.

1. If defendants had signed notes after the signatures of other co-signers against whom fraud was practiced had been attached to the same, and if the latter be relieved from liability thereon, then such fraud makes the notes voidable as to the former, though they did not participate in, and were ignorant of, such fraudulent conduct at the time they signed the note.

2. However, if the signers against whom fraud was practiced signed the notes after their execution by their co-signers, and these latter executed the notes with no contemporaneous agreement of any kind that such notes were to have further or other signers, the release of any subsequent co-signers, because of fraud in the obtaining of the signatures of such subsequent co-signers, does not disturb

the equality of burden as to the original signers, and it was incumbent upon these original signers to prove injury to themselves because of the fraud practiced upon their subsequent co-signers in order to relieve themselves from liability because of such fraud. The record in the case at bar fails to do so.

OPINION OF THE COURT.

WRIGHT, J.—The original opinion filed in this cause shows that there was an issue of fact as to whether or not the defendant Charles Lewis had signed the note sued on as a result of fraud. As pointed out in that opinion the trial court recognized the existence of the issue and was about to send the case to the jury as to the defendant Lewis when plaintiff dismissed its action as to him, resulting in a judgment for plaintiff against the remaining defendants. The original opinion filed in this cause holds that the plaintiff had the right to dismiss as to Lewis and to proceed against the other defendants. The attention of the court, however, is called by a motion for a rehearing to a contention raised upon appellant's brief but not dealt with by the court, which contention appellant claims is decisive of this appeal. It is to the effect that assuming, as the trial court held and as this court has also held in the original opinion, that Lewis, one of the signers, was induced to sign by fraud, then this fact whether Lewis was or was not a party to the suit or whether judgment was or was not sought against him, constitutes a defense to the action available to the other signers under Section 55, of the Negotiable Instrument Act. (Laws of 1907, Ch. 83, Sec. 55.) Impressed with the importance of this contention the case was restored to the docket for further argument and has therefore been reargued to the court upon this point.

Section 55, of the Negotiable Instrument Act, is as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, *or any signature thereto*, by fraud, duress, or force, fear or other unlawful means or for an illegal consideration or when he negotiates it, breach

of faith, or any such circumstances as amount to a fraud."

The only cases bearing upon this section so far as cited in the briefs and so far as disclosed in Brennan's Negotiable Instrument Law (ed. of 1911) are from Wisconsin, being the cases of Hodge v. Smith, 130 Wis. 326, 110 N. W. 192, and Aukland v. Arnold, 13 Wis. 64, 11 N. W. 212. In both of these cases it is held that where one of the signatures is obtained by fraud it is a defense available to all signers. In the latter case, after quoting the Wisconsin section which embodies in precisely the same language that is contained in our Section 55, it is said: "The first clause of this section was considered and interpreted in the recent case of Hodge v. Smith, 130 Wis. 326, 110 N. W. 192. It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the parties so defrauded be relieved from liability thereon, then such fraud makes such paper voidable by all other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assumed such an obligation it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is disturbed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it."

For an intelligent understanding of the effect of this section of the Negotiable Instrument Law upon the case at bar it is necessary to make a further brief statement of the facts supplementary to that contained in the original opinion. The complaint sets out in full the notes sued on with the usual allegations of nonpayment, etc. The answer, after denying any indebtedness on account of said notes, sets up fraud in the obtaining of certain of the signatures to such notes thereby seeking to avoid liability as to each and every one of the defendants. The sufficiency of the allegations of fraud was questioned in the lower court. This question however was disposed of in the

original opinion and will not be discussed further upon a rehearing. Upon a trial of the issues the plaintiff introduced the notes in evidence, proved that the same were due and unpaid and then rested. The defendants then offered evidenece to show that the signatures of three of the defendants, and particularly the defendant Lewis, were obtained by the plaintiff through fraudulent representations. It developed in the course of the trial that the signatures of the defendants Broyles, Schmidt, Story and Crossman were placed upon the notes at one time and that those of the defendants Lewis, Anderson and Evans at a later date after the notes in question had been sent up to Albuquerque and either sent back to Broyles or brought by the witness Johnson, the agent of the plaintiff. It also appeared from the evidence, as stated in the original opinion, that the defendants Brown, Evans and Anderson had previously signed notes for Broyles for similar amounts and that the notes involved herein were executed for the purpose of taking up the former notes. There is no evidence whatever in the record as to whether the defendants Schmidt, Story and Crossman or any of them had any knowledge that there were to be any other signers than themselves. There is a complete silence in the record as to whether they knew anything about Lewis, Evans, Anderson or even Brown as co-signers of these notes. In discussing the effect of fraud upon the signers of a note it is held in the original opinion that the defense of fraud alleged and proven in the case at bar is not available where the instrument induced by fraud simply retires a preexisting valid obligation of the same amount and of like tenor and this for the reason that such signer has not in contemplation of law been misled to his injury. We are of the opinion that the section of the Negotiable Instrument Law (cited) does not change this rule, nor is there anything in the two Wisconsin cases (cited) which is in conflict with the rule laid down in the original opinion. It only remains to consider what effect, if any, the fraud practiced upon other co-signers had upon the defendants Schmidt, Story and Crossman who were *new signers* upon the notes involved herein. It is apparent from the record

that the defendants Schmidt, Story and Crossman having established the fraud as to Lewis, relied upon the provisions of Section 55, of the Negotiable Instrument Act, to relieve them from liability without any necessity on their part of any further showing of injury to themselves. If Schmidt, Story and Crossman had signed the notes after the signatures of the other co-signers against whom fraud was practiced had been attached to the same, it is undoubtedly true under the reasoning of the court in the Wisconsin cases that they should have rested without any further showing of injury, since the release of any of such co-signers would have disturbed the equality of the burden as to them, (namely, the defendants Schmidt, Story and Crossman) they having the right in the absence of
1 any proof to the contrary, to assume that each and every one of the signers of the note who signed before them signed the same unconditionally and that each signer in event of the other having to pay for said note would be liable to the same extent as they themselves.

In the case at bar, however, the signers against whom fraud was practiced signed the notes several days after their execution by Schmidt, Story and Crossman. So far as the record in this case shows the notes were complete and binding obligations upon Schmidt, Story and Crossman at the time they executed the same with no contemporaneous agreement of any kind that such notes were to have further or other signers. Such being the terms of their contract the release of any subsequent co-signers, because of fraud in the obtaining of the signatures of such subsequent co-signers, would not disturb the equality of burden as to Schmidt, Story or Crossman. It was incumbent therefore upon the defendants Schmidt, Story and Crossman to have proven injury to themselves be-
2 cause of the fraud practiced upon their subsequent co-signers in order to relieve themselves from liability because of such alleged fraud. This they failed to do so far as the record in this case discloses. Except as herein modified, the original opinion is therefore adhered to.

[No. 1262, March 28, 1910.]

[On Rehearing, December 22, 1911.]

HARRY SLOCUM FRIDAY, Appellee, v. SANTA FE CENTRAL RAILWAY COMPANY, Appellant.

SYLLABUS (BY THE COURT.)

1. The record in this case, (especially when aided by our statute as to amendments of the record in formal matters even after appeal) sufficiently shows the injuries alleged to have occurred in the First Judicial District.

2. Judicial notice is taken of the counties composing a Judicial District and of the county in which known railroad stations or points on a railroad line at known distances from such stations are located.

3. The federal employer's liability act of June 11, 1906, is valid as to the Territory of New Mexico (following El Paso & N. E. Railway Company v. Gutierrez, U. S. Sup. Court, decided November 15, 1909.)

4. This court will not review instructions not excepted to in the trial court.

5. Assignments of error on the admissibility of testimony must, to be cognizable by this court, point out specifically the testimony deemed objectionable.

6. Under the rule of practice just stated an assignment alleging error in the reception of the testimony, upon a given point, of some seven witnesses, whose testimony upon that point went in under different circumstances and against varying objections, is too general to be entertained and is contrary to rule 14 of this court requiring each error to be stated in a separate paragraph.

Appeal from the First Judicial District, before JOHN R. MCFIE, Associate Justice. Affirmed.

N. B. LAUGHLIN and CHARLES F. EASLEY for Appellant.

The venue should have been alleged in the complaint. Hill et al. v. Walker, 167 Fed. 245; 97 Fed. 817.

Federal Liability Act of June 11, 1906, is unconstitutional. Howard v. Illinois Central Railroad Co., 207 U. S. 463, 51 L ed. 297; Illinois Central Railway Co. v. McKendree, 203 U. S. 514; United States v. Reese, 92 U. S. 214; Trade Mark Cases, 100 U. S. 82; Allen v. Louisiana, 103 U. S. 80; United States v. Harris, 106 U. S. 629; Poindexter v. Greenhow, 114 U. S. 270; Spreigue v. Thompson, 118 U. S. 90; Baldwin v. Franks, 120 U. S. 678; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; James v. Bowman, 190 U. S. 127; United States v. Ju Toy, 198 U. S. 253; A. T. & S. F. Railway Co. v. Mills, 108 S. W. 480; Hyde v. Southern Railway Co., 31 App. D. C. 460; Powell v. Wisconsin Central Railway Co., 159 Fed. 864; Howard, Admr. v. Illinois Central R. Co., et al., 207 U. S. 463.

Act of April 22, 1908, c. 149, 35 Stat. pt. 1, p. 65, is not retroactive. Winfree v. Northern Pacific Ry. Co., 164 Fed. 898; Plummer v. Northern Pacific Railway Co., C. C., 152 Fed. 206; Thornton on the Employers' Liability and Safety Appliance Acts, sec. 109 b; Osborn v. Detroit, 32 Fed. 36; Eastman v. County of Clackamas, id. 24; Humboldt, etc., Co. v. Christopherson, 73 Fed. 239; Wright v. Southern Ry. Co., 80 Fed. 260; Plummer v. Northern Pac. Ry., 152 Fed. 206; Hall v. Chicago, etc., R. Co., 149 Fed. 564

On motion for rehearing. R. S. U. S., secs. 1874, 1910; Organic Act, sec. 10; C. L. 1897, secs. 880, 900, 1040, 901, 905, 2950.

The federal and territorial sides of the district courts are separate and distinct. Schofield v. Stephens, 7 N. M. 619; R. S., secs. 1874, 1910; Robinson v. Peru Plow, etc. Co., 1 Okla. 140; Ex parte Crowdog, 109 U. S. 560; Gon Shay Ee, Petitioner, 130 U. S. 343; C. L. 1897, sec. 900; Hornbuckle v. Toombs, 18 Wall. 648; Clough v. Curtis, 131 U. S. 361, 33 L. ed. 945; Rev. Stat. Idaho, sec. 3830; McAllister v. U. S., 141 U. S. 174, 35 L. ed. 693; Good v. Martin, 95 U. S. 90; Reynolds v. U. S., 98 U. S. 145; City of Panama, 101 U. S. 453; See also Thiede v. Utah

Ter., 159 U. S. 570; Simms v. Simms, 175 U. S. 162; Ferris v. Higley, 87 U. S. 375; Benner v. Porter, 9 How. 125; Nickels v. Griffin, 1 Wash. Ter. 374; Phelps v. City of Panama, 1 Wash. Ter. 518; Lincoln, Lucky & Lee Mining Co. v. District Court, 7 N. M. 486; Osborn v. U. S. Bank, 9 Wheat. 816; Metcalf v. City of Watertown, 128 U. S. 586, 32 L. ed. 543; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690.

GEORGE W. PRICHARD for Appellee.

Injuries to persons and personal property are transitory not local. Mason v. Warner, 31 Mo. 508. It is only necessary to lay a venue for a place of trial in transitory action of trespass. McKenna v. Fiske, 1 Howard 237; Mitchell v. Harmony, 13 Howard U. S. 115-137; Regan v. Haines, 10 Ind. 348; Hill et al. v. Walker, 167 Fed. 245.

The Federal Employer's Liability Act of June 11, 1906, is valid as to the Territory of New Mexico. Howard v. Illinois Central Railroad Co., 207 U. S. 504.

Retrospective laws are constitutional. Oriental Bank v. Freeze, 18 Me. 109; Sutherland v. DeLeon, 1 Tex. 250; Wymes' Lesser v. Wynne, 58 Am. Dec. 66; Rowls v. Kennedy, 58 Am. Dec. 299; Acheson v. Miller, 2 Ohio State 203; Sturges v. Carter, 114 U. S. 519; Koshonong v. Burton, 104 U. S. 668; Campbell v. Harehitt, 155 U. S. 610, 615.

There was no contributory negligence. C. L. 1897, secs. 3216, 3217; Thornton on Employer's Liability and Safety Appliance Acts, p. 31.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, J.—The plaintiff brought suit for personal injury in the First Judicial District Court. The verdict was in his favor and the defendant railroad appeals. The errors assigned will be considered *seriatim*.

It is said *first* that the complaint does not show jurisdiction in that it does not allege the injury to have oc-

curred within the First Judicial District. This point does not appear to have been made before trial in the court below, but as it is claimed to be jurisdictional we proceed to consider whether it is fatal to the judgment rendered. The question of jurisdiction thus raised is, it will be noted, extremely narrow and is one purely of pleading, and we shall in dealing with it confine ourselves to the specific objection urged. While the complaint does not in terms state that the injury occurred in the first district, the cause is entitled "In the District Court of the First Judicial District." We judicially know that this district was at the date the suit was brought composed of the Counties of Santa Fe, San Juan, Rio Arriba and Taos. The caption is thus to be read as naming those counties as constituting the district. The case would thus seem to be
1 within the provision of section 59 of the Code, which is relevant as regulating procedure on the federal side of the court and which provides:

"The name of the county stated in the complaint shall be taken to be the venue intended by the plaintiff, and it shall not be necessary to state a venue in the body of the complaint or in any subsequent pleading."

But aside from this, the complaint alleges the injury to have occurred on the Santa Fe Central Railway between the stations of Williams Spur and Clark. These latter being railroad stations, their location may be judicial-
2 ly noticed and are known to us to be within the County of Santa Fe, which latter is, as above stated, judicially known to have been at that date within the First Judicial District. Reading the complaint therefore, in the light of judicial knowledge it sufficiently alleges the injury to have occurred in the First District.

In addition, the undisputed testimony received without objection and from both sides is to the effect that the injury occurred on defendant's line between mile posts thirty-two and thirty-three south of the city of Santa Fe. This point being also judicially known to us to be in Santa Fe County, it thus results that the undisputed testimony is that the casualty occurred in the First District. If therefore the complaint be defective in the re-

spect alleged it is under the condition of the record a mere defect of form without possibility of prejudice to any one and is even at this stage of the case subject to amendment under Code 85 which provides that "the court shall in every stage of the action disregard any * * defect * * in the pleadings which shall not affect the substantial rights of the adverse party" and that "no judgment shall be reversed * * by reason of the defect." It is also within section 86 of the Code which provides that "after final judgment rendered in any cause the court may in furtherance of justice * * amend in affirmance of such judgment any * * pleading * * by rectifying defects * * in matters of form; and such judgment shall not be reversed or annulled therefor."

The federal statute on amendments [R. S. Sec. 954] is similarly liberal. As is said in 1 En. P. & Pr. 511:

"Where the court has jurisdiction of the subject matter and the defendant has appeared in person to contest the merits the complaint may be amended by inserting averments necessary to perfect the jurisdiction of the court on the record."

Of course, were the record silent as to where the injury occurred or were the proofs subject to the least question on the point the matter would be one of substance and perhaps within the rule of the federal courts that jurisdiction must affirmatively appear. Here, however, the testimony of both sides does show the proper county and the only criticism is that the complaint does not allege it. We entertain no doubt of our power to correct this even on appeal.

Indulging—without sustaining—the contention that the complaint does not sufficiently aver the venue, we may therefore easily deem the omission under the condition of this record purely one of form and consider the complaint amended to conform to the undisputed facts showing the injury to have occurred in the First Judicial District and thus hold the criticism upon the complaint insufficient to necessitate a new trial.

It is strongly urged in the second place that the trial court erred in applying to the case the rules contained in the Federal Employer's Liability Act of June 11, 1906,

for the reason that that act has by the opinion in Howard v. Illinois Central Co., 207 U. S. 463, been declared unconstitutional and void not only as to the states but as well to the Territories. Decisions to the effect that the Act was left by the Howard case intact as to the Territories are cited from the District of Columbia in Hyde v. Southern Railway Co., 31 App. D. C. 466, and Gutierrez v. E. P. & N. E. Ry. Co., 117 S. W. 426, while the contrary view is asserted in at least one Texas case, A. T. & S. F. Ry. Co. v. Mills, 108 S. W. 480. We are, however, relieved from the necessity of comparing these lines of authority and of determining for ourselves the extent of the holding in the Howard case by the fact that the Federal Supreme Court has itself since the argument of this case expressly held in El Paso & N. E. Ry. Co. v. Gutierrez, [decided November 15, 1909] the Act of 1906 to be as to the Territories a valid exercise of congressional power.

3 We content ourselves with referring to that controlling authority in holding this assignment of error not well taken.

While the two foregoing are the only assignments of error argued either orally or upon the briefs, appellant's brief also mentions as insisted upon two other alleged errors. One is that the court erred in its instruction as to the functions of the jury in passing upon the weight of the evidence. It is sufficient to say, however, that the record shows no exceptions reserved to this or any of the instructions and their assignment may not therefore

4 be considered. Territory v. O'Donnell, 4 N. M. 196; Laird v. Upton, 8 N. M. 409; Fruit Exchange Co. v. O'Donnell, 9 N. M. 366.

The remaining assignment is as follows:

"The court erred in receiving illegal and incompetent testimony offered by the appellee of the witnesses E. E. Friday, A. R. Jones, M. J. DeMier, W. R. Ratliff, W. G. May, Robert Taylor and Fred Fisher as to the condition of cars in Train No. 2, other than car 618, upon which it is alleged the injuries complained of occurred." This

allegation of error does not point out specifically
5 the objectionable testimony of any one of the witnesses named, much less of the seven. It imposes upon the court the duty of going through a lengthy record with the view to segregating what testimony in the examination of each of the witnesses named is within the objection made and then of deciding whether such testimony so segregated is in either case subject to that objection. An examination of the record shows that some of the testimony upon the point went in without objection, some was brought out by defendant itself on cross examination, while some was admitted over one ground of objection and some over another. In some instances the question was objected to because immaterial, in others as leading and in others upon still other grounds. We do not feel called upon to entertain an assignment so general in its character and
6 involving such a diversity of question. Each of the rulings of the court upon this class of testimony constituted a ground for alleging error depending for its validity upon varying considerations. It is conceivable that some of this testimony may have been properly admitted over the objection made and some of it not. Rule 14 of this court provides that "each error relied upon shall be stated in a separate paragraph." We do not consider the assignment made as complying with that rule. We believe it to be within the decision of this court in Pearce v. Strickler, 9 N. M. 467, and Schofield v. Territory, 9 N. M. 534, where it is said that "it is not incumbent upon this court to search the entire record for such evidence as the counsel might have had in mind."

We consider it no unreasonable tax upon the diligence of the bar to require separate assignments of error for the several matters of evidence objected to. To permit objections to all of the testimony upon a given point not only of one but of seven witnesses to be combined under a single assignment would be to disregard the very salutary rule of this court above named, the decisions just cited enforcing it and the principles which must govern the order-

ly presentation of causes upon appeal. The judgment below is affirmed.

Associate Justice Mechem did not participate.

OPINION OF THE COURT.
(Upon Rehearing.)

Per Curiam.—Upon an examination of the grounds urged upon rehearing, we are of the opinion that they are not well taken and the original opinion filed herein and the judgment entered therein will be adhered to. An order may be entered to that effect.

WILLIAM H. POPE, Chief Justice.

[No. 1379. September 1, 1911.]

URSINUS SIDNEY BATEMAN, et al, Appellants, v. JULIUS J. GITS, et al, Appellees.

SYLLABUS (BY THE COURT).

1. Under the Federal Statutes the rights of a transferee of national bank stock under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice.

Appeal from the District Court for Chaves County, before WILLIAM H. POPE, Chief Justice. Affirmed.

U. S. BATEMAN for Appellant.

Transfer of shares of stock of a corporation. Laws 1905, chap. 79, secs. 21, 126, 130; R. S. U. S. 5139.

NISBET & NISBET for Appellants. No brief.

OPINION OF THE COURT.

MECHEM, J.—The property involved here are shares in a National Bank. The owner Gits had endorsed the certificates representing the shares in blank and had put them up as collateral for a loan. Thereafter the appellant

sued out an attachment and attached the stock. On the books of the bank there was nothing to show that the shares were held by anyone other than Gits. Of the attachment the pledgee had no notice. The court below found and adjudged that the attaching creditor's lien was subject to the lien of the pledgee. The question here has been before the courts of this country, as will appear from a perusal of the following cases: Continental Nat. Bank v. Elliott Nat. Bank, 7 Fed. 369; Hazard v. Nat. Exchange Bank, 26 Fed. 94; Doty v. First Nat. Bank, 3 N. D. 9; 17 L. R. A. 259; 53 N. W. 77; Mapleton Bank v. Standard, 8 Idaho 656, 67 L. R. A. 656. These cases hold that "under the federal statutes the rights of a transferee of national bank stock under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferrer without notice." Doty v. First Nat. Bank, supra. We adopt this holding. There are other assignments of error, but the decision of this one point against the appellant, in our opinion, disposes of the entire case. For the foregoing reasons the judgment of the lower court is affirmed.

[No. 1380. September 1, 1911.]

A. STRAUS, Appellant, v. W. L. FOXWORTH, Appellee.

SYLLABUS (BY THE COURT).

1. A tax certificate issued under Laws 1899, Chapter 22, Section 31, providing for the sale without a judgment of court, of property for delinquent taxes for amounts less than twenty-five dollars, vests a title in the purchaser which can be invalidated only on the grounds that the taxes, penalties, interest and costs had been paid before the sale, or that the property was not subject to tax, and not for irregularities in the proceedings leading up to the sale, unless they are fraudulent or amount to jurisdictional defects.

Appeal from the District Court for Quay County, before E. R. WRIGHT, Associate Justice. Affirmed.

REID & HERVEY for Appellant.

Statutes authorizing the sale of property for non-payment of taxes must be construed strictly in favor of the citizen. 36 Cyc. 1190; Laws 1899, chap. 22, sec. 25; Parker v. Overman, 18 How. 137; C. L. 1897, secs. 4079, 4080, 4084, 4091; Cooley on Taxation, 3 ed. 936; Games v. Stiles, 14 Pet. 322; Martin v. Barbour, 34 Fed. Rep. 701; Rustin v. Merchants, etc. Co., 23 Col. 351; Salinger v. Gunn, 61 Ark. 414; Martin v. Allard, 55 Ark. 218; Coit v. Wells, 2 Vt. 318; Bannon v. Barnes, 39 Fed. 895; Murray's Lessee v. Improvement Co., 18 How. 276; Lufkin v. Galveston, 11 S. W. Rep. 340; McCready v. Sexton, 29 Ia. 356; Treadwell v. Patterson, 51 Cal. 637; Huse v. Merrim, 2 Greenl. 375; Case v. Dean, 16 Mich. 12; Martin v. Barber, 140 U. S. 644; Cooley on Taxation, 3 ed. 518; Marx v. Hanthorn, 148 U. S. 172; DeTreville v. Smalls, 98 U. S. 517; Keeley v. Sanders, 99 U. S. 441; 12 U. S. Statutes 422, 640; 2 Cooley on Taxation 899.

A tax deed can not be made conclusive evidence of title in the grantee. Marx v. Hanthorn, 148 U. S. 172; Taylor v. Deveaux, 100 Mich. 581; McKinnon v. Weston, 104 Mich. 642; Weeks v. Merkle, 6 Okla. 714; Wilson v. Wood, 61 Pac. Rep. 1045, Okla.; Kelly v. Ferrall, 20 Fed. Rep. 364; Bannon v. Burns, 39 Fed. Rep. 892; McCready v. Sexton, 29 Iowa 356; Railroad Co. v. Galvin, 85 Fed. Rep. 811; Cairo etc. R. Co. v. Parks, 32 Ark. 131; Little Rock etc. R. Co. v. Payne, 33 Ark. 816; Wampole v. Foote, 2 Dak. 1; Dickerson v. Acosta, 15 Fla. 614; White v. Flynn, 23 Ind. 46; Corbin v. Hill, 21 Iowa 70; Powers v. Fuller, 30 Iowa 476; Taylor v. Miles, 5 Kas. 498; Baumgardner v. Fowler, 82 Md. 631; Groesbeck v. Seeley, 13 Mich. 329; Case v. Dean, 16 Mich. 12; Dawson v. Peter, 119 Mich. 274; Abbott v. Lindenbauer, 42 Mo. 162; Roth v. Gabert, 123 Mo. 29; Wright v. Cradlebaugh, 3 Nev. 341; Young v. Beardsley, 11 Paige 493; East Kingston v. Fowle, 48 N. H. 57; Sheets v. Paine, 86 N. W. Rep. 117, N. D.; Dever v. Cornwell, 86 N. W. Rep. 227, N. D.; Strode v. Washer, 17 Or. 50; Mather v. Darst, 13 S. D. 75; Harness v. Cravens, 126 Mo. 233; Bettison v. Budd, 21 Ark. 578; Shimmin v. Inman, 26 Me. 332; Del Castillo v. McConnico, 163 U. S. 674; Alvord v. Col-

lin, 20 Pick. 418; Workingman's Bank v. Lannes, 30 La. Ann. 871; Turpin v. Lemon, 187 U. S. 551; Pierce v. Engelkemeier, 61 Pac. 1046, Okla.; Martin v. Barbour, 34 Fed. Rep. 701; Tracy v. Reed, 38 Fed. Rep. 69; Bannon v. Burns, 39 Fed. Rep. 892; Davis v. Minge, 56 Ala. 121; Oliver v. Robinson, 58 Ala. 46; Radcliffe v. Scruggs, 46 Ark. 96; Townsend v. Martin, 55 Ark. 192; Cooper v. Freeman Lumber Co., 61 Ark. 36; Ramish v. Hartwell, 126 Cal. 443; Dickerson v. Acosta, 16 Fla. 614; Manguiar v. Henry, 84 Ky. 1; Larson v. Dickey, 39 Neb. 463; Roberts v. First Nat. Bank, 8 N. D. 504; Simpson v. Meyers, 197 Pa. St. 522; Salmer v. Lathrop, 10 S. D. 216; State v. Dugan, 105 Tenn. 245; Virginia Coal Co. v. Thomas, 97 Va. 527.

Where property is sold for more than is due, whether the excess is due to an illegal levy or illegal penalties, and costs, the officer has no jurisdiction to sell, and it is void notwithstanding curative statutes. Lufkin v. City of Galveston, 11 S. W. Rep. 340; Treadwell v. Patterson, 51 Cal. 637; Huse v. Merrim, 2 Greenl. 375; Case v. Dean, 16 Mich. 12; Eustis v. Henrietta, 91 Tex. 325; Alexander v. Gordon, 101 Fed. 91; Ensign v. Barse, 107 N. Y. 329; Harper v. Rowe, 53 Cal. 233; Warden v. Brown, 98 Pac. 252, Cal.; Devoe v. Cornell, 10 N. D. 123.

Sale was void because it was made at a time not authorized by statute. Redfield v. Parks, 132 U. S. 239; Coulton v. Stafford, 56 Fed. 569; Rickett v. Knight, 16 S. D. 395; Rush v. Lewis & Clark Co., 95 Pac. 836, Mont.; Hannerkratt v. Hamil, 10 Okla. 219; Magill v. Martin, 14 Kas. 7; Dyke v. White, 17 Colo. 296; Laws 1899, chap. 22, sec. 23.

R. P. Barnes and Hawkins & Franklin for Appellant, by special leave of court.

Curative statutes in tax legislation. Cooley on Taxation, 297; Laws 1897, secs. 4092, 4101; Laws 1899, chap. 22; Ontario Land Co. v. Yordy, 212 U. S. 152; Shipley, v. Gaffner, 93 Pac. 211, Wash.; Keely v. Sanders,

99 U. S. 441; De Treville v. Smalls, 98 U. S. 517; Marx v. Hanthorn, 148 U. S. 172; R. S. U. S., sec. 3224.

Statute of Limitations. Saranac Land & Timber Co. v. Roberts, 177 U. S. 318; Turner v. New York, 168 U. S. 90; Callahan v. Hurley, 93 U. S. 387.

Tax statutes must be construed strictly. French v. Edwards, 13 Wall. 506; Lyon v. Alley, 130 U. S. 184; Rokendorff v. Taylor, 4 Pet. 349; Stead v. Course, 4 Cranch 403; Thatcher v. Powell, 6 Wheat. 119; Early v. Doe, 15 How. 610; Slater v. Maxwell, 6 Wall. 268; Games v. Dunn, 14 Pet. 322; Marx v. Hanthorn, 148 U. S. 172; Moore v. Brown, 18 How. 414.

HARRY H. MCELROY, REED HOLLOMAN, C. C. DAVIDSON and DOUGHERTY & GRIFFITH for Appellee.

In matters of taxation, the federal courts will follow the rulings of the state courts. Bardon v. Land & River Imp. Co., 157 U. S. 327; Ballard v. Hunter, 204 U. S. 241.

Due process of law. King v. Mullens, 171 U. S. 404; King v. West Virginia, 216 U. S. 92; Fay v. Cozer, 217 U. S. 456; Saranac Land Co. v. Comptroller, 177 U. S. 318; Turner v. New York, 168 U. S. 90; DeTreville v. Smalls, 98 U. S. 517; Keely v. Sanders, 99 U. S. 441; Sherry v. McKinley, 99 U. S. 497; Springer v. U. S., 102 U. S. 586; Marx v. Hanthorn, 148 U. S. 184; Castillo v. McConnino, 168 U. S. 684; Witherspoon v. Duncan, 4 Wall. 210; Turpin v. Lemon, 187 U. S. 51; Spencer v. Merchant, 125 U. S. 345; Hiling v. Kaw Valley Railway. 130 U. S. 559; Hagar v. Reclamation District, 111 U. S. 701; Paulsen v. Portland, 149 U. S. 30; Martin v. Barber, 140 U. S. 644; Ontario Land Co. v. Yordy, 212 U. S. 152; Bannon v. Burns, 39 Fed. 895; Marsh v. Fulton Co., 10 Wall. 683; Railroad Co. v. Parks, 32 Ark. 131; Radcliffe v. Scruggs, 46 Ark. 96; Beggs v. Paine, 109 N. W. 327, N. D.; Gwyme v. Neiswander, 18 Ohio 400; Allen v. Armstrong, 16 Iowa 508; Callahan v. Hurley, 93 U. S. 387.

Notice. Railroad v. Commonwealth, 33 L. ed. U. S. 892; Laws 1899, chap. 22.

States as a general rule have the right of determining the manner of levying and collecting taxes. Memphis Gaslight Co. v. Shelly Co. Taxing Dis., 27 L. ed. U. S.; Witherspoon v. Duncan, 18 L. ed. 339; State v. Sponaugle, 43 L. R. A. 727; Railroad v. Kentucky, 29 L. ed. U. S. 414; Williams v. Supervisors, 122 U. S. 154; Keely v. Sanders, 99 U. S. 441; DeTreville v. Small, 98 U. S. 517; Callahan v. Hurley, 93 U. S. 387; Castillo v. McConnico, 168 U. S. 683; Springer v. U. S., 102 U. S. 594; Sherry v. McKinley, et al., 99 U. S. 330; Carson v. Titlow, 80 Pac. 299; State v. Whittesey, 50 Pac. 119, Wash.; Ontario Land Co. v. Yordy, 212 U. S. 152; Trust Co. v. Wall, 106 N. W. 160, Iowa; Sams v. King, 18 Fla. 557; Allen v. Armstrong, 16 Iowa 506; Rima v. Cowan, 31 Iowa 125; Virdin v. Bowers, 55 Miss. 1; In re Douglas, 41 La. Ann. 768; Henderson v. Ellerman, 47 La. Ann. 314; Winning v. Eakin, 28 S. E. 757, W. Va.; Moore v. Byrd, 23 S. E. 968; Turpin v. Lemon, 187 U. S. 551; Doremus v. Cameron, 22 Atl. 802 (N. J.); In re Lake, 40 La. Ann. 142; McMullen v. Anderson, 95 U. S. 37; Saranac Land & Timber Co. v. Roberts, 44 L. ed. 786.

Statute of Limitation. Cooley on Taxation 521; Turpin v. Lemon, 187 U. S. 51.

Construction of statute. New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656; Ontario Land Co. v. Yordy, 53 L. ed. 449; Castillo v. McConnico, 168 U. S. 683; 36 Cyc. 1128; Minnie v. U. S., 13 Pet. 445; C. L. 1897, secs. 4022, 4100; 36 Cyc. 110; U. S. v. Ninety-Nine Diamonds, 139 Fed. 961; Laws 1899, chap. 22; Blackwell v. Bank of Albuquerque, 10 N. M. 561; Territory v. Perea, 6 N. M. 531.

STATEMENT OF THE CASE.

The plaintiff was the owner of certain land in Quay County, title to which the defendant claimed to have obtained through certain tax certificates, followed by a tax deed, all given by the treasurer of said county. This

action was brought by the plaintiff against the defendant to remove the cloud on his title created by said tax deed. In his complaint he set up certain irregularities in the proceedings on which the sale for delinquent taxes, made March 5th, 1906, was based, alleging failure to comply with provisions of law bearing on the question of notice as to all but one, which was the sale of the land for the amount claimed to be due of $4.02, whereas the actual amount levied was $3.78. To the complaint the defendant demurred, alleging that the statutes of New Mexico do not permit a title acquired through a tax certificate issued under Section 31, ch. 22, Laws of 1899, to be attacked or invalidated except on the ground that the taxes, penalties, interest and costs had been paid before the sale, or that the property was not subject to the assessment, and that neither of these two grounds was set up in the plaintiff's complaint. The demurrer was sustained, the plaintiff elected to stand on his complaint and a judgment of dismissal was entered, from which the plaintiff appealed to this court.

The provisions of law which the appellee claims have the effect of limiting the right to attack tax titles, as above stated, are found in Section 25 of the Act above named construed in connection with other sections referred to in the opinion. Section 25 is as follows: "It is hereby made the duty of every person, firm or corporation, owning or having any interest, legal or equitable, in any real estate or other property, in this territory, on the first day of March of any year, to see that such property is properly listed for taxation on the assessment roll for such year in the county in which the same is situated; and if such property is described in the assessment roll and delinquent tax list for any year by such description as will serve to identify the same, the sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in listing the same upon such roll or list either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property

sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest and costs, had been paid before the sale, or that the property was not subject to taxation. In case any tract or legal sub-division of real estate, be sold as hereinbefore provided, upon a part of which the taxes had been paid, such sale and certificate shall nevertheless vest a complete and perfect title in the purchaser and his assigns to such portion of said tract or subdivision upon which the taxes had not been paid."

OPINION OF THE COURT.

ABBOTT, A. J.—Counsel for the appellant claim, in the first place, that Section 25, above quoted, should be restricted in its application to errors and irregularities in listing property for taxation, and was not meant to apply to defects in the assessment, advertisement and sale of land for taxes. The fact that immediately before the words which specifically limit the right of attack, there is a limitation of the effect of irregularities in listing does not, we think, have the effect claimed for it by the appellant. The argument for the opposite effect would be stronger. So far as listing was concerned, it was not to be expected that anything more would be said. The statement on that subject was complete. Besides, the act in question is evidently meant to contain a system of taxation practically complete in itself. The act consists of 34 sections; and while it leaves some portions of the legislation previously in existence unrepealed unless they are in conflict with Chapter 22, the reason for so doing is manifest from the proviso in Section 34: "All acts or parts of acts in conflict herewith, either general or special, are hereby repealed, and this act shall take effect and be in force from and after its passage: Provided, that the provisions of this act shall not affect or be applicable to taxes heretofore assessed or which are delinquent at the date of the approval hereof, except, that suit for the same may be brought and judgment thereon rendered in the manner provided by this act, but the validity of such delinquent

taxes shall be determined by the law in force at the time of making the assessment therefore. The time for the payment of all taxes now delinquent is hereby extended until May 1, 1899, and when the same may be in litigation at the date of the passage of this act until such litigation shall be determined." In view, then, of the comprehensive purpose of the act, of which the language last quoted leaves no doubt, it would be a forced construction which should narrow the application of Section 25 to errors in listing, leaving the much larger field of irregularities in advertising, making sale, giving certificates of sale and tax deeds uncovered.

It is claimed, too, that, even if the limitation on attack found in Section 25 is not restricted to cases of error in listing, yet by the words "sold at tax sale in accordance with this act," it was meant to limit that restriction to those cases in which the provisions for advertisement and sale contained in the act should be strictly followed. We are satisfied, however, that it was meant by this provision to afford deliverance from the evil of having tax sales held invalid for irregularities which were not based on meritorious grounds, an evil which as a matter of common knowledge had assumed such proportions not only in New Mexico, but throughout the country, as seriously to interfere with the fair adjustment of the burden of taxation. As pointed out by the Supreme Court of the United States in De Treville v. Smalls, 98 U. S. 517, Blackwell in his work on Tax Titles states that "of a thousand cases of tax sales in court not twenty have been sustained." That the purpose of the act was what we have suggested is further indicated, as it seems to us beyond question, by the repetition in the act in various forms and connections of the declaration that a tax title shall be good against all but really meritorious objections. In the latter part of Section 23 it is provided that the judgment shall be "conclusive except in cases where the taxes had been paid or the real estate was not liable to the tax or assessment." In Section 25, after the general statement already referred to, as if to make sure there should be no escape from it, there is a provision that, if the taxes had been

paid on a portion of land sold, nevertheless the sale and certificate shall vest a perfect title in the portion on which the "taxes had not been paid." In Section 34 there are provisions for mitigating what might be considered the rigors of the act through leaving the validity of delinquent taxes to be determined by the law in force when the assessment was made, and by extending the time of payment of taxes then delinquent, or in litigation at the passage of the act. This measure of leniency toward defaults already made was superfluous, if no greater degree of strictness was to be exercised toward defaults of the future. Bearing in mind the familiar rule of statutory construction which gives to the legislative intention controlling force, we are satisfied that the words "in accordance with this act"—not, it should be noticed, as having perhaps some significance in accordance with the provisions of this act—mean no more than under or by authority of this act, and that the intention was merely to limit the effect of Section 25 to cases coming under Chapter 22 as distinguished from those to which the provisions of law left unrepealed by it might apply.

Still further, counsel for the appellant contend that one of his reasons stated falls within one of the grounds of attack permitted by the statute (chapter 22), and, that as the tax levied was $3.78 and the sale was for $4.02, the land was not subject to the tax for which the alleged sale was made. It is said in reply that the difference between the two sums named would be covered by the interest and expenses of sale which the law permits the county to add, and such, it seems clear must have been the case. In Drennan v. Beierlein, 49 Mich. 272, Cooley, Jr., it was held, "in the absence of a clear showing to the contrary, that the addition was lawfully made." But, even if it were not, to hold that such a trivial defect invalidated the appellee's title, would be to return to the old way, instead of following the new, in conformity to the spirit and intention of the statute under consideration.

This brings us to the inquiry whether the legislature, having the will, had also the power to so limit the right of attack on a tax title. It is not claimed for the appellee

that such a statutory limitation would stand against fraud or lack of jurisdiction, but they do assert that the irregularities set up in the complaint do not go to the jurisdiction, and there is no claim of fraud made. The irregularities alleged are plainly distinguishable from such as would defeat jurisdiction, as, for instance, that there was no tax laid, or attempted to be laid, on the land in question. Assuming, then, that there is no jurisdictional defect in the case, we have to determine the question of absolute right involved.

It is settled that the owner of real estate on which a tax has been laid is not entitled as a matter of right to have it sold to satisfy the tax. It may be forfeited without a sale. King v. Mullins, 171 U. S. 404; King v. West Virginia, 216 U. S. 92; Fay v. Crozer, 217 U. S. 456; State v. Sponaugle, 45 W. Va. 415, 43 L. R. A. 727. And it has been held by the Supreme Court of the United State, whose decisions are controlling on this court, that, when a sale to collect a delinquent tax is provided for by statute, it may also be provided that the title acquired by such sale shall not be invalidated for irregularities merely, but only on such substantial grounds as that the land was not subject to the tax, that the tax had been paid, or the land redeemed from the sale in the manner provided by law. De Treville v. Smalls, 98 U. S. 517; Keeley v. Sanders, 99 U. S. 441; Springer v. United States, 102 U. S. 586.

It is contended by the appellee that the Supreme Court has, in Marx v. Hanthorn, 148 U. S. 184, overruled the dectrine of the three cases last cited. We do not so understand that decision, but accept rather the view of it expressed by the same court in Castillo v. McConnico, 168 U. S. 684, wherein it is said: "The case of Marx v. Hanthorn, 148 U. S. 172, in no way conflicts with the foregoing considerations. That case came to this court on appeal from a Circuit Court of the United States, and its decision involved ascertaining the meaning of the tax laws of the state as interpreted by the court of last resort thereof. In performing this duty the court adopted and followed the construction given to the tax laws of the state

by the Supreme Court of the state whence the case came." It is also contended for the appellant that, even if the certificate and deed given in pursuance of a judgment under Section 23, of Chapter 22, is protected from attack as in that section provided, yet the certificate and deed given without a judgment under Section 31 should not be held entitled to that protection. In terms the statute gives it the same standing that the certificate following a judgment has. The reason for selling without judgment in any case in which the tax delinquent does not exceed $25 is doubtless that for so small a tax the costs of obtaining judgment would be disproportionate. Bearing in mind that, as we have seen, it is not essential that there should be a sale by parity of reasoning there need be no judgment.

In reaching our conclusion we have not been unmindful of the hardship which may sometimes come upon owners of real estate through the enforcement of such a statute. But the course open to such an owner should, with a very moderate degree of care on his part, protect him from harm. He is presumed to know that his property has been taxed, and the time at which it becomes subject to tax. He has the right of appeal from the assessment to the county board of equalization, and from it to the territorial board. Even if the land is sold, he has the right for three years to redeem it, by paying the tax, interest, etc. The statute provides for similar publication of notice in each case, and it can make no substantial difference to the party delinquent that on a tax of $25 or more he is notified as one of a body of delinquents that at a certain time judgment will be rendered in court against the entire class, or that at a certain time and place his property will be sold for a delinquent tax.

Numerous decisions for and against the view we adopt are to be found in the exhaustive briefs submitted, but, as this decision must stand or fall with our interpretation of what the Supreme Court of the United States has said on the subject, we think it would be useless to go further into the examination of authorities here.

The judgment of the trial court is affirmed.

Mechem, J., having been of counsel in the court below, did not participate.

[No. 1387. September 1, 1911.]

JAMES M'VEIGH, Appellant, v. A. C. VEIG and L. I. SUMMERS & CO., a Co-Partnership, Appellee.

SYLLABUS (BY THE COURT).

1. Objections to an answer that it states inconsistent defenses may not be made by demurrer.

2. Under the statutory provisions declaring improvements to be real estate and that upon sale of real estate for delinquent taxes the owner has the right to retain possession until the expiration of the three years for redemption, improvements upon a mining claim become upon a sale thereof for taxes so associated with the realty as to constitute an incumbrance thereon within the meaning of C. L. 1897, sec. 2304, allowing the holder of an incumbrance to perform the annual labor so as to prevent re-location.

Appeal from the District Court, before M. C. MECHEM, Associate Justice. Affirmed.

E. L. MEDLER for Appellant.

Title to property purchased at tax sale entirely passed to the purchasers. C. L. 1897, secs. 2219, 1560, 1756, 2808, 2304, 4019; Laws 1899, chap. 22; Laws 1889, chap. 25; Laws 1891, chap. 94, sec. 7; 2 Lewis' Sutherland Stat. Con., secs. 422, 428, 431, 432; in re Barre Water Co., 62 Vt. 30; Lyndon v. Stanbridge, 2 N. H. 51; People v. New York & Rd. Co., 84 N. Y. 565; Leinkauf v. Barnes, 66 Miss. 207; Brooks v. Cook, 7 N. W. 217; People v. Illinois Cent. R. R. Co., 6 N. E. 469; State v. Schuchmann, 133 Mo. 111; Bouvier's Law Dictionary; Sessions v. Irwin, 8 Neb. 5; Gardner v. McClure, 6 Minn. 250; Crab v. Young, 92 N. Y. 69.

Inconsistent defenses. C. L. 1897, sec. 2685, sub-sec. 42; 1 Enc. P. & P. 856.

Necessity for reply. 18 A. & E. Enc. 694.

FERGUSSON & CREWS for Appellees.

Improvements on mining claim are part of realty. C. L. 1897, secs. 2304, 4019; 1 Lindley on Mines, sec. 409; 27 Cyc. 511; 32 Cyc. 664; State v. Williams, 35 Mo. App. 541.

Where meaning of statute is doubtful, the construction most agreeable to reason and justice should be adopted. 26 A. & E. Enc., 2 ed. 646; C. L. 1897, secs. 1560, 2304; Watkins v. Eaton, 30 Me. 529.

The consistency or inconsistency of defenses is a question of fact only. 1 Enc. P. & P. 857; 31 Cyc. 150; Citizens Bank v. Closson, 29 Ohio St. 78; C. L. 1897, sec. 2685, sub-secs. 41, 42; Stebbins v. Lardner, 48 N. W. 847; Pom. on Rem. and Rem. Rights, sec. 722; Noonan v. Bradley, 19 U. S. 757; Caldwell v. Ruddy, 1 Pac. 339; 1 Sutherland on Code Pleading, sec. 672.

Points not raised in trial court will not be acted on by appellate court. Chaves v. Lucero, 13 N. M. 368; 31 Cyc. 357; Beal v. Territory, 1 N. M. 507.

The facts are stated in the opinion.

OPINION OF THE COURT.

POPE, C. J.—This cause was disposed of upon the pleadings, which fact makes it necessary to consider these latter so far as here material with some detail. The complaint alleges that McVeigh on January 1, 1908, located certain "vacant and unappropriated public mineral lands" as the Burke mine, the premises being described with particularity in the complaint, that the necessary location work was done, and that the possession of the property had remained in the plaintiff up to the bringing of the suit. It is further averred that the property previous to January 1, 1908, was known as the New Century mine, owned by the Black Peak Gold Mining Company, but that said company failed to do the annual assessment work

for 1907, by virtue whereof the property became subject to the plaintiff's location as above described. There is an allegation that there were valuable improvements consisting of mill and machinery on the property worth $5,000, and that, by virtue of the above-mentioned location, plaintiff became the owner of such improvements. It is further shown by the complaint that the defendant Veig subsequent to the posting of plaintiff's location notice of January 1, 1908, located the claim as the Nil Desperandum mine, and that subsequently, on discovering that plaintiff had previously located said property as the Burke mine, Veig notified plaintiff that he would abandon the Nil Desperandum location, and thereafter did abandon it, having failed to do the necessary preliminary location work, and by failing to file his location notice in the proper office, but that, notwithstanding all this, Veig has caused to be filed in the probate clerk's office of Sierra county a proof of labor upon the said New Century location, falsely certifying that he, Veig, had done the annual assessment work for 1907, whereas in truth and in fact said work was not done, if at all, for the Black Peak Gold Mining Company, but as a mere volunteer, and with the fraudulent design to secure possession of the mining machinery and mill upon the premises, the said Veig pretending to own some interest in said improvements by virtue of a tax sale thereof, the exact nature of which is unknown. Alleging an attempt to remove the machinery, and that Veig while pretending to act for defendants L. L. Summers & Co. was in fact acting for himself, plaintiff prays an injunction against the removal of said mill and machinery, and against the assertion by defendant of any right thereon or to said Burke mine, and prays that the proof of labor may be cancelled as a cloud upon plaintiff's title, and that the latter be quieted and set at rest. The answer of the defendants Veig & Summers Co., are practically the same, each averring Veig to be simply the agent of Summers & Co. The answer while admitting that the plaintiff posted on January 1, 1908, and duly recorded, the location notice pleaded, denies that the necessary location work was done, or that the plaintiff has been in posses-

sion of the claim since January 1, 1908, as alleged, and denies that on January 1, 1908, the mining property in question was vacant unappropriated public mineral land. While admitting that the premises were prior to January 1, 1908, known as the New Century mine and were owned by the Black Peak Gold Mining Company, it denies that the company failed in 1907 to do its annual assessment work, or that said property became forfeited on January 1, 1908. Further elucidating this last allegation, defendant alleges that on November 29, 1907, he acquired at tax sale a tax title to the improvements upon the New Century mine and as described in the complaint, and that, in order to protect said improvements from reverting to the United States, the defendants caused to have seasonably performed the annual labor for 1907, and thereafter did file proof of such labor as alleged in the complaint, and that the notice locating the Nil Desperandum mine was filed by defendants on January 1, 1908, and prior in time to that of plaintiff, and was filed in order to protect their said tax title and the amount paid out for taxes, and to place defendants upon an equal footing with any other locator in case the title covered by the aforesaid tax certificate should prove in any way to be defective. The defendant denies abandoning the Nil Desperandum location, and denies any failure to record the location notice, but admits that he has not as yet (the answer being filed on March 3, 1908) performed the location work under the Nil Desperandum location, averring "that he has no knowledge, information, or belief sufficient to enable him to answer whether or not he has abandoned his claim to said property under said Nil Desperandum mining location and therefore denies that he has abandoned said property under said notice." There is no cross-complaint praying affirmative relief to defendants.

The answers were demurred to upon grounds to be presently discussed. The demurrer was overruled, with leave to plaintiff to reply within twenty days. At the expiration of that time, no reply having been filed, defendants moved for judgment. This motion was sustained, the injunction dissolved, and the complaint dismissed with

costs. Upon this appeal the errors assigned are the overruling of the demurrer and the entry of judgment. This involves a consideration of the grounds of the demurrer. The first ground urged is that there are inconsistent defenses set up. The argument is that the defendants cannot in one breath claim as a defense that plaintiff's location is invalid because the land had not been forfeited by failure to do the assessment work of 1907, and in the very next breath claim as a defense a location made by defendants based upon the existence of such a forfeiture. To this defendants answer that the inconsistency which the law denounces is one of fact—i. e., that a pleader may not present two causes of action or two defenses which involve a contradictory state of facts. In other words, he must be consistent in his claim of fact, but need not be in his positions of law. It is urged that there is no reason why defendants may not aver that there was as a matter of law no forfeiture of the New Century claim because defendants occupied such a relation to that claim in 1907 as to give them a standing to do the annual work for the then owners, and that, on failing to sustain this contention, they may still urge that, even if their work on behalf of the owners in 1907 was insufficient to save the claim from forfeiture, they still have a good defense based upon location made prior to the plaintiff's after the midnight of December 31, 1907.

We find it unnecessary, however, to decide this question for the reason that we do not deem it a matter properly arising upon demurrer. Our Code limits the grounds of demurrer to seven (Compiled Laws, sec. 2685, sub-sec. 35), among which is no ground that inconsistent defenses are asserted. An objection of that character must be raised in another way, such as by a motion to strike out or by motion to require the party to elect. 31 Cyc. 151, 635. Thus it is said in Caldwell v. Ruddy, 2 Idaho (Hasb.) 1, 1 Pac. 339, 340: "An objection that a pleading contains inconsistent allegations or denials cannot be made by demurrer. The grounds upon which a party may demur are specified and enumerated in the statute, and he must be limited to the statutory grounds. That the

pleading contains inconsistent allegations or defenses is not one of these grounds. When this objection exists, it should be taken advantage of by motion to strike out, or require the party pleading to elect between them. The first and second sub-divisions of the demurrer were properly overruled." That this was the rule independent of statute is shown by Noonan v. Bradley, 9 Wall. 394, 402, 19 L. ed. 757, where it is said: "One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent in their averments with each other. The remedy of the plaintiff in such case is not by demurrer, but by a motion to strike out one of the pleas, or to compel the defendant to elect by which he will abide." The ground of demurrer that "several causes of defense have been improperly joined" does not meet a case such as here, where the claim is that the defenses are inconsistent. Budd v. Bingham, 18 Barb. (N. Y.) 496.

The second and principal ground of demurrer is that the doing of assessment work by the owner of improvements upon a mining claim purchased at tax sale does not inure to the benefit of the mining claim, and that the defendants could obtain no interest in the mining claim by reason thereof. The statute provides (C. L., sec. 2304) as follows: "When the owner or owners of any mining claim or claims now located or which may hereafter be located, upon which there shall exist any mortgage, miner's or mechanic's lien, or other incumbrance of any kind which may be hereafter made or incurred shall refuse, neglect or fail, up to the first day of December of any year, to perform thereon the annual labor or make thereon the annual expenditure required by law to be made in order to prevent the same from becoming open to relocation, in such case the holder or owner of such mortgage, lien or incumbrance, may, upon the first day of December of such year or any time thereafter, before any such mining claim or claims shall have been relocated, enter with his or their workmen and employes upon the same and perform, or cause to be performed, the one hundred dollars' worth of labor or make the one hundred dollars' worth of improvements upon such claim or claims as by law re-

quired to be done or made each year in order to prevent such claim or claims from becoming open to relocation."

The pleadings disclose the purchase of the improvements at tax sale in November, 1907. Is a tax title to the improvements an incumbrance upon the mining claim? If so, under C. L., sec. 2304, the assessment work done by Veig for 1907 inured to him; if otherwise, it did not. Statutory provisions as to taxing mining claims are not numerous. C. L., sec. 4019, separates property for general purposes of taxation into two classes—real estate and personal property. The term "real estate" is declared to include "all mines, minerals and quarries," and also improvements, and the latter are defined to include "all buildings, structures, fixtures and fences erected upon or affixed to land whether title has been acquired to said land or not." C. L., sec. 1560, declares, in defining the exemptions from taxation for school purposes, that mines and mining claims "shall pay a tax upon the net product and upon the surface improvements only." Laws 1899, ch. 60, declares the exemption more clearly in the following terms: "That no tax shall be assessed, levied or collected upon any mining claim in this territory, located under the mining laws of the United States, nor upon any shaft or workings therein, until after patent shall have been duly issued therefor by the United States; and for one year thereafter, but nothing herein contained shall be held or construed to exempt from taxation, as now provided by law, the improvements upon any such mining claim, other than the shafts and other workings as aforesaid, nor the net product of any such mining claim."

We deem it clear from the statutes just quoted that the authority in the case of a mining claim is to tax, not the soil, but simply the improvements, and that a sale for taxes carries only the improvements. These latter, however, are under C. L., sec. 4019, real estate, and being classified as such the right to redeem continues under Laws of 1899, chap. 22, for three years from the date of sale, the right of possession remaining during that period in the former owner. It follows therefore that if it was the legislative intent that the holder of a tax title to improve-

ments on a mining claim might not keep up the annual work thereon, our provisions of law for taxing such improvements became perfectly useless. Since such improvements are real estate, they must not be removed until the three year period of redemption has passed, and if the purchaser thereof may not keep up the work on behalf of the owner it would inevitably follow that long before the purchaser ever became entitled to take possession the improvements will have reverted and become forfeited
2 to the government. We think this result could not have been intended by the legislature, and that the word "incumbrance" is broad enough to include a tax sale purchaser conditioned as above stated. This latter is not confined to voluntary lines, for the statute in terms includes those following by operation of law. Nor is it confined to liens at all. It includes servitudes of any character. As was said in Harrison v. Des Moines, etc. R. Co., 91 Iowa 114, 58 N. W. 1081, the term includes any "burden on land, depreciative of its value, such as a lien, easement or servitude which, though adverse to the interest of the land owner, does not conflict with his conveyances of the land in fee." So in 4 Words and Phrases, 3520. Incumbrances are said to be "separated into two classes, (1) such as affect the title to the property, and (2) such only as affect the property's physical condition. A mortgage or other lien is a fair illustration of the former, while a public road or right of way is an illustration of the latter." We think that our statute has, by making improvements real estate, so attached them to the soil that the purchaser thereof has a right that they remain attached to the soil until the expiration of the three years for redemption, and that this right creates an incumbrance within the meaning of C. L., sec. 2304, and that to protect that right the tax purchaser may prevent a reversion to the government by doing the annual work on behalf of the locator.

It follows, therefore, that the assessment work done by defendants in December, 1907, for that year was efficacious to keep the New Century claim alive, and the locations made on the first day of the following January, respective-

ly, by the plaintiff and the defendant were void. Since the defendants in their answer fully set up the above circumstances under which they did the assessment work for 1907, and since these facts which constituted defensive new matter were not traversed by a reply, the trial court was right in ordering a judgment for defendants on the pleadings.

The judgment is accordingly affirmed.

[No. 1407. September 1, 1911.]

JAMES GOODE, MINNIE GOODE, REYES P. MARTINEZ, TELESFORO MARTINEZ, S. VANDERWART, Appellants, v. COLORADO INVESTMENT LOAN COMPANY, Appellee.

SYLLABUS (BY THE COURT).

1. The plaintiff, a Colorado corporation, made the defendants a loan and took a mortgage on real estate situated in this Territory; the mortgage being executed within this Territory. The defendants answered that the plaintiff had not complied with the law of this Territory governing foreign corporations, and had no right to transact business in this Territory: Held, the doing of a single act of business by a foreign corporation does not bring it within section 102, chapter, 79, Laws 1905, providing that: "Every foreign corporation except banking, insurance and railroad corporations, before transacting any business in this Territory shall file in the office of the Secretary of the Territory a copy of its charter." Following Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727.

2. By their contract the plaintiff and defendants agreed that the law of the contract should be the statutes of the State of Colorado. The defendants answered that the contract called for the payment of more than twelve per cent. interest per annum, contrary to Section 2552, C. L. 1897: Held, the allegation did not constitute a defense, the contract being governed by the laws of the State of Colorado.

3. Defendants by their answer allege that they were compelled to employ an attorney to defend the action and a reasonable fee for such attorney is two hundred and fifty dollars: Held, this paragraph was properly stricken, because in the absence of allegation of any agreement, counsel fees cannot be awarded. Following Dame v. Cochiti R. & I. Co, 13 N. M. 10, 79 Pac. 296.

4. By their fourth assignment of error, defendants claim that the court erred in giving judgment for plaintiff: Held, it not appearing from the record that the judgment is fatally defective on account of lack of jurisdiction, we will not consider this assignment of error. Following Neher v. Armijo. 11 N. M. 67.

Appeal from the District Court for Union County, before WILLIAM H. POPE, Chief Justice. Affirmed.

WILLIAM J. EATON for Appellant.

After the issues have been made up a party cannot amend his pleadings as a matter of right. Hoffman v. Rothenberger, 82 Ind. 474; Beall v. School, 1 A. K. Marsh 475, Ky ; 31 Cyc. 397; Century Digest, sec 655.

Compliance with statute must affirmatively appear. Goodwin v. Colorado Mortgage and Investment Co., 28 U. S. 47; C. L. 1897, secs. 445, 2553, 2554; Laws 1899, chap. 77, sec. 1; Laws 1901, chap. 77, secs. 1, 2, 3; Laws 1903, chap. 65, secs. 1, 2; Laws 1905, chap. 79, secs. 102-107.

It is error to strike out an answer which constitutes a good defense and upon which defendant relies. 4 U. S. Digest 4525; Hosey v. Buchman, 10 U. S. 941; 113 N. Y. S. 997; 12 Current Law 1329; Mandelbaum v. Nevada, 19 U. S. 479; Silver Mining Co. v. Taylor, 25 U. S. 541; Marine Ins. Co. v. Hodges, 3 U. S. 200.

In an action by a foreign corporation the plaintiff has the burden of showing, not only the fact of incorporation, but also the statute under which it was incorporated. 3 Encyclopedia of Evidence 595; Savage v. Rus-

sell & Co., 84 Ala. 103; Bank of Alabama v. Simonton, 2 Tex. 531; Gaines v. Bank of Mississippi, 12 Ark. 769; Law Guarantee and Tr. Soc. v. Hogue, 37 Or. 544; Eagle Works v. Churchill, 2 Bosw. N. W. 166; State v. Habie, 18 R. I. 558, 30 Atl. 462; 10 Cyc. 235; 17 Cyc. 401; Taylor v. Riggs, 1 Pet. 591, 7 U. S. L. ed. 275; De Lane v. Moore, 14 How. 253, 14 U. S. L. ed. 409; Fresh v. Gilson, 16 Pet. 327, 10 U. S. L. ed. 982; U. S. Digest, pp. 2893 and 2894; 20 U. S. 867; Rogers v. Durant, 27 U. S. 303; Simpson v. Dall, 18 U. S. 265; Goodwin v. Colorado Mortgage and Investment Co., 28 U. S. 47; Dudley v. Collier, 87 Ala. 433; Farrior v. New England Mortgage Security Co., 88 Ala. 275; Christian v. American Freehold Land Mortgage Co., 89 Ala. 198; Hanchey v. Southern Home Bldg., etc. Assoc., 140 Ala. 245; Chattanooga Nat. Bldg. etc. Assoc. v. Denson, 189 U. S. 408; Cincinnati Mut. Health Co. v. Rosenthal, 55 Ill. 86; Hoffman v. Banks, 41 Ind. 1; Cassady v. American Insurance Co., 72 Ind. 95; State v. Briggs, 116 Ind. 55; G. Heilman Brewing Co. v. Peimeisl, 85 Minn. 121; Ehrhardt v. Robertson, 78 Mo. App. 404; Stewart v. Northampton Mut. Live Stock Ins. Co., 38 N. J. L. 436; Wolf v. Lancaster, 70 N. J. L. 201; Pennington v. Townsend, 7 Wend (N. Y.) 276; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587; New York Nat. Bldg. Assoc. v. Cannon, 99 Tenn. 344; Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 6; Aetna Ins. Co. v. Harvey, 11 Wis. 394; in re Comstock, Sawy., U. S. 218; Cincinnati Mutual Health Assurance Co. v. Rosenthal, 55 Ill. 92; British Columbia Bank v. Page, 6 Or. 431; Hachney v. Leary, 12 Or. 40.

O. P. EASTERWOOD for Appellee.

A party waives the objection to an amendment by pleading or by going to trial thereon, or by otherwise recognizing the amended pleadings. Bryan v. Wilson, 27 Ala. 208; Redman v. Peterson, 41 Am. St. Rep. 204, Cal.; Baldwin Coal Co. v. Davis, 67 Pac. 1041; Jordan v. Indianapolis Water Co., 64 N. E. 680; Miller v. Cavanaugh, 35 S. W. 920; Gryman v. Liebke Harwood Mill

Co., 85 S. W. 946; Willman v. Alabama Brokerage Co., 40 So. 102; Daley v. Ruddell, 70 Pac. 784; Mullin v. McKim, 45 Pac. 416.

The rulings or decisions which effect substantial rights, and on which error is predicated, will not be revised unless appropriate exception to the alleged error was reserved. Binford v. Dement, 72 Ala. 491; Caveny v. Weiller, 90 Ill. 158; Beard v. Parks, 44 Mo. 244; Driscoll v. Downer, 26 N. E. 757; Guthrie v. Fisher, 6 Pac. 111; Bond v. Halloway, 46 N. E. 358; Haines v. Porch, 36 N. E. 926; Petersborough Savings Bank v. Des Moines Savings Bank, 81 N. W. 786; Lott v. Kansas City, etc. R. Co., 21 Pac. 1070; Chapman v. Charleston, 13 Am. St. Rep. 681.

What constitutes doing business on part of foreign corporation. Cæsar v. Capell, 83 Fed. 403; Loan Co. v. Cannon, 96 Tenn. 599; Copper Mfg. Co. v. Ferguson, 113 U. S. 727; Midland Savings and Loan Co. v. Solomon, 79 Pac. 1077; Potter, 5 Hill 490; Graham v. Hendricks, 22 La. Ann. 523; Gates Iron Works v. Cohen, 43 Pac. 670; Insurance Co. v. Rogers, 47 Pac. 849; Hazelton v. Missouri etc. Ins. Co., 55 Fed. 749; Gilchrist v. Helene etc. Ry. Co., 41 Fed. 595; Florsheim Bros. Dry Goods Co. v. Lester, 46 Am. St. Rep. 163; Chase Elevator Co. v. Boston, 28 N. E. 302; Fuller etc. Mfg. Co. v. Foster, 30 N. W. 169; Commercial Bank v. Sherman, 52 Am. St. Rep 812; Steinman v. Midland Savings & Loan Co. et al., 96 Pac. 860; U. S. Savings & Loan Co. v. Shain, et al., 77 N. W. 1077, N. D.; Liverpool & G. W. Co. v. Phœnix Ins. Co., 129 U. S. 397; Trust Co. v. Burton, 43 N. W. 141; Mill Co. v. Bartlett, 54 N. W. 544, N. D.

Damages. Laws 1907, chap. 57, sec. 39.

OPINION OF THE COURT.

MECHEM, J.—This is an action brought by the appellee, hereinafter styled the plaintiff, against the appellants, hereinafter styled the defendants, to foreclose a mortgage on real estate. Judgment for the plaintiff, and defendants appeal.

The appellants assign four errors for our considera-

tion. Of these the first and second are not before us, having been waived.

1. The third assignment of error questions the action of the court below in stricking out the eighth, ninth, tenth, and twelfth paragraphs of defendants' answer. By the eighth paragraph of the answer, it is alleged that the plaintiff had no legal right to sue, for the reason that on the face of the complaint it appeared that plaintiff is a foreign corporation and that it did not appear from said complaint that plaintiff, previous to the execution of the contract sued on, had complied with the laws and statutes of New Mexico governing foreign corporations. Our statute on this subject (section 102, c. 79, Laws of 1905) provides that: "Every foreign corporation except banking, insurance and railroad corporations, before transacting any business in this territory shall file in the office of the Secretary of the Territory a copy of its charter," etc. The phrase "transacting business" has been held to be equivalent to the words "doing business" found in the statutes of many of the states. General Conference of Free Baptists v Berkey, 105 Pac. 411; 156 Calif. 466. The case of Cooper Manufacturing Company v. Fergusson, 113 U. S. 727, disposes of this point in favor of the plaintiff, holding, in effect, that the doing of a single act of business, or performing one transaction, would not be within a statute such as ours. It is on this case we hold that, as far as the record before us shows, the plaintiff had transacted but this one act of business, and therefore paragraph eight of the defendants' answer did not constitute a good defense and was properly stricken.

2. By the ninth and tenth paragraphs of defendants' answer, it was alleged that the rate of interest charged and provided for by the mortgage exceeded twelve per centum per annum and therefore was contrary to Section 2552, Laws of 1897, which provides that: "In written contracts for the payment of money it shall not be legal to recover more than twelve per cent. interest per annum." By the terms of the mortgage and contract between the parties, it was stipulated that the law of the contract should be

the statutes of the State of Colorado. This being so,
2 the laws of the Territory of New Mexico are not applicable to this contract, and the court below was correct in striking the paragraphs of the answer. Steinman v. Midland Saving & Loan Co. et al., 96 Pac. 860; U. S. Savings and Loan Co. v. Shain et al., N. D., 77 N. W. 1006.

3. By the twelfth paragraph of defendants' answer, they allege that they have been compelled to employ an attorney to defend the action and that a reasonable fee for such attorney is two hundred and fifty dollars. This paragraph, also, was properly stricken. Dame v. Cochiti Rd. & Imp. Co., 13 N. M. 10; 79 Pac 296, in which it was held that: "In the absence of any allegation and
3 proof of an agreement to pay counsel fees, such fees cannot, unless especially provided for by statute, be awarded as costs or otherwise."

4. By their fourth assignment of error, the defendants say that the court erred in giving judgment for plaintiff in the sum of $819.60. There appears from the record to have been no exception taken to the judgment, or to the findings of fact or conclusions of law of the referee appointed herein, upon which judgment was found. As there appears to be nothing in the record which shows
4 that the judgment is fatally defective on account of a lack of jurisdiction, we will not consider the assignment of error in this case. We have held, in the cases of Neher v. Armijo, 11 N. M. 67, 66 Pac. 517, and De Baca v. Wilcox, 11 N. M. 352, 68 Pac. 922, that "We will not examine a record, unless exceptions have been taken and the errors complained of called to the attention of the trial court. This is the general rule, subject to the exception that this court will notice, without exception or presentation, jurisdictional and other matters which may render a case inherently and fatally defective and require a reversal." For the foregoing reasons, the judgment of the lower court is affirmed.

[No. 1410. September 1, 1911.]

TERRITORY OF NEW MEXICO, On the Relation of JACOB J. ARAGON, Appellant, v. THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, Appellee.

Appeal from the District Court for Lincoln County, before EDWARD R. WRIGHT, Associate Justice. Affirmed.

FRANK W. CLANCY, Attorney General, and T. B. CATRON for Appellant.

Laws 1909, Chapter 80, never was lawfully enacted. Field v. Clark, 143 U. S. 671; State v. Howell, 26 Nev. 98; State v. Swift, 10 Nev. 183; Sherman v. Story, 30 Cal. 256; Pangborn v. Young, 32 N. J. L. 42; Speer v. Plank Road Co., 22 Pa. 377; A. T. & S. F. R. Co. v. Sowers, 213 U. S. 63.

Laws 1909, Chapter 80, is special and local legislation. Springer Act; People v. Supervisors, 43 N. Y. 16; Matter v. Henneberger, 155 N. Y. 424; People v. O'Brien, 38 N. Y. 193; Ferguson v. Ross, 126 N. Y. 464; Closson v. Trenton, 48 N. Y. 439; Com. v. Patten, 88 Pa. St. 260; Davis v. Clark, 106 Pa. St. 260; McCarthy v. Com., 110 Pa. St. 246; Montgomery v. Com., 91 Pa. St. 125; Devine v. Commissioners, 84 Ill. 591; State v. Herrman, 75 Mo. 346; Scowdens App., 96 Pa. St. 424; Klokke v. Dodge, 103 Ill. 125; State v. Judges, 21 Ohio St. 11; Strange v. Dubuque, 62 Iowa 205; South on Stat. Const., secs. 127, 128, 129; Smith's Com., secs. 595, 596; Sedg. Const. Law 32; Potters Dwarris on Stat. 355; ex-parte Westerfield, 55 Cal. 552; Desmond v. Dunn, 55 Cal. 251.

No petition as required by law asking for the removal of the county seat had been presented and the board of county commissioners had no authority to order an election on the petition which was presented. C. L. 1897, sec. 630; South on Stat. Cons., 2 ed., secs. 565, 572; Ball v. Lasting, 71 Ga. 678; St. Paul R. R. Co. v. Phelps, 26 Fed. 569; Swan v. Jenkins, 82 Ala. 478; Tally v. Grider, 66 Ala. 122; Lanier v. Padgett, 18 Fla. 843; McKinney

v. Commissioners, 26 Fla. 264; Zeiler v. Chapman, 54 Mo. 305; State v. Woodson, 67 Mo. 336; State v. Albin, 44 Mo. 349; People v. Kopplekom, 16 Mich. 342; Nefzger v. Railway, 36 Ia. 644; State v. Piper, 17 Neb. 618.

The election was void because there was no registration of voters therefor. C. L. 1897, secs. 630, 709.

JOHN Y. HEWETT and ANDREW H. HUDSPETH for Appellee.

It will be presumed that an act found among the published laws was constitutionally enacted. Ill. Central R. R. Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 Ill. 91; State v. Wray, 109 Mo. 594.

Want of certificate not fatal. McDonald v. State, 80 Wis. 407; Cottrell v. State, 9 Neb. 125; Leavenworth County v. Higginbotham, 17 Kas. 74; Taylor v. Wilson, 17 Neb. 88.

Laws 1909, Chapter 80, not local nor special. People v. Squires, 107 N. Y. 593; 13 A. & E. Enc., 1 ed. 984; Chavez v. Luna, 5 N. M. 831; Lyon v. Wood, 5 N. M. 327; 153 U. S. 649.

No registration is required by C. L. 1897, sec. 1702, except before a general election. This section, enacted in 1889, clearly repeals, by implication, Section 1709, passed in 1869, as it covers the whole subject of the older statute and was intended as a substitute therefor. U. S. v. Tynen, 11 Wall. 88; Bartlett v. King, 12 Mass. 545; Commonwealth v. Cooley, 27 Mass. 37; Tracy v. Tuffy, 134 U. S. 206; U. S. v. Barr, 4 Sawyer 254; Swan v. Buck, 30 Miss. 268; School Dist. v. Whitehead, 13 N. J. Eq. 290; Roche v. Jersey City, 11 Vroom 262.

Form of petition. Gray et al. v. Taylor, et al., 15 N. M. 742; State v. Tracey, 48 Minn. 499; State ex rel. Gibbs v. Summer's Point, 10 Atl. Rep. 377, N. J.; People v. North Chicago Ry. Co., 88 Ill. 537; Knowlton v. Shomo, 167 Mass. 424.

OPINION OF THE COURT.

PARKER, J.—This is an appeal from a judgment of the District Court of the Sixth Judicial District, sitting

in and for the County of Lincoln, dismissing the petition for a writ of quo warranto secured upon the relation of appellant. The case involves no point which has not been heretofore thoroughly considered by this Court in the case of Gray et al v. Tayler, et al, 15 N. M. 742, 113 Pac. 588, and the judgment of the lower court upon the authority of that case is affirmed, and it is so ordered.

[No. 1397. December 6, 1911.]

W. D. M'BEE, Appellee, v. PAT O'CONNELL and MRS. PAT O'CONNELL, Appellants.

SYLLABUS (BY THE COURT).

1. An acknowledgment of a deed, or other writing, affecting real estate, by the party whose real estate is affected, in the manner established by statute, is a necessary prerequisite to its being recorded under Section 3953, C. L. 1897.

2. An executory contract for the sale of real estate is, when duly executed and acknowledged, a writing entitled to record within the meaning of Section 3953, C. L. 1897.

3. An acknowledgement of an assignment on the back of an executory contract for the sale of real estate to which the assignment refers for particulars and purposes of description is not, under the circumstances given in the following statement of the case, an acknowledgment of the contract itself; and although the contract was copied into the land records by the proper recording officer, that did not make it of record, and thereby constructive notice to a subsequent purchaser having no actual knowledge of it.

Appeal from the District Court for Curry County, before WILLIAM H. POPE, Chief Justice. Reversed and remanded.

C. L. REESE for Appellant.

Instrument without proper acknowledgement is not entitled to be recorded. C. L. 1897, secs. 3953, 3955, 3945, 3947; Martindale v. Price, 14 Ind. 115; 1 A. & E. Enc.,

2 ed. 540; 1 Cyc. 581; Early Times Distilling Co. v. Zeiger, 11 N. M. 221; Jacoway v. Gault, 73 Am. Dec. 494, Ark.; First National Bank v. Baker, 62 Ill. App. 154; Gill v. Fauntleroy, 47 Ky. 177; Ross v. McLung, U. S. L. ed. 400; Meddock v. Williams, 12 Ohio 387.

Executory contracts for sale of real estate are not entitled to be placed of record. C. L. 1897, secs. 3953, 3955; Early Times Distilling Co. v. Zeiger, 11 N. M. 221; 24 A. & E. Enc. Law, 2 ed. 81; Mesick v. Sanderland, 6 Cal. 297.

Partnership. 22 A. & E. Enc., 2 ed. 177; Rocky Mountain National Bank v. McCaskill, 26 Pac. 821, Colo.; McGahon et al v. National Bank of Rondout, 39 L. ed. U. S. 403; Williams v. Bowers, 15 Cal. 321; Kimo v. Bullitt, 22 How. 256, 16 L. ed. 313, U. S.; Winship v. Bank, 5 Peters 529, U. S.

Agent need not have written authority to make written contract for his principal unless the contract is required to be under seal. 31 Cyc. 1227; Worrall v. Munn, 55 Am. Dec. 330, N. Y.; Antrim Iron Works v. Anderson, 112 Am. Rep. 434, Mich.; Jasper v. Wilson, 14 N. M. 482; Kird v. Hamilton. 102 U. S. 68.

Plaintiff in ejectment must have a legal title to recover against a defendant in possession under color of title. Salazar v. Longville, 5 N. M. 548; Maxwell Land Grant Co. v. Dawson, 7 N. M. 133; Deas v. Sammons, 7 A. & E. Ann. Cases 1124; 15 Cyc. 18, 64; Hockett v. Alston, 49 C. C. A. 180; Carter v. Ruddy, 166 U. S. 493; Moody v. Farr's Lessee, 33 Miss. 192.

Variance between allegations and proof. Huntington v. Jewett, 95 Am. Dec. 788, Iowa; 15 Cyc. 115; Seaton v. Son, 32 Cal. 481; Tarply v. Desert Salt Co., 14 Pac 338.

R. E. Rowells for Appellee.

Contract was entitled to record. C. L. 1897, secs. 3952, 2954, 3945, 3947; Garton et ux. v. Hudson Kimberly Pub. Co., 58 Pac. 946; McCormick v. James, 36 Fed. Rep. 14.

Substantial compliance with form of acknowledgement

prescribed in C. L. 1897, sec. 3945, is all that is necessary. McCormick v. James, 36 Fed. Rep. 14; Huse v. Ames, 15 S. W. 965; Hughes v. Powers, 42 S. W. 1; Early Times Distilling Co. v. Zeiger, 11 N. M. 221; Gill v. Fauntleroy, 47 Ky. 177; Ross v. McLung, 8 L. ed. 400, U. S.

Ejectment. Laws 1907, chap. 107; C. L. 1897, secs. 3160-3164, 3168, 3169; Jones v. Hollister, 32 Pac. 1115, Kas.; Solomon v. Yrisarri, 9 N. M. 480; Jennings v. Brown, 94 Pac. 557; Probst v. Trustees, 3 N. M. 373; Harrison v. Gallegos, 13 N. M. 1; Duendro v. O'Hara, 86 Pac. 985, Cal.; Deemer v. Falkenburg, 4 N. M. 149; Coles v. Meskeman, 85 Pac. 67, Ore.

STATEMENT OF THE CASE.

This is an action in ejectment in which the plaintiff seeks to recover from the defendants possession of certain land, in Clovis, Curry County, with damages for its detention. In his complaint, the plaintiff alleged that he was the owner in fee of the real estate in question and that he had "the legal estate in fee simple and the equitable estate in and to" the same, and that on or about September 1, 1908, the defendants wrongfully entered and ousted him from the premises and "still unlawfully withhold possession from him." The plaintiff's claim of ownership is based on an executory contract of sale and purchase of the land in question between the Santa Fe Land Improvement Company and J. M. Ray, made June 27, 1907, and an "assignment" by Ray to the plaintiff made October 3, 1907. By the agreement the Company named undertook to convey the real estate to Ray by a warranty deed within a specified time after performance by him of the terms of the agreement on his part. At the time of the assignment above named, the time for performance had not expired.

The assignment, it would seem, was written on the back of the contract referred to and does not purport to be an assignment of the contract itself, but instead of "all right, title, interest and claim in and to the within described lot or parcel of land" to the plaintiff, and an authorization to the Improvement Company to make con-

veyance to him on performance of the requirements of the contract. A certificate of acknowledgement was appended in these words:

"Territory of New Mexico, Roosevelt County.—ss.

"Before me, the undersigned, a notary public in and for said County and————this day came J. M. Ray, who is personally known to me to be the same person who acknowledged the within contract, and the foregoing assignment thereof, and he duly acknowledged the execution of said assignment.

"Given under my hand and seal, this 3rd day of October, A. D. 1907. Commission expires June 11, 1911. (Signed) John D. Cameron. (Seal)."

The assignment was endorsed by the proper officer as received for record December 3, 1907, and it, together with the contract, itself was copied into the county land records as of that date. There was no evidence that the defendants had actual knowledge of either the contract or the assignment. They claimed by subsequent purchase from J. M. Ray. The trial court held: "The defendants bought subject to the plaintiff's rights since the contracts under which the latter held and the assignment of the same were duly recorded. These affected real estate, were properly recorded under C. L. 3652-4, and thus carried legal notice to subsequent purchasers. The decree will accordingly go for plaintiff." And judgment was entered accordingly. From that judgment the defendants appeal to this court.

OPINION OF THE COURT.

ABBOTT, J.—Of the several errors assigned by the defendants, only two need be considered since they are decisive of the case. Indeed, one of them alone is, we think, conclusive, but the other is so connected with it, and of such importance that it cannot be properly disregarded. It is contended for the appellants that the executory contract on which the plaintiff's claim is based, is not an instrument entitled to record under Section 3953, C. L. 1897, as a "writing affecting the title to real estate." Strictly speaking, such a contract does not affect the title to real estate in the sense that it affects a present change

in it, and it has sometimes been held that such instruments were not entitled to record unless under express statutory provision. Vol. 24, Am. & Eng. Enc. 80. But, while the language of Section 3953, supra, is, as above stated, "affecting the title to real estate," yet, further on in the section the words, "the real estate affected," are used, and like expressions are found in other sections dealing with the subject, Sections 3931, 3943, 3944, 3945, 3947, 3952, 3953, 3964, 3968, 3969, 3970. Section 3953 uses both forms, and 3956 the former only. It seems probable therefore that the legislative intention was not to distinguish between "real estate" and the "title to real estate," which are, in fact, quite different things, but to use the expression interchangeably, and give to the
2 latter the broader meaning, which, perhaps, properly attaches to the former only, and thus to include the class of writings to which the contract in question belongs. In the brief for the appellants our attention is called to a case decided by this court, Early Times Distillery Co. v. Zeiger, 11 N. M. 221, in which the opposite view was expressed. The statement was in the nature of a dictum, and did not, we think, commit the court to that opinion of the law.

Statutory provisions, similar to those here involved, have been given a broad construction by courts of high standing. Lewis v. Johnson, 68 Tex. 448, 4 S. W. 644, and cases cited; Morrison v. Brown, 83 Ill. 562; Minn. Land & Tim. Co. v. Ford, and cases cited, 58 Fed. Rep. 452 (Eighth Circuit, opinion by Sanborn, Justice). But even if it was in itself a writing within the scope of Section 3953, and the acknowledgement was sufficient in form, which the appellants deny, it must still be held that the contract was not, in the legal sense of the word, "recorded." Very early in the legislative history of the Territory provision was made for greater formality and certainty in the transfer of real estate. In 1852, it was enacted that "Any person * * * holding any right or title to real estate * * * * may convey the same in the manner and subject to the restrictions prescribed in this act." That now appears in Section 3939, C. L. 1897. In the same act,

where what now appear as Sections 3942 and 3943, is as follows: "Section 3942. All conveyances of real estate shall be subscribed by the person transferring his title or interest in said real estate, or by his legal agent or attorney." Section 3943: Every instrument in writing by which real estate is transferred or affected, in law or equity, shall be acknowledged and certified to in the manner hereinafter prescribed." Section 3943 has since been superseded by the provisions in Chapter 62, of the Laws of 1901, *infra*. The sections 3953 and 3954 providing for record and making it constructive notice were enacted in 1887. Section 3955 was part of the same act, namely: "From and after the 1st day of January, 1888, no deed, mortgage or other instrument in writing, not recorded in accordance with Section three thousand nine hundred and fifty-three, shall affect the title or rights to, in any real estate, of any purchase or mortgage in good faith, without knowledge of the existence of such unrecorded instruments." In 1889, a form of acknowledgement was provided, by which the one making it declares the instrument acknowledged to be his or her "free act and deed," which simply carries out the meaning of the word "acknowledgement." Vol. 1, A. & E. Enc., 507 . And by Chapter 62, Section 18, Acts of 1901, it was expressly provided that an unacknowledged instrument of writing, "though filed and placed of record," should not "be considered of record." It is obvious from these provisions, taken together, and, indeed, we do not understand it to be questioned by counsel for the appellee,

that the person making a transfer of any right or in-
1 terest in real estate, must acknowledge the instru-
ment by which the transfer is made, before an officer authorized by law to take such acknowledgements, and that until it has been so acknowledged it cannot lawfully be recorded. It is, however, claimed for the appellee that the acknowledgement by Ray appended to the assignment, included the contract, to which the assignment referred. But it was limited specifically and pointedly to the assignment, since it refers to Ray as the one who executed the "contract and assignment" and who "acknowledged" the "assignment." And what right or power had Ray to make the

acknowledgement, even if he had attempted to do it? It was not his real estate to which the writing related. It has been held (Chicago etc. R. Co. v. Lewis, 53 Iowa 101) that both parties to a lease of real estate, containing mutual agreements, should acknowledge it; but it can hardly be that the one who is, by executory contract, to receive an interest in real estate, can acknowledge it as his "free act and deed." But, as we have seen, Ray did not undertake to do that. How, then, can it be said that the contract was recorded? It is obvious that something more than merely copying the contents of a writing into the land record
3 books is necessary to make it properly of record. Any writing picked up in the street might be so copied by any one who could get access to the books. The recording officer himself might spread upon the records by mistake, as we think happened in this case, a writing not entitled by law to record. There can be but one true test, and that is to be found in the terms of the law prescribing what may be recorded. An unacknowledged writing does not meet the test of our statute. If a writing not entitled to record, can be made of record, through including it by reference or a description in another instrument, which the maker can entitle to record, the way is open for fraudulent practices, a way to have recorded writings whose makers purposely refrained from acknowledging them, and meant not to have them recorded, a way, in fact, to nullify the safeguard which the provision for acknowledgement was meant to attach to the transfer of real estate. Such a conclusion is not required or warranted, we think, by the statutory provisions on the subject to which we have referred.

The judgment of the District Court is reversed, and the cause remanded.

Frank W. Parker, A. J., dissents.

[No. 1401. December 6, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. OSCAR F. CHENEY, Appellant.

SYLLABUS (BY THE COURT).

1. An order of a District Court denying a motion for a change of venue, will not be reversed by this court unless the record shows an abuse of discretion, which, in this case, it does not.

2. The instructions to the jury by the trial court, on the right of self-defense, as affected by appearances from the defendant's standpoint, were appropriate and sufficient when taken together.

Appeal from the District Court for Roosevelt County, before WILLIAM H. POPE, Chief Justice. Affirmed.

G. L. REESE and T. E. MEARS for Appellant.

Change of venue. Territory v. Taylor, 11 N. M. 595; Laws 1882, chap. 9; C. L. 1897, secs. 2879, 2881-2884; Territory v. Leary, 8 N. M. 180; Territory v. Gonzales, 11 N. M. 447; Rules of Practice for District Courts No. 7; Anschicks v. State, 45 Tex. 148; Lady Franklin Min. Co. v. DeLaney, 4 N. M. 56; People v. Yoakum, 53 Cal. 566; Lowry v. Hogue, 85 Cal. 600.

Instructions as to self-defense. 11 Enc. P. & P. 116; Wharton on Homicide, 3 ed., secs. 227, 286; Grainger v. State, 26 Am. Dec. 278, Tenn.; People v. Lennon, 71 Mich. 298; Wharton's Criminal Law, 10 ed., secs. 489-491; State v. Miller, 73 S. C. 277; Logue v. Commonwealth, 38 Pa. St. 265; Tillery v. State, 24 Tex. App. 251; Thompson v. State, 87 A. S. R. 453; Horne v. State, 81 Am. Dec. 499; Territory v. Pridemore, 4 N. M. 275.

FRANK W. CLANCY, Attorney General, for Appellee.

Change of venue. Territory v. Emilio, 14 N. M. 147; Territory v. Gonzales, 11 N. M. 315; Territory v.

Leary, 8 N. M. 182. Instructions must be taken as a whole. Pinkerton v. Ledoux, 3 N. M. 410; Territory v. Garcia, 12 N. M. 98; U. S. v. Densmore, 12 N. M. 106; Territory v. Livingston, 13 N. M. 327.

Instructions as to self-defense. Brickwood's Sackett on Instructions, secs. 3101-3108.

OPINION OF THE COURT.

ABBOTT, J.—The appellant was found guilty of murder in the second degree, by the District Court of Roosevelt County, in March, 1911, and judgment was entered accordingly, from which he appealed to this court. The essential facts appear in the opinion. The errors assigned in behalf of the appellant are, first, that there was an abuse of discretion by the trial court in refusing him a change of venue; and, second, that the instructions to the jury were not such as he was entitled to have given. The course which should be followed in the district courts on an application for a change of venue has been established by decisions of this court. Territory v. Emilio, 14 N. M. 147; Territory v. Gonzales, 11 N. M. 315-318; Territory v. Leary, 8 N. M. 182. The witnesses produced in support of the application should be examined in court, as to knowledge and interest, and if the presiding judge is of the opinion that their testimony does not establish the grounds of the motion, he should deny it. Ordinarily this court will accept the decision of the trial judge as to the sufficiency of the testimony, without examination of the evidence itself. Yet when it is claimed that there was an abuse of discretion by the trial court, this court should determine from the record whether the claim is well founded. In the present case, the testimony of the two witnesses produced in behalf of the defendant, shows that they did not claim to know the state of public feeling towards the defendant throughout the County of Roosevelt, but only in certain limited parts of it, and even if they were right in believing that such prejudice against him existed in those places, that unbiased persons for his trial could not be obtained from them, it still might be that fair jurors could be obtained

from other parts of the county as to which there was no evidence. The record wholly fails to show any abuse of discretion by the trial court.

Counsel for the appellant quote in their brief certain instructions given to the jury, which, they say, "made the jury the judge of the necessity to kill in self-defense," regardless of "the appearance of danger from the defendant's standpoint," and of "whether or not he acted in an honest fear of his life or great bodily harm." It is true that some of the instructions as quoted, contain no reference to that feature of the law, but in other instructions it was fully covered. In one given at the defendant's request occurs this language: "The court instructs you that a person acting in the lawful defense of himself, need not be in actual imminent peril of his life or of great bodily harm before he may slay his assailant; it is sufficient if, in good faith he has a reasonable belief, from the facts as they appear to him at the time, that he is in such imminent peril." And instruction 37 is as follows: "I charge you, however, that all that is said here on the subject of self defense is subject to the following principles: The law is, that if a person is assaulted in such a way and under such circumstances as to produce in the mind of a reasonable person a belief that he is in actual danger of losing his life or suffering great bodily harm he will be justified in defending himself although the danger be not real, but only apparent. Such a person will not be held responsible criminally if he acts in self defense from real and honest fear as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the real danger." It is usually not practicable to cover all the points of such a case by a single instruction, and it has
2 been repeatedly held by this court that instructions should be construed together. Pinkerton v. Ledoux, 3 N. M. 410; Territory v. Garcia, 12 N. M. 98; U. S. v. Densmore, 12 N. M. 106; Territory v. Livingston, 13 N. M. 327. The other errors assigned do not require specific discussion. The judgment of the District Court is affirmed.

[Nos. 1309, 1310. December 8, 1911.]

THE RIVERSIDE SAND & CEMENT MANUFACTURING COMPANY, Cross Appellant and Appellee, v. E. F. HARDWICK et al, Cross Appellees and Appellants.

SYLLABUS.

1. Verdict and findings of jury reached upon conflicting evidence present no question for review by this court.

2. Assignment not argued in the briefs will not be considered.

3. There is no limit to the number of placer claims which may be located by one person or association of persons.

4. No claim of surprise and no application for continuance being presented appellants cannot complain on appeal of action of trial court in permitting reply to be filed to the answer during the progress of the trial.

5. Monuments found upon the ground at the corners of a placer claim may be adopted by the locator as his own and will meet the requirements of marking on the ground by substantial monuments.

6. The principle that no valid location can be made of land in the actual adverse possession of another can have no application in the case at bar.

7. Pleadings not having put in issue the question of publication of articles of incorporation and return of proofs to the Secretary of the Territory, the court did not err in refusing to give requested instruction requiring the jury to find that all the formalities of law had been complied with in regard to the organization of the appellee corporation.

8. The fraud of locating by means of dummies is a fraud upon the government and the government alone can complain.

Appeal from the District Court of Chaves County.

before WILLIAM H. POPE, Chief Justice. Judgment entered for Appellee.

RICHARDSON, MCCLURE and HEFLIN for Appellants.

Unless the verdict is specific in finding that the plaintiff has a right to the land by reason of an absolute compliance with the requirements of the law, it will operate to reverse a judgment based thereon. Gwillin v. Donnellan, 115 U. S. 50; Burke v. McDonald, 33 Pac 49.

Claim was not marked by four substantial posts. Laws 1899, chap. 57, sec. 1; 2 Thompson on Trials, sec. 2295; Bates v. Hearte, 82 Am. St. Rep. 187.

Bona fide entry. Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673; Bolk v. Meager; 104 U. S. 287; Atherton v. Fowler, 96 U. S. 513; Durant v. Corbin, 20 Morrisson's Mining Reports 8794.

Dummy entries. Durant v. Corbin, 94 Fed. 382; Gird v. California Oil Co., 18 Morrison's Mining Rep. 45, 60 Fed. 531; Mitchell v. Cline, 24 Pac. 164.

REID & HERVEY for Appellee and Cross Appellant.

Findings warranted by evidence. Green v. Browne & Manzanares Co., 11 N. M. 658; Robinson v. Palentine Ins. Co., 11 N. M. 162; Territory v. Hicks, 6 N. M. 596; Rodey v. Travelers Ins. Co., 3 N. M. 543.

Valid Location. Gwillin v. Donnellen, 115 U. S. 50; Berke v. McDonald, 33 Pac. 49; Richmond Mining Co. v. Rose, 114 U. S. 576.

If a defendant shall go to trial as though a reply by way of traverse were in, he shall be deemed to have waived it. Shirts v. Irons, 28 Ind. 458; Irvinson v. Van Riper, 34 Ind. 148; Wilson v. Fuller, 9 Kas. 177; Hopkins v. Cochran, 17 Kas. 173; McAllister v. Howell, 42 Ind. 15; Foley v. Alkire, 52 Mo. 317.

The existence of a corporation is admitted by a plea to the merits in an action by a corporation. 3 Enc. Ev. 614; West Winsted Savings Bank and Bdg. Association v. Ford,

27 Conn. 282; St. Louis Smelting etc. v. Kemp, 104 U. S. 651.

In an action for ejectment forfeiture on the part of plaintiff must be specially pleaded if relied upon by defendant. Steel v. Gold Lead Mining Co., 18 Nev. 80.

Government alone can complain of lack of good faith in locators of placer claim. 1 Lindley on Mines, sec. 450; Davis v. Dennis, 85 Pac. 1079, Wash.; McKinley Creek Mining Co. v. Alaska United Mining Co., 183 U. S. 563; Martin's Mining Law, sec. 96; Billings v. Smelting Co., 51 Fed. 338; Manuel v. Wulff, 152 U. S. 507; Snyder on Mines, sec. 267; Costigan on Mining Law, sec. 47; Tornances v. Melsing et al, 109 Fed. 710; Wilson v. Triumph, etc. Co., 75 Am. Rep. 718.

Where a locator on a mining claim includes within his boundary line a greater area of surface than he is permitted to hold under the statute, he is entitled, nevertheless, to hold the limit which the law authorizes, and only the territory in excess of these limits embraced within his boundaries is to be rejected. Richmond Mining Co. v. Rose, 114 U. S. 576; Walton v. Wild Goose M. & F. Co., 123 Fed. 209. Glacier Mountain Silver Mining Co. v. Willis, 127 U. S. 471; Martin's Mining Law, secs. 128, 129; MacIntosh v. Price, 121 Fed. 716; Zimmerman et al v. Fudion et al, 161 Fed. 859.

One person may locate a mining claim entirely for another. U. S. Rev. Statutes, sec. 2319; Schultz v. Keeler, 2 Idaho 333, 568; McCullouch v. Murphy, 125 Fed. 147; Dunlap v. Pattison, 4 Idaho 473; Murley v. Ennis, 2 Colo. 300; Moore v. Hamerstag, 109 Cal. 122; Martin's Mining Laws, secs. 100-103.

OPINION OF THE COURT.

PARKER, J.—The Riverside Sand and Cement Manufacturing Company, appellee, brought an action of ejectment to recover the possession of a placer mining claim called the Chieftain No. 1, resulting in a verdict and judgment for the possession of only a portion of the same. The appellants, Eugene F. Harwick and others, the defendants below, took an appeal to this court. The plaintiff below and

appellee here also sued out a cross-appeal from the judgment. Both of these appeals will be considered together.

1. The first five assignments of error by appellant cannot be considered by this court. They relate to the verdict and findings of the jury which were reached
1 upon conflicting evidence. Under such circumstances they present no question for review by this court.
2 Melini & Eakin v. Friege & Bro., 15 N. M. 455. The sixth assignment is not argued in the briefs and will, therefore, not be considered.

2. The seventh assignment is directed to the refusal of the court to admit in evidence the location notice of the Chieftain No. 2, another placer claim adjoining the Chieftain No. 1. This was offered by appellant for the avowed purpose of showing abandonment by the locators of the Chieftain No. 1, that location being prior in point of time to the Chieftain No. 2. The argument seems to be based upon the assumption that a person or association of persons can locate only one placer claim and that the location of a second claim works a forfeiture of the first. We are unable to follow the argument. There was no conflict in area of the two claims. Counsel cite no authority in support of their position, except Brown v. Gurney, 201 U. S. 184, which, it will be seen from an examination of the case, has no application. The mere location of a second placer claim bears no such relation to the first location, under the facts in this case, as to be relevant to the question of abandonment. Besides, there is no limit
3 to the number of claims which may be located by one person or association of persons. I Lindley on Mines, sec. 450. The location notice was, therefore, properly excluded.

3. The eighth assignment is directed to the action of the court in permitting reply to be filed to the answer during the progress of the trial. The complaint pleaded a location of the Chieftain No. 1 placer claim. The answer denied the validity of the Chieftain No. 1 location and pleaded a valid location of the Excel Placer Claim, under which appellants claimed. The proof tendered by appellants went into detail upon both points and shows that

appellants either assumed that the allegations in the answer were put in issue without reply, or, at least, appellants were in no way surprised by the filing of the reply. No reliance by appellants was put upon the manner of replying and the consequent admission of the allegations of the answer. The reply simply denied rightful possession and ownership in the appellants, as alleged in the answer. No claim of surprise was made to the court and no application for continuance was presented. Under such circumstances we cannot understand how appellants were prejudiced or can complain of the action of the court.

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4. Complaint is made in the ninth assignment of the court's fifth charge to the jury in which he instructed them that monuments found upon the ground at the corners of a placer claim may be adopted by the locator as his own and will meet the requirements of marking on the ground by substantial monuments. Appellants complain of the instruction on two grounds. They first say that it contains an erroneous assumption of facts as to the existence of such monuments. The instruction, however, contains no assumption of fact whatever and is an abstract statement of the law without any specific application to the facts in the case on trial. That the instruction was applicable to the case is perfectly apparent from an inspection of the testimony in which the existence of such monuments is mentioned. Further objection is made to the instruction because of the principle announced that monuments found on the ground may be adopted by the locator. No authority is cited in support of the contention and the same is so contrary to the uniform current of authority as to require no discussion.

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5. In the tenth assignment it is urged that because when the Chieftain No. 1 was located a portion of the ground was being worked by other persons, the location was therefore unwarranted. The principle that no valid location can be made of land in the actual adverse possession of another is invoked and the principle is not disputed by counsel for appellee. It does not appear, however, that the entry was by way of intrusion upon

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the actual possession of another. Who and what these persons were who were working the ground, whether they made any claim to the same or had any rights therein, does not appear. The location of appellants bears no relation to them or other persons on the ground, so far as appears. Under such circumstances the principle invoked can have no application.

6. A sufficient answer to the twelfth assignment to the effect that the court erred in refusing to give requested instruction No. 5 requiring the jury to find that all the formalities of law had been complied with in regard to the organization of the appellee corporation, is to say that even if proof of the corporate existence was necessary after plea to the merits, the articles of incorporation
7 were introduced in evidence and the pleadings in no way put in issue the question of subsequent publication of the articles and return of proof to the Secretary of the Territory. This disposes of all of the contentions of appellants.

7. Appellee, upon its cross-appeal, complains of the rulings and instructions of the court which permitted appellants to submit to the jury the question as to whether two of the locators of the Chieftain No. 1 placer claim, under which appellee claims, were not mere accommodation locators having no interest in the location and conveying without consideration to the appellee. The objection is based upon two grounds. First, it is urged that such an issue is not within the pleadings and, second, that the fact, if true, of the use of two persons as "dummies" in the location of the Chieftain No. 1 is not available to appellants and is a matter in which the government alone is interested and of which it alone can take advantage. Appellants seek to justify the action of the court in submitting the question to the jury upon the authority of Durant v. Corbin, 94 Fed. 382; Gird v. Cal. Oil Co., 60 Fed. 531; and Mitchel v. Cline, 24 Pac. 164. In the first two cases there was an application for patent and the actions were in support of adverse claims. This fact, doubtless, was overlooked by the trial court and the distinction between that class of cases and ordinary contests between

individuals was overlooked. The case of Mitchell v. Cline, supra, was a case where, after patent, a suit for partition was instituted and it was sought to charge one of the entrymen as trustee for the benefit of the others as to a portion of the title. The court held that as all of the entrymen had perpetrated a fraud upon the government by the use of "dummies" in making the location, a court of equity would refuse relief and would leave the parties where it found them, all in accordance with a well recognized equitable principle. This case, as well as the case of Gird v. Cal. Oil Co., supra, and many other cases, point out that the fraud of locating by means of "dummies" is a fraud upon the government and not upon the citizen
8 who might wish to locate. The fraud, being a fraud upon the government, it would seem clear that the government alone can complain. 1 Lindley on Mines, sec. 450. The question as to how advantage can be taken of the disqualification of a locator has often arisen in connection with locations by aliens. Some earlier cases admitted the relevancy of the question of citizenship, but the law has been finally settled that the government alone is concerned and the same is not relevant in a contest between individuals except in adverse proceedings wherein the government is a silent party. I Lindley on Mines, sec. 234; McKinley Creek Mining Co. v. Alaska U. S. Co., 183 U. S. 563; Formanses v. Melsing, 109 Fed. 710; Wilson v. Triumph Co., 75 Am. St. Rep. 718. It follows that the trial court was in error in submitting to the jury the question of the qualification of the locators of the Chieftain No. 1.

Appellee moved for judgment non obstante veridicto, which should have been granted. This court, however, has the power to enter judgment and the same will now be entered for the possession of all of the Chieftain No. 1 placer mining claim as described in the record. And it is so ordered.

Roberts, A. J., not having heard the argument did not participate.

[Nos. 1355-7. December 8, 1911.]

RAFAEL TAGLIAFERRI, Appellee and Cross Appellant, v. CAESAR GRANDE, Appellant and Cross Appellee.

SYLLABUS (BY THE COURT).

1. A description in a written instrument calling for an acequia as a boundary carries title, (in the absence of some words clearly importing a different intention) to the center of such acequia.

2. Testimony tendered considered and held to constitute no such evidence of estoppel as would render it admissible.

3. Testimony erroneously received will not, in a case disposed of by the court upon peremptory instruction to the jury, be deemed a ground of reversal unless it appears that the court considered such in reaching its conclusion.

4. Muniments of title, prior to that immediately into the party having use for such at a trial, are presumptively in the possession of the persons to whom made and such presumption of fact stands prima facie as a sufficient showing, justifying the use of the record of such title papers, under Compiled Laws 3965, allowing the use of the record where the original is not in the hands of the party wishing to use it.

5. That the court erroneously declined upon defendant's motion to order an election as to which of the two counts plaintiff would proceed upon, is harmless where a verdict resulted against defendant as a matter of law upon one count and no judgment went against him as to the other.

6. Where a proceeding is rendered nugatory by reason of the fact that the judgment as rendered below fails to embody a conclusion of law inevitably resulting from the case as presented, but which is necessary to effectuate the proceeding, this court will modily the judgment below by inserting such conclusion and will affirm the judgment as so modified.

Appeal from the District Court for Bernalillo County,

before IRA A. ABBOTT, Associate Justice. Affirmed as modified.

NEILL B. FIELD for Defendant and Appellant.

Allegations of two counts of complaint are inconsistent. Budd v. Bingham, 18 Barb. 496; Bigelow v. Gove, 7 Cal. 133; Bliss on Code Pleading, sec. 412; Shipman on Pleading 211.

It was error to admit record of a power of attorney without preliminary proof required by statute. C. L. 1897, secs. 3965, 4010-4014; Kirchner v. Laughlin, 6 N. M. 300; Freeman on Judgments, secs. 415, 416; 4 Wigmore on Evidence, par. 2425; Dewitt v. Berry, 134 U. S. 306; Steamboat v. U. P. Co., 109 U. S. 681; Bryan v. Swain, 56 Cal. 616; Jones v. Wood, 16 Pa. St. 25; Davenport v. Whisler, 46 Ia. 287; Slocum v. Bracy, 55 Minn. 249.

The facts offered to be shown, if true, constituted a complete defense to the plaintiff's right of action, and the evidence when offered could not properly be excluded. Chaves v. Myer, 13 N. M. 368; Clark v. Ross, 96 Iowa 408; Meyer v. McLean, 2 John. 183; Express Co. v. Hunnicutt, 28 Am. Rep. 387; 2 Wigmore Ev., sec. 1082; Denton v. Perry, 5 Vt. 382; Waterman v. Johnson, 13 Pick. 261; Tomlin v. Cox, 19 N. J. L. 76; Townsend v. Johnson, 3 N. J. L. 279; Horner v. Stillwell, 35 N. J. L. 307; Ten Eyck v. Runk, 26 N. J. L. 513; Padgett v. Lawrence, 10 Paige's Chancery 170; Crafts v. Hibbard, 45 Mass. 438; Kellogg v. Smith, 61 Mass. 375.

Boundary did not extend to center of ditch. Hardin v. Jordan, 140 U. S. 371; St. Louis v. Rutz, 138 U. S. 242; U. S. v. Rio Grande Irrigation Co., 174 U. S. 698; C. L. 1897, secs. 52, 53; Barney v. Keokuk, 94 U. S. 338; Bishop v. Seeley, 18 Conn. 389; Morgan v. Bass, 14 Fed. 454; Carter v. R. R. Co., 53 Am. Rep. 116; Warner v. Sputworth, 6 Conn. 471; Canal Co. v. Edwards, 36 Conn. 476; Goodyear v. Shanahan, 43 Conn. 204.

That construction should be adopted which will effectuate the intention of the parties. Agawan Canal Co. v. Edwards, 36 Conn. 476; Goodyear v. Shanahan, 43

Conn. 204; Proctor v. Railroad Co., 96 Me. 458; Hall v. Davis, 36 N. H. 569; Prentiss v. Brewer, 86 Am. Dec. 730; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586; Fitch v. Baldwin, 17 Johns. 161; Herse v. Questa, 91 N. Y. Supp. 778; Cutler v. Callison, 72 Ill. 113; Hubbard v. Stearns, 86 Ill. 35; McNamara v. Seaton, 82 Ill. 498; Smith v. Hamilton, 20 Mich. 433; Rydalch v. Anderson, 107 Pac. 25; Wells v. Jackson Co., 47 N. H. 235; Sanborn v. Clough, 40 N. H. 316; Colby v. Collins, 41 N. H. 304.

Plaintiff has not shown that he was ever in possession of the strip of land which was actually in controversy. C. L. 1897, sec. 8; Laws 1903, p. 176; Harrison v. Gallegos, 13 N. M. 9; Dunbar v. Green, 198 U. S. 166; Hardy v. Johnson, 1 Wall. 373; Bergere v. Chaves, 14 N. M. 363.

A sale of land by a disseisee in New Mexico is void. 4 Kent. Com. 446; Brinley v. Whiting, 22 Mass. 347; Peck v. Heurich, 167 U. S. 624; Gant v. Hunsicker, 55 Am. Dec. 413; Thalheimer v. Brickeroff, 15 Am. Dec. 321.

Where a motion for new trial is not filed in time, the appellate court will not review the action of the trial court. Schofield v. Slaughter, 9 N. M. 422; Hendry v. Cartwright, 13 N. M. 384; Armijo v. Armijo, 181 U. S. 558.

MARRON & WOOD for Plaintiff, Appellee and Cross Appellant.

Boundary was in center of acequia. Boston v. Richardson, 13 Allen 154; 3 Washburn on Real Property, 5 ed. 452; Tiedeman on Real Property, secs. 833, 836, 838; Warner v. Southworth, 6 Conn. 471; Morrison v. Keane, 3 Me. 474; Dunkley v. Wilton R. Co., 24 N. H. 489; Causler v. Henderson, 64 N. C. 469; Warren v. Gloversville, 80 N. Y. Sup. 912; 4 A. & E. Enc. 832; C. L. 1897, secs. 17, 52, 53.

Evidence offered irrelevant as to issue of estoppel. Brown v. Brown, 30 N. Y. 541; 3 Washburn on Real Property 80.

Complaint properly joined counts of ejectment and

trespass. C. L., sec. 2485, sub-secs. 33, 39; Lockhart v. Wills, 9 N. M. 359; Bendlenthal v. St. Ry. Co., 43 Mo. Ap. 463; Rece v. Edwards, 131 U. S., 25 L. ed. 976; 3 Cyc. 383; Pierce v. Strickler, 9 N. M. 344.

Establishing either legal title or prior possession was sufficient to maintain action. Tiedeman on Real Property, secs. 827, et seq.; Brander v. Leddy, 67 Cal. 43; Armijo v. N. M. Co., 3 N. M. 244; Bradshaw v. Ashley, 180 U S. 59; Hill v. Braper, 10 Barb. 458; Zillmer v. Gerichten, Cal., 43 Pac. 408; Plume v. Seward, 4 Cal. 94; 60 Am. Dec. 599; 15 Cyc. 30, 37.

Where the verdict of the jury is proper and the judgment is irregular, the court on appeal will modify the judgment to conform to the verdict and affirm the case. Merrinan v. Knight, 54 Pac. 656; 3 Cyc. 428; Laws 1907, chap. 57, sec. 38.

STATEMENT OF THE CASE.

Tagliaferri, the appellee, sued Grande, the appellant, upon a complaint combining two causes of action. The first was upon an action in the nature of trespass *quare clausum fregit* for six hundred dollars damages, actual and punitive, in having wilfully, wantonly and maliciously broken into and entered upon certain real estate in the City of Albuquerque belonging to plaintiff, in having dug holes therein and set stakes and posts thereon. The second cause of action was in ejectment to recover possession of the premises. The premises are described in the complaint as follows: A parcel of land situated west of Broadway in the City of Albuquerque, New Mexico, and bounded on the north by lands owned or occupied by Mrs. Brault, on the south by lands of Estevan Jaramillo, on the east by Broadway in said city, and the west by the acequia of Barelas, the west boundary being the center of the said ditch or acequia of Barelas. The trespass and custer are each laid on April 13, 1908, and the action was filed on February 17, 1910. The defendant answered, in substance denying plaintiff's allegations and alleging affirmatively certain facts to be later discussed, as constituting estoppel against plaintiff's claim. Issue was joined on

this latter and the cause was tried to a jury. At the inception of the trial, and also upon the conclusion of plaintiff's case, defendant moved that plaintiff elect upon which count he would proceed but this motion was denied by the court. Upon the conclusion of all the testimony each side moved for a peremptory instruction in its favor, there being a mutual disclaimer that the case under the proofs admitted presented any issue for the jury. By direction of the court the jury returned the following verdict: "We, the jury, by direction of the court, find the issues in the above cause for the plaintiff, and that he is entitled to the premises described in the complaint, to-wit: "A parcel of land situate west of Broadway in the City of Albuquerque, New Mexico, and bounded as follows: On the north by lands owned or occupied by Mrs. Brault; on the south by lands of Estevan Jaramillo; on the east by Broadway in said city; on the west by the Acequia of Barelas, and assess his damages for their detention and the trespass at the sum of One Dollar ($1.00)." The defendant moved for a new trial on numerous grounds, which motion was denied. Plaintiff moved for such a judgment on the verdict as would embody the declaration of the complaint that the west boundary was at the center of the ditch or acequia of Barelas, which motion was also denied. From a judgment literally conforming to the verdict in its description of the property, both parties have appealed.

OPINION OF THE COURT.

POPE, C. J.—(After making the foregoing statement of facts:)—The present controversy turns substantially upon a single question, where was plaintiff's west boundary? Defendant and plaintiff held under one Gentile, a common grantor. Plaintiff's right of possession flowed from a muniment of title superior in point of time to defendant's. His contract of sale from Gentile, evidenced by two memoranda, was dated Jonuary 20-23, 1905. He made an initial payment and was placed in possession immediately and on June 20, 1909, he received a deed according to the description of his contract from the Jesuit Society, successor in title of Gentile. Each of

these descriptions conformed strictly with that embodied in the verdict, giving the west boundary as the Acequia of Barelas. Intermediate between plaintiff's contract and deed, Gentile made defendant a deed, dated January 3, 1907, covering land just west of plaintiff's property but giving as the east boundary simply the land of grantor, Gentile. There is no contention that defendant was not fully aware when he took his deed, as to the extent of plaintiff's paper title and the case at bar resolves itself largely into a question of the meaning of the words, "on the west by the Acequia of Barelas." Plaintiff contends that the legal import of these is the center of the ditch or acequia. Defendant, on the other hand, claims that this is not the rule as to artificial water courses, especially in view of our local legislation as to ditches, and that under all the circumstances of the case it was permissible to show, as in the case of ambiguous boundary calls, that the real west boundary was orally understood between Gentile and plaintiff, after the making of the memoranda of January 20-23, 1905, to be along a certain line a few feet east of the acequia embankment, the marking of which by defendant by the erection of a fence in 1908, constituted the trespass and ouster upon which plaintiff declares. Defendant says that this fence line must, under the circumstances, be deemed the definition of where "the Acequia of Barelas" was, and thus the west boundary of plaintiff's land. The trial court concurred in plaintiff's contention that the boundary was at the middle line of the ditch and rejected oral proof on the subject as tending to vary the terms of the muniments of title. The court's ruling brings up two questions; first, as to the legal import of the boundary call and, second, as to the admissibility of the oral proofs in alleged elucidation thereof. The rule is general that where a natural object having extension is named as a boundary, the line runs to the middle of the object. This has been repeatedly held as to non-navigable rivers and lakes and also trees. The rule has also been extended to artificial objects of like character to those above stated, although in the case of objects, such as houses, where the support of the soil even to the center of the earth is an

clement of the tenure, the line stops at the beginning of the object, agreeably to the principle that with the ceasing of the reason of the rule the rule itself ceases. The reason for the general rule is found not only in the consideration last named, but in the further fact that it affords a definite and convenient rule by which to ascertain and know boundaries and also prevents an anomalous condition where the soil underlying natural objects would be invariably left to the ownership of the public rather than to abutting property owners. The reasons thus applying to natural objects and water courses impress us as applicable equally to an artificial object, such as a ditch. The rule is stated in 3 Washburn on Real Property (5th ed.) 452, 453, quoting from Boston v. Richardson, 13 Allen 154, as follows: "Whenever land is described as bounded by other land, or by a building, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the lot granted." That this principle extends to artificial objects such as ditches, is stated in 5 Cyc. 901, in the following language: "The owner of land lying upon canals, ditches, or mill-races will usually take to the center thereof in the absence of a clear showing to the contrary in the grant or conveyance from which such owners derive their title." Likewise in 4 A. & E. Ency. (2nd ed.) 832, is found the following language: "The rule in regard to lands bounded on a non-navigable stream applies also to lands bounded upon artificial watercourse, as a canal, a ditch, or such like. In either case the presumption is that the adjoining land owner has title to the center of the

stream." The text in each instance is supported by ample authority. We find nothing in the cases cited by appellant, McManus v. Carmichael, 3 Ia. 1, and Bishop v. Seeley, 18 Conn. 389, to disturb our confidence in this as the true rule both upon reason and upon authority. Nor do we find anything in our acequia statutes, as embodied in C. L., sec. 8, as amended by Laws 1903, p. 176, and in C. L., secs. 52, 53, to make the rule different in this territory. While the right of way occupied by the ditch pertains to it for all purposes necessary to its use, the fee, subject to this, remains in the owner of the land bounding upon it. Our legislature has recognized this rather than the contrary in its provision, C. L., sec. 17, to the effect that, "All plants of any description growing on the banks of said ditches or acequias shall belong to the owners of the land through which said ditches or acequias run."

We deem it, therefore, the law of this jurisdiction that
1 a boundary call for an irrigating ditch goes, in the absence of some contrary intent manifested in the instrument, to the middle of the ditch.

The foregoing to a large extent disposes of the tender of testimony on this point by defendant, but as this is relied upon in the answer also as a ground of estoppel, we consider it from that point of view. It was sought to prove on the trial that when plaintiff Tagliaferri first attempted to construct a kitchen upon the lot in question, the mayor domo of the acequia requested him to move it back from the ditch to the line subsequently marked by the fence and that plaintiff did so, all this being in 1905. It was also sought to show that at some date between the contract of sale and the date of the deed, plaintiff was on the ground with Father Capilupi, the attorney in fact for the owner Gentile, and that Father Capilupi pointed out to plaintiff the west boundary of the land which had been sold him, the boundary being the line of the fence above mentioned, and that Tagliaferri agreed to that as the west boundary of the land and afterwards accepted the deed with knowledge of that boundary. Each of these tenders of testimony was rejected, both on cross examination of plaintiff and when offered as a part of defendant's

own case. We are of opinion that the testimony was properly rejected in each instance. What passed between the mayor domo and plaintiff as to the extent of the right of way for ditch purposes was manifestly of no relevancy as fixing the rights of plaintiff and defendant. Nor can any higher effect be given what passed between Gentile's agent and plaintiff. The latter, at the time of the alleged conversation, had a contract from Gentile by which he had bought a lot going to the acequia, which we have held to mean the center thereof. A mere oral agreement upon no consideration to take a more restricted piece of land would not be efficacious even between the parties. Later a deed from the Jesuit Society, the successor of Gentile, into which all these prior conversations and other transactions must be deemed merged, reiterated that plaintiff's rights were in legal effect to the center of the ditch, so that from that angle the oral agreement sought to be established would have had no effect as between plaintiff and Gentile. If not of any relevancy as between them, much less as between plaintiff and Grande. The latter is not shown even to have known of this at the time he bought in 1907, nor, indeed, is it shown to have occurred before he bought. From the standpoint of an estoppel, there-
2 fore, it lacks material elements to constitute it of any materiality, and the trial court was right in rejecting it as proof in the cause.

Complaint is made of the admission of a number of items of testimony. Illustrations of these are the assignment that the judgment in Capilupi v. Doe, was erroneously received, that the court improperly permitted the witness Ogle to testify to matters of hearsay and that it improperly allowed a map made by him to go to the jury. It seems sufficient to say as to most of these that a careful examination of the record fails to show that the testimony, if improperly received, was prejudicial. The case having gone off upon an instruction of the court for a peremptory verdict no testimony improperly received is to be deemed prejudicial unless it manifestly en-
3 tered into the consideration of the court in making such disposition of the cause. Radcliffe v. Chaves,

15 N. M. 258. It is further to be observed that, discarding these items of evidence from consideration as elements of proof, the decision of the court was still manifestly correct. One assignment of error in the admission of evidence, however, calls for especial mention, this being the claim that the power of attorney from Gentile to Father Capilupi was erroneously received. This assignment, if well taken, is a serious one since plaintiff's muniments were executed by Capilupi on behalf of Gentile and if the former was not duly authorized thereto the plaintiff's case, which must stand by its own strength, must fall. The complaint is that the court admitted the record of the power of attorney in the office of the probate clerk, without requiring proof that the original was not in the hands of plaintiff. It is urged that this was error, since Compiled Laws, sec. 3965, admits the record only where "it be proved to the court that said writing is lost or that it is not in the hands of the party wishing to use it." The power of attorney in question, however, was not only to Capilupi to do this particular act, but a general authority to act for Gentile in matters connected with real estate in Bernalillo county. Its presumptive custody at the time of the trial was, therefore, not with plaintiff, but with Capilupi and this presumption of fact, in the absence of something rebutting it, stood as a compliance with the statutory requirement as to preliminary proof. This we understand to be the holding of Probst v. Presbyterian Church, 129 U. S. 182, 187, and it is followed as controlling authority.

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It is further urged that the court below erred in not requiring plaintiff to elect as to the cause of action upon which he would proceed. It is said that the actions of trespass and of ejectment are absolutely inconsistent in that one proceeds upon the theory of injury to the possession and the other upon the absence of possession. Appellant cites Budd v. Bingham, 18 Barb. 496, and Bigelow v. Gore, 7 Cal. 133, in support of his contention. On the other hand, appellee contends that the doctrine insisted upon has no place under our code system allowing actions arising out of the same transaction or con-

nected with the same subject of action to be united. C. L. 2685, sub-sec. 33. We find it unnecessary to
5 decide this, however, for the reason that the refusal of the court to order an election was entirely without prejudice to appellant. At the close of the proofs plaintiff announced that he did not insist upon a recovery under the first count and the instructed verdict, while not in terms limited to the ejectment count, was in effect so limited since it ran simply for the possession of the premises and nominal damages of one dollar, resulting from the successful issue of the claimed possession. No damages were allowed on the trespass count. It would be entirely useless, therefore, to order a new trial because of the court's retaining a count upon which there was no finding against appellant. It cannot even be urged that defendant was prejudiced, by the presence of both counts, in defending against each before the jury for, as we have seen, the case became purely one of law and was determined without the jury's considering it. To the final contention of appellants, that plaintiff should not have recovered because he held by deed to property in the adverse possession of a person other than his grantor, it need only be said that the facts of the case do not show a sale by a disseisee, and it thus becomes unnecessary to determine whether the English Statute of Champerty (32 Henry VIII) is in the respect here asserted in force in New Mexico.

There remains for determination the point made upon cross-appeal that the court should, in entering judgment, have defined the west boundary as named in the verdict so as to show that it went to the center of the acequia. That this is the legal effect of the description, is pointed out above. That the judgment as rendered fails to embody this very point at issue is mutually conceded.
6 There should be an end of litigation. In conferring upon this court the power to give such judgment other than reversal or affirmance "as to it shall seem agreeable to law," (Laws 1907, ch. 57, sec. 38), it was the evident legislative intent that litigation should not be rendered ineffectual simply because of an inadvertance

of form in the judgment brought up. To remand the case because of this would avail nothing since upon the law the plaintiff must recover. The duty is therefore plain that this court should modify the judgment below by adding after the description therein contained the words "the western boundary being the center of said ditch or acequia of Barelas," and that the judgment as so modified stand affirmed. It is accordingly so ordered, appellant to pay the costs.

[No. 1356. December 8, 1911.]

FIRST NATIONAL BANK OF ALBUQUERQUE, Appellee, v. J. H. HAVERKAMPF, (J. A. Miller, Trustee in Bankruptcy), Appellant.

SYLLABUS.

1. Each error relied upon must be separately assigned.

2. A finding supported by a substantial preponderance of evidence will not be disturbed on appeal.

3. The doctrine of absolute fraud arising in a mortgage on merchandise, from the mortgagors retaining possession with the power of disposal in the usual course of trade, is contrary to sound principles of jurisprudence.

4. The failure to record mortgage promptly does not constitute a fraud in law as to subsequent creditors.

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

MARRON & WOOD for Appellant.

Mortgage not recorded was fraudulent in law and void as to creditors. Blennerhassett v. Sherman, 105 U. S. 100; Waite on Fraudulent Conveyances, sec. 235; Clayton v. Exchange Bank, 121 Fed. 630; Code Ga. 1895, secs. 2724, 2727; Bunch v. Schaer, 48 S. W. 1071; Curtis v. Lewis, 50 Atl. 878; 2 Kent's Com. 523, 14 ed.; 26 Enc. 662; Ruggles v. Cannedy, Cal., 53 Pac. 911; Kit-

chen v. Shuster, 14 N. M. 164; 5 Enc. 1014; 25 Enc. 130; re Noel, 137 Fed. 694; re Bothe, 173 Fed. 597; C. L. 1897, sec. 3960; Post v. Berry, 175 Fed. 564; Nickell v. Tracy, 184 N. Y. 386; Bonell v. Griswell, 89 N. Y. 322; Bank v. Stewart, 14 N. M. 551; in re Shirley, 112 Fed. 301; re Hunt, 139 Fed. 283; re Roeser, 148 Fed. 975; Clayton v. Exchange Bank, 121 Fed. 630.

The mortgagee takes no legal title to after-acquired property. 5 A. & E. Enc. 979; Jones on Chattel Mortgages, 3 ed. secs. 138, 154, 155, 164; Jones v. Richardson, 10 Met. 481; Gardner v. McEwen, 19 N. Y. 123; Chase v. Denny, 130 Mass. 566; McCaffrey v. Woodin, 65 N. Y. 459; 14 A. & E. Enc. 268; Zartman v. Bank, 189 N. Y. 267.

Transfers which at common law are void as to creditors are void as to trustees in bankruptcy. Security Warehousing Co. v. Hand, 206 U. S. 415; Rev. Stat. Wis. 1898, sec. 2313; Thompson v. Fairbanks, 196 U. S. 516; York v. Cassell, 201 U. S. 344; in re Economical Printing Co., 110 Fed. 514; Skelton v. Codington, 185 N. Y. 80; Bank v. Staake, 202 U. S. 141; Humphreys v. Thalman, 198 U. S. 95.

A judgment and execution are unnecessary to enable a creditor to attack a fraudulent transfer. Early Times Distillery Co. v. Zeiger, 9 N. M. 31; Grunsfeld Bros. v. Brownell, 12 N. M. 192; Case v. Beauregard, 11 Otto 688; 20 Cyc. 692; Bank v. Wetmore, 124 N. Y. 241; in re Beckman, 177 Fed. 161.

Execution was before bankruptcy. In re Boyer's Estate, 52 Pa. St. 432; Hunt v. Swaze, 55 N. J. L. 33; Clark v. Duke, 59 Miss. 575; Alrichs v. Thompson, 5 Harr., Del. 432; Hockman v. Hockman, Va., 57 A. S. R. 816.

If the mortgage be declared invalid as to any creditor, then it is void as to all creditors. Ilfeld v. Baca, 13 N. M. 32; Edwards v. Brokerage Co., 74 Mo. Ap. 621.

The possession of the receiver is the possession of the court and not of any party to the litigation. Wiswall v. Sampson, 14 How. 52; Fosdick v. Schall, 99 U. S. 235; 23 A. & E. Enc. 1042; Miller v. Jones, 15 N. B. R. 150;

in re Gourney, 7 Biss. 414; 86 Fed. 35; 21 Enc. 589; Gratz v. L. & R. I. Co., 82 Fed. 381; in re Ducker, 134 Fed. 43; in re Carney, 53 Fed. 927; 19 Enc. P. & P. 538; 1 Jones on Mortg., sec. 580; 21 Enc., 2 ed. 589; White v. McGarry, 47 Fed. 420; Stout v. Richard J. Carney Co., 53 Fed. 527; Miles v. Blanton, 3 Dana, Ky. 525; Carr v. Callaghan, 3 Litt. 371.

FELIX H. LESTER and HERBERT F. RAYNOLDS for Appellee.

An assignment of error must point out the specific error complained of. Melini et al. v. Friege et al., 15 N. M. 455; Territory v. Clark, 13 N. M. 61; U. S. v. Irrigation Co., 10 N. M. 635; Pearce v. Strickler, 9 N. M. 467; Schofield v. Territory, 9 N. M. 526; Territory v. Guillen, 11 N. M. 194; Cevada v. Miera, 10 N. M. 62; Mogollon G. & C. Co. v. Stout, 14 N. M. 245; McRae v. Cassan, 15 N. M. 496; Territory v. Anderson, 4 N. M. 213; Territory v. Cordova, 11 N. M. 367.

Findings of the trial court supported by any substantial evidence will not be disturbed on appeal. Candelaria v. Miera, 13 N. M. 360.

Mortgage was free from fraud in law and in fact. Clayton v. Exchange Bank, 121 Fed. 630; Bank v. Lesser, 10 N. M. 700; Kitchen v. Schuster, 14 N. M. 176; Ilfeld v. Baca, 13 N. M. 38; Foster v. McAllister, 114 Fed. 152; Bank v, Frank, 63 Ark. 16; Schultz v. Hoagland, 85 N. Y. 464; Bank v. Stewart, 14 N. M. 551; in re Shirley, 112 Fed. 301; Rev. Stat. Ohio, sec. 4150; in re Hunt, 139 Fed. 283; Jones on Chattel Mortgages, 5 ed., secs. 241, 243; Rogers v. Page, 140 Fed. 597; Valleley v. Bank, 116 A. S. R. 700; in re Antigo Screen Door Co., 123 Fed. 249; Sawyer v. Turpin, 91 U. S. 114; York v. Cassell, 201 U. S. 344; Hewitt v. Berlin Machine Co., 194 U. S. 296; 14 A. & E. Enc. 269; Bump on Fraudulent Conveyances, sec. 33.

The trustee takes no greater interest in, nor title to, the property of the bankrupt than the bankrupt or his creditors had at the time his title accrues. 5 Cyc. Bank-

ruptcy 347; in re Economical Printing Co., 110 Fed. 514; Loveland on Bankruptcy, 3 ed. 438; Security Warehousing Co. v. Hand, 206 U. S. 415; Hewitt v. Berlin Machine Works, 194 U. S. 296; in re Kellogg, 112 Fed. 54; 118 Fed. 1017; in re Platteville Foundry & Machine Co., 147 Fed. 828; Loveland on Bankruptcy 589; Meyer Bros. Drug. Co. v. Pitkin Drug Co., 136 Fed. 396; Humphrey v. Tattman, 198 U. S. 91; Muller v. Nugent, 184 U. S. 1; York Mfg. Co. v. Cassell, 201 U. S. 344; Thompson v. Fairbanks, 196 U. S. 516; in re Pierce, 157 Fed. 755.

The failure to record a mortgage does not invalidate it as between the mortgagee and the trustee in bankruptcy. Peabody v. Landon, 61 Vt. 318; Dooley v. Pease, 180 U. S. 126; Thompson v. Fairbanks, 196 U. S. 516; in re Wright 96 Fed. 187; Loveland on Bankruptcy 586; in re Ducker, 134 Fed. 43; in re Garcewich, 115 Fed. 87; in re Great Western Mfg. Co., 152 Fed. 123; in re International Mahogany Co., 147 Fed. 147.

Recording Acts of New Mexico make no mention of creditors and they are not protected thereby. C. L. 1897, secs. 75, 2953, 2361, 3953, 3955, 3960; Laws 1876, chap. 36, secs. 1, 2, 3; C. L. 1884, secs. 1586, 1587, 1588; Laws 1889, chap. 73; Webb on Record of Title, sec. 10; Ilfeld v. Baca, 13 N. M. 32; Kitchen v. Schuster, 14 N. M. 164; Runyan v. McClellan, 24 Ind. 165; Kirkpatrick v. Caldwell, 32 Ind. 147; 16 A. S. R. 381; Mann v. State, 116 Ind. 383; Emmons v. Pence, 78 Ind. 439; Hutchinson v. First National Bank, 133 Ind. 271; Loveland on Bankruptcy, 3 ed. 438; Collier on Bankruptcy, 6 ed. 555; Jones on Chattel Mortgages, 5 ed., secs. 237, 325, 364, 356; Rogers v. Page, 140 Fed. 596.

Unless the words of the statute are so broad as to manifestly include creditors at large, only those are regarded as creditors who obtain a lien by judgment, attachment or otherwise before an antecedent debt or mortgage is recorded. Ilfeld v. Baca, 13 N. M. 32; Bump on Fraudulent Conveyances, secs. 450, 451, 536; 6 Cyc. 1104; People's Bank v. Bates, 120 U. S. 556; Noyes v. Ross, 75 A. S. R. 557; Fulsum v. Peru etc. Co., 69 Neb. 316; Union

National Bank v. Oium, 44 A. S. R. 533; in re Shirley, 112 Fed. 301; Vallely v. First National Bank, 14 N. D. 580; McNeil v. Finnegan, 23 N. W. 540, Minn.

Possession under mortgage by mortgagor in absence of agreement to the contrary is permitted by New Mexico statute. C. L. 1897, sec. 2365.

Filing and recording of a mortgage under the registration act has the same effect as taking possession by the mortgagee. Jones on Chattel Mortgages, secs. 236, 243.

Evidence properly admitted. Lynch v. Grayson, 5 N. M. 488.

Execution and delivery of mortgage were proven. U. S. v. Folsom, 7 N. M. 547.

Mortgagee entitled to after-acquired property. Jones on Chattel Mortgages, 5 ed., sec. 170; Jones on Chattel Mortgages, secs. 138a, 173; Mattley v. Wolfe, 175 Fed. 619; Union National Bank of Chicago v. Kansas City Bank, 136 U. S. 223; Wiswall v. Samson, 14 How. 52; Allen v. Railroad Co., 3 Woods 316; U. S. Trust Co. v. Wabash W. Co., 150 U. S. 287; Dow v. R. R. Co., 124 U. S. 654; Ames v. Railway Co., 73 Fed. 49; Central Trust Co. v. Worcester Cycle Mfg. Co., 86 Fed. 35.

STATEMENT OF THE CASE.

The complaint alleged that on the 11th day of December, 1905, the defendant, Haverkampf, made and executed to the plaintiff his demand note for Nine Thousand Dollars, ($9,000) with 9 per cent. interest and attorney's fees, upon which was paid and credited $3350.00 and interest to January 11, 1907. It also alleged the execution and delivery on the same date, December 11, 1905, of a mortgage from Haverkampf to the plaintiff to secure the payment of the aforesaid note, and that this mortgage was not recorded until January 9th, 1907. It also set up that a quantity of the property covered by the mortgage was fraudulently transferred by Haverkampf to the defendant Kyle and prayed judgment setting aside such alleged transfer to Kyle and foreclosing the mortgage. A copy of the mortgage is attached to the complaint as an ex-

hibit and purports to convey all the property, real or personal, then possessed by Haverkampf and also all property he should thereafter acquire, including all his book accounts and choses in action. The plaintiff prayed for judgment for amount due, for foreclosure of the mortgage and for appointment of a receiver. On the same date that this complaint was filed, an order was made appointing a receiver of the property covered by the mortgage and the receiver thereupon took possession of the property. The defendant, Kyle, appeared on May 23rd, and answered those allegations of the complaint, charging fraudulent transfer of property to him, denying any fraud. A trial was had on January 3rd, 1908, of the issues raised by the answer of the defendant Kyle, and resulted in a judgment dismissing the complaint as to the said defendant. On May 27th, 1907, defendant Haverkampf filed his voluntary petition in bankruptcy and was by the court adjudged a bankrupt on the same day. The defendant, Miller, was elected trustee in bankruptcy of the estate on the 22nd of June, 1907, and was duly made a party defendant to the suit as such trustee. On December 12th, 1908, the defendant Miller filed an amended answer to the complaint, setting up the proceedings as hereinbefore cited, the appointment of this defendant as trustee, that at the time the note and mortgage set up in the complaint, were made, (and that at the time the mortgage was executed) the plaintiff and Haverkampf, who was then engaged in business as a dealer in general merchandise, agreed to keep the same off record and conceal its existence; that Haverkampf was to continue in possession of the property, selling and treating the same in all respects as his own; that he was to continue to buy goods on credit and incur debts to other parties therefor; that pursuant to said agreement the said mortgage was kept off record and concealed for more than a year and that in the mean time the said Haverkampf continued to buy goods on credit with the knowledge and consent of the plaintiff and incurred indebtedness to the extent of several thousand dollars. It is further alleged that some of the creditors had secured judgments against the defendant

Haverkampf, and that by reason of these facts the mortgage of the plaintiff was fraudulent and void as against the creditors. Reply was filed denying all fraud or fraudulent agreements concerning the execution or withholding from record of the plaintiff's mortgage, and a trial was had, resulting in a decree for the plaintiff for $7,444.26, together with $744.45 attorney's fee, sustaining the validity of the plaintiff's mortgage and declaring the same a prior lien upon the funds in the hands of the trustee, derived from the sale of the property mortgaged. From this decree the defendant Miller, Trustee, brought the case to this court by appeal.

OPINION OF THE COURT.

M'FIE, J.—There being no denial of the indebtedness represented by the note and mortgage sued on by the plaintiff, the sole question for determination by this court is, whether or not the trial court erred in its decree awarding to the plaintiff a prior lien by virtue of the mortgage indebtedness upon the funds now in the trustee's hands, the same having been derived from a sale of the mortgaged property. The court, having heard a large amount of evidence, made fifty-two findings of fact covering the disputed points and error is assigned upon several of these findings. The first assignment of error is, that the court erred in refusing to make ten findings of fact requested by the defendant. In the case of Oliver v. Enriquez, 16 N. M. 322, decided by this court at the present term, the court held that under Rule 13, each error relied upon must be separately assigned. This assignment is obnoxious to Rule 13 and cannot be considered. Counsel attempt to meet the requirements of Rule 13 by stating in the assignment that the court erred as to each of the ten findings refused, but we are of the opinion that this does not meet the requirements of Rule 13. The second assignment of error must fail for the above reasons, as it is identical with No. 1, excepting in that it relates to several conclusions of law instead of findings of fact. However, the remaining seventeen assignments of error seem to be in proper form and, as they

cover the subject matter of the assignments above referred to, no injury can result to the appellant in overruling these assignments.

We deem it proper to go at once to the consideration of the main question involved, without prolonging this opinion by a consideration of the large number of assignments of error found in the record, inasmuch as our conclusions upon the valid or fraudulent character of plaintiff's mortgage will necessarily dispose of the several assignments based upon occurences during the trial. That there was no fraud, in fact, is clear from the following finding of the trial court: "The court further finds that the said mortgage was given in good faith for a present consideration, to secure the payment of the note sued on, and exhibited herein, and that the said mortgage and all the transactions in connection therewith, were free and clear of fraud in fact." This finding is supported by a substantial preponderance of the evidence and other
2 findings of the trial court. This court has repeatedly held that under such circumstances, the finding will not be disturbed on appeal. Hamilton Mining Co. v. Hamilton, 14 N. M. 272; Hagerman Irrigation Co. v. McMurray, 16 N. M. 172; 113 Pac. 823.

Our next inquiry is, was there fraud in law in the taking of the mortgage and failure to promptly record the same as against general creditors? The record shows, and the court found, that at the time Haverkampf applied for this loan he owed R. B. Putney about $9,000.00, and that he owed other creditors sums aggregating $600.00 to $1,000.00; that Putney had a bill of sale covering nearly all of the property included in the plaintiff's mortgage as his security, and was threatening to take possession of the property unless his indebtedness was paid. Haverkampf applied for, and obtained, this loan upon conditions stated in the mortgage and embodied in findings Nos. 10, 11 and 12. X. "That said mortgage to the plaintiff, provided that with the money loaned on it, the defendant Haverkampf, should pay all his indebtedness to other parties and should make purchases only for cash, so that the plaintiff should remain and be his only creditor; but it was orally

agreed between him and plaintiff that by "cash" should be meant that he might purchase his goods on short terms of credit, provided he paid his bills therefor promptly, as they became due, and that he should permit and have no overdue indebtedness, and should without delay begin, and thereafter continue, the reduction of said loan, which was on demand, and complete the payment of it without long delay." XI. "There was no express agreement between the plaintiff and Haverkampf that the mortgage should not be recorded, but it was understood that it would not be recorded unless Haverkampf violated its terms, or the terms of the agreement above stated; that he should not permit or have overdue indebtedness." XII "The plaintiff refrained from having the mortgage recorded because of its confidence in Haverkampf's integrity, and that he could and would observe and perform the terms of the mortgage and the agreement and understanding between them in relation thereto, and to avoid injuring him in his business, up to the time when it learned, about December, 1906, that he had created to parties other than the plaintiff, indebtedness which was overdue, and was otherwise failing to keep his said agreements. After the time when the plaintiff so learned it refrained from recording said mortgage for about a month, to enable Haverkampf to obtain money elsewhere to pay its claims." The findings disclose that all of Haverkampf's indebtedness which existed at the time the mortgage was given, had been paid and that the indebtedness now represented by the trustee was incurred since the 11th day of December, 1905, some of it incurred before, and some after, the recording of the mortgage. The following findings are deemed important in this connection, in disclosing the circumstances surrounding this transaction and the actions of the parties. XXI. "That it appeared affirmatively in evidence that one of said creditors (The San Jose Market), so selling goods on credit between said times, would not have sold the same on credit had they known of the existence of said mortgage, and that another would have." XXII. "It did not appear in evidence that the creditors who extended credit to Haverkampf before the recording of said mortgage

made any search of the record, nor effort to ascertain whether his property was mortgaged or not." XXIII. "That the only creditors as to whom there was evidence on that point, who extended credit to Haverkampf during the period between the execution of the said mortgage and the recording of the same, also extended credit to him after the said mortgage was recorded." XXIV. "That said defendant, Haverkampf, made reports of his true true financial condition to R. G. Dunn & Company and Bradstreet's Commercial Agency, showing the existence of the indebtedness to the plaintiff." It further appears that Haverkampf remained in possession of the property in the store, buying and selling and replenishing his stock until the receiver, Charles F. Spader, was appointed and took possession May 9th, 1907, and that under an order of the court Spader surrendered possession thereof to Miller, the trustee in bankruptcy and appellant herein. The court further finds that Meyer, Bannerman & Company, Brown Bros. Shoe Co., Rothchild's Bros. Hat Co., and Hargadine-McKittrick Dry Goods Co., each recovered separate judgments against the defendant, Haverkampf, amounting in the aggregate to the sum of about $1,000.00. Judgments in the two first mentioned cases were filed May 27th, 1911, and the remaining two on June 8th, 1911. As will be seen, the first were obtained on the same day Haverkampf was adjudicated a bankrupt and the latter about twelve days thereafter. In the 47th finding the court declares that the assets of said defendant, Haverkampf, at their fair market value, exceeded his liabilities at the time the said note and mortgage were executed and that at that time Haverkampf had $3,000.00 on deposit in the First National Bank. There is nothing in the findings or the evidence to show that the plaintiff did in any manner encourage or induce any of the bankrupt creditors to sell goods or extend credit to Haverkampf during the time the mortgage was unrecorded. It further appears in the findings and the evidence that no creditors besides the plaintiff, had any lien, either by judgment or otherwise, upon any of the property of the said defendant, Haverkampf, at the time Charles F. Spader, receiver,

took possession of the property and accounts in terms included in said mortgage, under the order of the court. All of the above findings of fact we find to be sustained by the evidence taken at the trial, and the allegations of the answer, that the mortgage was withheld from record in pursuance of a fraudulent scheme and agreement to conceal the same from the creditors of Haverkampf with the fraudulent intent and purpose of inducing persons to give credit to Haverkampf, and the further allegation that Haverkampf was insolvent at the time the mortgage was executed are not sustained by the evidence, but, on the contrary, the evidence of Mr. Flournoy, who acted for the bank in making the loan, is to the contrary, stating distinctly that at the time the loan was made, Haverkampf was possessed of a large amount of property and had $3,000.00 to his credit in the bank and that the sole reason for the withholding of the mortgage from record was the absolute confidence reposed in Haverkampf, and, in addition to this, under the terms of the loan, the bank had no reason to believe that there would be any other creditors. Appellant relies upon two considerations as sufficient to warrant the court in holding the mortgage fraudulent as to creditors: 1st. That Haverkampf was permitted to remain in possession of the goods and was permitted to continue in business by selling and replenishing the stock. 2nd. Because of the withholding of the mortgage from record. Referring, then, to the first of these propositions, the mortgage provided that Haverkampf should retain possession and continue his mercantile business in the usual way. This precise point was before this court in the case of Bank v. Stewart, 13 N. M. 551. The court said: "But, even if it be granted that the rule of law contended for by the appellant was distinctly adopted in the two cases named, we think it has been so far worn away by the current of later decisions as to leave little, if any, more than that such a provision as the one in question is admissible as evidence of fraud, to be considered in connection with all the other evidence bearing on that point. To hold that such a provision of itself renders void the mortgage in which it occurs, no matter how fair and ample

the consideration may have been, would be to declare, in effect, that a stock of merchandise intended for retail trade, cannot be used as security for a loan, or for the purchase of necessary additions to it, except by first making an end of the sale for which alone the owner obtained it and on which its value chiefly depends." Etheridge v. Sperry, 139 U. S. 266; Huntley v. Kingman, 152 U. S. 527. That the doctrine of absolute fraud arising
3 in a mortgage of merchandise, from the mortgagors retaining possession, with the power of disposal in the usual course of trade, is not supported by any preponderance of authority, that it is contrary to sound principles of jurisprudence, that the qualifications of the doctrine made by leading courts, have, in a large measure destroyed its force, and are indicative that these courts themselves wish to be rid of the whole of it." Jones on Chattel Mortgages, secs. 425, 435. We regard this point settled against the contention of the appellant upon the authority above cited. In the case of Bank v. Lesser & Lewinson, 10 N. M. 700, this court held that, where the facts upon which fraud is predicated consist as well with honesty as with dishonesty, the law presumes in favor of honesty. The bona fides of the bank in the entire transaction is apparent from both the evidence and the findings of the trial court, for while the mortgage was withheld from record, it was because of the absolute confidence of the bank officers in Haverkampf and in reliance upon the assurance of Haverkampf that the bank should be his only creditor, except for goods purchased upon thirty, sixty or ninety days time and to be paid for when due. It further appearing that when the bank discovered that Haverkampf had violated this latter agreement, the mortgage was recorded at once. Under the circumstances of this case, and in view of the fact that the bank actually paid to Haverkampf $9,000.00 in cash for the very purpose of enabling him to pay his indebtedness, it should not be chargeable with fraud by reason of the secret acts of Haverkampf in violation of his contract, the bank not being in any way a party to his acts or conspiring or conniving with him in connection with them. It is true that the mortgage to

the bank was not recorded until the 9th day of January, 1907, but, as appears from the evidence and the findings, the mortgage was not withheld under any agreement or for the purpose of enabling Haverkampf to obtain credit. No attempts were made to conceal the existence of the mortgage, on the contrary, the evidence of Haverkampf shows that he reported the fact of the incumbrance to the commercial agencies of Dunn and Bradstreet, from which eastern creditors obtain information as to the financial standing of those to whom credit is extended. Haverkampf testified to this as a fact and it is, therefore, competent evidence, as most of the bankruptcy creditors represented by the appellant are eastern creditors. It further appears from the evidence and findings that the creditors of Haverkampf, at the time the mortgage was given, had been paid and that, while the bankrupt creditors gave credit after the mortgage was executed, it was prior to its being recorded. The findings show that no efforts were made by any of the present creditors to ascertain whether or not this mortgage was recorded, and, while two of the creditors testified that they would not have extended credit to Haverkampf had they known of the existence of the mortgage, it further appears that both of those creditors extended credit to Haverkampf after the mortgage was recorded. In fact, so far as the record discloses, neither the bank nor other creditors of Haverkampf had any suspicion that he was in a failing condition financially, a fact which accounts for much of the dealings with him up to the time of his failure.

The evidence, and the finding based upon it, as to the facts last above stated, were objected to and are made the subject of assignments of error, but we are of the opinion that the good faith of all those transactions may be shown in this case and that this evidence was competent as tending to show the honesty and good faith of the bank in reply to the suggestion that the mortgage was withheld from record in bad faith and in pursuance of an agreement and intent to enable Haverkampf to deceive and defraud creditors. But, be this as it may, we are of

the opinion that the failure of the bank to record its
4 mortgage promptly, does not constitute a fraud in
law as to the creditors represented by the appellant. This failure to record is relied upon as fraudulent in that the creditors were not put upon notice. In the case of Kitchen v. Schuster, 14 N. M. 176, this court held that the effect of a failure to record a chattel mortgage is to make it void as to purchasers and mortgagees in good faith without notice. It will be observed that creditors generally are not included. The law of this territory as it now exists is found in the following sections of the Compiled Laws of 1897: "Section 3953. All deeds, mortgages, United States patents and other writings affecting the title to real estate, shall be recorded in the office of the probate clerk of the county or counties in which the real estate affected thereby is situated." "Sec. 3955. From and after the 1st day of January, 1888, no deed, mortgage or other instrument in writing, not recorded in accordance with section three thousand nine hundred and fifty-three, shall affect the title or rights to, in any real estate, of any purchase or mortgage in good faith, without knowledge of the existence of such unrecorded instruments." "Sec. 2361. That hereafter all chattel mortgages, or other instruments of writing, having the effect of a mortgage or a lien upon personal property, shall be acknowledged by the owner or mortgagor and recorded in the same manner as conveyances affecting real estate. Upon the receipt of such instrument the recorder shall indorse on the back thereof the time of receiving it, and when recorded the party in whose favor the mortgage is executed shall have the right to withdraw the same. The recorder shall keep a book properly indexed, in which shall be recorded affidavits of renewal of chattel mortgages, and shall indorse on the back thereof the time of filing the same, and shall refer on the margin of the record of the same to the book and page in which the mortgage is recorded, which the affidavit is intended to renew. When such mortgage is acknowledged and recorded in the manner herein prescribed, or when such affidavit of renewal is recorded as herein required, and it shall be shown to the court by the

oath or affidavit of the party wishing to use the same, or either of them, or of any one knowing the fact that such mortgage or affidavit is lost or not in the possession of the party wishing to use the same, or either of them, the record thereof or the transcript of such record, certified by the recorder, under the seal of his office, may be received in evidence without futher proof. For recording a chattel mortgage the clerk shall receive one dollar and fifty cents when the same contains not exceeding ten folios of one hundred words each, and fifteen cents for each additional folio; for recording and indexing the affidavit. fifty cents; but this act shall in no manner affect or impair any existing chattel mortgage already filed as now required by law."

This court has declared the law upon this subject in the case of Ilfeld v. Baca, 13 N. M. 32-38. The court, speaking by Chief Justice Mills, said: "Registration is not to protect creditors unless specifically provided for in the law. That the registration act of this territory is not made to protect creditors is shown by the reading of Section 3953, of the Compiled Laws of 1897, which says: 'From and after the first day of January, 1888, no deed, mortgage or other instrument in writing, not recorded in accordance with Section 2953, shall affect the title or rights to, or in any real estate, of any purchase or mortgage in good faith, without knowledge of the existence of such unrecorded instruments.' Nothing is said in the act about creditors of the grantor. There is a great diversity in the statutes of the several states and territories as to the protection afforded to creditors by their several registry laws. In some states an unregistered deed is declared void as against 'creditors,' in others as against 'judgment creditors,' while in a considerable number (and New Mexico is among them), creditors are not mentioned in the statutes at all, and unrecorded conveyances are held valid as at common law against even judgment and attaching creditors. Unless the words of the statute are so broad as to manifestly include creditors at large, only those are regarded as creditors who obtain a lien by judgment, attachment or otherwise, before an antecedent deed

or mortgage is recorded. Webb on Record of Title, sec. 10." This case was again before this court on rehearing, 14 N. M. 65, but, while an opinion was written upon the rehearing, the construction of the registration statutes of the Territory as declared in the original opinion was not in any respect set aside or modified in the later opinion. The construction given those statutory provisions in the original opinion, therefore, must be adhered to as the views of the court upon that subject and are properly applied to the present case. Bean v. Orr, 182 Fed. 599. "'Every conveyance' * * * 'not so recorded shall be fraudulent and void against any subsequent purchaser, lessee or mortgagee in good faith for a vaulable consideration. None of the creditors whose claims are represented by the assignee are either subsequent purchasers. lessees or mortgagees, and are therefore not within the classes against whom the intrument is by statute declared to be fraudulent and void. Runyan v. McClellan, 24 Ind. 165; Kirkpatrick v. Caldwell Admr., 32 Ind. 299; Shirk v. Thomas, 121 Ind., 147; 16 A. S. R. 381; Mann v. State, 116 Ind. 383; Emmons v. Pence, 78 Ind. 439. We cannot extend the terms of the statute so as to include general creditors in the classes of persons against whom unrecorded mortgages are to be deemed as an inference of law fraudulent and void, for that would be legislation." Hutchison v. First National Bank, 133 Ind. 271; 36 A. S. R. 537, at 545. See, also, Loveland on Bankruptcy, 3 ed., pp. 438, 439, note 31 and p. 595, and cases cited. Collier on Bankruptcy, 6 ed., 555, and cases cited; Jones on Chattel Mortgages, 5 ed., secs. 237, 325, 364, 356, and cases cited. See, also, Rogers v. Page, 140 Fed. 596, at p. 606. This case seems to be conclusive in that it holds distinctly that the failure to record a chattel mortgage does not constitute a fraud in law and render the same void as to creditors in this territory. In the brief of counsel for appellant, the attention of the court is called to a number of cases which counsel strongly contend support their contention that the mortgage in this case was fraudulent in law as against the creditors of the bankrupt estate. This contention is based on the failure of the bank to promptly record its

mortgage. It must be admitted that the authorities are not harmonious on this subject, but an examination discloses that the difference of the statutes of the different states as to the effect of recording deeds, mortgages, and other instruments is the basis for this diversity of opinion. Counsel for appellant refer to several cases which, it is contended by them, are conclusive of this case. The first case relied upon is Blennerhassett v. Sherman, 105 U. S. 100. While this is a well considered case, the facts of the case are essentially different from the present case. In the Blennerhassett case there was positive notice of insolvency and an absolute want of good faith in addition to the failure to record the instrument promptly. As to knowledge of insolvency, the court said: "Notice of his insolvency was also brought home to Stephens and Blennerhassett by their knowledge of the fact that he had appropriated to his own schemes and speculations a fund which, principal and interest, amounted to over $800,000, committed to his custody as a trustee and receiver. The evidence that they knew of the fact of his appointment as receiver, the amount of the fund which came to his hands and the appropriation of the fund to his own uses is conclusive." In addition to this, the court found that Blennerhassett and Stephens actively concealed the incumbrance for the unlawful purpose of inducing credit and, also, by false representations by Blennerhassett and Stephens. In fact, the case discloses a studied scheme of fraud and deception. The case at bar is different in almost every respect. The bank paid the $9,000 in cash for the sole purpose of paying in full all of the then indebtedness of Haverkampf, so that the bank should be his sole creditor, and the money was used for that purpose, as is not denied. It is true that for the purpose of replenishing the stock of goods which was necessary and incident to a mercantile business, permission was given to purchase, but upon condition that all bills should be paid when due. It also appears that at the time the mortgage was executed, Haverkampf was required by the bank to make a schedule of his assets and liabilities, from which it appeared that his assets were valued at approximately $35,000.00, while

the liabilities were $10,000, which schedule was signed by Haverkampf. It further appears from the evidence that Haverkampf had $3,000.00 to his credit in the bank. The bank, therefore, could have no notice or evidence of insolvency, or reasonable grounds for believing that Haverkampf was, or was likely to become, insolvent. In addition to this, the facts show that Haverkampf claimed that he transacted business to the amount of $35,000 per annum, so that the loan was not made to bolster a failing concern. From the facts found the bank made the loan, secured by the mortgage, with the utmost good faith and the mortgage was not promptly recorded because of the confidence reposed in Haverkampf and the solvency of his business. These facts are not seriously disputed, so that the case of Blannerhassett v. Sherman, supra, appears to be inapplicable. The case of Bean v. Orr, 182 Fed. 599, is so nearly on all fours with the case now under consideration, that reference will be made at this point. "After a careful reading of the evidence, we are unable to find sufficient facts warranting the holding that Bean acted otherwise than in the utmost good faith, or that he was in any wise a party to any intention to hinder and delay or defraud any of the creditors of the Tysor-Cheatham Mercantile Company, or, at the time of advancing his money to the said company, he had any suspicion that the same company was insolvent. In fact, the case shows that the very $4,000 which Bean advanced on the security in question was full consideration and was intended to be used, and was used, to pay off creditors, and the propriety and necessity of the loan is shown to have been the dullness and embarrassment of business, crops being short, collections poor, and that the company was presently unable to dispose of its goods. It is true that Tysor, of the Tysor-Cheatham Mercantile Company, was a brother-in-law of Bean, and Bean wanted to help him, and he testifies that he had confidence that Tysor could and would repay him; and it is also true, under the circumstances fairly explained by Bean, that his mortgage was not recorded until some months subsequent to its execution. It is on these last-mentioned circumstances that the referee held that the

mortgage was executed to hinder and delay creditors, relying upon the case of Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656, in which this court, in a case where there was a mortgage upon a stock of goods on hand and to be added to by subsequent purchases, and an agreement to withhold the mortgage from the record for the purpose of aiding the credit of the mortgagor, and the mortgage was withheld from record until the mortgagor decided to take the benefit of the bankruptcy act, and where there were other circumstances pointing to fraud, held, stressing the withholding from record, that the mortgage was fraudulent under Georgia Law, as made to hinder and defraud creditors. Here the mortgage is on real estate, and the evidence shows, at best, only suspicion that fraud was intended by either party to it, while Bean, the mortgagee, so far as such showing can be made, vindicates himself of all fraud or intention to defraud or to aid to defraud. Neglecting to promptly record a mortgage is not in itself fraudulent as against other creditors, and it is not made fraudulent by the additional fact that brothers-in-law are adverse parties to the mortgage." From this case it is clear that the mere fact of a failure to promptly record a mortgage will not authorize a holding that the mortgage is fraudulent as to creditors. There must be something more than this. The case from Georgia referred to in the above quotation is instructive upon this point and is one of the cases relied upon by appellant's counsel. There were no fraudulent representations or acts attributable to the bank or its officers, as the court declared in its eleventh finding of fact. In the case of in re Hunt, 139 Fed. 283, the court said: "But while the court may have its suspicions that such was the fact, it is not, therefore, at liberty to so find or hold, even if those suspicions are justified by, and grew out of, the evidence. Fraud must be proved. It may be inferred from facts established by competent proof, but the inference of fraud cannot legally be drawn and is not justifiable when the inference of innocence is just as consistent with the facts. I cannot find from this evidence that the failure to record the mortgage was accompanied

by such acts on the part of the mortgagee or of its agents that a fictitious credit was given to Hunt, now the bankrupt, or that the acts of the defendant induced any creditor to forego any right. The defendant is not estopped from asserting the mortgage." In re Shirley, 112 Fed. 301. In this case the court discussed the effect of an unrecorded mortgage as to creditors under a statute in Ohio, declaring such instruments void. The court said, in part: "A creditor which was selling goods to its debtor took a chattel mortgage to secure his past indebtedness, but agreed, at the instance and request of the debtor, to withhold such mortgage from record so long as he should pay a certain sum per month and should pay cash for subsequent purchases. The creditor supposed that it was furnishing the debtor with practically all the goods he purchased, and there was no actual fraudulent intent. Held that, under such circumstances, the mortgagee was not estopped from subsequently filing its mortgage and asserting its lien thereunder from that date upon property other than the mortgagor's stock, as against other creditors who had in the meantime sold goods to him, without the mortgagee's knowledge.

In the present case, therefore, to hold that there was legal fraud it would be necessary to predicate this upon the fact that the mortgage was not recorded for about one month after the officers of the bank became aware of the fact that Haverkampf had purchased goods and failed to pay for them, in violation of his agreement with the bank. Until this time all the testimony and circumstances tend to show that the officers of the bank regarded the bank as the sole creditor of Haverkampf. It is true that the mortgage was not recorded for more than one year after its execution, but, having been given for full cash consideration, not in contemplation of insolvency, but for the sole purpose of enabling Haverkampf to pay his entire indebtedness, together with an agreement that no new indebtedness, of any consequence, should be incurred by him, without any agreement that the mortgage should not be recorded and with no evidence whatever of efforts on the part of the bank or its officers to induce the

extension of credit to Haverkampf, we are of the opinion that this case is not governed by the doctrine announced in the cases relied upon by the appellant, but is within the law as laid down in the cases last above referred to. If so, the bank should not be barred or postponed from enforcing its lien. Judgments for sums aggregating about $1,000.00 were rendered against the defendant, Haverkampf, on the same day on which he was adjudicated a bankrupt, but whether the judgments were rendered prior to the adjudication is not made clear. However, the mortgage, having been recorded January 9th, 1907, and the judgments rendered May 27th, 1907, the mortgage was a prior lien. All other creditors of the bankrupt were general, and not, lien creditors. That the trustee in bankruptcy stands in the shoes of the bankrupt and that his rights are similar, is settled by numerous authorities. York Mfg. Co. v. Cassell, 201 U. S. 353; Humphrey v. Tattman, 198 U. S. 95; in re Economical Printing Co., 110 Fed. 514; Security Warehousing Co. v. Hand, 206 U. S. 424; Hewitt v. Berlin Machine Works, 194 U. S. 302. That a mortgage, valid under state law made before the four months' period is valid as against the trustee of the mortgagor, is also declared by the above authorities. The mortgage in this case, having been both executed and recorded more than four months prior to the filing of the petition in bankruptcy, its lien would be valid under the bankrupt law and creditors represented by the trustee having no prior and subsisting lien. From these conclusions it follows that the judgment of the court below should be affirmed with costs. It is so ordered.

[Nos. 1376-78. December 8, 1911.]

CALEDONIAN COAL CO., Appellee and Cross Appellant, v. ROCKY CLIFF MINING COMPANY, et al, Appellants and Cross Appellees.

SYLLABUS (BY THE COURT).

1. Coal and minerals in place are land and their removal by a trespasser constitutes a permanent injury to the

freehold for which the owner of the fee is alone entitled to recover damages.

2. Proof of more than simple possession of the land upon which trespasses complained of are committed, is necessary to support an action brought to recover the value of coal unlawfully extracted by trespassers and converted to their own use.

3. Where A. goes into possession of land in pursuance of an agreement to purchase the land of B., the owner thereof, and with B.'s consent, begins to mine coal therefrom, A.'s possession is that of a mere licensee.

4. A license to mine coal does not convey or grant to the licensee any interest in the coal until the licensee has mined it.

5. A right of action for a trespass to land is not assigned by a subsequent conveyance of the land. Following U. S. v. Loughren, 172 U. S. 206.

6. The plaintiff entered into possession of the land pursuant to an agreement or understanding with the owner for the purchase of the same. It knew in August, 1904, that defendants had, and were then taking coal from the land. On April 11th, 1905, it took a deed from the owner for the land: Held that, in the absence of a binding contract between plaintiff and its vendor for the purchase of the land, prior to the discovery by plaintiff that the defendants had taken coal from the land, it could not recover for the value of the coal taken by defendants prior to the date it acquired title.

7. The evidence in this case examined and, held, that the trial court committed error as to the amount of coal for which a recovery was allowed.

8. The evidence held to support a finding by the trial court that plaintiff is entitled to recover 12½ cents per ton for the coal taken by defendants.

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

E. W. DOBSON for Appellants.

The right of action for trespass to land is not assigned by subsequent conveyance of the land. Schuylkill & S. Co. v. Decker, 2 Watts. 343.

Plaintiff's possession being merely a right of temporary possession it could only recover for injuries to that possession and not for injury to the freehold. Bloom v. Stenner, 50 N. J. L. 59; Frisbee v. Marshall, 122 N. Car. 760; Colorado Consolidated Land & Water Co. v. Morris, 1 Col. App. 401; Burkhalter v. Oliver, 88 Ga. 473; Bagget v. Trulock, 77 Ga. 369; 1 Sedg. Dam. 69; 3 Sedg. Dam. 926; 2 Ror. R. 786; Missouri Lumber & Mining Co. v. Zeitinger, 45 Mo. App. 114; Wadleigh v. Marathon County Bank, 17 N. W. 314; Anderson v. Thunder Bay Boom Co., 23 N. W. 776.

The measure of damages recoverable in an action of trespass for an injury to realty by an inadvertant removal of part of coal is its value as a part of the realty and not as a chattel after its removal. Warrior Coal Co. v. Mabel Min. Co., 20 South. 918.

FRANK W. CLANCY for Appellee.

As against a wrongdoer, actual possession is a sufficient title for the plaintiff. Graham v. Peat, 1 East 246; Chambers v. Donaldson, 11 East 74; Branch v. Doane, 18 Conn. 242; Bedden v. Clark, 76 Ill. 338; Hayward v. Sedgley, 14 Me. 439; Savage v. Holyoke, 59 Me. 345; Hunt v. Rich, 38 Me. 199; First Parish v. Smith, 14 Pick. 301; Kilborn v. Rewee, 8 Gray 417; Sweetland v. Stetson, 115 Mass. 49; Fowler v. Owen, 68 N. H. 272; Chandler v. Walker, 21 N. H. 282; Duncan v. Potts, 5 Stew. and Port. 82; Finch v. Alston, 2 Stew. and Port. 83.

The proper measure of damages in this case is the full value of the coal. Woodenware Co. v. U. S., 106 U. S. 432; Pine River Co. v. U. S., 186 U. S. 293; U. S. v. R. R. Co., 192 U. S. 541; United Coal Co. v. Coal Co., 24 Colo. 122; Holt v. Hayes, 73 S. W. 111; U. S. v.

Homestake Co., 117 Fed. 482; Durant Co. v. Percy, 93 Fed. 167; Ivy Coal Co. v. Alabama Coal Co., 135 Ala. 582; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 A. & E. 278; White v. Yawkey, 108 Ala. 370; Antoine Co. v. Ridge, 23 Cal. 219; Ellis v. Tone, 58 Cal. 289; Hindrey v. Williams, 9 Colo. 371; Clark v. Miller, 4 Wend. 629; Appeal of Harris, 12 Atl. 743; Hendrickson v. Anderson, 5 Jones 249.

STATEMENT OF FACTS.

The complaint in this cause, framed under the code of civil procedure, sets up, in substance, what would have been at common law an action of trespass *quare clausum fregit*. It shows, after stating the names and domicile of the parties, that plaintiff, the Caledonian Coal Company, was, during the actions of the defendants, the Rocky Cliff Coal Mining Company and Stephen Canavan, complained of, lawfully entitled to the possession of certain lands described according to the public land surveys, situate in the County of McKinley. It then sets up that, in 1904, defendants entered upon said land, beneath the surface thereof, and mined and extracted large quantities of coal, which they converted to their own use, the quantity being, to the best of the knowledge, information and belief of plaintiff, about 50,800 tons, of the value of $87,844, and that the mining and the taking of the coal by defendants were without any permission, consent or agreement on the part of plaintiff, and in violation of plaintiff's property rights. The complaint contained a prayer for an accounting of the amount and value of the coal so wrongfully taken, and for judgment for the value of the coal with interest and costs.

The defendants answered that they were not advised as to whether or not plaintiff was the owner of the land described in the complaint and called for strict proof thereof. The answer denied that the defendants had entered upon the lands described in the complaint in the year 1904 and extracted therefrom the amount of coal, of the value alleged in the complaint and further denied that the mining and taking of coal by them was without

the permission, consent and agreement of the plaintiff, and alleged that all the coal mined and taken by them from said lands was taken by and with the consent and agreement of plaintiff. They further alleged that the only demand plaintiff ever made upon them for the coal was on a royalty basis of 12½ cents per ton, and that plaintiff verbally agreed with defendants that they could take the coal from the lands described in the complaint and that defendants were to pay $20.00 per acre for the land to plaintiff.

Plaintiff replied to the answer denying any demand or claim for the coal on a royalty basis of 12½ cents per ton, but alleged that there was an offer by plaintiff to compromise its claim on such a basis, which offer was refused and rejected by defendants. The reply also denied any agreement with defendants that they could take the coal or that defendants were to pay $20.00 per acre as alleged in the answer.

A jury having been waived, the case was referred to an examiner for the taking of proofs and thereafter the court made findings of fact and conclusions of law thereon.

The court found that the land described in the complaint had been granted by Congress to the Atlantic and Pacific Railroad Company, and that plaintiff acquired title thereto by a deed dated April 11th, 1905. The court's fourth finding of fact was as follows: "4. The court finds that plaintiff, in pursuance of an agreement or understanding with railroad company, which does not appear to have been in writing, except so far as it is embodied in correspondence between the parties for the purchase by plaintiff of said south half of said section eleven, and with the knowledge and consent of the railroad company, entered upon said south half of said section eleven and begun the taking of coal therefrom, as early as the latter part of 1898, and had such use of said land continuously up to the time when it acquired title thereto." The court further found that the defendants, some time prior to August, 1904, entered into plaintiff's land and began taking coal therefrom, and that in August, 1904, the plaintiff notified defendants that they were on plaintiff's land and

told them not to drive their entries any farther, but that defendants continued to mine coal on plaintiff's land until some time in November, 1905; that after August, 1904, the plaintiff never took any steps to stop defendants taking coal from plaintiff's land except by demands of payment therefor, but other than may be inferred from the fact that plaintiff did not stop defendants from further mining on its land, the court finds that there was no agreement or contract between plaintiff and defendants as to the taking of coal by defendants from plaintiff's land, nor any understanding relative thereto. The court found that prior to October 2, 1905, defendants extracted from plaintiff's ground and applied to their own use 31,256.76 tons of coal, and that the value of said coal after it was taken out was $1.75 per ton; that of this coal, 6,932 tons were taken out after June 26, 1905, but that there is no evidence from which it can be determined how much of said coal was mined between April 11, 1905, and June 26, 1905. The court further found that on June 26, 1905, plaintiff presented to defendant Canavan, a bill for said coal mined on its land up to that time, to the amount of 21,857 tons, at 12½ cents per ton, and that on July 19, August 8, and October 14, of the same year, plaintiff renewed the same demand; that on January 19, 1906, plaintiff requested of defendant Canavan to let it know how much he claimed to have mined and what he was willing to pay for it; that on March 19, 1906, defendant Canavan offered to pay $25 per acre for the land mined; that on March 20, 1906, plaintiff, in writing, rejected Canavan's offer, and stated that it would be constrained to sue for the amount due on a royalty basis of 12½ cents per ton for the coal mined from its land; and that defendants never consented or agreed to pay said royalty so demanded by plaintiff; that 12½ cents per ton was, in 1905, and had been for years prior thereto, the usual and customary royalty paid in the vicinity of the coal mines in question. The court further found that it was impossible to state from the evidence how much coal was extracted by defendants from plaintiff's ground after October 2, 1905.

From the foregoing facts, the court concluded as a matter of law, that the plaintiff was entitled to recover from the defendants 12½ cents per ton for the tons of coal definitely shown by the evidence to have been by defendants extracted from plaintiff's ground and converted to their own use, with interest thereon at 6 per cent for five years, the number of such tons being 28,789, the amount to be recovered being $3,593.62, making, with interest as aforesaid, $4,678.21, with costs of suit, for which amount so found the court rendered judgment.

Both parties appeal from the judgment of the court. The plaintiff claims that the court erred in not rendering judgment in its favor (a) for the full amount of coal found by the court to have been extracted by defendants from the land in question, to-wit: 31,256.76 tons, and (b) for the full value of the coal as found by the court to be $1.75 per ton.

The defendants claim that the court erred (a) in finding as a matter of law that plaintiff was entitled to recover for any coal extracted from the south half of section eleven prior to April 11, 1905, the date the plaintiff received the deed from the railroad company, and (b) the court erred in holding as a conclusion of law that plaintiff was entitled to recover for any coal in excess of 6,932 tons.

OPINION OF THE COURT.

MECHEM, J.—(After making the foregoing statement of fact). 1. The first question presented in this case is whether or not the plaintiff was entitled to recover for the coal taken by the defendants prior to April 11, 1905, the date of the deed to the land from the railroad company to the plaintiff. The position of counsel for the plaintiff with respect to this question is stated in his brief as follows: "All that is necessary to support a plaintiff's action to recover damages as against a defendant who is a mere trespasser without any title or right, is the simple possession of the property upon which the trespasses are committed." The plaintiff did not allege or prove, nor did the court find, that it was injured as to its possessory

rights, that is, by reason of a disturbance of its possession simply. The action is brought to recover for the value of coal removed from the land, and if plaintiff is to recover the value of that coal, it must show some property right or interest in the coal which is not established by
2 possession of the land merely. The reason of this is that coal and minerals in place are land, (Caldwell v. Fulton, 31 Pa. St. 475; & 2 Am. Dec. 760) and their removal by a trespasser constitutes a permanent injury
1 to the freehold, for which injury the owner of the fee is alone entitled to recover. Hugunin v. McCunniff, 2 Colo. 367; 14 Mor. Min. Rep. 463; Starr v. Jackson, 11 Mass. 519; Wadleigh, v. Marathon County Bank, 17 N. W. (Wis.) 314; Burkhalter v. Oliver, 88 Ga. 473; 14 S. E. 704.

2. The court found that plaintiff had, "in pursuance of an agreement or understanding with said railroad company, which does not appear to have been in writing except so far as embodied in correspondence between the parties, for the purchase by plaintiff of said south half of said section eleven, and with the knowledge and consent of the railroad company, entered upon said south half of said section eleven and began taking coal therefrom as early as the latter part of 1898." According to this finding the construction most favorable to plaintiff, of which
3 it is susceptible, the railroad company granted nothing more than a license to the plaintiff to mine
4 coal from the land and did not grant plaintiff any property in the coal until it had mined it. As long as the coal remained in place, it was the property of the railroad company. 27 Cyc. 690; Grubb v. Bayard, 11 Fed. Case No. 5849; Baker v. Hart, 12 L. R. A. (N. Y.) 60; Arnold v. Bennett, 92 Mo. App. 156; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248; Funk v. Haldman, 53 Pa. St. 229. The plaintiff could not recover damages on the theory that it had title to the coal. No doubt, as was said in Baker v. Hart, supra, the act of the defendants was an infringement of plaintiff's rights, for which it could recover damages, as it in fact sustained, but it proved none.

3. Continuing the argument under this head, counsel for plaintiff says: "It is not to be tolerated that defendants, mere wanton wrong-doers, can set up that the title was in the railroad company, and that, therefore, they were at liberty to take the coal, thus diminishing the value of the land which plaintiff had agreed to purchase and was occupying and using under that agreement." If, as before stated, the title to the coal before the plaintiff received a deed from the railroad company was in the railroad company, a right to action to
5 recover for the same was also in the railroad company and such right did not pass by the deed. U. S. v. Laughren, 172 U. S. 206; Wadleigh v. Marathon County Bank, supra,; Burkhalter v. Oliver, supra; Chicago & Alton Ry. Co. v. Sarah Maher, 91 Ill. 312; Hagunin v. McCunniff, supra. It is clear that if the title to the coal converted by defendants was in the railroad company, a recovery by the plaintiff would be no bar to an action by the real owner, the railroad company. The plaintiff knew, at the time that it received a deed from the railroad company, that defendants had removed great quantities of coal from the land, thus diminishing its value. It bought the lands so damaged and reduced in value with full knowledge of that condition. The defendants are not responsible for the purchase by plaintiff of the land. There is nothing in the findings of facts upon which it could be determined as a matter of law that the position of plaintiff with respect to its rights to the land before the delivery of the deed from the railroad company was other than a mere license. There is nothing to show any conveyance to it of any interest in the land or the coal by reason of its being permitted by the railroad to take possession and mine. There is no evidence of any binding contract between the railroad company and plaintiff for the purchase of the property in existence prior to the discovery by plaintiff that defendants had taken coal from the land to the extent that the making and delivery of a conveyance would have been a mere formality to the passing of the title, so that the plaintiff being under a binding contract to buy the land whether or no, it was damaged

by the acts of the defendants to the extent of the value of the coal removed. We do not understand the position of defendants to be that because the plaintiff did not have title they were at liberty to take coal from the land, but they contend that they are not liable to the plaintiff for the value of the coal, but, if at all, to the railroad company. And we believe this to be the correct view of
6 the case. We, therefore, hold that the plaintiff is not entitled to recover the value of the coal mined by defendants prior to April 11, 1905, when plaintiff acquired title to the land.

4. The court found that defendants had wrongfully removed from plaintiff's ground and converted to their own use, in all, 31,256.76 tons of coal, covering a period from sometime in August, 1904, to October 2, 1905, and that of this 6,932 tons were mined after June 26, 1905, and of the balance, the court found that it was impossible to ascertain from the evidence how much was taken between April 11, 1905, and June 26, 1905. From
7 this, it is evident that the court erred in rendering judgment in favor of plaintiff on the basis of 28,789 tons, because, as we have shown, plaintiff has not established any right, title or interest in the coal mined prior to April 11, 1905, to entitle it to recover damages on the theory that it owned the coal, the only damages alleged or attempted to be established by it. And, as it was impossible for the court to state how much coal was extracted by defendants between April 11 and June 26, judgment should have been on the basis of 6,932 tons, that amount being definitely ascertained.

5. We have carefully examined the record in this case and find that there is substantial evidence to support the finding of the court that the plaintiff is en-
8 titled to recover the sum of 12½c. per ton, and no more, for the coal mined by defendants and converted to their own use after June 26, 1905. The judgment of the lower court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

OPINION ON MOTION FOR REHEARING.

MECHEM, J.—The appellant, by a motion for rehearing, calls the court's attention to certain matters contained in the record which, in counsel's opinion, fill the requirements of the conclusion announced in the original opinion filed in this case, that to entitle appellant to recover it was not sufficient that it establish possession under an agreement to purchase, but that it must be shown that such agreement was binding upon it to buy the land so that the execution and delivery to it of a deed was a mere formality to the passing of the title. No mention was made in the brief of either party of such an agreement, the case being tried upon appellant's theory that mere possession, if rightful, entitled it to recover. However, as the trial court made a finding that the appellant had possession under an agreement and rendered judgment on the theory that possession by appellant under such agreement gave it the right to recover for coal mined previous to the execution of the deed to it for the land, it would seem that if the record shows, as appellant now contends it does, that appellant was, at the time it took title from the railroad company, under a binding obligation to buy the land, so that it could not have refused to buy in view of the injuries committed by the appellees, then, in that event, the judgment was right and should be sustained. If facts were before the court sufficient to sustain its judgment, they should be considered as having been the basis of the judgment notwithstanding the theories of counsel trying the case. The record shows that the appellant and the railroad company, in the year 1903, agreed to arbitrate the question whether or not there was an enforceable contract between them for the sale by the railroad company and the purchase by the appellant of the south half of section eleven, the tract mentioned in the original opinion. The arbitrator to whom this question was submitted found, as to the contract of sale, that "the Caledonian Coal Company could have enforced that contract at any time after it was made, and, conversely the railroad company could have compelled the Caledonian Company to take and pay for the land." The arbitrator

ordered the performance of the contract which was performed by the execution of the deed of April 11, 1905, mentioned in the original opinion. This would seem to put the matter at rest, but the appellees claim that as a matter of fact the appellant only paid for 217 acres of land out of the south half of section eleven, that by an understanding between the railroad company and appellants it was agreed that the south line of section eleven was a crooked line so that between that line and what would have been the south line of section eleven had it been a square or typical section, there were 103 acres which the appellant did not pay for, and that the coal taken by appellees was mined in that area of 103 acres It also appears from the record that the appellant, at the time it entered the south half of section eleven, in 1898, was the owner in fee of the northern tier of forty acre subdivisions in section fourteen, which joins section eleven on the south. That by mistake of the government surveyors, the east line of section fourteen, by monuments on the ground measured 5990 instead of 5280 feet and this excess diminished the area of section eleven to that extent. This line was the subject of a discussion by this court in the case of Canavan v. Dugan, 10 N. M. 316, but did not involve sections eleven and fourteen. If the so-called crooked line was the dividing line between sections eleven and fourteen, then the appellant was the owner of the land from which the coal was taken, for the northern forty acre tract included it. It seems that the court in the case of Canavan v. Dugan, having decided the crooked line was not the correct line, the appellant brought suit against the railroad company, in which it sought to foreclose the railroad company from claiming or exercising any right to the 103 acres of land above referred to. This action was included in the arbitration and by the arbitrator decided that, as between the appellant and the railroad company, the so-called crooked line was the dividing line between their lands. No question is made but that the award was conclusive as between the parties to it, so if the contention of appellees is correct the appellant was the actual owner of the land; if

they are not correct, the appellant was under an enforceable and binding contract to buy it, so that it is entitled to recover for the value of the coal taken from the land by appellees. The court below found that appellees had mined and converted to their own use 28,789 tons of coal, for which appellant is entitled to recover on the basis of 12½ cents per ton royalty. To this extent the former opinion of the court is modified and the judgment of the court below is accordingly affirmed.

[No. 1383. December 8, 1911.]

EDGAR ANDREWS, Appellant, v. THE RIO GRANDE LIVESTOCK COMPANY, W. R. THOMAS and R. B. THOMAS, Appellees.

SYLLABUS.

1. A purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure with the knowledge of the landlord, was a forfeiture of his term; that his possession became so adverse, that the act of limitation would begin to run in his favor, from the time of such forfeiture; and the landlord could sustain ejectment against him without notice to quit.

2. If there is no privity between the cestui que trust and the trustee, if the cestui does not hold under the title of the trustee, he can hold adversely to the trustee. His possession of the trust estate must be in subserviency to the legal title and being in recognition of it, his possession of the land enures to the title under which he claims.

Appeal from the District Court for Santa Fe County, before JOHN R. MCFIE, Associate Justice. Reversed.

A. B. RENEHAN for Appellant.

Statute of Limitations. Laws 1899, chap. 63, sec. 2.

A void or voidable deed may constitute color of title. Wright v. Mattison, 18 How. 280; U. S. v. Casterlin, 164

Fed. 437; Grain Co. v. Crabtree, 166 Fed. 738; Lee v. Copper Company, 21 How. 206; Landes v. Bryant, 10 How. 459; Ellicott v. Pearl, 9 How. 475; Hall v. Law, 12 Otto 217; Schrimpscher v. Stockton, 183 U. S. 205; 2 Enc. L. & P. 512-516; Pike v. Evans, 94 U. S. 41; McIntyre v. Thomson, 10 Fed. 531; Coal Co. v. Wiggins, 68 Fed. 446; Packard v. Moss, 68 Cal. 123; 74 Cal. 17; Kendrick v. Latham, 25 Fla. 820; Wade v. Garrett, 109 Ga. 270; Fritz v. Joiner, 54 Ill. 101; Jackson v. Magruder, 51 Mo. 55; Davis v. Burroughs, 8 N. Y. S. 379; La-Frombois v. Jackson, 18 Am. Dec. 463; Gourdin v. Davis, 45 Am. Dec. 745; 2 Enc. L. & P. 59.

Actual possession by pretender to title or holder of paper evidence thereof is not required, but actual possession by his tenant or representative will suffice. Clift v. White, 12 N. Y. 519; Walker v. McCusker, 71 Cal. 594; Lightbody v. Treelson, 39 Minn. 310; Woolsey v. State, 17 S. W. 546; Webster's Dictionary; Bouvier Law Dictionary; Dixon v. Ahern, 14 Pac. 598; Adams v. Gilchrist, 63 Mo. App. 639; Gregg v. Forsyth, 24 How. 179; Bell v. Coke Co., 155 Fed. 712; Scaife v. Land Co., 90 Fed. 238; Treece v. American Assoc., 122 Fed. 598; Murphy v. Commonwealth, 187 Mass. 361; Heinemann v. Bennett, 144 Mo. 113; Hassett v. Ridgley, 49 Ill. 197; Holtzman v. Douglas, 168 U. S. 466; 2 Enc. L. & P. 379.

The payment of taxes is sufficient evidence of good faith. 2 Enc. L. & P. 409; Gottlieb v. Thatcher, 51 Fed. 373; Sexon v. Baker, 172 Ill. 365; Floyd v. Ricketson, 129 Ga. 676; Lee v. O'Quinn, 103 Ga. 355; Brady v. Walters, 55 Ga. 25; Stubblefield v. Borders, 92 Ill. 280; Foulke v. Bond, 41 N. J. L. 528; Severson v. Gremm, 124 Iowa 729; De Foresta v. Gast, 20 Colo. 307.

Continuity is an element of adverse possession. 2 Enc. L. & P. 439.

A conveyance by a trustee to the cestui que trust merges the title and determines the trust. 2 Perry on Trusts, sec. 921; 28 A. & E. Enc. 933; 1 A. & E. Enc., 2 ed. 842; 1 Perry on Trusts, secs. 13, 14.

A resulting trust may be established by parole. 2 Perry on Trusts, secs. 139, 143.

Adverse possession by a tenant may be established by a disclaimer. Bergere v. Chaves, 14 N. M. 352; 2 Enc. L. & P. 468-471; Willison v. Watkins, 3 Pet. 598.

Notice to the agent is notice to the principal. Mechem on Agency, sec. 718; 1 Perry on Trusts 321; 29 Cyc. 1113.

FRANK W. CLANCY for Appellees.

Character of possession necessary to show title. Laws 1899, chap. 63, sec. 2; 1 Cyc. 997; Thompson v. Pioche, 44 Cal. 508; Ward v. Cochran, 150 U. S. 608; Harvey v. Tyler, 2 Wall. 349; Sharon v. Tucker, 144 U. S. 541; Kincheloe v. Tracewell, 11 Gratt. 605; Probst v. Presbyterian Church, 129 U. S. 190; Jackson v. Porter, 13 Fed. Cas. 238; Bowman v. Lee, 48 Mo. 336; Bracken v. Railway Co., 75 Fed. 349; Colvin v. Land Assn., 23 Neb. 75; Smith v. Burtis, 9 Johns. 180; Bedell v. Shaw, 59 N. Y. 50; Schleicher v. Gatlin, 85 Tex. 272; Colvin v. Burnett, 17 Wend. 569.

STATEMENT OF FACTS.

Suit was instituted by the appellant, in the district court of Santa Fe county, on March 2, 1908, to quiet title to the north half of the northeast quarter of section 17, in township 15 north of range 8 east, against the appellees, and for injunctive relief and damages. The defendants filed an answer, denying appellants' allegations of ownership of the tract in question; alleged that appellant was in possession of some part or parts of the land in controversy, but denied his possession of all; denied adverse possession by appellant for ten years. The appellee company also counterclaimed, alleging title in itself, and asked to have its title quieted against the appellant. Upon issue joined the cause was tried by the court, and at the termination of appellants' evidence in chief, upon appellees' motion for a non-suit, the issues were found in favor of the appellees and a final decree was entered dismissing the complaint, from which judgment this appeal was prosecuted. The facts disclosed by the evidence, so

far as they are material to a decision of the controverted questions, may be briefly summarized as follows: The Bonanzas Mining Company, for many years prior to October 20, 1897, had been in possession of about twenty-five acres of the tract in question, under a claim of ownership. In 1889, the company leased the twenty-five acre tract to John Andrews, the uncle of appellant, who entered into possession of it. A short time after the entry by John Andrews, the appellant joined him, and the two men continued to occupy the land under the John Andrew's lease. For the first few years of the tenancy some rent was paid to the Bonanzas Company. It appears that for some years prior to 1896 no rent was paid by the Andrews', but they recognized the tenancy until 1897. In October, 1897, the sheriff of Santa Fe county, on execution issued against John Gwyn, who was at that time one of the holders of the paper title from the United States Government, sold the whole of the eighty acre tract, at public auction, to Ed. Bennett, for the use, however, of John Andrews and the appellant, and this fact was announced publicly at the sale by the sheriff in the presence and hearing of the duly authorized agent of the Bonanzas Mining Company, also John Andrews and several other parties. After the sale, the sheriff again informed the agent of the Bonanzas Mining Company that the land had been sold to Ed. Bennett for John and Edgar Andrews. Shortly after the sale the sheriff, at the request of the Andrews', executed a deed for the property to Fritz Muller, the uncle of the appellant. The consideration for the deed was paid to the sheriff by the Andrews'. The title to the property, acquired by the sheriff's deed, remained in Muller until 1903, at which time he conveyed it to Edgar Andrews at the request of John Andrews, made prior to the death of John Andrews in 1901. Muller testified that he held the land for the use and benefit of John and Edgar Andrews; that the consideration for the sheriff's deed was paid by John Andrews and that the Andrews' paid the taxes or reimbursed him for the taxes paid on the land in question. After he conveyed the land to Edgar Andrews the tax receipts introduced in evidence show

that Edgar Andrews paid the taxes and that the land was assessed in his name. It was admitted by the appellant, in the lower court, that the sheriff's deed to Fritz Muller was void, because of irregularities, which need not be set out, as it was conceded by the appellee that the deed, though void, would constitute color of title, but they contended that the possession of Andrews', from 1897 to 1903, was not under color of title; that such possession was not possession by Muller under his color of title and that the ten year period fixed by the statute of limitations had not run at the time the suit was instituted.

OPINION OF THE COURT.

ROBERTS, A. J.—Appellant claims title to the real estate in question under and by virtue of Section 2, Chapter 63, of the Acts of the Legislature of 1899, which provides: "No person or persons, nor their children nor heirs, shall have, sue or maintain any action or suit, either in law or in equity, for any land, tenements or hereditaments, against any one having adverse possession of the same, continuously in good faith, under color of title, and who has paid the taxes lawfully assessed against the same, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and all suits, either in law or in equity, for the recovery of any lands, tenements or hereditaments so held shall be commenced within ten years next after the cause of action therefor has accrued." There is no dispute but that appellant has resided upon the land for much longer than the ten year period; but the appellees contend, and the lower court upheld this contention, (1st) that from 1897 to 1903, appellant and his uncle, did not hold the land adversely, but held the same in subserviency to and under the claimed title of the Bonanzas Mining Company, as their tenants, and (2nd) that Andrew's possession from 1897 to 1903 was not under the color of title held by Muller under the sheriff's deed; in other words, that the possession and occupancy of land by a cestui que trust, would not enure to the paper title, standing in the name of the trustee. It appears from the

evidence, and is referred to in the opinion of the lower court, copied into the transcript, that a man named Nasario Gonzales claimed title to a portion of the eighty acres in dispute, but we apprehend that this fact did not influence the court to enter the judgment of non-suit, for the reason that, even if true that appellant had not established his title by adverse possession to the whole of the eighty acres, if he had so established his title to a portion of the tract, the court would have proceeded with the cause and would have quieted his title to that portion of the tract which the evidence disclosed he was entitled to.

1. The solution of the first proposition depends upon whether the facts occurring, at the sale of the property by the sheriff, in 1897, and the continued occupancy and cultivation of the land by Andrews, was a sufficient renunciation and disclaimer of the title of the landlord, under which Andrews had theretofore held the land, to set the statute in motion. In the case of Willison v. Watkins, 3 Pet. 44, the Supreme Court of the United States considered and declared the law to be settled, that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure with the knowledge of the landlord, was a forfeiture of his term; that his possession became so adverse, that the act of limitation would begin to run in his favor, from the time of such forfeiture; and the landlord could sustain ejectment against him without notice to quit. This case has since been repeatedly cited, with approval, by that and other courts. The appellee is not claiming under or in privity with the title of the Bonanzas Mining Company, the landlord, and the Bonanzas Mining Company is not asserting the tenancy, but appellee is relying upon the relationship of landlord and tenant between appellant and a third party to prevent the statute from running against it. We think the facts sufficient to set the statute running against the landlord and all other claimants or owners. The agent of the Bonanzas Company was present at the sheriff's sale. Andrews and several other parties were also present. The sheriff announced that he had sold the property to Ed. Bennett for

Andrews; the agent of the landlord heard the statement made, and, as Andrews was present, heard the statement made, apparently understood it, by his silence acquiesced in it. Had the statement been untrue the circumstances certainly called for a denial on his part, which was not made. Later, the sheriff again told the agent of the Bonanzas Company that Ed. Bennett purchased the property for Andrews. Thereafter, no rent was paid or tendered by Andrews to the landlord; no act was done by him which could in any way be construed as an admission of the title of the landlord. He used the premises as his own, repaired buildings and fences and cultivated the fields. Had Andrews taken the deed in his own name; had he himself been the bidder and purchaser at the sale, certainly there could be no dispute as to his renunciation of the title of his landlord, and we cannot see how the fact that the bid was made by a third party for Andrews, all of which was known to the landlord, and the title was taken in some other name, for his use, can alter the case. We think the facts sufficiently establish the renunciation of the landlord's title and were sufficient to set the statute in motion.

2. The second proposition presents more difficulties. No cases have been cited by counsel on either side where the question has ever been expressly decided by any of the courts. It is admitted by counsel for appellee that Fritz Muller, in whose name the sheriff's deed was taken, was a trustee and that Andrews was the cestui que trust and in possession of the real estate, but he contends that the possession by the cestui que would not enure to the legal title held by the trustee; in other words, that his possession would not be under color of title. Counsel for appellee admits that the holder of the color of title may perfect his title by adverse possession where the premises have been occupied by his tenant and this proposition is not subject to dispute. He also admits that it might be true that the possession of a cestui que trust, under an express trust, would enure to the legal title. In Love v. Watkins, 40 Cal. 547, the court, speaking of resulting trusts, says: "The only respect in which this trust differs

from an express trust, is as to the mode in which it is established or proven." In the case now before the court the trustee carried out the trust, without the necessity of a resort to the courts by the cestui. He acknowledged the trust, and conveyed the property to the beneficiary. The only necessity of proving the trust in the present case was to establish the relations of the parties relative to the real estate in controversy. Suppose Fritz Muller had taken the title for his own use, and had leased the land by parole to Andrews, can it be insisted that the parole lease could not have been established by the testimony? Would not the occupancy of the land by the tenant have enured to the title held by Muller? We do not believe that the relations between the parties in this case would have been altered, had the trust been an express trust. In the case of Lewis v. Hawkins, 23 Wall. 199, the court, in discussing the statute of limitations as between trustee and cestui que trust, says: "A cestui que trust cannot set up the statute of limitations against his co-cestui que trust, nor against his trustee. These rules apply to all cases of express trusts. 'As between trustee and cestui que trust, an express trust, constituted by the act of the parties themselves will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being the possession of the cestui que trust.' The same principle applies where the cestui que trust is in possession. He is regarded as a tenant at will to the trustee." If there was no privity between the cestui que trust and the trustee, if the cestui did not hold under the title of the trustee, certainly he could hold adversely
2 to the trustee. His possession of the trust estate must be in subserviency to the legal title, and being under the legal title and in recognition of it, his possession of the land would enure to the title under which he claimed. The same principle (that governing landlord and tenant) applies to mortgagor and mortgagee, trustee and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another by recognition of his title. Clark v. Clark, 21 Neb. 402. After the sheriff's sale Andrews was in possession of the land

under the title standing in the name of Muller. His testimony establishes this fact, and it is not disputed. In view of the foregoing it follows that the court erred in entering a non-suit. The judgment is reversed, with instructions to the lower court to overrule the motion for a non-suit.

[No. 1386. December 8, 1911.]

MARY E. COLLINS, Appellant, v. JULIA SCHUMP, et al, Appellees.

SYLLABUS.

1. The demurrer to the evidence of the plaintiff being sustained by the lower court, the testimony introduced on behalf of the plaintiff is deemed to be true and every conclusion which it tends to prove must be admitted.

2. Evidence reviewed and it clearly established fraud on part of appellees. A court of equity should, therefore, give appellant relief.

3. A recovery will not be denied appellant on the ground that she executed the conveyance to defraud creditors, when in fact there were no creditors, and no one was or could have been injured by the transfer. The mere fact that her husband was indebted to the bank would not create any liability on her part.

Appeal from the District Court for Quay County, before M. C. MECHEM, Associate Justice. Reversed.

C. H. HITTSON for Appellant.

On demurrer to the evidence every part of the testimony favorable to the plaintiff is deemed to be true and every conclusion which it tends to prove is deemed to be admitted. Jones v. Adair, 91 Pac. 78.

The law is indulgent to human infirmity and less tolerant of deliberate and obtrusive depravity. Chamberlain v. Chamberlain, 95 Pac. 659.

Even where fraud is shown on part of grantor, a

court of equity may grant relief. Buttlar v. Buttlar, 67 N. J. Eq. 136; Rivera v. White, 63 S. W. 125.

Where a conveyance is induced by the grantee, and particularly where the inducement is clearly fraudulent, and there is no consideration for such a conveyance, the grantor may have the same set aside. Herrick v. Lynch, 150 Ill. 283; Kervick v. Mitchell, 68 Iowa 273; Stewart v. Inglehart, 38 Am. Dec. 202.

C. C. DAVIDSON for Appellant. No brief.

STATEMENT OF FACTS.

Appellant, Mary E. Collins, owned two pieces of property in the City of Tucumcari, New Mexico, of the value of $4,500. She was married and resided with her husband at that place. The appellees, L. B. Schump and Julia Schump, also lived in Tucumcari, and Mrs. Julia A. Schump, was and had been for more than a year on very intimate and friendly terms with the appellant; the two ladies visiting each other almost every day. Shortly before the first of March, 1910, appellant's husband left home and was traveling around over the country visiting various places. About the middle of March, during the absence of Mr. Collins, the First National Bank of Tucumcari filed suit against both Mr. and Mrs. Collins, on a promissory note, executed to the bank by the husband, but not signed by the wife. The summons in the suit was served on Mrs. Collins while her husband was absent and his address unknown. Mrs. Schump was at appellant's house at the time the papers were served and took possession of them and told Mrs. Collins, "that the bank was going to start in and tie up her stuff so that they could rob her out of it and she could do nothing with it, and that the only way she could save anything was to get it out of her hands, and out of her name." Mrs. Collins suggested that she would not be willing to place her property in the hands of any one, except her mother, whereupon Mrs. Schump told her, "that it would not do to turn it over directly to her mother, but that she should convey it to some one else first, and let them turn it over to her mother." and told

Mrs. Collins "to turn it over to her, and that she would convey it to her mother." Mrs. Schump also advised Mrs. Collins not to consult an attorney, but that she would be a sister to her and protect her in the suit. Mrs. Collins finally yielded to the argument advanced by Mrs. Schump and a notary public was procured by Mrs. Schump, who prepared the deeds at Mrs. Schump's request, stating the consideration in one of said deeds at three thousand dollars and in the other at fifteen hundred dollars, according to directions given by Mrs. Schump. The conveyances were made without any actual consideration, and with the understanding that the property was to be re-conveyed to appellant's mother on or before the 31st day of March, 1910. On or about that date the appellant requested Mrs. Schump to make the conveyance, which she refused to do, and claimed the property as her own. Suit was filed by the appellant on the 1st day of April, 1910, for the cancellation of the deeds on the ground that said deeds were obtained by fraud and without any consideration. Appellees answered denying the fraud and alleging that full value had been paid for the property in question. The case was heard before a referee in Tucumcari, and upon the conclusion of the testimony on behalf of appellant, appellees interposed a demurrer to the evidence and the referee certified the record and demurrer to the court for a decision; the demurrer was sustained by the court below to the evidence and judgment was rendered for the defendants, from which judgment this appeal was prosecuted.

OPINION OF THE COURT.

ROBERTS, A. J.—The appellee has filed no brief in this court and we are under the disadvantage of having heard but one side of the case and being compelled to do a great amount of unnecessary work to enable us to arrive at a correct conclusion. As the demurrer to the evidence of the plaintiff was sustained by the lower
1 court, the testimony introduced on behalf of the plaintiff is deemed to be true and every conclusion which it tends to prove must be admitted. We can con-

ceive of but two propositions which might have influenced the lower court in sustaining the demurrer; (1st) that fraud sufficient in law to invalidate the deed had not been proven; and, (2nd) that the deed was executed by the appellant to defraud her creditors.

1. We have carefully reviewed the evidence and are
2 of the opinion that it clearly establishes fraud on the part of Mrs. Schump. The evidence discloses that Mrs. Collins was an uneducated woman; that she had never had any prior business transactions of any kind; that the real estate in question was the only real estate she had ever owned; that she knew nothing whatever about law or the courts; that she was alone and unable to communicate with her husband; that immediately after procuring the execution of the deeds Mr. and Mrs. Schump set about endeavoring to procure witnesses who would testify that they saw the purported consideration named in the deeds paid to Mrs. Collins, even offering to pay witnesses who would testify to these facts; that Mrs. Schump by her persuasion prevented Mrs. Collins from consulting an attorney or advising with any other person in regard to the matter. In view of these facts, to refuse to give Mrs. Collins relief would permit a designing and unscrupulous person to take an unconscionable advantage of her. We think the facts show actual fraud and that a court of equity should give her relief.

2. A recovery will not be denied to the appellant on the ground that she executed the conveyance to defraud creditors, when in fact there were no creditors, and
3 no one was or could have been injured by the transfer.

This principle appears not to have been called to the attention of the lower court. According to the testimony she did not owe the bank which instituted the suit any money. She had never signed the note and had no creditors. No person was harmed by the conveyance or could have been harmed by it. The mere fact that her husband was indebted to the bank would not create any liability on her part. As stated by the Supreme Court of California, in the case of Chamberlain v. Chamberlain, 95 Pac., p. 659: "It follows, we think, upon the clearest principles of equity, that

she could not take refuge behind the pretense that in yielding to her solicitations he committed a wrong against others, thereby depriving him of any redress for her gross misconduct. The law is more indulgent to human infirmity and less tolerant of deliberate and obtrusive depravity. A. cannot lay a trap for B., secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B. too readily yielded to temptation to save himself at the possible expense of creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken." To the same effect, see Sanford v. Reed, 85 S. W. p. 213. The Supreme Court of Texas, in the case of Rivera v. White et al., 63 S. W. 125, says: "Other authorities, with better reason, we think, hold that where there is no creditor there is no fraud, and, therefore, no policy of the law to prevent the enforcement of the trust." Quite a number of authorities are cited in support of the rule in this case. See, also, Salee's Executor et al v. Salee, 35 S. W. 437; Bloomingdale v. Crittenden, (Mich) 42 N. W. 836. We think the court erred in sustaining the demurrer to the evidence. The case will therefore be reversed and remanded, with instructions to overrule the demurrer and to proceed with the hearing of the case.

[No. 1388. December 8, 1911.]

TINA HAFFNER RETSCH, OTTO RETSCH, Intervenor, Appellee, v. ALOIS B. RENEHAN, et al, Appellant.

SYLLABUS (BY THE COURT).

1. The statute does not authorize a sheriff to charge or collect fees for the custody of real estate under levy of an execution.

2. Where, at a sale under execution, a sheriff causes to be made out of a judgment debtor's property illegal and improper charges, the sale is fraudulent and voidable.

3. Where real estate is bid in at an execution sale by the attorney of the judgment creditor for himself and not for his client he is charged with notice of the fraudulent acts of the sheriff in the conduct of the sale.

4. One is not a purchaser for a valuable consideration where the consideration is antecedent debts without surrender or cancellation of any written security by the creditor.

5. There being no evidence that the position of the parties had so changed that equitable relief could not have been afforded without doing injustice, the defense of laches is not available. Following Penn. Mutual Life Insurance Co. v. Austin, 168 U. S. 685.

6. The plaintiff having been in possession of the land laches will not be imputed to her.

Appeal from the District Court for Santa Fe County, before JOHN R. MCFIE, Associate Justice. Affirmed.

A. B. RENEHAN for Appellant.

After offering land for sale on execution, in parcels, and failing to get bids, a sale en masse is rightful. White v. Crow, 110 U. S. 190; 20 Enc. P. & P. 217; 17 Cyc. 1251; Constock v. Hill, 127 Colo. 165; Osgood v. Blackmore, 59 Ill. 268.

The purchaser is entitled to his deed on the day of the sale and to the immediate possession of the land. Rogers v. Carward, 55 Am. Dec. 733.

There was no wrong in the attorney's bidding and buying. Learned v. Geer, 139 Mass. 31.

Irregularities for which a sale may be set aside may be waived by the parties interested and waiver may be presumed from apparent acquiescence. Crawford v. Quinn, 35 Ia. 543; Maple v. Kussart, 53 Pa. St. 348; McConnel v. People, 71 Ill. 481; National Nickel Co. v. Nevada Nickel Syndicate, 106 Fed. 110; Barnes v. Zoerker, 107 Ind. 105; Frink v. Roe, 70 Cal. 302; Shottenkirk v. Wheeler, 3 Johns. ch. 280; 17 Enc. L. 956; Bachelder

Bros. v. Chaves, 5 N. M. 566; Stewart v. Severance, 43 Mo. 322; Gibson v. Lyon, 115 U. S. 447; Griffith et al v. Bogert, 18 How. 164; Doe v. Dutton, 2 Ind. 809; Sowle v. Champion, 16 Ind. 165; Hunter v. Turnpike Co., 56 Ind. 213.

A sale upon execution after the return day is good if the levy was made before. Remington v. Linthicum, 14 Pet. 90; Wheaton v. Sexton, 4 Wh. 503; Mason v. Bennett, 52 Fed. 345; Freeman Void Judicial Sales 113; Allen v. Kinyon, 41 Mich. 281; Freeman on Executions, sec. 6; Wyant v. Tuthill, 17 Neb. 496; Stewart v. Severance, 43 Mo. 322; Stein v. Chambliss. 18 Ia. 474; Young v. Smith, 76 Am. Dec. 83; Barden v. McKinney, 15 Am. Dec. 520; Rose v. Ingraham, 98 Ind. 278; Southern Hotel Co. v. Hotel Co., 94 Cal. 221; Bradley v. Sandilands, 56 Minn. 45.

Irregularities must be corrected at law. Kavenaugh v. Jakeway, Walker's Ch. Rep. 344, Mich.; Blair v. Compton, 33 Mich. 1; Campo v. Godfrey, 18 Mich. 44; Ross v. Mead, 5 Gilmouer 171; Praether v. Hills, 36 Ill. 402; Gillespie v. Smith, 29 Ill. 481; Fergus v. Woodward, 44 Ill. 374; McMullen v. Goble, 47 Ill. 67; Hay v. Ball, 77 Ill. 500; Roberts v. Fleming, 53 Ill. 196; Winchee v. Edwards, 57 Il. 41; Osgood v. Blackmore, 59 Ill. 26; Rinkney v. Small, 60 Ill. 416; Griffith et al v. Bogert et al, 18 How. 164; Voorhees v. Bank, 10 Pet. 477; 2 Freeman on Executions, 3 ed. sec. 310; Thompson v. Solmie, 2 Pet. 157; 2 Rose's Notes 817 & 821; Blaine v. The Ship, 4 Cr. 328.

Unimportant discrepancies between judgment and execution will be disregarded, much more so in the notice of sale. Ten Eyck v. Walker, 4 Wendell 463.

Lacking the sheriff's return, his deed is sufficient evidence of his proceedings. Remington v. Linthicum, 14 Pet. 91; Wheaton v. Sexton, 4 Wheat. 503; McNitt v. Turner, 16 Wall. 365; Freeman on Executions, sec. 341; Rorer on Judicial & Execution Sales, sec. 641; Cooper v. Galbraith, 3 Wash. (C. C.) 550; Moore v. Fraser, 15 Or. 637.

The adjournment of the sale was proper at common

law. Freeman on Executions, sec. 288; Gilbert v. Watts-DeGolyer Co., 169 Ill. 134; Blossom v. Railroad Co., 3 Wall. (L. ed. 43) 209; Freeman Void Judicial Sales, sec. 288; Semmes v. U. S., 91 U. S. 22; Requa v. Rhea, 2 Paige 339.

Republication of notice was not requisite. 2 Freeman on Executions, 3 ed., sec. 288; Tinkham v. Purdy, 5 Johns 345; Russell v. Richards, 11 Me. 371; Highes v. Longworth, 4 Bar. 153; Warren v. Leland, 9 Mass. 265; Dexter v. Shepherd, 117 Mass. 485; Blossom v. Railroad Co., 3 Wall. 209; Hard v. Foster, 98 Mo. 313; Semmes v. U. S., 22; Connell v. O'Neall, 154 Pa. St. 591; Russell v. Gibbs, 5 Cow. 390; Van Camp v. Searle, 147 N. Y. 150; Allen v. Cole, 9 N. J. Eq. 286; Cox v. Halstead, 2 N. J. Eq. 311; Luther v. McMichael, 6 Humphr., Tenn. 298.

Plaintiff's attorney may buy at execution sale in his own interest if he does not prejudice his client. Freeman Void Judicial Sales 123; Richards v. Holmes, 18 Howard 306.

Sheriff should not exact payment in coin when plaintiff is entitled to proceeds of sale and being entitled to fees his disposition of them is not subject to question. Freeman on Executions, sec. 301; Robinson v. Brennan, 90 N. Y. 208.

New Mexico has no provision for a certificate of sale, but there must be some writing to satisfy the statute of frauds. 2 Freeman on Executions, 3 ed., sec. 312; Leonard v. Flynn, 89 Cal. 535; Greer v. Clark, 31 Cal. 592; Remington v. Linthicum, 14 Pet. 92; Leland v. Wilson, 34 Tex. 91; Onerato's Interdiction, 46 La. Ann. 73; Jouet v. Mortimer, 29 La. Ann. 206; Porter v. Watson, 76 Pac. 841; Burk v. Bank, 3 Head 686; Cannon v. Pillow, 7 Humphrey 292, Tenn.; 20 Enc. L. ed. 727; Leach v. Koenig, 55 Mo. 451; Schumate v. Revus, 49 Mo. 333; Landis v. Brant, 10 How. 348; Keaton v. Thomason, 2 Swan, Tenn. 138; Pickett v. Pickett, 3 Dev. N. C. 6.

Statute of Limitations is applied equally in equity as at law. The doctrine of laches is also available though

not plead, and may even shorten the limitation period. Bank v. Daniels, 12 Pet. 32; Lewis v. Marshall, 5 Pet. 470; Curtner v. U. S., 149 U. S. 662; Moran v. Horsky, 178 U. S. 214; Miller v. McIntyre, 6 Pet. 61; Bacon v. Howard, 20 How. 22; Godden v. Kimmell, 99 U. S. 201; Badger v. Badger, 2 Wall. 87; Putnam v. Railroad Co., 16 Wall. 390; Bank v. Dispatch Co., 149 U. S. 436; Baker v. Cummings, 169 U. S. 189; Morris v. Haggin, 136 U. S. 386; Willard v. Wood, 164 U. S. 502; Hale v. Coffin, 114 Fed. 576, 120 Fed. 473; Richards v. Mackall, 124 U. S. 183; Parker v. Dacres, 130 U. S. 49; Alsop v. Riker, 155 U. S. 461; Whitney v. Fox, 166 U. S. 648; Caulk v. Pace, 53 Fed. 714; Bartlett v. Ambrose, 78 Fed. 841; U. S. v. Moore, 12 How. 209; Sena v. U. S., 189 U. S. 241; Townsend v. Vanderwerker, 161 U. S. 171; McIntyre v. Pryor, 173 U. S. 59; Brainerd v. Buck, 184 U. S. 109; Crosby v. Beale, 17 Wall. 336; Hoyt v. Sprague, 103 U. S. 613; Ware v. Galveston City Co., 146 U. S. 116; Hayward v. Eliot National Bank, 96 U. S. 611; Upton v. Tibblecock, 91 U. S. 45; C. L. 1897, secs. 2916, 2918; Upton v. McLaughlin, 105 U. S. 640; Rosenthal v. Walker, 111 U. S. 191; Teall v. Schroeder, 158 U. S. 172; 25 Cyc. 1186; Baker v. Cummings, 169 U. S. 715; 17 Cyc. 1283; Dwayne v. Burke, 12 Pet. 24; Screyer v. Scott, 134 U. S. 409; Farrer v. Churchill, 135 U. S. 250; United States v. American Bell Telephone Co., 167 U. S. 154; Lalone v. United States, 164 U. S. 426; Evers v. Watson, 156 U. S. 523.

Irregularities were waived by laches. Koontz v. Bank, 16 Wall. 196; Voorhees v. Bank, 10 Pet. 473; Evers v. Watson, 156 U. S. 520; Jackson v. Spink, 59 Ill. 409; Beebe v. U. S., 161 U. S. 637; White v. Luning, 93 U. S. 523; Evers v. Watson, 156 U. S. 524.

Proof of fraud. Lyttle v. Lansing, 147 U. S.

Attorney's appearance will be considered as authoritative and bind the principal unless clearly unauthorized. Osborn v. U. S. Bank, 9 Wh. 829; Hill v. Mendenhall, 21 Wall. 454; Coler v. Commissioners, 6 N. M. 116.

A quit claim deed does not deprive the purchaser of innocence. Boone v. Chiles, 10 Pet. 177; U. S. v. Land

Company, 148 U. S. 361; McDonald v. Belding, 145 U. S. 788; Moelle v. Sherwood, 148 U. S. 350.

A judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally except in a case of fraud. Griffith et al v. Bogart et al, 18 How. 164; Koontz v. Bank, 16 Wall. 196; 20 Enc. P. & P. 238; Lee v. Davis, 16 Ala. 516; Graaf v. Louis, 71 Fed. 594; Cassell v. Joseph, 184 Ill. 378; Bray v. Adams, 114 Mo. 486; Stevenson's Heirs v. McCreary 51 Am. Dec. 102.

The sheriff's fees and retaxation. Parrisher v. Waldo, 72 Ill. 71; Mann v. Warner, 22 Mo. App. 577; 5 Enc. P. & P. 246; Perfield v. James, 4 Hun. 69; Hart v. Lindsey, Walk. 72 Mich.; 2 Freeman on Executions, sec. 296.

Sheriff is presumed to have done his duty. Rohrer on Jud. and Ex. Sales, sec. 641; Gantley's Lessee v. Ewing, 3 How. 714.

Where execution debtor procures postponement he is bound. Payne v. Billingham, 10 Iowa 360.

Defendant's attorney may buy at public sale. Fischer v. McInnerney, 137 Cal. 28.

Plaintiff or intervenor cannot recover in any event without repayment of purchase price with interest. Graaf v. Louis, 71 Fed. 594; Davis v. McCann, 145 Mo. 179.

Notice. Freeman Void Jud., Sales, sec. 287.

Writ of venditioni exponas. Ritchie v. Higginbotham, 26 Kas. 647; 8 Words and Phrases 7290.

Clerk's records may be shown to be badly kept. Stevenson's Heirs v. McCreary, 51 Am. Dec. 103.

Courts of equity are bound by statutes of limitations the same as courts of law. Baker v. Cummings, 169 U. S. 715.

In judicial or execution sales possession by the judgment or execution debtor either exists or will be presumed to exist. 5 Pom. Eq. Jur., sec. 33; Simmons Creek Coal Co. v. Doran, 142 U. S. 1075; Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685.

Record of a conveyance charges all persons interested with notice of any fraud thereby committed. Teal v. Schroeder, 168 U. S. 172; C. L. 1897, secs. 2916, 2918.

It was unnecessary to plead specifically the plea of laches or statute of limitations. Badger v. Badger, 2 Wall. 95; Richards v. Mackall, 124 U. S. 187; 25 Cyc. 1406; Alexander v. Bryan, 110 U. S. 420; Hayward v. Elliott Nat. Bank, 96 U. S. 611; Upton v. Tribblecock, 91 U. S. 45.

THOMAS B. CATRON for Appellee.

The right to levy on, advertise and sell lands is statutory and each statute must be strictly construed. 2 Freeman on Ex., secs. 172, 285, 288; Gentry v. Ewing, 3 How. 713; Jones v. Jones, 1 Bland. 443; Suth. Stat. Con., secs. 400, 454, 455, 456; C. L. 1897, secs. 3106, 3113-3115, 3117; Corwin v. Merritt, 3 Barb. 341; Bloom v. Burdick, 1 Hill 130; Brisbane v. Peabody, 3 How. Pr. 109; Rogers v. Murray, 3 Paige 390; Atkins v. Kerman, 20 Wend. 249; Shennard v. Reade, 7 Hill 431; Sharp v. Spier, 4 Hill 76; Morse v. Williams, 35 Barb. 472; Sherman v. Dodge, 6 John Ch. 107; Sibley v. Smith, 2 Mich. 486; Koch v. Bridges, 45 Miss. 247; South. Stat. Con., sec. 455; People v. Schemerhorn, 19 Barb. 558; Hurford v. Omaha, 4 Neb. 336; Best v. Gholson, 89 Ill. 455; People v. Cook, 14 Barb. 290, 8 N. Y. 67; Marsh v. Chestnut, 14 Ill. 223; Clark v. Crane, 5 Mich. 151; State v. McLean, 9 Wis. 292; Norwegian Street, 81 Pa. St. 349; McKune v. Weller, 11 Cal. 49; in re Watts, 1 N. M. 541; Laws 1897, chap. 45, sec. 7; Todd v. Phillhower, 4 Zab. 796; Den v. Young, 7 Hal. 300; French v. Edwards, 13 Wall. 511; Ransom v. Williams, 2 Wall. 319; Rounsville v. Hazen, 33 Kas. 71; Hoffman v. Gaines, 47 Ark. 226; Dula v. Seagle, 98 N. C. 458; Mitchell v. Noaway Co., 80 Mo. 257; Ware v. Bradford, 2 Ala. 676; Brooks v. Rooney, 11 Ga. 423; Hobein v. Murphy, 20 Mo. 447; Lawrence v. Spied, 2 Bib. 401; Kilby v. Haggan, 2 J. J. Marsh 208; Osgood v. Blackmore, 59 Ill. 261; Jackson v. Spink, 59 Ill. 484; Curd v. Lackland, 49 Mo. 251; Draper v. Brysan, 17 Mo. 71; Muir v. Natchez, 4 S. & M. 602; Evans v. Robbison, 92 Mo. 199; Williams v. Peyton, 4 Wheat. 79; McMichael v. McDermott, 17 Pa. St.

353; Richards v. Unangst, 15 Pa. St. 90; Martin v. Bright's Heirs, 20 Am. Dec. 226; Stockton v. Orings, 12 Am. Dec. 302; Pa. St. 420; Purce v. Evans, 61 Am. Dec. 420; Trumble v. Turner, 53 Am. Dec. 90; Kloop v. Witingen, 43 Pa. St. 225; T. J. Taylor & Co. v. Pacific Co., 122 F. R. 145; Hopton et al v. Swan, 50 Miss. 549; Farr v. Sims, 24 Am. Dec. 263; Mills v. Rogers, 13 Am. Dec. 564; Smith v. Grantee, 18 Am. Dec. 263; Jones v. R. R. Co., 32 N. H. 295; McClean County Bank v. Flagg, 31 Ill. 295; Cummings' Appeal, 23 Penn. St. 509; Rorer on Jud. Sales, 855; Ryerson v. Nicholson, 2 Yates Rep. 516; Friedly v. Sheetz, 9 S. & R. 162; Rowley v. Brown, 1 Binney R. 61; Jackson v. Roberts, 7 Wend. Rep. 888; Carlile v. Carlile, 7 J. J. Marshall 625; Denning v. Smith, 2 John Ch. 342-4; Benson v. Smith, 42 Me. 425; Ollis v. Kirkpatrick, 3 Idaho 34; Free. Void Jud. Sales, sec. 30; Thornton v. Boyden, 31 Ill. 210; Montgomery v. Barnes, 19 La. Ann. 160; Enlow v. Miles, 12 S. & M. 147; Patten v. Stewart, 26 Ind. 395; Huntz v. Worthington, 4 Pa. St. 153; Williams v. Barlow, 49 Ga. 530; Donthell v. Kettle, 104 Ill. 360; Ryerson v. Nicholson, 2 Yates 516; Friedly v. Schutz, 9 S. & R. 162; Rowley v. Brown, 1 Binney 61; Rorer on Jud. Sales, secs. 730, 735, 746, 747, 748, 751, 757, 753, 1106, 1107; Jacobs v. Buckaloo, 4 Ariz. 254; 2 Dembtz Ld. Tit., sec. 171; Nesvitt v. Dallam, 7 G. & J., Md. 512; Woods v. Monell, 1 John Ch. 702; Tiernan v. Wilson, 6 John Ch. 411; Steads Ex. v. Course, 4 Cr. U. S. 403; Johnson v. Newton, 18 Johns 335; Berry v. Griffith, 2 H. & G. Md. 337.

The sheriff under an execution has no right to take possession of the real estate. Free. on Ex., sec. 280a.; 2 Dembtz. Land Tit., sec. 171; Morgan v. Kumey, 38 Ohio St. 601; Walters v. Duval, 1st G. & J., Md. 37; Wood v. Weir, 5 B. Mon. 544; Huston v. Duncan, 1 Bush. 205; Addison v. Crow, 5 Dana 271; Woolfolk v. Overton, 3 A. K. Marsh 69; Morton v. Sanders, 2 J. J. Marsh 142; Ladd v. Blunt, 2 Mass. 402.

Sales to raise a greater sum than authorized or a greater quantity than necessary are void. Dawson v. Letsey, 10 Bush 408; Peterson v. Corneal, 3 A. K. Marsh

618; Tiernan v. Wilson, 6 Johns. Ch. 411; Stead v. Course, 4 Cranch 403; Brown v. Ferrea, 51 Cal. 552; Mays v. Wheny, 58 Tenn. 138; Rorer Jud. Sales, 901, 902, 921, 1103.

Sheriff's deed not paid for and made before the time for redemption expired, is void. C. L. sec. 3117; 2 Dembtz Ld. Tit., sec. 174; 2 Devlin on Deeds, sec. 1427; Rorer Jud. Sales, sec. 956; 4 Kent. Comm. 431; Delahay v. McConnell, 4 Scam. 152; Gorham v. May, 10 Mich. 485; Grous v. Fowler, 21 Cal. 392; Moore v. Martin, 38 Cal. 438; Cernall v. Cleim, 33 Cal. 666; Hall v. Youell, 45 Cal. 584; Negley v. Stewart, 10 S. & R. 207; Robins v. Bellas, 2 Watts 359; Isler v. Andrews, 66 N. C. 552; Buckle v. Barstow, 48 Ind. 274; Aldrich v. Wilcox, 10 R. I. 405; Phillips v. Foster, 19 Ga. 298; Swope v. Artery, 5 Ind. 213; Chapman v. Howard, 8 Black 82; Meina v. Elliott, 51 Cal. 8; Swayze v. Burke, 12 Pet. 24.

The plaintiff's attorney cannot purchase at all. Meina v. Elliott, 51 Cal. 8; West v. Waddell, 33 Ark. 575; Hall v. Hollott, 1 Cox. 134; Wright Exr. v. Walker, 30 Ark. 44; 2 Freeman on Executions, sec. 292; C. L. 1897, sec. 3117; 2 Dan. Ch. Pr. 1267; Harper v. Perry, 28 Iowa 60; Stockton v. Ford, 11 How. 246; Brotherson v. Calsalus, 26 How. Pr. 18; Henry v. Ramain, 25 Pa. St. 345; Howell v. Baker, 4 John Ch. 119; 1 Story's Eq., sec. 311; Wormly v. Wormly, 8 Wheat. 445; Starr et al v. Vanderhuyden, 9 Johns. 253; Merritt v. Lamert, 10 Paige 358; Howell et al v. Ransom et al, 11 id. 538; Howell v. Baker, 4 Johns. Ch. 120; Armstrong v. Huston's Heirs, 8 Ohio 554; Wade v. Pettibone, 11 id. 57; West v. Raymond, 21 Ind. 306-8; Gay v. Parpart, 106 U. S. 697; Barstow v. Beckett, 122 Fed. Rep. 141; Allore v. Jewell, 94 U. S. 506; Schroeder v. Young, 161 U. S. 334; Howell's Heirs v. McCreary's Heirs, 7 Dana 388; Graffam v. Burgess, 117 U. S. 180; Byers v. Surget, 19 How. 303; McIntyre v. Pryor, 173 U. S. 38; Prevost v. Gratz, 6 Wheat. 481; 1 Beach's Eq. 354; Smith v. Ayer, 101 U. S. 326; Clute v. Barron, 2 Mich. 194; Rankin v. Porter, 7 Watts 390; Teakle v. Bailey, 2 Brock. 44; Banks v. Judah, 8 Conn. 157; Church v. Marine Ins. Co., 1 Mason 344; Barker v.

Marine Ins. Co., 2 Mason 369; Copeland v. Mercantile Ins. Co., 6 Pick. 204; Michoud v. Girod, 4 How. 552; Davoue v. Fanning, 2 Johns Ch. 252; C. L. 1897, sec. 3126; Denny v. Smith, 3 Johns. Ch. 332; Brown v. Bulkley, 14 N. J. L. 457; Clute v. Barron. 2 Mich. 198; Galbraith v. Elder, 8 Watts 547; Harper v. Perry, 28 Iowa 60; Hackenburg v. Carlile, 5 W. & S. 348; Henry v. Raiman, 25 Pa. St. 359; Pacific R. R. Co. v. Ketchum, 101 U. S. 500; Stockton v. Ford, 11 How. 246; 2 Freeman on Ex., sec. 292; Howell v. Baker, 9 John. Ch. 120; Johnson v. Outlaw, 56 Miss. 547; Succession of Hoss., 42 La. Ann. 1026; Hall v. Hallett, 1 Cox. 134; Manning v. Hayden, 5 Saw. 380; Bliss v. Prichard, 67 Mo. 181; 2 Pom. Eq. Jur., sec. 1049; Case v. Carroll, 35 N. Y. 380; Howell v. Ransom, 11 Paige 538; Merritt v. Lamber, 10 Paige 358.

The time in which the suit can be brought to vacate a sale is governed by no fixed rules; it is regulated by the facts and the determination of the court on the facts. 2 Freeman on Ex., sec. 296; Relf v. Elberly, 23 Iowa 467; Williams v. Allison, 33 Iowa 284; Hall v. Allison, 33 Iowa 284; Hall v. Hallett, 1 Cox. 135; Barstow v. Beckett, 122 Fed. R. 146; McIntyre v. Pryor, 173 U. S. 54, et seq.; Michaud v. Girod, 4 How. 560; Prevost v. Gantz, 6 Wheat. 497; Baker v. Whiting, 3 Summ. 475; Allore v. Jewel, 94 U. S. 506; Meader v. Norton, 11 Wall. 442; Ins. Co. v. Eldridge, 102 U. S. 548; Townsend v. Vanderruther, 160 U. S. 186; Moreland v. Bowling, 3 Gill. 500; Morris v. Robey, 73 Ill. 463; Devoe v. Fanning, 2 John. Ch. 269; citing New York Bldg. Co. v. McKenzie, decided by House of Lords.

Fraud. Farr v. Sims, 24 Am. Dec. 403; Neilson v McDonald, 6 John Ch. 204; 4 John Ch. 254.

Notice. Webber v. Clark, 136 Ill. 270; Smith v. Huntoon, 134 Ill. 30; Stewart v. Mathery, 66 Miss. 25; Norton v. Neb. L. & F. Co., 35 Neb. 470; Dennerlin v. Dennerlin, 111 N. Y. 52; Wood v. Krebbs, 30 Gratt. 715; Long v. Weller, 29 Gratt. 347; Cordova v. Hood, 17 Wall. 1; Brush v. Ware, 15 Pet. 114; Brittain v. Crowther, 54 Fed. 298; Williams v. Jones, 43 W. Va. 562; Gantly's

Less. v. Ewing, 3 How. 714; Wood v. Carpenter, 101 U. S. 141; Shauer v. Alerton, 151 U. S. 622; Kennedy v. Green, 3 Myl. & K. 722; Singer v. Jacobs, 3 McC. 638; Schulenberg v. Karbureck, 2 Dill.; Bartles v. Gibson, 17 Fed. 297; Cordova v. Hood, 17 Wall. 8; Reynolds v. Harris, 14 Cal. 667; Turner v. Bank, 78 Ind. 19; Ayres v. Campbell, 9 Iowa 213; Wormly v. Wormly, 8 Wheat. 445; Wood v. Robinson, 22 N. Y. 567; Mingus v. Condit, 23 N. J. Eq., Gren. 315; Smith v. Huntoon, 134 Ill. 24; Webber v. Clark, 136 Ill. 256; Huber v. Hess, 191 Ill. 304; Miller v. McAlister, 197 Ill. 305; Bumpes v. Dotson, 7 Hump. 310; Forsyth v. Matthews, 14 Pa. St. 100; Engraham v. Pate, 51 Ga. 537; Howell v. Mitchell, 61 Ala. 280; Sherman v. Hogland, 73 Ind. 473; Marshall v. Croom, 60 Ala. 121; Fischer v. Shelner, 53 Wis. 481; Sutz v. Mitchell, 94 U. S. 580; May Fraud. Conveyances 236; Demarest v. Terhune, 18 N. J. Eq. 49; Reeger v. Davis, 67 N. C. 189.

The absence of a change of possession as prima facie or presumptive evidence of fraud. Crawford v. Kirksley, 55 Ala. 300; Mayer v. Clark, 40 Ala. 259; Voredenberg v. White, 1 John. Cases, N. Y. 156; Beabs v. Guernsey, 8 John. 446; Barrow v. Paxton, 5 Johns. 258; Rothchild v. Rowe, 44 Vt. 393; Coburn v. Taft, 58 N. H. 445; Dempsey v. Gardner, 127 Mass. 381; Mead v. Gardner, 13 R. I. 257.

No proceedings to set aside the sale would be required until the return of the execution was filed. Moreland v. Bowling, 3 Gill. 500.

Absence of payment of judgment and costs fraudulent. Negley v. Stewart, 10 S. & R. 207; Iser v. Andrews, 66 N. C. 552; Aldrich v. Wilcox, 10 R. I. 845; Phillips v. Foster, 19 Ga. 298; Swope v. Ardery, 5 Ind. 213; Chapman v. Howard, 8 Black. 82; People v. Hays, 5 Cal. 66; Buckle v. Barbour, 48 Ind. 274.

There should have been a specific denial of each fact. 2 Wait's Prac. 423; Gallaher v. Cunningham, 8 Cow. 373; Heally v. Finster, 2 John. Ch. 160; Frost v. Beekman, 1 John. Ch. 301; Girard v. Saunders, 2 Ves. Jr. 454; Balcom v. N. Y. L. Ins. Co., 11 Paige 466; Nanz v.

McPherson, 7 Mon. 600; Curtis v. Lunn, 6 Munf. 42; Galatin v. Irwin, Hopkins Ch. 48; Pillow v. Thaum Heirs, 3 Yerg. 508; Murray v. Ballow, 1 John. Ch. 574; Edwards v. Lent, 8 How. Pr. 28; Ketcham v. Zerega, 1 E. D. Smith 553; Lawrence v. Derby, 24 How. Pr. 133; Foles v. Hick, 12 How. Pr. 153; 2 Wait's Pr. 423; Lewis v. Acker, 11 How. Pr. 163; Richardson v. Wilton, 4 Sand. 708; Beebe v. Marrow, 17 Abb. 194; Sherman v. N. Y. Cent., Mills Id. 187; Chapman v. Palmer, 12 How. P. 37.

Actual, notorious and exclusive possession of the land takes the place of the recording of the instrument of title. 1 Beach Mad. Court, sec. 354; Chapman v. Chapman, 21 S. E. R. 813; Hornes v. Powell, 8 De Gex., M. & G. 572; 2 Pomeroy's Eq. Jur., sec. 614; Phelan v. Brady, 119 N. Y. 587; 1 Warvelle on Vendors 669.

A failure of consideration may be alleged in case of total failure of the title of the land sold. Hall v. McArthur, 82 Ga. 572; Anderson v. Anstead, 69 Ill. 452; Julian v. Beel, 26 Ind. 220; Sunderland v. Bell, 39 Kas. 663; Baird v. Lævison, 91 Ky. 204; Curtis v. Clark, 133 Mass. 509; Burns v. Hayden, 24 Mo. 215; West v. Shaw, 32 W. Va. 195; Rice v. Goddard, 11 Pick. 293.

STATEMENT OF FACTS.

The plaintiff, Tina Haffner Retsch, widow and sole heir of Louis Haffner, filed her complaint in this action January 20, 1901, against the defendant, Alois B. Renehan and M. R. Fogarty, to set aside certain deeds to real estate and to remove the same as clouds from her title thereto. Judgment for plaintiff. Defendants appeal.

OPINION OF THE COURT.

MECHEM, J.—On December, 1895, in a cause in the District Court of Santa Fe county, A. Z. Monell, obtained judgment against Louis Haffner in the sum of $100.00 and costs of suit, and thereafter, under an execution, issued by virtue of said judgment, the Sheriff of Santa Fe county sold, and defendant Renehan bought in and received a deed from the said sheriff, to certain real

estate, the property of the said Haffner. Renehan was the attorney of record of Monell, the judgment creditor. The court below found that, "The total for principal indebtedness, interest, costs of suit, and costs of sale should not have exceeded $174.00," but that "the deputy sheriff making the sale announced that $565.00 bid, the amount of judgment and costs, would be necessary before there would be any sale," which sum Renehan bid and the real estate was struck off and sold to him; the court further found that of this sum, $375 was for custodian's or caretaker's fees at the rate of $125.00 per month. The
1 statute makes no provision for fees to a sheriff for the care and custody of real estate under levy by ex-
2 ecution. The charge for such fees in this case was illegal, improper, and extortionate. Renehan is charged
3 with notice of the illegal and fraudulent conduct of the officer making the sale and there is no room for any argument that a court of equity will not set such a sale aside.

2. On January 23, 1900, Renehan, by quit claim deed, conveyed said real estate to the defendant Fogarty, who sets up the defense of a bona fide purchaser for value and without notice. The consideration expressed in the quit claim deed was that Fogarty "has cancelled and confesses as paid a certain promissory note" of Renehan's for $250.00 and also a debt of $180.00. Renehan testified that the note was for $250.00 with interest from some time in 1890 or 1891 at 6%. The court found that
4 the consideration of the deed was for antecedent debts and, therefore, Fogarty was not a purchaser for a valuable consideration. The question here raised is discussed in 2 Pomeroy Eq. Jur., sec. 749, as follows: "Whether the complete satisfaction and discharge as the definite forbearance of an antecedent debt without surrender or cancellation of any written security by the creditor, will be a valuable consideration, is a question to which the courts of different states have given conflicting answers, but the affirmative seems to be supported by the numerical weight of authority. Some legal rules ought to be settled in accordance with the results of ex-

perience and dictates of policy, rather than by compliance with the deductions of a strict logic. To hold that a conveyance is security for an antecedent debt is made without, but that one in satisfaction of such debt is made with a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends upon mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend upon the coloring given to a part transacted by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is for his interest to picture the transaction. The rule which renders it so easy for an interested party to defeat the rights of others is clearly unpolitic." With the view thus expressed by so eminent an authority and supported, it seems to us, by sound reason, we are in full accord and, therefore, hold that there being an entire absence of any evidence showing a surrender or cancellation of any written security held by the creditor, Fogarty did not become a purchaser for a valuable consideration.

3. It might be also suggested that there is nothing in the testimony to show that the debt due Fogarty was enforceable.

4. Although the defendants did not in their pleadings rely upon the defense of laches, it is argued in their brief, and while it is not clear that they are entitled to have that question considered here, yet we will deal with it. In discussing the doctrine of laches, the court, in Penn. Mutual Life Insurance Co. v. Austin, 168 U. S. 685, says: "The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief can not be afforded without doing injustice, or that intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own

neglect." See, also, Patterson v. Hewitt, 11 N. M. 1. We have been unable to find, and our attention is not directed by counsel for defendants to anything in the record for which the trial court could have found that prior to January 20, 1901, the position of the parties
5 had so changed that equitable relief could not have been afforded without doing injustice.

Further, Mrs. Haffner having been in possession of
6 the land in dispute, laches will not be imputed to her no matter how long her delay. 5 Pomeroy Eq. Jur., sec. 33. Numerous other points are discussed in the briefs which we do not deem it necessary to discuss in disposing of this appeal. Finding that the learned trial judge committed no error, the judgment in this cause is in all things affirmed.

Pope, C. J. did not participate in this decision.

[No. 1389. December 8, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. MELVIN W. MILLS, Appellant.

SYLLABUS.

1. Only such assignments of error can be presented to the appellate court as were brought to the attention of the trial judge so as to permit of their correction by him.

2. A bond is a contract by specialty.

3. Where by bond the liability of sureties for a bank to the territorial treasurer for territorial funds on deposit in said bank, was limited to the sum of $10,000, whatever deposit was made by the treasurer above the amount to which the bank was entitled was made by him as an individual depositor upon his own responsibility, but such excessive deposit could not have been made with reference to the bond and could not affect the liability of the surety any more than a deposit made by another individual.

Appeal from the District Court for Santa Fe County, before JOHN R. MCFIE, Associate Justice. Affirmed.

JULIUS STAAB for Appellant.

Where a surety enters into a joint and several obligation with his principal, the obligee will be entitled to either a joint or several judgment at his election, but he cannot have both. U. S. v. Price, 9 How. 83; U. S. v. Cushman, 2 Summer 246; Sheehy v. Manderville, 6 Cranch 253; Sessions v. Johnson, 95 U. S. 347; U. S. v. Ames, 99 U. S. 35; King v. Hoare, 13 Mees & W. 494; Robertson v. Smith, 18 Johnson 459; Ward v. Johnson, 13 Mass. 148; Cowley v. Patch, 120 Mass. 137; Smith v. Black, 9 Serg. & R. 142; C. L. 1897, secs. 2894, 2895, 2942, 2946; Armentrout v. Smith et al, 43 S. E. 98; Snyder v. Snyder, 9 W. Va. 420; Beazley's Admr. v. Sims, 91 Va. 644; Gould v. Sternburg, 69 Ill. 531; Jansen v. Grimshaw, 125 Ill. 468; Davidson v. Bond, 12 Ill. 84; Faulk v. Kellums, 54 Ill. 188; Byers v. First Nat. Bank, 85 Ill. 423; Felsenthal v. Durand, 86 Ill. 230; Wilson v. Blakeslee et al, 16 Or. 43; Fisk v. Henaire, 14 Or. 29; Miller v. Bryden, 34 Mo. App. 602; Schweickhardt v. St. Louis, 2 Mo. App. 571; Eichelman v. Weiss, 7 Mo. App. 87; Clinton Bank v. Hart, 5 Ohio St. 33; Outcault v. Collier, 8 Okla. 477; McFarlane v. Tipp, 206 Pa. St. 321; Sawyer v. White, 19 Vt. 40; Mason v. Eldred, 6 Wall. 231; Oakley v. Aspinwall, 4 N. Y. 513; Russell v. McCall, 141 N. Y. 450.

The appellant was released from the bond because the territory by agreement with the bank, principal on the obligation, deposited larger sums with the bank than the bond called for. Ryan v. Trustees, 14 Ill. 20; Reese v. U. S., 9 Wall. 13; U. S. v. Corwine, 25 Fed. Cases 14, 871; U. S. v. Freed, 186 U. S. 309; Evans v. Gradon, 28 S. W. 439.

FRANK W. CLANCY, Attorney General, for Appellee.

The bond sued on was not merged in the judgment first taken, so as to prevent further proceedings against

another surety. Territory v. Mills, 13 N. M. 174; C. L. 1897, secs. 2894, 2895, 2946, 2942; Chitty on Contracts 3, 8 Am. ed.; Bishop on Contracts, sec. 108; Bouvier's Law Dic., Title Contracts, par. 15.

Deposits in excess of the bond cannot operate to discharge the appellant. McAuley v. Cooley, 45 Neb. 582, id. 47 Neb. 165; Taylor v. Standard Loan & Accident Ins. Co., 47 Neb. 673; Bartley v. Meserve, 36 L. R. A. 746; Clagett v. Salmon, 5 G. & J. 314; Bateman v. Mapel, 145 Cal. 241; Fertig v. Barles, 78 Fed. 866; Curtis v. Hubbard, 6 Metc. 186; Pratt v. Matthews, 24 Hun. 387, et seq.; Rouss v. Krauss, 126 N. C. 667; Fuqua v. Pabst Co., 36 S. W. 479; Minturn v. U. S., 106 U. S. 438; Ryan v Trustees, 14 Ill. 20; Reese v. U. S., 9 Wall. 13; U. S. v. Freed, 186 U. S. 309; U. S. v. Corwine, 25 Fed. Cas. 14, 871; Evans v. Gradon, 28 S. W. 439.

STATEMENT OF THE CASE.

In 1903, the Taos County Bank, organized under the laws of the Territory of New Mexico, made application to become a depository of territorial moneys to the amount of ten thousand dollars under section 5, chapter 61, of the laws of New Mexico of 1893, (Sec. 255, C. L. 1897) and gave its bond to the Territory in the sum of twenty thousand dollars with Juan Santistevan and Melvin W. Mills, the appellant herein, as sureties. On November 6, 1903, suit was instituted by the Territory on the bond against the principal and the sureties and judgment was prayed for the sum of $4304.86, together with interest from the 6th day of August, 1903. The bank and Juan Santistevan defaulted and a joint judgment was rendered on November 6, 1903, against them in the district court for the amount of $4367.92. The appellant Mills answered the complaint, and, after judgment against him in the district court, appealed to the supreme court and the judgment was reversed, (See 13 N. M. 174) and the cause was remanded to the District Court. Mills filed an amended answer setting up as his sole defense that the Territory of New Mexico, by its treasurer, deposited with the said bank a greater sum than $10,000, viz: the sum

of $10,020.00 and at another time that the territorial treasurer deposited with said bank the sum of $10,089.52 without the consent or knowledge of the defendant, Melvin W. Mills, surety on said bond and obligation, whereby the risk and liability of the defendant was increased; alleging that thereby the defendant became discharged. A demurrer was interposed to this answer on two grounds; first, that the answer did not state facts which constituted a defense and, second, that the facts set forth in the answer did not increase the risk and liability of defendant Mills, which, by the terms of the bond sued on did not exceed the sum of $10,000. The demurrer was sustained by the district court and the defendant elected to stand upon the demurrer and judgment was rendered against him for the sum of $5834.26, from which judgment this appeal was taken.

OPINION OF THE COURT.

ROBERTS, J.—The appellant has assigned thirteen grounds of error by which he attempts to present to this court two reasons for the reversal of the judgment; first, that the judgment rendered against the bank and Santistevan in 1893, on default, was a joint judgment and that by the election of the territory to obtain a joint judgment against the principal and one of the sureties it lost its right to proceed against the appellant. Second, that the appellant was released from liability because the Territory deposited larger sums with the bank than the bond indemnified, without the knowledge and consent of the surety.

1. The effect of the rendition by the district court of the joint judgment against the bank and Santistevan is not properly before this court for review. The point was never raised in the court below. No plea in abatement was filed, nor does the matter appear to have been in any way called to the attention of the court. This court has frequently held that only such assignments
1 of error can be presented to the appellate court as were brought to the attention of the trial judge so as to permit of their correction by him, and there is a

statutory provision also, which provides: "No exceptions shall be taken in an appeal to any proceeding in the district court, except such as shall have been expressly decided in that court." See Crabtree v. Segrist, 3 N. M. 500; Chaves v. Lucero, 13 N. M. 368. But, were the matter properly before the court, we do not believe that it would avail the appellant. Section 2942 of the Compiled Laws of 1897, is as follows: "Where two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly or severally, or severally only, and including the parties to negotiable paper, common orders and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the option of the plaintiff, be brought against any or all of them; when any of these so bound are dead, the action may be brought against any or all of the survivors with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several parties jointly bound, shall not be a bar to proceedings against the others." By the last sentence it will be noted that a judgment against one of several parties jointly bound shall be no bar to proceedings against the others, and it has been the uniform practice in this Territory since this statute was adopted, in 1880, to take judgment against one or more of such parties and to have further proceedings in the same action to obtain judgment against the others. No injustice can result from this practice, as the plaintiff cannot obtain satisfaction upon more than one of such judgments. Appellant attempts to get away from the effect of this statute
2 by insisting that in the statute the word "contracts" does not mean such a thing as a bond. A bond is a contract by specialty and is so recognized by every writer on contracts. (Chitty on Contracts 3, 8 Am. ed.; Bishop on Contracts, sec. 108; Bouvier's Law Dic. Title Contracts, par. 15.)

2. This brings us to a consideration of the only defense interposed by the appellant, and the only matter properly before the court for consideration. The record

discloses that at one time there was a deposit of $20 in excess of $10,000, and at another time a deposit of $89.52 in excess of that sum. There is nothing in the condition of the bond sued on which limits the territorial treasurer so that he could not make deposits in the bank other than the $10,000. We can not see how it concerns the surety that he made such deposits. By the bond the liability of the sureties was limited to the sum of $10,000 and no attempt is being made on the part of the Territory to hold them for any larger sum. Whatever deposit was
3 made by the treasurer above the amount to which the bank was entitled under the law, was made by him as an individual depositor upon his own responsibility for which, in case of loss, he would be liable under his official bond, but such excessive deposit could not have been made with reference to the bond now sued on and could not affect the liability of the surety any more than a deposit made by another individual. This position not only commends itself as a matter of reason, but is well supported by authorities. In Nebraska, the state treasurer, in pursuance of a statute similar to ours, deposited money in banks designated as state depositories, the statute prescribing the conditions which the bond should contain and setting out the form of the bond, at the end of which followed a provision that the treasurer should not have on deposit in any bank at any time more than one-half of the amount of the bond given by the bank. This provision must be considered as embodied in the bond and a part of it just as much as if it had been set out therein. It appears that the treasurer made deposits in excess of the fifty per cent. penalty of the bond and one of the questions considered by the court was as to whether such deposits operated to release the principals, or sureties, as to the fifty per cent. which was deposited. The court speaks as follows: "Is the bond of a state depository invalidated by the depositing of a sum of money therein by the state treasurer in excess of 50 per cent. of the amount of the penalty of the bond given by the bank? Neither in the briefs nor upon oral arguments at the bar was this question discussed by counsel, and therefore, according to pre-

cedents, the court might ignore it, notwithstanding it is raised by the record; but we shall not do so. The principle which should control our decision upon this feature of the case has already been recognized and applied by the court in McAuley v. Cooley, 45 Neb. 582, id., 47 Neb. 165. It is disclosed by that case that J. H. Cooley and George A. Bently formed a trading copartnership. By the terms of the articles, the total amount of capital was limited to $3,000, and said Bently was to have charge of and manage the business. W. S. McAuley and Charles H. Furrer executed a bond with Bently conditioned for the due and faithful performance by the latter in and concerning the business in which the firm was engaged. After the giving of the bond, the capital was increased to $5,000. In an action on the bond, it was held that the sureties thereon were no released from their obligation by such increase in the amount of capital invested. It requires no argument to show the application of that decision to the facts under consideration. The depository law has fixed the maximum sum which the treasurer shall have on deposit in any bank at the same time at one half of the amount of the bond executed by the bank. This is a limitation, not only upon the power of the treasurer to deposit, but restricts the bank from demanding a larger sum than one-half of the penal sum named in the bond. Were it not for this limitation, unquestionably a depository bank and the sureties upon its bond would be liable in case of a breach of its conditions, to the extent of the full penalty written in the bond. If the treasurer exceeds his duty by depositing a larger sum in a depository bank than he is authorized by law to do, it does not affect the liability of such bank and the sureties on its bond to repay to the state the sum deposited therein, in strict conformity to the requirements of the depository law, and the accretions thereof. See Taylor v. Standard L. & Acci. Ins. Co., 47 Neb. 673." Bartley v. Meserve, 36 L. R. A. 746, 750; 51 Neb. 116. In Maryland, several persons united in a mortgage reciting that one of the parties had begun the business of a merchant, and that the mortgagee had agreed to give him credit to the amount of $10,000,

and provided for indemnifying the mortgagee for all advances which he should make, not to exceed at any one time the sum of $10,000. The credit given was allowed to run beyond the $10,000 and the sureties made exactly the same defense which is sought to be set up here, but the court refused to sustain it. Clagett v. Salmon, 5 G. & J. 314, 328-9. In California, a surety company became surety on the bond of a contractor, given for the due performance of a contract, and when sued set up as a defense that the owner had paid to the contractor a large sum of money in excess of what was called for by the terms of the contract, and the trial court took the view that this was an impairment of the surety's rights, and that the surety was thus exonerated. It will be seen that the principle involved was like that upon which appellant relies in this case. Upon appeal, however, the supreme court said that this was immaterial and inconclusive; that if the payments were within the terms of the contract the sureties could not be heard to complain, and if they were not, then they were merely advancements of money entirely without the terms of the contract, and that the surety had no grievance, unless in some substantial way his condition was changed or a new liability sought to be imposed upon him because of such payments. Bateman v. Mapel, 145 Cal. 241, 243-4. In a federal court in New Jersey, suit was brought upon a bond, in which, as a final condition, it was covenanted that a credit should be given to the principals of $5,000, and that at no time should the amount due by them exceed the amount of the bond. Contention was made that by permitting the amount to be exceeded, the sureties were released, but the court held otherwise. Fertig v. Barles, 78 Fed. 866. In an early Massachusetts case, it appears that a surety guaranteed the payment of all sums which another person might owe a merchant for goods sold, provided that the whole amount which he should owe at any one time should not exceed $1,100, and later, added a further guarantee for the additional sum of $900.00, on the same conditions as expressed in the first obligation. The indebtedness was allowed to increase to nearly $2,700, and action being

brought, the defense was set up that the surety was released because the limit had been exceeded, but the court held against this contention. Curtis v. Hubbard, 6 Metc. 186, 191-2. In New York, the defendants executed a writing in which they agreed with a firm of wholesale dealers in coal that a retail dealer who purchased coal from the firm should pay any indebtedness to the firm up to the date fixed, and in default of his so doing agreed to pay the same, "provided the amount so in default shall not at any time exceed the sum of $1,000." The arrangement was that the retail dealer should pay in cash on or before the tenth day of each month, and it appears that on the tenth day of four different months he owed more than the guaranteed amount of $1,000, the largest monthly balance being over $1,500. The surety contended that because the amount in default had been allowed to exceed the $1,000 he was released, but the court held against his contention. Pratt v. Mathews, 24 Hun. 387, et seq. See, also, Rouss v. Krauss, 126 N. C. 667; Fuqua v. Pabst Co., 36 S. W. 479; Minturn v. United States, 106 U. S. 438. From the above it follows that the court committed no error in sustaining the demurrer to appellant's answer, and the judgment of the lower court is affirmed.

[No. 1394. December 8, 1911.]

W. W. SHOUCAIR, Appellant, v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY OF LONDON, ENGLAND, Appellee.

SYLLABUS.

1. Parole evidence cannot be heard as to occurrences prior to the issuance of an insurance policy.

2. There was no waiver by insurance company of provision in insurance policy requiring property assured to be unimcumbered, by company failing to ascertain by interrogation of the assured or by examination of the record whether there was any incumbrance on property assured.

3. Failure to disclose chattel mortgage upon insured property at time policy was issued broke conditions of the policy and the policy became void.

Appeal from the District Court for Curry County, before WILLIAM H. POPE, Chief Justice. Affirmed.

M. C. SPICER for Appellant.

If the insurance company, before the time expires for furnishing proofs of loss, denies the liability of the company, it is a waiver of the necessity to furnish them. Robinson v. Palatine Insurance Co., 11 N. M. 162; Royal Insurance Co. v. Martin, 192 U. S. 385; Tayloe v. Merchants' F. Ins. Co., 9 How. 390; 19 Cyc. p. 859; Phœnix Ins. Co. v. Luce, 123 Fed. 723; Phœnix Ins. Co. v. Kerr, 129 Fed. 723 (C. C. A.); Bank v. Home Ins. Co., 111 Pac. 507, Cal.; McCollough v. Home Ins. Co., 102 Pac. 814, Cal.; Dooly v. Hanover Fire Ins. Co., 47 Pac. 507, Wash.; Phœnix Ins. Co. v. Gibbons, 64 S. W. 909; Morgan v. Illinois Ins. Co., 90 N. W. 40, Mich.; Siegle v. Phœnix Ins. Co., 81 S. W. 637, Mo.; North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 50, Va.; Cooper v. Ins. Co., 71 N. W. 606, Wis.

An insurance company will not be permitted to take advantage of a condition contained in a policy to avoid payment of a loss, when the facts rendering the policy void by its terms were known to the insurer, directly or through its agent, at the time it issued the policy and accepted the premium. Mecca Fire Ins. Co. v. Smith, 135 S. W. 688, Tex.; Old Colony Ins. Co. v. Star-Mayfield Co., 135 S. W. 252, Tex.; 19 Cyc. 807, 1587; in re Millers' & Mfg. Ins. Co., 106 N. W. 485, Minn.; Northern Assur. Co. v. Grand View Bldg. Asso., 101 Fed. 77; Fireman's Fund Ins. Co. v. Northwood, 69 Fed. 71; Masterman v. Home Ins. Co., 32 Pac. 458, Wash.; German Am. Ins. Co. v. Humphrey, 35 S. W. 428, Ark.; Orient Ins. Co. v. McKnight, 64 N. E. 339, Ill.; Niagara Falls Ins. Co. v. Johnson, 45 Pac. 789, Kas.; Murphy v. Royal Ins. Co., So. 143, La.; Kowitzki v. Thuringia Ins. Co., 95 N. W.

976, Mich.; Burnham v. Greenwich Ins. Co., 56 Mo. App. 582, 63 Mo. App. 85; Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497; Grady v. Orient Ins. Co., 29 S. E. 655, S. C.; Hartford Ins. Co. v. Landfare, 88 N. W. 779, Neb.; Aetna Ins. Co. v. Frierson, 114 Fed. 56; McGurk v. Metropolitan Life Ins. Co., 16 Atl. 263, Conn.; R. I. Underwriters' Asso. v. Monarch, 32 S. W. 958, Ky.; Home Ins. Co. v. Stone R. National Bank, 12 S. W. 915, Tenn.; Young v. Hartford Ins. Co., 24 Am. Rep. 784, Ia.; Home Ins. Co. v. Gibson, 17 So. 13, Miss.; Farnum v. Phœnix Ins. Co., 23 Pac. 869, Cal.; American Ins Co. v. Yeagley, 71 N. E. 897, Ind.; Grabbs v. Farmers' Mut. Ins. Co., 34 N. E. 503, N. C.; Wisotzkey v. Niagara F. Ins. Co., 82 N. E. 1134, N. Y.; McElroy v. British America Ins Co., 94 Fed. 990; Thompson v. Traders' Ins. Co., 68 S. W. 889, Mo.; Coles v. Jefferson Ins. Co., 23 S. E. 732, W. Va.; Medley v. German Alliance Ins. Co., 47 S. E. 101, W. Va.; Loring v. Dutchess Ins. Co., 81 Pac. 1025, Cal.; Johnson v. Aetna Ins. Co., 51 S. E. 339, Ga.; Dist. of Doon v. Fidelity Ins. Co., 84 N. W. 956, Ia.; Bigelow v. Granite State F. Ins. Co., 46 Atl. 808, Me.; Spalding v. N. H. F. Ins. Co., 52 Atl. 858, N. H.; Vesey v. Commercial Union Assur. Co., 101 N. W. 1074, S. D.; American Cent. Ins. Co. v. Dolon, 66 Pac. 249, Colo.; Hartford Fire Ins. Co. v. Keating, 38 Atl. 29, Md.; Trustees v. Northwestern National Ins. Co., 73 N. W. 767, Wis.; Osborne v. Phœnix Ins. Co., 64 Pac. 1103, Utah; Caldwell v. Philadelphia F. Asso., 35 Atl. 612, Pa.; German American Ins. Co. v. Hyman, 94 Pac. 27, Colo.; Salzman v. Ins. Asso., 120 N. W. 697, Ia.; Staats v. Pioneer Ins. Co., 104 Pac. 185, Wash.; Continental Ins. Co. v. Rosenberg, 74 Atl. 1073, Del.; Hiburn v. Phœnix Ins. Co., 124 S. W. 63, Mo.; British & Foreign M. Ins. Co. v. Cummings, 76 Atl. 571, Md.; Athens Mut. Ins. Co. v. Ledford & Son, 68 S. E. 91, Ga.; Irwin v. Westchester F. Ins. Co., 118 N. Y. S. 1115; Allen v. Phœnix Ins. Co., 95 Pac. 829, Idaho; Trow v. Preferred Acc. Ins. Co., 67 Atl. 821, Vt.; Knickerbocker v. L. Ins. Co., 96 U. S. 24; Robinson v. Palatine Ins. Co., 11 N. M. 162; Raulet v. Northwestern Nat. Ins. Co., 107 Pac. 292,

Cal.; Wright v. Fire Asso., 31 Pac. 91, Mont.; German American Ins. Co. v. Niewedde, 39 N. E. 534, Ind. App.; Glenn Falls Ins. Co. v. Michael, 74 N. E. 964, Ind. App.; Union Assur. Soc. v. Nalls, 44 S. E. 896, Va.; Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503; Phœnix Ins. Co. v. Wartemberg, 79 Fed. 245; Southern Co. v. Hastings, 41 S. W. 1093, Ark.; Ormsby v. Laclede Farmers' Mut. F. Ins. Co., 79 S. W. 733, 72 S. W. 139, Mo.; Delaware Ins. Co. v. Harris, 64 S. W. 867, Tex.; Continental Ins. Co. v. Whitaker, 79 S. W. 119, Tenn.; Clark v. Manufacturers' Ins. Co., 8 How. 1061; Phœnix Ins. Co. v. Raddin, 120 U. S. 644; Eames & Cooley v. Home Ins. Co., 94 U. S. 298; Manchester Ins. Co. v. Abrams, 89 Fed. 932; Hall v. Niagara Ins. Co., 18 L. R. A. 135; Allesina v. Liverpool & L. & G. Ins. Co., 78 Pac. 392; Koshland v. Hartford Ins. Co., 49 Pac. 866; Arthur v. Palatine Ins. Co., 57 Pac. 62; Sproul v. Western Assur. Co., 54 Pac. 180; German American Ins. Co. v. Kline, 62 N. H. 857; Farmers' and Merchants' Ins. Co. v. Micke, 72 Neb. 122; Sanford v. Royal Ins. Co., 40 Pac. 608, Wash.; Wood on Insurance, 2 ed. 517; May on Insurance, 3 ed. 207; Alkan v. Insurance Co., 10 N. W. 91, Wis.; Dooley v. Hanover Ins. Co., 47 Pac. 501, Wash.; Neher v. Western Ass. Co., 82 Pac. 160, Wash.; Lancaster Ins. Co. v. Monroe, 39 S. W. 434; Fireman's Fund Ins. Co. v. Meschendorf, 14 Ky. Law Rep. 757; Continental Ins. Co. v. Ford, 131 S. W. 189; Cooley's Briefs on Ins. 1396; Phil. Tool Co. v. Ins. Co., 19 Atl. 77, Pa.; Cadwell v. Fire Ins. Co., 35 Atl. 612, Pa.; Short v. Home Ins. Co., 43 Am. Rep. 138, N Y.; Georgia Home Ins. Co. v. Holmes, 23 So. 183, Miss.; German Ins. Co. v. Davis, 51 Pac. 60, Kas.; Peet v. Fire & Marine Ins. Co., 47 N. W. 532, S. D., Jersey Rubber Co v. Commercial Union Ins. Co., 46 Atl. 777, N. J.; Pelzer Mfg. Co. v. Sun Fire Office, 15 S. E. 562, S. C.; Morrison v. Tenn. M. & F. Ins. Co., 59 Am. Dec. 299, Mo.; Quarrier v. Peabody, 27 Am. Rep. 582, W. Va.; VanKirk v. Citizens Ins. Co., 48 N. W. 798, Wis.; in re Miller Mfg. Co., 106 N. W. 485, Minn.

E. W. DOBSON for Appellee.

An insurance policy shall be void if the interests of the insured be other than unconditional. Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308; Martha L. Hunt v. Springfield Fire and Marine Insurance Co., 196 U. S. 179; Thompson v. Phœnix Ins. Co., 136 U. S. 287; McMaster v. New York L. Ins. Co., 183 U. S. 25; Middleton v. Parke, 3 App. D. C. 149.

Distinction between waiver or estoppel before and after execution of insurance policy. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; Batchelder v. Queen Ins. Co., 135 Mass. 499; Pendar v. American Mut. Ins. Co., 12 Cush. 469; 3 Words and Phrases 2494; Reid's Adm. v. Benge, 57 L. R. A. 253; Turner v. Edwards, U. S., 24 Fed. Cas. 350; Chiteau v. Goddin, 39 Mo. 229; Newman v. Hook, 37 Mo. 207; Stone v. Bank of Commerce, 174 U. S. 412; Ross v. Banta, 39 N. E. 732; Nash v. Baker, 58 N. W. 706; 8 Words and Phrases 7375; Bennecke v. Insurance Co., 105 U. S. 355; Bouvier's Law Dictionary, Waiver; First National Bank v. Maxwell, 55 Pac. 980; Wedd v. London & Lancashire Ins. Co., 116 N. Y. 106; A. & E. Enc. 525; Corey v. Bolton, 63 N. Y. Sup. 915; Bucklen v. Johnson, 49 N. E. 612; Freedman v. Fire Ass. of Phila., 32 Atl. 39; Imperial etc. Co. v. Coos, 151 U. S. 452; Carpenter v. Providence etc. Ins. Co., 16 Pet. 495; Finkbohner v. Glens Falls Co., 92 Pac. 318; Brickell v. Atlas Ass. Co., 101 Pac. 16; in re Miller's Manufacturers Insurance Co., 106 N. W. 485; Berry v. London Insurance Co., 167 Fed. 902; Wierengo v. American Fire Insurance Co., 57 N. W. 834; Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 108 N. W. 394; Wilcox v. Continental Insurance Co., 55 N. W. 188.

Effect of policy where interest of insured is other than sole and unconditional owner. Lynch v. Danzell, 4 Bro. Pearl. Rep. 432; 2 Marsh. Ins. b. 4 ch. 4, 803; Columbia Ins. Co. v. Babcock, 2 Ark. 554; Columbia Ins. Co. v. Lawrence, 2 Pet. 25; Fries, Breslin Co. v. Star Fire Ins. Co., 150 Fed. 611.

It was not incumbent upon insurer to inquire as to

the title of the insured. In re Millers' etc. Co., 106 N. W. 485; Syndicate Ins. Co. v. Bohn, 65 Fed. 165; Insurance Co. v. Lawrence, 2 Pet. 25, 49, 7 L. ed. 335; Waller v. Assurance Co., 10 Fed. 232; Collins v. Insurance Co., 44 Minn. 440; Lasher v. Insurance Co., 86 N. Y. 423; Weed v. Insurance Co., 116 N. Y. 106; Diffenbaugh v. Insurance Co., 150 Pa. 274; Fuller v. Insurance Co., 61 Iowa 350; Waller v. Assurance Co., 64 Iowa 101; Merc. v. Insurance Co., 68 Mo. 127; Wierengo v. American Fire Ins. Co., 57 N. W. 833, Mich.; McFetridge v. Insurance Co., Wis., 54 N. W. 326; Henning v. Assurance Co., Iowa, 42 N. W. 308; Insurance Co. v. Boulden, Ala. 11 South 771; Insurance Co. v. Smith, 92 Ala. 428; Dumas v. N. W. Nat. Ins. Co., 12 App. D. C. 245; Herber v. Palatine Ins. Co., 55 Ill. App. 275; Grisby v. German Ins. Co., 40 Mo. 276; Sulphur Mines Co. v. Phœnix Ins. Co., 26 S. E. 856; Crickelair v. Citizens Ins. Co., 48 N. E. 167; Milwaukee Mechanics Co. v. Niewedde, 29 N. E. 756; Aetna Ins. Co. v. Holcomb, 34 S. W. 915; Ins. Co. of North America v. Wicke, 54 S. W. 300; Wilcox v. Continental Ins. Co., 55 N. W. 188.

Principal may limit the authority of its agent. Modern Woodmen v. Tevis et al, 117 Fed. 369; Northern Assurance Co. v. Grandview Building Assoc., 183 U. S. 308; Royal Arcanum v. Taylor, 121 Fed. 66; Carrollton Mfg. Co. v. American Credit & Indemnity Co., 124 Fed. 25; Missouri Pac. Ry. Co. v. Western Assurance Co.. 129 Fed. 610; Imperial Ins. Co. v. Coors County, 151 U. S. 452; Kentucky, Vermillion Mining & Concentrating Co. v. Norwich Fire Ins. Co. Cas., 146 Fed. Rep. 695; Pennsylvania Casualty Co. v. Bacon, 133 Fed. 907; Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877; Hampton Stone Co. v. Gardiner, 154 Fed. 805; Insurance Co. v. Wolff, 95 U. S. 326; Ins. Co. v. Building Asso., 183 U. S. 308; Society v. McElroy, 83 Fed. 631; Rice v. Fidelity & Deposit Co., 103 Fed. 427; Ins. Co. v. Thomas, 82 Fed. 406; Williams v. Neely, 134 Fed. 1; Luckett Wake Tobacco Co. v. Glove & Rutgers Fire Ins. Co., 171 Fed. 147; New York Life Ins. Co. v. Slocum, 177 Fed. 842.

STATEMENT OF THE CASE.

This action was brought to recover the sum of five hundred dollars, under policy issued by appellee, upon certain personal property in the policy described, alleging that the said personal property was destroyed by fire on the 27th day of July, 1909. The defendant and appellee filed answer admitting the making of the contract of insurance, but denied that proof of loss was furnished by the insured within sixty days after the fire as provided by the terms of the policy. The defendant and appellee by way of further defense alleged: "That at the time of the making of this contract of insurance, plaintiff's Exhibit "A," the interest of the assured in the property described therein was not truly stated in the policy on account of concealment and misrepresentations by the assured to the agent of defendant; that the interest of the insured was not unconditional and sole ownership and that such fact was not endorsed on the contract of insurance and was concealed by the assured from this defendant; that the subject of insurance was personal property and became and was encumbered by a chattel mortgage at the time of the issuance of said policy." The appellant first filed reply in general terms denying the new matter set up in defendant's answer, and afterwards filed an amended reply in which he admitted that no proofs of loss were furnished as provided by the terms of said policy, but alleged "that his reason for not doing so was due to the fact that the defendant sent its adjuster to Clovis, New Mexico, a short time after the fire, and that said adjuster, after investigating the facts concerning the fire, he refused to pay the loss and informed this plaintiff that his company would deny liability under the policy." To the paragraph of defendant's answer alleging that the interest of the insured was not unconditional and sole ownership, and that the subject of insurance was personal property and was incumbered by chattel mortgage, the appellant replied as follows: "Plaintiff, replying to paragraph 9 of defendant's answer, denies that he concealed or misrepresented any facts concerning the property or his interest therein to the defendant's agent, but admits that there was a

chattel mortgage on said property duly recorded in the office of the Probate Clerk and Ex-Officio Recorder of Roosevelt County, New Mexico, at the time the contract of insurance was made; but plaintiff alleges that the application for insurance was made by him and that the agent of the defendant asked him several questions concerning the risk, all of which were truthfully answered; that said agent never asked him any questions as to the ownership of the property or whether it was incumbered by a chattel mortgage or otherwise nor did this plaintiff know that it was necessary for him to disclose any facts concerning the ownership or incumbrance at the time of the oral application or before the fire occurred or he would have so disclosed them according to his best knowledge and understanding. That at the time of making the contract of insurance the chattel mortgage on said property was of record as aforesaid and that the agent of the defendant could have ascertained that fact had he desired. That upon the delivery of the policy by the agent of the defendant this plaintiff paid the premium on said policy and the defendant has ever since retained the same; that by reason of the facts herein alleged the defendant waived the condition in the policy rendering it void if personal property be incumbered by a chattel mortgage at the time of the making of the contract of insurance." Defendant and appellee filed a motion in the lower courts asking for judgment upon the pleadings, the grounds of said motion being as follows: "Because it affirmatively appears from the pleadings that at the time of the issuance of the policy of insurance by the defendant company, upon the property therein described, the same was encumbered and the plaintiff was not the sole and unconditional owner thereof, and because the subject of insurance was personal property and was encumbered by a chattel mortgage at the time of the issuance of said policy, and the defendant had no knowledge of such encumbrance, and the plaintiff did not disclose such fact to the defendant or its agent at the time of the issuance of said insurance."

OPINION OF THE COURT.

M'FIE, J.—The judgment sought to be reversed in this case was rendered on the pleadings in the court below. While the issues were substantially made up, the motion to find for the defendant company upon the admissions in the reply of the plaintiff, reduces the case in this court to the single issue raised by the motion and upon which the judgment was rendered. It may be observed at the outset, that there is a long line of decisions of the state courts apparently at variance with the law which we feel compelled to hold in this jurisdiction, but we find that the decisions of the state courts are quite frequently based upon state laws enacted to change the rule of law laid down by the federal courts in insurance cases. Counsel for appellant in his able brief has called the court's attention to a large number of cases decided in the state courts in support of his contention, but, while conceding the strength of his argument in cases governed by statute in a state court, this jurisdiction is still within a territory wherein the decisions of the federal courts have a peculiarly binding force in the absence of statutory law. By the pleadings we are informed that the suit is brought by the plaintiff to recover damages for the destruction of personal property by fire upon an insurance policy issued by the company to him. The issuance of the policy is admitted, but the liability of the company for loss under its terms, is denied. The policy sued on contains, among many others, the following clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated; or, in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss." Also the following: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * * if the interest of the insured be other than unconditional and sole ownership * * * or if the subject of insurance be personal property and be

or become encumbered by a chattel mortgage." Paragraph nine of the answer bases the non-liability of the company upon these provisions of the policy, either of which, as the policy provides, renders the policy void unless complied with. The plaintiff, in his reply to paragraph nine, admits that at the time the policy was issued the insured property was encumbered by a chattel mortgage and then proceeds to allege a number of things by way of the avoidance of the effect of the existence of the mortgage and its nondisclosure to the company or its agent, all of which allegations would necessarily be established by parole evidence of transactions occurring, if at all, prior to the issuance of the policy. The motion interposed by the defendant for judgment on the pleadings raises but one issue and that is the admission that at the time the policy was issued upon this personal property, there was a valid chattel mortgage upon it and that the same was recorded. This, then, is a case where insurance was obtained upon personal property having an existing chattel mortgage upon it at the time the insurance was obtained, with no attempt of the insured to inform the company or its agent of that fact. This was in plain violation of at least two provisions of the policy, each of which rendered the policy void according to its terms. The provisions of this policy are similar to those of insurance policies generally, and the Federal courts have
1 not only sustained their validity, but have repeatedly held that parole evidence cannot be heard as to occurrences prior to the issuance of the policy. In the case of Imperial Fire Insurance Company v. Coos County, 151 U. S. 452, 462, the court said: "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy,

he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery, if the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made." Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497; Jeffries v. Life Insurance Co, 22 Wall. 47; Aetna Life Insurance Co. v. France, 91 U. S. 510; Phœnix Life Insurance Co. v. Raddin, 120 U. S. 183. "Stipulations such as are contained in this policy have frequently been subjected to consideration in the courts, and their validity is not open to question." Atlas Reduction Works v. New Zealand Ins. Co., 137 Fed. 497; Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; Northern Assurance Co. v. Grand View Bldg. Asso., 183 U. S. 308; Imperial Fire Ins. Co. v. Coos, 151 U. S. 452; Hunt v. Springfield Fire & Marine Ins. Co., 196 U. S. 47. In the case of Northern Assurance Co. v. Grand View Building Association, the court gives the following cogent reasons for sustaining the validity of these provisions of insurance policies and rejecting parole evidence concerning them: "It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form is for the benefit of both parties. In the present case, if

the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing, and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection. Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers are liable to be nullified by verdicts based on verbal testimony." The case of Hunt v. Springfield Fire and Marine Ins. Co., is substantially identical with the present case, except that instead of being a chattel mortgage there were two trust deeds upon the property. The court thus states the issue in that case: "The sole question presented by the record in this case is whether the provision in the policy for the unconditional ownership of the property by the plaintiff, and for the non-existence of any chattel mortgage thereon, was broken by certain trust deeds to secure the payment of money in each case." The court, after holding that the effect of the instruments was the same, concluded by holding that "the conditions of the

policy in that case were broken by the trust deeds," and affirmed the judgment of the court below.

Counsel for the plaintiff contends that it was the duty of the company to ascertain whether or not there were incumbrances on the property, either by interrogation of the assured, or by examination of the record, and, failing to do this, there was a waiver for which
2 the giving of a chattel mortgage would not bar a recovery by the plaintiff. In view of the law as laid down in the cases above referred to, this contention is not well founded. The policy contains another provision which it seems to us disposes of this contention. as there is no claim of intentional waiver, nor is any such waiver or agreement indorsed on the policy. "This policy is made and accepted subject to the stipulations and conditions printed herewith together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." In the case of Penman v. St. Paul Insurance Co., 216 U. S. 311, there was a clause in the policy substantially identical with the above provision. In passing upon its purpose and effort the court used the following decisive language: "We think also that the policy furnishes the only way by which its terms can be waived. It provides against modifications by the usage or custom of trade or manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or change 'shall be written upon or attached' to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parole testimony was not needed nor admissible to interpret them. They constituted the

contract between the company and the insured. No agent had power to change or modify that contract except in the manner provided. This was decided in Northern Assurance Co. v. Building Association, supra. Any other ruling would take from contracts the certain evidence of their written words and turn them over for meaning to the disputes of parole testimony."

The plaintiff's admission in his pleading that there
3 was an undisclosed chattel mortgage upon the insured property at the time the policy sued on was issued, as was said in the case of Hunt v. Springfield Fire & Marine Ins. Co., the conditions of the policy were broken by the chattel mortgage. The effect of the breach, as declared by the policy, was that it became void, and if void, no recovery could be had upon it in any event. In this view of the case, the court below was clearly within the law in granting defendant's motion and entering judgment for the defendant upon the pleadings; therefore the judgment of the court below will be affirmed with costs. It is so ordered.

[No. 1396. December 8, 1911.]

VALENTINA CHAVES de PADILLA, Etc., Appellee, v. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

SYLLABUS.

1. Failure to exercise due care in approaching a railroad crossing amounts to contributory negligence.

2. The burden of showing contributory negligence is on the defendant.

3. There is presumption, in the absence of evidence to the contrary, that person killed in crossing a railroad stopped, looked and listened.

4. Examination of the evidence fails to disclose that deceased was guilty of contributory negligence.

5. Examination of instructions discloses that court in its instructions given both as to the burden of proving contributory negligence and as to the presumption that due care and caution was exercised by deceased in approaching railroad crossing, fully and fairly expressed law applicable.

6. Examination of record discloses that evidence complained of was not admitted for purpose of showing consciousness on part of defendant company of antecedent negligence.

Appeal from the District Court for Valencia County, before M. C. MECHEM, Associate Justice. Affirmed.

R. E. TWITCHELL for Appellant.

It is the duty of a traveler upon a public road, approaching a railway crossing, to approach cautiously and carefully using his faculties of sight and hearing. Pierce on Railroads 343; Wichita etc. R. Co. v. Davis, 37 Kas. 743; Clark v. Mo. Pac. R. Co., 35 Kas. 354; Chicago etc. R. Co. v. Kuster, 22 Ill. App. 188; Hoyt v. New York etc. R. Co., 118 N. Y. 399; International etc. R. Co. v. Dyer, 76 Tex. 156; Tucker v. New York etc. R. Co., 124 N. Y. 308; Penn. R. Co. v. Righter, 42 N. J. L. 180; Lake Shore etc. R. Co. v. Clemens, 5 Ill. App. 75; Illinois etc. R. Co. v. Hetherwytan, 83 Ill. 310; Cincinnati etc. R. Co. v. Butler, 103 Ind. 31; Indiana etc. R. Co. v. Greene, 25 A. & E. Rd. Cases 322; Strong v. Sacramento etc. R. Co., 61 Cal. 326; Miller v. Chicago etc. R. Co., 164 Mo. 180; Maher v. Atlantic etc. R. Co., 64 Mo. 267; Karl v. Kansas City, etc. R. Co., 55 Mo. 484; Hicks v. Mo. Pac. R. Co., 101 Mo. 36; Pa. R. Co. v. Aiken, 18 Atl. Rep. 620; Railroad Co. v. Heilman, 49 Pa. St. 60; Greenwood v. Railroad Co., 124 Pa. St. 572; Weber v. N. Y. R. Co., 58 N. Y. 45; Central of Georgia Ry. Co. v. Barnett, 44 So. Rep. 392; Read v. N. Y. C. & H. R. R. Co., 107 N. Y. S. 1068; Salter v. Utica etc., 75 N. Y. 273; Georgia Pacific R. Co. v. Lee, 92 Ala. 262; Chicago, etc.

R. Co. v. Wilson, 133 Ill. 55; Lang v. Holliday Creek R. Co., 49 Iowa 469; Clark v. Missouri Pacific Ry. Co., 35 Kas. 350; Wright v. Boston etc. R. Co., 129 Mass. 440; Cleveland etc. R. C. v. Elliott, 28 Ohio St. 340; Holland v. Missouri Pacific Ry. Co., 210 Mo. 338; Hook v. Missouri Pacific R. Co., 162 Mo. 569; Hayden v. Missouri Pacific R. Co., 124 Mo. 566; Damrill v. St. Louis etc. R. Co., 27 Mo. App. 202; Davis v. New York etc. R. Co., 47 N. Y. 400; Boyd v. Wabash R. Co., 105 Mo. 371; Williams v. Chicago etc. R. Co., 64 Wis. 1; Straugh v. Detroit etc. R. Co., 65 Michigan 706; Brooks v. Buffalo etc. R. Co., 27 Barber, N. Y. 532; Schofield v. Chicago etc. Rd. Co., 144 U. S. 615; Continental Imp. Co. v. Stead, 95 U. S. 160; Railroad Co. v. Houston, 95 U. S. 697; Brown v. Milwaukee Ry. Co., 22 Minn. 165; Improvement Co. v. Munson, 14 Wall. 442; Pleasants v. Fant, 22 Wall. 116; Herbert v. Butler, 97 U. S. 319; Bowditch v. Boston, 101 U. S. 16; Griggs v. Houston, 104 U. S. 553; Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478; Anderson County Commrs. v. Beal, 113 U. S. 227; Bayliss v. Travelers' Insurance Co., 113 U. S. 316; Payne v. Chicago etc. R. Co., 129 Mo. 419; Chicago etc. R. Co. v. Hedges, 118 Ind. 5; Taylor v. Mo. Pac. R. Co., 86 Mo. 462; Drake v. Chicago etc. R. Co., 51 Mo. App. 562; Mann v. Belt Line R. Co., 128 Ind. 138; Indiana etc. R. Co. v. Hammock, 113 Ind. 1; Pennsylvania R. Co. v. Rothgeb, 32 Ohio St. 66; Chicago etc. R. Co. v. Lee, 68 Ill. 576; Union Pacific R. Co. v. Adams, 33 Kas. 427; Grows v. Maine etc. R. Co., 67 Me. 100; Maxey v. Missouri Pacific R. Co., 113 Mo. 1; Stepp v. Chicago etc. R. Co., 85 Mo. 229; Lenix v. Mo Pac. Ry. Co., 76 Mo. 86; Caldwell v. Kansas City etc R. Co., 58 Mo. App. 453; Hook v. Mo. Pac. Ry. Co., 162 Mo. 569; Wengler v. Mo. Pac. Ry. Co., 16 Mo. App. 493; Rodrian v. New York etc. R. Co., 125 N. Y. 526; Cullen v. Delaware etc. Co., 113 N. Y. 667; Williams v. Chicago etc. R. Co., 64 Wis. 1; Ormsbee v. Boston etc. R. Co., 14 R. I. 102; Davey v. London, etc. R. Co., L. R. 11 Q. B. D. 213; Chicago etc. v. Houston, 95 U. S. 697; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Galveston etc.

R. Co. v. Kutac, 72 Texas 643; Chicago etc. Ry. Co. v. Wheelbarger, 88 Pac. 531; Southern Ry. Co. v. Jones, 56 S. E. 432; Northern Pac. R. Co. v. Freeman, 174 U. S. 179; Schofield v. Chicago & St. Paul Ry. Co., 114 U. S. 615; Pennsylvania R. Co. v. Mooney, 126 Pa. St. 244; Gothard v. Alabama R. Co., 67 Ala. 118; Pennsylvania R. Co. v. Frana, 112 Ill. 398;: Terre Haute etc. R. Co. v. Voeler, 129 Ill. 540; Fletcher v. Atlantic etc. R. Co., 64 Mo. 484; Masterson v. Chicago etc. R. Co., 58 Mo. App. 572; Russell v. Atchison etc. R. Co., 70 Mo. App. 88; Henze v. St. Louis etc. R. Co., 71 Mo. 636; Stepp v. Chicago etc. R. Co., 85 Mo. 229; Kelly v. Chicago etc. R. Co., 88 Mo. 534; Kelsay v. Missouri Pac. Ry. Co., 129 Mo. 362; Hook v. Missouri Pac. Ry. Co., 162 Mo. 569; Pennsylvania Ry. Co. v. Morel, 40 Ohio St. 338; Beyel v. Newport etc. R. Co., 34 W. Va. 538; McBride v. Northern Pac. R. Co., 19 Oregon 64; Atchison etc. R. Co. v. Townsend, 39 Kas. 115; Cincinnati etc. R. Co. v. Howard, 124 Ind. 280; Nehrbas v. Central Pac. R. Co., 62 Cal. 320; South etc. R. Co. v. Donovan, 84 Ala. 141.

The negligence of plaintiff's intestate was a question of law for the court and the case should have been taken from the jury. Sheffield v. Rochester etc. R. Co., 21 Barb. N. Y. 339; Thompson v. Flint etc. R. Co., 57 Mich. 300; Hackford v. New York etc. R. Co., 53 N. Y. 654; Smith v. New York etc. R. Co., 137 N. Y. 562; Hook v. Mo. Pac. Ry. Co., 162 Mo. 569; Kelsay v. Ry. Co., 129 Mo. 362; Hayden v. Ry. Co., 124 Mo. 566.

Admission of testimony as to changes in physical condition on right of way and locality of accident, was prejudicial to defendant. Terre Haute & I. R. Co. v. Clem, 123 Ind. 18; Menard v. Railroad Co., 150 Mass. 386; Thompson v. R. Co., 91 Mich. 255; Baron v. Reading Iron Co., 51 Atl. 979; Mo. Pac. Rd. Co. v. Hennesy, 12 S. W. 608; Columbia R. Co. v. Hawthorn, 144 U. S. 202.

Instructions should be definite, direct and certain. Cothran v. Moore, 1 Ala. 423; Smith v. Collins, 94 Ala. 394; Todd v. Fambro, 62 Ga. 665; Aiken v. Weckerly, 19 Mich. 482; Hyde v. Shank, 77 Mich. 517; Gilmore v.

McNeil, 45 Me. 599; Crete v. Childs, 11 Neb. 252; Meyer v. Midland Pac. R. Co., 2 Neb. 319; Shaw v. People, 81 Ill. 150; Toledo etc. R. Co. v. Moore, 77 Ill. 217; Volk v. Roche, 70 Ill. 297; Cushman v. Cogswell, 86 Ill. 62; Wabash R. Co. v. Henks, 91 Ill. 406; Singer Mfg. Co. v. Pike, 12 Ill. App. 506; Chicago etc. R. Co. v. Harmon, 12 Ill. App. 54; St. Louis Coal R. Co. v. Moore, 14 Ill. App. 510; Franz v. Thieben, 15 Ill. App. 482; Davis v. People, 114 Ill. 86; American Ins. Co. v. Crawford, 89 Ill. 62; Mendota v. Fay, 1 Ill. App. 418; Harvey v. Miles, 16 Ill. App. 533; Cothran v. State, 39 Miss. 541; Payne v. Green, 10 Smed. & M. 507, Miss.; Crole v. Thomas, 17 Mo. 329; Otto v. Bent, 48 Mo. 23; George v. Smith, 6 Jones L. 273, N. Car.; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; Parmlee v. Adolph, 28 Ohio St. 10; Bates v. Fuller, 8 Lea 644, Tenn.; East Tennessee etc. R. Co. v. Fain, 12 Lea 41, Tenn.; Lancaster v. State, 2 Caldw. 339, Tenn.; Chicago etc. R. Co. v. Dougherty, 110 Ill. 521; Missouri Furnace Co. v. Abend, 9 Ill. App. 319; Owen v. Chicago, 10 Ill. App. 465; Illinois C. R. Co. v. Maffit, 67 Ill. 431; Warren v. Wright, 3 Ill. App. 602; Peoria etc. R. Co. v. Wagner, 18 Ill. App. 598; Toledo etc. R. Co. v. Grable, 88 Ill. 441; Flaherty v. McCormick, 7 Ill. App. 411; Covert v. Nolan, 10 Ill. App. 629; Ruff v. Garrett, 94 Ill. 475; Keyes v. Fuller, 9 Ill. App. 528; Bauchwitz v. Tyman, 11 Ill. App. 186; Neurberg v. Gaulier, 4 Ill. App. 348; Chapin v. Thompson, 7 Ill. App. 288; Swan v. People, 98 Ill. 610; Chicago etc. R. Co. v. Dvorak, 7 Ill. App. 555; Franklin Turnpike Co. v. Crockett, 2 Sneed 198, Tenn.; Wicks v. State, 44 Ala. 398; Ming v. State, 73 Ala. 1; Hughes v. Anderson, 68 Ala. 280; Sparks v. Mack, 31 Ark. 666; People v. Ramirez, 13 Cal. 172; American Ins. Co. v. Crawford, 7 Ill. App. 29; Warren v. Wright, 3 Ill. App. 602; Moshier v. Citchell, 87 Ill. 18; Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Bauer v. Bell, 74 Ill. 223; Snyder v. Laframboise, 1 Ill. 343; Baxter v. People, 8 Ill. 368; Chicago West Div. R. Co. v. Aviland, 12 Ill. App. 561; Pope v. Lowitz, 14 Ill. App. 96; Forman v. Ambler, 2 Dana 110, Ky.; Aikin v. Wreckley, 19 Mich. 482; Kim-

ball etc. Mfg. Co. v. Vroman, 35 Mich. 310; Staten v. State, 30 Miss. 619.

EDWARD A. MANN and HARRY P. OWEN for Appellee.

In the absence of all evidence to the contrary, it is presumed that deceased stopped, looked and listened. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461; Texas P. R. Co. v. Gentry, 163 U. S. 353; Northern Pac. R. Co. v. Freeman, 174 U. S. 397; Looney v. Met R. Co., 200 U. S. 480; Thompson on Negligence, sec 1622, 2 ed.; Northern Pac. R. Co. v. Spike, 121 Fed. 44; Johnson v. Ry. Co., 20 N. Y. 65; Oldsfield v. Harlem R. Co., 14 N. Y. 310; Adams v. Iron Cliffs Co., 44 N. W. 270, Mich.; Ry. Co. v. State, 20 Md. 420; Railroad Co. v. Nowicki, 46 Ill. App. 566; The City of Naples, 32 U. S. App. 613; Allen v. Williard, 57 Pa. 374; Schum v. Railroad Co., 107 Pa. 8; Cox v. Ry. Co., 31 S. E. 848; N. C.; McGee v. Kennedy, 66 Fed. 502; Chesapeake & O. Ry. Co. v. Steele, 84 Fed. 93; Hendrickson v. Great Northern R. Co., 16 L. R. A. 261; Pa. R. Co. v. Neher, 76 Pa. 157.

The question of contributory negligence was for the jury. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; New York S. & W. R. Co. v. Moore, 105 Fed. 725; Chesapeake & O. R. Co. v. Steele, 84 Fed. 93; Northern Pac. R. Co. v. Austin, 64 Fed. 211; A. T. & S. F. Ry. Co. v. McClurg, 59 Fed. 860; Delaware & L. Ry. Co. v. Devore, 122 Fed. 791; St. L. & S. F. R. Co. v. Barker, 77 Fed. 810.

Instructions as to contributory negligence. Baltimore & O. Ry. v. Griffith, 159 U. S. 603; Texas & P. Ry. Co. v. Cody, 166 U. S. 606; R. R. Co. v. Glannor, 15 Wall. 401; Hough v. R. Co., 100 U. S. 213; Coasting v. Folson, 139 U. S. 551; Railroad Co. v. Volk, 151 U. S. 73; Railroad Co. v. Gentry, 163 U. S. 353; Kreigh v. Westinghouse, 214 U. S. 255; Gardner v. Michigan C. R. Co., 150 U. S. 349; Northern Pac. Ry. Co. v. Austin, 64 Fed. 211; Railroad Co. v. Converse, 139 U. S. 469; Elliott v. Ry. Co., 150 U. S. 245; Railroad Co. v. Meyers, 62

Fed. 367; Railroad Co. v. Kelly, 63 Fed. 407; Northern Pac. R. Co. v. Freeman, 174 U. S. 179; Hook v. Mo. Pac. Ry. Co., 162 Mo. 569.

Evidence in the nature of preliminary examination of witnesses upon the question of the admissibility of a diagram which incidentally tended to show subsequent changed condition, was relevant and competent when not offered to prove a consciousness of an antecedent negligence of the defendant. Columbia R. Co. v. Hawthorne, 144 U. S. 202; 1 Wigmore Evidence, 283, sec. 437; Corcoran v. Traction Co., 15 N. M. 9; Ry. Co. v. Wyatt, 78 Am. St. 926; Terre Haute Ry Co. v. Clem., 18 Am. St.; St. Louis & San Francisco Ry. Co. v. Weaver, 57 Am. Rep. 176; So. Car Mfg. Co. v. Wagner, 14 N. M. 195; Territory v. Pierce, 16 N. M.; Laird v. Upton, 8 N. M. 409; Fruit Exchange v. Stamm, 9 N. M. 361; Bell v. Shingle Co., 35 Pac. 405.

Where brief does not touch upon assignments or cite authorities in support thereof, such assignments are deemed waived. Blue Creek etc. Co. v. Anderson, 99 Pac. 444; San Pedro etc. Co. v. Board of Education, 99 Pac. 263; Cent. Digest, App. & Error, secs. 4256-4261, 1078; Gildersleeve v. Water Imp. Co., 4 N. M. 318; Neher v. Viviani, 16 N. M. 10; Gray v. Walker, 108 Pac. 278, Cal.; St. Louis R. Co. v. State, 95 Pac. 874, Okla.; Home Association v. Sargent, 142 U. S. 691.

STATEMENT OF THE CASE.

This is an appeal from a judgment for five thousand dollars recovered against the appellant in the district court of Valencia county by the appellee as the sole surviving parent of Antonio Padilla, deceased. The complaint is in the usual form, charging that Antonio Padilla, deceased, was killed by a locomotive operated by the appellant company. The accident occurred at a public crossing near the town of Los Chaves in Valencia county, New Mexico. The plaintiff in the lower court and her son Antonio had lived all their lives in a small settlement some two miles south from the railway crossing where the accident occurred. There is no direct testimony in

the record to the effect that Antonio Padilla had any familiarity with the Los Chaves crossing, where the accident happened, prior to the day of this occurrence. The evidence in the case established the following facts: At a point 42 feet south from the crossing is a cattle guard At a point 205 feet from the center of the crossing, a contra acequia crosses the line of railway at right angles and at a grade even with the road bed. At a point 1144 feet south from the crossing another road crossed the railway, and at a point 1320 feet south of the Los Chaves crossing there was established a regulation whistling post for the Las Chaves crossing. South of the crossing and west of and parallel to the railway a right of way fence extended from the wing fence at the crossing to a point 418 feet south, at which point the fence closed in toward the railway track to a point within nine and one-half feet of the center of the track, and from this point (418 feet south of the crossing) a hedge fence enclosing an orchard, paralleled the west side of the track south for several hundred feet, at a distance of nine and one-half feet from the center of track. Between the crossing and said 418 foot point south, on the west side of the railway, (being the northeast corner of the hedge fence and orchard), there were at the time in question a number of cottonwood trees in full foliage, several trunks 18, 20 and 22 inches in diameter, all between the right of way fence on the west, and the railway tracks; and the branches of these trees extended at places to within twelve feet from center of the track and within thirty feet of the track and all of these trees were within 306 feet south of the crossing. Weeds, bushes and sun flowers were growing within the right of way on the west side of the railway and on the banks of the contra acequia which crossed the railway at the 205 foot point, to a height of "little more or less than the height of a man, two, three or four feet high." By actual measurement a warehouse stood, its north end 56½ feet, and its south end 58 feet from the center of the track on the south side of the highway as one approached the crossing from the west; following the highway southwesterly from this warehouse, the next

house from the highway crossing was the residence of the witness Jose F. Padilla, a distance of thirty-five or forty yards from said warehouse, and between the walls of these two houses said witness had a truck garden and sweet corn growing at the time in question; between these two buildings and at a point about 60 yards from the crossing the road bends to the south, about ten feet south of Padilla's residence is another house, and south of this last house are corrals and other buildings. Looking east from the rear of the residence of Padilla toward the track there were many trees between it and the track and crossing. Antonio met in collision at the crossing in question a light passenger locomotive of the defendant company, which was moving northward at at least the conceded rate of about thirty miles an hour at the point of collision. This locomotive was manned by an engineer and a fireman. The engineman had been operating a passenger locomotive between Albuquerque and Clovis since 1906, and over the crossing in question on every trip. The fireman was a green hand and had been working for the company defendant as a fireman for about a month. On the run from Belen to Albuquerque, when about a mile out of Belen the engineman stopped the locomotive for about five minutes to pack a hot box. The engineman could not bring the locomotive to a stop until he had reached a point five telegraph poles beyond the point of collision, and eight telegraph poles from the point of shutting off steam and application of the emergency brakes. Telegraph poles are about forty yards apart. The engine struck the wagon at front wheel, the horses lurched and jumped over the track to the east side, tore the wagon from the horses, and the team ran to the right side. The impact threw the wagon thirty or forty feet beyond the crossing, inside the right of way fence and north of the cattle guard on the north side of the crossing and inside the board fence (wing fence) about fifteen yards. The boy and part of the wagon were thrown on the pilot and carried to the point where the locomotive was brought to a stop. The principal error assigned by the appellant involving, as it does, a question of fact, necessitates the setting out at length of all the testi-

mony relating to the forward movement of the deceased toward the crossing just prior to the time of the accident. Six eye witnesses testified thereto for the appellee and two for the appellant. Jose de la Cruz Salas for the appellee testified:

Q. Did you see the locomotive that struck Antonio the engine? A. Yes.

Q. When did you first see it? A. At the time that he reached the track, I turned around and saw it.

Q. Had you seen the engine before that time? A. No.

Q. State whether or not you heard the whistle or the bell prior to the time Antonio was struck? A. At the time I saw him she whistled and rang the bell.

Q. How close was it to Antonio at that time? A. Something like thirty yards.

Q. And where was Antonio at that time? A. At the track.

Q. How was the engine running, at what speed; fast or slow? A. Somewhat fast.

Q. What was Antonio doing when you looked around. A. When I looked around he raised from the seat and raised the whip to strike the horses.

Q. Did you see the locomotive strike him? A. Yes.

Q. Did you see Antonio after that? A. No, I did not see him only at the time he was struck by the engine.

Ramona Gabaldon for the appellee testified:

Q. Where were you with reference to this crossing when you saw Antonio Padilla? A. I was getting to the main road and he was right in front of me.

Q. From what direction were you coming? A. I was coming from the north down.

Q. And in what direction was Antonio Padilla going when you saw him? A. He was going to get across the track and was going down when he met me and said "Good Morning," and he went up the track when the engine struck him.

Q. How far from the track were you when you met him? A. About—I was about 15 or 20 yards, from him when the engine killed him.

Q. State whether or not you heard or seen the engine prior to the time it struck Padilla? A. I did not see it.

Q. Had you heard it? A. No.

Q. State whether or not the engine whistled or rang the bell or gave any alarm prior to the time it struck Antonio Padilla? A. No, I did not hear anything until I saw the engine strike the wagon and raised him up.

Q. When did you first see the locomotive or engine? A. When it struck the boy and killed him. I did not see it before.

Q. And when did you first hear it make any sound? A. When it struck the wagon and boy and raised them.

Q. How is your hearing? A. Well.

Q. How is your eyesight? A. Well.

Q. When you saw the engine was it running fast or slow? A. At the time it struck the boy it kind of stopped but kept on going.

Q. How long did it go before it stopped? A. About two hundred yards more or less. I do not know exactly.

Q. Were there any cars attached to the engine? A Not any. It was an engine alone.

Q. He turned around and spoke to you and said good morning? A. Yes.

Q. Faced to the north, did he, faced you? A. Yes. He saw me and said good morning.

Q. Were the horses walking or trotting? A. They were walking when he said good morning.

Q. Did he keep right on up to the track until they were struck? A. Yes. When he was on the track the engine arrived.

Q. You noticed him all the way from the time he spoke to you until he reached the track, did you? A. I saw him when he was killed.

Q. How far had you gone from the time he spoke to you until he was struck? A. How far had I walked?

Q. Yes. A. I remained standing for a long while there.

Q. In the middle of the road? A. I was just going out into the road.

Q. You had not crossed the road at the time the accident happened? A. No. I had not crossed the road.

Q. You are absolutely certain he kept on going up the track after he spoke to you, are you, Mrs. Gabaldon? A. Yes.

Q. Did you hear the whistle blow or the bell ring at the time the boy was struck? A. Before, at the time it struck the boy on the wagon I heard it.

Q. You heard the bell ring, too, did you? A. When he was struck yes. I heard the bell ring, too.

Q. How far was it from where you were standing when you heard the bell ring? From the track—how far were you from the track when you heard them? A. Didn't I tell you about 15 or 20 yards?

Q. When you met Antonio in which direction were you going? A. I was going down.

Q. And which direction was Antonio going? A. Antonio was getting onto the track towards where the sun rises.

Q. And about how far did you say from the track you thought it was? A. About fifteen or twenty yards, more or less.

Q. And after you met Antonio which way did you go? A. I took my road toward my daughter's.

Q. How far had you gone on the road to your daughter's when the engine struck Antonio? A. I did not walk towards my daughter's house when he was killed. I was standing there.

Q. And did you see Antonio all of the time from the time you met him until the time the engine struck him? A. I saw that the engine that struck him was running.

Q. Did you see him all the time after he passed you until he was struck by the engine? A. Before? Yes.

Q. Did you keep your eyes on Antonio all the time after you met him until the engine struck him? A. He had just got through telling me good morning when I heard a noise and turned around and saw him struck by the engine.

Maria Garcia for the appellee testified:

Q. Did you see the accident? A. No, I did not see the boy killed.

Q. Did you see the boy at all? A. I saw the boy when he was getting on the track.

Q. Where was the train at that time? A. It was about the cattle guard on the track; then I went in because I did not want to see him get killed.

Q. Where was the boy when you first saw him? A. He was on the wagon getting onto the crossing.

Q. He was coming towards you or going from you? A. The boy was on the wagon coming up on the crossing.

Q. And where did you say the engine was at that time? A. In front of the house of Jose Francisco, more or less when I went in.

Q. Why did you go into the house? A. Because I knew he was going to be struck and I did not want to see him die.

Q. When did you first hear any whistle or bell, if you did hear one at all? A. I was inside the door of my house.

Q. Was that before or after you saw the boy coming up on the track? A. I had went into the house when I heard the whistle.

Q. How long had you been standing out in front of your house before you saw Antonio? A. More or less I presume—I cannot say, because I knew the train was coming for him and I went in.

Q. How long had you been standing out there in front of your house when you first saw the engine? A. Not more than a moment. Just as soon as I saw it coming I went in.

Q. How was the engine going, fast or slow, when you first saw it? A. Fast, very fast.

Q. Were you looking south at the time the engine was coming? A. I was looking toward the crossing, where the boy was coming.

Q. How long had you been looking in that direction? A. Just a moment, and when I saw him go, I went right in.

Q. He drove right up to the track, did he? A. Yes.

Q. Did you see him speak to a lady there at the road? A. No.

Q. Did you see a lady in the road? A. No.

Q. How long before he got to the crossing had you seen him? A. I do not know how long it was when I saw him—just a few moments when I saw him and went right in.

Q. He was driving right up to the track, was he? A. Yes.

Q. And he was looking towards you, was he? A. I think not, because he was driving his horses.

Q. He was looking at his horses, was he? A. I believe so. I do not know.

Q. You do not know what he was doing except driving right up on the track? A. He was driving his horses.

Q. How fast were the horses going? A. I do not know; they were walking.

Q. Did you call out to him, give him any alarm of having seen the engine? A. No, I did not.

Q. Are you certain that the bell was rung and the whistle blown at the time they struck the wagon? A. At the same time I heard the noise of the wagon I heard the whistle.

Q. And you were in your house then? A. I was on the inside of my house.

Q. Can you see there standing there in front of your house—can you see a person approaching the railroad track from the west any considerable distance? A. I do not know.

Q. Where was this boy's team, his horses, with reference to the railroad track when you first saw him? A. He was approaching to the track.

Q. How close was he to the track when you saw him? A. The horses were just approaching, getting to the track, when I saw and went in.

Q. You had seen the engine before this time, had you? A. No, I saw it at that time.

Q. That is the first time you saw it, at that exact minute, was it? A. Yes.

Q. You knew he was going to be struck? A. I saw the engine coming very fast, and I believed he was going to be struck.

Q. You saw the engine before the horses come on the track? A. No, I saw the engine and the horses at the very same time and I went in the house.

Q. You were standing in your door? A. Yes, I was standing in the door.

Jose Ramon Sanches for the appellee testified:

Q. Now, when did you see the engine that struck Antonio? A. I saw it at the time it struck him.

Q. When did you see it first? A. At the time that the engine whistled I turned around and I saw at that very instant he was struck.

Q. State whether or not you heard the engine whistle or the bell ring prior to that time? A. No, I did not hear it more than a little before it struck him.

Q. Where was Antonio when you heard the whistle? A. He was on top of the track.

Q. And how far from him was the engine at the time it whistled? A. More or less I should judge about fifteen or twenty yards.

Q. And you heard the engine whistle? A. I heard it at the time it struck the wagon.

Q. Did you turn around and look, at the time you were looking at the wagon, at the time the collision occurred? A. I turned my head around when I heard the whistle.

Q. And when you turned around you saw the engine strike the wagon, is that right? A. Nearly at the instant.

Doroteo Gabaldon for the appellee testified:

Q. When did you first see that engine? A. When I crossed the track.

Q. And where was the engine when you crossed the track? A. It was about half a mile below.

Q. State whether that engine gave any warning of its approach by whistling, ringing the bell or otherwise? A. Did not give any before it touched the wagon.

Q. Now, I wish you would describe to the jury what

you saw when the engine struck the wagon? A. I saw the machine coming, at that time I saw it raise the wagon.

Q. Where was the wagon when you first saw it? A. I did not see it more than when it was raised.

Q. State whether or not you saw the boy at that time? A. I did not see the boy at that time, but when it struck the wagon, I saw the boy flying.

Q. Did you know where the boy was struck? A. I saw him afterwards when I saw another man take him off the engine.

Q. When you approached this crossing on this particular morning you say you saw the engine—did you look down the track before you crossed it? A. When I got upon the track I saw it.

Francisco S. Chaves for the appellee testified:

Q. Did you see the accident? A. I saw it at the time the engine struck the wagon, and saw that the engine raised the wagon.

Q. What first attracted your attention? A. The blow that it gave the wagon, and at the same time I heard the whistle.

Q. Had you seen the engine or heard it prior to the time it struck the wagon? A. No.

Q. At the time the engine struck the wagon, how was it running, fast or slow? A. From what I could judge when it went by the house there that was my father's house, from all appearance it was fast.

Q. Was that before or after it struck the wagon? A. After it struck the wagon.

Q. How far did the engine go before it stopped? A. About five telegraph poles.

The engineer operating the locomotive testified for the appellant as follows:

Q. What, if anything, happened after you sounded this whistle for the second crossing? A. Nothing happened until I see the horses approaching the crossing from the left side.

Q. Were you looking ahead at that time? A. Yes.

Q. How far were the horses from the crossing when

you saw them the first time? A. About thirty feet I should judge.

Q. Was there anyone driving the horses? A. I do not know; I could not see anyone on account of the engine.

Q. Now, then, what happened? A. When I put the brakes into emergency and the team was approaching the track, and sounded the succession of whistles, the team drove up with their front feet between the two rails with the lines tight on them, and when I got right close to them at the rate of speed I was going, I saw the rein slackening, and the horses gave a lurch and jumped over the track. I went about five telegraph poles before I could stop. I got off the engine and started back towards the crossing where the wagon was hit, thinking that some one must have been injured as there was the box of the wagon and some hay on the north side of the crossing where the wagon was hit.

Q. When you first saw those horses which you say were abou thirty feet from the track, were they farther or nearer than the fence? A. Nearer the track than the fence.

A. Now, if you do not know whether the fence was ten feet or more, how do you know the horses were 30 feet away? A. The distance looked to me—seemed to be thirty feet, just to the foot of the incline.

Q. How far were you from the crossing at that time? A. I was inside of the cattle crossing.

Q. Inside the cattle guard? A. Inside the south crossing.

Q. Where were you in reference to the cattle guard at the north crossing? A. I do not know the distance I was up there, it was just inside the other—at the south crossing.

Q. Then if you were just inside the south crossing, you must have been in the neighborhood of 120 yards of the north crossing when you saw the horses, were you? A. According to that, I was, yes.

Q. That is according to what you testified, is it not? A. I have guessed at it all.

Q. You did not see the boy at all? A. No, sir.

Q. Just saw the horses? A. Saw the horses backs above their hips.

Q. What was the reason you could not see further back? A. On account of the engine; the distance from the cab to the front of the engine.

Q. You could see the rear part of the horses, but not the front part? A. I saw the horses' heads back to about the middle of the back. Did not see the rear part of the horses at all, near the wagon.

Q. Did you say the engine being in front of you prevented you seeing the rest of the team, the rear part of the horses? A. The distance from the cab to the front of the engine.

Q. What did you do when you saw the horses? A. Blew a succession of whistles and shut the engine off and put on brakes and emergency.

The fireman testified as follows:

Q. Just before the collision state whether you saw anything near the crossing, and if so, what it was? A. I seen a man driving up in a wagon.

Q. How far was he from the railroad track when you saw him the first time? A. About thirty feet.

Q. What did you do? A. I hollered to the engineer, and he was already sounding warning whistle.

Q. And what was the man in the wagon doing? A. He was driving across the track.

Q. Which way was the man looking? A. He seemed to be looking towards the engine.

Q. Do you remember how he was holding the reins, or what he was doing in the wagon? A. He seemed to tighten up on the lines and then release them.

Q. And what happened after you hollered to the engineer and he sounded the whistle? What was done with the engine by the engineer ? A. He shut the engine off and put the brakes into emergency.

Q. What happened after he put on the brakes and emergency to the speed of the engine; just state what was done? A. Stopped about the length of five telegraph poles.

Q. When you hollered to the engineer that is the time the whistle was sounded, is that right? A. It was already sounded.

Q. But you had not seen the man then? A. I had seen him before he was hit, yes.

Q. Had you not seen him when you called to the engineer? A. Yes.

Q. And the whistle was blown at the time when you hollered? A. Yes.

Q. And how far was that from the second crossing? A. Must have been two hundred yards.

Q. And the man was thirty feet from the track? A. About thirty feet, I guess. I never measured.

Q. What makes you think it was about thirty feet? A. Well, it looked that way from a distance.

Q. Well, you were looking at the man all the time, were you? A. After I got up and was ringing the bell, I seen the man about thirty feet from the track.

Q. Were you looking at him all the time? Did you see him pull up the reins and slacken the reins again; didn't you see that? A. Yes.

Q. And at the same time you saw the engineer throwing on the brakes. A. He shut the engine off with one hand and was sounding the whistle with the other.

Q. And you saw that, did you? A. Yes.

Q. Then you saw him throw the brakes, too, did you? A. Yes.

Q. And at the same time you saw this man driving his horses and pulling up the line and slackening up again? A. Yes.

Q. The engineer was on the right side of you and this man and team were on the left? A. Yes.

Q. You are not cross-eyed are you? A. No, I do not think I am.

Q. And you say it ran five telegraph poles after the emergency brakes were put on? A. Yes.

Q. You mean five telegraph poles after you struck the wagon or five telegraph poles from where you put on the emergency brakes 200 feet from the crossing? A. I

guess it was about that after it was put on, after they were put on.

Q. Did not the engine run up five telegraph poles past the crossing before it was stopped? A. I said about that distance, I do not know if it was just that or not.

Q. Now, let me understand you. You mean five telegraph poles from the crossing where the boy was hit to where the engine stopped? A. About that.

Three photographs were introduced in evidence by the appellant. Referring to these photographs the claim agent of the appellant testified that on the day of the accident from a point twenty-five or thirty feet west of the track he could have seen three hundred and fifty yards to the south, that being the direction from which the engine was approaching which killed Antonio Padilla, and that also from a point in the middle of the wagon road west of the track at a point opposite the wing fence and right of way fence he could see one hundred and seventy-five yards in the same direction.

OPINION OF THE COURT.

WRIGHT, J.—While there are numerous assignments of error, the majority of them relate to the same proposition and will therefore be considered as one general assignment.

1. The appellant contends that the conduct of the deceased, Antonio Padilla, was the proximate cause of the accident and of his death and precludes any recovery by the plaintiff. The law governing the duty of a traveler upon a public road approaching a railway crossing is too well settled to need any extended discussion at this time. It is settled that it is the duy to approach cautiously and carefully, using his faculties of sight and hearing. Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Chicago & St. Paul Ry. Co., 114 U. S. 615; Northern Pac. Railroad Co. v. Freeman, 174 U. S. 179; Weber v. N. Y. etc. Railroad Co., 58 N. Y. 45; Oklahoma City v. Reid, 33 L. R. A., n. s., 1115, Note. Failure on the part of

the deceased or injured person so to exercise due
1 care amounts to contributory negligence on his part and will undoubtedly bar a recovery. Northern
2 Pac. Railroad Co. v. Freeman, cited supra. In this jurisdiction the burden of showing contributory negligence is on the defendant. "In the courts of the United States, where the just and sensible rule obtains that the burden of showing contributory negligence is on the defendant, the plaintiff in an action for damages for the death of one killed at a railroad crossing, is not under the burden of showing a lack of contributory negligence on the part of the deceased; but, after he had shown negligence on the part of the railway company adequate to account for the accident without any fault on the part of the deceased, he has established a prima facie right of recovery." Thompson on Negligence, sec. 1622, (2nd ed).

It is also too well settled to allow of discussion that.
3 in the absence of evidence to the contrary there is a presumption that deceased stopped, looked and listened. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, and cases cited therein. This presumption is founded on the law of nature, that is, the instinct of self-preservation. In the absence of any evidence as to what the deceased did just prior to the accident it is never to be presumed that he was negligent. In Northern Pacific Railroad Co. v. Spike, 121 Fed. 44, the court uses the following language: "No one was with the deceased or witnessed his movements and the presumption prevails that he exercised ordinary care in approaching this crossing and that he would not have been killed but for the culpable negligence of the defendant in neglecting to give timely warning at the train's approach. The conditions prevailing at this crossing at the time of the accident were such as to make it imperatively necessary for the safety of travelers for the railway train to give the statutory signals of approach." Further on, in the same opinion, the court adds: "Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases and may be strong enough to overcome the testimony of an eye witness." See, also, McGee-

v. Kennedy's Adm'r., 66 Fed. 502; Baltimore & Ohio R. R. Co. v. Griffith, 159 U. S. 603; Grand Trunk R. R. Co. v. Ives, 144 U. S. 408. "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the fact is for the jury. It is also where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the courts." Grand Trunk R. R. Co. v. Ives, cited supra; Gardner v. Mich. C. R. R. Co., 150 U. S. 349; Oklahoma City v. Reid, 33 L. R. A. n. s. 1117, Note. In the case at bar the appellant contends that the evidence relating to what happened just prior to and at the time of the accident established contributory negligence on the part of the deceased as the approximate cause of his death to the extent that it became the duty of the court to pass upon the same as a matter of law and to instruct the jury to return a verdict for the appellant and that the court therefore erred in overruling appellant's motion for a peremptory instruction to that effect. The rules applicable to cases of this character being definitely settled in this jurisdiction, it only remains for us to consider the facts as disclosed by the evidence. With this end in view we have set out all of the evidence having any bearing upon this question, in the statement of facts. A careful consideration of this evidence fails to disclose that there is any positive evidence that the deceased, Antonio Padilla, was guilty of contributory negligence. The appellant seems to rely principally upon the testimony of the witness Ramona Gabaldon as establishing the fact that the deceased failed to exercise due care in approaching the railway crossing. Giving this testimony its full weight it can only by inference establish any contributory negligence on the part of the deceased. While it is true that the evidence of the claim agent, offered in behalf of the appellant, says that the deceased could have seen the approaching engine for some distance, if he had looked in that direction, at two distinct points, there is also evidence in the record (set out in the statement of facts) tending to establish the fact

that at other points along the line of his approach to the track his view was obstructed by trees, weeds and an irrigation ditch. No witness testified that they saw deceased at all times while he was approaching the railway crossing. It is also in evidence that the engine which caused the accident was running light at a high rate of speed, making very little noise, and that no whistle was sounded or bell rung until the engine was practically upon the deceased. In view of this evidence it can, therefore, well be said that reasonable men migh draw either conclusion therefrom. The motion for peremptory instruction on behalf of the appellant was, therefore, properly denied.

2. Appellant also complains that the court failed to properly instruct the jury upon the question of contributory negligence. An examination of the instructions given clearly discloses that the court in its instruc-
5 tions, both as to burden of proving contributory negligence and as to the presumption that due care and caution was exercised by the deceased in approaching the crossing, fully and fairly express the law applicable to this case.

3. In its fourth assignment of error the appellant complains of the action of the court in admitting evidence as to the changed conditions in the immediate vicinity of the crossing after June 28, 1909, the date of the accident, for the reason that evidence of such changed conditions, when caused by the defendant company, was received by the court as an admission of consciousness of an antecedent negligence. "Accordingly, it is conceded in almost all courts, that no act in the nature of repairs, improvements, substitution, or the like, done after the occurrence of an injury, is receivable as evidence of a consciousness, on the part of the owner, of negligence, connivance, or other culpability in causing the injury. There may, of course, be other evidential purposes for which the acts in question may be relevant; in that event they are to be received, subject to a caution restricting their use to the specific proper purpose * * * * * Again, since the condition of a place or a thing at the time of

an injury may always be evidenced by showing its condition before or after that time, provided no substantial change has occurred (post sec. 437) the description of the condition of the place subsequent to the injury may necessarily involve a mention of the fact of repairs, but this use of the fact should be guarded against the misuse for the forbidden purpose. Furthermore, the failure to observe a precaution required by law, may, if unexcused, be in itself a ground of liability, though it is sometime dealt with in terms of a rule of evidence." Wig. Evidence, Vol. 1, sec. 283. "The evidence upon the question of negligence in this instance is not of that satisfactory character which authorizes us to declare that the judgment should be affirmed, although incompetent evidence was admitted. If, therefore, we find incompetent evidence was permitted to go to the jury over the objection of the defendant, we must reverse the judgment." The evidence improperly admitted in the case cited was that appellant changed and repaired the crossing subsequent to the accident, but that it was offered for the purpose of showing antecedent negligence there can be no doubt, and the large number of cases cited in the notes to the case are all cases in which like evidence was offered for the purpose of showing prior negligence. Terre Haute Ry. Co. v. Clem., 18 Amer. St. R. 45. The above are undoubtedly correct statements of the rule as to this class of evidence. An examination of the record in the case at bar clearly
6 discloses that the evidence complained of was not admitted or received by the court for the purpose of showing consciousness on the part of the defendant company of antecedent negligence, but, on the contrary, it clearly appears that the evidence was merely preliminary for the purpose of identifying a plat which was subsequently introduced and that such evidence was strictly limited in its effect when so offered. There being no error apparent in the record, the judgment of the lower court is affirmed.

[No. 1399. December 8, 1911.]

HARRY M. DOUGHERTY and JOHN E. GRIFFITH, Partners, under the name of DOUGHERTY & GRIFFITH, and HERBERT B. HOLT and W. A. SUTHERLAND, Partners, under the firm name of HOLT & SUTHERLAND, Appellees, v. FANNY V. VAN RIPER, Appellant.

SYLLABUS.

1. Novation means the substitution of one debtor by mutual agreement for another.

2. Statement of facts comprises a complete novation.

3. Findings of the trial court based upon conflicting evidence will not be disturbed upon appeal.

4. A contract of novation is not obnoxious to the Statute of Frauds or governed by it.

Appeal from the District Court for Socorro County, before M. C. MECHEM, Associate Justice. Affirmed.

RENEHAN & DAVIES for Appellant.

There was no novation. 29 Cyc. 1130; 2 Page on Contracts, secs. 211, 629; 1 Parsons on Contracts 237; Tatlock v. Harris, 3 T. R. 174; Stowell v. Cram, 184 Mass. 563; Boston Ice Co. v. Edward Potter, 123 Mass. 28; Charles v. Amos, 10 Colo. 276; Vance v. Mfg. Co., 82 Fed. 251; 21 Enc., 2 ed. 666.

A novation upon condition cannot exist until the condition is fulfilled. Hyde v. Booraem, 16 Pet. 180; 21 Enc. 670; Wilson v. Copeland, 106 Eng. Rep. 1176; ex parte South, 36 Eng. Rep. 907; Edgell v. Tucker, 40 Mo. 527; Butterfield v. Hartshorn, 7 N. H. 346.

Statute of Frauds. Marion v. Young, 46 Mich. 103; Wierman v. Sugar Co., 106 N. W. 81; Chenoweth v. Building Assoc., 53 S. E. 561; Kelso v. Fleming, 104 Ind. 180; Bank v. Kirkwood, 85 Ill. App. 235; 184 Ill. 143; Netterstrom v. Gallistel, 110 Ill. App. 353; Izzo v.

Ludington, 79 N. Y. S. 744, 178 N. Y. 621; Mowry v. Trust Co., 76 Fed. 45; Hanson v. Nelson, 84 N. W. 742.

JAMES G. FITCH for Appellees.

Novation. 29 Cyc. 1130.

Findings supported by substantial evidence will not be disturbed on appeal. Territory v. Sais, 15 N. M. 171; Pecos-Valley Co. v. Cecil, 15 N. M. 45; 29 Cyc. 1132; Walker v. Wood, 170 Ill. 463; Union Cent. Ins. Co. v. Hoyer, 66 Ohio St. 344.

A contract of novation is not within the Statute of Frauds. 29 Cyc. 1188; 20 Cyc. 160, 186, 188, 276, 253, 263; Phillips v. Ocmulgee Mills, 55 Ga. 633; Neaves v. North State M. Co., 90 N. C. 412.

Agreement was unconditional. 1 Dan. Neg. Inst., sec. 81.

Damages. C. L. 1897, sec. 3143; Laws 1907, chap. 57, sec. 39; Dold v. Robertson, 3 N. M. 520; Shafer v. Second Nat. Bank, 4 N. M. 292; Jones-Downs Co. v. Chandler, 13 N. M. 501.

STATEMENT OF THE CASE.

This is an attachment suit brought by the plaintiff against the defendant, Fanny V. Van Riper, to recover the sum of five thousand dollars alleged to be due the plaintiffs at and prior to the 21st day of October, 1909, for services rendered to James G. Darden in litigation theretofore pending between Darden and the defendant Fanny V. Van Riper. It appears that in this prior litigation between Darden and the defendant, the plaintiffs were attorneys for Darden and that the sum sued for in this case was due to said attorneys from Darden. It appears, from the record, that this former litigation was between James G. Darden and the defendant, who was at that time the wife of Darden, and the controversy involved a divorce and the adjustment of property rights in a very considerable amount of property. While this litigation was pending negotiations were entered into for the settlement of the controversy between the parties and, on the

21st day of October, 1909, a settlement was agreed upon and effected whereby Darden agreed to convey certain real and personal property to the defendant and the defendant, in consideration thereof, agreed to assume and pay Darden's attorney fee to the plaintiffs in this case, amounting to the sum of five thousand dollars. It is admitted that Darden conveyed the property to the defendant and the plaintiffs allege that the defendant received and has had the benefit of this property since its conveyance to her, but she has failed and refused to pay them the five thousand dollars which she assumed and agreed to pay them. The findings of fact of the trial court covering the above issues are as follows: "That at and prior to the 21st day of October, A. D. 1909, plaintiffs had, as such attorneys, rendered legal services to one James G. Darden and for which the said James G. Darden was then and there indebted to plaintiff; that on the said 21st day of October, 1909, a settlement was had and effected by and between the said Darden and the said defendant of and concerning certain controversies and litigation in regard to their respective rights in and to certain property, real and personal, situated in the County of Bernalillo, Territory of New Mexico, and elsewhere, whereby the said Darden did promise and agree to convey to the said defendant, Fannie V. Van Riper, certain property, real and personal, in the County of Bernalillo and elsewhere; and in consideration thereof, the said defendant, Fannie V. Van Riper, did agree to forthwith assume, pay off and discharge the indebtedness of the said Darden to plaintiff, which said indebtedness was then and there ascertained to be and was fixed at the sum of five thousand dollars, which sum defendant agreed to pay to plaintiffs herein and plaintiffs, in consideration of said promise and undertaking of defendant, agreed and promised to accept the said sum of five thousand dollars from the said defendant, Fannie V. Van Riper, in full payment and discharge of said indebtedness and agreed to release, and did release and discharge the said Darden, for and on account of the said indebtedness. It is further found that the said James G. Darden did on the said date convey to the said defendant

the said property as he agreed to do and that the said defendant, Fannie V. Van Riper, accepted and still holds and retains the same and the rights and benefits thereof; that the said defendant, though often requested, has failed and refused to pay the said sum of five thousand dollars to these plaintiffs, or any part thereof; that by reason of the said refusal of the said defendant, the said plaintiffs have been damaged in the sum of five thousand dollars, with interest at the rate of six per cent. from the 21st day of October, 1909, amounting to the sum of three hundred dollars; that all the other allegations of the complaint of plaintiffs are true. It is further found that the said cause was instituted by the said plaintiffs against the said defendant by attachment and that the property belonging to the said defendant, situated in the County of Bernalillo, Territory of New Mexico, was attached; and it is further found that the said Fannie V. Van Riper is not a resident of, nor resides in this territory and that the said defendant has no property situated in the County of Socorro, Territory of New Mexico; and that the said grounds of attachment are sustained; and that while the said attachment so sued out by plaintiffs against the property of said defendant was in full force and effect, and before judgment was rendered in this cause, that the defendant executed a bond to the said plaintiffs, reciting and specifying the property so attached, and conditioned that if the defendant should perform the judgment of the court in the premises, than the said bond to be null and void, but otherwise to remain in full force and effect; that the said bond was executed by the said defendant, Fannie V. Van Riper, as principal, and the United States Fidelity and Guaranty Company, as surety, on the 6th day of May, 1910, and filed in this court on the 9th of May, 1910, upon the said property belonging to the said defendant, so attached by the process of this court, sued out on behalf of plaintiffs, and thereafter by an order of this court entered in this cause on the 19th day of May, 1910, discharged the said attachment, and the levy made thereunder by the sheriff of Bernalillo County, released, and restitution made the defendant of all property taken

or levied upon, pursuant to said writ of attachment." Jury being waived, trial was had by the court and judgment was rendered for the plaintiffs in the sum of five thousand three hundred dollars and interest, to reverse which judgment defendant has appealed to this court.

OPINION OF THE COURT.

M'FIE, J.—There is but one issue in this case, as disclosed by the record and briefs of counsel, and that is whether or not there was a complete and unconditional novation created by the settlement of the former litigation between the parties. The court below found that a complete novation had been established by the evidence and thereafter rendered judgment for the full amount due plaintiffs. Under the civil law there were at least three different kinds of novation and under the common law there can be no doubt of the existence of the kind of novation alleged in this case. "Novation means
1 simply the substitution of one debtor by mutual agreement for another. Kelso v. Fleming, 104 Ind. 180. The novation here defined, is identical with the novation pleaded by the plaintiffs in this case where a new debtor is substituted for the old." On page 11 of appellant's brief the following admission is made: "The testimony of Holt, Dougherty and Sutherland is in substantial accord, that Van Riper agreed to pay Darden's debt to them in consideration of Darden's releasing to Van Riper the property in controversy and Darden's release by Dougherty, et al, from his obligation to them." This statement seems to comprise a complete novation as having been established, at least by the testimony of the three plaintiffs above named, and as found by the
2 court. The indebtedness of Darden to the plaintiff was not denied, nor was the fact of this settlement agreement controverted, nor the further fact that a draft for the full amount due the plaintiffs was made by or on behalf of the defendant, Mrs. Van Riper, and with her knowledge and that the draft was given to the plaintiffs and accepted by them, so that the only real controversy is as to whether the payment of the indebtedness evidenced

by the draft, which was dishonored when presented for payment, was conditional or not. It is insisted by counsel for the defendant that after Mrs. Van Riper had entered into the contract to assume and pay the plaintiff's attorneys fees on condition that Mr. Darden would convey and transfer to her all of the property referred to in the contract, that Mr. Britt, one of the attorneys for the defendant, demanded that the draft should be made on ten days' time and that defendant's counsel insisted upon the property being free of all incumbrances or other obligations and that this was a condition upon which counsel for Mrs. Van Riper based the claim; that the acceptance of the property from the plaintiff was conditional and such condition not having been complied with novation was incomplete and there could be no recovery. If the contract was conditional in this respect, the law is well settled that until the condition is fulfilled the novation contract would not be complete, but an examination of the evidence and the finding of the court does not sustain the existence of this condition. Three witnesses, Holt, Dougherty and Sutherland, testified that the agreement to assume and pay the indebtedness due the plaintiffs at the time the contract was entered into, was unconditional and that while Mr. Britt did raise this question as to incumbrance upon the property, plaintiffs refused to consider that matter for the reason that Mrs. Van Riper had entered into the contract without any condition whatever and that plaintiffs insisted upon the unconditional character of the contract. It appeared from the testimony that there was some controversy about the giving of this draft, but, to settle that controversy, Mr. Renehan endorsed the draft, thus making it acceptable to the plaintiffs, and it is in testimony that the reason Mr. Britt assigned for requesting that the draft should be on ten days' time was because he intended to visit Mexico and would, therefore, be absent for a time, and not for the reason that he desired time to examine as to the incumbrance of the property to be conveyed to his client; and it further appears that when this matter of examining the property as to incumbrance was mentioned to the plain-

tiffs and the plaintiffs were requested to consent thereto they refused to consent and refused to even mention the matter to Mr. Darden. That thereupon Mr. Renehan requested permission to have a consultation with Mr. Darden, and did have a conversation with him, but the plaintiffs deny that the result of that conversation was ever made known to them or that they at any time admitted the conditional character of the contract claimed by defendant's counsel.

Mr. Britt and Mr. Renehan testified that there was this condition, and in that respect their testimony is in conflict with testimony for the plaintiffs. It must be admitted, therefore, that there is a conflict in the evidence as to this vital point, three witnesses testifying to the unconditional character of the contract of novation and two witnesses testifying to the conditional character of it. Such being the case this court has repeatedly held that
3 the findings of the trial court based upon conflicting evidence will not be disturbed by this court upon appeal, there being substantial evidence upon which to base the finding and verdict. Candelaria v. Miera, 13 N. M. 360, and cases cited. The findings, however, are supported also by the admitted facts that Mr. Darden did convey or return to the defendant the property which the contract provided should be returned to her and the draft was actually executed and given to the plaintiff. These facts not only show that the defendant had entered into the contract to assume and pay this indebtedness to the plaintiff, but that Darden as well as the plaintiffs and defendant was a party to the transaction and performed his part of the contract. The acceptance of the draft by the plaintiffs completes the link in the chain of novation. In the case of Kelso v. Fleming, 104 Ind. 180, the court said: "One of the essential elements to a novation is, that there should have been an extinguishment of the old debt; and another is that there should have been a mutual agreement between all the parties that the old debt should become the obligation of the new debtor." And in the case of McCartney v. Kipp, 171 Pac. 644, the court said: "There must be an acceptance of the new debtor

by the creditor and that the parties in interest assented to the extinguishment of the old debt." It is apparent from the fact that the draft was issued for the payment of the old debt and Darden, the other party to the transaction, having conveyed the property to the defendant as a consideration for the payment of the old debt by the defendant, that it was in contemplation of all the parties that the old debt should be extinguished as far as Darden was concerned and that the defendant, Mrs. Van Riper, became the new debtor by assuming and agreeing to pay the indebtedness which she knew Darden owed to the plaintiffs. The acceptance of the draft executed under the contract of the defendant to pay the debt is further evidence of the intention of the plaintiffs to release Darden from the payment of the old indebtedness. It seems, therefore, that every essential of contractual novation is found in the present contract as was found by the court below. Based upon the supposition of defendant's counsel that the contract was conditional so as to defeat complete novation, counsel argue that recovery in this case is barred by the statute of frauds, but the law is that
4 a contract of novation is not obnoxious to the statute of frauds or governed by it. In the case of Hamlin v. Drummond, 91 Me. 175, it is held that the statute of frauds does not apply in case of a complete novation. A number of other citations might be made to this same effect, but it is deemed unnecessary in this case. Finding no error in the rendering of the judgment of the court below, the same will be affirmed with costs.

[No. 1400. December 8, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. JIM WALKER, Appellant.

SYLLABUS (BY THE COURT).

1. Under the circumstances disclosed by the record in the case it was clearly within the discretion of the trial court to refuse to grant a continuance to the defendant.

2. In an indictment for larceny it is not necessary to allege that the owner of the property, the larceny of which is charged, is a corporation and if that allegation is made and if it is thereby made necessary to prove the existence of the corporation, evidence of its de facto existence is sufficient.

3. The giving of an instruction, which, although a correct statement of law, may be outside of the evidence in the case is not a good ground for a new trial or reversal it on other matter covered by the indictment there was evidence to warrant a conviction.

Appeal from the District Court for Chaves County, before WILLIAM H. POPE, Chief Justice. Affirmed.

W. W. GATEWOOD for Appellant.

Continuance should have been granted. C. L. 1897, sec. 2685, sub-sec. 133, 2985, 2989; Territory v. Perea, 1 N. M. 627; Territory v. Rivera, 1 N. M. 640; Territory v. Lopez et al, 3 N. M. 156; State v. Cooper, 45 Mo. 65; Territory v. Kinney, 3 N. M. 656; Rhode Island v. Mass., 11 Pet. 226; Schultz v. Moore, 22 Fed. Cases, No. 12825; Myers et al etc. v. Trice, 86 Va. 835; Markson v. Ide, 29 Kas. 501; Rice v. Melendy et al, 36 Ia. 166; Vicksburg etc. R. R. Co. v. Scott et al, 47 La. Ann. 706; Thompson v. Thornton, 41 Cal. 626; Printup v. Mitchell, 19 Ga. 586; Condon v. Brockway, 50 Ill. App. 625; Patin v. Poydras, 5 Mart. 693, La.; Baillio v. Wilson, 6 Mart. 334, La.; Sinelser v. Williams, 10 Rob. 97, La.; Searls v. Munson, 17 Ill. 558; Bentley v. Gerke Brewing Co., 14 Ky. Law 766; Burlington Fire Ins. Co. v. Coffman, 13 Tex. Civ. App. 439; Johnson v. Dinsmore, 9 N. W. 559, Neb.; Smith v. Bates, 27 S. W. 1044, Tex.; Waldrup v. Maxwell, 10 S. E. 597, Ga.; Texas & P. Ry. Co. v. Yates, 33 S. W. 291, Texas; State v. Berkley, 92 Mo. 45; Murphy v. Murphy, 31 Mo. 322; Barnum v. Adams, 31 Mo. 532; Light v. Richardson, 31 Pac. 1123, Cal.; Ogden v. Payne, 5 Cowen 16; Hooker v. Rogers, 5 Cowen 577; Peck v. Lovett, 41 Cal. 423; Lecense v. Cottin, 9 Martin

454, La.; 4 Enc. P. & P. 824, 828, 829, 840; 3 Graham and Waterman on New Trials, 894; Light v. Richardson, 31 Pac. 1123; Smith v. Brand, 44 Ga. 588.

Property having no owner cannot be the subject of larceny. U. S. v. Smiley, 6 Sawy. 640, U. S.; Hunter v. Watson, 12 Cal. 363; Ready v. Kearsley, 14 Mich. 225; Miller v. Chittenden, 2 Ia. 368; Barr v. Schraeder, 32 Cal. 610; 1 Dev. on Deeds 123; Johnson v. State, 36 Tex. 375; Ritchie v. State, 38 Tex. 643; Debbs v. State, 43 Tex. 650; 1 McClain's Crim. Law 544; Hawkins v. State, 95 Ga. 408; Fletcher v. State, 16 Tex. App. 635; Jones v. Com., 17 Grat. 563, Va.; Wallace v. State, 66 S. W. 1102, Tex. Crim. App.; 13 Ency. of Ev. 734; Wallace v. People, 63 Ill. 452; McCowan v. State, 58 Ark. 17; People v. Bogart, 63 Cal. 248.

Accustomed range. State v. Thompson, 40 Tex. 515; Foster v. State, 21 Tex. App. 86.

FRANK W. CLANCY, Attorney General, for Appellee.

New trial. C. L. 1897, sec. 2685, sub-sec. 133; 14 Enc. P. & P. 858.

Continuance. Sims v. Hundley, 6 How. 6; Thompson v. Selden, 20 How. 198; Davis v. Patrick, 57 Fed. 913; Kerr-Murray Co. v. Hess, 98 Fed. 57; Territory v. Watson, 12 N. M. 420; Territory v. Padilla, 12 N. M. 5-6; Territory v. Leary, 8 N. M. 186; Territory v. Yee Dan, 7 N. M. 443; Territory v. McFarlane, 7 N. M. 425.

Not necessary to allege corporate capacity of owner of stolen property. Territory v. Garcia, 12 N. M. 96; 1 Bishop Crim. Proc., sec. 748.

Indictment sufficient. C. L. 1897, secs. 70, 71, 79.

There was no error in giving oral instructions. C. L. 1897, sec. 2992.

OPINION OF THE COURT.

ABBOTT, J.—The defendant was tried and convicted in the District Court of Chaves County on the first count of an indictment under Section 79, C. L. 1897, which count charged that on October 8, 1910, in Chaves county, New Mexico, he "did take, steal, kill" etc., "one neat cattle * * * * of the property of El Capitan Live

Stock Company (a corporation.)" The further essential facts are stated in connection with the discussion of the questions decided. The assignments of error discussed in the brief for the appellant relate in part to matters of practice and in part to the alleged insufficiency of the evidence for the territory to sustain the verdict rendered. Of the former class the one chiefly emphasized is the refusal of the trial court to grant a continuance to the defendant. On November 12th, 1910, the case was set for trial on November 30th, and was in order for trial from the latter date to December 13th, when, to accommodate the defendant, who had on December 12th filed a motion for continuance based on the alleged absence of an essential witness, it was postponed until nine o'clock in the forenoon of December 16. Neither the defendant nor his counsel appeared at that time and the court sent notice to defendant's counsel that his appearance bond would be forfeited at two o'clock that day unless he appeared for trial. At that hour he appeared with counsel, who filed another motion for continuance incorporating the former one and adding that he had just returned from an unsuccessful search for the witness in question and had found his chief counsel, Mr. Gatewood, of the firm of Gatewood & Graves of Roswell, where the court was in session, too ill to go into the trial of the case. Although Mr. Gatewood was, apparently, in Roswell, the fact of his illness was not brought to the attention of the court until the time fixed for the trial to proceed. A subpœna for the missing witness, with others, had been taken out by the defendant December 10, but was not served on him, although he had been present in court every day from Nov. 30th and it does not appear from the record that he was not then at Roswell. He went away "some time between December 10, (about the noon hour) and December 13," according to the statement in the brief for the appellant. Although in the affidavit in support of his motion for continuance, this defendant made the allegation required by the statute that "he knows of no other witness by whom such facts can be fully proved," it is obvious that the facts set out in the affidavit as what

the absent witness would testify to, namely, that he had the mother of the calf he killed at his place and was also bringing up a dogie calf with her, must have been known to himself at least, if true. It appears, too, from the uncontradicted evidence introduced by the territory, that defendant had only about ten cattle, including several calves at his place of residence, that he had a wife, and that he told a witness one of those cattle belonged to her. He showed to other witnesses at the corral at his home the cow which he claimed was the mother of the calf he had killed and the calf which he claimed was a "dogie" he was bringing up by her. His wife, then, must in all probability have known the facts about the cow and calves which he said in his affidavit he was depending on the absent witness to prove. The evidence for the territory was that the calf in question was a "wild" calf as distinguished, we understand, from one accustomed to being where it would often see human beings, and that the defendant, who was on a horse, "roped" the calf at a point about a mile and a half from his house and dragged it away to his house where he immediately killed it. Yet, neither the defendant nor his wife testified and it is a fair inference either that the absent witness would not have testified as the defendant claimed he would, or that he did not consider it to his advantage to offer the facts he set up in his affidavit in evidence and in either case the absence of the witness was not detrimental to him. While what appeared in the course of the trial was not before the court when the motion for continuance was denied, the facts stated tend strongly to show the soundness of the court's conclusion. And, although the defendant was not represented at the trial by Mr. Gatewood, the record states that he was represented by his partner, R. L. Graves, Esq., and by O. O. Askren, Esq., "both attorneys of experience in criminal cases and competent to try the case." Undoubtedly, there was enough to warrant the granting of a continuance on the face of the motion, but there was not, we think, such diligence on the part of the defendant, either as to the absent witness or the illness of counsel, as to require the court to permit further delay. It is often

extremely difficult for a trial court to determine whether an application for a continuance is really meritorious and conforms to the statute in reality as well as in letter. The court is in duty bound to guard against improper delay and the consequent expense, so far as it has the right to do so. In this instance it seems probable that witnesses for the Territory had been held in attendance from November 30 to December 16, and the record does not show that the term continued beyond December 19. Further delay would have resulted, apparently, in a continuance of the case to another term with the loss of the outlay already made by the county in the cause, and the risk of the loss of essential evidence by the territory through the removal from the territory or the death of witnesses. It seems to have been an occasion eminently proper for
1 the exercise of the discretion vested in the courts in such cases, and that there was far from being the abuse of discretion which alone would justify this court in reversing the judgment of the trial court. Territory v. Watson, 12 N. M. 420; Territory v. Padilla, 12 N. M. 5-6; Territory v. Leary, 8 N. M. 186; Territory v. Ye Dan, 7 N. M. 443; Territory v. McFarlane, 7 N. M. 425.

Of the other class of assignments of error there is one which raises a serious question whether the evidence of ownership is sufficient to meet the requirements of the indictment and sustain the judgment rendered. The territory introduced in evidence the record of the stock brand of El Capitan Live Stock Company. In the copy of the certificate introduced it is shown in the drawing in the copy with its "location" on "cattle" and on "horses, mules and asses" and is styled the "Holding Brand" of "El Capitan Live Stock Company of Richardson, County of Lincoln and Territory of New Mexico. Recorded in Territorial Brand Book No. 4, page 13, this 2nd day of July, 1899." It was identified as what was known as the "Block brand" by witnesses for the Territory and as the brand borne by a cow with which was the unbranded calf which it was claimed the defendant took from the cow and killed. There was evidence tending to prove that the cow was

the mother of the calf and that the two had come into the inclosed pasture of one of the witnesses, about a mile and a half from the residence of the defendant, from which place the defendant took it, claiming it was his calf when discovered. The Territory put in evidence a certified copy of Articles of Incorporation of "El Capitan Live Stock Company," signed, acknowledged and recorded in December, 1908, stating, with other things, that its "principal office in New Mexico was in Roswell," which is in Chaves county. Obviously this corporation could not have had the Block brand recorded in 1899, as it did not exist at that time. The evidence of its incorporation in 1908 was irrelevant and would doubtless have been excluded by the court if its attention had been called to the date. But evidence that such a corporation was organized in 1908 with its principal New Mexico office in Chaves county does not prove that there was not a corporation of the same name in 1899 having its corporate residence in Lincoln county. It was not necessary for the indictment to allege that the owner was a corporation. 2 Bish. New Crim. Proc., sec. 718; Territory v. Garcia, 12 N. M. 96; and while it is by some authorities declared that if such an allegation is made it must be proved (1 Bish. New Crim. Proc., sec. 488 b, and cases cited) there is also authority that, being unessential, it need not be proved. "Mere surplusage will not vitiate an indictment and need not be established in proof. The material parts which constitute the offense charged must be stated in the indictment and they must be proved in evidence, but allegations not essential to such a purpose which might be entirely omitted without affecting the charge against the defendant and without detriment to the indictment are considered mere surplusage and may be disregarded." Story, Asso. J., U. S. Supreme Court, in United States v. Howard, 3 Summer 12. It is, of course, alleged and must be proved that the property, the larceny of which is charged, had an owner since without that, taking it could not be larceny, and the statute under which the defendant was indicted includes ownership in the description of the crime. If a larceny is committed it is

of no consequence, as regards the public interest in having the crime punished whether the stolen property belonged to a person or to a corporation, or to one owner or another, and if ownership in a corporation is alleged it is at most necessary to prove only its de facto existence. 2 Bish. Crim. Proc., citing Smith v. State, 28 Ind. 321, and People v. Barrie, 49 Cal. 342. See, also, United States v. Amedy, 11 Wheat. 392. The evidence that a brand was recorded as the brand and mark of El Capitan Live Stock Company, a coproration, that under the law of New Mexico such a brand on stock is proof of its ownership by the owner of the brand, that cattle were branded with the brand in question to such an extent that it was well known in the vicinity of the place where the calf was taken and killed, and that it was born at the time alleged by the cow which it was claimed was the mother of the calf, is sufficient, we think, to show the de facto existence of El Capitan Live Stock Company as a corporation engaged in the cattle business. In the brand certificate it is held out as a corporation and the more ordinary proof of the de facto existence of a corporation consists largely of acts of holding out by servants and agents. Another assignment of error relates to an instruction to the jury that "an animal upon its accustomed range is deemed to be in the immediate possession of the owner thereof." Counsel for the appellant say that as there was no evidence that the animal in question was on its accustomed range, if by that was meant the range of the alleged owner, and that the verdict did not conform to the instruction, which was the law of the case. It is true that the evidence makes it probable that the cow and calf had strayed from their customary range at the time the calf was taken by the defendant and the instruction in question was therefore, perhaps, unnecessary. But the court did not instruct, and it is, of course, not the law, that larceny of stock can be committed only by taking it from its accustomed range. That is only one of the ways in which there may be a violation of the statute law in question. The first of the offenses enumerated in the statute is to "steal any neat cattle, horse," etc., the next to "em-

bezzle such animals;" the third to "knowingly kill, sell, drive or ride away or in any manner deprive the owner of the immediate possession of" such stock. One of these charges in the indictment was that the defendant "did steal" the animal in question. It would be absurd to hold that merely because an animal had strayed from its usual place it can not be the subject of larceny. The contentions of the appellant on the other assignments of error are so clearly untenable under the statutes of New Mexico and the decisions of this court, that we think it unnecessary to discuss them separately. The judgment of the district court is affirmed.

[No. 1402. December 8, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. SILVESTRE TORRES, Appellant.

SYLLABUS.

1. Pleas in abatement are dilatory pleas and are subject to the most technical rules of pleading and the greatest accuracy and precision are required in framing them.

2. It is not necessarily true that secondary evidence is not legal evidence.

2. That appellant was subpoenaed and compelled to appear before the grand jury was not a violation of his constitutional rights, nor is the fact that he was sworn before such body and there testified to facts that did not incriminate himself.

4. If appellant was compelled over his protest to be a witness against himself before the grand jury and was compelled to testify to matters and things over his protest incriminating or tending to incriminate himself, it was a direct violation of his constitutional right guaranteed him.

5. The allegations in the plea are at best mere conclusions. The facts themselves must be stated and so clearly and definitely set forth as not to leave unobviated any supposable special answer.

6. Continuance properly denied.

7. The statute regulating continuances because of absent witnesses is mandatory and when the application for continuance complies with the statute there is no room for the court to exercise any discretion.

8. This court will not consider any alleged error in the omission to give instructions unless exception is duly taken and unless a request is made for such instruction.

9. Instructions examined and found fairly and completely to cover everything in the refused instruction.

10. In order to secure review by an appellate court of improper argument before the jury, by counsel, the attention of the trial court must be immediately called to the objectionable remarks and request be made for the interference of the court, and, in case of refusal, an exception be noted.

11. Counsel and court considered that admonition by the court cured the objectionable remarks of the prosecuting attorney, and counsel cannot now be heard to question such ruling in the absence of a specific exception.

Appeal from the District Court for Union County, before C. J. ROBERTS, Associate Justice. Affirmed.

J. LEAHY for Appellant.

Accused cannot be compelled to incriminate himself. C. L. 1897, secs. 979, 980, 3431, 3765, 3405; 5th Amendment of U. S. Constitution; Counselman v. Hitchcock, 142 U. S. 549; Levy v. Superior Court, 167 U. S. 42; Zucker, 161 U. S. 481; U. S. v. Edgerton, 80 Fed. 376; U. S. v. Bell, 81 Fed. 843; State v. Young, 24 S. W. 1045; 2 Bishop's C. P., sec. 794; Tuttle v. People, 79 Pac. 1039; U. S. v. Praeger, 149 Fed. 482; Hale v. Hinkle, 201 U. S. 67; State v. Gardner, 92 N. W. 529; Boone v. People, 36 N. E. 99; State v. Clifford, 53 N. W. 299.

Continuance should have been granted because of absence of witnesses. C. L. 1897, secs. 2987, 3422; State

v. Berkley, 4 S. W. 24; 2nd Story Const., secs. 1938, 1943; Starkie on Ev., 9th ed. 727; ex parte Milligan, 4 Wall. 120.

Instructions. Wharton on Homicide, 3 ed., sec. 587; Ty. v. Monroe, 6 Pac. 478; State v. Alcorn, 64 Pac. 1014; State v. Keeler, 28 Iowa 551; McBride v. People, 37 Pac. 953; Gay v. State, 49 S. W. 612; Harris v. State, 12 S. W. 1102; Hunter v. State, 31 S. W. 674.

Motive. Wharton on Homicide, secs. 210, 211, 340.

FRANK W. CLANCY, Attorney General, for Appellee.

The action of the grand jury is conclusive in presenting the indictment and the court will not permit a retrial of the propriety of finding the indictment after the grand jury has acted. U. S. v. Reed, 2 Blatch. 466; State v. Morris, 36 Iowa 272; Cox v. Coleridge, 1 B. & Cr. 37; 1 Chitt. Cr. L. 313; 9 Pick. 495; Dockery v. State, 35 Tex. Cr. 487; Washington v. State, 63 Ala. 192; State v. Fassett, 16 Conn. 471; Crech v. State, 24 Ind. 155; State v. Tucker, 20 Iowa 508; State v. Fowler, 52 Iowa 104; Hammond v. State, 74 Miss. 218; State v. Shreve, 137 Mo. 1; Leach's Cr. L. 159.

That appellant was taken before the grand jury and there called upon to testify is not sufficient ground for setting aside the indictment. Mencheca v. State, 28 S. W. 203; Spearman v. State, 34 Tex. Cr. 281; U. S. v. Brown, 1 Sawyer 532; People v. Landis, 82 Mich. 118.

Plea in abatement was not sufficient. Boone v. People, 148 Ill. 448; State v. Gardner, 88 Minn. 136; State v. Froiseth, 16 Minn. 297; State v. Frizell, 111 N. C. 722; U. S. v. Egerton, 80 Fed. 374; State v. Trauger, 77 N. W. 337; State v. Donelon, 12 So. 922; 1 Chit. Pl. 445; Gould Pl., chap. 3, secs. 57, 58; 1 Bish. Crim. Proc., sec. 324; Dolan v. People, 64 N. Y. 492; O'Connell v. Reg., 11 Clark & F. 155; State v. Bryant, 10 Yerg. 527; State v. Newer, 7 Blackf. 307; State v. Brooks, 9 Ala. 9; Hardin v. State, 22 Ind. 347; Findley v. People, 1 Mich. 234; Belden v. Laing, 8 Mich. 500; People v. Lauder, 82 Mich. 114; Rex v. Lewis, 6 Car. & P. 161; Rex. v. Davis, Id. 177; Reg. v. Owen, 9 Id. 238; Reg. v. Wheeler, 8 Id. 250;

People v. McMahon, 15 N. Y. 384; People v. Mondon, 103 N. Y. 211.

Failure to instruct as to involuntary manslaughter is not up for review. Territory v. O'Donnell, 4 N. M. 209; U. S. v. Duran de Amador, 6 N. M. 173; Territory v. Gonzales, 11 N. M. 326; Territory v. Watson, 12 N. M. 421; Territory v. Caldwell, 14 N. M. 543.

No error in refusing instruction. U. S. v. Wiltberger, 28 Fed. Cas. 730.

Statements of District Attorney to jury were not prejudicial. Chacon v. Territory, 7 N. M. 246.

STATEMENT OF FACTS.

At the September, 1910, term of the District Court of Union county, the defendant, Silvestre Torres and three others were jointly and severally indicted for the murder of one Reymundo Encinas. The joint indictment was No. 598. All the defendants were arraigned on all of the indictments and entered pleas of not guilty, all which proceedings took place before any of the defendants had consulted counsel. At the March, 1911, term, the defendants in all cases withdrew their pleas of not guilty and filed pleas in abatement. In the case at bar the plea was as follows: "And the said Silvestre Torres, in his own proper person, comes into court here, and, having heard the said indictment read, says that he was required and compelled to testify under oath before the grand jury by whom the said indictment was found and returned into court here, touching any and all matters that had come to his knowledge concerning the said alleged crime set out in said indictment, and particularly all he had heard tending to implicate all defendants jointly indicted with him by the grand jury under case No. 598, of the records of this court; that during the session of said grand jury, affiant was then confined in the county jail of said Union county, and was taken from there by the sheriff of said county before said grand jury and compelled, after being sworn by the foreman of said grand jury, to answer all questions touching said alleged crime, and all he had heard about the same, tending to implicate

himself or other persons, all of which was done against his will and over his protest, and that the indictment herein was found on hearsay and secondary evidence given by him and his co-defendants, and not on legal evidence, and this he is ready to verify. Wherefore he prays judgment of the said indictment and that the same may be quashed." To this plea the district attorney demurred. The court sustained the demurrer to the plea, and, after denying a motion for continuance, called the case for trial. The jury found the defendant guilty of voluntary manslaughter. Defendant filed motions for new trial and in arrest of judgment, all of which were overruled and exception duly taken. Sentence was pronounced, notice of appeal given and appeal duly granted.

OPINION OF THE COURT.

WRIGHT, A. J.—The first error assigned by appellant questions the ruling of the court in sustaining the demurrer to the plea in abatement. By his plea in abatement the appellant insists that the indictment be quashed for the following reasons, namely: 1. Because the indictment was found on hearsay and secondary evidence given by appellant and his co-defendants. 2. Because appellant's constitutional privilege was invaded in compelling him to testify against himself. Pleas in abatement are dilatory pleas and have always been subject to the most technical rules of pleading and the greatest accuracy and precision are required in framing them. They must leave nothing to be supplied by intendment. Any inference indulged in by the court must be against the pleader. 1 Chitty Cr. Law 445; 1 Bish. New Crim. Proc., sec. 327; People v. Lauder, 82 Mich. 114; Steiner v. State, 110 N. W. 723; Thompson v. U. S., 30 App. D. C. 352; Thomas v. State, 58 Fla. 122, 51 So. 410; U. S. v. Standard Oil Co., 154 Fed. 728; U. S. v. Amer. Tob. Co., 177 Fed. 774; Melville v. State, 89 N. E. 490; Pennel v. State, 125 S. W. 445; 122 Tenn. 622. Applying the foregoing rule to the plea in this case it is apparent that the same is bad for uncertainty and insufficiency. It is impossible to determine therefrom whether the appellant

relies upon the reception of incompetent and hearsay evidence or upon the point that his constitutional privilege was violated by being compelled to testify against himself. The position taken by the Attorney General is that, in the absence of some statute authorizing a reexamination of the evidence taken before a grand jury, upon which an indictment has been found, the action of the grand jury in presenting the indictment is conclusive. Whether such be the rule or not, this plea is bad; First, because
2 it is not necessarily true that secondary evidence is not legal evidence. Second, the allegations of the plea leave too much to inference. Third, the allegations are mere conclusions of law. For these reasons alone the trial court was right in sustaining the demurrer.

2. Passing now to the argument advanced by counsel, that the constitutional privilege of appellant was violated by his being compelled, over his protest, to be a witness against himself before the grand jury, we must bear in mind that this constitutional right is a personal privilege to be claimed or not, as the appellant may choose. The mere fact that appellant was subpœnaed and compelled to appear before the grand jury was not
3 a violation of his constitutional rights, nor is the fact that he was sworn before such body and there testified to facts that did not incriminate himself a violation of his constitutional rights. People v. Lauder, supra. If, in fact, the appellant was compelled, over his protest, to be a witness against himself before the grand jury, and as a matter of fact, was compelled to testify to matters
4 and things, over his protest, incriminating or tending to incriminate himself, it was a direct violation of his personal right guaranteed him under the Federal Constitution. Counselman v. Hitchcock, 142 U. S. 549; State v. Donelon, 12 So. 922; State v. Franger, 77 N. W. 337; Lindsey v. State, 69 Ohio State 215, 69 N. E. 126. Whether the plea raises this specific question was a question of law for the court. By sustaining the demurrer the lower court held that the plea did not present this question. Keeping in mind the rules of pleading applicable hereto, we find that the plea does not state that

the appellant refused to take the oath or that at the time the oath was administered, he claimed his privilege; nor does the plea anywhere allege that appellant at any time, claimed his constitutional privilege, or refused to answer any question which might incriminate or tend to incriminate him. The only expression in the plea, which, by any stretch of the imagination, could be so construed is as follows: "and compelled, after being sworn by the foreman of said grand jury, to answer all questions touching said alleged crime, and all he had heard about the same, tending to implicate himself or other persons, all of which was done against his will and over his protest." * * * * * It is to be noted that this plea does not set out the facts so testified to by appellant, nor does it show that he testified to any fact material to the inquiry, or that any facts so testified to were considered by the grand jury, or that such facts were the basis of the indictment returned. Nor can it be said that such plea discloses that the appellant was compelled to, and did, testify, over his protest, to any fact whatever tending to incriminate himself. The allegations in the plea are, at best, mere
5 conclusions. The facts themselves must be stated and so clearly and definitely set forth as not to leave unobviated any supposable special answer. Thomas v. State, 50 Fla. 122; 51 So. 410; State v. Comer, 157 Ind. 611; 62 N. E. 452. We are therefore of the opinion that the demurrer to the plea in abatement was properly sustained.

3. The appellant assigns as error the action of the trial court in overruling his motion for continuance, wherein appellant prayed a continuance or postponement of the trial until the presence of three witnesses, named therein, could be had. After considering the facts set out in such motions, the court ruled that such motions were sufficient as to the witnesses Clemencia Lucrecio and Julianita Torres. The Territory thereupon stated that it was ready to admit, (and later did admit upon the trial,) that if the two witnesses mentioned in said motion were present they

would testify as set forth in said motion. This admission having been made, the court, under the authority of
6 Section 2987, of the Compiled Laws, denied the motion for a continuance. Section 2981, cited supra, reads as follows: "If the application for continuance is insufficient it shall be overruled; if held sufficient the cause shall be continued, unless the opposite party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated."

4. Appellant also filed an additional affidavit and motion for continuance because of the absence of one Julian Padilla, a material witness for the appellant. The court, after considering such additional motion overruled the same as insufficient. An examination of the motion and affidavit discloses that there is no such showing of diligence on the part of the appellant as is required by law. It is true that the affidavit in support of the motion shows the issuance of subpœna and delivery to a deputy sheriff for service, but it does not show when this was done. The record in this case shows that the appellant was indicted and arraigned at the term prior to the trial and had been released on bond after arraignment, and while it is true that the plea was later withdrawn for the purpose of filing a plea in abatement, this could not excuse the appellant from exercising all due diligence in preparing his defense. The record in this case does not disclose whether the subpœna for Julian Torres was issued one week or one hour prior to the filing of the motion for continuance. The statute regulating continuances be-
7 cause of absent witnesses is mandatory and when the application for continuance complies with the statute there is no room for the court to exercise any discretion. Territory v. Kinney, 3 N. M. 656. Section 2986 of the Compiled Laws prescribes that the application shall contain, and prescribes, among other things, that the application shall set out the "efforts, constituting due diligence, which have been used to obtain such witness or his testimony." In the case at bar, the application for con-

tinuance fails to set out any facts showing due diligence on the part of the appellant. The trial court, therefore, properly denied the additional motion for continuance.

5. The next error assigned is that the court failed to instruct as to involuntary manslaughter. The record shows that the appellant's counsel took no exception to the failure of the court so to instruct, nor did he make any request for any such instruction. It is too well settled to permit of any discussion, that this court
8 will not consider any alleged error in the omission to give instructions unless exception is duly taken and unless a request is made for such instruction as appellant alleges should have been given. Territory v. Watson, 12 N. M. 421; Territory v. Caldwell, 14 N. M. 543. No request having been made nor exception taken, there is nothing for the court to consider.

6. Appellant assigns as error the refusal to give the second requested instruction. The instruction in question is as follows: "The jury are instructed they cannot indulge in presumption as to the proximate or efficient cause of the death of the deceased, but must find from the evidence that the wound testified to and found on the body of deceased was sufficient to cause his death, and that said wound was necessarily a mortal wound and did cause his death." The trial court refused to give this instruction for the reason that the instructions given by the court, on his own motion, fully and completely covered everything contained in the refused instruction. We
9 have examined the instructions given by the court on his own motion and find that they do fairly and completely cover everything contained in the refused instruction. It therefore follows that there was no error in the refusal to give such requested instruction. Territory v. Price, 14 N. M. 262, 91 Pac. 724; Cunningham v. Springer, 13 N. M. 259, 287, 82 Pac. 232; Territory v. De Gutman, 8 N. M. 92, 42 Pac. 68.

7. The last assignment of error relates to three alleged prejudicial statements made by the district attorney in his argument to the jury. It is very doubtful whether the objectionable remarks and the circumstances relating

thereto are so preserved in the record as to be before this court. No bill of exceptions was taken at the time and they appear only in an affidavit of defendant's attorney filed in support of the motion for a new trial. After setting out the alleged objectionable remarks the affidavit states: "Affiant further says, that at the time each and every of the said statements were so made to the jury, affiant (counsel for appellant) then and there made due objection to the court, and the court admonished the prosecutor in the first and third statements herein." The general rule is well settled that, in order to secure a review by an appellate court of improper argument before the jury, **10** by counsel, the attention of the trial court must be immediately called to the objectionable remarks and request be made for the interference of the court, and, in case of refusal, an exception be noted to the ruling of the court. Corcoran v. Albuquerque Traction Co., 15 N. M. 9, 103 Pac. 645; Territory v. Cordova, 11 N. M. 374, 68 Pac. 919; Whaley v. Vanatta, 77 Ark. 238, and note with collected cases. No ruling appears to have been made by the trial court upon the second statement to which objection is made. There being neither a ruling nor a refusal to rule on the part of the trial judge, there is nothing before us for review. As to the first and third statements to which objection is made, it appears that the court, upon his attention being called thereto, admonished the prosecuting attorney. No exception was taken to the action of the court in so doing, nor was any request made by counsel for any other action or ruling by the court. It is evident, therefore, that both counsel and the court **11** consider that the admonition by the court cured the objectionable remarks, and counsel cannot now be heard to question such ruling in the absence of a specific exception to the action of the trial court. There being no reversible error apparent in the record, the judgment of the lower court is affirmed.

DISSENT.

I dissent from so much of the opinion as sustains the action of the trial court in overruling the demurrer to the plea in abatement.

WILLIAM H. POPE, Chief Justice.
JOHN R. MCFIE, Associate Justice.

[No. 1405. December 8, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. EDWARD McNABB, Appellant.

SYLLABUS (BY THE COURT).

1. The burden of proving beyond a reasonable doubt the guilt of one on trial for crime, including the degree of sanity legally essential to the commission of the crime charged, is on the prosecution throughout the trial, but the presumption of sanity stands as a fact established for the prosecution, unless there is sufficient evidence of insanity on one side or the other to create a reasonable doubt of sanity.

2. The power of a trial court over the order of introduction of evidence is not absolute and does not include the right to reject admissible evidence when offered on the ground that the defendant on trial had not himself testified and laid a foundation for the testimony rejected it appearing that the same foundation would be laid by the witness then offered.

3. While the word, irrationality, is sometimes used as a synonym for insanity, the admission of evidence of the irrationality of the defendant did not cure the rejection of evidence offered of his "insanity," under the circumstances stated in the opinion.

4, The opinion of a non-expert witness, who has had wide opportunity for observation, is admissible on the question of the insanity of a defendant on trial for murder, although the witness may be unable to give in detail all the circumstances and appearances which led her to think there had been a change from sanity to insanity. The duty of

the trial court to pass beforehand on the qualification of such a witness to testify is to be exercised with due regard to the rights of the defendant, and its decision may be reversed when it is clear that through it the defendant was deprived of what was essential to a fair trial.

Appeal from the District Court for Guadalupe County, before EDWARD R. WRIGHT, Associate Justice. Reversed and remanded.

O. A. LARRAZOLO, C. E. MCGINNIS and T. B. CATRON for Appellant.

Evidence as to insanity was admissible. Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 435; State v. Beuerman, 59 Kas. 589; Shultz v. State, 37 Neb. 496; Genz v. State, 58 N. J. L. 484; Armstrong v. State, 30 Fla. 200; Mutual Life Ins. Co. v. Lathrop, 111 U. S. 619; Bitner v. Bitner, 65 Pa. St. 348; Conely v. McDonald, 40 Mich. 150; Underhill on Crim. Ev., 2 ed., par. 162; Colee v. State, 75 Ind. 511; State v. Kutzleben, 136 Iowa 89; 2 Greenl. on Ev., 13 ed., par. 371; Grant v. Thompson, 4 Conn. 203; Hardy v. Merrill, 56 N. H. 227; Clary v. Clary, 2 Ired. Law 83; Dunham's Appeal, 27 Conn. 193; Grant v. Thompson, 4 Conn. 203; State v. Pike, 49 N. H. 399; State v. Archer, 54 N. H. 465; Hathaway v. Ins. Co., 48 Vt. 335; Clark v. State, 12 Ohio 483; Gibson v. Gibson, 9 Yerg. 330; Potts v. House, 6 Ga. 324; Vanauken's Case, 2 Stock. Ch. 190; Brooke v. Townshend, 7 Gill. 10; DeWitt v. Barley, 17 N. Y. 342; Hewlett v. Wood, 55 N. Y. 634; Rutherford v. Morris, 77 Ill. 397; Duffield v. Morris, 2 Harr. 384, Del.; Pidcock v. Potter, 68 Pa. 342; Doe v. Reagan, 5 Blackf. 218; Dove v. State, 3 Heisk. 348; Butler v. Ins. Co., 45 Ia. 93; People v. Sandford, 43 Cal. 29; State v. Klinger, 46 Mo. 229; Holcombe v. State, 41 Tex. 125; Territory v. Padilla, 8 N. M. 510; McClackey v. State, 5 App. 320, Tex.; Norton v. Moore, 3 Head. 482; Powell v. State, 25 Ala. 28; 1 Bishop Crim. Proc., sec. 536; 1 Wharton & Stille, Med. Jur., sec. 257; Whart. Ev., sec. 510; 1 Redf. Wills, ch. 4, part 2; May v. Bradlee,

127 Mass. 414; Com. v. Sturtivant, 117 Mass. 122; Weems v. Weems, 19 Md. 334; Abraham v. Wilkins, 17 Ark. 292; Beaubien v. Cicotte, 12 Mich. 459; 16 A. & E. Enc. 562.

Res Gestae. 1 Greenl. on Ev., 13 ed., par. 108; Barthelemy v. People, 2 Hill 248; Wetmore v. Mell, 1 Ohio 26; Shailer v. Bumstead, 99 Mass. 112; Whart. Crim. Ev., 8 ed., par. 262, 263; R. v. Gordon, 21 How. St. Tr. 542; U. S. v. Craig, 4 Wash. C. C. 729; U. S. v. O'Meara, 1 Cranch C. C. 165; State v. Wagner, 61 Me. 178; Underhill on Crim. Ev., 2 ed., par. 93; Sprinkle v. U. S., 141 Fed. 811; State v. Lane, 72 Atl. 39, N. J.; Com. v. Williams, 105 Mass. 62; Com. v. Vosburg, 112 Mass. 419; Russell v. Frisbie, 19 Conn. 205; Haight v. Haight, 19 N. Y. 464; Hunter v. State, 40 N. J. L. 495; Brown v. Com., 76 Pa. St. 319; Haynes v. Com., 28 Grat. 942; Comfort v. People, 34 Ill. 404; Dawson v. People, 90 Ill. 222; Hamilton v. State, 36 Ind. 281; Binns v. State, 57 Ind. 46; People v. Marble, 38 Mich. 117; State v. Porter, 34 Iowa 131; State v. Tilly, 3 Ired. 424; State v. Huntly, 3 Ired. 418; State v. Rawles, 65 N. C. 334; Mitchum v. State, 11 Ga. 615; Stiles v. State, 57 Ga. 183; Allen v. State, 60 Ala. 19; Head v. State, 44 Miss. 731; State v. Graham, 46 Mo. 490; State v. Testerman, 68 Mo. 408; State v. Thomas, 30 La. Ann. 600; State v. Winner, 17 Kas. 298; People v. Vernon, 35 Cal. 49; State v. Garrand, 5 Ore. 216; Hadley v. Carter, 8 N. H. 40; Nutting v. Page, 4 Gray 584; Jones v. Rigby, 41 Minn. 530; Corbett v. St. Louis I. M. & S. R. Co., 26 Mo. App. 621; Stockman v. State, 24 Tex. App. 387; Miller v. Ternance, 50 N. J. L. 32; Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544.

"Contemporaneous." Alabama G. S. R. Co. v. Hawk, 72 Ala. 112; Mitchum v. State, 11 Ga. 615; Whart. Ev. 262; Harriman v. Stowe, 57 Mo. 93; Mayes v. State, 64 Miss. 329; Taylor Ev., 8 ed., par. 588.

Letters and conversation addressed to a person whose sanity is the fact in question, being connected in evidence with some fact done by him, are original evidence to show whether he was insane or not. 1 Greenl. Ev., par. 101; Welch v. Spies, 103 Iowa 389; State v. Fox, 25 N. J. L.

602; Murdock v. Courtenay Mfg. Co., 52 S. C. 428; Whart. Crim. Ev., 13th ed., par. 256, 257, 272; 24 A. & E. Enc. L., 2d ed, 664; Buel v. State, 104 Wis. 149; Mutual Life Ins. Co. v. Hillmon, 144 U. S. 296; Travelers Ins. Co. v. Mosley, 75 U. S. 8; Sparf v. U. S., 156 U. S. 58; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 321; Worth v. Chicago M. & St. P. R. Co., 51 Fed. 174; Seawell v. Berry, 55 Fed. 732; Rogers v. Manhattan L. Ins. Co., 138 Cal. 291; Green v. State, 154 Ind. 662; Seifert v. State, 160 Ind. 470; Deer Island v. Winterport, 87 Me. 44; Com. v. Trefethen, 157 Mass. 189; Viles v. Waltham, 157 Mass. 544; State v. Hayward, 62 Minn. 497; Hale v. Life Indem. & Invest. Co., 65 Minn. 551; State v. Young, 119 Mo. 523; State v. Martin, 124 Mo. 527; State v. Montensen, 26 Utah 336; State v. Ramo, 76 Vt. 434.

Admissions. 1 Greenl. Ev., 13 ed., pars. 170-213; Wilson v. Calvert, 8 Ala. 757; Yarborough v. Moss, 9 Ala. 382; Dorlan v. Douglass, 6 Barb. 451, S. C.; Gresley on Ev. 13.

Confessions. 1 Greenl. on Ev., 13 ed., par. 218; Whart. Cr. Ev., 8 ed., par. 688; McCulloch v. State, 48 Ind. 109; Chambers v. State, 26 Ala. 59; Frank v. State, 27 Ala. 37; Haiston v. Hixen, 3 Sneed 691; State v. Phillips, 24 Mo. 476; State v. Brandstetter, 65 Mo. 149; Massey v. State, 1 Tex. App. 563; State v. Worthington, 64 N. C. 594; Griswold v. State, 24 Wis. 144; Brown v. State, 8 Tex. App. 139.

Declarations against interest. 1 Greenl. Ev., 13 ed., pars. 149, 150, 152; Whart. Crim. Ev., 8 ed., par. 461; U. S. v. White, 5 Cranch. C. C. 457; U. S. v. Macomb, 5 McLean 286; Brown v. Com., 73 Pa. St. 321; Summons v. State, 5 O. St. 325.

Invective and abuse by counsel. State v. Proctor, 53 N. W. Rep. 424, Iowa; Perkins v. Burley, 64 N. H. 524; State v. Young, 105 Mo. 634; Geist v. Detroit City R. Co., 91 Mich. 446; Grosse v. Estate, 11 Tex. App. 377; Jackson v. State, 116 Ind. 464; State v. Jackson, 95 Mo. 652; Freeman v. Dempsy, 41 Ill. App. 554; Cluett v. Rosenthal, 58 N. W. Rep. 1009, Mich.; Fathman v. Tumiltry,

34 Mo. App. 237; Rudolph v. Landwerlen, 92 Ind. 34; Gulf etc. R. Co. v. Butcher, 83 Tex. 300; State v. Foley, 12 Mo. App. 431; State v. Ulrich, 110 Mo. 350; Moore v. State, 21 Tex. App. 666; State v. Fischer, 27 S. W. Rep. 1109, Mo.

Instructions. Hotema v. U. S., 186 U. S. 418; Davis v. U. S., 160 U. S. 485; People v. McCann, 16 N. Y. 58; Brotherton v. People, 75 N. Y. 159; O'Connell v. People, 88 N. Y. 377; Walker v. People, 86 N. Y. 81; Chase v. People, 40 Ill. 352; Hopps v. People, 31 Ill. 385; State v. Bartlett, 43 N. H. 224; People v. Garbutt, 17 Mich. 9.

Reasonable doubt. Chavez v. Territory, 6 N. M. 463; 23 A. & E. Enc. L., 2 ed. 955; Hopt v. Utah, 120 U. S. 430; Miles v. U. S., 103 U. S. 312; Dumbar v. U. S., 156 U. S. 199; Fuller v. State, 117 Ala. 200; State v. James, 37 Conn. 369; Battle v. State, 103 Ga. 53; State v. Kruger, 61 Pac. 464, Idaho; Little v. People, 157 Ill. 158; Siberry v. State, 133 Ind. 689; State v. Bodekee, 34 Iowa 520; State v. Brown, 55 Kas. 611; Jolly v. Com., 61 S. W. 49, Ky.; State v. Rounds, 76 Me. 124; People v. Cox, 70 Mich. 247; State v. Sauer, 38 Minn. 438; Rucker v. State, 18 So. Rep. 122, Miss.; State v. Robinson, 117 Mo. 469; Barney v. State, 49 Neb. 515; Kane v. Hibernia Ins. Co., 39 N. J. L. 706; State v. Whitson, 111 N. C. 695; Morgan v. State, 48 Ohio St. 371; Parzwald v. U. S., 7 Okla. 234; State v. Crockett, 39 Ore. 76; Com. v. Drum, 58 Pa. St. 9; State v. Powers, 59 S. Car. 215; Butler v. State, 7 Baxt. 35, Tenn.; Lenert v. State, 63 S. W. 565, Tex.; State v. Neel, 23 Utah 544; State v. Gile, 8 Wash. 24; Territory v. Friday, 8 N. M. 204; Aguilar v. Territory, 8 N. M. 503.

New Trial. Whart. Crim. P. & P., 9 ed., pars. 793, 794, 801, 802.

FRANK W. CLANCY, Attorney General, and EDWARD A. MANN for Appellee.

Evidence as to defendant's prior peaceable disposition was properly excluded. 1 Wharton & Stille 373; Charter

Oak Life Ins. Co. v. Rodel, 95 U. S. 238; Territory v. Padilla, 8 N. M. 510; 1 Greenl. Ev., 4 ed. 532; Whart. Ev., 9 ed., secs. 417, 458, 460; Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 619.

Opinion evidence as to sanity properly ruled out. Territory v. Padilla, 8 N. M. 510; Wharton's & Stille's Med. Jur., sec. 353; State v. Lehman, 2 S. D. 171; 23 Cyc. 345. Order of proof. Philadelphia & Trenton Ry. Co. v. Stimpson, 14 Peters 463; Ames v. Quimby, 106 U. S. 342; Insurance Co. v. Mercantile Co., 13 N. M. 241; 2 Elliott on Ev., sec. 886.

Threats. Underhill Crim. Ev., sec. 328.

No error as to langauge used by counsel to address jury. Johnston v. U. S., 154 Fed. 445; Chacon v. Territory, 7 N. M. 241; Ross v. State, 57 Pac. 924, Wyo.; People v. Hagenow, 236 Ill. 514; State v. Griffin, 87 Mo. 608.

Court's instruction as to insanity was free from error. Faulkner v. Territory, 6 N. M. 464; Territory v. Caldwell, 14 N. M. 535; Miera v. Territory, 13 N. M. 192; Territory v. Garcia, 12 N. M. 87; U. S. v. Densmore, 12 N. M. 96; Davis v. U. S., 160 U. S. 478.

Reasonable doubt. State v. Potts, 22 Pac. 754, Nev.; Commonwealth v. Harmon, 4 Pa. St. 273; Fife v. Com., 29 Pa. St. 438; Nevling v. Com., 98 Pa. St. 334; McMeen v. Com., 114 Pa. St. 305; Spies v. People, 122 Ill. 82; Watt v. People, 18 N. E. 349; People v. Worden, 113 Cal. 569; People v. Whitney, 55 Cal. 420; Bartley v. State, 53 Neb. 311; Leisenberg v. State, 60 Neb. 628; Bothwell v. State, 71 Neb. 747.

Alleged misconduct of counsel and instructions not properly reviewable. Territory v. McGrath, 16 N. M. 202; 114 Pac. 366.

STATEMENT OF THE CASE.

At a special term of the District Court of Guadalupe county, held February, 1911, the appellant, Edward McNabb, was tried for the murder of Herbert Hargis, by shooting him with a gun, on October 13, 1910. He was found guilty of murder in the first degree. A motion for a new trial was made and overruled. Judgment was

rendered on the verdict, and the defendant was sentenced to death by hanging; all at said term of court. From that judgment the defendant appealed to this court. In the opening statement to the jury for the defendant at the trial, his counsel admitted that he killed Hargis, and said the defense would be that the defendant had been informed Hargis was paying attentions to his, the defendant's wife, in his absence, as a traveling salesman, which had become the subject of gossip in the town where they lived, that he remonstrated with her on the subject, sent word to Hargis to leave the town, which he failed to do, finally became "mentally unbalanced" over the matter, and, at last, "in an instant of emotional insanity produced by the conduct of the deceased," and "in a fit of insanity superinduced by the provocation offered by the deceased," he shot him.

OPINION OF THE COURT.

ABBOTT, J.—In view of our conclusion that there was reversible error in the trial, we disregard such assignments of error as do not appear to require specific discussion under the circumstances, and deal only with three which are of general importance. In the first it is claimed that the trial court imposed on the defendant the burden of proof as to the defense of insanity through this instruction: "Upon this subject you are instructed that the law presumes every man sane and responsible for his acts until the contrary is shown by the evidence, but, while this is true, still if there is evidence in the case tending to rebut this presumption sufficient to raise a reasonable doubt in your mind as to the sanity or insanity of the defendant, as hereinafter explained, at the time of the commission of the acts charged in the indictment, then it will be your duty to acquit the defendant." We understand the law governing the case to be that at the beginning of the trial there existed the legal presumption that the defendant was sane at the time he killed Hargis and at the time of trial. That presumption stood in place of
1 proof of the fact, and if no evidence on that point had been offered on either side, the presumption

would have been conclusive. There could have been no "reasonable doubt" of the defendant's sanity on the part of the jury because there was the conclusive presumption on the one side, and no evidence on the other. The evidence introduced by the prosecution may, contrary to its intended effect, indicate to the jury the insanity of the one on trial. But it is correct to say that the evidence as a whole must raise in the minds of the jury a reasonable doubt, since there is no other way for such doubt to arise. Without evidence, as we have said, the presumption of sanity stands. "The presumption that all men are sane until the contrary appears, fills its mission when it relieves the prosecution of the necessity of proving the prisoner's sanity in the first instance, but, if in the progress of the trial, proof is adduced by either side tending to show the insanity of the accused, it devolves upon the prosecution to prove the sanity of the prisoner beyond a reasonable doubt." 15 A. & E. Ann. Cases 96, citing People v. Casey, 231 Ill. 261; Dudley v. State, 131 Wis. 178; U. S. v. Chisholm, 153 Fed. 808. We think the instruction sufficiently guarded in the respect in question since, in connection with it, the court gave this instruction: "And if you believe from the evidence or if you have a reasonable doubt from the evidence that at the time of the commission of the act charged in the indictment the mind of the defendant was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect to the killing, then you are instructed that the defendant will not be legally responsible for his act and you will in that case acquit him." It is well settled that the instructions must be construed together. Territory v. Garcia, 12 N. M. 87; U. S. v. Densmore, 12 N. M. 96; Miera v. Territory, 13 N. M. 192; Territory v. Caldwell, 14 N. M. 535.

The next question we consider arose from the attempt on the part of the defendant to introduce by his first witness on the defense of insanity evidence of fact bearing on the relations of Hargis with the defendant's wife, which facts counsel for the defendant stated he purposed to show by the witness were communicated by him to the defend-

ant a few days before he shot Hargis. Objection was made on the ground that the facts, if proved, were immaterial, which counsel for the defense conceded them to be, in themselves, but claimed the right to show that they were communicated to the defendant as facts and his mind was accordingly affected. The further objection was made that no foundation had been laid for the introduction of the evidence for the last named purpose. Counsel for the defendant agreed that the order of proof was subject to the discretion of the court, but said he purposed to show by the evidence communication to the defendant. The court ruled: "This matter is not material at the present stage of the proof. If you desire to withdraw this witness and later on———" Counsel for the defendant then said: "That simply means that I will have to put the defendant on the stand first." To which the court replied: "I think so." Defendant's counsel then said he was not prepared to have defendant take the stand, and "if that was to be the rule of procedure," he asked for a continuance until the next morning "to consult with the defendant," which request was granted. When the trial was resumed the defendant was not offered as a witness at first, but instead his wife was made a witness, and was asked if a short time before Mr. Hargis was killed she had a conversation with her husband in relation to him, to which question objection was made, that it was "incompetent, irrelevant and immaterial, no proper foundation having been laid," and the objection was sustained. Defendant's counsel then made proffer as follows: "By this witness the defendant offers to prove that previous to the death of Mr. Hargis, and within a period of about twenty days before the homicide, the defendant had a talk and conversation with her, in which he remonstrated with her for the attention that she had been paying up to that time to the deceased Hargis, and for receiving his visits at the defendant's home during the defendant's absence. That he stated to her that he knew about this matter and these visits and knew also that he had taken her to parties, and, as before stated that he objected to those things and stated to her

that she should desist from any further relations with the deceased. The defendant further offers to prove from this witness that from that time on there existed in the home of the defendant, and between the defendant and the witness, who is his wife, great unhappiness and infelicity." To this objection was made, and the offer was denied. Objections to the introduction of similar testimony by other witnesses were sustained. This, we think, was error. While it is true that the order of proof
2 is largely subject to the discretion of the trial court, it cannot be exercised in a way to deprive a defendant of material rights. The defendant in this case had the right to refrain from testifying. The court, in effect, made the condition that he must testify before such evidence offered on his behalf by other witnesses would be admitted. The testimony of others that they had talked with him about his wife's relations with Hargis was equally competent with his own testimony to the same effect, and might well be thought more reliable than his own testimony, since he was testifying under jeopardy of conviction and the consequent death penalty. It is said in the brief for the Territory that as this evidence was excluded on a question of the order of proof it might have been again offered after the defendant had testified to the same effect, in corroboration of his evidence, and, as that was not done, the defendant has no ground of complaint. But, if it was improperly excluded in the first place, the defendant was not bound to repeat his proffer. His counsel may have thought that the time for introducing the evidence to good effect had gone by, or in the stress of the trial he may have forgotten to re-offer it. The defendant should not suffer for any of these reasons. This subject is discussed and for this court settled in Edlington v. U. S., 164 U. S. 361.

Several assignments of error relate to refusals by the court to admit testimony offered as to the insanity of the defendant at the time he shot Hargis. It is a subject on which the adjudicated cases are so conflicting that it is very difficult for a trial court to steer a course which will avoid the rocks, and on the whole, we think the trial

judge in this case did not succeed in doing it. Owing to the inability of all but now and then a person specially gifted, or trained, to describe adequately, the facts, circumstances and appearances from which he concludes that a certain person is sane or insane at a particular time, the courts have, as a rule, come to permit such non-expert witnesses to give the conclusion itself, when their opportunities for observation have been such as to warrant it. In Cyc., vol. 17, 139, it is said: "The inference of a properly qualified, unskilled observer, as to the sanity or insanity of a person observed by him is competent in a majority of the American states. The rule in this respect is the same in England, both in the ecclesiastical courts in proceedings involving the question whether the testator was of unsound mind and in the common law courts, and in Canada. There is a strong tendency to unanimity in admitting this class of evidence observable in the action of the courts." "The statement of inference must as a general rule be accompanied by a statement of the facts on which it is founded. Where the facts are not sufficient in the opinion of the court to give a reasonable basis for an inference, or sufficient admissible facts are not clearly stated, the witness is incompetent, or his evidence is entitled to but little weight. It is, however, inconsistent with the theory on which the rule rests—that of inability to state all the facts—to require that all the facts should be stated." In Redfield on Wills, 1, c. 4, pp. 2, 145, note 24, it is said: "There will now remain scarcely any dissentients among the elder states; and those of recent origin, whose discussions have been based upon the authority of the earlier discussions of some of the older states, which have since abandoned the ground, may also be expected to change." This view of the law has been adopted by the Supreme Court of the United States in Conn. M. L. Ins. Co. v. Lathrop, 111 U. S. 618; approved in Queenan v. Oklahoma, 190 U. S. 548, in which the court said: "But, as is pointed out in Connecticut Mutual L. Ins. Co. v. Lathrop, supra, it is impossible for a witness to reproduce all the minute details which he saw and heard, and most witnesses make but a meagre and halting effort. There-

fore, in this, as in many other instances, after stating such particulars as he can remember—generally, only the more striking facts—an ordinary witness is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced. To allow less may deprive a party of important and valuable evidence that can be got at in no other way." See, also, Jones on Evidence, 1st ed., sec. 366.

The exclusion of the testimony of Mrs. McNabb, the wife of the defendant, may be taken, for our purposes, to illustrate this class of testimony excluded. She had been the wife of the defendant and had lived with him for eight years, and, although there had been for a short time estrangement between them on account of Hargis, she continued to see him "every day, or every other day" up to the time he shot Hargis. Probably no other person living had equal opportunity to observe and know him, and to notice whether any change occurred in him. She had the usual difficulty in confining herself to a description of the acts and circumstances from which she had apparently derived an impression, or opinion she was not allowed to give. Extracts from the record will best convey an understanding of what took place and its natural effect:

Q. How long have you been married to the defendant? A. Eight years.

Q. I will ask you, Mrs. McNabb, if for a period, say of fifteen or twenty days previous to the death of Mr. Hargis, you noticed anything peculiar in the conduct and character of your husband, the defendant in this case?

Mr. Mann: This is objected to as incompetent, irrelevant and immaterial, and that no proper foundation for the same has been laid; the rule being that where non-expert testimony is attempted to be introduced for the purpose of showing insanity, that the facts must first be stated before any opinion of the witness can be given.

The Court: Sustained, as calling for a conclusion of law.

Q. Well, now, during that period of time, state what was his conduct and general deportment and demeanor, if you observed it? A. I observed a great change in Mr.

McNabb, he didn't seem like the same man when he came home—

Mr. Mann: I ask that the answer of the witness be stricken as a conclusion, and not as a statement of facts from which the jury may draw any inference or conclusion as to the conduct of the defendant during the period stated.

The Court: Sustained.

To which ruling of the court the defendant, by his counsel then and there duly excepted.

Mr. Mann: Ask that the jury be instructed that this be withdrawn.

The Court: Gentlemen of the Jury, this last answer of this witness is stricken and will not be considered by you in arriving at a verdict.

Q. State what particular acts in the conduct and general demeanor of your husband you noticed and observed during the period of time mentioned, that makes you say, that he was a changed man and was not the same man he had been before?

Mr. Mann: This is objected to as leading and suggestive, and for the further reason that it is assuming the fact not proven and based upon an answer which has been stricken from the record.

The Court: Sustained.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Q. If you noticed anything, any actions in the conduct of your husband that were uncommon in him during the time that I have mentioned, that is, for fifteen or twenty days prior to the death of Mr. Hargis, state what they were?

Mr. Mann: This is objected to as leading and suggestive; as assuming a fact or state of facts not proven and calling for a conclusion of the witness.

The Court: Overruled.

Q. (Repeated). A. Yes, he was nervous and very much excited, and seemed to be mad, and, well—he didn't seem like himself. He impressed me as being crazy, perfectly wild.

Mr. Mann: The Territory moves to strike all the answer of this witness as incompetent, irrelevant and immaterial; as mere conclusion of the witness and not containing any statement of facts upon which the jury may draw any inference as to the sanity or insanity of the defendant. (Answer read to the word "mad.")

The Court: So much of the answer as has been interpreted to you may stand in evidence; the remainder of the answer, where this witness stated that the defendant appeared crazy and wild, is stricken from the record, and will not be considered by you in arriving at a verdict.

Q. You have stated some acts or actions in the conduct of your husband that you have stated were uncommon in him. Can you state any others, any acts of his, or of his conduct that were uncommon in him?

Mr. Mann: This is confined to the same period of time?

Mr. Larrazolo: Within that period of time.

The Court: Mrs. McNabb, answer the question just propounded to you, but do not give any impression or opinion.

Q. Just what you noticed that was uncommon in him in addition to his being excited and mad and nervous as you have said? A. Well, as I stated, he didn't seem like the same man.

Q. That is not an answer to my question, Mrs. McNabb.

The Court: The last statement of this witness, gentlemen, is not to be considered by you as evidence. Now, don't give your opinion, or what it seemed to you; state merely the acts and conduct, if any, which were uncommon, out of the ordinary; definitely, specific acts during that fifteen days? A. He wasn't kind; he wasn't agreeable; he was nervous and highly excited.

Mr. Mann: I move that all of that be stricken as a repetition of the answer just given.

The Court: Overruled.

Q. Now, from your observations of the actions and conduct of your husband, the defendant in this case, during the period of time stated, that is, for fifteen or twenty

days prior to the death of Mr. Hargis, state what impression he made on you, as to whether he was sane or insane?

Mr. Mann: This is objected to as incompetent, irrelevant and immaterial, and for the reason that no proper foundation for this question has been laid. The testimony which has been given by this witness does not show any act, specific act, but merely that during the period he was nervous, excitable, angry and unkind, and the opinion of this witness as to his sanity or insanity would not have any weight more than the opinion of the jury upon the same statement of facts which the witness has related. I call the court's special attention—no specific act has been shown.

The Court: Sustained.

To which rulings of the court, defendant, by his counsel, then and there duly excepted.

Mr. Larrazolo: I desire to properly understand the meaning of the court. Do I understand that the court holds that non-experts cannot give either their opinion or their impression touching the sanity or insanity of the subject, after showing they were acquainted with them, and in position to observe their conduct?

The Court: I hold that this witness from her testimony, simply testifying that the defendant was nervous, excitable, mad and unkind to her, is not qualified to give her opinion as to whether the defendant was sane or insane at that time.

Q. Have you stated, Mrs. McNabb, all those things and acts, doings and sayings of your husband, during the time that I have mentioned, that you found to be uncommon in him? Have you stated them all, or can you describe them all?

Mr. Mann: This is objected to as leading and suggestive.

The Court: Overruled.

Q. Can you describe them all or can you not, say so. A. No, I cannot describe them.

Q. You may state, Mrs. McNabb, from the conduct and acts, doings and sayings of your husband, during

the period of time that I have mentioned, namely—within fifteen or twenty days immediately prior to the death of Mr. Hargis, what was your husband's appearance?

Mr. Mann: This is objected to for the reason that she has already stated all that she says she can state of the actions and conduct of her husband, and that she could not describe further his actions and conduct, and that the jury are the best judges from the action and conduct she has described as to the mental condition of the defendant, and, further, as it calls for a conclusion of the witness and not for facts.

The Court: Sustain the objection.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Q. From your observations of your husband's conduct, of his actions and doings and sayings, and from his general appearance for a period of fifteen or twenty days prior to the death of Mr. Hargis, I want you to state what impression did you form in regard to the sanity or insanity of your husband?

Mr. Mann: Objected to for the same reasons heretofore given.

The Court: Same ruling. Sustained.

To which ruling of the court, defendant, by his counsel, then and there duly excepted.

We think this shows a violation of the principle laid down in the authorities already cited, and is at variance, besides, with Charter Oak L. I. Co. v. Rodel, 95 U. S. 238-239. While it is true that the trial court was charged with the duty of determining whether from the facts stated the witness should be allowed to give an opinion on the question of sanity, that is not an absolute power regardless of circumstances. In Cyc., vol. 17, p. 34, it is said: "The ordinary observer,—'the man in the street'—is qualified if it affirmatively appears to the presiding judge that he has had sufficient opportunities for drawing the inference which he proposes to state, and the capacity necessary to make and state it." And, on page 31, of the same volume: "The qualifications of a witness, as to knowledge

and capacity must be established as facts, to the reasonable satisfaction of the trial court, whose finding will not be reviewed except in case of manifest mistakes." But if "clearly erroneous" the ruling will not stand. Chateaugay Ore Co. v. Blake, 144 U. S. 476; Clary v. Clary, 24 N. C. 78; People v. Schmidt, 106 Cal. 48; 39 Pac. 204; Montana R. R. Co. v. Warren, 137 U. S. 348-353; Maughan v. Burns, 64 Vt. 316; Wright v. Williams, 47 Vt. 222.

From the statement of the reason of its ruling, given by the court, as above quoted, there is omitted the most important fact that the witness had lived with the defendant as his wife for eight years, and that it must have been by a comparison between her husband as she had known him for those eight years and as he had been in the few days preceding the shooting of Hargis, which led her to think he did not "seem like the same man," "did not seem like himself," "he impressed me as being crazy, perfectly wild;" all of which expressions were taken from the jury. Counsel for the defendant then asked the witness this question: "Now then, from your observation of your husband's general conduct, of his acts, his doings, sayings, during the fifteen or twenty days prior to the death of Mr. Hargis, what impression did those things make on you in regard to your husband being rational or irrational?" to which objection was made and sustained. Later in the trial the court permitted certain witnesses for the defendant to testify of the impression they formed immediately before the shooting of Hargis that the defendant was "irrational." In the brief for the Territory, it is contended that "insane" and "irrational" are synonymous words, and that as the evidence of "irrationality" was admitted, any error there may have been in excluding evidence of insanity was cured. The court itself did not treat the words as synonymous, since it refused to permit the witness Garlington to give his impression as to insanity from the acts and circumstances of which he had testified and permitted him to give it as to irrationality. Record, pp. 224-225. That may well have led the jury to think that there was a difference between "insanity" and "irrationality" in law, as there is in common speech. The instructions to the

jury were calculated to strengthen such an impression, since the jury were told that they were to determine the "sanity" or "insanity" of the defendant, and were not instructed that the evidence they had heard of his "irrationality" could be considered on the question of his sanity, or that "irrationality" and "insanity" meant the same thing. Indeed the words "rational" and "irrational" were not used or referred to in the instructions. But even if the admission of evidence of irrationality cured the error of
3 excluding evidence of insanity by the same witness, which under the circumstances stated we think it did not, there remains the fact that Mrs. McNabb was not permitted to give her opinion of either the insanity or irrationality of her husband, the defendant, at the time in question, although she must have known the relations between herself and Hargis better than any other person then living knew the details of her talk with her husband on the subject which resulted in estrangement between
4 them, and in all probability had observed and knew better than any one else the effect on his mental condition of what he had heard or suspected about her relations with Hargis. Unfavorable as we may regard the defense of insanity in such a case—insanity which came and went with the occasion—it is a defense which the defendant had the right to make, and to have it safeguarded during the trial as carefully as if it had been any other defense. We conclude that, in the particulars we have named, the rights of the defendant were not fully preserved to him, and that he is entitled to another trial. The judgment of the district court is reversed and the cause remanded.

Mechem, J., did not participate in this decision.

[No. 1411. December 8, 1911.]

L. CURRENT, B. H. MILLESON and A. M. HUBBARD, suing for themselves and all other persons similarly situated and hereinafter named, Appellants, v. THE CITIZENS' BANK OF AZTEC, NEW MEXICO, a corporation, and the HARTMAN STOCK FARM, a coporation, Appellees.

SYLLABUS.

1. Amendment of answer by interlineation permissible, but if it was error, it was harmless error.

2. There being substantial evidence to sustain the findings of the lower court the appellate court will not weigh the evidence.

Appeal from the District Court for San Juan County, before JOHN R. MCFIE, Associate Justice. Affirmed.

J. M. PALMER and PERKINS & MAIN for Appellants.

Inconsistent defenses are not allowable. Code, subsecs. 42, 89; Frick v. Joseph, 2 N. M. 138; Staab v. Jaramillo, 3 N. M. 1; Butler v. Kaulbach, 8 Kas. 668.

Warranty. Shippen v. Bowen, 122 U. S. 575; Union Ins. Co. v. Wilkinson, 80 U. S. 222; Despain v. Ins. Co., 106 Pac. 1027, Kas.; Morehouse v. Comstock, 42 Wis. 626; Cooper v. Schlesinger, 111 U. S. 148; Hodgkins v. Dunham, 103 Pac. 351; Rosenthal v. Rambo, 76 N. E. 404, Ind.

ABBOTT & ABBOTT for Appellees.

Purchaser must show fulfillment of condition before he can hold vendor liable under warranty. Jasper County Bank v. Barts, 130 Mo. App. 635; Nichols Sheppard Co. v. Rhoadman, 112 Mo. App. 291; J. I. Case Threshing Mch. Co. v. Hart et al, 113 S. W. 488; Smith v. Borst, 63 Barb. 57; Davis v. Iverson et al., 5 S. D. 295.

Laches and estoppel. 1 Paige on Contracts 242; Fire Ins. Co. v. Overholtzer, 172 Pa. St. 228; Kirk & Co. v. Seeley, 63 Mo. App.; Rowell v. Oleson, 32 Minn. 288; Hines et al v. Kiehl et al, 154 Pa. St. 190; Case Thresh. Mch. Co. v. Vennum, 23 S. W. 563; Webster v. Phœnix Ins. Co., 36 Wis. 67; Abbott v. Johnson, 2 N. W. 332; Nichols v. Hall, 4 Neb. 210; Hoover & Gamble v. Doetsch, 45 Ill. App. 631; Davis v. Gosser, 41 Kas. 414; Rumsey v. Fox et al, 122 N. W. 526; Hodge v. Smith, 130 Wis. 326; N. W. Thresher Co. v. Mehloff et al, N. W. 428; First National Bank of Wamego, Kas. v. Spinner,

43 Pac. 679; Jones v. Wessell, 40 Neb. 116; Viertel v. Smith, 55 Mo. App. 617; 43 Cen. Digest 471; Wasatch Orchard Co. v. Morgan Canning Co., 12 L. R. A., new series, 546; Walters et al v. Akers et al, 101 S. W. 1179.

Unsoundness at time of sale must be clearly proved. Jordon v. Foster, 11 Ark. 139; Miller v. McDonald, 13 Wis. 673; Colchord Mch. Co. v. Loy-Wilson Foundry Mach. Co., 131 Mo. App. 540.

STATEMENT OF FACTS.

On January 21, 1905, the appellants purchased from the Hartman Stock Farm an imported Percheron stallion, paying therefor the sum of $100.00 cash, and executing their three promissory notes each in the sum of $766.66, payable respectively, one, two and three years after date. About two weeks prior to the consummation of the purchase the stallion in question was taken to the town of Aztec by an agent of the appellee company, and was there exhibited to the appellants. When the horse arrived at Aztec he had a cut or sore just above the hoof on one of his legs. The agent of the stock company informed appellants that the cut was made by a neverslip shoe, a few days before the horse was brought to Aztec. Appellants claim that the agent of the stock company represented to them that the horse was in good health and sound condition and valuable for breeding purposes, and was a fit, sound and healthy animal; that soon after the consummation of the deal and the execution of the notes, the horse became sick and broke out in various places on his legs with sores, similar to the sore alleged by the stock company to have been made with the neverslip shoe. Appellants bred the horse during the season of 1905, and in January, 1906, paid the first note without protest or dispute. They made no offer to return the horse and no demand for a recision of the contract until January, 1907, when the second note became due. At that time the two remaining notes were in the Citizens' Bank of Aztec for collection, and appellants instituted this suit to cancel said notes and to restrain the stock company and the bank from transferring said notes or withdrawing them from the jurisdiction of

the court, alleging that the condition of said horse had been fraudulently and falsely represented to them, at the time of their purchase, knowingly by the stock company's agent. The Hartman Stock Company answered, admitting the representations but denying their falsity and alleged that said horse at the time of the sale was free from disease and suitable for breeding purposes and as represented by their agent. Afterwards, and long prior to the hearing, appellees asked and were granted leave by the court, upon notice to counsel for appellants, to amend their answer by inserting and interlining in their original answer paragraph 9½, setting up the fact that the stallion had been sold to the appellants with no other guarantees save those expressed in a certain bill-of-sale contract, which said bill-of-sale contract was delivered to the appellants at the time the stallion was sold, and making said contract a part of said paragraph of the answer. Appellants answered said amendment. Denied that said bill-of-sale was delivered to appellants and alleged that the only terms and conditions of sale were set forth in the original complaint. The case was tried by the court and finding of facts was made. Among other things, the court found: "That prior to the purchase of said animal the plaintiffs fully and thoroughly inspected the same to their satisfaction; that the horse was in good condition and valuable for breeding purposes at the time of the sale; that the defendants did not make false or fraudulent representations to plaintiffs to induce them to purchase the animal; that the sore or cut on the horse's fetlock was caused after being shod at Durango, and not an old sore; * * * * * * that the animal developed a disease shortly after his purchase by the plaintiffs." Other findings were made by the court, not material, however, to a decision of the errors complained of in this case as we view it.

OPINION OF THE COURT.

ROBERTS, A. J.—The first alleged error discussed by the appellants is the action of the trial court in permitting appellees to file an amendment to their answer by inserting by interlineation, paragraph No. 9½, setting

up the alleged bill of sale and contract given appellants by the Hartman Stock Company, claiming that such action was in direct conflict with the provisions of sub-section 89 of the Code of Civil Procedure, and that said paragraph 9½ set up matters at variance with the allegations contained in paragraph three of said answer. Sub-section 89 of the Code reads as follows: "In every complaint, answer or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading may be set forth in such pleading, and which may be necessary to the proper determination of the action or defense." We see nothing in the section which would preclude the court from permitting the defendant to amend his answer by interlineation, and as the appellants were given time to, and did reply to the matter set up in the added paragraph, we cannot see how any injustice was occasioned by the action of the court in permitting the amendment, and if it was error, it did not harm the appellants, because the court did not base its judgment upon the bill of sale, but upon the fact that the horse was in sound condition and free from disease at the time of the sale. If the amendment resulted in inconsistent defenses, appellants' remedy was by a motion to strike or a motion to elect, and no motion having been made the objection was waived. 31 Cyc. 151.

The remaining assignments of error necessary to discuss, challenge the sufficiency of the evidence to sustain the findings. The court, after hearing the evidence, found that the horse in question was in good condition and valuable for breeding purposes at the time of the sale; that no false or fraudulent representations were made to the appellants to induce them to purchase the animal; that the sore or cut on the horse's fet-lock was caused after being shod at Durango and was not an old sore. While it is true the several witnesses for the appellants testified upon the trial that the horse became affected with sores on his legs and body shortly after his purchase similar to the sore on his fet-lock at the time of the purchase, four or five witnesses, among whom was the manager of the horse department of the Hartman Stock Company, who had charge of

this horse from the time he was received by the company until his shipment from Ohio to Pueblo, Colorado; the agent of the company at Pueblo, who had charge of the horse until he was delivered to the agent who sold him to the appellants; and the agent who made the sale, all testified that the horse was in sound condition; the first two witnesses testifying that there was no mark or blemish on his leg or fet-lock at the time he was under the care of each of them, and the blacksmith at Durango, who shod him with the neverslip shoes, testified that the horse had no mark or blemish on his fet-lock at the time he was shod, and McGraw, the agent who delivered the horse to the appellants, testified that the blemish on his fet-lock was made by the neverslip shoe the night after the shoes were placed on him. All these witnesses testified that the horse was in good health and sound condition, and as the record discloses that there was substantial evidence to
2 sustain the findings of the lower court, this court will not weigh the evidence. Finding no error in the record, the judgment of the lower court is affirmed.

Pope, C. J., concurs in the result.

[No. 1422. December 8, 1911.]

J. H. O'RIELLY, Appellee, v. JOHN W. COLBERT and COAST LINES HOSPITAL ASSOCIATION, Garnishee, Appellants.

SYLLABUS.

1. A resident of the territory and the head of a family is exempt from garnishment of his wages, except for debt incurred for the necessities of life.

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

E. L. MEDDLER for Appellants.

The exemption law in force at the time the contract was made governs the rights of the parties. C. L. 1897,

sec. 1737; Laws 1909, chap. 63, sec. 26; Gunn v. Barry, 15 Wall. 610; Edwards v. Keasey, 96 U. S. 607; Waples Hom. & Ex., sec. 9; 18 Cyc. 1378.

Terms "wages" and "salary" are not entirely synonymous. 12 Enc. Law, 2 ed. 135, 138; South etc. R. Co. v. Falkner, 49 Ala. 115; McLellan v. Young, 54 Ga. 399.

Repeal of any law by implication is not favored. 1 Lewis Suth. Stat. Con., secs. 256, 267; C. L. 1897, sec. 1737; Territory v. Digneo, 15 N. M. 159; Front v. Wenie, 157 U. S. 46; U. S. v. Healey, 160 U. S. 147.

Traverse. Laws 1909, chap. 63, sec. 24; National Bank v. Brooks, 9 N. M. 125.

FELIX H. LESTER for Appellee.

Section 26, Chapter 63, Laws 1909, did not involve impairment of any substantial rights. C. L. 1897, sec. 1737; New Mexico National Bank v. Brooks, 9 N. M. 113; Laws 1887, ch. 37, sec. 6; Laws 1897, chap. 71; Sparger v. Cumpton, 54 Ga. 359; 13 Wis. 238; Cooley's Const. Lim. 383; Harris v. Glenn, 56 Ga. 96; Von Hoffman v. City of Quincy, 4 Wall. 553; Edwards v. Kearzey, 6 Otto 608; Thompson on Homesteads and Exemptions, secs. 13-15; Cooley's Constitutional Limitations, 5 ed. 349; Myers et al. v. Moran, et al., 99 N. Y. Supp. 269.

Section 26 of the Act of 1909 repealed sub-section 6 of section 1737, C. L. 1897.

Section 26 of the Act of 1909 determines the right of exemption. Bovard v. K. C. Ft. Sc. & M. Ry. Co., 83 Mo. App. 498; Commonwealth ex rel. Wolfe v. Butler, 99 Pa. St. Rep. 535; Dayton v. Ewart, 98 Am. St. Rep. 549; Bell v. Indian Livestock Co., 3 L. R. A. 642; Morse v. Robertson, Hawaii, 195; 8 Words & Phrases, 7371.

STATEMENT OF THE CASE.

John W. Colbert, the appellant, was employed by the Coast Lines Hospital Association, at Albuquerque, New Mexico, as a surgeon, at a monthly salary of $200. per month. On April 24, 1909, J. H. O'Rielly recovered a judg-

ment against him for $578.30. The present suit was brought against Colbert and the Coast Lines Hospital Association as garnishee, and alleged that the judgment defendant Colbert, had no property in his possession within the Territory of New Mexico, subject to execution, sufficient to satisfy the judgment, and alleged, upon information and belief, that the garnishee was indebted to the defendant Colbert for wages; that the garnishee was not a public officer, and that the plaintiff sought to garnishee the wages of the defendant over and above the sum of $50.00 per month and alleged that it did not seek to garnishee property exempt under Section 26, Chapter 63, Laws of 1909. Interrogatories were filed with the complaint, directed to the Hospital Association, in response to which the association answered that the defendant Colbert was working for it on a salary of $200. per month; that at the time of the service of the garnishment it owed Colbert $164.22 and that there was due the defendant the further sum of $119.63, salary accrued since the service of the garnishment. Colbert filed an answer, alleging that the indebtedness, for which the judgment of $578.30 was rendered, was on account of a contract, and was not for manual labor or the necessities of life furnished to the defendant or his family. The defendant further alleged that he was the head of a family, consisting of a wife and one child; that they were residing in Albuquerque, New Mexico; that he was in the employ of the garnishee defendant, as a surgeon, at a salary of $200.00 per month, and that said salary was his only income, and was necessary for the support of his family and that the same was exempt from levy, execution or garnishment. The plaintiff filed a motion for judgment against the garnishee, for the amount shown to be due, by its answer, less the amount of $50 per month, which plaintiff admitted was exempt by law to Colbert. The court below sustained the motion and rendered judgment for $212.42, being the amount of salary due at the time of the filing of the garnishee's answer less $50 per month. From this judgment appeal is taken.

OPINION OF THE COURT.

ROBERTS, J.—The only question involved in this case is the construction of Section 26, Chapter 63 of the Laws of 1909, which reads as follows: "No public officer shall be summoned as a garnishee in his official capacity nor shall any person be charged as garnishee on account of current wages due from him to a defendant in his employ unless such debt was incurred for the necessities of life, provided such defendant is the head of a family and a resident of this Territory, and provided further that the wages earned by the defendant do not exceed fifty dollars per month, and in case such wages exceed fifty dollars per month then the excess only may be garnisheed." Appellee bases his right to recover upon this section; his contention being that, by its provisions, the current wages of a debtor may be garnisheed for necessaries of life, and if his wages exceed the sum of $50. per month, then the excess may be garnisheed for any debt. The Supreme Court of the United States, in the case of U. S. v. Goldenberg, 168 U. S. 195, lays down the rule for construing statutes as follows: "The primary and general rule of statutory construction is that the intent of the law maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. 'It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial additions to the language of the statute." The section of the statute, under consideration, says when a garnishee may be required to pay into court, wages of a defendant, in his hands. Stripped of surplusage, the first part of the section says, 'that he shall not be charged as garnishee on account of current wages due from him to a defendant in his employ unless

such debt was incurred for the necessities of life.' Can we place any construction upon this language, other than that current wages can not be garnisheed for any debt, unless such debt was incurred for the "necessities of life?" It is not within the province of the court to legislate. Where there is no ambiguity or uncertainty in the words used by the legislature and the meaning and intent is clearly manifest, it is the duty of the court to give effect to the legislative will. Two provisos are added to the words of the statute above quoted. The first proviso makes it necessary that a defendant, before being entitled to the exemption of current wages for any debt, must be a resident of the Territory of New Mexico and the head of a family. If he does not fall within these terms, he is not entitled to claim current wages exempt for any indebtedness. If he is the head of a family and a resident of the Territory, then his wages may be garnisheed for the necessities of life. The second proviso permits him to claim, as exempt from garnishment for debts contracted for the necessities of life, current wages, to the amount of $50.00 per month. Any excess over that amount may be subjected to garnishment. By his answer the appellant Colbert showed that the debt upon which the judgment was based, was not contracted for the necessities of life; that he was a resident of New Mexico and the head of a family and that the money sought to be garnisheed was current wages. This presented a complete defense to the garnishment proceedings and the court erred in rendering judgment for the appellee upon the pleadings. The judgment of the lower court is reversed.

DISSENTING OPINION.

POPE, C. J.—I dissent from the views announced in the majority opinion, the practical effect of which would be to leave a person receiving a salary running into thousands of dollars immune from garnishment where the debt shall not have been for necessaries. In my view the proper construction of Section 26, of Chapter 63, of the Laws of 1909, is reached by reading the clause "unless such debt was in-

curred for the necessities of life" at the end of the section. Thus transposed the section means that current wages are not subject to garnishment where (a) the defendant is the head of a family, and (b) a resident of this Territory, and (c) the wages do not exceed $50.00, and in case such wages exceed $50.00 then only the excess may be garnisheed, provided, the debt is not incurred for the necessities of life. In other words, no exemption exists (whether the wages exceed $50.00 a month or not) where the debt is for the necessaries of life.

[No. 1435. December 19, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. JOSE REFUGIO LUCERO, Appellant.

SYLLABUS.

1. Flight does not raise a presumption of guilt.

Appeal from the District Court for Taos County, before JOHN R. MCFIE, Associate Justice. Reversed.

A. B. RENEHAN for Appellant.

Change of venue. Territory v. Kelly, 2 N. M. 301; Rafferty v. People, 72 Ill. 37; Territory v. Kinney, 3 N. M. 143; Territory v. Lopez, 3 N. M. 156; Territory v. Taylor, 11 N. M. 588; Freleigh v. State, 8 Mo. 436; Johnson v. Com., 82 Ky. 116; 12 Cyc. 243.

Refusal to grant continuance was error. Terr. v. McFarlane, 7 N. M. 421; Money's Dig. 39; Territory v. Watson, 12 N. M. 419; Kinney v. Territory, 3 N. M. 656; Bowlin v. Com., 22 S. W. 543; Harrington v. State, 21 S W. 356; Casey v. State, 102 S. W. 725; Tull v. State, 55 S. W. 61; Thompson v. State, 78 S. W. 691; Stegor v. State, 105 S. W. 789; Territory v. Leary, 8 N. M. 186; Territory v. Emilio, 14 N. M. 153.

Flight does not create a presumption of guilt.

Starr v. U. S., 164 U. S. 627; Alberty v. U. S., 162 U. S. 499; Hickory v. U. S., 160 U. S. 408; U. S. v. Green, 146 Fed. 803; State vs. Poe, 123 Ia. 118; People v. Wong Ah Ngow, 54 Cal. 151; State v. Arthur, 23 Ia. 430; 22 A. & E. Enc. L. 1265; 12 Cyc. 395; Sheffield v. State, 43 Tex. 378.

Instruction as to voluntary manslaughter. Maher v. People, 10 Mich. 212; Seals v. State, 3 Baxt. 466; 21 A. E. Enc. L. 179; Lister v. State, 3 Tex. App. 17; 12 Cyc. 612; Milton v. State, 6. Nebr. 136; Elliston v. State, 10 Tex. App. 361; Ainsworth v. State, 11 Tex. App. 339; Young v. State, 11 Humph. 200; State v. Adams, 78 Ia. 292; Stevenson v. U. S., 162 U. S. 980.

Doubt. Biberry v. State, 133 Ind. 677; People v. Johnson, 140 N. Y. 350; Robinson v. State, 106 Pac. 24; State v. Raby, 61 Ia. 86; State v. Taylor, 57 W. Va. 228; Fife v. Com., 29 Pa. St. 429.

Proof of cause of death. Waller v. People, 209 Ill., 287; 21 Cyc. 999.

FRANK W. CLANCY, Attorney General, for Appellee.

Instruction concerning flight being a presumption of guilt was not prejudicial to defendant. State v. Milligan, 170 Mo. 215; State v. Hartman, 196 Mo. 110; State v. Seymour, 94 Ia. 699; Hickory v. U. S., 160 U. S. 421; Alberty v. U. S. 162 U. S. 508; Starr v. U. S., 164 U. S. 631; State v. Arthur, 23 Iowa 431; State v. Williams, 54 Mo. 170; State v. Brookes, 92 Mo. 542; State v. Jackson, 95 Mo. 623; State v. Walter, 98 Mo. 95; State v. Potter, 108 Mo. 424; State v. Arthur, 23 Iowa 431.

Instruction as to voluntary manslaughter. Territory v. Fewel, 5 N. M. 34.

Doubt. Robinson v. State, 106 Pac. 27; State v. Ruby, 61 Iowa 88; State v. Taylor, 57 W. Va. 239; Fife v. Comm., 29 Pa. 438; Nevling v. Comm., 98 Pa. 334; Willis v. State, 43 Neb. 102; Barney v. State, 49 Neb.

516; Davis v. State, 51 Neb. 349; Bartley v. State, 53 Neb. 312.

Evidence as to cause of death. Waller v. People, 209 Ill. 288.

OPINION OF THE COURT.

ROBERTS, A. J.—The appellant, Jose Refugio Lucero, was convicted in the District Court of Taos county, of murder in the second degree and was sentenced to serve a term of not less than twenty-five nor more than thirty years in the New Mexico Penitentiary. Appeal was prayed and granted to this court. Seven grounds of error have been urged by the appellant, but as we are compelled to reverse the case, because of an erroneous instruction given the jury by the lower court, we shall discuss only the questions essential to the consideration of the erroneous instruction. By instruction sixteen the court charged the jury as follows: "You are instructed that flight raises the presumption of guilt, and if the jury believe and find from the evidence that after the shooting of the deceased by the defendant, if you find that he did shoot him, that the defendant fled from the territory and tried to avoid arrest, then the jury may take this fact into consideration in determining his guilt or innocence; that is, if you believe that at the time he knew that he had shot and killed the deceased, if you find that he did so shoot and kill him." The objection urged against this instruction is, that flight does not raise a presumption of guilt, and by the instruction the jury may have reasonably understood that they could convict on proof of flight alone, on the part of the defendant. The fact that the defendant fled from the vicinity where the crime was committed, having knowledge that he was likely to be arrested for the crime, or charged with its commission, or suspected of guilt in connection therewith, may be shown as a circumstance tending to indicate guilt, and may be considered by the jury, with other circumstances tending to connect the defendant with the commission of the crime, to authorize the inference of the guilt of defendant, the corpus delicti being proven. There is general assent

to this proposition among the authorities, and it is well settled that evidence of flight is admissible. 1 Bishop's New Criminal Proc., sec. 1250; Abbott's Trial Brief 458. There is a broad distinction, however, between an "inference" and a "presumption," and this distinction is clearly pointed out in the case of Cogdell v. Wilmington & W. R. Co., 132 N. C. 852, 44 S. E. 618; where the court says: "An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury." The only cases which we have been able to find approving instructions to the jury that flight raises the presumption of guilt are those in Missouri. Such an instruction is sanctioned by the following among many cases in that state: State v. Walker, (Mo.) 9 S. W. 646; State v. McFoo, 100 Mo. 7, 19 S. W. 222; State v. Hunt, 141 Mo. 626, 43 S. W. 389. The Supreme Court of Iowa, in the case of State v. Poe, 123 Iowa 118, 98 N. W. 587, in a well considered case in which all the authorities are reviewed, in speaking of the Missouri rule says: "The rule in Missouri seems to be peculiar and we are not inclined to follow it." In the case of State v. Poe, supra, the lower court gave to the jury this instruction: "It is claimed by the state that defendants Decker and Poe at once fled, and endeavored to escape arrest by such flight. If you find said defendants at once after the alleged offense fled to Missouri, and endeavored to avoid arrest and prosecution by such flight, such fact would be presumptive evidence of guilt; and if such fact is unexplained, the jury would be justified in considering such flight as evidence of guilt." In speaking of this instruction the court says: "On principle and authority, the instruction as to the presumption to be drawn from proof of flight is erroneous, and should not be sustained, unless it is so far sanctioned in the cases in our own state that we are precluded from following the dictates of reason as illustrated by the weight of authority." After reviewing the various decisions of the Iowa court the instruction was disapproved and the cause reversed. In Hickory v. United States, 160 U. S. 408, the subject is fully considered and an instruction is condemned

which is characterized as "tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth," and the court continues as follows: "In this subject, also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt, with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have; that is, as creating a legal presumption so well settled as to amount, virtually, to a conclusive proof of guilt." In Alberty v. United States, 162 U. S. 499, the court approves what was said in the case from which we have just quoted and with reference to a similar charge says: "The criticism to be made on this charge is that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt. It certainly would not be contended as a universal rule, that the fact that a person who chances to be present on the scene of murder, shortly thereafter left the city, would, in the absence of other testimony, be sufficient in itself to justify his conviction of the murder." See, also, Starr v. United States, 164 U. S. 627. It follows that the court erred in giving the instruction above referred to, and a new trial must be ordered. This cause is therefore reversed.

[No. 1382. December 19, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. OTTO J. EYLES, Appellant.

SYLLABUS.

1. Careful examination of the record shows that evidence upon question of agency and intent is so meagre as not to justify a verdict of embezzlement and nothing more serious than breach of trust.

Appeal from the District Court for Santa Fe County, before JOHN R. MCFIE, Associate Justice. Reversed and remanded.

RENEHAN & DAVIES for Appellant.

Defendant was not an agent. 31 Cyc. 1189; Stock Exchange v. Keyes, 67 Ill. App. 462; Mechem on Agency, sec. 1; 2 Kent's Comm. 784; Bishop on Contracts, sec. 1027; 2 Page on Contracts, sec. 960; Parsons on Contracts 38; 31 Cyc. 1194; Caseman v. Brown, 148 U. S. 582.

Merchant and customer, seller and buyer. Kelly, Maus & Co. v. Sibley, 137 Fed. 588; Black v. Webb, 20 Ohio 304.

Defendant was owner of piano. New Haven Wire Co. Cases, 57 Conn. 352; Moors v. Kidder, 106 N. Y. 32; Bank v. Logan, 74 N. Y. 568; Simonds v. Wrightman, 36 Ore. 120; Land Co. v. Exchange Bank, 101 Ga. 345; State v. Kemp, 22 Minn. 42; Commonwealth v. Sterns, 2 Met. 343; Commonwealth v. Libbey, 11 Met. 64; 45 Am. Dec. 185; 2 Bish. New Crim. Laws, secs. 345, 369; State v. Reddick, 2 S. D. 124; Van Etten v. State, 24 Neb. 734; McElroy v. The People, 202 Ill. 475; State v. Cusnie, 45 Ohio St. 535.

Debtor and creditor. Hamilton v. State, 46 Neb. 287; State v. Covert, 14 Wash. 652; Commonwealth v. Young, 9 Gray 5; Webb v. State, 8 Tex. App. 310; Mulford v. People, 139 Ill. 594.

Felonious intent. Calkins v. State, 98 Am. Dec. 132; Com. v. Tuckerman, 10 Gray 173; 1 Whar. Cr. L., sec. 1030; State v. Tompkins, 32 La. Ann. 620; Fleener

v. State, 58 Ark. 104; State v. Culver, 97 N. W. 1016; Beaty v. State, 82 Ind. 233; People v. Hurst, 62 Mich. 276; State v. Nolan, 111 Mo. 473; State v. Cunningham, 154 Mo. 161; State v. Rigall, 169 Mo. 663; Wiley v. The State, 97 Ga. 207; Kribs v. The People, 82 Ill. 426.

A conviction cannot be sustained for embezzlement when the proof tended merely to show that the money was an advance payment on a contract which the accused wholly failed to perform. State v. Culver, 97 N. W. 1015; Wiley v. State, 97 Ga. 207; Mulford v. The People, 139 Ill. 586; Beaty v. The State, 82 Ind. 228; Reg. v. Norman, 41 E. C. L. 274; Reg. v. Reed, 1 Carrington & M. 306; Bish. Cr. L., sec. 240; Whar. C. L., sec. 1940; 1 Gr. on Ev., sec. 51; Keeler v. The State, 4 Tex. App. 527.

Directed verdict. Simonds v. R. R. Co., 110 Ill. 340; Pleasants v. Fant, 22 Wall. 120; Randall v. R. R. Co., 109 U. S. 482; Sparf v. U. S., 156 U. S. 101; U. S. v. Kuhl, 85 Fed. 624; Pleasants v. Fants, 8 Rose's Notes 505.

A wrong ruling which operates to exclude material facts is prejudicial. Elliott App. Pr., sec. 653.

Trade journals are evidential. Jones on Ev., 2 ed. 582.

FRANK W. CLANCY, Attorney General, and FRANCIS C. WILSON for Appellee.

Where there is substantial evidence to support a verdict it will not be disturbed by the appellate court in the absence of legal errors. Territory v. Maxwell, 2 N. M. 250; Territory v. West, 14 N. M. 546; Territory v. Neatherlin, 13 N. M. 491; Candelaria v. Miera, 13 N. M. 360.

Relation of principal and agent existed. 31 Cyc. 1189, 1216; Holmes v. Tennessee Coal Co., 22 South. 403; Smith v. Simmons, 103 Pa. 32; 1 Bouvier's Law Dict.; People v. Treadwell, 69 Cal. 226; Pullam v. State, 78 Ala. 31; State v. Heath, 8 Mo. App. 99; Com. v. Young, 9 Gray 5, Mass.

Relationship of vendor and vendee did not exist.

Kelly, Maus & Co. v. Sibley, 137 Fed. 588; Black v. Webb, 20 Ohio 304.

Defendant received money of his principal and converted it to his own use. Walker v. State, 117 Ala. 42; Eggleston v. State, 192 Ala. 80; State v. Lewis, 31 Wash. 75; State v. Buchanan, 43 Wash. 387; People v. Hurst, 62 Mich. 276; State v. Cunningham, 150 Mo. 161; Wiley v. State, 97 Ga. 207; Kribs v. The People, 82 Ill. 426; Keeler v. The State, 4 Tex. App. 527.

Court could not direct verdict of acquittal. Simonds v. R. R. Co., 110 Ill. 304; Sharf v. U. S., 156 U. S. 101.

Conversion. Haupt v. State, 108 Ga. 60.

OPINION OF THE COURT.

WRIGHT, J.—The defendant was convicted of embezzlement at the September, 1910, term of the district court for Santa Fe county. The indictment is in the usual form, charging embezzlement under the statute of the sum of One Hundred and Fifty Dollars ($150.00) of the property of one Bronson M. Cutting, which said sum it is alleged came into the possession of the defendant by reason of his employment as an agent by the said Bronson M. Cutting. At the conclusion of the evidence for the territory the defendant moved for a peremptory instruction of not guilty, upon the failure of proof as to agency and felonious intent. This motion was denied. It was again presented at the close of the case, and again denied, to which rulings the defendant excepted. The same questions were again presented to the trial court in the motion for new trial and in arrest of judgment. Numerous errors in the instructions given by the court and in the refusal to give instructions requested by the defendant are assigned. However, in view of our holding in this case, it will not be necessary to consider anything beyond the questions raised on the motion for peremptory instructions preserved in the motions for new trial and arrest of judgment. The prosecution of this case was had under the provisions of Section 1122, of the Laws of 1897, which reads as follows: "If any officer, agent, clerk or servant of any incorporated company,

or if any clerk, agent or servant of a private person, or of any copartnership, except apprentices, and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use, any money or property of another, which shall have come to his possession or shall be under his care, by virtue of such employment, he shall be deemed, by so doing, to have committed the crime of larceny." The sole question for determination in this case is, does the testimony establish the elements of the crime of embezzlement as defined in the section of the statute above quoted, so as to warrant the verdict of guilty returned by the jury in this case? We have carefully examined the record in this case, and feel constrained to hold that the evidence upon the quetions of agency and intent is so meager as not in law to justify the verdict returned in this case. The record discloses that the defendant was guilty of nothing more serious than a breach of trust. As no useful purpose could be served by a discussion of the evidence or the lack of evidence upon these two points, we content ourselves with a statement of our conclusions therefrom. The judgment of the lower court is reversed, and the cause remanded.

[No. 1384. December 19, 1911.]

GEORGE W. BOND et al, Appellants, v. UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al, Appellees.

SYLLABUS (BY THE COURT).

1. The title papers of the town of Tome grant examined and held to be a community grant of the nature described in United States v. Sandoval, 167 U. S. 278; Rio Arriba Company v. United States, 167 U. S. 298, and United States v. Pena, 175 U. S. 500.

Appeal from the District Court for Valencia County, before M. C. MECHEM, Associate Justice. Affirmed.

HANNA & WILSON for Appellants.

Grant was not a town grant. Ordinances of Philip II, 88, 89, Law 6, Book 4, Title 5, Recopilacion de las Indias; Law 10, Book 4, Title 5; U. S. v. Santa Fe, 165 U. S. 686; Hall Mexican Law 51; Law 2, Book 4, Title 7, Recopilacion de las Indias; Sheppard v. Harrison, 54 Tex. 95; U. S. v. Larkin, 58 U. S. 557; U. S. v. Morant, 123 U. S. 325; Fremont v. U. S. 58 U. S. 442; U. S. v. Arredondo et al, 31 U. S. 718; Hancock v. McKinney, 7 Tex. 449; Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121; Chapin v. School Dist. No. 2, 35 N. H. 445; Star Brewery Co. v. Primas, 163 Ill. 652; Pablo Maes et al, v. Binger Herman etc., 183 U. S. 581; Strother v. Lucas, 37 U. S. 438; U. S. v. Pio Pico, 72 U. S. 536; Steinbach v. Stewart, 78 U. S. 577; U. S. v. Clarke, 16 Pet. 228; Rio Arriba Land & Cattle Co. v. U. S., 167 U. S. 298; Graham v. U. S., 71 U. S. 259; Maralin v. U. S., 1 Wall. 282; 46 Jur. Civil 9; 3 Sanchez Roman 277; 2 Novisima Recopilacion, lib. XI, tit. 8, Law 4, 736; New Orleans v. U. S., 35 U. S. 720; Carino v. Insular Gov., 212 U. S. 449; Lewis v. San Antonio, 7 Tex. 289; Partidas 3, Law 16, Title 29; Hall 30; 2 White 83; Payne v. Treadwell, 16 Cal. 221; Bouldin v. Phelps, 30 Fed. 547; Arayo v. Currell, 1 La. 528; United States v. Turner, 11 How. 663; Ott v. Soulard, 9 Mo. 573; United States v. Varela, 1 N. M. 599; Hopkins v. Kansas City Ry. Co., 79 Mo. 98; State v. Cleveland, 80 Mo. 108; Johnson v. Common Council, 16 Ind. 227; Temple v. State, 15 Tex. App. 304; Patterson v. State, 12 Tex. App. 222.

Grant was complete and perfect at time of Treaty of Guadalupe Hidalgo. United States v. Percheman, 7 Pet. 86; Ainsa v. N. M. & A. R. Co., 175 U. S. 76; Deut v. Emmeger, 14 Wall. 308; Tremier v. Stewart, 101 U. S. 797; U. S. v. Chaves, et al, 159 U. S. 452; Fletcher v. Fuller, 120 U. S. 534; Pinkerton v. Ledoux, 129 U. S. 354; U. S. v. Pico, 72 U. S. 536; Rio Arriba L. & C. Co. v. U. S., 167 U. S. 397.

Confirmation by Congress is an adjudication which cannot be reviewed in the courts. Hall's Mexican Law 53; U. S. v. Arredondo et al, 31 U. S. 718; U. S. v. Sandoval, 167 U. S. 278; Rio Arriba L. & C. Co. v. U. S.,

167 U. S. 298; U. S. v. Chaves, 159 U. S. 452; Moore v. Robbins, 96 U. S. 535; U. S. v. Citizens' Trading Co., 93 Pac. 448; Greenameyer v. Coate, 212 U. S. 434; Hogan v. Page, 2 Wall. 607; Carpenter v. Rannells, 86 U. S. 138; Watterson v. Bennett, 18 La. Ann. 250; McDonald v. McCoy, 53 Pac. 421; Racahel v. Irwin, 8 Mart. 331; Connoyer v. Schaeffler, 89 U. S. 837; Rector v. Gibbon, 111 U. S. 291; Widdicombe v. Childers, 124 U. S. 405; Tameling v. U. S. Freehold etc. Co., 90 U. S. 662; Ojo del Apache Tract, Report No. 72, vol. 2, page 446, N. M. Private Land Claims; Report of Committee on Land Claims, vol. 1, N. M. Private Land Claims 113; Carpenter v. Montgomery, 13 Wall. 480; Salmon v. Symonds, 30 Cal. 301; Catron v. Laughlin, 11 N. M. 604; Ford's Heirs v. Morancy, 14 La. Ann. 77; Southern Pac. R. Co. v. Wiggs, 43 Fed. 333; Hardy v. Harbin, Fed. Cas. No. 6060; Climer v. Selby, 10 La. Ann. 182; Townsend v. Greeley, 5 Wall. 326; Board v. Federy, 3 Wall. 478; Bernier v. Bernier, 147 U. S. 247; Watson v. Sutro, 86 Cal. 527; Gates v. Salmon, 35 Cal. 593; Martin v. Walker, 58 Cal. 586; Luco v. de Toro, 91 Cal. 405; Royston v. Miller, 76 Fed. 50; Stein v. McGrath, 30 So. 792, Ala.

Incorporation of grant. C. L. 1897, secs. 2149, 2160, 2163, 2166, 2176.

Due process of law. Clark v. Mitchell, 64 Mo. 564; Taylor v. Porter, 4 Hill. 140; Wynehamer v. People, 2 Parker, Cr. R. 421; in re Hatch, 43 N. Y. Sup. Court 89; Dorman v. Buick, 32 Cal. 241; Stuart v. Palmer, 74 N. Y. 183; Foulke v. Bond, 41 N. J. L. 527; Roll et al v. Everett et al, 73 N. J. L. 647; Ord v. de la Guerra, 18 Cal. 67; Busch v. Huston, 75 Ill. 343; Ewer v. Lovell, 9 Gray 276; Ashley v. Rector, 20 Ark. 359; Freeman on Cotenancy, 2 ed. 99; Maloney v. Van Winkle, 21 Cal. 582; 30 Cyc. 177; Richard Mitchell et al v. Sylvanus Starback et al, 10 Mass. 5; Lavalle v. Strobel, 89 Ill. 384.

FRANK W. CLANCY for Appellees.

Town grant. Escriche Dictionary, ed. 1847; Recopilacion de las Leyes de las Indias, Law 1, title 11, book

4; law 2, title 7, book 4; Pinkerton v. Ledoux, 129 U. S. 354; Van Reynegan v. Bolton, 95 U. S. 35; More v. Steinbach, 127 U. S. 79; Law 2, title 12, book 4, Hall's Mexican Law 18, sec. 33; Rio Arriba L. & C. Co. v. U. S., 167 U. S. 397.

Confirmation by Congress is an adjudication which cannot be reviewed in the courts. Tomeling v. U. S. Freehold etc. Co., 93 U. S. 662; U. S. v. Maxwell Land Grant Co., 121 U. S. 366; Lafayette's Heirs v. Kenton, 18 How. 198; Astiazaran v. Santa Rita Co., 148 U. S. 82; Botilla v. Dominguez, 130 U. S. 246; Mitchell v. Furman, 180 U. S. 436; Barker v. Harvey, 181 U. S. 486.

OPINION OF THE COURT.

POPE, C. J.—The appellants, Bond and others, filed suit for partition and quieting of title against the unknown heirs of a large number of persons and the unknown owners and proprietors and claimants of interest in what is known as the Tome grant in Valencia county, New Mexico. The persons whose unknown heirs were sued were the persons alleged to have been the grantees of that grant being the persons named in the grant papers to be presently more fully noticed. The case was decided upon the pleadings. The controlling question is whether the grant papers made in 1739 constituted a grant to the parties named therein for the entire tract or whether they constituted simply a grant to such parties of the allotments described therein as set aside to them leaving the unallotted lands for future settlers and the outlying pasture and non-agricultural lands in the crown. It is contended by the plaintiffs and appellants that if the former is true then plaintiffs who apparently held by succession of title from some of the original grantees are entitled to have partition as against others similarly holding interests. It is contended on behalf of the defendants, among them being the corporation known as the Town of Tome, that the legal effect of the grant when made was, save as to the small pieces of land actually allotted, to pass no title from the crown of Spain and that when the United States succeeded to the sovereignty in

1848 the title to all save these allotments passed into the United States, and that when the United States by act of Congress approved December 22, 1858, confirmed the grant to the town of Tome and when patent issued to said town pursuant to said confirmation the title thus held previously by he government passed directly to the town unburdened with any trust on behalf of the heirs of the parties named in the original title papers and thus with no claims upon it which plaintiffs may here assert. This involves a consideration of the nature of the original grant papers. These are as follows: "Year 1739. New Settlement of 'Nuestra Senora de la Concepcion de Tome Dominguez,' instituted and established by Don Gaspar Domingo de Mendoza, governor and captain general of this Kingdom of New Mexico, contained in four pages, including this. Sir Senor Justice: All the undersigned appear before you, and all and jointly, and each one for himself, state, and in order that his excellency the governor may be pleased to donate to them the land called Tome Dominguez, granted to those who first solicited the same and who declined settling thereon, we therefore ask that the land be granted to us; we therefore pray you to be pleased, (eaten by mice) at that time to (eaten by mice), said settlers we being disposed to settle upon the same within the time prescribed by law; we pray you to be pleased to give us the grant which you have caused to be returned, as you are aware that our petition is founded upon justice and necessity, our present condition being very limited, with scarcity of wood, pasture for our stock, and unable to extend our cultivation and raising of stock in this town of Albuquerque, on account of the many footpaths encroaching upon us, and not allowed to reap the benefit of what we raise, and, in a measure, not even our crops on account of the scarcity of water, and with most of us our lands are of little extent and much confined, etc. In view of all which we pray and request you to be pleased to grant our petition, by doing which we will receive grace with justice; and we swear in all form that it is not done in malice; we protest costs and whatever may be necessary. Juan Barela, Josef Salas, Juan

Ballejos, Manuel Carrillo, Juan Montano, Domingo Sedillo, Matias Romero, Bernardo Ballejo, Gregorio Jaramillo, Francisco Sanchez, Pedro Romero, Phelipe Barela, Lugardo Ballejos, Augustin Gallegos, Alonzo Perea, Thomas Samora, Nicholas Garcia, Ignacio Baca, Salvador Manuel, Francisco Silva, Francisco Rivera, Juan Antonio Zamora, Miguel Lucero, Joachim Sedillo, Simon Zamora, Xpritoval Gallegos, Juan Ballejos, Grande, Jacinto Barela, Diego Gonzales. In this town of San Phelipe de Albuquerque, on the second day of the month of July, in the year one thousand and seven hundred and thirty-nine, before me, Captain Juan Gonzales, Baz, Senior Justice of this town and its jurisdiction, came the persons contained in the above petition which by me seen, I state: That I cannot deliver to them the grant asked for, as it has been returned by order of my governor, until I consult with his excellency, to whom this petition is referred, that seeing it, his excellency may determine whatever may be proper. I have so ordered and signed, acting by appointment, with two attending witnesses, in the absence of a public or royal notary, there being none in this kingdom. Date, ut supra.

"JUAN GONZALES BAZ.

"Witness:

"B. S. R. ALEJANDRO GONZALES,

"SALVADOR MARTINEZ.

"Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom of New Mexico, for his majesty, having seen the above, I consider it as presented, and in view of the individuals therein contained, grant to them, in the name of his majesty, whom may God preserve, the land petitioned for, called the land of Tome Dominguez, for themselves, their successors, and whoever may have a right thereto under the conditions and circumstances required in such cases, and which is to be without prohibition to any one desiring to settle the same, holding and improving it during the time required by law. In view of which, I should order, and did order, that said senior justice or his lieutenant, whose duty it is, shall

place them in possession of the aforementioned lands, giving in all cases to each one the portion he may be entitled to in order to avoid difficulties which may occur in the future. I have so provided, ordered, and signed, acting by appointment, with attending witness, in the absence of a royal or public notary, there being none other.

"DON GASPAR DOMINGO MENDOZA.

"ANTONIO DE HERRERA,

"JOSEPH TERRUS.

"Possession. In the new settlement of 'Nuestra Senora de Concepcion de Tome Dominguez,' instituted and established by Don Gaspar Mendoza, actual governor and captain general of this Kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty-nine. I, Captain Juan Gonzales Baz, senior justice and war captain of the town of San Phelipe de Albuquerque, and the districts within its jurisdiction, by virtue of the decree issued and above provided by said governor, the royal possession ordered to be given being published and promulgated, and the parties concerned being together, I proceeded to the above mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned of 'Nuestra Senora de la Concepcion de Tome Dominguez,' whose titular feast they promised to observe and celebrate every year. And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition, which are as follows: On the west the Del Norte river, on the south the place commonly called 'Los Tres Alamos,' on the east the main ridge called San Dia, and on the north the point of the marsh hill called Tome Dominguez; at which principal boundaries I ordered them to perpetuate their existence with permanent land marks, pointing out to them, also, as a means of good economy, their common pastures,

water and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances; and for their greater quietude, peace, tranquility and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows: To Francisco Sanchez, the general boundary on the west, the Del Norte river and (torn) arroyo or dry branch running out from said river, (torn) bounded by lands of Matias Romero, (torn) with them the lands of Ygnacio Baca; with them Lugardo Ballejo; with these the lands of (torn) these are bounded by the lands of Bernardo Ballejo; (torn) lands of Juan Ballejo el grande; with these (torn) Gregorio Jaramillo; with these are bounded the lands of Josefa Gutierez; with these a body of the lands of her brother, Gregorio Gutierez, (torn) the lands bounded by them; those of Miguel Lucero, (torn) with them those of Francisco de Silva; with these are those of Juan Ballejo, the youngest; with these are bounded the lands of Manuel Carrillo and his sister, Jacinta Martin Carrillo, (torn) a body of the lands of Juan Barela, (torn) Ventura Romero, Domingo Sedillo, (torn) Salvador Manuel Marquez, Manuel Carrillo, (torn) Jacinto Barela and Augustin Gallegos (torn) on the east, (torn) Cristobal Gallegos, Felipe Barela, (torn) Simon Zamora and Juan Montano, (torn) which are distributed on uncultivated ground in order that (torn) appeared to be agreed upon (torn) possession was given (torn) all having expressed themselves as satisfied now and in the future, without failing to comply in one single instance with what had been ordered, nor in which said settlers should observe. And in order that it may so appear, I signed, acting by appoint-

ment, with attending witnesses, in the absence of a public and royal notary, there being none in this kingdom, on said day, ut supra, &c. corrected.

"FRANCISCO SANCHEZ,
"JUAN GONZALES BAZ.

"Witnesses:
"ALEJANDRO GONZALES,
"YSIDRO SANCHEZ."

In determining the controlling question in the case, the work of this court, as doubtless was the work of the court below is greatly facilitated by the course of litigation involving certain grants before the court of private land claims, established by the Act of March 3, 1891, to deal with the Spanish and Mexican land grants in the Southwest. That court had before it four grants, the decisions of which throw great light upon the present case. The first of these grants was known as the San Miguel del Bado grant which was prosecuted before the court of private land claims under the title of United States v. Sandoval. This case subsequently went to the Supreme Court of the United States and is reported under the title of the United States v. Sandoval, 167 U. S. 278. The title papers in that case were as follows: "I, Lorenzo Marquez, resident of this town of Santa Fe, for myself and in the name of fifty-one men accompanying me, appear before your excellency, and state that in consideration of having a very large family, as well myself as those accompanying me, though we have some land in this town, it is not sufficient for our support, on account of its smallness and great scarcity of water, which, owing to the great number of people, we cannot all enjoy, therefore we have entered a tract of land on the Rio Pecos, vacant and unsettled, at the place commonly called El Vado, and where there is room enough not only for us, the fifty-one who ask it, but also for everyone in the province not supplied. And its boundaries are, on the north the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente; on the south the Canon Blanco; on the east the Cuesta, with the little hills of Bernal, and on the west the place com-

monly called the Guzano, which tract we ask to be granted us in the name of our sovereign, whom may God preserve; and among these fifty-one men petitioning are thirteen Indians, and among them all are twenty-five fire arms, and they are the same persons who appear in the subjoined list which I present in due form; and we unanimously and harmoniously, as one person, do promise to enclose ourselves in a plaza well fortified with bulwarks and towers, and to exert ourselves to supply all the firearms and ammunition that it may be possible for us to procure. And, as we trust in a compliance with our petition, we request and pray that your excellency be pleased to direct that we be placed in possession in the name of his royal majesty our sovereign, whom may God preserve. And we declare in full legal form that we do not act with dissimulation, etc.

"LORENZO MARQUEZ,
"For himself and the petitioners."

(The list referred to does not appear).

"DECREE.

"At the town of Santa Fe, Capital of this Kingdom of New Mexico, on the 25th day of the month of November, one thousand seven hundred and ninety-four, I, Lieutenant Colonel Fernando Chacon, Knight of the Order of Santiago, civil and military governor of said Kingdom, subinspector of the regular troops therein, and inspector of the militia thereof, for his Majesty, (whom may God preserve,) having seen the foregoing document and petition of Lorenzo Marquez for himself and in the name of fifty-one men, should and did direct the principal Alcalde of this town, Antonio Jose Ortiz, to execute said grant as requested by the petitioners, so that they, their children and successors may have, hold and possess the same in the name of his Majesty, observing at the same time the conditions and requisites required in such cases to be observed, and especially that relative to not injuring third parties. Thus I ordered, provided and signed with the witnesses in my attendance, with whom I act for want of royal or public notary, of which there is none in

said Kingdom, and upon this common paper, there being none of any seal, to which I certify. CHACON."
"Attending: FERNANDO LAMELAS.

"On the 26th day of the month of November, one thousand seven hundred and ninety-four, I, Antonio Jose Ortiz, captain of the militia and principal alcalde of the town of Santa Fe, in the pursuance of the order of Lieutenant Colonel Fernando Chacon, Knight of the Order of Santiago, and civil and military governor of this Kingdom, before proceeding to the site of El Vado, I, said principal alcalde, in company with two witnesses, who were Xavier Ortiz and Domingo Santistevan, the fifty-two petitioners being present, caused them to comprehend the petition they had made, and informed them that to receive the grant they would have to observe and fulfill in full form of law the following conditions: First. That the tract aforesaid has to be in common, not only in regard to ourselves, but also to all the settlers who may join them in the future. Second. That with respect to the dangers of the place, they shall have to keep themselves equipped with firearms and bows and arrows, in which they shall be inspected as well at the time of settling as at any time the alcalde in office may deem proper, provided that after two years settlement all the arms they have must be firearms, under the penalty that all who do not comply with this requirement shall be sent out of the settlement. Third. That the plaza they may construct shall be according as expressed in their petition; in the meantime they shall reside in the Pueblo of Pecos where there are sufficient accommodations for the aforesaid fifty-two families. Fourth. That to the alcalde in office in said pueblo they shall set apart a small separate piece of these lands for him to cultivate for himself at his will, without their children or the successors making any objection thereto, and the same for his successor in office. Fifth. That the construction of their plaza as well as the opening of acequias and all other work that may be deemed proper for the common welfare, shall be performed by the community with that union which in their government they must preserve. And when this was heard and

understood by each and all of the aforesaid persons, they accordingly unanimously responded that they understood and heeded what was communicated to them. Wherefore, I took them by the hand and announced in clear and intelligible words that in the name of his Majesty (God preserve him) and without prejudice to the royal interest or that of any third party, I led them over said lands, and they plucked up grass, cast stones, and shouted 'long live the King,' taking possession of said land quietly and peaceably, without any objection, pointing out to them the boundaries, which are, on the north the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente; on the south, the Canon Blanco; on the east, the Cuesta with the little hills of Bernal, and on the west, the place commonly called the Guzano, notifying them that the pastures and watering places are in common, and that in all time it may so appear, I, acting by appointment, for want of a notary, there being none in this jurisdiction, signed this with my attending witnesses, with whom I act. To which I certify.

"ANTONIO JOSE ORTIZ.

"Attending:

"JOSE CAMPO REDONDO,

"ANTONIO JOSE ORTIZ.

"This copy agrees with its original on file among the archives of this town, and is faithfully and legally made, compared and corrected. In testimony whereof, I make my customary sign manual in this town of Santa Fe on the eighth day of the month of November, one thousand seven hundred and ninety-four.

"(Signed) ANTONIO JOSE ORTIZ.

"(Seal) Fourth real.

"Fourth seal, fourth real, year one thousand seven hundred and ninety-eight and ninety-nine.

"(Seal)

"At this place, San Miguel del Bado del Rio de Pecos, jurisdiction of the capital town of Santa Fe, New Mexico, on the twelfth day of March in the present year, one thousand eight hundred and three, I, Pedro Baptista Pino,

justice of second vote of the town of Santa Fe and its jurisdiction, by verbal order of Colonel Fernando Chacon, governor of this province, have proceeded to this said settlement for the purpose of distributing the lands which are under cultivation to all the individuals who occupy said settlement; and having examined the aforesaid cultivated land, I measured the whole of it from north to south and then proceeded to lay off and provide the several portions, with the concurrence of all parties interested, until the matter was placed in order according to the means myself and the parties interested deemed the best adapted to the purpose; in order that all should be satisfied with their possessions, although said land is very much broken on account of the many bends in the river. And after the portions were equally divided in the best manner possible, I caused them to draw lots, and each individual drew his portion, and the number of varas contained in each one portion was set down, as will appear from the accompanying list, which contains the number of the individuals who reside in this precinct, amounting to the number of fifty-eight families, between whom all the land was divided, excepting only the portion appertaining to the justice of this precinct, as appears by the possession given by the said governor, and another small surplus portion which by the consent of all is set aside for the benefit of the blessed souls in purgatory, on condition that the products are to be applied annually to the payment of three masses, the certificates for which to be delivered to the alcalde in office of said jurisdiction. And after having made the distribution I proceeded to mark out the boundaries of said tract from north to south, being on the north a hill situated at the edge of the river above the mouth of the ditch which irrigates said lands, and on the south the point of the hill of pueblo and valle called Temporales, a large portion of land remaining to the south, which is very necessary for the inhabitants of this town who may require more land to cultivate, which shall be done by the consent of the justice of said town who is charged with the care and trust of this matter, giving to each one of those contained in the list the amount he may

require and can cultivate; and after having completed all the foregoing, I caused them all to be collected together and notified them that they must each immediately erect mounds of stone on the boundaries of their lands so as to avoid disputes; and I also notified them that no one was privileged to sell or dispose of their land until the expiration of ten years from this date, as directed by said governor, who, if he be so pleased, will certify his proper approval at the foot of this document, of which a copy shall remain in this town and the original be deposited in the archives where it properly belongs. Done in the aforesaid town, on the day, month and year above mentioned. Signed with my hand, with two attending witnesses, with whom I act in the absence of a public or royal notary, there being none of any description in this kingdom. I certify.

"(Signed) PEDRO BAPTISTA PINO.

"Attending: JOSE MIGUEL TAFOYA."

Here followed the list of fifty-eight individuals, with the number of varas each one received, running from forty-nine varas in one instance to two hundred and thirty in another, sixty-five varas being allotted in thirty-eight instances. "There are contained in this list fifty-eight families. San Miguel del Bado, March twelfth, one thousand eight hundred and three.

PEDRO BAPTA. PINO.

"Given gratis, together with twenty-odd leagues travel.

"(Pino's Rubric).

"By virtue of what has been done by Pedro Pino, senior justice of second vote of this capital town of Santa Fe concerning the distribution of lands made in the name of his Majesty to the residents of the new town of El Bado, known as San Miguel, I declare the aforesaid residents of El Bado the lawful owners thereof, approving and confirming the possession given by said Senior Justice Pedro Pino; and in order that it may so appear in all time, I signed this at Santa Fe, New Mexico, on the 30th day of March, 1803.

"FERNANDO CHACON."

The court of private land claims held that the effect of these muniments of title was to vest in the parties named therein the title to the entire tract of land described. Upon appeal, however, the Supreme Court of the United States held that the title of the crown was divested only as to the allotments described in the several acts of possession and the remainder continued in the former sovereignty and passed to the United States by the treaty.

The claim of the government which was sustained in that case is stated by the Supreme Court as follows: "The contention on behalf of the United States is that the court of private land claims had no power to confirm lands situated as these were, within the outboundaries, that had not been allotted prior to the date of the treaty, because under the laws of Spain and Mexico, the *jus disponendi* of all unassigned lands remained in the government and passed to the United States." Dealing with this contention the court said: "Did the fee to lands embraced within the limits of the pueblo and intended for community use continue to remain in the sovereign or did it pass to the pueblo? Answering this by reference to the previous case of the United States v. Santa Fe, 165 U. S. 675, the court said: "Under the laws of the Indies, lands not actually allotted to settlers remained the property of the King, to be disposed of by him or by those on whom he might confer that power. * * * Towns were established in two ways: By their formation by empresarios or contractors, the title to the lands granted vesting in the contractors and settlers, minute provisions being made in relation thereto. By individuals associating themselves together for that purpose and applying to the governor of the province, through whose action a city, villa or place was established. These municipalities appear to have been quasi corporations sub modo, and their ayuntamientos exercised political control over the pueblos and over surrounding country attached to their jurisdiction. The alcalde made allotments subject to the orders of the ayuntamiento, and they were again apparently subject to the provincial deputation or an equivalent superior body. At all events unallotted lands were subject to the disposition of the

government." The next case dealing with the subject was Rio Arriba Land & Cattle Co. v. United States, appealed from the court of private land claims and reported in 167 U. S. 298. The title papers in that case were as follows: "I, Francisco Salazar, ensign in the militia of Abiquiu, together with my brothers (Hermanos) and twenty other poor and needy citizens, appear before your excellency (and state), that I have examined a tract of land, unappropriated and unsettled, called the Chama River Canon, situated about four leagues distant from this place, and for which we petition your excellency in the name of the King and without injury to any third party, as we find ourselves without any land wherefrom to support ourselves, owing to the decease of our mother at the rancho off of which she supported us, and as the latter has this day been divided among nine heirs residing in other jurisdictions we find ourselves absolutely deprived of any place to plant and to enable us to pay tithes and first fruits. We therefore humbly ask and pray your excellency to heed this our petition, and we trust from the charitable heart of your excellency you will consider the same favorably, and we protest our petition not to be made in dissimulation and whatever be necessary, etc." This petition was referred, July 6, 1806, by the governor to the alcalde in these words: "The alcalde will report fully on this petition, giving the extent of the land in question, its boundaries, the proportion of irrigable land, and when he comes to say how many settlers it will accommodate and the application being made public he will report whether any damage may result to any of the surrounding settlers, either in regard to pasturage, water or watering places, and he will make personal examination respecting all these matters, to the end that action may be had in accordance with his report and subsequent questions avoided." On July 14, 1806, the alcalde made the following report: "I, Manuel Garcia de la Mora, chief alcalde, in obedience to the foregoing decree, proceeded personally to visit and examine the spot (rio) called the Chama River Canon, over all of which I passed with the greatest care and observation, as well as the land itself and the places for taking out the heads of

irrigating canals and the pastures and watering places, and I report that for pastures without fields and without any resulting damage there is one league from the last grant (that of the Martinezes) to the side on which the sun rises, and that thence to the western boundary, which divides the said Chama river canon from the Gallina river, there are about two leagues, somewhat more or less, cultivable land, and the town being placed in the center, the thirty-one families applying for it may be accommodated and land enough remain for the increase they may have in the way of children and sons-in-law (hijos y llernos), and the section of the country is a very desirable one, and the settlers may therefore proceed with their buildings, and for the other two boundaries there is assigned them on the north and on the south one league for pastures, for on these two sides no injury can result, as there is neither a settlement or grant now made or that might be made, and the heads of acequias along the length of the planting lands there are five or six of them. With all the foregoing I have fulfilled your excellency's order. The same having been read faithfully and quite audibly to all the community, they replied that they had nothing to represent in regard to said petition and that no one of them was injured, the land being uncultivated and unsettled, the said canon is distant from Abiquiu about five leagues."

On August 1, 1806, Governor Alencaster decreed: "In pursuance of the foregoing report, that the said alcalde may proceed to the assignment of twenty-six lots of land capable of being planted with the equivalent of three cuartillas of wheat, one ditto or three almudes of corn, another three of beans, and of having erected on each of them a small house with a garden, and of these lots two of them adjoining one another will be assigned to the Ensign Francisco Salazar and the remaining twenty-four to the individuals who, upon report made by the said alcalde, may obtain my decree that they be assigned lands, the said assignments to be made in such manner that lands may remain unassigned equally on the four sides, or at least on two of them, so that new assignments may be

made in the future, and the lines bounding with the adjoining lands to be described in order that the rights to pastures and watering places may clearly appear; to the said parcel of lots held by the twenty-five settlers will be given the name of 'San Joaquin del rio de Chama;' and the said alcalde, having received the said twenty-four titles to settlers, will proceed to deliver and distribute, give possession, and make grant, in the name of his Majesty, to the twenty-four settlers aforesaid, and the said Ensign Salazar, being appointed justice and all the foregoing provisions being verified, the granting document will be remitted to me to be legalized as required, the proper duplicates (testimonios) to be given the parties interested and then the original to be returned, to be duly deposited among the archives of this office."

On March 1, 1808, the alcalde made this report: "I, Manuel Garcia de la Mora, chief alcalde of the town of La Canada, proceeded to the rancho de San Joaquin, and in view of and in obedience to the foregoing decree of Lieutenant Colonel Joaquin del Real Alencaster, governor of this royal province, I, said chief alcalde, proceeded to the Chama river canon, called the San Joaquin canon, accompanied by the twenty-five settlers; and there appearing also fourteen other citizens without land, and his excellency having given me verbal instructions to the effect that should other persons come forward to increase the settlement land should also be assigned to them with the same rights as the others enjoy, and all the settlers being assembled, I proceeded with the distribution of the land to them as appears from the quantities of land they received, noted in the list and certified by me, and into the possession of which I placed them, taking them by the hand and leading each settler over his own piece of land and placing him in possession in the name of the King, whom may God preserve; and they ran joyfully over the land, plucking up weeds and casting stones and shouting aloud 'Long live the King that protects and helps us.' With which they remain in possession, naming the town whose site I pointed out to them, San Joaquin del Rio de Chama, and with which I have executed the foregoing decree and all

of which authenticated, with two instrumental witnesses, designating to the settlers as boundaries—on the north, the Cebolla Valley; on the south, the Capulin; on the east, the boundary of the Martinezes; and on the west, the Little White hill, (segita blanca), for their pastures and watering places and with a view to the coming of other settlers and the increase of families and descendants; all of which I signed with two instrumental witnesses and with the witnesses in my attendance, with whom I act by appointment for lack of a royal or public notary, there being none of any kind in this royal province; to which I certify."

In that case it was likewise contended that the title to the entire tract passed to the parties named in the papers, but this contention, following United States v. Sandoval, supra, was overruled, the court holding "that as to all unallotted lands within exterior boundaries where towns or communities were sought to be formed, as in this instance, the title remains in the government for such disposition as it might see proper to make," and that "the only title which was passed on or contended to be passed on was to the various allotments which were actually made." Another case in which the same question is involved was United States v. Pena, which is reported under that title, on appeal from the court of private land claims, in 175 U. S. 500. The title papers in that case are thus described in the opinion of the court just cited: "In 1836, Jose Julian Martinez and others made application to the ayuntamiento of Ojo Caliente for a tract of public land, called 'the Petaca.' That body declared its opinion that the grant should be made, and thereupon the governor signed this order: "Santa Fe, Dec. 25, 1836. Having seen the action of the ayuntamiento of Ojo Caliente of date 22 instant, in which they say there is no objection to granting the applicant and his associates the land mentioned, the former grantees not possessing now any right herein, they having abandoned the same, the alcalde of said place will place those who now apply for the same in possession thereof in the required form and in conformity with the law on the subject, setting forth the general donation, in

which shall necessarily be stated the boundaries of said possession, and without prejudice to any third party; also binding the grantees to the obligations prescribed by the laws to acquire title, for which purpose the alcalde shall take charge of the general document of distribution, which shall be for the archives, and he shall give testimonies therefrom, as may be requested of him, on payment of his corresponding fees. PEREZ."

In pursuance of this order the alcalde proceeded to give juridical possession, and this is the report of his action: "For the years one thousand eight hundred and thirty-six and eight hundred and thirty-seven. At Santa Cruz del Ojo Caliente, jurisdiction of this name, on the 25th day of the month of March, one thousand eight hundred and thirty six, in compliance with the decree of the civil and military governor of the Territory of New Mexico, Alvino Perez, of date February 25, of the same year, in which he directs me to place in possession the petitioners who have applied for the Petaca tract of land, and as is set forth in their petition of date 29th of January, of the same year, I proceeded to distribute said land in the presence of the parties interested, giving to each one of those mentioned in the list one hundred and fifty varas in a direct line designating to them as their boundaries on the south the entrance to the canoncito and lands of Jose Miguel Lucero, on the north the hill commonly called the Tio Ortiz Hill, on the east, creek of the aguaje of the Petaca, and on the west the boundary of the Vallecito grant, within which limits the said new grantees were located. Of these I donated only to citizen Felipe Jaquez from the boundary of Vincente Martin to that of Eusebio Chaves, the land being a narrow strip and of little utility; thereupon I donated to citizen Manuel Lujan two small valleys, which were not measured with the line and reach to the distribution of the said canoncito, and I donated to citizen Mariana Pena two small valleys, very narrow, without varying; and continuing, I donated to citizen Antonio Eleuterio Ortiz, in the same canoncito, a small valley, also without varying, following the same course in the said canoncito, I donated to citizen Jose Francisco Lucero a small valley,

also without varying, and to Jose Antonio Lucero another small valley, the boundary thereof being on the south the mouth of the same canoncito, leaving therefor a plaza one hundred and fifty varas, and fifty of women's gardens and fifty for ingress and egress, there remaining at the mouth of the Canada de la Dorada, for common watering places, one hundred and fifty varas in a direct line, which donation I made in the name of the national sovereignty, in conformity with the law on the subject, the grantees mentioned in the annexed list understanding that the pastures, forests, waters and watering places are in common, and they were further informed that he who fails to occupy and cultivate the land granted within the term of five years, in order to acquire title, the same cannot be by him sold, exchanged or alienated, nor will he be admitted in a new settlement; and if any should of their own accord abandon the tract, they remain informed further that they possess no right, such being the requirements of law; and being informed of and agreeing to all this, they received and accepted possession in virtue of which they plucked up herbs, leaped, cast stones and shouted with joy, saying, God be praised, long live the ration, long live the sovereign congress and the law that governs and protects us, and other manifestations of pleasure, by virtue of which they took possession; and, that it may so appear at all times, I, under this decree, signed this grant and donation with all the authority His Excellency was pleased to confer upon me for the purpose set forth in the above petition and expressed in said decree attached to the present grant, the witnesses being the citizens Jesus Maria Barela and Jose Maria Barela and Jose Francis Lucero, as properly made.

JOSE ANTONIO MARTINEZ.
JESUS MARIA BARELA.

"There was given to Juan de Jesus Jaquez from the boundary of Jose Gabriel Vigil to a pinabete on the north; Valid. (Rubric)." At the close of this follows the list referred to in the report.

Dealing with this matter the court says: "What was the scope and effect of this grant? Obviously, we think,

to give to each individual named in the list the particular tract set apart to him. It was a grant in severalty and not one of a single large tract to several persons to be by them held in common or distributed among each other. It matters not that the petition for this grant was in the name of only two or three individuals, for it was not an uncommon thing for one or more to appear as the representatives of a body or a number of persons. The language of the order of the governor seems to contemplate a grant in severalty, for it speaks of 'the general donation, in which shall necessarily be stated the boundaries of said possession.' The outer limits within which the grants are to be made are to be stated, and within those limits the several grantees are to have possession. Again, the provisions that 'the Alcalde shall take charge of the general document of distribution' and 'give testimonios therefrom as may be requested,' carries the same suggestion. The alcalde is to take charge of this general document for filing in the archives, but while holding it he is to give testimonios from it to the several parties who receive grants within the outboundary limits. But whatever doubts might arise from an examination of the governor's order, if that was the only document to be considered, the report of the alcalde's proceedings shows affirmatively that he distributed the lands in the presence of the parties interested, 'giving to each one one hundred and fifty varas in a direct line.' He evidently understood that he was to distribute this land among certain individuals. He proceeded to do so and gave juridical possession accordingly. Whatever may be thought of his interpretation of the governor's order, the only juridical possession which is shown to have been given is juridical possession in severalty to the parties named in the list. The original petitioners were never put, so far as the record shows, in juridical possession of the entire tract, and such a grant, if it was so intended, was never made effective by any juridical possession. We think it more in consonance with justice and equity to hold, not that the grant was of an entire tract which never became operative because of a failure to give juridical possession, but the alcaldes rightfully understood it as

a grant in severalty, and giving juridical possession vested in the grantees the tracts of which they were so placed in possession. United States v. Santa Fe, 165 U. S. 675; United States v. Sandoval, 167 U. S. 278; Rio Arriba Land & Cattle Co. v. United States, 167 U. S. 298." Still another case came before the court of private land claims involving this question, that being the Fernandes de Taos grant, which was tried before that court under the title of Juan Santistevan v. United States. The material title papers there involved were as follows: "On the first day of May, of the present year, one thousand seven hundred and ninety-six, I, the Alcalde Mayor and War Captain of the Pueblo of Taos and its districts, Don Antonio Josef Ortiz, in obedience to that which was ordered by Lieutenant Colonel Don Fernando Chacon, Knight of the order of Santiago and Civil and Military Governor of this Kingdom, I, the said Alcalde Mayor, before going to the place of the said tract of the Rio de San Fernando, in company with two witnesses who were Don Antonio Josef Lovato and Don Lorenzo Lovato, there being present the sixty three families, I explained to them the petition which they had made and I informed them that to obtain such possession they must keep and observe the following conditions in due form of law: That the said place must be common not only to them but to all who may hereafter join the settlement, and that in view of the exposed situation of the place they shall be provided with fire arms or bows and arrows which arms shall be inspected at the time of their entrance as well as at any other time that the alcalde may direct, with the understanding that within two years after taking possession all the arms which they have shall be fire arms under the penalty that those who do not provide themselves shall be dismissed from the said settlement; that the town which they build shall be like that which they describe in their petition; and they all together and each one for himself having heard the said conditions they replied unanimously that they knew and understood that which had been explained to them, and I therefore took them by the hand and I said in a clear and intelligible voice that in the name of His Majesty (whom may God

preserve) and without prejudice to his royal estate nor to that of any third party I walked with them over the said lands and they pulled up grass and threw stones and shouted, saying 'Long live the king,' taking possession of the said lands quietly and peaceably without any opposition, their boundaries being designated for them, and they are: On the west, lands of Don Antonio Josef Lovato, below in the bottom, and above, the middle road; on the east, the canon of the Rio de San Fernando; on the south, the Ceja, which is on the other side of the river, and on the north, the boundary line of the Indians of Taos, with the notification that the pastures and watering places are common, and in order that it may so appear I signed it as Receptoria in the absence of a notary, of which there is none, with my assisting witnesses, with whom I act, to which I certify. ANT. JOSEPH ORTIZ."

"Pueblo of San Geronimo de Taos, November 7, 1797.

"The settlers of the Rio de San Fernando, having petitioned the Lieutenant Colonel, the Governor of this Kingdom, Don Fernando Chacon, that he would be pleased to grant them, in the name of his Majesty (whom may God preserve) the surplus of the waters of the Taos river and that of the Lucero and His Excellency having given the order to me, the said Alcalde Mayor, in order that I should do so in the name of His Majesty, I give them the present for their better protection. To which I certify.

"ANT. JOSEF ORTIZ.

"In the City of Santa Fe, of New Mexico, on the ninth day of the month of August, one thousand seven hundred and ninety-nine, I, Don Fernando Chacon, Civil and Military Governor of the said Province, granted the possession of lands which in the name of His Majesty was given to the settlers located at the place of San Fernando for them, their children and successors, without power ever to alienate or sell and permitting them as poor persons, to include within two sheets of stamped paper the particular possession given to each settler with the amount belonging to him, and I signed it with my Secretary in the absence

of a notary, royal or public, of which there is none in this province. FERNANDO CHACON.
JOSEF PASCUAL GARCIA.

Following the foregoing document was one giving a list of settlers with the number of varas allotted to each.

The Court of Private Land Claims, viewing these title papers in the light of the three cases above cited, held that the title conveyed by the government covered only the several allotments and did not include unallotted or non-agricultural land, these being reserved for the crown, either for future allotment or as royal estate.

It only remains to determine whether the title papers in the present case first above quoted, came within the rule shown to be applicable to the cases last mentioned. It is with the view that this might be clearly developed that the title papers in the other cases have been quoted at such length. We are of the opinion that the Tome title papers reasonably partake of the same nature as those involved in the several cases dealt with by the Court of Private Land Claims. The petition was in order to found a settlement. The grant as made by Governor Mendoza was to the partitioners, but not to them only. It ran in favor of "whoever may have a right thereto under the conditions and circumstances required in such cases," and it distinctly provides that it is to be "without prohibition to any one desiring to settle the same." The Governor expressly provides for allotments by ordering that there shall be given to each one "the portion he may be entitled to in order to avoid difficulties which may occur in the future." The act of juridical possession shows that among those who appeared for the purpose of being given allotments were a number not named in the original petition and that, indeed, a number of the original petitioners did not appear. This demonstrates that in the minds of the parties present for juridical possession the grant was not deemed to be confined to the original petitioners, but was with a view to a settlement in which all who were willing to join in the common enterprise were entitled to receive allotments. This condition brings the case, in our judgment, clearly within the rule stated in the cases above

mentioned. In other words, the only title which passed from the crown was to the allotments and these to each of the allottees respectively, and not to the community to be held in common as the property of all. The outlying land remained in the crown subject, however, to use for pasturage and other purposes by the members of the community. That this last, however, constituted a title in no sense, but simply a permissive use at the pleasure of the crown, is pointed out in the Sandoval, Rio Arriba Company and Pena cases above referred to. The similarity between the present title papers and those in the Pena case impresses us as particularly noticeable. This being the nature of the Tome title papers we hold, with the contention of the appellees, that when Congress came to act upon this claim in 1858, it passed as the property of the United States to the town of Tome all of the land not previously allotted to settlers. This thus partook of the nature of an original grant to that town and to its successors, the present defendant corporation. The grant was burdened with no trust in favor of plaintiffs as the successor in title to certain of the original allottees, and the court below was therefore right in declining to impress upon the confirmation any such declaration of a trust. The judgment is affirmed.

[No. 1406. December 19, 1911.]

CITY OF ROSWELL, Appellee, v. EASTERN RAILWAY COMPANY OF NEW MEXICO, Appellant.

SYLLABUS (BY THE COURT).

1. By the eighteenth sub-section of section 2402, C. L. 1897, cities are granted the following power: "To have the right to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor within the limits of the city." Held, that Sec. 3, ordinance No. 213 of the City of Roswell, which provides that: "On and after the first day of June, 1910, it shall be unlawful

for any person or common carrier to knowingly bring intoxicating liquors from any city, town or village, or other place, within the Territory of New Mexico, into the City of Roswell," is an attempt to exercise a power neither expressly nor impliedly granted by the eighteenth sub-section of Sec. 2402, C. L. 1897, and therefore void.

Appeal from the District Court for Chaves County, before WILLIAM H. POPE, Chief Justice. Reversed.

R. E. TWITCHELL, J. M. O'BRIEN and H. L. WALDO for Appellant.

Conflict with Federal statute. 34 Stat. Large 584; Jung v. Myer, 11 N. M. 378; Territory v. Baca, 6 N. M. 420; in re Rahrer, 140 U. S. 556; Liesy v. Hardin, 135 U. S. 100; Brown v. Maryland, 12 Wheat. 419; Bowman v. C. & N. W. R. R. Co., 125 U. S. 465; McGregor v. Cont, 39 L. R. A. 484, Iowa; State v. Hickox, 64 Kas. 658.

In conflict with territorial statutes. C. L. 1897, secs. 3862, 3863, 3912, 3847, sub-sec. 11; 2042, sub-sec. 18; 2403; Dillon on Municipal Corporations, 2 ed. 253.

In conflict with common law. Bowman v. C. & N. W. R. R. Co., 126 U. S. 465; Brown v. Houston, 114 U. S. 622; Southern Express Co. v. State, 101 Ga. 670; Fears v. State, 102 Ga. 274; State v. Goss, 59 Vt. 256; State v. Campbell, 76 Iowa 122.

Contrary to public policy. 1 Dillon on Mun. Corp., 2 ed., sec. 263s, 263, 369, 376; Thomas v. Richmond, 12 Wall. 355; Canton v. Nist, 9 Ohio St. 439.

H. M. Dow for Appellee.

Police power. C. L. 1897, sec. 2402, sub-secs. 18, 36, 66; sec. 2403; Dillon on Mun. Corp., sec. 673; 23 Cyc. 68; Vinson v. Monticello, 734, Ind.; State v. Adamson, 14 Ind. 296; Schwuchow v. Chicago, 68 Ill. 444; Litch v. People, 75 Pac. 1079, Colo.; Woolen & Thornton on Intox. Liq., sec. 275.

Federal commerce acts do not supersede acts passed by states which are directed toward the health, morals, etc., of citizens although indirectly latter may seem in conflict with former. Austin v. Tennessee, 21 U. S. 132; Sherlock et al v. Alling, 93 U. S. 99; Railroad Co. v. Hudson, 91 U. S. 465; Patterson v. Kentucky, 97 U. S. 501; Smith v. Alabama, 124 U. S. 465.

Ordinance is not inconsistent with federal and territorial statutes. C. L. 1897, sec. 2402, sub-sec. 18; State v. Goss, 59 Am. Rep. 706, Vt.; Hanover v. Doane, 12 Wall. 342; Story on Contracts, sec. 642; Bancher v. Mansel, 47 Me. 58; Wesserbohr v. Boulier, 30 Amer. St. Rep. 344, Me.

Not contrary to public policy. Ex parte Simmons, 115 Pac. 380, Okla.; Elliott on Railroads, sec. 663; Boston etc. Co. v. Massachusetts, 97 U. S. 25; Railroad Co. v. Richmond, 96 U. S. 521.

OPINION OF THE COURT.

MECHEM, J.—The appellant was convicted of a violation of Section 3, Ordinance 213, of the City of Roswell, which reads as follows: "On and after the first day of June, 1910, it shall be unlawful for any person or common carrier to knowingly bring intoxicating liquors from any city, town or village, or other place, within the Territory of New Mexico, into the City of Roswell." The City of Roswell contends that the ordinance above set forth is a valid exercise of its powers under the eighteenth subsection of Section 2402, Compiled Laws of 1897, which grants to cities the following powers: "To have the right to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, within the limits of the city." The ordinance in question in other sections prohibits within the limits of the City of Roswell the sale, barter, giving away or otherwise furnishing, except as herein provided "liquors of various kinds. The soliciting or taking orders for or advertising the sale of intoxicating liquors," and the keep- of them "with intent to sell, give or barter the same," in violation of the ordinance is also forbidden. Physicians

are, however, allowed to prescribe and apothecaries to sell such liquors under regulations prescribed in the ordinance. It is obvious that the prohibition of Section 3 extends not merely to bringing of liquor into Roswell for purposes violative of the ordinance, but to bringing it for purposes not in violation of the ordinance and, indeed, for purposes authorized and provided for by the ordinance. How is any person to get liquor into Roswell for his own use or to sell as an apothecary, or how is an apothecary to fill the prescription of a physician without violating Section 3 of the ordinance? To be valid an ordinance must be "reasonable," not in "contravention of common right." Dillon on Mun. Corp., 5 ed., secs. 589-596. Section 3 of the ordinance in question cannot be held to meet that test, besides it is the settled law of this territory that municipal corporations "have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. Dillon on Municipal Corporations, secs. 89, 237, 5 ed., and cases cited. Ottawa v. Carey, 108 U. S. 110-121; Barnett v. Denison, 145 U. S. 135-139.

It will be seen from the mere reading of the statute above set forth that the power claimed by the appellee is not expressly granted. It remains to consider whether it is implied. The question, then, is: Is the power wholly to prohibit the bringing of intoxicating liquors into the City of Roswell necessary to carry into effect the power to prohibit the selling and giving away thereof? While it may be said that the absolute prohibition of bringing liquor into Roswell would materially aid the prohibition of its sale and giving away, yet it cannot be said that it is necessary in order to carry the power to prohibit the sale and giving away, into effect, in other words, it cannot be said that if the City of Roswell cannot wholly prohibit the introduction of liquor within its limits that it cannot prevent the sale and giving away thereof. Where a municipal corporation claims the right to exercise a power on the ground that it is implied because essential to the exercise

of a power expressly granted, it must show not that the power claimed is simply convenient, but that it is indispensible; that without it the power expressly granted is nugatory. Dillon on Municipal Corporations, 4 ed., sec. 89. It follows Section 3, of Ordinance 213, of the
1 City of Roswell is void because it is unreasonable; it is an attempt by the city to exercise a power which is neither expressly nor impliedly granted to it by the statute of this territory. As we hold the ordinance to be invalid to the extent indicated it would be useless for us to attempt to determine the rights of the defendant under an ordinance of some other description. Such a decision on our part would naturally be considered a dictum and would be wholly unprofitable. The judgment of the court below is, therefore, reversed.

[No. 1425. December 21, 1911.]

GEORGE A. DAVISSON, Plaintiff, ETTA OWENS, Defendant, v. CITIZENS' NATIONAL BANK, Defendant, Appellant.

SYLLABUS.

1. A decision in a prior appeal is the law of the case and upon a subsequent appeal nothing is before the court for revision but the proceedings subsequent to the mandate.

Appeal from the District Court for Chaves County, before WILLIAM H. POPE, Chief Justice. Affirmed.

WILLIAM C. REID and JAMES M. HERVEY for Appellant.

Duty of holder of escrow. 2 Page on Contracts, sec. 585; Davis v. Clark, 58 Kas. 100; Roberts v. Mullenix, 10 Kas. 22; Grove v. Jennings, 46 Kas. 366; 16 Cyc. 576, 584; 11 A. & E. Enc. 352; Humphrey v. Richmond etc. R. R. Co., 13 S. E. 985; Burlington R. R. Co. v. Palmer, 42 Iowa 222; Bodwell v. Webster, 113 Pick. 411; Hayton

v. Meeks, 14 S. W. 864, Ark.; Equity Gaslight Co. v. McKeige, 34 N. E. 898, N. Y.; Riggs v. Trees, 5 L. R. A. 696, Ind.; Hoyt v. McLagan, 87 Ia. 146.

A court has the power to overrule its decisions which were clearly erroneous. Borden v. N. P. R. R. Co., 154 U. S. 322; Kilbourn v. Thompson, 103 U. S. 168; Thaw v. Ritchie, 4 Mackey 384, D. C.; Hastings v. Foxworthy, 45 Neb. 676; Robbins v. Chicago City, 4 Wall. 657.

Statute of frauds. 29 A. & E. Enc. 807; Emerson v. Slater, 22 How. 42; Swain v. Seeman, 9 Wall. 254; Kirchner v. Laughlin, 4 N. M. 394; Hasbrouck v. Tappen, 15 Johns. 200; Hersley v. Savanstrom, 41 N. W. 1027; Athe v. Bartholomew, 33 N. W. 110; Abel v. Munson, 18 Mich. 305; Cook v. Bell, 18 Mich. 389; 29 A. & E. Enc. 824; 20 Cyc. 296; Warvelle on Vendors, sec. 419.

ED. S. GIBBANEY and W. A. DUNN for Appellees.

Matters of law determined upon a former appeal become the settled law of the case, are binding upon the court and the litigants, and cannot be reviewed on second appeal. Dye v. Crary, 13 N. M. 439; 3 Am. Dig., col. 2340; 2 Am. Dig. 732.

One wrongfully withholding property may be proceeded against by the owner, even if the latter be a stranger to the arrangement whereby the same was deposited or bailed. Wells v. Am. Exp. Co., 42 Am. Rep. 695. Wis.; Doty v. Hawkins, 25 Am. Dec. 459, N. H.; Clark v. Eureka County Bank, 123 Fed. 922.

STATEMENT OF FACTS.

This cause of action was before this court upon practically the same record and upon the former hearing the case was reversed with instructions to the lower court to reinstate the cause and proceed in accordance with the views therein expressed. 15 N. M. 680. Upon the second trial of the cause in the court below no new pleadings or amendments to the pleadings were made and no additional evidence was introduced. The court below, in accordance with the mandate of this court, made findings of fact and

conclusions of law and entered judgment for the appellees, from which judgment this appeal is prosecuted.

OPINION OF THE COURT.

ROBERTS, J.—Upon this second appeal we are limited to a consideration of but one question, viz, did the lower court reach its final decree in due pursuance of the previous opinion and mandate of this court? We find that it did. Appellant has presented, as a new proposition in this case, the point that neither the complaint of Davisson nor the cross-complaint of Mrs. Owens states facts sufficient to constitute a cause of action against the appellant bank, but we are precluded from a consideration of this proposition on this appeal. This question could have been raised upon the former appeal. It is the settled law in New Mexico, as well as in the Supreme Court of the United States, that a decision in a prior appeal is the
1 law of the case and that upon a subsequent appeal nothing is before the court for revision but the proceedings subsequent to the mandate. United States v. Camou, 184 U. S. 572; Barnett v. Barnett, 9 N. M. 205; Crary v. Field, 10 N. M. 257. This doctrine appears also to be supported by practically all of the states of the Union, with the possible exception of Missouri, Indiana and Nebraska. A very instructive note on this proposition is found in the Nebraska case of Hastings v. Foxworthy, 34 L .R. A. 321. The former decision of this case being the law of the case, whether right or wrong, this court is bound to adhere to it so far as this case is concerned, and the cause will, therefore, be affirmed.

[No. 1342. December 22, 1911.]

Ex Parte GEORGE E. PRIEST, MELVIN W. QUICK and CHARLES M. BENJAMIN, Relators, Appellants, v. BOARD OF TRUSTEES OF THE TOWN OF LAS VEGAS, Respondents, Appellees.

SYLLABUS (BY THE COURT).

1. Statutory provisions for the service of process upon unknown claimants by publication in actions to quiet title will be strictly construed.

2. If it be sought in such a case to bar the known confirmee of a grant such confirmee should be sued by name in the proceeding and not under the description of an unknown claimant.

3. The rule last stated applies notwithstanding the confirmee named is an unincorporated town, the latter being by the congressional confirmation recognized and designated as an entity capable of receiving the title.

Appeal from the District Court for San Miguel County, before WILLIAM J. MILLS, Chief Justice. Affirmed.

VEEDER & VEEDER for Appellants.

Mandamus is appropriate remedy. C. L. 1897, sec. 2716; Laws 1903, p. 73, sec. 7; Walkley v. City of Muscatine, 6 Wall. 481; La Grange v. State Treasurer, 24 Mich. 469.

A judgment on default is as conclusive against collateral attack as any other form of judgment. Ruppin v. McLachlin, 98 N. W. Rep. 153; 23 Cyc. 1077; Noble v. Union River Logging R. R., 147 U. S. 165; Hahn v. Kelly, 34 Cal. 391; Huling v. Kaw Valley Ry., 130 U. S. 559; High on Ex. Legal Rem., 2 ed., sec. 396; Mayor v. Lord, 9 Wall. 409; Supervisors v. U. S., 4 Wall. 435; Commissioners v. Aspinwall et al, 24 Howard 376; Supervisors v. Durant, 9 Wall. 415.

Mandamus proceeding is not a civil action. Duke, Mayor etc. v. Turner et al, 204 U. S. 623; Chapman v.

Douglas County, 107 U. S. 348; Chinn v. Trustees, 32 Ohio St. 236; Code, sec. 175; Laws 1907, p. 294; Laws 1899, p. 169; Laws 1903, p. 9; Laws 1905, p. 325; Laws 1907, p. 294; Conklin v. Cunningham, 7 N. M. 445; Leavenworth v. Leavenworth et al, 64 Pac. 66; Keasy et al v. Bricker et al, 60 Pa. 1; Sherman v. Langham, 42 S. W. 961; U. S. v. New Orleans, 98 U. S. 381.

CHARLES A. SPIESS and S. B. DAVIS, JR., for Appellees.

Means provided to determine validity of titles within ceded territory. Federal Acts of March 3, 1851, August 21, 1852, July 22, 1854, sec. 8; August 25, 1854.

Town grants. Grisar v. McDowell, 6 Wall. 363; Townsend v. Greeley, 5 Wall. 326; U. S. v. Sandoval, 167 U. S. 278; U. S. v. Santa Fe, 165 U. S. 675; San Francisco v. Canavan, 42 Calif. 541; San Francisco v. LeRoy, 138 U. S. 656; Monterey v. Jacks, 73 Pac. 436, affirmed 205 U. S. 360; Maese v. Herman, 183 U. S. 72; Hayes v. U. S., 170 U. S. 637; Board of Education v. Martin, 92 Cal. 209; Law 1903, chap. 47; Law 1909, chap. 103.

OPINION OF THE COURT.

POPE, C. J.—The appellants, Priest, Quick and Benjamin, brought proceedings in the district court of San Miguel county to require the Board of Trustees of the Town of Las Vegas to execute to them a deed for a tract of land forming a part of what is known as the Las Vegas Land Grant. The petition is entitled one for mandamus, but it partakes in form rather of a petition to the court for an order on the trustees (who under the law are appointees of the court) to execute a deed. The petition sets forth as the basis of the claim a certain decree rendered in the district court of San Miguel county, on September 15, 1894, quieting plaintiffs' title to the tract in question. There were pleadings denying the force of this adjudication as binding on the defendant trustees, and there was also a cross complaint praying the quieting of defendant's title as against this alleged decree. Upon full hearing the

court granted a decree dismissing plaintiff's petition. Some point is made upon the failure of the trial court to sustain a motion to strike out the cross complaint, because having no place as a pleading defensive to mandamus. But assuming the proceedings to be mandamus,—a matter as we have above noted not entirely clear—there was no prejudice to plaintiffs for the court below granted no relief upon the cross complaint, the judgment entered being one merely denying the relief prayed, and, as we have seen, dismissing the petition. The gist of the whole case, in our judgment, lies in the inquiry as to whether the decree of 1894 was binding against defendants. In this view of the matter much testimony that was produced at the trial and much that was argued in this court becomes immaterial. For instance, a large part of the argument here was to demonstrate, contrary to what was held in the decree of 1894, that the statute of limitations could not, at the date of those proceedings run against the Las Vegas grant and in favor of plaintiffs, and that the title decreed in 1894 to plaintiffs proceeded upon a false premise, in that it quieted title upon the statute of limitations when the status of the grant title was such that no rights by limitation could accrue. If, however, the court had jurisdiction, as against defendants to render the decree of 1894, all the findings upon which that decree proceeds are likewise conclusive against it and it avails nothing to inquire, as did the trial court, into whether such findings were as a matter of fact properly made. The whole question, therefore, is whether the proceedings of 1894 bind the present defendants. The suit there filed was against certain named individuals (not here involved) and "all the unknown claimants of interest in the premises and lands hereinafter described adverse to complainants." It alleges plaintiffs to be the owners in fee simple of the premises here involved by virtue of adverse possession under color of title for the statutory period preceding the bringing of the suit and it prays the quieting of title in plaintiffs. There was the following allegation in the complaint: "That the said tract of land lies within the exterior boundaries of that certain grant of land made by the government of

Mexico in the year A. D., 1835, to Juan de Dios Maese and others, and known as the Las Vegas Grant, the said grant, as your orators are informed and believe, being made by the Mexican government to the said Juan de Dios Maese and others for the use and benefit of the inhabitants and settlers of the town of Las Vegas. That the said grant of land made by the Mexican government to Juan de Dios Maese and others, was known in the archives of the Surveyor General of New Mexico, as private land claim number twenty (20), and as such was, on July 21, 1860, duly confirmed by Act of Congress of the United States to the Town of Las Vegas, and thereby became segregated from the public domain of the United States." The suit was brought under the provisions of statute now appearing as Sections 4010, 4011, of the Compiled Laws of 1897, reading as follows: "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto. The plaintiff must file his bill of complaint in the district court, setting forth the nature and extent of his estate, and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the plaintiff, and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff, and plaintiff's title thereto be forever quieted and set at rest. Any or all persons whom the plaintiff alleges in his bill of complaint, he is informed and believes make claim adverse to the estate of plaintiff, the unknown heirs of any deceased person whom plaintiff alleges in his bill of complaint, in his life-time made claim adverse to the estate of plaintiff, and all unknown persons who may claim any interest or title adverse to plaintiff, may be made parties defendants to said bill of complaint, by their names, as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased person, and said unknown person who may claim

any interest or title adverse to plaintiff by the name and style of unknown claimants of interests in the premises adverse to the plaintiff and service of process on, and notice of said suit against defendants, shall be made in the same manner as now provided by law in other civil suits." The service by publication was under what now appears as C. L. 2964, which is as follows: "When any plaintiff or complainant, his agent or attorney, in any civil cause pending, or hereafter commenced in any court of record in this territory, shall file in the office of the clerk of said court, a sworn petition, bill of complaint, or affidavit, showing that the defendant, or any one or more of them in said cause, resides, or has gone out of the territory, has concealed himself within it, has avoided service of process on him, or is in any other manner so situated that process cannot be served upon him or them, or that his or their names, or place of residence is unknown, or that his or their whereabouts cannot be discovered; in such case it shall be the duty of the said clerk to publish a notice of the pendency of said cause, to said defendant or defendants, in some newspaper published in the county where the cause may be pending." The regularity of the service is not here questioned. Default was adjudged and the cause went to final decree on September 15, 1894. The decree declares that plaintiff, by reason of adverse possession under the statute, is the owner in fee simple of the premises and his title is "confirmed and established in the complainants and each of them against any and all and every adverse claim of the said defendants or any of them or of any person whatsoever and the said defendants are and each of them hereby is forever barred and estopped from having, claiming or asserting any right, title or interest or claim whatsoever in and to the said tract and parcel of land and real estate, or any portion thereof, adverse to the said complainants or any of them, and the title of the said complainants and each of them in and to the above-described tract of land and real estate, and each and every part thereof, is hereby forever quieted and set at rest."

Did this decree bind the present defendants, the Board of Trustees of the Town of Las Vegas? The Board

was not *eo nomine* a party, nor, indeed, was it in existence in 1894. Any effect of the decree upon it must, therefore, result from its holding under some party to the cause. That it does not hold under any of the individuals named is conceded. That it is not affected by the futile provision of the decree quieting title against "any person whatsoever" is evident. The only remaining alternative is that it is bound because of the fact that "all the unknown claimants of interests in the premises adverse to complainants, were cited in the publication and were decreed the publication and were decreed against in the court's disposition of the case and that this was a binding adjudication against defendant under Compiled Laws, 4011, above quoted. But, in 1894, were the owners of the Las Vegas Grant, whom defendant now represents, unknown owners? The complainants certainly knew the exact status of the matter for their complaint, as we have seen, in terms alleged that the premises were a part of the Las Vegas Grant "on June 21, 1860, duly confirmed by Act of Congress of the United States to the Town of Las Vegas."

The complainants thus knew that the Town of Las Vegas was the confirmee of the grant and that if complainant's title had, by adverse possession, been wrested from any one it was from such confirmee. Knowing this, we are of opinion that it was their duty to have made the Town of Las Vegas a party, and that the term
2 "unknown owners" could not be utilized to divest title from what the Act of Congress, no less than plaintiffs' conceded knowledge, told them was the true ownership of the property. Statutes providing for constructive service are subject to great abuse. They are, of course, necessary, since without them titles could never be quieted or proceedings in rem maintained against non-resident or truly unknown parties. But it is a matter of judicial knowledge that a published summons in the vast majority of cases fails to reach those to whom addressed and that property is taken with but a theoretical opportunity for the hearing which is an essential of due process of law. Considera-

tions such as these last named lead the courts to in-
1 sist upon a strict construction of such statutes and to hold that where the real owner may be brought into court by name his property may not be taken by an advertisement against unknown owners. Where, as in this case, the locus of the title is definitely declared of record and such is confessedly known to the complainant, it is but an exaction of good faith that the holder of such title should be summoned by name in order that he may appear and defend. To exact less is to open the doors wide to insidious attacks upon property rights, and, indeed, to ignore the statute, which in terms provides, (C. L., sec. 4011) that persons claiming interests "may be made parties defendant by their names, as near as the same can be ascertained." The cases upon this particular subject are not numerous, but among these Ware v. Easton, 46 Minn. 180, is very close to the point. In that case it is said: "It is claimed that the summons was defective in not naming Homan, the patentee of the land, as one of the defendants; and we think this objection well taken. In so far as the records disclosed, he was the owner of the government title. The defendant was bound to take notice that Homan was the patentee of the land, as well from the government records as those of the county. The important provisions of this statute, as a means of notice to the unknown claimants, are the designation of the names of interested parties who are known and those who appear such by the records, together with the publication of the notice of *lis pendens* containing a description of the land, and the record of the same. If the land appears to have been entered by Homan, and his grantees, if any, are unknown and not disclosed by the records, the most effectual notice to those claiming under him would be to name him, in connection with the general designation of such unknown claimants. The statute must be strictly construed and followed, and it is enough that it requires such parties to be specially named. If any one appearing by the record to be the owner of the patent title under the original owner is designated, of course it would not be necessary to name any preceding owner under whom he claimed; but he who appears to be

the owner of record must be named, unless the actual holder of the title can be discovered and named; that is to say, if it be desired to bind unknown parties claiming some right or interest derived from or under the original patentee of the United States. The same rule would apply, *mutatis mutandis,* to parties claiming a separate title under the state through tax-sales. The statute was not complied with in the case under consideration here. The notice was insufficient to bing Bragg, the owner of the patent title at that time, and the judgment is void as to him and those claiming under him."

It is said by plaintiffs, however, that the designation of the ownership of the Las Vegas Grant as "unknown claimants" was justified upon the grounds that the Town of Las Vegas as used in the act of confirmation, was a mere aggregation of people without corporate organization, and that the suit became thus one practically against the individuals residing on the grant and that as to these the designation of unknown owners was necessary and proper.

It is further said that there was no officer upon whom
3 process might be served. We are not, however, impressed with these contentions. Much that is here said upon the subject was ineffectually urged to the Supreme Court of the United States in Maese v. Hermann, 183 U. S. 572, where it was contended that the Town of Las Vegas could not take the patent to the grant, because it was without legal or corporate existence, a nonentity. The court held, however, that "the town and its inhabitants were certainly substantial entities in fact and were recognized by Congress as having rights and directed such rights to be authenticated by a patent of the United States" and patent issued accordingly. To the claim that there was no officer of the town upon whom process might be served the obvious answer exists, that under C. L. 2964, then in force, service by publication could be made since in that event the defendant "was so situated that process could not otherwise be served upon it." The judgment is affirmed.

[No. 1358. December 22, 1911.]

TERRITORY OF NEW MEXICO, Appellee, v. MALCOM TRAPP, Appellant.

SYLLABUS.

1. Appellant cannot be heard to complain of error invited by himself.

2. A verdict will not be set aside on appeal when it is supported by substantial evidence.

3. A citizen has a right to go, if requested, with a constable to make an arrest.

4. Five forms of verdict as to manslaughter submitted by court to jury examined and found correct.

5. Alleged threats of deceased properly excluded as at that time no evidence had been presented from which the attitude and conduct of the deceased was in doubt.

6. Alleged conversation of deceased with one of the defendants properly excluded as antagonizing the rule against showing specific acts of violence and requiring proof of general reputation.

7. Evidence properly excluded because of irrelevance.

8. Requested instruction faulty because it entirely omitted the fundamental requirements that the circumstances must be viewed by the jury as they reasonably appeared to the defendants.

9. Jury not misdirected because of the omission in the instruction of the negative words "without malice," as it in no way decreased the amount of proof required to convict, but was an omission in defendant's favor and of which he cannot complain.

10. Requested instruction not correct statement of law, as it was not necessary to verdict, for defendant to have provoked the quarrel in which the homicide occurred.

11. No different and proper instruction more fully covering the law of self defense being requested, there is no error

in the given instruction objected to, which as far as it went was correct.

12. Searches and seizures provided against in the Constitutional guarantee are those of the government or the states under state constitutions and are not the unlawful acts of individuals.

13. It is not true as a matter of law that a person may resist illegal arrest to the extent of taking life in the absence of an attempt on the part of the person killed to take life or to do great bodily harm.

Appeal from the District Court for Lincoln County, before M. C. MECHEM, Associate Justice. Affirmed.

W. H. H. LLEWELLYN, E. R. WRIGHT, GATEWOOD & GRAVES for Appellant.

Homicide statutes: Laws 1907, chap. 36, sec. 2; C. L. 1897, secs. 1069, 1071.

Resisting unlawful arrest. State v. Harrod, 102 Mo. 590; State v. Harper, 149 Mo. 514; Burke v. Com., 7 Ky. L. Rep. 869; Karr v. State, 106 Ala. 1; Pratt v. State, 75 Ark. 350; State v. Westfall, 49 Ia. 328; Chittenden v. Com., (Ky.) 9 S. W. 386; State v. Brittan, 89 N. C. 481; Sullivan v. Com., 13 Ky. L. R. 869; Foster v. State, 102 Tenn. 33; Stanley v. Com., 86 Ky. 440; Campbell v. Com., 88 Ky. 402; Carroll v. State, 23 Ala. 28; Storey v. State, 71 Ala. 329; Carpenter v. State, 62 Ark. 286; Mitchell v. State, 43 Fla. 188; Richard v. State, 42 Fla. 528; State v. Thompson, 9 Ia. 188; State v. Kennely, 20 Iowa 569; Burton v. Com., 23 Ky. L. Rep. 1915; State v. Conally, 3 Ore. 69; Stoneham v. Commonwealth, 86 Va. 523; United States v. Outerbridge, 5 Sawy. 620; United States v. Wiltberger, 3 Wash. C. C. 515; Parrish v. Com., 84 Va. 1; State v. Dugan, Houst. Crim. Rep. (Del.) 563; State v. Rutherford, 8 N. C. 457; Shorter v. People, 2 N. Y. 193; State v. Harris, 46 N. C. 190; People v. Walworth,

4 N. Y. Crim. Rep. 355; Jones v. State, 76 Ala. 8; Brinkley v. State, 89 Ala. 34; People v. Newcomer, 118 Cal. 263; Haynes v. State, 17 Ga. 465; State v. Middleham, 62 Ia. 150; Bledsoe v. Com., 9 Ky. L. Rep. 1002; Tingle v. Com., 11 Ky. L. Rep. 224; Wright v. Com., 85 Ky. 123; Pond v. People, 8 Mich. 150; State v. Taylor, 143 Mo. 150; Willis v. State, 43 Neb. 102; State v. Harman, 78 N. C. 515; Estep v. Com., 86 Ky. 39; Hurd v. People, 25 Mich. 405; People v. Lilly, 38 Mich. 270; Davison v. People, 90 Ill. 221; State v. Patterson, 45 Vt. 308; Semayne's Case, 5 Coke 91a; Meade's Case, 1 Lewin, C. C. 184; Richardson v. State, 7 Tex. App. 486; Weaver v. State, 19 Tex. App. 547; Stoneman v. Com., 25 Gratt 887; Jones v. State, 26 Tex. App. 454; Ross v. State, 10 Tex. Ct. App. 455; People v. Hubbard, 24 Wend. (N. Y.) 369; Curtis v. Hubbard, 1 Hill (N. Y.) 336; Pinder v. State, 27 Fla. 370; Cortez v. State, 69 S. W. 536; People v. Fitchpatrick, 39 Pac. 605; Wharton on Homicide, 3 ed., sec. 409; Com. v. Crotty, 10 Allen (Mass.) 403; Glover v. State, 33 Tex. Cr. App. 224.

Uncommunicated threats. State v. Foster, 49 S. W. 747; State v. Felker, 71 Pac. 668; State v. Hennessy, 90 Pac. 221; Wood v. State, 29 So. R. 557; King v. State, 19 S. W. 110; Wiggins v. People, 93 U. S. 465; Wallace v. United States, 162 U. S. 465; Holler v. State, 37 Ind. 57; State v. Foster, 102 Tenn. 33; State v. Felker, 71 Pac. 668, Mont.; State v. Hennessey, 90 Pac. 221, Nev.; Wood v. State, 29 So. R. 557; King v. State, 19 S. W. 110.

Jury and court may draw proper and logical conclusions from the facts proven. Union Bank v. Middlebrook, 33 Conn. 100; Patterson v. McCausland, 3 Bland ch. 71, Md.; Frost v. Brown, 2 Bay. 133, S. C.; O'Garrow v. Eisenlower, 38 N. Y. 298; Moore v. Hopkins, 23 Pac. 319, Cal.; Scott v. McNeil, 154 U. S. 34.

A verdict should be set aside and a new trial granted where there is no substantial evidence to support it. Territory v. Sais, 15 N. M. 171; 2 Standard Dict. 1793, substantial.

Prejudicial remark of court. Copeney v. State, 10 Tex. Ct. App. 473; Horne v. State, 37 Ga. 80; Hawkins v. U. S., 116 Fed. 569; Lycan v. People, 107 Ill. 4278; State of Nevada v. Frazer, 14 Nev. 214; People v. Kindelberger, 100 Cal. 367; Griffin v. State, 90 Ala. 596; Cunningham v. People, 195 Illinois 550; Marzen v. People, 173 Ill. 43; State v. Pugsley, 75 Iowa 748; 12 Cyc. L. & P. 538-541; 8 Enc. P. & P. 272-3.

Court misdirected jury as to verdict. Territory v. McFarlane, 7 N. M. 421; 22 Enc. P. & P. 894; Morrill v. Linderman, 86 Ill. App. 75; Lewin v. Barry, 63 Pac. 121, Colo. App.; People v. Jenkins, 56 Ill. 4.

Persons acting in defense of another are on the same plane as those acting in defense of themselves. State v. Hennesy, 90 Pac. 221, Nev.; 4 Elliott on Evidence, sec. 3041s; State v. Felker, 27 Mont. 451; People v. Curtis, 52 Mich. 616; Wpod v. State, 128 Ala. 27; State v. Austin, 104 La. 409; Foster v. State, 102 Tenn. 33.

Jury should have been instructed to view the situation from the standpoint of defendants. Territory v. Gonzales, 11 N. M. 301; Hickory v. U. S., 151 U. S. 303; Allen v. U. S., 150 U. S. 551; Wharton on Homicide, 3 ed. 455; People v. Lennon, 71 Mich. 298; Amos v. Com., 16 Ky. L. R. 358; Rowsey v. Com., 116 Ky. 617; Meredith v. Com., 18 B. Mon. 49; Haney v. Com., 5 Ky. L. R. 203; Com. v. Carey, 2 Brewst. 404, Pa.; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481; Com. v. Drum, 58 Pa. 9; Brownlee v. State, (Tex. Crim. App.) 87 S. W. 1153; Bell v. State, 20 Tex. App. 445; Swain v. State, (Tex. Crim. App.) 86 S. W. 335; Watts v. Territory, 1 Wash. Terr. 409; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; Rex. v. Scully, 1 Car & P. 319; Levett's Case, Cro. Car. 538; Stacy v. State, (Tex. Crim. App.) 86 S. W. 327; Williford v. State, 38 Tex. Crim. Rep. 393; Sargent v. State, 35 Tex. Crim. Rep. 325; Blair v. State, 69 Ark. 558; Early v. Com., 24 Ky. L. Rep. 1181; Oakley v. Com., 10 Ky. L. Rep. 885; Adkins v. Com., 26 Ky. L. Rep. 496; Pennington v. Com., 24 Ky. L. Rep. 321; Adams v. State, (Tex. Crim. App.) 84 S. W. 231; Beard v. State, (Tex. Crim. App.) 81 S. W. 33; Allen v. United

States, 150 U. S. 551; Hickory v. United States, 151 U. S. 303; Martin v. State, 17 Ohio C. C. 406; Granger v. State, 5 Yerg. 459.

Voluntary manslaughter. C. L. 1897, sec. 2992; Aguilar v. Territory, 8 N. M. 496; Territory v. Friday, 8 N. M. 204; Territory v. Pino, 11 N. M. 559; Laws 1907, 42; Wharton on Homicide, 3 ed. 6; Cl. & Mar. Law of Crimes, 2 ed. 350; Wharton Am. Crim. Law, sec. 931.

Self defense. Territory v. Gonzales, 11 N. M. 301; Adams v. N. Y., 192 U. S. 585; Cortez v. State, 69 S. W. 536; Ross v. State, 10 Tex. App.

FRANK W. CLANCY, Attorney General, for Appellee.

Self defense. Territory v. Gonzales, 11 N. M. 326. Evidence was sufficient to justify verdict.

Reasonable doubt. Territory v. Gonzales, 11 N. M. 326; Sackett, sec. 3023; Pinkerton v. Ledoux, 3 N. M. 410; Territory v. Garcia, 12 N. M. 327; U. S. v. Densmore, 12 N. M. 106; Territory v. Livingston, 13 N. M. 327; Territory v. O'Donnell, 4 N. M. 210; U. S. v. Duran de Amador, 6 N. M. 178; Express Co. v. Kountze, 8 Wall. 353; Humes v. U. S., 170 U. S 211; Isaacs v. U. S., 159 U. S. 490.

Unreasonable search or seizure. Bacon v. U. S., 97 Fed. 40; Gindrat v. People, 138 Ill. 103; Shield v. State, 104 Ala. 35; Com. v. Dana, 2 Metc. (Mass.) 329; State v. Flynn, 36 N. H. 64; 1 Greenl. Ev. 254a.

If a man makes resistance to his being arrested, he is guilty of murder if he kills an officer who has lawful authority to arrest, and is guilty of manslaughter if he kills an officer who has not such lawful authority. 1 Bishop Criminal Law, sec. 868.

OPINION OF THE COURT.

PARKER, J.—The appellant was indicted jointly with his father and brother for the murder of one Webb J. McAdams, the court excluding murder from the consideration of the jury, and submitting the sole question of the guilt or innocence of the defendants of voluntary

manslaughter. It appears that the deceased was a constable and, with one Davidson, whom he had asked to accompany him, went to the home of the Trapps for the ostensible purpose of arresting the elder Trapp. The court held that the warrant in the possession of the deceased was illegal and conferred no rights on the deceased and so instructed the jury. Upon arrival at the Trapp home the deceased attempted to arrest the elder Trapp under the illegal warrant, and thereupon, a mortal combat ensued in which the deceased was shot and killed by the appellant. The account of the actual difficulty differs, naturally, as given by the prosecution and the defense. The prosecution showed that as soon as the deceased attempted to arrest the elder Trapp, appellant presented a six-shooter at the side of his father and fired on deceased, wounding him in the abdomen, and instantly fired on deceased again after he had fallen from the effect of the first shot. The defense showed that the deceased and said Davidson attacked the elder Trapp and fired at him and that appellant, in defense of his father, shot the deceased. The father and brother were acquitted and appellant convicted of voluntary manslaughter.

1. Appellant complains that there is no evidence to support the verdict. In the first place it is to be observed that appellant in his 11th and 17th requested instructions expressly asked the court to submit to the jury the question of the guilt or innocence of appellant and the other defendants of manslaughter. No motion was made at the close of the Territory's case for an instruction by the appellant, nor was any made at any time during the trial. Under such circumstances the error, if error it was, was invited by appellant and he cannot be heard to
1 complain here. But there was no error in submitting the issue to the jury. Following, as correct, the rule laid down in Territory v. Sais, 15 N. M. 171, 103 Pac. 980, cited by appellant, that a verdict will not be set
2 aside when it is supported by substantial evidence, we can see no force in the argument of appellant. He proceeds to argue that the circumstances attending the killing, previous threats of deceased, the circumstances of

the attempted illegal arrest, the preponderance, in number at least, of the witnesses for the defense over the one for the prosecution, as to the actual killing, so overwhelmed the prosecution as to render it improper to allow the verdict to stand. All this was eminently proper to present by way of argument to the jury which tried the case, but it has no place here. That there was substantial evidence upon which to base the verdict seems apparent from the testimony of Davidson who accompanied the deceased when he attempted to make the arrest and when he was killed.

2. Appellant complains of the refusal of the court to withdraw from the jury an alleged harmful remark made by the court in ruling on the admission of evidence. It appears that the witness, Davidson, who accompanied deceased, claimed to be a deputy sheriff and, upon cross examination, he was asked whether he had exhibited with his testimony at the preliminary examination of defendants his commission as deputy sheriff. Objection was interposed by counsel for the territory on the ground that the record of the preliminary examination was the best evidence. The objection was overruled and the court then said: "He had a right to be there if McAdams told him to come. That is the view of the court. It is immaterial." It is apparent that the court was impressing upon counsel that Davidson's presence with the deceased at the Trapp home was equally lawful so far as he was concerned whether he was a deputy sheriff or was merely a citizen who had been summoned by an admitted officer to assist in arresting a person, as was shown by the undisputed evidence. Counsel for appellant complains that this statement conveyed to the jury the information that in the opinion of the court the deceased and the witness Davidson were rightfully at the Trapp residence. We do not so construe the remark. The remark was merely a general declaration of the law to the effect that a citizen has a right to go, if requested, with a constable to make an
3 arrest, and referred to no opinion of the court on the facts. When the court came to apply the law to the facts in the case he gave his 14th instruction in which the jury was specifically directed that the alleged warrant was

illegal and void and conferred no right on deceased or any one else to go upon the premises of the Trapps for any purpose.

3. Appellant complains of the alleged misdirection of the jury in submitting forms of verdict. The court submitted five forms, as follows: 1. Guilty as to all defendants; 2. Guilty as to appellant and father and not guilty as to brother; 3. Guilty as to appellant and brother and not guilty as to father; 4. Guilty as to appellant and not guilty as to father and brother; 5. Not guilty as to all defendants. Appellant contends that proper instructions required forms as follows: 1. Acquittal of appellant and conviction of father and brother; 2. Acquittal of appellant and father and conviction of brother; 3. Acquittal of appellant and brother and conviction of father; 4. Acquittal of all three. He argues that appellant was denied the right of acquittal separately from the others. But counsel overlooks the controlling fact that appellant was the 4 person who committed the actual homicide. Under the facts the father and brother could not be convicted and the appellant acquitted. If the appellant was to be acquitted all of the defendants must necessarily be acquitted. There is, therefore, no merit in the contention.

4. Appellant complains of the exclusion of the testimony of two witnesses to alleged threats by deceased. The witness Thompson testified to a conversation with the deceased in which he told that "he (McAdams) was going to arrest Trapp and take Cleve Hibler along and get Trapp and him (Hibler) into a fight and kill one another." This was taken from the jury over the objection of the appellant. The witness, Jump, testified that deceased told him, at the time of service of process in an action by the elder Trapp against the deceased, that he, the deceased, would have the elder Trapp in the Lincoln jail inside of twenty-four hours. This testimony was stricken out over the objection of the appellant. Neither of these alleged threats were communicated to any of the Trapps. Whether either of these statements were of such a nature, especially the latter, as to be admissible at all as threats is extremely doubtful. They were offered as tending to

show the probability of the deceased having begun the difficulty. At that stage of the trial no evidence had been offered by the defense as to the circumstances of the killing, and the prosecution had shown by an eye witness that appellant was the aggressor and that deceased had committed no overt act of hostility. Under such circumstances the statements were properly excluded for this,
5 if for no other reason, there having been at this time no evidence presented from which the attitude and conduct of the deceased was in doubt. 1 Wig. Ev., secs. 110, 111; 6 Ency. Ev., p. 789, et seq.

5. Appellant complains of the exclusion by the court of an alleged conversation between the elder Trapp and the deceased, in which the deceased told the witness of different difficulties he had had, and that he had assaulted other men and had had different fights, and bragged about being a fighter and a shooter. This conversation was not communicated to the appellant. If the evidence was offered to show the violent character of the deceased as reflecting on the view appellant took of the appearance at the time of the homicide it is perfectly apparent that the fact must, in order to be relevant, be known to the person who acted. 2 Bish. New Cr. Proc., sec. 611. If the evidence was offered as reflecting on the question of who began the difficulty, it antagonized the well recognized rule
6 against showing specific acts of violence and requiring proof of general reputation. 2 Bish. New Cr. Proc., sec. 617.

6. Appellant complains of the exclusion by the court of evidence by the brother concerning a visit of the deceased with another man to the Trapp residence a short time prior to the homicide. This was evidently offered in connection with a previous alleged threat made shortly before. The court did not take from the jury the fact of the visit, but merely instructed them not to consider what the deceased and his companion did and said while there. The exact ground for the court's ruling does not appear either from the motion to strike out the testimony or from the court's ruling. What the parties said and did was of an

entirely peaceable character and we assume that, there-
7 fore, the court excluded the same, because irrelevant and showing nothing in the nature of hostility or threats. In this it was correct.

7. Appellant complains of the court's refusal to give defendant's 10th requested instruction. The instruction relates to the duty of the jury to view the circumstances from the standpoint of the person who acted upon them, as nearly as they could in view of the evidence. The instruction requested is as follows: "You are further instructed that in considering the question of the guilt or innocence of the defendants, and of each of them, you should view the facts and circumstances of the case as nearly as you can from their respective standpoints and put yourselves as nearly as you may in their respective places, and see and consider the situation as in your judgment it must at the time have appeared to them; and if upon so doing, you cannot say from all the evidence before you that you are convinced beyond a reasonable doubt of the guilt of some one or more of the defendants, then you should find him or them of whose guilt you are not so convinced, not guilty." It will thus appear that the request was faulty in that it entirely omits the fundamental requirements that the circumstances
8 must be viewed by the jury as they reasonably appeared to the defendants. This doctrine is sometimes otherwise expressed to the effect that the defendant may act upon appearances if he honestly and without fault or carelessness believes the facts to exist. 1 Bish. New Cr. Law, sec. 305; 2 Bish. New Cr. Law, sec. 645. But in all, or a great many, of the cases and text books the element of reasonableness of the belief of the defendant in the existence of danger is required. See Brickwood's Sackett Ins., secs. 3101-3108. The requested instruction was therefore properly refused. The Court instructed correctly on this point in its 11th instruction and inserted the above requirement. This instruction did not specifically direct the jury to place itself in the position of defendants, but no proper request was made for such instruction, as we have seen. Under such circumstances appellant cannot

be heard to complain. Territory v. Gonzales, 11 N. M. 301, 326.

8. Appellant complains of the refusal of the court to give the 11th requested instruction in which voluntary manslaughter is defined in the terms of the statute. The statute is as follows: "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds . 1st. Voluntary: Upon a sudden quarrel or in the heat of passion. * * *" Laws 1907, p. 42. As before seen, the court eliminated all consideration of the question of the guilt of the defendants of murder, and submitted the sole question of guilt or innocence of voluntary manslaughter. In the court's instruction he omitted all reference to malice and submitted the sole question as to the unlawful killing upon a sudden quarrel or in the heat of passion. The confusion in the mind of counsel arises out of the negative form of the words "without malice" used in the statute. He argues from the narrow ground that the crime not being defined in the exact words of the statute, there was a misdirection of the jury. But it is easily seen that the argument is faulty. This is not a case of requiring less of a jury to convict than the law requires, by means of the omission of some essential element of the crime required by the law to be present. It is rather a case of requiring more of the jury by the court's instructions, in order to convict, than the law requires. The omission of the negative words
9 "without malice" in no way decreased the amount of proof required to convict, but, on the other hand, it was an omission in appellant's favor and of which he cannot complain.

9. Appellant complains of the refusal of his 12th requested instruction, as follows: "You are further instructed that before you can find the defendant, Malcom Trapp, guilty of any offense whatever under the indictment in this case, you must first satisfy your minds from the evidence beyond all reasonable doubt that he provoked the difficulty and made the first assault or that he and his father, said John C. Trapp, or he and his brother, John Trapp, or he and both of them acting together, brought on said difficulty and made said first assault, or that his said father or

brother or both of them acting together, while he was present aiding, abetting, encouraging or counselling one or both of them, provoked said difficulty and made said first assault. And unless you so find from the evidence beyond all reasonable doubt, you will acquit Malcom Trapp."

It is apparent that this instruction is not a correct
10 statement of the law. It is not necessary for defendants to have provoked the quarrel in which the homicide occurred. It is usual, if not almost universal, for the provocation to come from the person killed. In fact it is hardly possible to imagine a case where a defendant could provoke a quarrel and then, by reason of his own quarrel, be so overcome by heat of passion as to be excusable from the charge of murder in case he kills his antagonist.

10. It is a sufficient answer to appellant's objection to the court's 12th instruction on the law of self-defense to say that no different and proper instruction more fully
11 covering the subject was requested. Territory v. Gonzales, 11 N. M. 301, 326. The instruction, so far as it went, was correct.

11. Appellant complains of the court's refusal to give his 15th requested instruction to the effect that if the deceased and the witness Davidson went to the Trapp house without a legal warrant and attempted to seize or search for the elder Trapp, it was a violation of the Trapps' constitutional guarantee against unlawful searches or seizures. The searches and seizures provided against are those of the
12 government or the states under state constitutions, and are not the unlawful acts of individuals. Bacon v. U. S., 97 Fed. 40.

12. Appellant complains of the court's refusal to give his 19th instruction, as follows: "You are further instructed that if you find from the evidence that the place where said homicide occurred was the property of the defendant, John C. Trapp, and lawfully occupied by the defendant at the time it occurred, and fail to find from the evidence beyond a reasonable doubt that the deceased and Clay Davidson or either of them at the time of said homicide had lawful right or leave to enter upon said premises or go into said house, and further find from the evidence that they

went upon said premises and to said home armed with deadly weapons and without authority of law and for what defendants believed and had reason to believe to be an unlawful purpose, then and in that event the defendants and each of them had lawful right to defend said home and premises and themselves against such unlawful aggression, meeting force with force proportioned to the force opposed to them and sufficient lawfully to protect said home and premises in themselves, even to the extent of taking life if necessary for said purpose; and if you further find from the evidence that said Webb J. McAdams received said fatal wound under such circumstances, then and in that event you should acquit the defendants and each of them, although you may believe from the evidence that one or more of the defendants fired the first shot." This instruction is palpably faulty. The unlawful purpose referred to, in the light of the evidence, was the illegal arrest of the elder Trapp. It is not true as a matter of law that a person **13** may resist illegal arrest to the extent of taking life, in the absence of an attempt on the part of the person killed to take life or do great bodily harm. 1 Bish. New Cr. Law 868. If, on the other hand, such an attempt is made by the party seeking to make the arrest, a different principle applies, and the right of self-defense intervenes, a principle fully submitted to the jury by the court in its instructions.

Appellant's 20th requested instruction was likewise properly refused. The complaint of the giving of the court's 7th instruction has been heretofore disposed of. There being no error in the record the judgment of the lower court will be affirmed, and it is so ordered.

Associate Justice Wright, having been of counsel, did not participate in this opinion. Associate Justices Abbott and Roberts dissent.

[Nos. 1412-1417. December 22, 1911.]

THE TERRITORY OF NEW MEXICO, Ex Rel. W. R. WHITE, Appellant, v. J. G. RIGGLE, Probate Clerk and Ex-Officio Recorder of the County of Lincoln, N. M., Appellee.

THE TERRITORY OF NEW MEXICO Ex Rel. W. R. WHITE, Appellant, v. CHARLES A. STEVENS, Sheriff of the County of Lincoln, N. M., Appellee.

THE TERRITORY OF NEW MEXICO Ex Rel. W. R. WHITE, Appellant, v. T. W. WATSON, Treasurer and Ex-Officio Collector of the County of Lincoln, N. M., Appellee.

THE TERRITORY OF NEW MEXICO, Appellant, v. J. G. RIGGLE, Probate Clerk and Ex-Officio Recorder of the County of Lincoln, N. M., Appellee.

TERRITORY OF NEW MEXICO, Appellant, v. CHARLES STEVENS, Sheriff of the County of Lincoln, N. M., Appellee.

THE TERRITORY OF NEW MEXICO, Appellant, v. T. W. WATSON, Treasurer and Ex-Officio Collector, Lincoln County, N. M., Appellee.

SYLLABUS.

1. Repeals by implication are not favored and where two statutes can be construed together and preserve the objects designed to be obtained by each, they should be so construed.

2. In cases where there is a removal, or attempted removal, of a county seat, a time is fixed when the offices of the old county seat shall be transferred to the new and such offices shall not be removed until a court house and jail shall be completed at the new county seat.

Appeal from the District Court for Lincoln County, before E. R. WRIGHT, Associate Justice. Affirmed.

W. H. H. LLEWELLYN, CHARLES A. SPIESS and E. L. MEDLER for Appellant.

Mandamus was the proper remedy. C. L. 1897, secs. 632, 633; Laws 1907, chap. 87; Gray v. Taylor, 15 N. M. 742; 19 A. & E. Enc., 2 ed. 775; State v. Stock, 16 Pac. 106, 799; Kas.; State v. Burton, 27 Pac. 141, Kas.; State v. Weld, 39 Minn. 426; Wells v. Taylor, 5 Mont. 202; Calaveras County v. Brockaway, 30 Cal. 325.

Where the duty is required to be performed by law and is of public nature, the law is sufficient demand and omission to perform is refusal. 19 A. & E. Enc., 2 ed. 760; Atty. General v. Boston, 123 Mass. 460; North Pac. Rd. v. Dustin, 142 U. S. 508; High Ex. Legal Rem., sec. 431; Union Pac. R. R. Co. v. Hall et al, 91 U. S. 355; Duty of officers to keep offices at county seat. C. L. 1884, secs. 411, 415; C. L. 1897, secs. 630-634, 747, 749; State v. Woods, 104 Mo. 459; Williams v. Reutzel, 60 Ark. 155; Whallon v. Circuit Judge, 51 Mich. 503: Acts 1897, chap. 6; Acts 1903, chap. 38; Acts 1905, chap. 119; Acts 1907, chap. 87; Acts 1909, chap. 80; Lewis Suth. Stat. Con. 463, secs. 246, 257.

Repeal by implication. Baca v. Bernalillo County, 10 N. M. 438; Sandoval v. County Com., 13 N. M. 543; Territory v. Digneo, 15 N. M. 159; Front v. Wenie, 157 U. S. 46; U. S. v. Healey, 160 U. S. 147; Lewis Suth. Stat. Con., secs. 37, 267, 348; McCartte v. Orphan Asylum Society, 18 Am. Dec. 516, N. Y.; Baca v. Perea, 8 N. M. 187; Douglass v. Lewis, 3 N. M. 596; County Com. Socorro County v. Leavitt, 4 N. M. 37; Coler v. Co. Com., 6 N. M. 88.

T. B. Catron for Appellee.

Officers are not required to remove offices and books to new county seat before court house and jail are completed. Laws 1907, chap. 87; Laws 1903, chap. 38; C. L. secs. 630-635; Baca v. Bernalillo, 10 N. M. 438; Sandoval v. County Com., 13 N. M. 543; Territory v. Digneo, 15 N. M. 154.

A general statute without negative words will not repeal by implication from their repugnancy, the provisions of a former one which is special and local. 1 Lewis Suth.

Stat. Con., secs. 256, 274, 275, 465, 532; Winslow v. Morton, 118 N. C. 491; Endlich on Inter. Stat., sec. 223.

OPINION OF THE COURT.

MECHEM, J.—The six cases above settled will be disposed of as one and by this opinion for the reason that the law controlling all of the cases is the same. In other words, the determination of one of these cases involves the decision of all. These cases all grew out of the attempt to remove the county seat of Lincoln County from the Town of Lincoln, where it has long been located, to the Town of Carrizozo, in the same county. Causes Nos. 1412, 1413, and 1414 are suits wherein it is sought to compel the defendants, who are admitted to be officers of the County of Lincoln, to remove their offices from the Town of Lincoln to the Town of Carrizozo, at which place the Board of County Commissioners had provided offices for the use of those officers. Nos. 1415, 1416 and 1417, are denominated "Accusations for the removal from office" of the same officers, which are defendants in the other three cases, for the reason that they have declined and refused to remove their offices to the Town of Carrizozo. The complaint alleges that on the 6th day of July, 1909, there was presented to the Board of County Commissioners of the County of Lincoln a petition in writing, praying the Board of County Commissioners to call an election to submit to the qualified voters of said county the question of the removal of said county seat to Carrizozo. That on the 9th day of July, 1909, the Board granted the prayer of the petition and ordered an election to be held on the 17th day of August, 1909, which, after due notice, was held; that a canvas of the votes of said election showed that Carrizozo received nine hundred votes for the county seat and Lincoln six hundred and thirteen votes therefor. That on canvassing the vote, August 23rd, 1909, the Board declared Carrizozo to be the county seat of Lincoln county. That following this declaration the said Board provided offices at the expense of the county for the above officers, as referred to above. That the defendants failed and refused, and still do so, to establish and maintain their offices at

Carrizozo, the county seat, and, although requested, failed and refused to keep there the books, papers and official records pertaining to their offices. And, in the case of the defendant Stevens, the petition for the writ of mandamus sets up the refusal of the defendant, Stevens, the sheriff, to establish and maintain his office in the town of Carrizozo and remove the prisoners in his custody to the town of Carrizozo, although requested so to do.

A demurrer was interposed by the defendants in each of the above causes, denying the sufficiency of the facts alleged in the complaint, and alleging the following specific grounds of demurrer: "3rd. Because there has been no court house and jail completed at Carrizozo for the County of Lincoln, of which this court will take judicial cognizance. 4th. That because the defendant has no right or lawful power to keep his office or books, records and papers of his office at Carrizozo in the County of Lincoln until a court house and jail shall have been completed at said place. 5th. Because there is no law of this Territory requiring or allowing this defendant to move his office and books, papers and records thereof from the Town of Lincoln, where the same are situated, to the Town of Carrizozo in said County of Lincoln, until there shall be erected and completed a court house and jail at said Town of Carrizozo," and other points of demurrer involving the right of the County Commissioners to rent offices at the Town of Carrizozo and denying the right of such officers to occupy offices at the Town of Carrizozo.

Counsel on both sides of these cases submitted them to the court for determination upon the law as the same is declared in the Compiled Laws and the Session Laws of 1903 and 1907, there being no disposition to question the fact that there was no completed court house and jail at the Town of Carrizozo, nor the other facts pertaining to the attempt to change the county seat from Lincoln to the Town of Carrizozo. The fact that the petition does not allege the completion of the court house and jail at the Town of Carrizozo lays a sufficient foundation for the demurrer to rest upon under the particular circumstances of this case. An examination of the briefs discloses the

fact that the difference in the contentions of counsel is based upon the diverging view of counsel as to the proper construction to be placed upon the sections of the law involved. Counsel for the defendant officers, in behalf of the demurrer, relying upon Section 633, Compiled Laws 1897, as to the law governing this case, whereas counsel for the plaintiff relies upon Section 1, Chapter 38, of the Laws of 1903, and Chapter 87, of the Laws of 1907, amendatory of Chapter 38 of the Laws of 1903. The clause of Section 633, Compiled Laws, relied upon by counsel for the defendant, reads as follows: "So soon as convenient buildings can be had at such new county seat, the courts for said county shall be held therein, and so soon as the new court house and jail shall have been completed, the County Commissioners shall cause all the county records, county offices and property pertaining thereto, and all county prisoners shall be removed to the new county seat." Section 1, Chapter 38, Laws of 1903, is as follows: "Section 1. That the offices of county officers in this Territory shall be established and maintained in the county seat; so it shall be illegal to hold or maintain said offices outside of the place which is required in this section." This act was amended by Chapter 87, Laws of 1907, so as to read as follows: "Section 1. That all sheriffs, treasurers and probate clarks of various counties in New Mexico shall establish and maintain their offices and headquarters for the transaction of the business of their respective offices at the county seat of their respective counties and shall there keep all the books, papers and official records pertaining to their respective offices; provided, that such offices shall be provided for such officers at the expense of the respective counties."

This section is the one relied upon by counsel for the plaintiff to effect the repeal of Section 633, supra. It is contended that this section, indicates that offices were to be maintained at the new county seat of Lincoln county and that such is the meaning of the proviso in this section, but that the whole section operates to repeal the condition imposed in Section 633, upon which defendants' counsel rely, and as a justification for their refusal to remove

their offices from the old county seat to the new. Counsel for the demurrants deny that this later act in any way modifies Section 633, as contended for by plaintiff's counsel, upon the authority of 1st Lewis Suth. Stat. Cons., sec. 274, p. 536 (N. 92) which is as follows: "A general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special and local, unless there is something in the general law or in the course of litigation upon the subject matter that makes it manifest that the legislature contemplated and intended to repeal," and in the last paragraph from which he above is quoted the author cites numerous authorities and further says: "When the legislator frames a statute in general terms or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate a particular legislation, to the details of which he has previously given his attention, applicable only to a part of the same subject, unless the act shows a plain intention to do so." Counsel for demurrants contend that the Law of 1907 is a general law, and there is nothing included in it which indicates that it was intended to make it specifically applicable to cases such as are referred to in Section 633, involving the subject of the location of offices of county officers in case of attempted removal of a county seat; that this latter act does not necessarily relate to that particular subject, and there is nothing in it that shows a clear intention to effect a repeal of any portion of Section 633, nor is there such a repugnance as would make these sections irreconcilable. It is clear that the latter act may relate to the location of county officers generally at county seats, and make it the duty of boards of county commissioners to provide offices for them at the county expense. This would be necessary in any case, but that is not inconsistent with the other provisions that require officers to remain at the old county seat, in case of attempted removal until a suitable court house and jail, at least, are provided and completed at the new county seat. This provision seems especially applicable in the case of the sheriff's offices and affords a reason why it should be made essential that a new jail should be completed before

prisoners should be removed from the jail at the old county seat, but there is no reference to be found in these later laws to the subject of removing prisoners, nor for the guarding and taking care of them upon such removal. It is a rule of statutory construction that repeals by im-
1 plication are not to be favored and that where two statutes can be construed together and preserve the objects designed to be obtained by each, they should be so construed. In the case of Territory v. Digneo, 15 N. M. 157, this court, quoting with approval from Frost v. Wenie, 157 U. S. 56, and U. S. v. Healy, 160 U. S. 147, 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." "One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between different acts on the same specific subject. When there is a difference in the whole purview of the two statutes apparently relating to the same subject, the former is not repealed. Such is the general doctrine in which all the cases concur." 1 Lewis Suth. Stat. Cons. 468 (N. 48 and 49). To the same extent it may be properly said that Section 633 and Chapter 87, Laws of 1907, refer to the same general subject—that is, they both require county officers to keep their offices at the county seat, but Section 633 relates to a specific case. Section 633 provides that in special cases, such as the removal of county seats, that those offices shall not be removed from the old county seat to the new until a court house and jail has been completed at the new county

seat so that in another aspect it may be said that there is a very considerable difference in the purview of those two statutes. The purpose for which Chapter 38 of the Laws of 1903, and Chapter 87 of the Laws of 1907, were enacted, each of them having the same purpose in view, seems clearly to have been to prevent county officers from maintaining their offices at their homes or other convenient places outside of the county seat and to require them to establish and maintain their offices at the county seat and thus remedy a condition which doubtless existed in this Territory and necessitated the enactment of this provision, but there is an entirely different purpose provided for in Section 633 in that it specifically provides that in cases where there is a removal, or attempted removal, of a county seat, a time is fixed when the offices at the old county seat shall be transferred to the new and this is the object of the provision of Section 633, that the
2 offices shall not be removed until a court house and jail shall be completed at the new county seat. It is therefore apparent that these statutes may be construed together and that there is no such conflict between them as to prevent them from being construed together and the controverted clause in Section 633, maintained as the law of this Territory in county seat removal cases unaffected by the later legislation referred to. It being practically conceded that a court house and jail at the new county seat had not been completed at the time of the institution of these causes, and the petition failing to allege that the same had been completed as required by Section 633, the decision of the court below is sustained, the demurrer to the petition in each case was correct, there being no law which required the defendants to remove their offices to the new county seat. The counsel for the plaintiff standing by their petitions for dismissing the causes in the court below, the judgment dismissing the cases in the court below was a proper one and is, therefore, affirmed.

The first three causes numbered 1412, 1413, and 1414 being thus disposed of, and the remaining three causes being petitions to oust the same officers for declining to

remove their offices to the new county seat, these must also fail for the reason that the officers had a legal right to refuse to remove their offices under the law. It appears that the judgments in the three last mentioned cases were judgments in mandamus, the same as in the first three cases, whereas the latter cases were not mandamus cases, but, it being so clear that these judgments of dismissal were entered as judgments in mandamus cases by inadvertance, no attention will be paid to the technical defect in the judgments rendered and the same will be treated as judgments of dismissal of the causes brought for the removal of the officers. The judgment of the court below will be affirmed in each of the above causes, with costs. It is so ordered.

[No. 1403. December 23, 1911.]

JOHN H. McKNIGHT, Appellee, v. EL PASO BRICK COMPANY, a Corporation, Appellant.

SYLLABUS.

1. The judgment of the U. S. Land Department, holding appellant's application for patent void because the officers of the local land office were without jurisdiction, is binding in this case.

2. A final receipt of mineral lands issued upon a valid application for patent, vests the purchaser with an equitable title to the land and so segregates it from the public domain.

3. Even though a final receipt or the equitable title thereby attained may have been the result of fraud and therefore voidable, yet, until avoided it will be valid and existing.

4. The cancellation of a mineral patent does not of itself render the ground embraced by it subject to location.

5. The decision of the trial court that the final receipts relied upon by appellant were void, nullities and of no effect, was correct.

6. The proof of annual labor prescribed by C. L. 1897, sec. 2315, would inure to the benefit of the locator filing the same in any kind of action in which it was material to establish the performance of such labor.

7. If owner of mining claim will not file affidavit of proof of labor, it places upon him the burden of showing that he has complied with the law, such compliance being necessary to the maintenance of his estate.

8. The mere statements that the appellant had performed annual labor was prima facie proof, unless it was further shown by what persons the labor was performed.

9. Ex parte affidavit was worth nothing as evidence generally unless it complied with the statute.

10. Finding of court below will not be disturbed if made on substantial evidence.

11. When the burden by non-compliance with the statute was placed upon the appellant it could have been shifted or met by proof either of the annual labor done at the proper time or work done before the location of appellee. The proviso of the statute calls for an affirmative showing by the original locator.

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

HAWKINS & FRANKLIN, HOLT & SUTHERLAND for Appellant.

Entries of land segregate the lands so entered from the public domain until such entries are finally canceled. 1 Land Dec. 362; Witherspoon v. Duncan, 4 Wall. 218; U. S. Rev. Stat., secs. 2325, 2290; St. Paul M. & M. R. R. Co. v. Forseth, 3 Land Dec. 446; Van Gesner v. U. S., 153 Fed. 46; 31 Land Dec. 482; Germania Iron Co.

v. James, 89 Fed. 811; James v. Germania Iron Co., 107 Fed. 605.

The entry was not void. Wisconsin Central R. v. Forsythe, 159 U. S. 61; Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330; Quinby v. Conlan, 104 U. S. 420; Doolan v. Carr, 125 U. S. 618; Lake Superior Ship Canal Co. v. Cunningham, 155 U. S. 354; U. S. v. Winona & St. Paul Co., 67 Fed. 955; New Dunderberg Min. Co. v. Old, 79 Fed. 602; Folz v. Railway, 60 Fed. 316; King v. McAndrews, 111 Fed. 864; Witherspoon v. Duncan, 71 U. S. 218; Smelting Co. v. Kemp, 104 U. S. 218; Simmons v. Wagner, 101 U. S. 260; Knight v. U. S. Land Assoc., 142 U. S. 211; Hastings Railroad Co. v. Whitney, 132 U. S. 363; Whitney v. Taylor, 158 U. S. 85; Parsons v. Venske, 164 U. S. 91; Brown v. Gurney, 201 U. S. 184; Murray v. Polglaise, 43 Pac. 505, 59 Pac. 439; Noonan v. The Caledonia Gold Mining Co., 121 U. S. 393; Kendall v. San Juan Mining Co., 144 U. S. 658; Diller v. Hawley, 81 Fed. 657; Lavagnino v. Uhlig, 198 U. S. 443; Farrell v. Lockhart, 210 U. S. 142; Costigan Mining Law 312.

Original locations by appellee were invalid. Belk v. Meagher, 104 U. S. 284; Brown v. Gurney, 201 U. S. 184; Wills et al v. Blain et al, 4 N. M. 378.

Affidavit of annual labor. C. L. 1897, sec. 2315; Upton v. Santa Rita Mining Co., 14 N. M. 96; Greenleaf's Lessee v. Birth, 5 Peters 132; U. S. v. Homestake Min. Co., 117 Fed. 481; Walton v. Railway, 56 Fed. 1006; National Loan and Investment Co. v. Rockland Co., 94 Fed. 335; Payne v. Wilson, 146 Fed. 488; Birmingham Ry. & Elec. Co. v. Wildman, 24 So. 548, Ala.; Jaffray v. Thompson, 21 N. W. 659, Iowa; Montgomery v. State, 45 So. 879, Fla.; Goodall v. Norton, 92 N. W. 445, Minn.; Bristol v. Warner Exec., 19 Conn. 17; Rowan v. Chenoweth, 38 S. E. Rep. 544, W. Va.; Walden v. Sherburne, 15 Johnson 408; 5 Taunt. 245; Union Iron Works v. Union Naval Stores Co., 47 So. 652, Ala.; Bell v. Davis et al, 3 Cranch. C. C., 4 Fed. Cas. 1249; Bank v. Darden, 18 Ga. 318; Anderson v. Pollard Co., 62 Ga. 47; Lewin v. Dille, 17 Mo. 68.

Although a document is introduced to prove a particular fact or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes. 17 Cyc. 465, Evidence; Reeves v. Brayton, 15 S. E. 658, S. C.; Winants v. Sherman, 3 Hill 72, N. Y.; Kelly v. Dutch, 2 Hill 105; Sill v. Reese, 47 Cal. 340; Sears v. Starbird, 20 Pac. 549, Cal.; 4 Enc. Ev. 842; Raymond v. Nye, et al, 5 Metc. 151, Mass.

Boundaries did not close or meet and such boundaries could not be traced either from notices or from any markings on the ground. Seidler v. Lafave, 4 N. M. 371; Gleeson v. Mining Co., 13 Nev. 462; Brown v. Levan, 46 Pac. 661, Idaho; McIvres Lessee v. Walker, 9th Cranch 173; Finley v. Williams, 9 Cranch 164; Pollard v. Shively, 5 Col. 309; Lindley on Mines, secs. 375, 382.

Proof that appellant had not resumed labor on claims was necessary. U. S. Rev. St., sec. 2324; 2 Lindley on Mines, secs. 645, 651; Hammer v. Garfield, 130 U. S. 291; Emerson v. McWhistler, 65 Pac. 1036; Power v. Sla, 61 Pac. 468, Mont.; Belk v. Meagher, 104 U. S. 279.

Incumbent upon appellee to show that he was the owner of a valid and subsisting location of the lands in dispute, one which entitles him to possession against the United States, as well as against another claimant. Upton v. Santa Rita Mining Co., 14 N. M. 96; Murray Co. v. Hanover, 66 Pac. 764; Iba v. Central Association, 5 Wyo. 355; Gwillim v. Donnellan, 115 U. S. 45; Brown v. Gurney, 201 U. S. 184; Jackson v. Roby, 109 U. S. 440; Perego v. Dodge, 163 U. S. 160; 2 Lindley on Mines, sec. 763; Cleary v. Skiffich, 65 Pac. 59, Colo.; Kirk v. Meldrum, 65 Pac. 633; McWilliams v. Winslow, 82 Pac. 538, Col.; Lozar v. Neill, 96 Pac. 343, Mont.

WADE & WADE and EUGENE S. IVES for Appellee.

Burden to prove that assessment work had been done was upon appellant. Upton v. Santa Rita Mining Co., 14 N. M. 96; 1 Enc. P. & P. 334; 2 Wigmore on Ev.,

secs. 1384, 2113; in re Murray, 41 La. Ann. 1109; St. Louis & S. F. Ry Co. v. May, 115 S. W. 900; Henderson v. Givens, 16 Ala. 261; Chesapeake Bank v. Swain, 29 Md. 483; Abbotts v. Pearson, 130 Mass. 191; Greenleaf's Lessee v. Birth, 5 Pet. 131; U. S. v. Homestead Mfg. Co., 117 Fed. 481; Sill v. Reese, 47 Cal. 340; C. L. 1897, sec. 2315; Succession of Murray, 7 So. 126; 17 Cyc. 52; Providence G. M. Co. v. Burke, 57 Pac. 641; 2 Lindley on Mines, sec. 636; 1 Lindley on Mines, sec. 249.

Original location notices of appellee were sufficiently definite. 27 Cyc. 574; Seidler v. Lafave, 5 N. M. 44; Farmington Gold Mining Co. v. Rhynney Gold and Copper Co., 58 Pac. 832; Tiggeman v. Mrzlak, 40 Mon. 19; Morrison v. Reagan, 8 Idaho 291; Hammer v. Garfield M. & M. Co., 130 U. S. 2991; Upton v. Larkin, 7 Mont. 449; 27 Cyc. 574; 1 Lindley on Mines, secs. 381-383; Kinney v. Fleming, 58 Pac. 723; Providence G. M. Co. v. Burke, 57 Pac. 641; Bramlett v. Flick, 23 Mont. 95; Upton v. Santa Rita M. Co., 14 N. M. 96.

Burden of proof upon appellant to show resumption of work. 2 Lindley on Mines, sec. 645; Little, Dorith & Co. v. Arapahoe & Co., 30 Colo. 431; Sherlock v. Leighton, 9 Wyo. 297; Hall v. Kearney, 18 Col. 505; Power v. Sla, 61 Pac. 468; McCormick v. Baldwin, 105 Cal. 284; Honaker v. Martin. 11 Mont. 91.

Final receipt issued was ineffective to segregate land from public domain pending adjudication as to its validity. Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 463; Germania Iron Co. v. James, 89 Fed. 811; Brown v. Gurney, 201 U. S. 184; Murray v. Polglase, 17 Mon. 455; Adams v. Polglase, 23 Mon. 401; Adams v. Polglase, 32 Land Dec. 477; Noonan v. Caledonia Gold Min. Co., 121 U. S. 393; Roy Lode, 1 Brainard 173; Dobbs Placer Mine, 1 L. D. 565; Gunnison Crystal Mining Co.; 2 L. D. 722; Meyer et al v. Hyman, 7 L. D. 336; Moss Rose Lode, 11 L. D. 120; Colomokas Gold Mining Co., 28 L. D. 172.

The rule that invalid agricultural entries segregate the land until cancellation is not inconsistent with the principle that the fact of segregation depends fundamen-

tially upon the fact of an interest in the property existing in a third party. 21 Stat. Large 141; Hodges v. Colcord, 193 U. S. 192.

Entry of appellant was void ab initio. Polk v. Wendal, 9 Cranch. 87; Minter v. Crommelin, 18 How. 87; U. S. v. Winona & St. P. R. R. Co., 67 Fed. 955; New Dunderburg Mining Co. v. Olds, 79 Fed. 602; U. S. v. Northern Pac. R. R. Co., 95 Fed. 869; King v. McAndrews, 111 Fed. 864; Knight v. U. S. Land Ass'n., 142 U. S. 211; McCracken v. Flanagan, 127 N. Y. 493; Hastings etc. R. R. Co. v. Whitney, 152 U. S. 363; Whitney v. Taylor, 158 U. S. 85; Noonan v. Caledonia Mining Co., 121 U. S. 393; Kendall v. San Juan Silver Mining Co., 144 U. S. 658.

Pleadings, proof, and proceedings sufficient to sustain finding of trial court. 1 Enc. P. & P. 802; Davenport v. Ladd, 38 Minn. 545; Althouse v. Town of Jamestown, 91 Wis. 46; Brown v. Gurney, 201 U. S. 184; Kirk v. Meldrum, 65 Pac. 634; McWilliams v. Winslow, 82 Pac. 528; Goldberg v. Bruschi, 31 Pac. 24.

Locators were dummies. Gird v. Cal. Oil Co., 60 Fed. 531; Cook v. Klomos, 164 Fed. 529; Rev. St. 2331.

STATEMENT OF FACTS.

This is a suit brought by the appellee against the appellant in support of an adverse claim and contest filed by appellee in the land office at Las Cruces, New Mexico, against an application for patent previously filed in such office by the appellant for the Aluminum group of placer mining claims, consisting of the International, containing about 132.22 acres; the Aluminum, containing about 111.-64 acres; the Hortense, containing about 150 acres, all located in Dona Ana county, New Mexico, in which adverse proceeding the appellee claims to be the owner of five placer mining claims, known respectively as the Agnes, the Lulu, the Lynch, the Tip Top and the Aurora claims, each consisting of about twenty acres, and therein alleged to be in conflict with certain of the area embraced within the Aluminum and Hortense claims, as part of the group for which application for patent had been made by appellant.

The pleadings were as follows: On January 2nd, 1909, appellee filed his complaint alleging citizenship; that the appellant was a corporation organized under the laws of the State of Texas and doing business within the territory of New Mexico; that the appellee on September 12, 1908, after a discovery of mineral upon unappropriated mineral lands of the United States subject to location and purchase, and by reason of such discoveries and divers locations made and maintained upon such lands, was and still is entitled to the possession of the mining locations claimed by him and above referred to; that the appellee had dispossessed him thereof; the filing by the appellant in the land office on November 25th, 1908, of its application for patent for such Aluminum group of mining claims and the giving of notice by the Register of the Land Office of such application for such patent; that the appellant wrongfully set up and alleged that it was the owner and in possession of such group of mining claims; that the appellee on the 30th day of December, 1908, and during the sixty days period of publication of the notice of the application for patent, had filed, as required by law, his protest against such application for patent; that proceedings on such application in such land office had been stayed to wait the determination by the court of competent jurisdiction of the right of possession to the land claimed by appellant and that such suit was brought to determine such right of possession; the appellee further alleged that the Hortense and Aluminum placer claims of the appellee were void, because the appellee had, he alleged, failed to discover any mineral thereon prior to the locations made by appellee upon the same ground, and, by reason of the failure of the appellant to conform its claim to the public surveys of the United States, and alleged that if said Hortense and Aluminum claims ever had any validity or legal existence, the appellee and its grantors failed to perform the annual labor for the years 1904 and 1905, and each thereof, and thereby forfeited any rights they might have had in such claims and did not resume possession of the work upon the same at any time prior to the acquirement of the appellant and his grantors of that portion of such

claims which they had located and asked judgment to the effect that he was the owner and lawfully entitled to the possession of the mine locations claimed by him, and prayed that he have his title thereto and possession thereof quieted and confirmed. The appellant, answering such complaint, alleged ownership of said Aluminum group of mining claims and each thereof under mining locations and amendatory locations, copies of which were attached to such answer, admitting that it was a corporation as alleged and was in possession of the premises described in the complaint; that it had filed its application for patent for such Aluminum group as alleged, but denying all other facts alleged in the complaint and praying judgment to the effect that it was the owner and lawfully entitled to the mining claims described in the location notices described and thereto attached, and that it have its title thereto confirmed as against the adverse claim of appellee. To this answer the appellee replied, admitting that on the 12th day of September, A. D. 1908, and for one or more years prior thereto, the land contained in such Aluminum group of placer mining claims, and each of them, was embraced within one or other of the locations claimed by appellant, but denying that the said locations were valid or duly and lawfully made, or that the appellee was, at the time aforesaid, or at any other time, the owner thereof; admitted that the appellee then held all of the said Aluminum group of mining claims under and by virtue of its location notices and by virtue of a pretended doing and performance of the matters and things required by law in order to hold and own the same, but denied that the appellee, by reason, thereof, then owned or had ever owned, as against the appellant, that part of the land embraced in the said Aluminum group of mining claims which was claimed by the appellee in his complaint. By agreement of attorneys of both sides a jury was waived and the case was heard outside of term time by the court, who, on the 17th day of December, 1910, made written findings of fact and conclusions of law and rendered its judgment against the appellant and in favor of the appellee and to the effect that the appellee recover the possession from the appel-

lant of the area in conflict between the adverse claims of the respective parties. The following facts were found by the court: First: That the mining locations claimed by appellant were made on the following dates: Aluminum, original location, December 5, 1900. Hortense, original location, March 31, 1902. And those claimed by appellee were as follows: Agnes, original location, April 7, 1905, Lulu, original location, April 7, 1905. Second: That the appellant failed to perform the annual labor on the Aluminum and Hortense claims for the years 1904 and 1905. Third: That there was no evidence introduced to show whether or not appellant had resumed work upon the Aluminum and Hortense mining claims, before appellee made or attempted to make locations of said Lulu and Agnes mining claims. Fourth: That on the 21st day of November, 1905, appellant applied for patent before the United States Land Office, Las Cruces, for the Aluminum and Hortense mining claims as then located and embracing substantially the area now embraced therein, submitted its proofs, and thereupon the Register and Receiver acted upon and accepted the same; the appellant paid to such officers in purchase of the area embraced therein the sum of————dollars, being the full amount required under the laws of the United States in purchase thereof and received a final receipt in the usual form for such payment. Fifth: That the appellee did not adverse or contest the application of the appellant for such patent before the land office, or bring suit against the appellant for the possession of any portion of such property before the issuance of such final receipt, but, subsequent to the issuance thereof the appellee and others protested before the said land office against the granting of a patent to the appellant on such entry upon various grounds. Sixth: That this final receipt and entry so made of such mining claims was cancelled by decision of the Secretary of the Interior rendered on the 9th day of September, 1908, upon the ground that a portion of the proof submitted with such application i. e. that of the posting of the claim with notice of application, was sworn to outside of the land district in which the claims were situated. Seventh. That on the

——day of May, 1906, subsequent to the time when such final receipt was issued to appellant and previous to the time when the same was cancelled by decision of the Secretary, hereinafter mentioned, the appellee entered into and upon such Hortense and Aluminum mining claims and made relocations of such Lulu and Agnes mining claims and also originally located thereupon the Tip Top, Aurora and Lynch mining claims. Eighth: That there was no evidence introduced to show whether at the time of the location of said Tip Top, Aurora and Lynch mining claims and the relocation of such Lulu and Agnes claims by the appellee aforesaid in the year 1906, the appellant had resumed work on the ground embraced in said claims or either thereof. Ninth: That on the 11th day of September, 1908, after the decision of the Secretary of the Interior, cancelling such final receipt and entry made by appellant, the appellant made amendatory locations of the Aluminum and Hortense mining claims for the purpose of adjusting the land embraced therein to the survey as so made, and so as to make the exterior boundaries of such claims conform to the government sub-divisions.

OPINION OF THE COURT.

MECHEM, J.—To meet and overcome appellees' proof of the relocation of the Lulu and Agnes claims and the original locations of the Aurora, Tip Top and Lynch claims, made in May, 1906, the appellant introduced its final receipts for the land embraced in the above named claims, issued August 2, 1905, and outstanding in May, 1906. The court held that the said receipts were from their reception void, nullities and of no effect. This holding of the court was based on the action of the Secretary of the Interior affirming a decision of the Commissioner of the General Land Office cancelling the application of appellant for patent upon which application the said receipts were issued by Receiver of the Land Office at Las Cruces. The proceeding in the Land Office is entitled Ex Parte El Paso Brick Company, 37 L. D. 155. The decision of the Secretary of the Interior was rendered September 9, 1908. After reviewing the objections to appel-

lants' application for patent and the authorities in point, the Secretary said: "In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been heretofore filed, the Register was without authority to direct the publication of the notice or otherwise proceed and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings, therefore, fall and the entry will be cancelled." Thereafter, on the 24th day of November, 1908, the appellant waived before the Secretary of the Interior its right to make a review of such decision and thereupon such decision and the cancellation of said entry became final and said entry was cancelled on the records of the local land office. The appellants insist that the decision of the lower court was erroneous because as by the issuance of the final receipts, the land embraced in them became segregated from the public domain, it remained so segregated until the date of cancellation of the receipts.

Did the Land Department, by its judgment, holding appellants' application for patent void because the officers of the local land office were without jurisdiction, serve to restore the land to the public domain when the entry was cancelled on the records of the local land office, or was it a decision that the application and the proceedings thereunder were ineffectual for any purpose and therefore of necessity ineffectual to segregate the land applied for from public domain? There can be no question but that the decision of the Land Department is binding in this case. Smelting Co. v. Kemp, 104 U. S. 636; Knight v. U. S. Land Asosciation, 142 U. S. 211. If binding upon the courts of this territory, it is an adjudication that the final receipts offered by appellant were nullities and therefore properly held by the court below not to

in any wise affect the land embraced within them. But counsel for the appellant contend that the decision of the Land Department only went to restoring the land to the public domain when the application for patent was cancelled on the records of the local land office. No case has been cited by counsel for either party exactly in point. No case has been cited involving an application for patent held by the land department to be void because of a lack of jurisdiction in the local land officers to receive it. The appellant cites the following rule of the Land Department: "Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application or patent." It is contended that as long as the application for patent remains uncancelled another may not be received for the same land. That the same rule applies to homestead and pre-emption entries and the decisions of the Land Department and the Federal Courts are all unanimous in holding as to such entries two things: 1. That the entry segregates the land from the public domain. 2. That even if void as long as it remains uncancelled on the records of the local land office another entry cannot be received. There can be no doubt but
2 that a final receipt for mineral lands issued upon a valid application for patent, vests the purchaser with an equitable title to the land and segregates it from the public domain.

There can be no doubt that even though a final re-
3 ceipt or the equitable title thereby attained may have been the result of fraud and therefore voidable, yet, until avoided, it would be valid and existing. Parsons v. Venske, 164 U. S. 91. Adams v. Polglase, 32 L. D. 477.

But in this case it was held that the application for patent was not merely voidable but void. Counsel for appellant rely upon, among other cases, those of Germania Iron Co. v. James, 89 Fed. 811, and James v. Germania Iron Co., 107 Fed. 605. They say that these decisions are authority for their contention, because holding under a similar rule, to the one above stated, but applying to agricultural entries, that no rights can be acquired to land

embraced in an entry, until cancellation or its equivalent of the entry has occurred. The sole question before the court in those cases is stated to be: "The question it represents is whether strangers to a contest in which a decision of the Secretary of the Interior was filed in his office in Washington to the effect that a certain entry of the land in question was illegal, and should be cancelled, and that the lands should be open to disposal under the public land laws of the United States, had the right to enter that land at Duluth, in the State of Minnesota, the moment that decision was filed in Washington, or had no such right until the local land officers received the decision and had cancelled the former entry on their plats and records where it was made." 89 Fed. 813, 814. The rule of the Land Department plead was "that after a decision of the Secretary had been rendered that a former entry was void and should be cancelled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records." Further, the court in its opinion says: "The Secretary of the Interior is an appellate tribunal in these cases, whose court is held, and whose decisions are filed, more than one thousand miles from most of the inferior tribunals in which the parties appear and institute and try their contests. It is according to the almost universal practice of judicial tribunals for the inferior court to take no action, and allow none to be taken in it, until the decision and order of the appellate court has been officially received and recorded. The reasons for such rule in the Land Department are far stronger and more imperative than in ordinary courts of law or equity. It is in the local land office that the rights of the entrymen must be initiated as well as contested. The policy of the government is to afford to the actual settlers, to the preemptors and homesteaders, to those who live on or near the public land to be disposed of, every facility to acquire it without burdensome expense or unnecessary trouble. The very existence of local land offices is the outgrowth of the purpose of Congress to carry to the residents of the

district in which the lands are situated, not only the tribunals in which they may initiate and try their rights, to obtain portions of the public domain, but all the information to enable them to intelligently prefer and establish their claims." And further in the opinion, in 107 Fed. 597, the court said: "Conceding, but not deciding, that the Secretary's decision was a final judgment of the validity of their claims against the United States and against each other, the crucial question in this case still remains unanswered. That question is whether or not, under that decision, the prior entry of Orilie Stram was removed from the land and it was opened to acquisition by strangers to the contest, under the rules and practice of the department before the local land officers cancelled the entry, or were informed on the decision. "None of the parties to this litigation were parties to that contest, and the question is not the finality of that judgment, but the time when after that decision, under the rules and practice of the land department, the land became open to acquisition by strangers. * * * * and by all analogy such a decision of an appellate court has no effect in the inferior tribunal, where rights and contests are initiated until it is received and acted upon by that tribunal. * * * Turning now to the question at issue, the following propositions will be found to be established beyond controversy: The entry of the land by Stram with his half script, whether valid or void, segregated it from the public domain, and appropriated it to private use so that no entry could be made upon it by James or any other applicant before the local land officers received notice of the decision of the Secretary, and cancelled it on their books and plats." Remembering that the rule of the Land Department construed and applied in that case, was: "That after a decision of the Secretary had been rendered that a former entry was void and should be cancelled, no subsequent entry of the land could be made until the decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records." A reading of the decision shows that the question was as to when such decision took effect

as to entries of agricultural lands and by reason of the rule, and not by virtue of any law, it was held that as to such entries whether void or valid, until their cancellation was noted on the records of the local land offices, no other entry could be made or any other right initiated.

The rule with regard to mineral applications provides that "before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application or patent," and it would seem that as far as receiving a mineral application is concerned this rule would prevent the local land officers from receiving an application for land covered by a prior application until the cancellation of such prior application was noted on their records. And if rights to mineral lands were initiated by entry those cases would be conclusive. But, although a void entry of agricultural lands would by the fact of its pendency prevent another from entering the land, can it be said that a void application for a patent of mineral lands would prevent another from locating the same land? "It is in the local land office that the rights of the entrymen must be initiated as well as contested." Germania Iron Co. v. James, 89 Fed. p. 814. The pendency of a void entry segregates the land from the public domain, for this reason, that until it is cancelled there is no method of procedure whereby anyone may initiate a right to the land because the right is initiated by entry alone and by entry in the local land office. The reason why a decision cancelling entry by the Secretary should not immediately restore the land to the public domain was thus stated by the court in the same case: "In view of this legislation that would indeed be a strange rule, glaringly inconsistent with the evident intention of Congress in establishing local land offices, and with the express provisions of the acts by which they established and developed the land department, which would make the rights of applicants to acquire land more than one thousand miles from Washington depend on action upon a decision filed there, in a contest to which they were strangers, before it was officially communicated to

the officers of the local land office or generally known to the public. Such a rule would enable a sentinel in the office of the Secretary of the Interior to secure for himself and to deprive the citizens of the vicinage of every valuable tract of land restored to the public domain by such a decision, while it would offer patent opportunities for the play of secret and mischievous machinations that might well be avoided. It is the converse of such a rule and practice—it is the rule and practice that the land remained withdrawn from entry or sale until the decision of the Secretary was officially made known to the local land officers, and the notation of the cancellation of the former entry was made on their plats and records,—which the bill alleges was in force when the decision of February 18, 1889, was filed. That practice is consistent with the purpose and provisions of congressional legislation on the subject, gave equal opportunities to all applicants, brought the necessary information to the local land office in time to enable all who intended to apply for the land to obtain and act upon it without expense, and was fair, fitting, just and reasonable.'

By Section 2, Chapter 89, 27 Stat. at Large 140, 6 Fed. Stat. Ann. 30, it is provided: "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated, of such a cancellation and shall be allowed thirty days from date of such notice to enter said lands," so that the land covered by a void entry remains withdrawn to permit the successful contestant to exercise a preference right of entry.

From the foregoing it will be observed that by entry and by entry alone are rights initiated to agricultural lands. That the existence of one entry, whether void or valid, precludes another entry, and therefore prevents the initiation of a new right. That by the rule and practice of the land department and by statute, entries to agricultural lands are kept in force whether void or not until cancelled on the books of the local land office, making

the initiation of a new right date not from the judgment of the Secretary of the Interior, but from the action of the local land office in entering the cancellation on their records.

It will not require a great deal of reflection to determine that the rule and practice of the land department with respect to agricultural lands, claimed by appellant to have control in this case by analogy, are not applicable to applications for mineral patents. The application for a patent to mineral lands differs from an entry of agricultural lands in many respects, among others, in that the applicant for a mineral patent must have a valid location. The application for patent is not necessary to vest in the claimant title to the claim he possesses. A valid location on the ground followed by recordation of notice of location in the office of the probate clerk of the county in which the claim is situated and compliance with the law as to annual labor are in themselves sufficient to vest in the locator title to the mining claim. He can hold it forever as long as he performs the necessary annual labor. The moment he is in default on account of a failure to perform the annual labor the claim is open to relocation by that fact alone. From this fact arises the rule that the can-
4 cellation of a mineral patent does not of itself render the ground embraced by it subject to location. Beals v. Cone, 27 Colo. 473, 62 Pac. 9 and 8. It does not restore it, in other words, to the public domain. The effect of such an adjudication is nothing more than a rejection of the application for patent. The applicant is left with the same rights as if no application had been made. Beals v. Cone, supra.

It would then appear that the rules of the land department, by virtue of which a void entry is effectual not only to withdraw, but to keep withdrawn, land from entry until the cancellation of the void entry was entered on the books of the local land office, should not be applied in a case like this to restrain the natural, legal and necessary effect of a judgment of the Land Department holding application for patent void and a nullity and of no effect as to any proceeding under it. There seems to

be no reason for holding that, although by the judgment of the tribunal invested by the government with jurisdiction of such questions, the action of the local land officers in receiving appellant's application and in acting upon it was decided to be without jurisdiction and, therefore, of no effect whatever, yet, the court below should have held in the face of that decision that the acts of the local officers were merely voidable, not void, so that they did affect the land in question. The various considerations which led to the adoption of the rules and practices of the land department with respect to entries of agricultural land can only be said to be applicable to applications for mineral patents, if at all by analogy, and there seems to be no appreciable analogy between them, at least not to the extent of effectuating a practical modification of the judgment of the land department introduced in evidence in the case at bar. We therefore hold that the
5 decision of the trial court, that the final receipts relied upon by appellant were void, nullities and of no effect, was correct.

The court found that neither the locators of the Hortense or Aluminum claims, or any of the said locators of the appellants, or any of its predecessors, did or performed, or caused to be done or performed, the annual labor and improvements required by law upon or for either of said claims, for or during the year 1904, or for or during the year 1905. The appellee located the Lulu and Agnes claims April 1, 1905. By Section 2315, Compiled Laws of New Mexico of 1897, the owner of an unpatented mining claim may make and file with the county recorder proof of labor under oath, containing certain details, and that such affidavit when so made and filed, shall be prima facie evidence of the facts therein stated. It is further provided, however, as follows: "The failure to make and file such affidavit as herein provided, shall, in any contest, suit or proceeding touching the title of such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law." The appellee at the trial introduced in evidence the records of the probate clerk and ex-officio re-

corder of the County of Dona Ana, and from the same was then and there read to the court the affidavit sworn and subscribed by W. F. Robinson, as president of the appellant company, setting forth with particularity the doing of the annual work upon the Hortense and Aluminum claims for the year 1904, but omitting to state "the name or names of the person or persons who performed such work," which the statute requires should be set forth. In tendering such record in evidence, appellee's attorney stated that he did so in order to show that no proper statutory affidavit of such annual labor had ever been filed as provided by the laws of New Mexico. The above was the only proof that was submitted by either side with reference to the question as to whether the annual labor during the year 1904 essential to holding the claim for the year 1905, was done and performed by the appellant on the Hortense and Aluminum claims. It is the position of appellant's counsel that the affidavit was evidence of the facts therein stated, namely: That the labor for the years 1904 and 1905 was done by appellant. The appellant admits that there were two objections to the affidavit; first, that it was not filed within the time required by the act; second, that it did not give the name or names of the person or persons who performed such work, other than that it was done and performed by the appellant. In the case of Upton v. Santa Rita Co., 14 N. M. 96, 89 Pac. 275, a proof of labor was offered and objected to, because the affidavit did not state the amount or character of the actual cost of the work done, nor the names of the persons who actually performed the same, nor the time when it was done. This court in that case held that the proof of labor was properly rejected. It is suggested by counsel for the appellant that this statute by its terms only applies in any contest, suit or proceeding touching the title to the locator's mining claim, and asks if this proceeding is one which involves the title of either party thereto, or if it is one which involves the right of possession by the two claimants only, and that it is well understood that it was decided to be the latter in the case of Upton v. Santa Rita Mining Co., supra. We think

the appellant asks us to put too narrow an interpretation upon this statute and one not justified by its manifest intent. We think that the proof of annual labor pre-
6 scribed by this statute would inure to the benefit of the locator filing the same in any kind of action in which it was material to establish the performance of such labor.

Counsel for appellant say that there was no obligation of any character upon the appellee to show that the appellant had not filed such an affidavit; that the statute in substance, is that the burden shall be upon the owner, unless he file such an affidavit, and in order to escape such burden, he must show, therefore, that he has filed such affidavit; and that if, when he offers such affidavit in evidence, the opposing party conceives that it does not comply with the statute, and that therefore it may be excluded, he has then to object to its introduction. In other words, it is the position of counsel for appellant that the appellee should have introduced evidence showing a failure to do the annual labor and if he was able to produce clear and convincing proof of the failure of the appellant to have the annual work done, oftentimes a matter of great difficulty, then the appellant would have been put to proof, and then if he offered the affidavit, the appellee could have objected. No court, we take it, would sanction such a waste of time to do an unnecessary thing. The attorney for appellee knew that the appellant had not filed a statutory affidavit. It was his duty to establish the fact first, and to do that he was compelled to put the record in evidence, and the records contained the faulty affidavit. In this case it is true, as counsel for appellant point out, that appellee could have contented himself with showing that no affidavit was filed within the "sixty days from and after the time within which the assessment work required by law to be done upon the claim should have been done and performed," but that does not alter what would be the effect of a faulty affidavit introduced in evidence for the sole purpose of shifting the burden of proof. We think that there was an obligation upon the appellee to show that the appellant

had not filed such an affidavit. The statute is one
7 of convenience; if the owner will not file the affidavit it places upon him the burden of showing that he has complied with the law, such compliance being necessary to the maintenance of his estate, and the facts proving the same being peculiarly within his own knowledge and easier far for him to show their existence, if they did exist, than it would be upon the other party to show their non-existence.

The appellant contends that no matter how defective the affidavit was under the statute, that the facts therein stated were before the court as evidence when the same was introduced in evidence by the appellee, and that such facts, not being disputed by any other evidence, they stand clearly proven. And that the appellee did not attempt to, and could not, limit the effect of such evidence. That the appellee did attempt to limit the effect of the proof of labor is shown by the record which recited that "certified copies of proofs filed in June, 1905, and on the 28th of December, 1906, are offered in evidence, for the purpose of showing, in connection with the testimony of the witness, that there have been no satisfactory proofs of labor filed for any year previous to 1906, the same being marked Exhibits Q and R." The witness mentioned was the officer in custody of the county record. The rule invoked by appellant's counsel is: "As a general rule, although a document is introduced to prove a particular fact or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes. Nor, it is held, is a party entitled by an express qualification at the time of introducing a document to restrict its effect as evidence to a definite purpose; but he is compelled to offer it for what it is worth as evidence generally. Vol. 17, Cyc., Sub. Evidence, p. 465. The cases cited to support this rule and the cases cited by appellants' counsel all deal with documents or books introduced in evidence to establish a fact shown by them in favor of the party introducing it. In this case the appellee did not rely upon any fact shown by the proof of labor. He introduced the proofs to show the

non-existence of certain statements which the proofs should have contained. Now, it is quite clear that if the proofs of labor had contained other statements of facts which would have explained or qualified the non-existence of the statements without which the proofs were not evidence for any purpose, the appellant should be allowed the benefit of those statements. In that case the appellant would have been within the rule invoked.
8 The mere statement that the appellant had performed annual labor for the years 1904 and 1905 was not proof, prima facie proof, unless it was further shown by what persons the labor was performed. In other words, it was not a fact shown by the proofs without all the other facts required by law to accompany it.

Another consideration suggests itself in this connection and it is, that the offer of the evidence was not to establish whether appellant had or had not performed the annual labor, but to establish the fact that he had not filed the proof of labor required by the statute. If, therefore, the proof of labor introduced by appellee by one portion only established the fact desired to be shown by appellee, but by another portion explained away that fact or established its opposite, the whole proof or affidavit was in for such purpose. And, in this case, although the appellee in offering the proof of labor for a definite purpose might not be allowed to restrict probative force to that purpose, yet, the appellant would be entitled to use the proofs for what they were "worth as evidence
9 generally." The ex-parte affidavit was worth nothing as evidence generally unless it complied with the statute. Finally, unless the proof of labor was filed within the time required by the statute it was not evidence of anything.

The appellant claims that the original locations of the Lulu and Agnes did not conform to law in that the same were not located with reference to any permanent monument sufficient for their identification, and, because the boundaries thereof did not close or meet and such boundaries could not be traced either from the notices or from any markings on the ground. In disposing of these

objections it is sufficient to say that evidence was introduced at the trial as to these alleged defects in the location notice, and that the court found that the notices did conform to the law. Such a finding will not be dis-
10 turbed by this court if made on substantial evidence as in this case. Candelario v. Miera, 13 N. M. 360; Seidler v. Lafave, 5 N. M. 44, 20 Pac. 789.

The court below held that it was upon the appellant to show that it had resumed work so as to come within the proviso of the following portion of Section 2324: "And upon a failure to comply with these conditions, the claim or mine upon which said failure occurred shall be open to relocation in the same manner as if no location of the same had been made; provided, that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." This is assigned as error. By failure to file the statutory affidavit of proof of labor the burden was on the appellant to prove the performance of the annual labor. This the appellant failed to establish; therefore, the claims in question were open to location, provided, that the appellant had not resumed work upon its claims after failure and before location by appellee. When the burden, by non-compliance with the statute, was placed upon the appellant, it could
11 have been shifted or met by proof either of the annual labor done at the proper time or work done before the location of appellee. The proviso of the statute calls for an affirmative showing by the original locator. As was observed with regard to annual labor, the evidence is peculiarly within the control of the person whose duty it is to do the work. If appellant had in fact resumed work before the date of appellee's locations it could easily have shown it and it was its duty to show it. The claims in this case each covered more than one hundred acres of land. The law required one hundred dollars' worth of work. From this fact it will be seen that impossibility of clear and convincing proof by appellee that apellants had not resumed work on some part of these claims and had not performed one hundred dollars' worth of

work. We are satisfied that the judgment of the court below, finding affirmatively in favor of the appellee, was correct on the facts and the law applicable to them. The judgment of the lower court is affirmed.

[No. 1409. December 23, 1911.]

THE TERRITORY OF NEW MEXICO Ex Rel. GEORGE S. KLOCK, Appellee, v. EDWARD A. MANN, Appellant.

SYLLABUS.

1. Where provision is made by statute for an officer to hold over until his successor is duly elected and qualified, the hold-over is regarded as in all respects a de jure officer and the expiration of his term does not produce a vacancy which may be filled by the authority having the power to fill vacancies.

2. There would be no vacancy until such time as the Governor and Legislative Council should unite in an appointment and the previous incumbent of the office, being entitled to hold until such appointment was duly made, would continue in such office unless removed pursuant to law.

3. The writ of ouster does not reinstate the one legally entitled to the office or actually put him in possession thereof, but in the case at bar the decision of the court in the quo warranto proceeding decided that the respondent was not entitled to the office. This left the relator as the de jure officer entitled to the possession and legally qualified to fill the office.

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

E. W. DOBSON for Appellant.

District Attorneys are neither county nor territorial officials. Enabling Act, sec. 5; Sutherland on Stat. Con., sec. 232; Hammock v. Loan and Trust Co., 105 U. S. 84; Stephens v. Cherokee Nation, 174 U. S. 480; U. S. v. Railroad Co., 164 U. S. 541; U. S. v. Lacher, 134 U. S. 628; U. S. v. Isham, 17 Wall. 502; Revised Statutes, sec. 1857; Meeden v. Board of Supervisors, 114 Pac. 974; Territory ex rel. Welter v. Witt, 16 N. M. 335.

There was a vacancy in the office when the governor appointed. 144 Pac. 362; C. L. 1897, secs. 2556, 2580, 2582; Albright v. Territory, 13 N. M. 64; Territory ex rel. Klock v. Mann, 16 N. M. 211; Territory v. Ashenfelter, 4 N. M. 93; Laws 1905, chap. 93; ex parte Hennen, 13 Pet. 256; Keenan v. Perry, 24 Tex 253; People v. Bissell, 49 Cal. 412.

SUMMERS BURKHART and JULIUS STAAB for Appellee.

A vacancy is a prerequisite to a legal appointment by the Governor. C. L. 1897, secs. 2556, 2574, 2580; 1 Lewis Suth. Stat. Con., sec. 250; 2 Suth. Stat. Con. 916, 918, 919, 90; Territory ex rel. Klock v. Mann, 16 N. M. 211; Laws 1905, chap. 33, sec. 2; Laws 1909, chap. 22, sec. 1; Enabling Act; 29 Cyc. 1399; Mechem's Public Officers, sec. 126; People v. Edwards, 20 Pac. 831; Territory v. Ashenfelter, 4 N. M. 133; Organic Act; Meeden v. Supervisors etc. 114 Pac. 974, Ariz.; Griffin v. Rhoton, 85 Ark. 89; U. S. v. Mouat, 124 U. S. 303.

OPINION OF THE COURT.

WRIGHT, J.—The relator, George S. Klock, was appointed District Attorney for the Sixth District Attorney District of New Mexico, on February 18, 1909, by the then Governor of the Territory, and was duly confirmed by the legislative council, as the law required. for the term of two years and until his successor should be appointed and qualified. On November 18, 1910, the present governor made an order which assumed to remove him from office, and on the same day another order

appointing the respondent, Edward A. Mann, District Attorney in his place. In a decision rendered March 4, 1910, Territory ex rel. Klock v. Mann, 114 Pac. 362, the Supreme Court of the Territory held that the governor had not the power of removal under the circumstances and therefore that the appointment was invalid. Following the judgment and mandate of the Supreme Court in that case, a judgment of ouster was entered in the District Court against the respondent, and the relator, Klock, upon the 24th day of March, 1911, resumed the duties of the office of District Attorney without objection on the part of the respondent, and continued to discharge them until about the 6th day of April, 1911, when the respondent appeared claiming another commission from the governor dated March 29th, 1911, purporting to appoint him to the office and the respondent, having duly qualified on April 6th, 1911, again entered upon the performance of the duties of the office of District Attorney. The relator thereupon brought an information in the nature of a quo warranto, in the name of the Territory, to try the respondent's title to the office. This matter was heard in the lower court and judgment entered in favor of the relator, holding that he was entitled to the office. A writ of ouster was issued, based upon such holding, and respondent was again put out of the office of District Attorney. No supersedeas was granted by the lower court and from the judgment in quo warranto the respondent appeals to this court. Upon the former appeal the court held that the governor was without power to remove a district attorney appointed for a fixed term before the expiration of such term. In the opinion of the court it is also held, incidentally, that if there had been a vacancy the governor would have had the power to fill it under the provisions of Sections 2556 and 2580 of the Compiled Laws of 1897, which sections are quoted in full in the former opinion. In the present case, although the two year term for which the relator had been originally appointed had expired prior to the appointment of respondent on March 29, 1911, the relator claims that there was no vacancy in the office of district attorney which the

governor could fill under the provisions of Section 2556 as modified and restricted by the provisions of Section 2580, Compiled Laws 1897, basing his contention upon two distinct grounds. First, that as by the statute of 1905, chapter 33, sec. 2, in force when he was appointed and in effect reenacted in chapter 22, section 1, Laws of 1909, a district attorney holds office for two years and until his successor is appointed (chosen) and qualified there is no vacancy even after the expiration of two years, unless and until the council joins with the governor in the appointment; and, second, that, even if by the statute law of the territory, there would have been a vacancy at the end of the term of two years but for the enactment by Congress of the Enabling Act, approved June 20th, 1910, yet, by that act the relator was continued in office until the proclamation of the President declaring New Mexico to be a state. Section 2, chapter 33, of the Session Laws of 1905, provides for the appointment of district attorneys by the governor by and with the advice and consent of the Legislative Council, and further provides that such district attorneys, when so appointed, "shall hold their office for a period of two years from the date of such appointment and until their successors may be duly appointed and qualified." This same act was re-enacted in practically the same words by the Legislature of 1909. Where provision is made by statute for an officer to hold over until his successor is duly elected and qualified, the holdover is regarded as in all respects a de jure officer and the expiration of his term does not produce a vacancy which may be filled by the authority having the power to fill vacancies. 29 Cyc. 1399; Kinberlin v. The State, 130 Ind. 120; 30 Amer. State Reports 208; State ex rel. Carson v. Harrison, 113 Ind. 441; People v. Tyrrell, 87 Cal. 479. In People v. Whitman, 10 Cal. 38, it was held that, "The term of the office is fixed at two years, certain, with a contingent extension. When this contingency happens this extension is as much a part of the entire term as any portion of the two years." In State ex rel. Carson v. Harrison, cited supra, at page 439, the court in discussing the

meaning of the word "vacancy" uses the following language: "The word vacancy as applied to an office has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution, or law, with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event." It is also well settled that the right to hold-over continues until a qualified successor has been elected or appointed by the body electorate; or the appointing power, which by law is entitled to elect or appoint such successor. State ex rel. Carson v. Harrison, cited supra, and cases cited therein. The power of appointment of district attorneys in New Mexico rests jointly in the Governor and Legislative Assembly, except in cases of vacancy in the office. The governor acting alone can only appoint to fill vacancies, which apointments shall expire on the commencement of the next Legislative Assembly thereafter. In the case at bar the relator, having the right to hold-over until a duly elected and qualified successor should demand the office, has the right to the office of district attorney and can hold the same until some qualified person appointed by the governor by and with the advice and consent of the Legislative assembly appears and demands the office. Counsel for the respondent contend that such a view of the law practically ties the hands of the governor and ask what the result would be in event the governor should nominate some one whom the Legislative Council would refuse to confirm. Clearly, there would be no vacancy
2 until such time as the governor and Legislative Council should unite in an appointment and the previous incumbent of the office, being entitled to hold until such appointment was duly made, would continue in such office unless removed pursuant to law. Such being our views upon the first contention advanced by the relator, it is not necessary for us to consider the effect of the Enabling Act of June 10th, 1910, upon the term of office of the relator.

The respondent, in his brief, advances an ingenious argument to the effect that since the relator was in actual possession of the office on February 11th, 1911, the date relator's two year term expired, that therefore the office was vacant from the 24th day of March, 1911, the day the writ of ouster unseated the respondent, until the 6th day of April, 1911, the day upon which the relator qualified under his so-called second appointment. This argument is based upon the theory that the ouster of respondent did not reinstate the relator, and in support of such proposition the respondent cites and relies upon the case of Albright v. The Territory, 13 N. M. 64. It appears to us that the argument advanced by counsel is based upon false premise. It is true that the writ of ouster does not reinstate the one legally entitled to the office or actually put him in possession thereof, and this for the reason that the one legally entitled to such office is not necessarily a party to the proceedings questioning the title of the respondent. In the case at bar, however, the decision of the court in the quo warranto proceedings decided
3 that the respondent was not entitled to the office and in so holding necessarily held the action of the governor in attempting to remove the relator as a nullity. This left the relator as the de jure officer entitled to the possession of such office and legally qualified to fill the same. On March 24th, 1911, immediately upon the issuance and service of the writ of ouster, the relator took actual possession of the office and thereupon became a de jure officer in possession of his office and hence there was not, and could not be, any vacancy upon March 29th, the date respondent received his second appointment. 29 Cyc. 1400. There being no error apparent in the record, the judgment of the lower court is affirmed.

Parker and Mechem, J. J., dissent.

[No. 1437. December 23, 1911.]

THE COMMUNITY DITCHES OR ACEQUIAS OF TULAROSA TOWNSITE, a Corporation, Appellant, v. THE TULAROSA COMMUNITY DITCH, W. D. TIPTON, E. KNIGHT, J. J. DALE, and E. H. SIMMONS, Appellees.

SYLLABUS (BY THE COURT).

1. The remedy for the unlawful assumption of the right to act as a corporation and the exercise of corporate rights ultra vires, is by quo warranto and not in equity.

Appeal from the District Court for Lincoln County, before E. R. WRIGHT, Associate Justice. Affirmed.

W. J. CONNELL and EDWIN MECHEM for Appellant.

The ditches are community ditches. C. L. 1897, secs. 8, 10; Vernon Irrigation Co. v. City of Los Angeles, 39 10; Vernon Irrigation Co. v. City of Los Angeles, 39 Pac. 765; Hart v. Burnett, 15 Cal. 538; Lux v. Haggin, 10 Pac. 713.

Injunction is the proper remedy. U. S. v. Alexander, 46 Fed. 728.

Priority. Rev. U. S. Stat., sec. 2339.

T. B. CATRON for Appellee.

Community ditches. C. L. 1897, secs. 8-15; Laws 1895, chap. 1; Laws 1903, chap. 98; Laws 1899, chap. 44; 2 Machem's Mod. Law of Corp., secs. 1477, 1480.

Presumption in favor of corporate acts and doings. Water may be sold separate from the land. 3 Farnham Water and Water Rights 2004; McPhail v. Forney, 4 Wyo. 556; Arnett v. Linhart, 21 Col. 188; Strickler v. Colorado Springs, 16 Colo. 61; Crippen v. Comstock, 66 Pac. 1074; Cache La Poudre Co. v. Reservoir Co., 25 Colo. 144. The last case is one which affirms the same case in the 8th Colorado Appeals 234; Wiel on Water Rights 590; Cooper v. Shannon, 36 Colo. 98.

Quo warranto. 32 Cyc. 1412; Moody v. Lowrimore, 74 Ark. 421; Ames v. Kas., 111 U. S. 449; 14 A. & E. Cyc. Law, Franchises; ex parte Henshaw, 73 Cal. 493; Spring V. W. Works v. Shotler, 62 Cal. 110; State v. Boston, 25 Vt. 442; Feitsam v. Hay, 122 Ill. 295; Armijo v Baca, 3 N. M. 391.

STATEMENT OF THE CASE.

The plaintiff alleges that it is a corporation, organized and existing under the laws of New Mexico and entitled to control and distribute the waters of the Tularosa river in the County of Otero, in the interest and for the benefit of those entitled to use those waters; that the defendant, the Tularosa Community Ditch was organized "in the interest of certain so-called 'shareholders,'" whose "water rights and shares * * * are solely of speculative character, and their source of origin was not the appropriating and placing of any of said waters of the Tularosa river to a beneficial use or applying or using the same on any specified land as is required by law," that the said defendant, the Tularosa Community Ditch, "has assumed to act in a corporate capacity without any lawful right or authority to do so," and "that at the present time and for some time past the said defendants, W. D. Tipton, E. Knight, and J. J. Dale, claiming to be the commissioners of said 'The Tularosa Community Ditch,' and the said E. H. Simmons, claiming to be the mayordomo of said 'The Tularosa Community Ditch,' have wrongfully and unlawfully assumed to act as commissioners and mayordomo respectively, of said so-called 'The Tularosa Community Ditch,' and have wrongfully and unlawfully, and by intimidation and threats of injury and violence prevented the said original settlers, their successors, heirs and assigns, from enjoying and using the full and proper quantity of said waters necessary for the irrigation of their 'Solares' and 'Hortolizas' in said Town of Tularosa, and have wrongfully and unlawfully interfered with said acequias and water ditches and with the commissioners and mayordomo of said 'The Community Ditches or Acequias of Tularosa Townsite,'

in the exercise of their duties in regulating the use of said water and regulating the use of and maintaining the said acequias and water ditches, and wrongfully and unlawfully have diverted and used much water therefrom in and upon desert land outside of the Town of Tularosa which has been grubbed, broken and put in cultivation since January 1, 1909, as well as prior thereto, and have aided and abetted the said organization known as 'The Tularosa Community Ditch' in the wrongful commission of all the acts mentioned and complained of and propose to continue so to do, and will continue so to do unless enjoined and restrained by a decree of this honorable court." The complaint concludes with a prayer for equitable relief, and especially that the defendants "be enjoined from in any manner interfering with said acequias and water ditches or with the waters of said Tularosa river therein, or in any manner interfering with said plaintiff, its commissioners or mayordomo in the management and control of said acequias and water ditches or the use or regulating the use of the waters therein." At the close of the evidence for the plaintiff the defendant demurred to it on several grounds, among them, "that plaintiff has not shown that it had charge of or control of the community ditch in question. Plaintiff has not shown that it has any right to institute this action." The demurrer was sustained for the reason, with others, "that the procedure brought is not a proper procedure to determine the rights of the plaintiff or defendant to control the use and disposition of this water," and the petition was dismissed "without prejudice to any of the rights of any individual whatever who may have right in and to the waters or ditches referred to in the pleadings."

OPINION OF THE COURT.

ABBOTT, J.—The plaintiff has, we think, mistaken its remedy in this matter. It alleges the usurpation of corporate authority by the defendant, The Tularosa Community Ditch, that it has no right to act in a corporate capacity, and, in effect, that even if it had any right to

act as a corporation, it had committed acts against the plaintiff which were *ultra vires*. and constituted an abuse and misuse of its power. If these allegations are true, the exclusive remedy is by quo warranto. If the defendant, The Tularosa Community Ditch, is assuming to be a corporation, when, in fact, it is not one, or, if being one, it has usurped authority beyond its corporate powers, it is a matter of public concern and should be dealt with, not by a suit in equity, in which a decision would necessarily be limited to the cause itself, but in proceedings in the nature of quo warranto, which would determine the status of the defendant, once and for all. In Spelling's Extraordinary Relief, it is said (Section 1804): "Quo warranto has, from its remotest history as a remedy, been deemed and employed as the exclusive proceeding by which the sovereign inquires into the right to exercise and enjoy, as well as the method of employing franchises, which, not being of common right, are considered as particles or attributes of sovereignty. It is the appropriate remedy against a corporation for abuse of power, misuse of privilege, malfeasance, or nonfeasance." Citing Com. v. Union Ins. Co., 5 Mass. 230; Com. v. Fowler, 10 Mass. 290. See, also, Section 21, and note cited. Even more explicit is the statement in Cyc., vol. 32, p. 1415: "In the absence of statutory provision to the contrary, quo warranto proceedings are held to be the only proper remedy in cases in which they are available. Thus they are held to be the exclusive method of questioning the legality of the organization or a change in the territory of a quasi-public corporation, such as a school district, or a drainage district, * * * * * or to attack the validity of the organization of a corporation * * * * and when the remedy by quo warranto is available, it is held that there is no concurrent remedy in equity unless by virtue of statutory provision." Chapter XV of High's Extraordinary Remedies, 3 ed., deals exhaustively with the subject and to the same effect. This court has again and again decided the remedy by quo warranto to be the appropriate and exclusive one where the alleged unlawful possession and

use of the powers of a public office or franchise is complained of. Territory v. Ashenfelter, 4 N. M. 134; Conklin v. Cunningham, 7 N. M. 445; Hubbell v. Armijo, 13 N. M. 482; Territory v. Armijo, 14 N. M. 205. The plaintiff cites Armijo v. Baca, 3 N. M. 391, as an instance where equitable relief was offered; but the plaintiff, Armijo, was in possession of the office there in question, and the defendant was enjoined from interfering with him. The defendant should himself have proceeded by quo warranto.

In this case it appears that the defendants, unlawfully, as the plaintiff claims, are in control of the Tularosa river and the acequias in question, and have been so for a long time, with the exception of a short period when an order of court, afterwards revoked, deprived them of control. The judgment of the district court is affirmed.

Clarence J. Roberts, J., Frank W. Parker, J., concur in the result. W. H. Pope, C. J., not having heard the argument took no part in the decision.

[No. 1288. January 2, 1912.]

GEORGE W. STONEROAD et al, Appellees, v. WILLIAM P. BECK et als, Appellants.

SYLLABUS.

1. To establish its claim of title to an undivided interest of the overlap of two grants, the intervenor introduced the Act of Confirmation by Congress and the patent issued thereunder. To avoid the apparent effect of this proof the appellees must accept the burden of establishing a perfect legal title or right independent of their title by the Act of Confirmation.

2. Upon the cession of New Mexico to the United States all the laws of Mexico relating to subjects non-political in their character remained in force, but were administered by officers appointed and controlled by the United

States. Likewise, in Mexico, after the independence of that country by the plan of Iguala and the other acts referred to, the laws of Spain in force at that time of a non-political character were continued and remained in force and the officers of Spain having in charge the enforcement of those laws were made the officers of the Mexican nation.

3. The Preston Beck and Perea grants being both void grants owe their validity entirely to the Act of Congress confirming them.

4. The right to a patent once vested is treated by the government, when dealing with public lands, as equivalent to a patent issued. When in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening rights.

5. The above rule can have no application to the case at bar, because it cannot be said, either upon the application to the Surveyor General or upon his favorable report upon the application, did a right to patent vest.

6. The claimants of the Preston Beck grant had no equitable right or title previous to the Act of Confirmation. The Act of Confirmation should not, as to the Preston Beck grant, be given effect by relation as of an earlier date, so as to take priority over the Perea grant. Both are equal in time. The intervener and appellee holding by the same Act of Congress so far as their grants conflict or overlap, have each an equal undivided moiety of the lands within the conflict.

7. The giving of juridical possession in 1825 to the Beck grant did not constitute a circumstance granting a feature of superiority, although no juridical possession was conferred to the Perea grant.

8. Even though when the treaty was signed, there was a license to occupy in favor of the Beck grantees, this license or permissive possession was revoked ipso facto by the treaty and when the treaty was signed these properties passed to the United States as public domain to be dealt with by Congress.

9. The mere circumstance that one claimant reached the Surveyor General's office first in order to present his claim cannot be considered as affecting the rights of other parties.

10. The fact that a contract for survey had been first let for the Beck grant could not operate to render nugatory an Act of Congress which confirmed equally to the Perea grant and to the Beck grant the interest of the government in the lands involved.

Appeal from the District Court for San Miguel County, before WILLIAM J. MILLS, Chief Justice. Reversed and judgment entered.

STEPHEN B. DAVIS, JR., and CHARLES A. SPIESS for Appellants and Intervenors.

The title to public lands was vested in the Mexican nation. Republic v. Thorn, 3 Tex. 499; Good v. McQueen's Heirs, 3 Tex. 241; U. S. v. Coe, 171 U. S. 681; U. S. v. Hartwell's Heirs, 22 How. 288; Leese v. Clark, 3 Cal. 16; Pino v. Hatch, 1 N. M. 125; Pollard's Lessee v. Hagan et al, 3 How. 225; Jones v. Borden, 5 Tex. 410.

When title passes to the new sovereignty it alone has authority to determine how its property shall be disposed of. Ely's Administrator v. U. S., 171 U. S.; Pino v. Hatch, 1 N. M. 125; Jones v. U. S., 137 U. S. 202; in re Cooper, 143 U. S. 503; Cessna v. U. S., 169 U. S. 165.

The colonization law of 1823 was valid. Cessna v. U. S., 169 U. S. 165; Goode v. Queen's Heirs, 3 Tex. 168; Yates v. Iams, 10 Tex. 168; Holliman v. Prebles, 1 Tex. 673; Yates v. Houston, 3 Tex. 433; 1 White's Recopolicion 594; Raynolds on Spanish and Mexican Laws; Hall' Mexican Law.

The titles to the Beck and Perea grants are American titles, not Mexican titles, and the doctrine of relation does not apply to such titles. Dent v. Emmeger, 14 Wall. 308; Menard Heirs v. Massey, 8 How 307; Chauteau v.

Eckhart, 2 How. 345; Les Bois v. Bramell, 4 How. 449; Rodriguez v. U. S., 1 Wall. 482; Hale v. Ackers, 69 Cal. 160; Jackson v. Baird, 4 Johns. 230; 3 Washburn on Real Property 328; Butler & Baker's Case, 2 Coke's Rep. 29; Gibson v. Choteau, 13 Wall. 101; Lynch v. Bernal, 9 Wall. 315; Evans v. Durango Land and Coal Co., 80 Fed. 433; Henshaw et al v. Bissell, 18 Wall. 225; Beard v. Federy, 3 Wall. 479; Berthold et al v. Macdonald et al, 24 Mo. 126; 22 Howard 334; Landes v. Brant, 10 Howard 370; Doe v. Eslava, 9 Howard 421; Barry v. Gamble, 3 Howard 32; Lanfear v. Hunley, 4 Wall. 204; McCabe v. Worthington, 16 Howard 86; Trenier v. Stewart, 101 U. S. 797; St. Paul & S. City R. Co. v. Winona & St. Paul R. Co., 112 U. S. 720; Chicago M. & St. P. R Co. v. United States, 159 U. S. 372; Southern Pacific Ry. Co. v. United States, 183 U. S. 519; Sioux City & St. Paul R. Co. v. U. S., 159 U. S. 349.

JONES & ROGERS for Appellees.

Patent adds nothing to the validity of the title. Shaw v. Kellogg, 170 U. S. 341; Rutherford v. Green's Heirs, 15 U. S. 2 Wheat. 296; Bryan v. Forsythe, 60 U. S. 19 How. 234; Lagden v. Haynes, 88 U. S. 21 Wallace 521; Beard v. Federy, 3 Wall. 493; Russell v. Maxwell Land Grant Co., 158 U. S. 258.

He who secured the first confirmation or patent obtains the title. Chauteau v. Eckhart, 2 How. 345; Les Bois v. Bramwell, 4 How. 449; Willot v. Sanford, 19 How. 79; Menard Heirs v. Massey, 8 How. 307; Dent v. Emmenger, 14 Wall. 308; McCabe v. Worthington, 16 How. 87; Trenier v. Stewart, 101 U. S. 808.

The title is established from the date of the grant by the Mexican government. Colorado Co. v. Commissioners, Beard v. Federy, 3 Wall. 491; Gibson v. Chauteau, 13 Wall. 93; Catron v. Laughlin, 11 N. M. 632; Doe v. Eslavo et al, 9 How. 446; Berthold et al v. McDonald et al, 122 How. 340; Henshaw v. Bissell, 18 Wall. 266; Rodriguez v. U. S., 1 Wall. 582; Trenier v. Stewart, 101 U. S. 810; Miller v. Dale, 92 U. S. 474.

The claimants of the Perea grant had no title, legal or equitable, under the Mexican government. Haynes v. U. S., 170 U. S. 637; Malarin v. U. S., 1 Wall. 289; U. S. v. Pico, 5 Wall. 539; Moore v. Steinbach, 127 U. S. 80; Ainsa v. U. S., 160 U. S. 234; U. S. v. Pena, 175 U. S. 504.

Claimants of the Beck grant had a perfect legal title under the Mexican government. United States v. Arredondo et al, 6 Peters 713; U. S. v. Clarke, 8 Peters 456; Crespin v. U. S., 168 U. S. 213; Leese v. Clarke, 3 Cal. 16; Pino v. Hatch, 1 N. M. 125; Moore v. Steinbach, 127 U. S. 70; 12 Bancroft 726, et seq.; Ely v. U. S., 171 U. S. 221; U. S. v. Vallejo, 1 Black. 541; Moore v. Steinbach. 127 U. S. 80; 1 White 561, et seq.; 1 Galvan's Decrees 4-7; U. S. v. Green, 185 U. S. 257; U. S. v. Peralta, 19 How. 348; Catron v. Laughlin, 11 N. M. 606; Shaw v. Kellogg, 170 U. S. 339; Reynolds Spanish and Mexican Land Laws 100, et. seq.; Sutherland on Stat. Cons., sec. 168.

If the title to the Beck grant was not perfect under the laws of Mexico, yet, it was a better title than the title to the Perea grant. Pino v. Hatch, 1 N. M. 125; Pollard's Lessee v. Files, 2 How. 603; Miller et al v. Dale et al, 92 U. S. 473; Stoneroad v. Stoneroad, 158 U. S. 241; Bryan v. Forsythe, 19 How. 336; Shaw v. Kellogg, 170 U. S. 341; Langeau v. Haynes, 21 Wall. 531; Rutherfords v. Green's Heirs, 2 Wheat. 206.

The confirmation of the Beck grant was legally prior to the confirmation of the Perea grant. Landes v. Brant, 10 How. 372; Crowley v. Wallace, 12 Mo. 145; 5 Cruise on Real Property 510; Beard v. Federy, 3 Wall. 491; Henshaw v. Bissell, 18 Wall. 265; Grisor v. McDowell, 6 Wall. 379; Stark v. Starrs, 6 Wall. 418; Shipley et al v. Cowan et al, 91 U. S. 337; Gibson v. Choteau, 13 Wall. 101.

OPINION OF THE COURT.

MECHEM, J.—This is a suit originally commenced by certain claimants of interest in the Preston Beck Grant for the purpose of determining the title of the various per-

sons claiming interest therein, and obtaining partition of it. In the year 1903, A. A. Jones, was appointed receiver of the grant and immediately entered into possession of a large portion of it. The Preston Beck grant, in the southeasterly portion, conflicts with the Perea grant to the extent of several thousand acres. The receiver appointed in this suit took possession of the Preston Beck grant, including that portion of it in conflict with the Perea grant. Thereafter the St. Louis Land & Cattle Company, intervenor and appellant herein, claiming the ownership of this land as the holder of the title to the Perea grant, applied to the District Court of San Miguel county, by which the receiver had been appointed, for an order directing the receiver to surrender possession to it of the land in conflict. The district court considered this petition for the order directing the receiver to surrender possession sufficient to give jurisdiction to decide whether the land in conflict belonged to the owners of the Preston Beck grant or to the St. Louis Land & Cattle Company, as the owner of the Perea grant; took evidence as to the respective titles and finally decreed that the land in conflict belonged rightfully to the Beck grant and the receiver was entitled to the possession of it and the St. Louis Land & Cattle Company had no right, title or interest in or to any portion of it. From this decree the St. Louis Land & Cattle Company had appealed to this court. The question we are called upon to decide is as to the title of this tract of land in conflict between the two grants. The Preston Beck grant and the Perea grant were both confirmed by the Act of Congress of June 21, 1860, 12 Stat. at Large, p. 71. The court below found that both the Preston Beck and Perea grants were not only imperfect, but were void grants prior to the action taken by Congress with reference to them, but it held that as the Beck grant was first made, or attempted to be made, by certain officials of Mexico, the government of the United States in issuing a patent for the same, in effect declared that it was valid under the laws of Mexico, and, being an older grant, consequently had priority over the Perea grant. And further, that the claimants of the Beck

grant had taken the first steps necessary to acquire title by applying to the surveyor general and securing his favorable report of the grant before the claimants of the Perea grant had done so and that the patent or Act of Congress related back to the date of the acts of the surveyor general. The situation of the parties may be thus stated. By virtue of the Act of Congress confirming their respective claims, each has a patent of equal standing as far as time is concerned and as their position as grantees of the government of the United States is concerned; both, then, have a conveyance to the same tract of land. By Section 4 of the act of confirmation it is provided, "and it is further enacted that the foregoing confirmation shall only be considered as quit claims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whatsoever." If either party has the better title to the land in controversy that title must be founded on one which existed at the time of the act of confirmation. The intervenor, as the owner of the Perea grant, claims an interest in the tract in controversy, by the virtue of the act of confirmation above referred to. The appellees as owners of the Preston Beck grant resist, because, as they say, those from whom they deraign their title at the time of the Act of Congress had rights adverse to the government in the tract in dispute, which were not affected by the act of confirmation. In fact, they depend, not upon their rights as grantees of the United States, but upon an antecedent title. It is sufficient to establish its claim of title to an undivided interest, at least of the overlap that the intervenor introduces, the act of confirmation and patent issued thereunder. To avoid the apparent effect of this proof the appellees must accept the burden of establishing a perfect legal title or right independent of their title by the act of confirmation. Both parties here claim under patents of the same date. Our inquiry, in order to settle their respective rights to the land claimed by each, must extend to the character of the original grants from the Mexican government. Henshaw v. Bissell, 18 Wall. 266. It is not claimed by the intervenor that the Perea grant

was a valid grant. It was claimed by the appellee that the Preston Beck grant was a perfect grant prior to its confirmation by Congress.

The Preston Beck grant was made December 23, 1823, by Bartolome Baca, the then political chief of New Mexico. The independence of Mexico dated from February 24, 1821. On that date the Kingdom of Spain lost its jurisdiction over what is now Mexico and the sovereignty of the Mexican nation commenced. Thereafter the colonization law of the Emperor Iturbide was adopted, January 4, 1823; was in force only a short time having been suspended by the decree of April 11, 1823, and superceded by the law of August, 1824. From this it will be seen that the Preston Beck grant, made on December 27, 1823, was made during the suspension of the Iturbide colonization law of January 4, 1823. The question presented is whether or not the political chief of the Province of New Mexico had authority to make the Preston Beck grant. Counsel for appellees contend that both by express action of the Mexican government and legal presumption, it must be decided that the Beck grant was a perfect grant and made by legal authority. Both here and in the court below, as stated in the opinion of the learned trial judge, no question was raised that the grant as made would not have been valid if made by the same officer acting under the Spanish government. It is assumed by both parties to this action, as we shall assume, that under the government of Spain the political chief would have had the power to make grants of public lands. It is contended by appellees that the Mexican government by certain acts hereafter discussed continued in office the officers of Spain and continued them in the exercise of all the power and authority they may have had under the Spanish government. The acts referred to are certain portions of the plan of Iguala, the treaty of Cordova and an order of the provisional council, dated October 5, 1821. In the case of Ely's Administrator v. United States, 171 U. S. 220-228, these various acts as far as pertinent here are thus stated: "On February 24, 1821, a declaration of independence was made known on the form known as the plan of Iguala,

and this declaration of independence was made good by the surrender of the City of Mexico on September 27, 1821. The fifteenth section of this plan provided that, 'the junta will take care that all the revenues of departments of the state remain without alteration whatever, and all the employees, political, ecclesiastical, civil and military, will remain in the same state in which they exist today.' On August 24, 1821, what is known as the Treaty of Cordova was signed at that village by General Iturbide for Mexico, and Viceroy O'Donoju for Spain, the latter, however, having no previous authority from Spain, and this treaty was by Spain afterwards repudiated. This treaty provided that 'the provisional junta was to govern for the time being in conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortes shall form the constitution of the state.' Immediately after the surrender of the City of Mexico a provisional council or junta, consisting of thirty-six members, was created under the plan of Iguala, which assumed the control of the government, and on October 5, 1821, this provisional council promulgated the following order (Reynolds, p. 95): 'The sovereign provisional council of government of the Empire of Mexico, considering that from the moment it solemnly declared its independence from Spain, all authority for the exercise of the administration of justice and other public functions should emanate from said empire, has seen fit to habilitate and confirm all authorities as they now are, in conformity with the plan of Iguala and the treaty of the Village of Cordova, for the purpose of legalizing the exercise of their respective functions."

Conceding that by these acts the political chief of the Province of New Mexico was continued in the exercise of his public functions, can it be said that they continued such officer in the exercise of the power he derived from the King of Spain to alienate the public domain? These acts above referred to were necessary to secure a continuation of orderly government and prevent a condition of anarchy, and if there is nothing in them to declare a broader purpose they should not be construed to effectuate a purpose beyond that which satisfies their language. It

would not be contended for a moment that the new sovereignty intended to continue in force any law which did not recognize it, any law at variance with its paramount power and authority. On the other hand, it is equally clear that it was its intention that all the laws in force in Mexico at the date of the extinguishment of the sovereignty of Spain, should remain in force, except so far as they affected the political institutions of the New Mexican government. This same result is affected by the "doctrine that the laws of conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him." Moore v. Steinbach, 127 U. S. 70-81.

It is not to be questioned that in an inquiry in which it was important to determine what was the law of descent and distribution, for instance, in Mexico immediately after its independence and there being no new law promulgated by Mexican authority, in that event the law in force in Mexico previous to its independence would control.

The change of sovereignty affected by the overthrow of Spain and the establishment of the Mexican nation was much the same as the change of sovereignty affected by the cession of New Mexico to the Unitel States. In the case of Leitensdorfer et al v. Webb, 20 How. 176, the Supreme Court, commenting on the results of such change, said: "By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the constitution and laws of the United States, or with any regulations which the conquering or occupying power should ordain. Amongst the consequences which would be ordinarily incident to the change of sovereignty, would be the appointment and control of the agents by whom, and the modes in which, the government of the occupant should be ad-

ministered—this result being indispensible, in order to secure those objects for which such a government is usually established. This is the principle of the law of nations, as expounded by the highest authorities."

The plan of Iguala and the other acts of the Mexican nation referred to were intended to accomplish two things, first, recognize and affirm the principle of the law of nations that the municipal and commercial laws of that country in force under Spanish rule should remain in force to the extent that they were compatible with the existence of the new sovereignty; and second, as a consequence incident to a change of sovereignty to appoint and control every public officer, so that "all authority for the exercise of the administration of justice and other public functions should emanate" from the new sovereign. Upon the cession of New Mexico to the United States all the laws of Mexico relating to subjects non-political in their character remained in force but they were administered by officers appointed and controlled by the United States. Likewise, in Mexico, after the independence of that country by the plan of Iguala and the other acts referred to, the laws of Spain in force at that time of a non-political character were continued and remained in force and the officers of Spain having in charge the enforcement of those laws were made the officers of the Mexican nation. It cannot be supposed that the statesmen of Mexico were ignorant of the principles of the law of nations, a subject of great antiquity and of world-wide application. It is to be presumed, on the contrary, that in erecting a new nation by which the previous political relations of the people of that country were dissolved, they would regard as eminently necessary that the relations of the people to each other and their rights of property should remain undisturbed, and further, that until a more perfect government should be ordained, the governmental machinery than in existence should be continued in action for the time being. It is indicative of this purpose that the junta or council is termed "provisional," that the treaty of Cordova provided that, "the provisional junta was to govern for the time being in

conformity with existing laws in everything not opposed to the plan of Iguala, and until the Cortez shall form a constitution of the state."

The act of habilitation, above referred to, was adopted by the provisional council on October 5, 1821, in conformity with the treaty of Cordova and the plan of Iguala. The provisional council or junta remained in power until the assembling, on February 24, 1822, of the Congress, elected under the provisions of the plan of Iguala and the treaty of Cordova, for the purpose of framing a constitution. (Raynolds, p. 31). From the foregoing, it is very evident that the government of Mexico during this period was temporary and provisional in character. That it, while holding in its hands the supreme power, perhaps, yet it was only clothed with that power by necessity until, as was contemplated and as was afterwards done, a constitution might be adopted. In such a case it would seem that the temporary government had power only to preserve order, to maintain a condition of political non-action until the new sovereignty should be manifested through the, at that time well recognized, forms of constitutional government. It would seem, therefore, that a proper construction of the various acts relied upon by appellees must be construed in the light of these conditions and should not be given a construction to include matters and things certainly not within their exact letter nor within their spirit.

It is significant that of the ten grants made in New Mexico between the date of Mexican independence and the law of August 18, 1824, of which we have any records, four including the Preston Beck grant were confirmed by Act of Congress and the remainder were rejected by the Court of Private Land Claims.

"The grants confirmed by Congress are: Ojito del Rio Gallinas; date of grant, December 23, 1823; confirmed by Congress, June 21, 1860. Casa Colorado; date of grant, September 15, 1823; confirmed by Congress, December 22, 1858. Brazito grant; date of grant, 1822 or 1823; confirmed by Congress June 21, 1860. Anton Chico grant; date of grant, February 13, 1822; confirmed by Congress June 21, 1860. As shown by the docket of the

Court of Private Land Claims, the following claims were presented to the court for confirmation and rejected. The decrees of the court are not accessible: No. 59. Juan Gid or John Heath grant (Dona Ana county, 108,000 acres); date of grant, December 27, 1822; decree rejecting claim filed June 26, 1895, Court of Private Land Claims. No. 142, No. 204, No. 206. Vallecito de Lobato grant; dated February 23, 1824. Rio Arriba county, 114,400 acres. Claim rejected and petition dismissed October 5, 1897, by Court of Private Land Claims. February 4, 1898, appealed and allowed. No. 174: Jose Ignacio Martinez grant. Taos county, 500 acres. Grant dated October 30, 1821. Dismissed and grant rejected January 31, 1898, by Court of Private Land Claims. No. 175. Felipe Medina grant. Taos county, 300 acres. Dated July 24, 1823. Petition dismissed and grant rejected January 31, 1898, by Court of Private Land Claims No. 176. Manuel Fernandez grant, Taos county. Dated December 20, 1823. Petition dismissed and grant rejected January 31, 1898, by Court of Private Land Claims. No. 241. Paraje del Rancho grant. Taos county, 90,000 acres. Dated December 27, 1821. Petition dismissed May 17, 1897, by Court of Private Land Claims.

In the case of Leese v. Clark, 3 Cal. 16-23, the court said: "Prior to the Mexican Revolution which produced the plan of Iguala, February 24, 1821, the unappropriated lands in this country constituted a part of the domain of the Spanish monarchs, who alone represented and exercised the sovereignty of the Spanish nation. The royal governors were the mere deputies of the King, and exercised the sovereignty in his name. His will, manifested in the form prescribed by his regulations, operated as a valid alienation of the public domain. His governors, acting under his authority, and in his name, were the mere executors of his will—whence the law or decrees of the kings, and the regulations and usages of their governors, sanctioned by royal approval or acquiescence, afforded the proper tests by which to determine the validity of grants of land belonging to the nation whose sovereignty those kings represented and exercised, and they are accordingly

consulted and relied upon by the courts of the United States in adjudicating Spanish claims in Florida and Louisiana. But, on the 24th of February, 1821, the relation between Mexico and Spain ceased; and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico, except by an act of Mexican sovereignty. The royal decrees, regulations and usages, ceased to have any effect whatever as to subsequent grants of land. This point was determined by the Mexican Congress, in a case which arose shortly after the independence of that government, and has ever since been acquiesced in. On the 17th of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas. On the 19th of August, the Mexican governor of that province (Martinez), assuming the powers properly exercised by the royal governors, modified the grant in favor of the younger Austin. Had the royal laws and usages still continued to retain their force, the acts of Martinez would have been valid, but the Mexican government, at the same time it recognized the act of the royal governor as valid, because done before the change of sovereignty, refused to confirm the act of its own governor, done after the change, on the ground that the sovereignty could be exercised only by the Mexican nation. The subject attracted public attention, and the Mexican government were about passing a general law in relation to the alienation of public lands, when Iturbide forcibly dispersed the members of that body, and caused himself to be proclaimed emperor. On the 4th of January, 1823, he promulgated a general law on the subject, but, being shortly afterwards deposed, Congress, on the 11th of April, 1823, suspended that law. On the 18th of August, 1824, Congress enacted a general colonization law, prescribing the mode of granting public lands throughout the Mexican territory. (White's Recop. 561, 8, 71, 76 and 82).

Stephen F. Austin, alluded to in the case just cited as the "younger Austin," on November 1, 1829, addressed to the "settlers in what is called 'Austin's colony'" in Texas, on account of his negotiation with the Mexican

government, in which he says that at the time of his arrival in the City of Mexico on the 29th day of April 1822, "the national Congress had been in session since the 24th of February of that year. The form of government as then established was a limited monarchy, in conformity with the plan of Iguala and treaty of Cordova, and the Spanish constitution was provisionally adopted. The executive department was administered by a regency, of which the generalissimo, Don Agustin Iturbide, was president." After describing the unsettled conditions then existing, he continues, "on examination into the state of this colonization business, he (Austin) found that the regency had decided that the Governor of Texas, Martinez, was not sufficiently authorized to stipulate what quantity of land the new settlers were to get, as he did by his letter to Austin, of the 19th of August, 1821, and that this point must be settled by a law of Congress, for which purpose all documents relative to said new settlement were transmitted by the regency to Congress."

There seems to have been no doubt of the validity of the grant to Moses Austin, a Spanish subject, made under the Spanish government, but the regency and the Congress of Mexico decided that that power of the governor was abrogated by the overthrow of Spanish rule. It was an interpretation of the plan of Iguala, treaty of Cordova and order of October 5, 1821, by the supreme power of Mexico and furnishes us the best means of construction. U. S. v. Sherbeck, 27 Fed. Cas. 16275. Moreover, the language of these acts, the conditions of the country in which they were promulgated, all bear so close an analogy to the principles of the law of nations respecting the laws of conquered or ceded countries as to warrant us in saying that such were their manifest intent and effect. If this be so, the case of More v. Steinbach, 127 U. S. 70-81, in which the court said: "The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to laws author-

izing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken, except in pursuance of his authority on the subject," is in point and decisive and we so apply it .

In the case of Ely's Administrator v. U. S., supra, relied upon by appellees in this connection does not hold that the validity of the sale in that case depended solely on the power of the officer to make it. On the contrary, it is quite evident from a reading of that case, that, had the validity of the sale depended solely on the power of the officer to make it, the court would have held it invalid. Moreover, the decision in Ely's Administrator case was upon facts and under laws bearing no analogy to the case at bar. In that portion of Mexico where the land involved in Ely's Administrator case was situated public lands were sold by intendants of the royal treasury. We know of no law of Spain providing for the sale of land in the Province of New Mexico and the lands in New Mexico which during those times became the subject of private ownership became so by grants, either as rewards to officials, or to settlers to encourage industry and the occupation of the country. In that case the land was sold, in this case the land was a gratuitous grant. In that case, the purchase price of the land was received by and retained by the Mexican government and afterwards the sale was ratified and confirmed by a Mexican official whose power and authority to bind the Mexican government the court held to be undoubted; in this case nothing further was done by any Mexican official to confirm and ratify the act of the political chief. Speaking of the subsequent action of the Mexican official who confirmed and ratified the sale in Ely's case and of the extent of his powers, the court said: "When an office is created with such large powers as these and the incumbent thereof reviewing proceedings theretofore had by prior representatives of the government, and finding that a sale made by one of such prior officers has resulted in the payment of the cash proceeds thereof into the public treasury, confirms his action, ratifies

his proceedings and issues appropriate title papers therefor, it would seem that any doubts which might hang over the power of the prior officer were put at rest, and that thereafter no question could be raised as to the validity of the sale." Ely's Administrator v. United States, supra, p. 233.

Counsel for appellees contend that the fact that the officers of the Mexican government continued to make disposition of the public domain in accordance with the laws of Spain raises a legal presumption in the case at bar that authority to make this grant existed. As sustaining their position on this point counsel cites the cases of United States v. Peralta, 19 How. 347; U. S. v. Arredondo, 6 Pet. 691. In the case of Florida v. Furman, 180 U. S. 402, a suit brought by claimants of a Spanish land grant to remove as clouds from their title, patents issued by the United States to land embraced within the land grant, the court, speaking of the Arredondo and Peralta cases, said: " * * * * it was held in view of the rules of decision presented by the statutes under which the courts exercised jurisdiction, that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the official executing the grant, but that the court would assume as settled principle that a public grant was to be taken as evidence that it was issued by lawful authority," and that "in Crespin v. United States, 168 U. S. 208, which was a case under the act of 1891, it was held that the presumption indulged in United States v. Arredondo could not supply the want of power in the alleged granting officer." In the case at bar, as we have said, complainants were not proceeding under any act of Congress permitting the United States to be sued, but as at common law, and on the basis of absolute legal title. That title they were obliged to make out and could only avail themselves of such presumptions as would ordinarily obtain."

In the case at bar the appellees seek to bring themselves within the reservations of the act of confirmation. Their position is, that at the time Congress confirmed the Perea grant that the United States had no title to convey. To establish this fact they must prove a perfect title, and

to do that show affirmatively that the officer making the grant had power to make it.

The Preston Beck and Peralta grants being both void
3 grants owe their validity to the act of Congress confirming them. Before their confirmation neither had any title or right to the land embraced within their boundaries, so that the act of confirmation cannot relate back, at least, to the date of the acts of the Mexican political chief by which he attempted to make the grants. This point is clearly settled in Dent v. Emmeger, 14 Wall. 308-312, in which the court said: "Titles which were perfect before the cession of the Territory to the United States, continued so afterwards, and were in no wise affected by the change of sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. But inchoate rights, such as those of Cerro, were of imperfect obligation and affected only the conscience of the new sovereign. They were not of such a nature (until the sovereign gave them a validity and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by Congress they became American titles, and took their legal validity wholly from the act of confirmation, and not from any French or Spanish element which entered into their previous existence. The doctrine of senior or junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims or the circumstances attending it. Such is the settled course of adjudication both by this court and the Supreme Court of Missouri."

The court below held that the Preston Beck grant had priority over the Perea grant, because the claimants of the former grant were first to apply to the surveyor general of New Mexico and secure his confirmation of their claim,

and, "if the confirmatory act and subsequent patent operated as a deed to convey title from the United States to the confirmee, they would relate back to the inception of the proceedings necessary in order to obtain them, which in this case was the filing of the petition before the surveyor general. In the cases cited by counsel for the appellees, the patents or grants related back to the inception of the right to the patent. In other words, before the patents issued it had been determined by some intermediary tribunal that the claimant was entitled to a patent, or where the claimant by virtue of settlement and complying with the law became entitled to a patent. In all these cases the claimants before receiving patents had title. The patent followed as a matter of course. Before it issued the equitable title was in the claimant, the government holding the legal title for his benefit. In this case the action of the surveyor general amounted to nothing at all. Between his report and the action of Congress the claimant had no right or title. In the case of Pinkerton v. Ledoux, 129 U. S. 346-351, the court said: "The Surveyor General's report is no evidence of title or right to possession. His duties were prescribed by the act of July 22, 1854, before referred to, and consisted merely in making inquiries and reporting to Congress for action. If Congress confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress, it had no effect to establish such boundaries, or anything else subservient to the title." The act did not even provide for applications to the surveyor general. It was his duty "under the instructions of the Interior Department to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico." His instructions from the secretary of the interior were: "You will commence your session by giving proper notice of the same in a newspaper of the largest circulation in the English and Spanish languages, and will make known your readiness to receive notices and testimony in support of the land claims of individuals derived before the change of government. You will require claim-

ants in every case, and give public notice to that effect, to file a written notice setting forth the name of "present claimant," name of "original claimant," nature of claim, whether inchoate or perfect, its date, from what authority the original title was derived, with a reference to the evidence of the power and authority under which the granting officer may have acted, quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim and to show a transfer of right from the 'original grantee' to 'present claimant.'" But this order was not effective to give rights which the law did not give. That the powers of the surveyor general of New Mexico and the board of commissioners of California were so dissimilar that the case of Beard v. Federy, 3 Wall. 478, is not in point here is readily seen from the following statement from the case: "After our conquest of California, in 1846, Congress, by act of March 3, 1851, 'to ascertain and settle the private land claims' in that state constituted a board of commissioners, in the nature of a judicial body, before which claims to land there were to be investigated. Every person claiming lands there 'by virtue of any right or title derived from the Spanish or Mexican governments, was to present his claim to this board with the documentary and other evidences of it. Notices of depositions, when taken, were to be given to the law officers of the United States. In case of confirmation of the claim, an appeal was given the United States to the district court; in which case, says the act (Par. 10), that court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court. If the decree in that court was adverse to the government, an appeal was given to this court. The act declares that 'for all claims finally confirmed by the said commissioners or by the district court, or by the supreme court, a patent shall issue to the claimant,' but that such patent shall be 'conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.' It declares, moreover, 'that all lands, the claims to

which shall not have been presented to the said commissioners within two years after the date of the act, shall be deemed, held and considered as part of the public domain of the United States." Speaking of the effect of a decision by the board, the court said: "The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

There can be no doubt but that it is the law that "the
4 right to a patent once vested is treated by the government, when dealing with public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening rights." Stark v. Starrs, 6 Wall. 402-418. This rule can have no application to the case at bar, because it cannot be
5 said that, either upon the application to the surveyor general or upon his favorable report upon the application, did a right to patent vest.

In the case of Hussman v. Durham, 165 U. S. 144, 145, the court, in discussing the doctrine of relation, says: "A title by relation extends no further backwards than to the inception of the equitable right." In this case the claimants of the Preston Beck grant had no equitable right or title previous to the act of confirmation. This being so, the act of confirmation should not, as to the Preston Beck grant, be given effect by relation as of an earlier date, so as to take priority over the Perea grant. Both
6 are equal in time. The intervener and appellees, holding by the same Act of Congress in so far as their grants conflict or overlap, have each an "equal undivided moiety of the lands within the conflict." Southern Pacific Railroad v. United States, 183 U. S. 519.

For the reasons given the judgment of the lower court will be reversed and the cause remanded for further proceedings in accordance with this opinion, and it is so ordered.

Justices Wright and Roberts, not having been on the bench when this cause was submitted, did not participate in this opinion.

OPINION ON MOTION FOR REHEARING.

Per Curiam.—In deference to the importance of this case we have heard counsel orally upon the motion for rehearing, thus waiving our rule, which precludes, except by special consent, oral argument upon such matters. The motion proceeds upon two general grounds; first, that the court, in its opinion, has overlooked certain contentions which counsel have presented in their briefs, and second, that certain positions there advanced are incorrectly decided by the court and that the opinion in these respects is contrary to controlling authority. The court has considered the case from each viewpoint. We adhere to the position quite fully outlined in the original opinion, that each of the conflicting Mexican grants was made without authority of law. The question which has, however, chiefly concerned us upon this motion, is whether, even if the grants were originally made without authority, there were other considerations operating in favor of the Beck grant entitling it to priority over the Perea grant. This is to be considered from two standpoints, matters before and matters after the treaty. First, did there exist, at the date of the treaty, by reason of what occurred under the former government, such elements of superiority in the Beck grant, viewed even as an invalid grant, as justifies our considering it prior in right here? It is urged, in this connection, that the giving of juridical possession in 1825 lent the Beck grant a feature of superiority, since in the Perea
7 grant no juridical possession was conferred. We are of opinion, however, that this mere fact would not constitute a circumstance giving priority. If, as we have held, the original action of the granting authorities was invalid because not characterized by the power to pass the title, much more so is the act of an alcalde viewed as an attempt to the same end. The alcalde, of course, had no power to initiate a grant on behalf of the sovereignty (Hays v. United States, 175 U. S. 248). We think it is

equally clear that if he gave possession pursuant to a void grant, no more dignity could flow from this latter circumstance than from a situation in which he attempted to give possession upon his own initiative and upon his own claim of power.

It is next argued, and with great force, that, discarding the matter of juridical possession as an element of title, and discarding the acts of the granting authorities as efficacious to pass title, still, under the case of Pino v. Hatch, 1 N. M. 125, 130, citing Pollard's Lessees v. Files, 2 How. 591-3, the acts of the granting officers invested the grantees with at least the right of possession for such time as the sovereign might permit them to stay there, in other words, a permissive possession tantamount to a license to occupy. It is said that as this existed in behalf of the Beck grantees, it constituted a feature of advantage and superiority which that grant possessed at the time of the treaty. We note, however, that the petition for the Perea grant, made after the Beck grant, recites possession and upon that an order made favorable to the petition was made by authorities claiming to have power to pass title, so that if we are to impute a permissive possession from the Beck grant, we must likewise impute a permissive possession from the Perea grant. We recognize, however, as between these two, the difference that in the Beck grant there was juridical possession and in the Perea grant there was not. However, we think that if this doctrine is to be invoked, there is much to be said in support of the view that it operates in favor of the Perea grantees, as well as the Beck grantees. We, however, are of the opinion that, irrespective of this, the most that can be said in behalf of the Beck grant, under Pino v. Hatch, is that when the treaty came to be signed there was a license to occupy in favor of the Beck grantees. We do not commit ourselves to that position, but we say that the most that can be claimed under Pino v. Hatch is that that existed. Now, if that did exist, we are of opinion that under the case of Zia v. United States, 168 U. S. 198, this license or permissive possession was revoked ipso facto by the treaty and when the treaty was signed these

properties passed to the United States as public domain to be dealt with by Congress and that Congress did deal with them on the same day by the same act, granting the premises here involved to two distinct parties represented by the two interests now before the court. It is next said, however, that these were circumstances subsequent to the treaty which create a superiority in favor of the Beck grant. We have, in the original opinion, dealt with the contention that the filing of the Beck petition first before the surveyor general created an element of superiority. We have held that it did not and that the doctrine of relation had no application. We adhere to that view. The Act of 1854, which authorized the presentation of these petitions to the surveyor general, placed no time limit thereon. It invited all parties to come and present them for the consideration of the surveyor general, to be transmitted by him to Congress for its action. We think, therefore, that to hold that the mere circumstance that one
9 claimant reached the Surveyor-General's office first in order to present his claim cannot be considered as affecting the rights of other parties, who, perhaps equally diligent, but farther removed geographically, may have presented theirs the next day, or the next week. Such a rule as is here insisted upon, in our judgment, would have meant that a petitioner living in Santa Fe and filing his claim immediately would have rights superior by that very fact to a claimant filing his claim seasonably, although later. We do not think that result can exist and this is illustrative of where counsel's contention would lead us under the system created by the act of 1854. We have, however, considered this in the original opinion.

The other point urged, and one which it is insisted we have overlooked in the opinion, is that the survey of the Beck grant was first made and that it operated as such a segregation of the land from the public domain as made any attempt to survey it under the Perea grant futile, and that the circumstance that the survey was first made of the Beck grant thus gave that an element of superiority. We are unable to accede to that view. We think that the time when a survey would be made was so much a matter in the

hands of executive or administrative officers that the
10 mere fact that a contract may have been first let for the Beck grant, due, perhaps, to inherent difficulties in the survey of the other, or other purely accidental circumstances, could not operate to render nugatory an act of Congress which confirmed equally to the Perea grant and to the Beck grant the interest of the government in the lands involved. Upon consideration, therefore, of this second matter, we do not find any circumstance which leads us to adjudge the Beck grant superior in point of time. Our judgment, therefore, on this motion is that the original opinion must be adhered to, and that will be the order of the court.

This view of the law being conclusive of the cause and it being stipulated by counsel that there shall be a final judgment in this court pursuant to the court's opinion, rather than a remanding of the cause to the trial court, the Clerk will enter a judgment in this court declaring the rights of the respective parties to be the ownership of an undivided moiety in the overlap between the Beck and Perea grants. Counsel may prepare a judgment in accordance herewith.

WILLIAM H. POPE,
Chief Justice.

[No. 1418. January 4, 1912.]

PETER ROSS, Jr., Appellant, v. PATRICK BERRY, Jr., etc., Administrator, Appellee.

SYLLABUS.

1. It was not necessary for the appellant to have had the transcript of evidence signed and settled as a bill of exceptions in order to have made the same a part of the record.

2. The bill of exceptions, especially when it includes the evidence in a case, can only be settled by the trial judge who presided at the trial.

3. Motion to strike bill of exceptions containing the transcripts of the evidence and the findings of fact and conclusions of law, signed and settled by the presiding judge of the district, but not by the trial judge, sustained.

4. Motion at this time by appellant to settle the transcript of evidence and bill of exceptions by adding thereto the certificate of the trial judge, overruled. In so far, however, as said motion may be construed as a motion in diminution of the record for the purpose of having the findings of fact and conclusions of law, together with the exceptions thereto, made a part of the record proper, the same will be granted.

Appeal from the District Court for Colfax County, before C. J. ROBERTS, Associate Justice. Motion to strike sustained, but motion to dismiss denied.

J. LEAHY and H. L. BICKLEY for Appellant.

E. C. CRAMPTON and L. S. WILSON for Appellee.

Record proper. Laws 1897, chap. 57, secs. 22, 24, 26; Street v. Smith, 15 N. M. 95.

The statute requires five days' notice to the opposite party before signing and settlement of the bill, this was not given, it is mandatory. Laws 1907, chap. 57, sec. 26; in re Scott's Estate, 61 Pac. 98, Cal.; State v. Howard, 46 Pac. 650, Wash.; Safford v. Turner, 37 Pac. 121, Kas.; McKay v. Railway Co., 31 Pac. 999, Mont.; Van Why v. S. P. R. R. Co., 86 Pac. 485, Utah.

Bill of exceptions, especially when it contains the evidence, can be settled only by the trial judge. Maloney v. Adsit, 175 U. S. 281.

The bill of exceptions was never filed with the district clerk. Pettit v. People, 52 Pac. 676, Colo.; L. & N. R. R. v. Schmidt, 46 N. E. 344, Ind.

OPINION OF THE COURT.

WRIGHT, J.—This is an appeal from the district court of Colfax county. Trial was had in the lower court

before Associate Justice Mechem in the absence of the presiding judge of said court. Jury was waived and trial was had before the court. Findings of fact and conclusions of law were duly made and filed. Judgment was entered thereon in favor of the plaintiff, from which judgment the defendant duly prayed an appeal to this court. Thereafter, and prior to the return day of such appeal an alleged record and bill of exceptions were prepared by counsel for the appellant, and upon the 26th day of July, 1911, presented to Associate Justice Roberts, the presiding judge of the Fourth Judicial District, which district includes the County of Colfax. It also appears that just prior to the presentment of such alleged record and bill of exceptions counsel signed the following stipulation which was indorsed upon the original copy of such alleged record and transcript: "It is agreed the foregoing constitutes a full and complete transcript of the record and proceedings of the district court in the foregoing cause." Upon such stipulation Associate Justice Roberts signed and settled such alleged record and bill of exceptions, which were thereupon filed in this court. Thereafter, prior to the first day of the present term, appellee filed a motion to strike such alleged bill of exceptions from the record because the same was not properly settled and signed as provided in Section 26, Chapter 57, Laws of 1907, and also prayed the dismissal of the appeal. Section 26, Chapter 57 of the Laws of 1907, reads as follows: " * * * * after such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes and when the stenographer shall have transcribed his notes he shall file the same in the office of the clerk of the court in which the action in which they were taken was tried and thereupon either party to said cause desiring to have the same or other matters under Section 25 of this act embodied in a bill of exceptions, may give five days notice to the opposite party of his intention of applying to the judge of the court in which said cause was tried to have the judge of said court sign and seal the same in proper form as a bill of exceptions. * * * *" It does not appear from the transcript filed in this court that the find-

ings of fact and conclusions of law therein set out as a part of the bill of exceptions were ever filed in the office of the district clerk so as to entitle the same to become a part of the record proper. If such findings of fact and conclusions of law are now before this court they are so by reason of being incorporated in the bill of exceptions and not as a part of the record proper. Under our procedure, Section 24, Chapter 57, Laws 1907, it was not necessary for the appellant to have had the transcript of evi-
1 dence signed and settled as a bill of exceptions in order to have made the same a part of the record. Section 24, Chapter 57, Laws 1907, provides that: "In all actions tried without a jury the testimony taken before the court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee * * * * shall become and be a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal or writ of error without any bill of exceptions."

The sole question raised by the motion to strike, then, is as to the effect of the signing and settling of the alleged bill of exceptions by Associate Justice Roberts, the presiding judge of the district court of Colfax county, who was not, however, the judge who tried the case. Whether we shall consider the action of Associate Justice Roberts as taken under the provisions of Section 24 or under the provisions of Section 26, quoted supra, the sole question raised by the motion to strike is as to the meaning of the two expressions, "properly certified by the court or referee," contained in Section 24, and the expression "judge of the court in which said cause is tried, to have the judge of said court sign and seal the same in proper form as a bill of exceptions." It is a fundamental principle that the bill of exceptions, especially when it in-
cludes the evidence in a case, can only be settled by
2 the trial judge who presided at the trial. The reason for this is obvious. A judge who has not heard the evidence could not be in a position to settle a bill of exceptions containing such evidence. It is clear, therefore, that such is the proper and only construction of the words

quoted supra from Sections 24 and 26. Street v. Smith, 15 N. M. 95, 103 Pac. 644; Maloney v. Adsit, 175 U. S. 281.

At common law the rule was that where the settling of the bill of exceptions was rendered impossible for some reason, such as by the death of the trial judge or his resignation from office, the only remedy was to be found in a motion for new trial, which was granted as a matter of course. (Maloney v. Adsit, cited supra). Nor does the stipulation of counsel avoid the necessity of the signature of the trial judge, either under the provisions of Section 24 or of Section 26. (Maloney v. Adsit, cited supra.) Counsel for appellant suggests that the reason the transcript of evidence was not submitted to the trial judge for settlement was due to the absence of the trial judge from the territory, which rendered such procedure impossible prior to the return date of such appeal. Section 36, Chapter 57, Laws 1907, as amended by Section 4, Chapter 120, Laws 1909, clearly outlines the proper procedure under such circumstances and should have been followed in this case. The motion to strike the bill of exceptions containing the transcript of the evidence and the find-
3 ings of fact and conclusions of law must, therefore, be sustained. In so far as the motion of appellee seeks to dismiss the appeal, the same must be denied as the record proper containing the pleadings and all other instruments properly filed in the office of the district clerk is still before the court.

The appellant, also, upon the first day of the term, filed a motion for diminution of the record in an effort, at this late date, to attach to the bill of exceptions, a proper certificate signed by the trial judge. The motion also seeks to incorporate in the record proper the findings of fact and conclusions of law, together with the exceptions of counsel thereto, which appear, by certificate of the clerk filed with said motion, to have been properly filed, but for some reason to have been omitted from the transcript of the record proper.

In so far as the appellant's motion seeks, at this time,
4 to settle the transcript of evidence and bill of exceptions by adding thereto the certificate of the trial judge, it must be overruled. In so far, however, as said motion may be construed as a motion in diminution of the record for the purpose of having the findings of fact and conclusions of law, together with the exceptions thereto, made a part of the record proper, the same will be granted.

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