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26

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO

FROM

JANUARY TERM, 1880, TO JANUARY TERM, 1883, INCLUSIVE.

REPORTED BY

CHARLES H. GILDERSLEEVE,

COUNSELOR-AT-LAW

VOLUME II.

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JUDGES AND OFFICERS OF THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO,

DURING THE TIME COVERED BY THIS REPORT.

FIRST DISTRICT.

HON. L. BRADFORD PRINCE, Chief Justice.

HON. SAMUEL B. AXTELL, Chief Justice (1883).

SECOND DISTRICT.

HON. SAMUEL C. PARKS, Associate Justice.

HON. JOSEPH BELL, Associate Justice (1883).

THIRD DISTRICT.

HON. WARREN BRISTOL, Associate Justice.

U. S. District Attorney, - - -	Hon. Sidney M. Barnes.
Clerk, - - - - - - - - - -	Frank W. Clancy.
U. S. Marshal, - - - - - -	John Sherman, Jr.
U. S. Marshal (1883), - - - -	A. L. Morrison.
Attorney General, - - - - -	William Breeden.

LIST OF THE JUDGES

WHO HAVE BEEN APPOINTED FOR THE TERRITORY OF NEW MEXICO SINCE ITS ANNEXATION TO THE UNITED STATES.

JOAB HOUGHTON, Chief Justice, } These Judges served as
CARLOS BEAUBIEN, Associate Justice, } such under the Provin-
ANTONIO JOSE OTERO, " } cial Government in 1846.

HORACE MOWER, Associate Justice, appointed in 1852.
JOHN S. WATTS, Associate Justice, appointed in 1852.
GRAFTON BAKER, Chief Justice, appointed in 1853.
JAMES J. DEAVENPORT, Chief Justice, appointed in 1854.
(Afterwards Chief Justice from 1859 to 1867.)
KIRLEY BENEDICT, Associate Justice, appointed in 1854.
PERRY E. BROCCHUS, Associate Justice, appointed in 1855.
W. T. BOONE, Associate Justice, appointed in 1859.
WM. G. BLACKWOOD, Associate Justice, appointed in 1859.
SYDNEY A. HUBBELL, Associate Justice, appointed in 1862.
JOSEPH G. KNAPP, Associate Justice, appointed in 1862.
JOAB HOUGHTON, Associate Justice, re-appointed in 1866.
JOHN P. SLOUGH, Chief Justice, appointed in 1867.
JOHN S. WATTS, Chief Justice, re-appointed in 1868.
JOSEPH G. PALEN, Chief Justice, appointed in 1869.
HEZEKIAH S. JOHNSON, Associate Justice, appointed in 1869.
B. J. WATERS, Associate Justice, appointed in 1871.
DANIEL B. JOHNSON, Jr., Associate Justice, appointed in 1872.
WARREN BRISTOL, Associate Justice, appointed in 1873.
HENRY L. WALDO, Chief Justice, appointed in 1875.
SAMUEL C. PARKS, Associate Justice, appointed in 1878.
CHARLES MCCANDLESS, Chief Justice, appointed in 1878.
L. BRADFORD PRINCE, Chief Justice, appointed in 1879.
JOSEPH BELL, Associate Justice, appointed in 1882.
SAMUEL B. AXTELL, Chief Justice, appointed in 1882.

LIST OF ATTORNEYS

PRACTICING IN THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO FROM THE ANNEXATION OF THE TERRITORY TO THE UNITED STATES UP TO THE YEAR 1882.

Allen, Samuel T.
Ashurst, Merrill.
Bail, John D.
Barnes, Sidney M.
Bartlett, Edward L.
Bonham, Joseph Fenner.
Breeden, Marshall A.
Breeden, William.
Catron, Thomas Benton.
Caypless, Edgar.
Chaves, J. Francisco.
Childers, W. B.
Clancy, Frank W.
Clarke, Fred. W.
Conway, Thomas Frederick.
Crane, William F.
Davis, William W. H.
Downs, Francis.
Dunne, Edmund F.
Fiske, Eugene A.
Fountain, A. J.
Fox, George W.
Fraser, John R.
Gary, Joseph E.
Gildersleeve, Charles H.
Gwin, John M.
Goodwin, Jesse C.
Graves, William C.
Hazledine, William C.
Houghton, Joab.
Hoyt, Abram G.
Hubbell, Sidney A.
Johnson, Henry C.
Knaebel, John H.
Lee, W. D.
Lemon, George.
Leonard, Ira E.
McComas, Charles C.
Mills, Melvin W.
Newcomb, S. B.
Pillians, Palmer J.
Posey, G. Gordon.
Price, Edward V.
Prichard, George W.
Prince, L. Bradford.
Quinn, James H.
Reynolds, James R.
Risque, John B.
Ritch, William G.
Russell, D. C.
Rynerson, William L.
Salazar, Miguel.
Sena, Jose D.
Shaw, James M.
Skinner, William C.
Sloan, Andrew.
Sloan, W. B.
Smith, Hugh N.
Springer, Frank.
Stevens, Benjamin.
Stone, W. S.
Sulzbacher, Louis.
Terrill, William C.
Thompson, F. A.
Thornton, William T.
Tompkins, Richard H.
Trimble, L. S.
Tuley, Murray F.
Vander Veer, P. L.
Waitman, Hanson.
Waldo, Henry L.
Warner, Milton J.
Warren, Henry L.
Watson, W.
West, Elias B.
Wheaton, Theodore D.

NOTE.

The volume herewith submitted to the profession contains briefs of counsel and opinions of the court in all the cases decided in the Supreme Court of the Territory of New Mexico during the years 1880, 1881, 1882, together with six cases decided by the same court in 1883. Lists of all attorneys admitted to practice in the courts of New Mexico, and of all the judges of such courts appointed since the organization of the Territory under the United States government, are also included. A full index has been appended, and will contribute materially to the utility of the book.

The reporter acknowledges with thanks the services of Mr. Adelbert Hamilton, of the Chicago bar, in the preparation and printing of the volume.

April 11, 1883.

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CASES DETERMINED

BY THE

SUPREME COURT OF NEW MEXICO,

JANUARY TERM, 1880.

GARLAND ET AL., Plaintiffs in Error, v. BARTELS BROTHERS, Defendants in Error.

January 20, 1880.

APPEAL. (1) *Description of parties: Replevin, judgment against sureties on replevin bond: Reformation of judgment upon appeal.*

APPEAL FROM JUSTICE. (2) *District court governed by what rules: Jurisdictional amount.*

REPLEVIN. (3) *Value of property and damages for detention most both be assessed.*

1. William Garland commenced an action of replevin before a justice of the peace against Julius Bartels and Gus Bartels as Bartels Brothers. He gave the sheriff a bond with B. H. Hopper and J. H. Hopper as sureties, and 900 ties were replevied of defendants. Julius Bartels appeared and a trial was had before the justice of the peace. It resulted in a verdict by the jury and an assessment of costs by the justice "against Julius Bartels," who appealed to the district court. In the record of that court Bartels Brothers are stated to be "appellants." Neither Garland, nor his sureties, appeared in the district court to contest the appeal, and, upon default, a jury was impanelled to ascertain the damages sustained by Bartels. It assessed them at $270, for which sum, and $46 costs, the district court rendered judgment in favor of "appellants," and against the plaintiff and his sureties.

Held, That the parties ought to have been described on appeal to the district court by the same name as in the action commenced originally before the justice of the peace. That in entitling the cause, rendering judgment or otherwise proceeding upon the appeal in the district court, it was irregular to describe the defendants merely by

the firm name of Bartels Brothers, but that the judgment ought not to be disturbed for this irregularity, since it in nowise affected plaintiff, and that the judgment of the district court against the sureties was invalid for want of jurisdiction, they not appearing and never having been summoned; but that if there were no other irregularities, the supreme court might reform the judgment so as to obviate this error.

2. In the trial and determination of causes in the district court upon appeals from judgments rendered by justices of the peace the district court must be governed by the same rules that are prescribed by law for the government of courts of justices of the peace in like causes. The law provides that no justice of the peace shall have jurisdiction over a debt or damages in an amount exceeding $100, and the verdict and judgment being for more than double ($270 + $46) this sum, they are erroneous.

3. In any action of replevin brought before a justice of the peace where the plaintiff fails to prosecute his suit to final judgment, a jury must be impanelled, and sworn to inquire and assess the value of the property replevied, together with the damages for the detention of the same, and the justice shall render judgment in favor of the defendant for such value and damages as assessed. Therefore, where the jury was sworn to assess damages only, the oath, as administered, did not include the assessment of the value of the property replevied, and the judgment was rendered for damages only, and not for the value of the property replevied. Such verdict and judgment were held erroneous. The value and damages should be stated separately, both in the verdict and judgment.

Error to the District Court, Colfax county.

William Garland, one of the plaintiffs in error, brought suit in replevin before E. F. Lancaster, justice of the peace in and for Colfax county, to recover certain property, a trial by jury was had and a verdict rendered in favor of the plaintiff. The defendants in error under the name of Bartels Brothers took an appeal to the district court for Colfax county, and on the 25th day of August, A. D. 1879, obtained judgment in said district court upon default of an appearance by said plaintiff Garland. Damages were assessed for said defendants in the sum of $270, and judgment entered in favor of defendants for that sum against said William Garland and B. H. Hopper and J. P. Hopper, the plaintiffs in error, the last two as sureties on the replevin bond of said Garland.

Louis Salzbacher and *Breeden & Waldo*, for plaintiffs in error.

The judgment is erroneous because rendered in favor of the defendants by the name of Bartels Brothers and not by the names of the defendants in the original suit.

The judgment is erroneous because entered against the plaintiff William Garland and his sureties on the replevin bond. Such judgment was not authorized by statute and should have been against the plaintiff Garland alone, and the remedy against the sureties upon the replevin bond: Laws of New Mexico, 1875–6, sec. 54, page 85.

The verdict and judgment are erroneous because there was no finding of the value of the property replevied as required by law: Laws of New Mexico, 1875–6, sec. 53, page 84.

M. W. Mills, *Catron & Thornton* and *Frank Springer*, for defendants in error.

It appears by the transcript that the defendants Bartels Brothers were defendants in the original suit, and that the judgment in their favor was proper as to parties.

We concede that the judgment against the sureties was erroneous. The whole judgment should not for that reason be reversed, but it is competent for the supreme court to modify the judgment and affirm it against plaintiff Garland: Comp. Laws N. M., page 108, § 7.

The verdict of the jury, upon which the judgment in the district court was rendered against plaintiffs in error, was for the damages of the defendants by reason of the premises.

Defendants were entitled to have a judgment for the value of the goods and chattels replevied, and also for adequate damages for the detention of the same: Laws 1876, page 84, sec. 53.

They might waive either and take judgment for whichever cause they saw fit or could prove. When judgment was rendered by the district court for damages, the presumption is that it was the damages allowed by law to be adjudged in the action or proceedings disclosed by the record.

BRISTOL, Associate Justice: This case is here from the district court of the first judicial district for the county of Colfax by writ of error. Such of the facts as are necessary to an understanding of the case, are as follows:

William Garland, one of the plaintiffs in error, in April, 1879, instituted an action of replevin before a justice of the peace of said county against Julius Bartels and Gus Bartels, as Bartels Brothers, to recover the possession of nine hundred ties, the value of which is stated in his affidavit for a writ of replevin, to be $90; a writ of replevin was issued by the justice of the peace and the sheriff of the county made return thereto that he served the same by taking the property described and delivering it to the plaintiff after taking bonds and reading the writ to defendant; what this bond was does not appear, neither does it appear that the sheriff caused the value of the property to be assessed as required by law, preparatory to taking a bond and delivering the property to the plaintiff. A jury trial was had before the justice of the peace, the plaintiff, William Garland, appearing, and Julius Bartels, one of the defendants, also appearing. The jury, over their signatures, found in writing the following verdict, viz.:

"OTERO, New Mexico, April 19, 1879.

"We, the jury in the case wherein William Garland is plaintiff and Julius Bartels is defendant, find a verdict in favor of William Garland and against Julius Bartels." Whereupon the justice of the peace "assessed the costs of the suit against the said defendant, Julius Bartels." From this judgment or determination, or whatever the ending of the proceeding before the justice of the peace may be called, an appeal was taken to the district court for Colfax county at the instance and request of the said defendant Julius Bartels. The style of the case as entered in the proceedings of the district court for Colfax county upon such an appeal, is:

WILLIAM GARLAND
v.
BARTELS BROTHERS, *Appellants.*

And so much of the proceedings in that court as relate to the judgment in this case which was rendered therein at the August, 1879, term thereof, is as follows:

"WILLIAM GARLAND
v.
BARTELS BROTHERS, *Appellants.* } *Replevin—Appeal.*

"Now come the said defendants and appellants by their attorney, M. W. Mills, Esquire, and the said plaintiff and appellee, although three times solemnly called, comes not, but makes default.

"It is therefore considered and adjudged by the court that the said defendants and appellants ought to recover their damages by reason of the premises, but such damages being unknown to the court, it is ordered that a jury be impanelled to inquire thereof; and thereupon comes a jury, to wit: (Here follow the names of the jurymen), twelve good and lawful men of the body of the county, who being impanelled and sworn well and truly to assess the damages of the said defendants and appellants by reason of the premises upon oaths, assess the same at $270.

"It is therefore considered and adjudged by the court that the said defendants and appellants recover of the said plaintiff William Garland and of B. H. Hopper and J. P. Hopper, his sureties on the bond heretofore filed herein, the sum of $270 and their costs in this behalf expended taxed at $46, and that they have execution therefor."

It is of this judgment rendered by the court below, under the circumstances and upon the facts hereinbefore recited, that the plaintiffs in error complain and assign as error therein as follows:

First. That the judgment is erroneous because entered in favor of the defendants by the name of Bartels Brothers, and not by the name of the defendants in the original suit.

Second. That the judgment is erroneous because entered

against the plaintiff William Garland and his sureties in the replevin bond; and

Third. That the verdict and judgment are erroneous because there was no finding of the value of the property replevied as required by law.

There can be no doubt that the parties ought to have been described by name in the proceedings in the district court below in the same name as in the justice court wherein the action was originally brought. It was irregular to describe the defendants in the entitling of the cause, and that in all the proceedings in the court below, including the rendition of the judgment, merely by the firm name of Bartels Brothers. But as the plaintiffs in error can be in no wise affected by this irregularity, the judgment ought not to be disturbed at their instance on that ground.

The court below acquired no jurisdiction to render a joint judgment against William Garland and his sureties B. H. Hopper and J. P. Hopper, and under no circumstances arising in this action, could the court render a valid judgment against these sureties. In this respect there is manifest error in the judgment. If there were no other irregularities in the proceedings and judgment in the court below, we might perhaps under the statute be justified in reforming the judgment, or in rendering such judgment in this court as would be in conformity with the verdict, but in doing this, we must necessarily pass upon and be satisfied of the validity and sufficiency of the verdict. In the trial and determination of causes in the district court upon appeals from judgments rendered by justices of the peace, the district court must be governed by the same rules that are prescribed by law for the government of courts of justices of the peace in like causes: Session Laws N. M., Session 1876, p. 90, sec. 17. One of the rules prescribed by law for the government of courts of justices of peace as well by the act of congress organizing a territorial government for New Mexico, as by the statute law of such territory, is that no such court shall have jurisdiction over a debt or damages in an amount exceeding one

hundred dollars. Another of such rules is, that in any action of replevin brought before a justice of the peace, where the plaintiff fails to prosecute his suit to final judgment, a jury must be impanelled and sworn, to inquire and assess the value of the property replevied, together with the damages for the detention of the same, and that the justice shall render judgment in favor of the defendant for such value and damages as assessed: Session Laws N. M., 22d Session, 1876, p. 84, sec. 53. It seems from an examination of the record, that neither of these rules, though applicable, were applied to this case by the court below.

The verdict and judgment for damages were for more than double the amount of which a justice of peace has jurisdiction.

The jury was sworn to assess damages only. The oath as administered did not include the assessment of the value of the property replevied. The judgment was rendered for damages only, and not for the value of the property replevied. Such value and damages should be stated separately, both in the verdict and judgment.

For the foregoing reasons, we are of the opinion that the judgment herein by the court below ought to be reversed, and the cause remanded to such court for a proper judgment of default, also for an assessment of the value of the property in controversy, as well as of damages for the detention of the same and for judgment thereon as hereby indicated.

And it is so ordered.

CORNELIUS BENNETT ET AL., Appellants, v. JAMES ZABRISKI, Appellee.

January 21, 1880.

ATTACHMENT. (1) *Pleadings in, description of parties: Variance.*
SAME. (2) *Writ, allegations of, traversable.*
SAME. (3) *Same, amendment.*

1. The plaintiffs must be described in substantially the same way in the affidavit, writ, and declaration in attachment. If different descrip-

tions are given in the affidavit and in the writ, it will not be presumed that the plaintiffs named in each are the same.

Thus, where the affidavit in attachment was in behalf of the firm of Bennett Bros. & Co., but did not show of what persons said firm was composed, and the writ of attachment was issued in favor of Cornelius Bennett, Joseph F. Bennett, and Henry Lesinsky, but did not show that these persons composed the firm of Bennett Bros. & Co., or any other firm, it was held that all proceedings founded upon such affidavit and writ were properly quashed upon motion by defendant.

2. A writ of attachment is traversable. Every material fact alleged in it may be denied, and trial had upon it without reference either to the petition or to the declaration, which cannot be relied upon to supply deficiencies in the writ.
3. In the absence of statutory authority so to do, a writ of attachment cannot be amended.

Appeal from the District Court, Grant county.

Plaintiffs sue defendant in an action of assumpsit, and sue out a writ of attachment which, among other things, states that the petitioners are Cornelius Bennett of Arizona, Joseph F. Bennett, of Grant county, and Henry Lesinsky, of Doña Ana county, in this territory. That said petitioners were doing business under the firm name and style of Bennett Bros. & Co., at Silver City in said county of Grant. And that the defendant James A. Zabriski, was a resident of the state of Texas.

The affidavit upon which the writ issued was as follows:

TERRITORY OF NEW MEXICO, } ss.
COUNTY OF GRANT. }

This day personally appeared before me, the undersigned clerk of the Judicial District Court within and for the county and territory aforesaid, Joseph F. Bennett, of the firm of Bennett Bros. & Co., and being duly sworn, says: That James A. Zabriski is justly indebted to the firm of Bennett Bros. & Co. in the sum of one hundred and eight dollars and seventy-eight cents, after allowing all just offsets

on account of goods, wares and merchandise sold and delivered, moneys lent and advanced, and account stated, and that the said James A. Zabriski is not a resident of, nor resides in, this territory.

J. F. BENNETT,
Sworn and subscribed.

Bond was given and approved. John P. Risque also made affidavit that the defendant was a non-resident of the territory.

Defendant entered a special appearance for the purpose of moving to quash the proceedings for the following reasons:

1st. The affidavit is made by one Joseph F. Bennett, but does not state for whom.

2d. It does not state to whom the defendant is indebted.

3d. It does not say that said indebtedness is due after allowing all just credits.

4th. It does not state that he has good reason to believe and does believe in the existence of the fact set forth as ground for issuing of attachment that the defendant is a non-resident.

5th. The writ does not set forth when, or where, or by whom the debts were contracted.

6th. The body of the writ does not set forth in what style the plaintiffs sue.

7th. And for other good and sufficient reason apparent upon the affidavit and writ.

This motion was by the court sustained, the writ of attachment quashed, the attachment dismissed, and judgment rendered on the merits of the case in favor of the plaintiffs.

Conway & Risque and *Catron & Thornton*, for appellants.

1st. Plaintiffs insist that the whole record can be examined to see for whom by whom the affidavit was made: Drake on Attachment, sec. 93. Failure to entitle the affidavit in the cause or failure to describe the persons who made it as plaintiffs, or the debtor named in it as defendant, does not make it bad: Drake on Attachment, sec. 92; *Chandler v. Riddle*,

6 Ast. (1 Eng.), 480; *Kenney v. Heard*, 17 Ast., 397; *Pool v. Webster*, 3 Metcalf (Ky.), 278.

2d. The affidavit does state to whom defendant is indebted; it says to Bennett Bros & Co., and the petition shows that Bennett Bros. & Co. are the plaintiffs. It states that the amount sworn to was due after allowing all just offsets, which are the exact words of the statutory form. The statute has prescribed a form for affidavits in attachment (Compiled Laws, sec. 216, page 25); and this affidavit is a substantial compliance with that form. The writ is also in compliance with the statutory requirements, and is good.

PARKS, Associate Justice: This was a proceeding by attachment, and a motion was made at the return term of the writ by the defendant's attorney, who appeared specially and for that purpose alone, and moved to quash the proceedings for several reasons stated in the motion. It is necessary to notice but one of these reasons.

The affidavit in this case was made in behalf of the firm of Bennett Bros. & Co., and does not show of what persons said firm is composed. The writ of attachment was issued in favor of Cornelius Bennett, Joseph F. Bennett and Henry Lesinsky, and does not show that said persons composed the firm of Bennett Bros. & Co., or any other firm.

It is laid down in Chitty's Pleadings, that, "It must be stated with certainty who are the parties to the suit, and therefore, a declaration by or against C., D. & Company, not being a corporation, is insufficient," and that, "Actions to be properly brought must be commenced and prosecuted in the proper Christian and surnames of the parties, and not in the name of the company or firm." By the statute of New Mexico the party bringing suit is required "to set forth the Christian and surname of both plaintiff and defendant." An affidavit in attachment is an important pleading. It is a declaration under oath by which property is taken

from a defendant before a judgment is obtained against him. It is traversable and every material fact stated in it may be denied and a trial upon it.

It must be sufficient in itself. The trial is had upon it without reference to the petition or declaration and we cannot look to the petition or declaration to supply its deficiencies. We cannot presume that the plaintiffs in the declaration, affidavit and writ are the same: they must be described in all these papers. For aught we can know from the affidavit and writ in this case, the parties mentioned in them may be very different.

We have no statute authorizing the amendment of an affidavit in attachment, and the judgment of the district court in sustaining the motion to quash the proceedings in this case must be sustained.

Judgment affirmed.

JESUS G. ABREN, Appellant, v. WEBSTER BROWN, Appellee.

January 23, 1880.

REPLEVIN. (1) *Protest and allegations of innocence to be filed with whom.*

SAME. (2) *Affidavit, protest, and allegations of innocence considered as pleadings.*

SAME. (3) *Failure to file protest and allegations of innocence, whether judgment is valid.*

SAME. (4) *Protest and allegations of innocence, default in filing, waiver of, by going to trial.*

1. Whether the defendant in replevin is required to file the protest and allegations of innocence provided for by the statute (*Session Laws 1868, page 76*), with the clerk of the probate court, or the clerk of the district court, *quære.*
2. It would seem to be a fair construction of the statute (*Session Laws, 1868, page 76*), to hold that the plaintiff's affidavit in replevin should be treated as his verified declaration in replevin, and that the defendant's protest and allegations of innocence should be regarded as his plea in bar upon the merits.

3. As to the statute (*Session Laws 1868, page 76*), providing that the default of the defendant in replevin in filing the protest and allegations of innocence as provided for in that statute, "shall be decreed an abandonment of all claims in the premises," it is queried. (1) By what tribunal such abandonment shall be decreed? and (2) If not by the district court, whether such determination of the right to personal property through the default of the defendant to file his protest and allege his innocence without any adjudication by a competent tribunal, is not a determination of the right to personal property without due process?
4. An affidavit being made and filed with him, the probate clerk of Colfax county issued a writ of replevin, which was served, and the property placed in possession of plaintiff. The defendant failed to file his protest and allegations of innocence within thirty days after the replevying of the property as required by statute(*Session Laws 1868, page 76*), thus making default. By the writ of replevin, the defendant was also cited to appear in the district court, and plead within a specified time long after the expiration of the thirty days. At such time plaintiff declared against the defendant in that court, and the defendant appeared and pleaded the general issue. Both parties then agreed to a continuance after the expiration of which the court, on motion of the plaintiff, struck the cause from the docket on the ground that defendant had defaulted in failing to file his protest and allege his innocence within the thirty days as required under the statute.

   Held, That even if the statute in question was a valid law, the plaintiff by appearing, pleading, and consenting to a continuance after the default of defendant, in not filing his protest and allegations, waived such default. That the court acquired jurisdiction of both parties to the cause by the service of the writ with the citation therein contained, by the appearance of both parties, and by their submission to such jurisdiction long after the expiration of the thirty days, as well as by the filing of their respective pleadings, and by their agreement to a continuance. That the court having thus acquired jurisdiction, neither party was at liberty to withdraw without the consent of the other, so as to prevent a final determination of the right to the possession of the property as between them.

Appeal from District Court for Taos county.

This is an action wherein plaintiff sued out a writ of replevin from the clerk of the probate court, returnable to the district court for the county of Taos. The affidavit and

bond do not conform to the statutes authorizing the probate clerk to issue writs of replevin. The papers were sent up to the district court, but no protest appears among them. The case was docketed, papers filed and plaintiff filed a petition in the case, to which the defendants pleaded, both observing the requirements of the statutes with reference to writs of replevin, and on motion of the plaintiff, by agreement of the parties, the cause was continued until the following term, at which time the plaintiff moved the court to strike it from the docket, which was done, defendant excepting. Defendant then moved the court to impanel a jury to assess the value of the property replevied and double damages for its detention. This motion was refused by the court, the defendant excepting. Defendant then appealed from both orders to this court.

———, for appellant.

It cannot be claimed that this suit is brought under the statutes of January 29, 1868, for the reason that neither affidavit nor bond nor writ comply with statute, but they do conform to the statute in the Compiled Laws governing writs of replevin: Act of January 29, 1868, page 76; Compiled L., page 242, secs. 3 and 4. Statutes for replevin, etc., must be strictly construed against the party using them.

If the statute is not followed by the plaintiff, can he take the defendant's property and hold him strictly to the statute? The first section of the law of January 29, 1868, gives general authority to probate clerks to issue writs of replevin subject to the same rules and restrictions of clerks of the district court and seems to be entirely independent of the rest of that statute. See sec. 1, and Comp. L., 342. This section can be left out and the statute of January 29th will be perfect.

If it was intended that the probate clerk's conduct should be governed by the remainder of the act, then why provide that his conduct should be subject to the rules and restric-

tions governing clerks of the district court, which are different from the remainder of the statute of January 29, 1868?

If a protest was necessary, then the presumption is that it was filed. Officers are always presumed to do their duty, and the statute in this case, if applicable, prohibits the clerk from sending up the record to the district court. If the protest is not to be found, we must assume that it was filed.

Supposing that a protest is required and that none was filed, as required. The plaintiff waived it by voluntarily coming in and filing a petition and asking for a continuance, thus submitting to the jurisdiction of the court. This is a cause of which the court has general jurisdiction and irregularities can be waived so as to give the court jurisdiction of the person and property. In fact, being that the writ directly makes itself returnable to the district court, the sheriff could return it there only.

Can the plaintiff, after he has sued out a writ returnable to the district court, under the rules and forms of the district court and the statute of 1868, and after he has appeared and filed his petition whereby he admits regularity and has allowed a plea to be filed and has moved for and obtained a continuance, be permitted to deny jurisdiction, or to question regularity of the court proceedings, or of his own writ and returns? The plaintiff, by his acts, waived irregularities.

There is no means whereby the property of one person can be taken, legally, by another, without a judgment or without the consent of the person from whom it is taken.

This case seeks to take property from defendant by legal means, and yet to render no judgment against defendant. This is contrary to all legal principle and would overturn every right: Cooley Const. Limitation, 353 and 354; *Greene v. Bigg*, 1 Curtis, 311; *Lowry v. Rain*, Cam. L. Journal, vol. 10–29; *Taylor v. Porter*, 4 Hill, 140. The most that could be claimed is that defendant is in default, and judgment not entered: Potter's Dwarris on Stat., 395.

Further, an appearance by attorney cures all irregularity of process. Having once appeared by attorney, the defendant cannot take advantage of irregularity in the process or its service: *Knox v. Thomas*, 3 Cranch, 496.

The clerk may enter the appearance of the attorney-general in all cases of the United States at the first term in which he may move to take advantage of irregularity, but if he lets it pass for that term without objection, it is conclusive on him as to an appearance. The appearance cures all defects in process and service: *Tarrar v. U. S.*, 3 Pet., 459.

Where a court has capacity by its original jurisdiction to receive and try a given question, and the parties without compulsion submit such a question, it is too late to inquire how the question came there: 1 Ohio Digest, 717, sec. 14.

Jurisdiction over the party is acquired where he appears and pleads to the action, or does not object at first term: 43 Mo., 502; 60 Mass., 564; 42 Mass., 508; 48 Mo., 235.

Frank Springer, for appellee.

Every presumption is in favor of the validity of a law, and courts will not declare an act invalid except in case of the most clear and unequivocal violation of fundamental law: Sedgwick Const. Lim., 409, and cases cited.

The legislature has a right to establish methods of procedure, and to define the steps which must be taken by parties to preserve their rights. If notice is provided and time allowed, so that by following the prescribed course a party has opportunity to defend, it is perfectly competent for the legislature to declare that if he fails to do that which the law requires, he shall not be further heard: Sedgwick Const. Law, p. 481, citing *Webster v. Alton*, 9 Foster (N. H.), 384; *Empire City Bank*, 18 N. Y., 200, 215; Cooley Const. Limit., 403, and notes and cases cited.

Of this nature are statutes of limitation: Angell on Limit., § 22; Cooley Const. Limit., 364, *et seq.*

For instance, the one year limitation in replevin.

Statutes, or rules of court, fixing the time within which parties are required to plead, belong to the same class, yet no one claims that they operate to deprive parties of property without due process of law.

The New Mexican statutes (Laws 1868, pp. 76, 80, § 4), require the party from whom the property has been replevied, to answer within thirty days, or forever keep silent. In other words, the law presumes, in default of such answer, that the property belongs to the plaintiff, and this presumption is made conclusive.

Suppose the plaintiff had taken no steps to prosecute his suit, and the defendant had taken a judgment against him and his sureties on the bond, would not this court have been bound to reverse the judgment on writ of error? Undoubtedly, because the plaintiff was not bound to prosecute his action after the default of defendant.

It was proper for the court to treat the case as abandoned, and to strike it from the files, if the plaintiff so elected. Or, it might have stricken defendant's answer from the files, and gone on and rendered judgment as in any case of default. If the first course was erroneous, it was without prejudice to defendant. It was no waiver of the benefits of the statute, and did not in any way cure defendant's default for the plaintiff to file a petition and ask a judgment. He was at liberty to pursue that course, or adopt another. The defendant had no right to be heard in either case at all. He had lost his day in court by his own laches.

Appellant is not entitled to be heard in his second assignment of error, because appeal was not allowed from the order denying his motion to impanel a jury and assess damages.

The appeal is not properly before this court, for the reason that the district court in and for the county of Taos had no jurisdiction to make an order *nunc pro tunc* in the case, or any order in it, in April, 1879. This case was on the docket

in the Taos District Court, by virtue of the act of January 14, 1876, attaching the county of Colfax to the county of Taos for judicial purposes. Jurisdiction in the case was taken away by the absolute repeal of the act in January, 1878, without any saving clause as to pending causes. The court had no power to make any further order in the case: Sedgwick Const. Law, 108.

The appeal should for this reason be dismissed.

BRISTOL, Associate Justice: On the 22d day of December, 1876, Brown, the plaintiff below and appellee here, made the usual affidavit before the clerk of the probate court of Colfax county for a writ of replevin against Abren, the defendant below and appellant here, to recover the possession of two horses, valued at $300, and damages.

The affidavit was on the same day filed in the office of the probate clerk, and a writ of replevin issued by him, under the seal of the probate court.

The sheriff made return to such writ that, on the 22d day of December, 1876, he served the same, took from Brown a bond, and delivered to him the two horses.

This writ, among other things contains a citation to Abren "to be and appear before the district court for the first judicial district, on the first day of the (then) next term thereof, to be begun and held within and for the county of Taos, at the court house of said county, on the first Friday after the fourth Monday of March, 1877, to answer unto Webster Brown for the wrongful detention of the goods and chattels aforesaid to the damage of the plaintiff $300."

The making and filing the affidavit and bond, and issuing the writ under the circumstances, evidently were done in pursuance of the statute of the territory enacted in January, 1868: *Vide* Session Laws 1868, p. 76. This statute provides that the clerks of the respective probate courts of the

territory are authorized to issue writs of replevin subject to the same rules and restrictions as are prescribed for the clerks of the district courts, upon the filing in the office of any such clerk of a probate court an affidavit and bond by the plaintiff as therein specified. Such statute further provides that the defendant may protest against the replevin by filing such protest within thirty days after the replevying of the property, and "alleging innocence in the premises against him," and this allegation shall bring in question, not only the legal ownership of the property, but also the illegal seizure and detention thereof. But a failure to file such protest within the thirty days, "shall be deemed an abandonment of all claim in the premises, and the said action shall be conclusive and the claimant shall not be bound for the prosecution of his suit in the district court."

Such statute further provides that any clerk of a probate court, before whom any such action of replevin shall have originated, shall file in his office all the papers and documents relative to the case, and shall transmit the same to the clerk of the district court, ten days before the commencement of the next term thereof in his county; provided such protest shall have been filed within the time prescribed; but if such protest should not be so filed, then the papers shall not be transmitted to the clerk of the district court, but remain in the office of the clerk of the probate court. The more this statute is considered by any one, the greater his perplexity is likely to be, as to how it can be legitimately applied to any judicial proceeding in the district court.

Upon filing with the probate clerk an affidavit and bond by the plaintiff, and the issuing and service of a writ of replevin, and before the plaintiff's petition or declaration is required to be filed in the office of the clerk of the district court, the defendant is required to file his protest and allege his innocence.

Where he is to file the same is not specified in the statute,

there is nothing to indicate that he is to file the same with the clerk of the district court, and it is but an exceedingly remote inference that he is to file the same with the probate clerk; if so made and filed, then such protest and allegation of innocence shall bring in question the ownership of the property and the illegal seizure and detention thereof, that is, such proceeding shall raise the very issues to be tried in an action of replevin.

It would seem to be a fair construction of this statute that the plaintiff's affidavit should be treated as his verified declaration in replevin, and the defendant's protest and allegation of innocence should be regarded as his plea in bar upon the merits, and that the issues to be tried are in this way to be made up in replevin suits thus instituted before probate clerks; that, perhaps, would be well enough; it would only be creating an additional mode of procedure. But the strange feature of this statute is, that a default in filing this protest by the defendant, "shall be decreed an abandonment of all claim in the premises," etc.

Decreed by what tribunal? Certainly not by the district court, the only competent tribunal to make such a decree. Because, if the protest should not be filed, the case is not to be transmitted to that court for adjudication. The plaintiff in that contingency, after acquiring possession of the property under the writ, retains the same without being required to appear and prosecute the action in the district court to final judgment.

While we refrain from passing upon the validity of so much of this statute as relates to the determination of the right to personal property through the default of the defendant to file his protest, and allege his innocence as prescribed thereby, without an adjudication by a competent tribunal, yet we entertain very grave doubts of its validity or of its being due process of law.

The property in controversy was replevied on the 22d day

of December, 1876. This is the date from which the thirty days within which the defendant was required to file his protest under the statute would begin to run.

The defendant below was cited in and by the writ that was served on him at the instance of the plaintiff, to appear at the district court "on the first Friday after the fourth Monday in March, 1877," and plead to the plaintiff's declaration. Such appearance would be long after the expiration of the "thirty days."

On the 2d day of April, 1877, the plaintiff below filed his declaration in the office of the clerk of the district court, which was of course long after the expiration of the "thirty days." It was also during the term of the district court at which the writ was returnable. On the 6th day of April, 1877, and at the term aforesaid, the defendant below filed his plea to such declaration, pleading thereby the general issue, and at the same term on the 10th day of April, 1877, the cause was continued to the (then) next ensuing term, at the cost of the plaintiff, and upon the agreement of both parties, and at the term next thereafter, both parties appearing, the court sustained a motion then and there made by the plaintiff, to strike the cause from the docket, on the ground that the defendant had failed to file such protest, and allege his innocence under such statute. Judgment was entered striking the cause from the docket, without further adjudication. The defendant excepted. Even upon the assumption that this statute in all respects is a valid law, there can be no doubt that the plaintiff could waive the default of the defendant in filing his protest and allegation of innocence, and that he could, notwithstanding such default, submit himself and his case to the jurisdiction of the district court in the ordinary mode, by personal appearance, and filing his declaration in replevin.

We are unanimous in our opinion that the plaintiff waived such default by his subsequent appearance, pleading and con-

senting to a continuance. That the court below acquired jurisdiction as well of both parties of the cause, by the service of the writ with the citation therein contained, the appearances of both parties, and submitting to such jurisdiction long after the expiration of the "thirty days," as well as by the filing of their respective pleadings, and agreeing to a continuance. The court below having in this way acquired such jurisdiction, neither party was at liberty to withdraw without the consent of the other, so as to prevent a final judgment determining the right to the possession of the property as between them.

The judgment of the court below in striking the cause from the docket under the circumstances, was erroneous. It is ordered that judgment be entered, reversing the judgment below for appellant's costs, and remanding the cause to the court below, with directions to reinstate the same upon the docket, and to proceed therein by due course of law.

JOHN R. MAGRUDER, Appellant, v. BERNARD WEISL, Appellee.

January 23, 1880.

CAPIAS AD RESPONDENDUM. (1) *Appearance by attorney to plead.*

1. A person arrested on a *capias ad respondendum,* who gives a bond to appear on the first day of a subsequent term of court, need not appear until the second day of such term, and then he may appear by attorney for the purpose of traversing the affidavit and pleading to the declaration; being only bound by law to render himself in custody to abide the judgment, order or decree of the court, he need not appear in person for any other purpose

This is an action of trespass on the case upon premises, commenced by the issuance of a writ of *capias ad responden-*

dum. The sheriff executed the writ by arresting the defendant, and taking bond for his appearance "on the next July term of said court to be begun and held within and for the said county of Grant, at the court house of said county, on the second Monday of July, A. D., 1878, then and there to answer unto the said suit of the said Bernard Weisl," etc. Defendant failed to appear in person, but appeared by attorney, and by attorney asked to be allowed to contest the truth of the affidavit upon which the writ issued, and to plead to the merits of the suit. The court overruled the appearance by attorney, and refused to allow it for either purpose, and at the instance of the plaintiff gave judgment by default against defendant, and ordered a jury to come to inquire of plaintiff's damages. A verdict is returned and judgment made final and entered against defendant for the amount of the verdict of the jury. The court allowed a witness, C. E. Goldsmith, to give in evidence to the jury the plaintiff's books of account, without testifying that he kept the books, or in any way knew them to be correct, or laying any foundation whatever for their introduction in evidence.

The court, after forfeiting his bond, and rendering a judgment against defendant, ordered a *scire facias* to issue against defendant's bondsmen, although no assignment of the bond had been made by the sheriff, and no *ca. sa.* had issued and return thereon been made.

Conway & Risque, for appellant.

The statute authorizing suits by "capias" has been repealed by the act of February 15, 1878, "regulating practice in district courts," and if that did not repeal it it becomes wholly inoperative by the abolition of imprisonment for debt. The appearance at common law, was by giving bail above, or bail to the action. Defendant could then appear by attorney, and need never have put in an appearance at all. Bail above, or bail to the action, is unknown to the laws of New Mexico, and if defendant appears in person,

the court cannot order him into custody, or hold him after rendition of judgment. The statute does not say what shall be an appearance, and as at the common law, bail above does not exist, there is no prerequisite to an appearance by attorney. Capias accomplishes nothing more now than a summons does, hence the legislature has by implication repealed it, by the act declaring by what process suits shall be commenced.

Defendant appeared there by his attorney and the default granted by the court was illegal. Defendant should have been permitted to be heard by his attorneys.

The statute says the denial of the affidavit shall be heard as in attachment cases, and no personal attendance of the defendant is necessary there.

The bond taken by the sheriff in this case is not in compliance with the statute; it must be strictly followed, and it only requires the bond should be conditional that the defendant shall render himself in custody to abide the judgment, orders or decree of the court; it shows no requirement of personal attendance and is suited only to the time when the court could imprison after judgment, and shows the law to be inoperative now. Even if the default was proper, the evidence submitted to the jury is plainly incompetent.

The issuance of the *scire facias* at that stage of the proceedings is wholly unwarranted; *ca. sa.* had to issue and be returned *non est inventus*, and the bond assigned by the sheriff before the bail could be proceeded against. Reference is made to the following authorities:

The capias law, page 204 Comp. Laws of N. M., has been repealed. See acts approved February 15th, 1878, "relating to the practice in the district courts:" Acts 1878, page 53. It provides that all suits at law shall be commenced by filing a declaration with the clerk, who shall at once make out a summons or subpœna to the defendant. The act is general in its terms, prescribes the proper process; it is imperative.

The rule of law *expressio unius exclusio alterius* applies. This is a repeal of any other kind of process. "Even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first act * * * it will operate as a repeal." It is in effect a revision: 11 Wallace, 92, and authorities cited, *Id.*, 656; 10 Wallace, 395.

Subpœna is appropriate writ for chancery suits, and summons for suits at law: See Bouvier's Law Dict., "Subpœna" and "Summons;" 3 Black. Comm., 280.

Capias becomes inoperative by the abolition of imprisonment for debt. No *capias ad satisfaciendum* can issue. Appearance at common law was putting in bail above. Then defendant could appeal by attorney; could send his bail bond without appearing himself: 6 Cal., 59; 4 Law Library, 400 and 373, *et seq.* (Petersdorf on Bail); Tidd's Practice, 1097 and 1107; Bacon's Abridgement, Art. "Bail" D; 3 Black. Comm., 416; 1 Chitty Pleadings; 3 Carnes Rept., 95.

There being no such thing as bail above in New Mexico, and the statute never having expressly changed the common law as to appearance (in fact it is wholly silent as to it), it follows that defendant could appear by attorney and defend without personal appearance: 3 Carnes Rept., 95; Bouvier's Law Dictionary, "Appearance;" 3 Black. Comm., 26, and authorities cited above.

The statute West, 3 C, 10, cited in 3 Black. Comm., 26, expressly provided "attorneys may be made to prosecute or defend any action in the absence of the parties to the suit." This statute is in force as a part of the common law of the U. S., antedating the second year of James I (1607).

The law never requires a useless or vain thing to be done, or charges for a failure to do it, and delivery of defendant would have been such, for he could not have been held, and his attorney could have done anything the defendant in person could: *Matron v. Elder*, 6 Cal., 59; 2 Mass., 481. Especially last page of the case.

Sec. 8, Compiled Laws, N. M., 204, provides that defendant "may deny the truth of the affidavit by answer, without oath, and the same proceedings shall be had therein, as in cases of attachments." His personal attendance is wholly unnecessary.

The right to appear and defend by attorney is guaranteed by sec. 21 of the Bill of Rights, Comp. Laws of N. M., p. 642, sec. 21.

Ca. sa. had to be sued out against the principal and returned *non est inventus*, before the plaintiff could proceed to hold the bail. This can not be done now for obvious reasons, so giving a bond would be a mere form, and capias no more than a summons: 3 Johnson, 514; 2 Wend., 246; 3 Black. Comm., 416, and authorities cited above. The bondsmen were entitled to four days within which to summon the defendant, before they could be proceeded against: See authorities cited above.

An attorney is vested with all the necessary powers to defend the suit and carry into effect any order, judgment or decree of the court: See Bacon's Abridgment Act, "Attorney" B; Bouvier's Law Dictionary, "Attorneys and "Appearance," and Waite's Digest of N. Y. Rep., "Attorney and Client," p. 205, sec. 43.

Appearance to deny the truth of the affidavit is special, and the court can not compel general appearance: "Attachment," Comp. L. of N. M., 212, sec. 16.

Appearance by attorney is appearance for all purposes, unless the statute expressly requires the attendance of defendant in person: Bouvier's Institute, vol. II, "Process" and "Appearance." The last clause of which is as follows: "When defendant has been arrested under a capias, the entry of special bail to the action is considered an appearance."

Filing an answer is an appearance: 21 Cal. Making a motion: 11 Wiscon., 401. Filing demurrer: 15 Indiana,

374. Asking for a continuance: 11 Iowa, 45. See, also, 4 Johnson Ch. (N. Y.), 94; 6 Peters, 323, and Bouvier's Law Dictionary, "Appearance."

The bond taken in this case is not in compliance with the statute, and is therefore void: Comp. L. of N. M., p. 204; *Bernard v. Veile*, 21 Wend., 88.

It was error to forfeit the bond and order *scire facias* to issue. It was necessary to assign the bond to plaintiff first, and have *ca. sa.* issued against principal, and return *non est inventus*: *McDowell v. Morgan*, 33 Mo., 555; 2 Mass. Rep., 481; 3 Black. Comm., 416; Tidd's Practice, 1097 and 1107; Bacon's Abridgment, Art. "Bail" D., and cases cited in notes. Law Library, vol. 4, p. 400, and 313 *et seq.*; 3 Johnson, 514; 2 Wendell, 246.

It was necessary to lay a foundation to admit plaintiff's books in evidence; witness could not testify from them otherwise: 1 Greenleaf's Evidence, sec. 117, *et seq.*; *Hisrrich v. McPherson*, 20 Mo., 310 and authorities cited; 23 *Ib.*, 544.

S. B. Newcomb and *Catron & Thornton*, for appellee.

First. The capias in the case is a sufficient summons, and would be good as an ordinary summons, and if not, it was waived by the defendant entering into bond to appear as he expressly agrees to do in said bond, as appears by reference to said bond.

It is a well established principle that a defendant can waive irregularities in a summons by accepting service. This bond is in effect an acceptance of service and an absolute agreement in writing to appear.

Second. Neither the bill of exceptions nor the record shows in what manner Conway and Risque offered to appear and plead for defendant, if they were permitted at all to do so. They should have moved the court in writing to enter their appearance for the defendant and should have tendered their pleas in writing to be passed upon.

If they were attorneys of the court there would have been

no objection to filing pleas or traverses without leave, but the court, on objection, when filed without leave, would determine whether they were proper or properly filed. In the absence of such showing, this court cannot tell why the court refused to permit the appearance, even if the reason given was not a good one, yet if the attorneys were otherwise in default as to the proper manner of appearing, they cannot object, if the decision might otherwise be correct.

Besides, the capias proceeding seems to imply a personal appearance. This is especially so when defendant enters into bond to personally appear, and must plead under oath: Comp. L., p. —.

Third. There was no error in giving judgment by default although attorneys offered to appear, no appearance being actually had.

Fourth. The bill of exceptions does not pretend to contain all the evidence introduced, nor even all the evidence of the witness Goldsmith. The question as to defect in the evidence cannot be considered as other evidence might have been, and probably was introduced to supply all defects. It is a legal presumption that sufficient evidence was introduced, if the contrary is not duly shown.

Fifth. It is immaterial whether the bond was perfected or not, there is no final judgment on it nor any appeal from the judgment of perfection, nor are the parties to the bond made parties here.

Sixth. The statute of 1878 does not repeal any other statute regulating practice except when it directly conflicts with it.

Repeals by implication are to be discouraged.

PARKS, Associate Justice: On the 28th day of February, 1878, John R. Magruder was arrested for a debt of $1,306, by the sheriff of Grant county on a *capias ad respondendum* sued out by Bernard Weisl, and gave bond for his

appearance at the district court of said county on the first day of the July term thereof, to answer said suit.

On the second day of said term, Conway and Risque, attorneys for defendant, offered to enter the appearance of defendant for the purpose of traversing the affidavit and pleading to the declaration. The defendant not appearing in person the court refused to allow said defendant to appear by attorney; judgment by default was rendered against him, his bond forfeited and $1,306 damages assessed against him by a jury and judgment rendered; other proceedings were subsequently had which are of no importance to the determination of this case. The case was brought into this court by appeal.

The first error assigned involves the construction to be given to act of Feb. 15, 1878, relating to practice in the district courts. The court are not agreed as to the construction to be given to that act, and such construction is not necessary to the decision of this case.

All of the other errors assigned follow from the second, which is as follows:

The court erred in refusing to permit defendant to appear by attorney and deny the truth of the affidavit and plead to the merits of the suit.

The defendant was not required by the statute to do anything until the second day of the term, and on that day he had as much right to appear by attorney in this as in any other case. He was only bound by law to render himself in custody to abide the judgment, order or decree of the court.

The fact that while under arrest he was required to give and did give bond for more than the law required did not change his legal rights.

The refusal of the court to permit him to appear by attorney and traverse the truth of the affidavit on which he was arrested and plead to the declaration, was error.

For this error the judgment is reversed, and the case remanded to the court below for a new trial.

BENJAMIN ZANZ v. ELIAS S. STOVER ET AL.

January 23, 1880.

TRIAL BY COURT. (1) *Finding not reviewable.*
GARNISHMENT. (2) *Pleadings in.*
SAME. (3) *Sworn answer: Pleadings.*
GARNISHMENT. (4) *Case stated.*

1. Where a jury is waived and a trial had before the court, so far as its decision of questions of fact is concerned, its verdict will not be set aside, nor the judgment founded thereupon reversed, where there is any evidence whatever on which its finding of fact could have been based.
2. In a proceeding of garnishment the allegations, answers and denials are to be regarded and treated simply as pleadings. The allegations stand in place of the ordinary complaint or declaration; the answers in place of the ordinary answer or plea; the denial in place of the ordinary reply.
3. The answer of the garnishee, although sworn to by him, is not evidence; neither is any other pleading in garnishment.
4. The allegations of the plaintiff in a proceeding of garnishment stated that the garnishees were indebted to the judgment debtor for work, labor and services, in the sum of $700 or some other sum. The answers stated that the garnishees composed a firm, that the judgment debtor had performed work, labor and services in their store, that he had performed such work for about twelve months, and that they had not paid him anything for such work. Upon the trial the plaintiff introduced evidence of the services rendered by the principal debtor and of their value, and rested. The garnishees introduced no evidence at all.

   Held, that there was no evidence on which a jury, or a judge sitting in place of a jury, could find for the garnishees, and that a judgment in their favor under such circumstances, is erroneous

Benjamin Zanz, the plaintiff and appellant herein, on the second day of October, 1877, recovered judgment in the dis-

trict court for the county of Bernalillo against William E. Talbott for the sum of $54.50 damages and $13.22 costs, on the fourth day of the same month, execution having been issued on said judgment, the defendants herein, Stover *et al.*, were summoned as garnishees of said Talbott, he being then working for them as clerk in and about their store and business in Albuquerque. At the return term of said writ of execution, being the May term, 1878, of said court, allegations and interrogatories were propounded by the plaintiff to the defendants, Stover *et al.*, who filed their answer thereto at the October term, 1878, of said court. By consent of parties, the trial by jury was waived, and the case was tried by the court on the law and facts.

In answer to plaintiff's interrogatories, the defendants admitted that Talbott, the execution debtor, had worked for them twelve months as clerk in and about their store and business, that they were paying nothing for his work, that they had never paid anything for said twelve months' work, and that they owed nothing for said twelve months' work.

Plaintiff denied the garnishees' answer that they owed Talbott nothing, and were not indebted for the value of said labor, and issue was joined between the plaintiff and defendants, Stover *et al.* Plaintiff thereupon proved the value of said work to be $50 per month, and the defendants introduced no evidence whatever. Judgment was rendered by the court for the defendants, whereupon the plaintiff appealed to this court.

C. H. Gildersleeve and *F. B. Catron* for the appellant:

By Law of Dec. 31st, 1873, Session Laws of 1873–4, page 38, "Notice of garnishment shall have the effect of attaching all personal property, money, rights, credits * * * or other choses in action, due or to become due from the garnishee to the defendant * * * or charge, or under his control at the time of the service of the garnishment or which may come into his possession or charge, or

under his control, of, for or on account of which he may become indebted to the defendant between that time (service of notice of garnishment) and the time of filing his answer.

The only conclusion to be drawn from the defendants' answers, which are evasive and not explanatory, is that Talbott worked for them twelve months for nothing. This creates a presumption of collusion and fraud between them, a debtor cannot defraud his creditors out of the proceeds of his skill and labor by working gratis; his creditors are entitled to the fruits of his labors; and Talbott himself could have compelled the defendants to pay the value thereof: Bump on Fraudulent Conveyances, pages 270, 271; *Preston v. Campbell*, 9 Ala., 934; *Allen's Adm'x v. Richmond College*, 41 Mo., 302; *Waddingham v. Loker*, 44 Mo., 132.

As defendants accepted the clerk's services for twelve months in and about their store and business, there arises a presumption of contract between them that the services so rendered should be paid for: Parsons on Contracts, vol. 1, page 445, and notes; *vide* vol. 2, page 46, and notes; *James v. Bixby*, 11 Mass., 34.

The plaintiff as against the garnishee occupies the same position as the execution debtor, and the garnishee stands in precisely the position he would occupy if the defendant had sued him: Drake on Attachment, secs. 452, 461, 463; a fair construction of sec. 19, Comp. Laws N. M., page 214, would lead to same conclusion.

The garnishee must answer fully and distinctly, and clearly explain the relations between himself and the debtor, for an evasive answer will be construed more strongly against him: Drake on Attachment, secs. 629, 630, 633 and notes 634–656a, 659, 672; *Bebb v. Preston*, 1 Iowa, 469; *Ormsbee v. Davis*, 5 R. I., 442; *Crain v. Gold*, 46 Ill., 293; *Kelley v. Bowen*, 12 Pick., 383; *Cleveland v. Clapp*, 5 Mass., 205; *Scott v. Ray*, 35 Mass., 361.

The garnishees' answer is not conclusive, or true and suffi-

cient under the laws of New Mexico, if denied: Comp. Laws N. M., sec. 19, page 214, and is never conclusive unless made so by statute, and is not evidence in his own favor even: Drake on Attachment, sec. 654; *Smith v. Hendricks*, 39 Mo., 164; *Keep v. Sanderson*, 12 Wis., 363.

When from all the facts no other reasonable conclusion can arise but that the garnishee owes the execution debtor, he will be held, even though he denies any indebtedness: 40 Pa. State, 248; *Maime v. Buford*, 3 Ala., 312; *Bebb v. Preston*, 1 Iowa, 469.

The confession in the garnishees' answer that Talbott worked for them twelve months without their having paid anything for said work, together with the proof by plaintiff that the value of said work was $50 per month during said time, is sufficient to make out a *prima facie* case for the plaintiff, which the defendants should have rebutted on the trial; they must show enough to discharge themselves: *McCoy v. William*, 1 Gilm. (Ill.), 591.

Breeden & Hazledine, for appellees.

The judgment of the court below was correct, and should not be disturbed.

The answer of defendants garnishees is explicit and in nowise evasive. They answer directly and unequivocally every interrogatory propounded to them. If there is a failure to get out all the facts, it is because the interrogatories of the plaintiff are defective, and not of a character to require explanation and detail from the defendants.

In order to recover against the garnishees, it was for the plaintiff to state affirmatively that the defendant garnishees were indebted to the judgment debtor Talbott, or had his property in their possession.

Indebtedness or liability of the garnishee will not be presumed: Drake on Attachment, sec. 461; 33 Iowa, 210.

The answer of the garnishees is to be taken as true, and it was for the appellant to disprove the same: Drake on

Attachment, sec. 651; *Kegin v. Dawson*, 1 Gilm., 86; *McKey v. William*, 1 Gilm., 584; 14 Ill., 342; 27 Ill., 352; 52 Ill., 222.

No evidence was offered tending even to disprove the answer of the garnishees, and it does not show an indebtedness so far as appears from the answer (which is a full and explicit reply to the interrogatories). The judgment debtor Talbott may have been working out a prior indebtedness, or on account of a trust, or on an agreement with the garnishees to support and provide for his family, or he may have been a partner with the garnishees, general or special. Either hypothesis is consistent with the answer and the evidence, and in neither case would the garnishees be liable: Drake on Attachments, secs. 454 and 457.

When there remains a reasonable doubt of the garnishee's indebtedness, he is entitled to be discharged: *Morse v. Marshall*, 22 Iowa, 290; Drake on Attachment, sec. 659, subd. 7.

The finding in the case was equivalent to the verdict of a jury—a jury having been waived and the case tried by the court.

The answer of the garnishees was properly before the court at the trial, and it was for the court (as for a jury, if one had been called) to give it such weight as it deemed it to be entitled to: *Schwab v. Gingerik*, 13 Iowa, 697.

The case having been fairly tried and determined, there being facts before the court to justify a finding for the defendants, it was for the court which tried the case to decide upon the weight of the evidence, and this court will not disturb the finding.

Prince, Chief Justice: This is a case of garnishment, under the territorial statute.

The material facts are as follows: The plaintiff Zanz recovered judgment in the district court held in Bernalillo county, in October, 1877, against one William E. Talbott.

Execution was issued, which was afterwards returned unsatisfied, and on October 4th, 1877, Elias S. Stover and Almaron M. Coddington were summoned as garnishees. At the May term of 1878, being the return term of the writ, written allegations and interrogatories were exhibited by the plaintiff, in pursuance of the statute, which the garnishees failed to answer, and their default was taken at the next term, October 9th, 1878. This default was subsequently opened, and Stover filed answers to the interrogatories during the same term, on October 14, Coddington not having answered. Judgment by default was taken against him on October 15th, and on the same day the plaintiff filed a denial of portions of the answers of the garnishee Stover, and issue was thereupon joined.

The case came on for trial on the issues so made upon the 19th day of October, whereupon the parties agreed to waive a trial by jury and try the same before the court. The plaintiff introduced the record of judgment in Zanz against Talbott, the execution issued thereon, and the summons to the garnishees, with proof of service. He called one witness, John A. Hill, who testified that he had been a clerk for the garnishees for seven months past in their store at Albuquerque; that Talbott had been working for them from Oct. 4th, 1877, down to the present time, clerking, and doing other work for them in and about the store and business, and that, to the best of his knowledge and belief, said work was worth $50 per month.

This was all the evidence introduced on said trial, the defendants not introducing any whatever. The court gave judgment for the defendants, to which the plaintiff excepted and appealed to this court.

The court having acted in this case as a jury, so far as its decision on questions of fact was concerned, its verdict should not be set aside, nor the judgment thereon reversed, in a

case where there is any evidence whatever, on which it could be based.

In the case before us, no evidence at all was produced on the part of the defendants, and the plaintiff introduced sufficient to make out his case *primâ facie*. To sustain the decision in their favor under these circumstances, counsel for defendants have argued that "the answer of the garnishee is to be taken as true, and it was for the plaintiff to disprove the same," and further say that "the answer of the garnishee was properly before the court at the trial, and it was for the court (as for a jury, if one had been called), to give it such weight as it deemed it entitled to."

These arguments are based on the idea that the answers of the garnishee to the allegations and interrogatories of the plaintiffs are evidence in the case. But there is nothing in the law of this territory to sustain such a view.

It is clear from a reading of the statutes that, however the law may be in other states and territories, here the allegations, answers and denials are to be regarded and treated simply as pleadings. The proceedings are distinctly set forth on page 214 of the Compiled Laws (General Laws, 139).

"The plaintiff may exhibit in the cause written allegations and interrogatories touching the property, effects and credits attached in the hands of any garnishee.

"The garnishee shall file his answer thereto on oath.

"The plaintiff may deny the answers of the garnishee in whole or in part, and the issue shall be tried as ordinary issues between plaintiffs and defendants."

This seems so plain as to require no argument to show that the various papers filed are to be regarded as ordinary pleadings. The allegations stand in place of the ordinary complaint or declaration; the answers in place of the ordinary answer or plea; the denial in place of the ordinary

reply, and the issue thus framed "shall be tried as ordinary issues between plaintiffs and defendants."

All the incidental proceedings tend to the same conclusion.

"In default of an answer by the garnishee to the interrogatories propounded, the plaintiff may take judgment by default against him." (Sec. 17.)

"If the answer of the garnishee be not excepted to or denied, it shall be taken to be true." (Sec. 19.)

It seems, then, that the allegations, answers and denials are to be considered and treated as pleadings in ordinary actions; and it only remains, therefore, to inquire how the particular case before us is affected by this principle. The allegations state that the garnishees are indebted to the judgment debtor for work, labor and services in the sum of $700, or some other sum.

The answers are partially denied and partially not. The part thereof not denied, and therefore standing as confessedly true, is embraced in the answers to the 1st, 3d, 4th and 7th interrogatories, and is to the effect that (1st.) The garnishees compose the firm of Stover & Co. (3d.) Talbott has performed work, labor and services in the garnishees' store at Albuquerque. (4.) He has performed such work continuously since October 4th, 1877, being twelve months. (7.) The garnishees have not paid anything for such work since October 4th, 1877.

The case, therefore, comes up as one in which a plaintiff in his complaint alleges that a defendant owed him a sum of money for services, and the defendant, in his answer, alleges that the plaintiff has worked for him for twelve months, and that he has paid him nothing. Thereupon, the plaintiff introduces evidence of his services and their value, and rests; the defendant introduces no evidence at all.

In such a case there would be no evidence on which a jury

could find for the defendant, and, consequently, none on which a judge sitting in place of a jury could so find.

Under the provision of the statute (Sec. 19), that the answers of the garnishee, if not excepted to or denied, shall be taken to be true, we may consider that any part of such answers not so excepted to or denied, should be considered as true; in other words, such undenied parts of the answers are equivalent to evidence in the case; and if there had been in the undenied portions of the answers in this proceeding any statements which, if they had been regularly in evidence, could have justified a verdict or decision for the defendant, the decision and judgment herein should be sustained, but as no such statements appear, it is not possible so to sustain them.

The judgment must be reversed, and the case remanded to the district court of the second district for a new trial.

CLARENCE P. KIDDER v. JOSEPH F. BENNETT ET AL.

January 24, 1880.

NO WRIT OF ERROR IN CHANCERY.

In New Mexico, a writ of error does not lie in chancery cases. Such cases taken up on writ of error will be dismissed upon motion.

Writ of Error to the District Court for the county of Grant.

This is a motion to dismiss a writ of error in a proceeding in chancery.

———, for defendant in error.

The first authority with reference to writs of error is the organic act, which says: Writs of error, bills of exception, and appeals, shall be allowed to the supreme court, in all causes from the final decisions of said district courts, under such regulations as may be prescribed by law. Organic Act, sec. 10, page 10.

Our statutes state that the supreme and district courts shall have power to issue all writs granted by law to the circuit and district courts of the United States, and the supreme court to establish all rules and forms of proceedings touching such writs in conformity with the known general principles, usages and objects of such process: Comp. Laws, p. 102, sec. 70. Also the said supreme and district court, in the exercise of chancery jurisdiction arising in all cases and matters of equity, shall conform in their decisions, decrees, and procedure to the laws and usages peculiar to such jurisdiction in this territory and the supreme, circuit and district courts of the United States: Comp. Laws, page 102, sec. 9.

The law also provides, that hereafter no writ of error shall be allowed by the supreme court of this territory, except within one year after the rendition of the judgment on which said writ of error is based, and that said supreme court shall make rules for the government of the practice in writs of error in common law cases: Stat. June 9, 1874, p. 44.

Under the above law the supreme court adopted the rules of Jan. 27, 1874, with reference to writs of error. See amendments to rules, etc., 1, 2, 3, 4, 5, 6.

It is a well recognized fact that writs of error at common law only were allowed in common-law cases, and appeals in chancery cases: Tomlin's Law, etc., Title Appeal, vol. 1, p. 81. The above principle is well recognized.

In the court of the United States appeals only lie in chancery cases, writs of error only in common-law cases: *McCullum v. Eager*, 2 How., 61.

If a writ of error was proper under our rules, this transcript is not sufficient: Rule 6, "Writs of Error." Clerk may make return to the same by transmitting a true copy of the record and of all proceedings in the cause: Rule 6, Article, "Writs of Error."

In this case the clerk does not certify that the pretended transcript is a true copy of record.

There must be a *placita*, or hearing, otherwise the writ will be dismissed.

PRINCE, Chief Justice: This is a chancery case originating in the county of Grant. The defendants demurred to the complaint, and after a hearing at the December term, 1876, the demurrer was sustained, and the complaint dismissed. To this the plaintiff excepted.

On December 19, the plaintiff's attorney moved for a writ of error, which motion was granted, and the writ of error allowed.

By said writ of error, the case came into this court.

At the opening of this term counsel for respondents moved to dismiss the cause and strike the same from the docket for seven assigned reasons, mentioned in the motion papers. Of these it is not necessary to refer to but one, that is, "because a writ of error does not lie in chancery cases.

However much it is to be regretted that technical differences as to methods of appeal, now abrogated in many states, should continue to exist in New Mexico, yet that does not change the law and practice of the territory, which make certain important distinctions between proceedings in law and equity. Under our practice it is true that "a writ of error does not lie in chancery cases."

The motion, therefore, is granted, and the writ of error dismissed.

STANTON S. BRANNIN, Appellant, v. MARTIN W. BREMEN, Appellee.

REPLEVIN. (1) *Dismissal by plaintiff: Defendant's right to verdict and judgment.*

SAME. (2) *Informality in verdict not fatal to judgment: Assessment of "damages" instead of "value."*

WRIT OF ERROR. (3) *Record, no objections entertained to matters outside.*

REPLEVIN. (4) *Double damages.*

1. The plaintiff in a replevin suit cannot by a discontinuance of the action or by suffering a non-suit, prevent a judgment being rendered against him for damages or for a return of the property. Therefore, where a plaintiff in replevin moved to dismiss the suit at his own costs, and the court ordered the case to be dismissed except to assess the value of the property and the damages and to render judgment for the defendant, it was *held* that such a "dismissal" amounted merely to an abandonment of the case by the plaintiff with the consent of the court, and that it did not affect the defendant's right to a verdict and judgment in his favor, nor deprive the court of jurisdiction of the suit.
2. A party will not be deprived of a recovery merely because of a bare informality in a verdict. Thus, while a verdict by a jury in a replevin suit that they "do assess damages of the property mentioned in the declaration at $825, and the actual damages of the defendant at six per centum per annum to be $24.75," is not well expressed in that the word "damages" is used with reference to the property instead of the word "value," a correct judgment rendered upon it will not be set aside. Such a verdict is not objectionable for non-conformity to the law which requires the "value" of the property to be assessed.
3. Objections to a bond which is not made part of the record, brought up on error, will not be considered.
4. Double damages may be assessed in replevin by a jury, for the detention of the property.

Appeal from the District Court for Grant county, BRISTOL, J.

This is an action of replevin brought to recover possession of four tons of ore, more or less, to the possession of which plaintiff alleged he was entitled, and that the same was de-

posited at the quartz mill of the defendant. The suit was regularly brought according to the statute, and the writ was executed by taking the ore and delivering the possession of it to the plaintiff.

When the case came on to be heard, plaintiff, by his attorneys, filed a written dismissal of the same at his own costs. The court, therefore, made an order "that the said action be dismissed, except for the purpose of assessing the value of the property mentioned in the declaration and for damages, and for judgment in favor of the defendant, and the jury being required to assess the damages herein, it is ordered that a jury come to inquire thereof." Thereupon a jury came and were sworn to well and truly assess the damages. The jury found a verdict assessing "the damages of the property mentioned in the declaration at $825, and the actual damages of the defendant at six per centum per annum to be $24.75." The court thereupon gave judgment against the plaintiff and the sureties on his replevin bond for the said "sum of $825, the assessed value of the property mentioned in the declaration, and the further sum of $49.50, double damages assessed by the jury aforesaid, for the detention of the same," and it was ordered by the court that if said property was not returned by the plaintiff, and accepted by the defendant, within thirty days, that execution issue for said sums of money, together with costs.

Conway & Risque, for appellant.

Appellant insists that when the cause was dismissed by his attorneys, it was no longer in court for any purpose; that the proper judgment to have been rendered against plaintiff was one for costs, and that the defendant's proper remedy was a suit upon the replevin bond.

Appellant further insists that even if the proper course is to give judgment then and there upon the bond, the verdict of the jury in this case was not the proper one; that it was not in accordance with the law. It should have been for the

assessed value of the property, instead of the damages thereof. No judgment could be rendered on the verdict as found, and the judgment rendered does not conform to the verdict found.

The judgment rendered is greater than twice the amount of the alleged value of the property. The law only required a bond for that amount, and the legal presumption is that the officer took the proper statutory bond. The transcript does not contain any bond at all, or show in any way what the amount of any bond taken was.

The presumption that the officer took a proper bond is, at least, equally as strong as any intendment in favor of the judgment.

Unquestionably the court could not give judgment against the sureties for an amount greater than the bond. The clerk certifies that the transcript is a correct transcript of all the proceedings in the case; it shows no ground whatever upon which to base a judgment against the sureties. Against any presumption there may be in favor of the judgment, we have both the clerk's certificate and the presumption that the officer serving the writ did his duty properly, and that plaintiff would not have given a greater bond than the law required.

The dismissal of this case divested the court of any power to give judgment against plaintiff for anything but costs. The sixth section of the replevin act provides, that the defendant may plead that he is not guilty of the premises charged against him, and this plea will put in issue not only the rightful ownership of the property, but also the wrongful taking and detention thereof. No such plea was filed, and no such issue raised in this case, yet defendant gets a judgment for the value of property, the ownership of which he has never, according to the forms of pleading, claimed.

Our own supreme court has decided that such a judgment cannot be rendered in the absence of such a plea, the plaintiff not prosecuting. See manuscript opinion of court in case

of *Elsburg & Amburg v. Fritze & Generette*, delivered at the January term, 1867: Comp. Laws of New Mexico, page 244, sec. 6.

Discontinuance disposes of the whole of a suit: *Matthias v. Cook*, 31 Ill., 83.

Defendant must elect whether he will take a return of the property or its assessed value, before damages can be assessed: *Wheelock v. Wilkins*, 19 Mich., 78.

When the verdict in an action of replevin is for the defendant, judgment cannot be rendered against the principal and sureties for damages: 10 Iowa, 226; *Beale v. Dale*, 25 Mo., 301.

Double damages against sureties is improper: *Collins v. Hough*, 26 Mo., 149; Comp. Laws of N. M., page 242, sec. 4.

At common law both plaintiff and defendant become "actors." The defendant by becoming avowant. He sets up claim by plea to the property. Writ of inquiry was introduced by statute: 9 Wendell, 149.

The court ought not to permit a dismissal of a suit until the value is assessed; if it does, it follows that value cannot then be assessed, but defendant must have recourse to his bond: 45 Mo., 111.

S. B. Newcomb, for appellee.

The first error assigned by appellant is "that after the court allowed the cause to be dismissed, it had no jurisdiction to render a judgment against plaintiff for anything but costs." In the first place it will be perceived that the court did not allow a full dismissal of this cause. It simply allowed the plaintiff to abandon his right or claim to the property in question; this the court could not prevent. It could not command or force the plaintiff to contend for this property against his will, but the court had the right and was bound to protect the rights of the defendants under the statute.

The 6th and 7th sections of our replevin law, Compiled

Laws of New Mexico, page 244, are exact copies of sections of the laws of Missouri passed in 1845. The plaintiff in a replevin suit cannot by a discontinuance of the action, or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property." *Smith v. Winston*, 10 Mo., 190–1–2; *Berghoff v. Heekwolf*, 26 Mo., 511; 1 Tidd, 575; 11 Archbold's Q. B. Practice, 6, 1084; *Collins v. Hough*, 26 Mo., 151–2–3.

As to the second error, that the verdict of the jury does not conform to the law. The verdict does substantially comply with the law. It is true the word damages is used when value would be more appropriate, but this is a mere clerical error, it does not vitiate the verdict. The jury say they "assess the damage of the property mentioned in the declaration at $825, and the actual damage of the defendant at six per centum interest per annum to be $25.75." The words "damage of the property" were evidently written by the clerk in the record by mistake, and in any event cannot affect the finding of the jury, as the value of the property is clearly distinguished in their verdict from the actual damage of the defendant. The law nowhere says that the jury shall use the identical word "value" in their verdict; they must assess the value of the property; this they did, and they were at liberty to use any word to express this act; and taking the whole verdict together their meaning is sufficiently apparent and certain.

As the verdict of the jury is substantially correct, the judgment of the court is supported by the verdict of the jury.

The law says that judgment shall be given for the assessed value of the property, not the value the plaintiff may see fit to put upon it when he sues out his writ of replevin. If the latter proposition were the law, a plaintiff could take a $1,000 worth of property from a defendant by valuing it at $100, and the defendant would be without remedy.

The appellant has seen fit to inject into his brief a cause of error other than he has assigned. We contend that the court should not take cognizance of this error.

The appellant contends that because the defendant did not plead as the statute says he may do, therefore no judgment could be rendered against the defendant, and he cites the case of *Elsburg & Amburg v. Fritze et al.*, S. C. N. M., January Term, 1867.

The learned judge who rendered the decision in that case, bases his decision on false premises. He says "there can be no trial without an issue, and no issue without pleadings on the part of the parties litigant." Now there were no parties litigant. The plaintiff had abandoned his case, gave up his claim to the property by his failing to appear and prosecute his suit, therefore no trial could be had. Nothing was to be done but to assess the value of the property and the damages under the statute. If that is to be called a trial then trials can and constantly do take place without an issue and without a plea. When judgment is rendered against a defendant by default or for want of a plea in cases of tort or unliquidated damages, a jury must come to assess the damages, and a trial in this sense is had and the defendant can even appear and cross-examine witnesses.

The supreme court of Missouri say that "in actions of this kind the defendants' right to a judgment for affirmative relief in no wise depends upon the shape of his answer, but alone (where the plaintiff has possession of the property) upon the plaintiffs' failure to prosecute his action with effect." If a plaintiff having got possession of property by means of his suit, should before answer filed, voluntarily dismiss his suit, can there be any doubt that the defendant would in such case be entitled to have an assessment and judgment for the property taken or its value: *Fallon v. Manning*, 35 Mo., 274.

PARKS, Associate Justice: This was an action of replevin brought into this court by writ of error from the county of Grant.

The record shows that the plaintiff filed a motion to dismiss the suit at his own cost; that the court ordered the case to be dismissed, except for the purpose of assessing the value of the property replevied, and for damages and for judgment in favor of the defendant; that a jury came "to assess the value of the said property and the damages sustained by the defendant;" that the jury say in their verdict, that they "do assess the damages of the property mentioned in the declaration at eight hundred and twenty-five dollars, and the actual damages of the defendant at six per centum per annum, to be twenty-four and $\frac{75}{100}$ dollars," and that the court gave judgment against plaintiff, and the sureties on his replevin bond for "the said sum of eight hundred and twenty-five dollars, the assessed value of the property mentioned in the declaration, and the further sum of forty-nine $\frac{50}{100}$ dollars, double damages assessed by the jury as aforesaid for the detention of the same."

The first error assigned is, "that after the court allowed said cause to be dismissed, it had no jurisdiction to render a judgment against plaintiff for anything but costs, but it ordered a jury to come and inquire of plaintiff's damages and gave a judgment therefor."

The supreme court of Missouri in construing their statute on replevin, from which ours was copied, say, "the plaintiff in a replevin suit cannot by a discontinuance of the action or by suffering a nonsuit prevent a judgment being rendered against him for damages or for a return of the property."

We approve this construction of the statute and adopt it as the law of this case. The dismissal of the suit as described in the record, amounts to just this: that the plaintiff abandoned his case and the court consented to that abandonment. It is not material in what form of words these facts are set

forth, nor does this (so called) dismissal affect the defendant's right to the verdict and judgment in his favor. So far as his rights were concerned, the court had no power under the statute to dismiss the suit, and in fact it did not do so. The intention of the law was carried out by the court, and there is no material error in the manner in which it was done if indeed there is any error at all.

In fact the greater part of the record which sets forth the dismissal of the case might perhaps be regarded as surplusage under our statute, as it amounts to nothing beyond showing that the plaintiff had abandoned his suit as already stated.

The second error assigned is that "the verdict of the jury does not conform to the law in that it finds the damages of the property instead of its assessed value," and the third error is substantially the same as the second. The verdict is certainly not well expressed, but the jury are not required by the statute to use any particular form or words. It would have been better if they had used the word value, or some equivalent word instead of the word damages. But the meaning of the jury is plain. It was certainly understood at the time it was given, to be substantially right and sufficiently clear, as the court rendered a correct judgment upon it. The use of the word damages complained of, may be a mere clerical error. The rule adopted by some of the courts, that "when on the whole record, we see that injustice has not been done a defendant, it would be going too far to deprive a plaintiff of a recovery upon no better grounds than the bare informality of a verdict" is correct, and is in principle applicable to this case.

The fourth error assigned grows out of the replevin bond, but as the bond has not been before us in any form, we cannot very well consider this objection. In fact it seemed to be abandoned in the argument before this court.

The double damages complained of seem to be expressly

authorized by our statute. See Compiled Laws of New Mexico, p. 244, sec. 7.

Upon this whole record we see no ground of reversal, and the judgment of the district court must be sustained.

Judgment below affirmed.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW MEXICO,

JANUARY TERM, 1881.

IN THE MATTER OF THE ATTORNEY-GENERAL OF NEW MEXICO.

TERRITORY OF NEW MEXICO v. JOSEPH STOKES AND WILLIAM MULLEN.

January 13, 1881.

CONSUITUTIONAL LAW. (1) *Special act of congress not necessary to annul territorial statute.*

SAME. (2) *What is the constitutional law of a territory.*

SAME. (3) *What classes of official vacancies governor of territory can fill without consent of council.*

OFFICE OF ATTORNEY-GENERAL. (4) *What is not a vacancy in, "from resignation."*

SAME. (5) *Governor cannot fill without consent of council.*

SAME. (6) *Incumbent does not "hold over" in case no successor named.*

SAME. (7) *Nature of.*

SAME. (8) *Vacancy in, power of court to appoint some one to perform duties.*

SAME. (9) *Held vacant.*

1. It is not true that because a territorial statute has never been directly abrogated by act of congress, it is, therefore, certainly valid. Action by congress in annulling territorial statutes is rare, and only takes place where they are not void of themselves, but simply improper or inexpedient without being illegal, *per se.* The usual way of declaring a territorial statute which is inconsistent with the higher law of

congress inoperative, is through the courts, just as in states statutes would be adjudged unconstitutional.

2. In a territory the constitution and laws of the United States, and especially the organic act of the territory itself, stand exactly in the relation that a state constitution occupies in a state.
3. Congress having, in the law of 1872, relating to appointments by the governer (Rev. Stat., U. S., sec. 1858), distinctly designated two classes of vacancies which the governor can fill without the consent of the council, the maxim "*expressio unius est exclusio alterius,*" and the legal construction as well as the reasonable interpretation of this enactment is to exclude the governor from filling any other kind of a vacancy than these two, without the consent of the council, as fully as if he were expressly excluded in terms from so doing.
4. Where one incumbent of the office of attorney-general of New Mexico resigned, and the vacancy thus created was filled by the governor whose appointee held until the expiration of the term and then the office became vacant, owing to the failure of the territorial council to confirm the governor's nominee for the next term, *held,* that such vacancy was not a vacancy "from resignation," because founded originally on the resignation of an incumbent of the office.
5. The governor of the territory of New Mexico has no authority conferred upon him to make any appointment to the office of attorney-general without the concurrence of the council, after the organization of the territory, except to fill vacancies occurring during the recess of the legislative council, from resignation or death.
6. The incumbent of the office of attorney-general does not "hold over" in case his term expires and no person is appointed to succeed him.
7. The attorney-general of New Mexico is not a township, district, or county officer, but a territorial one. He is the legal adviser of the governor and all other territorial officers.
8. In case a vacancy in the office of attorney-general, the court has power, as occasion arises, to appoint some suitable person to represent the territory in the prosecution or defense of cases before it.
9. The office of attorney-general of New Mexico is vacant, the term of the late incumbent having expired by operation of law, and the governor having no power to fill vacancies, except those occasioned by death or resignation, without the concurrence of the council.

At the expiration of the legislative session of 1880 a controversy arose as to the office of attorney-general of the territory. Hon. Henry A. Waldo had been holding that office for nearly two years under an appointment made by the gov-

ernor to fill a vacancy occurring while no legislature was in session. On February 14, 1880, Eugene A. Fiske, Esq., appeared in the district court in the first district claiming said office by virtue of a commission from Governor Wallace dated on that day, the legislative term having expired the evening before.

The following authorities and acts of Congress and of the Legislative Assembly of New Mexico were cited by Mr. Fiske: Organic Act N. M., Sept. 9, 1850 (9 U. S. Stats., p. 449); Rev. Stats. U. S., secs. 1858, 1841, 1850 and 1857; Const. of the U. S., art. 2, sec. 3; Pascal's Annotated Const. U. S., p. 182; Act Rel. to Jesuits, 20 U. S. Stats., p. 280; Pascal's Annotated Const. of U. S., p. 174, note 198; Rev. Stats. N. M., sec. 23, Act Feb. 28, 1862, pages 86, 88; secs. 4 and 5, art. 6, chap. 10, pages 82, 84; Session Laws N. M., Act Jan. 8, 1874, sec. 2, p. 16; Rev. Stats. N. M., Act 1854, pages 628, 744; *U. S. v. Kirkpatrick*, 9 Wheat., 734; *Id.*, 4 Sawyer, 593; *Cate v. Ross*, 2 Duval (Ky.), 244; *People v. Bain*, 6 Cal., 509; *Peppin v. State*, 2 Sneed, 45; 4 Op. Attorney-General U. S., p. 523; *Clinton v. Englebrecht*, 13 Wal., 446; *Miner's Bank v. Iowa*, 12 How., 8; 5 Op. Attorney-General, 525; *Beebe v. Robinson*, 52 Ala., 74.

The chief justice, before whom the matter was thus presented, invited expressions of opinion on the subject from members of the bar, as *amici curiæ*, and arguments were made by several counsel. The discussion was adjourned to February 23d, in order to have all views thoroughly heard, and on that day various arguments were made and authorities produced. On the succeeding day Chief Justice Prince delivered the following opinion, which is given entire, as it contains a synopsis of the arguments advanced on all sides of the question. Although this opinion was rendered in the district court, its importance and the thoroughness with which it discusses the subject seem to warrant its insertion here. Below will be found the opinion of the supreme court in relation to the same matter, delivered in the case of the *Territory of New Mexico v. Stokes and Mullen*, *infra*, p. 63.

PRINCE, Chief Justice: On the morning of February 14th, 1880, two gentlemen appeared in the district court then sitting in and for the county of Santa Fe, each claiming to be attorney-general of the territory and asking recognition as such. The one was Hon. Henry L. Waldo, who for a considerable time previous had filled the office of attorney-general, and the other was Eugene A. Fiske, Esq., who presented a certificate of appointment by the governor, dated on that day.

A formal motion, as attorney-general, was made by one, and objected to by the other on the ground that the former was not rightfully filling that office, in order that the matter might be brought before the court; and thereafter both parties were heard at length on the subject, and by request a number of the counsellors of the court also stated their views, and produced authorities bearing on the question. The material facts, with regard to which there is no dispute, are briefly as follows:

Judge Waldo was appointed attorney-general in the year 1878, to fill a vacancy occasioned by the resignation of Col. Breeden, the previous incumbent; said resignation and the appointment of Judge Waldo both being subsequent to the adjournment of the legislature of that year. No legislature convened in 1879. The Legislative Council of 1880 finally adjourned about midnight on February 13th, having failed to confirm the nomination for attorney-general sent to it by the governor. On the morning of Feb. 14th, the governor, alone, appointed Mr. Fiske as attorney-general.

Three views have been presented to the court, and enforced by argument.

1. That the governor, alone, had power to appoint Mr. Fiske to fill the vacancy created by the expiration of the term of Judge Waldo; and that Mr. Fiske is now attorney-general.

2. That the governor has no power to appoint without the advice and consent of the council, except to fill vacancies resulting from death or resignation; and consequently could

not appoint in this case, and that under the circumstances Judge Waldo, as last incumbent, "holds over" until an appointment is legally made.

3. That the governor has no power to appoint under the circumstances; but that Judge Waldo's term is absolutely limited by statute and has expired; that, consequently, a vacancy exists.

Let us examine, in the first place, the statutes which relate to the office of attorney-general.

The organic act, which established the territorial government, provides as follows:

"SEC. 8. All township, district and county officers not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly. * * * The governor shall nominate, and by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for; and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly."

This section is substantially re-enacted in the U. S. Rev. Statutes, being there made applicable to all territories, in section 1857. No such an officer as attorney-general is named or "otherwise provided for" in the organic act. He is not a township, district or county officer, but a territorial one. As such, therefore, he comes within the scope of the latter half of sec. 8 of the organic act (or Section 1857 of the Revised Statutes), and within that alone. It was suggested in the argument that he was a "district officer," but the view can hardly be seriously entertained. Under the act of 1859 (Compiled Laws, page 82) the great part of which is still in force, he was the public prosecutor throughout the whole territory, besides being the legal adviser of the governor and other territorial officers. Subsequently (1862 and 1863) district attor-

neys were provided for, to act in certain districts, but the general duties of the attorney-general as official adviser, etc., have never been disturbed.

The legislature, in conformity with the organic act, provided (see Compiled Laws, page 84, sec. 7) that he should be appointed by the governor by and with the advice and consent of the legislative council; and added that he shall hold his office for two years, and until his successor should be appointed and qualified.

(It is to be observed that the attorney-general mentioned on page 82 of the Compiled Laws, was an officer created by the Kearney Code, before the organic act, forming the territory, was passed, and not the present official of that name.)

It is plain, then, that under section 8, of the organic act, which is the fundamental law of the territory, this officer had to be nominated by the governor, and by and with the advice and consent of the legislative council, appointed. There is but one exception to the strictness of this law, and that is the case of a new territory, in which, *in the first instance*, the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly.

The statement of this one case in which the governor can act alone, emphasizes the requirement under other circumstances of the concurrence of the council.

In 1854, the legislature of New Mexico passed an act, which is reprinted in the "Compiled Laws," on page 627, which provides that "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 such temporary appointments during the recess of the legislative assembly, to continue until the meeting of the same."

It has been discussed at much length, in the argument, whether this law was within the power of the legislature to

pass or not, it being held on the one side that it was not in contravention of any provision of the organic act, and on the other that the organic act having stated distinctly the way in which such appointments were to be made, and particularized one single exceptional case in which the governor could appoint without the council, that it was not competent for the territorial legislature to designate a different way, or to add another case in which the executive could act alone.

It seems, however, that this discussion becomes comparatively unimportant in view of the subsequent congressional action in 1872. Down to that time the only law as to appointments of such officers as attorney-general had been in the organic act; there was no congressional provision for the fililng of any vacancies during the legislative recess, and there was but the single exception previously referred to—that of the "first instance"—to the requirement that the council should concur in order to make a valid appointment.

On June 8, 1872, congress enacted the following law (now section 1858 of the Revised Statutes) giving power to the governors of territories to make appointments in certain cases:

"In any of the territories whenever a vacancy happens from resignation or death during the recess of the legislative council in any office which, under the organic act of any territory, is to be filled by appointment of the governor, by and with the advice and consent of the council, the governor shall fill such vacancy by granting a commission, which shall expire at the end of the next session of the legislative council."

It will be observed that the class of officials herein referred to is exactly that which includes the attorney-general of this territory.

Here then was an explicit expression of the supreme will with regard to the filling of vacancies; and if the appointment now in question had been made to fill a vacancy occur-

ring from death or resignation there could be no doubt of the power of the governor to make it, alone, without the necessity of concurrent action by the council.

But the vacancy in this instance, if there is one, has occurred by expiration of term.

It may be noted here that Judge Waldo was appointed as attorney-general under this very section, in 1878. And the language is very explicit, that such terms "shall expire at the end of the next session of the legislative council."

It seems certain, at all events, that no vacancy exists from either death or resignation. It is true that one counsel has taken the ground in argument that this is a vacancy "from resignation," because it is founded originally on the resignation of Col. Breeden; and he held that all vacancies that may occur until there is a regular appointment by the governor and council for a full term, will relate back to that event and be vacancies arising from it, and therefore vacancies "happening from resignation." But this I do not think is tenable. We may safely assume, then, that this is not one of the two classes of vacancies referred to in this section. If there is a vacancy it is because of the expiration of Judge Waldo's term under the provisions of this very law. The question then arises, whether, since the passage of this act of 1872, the governor, alone, can appoint to fill a vacancy occasioned by expiration of term.

The attention of congress was evidently called to this subject of filling vacancies by appointment by the governor alone, or the law of 1872 would not have been enacted. It gives that power distinctly in two cases, and no more. It stops there.

Now no maxim of law is of more general and uniform application than "*expressio unius est exclusio alterius*," "the expression of one thing excludes others." Broom in his "Legal Maxims," p. 664, says this maxim is "never more applicable than when applied to the interpretation of

a statute." On the same subject Sedgwick in his "Constitutional and Statutory Law," says, "If a new power be given by an affirmative statute to a certain person, all other persons are in general excluded from the exercise of the power, since '*expressio unius est exclusio alterius:*'" See p. 30.

In Iowa the same idea is expressed in these words: "Where a statute limits a thing to be done in a particular form, it includes in itself a negative, viz.: that it shall not be done otherwise" (7 Clarke, 265); and in Connecticut it is held that "a statute that prescribes that a thing shall be done in a particular way, carries with it an implied prohibition against doing it in any other way:" 36 Conn., 373.

This general principle is so fundamental and well understood that it requires no argument to enforce it, the only question being whether it applies to the case in hand.

In the law of 1872 (Revised Statutes, sec. 1858,), congress, having the whole subject before it, distinctly designated two classes of vacancies which the governor can fill without the consent of the council. It seems clear that by designating these two, they have excluded all others. If not, why designate any classes of cases at all? Why not have said that "whenever a vacancy happens, the governor shall fill," etc.? But they carefully particularized two kinds of vacancies and two only.

It appears to me that the legal construction, as well as the reasonable interpretation is to exclude any other kind of a vacancy, as fully as if it were excluded in terms.

This is the only law of congress which gives to the governor authority in any case to act by himself in making such appointment, except at the first organization of each territory. If the power to fill the vacancy in question is not to be found here, it does not exist anywhere in congressional law. This law was passed long after the territorial statute of 1854, and if the latter even was valid, it is controlled and modified now by the expression of the superior power.

It has been argued in this case, that because the law of 1854 was never directly abrogated by act of congress, therefore it was certainly valid. But this does not at all follow.

In a territory the constitution and laws of the United States and especially the organic act of the territory itself, stands exactly in the relation a state constitution occupies in a state. All territorial enactments not consistent with them are null and void. This is stated in terms in 1 Utah Reports, p. 75; in 20 Wallace, 375, and other places, but we do not need any such exposition for the proposition is obvious from the language of the organic act, from sec. 1851 of the Revised Statutes, and self-evident from the very nature and constitution of a territory.

Action by congress in annulling territorial statutes is rare, and usually only takes place in cases where they are not void of themselves, but simply improper or inexpedient without being illegal *per se*. The usual way of declaring a territorial statute which is inconsistent with the higher law of congress, inoperative, is through the courts, just as in the states similar enactments would be adjudged to be unconstitutional.

It is not even presumptive, therefore, far less conclusive evidence, that the territorial law of 1854 was originally valid, or if so, has continued in force since the enactment by congress of sec. 1858 in 1872, because it has not been formally annulled by congress. Each law of congress annuls or modifies every territorial statute with which it conflicts, because it is superior, and overrules it; and it is not necessary that it shall contain a special repealing clause.

In two territories there have been adjudicated cases with regard to territorial laws which provided for a different method of appointing officials from that fixed by the organic acts, and in both cases the supreme court of the territory has declared such laws to be void; though in neither case had congress acted in annulling them. One of these cases was in

Utah, where the legislature had provided for a territorial officer known as a marshal, who came within the same class as our attorney-general under the organic act, and consequently should have been appointed by the governor and council. The Utah law provided for his election by a joint vote of the legislative assembly. The court decided that the part of the law creating the office was legal, but the portion fixing the method of his selection was void. They recited the language of the organic act as to such appointments and they say, "The Utah statute in so far as it conflicts with the province of the organic act is null and void." "They could neither appeal or override an important provision of the organic act:" 1 Utah, 89.

This decision is important as distinguishing between the legal and the illegal part of the territorial statutes; and thereby answers the argument made with much force in this matter during the first day's hearing, that the legislature had created the office of attorney-general and therefore had equal power to regulate the method of filling it.

The case in Montana was analogous. The officer in question was the auditor, and the legislature had passed an act making him elective by the people. The court decided that this provision was in contravention of the organic act and of no force: 1 Montana, 250.

The last mentioned case has another phase, which makes it important in the discussion of the subject before us. The governor had appointed an auditor without the concurrence of the council. This was decided to be illegal. The language is so appropriate that I quote it *verbatim*:

"Being an office created by the legislature of the territory, the appointment to which comes under that clause of section 7, of the organic act, (Sec. 8, of New Mexico) of officers not therein otherwise provided for, and which the governor is empowered to nominate and by and with the advice and consent of the legislative council appoint, we are of the opinion

that the commission given by the governor to the plaintiff, purporting to appoint him to the office of territorial auditor without the advice and consent of the legislative council, does not confer the right to the possession and emoluments of the said office."

The arguments which have been made at a considerable length on this hearing as to the general power of the executive to appoint, under the clause which makes it his duty to "see that the laws are faithfully executed," or under the doctrine of *ex necessitate*, are, I think, shown not to be controlling, by the decision in this same Montana case, in which they are discussed fully.

It appears then, from a consideration of all the statutes and decisions affecting the matter, that the governor has no authority conferred upon him to make any appointment to the office of attorney-general, without the concurrence of the council, after the first organization of a territory, except to fill vacancies occurring during the recess of the legislative council, from resignation or death; and the present circumstances not falling within that limitation, that he had no power to make the appointment of Mr. Fiske on February 14.

This brings us to the second question, viz.: If the governor has no power to appoint, under the circumstances, does Judge Waldo, the late incumbent, "hold over?"

In favor of this proposition, language of the Compiled Laws, page 84, sec. 7, is quoted:

"The governor by and with the advice and consent of the legislative council shall appoint an attorney-general who * * * shall hold his office for two years, and until his successor shall be appointed and qualified."

And also a section on page 514, as follows: "All officers appointed or otherwise, shall continue in office and in the discharge of their duties until others are appointed or elected

and qualified according to law," as well as certain California decisions.

The first section cited, however, does not seem to apply to an official appointed by the governor to fill a vacancy; and the latter, which was adopted in 1851, was shown to have reference in all probability only to persons then in office and to the peculiar circumstances of that time.

In opposition to the California decisions, others from the same state, together with some from different sources, and the opinions of distinguished annotators on the constitution, were produced.

But the plain language of section 1858, under which Judge Waldo was appointed, really seems to leave little to conjecture in the matter.

It says distinctly that the commission in such cases "shall expire at the end of the next session of the legislature;" and the reason of this in case of appointments made under such circumstances, seems plain. The appointee was never confirmed by the council, and the obvious intention is that he shall not continue in office longer than the exigency occasioned by the vacancy requires, without their concurrence.

The language is so distinct that it cannot well be misunderstood or explained away, and I think makes it clear that the term of Judge Waldo expired with the end of the session of the legislative council, on the night of February 13th last.

This leads to the conclusion that a vacancy exists in the office, which, under existing laws, can only be filled by the nomination by the governor and confirmation by the council; and it is urged that no council session is soon to be held, and that the existence of such a vacancy is most unfortunate. As to this there can be little question, but it is not a matter with which the court has to do, or which it can remedy. In this connection I quote the language of the opinion in the Montana case previously referred to. "In reply to the queries of counsel, that if the governor has not the power of

appointment to fill vacancies during the recess of the legislature, who has? We would say * * that it is not the province of the court to legislate for a contingency."

It is certainly very desirable that some provision should be made for the filling of such vacancies, and this, of course, can only be done by congress. In the act of 1872 they either supposed that they had covered every possible case that could occur, when they designated the two kinds of vacancies that might be filled, or else they intentionally withheld the power in other instances. In either view, it seems right that their attention should be called to the inconvenience arising from the inability to fill such a vacancy as that now before us, under existing laws.

It is true that the court has power to appoint some suitable person, as occasion arises, to represent the territory in the prosecution or defense of cases before it; and this it will endeavor to do in each instance until a lawful attorney-general appears, in such a manner as best to subserve the public interests in the locality where the emergency may arise; but this covers but a part of the duties of an attorney-general, and was never intended to be more than a temporary expedient.

It is earnestly to be hoped that congress will take some action to meet such cases before the summer term of our courts.

The decision of the court is that the office of attorney-general of New Mexico is vacant, the term of the late incumbent having expired by operation of law, and the governor having no power to fill vacancies, except those occasioned by death or resignation, without the concurrence of the council.

THE TERRITORY OF NEW MEXICO V. JOSEPH STOKES AND WILLIAM MULLEN.

January 13, 1881.

In order to obtain a decision of the supreme court on the question whether the office of attorney-general of New Mexico was vacant or not at the January, 1881, term, when the case of *The Territory of New Mexico v. Joseph Stokes and William Miller* was called, both Judge Waldo and Mr. Fiske appeared, claiming to represent the territory as attorney-general.

The case was submitted on an agreed statement of facts.

By the Court—BRISTOL, J.: This is a case of burglary under the laws of the territory, and is here upon appeal from the judgment and sentence of the district court for the county of Santa Fe, in the first judicial district.

It is a case, therefore, in which the attorney-general of the territory, if there be such an officer, should appear on behalf of the territory.

The cause having been called for hearing in its order, Hon. Henry L. Waldo and Eugene A. Fiske, Esq., both being attorneys and counsellors of this court, appear, each claiming as against the other the right to appear as attorney-general and to be recognized by the court as such. They respectively submit their commissions showing the authority under which they claim the office, also a statement of facts agreed upon showing the occasion and circumstances for and under which their respective commissions were executed and issued, and ask the judgment of the court thereon as to which or either of them is attorney-general.

These facts, as agreed upon, so far as is necessary to determine the question involved, are substantially as follows:

1st. That during the recess of the legislative assembly of the territory next preceding the last session thereof, said

Waldo was appointed and commissioned as attorney-general to fill the then existing vacancy in the office occasioned by the resignation of his predecessor, Hon. William Breeden. That said Waldo is still alive and has never resigned.

2d. That at the then next session of the legislative assembly of the territory, which was the last session, and on the last day thereof, the governor of the territory nominated said Fiske for the office of attorney-general to the legislative council. That the said council on that day voted upon the question of confirming said nomination and thereby voted against and refused to confirm the same.

That thereafter, upon the same day, and after a consideration of said vote, said council again voted upon the question of confirming such nomination, and thereby again voted against and refused to confirm the same.

And that thereafter, on the same day, the governor again nominated said Fiske for said office to said council, but such nomination did not come before said council in executive session, and said assembly adjourned on that day, *sine die*, without any action having been taken by such council upon said last nomination.

3d. That thereafter, and after the termination of the said session of the legislature, the governor of the territory on his sole authority, executed and delivered to said Fiske a commission purporting to authorize and empower him to hold and perform the duties of said office.

By neglecting to nominate any one to the council to fill a vacancy, he might by his own act create the contingency wherein he could fill the office under all circumstances independently of the council, and in this way entirely ignore the provisions of law placing restrictions upon his patronage; or he might create such a contingency by repeatedly nominating the same candidate whom the council refuse to confirm, and then after the adjournment of the legislature appoint the rejected candidate.

We do not hesitate to say that all this would be in direct

contravention of the spirit, policy and object of the law. And that the general grant of power to the governor to "take care that the laws be faithfully executed," was not intended to cover cases of this kind.

Mr. Fiske claims title to the office upon still another ground, which is that the governor had authority to appoint him under the circumstances, by virtue of the act of congress of 1872 (U. S. Rev. Stat., sec. 185), which provides as follows:

"In any of the territories, whenever a vacancy happens from resignation or death during the recess of the legislative council, in any office which under the organic act of the territory is to be filled by appointment of the governor by and with the advice and consent of the council, the governor shall fill such vacancy by granting a commission which shall expire at the end of the next session of the legislative council."

This act covers the office of attorney-general.

It is contended in behalf of Mr. Fiske's appointment, that inasmuch as the recess appointment of Mr. Waldo was to fill the vacancy occasioned by the resignation of his predecessor, such vacancy continued after the expiration of Mr. Waldo's commission, and that by reason of such continuation into the recess commencing at the end of the last session of the council, the governor had the authority to fill such vacancy by Mr. Fiske's appointment under such act of congress.

This construction of the provisions of that act cannot be upheld.

"The governor shall fill such vacancy by granting a commission," etc., is the language of that act.

If the vacancy was so filled by the appointment of Mr. Waldo, and he was thereby *de jure*, as well as *de facto*, constituted an attorney-general, of which there can be no doubt, then there could be no further continuance of that particular vacancy. So far as filling that vacancy was concerned, the

governor's authority had been exercised and exhausted by Mr. Waldo's appointment.

Under the circumstances, therefore, this act of congress conferred no authority on the governor to support Mr. Fiske.

Upon the foregoing facts we are asked to declare the law applicable to the question involved.

One of the grounds upon which Mr. Fiske claims title to the office is that the governor was duly authorized to appoint and commission him under the circumstances, by virtue of a law passed by the territorial legislature in the year 1854, which provides:

"That 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 such temporary appointments during the recess of the legislative assembly to continue until the meeting of the same."

The terms of this act are broad enough to cover every conceivable contingency under which a vacancy might occur, and to authorize the governor, during a recess of the legislature, to make an appointment filling the same.

But was this territorial law, or any part of it, ever within the legislative powers granted by congress, and therefore valid?

The act of congress providing for a territorial government for New Mexico, commonly called the organic act, provides that "all township, district and county officers, not herein otherwise provided for, shall be appointed, or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly.

"The governor shall nominate, by and with the advice and consent of the legislative council, and appoint all officers not herein otherwise provided for."

The organic act further provides as follows:

"The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act."

The restriction here as to consistency with the constitution would include the laws of congress warranted by the constitution.

The foregoing provisions of the organic act contain all the powers granted to the legislative branch of the territorial government, so far as the office of attorney-general was concerned, at the time these appointments were made.

The office of attorney-general is a territorial, and not a township, county or district office. And when we consider the fact that congress has invested the legislative branch of the territorial government with ample power to provide by law for filling any vacancy that may occur in a township, county or district office, and has withheld such power as regards territorial offices, and instead thereof has provided by express law how such territorial offices shall be filled, it follows by necessary and unavoidable implication that the territorial legislature has no power to provide by law any other or different mode of filling a vacancy in the office of attorney-general.

And such act of the territorial legislature would be inconsistent with the provisions of the organic act, and thereby excluded from its present legislative powers.

The law passed by such legislature on the subject, and above referred to, therefore is null and void and conferred no authority on the governor to appoint Mr. Fiske under the circumstances: 1 Montana Reports, 252.

Mr. Fiske claims title to the office on another ground, which is that the governor had authority to appoint him under the circumstances by virtue of that provision in the organic act which makes it his duty to "take care that the laws be faithfully executed." The answer to this is:

1st. The office of attorney-general, though no doubt a convenience, is not a necessary incident to the executive department of the territorial government, and

2d. Such appointment is in contravention of the law.

If the principle here contended for in favor of sustaining

this appointment be maintained, then the governor has the whole matter of appointments of this description in his own hands.

The appointment of Mr. Fiske being without authority of law, and therefore void, Mr. Waldo comes in and claims title to the office upon the sole ground that in the absence of express affirmative provisions by statute, giving appointees like himself the right to hold over beyond the expiration of their commissions, he has, on sound principles of law, based upon public majority, the right to so hold over until his successor shall have been appointed by the governor, with the advice and consent of the legislative council, there being no other legal mode of appointing his successor.

In support of this proposition the cases of *Stratton v. Oulton*, 28 Cal., 44, and the *People v. Stratton*, 28 Cal., 383, with the cases therein referred to as recited authority.

The broadest application that can be made of the principles contended for, as enumerated by these California decisions, is that when a statute in general terms provides that the regular term of an officer shall be a certain period of time, and contains no express provisions that the incumbent may hold over at the expiration of his term until the office be filled by his successor, then such incumbent if elected or appointed as contemplated by law for and during such regular term, may, *ex necessitate*, hold over until his successor is so elected or appointed.

If, for instance, the law fixing the regular term of office of auditor-general at two years contained no provision that the regular appointee for any such term might hold over, and if under such a law Mr. Waldo, instead of holding the office under a recess appointment, had been appointed by the governor with the advice and consent of the council, for the regular term, then a failure of an appointment in like manner of a successor at the end of the term, he might hold over *ex necessitate*.

But this salutary principle of law, based upon public

necessity, can have no application to a recess appointment like that of Mr. Waldo's under said act of congress.

In the case of *McCall v. Byram Manufacturing Co.*, 6 Conn., 427, where this subject is discussed at length, the principle was affirmed and cited with approval in these California decisions, that a statute might be so restrictive by the expression or implication of a negative as to terminate the holding of an office at a specified time.

The act of congress under which Mr. Waldo was appointed is a statute of this description.

The language of the act is, "The governor shall fill such vacancy by granting a commission which shall expire at the end of the next session of the legislative council."

What language could be employed that would be more restrictive by the implication of a negative; or would more clearly express on the part of congress that the incumbent should not hold over upon the expiration of his commission?

The object and policy of the law as expressed in the act of congress aforesaid, and the provisions of the organic act regarding this class of officers, are obvious.

Except in the two contingencies specified they are to be filled by the joint concurrence of the governor and council.

But if an incumbent holding an office of this kind under a recess appointment has the right to hold over, then, the governor making any such appointment has it in his power to keep the office filled by neglecting to make any nomination to the council, or otherwise conferring with that body on the subject.

It was, no doubt, the intention of congress to prevent this by so restricting the patronage of the governor that the recess appointments he is authorized to make shall, unconditionally, terminate at the end of the next session of the legislative council, and that he shall have no authority to make recess appointments to offices of this description except when vacancies occur by death or resignation.

We all concur, therefore, in the opinion that neither Mr.

Waldo nor Mr. Fiske is entitled to the office of attorney-general, and that the office is vacant.

The application of each to appear as that officer is denied.

EUGENE A. FISKE v. WILLIAM BREEDEN.

January 20, 1881.

ATTORNEY-GENERAL. (1) *Office of, vacant.*

1. Ever since the adjournment of the last session of the territorial legislature, the office of attorney-general has been, and still is vacant.

   Held, therefore, that no action can be maintained by one who claims to be, but is not, attorney-general, against one who is alleged to have been wrongfully introduced into such office and to have wrongfully received fees as such officer.

Appeal from the District Court of Santa Fe county.

The facts appear in the opinion of the court.

Eugene A. Fiske, pro se.

1. The plaintiff was at the time this cause accrued, attorney-general of New Mexico: Organic Act of New Mexico, Sept. 9, 1850 (9 United States Statutes, p. 449); Rev. Statutes U. S., secs. 1858, 1841 and 1857; Art. 2, sec. 3, Constitution of the United States; Pascal's Annotated Constitution U. S., p. 182; Act relative to Jesuits, 20 U. S. Stats., p. 280; Pascal's Annotated Constitution of United States Statutes, p. 174, note 198; Rev. Statutes of New Mexico, sec. 23, Act February 28, 1862, pp. 86, 88; *Id.*, secs. 4 and 5, art. 6, chap. 10, pp. 82, 84; Session Laws N. M., sec. 2, Act Jan. 8, 1874, p. 16; Rev. Statutes N. M., Act 1854, pp. 628, 744; *United States v. Kirkpatrick*, 9 Wheaton, 734; *United States v. Kirkpatrick*, 4 Sawyer, 593; *Cate v. Rose*, 2 Duval (Ky.), 244; *People v. Bain*, 6 Cal., 509; *Peppin v. State*, 2 Sneed., 45; 4 Op. Atty.-Genl. U. S., p. 523; *Clinton v. Englebrecht*, 13 Wall., 446; *Miners' Bank v. Iowa*, 12 How., p. 8; 5 Op. Atty.-Genl., 525; *Beebe v. Robinson*, 52 Ala., p. 66.

2. It is admitted that plaintiff was present in court and offered to perform the duties of attorney-general at the time the cause of action accrued to plaintiff.

3. The performance of the duties of an office by an intruder, does not impair the right of the true incumbent to the emoluments of the office. The salary of an office is incidental to its title and not its occupancy. An officer *de jure* can collect fees received by an officer *de facto*, though the latter performs the services. Payment to an officer *de facto* is no bar to recovery by the party legally entitled: *Carroll v. Siebenthaler*, 37 Cal., 193; *People v. Miller*, 34 Mich., 458, 9 Am. Reps., 131; *State v. Tate*, 70 N. C., 161; *Dorsey v. Smyth*, 28 Cal., 21; *Mayfield v. Moore*, 53 Ill., 428, 5 Am. Rep., 521; *Mayor and Aldermen of Memphis v. Woodward*, 60 Tenn., A. D. 1874; *Dodd v. Weaver*, 34 Tenn. (2 Sneed.), 673; *Pearce v. Hawkins*, 2 Swan (Tenn.), 80; *People v. Tann*, 3 Barb., 193.

T. B. Catron and *H. L. Waldo*, for appellee.

The appellant relies upon the claim that he is attorney-general of the territory of New Mexico, and as such is entitled to recover the fees and compensation received by appellee for services (such as are usually performed by the attorney-general), performed by appellee under an appointment by the court below. Appellant is not, and was not attorney-general, or entitled to any fees or compensation as such: Opinion of Chief Justice Prince, *ante*, p. 49; *Fiske v. Rogers*, 1 Mont., Revised Statutes U. S., secs. 1857 and 1858.

If the appellant was the attorney-general, he still would have no cause of action against the appellee. The fees and moneys received by appellee were for services performed by him upon an appointment by the court; he did not assume or claim to be attorney-general; he was not an usurper of or intruder into that office. He was simply appointed to perform certain services, on account of which the appellant has no claim. There was no privity between the appellant and

appellee upon which to base an action of assumpsit by the appellant against the appellee: 1 Chitty, 99.

BRISTOL, Associate Justice: Eugene A. Fiske, the appellant, was the plaintiff below, and William Breeden, the appellee, was the defendant below.

The plaintiff below sued the defendant in an action of assumpsit to recover the value of certain fees which the plaintiff claimed the defendant had received as attorney-general by appointment of the court, the plaintiff claiming that he was attorney-general, and entitled to the fees aforesaid, on the ground that the defendant had wrongfully received said fees as attorney-general, as he had been wrongfully introduced into the office by means of such appointment.

The material facts were agreed upon between the parties as evidence, and submitted to the court below for judgment thereon, and judgment was entered in favor of the defendant.

In the case of *The Territory v. Joseph Stokes and William Mullen*, *ante*, p. 49, in which the question as to who, if any one, was attorney-general, we decided at a previous day of this term among other things that said Fiske was not attorney-general, and in effect that ever since the adjournment of the last session of the territorial legislature, the office of attorney-general has been and still is vacant. The facts agreed upon in that case and this case, so far as the right of said Fiske to the office is concerned are substantially the same.

These facts are specifically stated in the opinion of the court in that case, and will not be repeated here.

For the reason stated in the opinion of the court in that case, based upon said facts, we hold in this case that the said plaintiff is not entitled to recover, and that the judgment for the defendant in the court below ought to be sustained.

Judgment below affirmed with costs.

THE TERRITORY OF NEW MEXICO v. DORA DWENGER.

January 22, 1881.

MURDER, EVIDENCE, ADMISSIONS. (1) *Competency of, how affected by time of making admissions, and by time of occurrence of facts admitted.*

SAME. (2) *Accessory, guilt of principals to be established.*

SAME. (3) *Evidence of guilt of principals and of accessory.*

SAME. SAME. (4) *Instruction limiting application of such evidence.*

SAME. SAME. (5) *Admission held admissible.*

1. The time when an admission is made does not affect its competence as evidence, even though it be made years after the commission of the crime to which it relates. The time of the occurrence of the facts admitted is of more consequence, however, and if remote from the date of the crime, a serious question might be raised as to the competence of the admissions concerning them. But not so, if the facts occurred within a short while after the crime was committed.

   Held, That where, within a day after the murder was committed, the prisoner said: "You need not blame the boys for robbing him of his clothes;" that "in Germany there was a case of the kind where a man was murdered and the body was identified by the clothing," and that that was the reason why she sent the sack along to bring the clothes home, both the admissions and facts were sufficiently proximate to the murder to be competent evidence. So also, an admission by the prisoner as to the concealment of the coat in a quilt, was held competent.

2. In the trial of a person as accessory to a murder committed by several, the guilt of the principals, or of some one of them, must first be established by competent testimony.

3. In such a case there is no distinction between the competency of evidence as to the guilt of the principals and of evidence as to the guilt of the accessory. Any testimony which is competent evidence regarding either branch of the case is admissible.

4. But where certain evidence relates wholly to the principals, perhaps an instruction may be framed requiring the jury to limit the application of that evidence to them alone, and requiring the jury not to consider it with reference to action or complicity of the accessory.

5. An admission by one of the principals, a son of the accessory, that "my mother and Mr. Young put up the job that we were to kill him; the plan was made at the breakfast table the morning we went

out to kill him," relates not only to the guilt of the principals but also to the guilt of the accessory, and is competent as to both issues. An instruction which would exclude this admission from the jury is erroneous.

Appeal from the District Court for Doña Ana county, Bristol, J.

The facts appear in the opinion of the court.

Bail & Garrison, for appellant.

The indictment in this case is in the form used for indictments of accessories before the fact to murder at common law. The court below treated it as an indictment for murder in the fifth degree under our statute, holding that the common law crime of accessory to murder before the fact, was, under our statute, nothing more nor less than murder in the fifth degree. We regard this as the correct view; at all events the evidence to convict must be the same in either case.

The court, in charging the jury, has properly laid down the law as to the two propositions to be passed upon. It is in the application of the evidence of which we complain.

The jury, no doubt, assumed (and was warranted in so doing under the instructions given by the court) that all the confessions and declarations of the several parties, as detailed by the witnesses for the prosecution, were proper and competent evidence to be considered in the determination of both of the above propositions.

From this we dissent. This was error. We therefore maintain that the sixth, seventh and eighth instructions asked for by the defendant ought to have been given.

The eighth instruction asked for by the defendant states the law as applicable to this case, correctly: Bishop Crim. Law, sec. 67, and the authorities there referred to; Wharton Crim. Law, sec. 703; Roscoe Crim. Ev. (side page), 54; Roscoe Crim. Ev. (side page), 222.

When an accessory before the fact to murder was tried, after the principal had been tried and executed, Parke, B.,

ordered the proceedings to be conducted in the same manner as if the principal was then on his trial, and the evidence against the accessory was not gone into until the case against the principal was concluded: Ratcliff's case cited by Roscoe Crim. Ev. (side page), 222. The guilt of the principal felon, in the case before the English judge, was treated as an independent consideration, and was not blended with the guilt of the accessory as was done in the case at bar. This English case cannot, as we conceive, be distinguished from the one at bar, and the proper mode of conducting cases of this character is in that case clearly marked out.

The principal felons were on trial in this case, and are in all cases of this character. The guilt of the principal felons, or some one of them, must first be established by competent testimony. This is the first proposition. This being proven, the second proposition is to be established: Did the defendant by her act or procurement cause such murder to be committed? Now, if it be conceded that the confessions of the principal felons are competent evidence to go to the jury in determining their guilt, are not such confessions improper when the jury come to consider the second proposition—that is, the defendant's guilt? Her guilt, if guilty at all, consists in her having by some means procured the murder—to be committed, and not in the commission of it.

It must be borne in mind that the defendant was not in this case indicted jointly with the principal felons. The court below held, that the confessions and declarations of the principals were competent and legal evidence to establish both the propositions laid down in the charge—or rather, that such confessions were proper evidence to be considered by the jury. From this view we dissented at the trial of the case, and we still dissent, and we insist that the eighth instruction asked for by the defendant should have been given: That these confessions were not legal evidence tending to

establish either of the foregoing propositions—and certainly not the second, as to what part she had in the killing of the deceased, and whether or not it was done by her act or procurement. The instruction might have been differently worded, and the line between these legal propositions might have been more sharply drawn. The jury had not only to consider whether or not the principal felons were guilty as charged in the indictment, but it was also necessary to find whether she was guilty in the manner charged against her in the same indictment. That is to say, whether or not such homicide was committed by her act or procurement. She could not be guilty and they innocent. The converse, however, is not true. They might be guilty and she innocent; and this instruction, as we understand it, asks that the jury in considering her case—as to whether or not such murder was influenced by her act or procurement—the jury should not give these confessions any weight, as tending to prove the charge as alleged against her in this indictment. This is the idea embraced in the eighth instruction. If incorrect at all, it is too narrow and to the defendant's prejudice. The territory cannot complain.

Under the charge and instructions given by the court, the jury was misled. The jurors were substantially informed by the court, that these confessions were not only proper evidence for them to consider in determining the question as to whether the principals or one of them, did murder the deceased, Henry F. Dwenger, as charged in the indictment, but that the said confessions were likewise legal and competent evidence for their consideration in determining whether such murder was committed by the principal felons through or by the act or procurement of the defendant. This was error.

The principle of law which makes the confessions and declarations of a conspirator evidence against his co-conspirator cannot have any application in this case. First, because it was

not shown, by any competent evidence in the trial of the case, that any conspiracy existed between the defendant and the principals, before the killing of the deceased, Henry F. Dwenger; and secondly, the object of such conspiracy, if any ever existed, had long since been accomplished before any confessions were made by any of the accused parties: 3 Greenleaf Ev., sec. 94; 1 Greenleaf Ev., secs. 110, 111; 2 Bishop Crim. Procedure, 229, 230; Roscoe Crim. Ev. (side page), 414 *et seq.*

The court erred in refusing the sixth and seventh instructions asked for by the defendant.

The rule is laid down by Mr. Roscoe, in his work on Criminal Evidence (4th American edition; and this is the edition which is cited by us)—side page 94, thus: "It may be thought that collateral facts, occurring soon after the offense, with which the prisoner is charged, may sometimes afford as reasonable a presumption of guilty knowledge, as when the facts occurred at some time before the offense; but it would seem from the cases that where evidence is given of collateral circumstances to show the prisoner's guilty knowledge, it must in general appear that those circumstances occurred previously to the commission of the offense with which he is charged," etc.

All the admissions and declarations of the defendant bearing upon her guilty knowledge were made after she had been arrested, and more than two months after the commission of the murder. Her admissions, taken altogether, while they show that she did attempt to hide and cover up the homicide at the same time, negatives the idea that she knew anything of it until after its consummation. Her denials of this fact, in connection with her subsequent knowledge must have some weight with the jury, if properly instructed on this point. But we maintain that all her acts and doings in the way of secreting the clothing of the deceased, subsequent to the homicide, does not raise the slightest presumption of her

guilt as charged in this indictment. This species of evidence, while it would undoubtedly be proper under an indictment against her, as accessory after the fact, is exceedingly dangerous and improper for the consideration of a jury in passing upon the guilt or innocence of a person who is being tried substantially as an accessory before the fact.

S. B. Newcomb, for appellee.

The appellant admits that the learned judge below properly laid down the law upon the only two propositions to be passed upon.

This was all the court was called upon to do; in fact, it was all he was allowed to do by our law. See Session Law of 1880, page 51, sec. 23.

The two propositions to be passed upon by the jury were:

First. Did William Young and William H. Dwenger, or either of them, murder Henry F. Dwenger?

Second. Did this defendant incite, move, procure of the said Young and William H. Dwenger, or either of them, to commit this murder?

Now, in order to convict defendant, the guilt of the principal felons had to be first established, and their confessions were proven and given as evidence for that purpose, and no other, and was competent legal evidence for that purpose; but we go farther and say it was proper testimony against defendant upon another ground, namely, conspiracy.

The learned counsel for defendant assume that there was no evidence of a conspiracy, but a slight examination of the facts will disclose abundant evidence thereof.

It will be remembered that the defendant was the wife of the murdered man; that his murderers. William Young and William H. Dwenger, lived in the same house with defendant and her husband; that, on the morning Young and Wm. H. Dwenger took the old man out into the mountains and killed him; just before they started on their murderous

expedition, Young and defendant were seen engaged in an earnest conversation outside of their house.

The defendant's declaration that she sent the sack along for the boys to bring home the old man's clothes.

The fact that deceased possessed considerable property, which was after his death divided up between Young and William Dwenger and defendant; that they did all continue to live together until they were arrested and lodged in jail.

The defendant's contradictory statements as to the old man's whereabouts; all tend to the irresistible conclusion that a deep-laid plot and vile conspiracy had been formed by these three villains to take the life of old man Dwenger, to get rid of him, so they could get possession of and enjoy his property.

Conspiracy is generally proved from circumstances. No direct evidence need be given of the fact of conspiracy; it may be collected from the circumstances of the case: Chitty's Criminal Law, vol. 8, p. 1143; Greenleaf's Evidence, vol. 3, p. 81, sec. 93.

The appellant does not deny but that the evidence in this case clearly proved her guilt. No pretense here of insufficiency of evidence to support the verdict.

The guilt of the principal felons has been established by no less than three juries. It will be observed that this defendant did not go on the stand, or in any way attempt to show her innocence.

Human life is not at stake here; unfortunately, the law does not permit of her being hanged. Justice has only failed in this case by the law providing a too light punishment.

As to defendant's confessions being made after the fact not being admissible, the counsel for defendant confuses the mere act of confessing with the fact of confessing to acts that occurred after the fact.

Now, surely it will not be contended that a confession

made after the act was committed of a fact that took place before said act was committed is not competent evidence, as, for example, in this case, the sending the sack with the murderers to bring back the clothes of the man they are taking out to murder. Confessing to an act or circumstance that took place after the crime was consummated may not be competent to prove conspiracy; but, confessing to the same act or circumstance if it had been committed, or had taken place before the crime was committed, would be good evidence, although the mere act of confessing had been done after the commission of the crime; but it will be remembered that defendant's admissions were not proven in the case to establish a conspiracy, but to prove the commission of the crime of murder in the fifth (5th) degree, or of an accessory before the fact to murder; to which case we do not think the instructions applied to conspiracy has any application.

The learned judge's charge in this case is very full, and quite as favorable to the defendant as the nature of the case would permit.

The only complaint here is that the judge should have taken from the jury, as to a part of the case evidence that was properly in the case; this, we think, he was not obliged to do—the evidence was for the jury alone. There was no evidence before them but legal, competent and proper testimony. The law, it is admitted, was properly laid down and given to the jury. This was all the court could be asked to do; and as there cannot be a shadow of doubt as to defendant's guilt, no injury has resulted to defendant, substantial justice has been done, and the judgment should be affirmed.

Prince, Chief Justice: This is an appeal from the judgment of the third district court, sitting in Doña Ana county.

The defendant, who is the appellant, was indicted by the

grand jury of Grant county, at the July, 1879, term, as an accessory before the fact to the murder of Henry F. Dwenger, William Young and W. H. Dwenger being indicted as principals.

The defendant having applied for and taken a change of venue to the county of Doña Ana, her trial was had at the March, 1880, term, in that county, the principals having been first tried and convicted.

The court held that, under our territorial law, the offense charged was murder in the fifth degree, and the jury brought in a verdict of guilty of murder in that degree, and assessed the punishment at ten years' imprisonment. Before sentence, the prisoner's counsel moved for a new trial on various grounds, which motion was denied by the judge presiding. Thereupon the defendant appealed to this court.

The matters for our consideration are, fortunately, narrowed down to a small number. It is conceded by the defendant's counsel that the action of the court below in treating a case of this nature as murder in the fifth degree under our statute was correct; and that, in the charge to the jury, the two propositions for that body to pass upon in determining the facts were properly laid down. On the motion for a new trial five specific causes were assigned, besides the formal ones. These five consisting of alleged errors in the admission of testimony, and in refusals to give instructions to the jury which were requested; but in the brief and argument of counsel for the defendant, they have confined themselves to the refusal of the court below to give to the jury the sixth, seventh and eighth of the instructions requested by them at the trial; and these substantially include the matters of evidence stated in the motion for a new trial, and are all that we have to consider. These are as follows:

Sixth. "The jury is further instructed to disregard all the evidence in this case purporting to be the admissions or confessions of the defendant, Dora Dwenger, made by her after

such killing, relating or pertaining to any act or thing done by her subsequent to the homicide of the said Henry F. Dwenger, with the view of concealing such homicide, or for the purpose of enabling the perpetrators thereof to elude punishment."

Seventh. "And the jury are further instructed that all confessions and admissions made by the defendant under the circumstances and in the manner detailed by the witnesses for the prosecution tending to prove her concealment of such homicide, ought not to be considered by the jury as proving or tending to prove that the defendant incited, procured, hired, counselled, moved, aided or commanded the said Wm. Young and William H. Dwenger, or either one of them, to kill the said Henry F. Dwenger, as charged in this indictment."

Eighth. "The jury are further instructed that the confessions or declarations made by William Young, or by the said Wm. H. Dwenger, as stated by witnesses for the prosecution, are not legal or competent evidence in this case against the defendant, and ought not to be considered by the jury in their deliberations as to the guilt or innocence of the defendant, unless the jury shall further believe from the evidence that the defendant was present when such confessions or declarations were made and assented thereto."

It was argued by counsel for the defendant that the sixth and seventh instructions should have been given, because the admissions of the defendant were made two months after the commission of the murder, and also because they related to events occurring after that commission. The time when the admission is made, however, can be of no importance; if years after the crime in question, it would have just as much weight and be just as binding as evidence. The time of the occurrence of the acts admitted is of more consequence, and if remote from the date of murder would raise a serious question. But in this case they occurred within a very short time after the murder, and as to one act of special import-

ance, it is impossible to tell from the evidence whether it occurred before or after. This is the admission of the defendant testified to by the witness Hoffman, as follows:

"You need not blame the boys for robbing him of his clothes. I sent a sack along to bring the clothes home. She said in Germany there was a case of the kind where a man was murdered and the body was identified by the clothing, and that was the reason why she sent the sack along to bring the clothes home; she did not state the time, whether before or after the killing."

Sheriff Whitehill testified substantially to the same statements by the defendant, and adds, "she said she had sent the sack for them; at the time she spoke I thought she had sent the sack up at the time he was killed, but since then they have all told me that the clothing was brought in the next day."

So at the farthest, this was an action of the defendant on the next day after the murder, and directly connected with the murdered man and his death, and as such it is admissible to be considered by the jury in connection with the other evidence in coming to their conclusion.

Of a similar character is the evidence (in the form of admission by the defendant), as to the concealment of the coat in the quilt. While not conclusive in itself, it is yet so connected with the murder that it was proper to go before the jury as a circumstance for their consideration. We think, therefore, that there was no error in the admission of this testimony, nor in the refusal to give the sixth and seventh instructions as regarded by the defendant's counsel.

This brings us to the eighth instruction. The defendant's counsel concede that the judge rightly stated to the jury in his charge, the two questions which were involved in the case, and which they were to decide. The first of these was as follows:

"That William H. Dwenger and William Young, or one

of them, actually and intentionally killed Henry F. Dwenger, without justification or excuse, in the county of Grant, in November, 1878. That they or one of them, so killed Henry F. Dwenger by means of a fatal gunshot wound inflicted by them or one of them."

The same is briefly stated in the defendant's brief in these words: "The guilt of the principal felons or some one of them, must first be established by competent testimony."

Whatever testimony then tended to prove such killing by the principals, was competent as evidence in the case; such testimony indeed was absolutely essential, because if the jury did not find that the first proposition was proven and that the principals were guilty, there would be no case against the defendant as accessory. The defendant's counsel in their brief, endeavored to raise a distinction between the competency of this evidence as proof of the first proposition (as to the guilt of the principals), and as proof of the second proposition (as to the guilt of the defendant).

With regard to this, it may be said that any testimony which was proper as evidence regarding either branch of the case was of course admissible and could not have been excluded without error.

It may be that if the confessions and declarations of the principals had related wholly to the first proposition submitted to the jury, an instruction might have been framed limiting the application of that testimony to that proposition, and stating that it did not apply to the second proposition as to the action or complicity of the defendant before the commission of the crime as an accessory.

But firstly, the confessions and declarations to go beyond the subject of the first proposition, and secondly, the eighth requested instruction is not so framed. One of the statements of William H. Dwenger, testified to by the witness Watts, is as follows: "My mother and Mr. Young put up the job that we were to kill him; the plan was made at the

breakfast table the morning we went out to kill him." This clearly goes beyond the question of the guilt of the principals and directly affects that of the defendant.

Again, the eighth instruction is much too broad for the distinction drawn in the defendant's brief, even if all the confessions and declarations of the principals as testified to had been strictly confined to their own guilt. The judge was asked to charge that those confessions and declarations "are not legal or competent evidence in this case against the defendant, and ought not to be considered by the jury in their deliberations as to the guilt or innocence of the defendants. Had he given this instruction, the jury would naturally have believed that they were precluded from giving to those confessions and declarations any consideration whatever in the case. The distinction is not clearly drawn, if drawn at all, between the two propositions submitted. To have given the instruction under the circumstances would not only have been error, because part of that testimony directly bore on the guilt of the accused, but because it would have misled the jury as to their right to consider these confessions and statements in any part of the case.

Without considering then the points as to "conspiracy," presented in the briefs, we think that the judge could not properly have given this eighth instruction and was right in declining to adopt it.

This covers all points raised by the defendant. The judgment of the court below is affirmed.

All concur.

YGNACIO HERRERA, Appellant, v. ANTONIO JOSÉ CHAVES AND MARIA DE LA LUZ GARCIA DE CHAVES, Appellees.

January 23, 1881.

ASSUMPSIT. (1) *Instruction of jury to find for the defendant.*
PRACTICE. (2) *Nonsuit, district court cannot order peremptorily.*

1. In an action of assumpsit it is proper for the court to instruct the jury to find a verdict for the defendants where no evidence is adduced tending to prove either an express or implied obligation or promise by defendants, or either of them, as the plaintiff alleged in his declaration.
2. The district courts have no power to order a peremptory nonsuit against the will of the plaintiff. PARKS, A. J., dissenting.

Appeal from the District Court, Bernalillo County.

This was an action of assumpsit brought by the plaintiff in error, plaintiff below, to recover damages from the defendants alleged to have been sustained by reason of the defendants' failure to pay a debt alleged to have been contracted by one of the defendants, Maria de la Luz Garcia de Chaves, as a *feme sole*, on account of the maintenance of two children by a prior marriage. The action was brought against the defendants as husband and wife. In the court below issue was formed, a jury impanelled, and the evidence on the part of the plaintiffs introduced, and the case submitted under the instruction of the court to the jury to find for the defendant. The jury failed to agree upon a verdict, and the court thereupon ordered that the plaintiff be nonsuited. Bills of exception were framed and sealed, and the case now comes here by appeal.

Breeden & Hazledine for appellant.

The action was properly brought: Tyler on Infancy and Coverture, 333; 2 Chitty, 573; Ohio Form, 106. Parents are liable for the maintenance of infant children: 16 Bass, 135–140; 4 N. H., 86; 16 Bass, 272–274; 13 John., 480; Tyler on Infancy and Coverture, 101.

A father or mother, after the death of husband or wife, cannot divest him or herself of the duties and responsibilities of the paternal relation by a verbal or parol agreement; such a result can only be accomplished by the solemnity of a deed. A verbal or parol agreement of the character mentioned can be revoked at any time: 44 N. H., 321; Schouler Dom. Relations, 343; 3 M., 225; 31 M., 240.

After the death of the father the mother is head of the family, and is bound to support minor children: Reeves Dom. Relations, 74; 16 Mass. 140.

A husband is liable for debts of wife contracted *dum sole:* Reeves Dom. Relations, 66; Tyler on Infancy and Coverture, 332.

The court had no right to order a nonsuit: 1 Peters, 471–476; 6 Peters, 598; 8 Mo., 685, side paging; 7 Ala., 528; 16 Ala., 422; 14 Howard, 218; 23 Howard, 183; 6 Pick., 118.

Barnes & Chaves, for appellees.

First. The action was not properly brought; the declaration does not show that defendants are husband and wife; this being true, as we conceive, defeats the plaintiff in his right to recover or reverse this case, and justified the court below in entering a nonsuit: Tyler on Infancy and Coverture, pp. 333 and 334; 21 Wendell, p. 20. *Secondly.* The evidence, in the case, offered upon the trial shows beyond question that there was no contract, express or implied, proven against the female defendant, to pay for the support and maintenance of her children named in the suit, but upon the contrary, it is clearly shown that said children were given to the plaintiff, their uncle, absolutely and forever, and that he supported and maintained them without any expectation on his part, or on the part of their mother and father, that he should be paid; the circumstances forbid the idea of a contract to pay; the attempt to recover in this case is an afterthought. See 2 Parsons on Contracts, pp. 46, 47, and

authorities cited; 16 Vermont, p. 150; *Fitch v. Peckham; Weir v. Weir;* 3 Ben Monroe (Ky.), 647; 3 Esp. 3, and 15 Pickering, 130; 1 Parsons on Contracts, 298, and authorities cited; 17 Vermont, 350; 1 J. J. Marsh, 433–4; 3 Bush, 613.

The authorities cited by appellant's counsel in reference to liability of parents to maintain their infant children, and as to the mother being the head of the family, and bound to support minor children, do not apply to the case now before the court.

The position assumed by the counsel for appellant, as to the liability of the husband for the debts of the wife, contracted *dum sole*, may be conceded as a general principle. Yet we say that there is no liability or debt of the wife, or female defendant shown by the record in this case, and there should have been no finding against the defendants or either of them.

The court did not err in instructing the jury to find for the defendants, and afterwards entering or directing the clerk to enter a nonsuit; because, *First*, The plaintiff's declaration upon its face showed no cause of action against the defendants. The averment therein made does not show that defendants were husband and wife. *Secondly*, The whole of the proof taken together and offered by the plaintiff upon the trial, and as presented in this record, showed conclusively that plaintiff had no cause of action against the defendants. The motion of the defendants to instruct the jury to find for defendants was proper; it was in the nature of a demurrer to the whole of the evidence; and the instructions of the court to the jury to find for the defendants was nothing less than a proper decision of the court that the plaintiff had no cause of action; and, was in law a verdict by the court for defendants; and the jury not having retired from the bar of the court, and two of them, in the presence of the court, refusing to obey the court, and

plaintiff not asking any instructions, or to have the jury sent out, the court did right in directing a nonsuit; there was no injustice done to the plaintiff, and he should not be heard to complain here.

The plaintiff did not move for a new trial, or file grounds for a new trial, and hence he cannot, as we respectfully suggest, ask the court to view the pretended errors complained of in this case.

Upon the whole case, the action, ruling and findings of the court below, were right and proper, and the judgment below should not be disturbed. We therefore ask for an affirmance. See 14 Bush, 316; 13 Bush, 298; 5 Bush, 206; 7 Bush, 236; 4 Bush, 289.

Bristol, Associate Justice: This is a case of assumpsit brought by the appellant Ygnacio Herrera, the plaintiff below, against Antonio José Chaves and Maria de la Luz Garcia de Chaves, the defendants below, to recover the reasonable value of boarding, lodging, clothing, schooling, etc., of certain two minor children, at the instance and request of said Maria, one of the defendants, while she was the widow of the father of said children, and sole and unmarried, she being the mother of said children and being also the wife of said Antonio, the other of said defendants at the time of the commencement of this action, as well as during the progress of the proceedings therein.

The general issue was pleaded to the declaration and the cause brought to trial before a jury.

After the plaintiff had presented all his evidence and rested, the court below, at the request of the defendants, instructed the jury to find for the defendants on the ground that there was no evidence sufficient to support the plaintiff's declaration. To this instruction the plaintiff excepted. Two of the jury refused to obey said instruction to find for the defendants, while ten of the jury assented thereto.

Whereupon, and before said jury left their seats, the court, in the presence of the jury and against the will of the plaintiff, peremptorily ordered a nonsuit to be entered and the jury discharged, which was accordingly done, together with judgment for the defendants for their costs. To which order and entry of judgment the plaintiff excepted. A bill of exceptions presenting these facts and including all the evidence is before this court as parts of the record.

Upon this statement of the case, several questions are presented by the briefs of the respective counsel for the parties, none of which do we consider it material or necessary to notice except those arising on the plaintiff's exceptions already stated.

The instruction of the court to the jury to find for the defendants was clearly proper under the circumstances, as there was no evidence deduced on the trial tending to prove either an express or implied obligation or promise on the part of the defendants, or either of them, as the plaintiff had alleged in the declaration.

As to the question whether the court below, under the circumstances, had any authority to order a peremptory nonsuit against the will and consent of the plaintiff, we meet with difficulty in arriving at a satisfactory conclusion from the conflicting decisions on the subject by the courts of the various states.

In the state of New York the appellate courts have always held that the courts of original jurisdiction, not only had the power, but that it was their duty, to direct a nonsuit even against the will of the plaintiff, when upon the trial he failed to present any evidence in support of his claim: *Pratt v. Hull*, 13 John., 134; *Allgro v. Duncan*, 14 How. (N. Y.) Pr., 210.

But whatever may be the preponderance of authority among the different states in favor of recognizing and exercising this judicial authority, we are constrained to regard

the decision of the U. S. Supreme Court as conclusive, if they cover the case before us. The reason being that an appeal or writ of error lies from the final decrees or judgments of the supreme court of a territory, directly to the U. S. Supreme Court.

The first case in which the identical question we are now considering arose in that court in the case of *Elmore v. Grymes*, 1 Pet., 469.

That case went to the U. S. Supreme Court from a U. S. Circuit Court, over which Associate Justice Johnson of the supreme court presided as circuit judge. Judge Johnson, as such circuit judge, had peremptorily ordered the plaintiff to be nonsuited against his will because the evidence on the trial was inadequate to maintain the suit.

The case went to the U. S. Supreme Court on this point alone; no evidence was before the supreme court. That court, Chief Justice Marshall delivering the opinion, held "that the court below had no power to order a peremptory nonsuit against the will of the plaintiff. That the plaintiff had a right to have his case submitted to a jury."

Associate Justice Johnson, who had directed the nonsuit in the circuit court, gave an elaborate dissenting opinion with some degree of asperity, in which he reviewed the whole subject. His reasoning is certainly strong, and as it would seem, conclusive, yet the supreme court adhered to its decision. They adopted the old English *nisi prius* practice on this subject, which was that "the plaintiff is in no case compellable to be nonsuited, and if he insist upon the matter being left to the jury, they must give in their verdict: 2 Tidd's Practice, 869.

Since the decision of *Elmore v. Grymes*, *supra*, the U. S. Supreme Court have repeatedly referred to and affirmed that decision: 1 Pet., 476; 6 Pet., 598; 23 How., 172; 1 Wal., 359.

The matter may therefore be considered as settled, so far

as that court is concerned, and that the same is conclusive upon us.

We hold, therefore, that the court below erred under the circumstances in ordering a peremptory nonsuit against the will of the plaintiff.

The judgment of the court below is reversed, and a trial *de novo* granted.

PARKS, Associate Justice, dissenting: I submit to the decision which has just been read, but I am not satisfied that it is correct. The opinion of a majority of the court in *Elmore v. Grymes*, 1 Pet., 471, upon which this opinion is founded, was announced by the court in very few words, and no attempt is made to sustain it by reason or authority. On the contrary, the dissenting opinion of Judge Johnson in the same case is fortified by the weight of authority both in England and this country, and is supported by reason and legal principle. He shows that it is not the perfection of reason to hold that a court may indirectly put an end to a trial where there is no evidence, by directing a verdict for defendant, but that it may not do the same thing directly by ordering a nonsuit. The power conceded to the court is greater than the power denied it. So far as I am advised, the opinion of Judge Johnson has never been answered. It has happened, not infrequently, in the history of the law, that a doctrine has long obtained, supported by real or supposed authority, which when thoroughly discussed and examined, could not be sustained.

In our opinion, cited in another case pending in this court, it is stated substantially that the doctrine that an award alone was a bar to an action, was long held in England, and till Lord Tenterden exposed its fallacy. And similar instances might be cited, where judges distinguished for ability, learning and integrity, have upheld principles or practices which subsequent investigation have proved erroneous.

I adopted the rule in this case in the second judicial district, because I was assured by experienced attorneys that it had long been the practice in this territory, and because I believed it to be right in principle and sometimes necessary, as in this case, to vindicate the authority of the court.

If New Mexico were a state, this question should be examined and decided upon its merits.

As it is, I can only acquiesce in the decision of a majority of this court.

THE TERRITORY OF NEW MEXICO, Appellee, v. WILLIAM YOUNG ET AL., Appellants.

January 24, 1881.

GRAND JURY. (1) *Prisoner need not be brought into court when grand jury impanelled in order to challenge.*

PETIT JURY. (2) *Jurors need not be absolute "owners" of fee of real estate.*

SAME. (3) *Erroneous acceptance of juror cured by peremptory challenge.*

MURDER. (4) *Instruction held not a comment by judge upon weight of evidence: Instruction as to degree.*

1. Under the statute (sec. 3, Act February 7, 1854) providing that a person held to answer a charge "may challenge the panel of the grand jury, or an individual grand juror," it is not necessary to bring persons accused of crime, and incarcerated in jail, into court at the time of impanelling the grand jury to enable them to exercise such right of challenge, and a failure to do so will not invalidate an indictment.
2. Under the law requiring a juror to be the "owner" of real estate, it is not necessary that jurors shall be absolute owners of the fee. The statute is to be construed liberally, and the requirement of ownership is met, if the juror be in possession of, or have a qualified interest in real estate.
3. An error of the court in refusing to exclude a person from the jury, upon the ground of non-citizenship, is cured by the party objecting to such juror, peremptorily challenging him.
4. In a murder case a statement by the judge to the jury that "there is no evidence before you tending to show that the killing of Henry

F. Dwenger is murder in any other degree than the first degree of murder" is not erroneous, as being a comment by the judge upon the weight of the evidence before the jury. It is a statement that there is no evidence; but if, in fact, there was evidence of the kind named, such a statement would be erroneous, and it is not improper for the judge to designate the degree of murder which the evidence shows was committed.

Appeal from the Third Judicial District, Doña Ana county, Bristol, J.

The facts appear in the opinion of the court.

Edward V. Price, for appellant.

The first point complained of by the defendant in this case is: That being incarcerated in the county jail at the time of the impanelling of the grand jury, and not having been produced in court, he was thereby deprived of his statutory right of challenging that body. See Compiled Laws of New Mexico, chapter 69, page 500, sec. 3.

Where a person is held to answer to an indictment in a capital case (the same not being bailable), it is the duty of the prosecutor to produce said person in court, before the grand jury is sworn, in order that he may have an opportunity to view said body and interpose his challenges, if any he may have, and the defendant can no more waive this statutory right, than any other statutory or common-law right, in a capital case, unless he is produced in court and given an opportunity to assert his right.

The second cause of complaint is, that the court should have sustained the challenge to Albino Samanego interposed by the defendant, on the ground that he was not the owner of real estate, one of the qualifications of a petit juror prescribed by the act of the legislature of 1879, 1880. The evidence which has been preserved by a bill of exceptions, and now on file in this court, shows conclusively that the proposed juror was at the time of challenge only a squatter on the public domain, and not the "owner" of the land he pro-

fessed to occupy according to the true legal signification of the word "owner."

Mr. Bouvier, in his Law Dictionary, defines the word "owner," thus: "The owner is he who has dominion of a thing real or personal * * * which he has the right to enjoy and to do with as he pleases, even to spoil or destroy it."

"The right of the owner is more extended than of him who has only the use of the thing. * * * He may commit what would be considered waste if done by another:" 2 Bou. Dict., p. 276, ed. 1860.

It has been repeatedly decided by the supreme court of the United States, that the *status* of a squatter simply, on public lands, is that of a tenant by sufferance only.

The third error complained of is—that the challenge to the competency of Pedro Provencio, on the ground that he was not a citizen of the United States, should have been sustained. It was and probably will be maintained by the territory that the father of the proposed juror became a citizen by force of Article V. of the treaty proclaimed June 30th, A. D. 1854, and commonly known as the Gadsden treaty, to be found on page 503 of the Revised Statutes of the United States relating to the "District of Columbia, post-roads and public treaties." But the territory should have shown affirmatively, that the father of the juror had not under the provisions of Articles VII. and VIII. of the treaty Guadalupe Hidalgo, "within one year made his election to retain the title and rights of a Mexican citizen," or that he had remained without making his election for one year next succeeding the date of the exchange of ratifications of the Gadsden treaty, to wit, the 30th day of June, A. D. 1854, within the ceded territory. See Articles VII. and VIII., Guadalupe Hidalgo treaty, pp. 495–6; Same, Revised Statutes.

The fourth cause of complaint consists in the court's re-

fusal to permit the defendant to prove and offer in evidence the verdict of the jury on the trial of William Dwenger, the principal of the first degree.

And it is maintained that it is illogical and contrary to sound reason to suppose that a person whom the evidence points out to be guilty (if at all) of only being present, aiding, abetting, etc., a principal in the second degree, can be guilty of any grade of the offense higher than the principal of the first degree.

Fifth—The court exceeded its power and authority in instructing the jury that their verdict should be "guilty of murder in the first degree, or not guilty."

The laws of this territory provide, that "all issues of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict and the court shall render judgment accordingly:" Compiled Laws of N. M., sec. 22, page 372. What particular issues of fact were involved in the trial of the case at bar? I answer: 1st. The *corpus delicti*—that a human being had been unlawfully killed by the hand of another. 2d. Whether or not the defendant had been instrumental in producing the death. 3d. If he was, then what were the circumstances attending the commission of the crime; and this clearly involves in the case at bar, the necessity of ascertaining as a conclusive effect, the particular degree of which the defendant is guilty (if at all), and why?—for the plainest reason in the world, viz.: That it would be an absolute impossibility for the jury to "assess the punishment" until they had first ascertained the degree of the crime charged. See *State v. Kirkland*, 14 Rich. (S. C.), 230; 5 Ga., 441; 10 Ga., 101; 12 Wright (Penn.), 396; 29 Ga., 594; *Beaudien v. State*, 8 Ohio State, 634 (marginal page).

Sixth—It is also maintained by the defense that the defendent's motion for a new trial was improperly overruled by the court.

1st. Because the evidence in the case clearly establishes the fact that the defendant, if guilty at all, is guilty of having been an accessory after the fact only; a fact of itself that is fatal to the verdict.

It follows then, the jury being satisfied that the defendant was guilty of some grade of the offense, were compelled by the instruction of the court either to convict of a higher grade of crime than the evidence warranted, or accept the other horn of the dilemma and turn a man loose that had clearly violated the laws of his country.

And here it also follows, that the verdict is contrary to law, being evidently based upon a misconceived statement of the law governing the case. See same cases last above cited.

S. B. Newcomb, for appellee.

The first point made by defendant is not well taken.

That before a grand jury can be impanelled all the prisoners in the county jail must be brought into court and given an opportunity to challenge that body, is certainly a novel proposition.

We have no statute commanding this, and certainly it has never been the practice in this or any other country.

The right to challenge a grand jury is denied by "Joy on Challenge to Jurors," and other English authorities, but it is recognized generally in America.

Mr. Proffatt, in his work on Jury Trial, cites but one case where a prisoner was brought into court that he might have his challenges, but that was a case where the state was allowed to challenge in the first instance.

The question raised by the second ground of error is of great importance in this country (although, as we shall hereafter show, it can have no weight in this case) from the fact that in some counties, at least, nearly all the owners or occupiers of the land, hold by the same tenure as the juror Samanego; they have no title to their lands beyond a mere

possessory one—and should the court hold that insufficient, the result will be enough jurors cannot be had in many counties to try a capital case.

We think all the legislature intended by the words "owner of real estate" was, that a man should be in possession of land, cultivating and occupying it, holding it by a title good as against every one except the government.

If this legislature intended a juror should hold his lands in fee simple it would have so declared.

As to the juror Provencio, mentioned in the third ground of error, we think the evidence shows conclusively that he is a citizen of the United States, but whether he is, or is not, is not at all material to this case.

The defendant absolutely waived his right to object to the rulings of the court, as to both of these jurors, by peremptorily challenging them.

The defendant did not exhaust all his peremptory challenges, having challenged but eight jurors peremptorily. See *Stewart v. State*, 13 Ark., 720; *McGowan v. State*, 9 Yerger, 184; *Freeman v. People*, 4 Denio, 61; *Carroll v. State*, 3 Humph., 315; *Whalen v. Queen*, Q. B. Canada; *State v. Elliott*, (45 Iowa) 2 Am. Crim. Law Repts., 322; *Erwin v. State*, *Id.*, 251, 423.

Prince, Chief Justice: This is an appeal from a judgment of the third district court, sitting in the county of Doña Ana.

The defendant was indicted, together with Dora Dwenger and William H. Dwenger, at the July (1879) term, in Grant county, for the murder of Henry F. Dwenger.

Defendant demanded a separate trial, and also moved for a change of venue to another county, both of which were granted, and the venue changed to the county of Doña Ana. Before the change of venue, the defendant moved to quash the indictment, which motion was denied, and the defendant

excepted. The trial took place at the April (1880) term in Doña Ana county.

In the selection of jurors, the defendant challenged Albino Samanego, on the ground that he was not an owner of real estate. The court overruled such challenge, and the defendant excepted. Thereafter the defendant peremptorily challenged said proposed juror. The defendant also challenged Pedro Provencio, on the ground that he was not a citizen of the United States. The court overruled such challenge, and the defendant excepted; thereafter the defendant peremptorily challenged said proposed juror. The defendant used eight only of the twelve peremptory challenges, to which he was entitled.

After the delivery of the judge's charge, and before the jury retired, the defendant duly excepted to certain specified parts of said charge.

After the rendition of the verdict, the defendant moved the court to set aside the verdict, and grant a new trial, which motion the court denied, and the defendant excepted. The jury having rendered a verdict of guilty of murder in the first degree, the court pronounced sentence of death, and thereupon the defendant appealed to this court and obtained a stay of proceedings.

Counsel for defendant states five grounds on which he claims that the judgment below should be reversed. We will consider these *seriatim*. The first is, that the defendant "being incarcerated in the county jail at the time of the impanelling of the grand jury, and not having been produced in court, he was thereby deprived of his statutory right of challenging that body."

This claim is made under section 3 of the act of February 7, 1854, which provides that "a person held to answer a charge, may challenge the panel of the grand jury, or an individual grand juror." While this law has been of the statute book nearly twenty-seven years, it has never been the practice to

bring persons held to answer charges, into court at the time of the impanelling of the grand jury; nor do we know of any single instance in which that course has been adopted. It would obviously be a great inconvenience, and it is difficult to see what greater right a man already held to answer a charge has to be heard as to the composition of the grand jury, which is primarily to consider his case, than one whose case is brought before the same body during their session, without his having been previously held to answer.

No case has been cited showing that in any state or country has it been considered an absolute right on the part of an accused person in confinement, thus to be brought into court, so that the failure so to bring him would invalidate the further proceedings. The furthest that any of the cases mentioned goes, is to say that it was the practice in California thus to produce such prisoners.

In the absence of any law containing such requirement, and in view of the uniform practice in this territory, we do not think that this point presents an error which invalidated the indictment, and on account of which it should have been quashed. We cannot fail to recognize the wide distinction between a grand and a petit jury as to their functions and methods of procedure. The action of the former is simply preliminary; it is an inquiry by the grand inquest as to whether there is such probability from the statements made before them, which are usually *ex parte* of the guilt of a certain person, that he ought to be placed on trial. The importance of the feeling or action of any individual member, is not only less on account of this preliminary character of the proceedings, but also because a unanimous vote is not necessary in reaching a conclusion. It is not expected that in every instance, each grand juror shall be free from all previous knowledge of the cases, or even of the precise circumstances of the cases coming before them for official action; on the contrary, it is stated in the statute as to their

powers and duties which is required by law to be read to every grand jury as a part of the charge of the court (chap. 70, sec. 9, General Laws), that, "If a member of the grand jury knows that an offense has been committed which is triable in the county, he must declare the same to his fellow jurors."

The second cause alleged for reversal is that the court should have sustained the challenge to Albino Samanego, interposed on the ground that he was not an owner of real estate. Upon the examination of this juror, he said, "I am the owner of a piece of real estate and house in the town of Colorado;" that as he was informed, his brother had entered the land at the land office at Las Mesilla; that under a general agreement among the people, one man entered a quarter section, and each quarter was divided in five parts, and each person took one-fifth part; that the justice of the peace divided up this quarter section, and gave him the part he occupied and claimed; that he had cultivated it for a number of years, had it now sown, and was in undisputed possession of it. He further testified, "The lot upon which the house I live in is built, belongs to myself; it (the house) is a jacal; I built it myself; it is not on the land I have mentioned, but is inside of the town of Colorado." With this uncontradicted evidence as to the ownership of the house and lot, we do not see from the record, how any question can arise as to the qualification of this juror as an owner of real estate; if there is anything to invalidate the testimony, the record fails to show it. Even were this not so, it would be far from clear that the juror was incompetent; the practice has been throughout the courts of the territory to construe the words "owner of real estate" quite liberally in this connection. The word "owner" does not necessarily imply that the person should be the holder of a fee simple. It is frequently used as equivalent to "possessor," and to designate the person in actual possession and control of

property. In proceedings for street openings and others of a similar character where the consent or action of a majority of the "owners" of the real estate affected was required, it has been held almost, if not quite uniformly, that the entire ownership of the fee was not necessary to constitute a person such as an "owner." In certain counties of New Mexico, owing to the large areas covered by land grants, or the fact that the land is nearly all owned by the United States, it would be practically impossible to obtain juries in many instances, if it was an essential qualification that each juror should be the owner in fee simple, by an absolute title of record, of real estate. This fact has always been patent, and well known to the legislatures of the territory, and we have a right, therefore, to consider it in endeavoring to arrive at a conclusion as to the legislative intent in the use of the word "owner." The object of the law was evidently to place upon juries those who were to some extent established in and identified with the territory, and who had a stake in the community. The possession of real estate was perhaps as good a criterion, with regard to their qualifications as could be suggested. But an absolute fee simple was not necessary for this, and the legislature certainly could not have intended to apply such a test in counties where through the peculiar situation of the land, it was practically impossible for many persons to obtain such a title. All the requirements embraced in the reason of the law are met by the actual occupation and undisputed possession of real estate, and this, we think, is the extent to which this qualification should be pressed, or the law requires. In the case before us, however, the statement of the juror, under oath, that the lot upon which the house in which I live is built, belongs to myself, uncontradicted and unimpeached, seems to settle the point that the challenge was rightfully overruled, even according to the strict interpretation of the law. The fact that the juror was

afterwards peremptorily challenged, it is, therefore, not necessary to consider in this connection.

The third error assigned is the overruling of the challenge interposed against Pedro Provencio, a juror, on the ground that he was not a citizen of the United States. We do not consider it necessary to discuss the subject of the citizenship of Provencio, although there seems but little doubt that he was competent, so far as that was concerned, because, even if he were not, the error was cured by the subsequent peremptory challenge of the proposed juror by the defendant, taken in connection with the fact that on the completion of the jury defendant had not exhausted his peremptory challenges. The law with regard to this seems to be pretty well settled, and is founded on common sense.

Some decisions go much beyond this and declare that even in case the defendant had not challenged the juror peremptorily, and such juror had therefore remained and acted on the jury, yet if the defendant had not exhausted his peremptory challenges, the juror was so remaining and acting by defendant's voluntary act, and so he was not prejudiced: *State v. Davis*, 41 Iowa, 311; *State v. Elliot*, 45 Iowa, 486.

Other decisions of highly respectable courts are to the effect that in case the defendant peremptorily challenges a juror, no previous action of the court in overruling a challenge of such juror for cause, can be ground for exception on appeal, even if the defendant may have exhausted all his peremptory challenges before the jury was completed. This is put on the ground that "the prisoner had the power and the right to use his peremptory challenges as he pleased, and the court cannot judicially know for what cause or with what design he resorted to them: *People v. Bodine*, 1 Denio, 310. He was free to use or not use them, as he thought proper, but having resorted to them, they must be followed out to all their legitimate consequences:" *Freeman v. People*, 4 Denio, 31; *Stewart v. State*, 13 Ark., 732, etc.; *Whelan*

v. The Queen, Canada Q. B., 28. Without going so far as either of these classes of decisions would lead us (for it is unnecessary in the present instance), there can be no doubt that in a case like that before us, where the defendant does not exhaust his peremptory challenges, and so is no way injured, by using the peremptory challenge for the proposed juror in question, if he chooses, after his challenge for cause has been overruled, to challenge peremptorily, he thus virtually and effectually wipes out any error which may have been committed in such overruling. He has ceased in any way to be prejudiced by the action of the court, and so has no reason for complaint.

The fourth error assigned by the defendant is "that the court exceeded its power and authority in instructing the jury that their verdict should be guilty of murder in the first degree or not guilty." The court so charged almost in the precise words above, and also stated to the jury, "there is no evidence before you tending to show that the killing of Henry F. Dwenger is murder in any other degree than the first degree of murder."

Had the court the right under the law so to charge? Sec. 23 of the recently enacted "Practice Act" (chap. 6, Laws of 1880), says: "The court shall not comment upon the weight of the evidence," and in the charge in this case, the court recognized this provision by instructing the jury: "You are the exclusive judges of the weight of the evidence and of its sufficiency to satisfy your minds as to the defendant's guilt." Is language such as is objected to by the defendant a "comment on the weight of evidence?" We think not. It is clearly competent for the court, at the end of the testimony for the prosecution, to say to the jury: "There is no evidence to sustain the indictment." If there is the least evidence, it becomes the province of the jury to take it into consideration and judge of its weight. They may give it credit or not; they may consider it of more importance than

the opposing evidence or not; they are the judges of the value to be attached to it and the weight it should have in determining their verdict. But if there is no evidence at all, there is nothing for them to consider and weigh. The statement by the court below that the verdict should be "guilty of murder in the first degree or not guilty," was exactly equivalent to the other statement, "There is no evidence before you tending to show that the killing is murder in any other degree than the first." Under our law, there are five degrees of murder, included in each of the degrees except the first and fifth, are several distinct kinds of homicide. No less than three different offenses, varying greatly in their character, equally constitute the crime of murder in the second degree, with different punishments; and the third degree includes no less than five distinct definitions. The reading of the entire law as to homicide to the jury in each case, would not only be useless, and as to some of the sections, absurd, but would tend to confuse their minds, and make it almost impossible for them to distinguish what the real crime as proved is, and to agree on a proper verdict. In case of a homicide in a street brawl, to read to the jury the law as to assisting in a suicide, killing an unborn infant child, acting as second in a duel, or administering drugs while intoxicated, would be palpably absurd; and in case of a murder by an ordinary pistol shot, to include in the charge, the sections as to killing in a cruel and unusual manner, would simply confuse and mislead. The judge has to discriminate somewhat, and the question is simply as to where the line should be drawn. It is within the power, and we think it is almost the duty of the judge presiding, to simplify and make clear the duties of the jury as far as possible, by eliminating from these degrees, which are in effect made by our law distinct crimes, any which the case certainly is not. He has the right to say when the evidence warrants, "There is no evi-

dence of the homicide charged being murder in the first degree," or "in the second degree," etc., as the case may be.

And it is the same thing virtually to say, "There is no evidence introduced tending to show murder in the second, third and fourth degrees," as to say, "This case, under the evidence, is either one of murder in the first or the fifth degrees." One form simply names the degrees which the alleged crime is not; the other the degrees which under the evidence it may be. Of course, the judge who thus excludes certain degrees from the consideration of the jury, does so at his peril, that is to say, he should be absolutely certain that there is no testimony whatever which would make a verdict of one of these degrees possible, for if there is the least vestige of evidence, it is for the jury to determine its weight and effect; and the slightest mistake of that kind would be error for which the appellate court would have to grant a new trial. But judiciously and carefully administered, such guidance by the court, is certainly advantageous to the administration of justice, especially under our complex murder law. In this case, we have carefully examined the evidence to ascertain whether there was anything whatever, however slight, on which a verdict of guilty of murder in any degree but the first could have been sustained, but find none. The instruction of the court below was warranted by the facts in the case as proved, and was not error.

It was suggested by counsel for the defendant that the law which provides that the jury shall "assess the punishment" in criminal cases, made this instruction improper. But that law has no bearing on this case whatever. That provision is simply to enact that the jury and not the judge shall fix the punishment to be inflicted within the limits established by law, where the law has left any option as to its extent. In nearly all of the older states this is done by the court. In such case the verdict of the jury simply states the offense of which they find the defendant guilty, as for example, "guilty

of murder in the fifth degree," and it would be for the judge, after considering all the circumstances, to assess the punishment of fine or imprisonment, as he thinks the ends of justice require, within the limits fixed by statute for that offense. But in this territory the legislature chose to leave the assessing of the punishment, within those limits, to the jury instead of the judge, so that the verdict has to include not only a statement that they find the accused guilty of such a crime or degree of crime, but also, added thereto, the punishment within the statutory limits, which they have thought it proper to impose in cases where it is not absolutely freed by the law itself. This is a matter whether done by judge or jury, that comes after the determination of the degree of crime of which the accused is guilty, and is subject to the limitation of law as to punishment for that degree, so the fact of its being devolved upon the jury in this territory rather than upon the judge, cannot have any influence upon the rights, duties and powers of either judge or jury in finding a verdict as to the crime itself.

The fifth point of the appellant's counsel is, that the motion for a new trial was improperly overruled, for the reason that the defendant, if guilty at all, was guilty only as an accessory after the fact. We see nothing in the testimony on which to base this argument, even if there is such a crime known to our law in this territory, as that of being "accessory after the fact" to a murder. Believing that no error has been shown in the proceedings, the judgment of the court below must be affirmed.

THE TERRITORY OF NEW MEXICO, Appellee, v. LUIS VALENCIA, Appellant.

January 24, 181.

JUSTICE OF THE PEACE. (1) *Jurisdiction of, limited, and must appear affirmatively.*

SAME. (2) *Complaint before, must show jurisdictional and substantial facts.*

CRIMINAL CASE. (3) *Dismissal of appeal from justice of the peace by district court, need not be ordered until indictment found or information filed.*

1. The jurisdiction of a justice of the peace is inferior, special and limited by statute to specific territorial boundaries, established by law as a county, town, or incorporated city, and to specific subject matters, such as assault and battery, suits to recover debts where the amount claimed does not exceed $100, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed.
2. In a complaint for a misdemeanor before a justice of the peace, all the technicalities of an indictment need not be observed. If there be a substantial statement of the offense, it will be sufficient. But the facts conferring jurisdiction upon the justice must appear, and where a complaint for an assault and battery failed to show where the offense was committed, except that it was done upon the property of the prosecuting witness (not showing the county in which that property was situate, or that it was within the jurisdiction of the justice), the prosecution under such complaint should be dismissed on appeal to the district court.
3. But if it appears by evidence, that the misdemeanor complained of was committed by the defendant, the appeal from the justice of the peace may remain undisposed of in the discretion of the district court until the prosecuting attorney shall have filed an information, or the grand jury found an indictment, when the proceedings under the appeal may be dismissed and the district court take original jurisdiction of the offense and proceed to trial while the defendant and witnesses are present in court.

Appeal from the First Judicial District, Taos county. PRINCE, J.

The appellant in this case is charged with assault and battery. The case originated before a justice of the peace

within and for Taos county; was appealed to district court, where defendant was found guilty. It is brought here on appeal.

Conway & Risque, for appellant.

Appellant claims that, from errors manifest on the face of the record, neither the justice of the peace nor the district court had jurisdiction. 1st. The complaint is a species of legal nondescript attempting to charge assault and battery, and at the same time seeking to recover damages for injuries alleged to have been done to the field of prosecuting witness by cattle of defendant—a proceeding utterly foreign to our law, and, we believe, to any system of jurisprudence. 2d. There is no venue laid in the sworn declaration or complaint. As to venue, see Archibold's Criminal Pleading, pp. 46, 47 and 49.

3d. There is no charge or crime known to the laws of this territory made out in the sworn declaration. The proceeding is brought under sec. 11, p. 360, Compiled Laws, 1865, but does not in any manner follow the language of the statute, and the word "unlawfully" is not used at all.

The supreme court of this territory, in the case of , has decided that the omission of the word "unlawful" is a fatal defect in an indictment.

4th. For the reasons above stated, the court below erred in overruling motions for new trial and in arrest of judgment.

C. H. Gildersleeve, for appellee.

In this case there is no bill of exceptions snowing the evidence adduced on the trial of said cause, or the charge of the court to the jury. The defendant's ground of appeal is based solely on alleged want of jurisdiction in the district court, apparent on the record, on account of informalities in the justice's court.

The complaint is based on sec. 16, p. 362, Compiled Laws, N. M. By sec. 15, Compiled Laws, p. 206, all appeals

from inferior tribunals shall be tried anew on their merits, as if no trial had been had below.

In criminal proceedings before justices of peace for misdemeanors, technical accuracy is not required: 4 Chand. (Mich.), 148; 10 Me. (1 Fairf.), 473; 25 Ala., 221; 19 Ala., 11; 3 Ill. (2 Scam.), 7.

Sufficient appears on the face of the complaint before the justice of peace to show that an assault and battery was committed in a "rude and insolent manner," and that the accused violated a criminal law of the territory, and was tried for that offense.

The appellate court should try an appeal from a justice of the peace according to justice, regardless of any defect in the warrant, summons, or other proceedings of the justice: *Berry v. Brown* (Minor), Ala., 57; *Gayle v. Turner*, 204.

BRISTOL, Associate Justice: This is a criminal prosecution for assault and battery commenced by the territory against Luis Valencia, the defendant below and appellant here, before a justice of the peace of Taos county.

The defendant was tried by a jury, convicted and sentenced in the justice's court to pay a fine of $10, and judgment was rendered in that court for such fine and costs.

The complaint on which the defendant was arrested, tried and convicted before the justice of the peace is as follows:

"TERRITORY OF MEXICO, }
COUNTY OF TAOS. }

"According to and under the oath of Julian Martines, this 11th day of the month of September, 1879, about 10 o'clock in the morning, and under his oath and affirmation declares and says that to-day, the 11th of September, 1879, about 7 o'clock in the morning, a certain Luis Balencia, in a rude and insolent manner assaulted and beat Manuel Martines on his own property, and further, the same Julian Martines

claims of the accused Luis Balencia $40 forty dollars for damages suffered in his field by animals of said Valencia."

"Now, therefore, I entreat justice in the name of the territory of N. M., that it assist me, so help me God.

"Ranch of Taos, N. M., Sept. 11, A. D. 1879.

"JULIAN $\overset{\text{His}}{\underset{\text{mark.}}{+}}$ MARTINES.

"Sworn to and subscribed before me, in my office, Precinct No. 3, in said county, to-day, Sept. 11, A. D. 1879.

"JOSE MIGUEL NIGEL,
"*Justice of the Peace.*"

It appears from the docket entries of the justice that the parties interested settled the matter of damages mentioned in the complaint, and that the justice only took cognizance of the charge of assault and battery. It also appears from said docket entries that the defendant moved a dismissal of the cause, which was overruled by the justice before the jury was called.

The verdict of the jury on the trial, before the justice, was as follows:

"We, the jury, are unanimously of opinion that we find the accused guilty according to the law and the evidence."

Upon this verdict the justice assessed the punishment at a fine of $10, and gave judgment therefor and costs.

From this judgment the defendant appealed to the district court in and for said Taos county. The case was brought to trial before a jury in that court, at the last September term thereof, the defendant at the time interposing no objection thereto. The jury found "the said defendant guilty in manner and form as charged in the complaint herein." The defendant interposed a motion for a new trial, also for arrest of the judgment, assigning various grounds, among which was that the court below had acquired no jurisdiction to proceed against the defendant in the premises on the complaint aforesaid of Julian Martines. The motions were

overruled and the district court assessed the "punishment of the defendant at a fine of $10, and rendered judgment for such fine and costs." The case is here by appeal from this judgment.

No bill of exceptions appears of record; no evidence adduced on the trial is before this court, and the only question raised upon the record which we can consider, is whether the court below had jurisdiction.

The jurisdiction of a justice of the peace is inferior, special and limited by statute to specific territorial boundaries established by law as a county, town, or incorporated city, and to specific subject matters as assault and battery suits to recover debts where the amount claimed does not exceed $100, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed: *Reeves v. Clark*, 5 Ark., 27; *Stranham v. Inge*, 5 Ind., 157; *Bigelow v. Steanes*, 19 John., 39; *Bridge v. Ford*, 4 Mass., 641. This principle is laid down as law in all the books on the subject.

It has been held that a conviction before a justice will be quashed, if the record thereof does not show the place where his court was held, on the ground that it must appear of record that the justice acted within the sphere of his jurisdiction: *Brackett v. The State*, 2 Taylor (Vt.), 167. It is true that in a complaint for a misdemeanor before a justice all the technicalities of an indictment will not be observed. If there be a substantial statement of the offense, it will be sufficient: 4 Wis., 148. But even in this respect it has been held that if in a complaint for larceny before a justice the goods alleged to have been stolen be described in a schedule annexed to the complaint, and not in the body thereof, the complaint will be bad: *Cummings' Case*, 3 Me. (3 Greenl.), 51. That there must be some kind of substantial statement covering all the essential elements of the offense, also covering the facts conferring jurisdiction, is quite evi-

dent, in order to constitute a criminal prosecution before a justice, due course of law.

The district court, under our statute, could not assume a more enlarged jurisdiction on appeal than was conferred on the justice. In the complaint in this case there is no statement as to where the assault and battery was committed, except that it occurred on the property of Manuel Martines; in what county the property was situated does not appear. The language of the verdict is, "the jury find the said defendant guilty in manner and form as charged in the complaint herein."

The meaning of the verdict therefore is, that on the 11th of September, 1879, about 7 o'clock in the morning, Luis Valencia, in a rude and insolent manner, assaulted and beat Manuel Martines on his own property.

The territorial jurisdiction of the justice in criminal prosecutions was limited by law to the county of Taos. It does not appear affirmatively or otherwise, on the record, that the offense complained of was committed in that county. We have no right to presume that it was. In dismissing the prosecution thus commenced, it by no means follows that there need be a failure of justice in the district court. If it appears by evidence that an offense of this kind was committed by the defendant, the appeal may remain undisposed of, in the discretion of the court, until the prosecuting attorney shall have filed an information, or the grand jury found an indictment, when the proceedings under the appeal may be dismissed and the district court take original jurisdiction of the offense and proceed to trial, while the defendant and witnesses are present in court. There can be no doubt that this course would be better and more conformable to law than to sustain a record so defective as this.

The jurisdiction of the justice not appearing from the record of the proceedings, it follows that the judgment below ought to be reversed and the prosecution dismissed.

And it is so ordered. All concur.

THE TERRITORY OF NEW MEXICO, Appellee, v. RICHARD ROMINE, Appellant.

January 25, 1881.

TRIAL BY JURY. (1) *Whether trial by a jury who speaks only Spanish is.*
INSTRUCTIONS. (2) *Written in English, but translated orally to Mexican Jury.*
PRACTICE. (3) *Translation of proceedings to other languages.*
MURDER. (4) *Instruction as to degree.*
SAME. (5) *Same as to justifiable homicide*
SAME. (6) *Verdict, should name degree.*
SAME. (7) *Verdict assessment of punishment in.*
SAME. (8) *Instruction as to fourth degree.*
SAME. (9) *Same as to weight of defendant's testimony.*
SAME. (10) *Malice and premeditation, proof of.*

1. The defendant in a criminal case took a change of venue from a county where the English element largely predominated, to one where the Spanish population is very largely in the majority. The jurors who sat in the trial were all Mexicans, and none of them understood the English language, in which the proceedings at the trial took place.

   Held, that this was a sufficient "trial by jury," and that there is no law in New Mexico requiring the jurors to speak any particular language.
2. The instructions were written in English and translated orally to the jury.

   Held, that the object of the law requiring instructions to be written was simply to enable them to be preserved in the files, so as to be available for exception or on appeal, and that the oral translation of them to the jury did not render them violative of the law, as being oral instructions.
3. In all counties where the jury contains members representing each language, or where the persons speaking each are before the court, all the proceedings are to be translated by a sworn interpreter, into the other language from that in which they originally take place.
4. It is not error for the court to instruct the jury in a murder case, that the killing in question was either murder in the first degree, murder in the fourth degree, or justifiable homicide, where there is no evidence in the case which could bring the case within the definition of any degree not given.
5. Where the words of an instruction are broad enough to cover all the

evidence, it is not necessary that the instruction should include both causes of justifiable homicide named in the statute.

6. All verdicts in murder cases should specifically name the degree of murder of which the accused is found guilty, but a verdict of "guilty as charged in the indictment," where the indictment charged murder in the first degree, is sufficient.

7. The provisions of the statute (Gen. Laws, chap. 57, sec. 22, p. 289), that "all issues of fact in a criminal case shall be tried by a jury, *who shall assess the punishment in their verdict,*" does not refer to a case of murder in the first degree, wherein the jury need not assess the punishment in their verdict, nor to any other offense the punishment for which is fixed absolutely by the statute, being an undeviating penalty. It refers to offenses the limits of whose punishment are fixed by law, within which a discretion as to the amount of punishment is to be exercised by the jury, according to the circumstances of each case. In such cases only are they to assess the punishment in their verdict.

8. The use of the words "on which some part of the evidence, if true, has some bearing" by the judge in defining murder in the fourth degree to the jury, *held*, not objectionable.

9. An instruction to a jury as to the testimony of defendant in a murder case that "it will be proper for you to consider the fact that he is the defendant, and that, greatest possible temptation is presented to him to testify in his own favor, if he is really guilty" is not erroneous, but the wisest course in similar cases is to instruct the jury generally that they have the right in determining the credibility and weight of evidence, especially where there is a conflict of testimony, to consider the peculiar circumstances or position of any witness which might have the effect of influencing his evidence without selecting the testimony of any particular witness for such comment.

10. Malice and premeditation in a case of murder may be inferred by the jury from actions or words of the accused, or collateral circumstances properly proved before them. There must be *some* evidence of malice or premeditation before the jury to warrant it in finding the defendant guilty of murder in the first degree.

Appeal from District Court of Doña Ana county.

Appellant was indicted at the March term of the district court for killing Patrick Rafferty, on the 16th day of March, 1877, at the county of Grant, in the territory of New Mexico, with a hammer, and was convicted of murder in the first degree.

S. B. Newcomb and *Catron & Thornton*, for appellant.

The jurors who sat in the trial of this case were Mexicans, and none of them understood the English language, in which the proceedings at the trial were had. The policy of the common law is, that "Where there is a wrong, there is a remedy," and the common law, as recognized by the United States and the several states of the union, is the rule of practice and decision in the territory of New Mexico in criminal cases: Compiled Laws of New Mexico, sec. 18, page 194. The defendant did not except to the jurors. He had a right to a trial by an English speaking and English understanding jury: *Lyles v. The State*, 41 Texas, 172, and the cases therein cited. In this case, the learned judge, who delivered the opinion, says that the constitution says, "That the right of trial by jury shall remain inviolate." These precise words are found in the "Bill of Rights:" Compiled Laws of New Mexico, sec. 5, page 636. He further says, "It (the trial by jury) cannot be considered as remaining inviolate, when the jurors can neither speak, nor understand the language in which the proceedings were had," etc., etc. In *Lyles v. The State*, 41 Texas, 172, the court further say, "A trial by such a jury as sat in this case" (nine of whom did not understand nor speak the English language, in which the proceedings were had) "was violative of section 16, article 1, of the 'Bill of Rights' of the constitution, which declares that, 'No citizen shall be deprived of life, liberty or property,'" etc., etc., going on, giving the exact language, as that found in sec. 15, page 640 of the Compiled Laws of New Mexico, which see.

Sec. 15, page 496, and sec. 21, page 498, Compiled Laws of New Mexico, state what is necessary to parties "liable to be chosen and to serve as grand and petit jurors," etc.

Such persons are not competent jurors, however, unless they can speak and understand the language, in which the proceedings are had on the trial. If such were intended it

would be null and void. See *Lyles v. The State*, 41 Texas, 172, and also sec. 5, page 636, "Bill of Rights," Compiled Laws of New Mexico, and sec. 15, page 640, *Id.*, also 8 Ala., 302.

The instructions to the jury were written in the English language and orally interpreted to the jury in the Spanish language. See 41 Texas, 172, and sec. 1, page 200, Compiled Laws of New Mexico, which declares that the instructions shall be in writing.

If the instructions were orally interpreted to the jurors, they were oral instructions—nothing but verbal instructions, and contrary to the law. To instruct the jurors in writing was a duty imposed upon the presiding judge, by the statutory law governing his judicial acts, and a right to which the defendant was entitled and could not waive. The purpose of instructing in writing is that the jury may see them while deliberating, and by verbal interpretation they cannot properly catch and retain them, and for this reason the law orders that they be given in writing, and therefore, any procedure which is a violation of the spirit of this law is an injury to the defendant. The law says that in a trial of this kind, certain acts shall be performed by the presiding judge. The law for wise purposes says the jurors shall be instructed in writing, and he disregards what the law says, and a plain and imperative duty is neglected, and the jurors are verbally instructed.

The defendant need not except; in a capital case he stands upon all his rights and waives nothing, and he is not required to instruct the court as to what are and what are not its duties, and if the plain letter and spirit of the law is not complied with, this dereliction is not chargeable to the defendant, and the case must be reversed because of this error: *Nomaque, an Indian, v. The People*, Breese (Ill.), 145; *People v. McKay*, 18 Johns. (N. Y.), 212.

"In a capital trial, if error intervene, it must be assumed

to be injurious to the prisoner, and he is entitled to a reversal of judgment. The courts have no power to affirm the case: *People v. Williams*, 18 Cal., 187."

The court erred in commenting upon the evidence of appellant: Page 428 " Albany Law Journal," May 31st, 1879; *Veatch v. State*, 56 Indiana, 584; 26 Am. Rep., 44.

The court erred when it told the jury that the evidence showed the offense to be either murder in the first degree, or murder in the fourth degree, or that the killing was justifiable, because it invades the especial province of the jury, and takes from the consideration of the jurors the other degrees of criminal homicide, a right to which the defendant is entitled. See *The State of Iowa v. Ezra C. Clemons*, " Northwestern Reporter," vol. 1, p. 82 (No. 9 New Series), which says, " All the degrees of criminal homicide should be explained and submitted to the jury. * * * The degree of the crime is to be determined by the jury, and not by the court, and there can be but one rule for the court, in all cases." See also 41 Texas, 172.

The court erred, when it told the jury what the evidence tended to show, and on what points certain evidence had some bearing: *Bill v. The People*, 14 Ill., 432; *Bond v. The People*, 39 Ill., 26; *Kennedy v. The People*, 44 Ill., 283; *Hopkins v. The People*, 18 Ill., 264; *Morrison v. The State*, 41 Texas, 516; *Bishop v. The State*, 43 Texas, 390; *Rice v. The State*, 3 Ct. of App., 451; *Haskew v. The State*, " Texas Law Journal," November 26th, 1879, published at Tyler, Texas. Opinion filed November 12th, 1879. Note the following extracts from the instructions: First, the judge says, "From the evidence before you, if the defendant is guilty of murder in any of the degrees designated by law, it must be either murder in the first degree or murder in the fourth degree." Then, further on, he says: " Murder in the fourth degree, on which some part of the evidence, if true, has some bearing, consists," etc.

This tells the jury that the defendant's evidence is false, and, therefore, there is no evidence to show it to be in the fourth degree. Is this the law? Is it just and fair? The jury are to pass untrammelled upon the credibility of the witnesses and the bearing of the evidence. Then, again, "If the defendant actually killed Rafferty, then the case, as presented by the evidence, is either murder in the first degree or murder in the fourth degree, or the killing was justifiable." Again, "If the killing was justifiable, then the case, as presented by the evidence," etc. If this is the law, what is the province of the jury? What figure do juries cut in legal investigation? Finally, the court says: "You have heard his statement of the case. In determining the question as to whether the defendant has told the truth, and all the truth, as to the position of the deceased at the time he received the fatal blow, and in reference to all the circumstances, it will be proper for you to consider the fact that he is the defendant, and that the greatest possible temptation is presented to him to testify in his own favor, if he is really guilty."

This is not proper as an instruction from the court. It ignores the reasonableness or unreasonableness of his statement, taken in connection with the other circumstances proved by other evidence.

In a capital case, when the instructions do not announce correct legal principles, or, being correct, do not apply to the case, though no exceptions are taken to them, the appellate court, in the face of the record, will not pronounce sentence of death on the prisoner, but will award a new trial: *Falk v. The People*, 42 Ill., 331; *Schlenker v. The State*, Supreme Court of Nebraska, October 15th, 1879, Northwestern Reporter, vol. 2, New Series, p. 710. In criminal cases, where life is at stake, it is not required that the evidence be palpably insufficient to warrant a conviction, before an appellate court will reverse, the rule being different in civil and

criminal cases, and especially where life is at stake: *Falk v. The People*, 42 Ill., 331.

If the prisoner was guilty the evidence would have equally well applied to murder in the third or fifth degrees as to murder in the first and fourth: Comp. L., secs. 12 and 13, p. 320.

The court should also have instructed as to both causes of justifiable homicide. The first cause being equally applicable to the case with the second: Comp. L., sec. 5, 1st and 2d ed., p. 313.

The jury should have assessed the punishment: Comp. L., sec. 22, p. 372; *People v. Bonney*, 19 Cal., 446; *People v. Bonney*, 40 Cal., 129; *People v. Marquis*, 15 Cal., 38; *People v. Nichols*, 34 Cal., 217.

Premeditation must be proven, and cannot be presumed from the mere fact of killing: *Stoakes v. People*, Thompson's Cases, 931.

W. L. Rynerson and *Wm. Breeden*, for appellee.

The jury was a lawful one; whether they understood English or not is of no consequence. If this were a valid objection it was waived by the defendant in consenting to go to trial and failing to challenge the jurors on that ground: 1 Bish. Crim. Law, 995, *et seq.*, and particularly sec. 997 and authorities there cited.

It was not necessary that the verdict should fix the punishment. The indictment charged murder in the first degree, and the verdict was guilty as charged, that is, guilty of murder in the first degree. The punishment of this offense is absolutely fixed by law, and the jury could not change it and had nothing to do with it: Compiled Laws of New Mexico, sec. 2, p. 318. Where the jury is required by statute to fix the punishment and has a discretion as to the character or amount of punishment, the verdict should fix the punishment, but not otherwise, and in this case if the jury had assumed to fix the punishment, that portion of the verdict

would have been surplusage: 1 Bish. Proced., 838; 2 *Id.*, 625.

There was no error in commenting upon the evidence by the judge. He had a right to say to the jury what he did say: 34 Cal., 191. This was the common-law rule which governed at the trial of this cause: Compiled Laws of New Mexico, sec. 188, p. 194.

It was the province of the court to give to the jury the law applicable to the facts of the case. There was no error in the refusal or failure of the court to instruct as to the third and fifth degrees. And the instruction given by the court as to the justifiable homicide, comprehended all that the defendant was entitled to: 6 Cal., 214; 31 Ga., 424; 27 Cal., 507; 18 Tex., 343; 32 Cal., 280; 8 Cal., 89; 31 Mo., 147.

Premeditation or malice aforethought, is not susceptible of direct proof, but is to be presumed or its existence determined by all the facts and circumstances connected with the case and the conduct of the defendant: 65 Ill., 17; 17 Cal., 369.

The instructions were in writing as shown by the record and the law in that respect was complied with.

PRINCE, Chief Justice: This is an appeal from a judgment of the third district court, sitting in the county of Doña Ana.

The defendant was indicted in Grant county, at the July term in 1877, for the murder of Patrick Rafferty.

Thereafter, on application of the defendant, the venue was changed to the county of Doña Ana.

The case came on for trial at the June term in 1878, in said court.

At this trial, after the charge of the judge, the defendant's counsel took exceptions to certain parts thereof relative to the testimony of defendant.

The jury brought in a verdict of "guilty as charged in the indictment," and thereupon the defendant moved for a new trial.

The motion was denied, and the defendant appealed to this court.

The first point relied on by the defendant in his brief is that "the jurors who sat in the trial were all Mexicans and none of them understood the English language in which the proceedings at the trial were had."

It appears by the bill of exceptions that this is true, and that the instructions to the jury were written in English and orally interpreted to them in Spanish; and that all the proceedings were similarly interpreted, the translation being made in all cases by an interpreter previously duly sworn.

The defendant claims that this was error for two reasons:

Firstly. That trial by a jury not understanding English was not "trial by jury," as understood at common law, or contemplated by the bill of rights.

Secondly. That the instructions to the jury were really given orally, being translated, and were thus in violation of law.

As to the first of these propositions it may be said that the qualifications of jurors in New Mexico were fixed by the act of February 2, 1859 (Compiled Laws, 496), and at the time of this trial had been unaltered for nearly twenty years. That act, in section 157, specifically provided that "all white persons," having certain qualifications of age, citizenship, etc., shall "be liable to be chosen and serve as grand and petit jurors;" and among these qualifications the ability to speak any particular language is not named.

Under this law juries were selected for over twenty years, embracing both Spanish and English speaking members, without any objection or any change being made in the law, or action taken by the congress of the United States. Since the trial of this cause below, in the year 1880, a new jury

law was enacted by the legislature, but it made no alteration in this respect, though the fact that large numbers of Spanish speaking citizens, who understood no English, were annually called to serve on juries, it was known undoubtedly to every member, so that there can be no doubt as to the legislative intent.

We cannot shut our eyes to the peculiar circumstances of this territory, taken from the Republic of Mexico in 1846, and nearly all of whose inhabitants in the years first succeeding the annexation, understood no English. Even at the present time the preponderance of Spanish speaking citizens is very large; and in certain counties the English speaking citizens possessing the qualifications of jurors, can be counted by tens instead of hundreds. In at least three of the courts of the territory at the time of this trial below, it may be said without hesitation, that a sufficient number of English speaking jurors could not have been obtained to try any important case which had attracted public attention.

Apart from the impracticability of obtaining English speaking juries, it would have been manifestly unjust to the great majority of the people of the territory, had such a requirement as to language been made. Either they would have had to be tried in a language which they did not understand, or else a double system would necessarily have been established, including an English speaking jury for English defendants, and a Spanish speaking jury for Spanish defendants; and if the theory had been carried to its logical conclusion, an English speaking judge to address the English jury, and a Spanish speaking one to instruct the Spanish jury.

The practice under the territorial law has been uniform for a long series of years, and works as little injustice to any parties, whatever their language, as any system that could well be devised under the prevailing conditions. In all counties where the jury contains members representing each

language, or where persons speaking each are before the court, all the proceedings are translated by a sworn interpreter, who is a court officer, into the other language from that in which they originally take place. Thus, every one interested is as fully as possible informed of every proceeding, and no injustice is done.

In the case before us, this course was pursued. There is no allegation or suggestion that there was any incorrect interpretation; indeed, there is nothing in the record or the bill of exceptions, to show whether the defendant himself speaks Spanish or English. If, as we infer from the argument, he is an English speaking citizen, then it was by his own act in demanding a change of venue, that the case was brought from a county where the English element largely predominated on the juries, to one where the Spanish population is very greatly in the majority.

We do not think that there is anything in the law which makes the fact of not understanding the English language a disqualification for a juror in this territory, or which gives to any defendant the right to be tried by jurors of any particular nationality or language.

As to the second point, regarding the written instructions to the jury, the argument of defendant's counsel is that the instructions being written in English, and translated to the jury in Spanish, they were really orally given; and, further, that the intent of the law was that the jury might see them while deliberating, and if only given to them orally that intent was defeated.

If the object of the law were as suggested by counsel, there might be something in this point; but that object, as shown by the context, was entirely different, being that the instructions should be filed with the papers in the case, so as to be available for exception or on appeal. In fact, at the time of the trial below, and until the passage of the Practice Act of 1880, there was no authority for allowing the jury to

take the judge's instructions with them when they retired for consultation.

The law was fully complied with by the instructions being written by the judge, so as to be preserved on file; and there was no error in this respect.

The next cause for reversal assigned by the defendant, is that the court erred in stating in the charge to the jury that the killing in question was either murder in the first degree, murder in the fourth degree, or justifiable homicide.

The law with regard to this we have recently stated quite at length, in the opinion rendered in the case of *The Territory v. Young*, *ante*, p. 93, and so we do not repeat it here.

As there said, if there is any evidence whatever which could bring the case within the definition of any degree not given, the limitation of the degrees in the charge to the jury would be error which would be good cause for reversal. But we have examined the evidence before us in this case with much care, and fail to see any under which the degree of murder could be other than the first or the fourth, if a crime be proved at all. The definitions given by the judge of those degrees, and of the circumstances under which such a killing would be justifiable, substantially coincide with the statute, and could not have misled the jury. One of the "additional points" of the defendant is that the instruction regarding justifiable homicide should have included both causes named in the statute; but we think the words used are broad enough to cover all the circumstances possible under the evidence.

The next point raised, and upon which a large amount of argument was expended, was as to the form of the verdict; which is claimed to be insufficient and contrary to law, both because it does not designate the precise offense of which the jury found the defendant guilty, and also because the jury did not assess the punishment therein.

The record shows that the indictment is in the usual form

of an indictment for murder in the first degree, including all the allegations required by the statute to constitute that crime.

It is conceded on all hands that under such an indictment, a jury can either find the defendant guilty of the crime charged, or of any lower crime the necessary constituents of which are included in the indictment. This is a general and elementary principle of criminal law.

The judge in his charge instructed the jury that under the evidence, three, and only three, verdicts could properly be returned, and these were respectively in case the jury should believe the defendant guilty of murder in the first degree, or in the fourth degree, or that the homicide was justifiable. He instructed them that if they found the defendant guilty of murder in the first degree, their verdict should be simply "guilty;" if in the fourth degree, their verdict should be that they "find him guilty of murder in the fourth degree, naming the degree in the verdict," and assessing the punishment within the statutory limits. If they entertained any doubt of his guilt in one of the degrees, then their verdict should be "not guilty." This made the distinction very clear and forcible, and if under such instructions, the jury should simply have returned a verdict of "guilty," there could have been no doubt of their intention to find the defendant "guilty" in the first degree.

The verdict which they did bring in was "guilty as charged in the indictment." This, in our opinion, is stronger and more certain even than the verdict of "guilty" would have been. The indictment charged murder in the first degree. It charged the defendant with the felonious killing of Rafferty, from a premeditated design to effect the death of said Rafferty.

If there could have been any doubt as to the verdict, if it had been simply in the words suggested by the court, that doubt is removed by the additional words used by the jury.

Such a verdict under such an indictment, and especially in view of the judge's charge, can mean nothing else than murder in the first degree; and considering the peculiar wording of our statute, which nowhere expressly mentions the first degree of murder by name in its definition, was perhaps the very best and strongest way in which the jury could have expressed their opinion. While fully satisfied that this is a good verdict, for murder in the first degree, yet it may not be out of place to suggest that to avoid question and discussion, it may be better in the future, that all verdicts in murder cases should name the degree specifically.

The next point is that the jury should have named the punishment in their verdict. This is claimed under the provision in our statutes (chap. 57, sec. 22), which reads as follows: "All issues of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict:" General Laws, 289.

We have had occasion to refer to this provision somewhat in the recent case of *The Territory v. Young*, *ante*, p. 93, and have stated there to some extent our view of its intention and scope; but it may be best to consider the matter here more fully as the connection is somewhat different.

In our criminal law as in most others, the punishment for some offenses is fixed absolutely by the statute, being an undeviating penalty. Such, for example, is the punishment of death for murder in the first degree, and imprisonment for life under our definition of murder—the second degree. But for most offenses, a sliding scale of punishment is provided, so that in each case the penalty can be proportioned somewhat to the peculiar circumstances involved. This is a proper and beneficent system which has obtained in almost every criminal code, and in our statutes finds its strongest example in the penalty for murder in the fifth degree, where the option extends from a fine of a single dollar to imprisonment for ten years.

Now, some authority must have power, after it has been determined that a person is guilty of one of these crimes, for which such a sliding scale of penalties is provided, to consider the circumstances of the case and determine what penalty within those limits fixed by law shall be inflicted; to use the technical words of our statute, to "assess the punishment."

In most, if not all of the older states, this is done by the judge presiding; in New York two local justices are associated with him for this purpose, and in such cases the jury simply finds the offense of which the accused is guilty, and nothing more; the punishment, within the limits prescribed by law, is entirely for the court.

But in our territory this power is given to the jury. They are to assess the punishment, wherever such assessment is necessary, as well as find the crime of which the accused is guilty.

The intent of the section above quoted was simply to give this power to the jury, which ordinarily had been exercised by the court. But it refers, of course, to cases where an assessment is to be made; where there is some penalty to be determined; where there is some option and discretion to be exercised. And this includes the great majority of crimes to which, by our statutes, a sliding scale of penalties is affixed. Here the jury is to "assess the punishment" within, of course, the limits provided by law.

But in the case of those few crimes for which the statute absolutely fixed one unchangeable penalty, there is nothing to be "assessed" either by the judge or the jury. The penalty is established by the law, and it would be absurd to talk of assessing that which is unalterably fixed and determined.

Had the verdict been "guilty of murder in the fourth degree," it would have been necessary for the jury to have "assessed the punishment," because the penalty for that crime is not established by law, except as to its limits, and

within those is left to the jury. But for murder in the first degree, the law itself fixes the penalty unalterably, and no action of the jury could ratify or strengthen it. The statute in this particular instance even goes on to provide the duty of the governor in case of conviction.

Were this not entirely clear, the practice of the courts for nearly thirty-five years, since the promulgation of the Kearney code, of which this section, as to the power of the jury to assess, is a part, would be sufficient to guide us. But, in our opinion, there can be no doubt that that section only applies to those crimes whose penalties are capable of being assessed, that is to say those for which the punishment may be more or less, within certain statutory limits.

Another point raised by the defendant's counsel is that the use of the words "on which some part of the evidence, if true, has some bearing," by the judge, in giving a definition of murder in the fourth degree, was improper, and might prejudice the jury, but this, we think, is not a valid objection. The words really added nothing to the sense, as the fact of charging as to that degree at all implied that some part of the evidence, if true, had some bearing thereon, and we fail to see any way in which their use could have been injurious to the defendant.

A much stronger objection is urged against the part of the judge's charge in which he referred to the evidence given by the defendant himself. This is in the following words: "The defendant himself was admitted as a witness before you. You have heard his statement of the case. In determining the question as to whether the defendant has told the truth, and all the truth, as to the position of the deceased at the time he received the fatal blow, and in reference to all the circumstances, it will be proper for you to consider the fact that he is the defendant, and that greatest possible temptation is presented to him to testify in his own favor, if he is really guilty."

At the time of this trial, the new practice act, which provides that the court "shall not comment upon the weight of the evidence" (Laws of 1880, chap. 6, sec. 23), had not been passed, and the rules of the common law governed in criminal cases, under sec. 18 of the act of July 12, 1851, General Laws, page 118.

We think it is the wisest course in similar cases to instruct the jury generally, that they have the right in determining the credibility and weight of evidence, especially where there is a conflict in the testimony, to consider the peculiar circumstances or position of any witness which might have the effect of influencing his evidence, without selecting the testimony of any particular witness for such comment; but under the law as it was at that time, full as strong expressions, with regard to the testimony of parties on trial, as were used in the court below, have been upheld by the courts, as in the case of ———— *v.* ————, 34 Cal., 191.

Whatever might be the case with such language if used under the new law, we do not think that the instruction, as given at the time of this trial, was error.

Two other points raised by the defendant may be considered together. They are:

First. That malice must be proved and not inferred.

Second. That premeditation must be proved and not presumed.

These propositions may be true if they are intended to mean that there must be some evidence in the case from which the jury can conclude that there was malice and premeditation; but they are not true if intended to mean that malice and premeditation must be proved directly by evidence. They are both matters which are within the breast of the person accused, and peculiarly within his own personal consciousness. They are not visible and tangible objects, or events that can be proved by ordinary witnesses, as something more substantial might be. No one but the

accused himself can testify directly from absolute personal knowledge that they exist; and so there can be no direct evidence of their existence, except from his statements either on the trial or testified to as admissions. The jury has the right to infer their existence from actions or words of the accused, or collateral circumstances properly proved before them; and without this right, in the majority of cases, it would be impossible to prove them at all. We think there was no error in the case at bar with regard to this subject.

ROMALDO BACA, Plaintiff in Error, v. ADOLPH BARRIER, Defendant in Error.

January 28, 1881.

QUANTUM MERUIT. (1) *Where special contract.*
CONTRACT FOR WORK AND LABOR. (2) *Abandonment—Recovery notwithstanding.*

1. A contractor may sue generally for work and labor, as well as under his special contract.
2. Plaintiff contracted to paint defendant's house, etc., without delay, and the latter agreed to furnish defendant with the necessary materials to do the job, and did so as to part of the job and paid plaintiff part of the contract price, but before the contract was completed locked the house and refused to allow plaintiff to continue work, telling him that there were no materials, and that he would be notified when to resume. He never notified plaintiff to resume.

   Held, That the furnishing of materials was a condition precedent to plaintiff's performance of the work; that plaintiff having done work amounting to $789, and having been paid $372 30, was entitled to judgment for the balance, with interest, notwithstanding he did not fully complete the work.

   Quære, whether defendant was not so far at fault as to justify plaintiff in abandoning the contract, for under the terms of the contract whereby defendant obligated himself to furnish the materials, without any mention as to time, the law will imply an agreement to furnish them within a reasonable time.

Error to the District Court of San Miguel county.

The facts appear in the opinion of the court.

——— ———, for plaintiff in error.

1. As the plaintiff below did not sue on the contract, but in general assumpsit, the true rule of damages is the actual loss he sustained, if any, by reason of the stoppage of the work: Sedgwick on Measure of Damages, p. 273, 6th ed.; *Pond v. Wyman*, 15 Mo. Rep., 177; *Loker v. Damon et al.*, 34 Mass., 284.

2. The amount of damages so sustained by plaintiff, he was bound to show, and this he has utterly failed to do. There is no testimony to sustain the finding of the referee that one-half the work specified in the contract was done.

3. The finding of the referee and judgment of the court below is so plainly contrary to and unsupported by the testimony in the cause, that this court will reverse the judgment for that, if for no other reason: *Cary v. St. L., K. C. & N. R. R.*, 60 Mo., 209, and *Smith v. Crows*, 2 Mo. App. 269.

Breeden & Waldo, for defendant in error.

The defendant in error, plaintiff below, sued in assumpsit for the value of the work done, the plaintiff in error having prevented him from completing the work according to the contract. This the plaintiff below had a right to do, and the measure of damages was the value of the work performed. And the only evidence required from the defendant in error in the court below was as to the amount of work performed and the value of the same: 1 Col., 272; Sedgwick on Damages, 265, and note; 33 Vt., 80; 47 Mo., 401; 21 Vt., 17.

The finding of the referee had the same effect, and is to be regarded and treated in the same manner and according to the same rules as the verdict of a jury: 93 U. S., 78; 18 Ia., 36; 3 Cal., 284; 20 Ia., 276; 5 Cal., 228.

The most that can be claimed by the plaintiff in error is that there was conflicting evidence and disputed questions of

fact in the court below. Such issues of fact and conflict of evidence having been passed upon and determined by a referee, this court will not disturb that finding or judgment thereon, especially so as no motion was made in the court below to set aside the finding or for a new trial, or new hearing, and the court below had no opportunity of passing upon or considering the correctness of the finding: 2 Cal., 153; 21 Cal., 179; 3 Cal., 284; 27 Cal., 470; 5 Cal., 228; 23 How., 491; 32 Ill., 53, 116, 146; 1 Blk., 414.

The judgment should be affirmed, with ten per cent. damages: Compiled Laws of N. M., sec. 8, p. 168.

Bristol, Associate Justice: The case is as follows: On the 9th of September, 1875, the parties entered into and executed a contract in writing whereby the defendant in error, Adolph Barrier, agreed without delay, and in a good and workmanlike manner, to the satisfaction of Romaldo Baca, the plaintiff in error, and according to his order and direction, to paint with three coats of paint all the woodwork of said Baca's house therein described, except the front doors, which had already been painted; in like manner to glaze all the windows and sash doors of said house; and in like manner to paper all the rooms and halls of certain two adobe stories therein mentioned; and in and by said contract, said Baca on his part agreed to furnish all the paints, oil, glass, putty, paper and materials necessary to the performance of such work by said Barrier; and to pay him, said Barrier, for the entire performance of said work, the sum of $850, in manner following, that is to say, at the end of each and every week during which said Barrier shall have worked continuously under said contract, the sum of $4 in money and $8 in goods from some mercantile house in Las Vegas; and upon the completion of said work, the balance then remaining unpaid of said sum of $850.

The said defendant in error, who was the plaintiff below,

in his declaration did not declare upon this special contract, but for work and labor generally by him performed for the defendant below, and plaintiff in error here, at his instance and request.

The defendant below pleaded the general issue, and a special plea setting up said contract, and alleging plaintiff's non-performance. Issue was joined, and by stipulation of the parties the case was referred to Hon. Sidney M. Barnes, an attorney of this court, as referee, to take the testimony and to find the issues of fact as well as conclusions of law covering the whole case, the same to have the effect of a verdict of a jury upon the issues of fact upon which judgment of the court below was to be entered.

At the August, 1880, term of the court below the said referee filed and submitted his report and findings, which findings as to the issues of fact are as follows:

1st. That on the 9th day of September, 1875, the parties entered into the contract already stated.

2d. That the said Barrier performed at least one-half of the work under said contract.

3d. That said Baca improperly terminated said contract, and prevented Barrier from completing it.

4th. That Baca has not been injured but benefited by the part performance of the contract by Barrier.

5th. That Barrier has not been injured by having been prevented by Baca from completing the work.

6th. That all the work which the said Barrier did on said house, except certain extra work thereon in setting large glass and recting broken glass, was done under said contract,

7th. That Barrier at the request of Baca did obtain work for him outside of said contract in painting and papering a chapel and store, and painting a buggy and bedstead.

8th. That from time to time Baca has paid Barrier on the work performed, sums amounting in the aggregate to $372.30.

9th. That the reasonable value of the work so done by

Barrier, outside of said contract, is as follows: Extra work on house, $135; painting buggy, $25; painting bedstead, $7; painting and papering chapel, $150; and painting and papering store, $47.

10th. That the reasonable value of Barrier's work on the house, under the contract, is the pro rata contract price, to wit, $425.

11th. That there is still due and unpaid upon said entire work, the sum of $416, with interest thereon from and after the 22d day of December, 1876, at six per cent. per annum.

As conclusions of law, the referee finds that under the circumstances, Barrier had a right to sue generally for his work and labor, instead of declaring on said special contract. And that he is entitled to recover of Baca in this action the sum of $416, and interest as aforesaid.

The referee's report was regularly brought to hearing before the court below, on the questions of law involved therein, at the term aforesaid, and the same was in all respects confirmed, as well as to the issues of fact as to the conclusions of law, and judgment entered accordingly in favor of said defendant in error, for the said sum of $416, and interest.

The case is here by writ of error from this judgment.

The questions of law presented for our decision upon this record are few.

All the evidence before the referee, together with the findings, are embraced in a bill of exceptions, and is before us as a part of the record.

All the questions involved will depend upon the fact as to which party was at fault for the non-performance of the contract by Barrier.

The counsel for the plaintiff in error virtually admit that if the plaintiff in error is at fault, the judgment ought to stand.

The entire argument of counsel for Baca is based on the

theory that Barrier abandoned the work under the contract, without the fault of the plaintiff in error, and therefore violated the contract on his part.

This question must be determined by the terms of the contract and the subsequent acts of the parties, as disclosed by the evidence.

After careful examination of the entire record, we are of the opinion that this theory cannot be maintained.

It is claimed on behalf of Baca, that inasmuch as under the terms of the contract Barrier was bound to complete the work without delay, and that over a year had elapsed without such completion, we ought to presume that Barrier broke the contract.

But on this point it must be observed that under the terms of the contract Baca was bound on his part to furnish all the materials necessary to perform the work, and direct the manner of executing the work. The furnishing the materials therefore was a condition precedent to the performance of any work at all. And to have such materials on hand promptly at all times during the progress of the work, was a condition precedent to performance without delay by Barrier, and it must appear affirmatively from the record that this condition precedent was fully complied with before we can presume from the mere lapse of time, that Barrier violated the contract. The record does not show this, and no such presumption arises.

The only testimony bearing on this point directly is as to what took place in November or December, 1876, when, according to the testimony of some of the witnesses, Barrier, with his workmen, went to the house on which the work under the contract was to be done, found it locked and in the possession and under the control of Baca; demanded permission to work on the house; was refused by Baca; informed that there were no materials, and that he would be notified when to resume. One of the witnesses testifies that

on this occasion Baca told Barrier that he did not want him to work any more.

If this testimony was true, and it was for the referee and not this court to determine that question, then there was a lapse of an entire year when Baca had not fully performed the condition precedent of furnishing materials.

And the question may well arise whether Baca in this respect was not so far at fault as to justify Barrier in abandoning the contract; for, under the terms of this written agreement, whereby Baca obligated himself to furnish the materials without any mention as to time, the law will imply an agreement to furnish them within a reasonable time. It would be absurd to contend as a principle of law that Baca was at liberty to consult his own convenience and keep Barrier, with his workmen, waiting indefinitely for those materials, and still hold him to the contract. At all events, before any presumption against Barrier as to delay in completing the work, it must appear that Baca is not at fault in furnishing the materials.

Some of the evidence is to the effect that Barrier actually furnished some of the materials himself. Again, if Baca on the occasion referred to, gave Barrier to understand that he need not resume work until notified so to do, he was at liberty to take Baca at his word and to act accordingly.

There is nothing in the record to indicate that from that day to this Barrier has received any such notice.

In this light of these suggestions, it is plain that there was sufficient evidence before the referee to support his finding that Baca was at fault under the contract.

And this point being settled, it follows that the measure of damages applied by the referee in determining the amount due was as favorable to the plaintiff in error as the circumstances would admit of, and that he has no ground of complaint.

This disposes of the whole case.

A number of legal questions touching the proper measure of damages under certain conditions have been raised by counsel and numerous authorities cited.

None of which do we feel called upon to decide.

Judgment affirmed.

CHARLES Z. FRICK, Plaintiff in Error, v. ANTHONY JOSEPH, Defendant in Error.

January 24, 1881.

ACCORD AND SATISFACTION. (1) *Executory agreement to pay out of proproceeds of a mine is not.*

JUDGMENT NON OBSTANTE VEREDICTO. (2) *Discretionary with court.*

1. The maker of a promissory note for $250 agreed to give the holder a portion of the proceeds of an interest in a mine, and claimed that the same was agreed to be in full payment for the note. At one time he paid the holder out of such proceeds the sum of $86, which was credited upon the note. Subsequently, he tendered the holder $50, all of the further proceeds of the mining interest, but the holder refused to accept this sum in full payment for the note and to surrender the note, and brought suit upon it.

   It appeared that neither at the time the agreement was made nor subsequently did the holder surrender the note, give a receipt, or execute a release, and that he kept the note and credited all the money paid on it. It also appeared that at the time of the agreement the maker did not demand the note, or a receipt; that two years afterwards he paid the $86 on the note, and that five years later tendered the $50.

   Held, That an agreement to settle a claim or demand in order to constitute an accord and satisfaction, and as such bar an action, must be executed. That this agreement was not executed but executory, since the money with which to pay the note was to be produced from the mine; and held, further, that the acts of the parties showed no intention to treat the agreement as an accord and satisfaction.

2. The rendition of judgment *non obstante veredicto* is discretionary with the court.

Error to the District Court of Taos county.

This suit was brought to recover the amount due on a certain promissory note made by the defendant and one William W. Henderson, deceased, to plaintiff for $250, dated January 29th, 1868, payable five months after date, with twelve per cent. per annum interest after maturity. On this note the sum of $86 was paid March 10th, 1873.

The defendant pleaded non assumpsit and three special pleas. To two of the special pleas plaintiff's demurrer was sustained, issue was joined on the plea of non assumpsit and on the second of the special pleas, and the cause was heard upon the issue so made up.

The evidence offered on the part of the plaintiff was the promissory note sued on, and the depositions of Catron and Breeden, with the letter therein referred to; and on the part of the defendant, the deposition of Gourgas Pope, and deed of conveyance accompanying the same.

A jury was waived by the parties and the cause submitted to the court for determination by stipulation. The court found for the defendant on the special plea and gave judgment for the plaintiff only for the amount admitted by the special plea to be due, to wit, the sum of $50 and interest; to which the plaintiff excepted and moved for a new trial, which motion was overruled, and the cause is brought into this court by writ of error.

Breeden & Waldo, for plaintiff in error.

The plaintiff claims that he is entitled to judgment for the full amount of the note sued on and interest, less $86 paid thereon.

The finding of the court had the same effect, and should be here treated by the same rules as the verdict of a jury: *Ryan et al. v. Carter et al.*, 93 U. S., 81.

The defense rests entirely upon the special plea, and the finding and judgment of the court was for the defendant on his said special plea.

There was no evidence to sustain this plea, or to authorize

said finding. On the contrary, the evidence shows that the agreement alleged in the plea was not performed, and that the defendant and his associate mentioned in the plea, placed it out of their power to perform the agreement. The evidence appears to refer to another and different note from that sued on, and if held to refer to the note sued on, it shows a different agreement from that set up in the plea.

The alleged agreement constituted no bar or defense to the suit. No consideration was alleged or proven. The alleged agreement was void, a mere *nudum pactum*, and the plaintiff was not bound thereby: 7 Conn., 57; 5 Mass., 301; 4 Johns., 235; 6 Yng, 418; Bouvier's Law Dictionary, title Consideration; 2 Greene, 553. As to necessity of proof of consideration, see 13 Conn., 170; 14 Johns., 238; 10 Wend., 675; 17 Johns., 301.

The alleged agreement was at most merely an accord, and was not binding upon the plaintiff, and constituted no bar of defense to the suit, because it was without consideration, was not advantageous to the plaintiff, was not certain, and was not executed or followed by performance or satisfaction: Bouvier's Law Dictionary, title Accord; 3 Wendell, 66; 14 Wendell, 116; 2 Johns., 342; 16 Johnson, 86; 2 Wash. C. C. 180; 6 Wend., 390; 5 N. H., 136; 2 Greene, 553. There was no evidence of the substitution of a new undertaking, or of any release of the makers from liability on the note, but on the contrary, the defendant's witness swears that he and the defendant assumed the payment of, and agreed to pay the note, and the defendant's plea shows that the payment made was applied upon the note, and by his pleadings the defendant admits and shows that the note has not been extinguished, but is still in force. The defendant's liability on the note was not extinguished or changed, but the evidence, if it shows anything in connection with the note sued on, shows that the proceeds of the mine, according to the alleged agreement, were to be applied to the payment of the

note: 7 Johns., 315; 2 Wendell, 431. If the special plea was sustained by the evidence, the plaintiff was entitled to judgment, *non obstante veredicto*, because the plea and the matters therein pleaded, constituted no bar or defense to the suit. The plea shows no consideration for the agreement therein alleged: it does not show that the defendant's liability was affected by the agreement. The plea at most sets up merely an accord, which was not binding, and was not executed, and it sets up no matter or thing, which, if true, would bar the plaintiff from his suit for the full amount of the promissory note, or constitute a defense thereto: 12 Ohio 204; 2 Hill, 86; 1 Root, 351; 1 Chitty, 656; Freeman on Judgts, 7; Stephen on Pleading, 97.

The whole case being before this court, and no new trial being necessary in the court below, this court should render judgment for the plaintiff for the amount of the promissory note sued on, and interest. If the court should decline to render such judgment, then the judgment in this cause should be reversed, and a new trial awarded on the pleadings and proofs as they now stand, and according to the decision and direction of this court: Compiled Laws of New Mexico, sec. 7, p. 108.

Conway & Risque, for defendant in error.

The finding and judgment of the court below was in accordance with the law and the evidence, and should be sustained.

First, as to the evidence: The testimony of Messrs. Catron and Breeden, on behalf of the plaintiff, as to the letter signed Frank Pape, is wholly irrelevant, impertinent and immaterial, said Frank Pape not being in any way connected with the case. The uncontradicted testimony of Gourgas Pope shows that plaintiff agreed with W. W. Henderson, whose name is signed to said note on the face as maker, to accept a certain interest in a mine in settlement of the note

sued on; that plaintiff received eighty-six dollars as his share from the mine.

Second. Plaintiff having thus released Henderson, one of the joint makers of the note, it follows that Joseph, the defendant, is released from all liability on the note, for "a release to one of several joint contractors is in law a release to all:" Byles on Bills, p. 375, sec. 232 and foot notes. "A release of one of several joint debtors who are severally as well as jointly liable is equally a release to all:" Byles on Bills, p. 375, sec. 232. "The holder of a joint and several note of A and B, by discharging A discharges B also:" Chitty on Bills, p. 417, sec. 418. "A release of one joint maker or indorser by the holder, whether they are accommodation parties or not, will discharge all the joint parties, for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such a case; in short, when the debt is extinguished as to one, it discharges all, whether the parties intend it or not:" Story on Promissory Notes, sec. 425, p. 549 and foot note; Parsons on Contracts, sec. 27, vol. 1.

There was a consideration for the agreement set up in the plea; the consideration was the interest in the mine. This is set out in the plea and substantiated by the evidence. Not only this, but the credit on the back of the note shows that the money was paid by Pape & Joseph. Why should Pape pay anything on the note in question if it were not in pursuance of the said agreement? And why should plaintiff receive money from Pape if not in pursuance with his agreement with Henderson, there being nothing to show any indebtedness by Pape?

The plea is a good defense. "The holder discharging or giving time to any of the parties will be a discharge to every other party thereto," etc.: Story on Promissory Notes, p. 530, sec. 413.

The testimony of Pope identifies the note spoken of by

him as the one sued on. The amount stated by him to have been realized from the mine corresponds to the amount credited on the note.

PARKS, Associate Justice: This case is clearly stated by the plaintiff in error, and is as follows:

This suit was brought in the court below to recover the amount due on a certain promissory note made by the defendant and one William W. Henderson, then deceased, to plaintiff for $250, dated January 29, 1868, payable five months after date with interest at twelve per cent. per annum after maturity, on which the sum of $86 was paid March 10, 1873. The defendant pleaded non-assumpsit and three special pleas. To two of said special pleas, the plaintiff's demurrer was sustained and issue joined on said plea of non-assumpsit and the second of said special pleas, and the cause was heard upon the issues so made up. The evidence offered on the part of the plaintiff was the Gourgas promissory note sued on, and the depositions of Catron and Breeden, with the letter therein referred to, and on the part of the defendant, the depositions of Gourgas Pope, and deed of conveyance accompanying same. A jury was waived by the parties and the cause submitted to the court for determination, by stipulation. The court found and gave judgment for the plaintiff for the amount admitted by said special plea to be due, only, to wit, the sum of $50 with interest, to which the plaintiff excepted, and moved for a new trial, which motion was overruled, and the cause brought into this court by writ of error. The second special plea is as follows:

"And for a further plea in this behalf, the said defendant says *actio non*, because he says that long after the maturity of the note sued on and set forth in said petition, to wit: on or about the 25th day of May, 1870, the said plaintff agreed with the said William W. Henderson, the maker and principal on said note, to accept in full satisfaction and payment of

said note a certain portion of the proceeds of a certain interest then owned by the said William W. Henderson in a mining claim known as the California Company's Claim, situate in Humbug Gulch, in the county of Colfax, and that the said interest was then and there turned over to the said defendant and one Gourgas Pope by the said Henderson to carry out the said agreement; that on or about the 10th day of March, 1873, the said interest produced as the proportion due the said plaintiff the sum of $86, which was paid to the said plaintiff by the said defendant and the said Pope, and credited on the back of said note by the said plaintiff; that the said interest produced as the proportion due the said plaintiff, on or about the 24th day of May, 1875, the further sum of $50, as the only further product besides the $86, and as the final and last product of said interest to be paid said plaintiff in full settlement of said promissory note, and as to the said sum of $50 of the said several sums of money in the said declaration mentioned, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of $50, parcel, etc., in this behalf, because he says that after the making of the said several supposed promises and undertakings in the said declaration mentioned as to the said sum of $50, parcel, etc., and before the filing of the petition herein, to wit: on the 13th day of April, 1875, at the county of Taos, that is to say at the county of Mora aforesaid, he, the said defendant, was ready and willing and then and there tendered and offered to pay to the said plaintiff the said sum of $50, parcel, etc., to receive which of the said defendant, he, the said plaintiff, then and there wholly refused; and the said defendant, in fact, further saith that he, the said defendant, has always from the time of the making of the said several promises and undertakings in the said declaration mentioned, as to the said sum of $50, parcel, etc., hitherto at the county of Mora aforesaid, been ready

to pay, and still is there ready to pay to the said plaintiff, the said sum of $50, parcel, etc., and he now brings the same into court here ready to be paid to the said plaintiff, if he will accept the same; and this he, the said defendant, is ready to verify. Wherefore, he prays judgment if the said plaintiff ought to have or maintain his aforesaid action aginst him, to recover any more or greater damages than the said sum of $50, parcel, etc., in this behalf, etc.

"CONWAY & RISQUE,
"Attorneys for Defendant."

The demurrer to this plea was overruled, but it is a little remarkable that the learned judge who overruled it, at the same time gave the defendant leave to amend it, and that defendant did not amend.

If this plea sets up a defense to the note as held by the court below, it is as an accord and satisfaction. The general doctrine that an agreement to settle a claim or demand in order to constitute a bar to an action, must be executed, is so well settled that it is stated on high authority that a "decision to the contrary would overthrow all the books."

The law applicable to this case is believed to be well stated by the supreme court of Vermont in *Babcock and others v. Hawkins*, 23 Vermont, 563. The court says: "The accord is sufficiently executed when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose; this may be done by surrender of the former securities by release or receipt in full or in any other mode. All that is requisite is that the debtor should have executed the contract to that point whence it was to operate as satisfaction of the pre-existing liability in the present tense; this is shown in the present case by executing a receipt in full the same as if the old contract had been upon note or bill and the papers had been surrendered."

In the case at bar, the intention of the parties is shown upon the part of the plaintiff, by the facts, that he did not surrender the note, did not give a receipt, did not execute a release, that he kept the note for years and credited all the money paid on the note; and upon the part of the defendant, it is shown by the facts that at the time of the agreement, he did not demand the note or a receipt, that two years after he paid $86 on that note, and five years after, as stated in his plea, he tendered $50 as the final and last product of said interest to be paid said plaintiff in full settlement of said note. We cannot understand how defendant could pay plaintiff $50 in full satisfaction of the note in 1875, if the note had been extinguished by the agreement in 1870, and a new contract substituted for it. Against these convincing proofs that it was not the intention of the parties to substitute the new contract for the old, is the testimony of Pope to the effect that he understood the agreement and deed described in his deposition to be intended as a release of the note; but his testimony was taken six years after the transaction, and the deed furnishes no evidence of any such intention. In the view we take of this case, it is not necessary to examine particularly the weight of Pope's testimony, and in any view of the case, his recollection of the intention of the parties after so long a time is very slight testimony compared with the conclusive acts of the parties themselves. The agreement set forth in the plea does not show what kind of mine it was, whether it was of any value or what portion of its proceeds plaintiff in error was to receive; so far as the agreement shows, the mine may have been utterly worthless and the agreement void for want of consideration.

It is evident also from the plea that this was not one of that kind of agreements which are executed at the time they are made; plaintiff agreed to accept in full satisfaction and payment of the note, a certain portion of the proceeds of a certain interest in a mining claim. No portion of the pro-

ceeds of the mine could be accepted till it was produced from the mine. Eighty-six dollars was produced, tendered and credited on the note two years after, and $50 produced, tendered and not accepted five years after according to the plea.

The plea is inconsistent with itself; the plea of accord and satisfaction denies any and all indebtedness; the plea of tender admits that something is due.

The judgment on this plea should have been against the plaintiff for costs or in his favor for note and interest, deducting only the $86 paid, for there is no proof of the tender of the $50, and, in fact, there is no evidence of what became of the mine or of any interest in it, after the $86 was paid. For aught that appears in the testimony, the portion of the proceeds of the mine to which plaintiff was entitled under the agreement, may have amounted to enough to pay the note. The plaintiff in error claims that the court has the right in this case to render judgment *non obstante veredicto*, as upon confession for the balance due on the note, but the exercise of that right is discretionary, and in this case we think it proper to give the defendant the benefit of a new trial.

For this purpose the judgment is reversed and remanded, with leave to the defendant to amend his plea.

All concur.

THE TERRITORY OF NEW MEXICO, Appellee, v. JOHN J. WEBB, Appellant.

January 28, 1881.

MURDER. (1) *Verdict, when jury need not fix punishment.*
SAME. (2) *Finding of jury not set aside, when.*
NEW TRIAL. (3) *Discretionary with court.*
PARDON. (4) *Power of governor to grant.*
MURDER. (5) *Trial—Omission to ask prisoner if he has anything to say, before sentencing him.*
PRACTICE. (6) *Presumption of regularity of proceedings.*

1. A jury finding a verdict of guilty of murder in the first degree, need not assess the punishment.
2. Where the testimony is conflicting, but the verdict of the jury is sustained by positive evidence, it will not be set aside as being contrary to the evidence. PARKS, J., dissenting.
3. A motion for a new trial is addressed to the discretion of the court.
4. The governor of the territory has discretionary power to grant a full pardon or mitigate the punishment, and in determining the question of executive clemency the governor may properly consider matters that are beyond the province of the supreme court.
5. It is not error for the court to omit to ask, before pronouncing final judgment, whether the prisoner has anything to say why sentence should not be pronounced against him, especially where the omission does not appear affirmatively from the record, but is only presumed from the fact that the record is silent as to such question. PARKS, J., dissenting.
6. A court of general jurisdiction having obtained jurisdiction, all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary is shown.

Appeal from the District Court of San Miguel county.

The facts appear in the opinion of the court.

S. M. Barnes, for appellant.

The finding and verdict of the jury and the judgment and sentence of the court thereupon are contrary to law and void. The jury found the defendant guilty of murder in the first degree, but failed to assess the punishment, as required by law. The court assessed the punishment without authority of law. See Laws of New Mexico, by L. Bradford Prince; Practice in Criminal Cases; Kearney Code, sec. 22, p. 289; Wharton's Criminal Pleading and Practice, 8th edition, sec. 752, chap. 15: "Where a statute requires in the verdict a designation of a degree, or the specific assessment of a punishment, a general verdict without such designation or assessment will be a nullity," and the numerous cases cited by Wharton, as above, sustain these positions.

The verdict of the jury being contrary to the law and evidence, will be set aside: Wharton's Crim. Plead. and Practice, sec. 813, chap. 18, p. 551, and cases cited therein.

The appellant should have been asked before the sentence was pronounced against him, if he had anything to say why sentence should not be pronounced against him, and it is essential that it should appear on record that this was done. The transcript of the record does not show that he was so asked. See, in support of this view, Wharton's Crim. Plead. and Practice, sec. 906, chap. 19, p. 604, and the numerous adjudged cases there cited. This is the doctrine and practice at common law in all capital felonies.

A new trial should be granted, where the court below, as it did in this case, allowed the prosecuting counsel, in his closing speech, to charge the defendant with other offenses besides that on trial. The court should have not permitted this, even though no objection was made by appellant's counsel. See Wharton's Crim. Pleading and Practice, sec. 853, chap. 18, p. 584, and adjudged cases therein cited.

The jury in this case was controlled by prejudice and popular excitement against appellant at and before the trial, and the facts in this case, as developed in the transcript, show that the appellant did not obtain a fair and impartial trial, and should not, from the law and evidence, have been found guilty and sentenced to be hung. The verdict of the jury was the result of misconduct of the sheriff at the close of the argument, in announcing improperly and untruthfully, in the presence and hearing of the court and jury, that defendant's friends were present to rescue him. The jury retired to consult without this announcement being denied or explained. The jury, by the conduct of the sheriff, as above stated, and the appeals of counsel to popular prejudice against defendant, were induced to render an unjust verdict against him. These facts entitle the defendant to a new trial: Wharton's Crim. Plead. and Practice, sec. 561 and cases therein cited; secs. 849, 853, 889, and the 8th Cal. Report, 441, and adjudged cases cited.

The appellant was a peace officer of San Miguel county,

N. M., at and before the alleged killing. He was justified in attempting to disarm the deceased, and in killing him in self-defense. See Laws of N. M., acts 1871, 1872, p. 59, and acts 1873 and 1874, p. 27.

It was made the positive duty of appellant, as a police officer under said laws, to arrest and disarm deceased, and if he had failed in this he would have been subject to indictment and punishment under said laws above referred to. See also Prince's General Laws of New Mexico, p. 315. The appellant, under said laws of New Mexico, was authorized and empowered as a private citizen to arrest and disarm the deceased. See Prince's Gen. Laws N. M., p. 314, sec. 9.

The proof in this case fully shows that deceased was in a public drinking saloon at a late hour in the night, acting in a boisterous, improper manner, armed with a pistol, a deadly weapon, and threatening to kill appellant, and when appellant attempted to disarm him, the deceased made an effort to shoot the appellant and refused to be disarmed. The proof shows clearly that the appellant shot deceased in his own necessary self-defense. A new trial should have been granted him: Wharton on Homicide, secs. 501 to 507, inclusive, and authorities cited; Wharton's Criminal Law, secs. 1021 and 1026. The charge of the court below was contrary to law, and, in fact, was a comment upon the evidence.

Breeden & Waldo, for appellee.

First. 1. The verdict of the jury, and the judgment and sentence of the court thereon were correct, and sufficient in form. The verdict was murder in the first degree, and the punishment is fixed by law: Comp. L. of New Mexico, sec. 2, p. 318. 2. The statute requiring the jury to assess the punishment, could not apply to this case, in which the jury had no discretion as to the punishment to be imposed, and no power to vary or change the punishment prescribed by law. 3. The statute provides that the jury shall assess the punishment. The language clearly implies a power and discretion

in the jury in determining the amount or character of punishment to be imposed; a reference to the judgment of the jury as to the punishment to be inflicted. To assess means to ascertain, to determine, to fix: Bouvier's Law Dictionary, Title, "To assess," "Assessment." 4. There is no ambiguity or uncertainty in the language used, and the words of the statute are to be taken and understood in their general, usual and well-known meaning and acceptation: *Beardstown v. Virginia*, 76 Ill., 34; *Dunn v. Reid*, 10 Peters (U. S.), 524. 5. The jury could not vary the punishment prescribed by the statute. It was not their province to determine or ascertain the punishment. The statute must have a reasonable application, and the verdict in this case was all that was necessary or required by law: 1 Bish. Proced., 834; 2 Bish. Proced., 625; Littell's Select Cases (Ky.), 419.

Second. 1. The verdict was fully warranted by the evidence. The case was fairly submitted to, and determined by the jury. The most that can be said for the appellant is that there was a conflict of evidence; this it was for the jury to pass upon, taking into consideration all the evidence before it, the credibility of witnesses, their manner and appearance on the stand, etc.; this the jury did, and it is not for the court to review their finding. 2. The evidence for the prosecution being amply sufficient to warrant a conviction, this court will not disturb the verdict merely because there was conflicting and contradictory evidence, even if the court itself might upon the whole case disagree with the finding of the jury: Hilliard on New Trials, sec. 8, p. 46; *Id.*, sec. 11, p. 50; secs. 1 and 2, p. 91, sec. 3, p. 92; p. 6; *Winfield v. The State*, 3 Greene, *Id.*, 339; *The State v. Elliott*, 15 *Id.*, 52; 53 Ill., 509; *People v. Ah Loy*, 10 Cal., 301; 4 Ga., 335; 1 Scam., 130; 15 Ia., 72.

Third. 1. The omission to ask the defendant, if he had anything to say why sentence should not be pronounced against him, was unimportant, inasmuch as the purpose of

such question was to enable him to offer anything he might present in mitigation of punishment, which in this case could have availed nothing, as the court had no power to mitigate or reduce the punishment, and the reason for such practice was removed by the statute admitting the defendant to testify, and the practice of hearing affidavits in support of the motion for a new trial. In any event, all that could result from this objection is, that the cause should be remanded for re-sentence upon the verdict already found.

Fourth. 1. The defendant cannot take advantage of the alleged fact that improper remarks or unfair statements or arguments were made to jury by counsel for the prosecution, because he made no objection and gave the court and counsel no opportunity for the correction thereof at the time; and the objection was fully considered on the motion for new trial by the judge before whom the cause was tried, and who saw and heard all that occurred: 57 Ga., 42; Wharton's Crim. Pleading, 560–577. 2. And, besides, the objection only appears in the record in connection with the motion for a new trial, which motion and the matters connected therewith, were determined by the court below, and its ruling thereon is not subject to review in this court: *Pate v. The People*, 8 Ill., 644; *Holliday v. The People*, 9 Ill., 111; 37 Pa. St., 168; 51 Pa. St., 332. 3. The common law was the rule of practice: Comp. L., sec. 18, p. 194. The overruling of a motion for new trial could not be assigned for error at common law.

Fifth. 1. There is nothing to show that the jury was controlled or influenced by popular prejudice, feeling or excitement, but their verdict was according to the evidence, or fully warranted by it. That being the case, this court should not disturb the verdict. 2. That question, as well as the alleged action of the sheriff, was presented, considered and determined upon the motion for a new trial, before the judge who saw, heard, and was familiar with all that trans-

pired at the trial. Both were questions of fact, presented on the motion for new trial, and determined by the court. 3. Besides, they are only presented in connection with the motion for a new trial, and not properly brought into this court for, or subject to review.

Sixth. 1. The statements in the appellant's brief, as to his being a police officer, and the right or wrong of his action, are all matters of evidence fairly submitted and determined by the jury, and in this case not subject to review by this court.

Seventh. 1. The instructions to the jury by the court below were correct and unexceptionable. The appellant does not except to any specific portion thereof, but makes a sweeping exception to the whole charge. 2. Upon such an exception this court can not properly review the charge. A general exception to the whole charge is not admissible, and can avail nothing.

Opinion of the Court: The facts are as follows:

At the March, 1880, term of the district court of the first judicial district sitting in and for the county of San Miguel, John J. Webb, the defendant below and appellant here, was indicted by the grand jury for the murder in the first degree of Michael F. Killiher. To this indictment, the defendant appeared and pleaded not guilty.

The case was brought to trial at this same term, and upon the conclusion of which the jury found the following verdict:

"We, the jury, upon our oaths do say that we find the defendant guilty of murder in the first degree, in manner and form as charged in the indictment."

Thereupon, at the same term, the defendant interposed a motion for a new trial, which was regularly brought to a hearing and overruled by the court. The court then pronounced sentence and judgment against the defendant, as follows:

"It is therefore considered and adjudged by the court that the said defendant, John J. Webb, be taken hence to, and closely confined in the common jail of the county of San Miguel, until the ninth day of April, in the year one thousand eight hundred and eighty; that on said day, between sunrise and sunset, he be taken from said jail to some spot in said county, to be selected by said sheriff, and then and there be by the said sheriff hanged by the neck until he be dead."

From this sentence and judgment the case is here by appeal.

The record of the proceedings does not disclose the fact that any exceptions were taken in behalf of the defendant during the trial, though at every step during the progress of the proceedings subsequent to the filing of the indictment, the defendant was aided by counsel.

All the evidence adduced on the trial was settled by bill of exceptions and is before us as part of the record.

Several grounds of error are assigned by the appellant's counsel, on which they claim the judgment ought to be reversed. These grounds we have reviewed in the order in which they occur. The first assignment of error is, that the verdict and judgment is contrary to law and void, because the jury found the defendant guilty of murder in the first degree but failed to assess the punishment.

This question we have already passed upon at the present term, in the cases of the *Territory v. Young*, *ante*, page 93, and the *Territory v. Romine*, *ante*, page 114, in which we decided that this was not error under our statute. The opinions of the court delivered in those cases, so far as this question is concerned, we adopt and affirm in this.

The second assignment of error is that the verdict of the jury was contrary to the law and evidence.

As to the legality of the verdict, we have already decided. It cannot be said that the verdict was contrary to the evidence because there was positive evidence, which if true, fully justified the verdict. The testimony of the witnesses was

conflicting, and the most that could be claimed on behalf of the appellant is that the verdict was contrary to the preponderance of the evidence.

The prisoner had the benefit of a motion for a new trial. This was addressed to the sound discretion of the court below. The chief justice of this court, who presided as judge in that court, heard all the testimony as it was uttered by the witnesses. He, as well as the jury, had the opportunity to notice the manner, and to some extent the character, of each witness on the stand. They heard the inflections of his voice, saw the varying expressions of his features, observed the language of his gestures, took in the general style and make up of each witness, and observed, perhaps, a number of other like things and incidents which though comparatively insignificant in themselves, yet, sometimes cast a flood of light upon the question of credibility. All this is an utter blank to the other members of this court, and renders them much less competent to weigh this conflicting evidence should they attempt to do so.

There is nothing in the record that casts the slightest suspicion on the integrity of the jury; and the fact that they found the defendant guilty of murder in the first degree, and that the court below refused a new trial, leaves us to infer that in the minds of judge and jury trying the cause there was no reasonable doubt of the prisoner's guilt.

We might, were it necessary or proper, in addition to positive evidence, review and critically analyze the circumstances attending the killing of the deceased, and point out, when brought to the test of human experience, how several incidents then occurring would naturally suggest bad faith on the part of the prisoner, and indicate, with some degree of force, a premeditated design to kill before he approached or uttered a word to the deceased.

To sustain the proposition that a conviction will be set aside when contrary to the weight of evidence, the appel-

lant's counsel have cited as authority, Wharton's Crim. Pl. and Pr., 8th ed., 551, sec. 813, where that author, under the head of New Trials, which are always within the sound discretion of the court, lays down this principle and applies it more especially to that class of cases where any of the material allegations of the indictment remain unproved, but in the conclusion of that section the same author says: "If, however, there be conflicting evidence and the question be one of doubt, it seems the verdict will generally be permitted to stand; and this though the court may differ from the jury as to the preponderance of the evidence." In support of this latter proposition, that author cites above thirty adjudications.

If this be the rule on a motion for a new trial which is addressed to the discretion of the court trying the cause where the evidence is conflicting, with how much more strictness ought the rule to be adhered to by an appellate tribunal, to which like this court an appeal from an order overruling a motion for a new trial does not lie. No such appeal is ever allowable except under express provisions of statutes.

Where the evidence is contradictory and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the cause in their discretion, the decision denying the same is not examinable by an appellate court: *State v. Cruise*, 16, Mo. 391; *Herbon v. State*, 7 Tex., 69.

If there had been no part of the evidence which if true would sustain the verdict, then an error of law would have been apparent from the record upon which we could reverse the judgment.

Under the rules governing the judicial administration of the criminal laws of this territory, this court can only review and determine errors of law appearing upon the face of the record: *Cathcart v. Commonwealth*, 37 Penn., 108. It is

quite beyond the scope of its duties to determine the credibility of witnesses testifying in a lower court, the weight of their testimony aside from the law of evidence, or the reconciliation of conflicting testimony.

It would, indeed, be establishing a precedent vicious in its nature and bad on principle if this court, sitting as an appellate tribunal to determine errors in law, should thus invade the province of the jury and attempt to determine these questions of fact from conflicting testimony.

If the affirmance of the judgment below should necessarily follow the overruling of this objection to the verdict now under consideration, such affirmance would not necessarily determine the fate of the prisoner.

The law has humanely reposed in the judgment and conscience of the governor the discretionary power to grant a full pardon or mitigate the punishment.

In determining the question of executive clemency, the governor may properly consider matters that are beyond the province of this court; and we think the ends of justice will be much better subserved by leaving the responsibility here, than that we should deviate from the course which the policy of the law has marked out for us to pursue.

We hold, therefore, that the objection that the verdict is contrary to the evidence, ought not to be sustained in this case.

Cases, however, might arise wherein, though there might be some evidence to sustain every material allegation of the indictment, yet at the same time the evidence might be so very slight, as to justify an appellate court in reversing a judgment rendered thereon.

The third assignment of error is that before final judgment was pronounced, the prisoner was not asked if he had anything to say why sentence should not be pronounced against him. As authority in support of this proposition we are referred to said ed. of Wharton's Crime Pl. and Pr. 604, sec. 906, where the rule at common law is shown to be that

in capital felonies this was not only required, but that it should appear of record. But that author in the same section observes that "in several of the states the rule is that the absence of such an averment will require the remittal by a court of error of the record to the trial court for a new sentence." In other states the failure of the record in this respect has been held not to be ground for a refusal, though it is agreed on all sides that "the form is proper to be used."

"But this address is not to be viewed as an invitation to the defendant to bring forward additional motions in arrest of judgment, or for a new trial. Those motions have, according to the usual practice, been already made and disposed of.

"The object of the address is to give the defendant the opportunity to personally lay before the court statements which, by the strict rules of law, could not have been admitted when urged by his counsel in the due course of legal procedure; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment."

It seems by this that the rule has not been uniformly adopted as common law among the various states of the Union. From the authorities cited, the courts of about as many states, holding one way as the other, and that the only benefit that can accrue to the defendant under any circumstances is to extenuate his guilt, or to mitigate his punishment.

This rule was adopted and subsequently became a part of the criminal code when the accused could not be a witness, to tell the court and jury anything in mitigation of punishment, or in extenuation of his guilt, and at a time also when such extenuation and the grade of punishment rested largely in the power of the court.

In cases of capital homicide under our statute, if the accused is found guilty of murder in the first degree, the

only opportunity he would have to make any impression on the court in extenuation of his guilt, and therefore in mitigation of the punishment, would be on a motion for a new trial. But, if after this question has been disposed of, and the prisoner's guilt has been fixed and determined at murder in the first degree, then there can be no extenuation of guilt, or mitigation of the punishment by the court. While in the lower grades of homicide where the jury assesses the punishment, and determines the grade of the offense, the power of the court over such extenuation and mitigation is gone and the prisoner's address to the court utterly useless.

But the fact that under the law the prisoner was a competent witness, and on the trial in this case actually gave his testimony in his own behalf, would seem to supersede any occasion for his personal address to the court in extenuation of his guilt or in mitigation of his punishment.

Under our peculiar statute as to homicide and the law of Congress applicable to the territories, rendering the defendant in criminal prosecutions a competent witness in his own behalf, we may as well concur with the courts of those states that hold that the non-observance of this rule as implied by the silence of the record is not ground for reversal.

On principle it would seem that the observance of the rule ought to be presumed unless the record, by some statement, shows to the contrary. Upon the ground that in a court of general jurisdiction, after acquiring jurisdiction, all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary be shown.

In the case of *Cathcart v. The Commonwealth*, *supra*, defendant was under indictment for murder in the first degree. The record did not show affirmatively that the prisoner had any counsel during the trial. This was one of the assignments of error. On this point the supreme court of Pennsylvania held, that they could not presume that the prisoner was denied counsel because the record did not show

that he had counsel, notwithstanding the constitution of that state secured that right to every one indicted for crime, and that it was not ground for reversal.

It would be immeasurably more important to a prisoner on trial for a capital felony to be aided by counsel than that, after he had testified in his own behalf and had been heard on a motion for a new trial, he should be asked if he had anything further to say why sentence should not be pronounced.

If the silence of the record in regard to counsel is not ground for reversal, it would seem on principle that such silence in regard to the matter now being considered should not be ground for reversal. Notwithstanding this ruling, we would not advise that a custom so honored by time and high authority should be disregarded under any circumstances.

The fourth assignment of error is that the court below allowed the prosecuting counsel, in his address to the jury, to charge the defendant with other offenses than the one on trial.

As to this objection, it is sufficient to say that upon examination of the record we do not find the fact to be as assumed by this assignment of error.

There are several other assignments of error based upon *ex parte* affidavits used on the motion for a new trial, and on certain facts assumed to be true, but which relate to issues of fact for the jury. These all relate to matters which are not properly before us for review.

We discover no error in the record.

The judgment is affirmed.

PARKS, J., dissenting: I dissent from the opinion of the court for the following reasons:

First. The rule of the common law that a verdict against the weight of evidence should be set aside in criminal cases, is a just one and ought to be followed by the courts.

In case of crimes punishable with death, if the trial court

disregards this rule, its action ought not to be held binding on this court.

In this case the killing was admitted, and the only question was as to the degree of the defendant's guilt. Upon this question the verdict of the jury was, as I think, against the weight of the evidence.

Second. The practice of asking the defendant, after conviction, if he has anything to say why sentence should not be pronounced against him, is founded in justice, reason and humanity. It is sanctioned by long and almost immemorial usage, and should be considered too well settled to be shaken by these cases in which it has been held unnecessary. It should be held both in the theory and practice, a sacred right for a man convicted of murder and about to be sentenced to an infamous death, to be heard before he is sentenced. In this case this right was not recognized.

Third. With this view of the law and in view of the state of things at present existing in this territory, I am not willing that this man's fate should depend upon the very uncertain action of any governor, no matter how high may be his qualifications and character.

For these reasons I am unable to concur in the opinion of the majority of the court.

THE TERRITORY OF NEW MEXICO v. JOSEPH STOKES AND WILLIAM MULLEN.

January 28, 1881.

BURGLARY. (1) *Prosecution for, under general railroad law.*

1. The general railroad act, ch. 1, tit. 8, section 8, provides that "any person who shall in the day or night time enter by force, or otherwise, any car of any corporation, formed under this act, with intent to steal any valuable thing then and there being, shall be deemed

guilty of burglary, and upon conviction thereof shall be punished as in other cases of burglary." This provision applied only to corporations created under this general act, but subsequently the legislature passed an act conferring upon all corporations organized before the passage of the general railroad law, "all the powers, *privileges* and exemptions conferred upon corporations organized" under that act. Upon the theory that the "privileges" thus conferred would give to corporations formed before the passage of the general railway law, the "privilege" of being protected from burglary in the means provided by the section of the general law quoted above, the defendants were indicted under section 8, ch. 1, tit. 8 of the general railroad act for burglarizing the cars of the N. M. & S. P. R. R. Co., a company organized before the general railroad statute was passed.

Held, That the word "privilege," as used in the second act, does not confer the right to prosecute any one for burglary under section 8 of the general railroad act, ch. 1, tit. 8, where the burglary was of cars owned by a company organized before the general act was passed; but that the defendants could be prosecuted under the criminal code of New Mexico.

Appeal from the District Court for Santa Fe county. PRINCE, J.

The defendants in this case were indicted by the grand jury of San Miguel county for burglary under sec. 8, chap. 1, title 8 of an act, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved February 2d, 1878 (Laws of 1878, p. 43).

Change of venue was taken to Santa Fe county, and the cause tried at the July term, 1880, of the district court at Santa Fe county.

After the evidence was in, defendants, by their counsel, moved the court to instruct the jury to find a verdict of "not guilty," for the reason that the territory had not shown that the defendants entered by force, or otherwise, any car of any corporation formed under the act of the legislature of New Mexico, approved February 2d, 1878, which motion the court overruled, and defendants duly excepted.

There was a verdict of guilty, and motions in arrest of judgment and for new trial were filed in due time.

The bill of exceptions shows that no evidence whatever was introduced on the part of the prosecution to prove that the New Mexico and Southern Pacific Railroad Company (whose car defendants were charged with entering) was organized under the act of February 2d, 1878, above mentioned, and that the court admitted in evidence, against the objection of defendants, a copy of certain articles of incorporation, set forth in the record, pp. 19 to 28.

P. F. Conway and *C. H. Gildersleeve* for appellants.

I.—Appellants claim that the court below erred in admitting in evidence the articles of incorporation above mentioned, and in refusing to instruct the jury to acquit.

An examination of the record (pp. 19 to 28), will show that the articles of incorporation introduced by the prosecution are not drawn in accordance with the provisions of the act entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved February 2d, 1878 (Laws of 1878, p. 17).

Sub-head 10, of sec. 2, title 1, chap. 1 of said act (p. 18, Laws of 1878), provides that articles of incorporation must set forth "that at least ten per cent. of its capital stock subscribed has been paid to the treasurer of the intended corporation, giving his name and residence." Section 4, same title and chapter of said act (p. 18, Laws of 1878), provides that, before filing articles of incorporation, the incorporators must have actually subscribed to the capital stock of the corporation at least one thousand dollars for each mile of its road and branches, and at least ten per cent. thereof must have been paid for the benefit of the corporation to a treasurer appointed by subscribers to articles of incorporation.

Section 5, same chapter and title of said act (p. 19, Laws of 1878), is as follows: "There must be securely attached

to said articles of incorporation an affidavit of the treasurer named therein, that the requisite amount of capital stock of the intended corporation has been actually subscribed, and that ten per cent. thereof has been actually paid to him for the benefit of said corporation, stating the amount of stock subscribed, and the amount actually paid in."

The articles of incorporation admitted by the court below do not comply in any manner with the provisions of the statute last above quoted, and consequently the New Mexico and Southern Pacific Railroad Company is not a corporation formed under the provisions of the act of Feb. 2d, 1878. Section 8, title 8, chap. 1 of said act (p. 43, Laws of 1878), reads as follows: "Any person who shall in the day or night time, enter by force or otherwise, any car of any corporation, formed under this act, with intent to steal any valuable thing there and then being, shall be deemed guilty of burglary, and upon conviction thereof, shall be punished as in other cases of burglary."

There can be no doubt that the indictment in this case was brought under this section, and in view of the failure of the incorporators of the New Mexico and Southern Pacific Railroad Company to comply with the provisions of this law in framing their articles of incorporation, it is plain that the objection of defendants to the introduction of said articles of incorporation was well taken, and that the court should have given the instruction to the jury to find the defendants not guilty as prayed for in their motion.

II. The action of the court below in admitting said articles of incorporation, and refusing to instruct the jury to acquit, was based upon section 1 of an act entitled "An act in reference to certain incorporated companies in the territory of New Mexico," approved Feb. 12th, 1878 (Laws of 1878, p. 52). We claim that this section cannot be so construed.

It provides that all powers, privileges and exemptions con-

ferred on corporations organized under the act of Feb. 2d, 1878, are also conferred on corporations organized for railroad purposes under the general incorporation law of Dec. 27th, 1867 and Jan. 30th, 1868. Section 8 of the act of Feb. 2d, 1878, under which the indictment is brought, confers no power, privilege or exemption upon a railroad company. It is an act of the sovereign declaring certain acts to be a crime of a nature different from what it was before, or rather making that a crime which was not prior to the passage of the law. It is in derogation of the common law, and should be strictly construed.

The words, powers, privileges and exemptions, used in the act approved Feb. 12th, 1878, Laws of 1878, p. 52, have no reference to sec. 8, title 8, chap. 1, act of Feb. 2d, 1878 (Laws of 1878, p. 43). The first thing requisite in the construction of an act of the legislature is to discover what is the intention of the legislature.

Let us see what was meant and intended by the legislature in the use by it of these words, powers, privileges and exemptions.

Fortunately for the purposes of this inquiry, the legislature has not left its meaning dark or obscure; the powers, privileges and exemptions meant and intended by the act of Feb. 12th, 1878, are set forth at large and in the utmost minutiæ of detail, in the act of Feb. 2d, 1878.

First. As to powers, see title 6, chap. 1 of act approved Feb. 2d, 1878 (pp. 31 to 39, Laws of 1878); there they are defined to be the power of succession by its corporate name, to sue, and be sued in court, to make and use a common seal, and alter the same at pleasure, to acquire, purchase, hold and convey real estate, and so on to the end of the chapter.

Second. As to privileges and exemptions, see title 9, chap. 1, secs. 1 to 10 inclusive, of act approved Feb. 2d, 1878 (Laws 1878, p. 49).

The powers, privileges and exemptions meant are all

referred to and defined in the sections above quoted, but nowhere among them do we find any reference to the section of the same act defining the offense of burglary; but this section is found under its proper heading: "Regulation and Management." The conclusion seems most reasonable, that the legislature referred to the powers, privileges and exemptions specifically granted, and not to the section defining a criminal offense.

"The section of the statute under which the indictment is brought is in derogation of the common law, and to be strictly construed:" *Melody v. Reab*, 4 Mass., 471; *Gibson v. Jenney*, 15 Mass., 205; *Duelly v. Duelly*, 46 Me., 377.

"Penal statutes are to be taken strictly and literally, and cannot be extended by construction:" *U. S. v. Starr*, 1 Hempst., 469; *Andrew v. U. S.*, 2 Story, 202; *Ranson v. Starr*, 19 Conn., 292.

"When the liberty of the citizen is involved statutes should be strictly construed:" *Case of Pierce*, 16 Me., 255; *Elam v. Ransom*, 21 Ga., 139; *Ramsey v. Foy*, 10 Ind., 493.

"An offense cannot be created or inferred by vague implications. Penal laws must be construed strictly, but not so strictly as to defeat the obvious intention of the lawmaker; but so strictly that the case in hand must be brought within the definitions of the law that is within its reach, taken in their ordinary significance:" *Atlanta v. White*, 33 Ga., 229.

We submit that, in view of the foregoing, the law of Feb. 12th, 1878, does not bring railroad companies not organized under the law of February 2d, 1878, within the operation of the section defining burglary here sought to be invoked, and that the court below erred in the admission of the testimony complained of and in overruling the motions for new trial, and in arrest of judgment.

The act of February 12th, 1878, attempts only to confer certain "powers, privileges and exemptions" on railroad cor-

porations, and does not in any manner pretend or assume to confer on the territory the right of prosecution for any new character of statutory crime.

The act of February 12th, 1878, is wholly and totally null and void; it attempts to confer on railroad corporations organized previous to February 2d, 1878 (to wit, under the law of December 27th, 1867, and the act of January 30th, 1868, amendatory thereto), all the "powers, privileges and exemptions" conferred on railroad corporations, and for the management of the affairs hereof, by the act approved Feb. 2d, 1878, and hence is in violation of the act of congress, June 10th, 1872, Revised Statutes U. S., sec. 1889, p. 333, which says that "legislative assemblies of the several territories shall not grant private charters or especial privileges," etc.

This act of February 12th, 1878, attempts to grant an especial privilege, and to grant the same especially to railroad corporations, organized for railroad purposes.

It attempts to grant, especially to certain railroad corporations organized previous to a certain date (February 2d, 1878), "powers, privileges and exemptions" that other railroad companies, organized under the same act, but subsequent to that date cannot enjoy.

It not only attempts to grant that especial privilege, but to grant the same especially to railroad corporations organized previous to February 2d, 1878.

Which is an exercise of legislative power clearly not vested in the legislature of the territory of New Mexico; said act of February 12, 1878, is hence null and void.

Catron & Thornton, for appellee.

There is no error on the record in this case. The indictment is for burglary in entering a car of the New Mexico & Southern Pacific Railroad Company, with intention to steal its property, etc.

The defendants pleaded not guilty to the indictment, but

made no objections to its form or sufficiency. They were found guilty, and sentenced.

The bill of exceptions contains a statement of the judge as to evidence on a certain point, then sets out certificate of incorporation in full, which was given in evidence as stated, but does not pretend to give all the evidence.

The statement in the "bill of exceptions," that there was no evidence introduced to show that the N. M. & S. P. R. R. Co., was organized under the act of Feb. 2, 1880, is an attempt of the judge to forestall this court, and decide a matter pertinent to the issue.

This court cannot examine into the fact whether the evidence sustained the indictment or not, as all the evidence is not inserted in the bill of exceptions, without which it cannot pass on a question of fact: U. S. Digest, vol. 6, sec. 308, p. 14; *Id.*, sec. 346, p. 19; U. S. Digest, vol. 6, sec. 437, p. 20; *Id.*, sec. 450; 10 Ill., p.

The bill of exceptions does not show the reason for the objections made to the introduction of testimony. See 37 Missouri, p. 358.

If the case comes under the law referred to, still it is good, as the exemption from robbery, and the privilege to keep and use cars free from robbers and armed bands, and the right to immunity from them will extend these provisions to the old companies.

A privilege is a right to an immunity or protection in something, or some right.

Criminal law is nothing more than a protection of persons in their rights, privileges and immunities.

It is the privilege of every citizen to insist on his rights and protection, and to defend himself, either personally, or by means of the law, punishing persons who injure him in the enjoyment of his rights.

There being no error apparent on the record, the court must sustain the sentence.

PARKS, Associate Justice: The defendants in this case were indicted at the last October term of the San Miguel district court for committing burglary in a baggage and express car of The New Mexico and Southern Pacific Railroad Company, on the fourteenth day of said month of October last. The case was taken to Santa Fe county by change of venue; was tried there, defendants found guilty and sentenced, and the case brought to this court by appeal.

There is no general law of this territory making the acts charged against the defendants burglary, or by which they could be punished under this indictment. The ground taken by the prosecution in this case is, substantially, that this indictment was founded upon and must and can be sustained by the eighth section of title eighth of the railroad laws passed February 2d, A. D. 1878, taken in connection with section first of the act upon the same subject of February 12, A. D. 1878.

Section eighth aforesaid defines the crime of burglary in any case of any corporation formed under that act, and fixes the punishment, and section one of the said subsequent act confers all the powers, privileges and exemptions of the said first act upon all the corporations incorporated under the laws of this territory for the purpose of constructing railroads, etc.

It was stated in the beginning of the argument, and it is evident from the record and the argument of counsel, that this case depends upon the meaning of the word "privileges" in the act of February 12, 1878.

According to Jacob's Law Dictionary, the original legal meaning of the word "privilege" is exemption of a private man or a particular corporation from the rigor of the common law. Another definition given by him is, exemption from some duty, burden or attendance. Bouvier says a privilege is a particular law which grants special prerogatives to some persons contrary to common right. Webster defines it

to be immunity, franchise, right, claim, liberty, special exemption from evil or burden, special enjoyment of good, peculiar benefit or advantage.

Without multiplying authorities or definitions, it is sufficient to say that in no usual or proper or legal meaning of the word privileges can it be used as claimed in this case.

The right of the people of New Mexico to prosecute and punish wrong-doers under this, or any other law, is not a privilege of any particular person or persons, corporation or corporations. It is something more than that. It is part of the criminal law of the country, enacted for the public good; for the punishment of crime, and in which the whole community are interested. We are of the opinion that there is no law of this territory under which this indictment, verdict and judgment can be sustained.

But it does not follow upon this opinion that acts such as are alleged to have been proved upon the trial of this case can be committed with impunity.

The criminal code of New Mexico is believed to be sufficiently comprehensive to punish all invasions of the rights of personal liberty, personal security, and private or public property.

What part or parts of that code are applicable to the alleged facts of this case, if any, it is not the province of this court either to determine or indicate.

The judgment of the district court is reversed.

Prince, Chief Justice, dissenting: In this case, being unable to agree with the conclusions of the majority of the court, I think it proper to put on record my reasons for such dissent.

There is no question raised as to the facts in the case, and the decision turns upon one single point, and that one of much importance and interest.

The defendants are indicted under sec. 8, of title 8, of

chap. 1 of the laws of 1878, commonly known as the General Railroad Act. That section reads as follows: "Any person who shall, in the day or night time, enter by force or otherwise, any car of any corporation formed under this act, with intent to steal any valuable thing then and there being, shall be deemed guilty of burglary, and, upon conviction thereof, shall punished as in other cases of burglary."

The object of this law was very evident. The criminal code of the territory contained provision concerning burglary in dwelling houses, offices, shops, warehouses, outhouses, colleges, churches, meeting houses, court houses, town houses, academies and other public buildings, in the day time or night time, and under almost all conceivable circumstances (General Laws, secs. 9 to 13, chap. 7), and these included every kind of structure, which, down to that time, had been capable of being burglariously entered, in New Mexico.

But a new era was approaching. Railroads were being built almost to the boundaries of the territory, and it was hoped would soon enter its borders. At that time, not a rail had been laid in New Mexico, but the legislature, wishing to encourage the introduction of the modern methods of travel, enacted this general railroad law, which is very elaborate and comprehensive in its provisions, and gives to companies organized thereunder such powers, privileges, franchises and immunities as were supposed to be necessary or desirable and consistent with the public welfare. Among other privileges conferred was that of protection from robbery and depredation by burglars, by the enactment of the section above quoted. Other similar privileges were those of protection from having their roads undermined by tunnels, etc., the digging of which was made a misdemeanor (sec. 10 of title 8); protection from having their structures, engines, etc., injured, or track obstructed, which was afforded by making such injuries misdemeanors, punishable by law (sec. 11, title

8); protection from claims on the part of passengers for damages for injuries in cases where they had violated the regulations of the road (sec. 7); protection from attempts to throw cars off the track, or cause collisions, which are made felonies by sec. 9.

By section 1889 of the U. S. Revised Statutes, the legislature is prohibited from granting any "especial privileges" to any corporation or individual; but these privileges were included in a general act for the incorporation of railroad companies, intended not for the benefit of any one or more particular organizations, but for all that might exist in the territory, and thus were not obnoxious to the objection of being "especial." This act was passed on the 2d of February, 1878, but scarcely more than a day had elapsed, when it appeared that although there was no railroad actually built in New Mexico, yet there did exist one or more corporations for railroad purposes, which had been previously organized under the general incorporation act of 1868: General Laws, p. 203.

That act was comparatively brief, and did not confer the privileges of protection and immunity from violence and damage to which we have referred, as well as many other powers, privileges and exemptions; so that, unless legislative action were had, there would be two classes of railroad corporations—one possessing certain privileges and the other not. Besides, being manifestly unjust, this condition of affairs might also be construed as making these privileges "especial," which were thus confined to the corporations formed under a particular act, and of which other similar corporations were deprived, and thus be in contravention of the law of congress previously referred to, which prohibited the granting of said "especial privileges," and, consequently, void.

The legislature proceeded with great promptitude to obviate the difficulty, so that a bill, prepared for the purpose,

was introduced, went through all its stages of consideration and progress, was passed by both houses and signed by the governor, and filed in the secretary's office as a law, by the succeeding twelfth day of February, but ten days subsequent to the general railroad law. This remedial statute is chapter 3 of the Laws of 1878, and it reads as follows:

"SECTION 1. All the powers, privileges and exemptions conferred upon corporations organized under an act entitled 'An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto,' approved February 2d, A. D. 1878, are hereby conferred upon all corporations incorporated under the laws of this territory for the purpose of constructing railroads, and also upon all corporations organized for railroad purposes that have registered in the office of the secretary of this territory the original or certified copy of their articles of incorporation, in accordance with an act entitled 'An act to amend an act entitled "An act to create a general incorporation law," permitting persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, and to repeal the sixteenth section of said act,'" approved January 30th, 1878: General Laws of New Mexico, p. 470.

The obvious intention of this statute was to place all the railroad companies organized under the laws of the territory upon the same footing; to permit no inequality of rights or privileges; to allow no partiality towards those organized under any particular statute, but to bring about an entire uniformity and equality in their position before the law.

The privileges conferred by the act of February 2, 1878, were no longer to be "especial" to the companies organized thereunder, but were to be enjoyed generally and equally by all of similar character. Among the privileges were the high and important ones of protection from robbery, depredation and willful injury, to which we have already referred.

Can it not be supposed that it was not intended by the legislature, when it enacted this law of February 12, that these privileges of protection and immunity should be included among the privileges which were to be made general, and of which the older corporation were now to have the benefit equally with the newer?

Yet this is the sole question in this case. It is in proof that the New Mexico & Southern Pacific Railroad Company, one of whose cars was the scene of the burglary in question, was not incorporated under Chapter I of the Law of 1878, but under a prior incorporation act, and this was one of those referred to in Chapter III of that year, and for whose benefit and protection that act was passed. The point was raised, and it is held by the decision of the court just rendered that the offense was not cognizable by one law under the present indictment, because the car entered was not the property of a corporation organized under Chapter I; and that Chapter III does not remedy the difficulty by placing cars of the other corporations therein mentioned on the same footing as to the privilege of protection from burglars with cars of companies organized under Chapter I.

It may be that the legislature could have employed stronger and more apt words than it did to express its will, but I cannot concur in the opinion that the object is not substantially and legally attained by the language as it exists in Chapter III. The intention of the legislature is, to my mind, too plain to admit of doubt. It was obviously to place all similar corporations on the same basis, to give to one railroad company exactly the same powers, privileges and exemptions that every other similar company possessed within our territory; to prevent any inequality, discrimination or favoritism. This was not only right, but absolutely essential, in order to make the privileges conferred general, and therefore legal. It is not to be supposed that they intended that the protection afforded equally to those of

another, that it should be a crime punishable by a heavy penalty to enter one car in a train, with intent to steal, because that car happened to belong to one company, and no crime at all to enter the next car, with like intent, because that car unfortunately belonged to a different company. Yet that would be precisely the result if the legislature intended to make such a discrimination, and if the word "privileges" in the act of February 12, 1878 does not include the privilege of protection from burglary or other injury. Under this construction, while it is a misdemeanor to undermine the track of the Rio Grande, Mexico & Pacific Railroad, it is no offense similarly to endanger the property of the company and lives of passengers on the New Mexico & Southern Pacific Railroad. It is a felony to place an obstruction on the track of one, with intent to throw the train off; or to displace a switch with intent to cause a collision—a felony for which the offender can be imprisoned for ten years—and no statutory offense at all to do a like deed to the other. The defendants now before us under the indictment in this case were felons if the car which they happened to try to rob belonged to one, and not guilty if it belonged to the other.

This would be, in my opinion, the height of injustice and inequality. The privilege of protection in the one case would be in the greatest degree "especial." Let us suppose the two roads ran in the same direction, and were opposed to each other in interest; would not that one have a very "especial privilege" over the other, and reap its benefits in passengers and freight, which received the privilege of protection from robbers, from underminers and train-wreckers?

Believing that the words of the act of February 12 conferred this protection and immunity from danger upon the New Mexico & Southern Pacific Railroad to which the car entered in this case belonged, I am compelled to dissent from the views of the majority of the court, in reversing the judgment herein.

CORNELIUS BENNETT ET AL., Plaintiffs, v. JAMES ZABRISKI, Defendant.

January 29, 1881.

ATTACHMENT. (1) *Variance in pleadings as to description of parties.*

REHEARING. (2) *Changing decision upon.*

1. The declaration, affidavit, writ, bond, judgment and execution in attachment, must not vary in their description of parties. Affirming *Bennett v. Zabriski.* PRINCE, C. J., dissenting.
2. Unless convinced that it is wrong, the court will not change a unanimous opinion deliberately formed and announced.

Petition for rehearing.

Plaintiffs sue defendant in the third judicial district court, sitting within and for the county of Grant, in an action of assumpsit, and sue out a writ of attachment. The declaration, among other things, states the petitioners are Cornelius Bennett, of Arizona; Joseph F. Bennett, of Grant county, and Henry Lisinsky, of Doña Ana county, in this territory. That said petitioners were doing business under the firm name and style of Bennett Bros. & Co., and that the defendant, James A. Zabriski, was a resident of the state of Texas.

The affidavit upon which the writ was issued was, in effect, as follows:

TERRITORY OF NEW MEXICO, }
COUNTY OF GRANT. } *ss.*

This day personally appeared before me, the undersigned, clerk of the third judicial district court, within and for the county and territory aforesaid, Joseph F. Bennett, of the firm of Bennett Bros. & Co., and being duly sworn, says that James A. Zabriski is justly indebted to the firm of Bennett Bros. & Co. in the sum of $180.78, after allowing all just offsets on account of goods, wares and merchandise sold and delivered, money lent and advanced, and account stated,

and that the said James A. Zabriski is not a resident of nor resides in this territory.

J. F. BENNETT.

Sworn and subscribed to, etc.

Bond was given and approved. John P. Risque also made affidavit that the defendant was a non-resident of the territory. Defendant entered a special appearance for the purpose of filing the following motion to quash the proceedings herein:

1st. The affidavit is made by one Joseph F. Bennett, but does not state for whom.

2d. It does not state to whom the defendant is indebted.

3d. It does not say that said indebtedness is due after allowing all just credits.

4th. It does not state that he has good reason to believe and does believe in the existence of the fact set forth as a ground for issuing of attachment, that the defendant is a non-resident.

5th. The writ does not set forth when or where, or by whom, the debt was contracted.

6th. The body of the writ does not set forth in what style the plaintiffs sue.

7th. And for other good and sufficient reasons apparent upon the affidavit and writ.

This motion was by the court sustained and judgment so rendered. On the merits of the case, a judgment was rendered in favor of the plaintiffs.

Conway & Risque and *Catron & Thornton*, for appellants.

First. The plaintiffs insist that the whole record can be examined to see for whom and by whom the affidavit was made. See Drake on Attachment, sec. 93.

Failure to entitle the affidavit in the cause, failure to describe the person who made it as plaintiff, or debtor named in it as defendant, does not make it bad. See Drake on

Attachment, sec. 92; *Cheadle v. Riddle*, 6 Ark. (1 English), 480; *Kinney v. Heald*, 17 Ark., 397; *Pool v. Webster*, 3 Metcalf (Ky.), 278.

Second. The affidavit does state to whom the defendant is indebted, it says to Bennett Bros. & Co., and the petition shows that Bennett Bros. & Co. are the plaintiffs.

It states that the amount sworn to was due after allowing all just offsets, which is the exact words of the statutory form.

The statute has prescribed a form of affidavit in attachment. See Compiled Laws, sec. 25, page 216. This affidavit is a substantial compliance with that form.

The writ is also in compliance with the statutory requirements, and is good.

Where a form is prescribed by statute for proceedings in attachment, it should be followed, and an affidavit which follows the statute is sufficient: *Shockley v. Bullock*, 18 Ga., 283; *Harrito v. Humphreys*, 26 Ga., 514; *McColburn v. White*, 23 Ind., 43; *Reyburn v. Brackett*, 2 Kan., 227; *Matthews v. Don*, 20 Ind., 248.

Courts will construe the statute in relation to attachment in the most liberal manner for the advancement of justice, the suppression of fraud and the benefit of creditors: *Bank of Augusta v. Conrey*, 28 Miss., 667; *Bryan v. Lashley*, 21 Miss. (13 Smed & M.), 281.

PARKS, Associate Justice: In this case the court adheres to and reaffirms its decision made at the last term for the following reasons:

1. The decision was founded upon well settled rules of pleading and practice and was in accordance with the statute of this territory.

2. The authorities referred to adverse to the decision of the court tend to introduce a vague, loose and indefinite

character of pleading and endless confusion in legal proceedings.

We have had more than one illustration during this court of the necessity of care in the preparation of pleadings and of the trouble that follows the want of it.

If the declaration, the affidavit and the writ in a summary proceeding, such as attachment, may materially vary in so important a matter as the description of the parties to the suit, so may the bond, the judgment, the execution, and any and all other papers in the case.

And in case of a sale of real estate it would be difficult to ascertain from whom the title was derived or to whom the conveyance should be made. Such uncertainty and confusion can easily be avoided by the plaintiff. In fact, the attorney who brings the suit is bound to know the correct description of the prisoner, partnership or corporation from whom he sues, and there is no excuse for his not using that description throughout the entire record he is making. If he may vary the description of the parties to the suit, so also may he vary the description of property or any other material fact or facts.

A title to property coming through so confused a record might be seriously contested and the value of property so derived materially lessened.

3. Where an opinion of this court has been deliberately formed and announced and is unanimous, nothing but conviction that it is wrong should induce the court to change.

The decisions of this court are the law of this territory, and that law should not be fluctuating and uncertain. The court itself, the bar and the people should know what to depend upon.

Neither doubts as to its correctness, adverse authorities or opinions or anything else, but a clear perception that it is wrong should induce this court by changing its opinion to change the law.

And still believing that the unanimous opinion of the court in this case was founded upon correct principles, and would lead to correct practice, we shall adhere to it till convinced that we are in error.

PRINCE, Chief Justice, dissenting: On the rehearing in this case I regret to find myself unable to concur with my colleagues in their conclusions that the judgment rendered at the last session was correct, although on less consideration I concurred in it.

This action was commenced as provided in Chap. 21, sec. 2 of the Statutes (page 136, General Laws), which provides that "a creditor wishing to sue his debtor by attachment, may place in the clerk's office a petition or other lawful statement of his cause of action; and shall also file an affidavit and bond." Thereupon the attachment writ is issued.

This is different from the proceedings under the act of 1855 (page 140, General Laws), which provides for the issuance of the writ on filing an affidavit and bond only.

In this case, the petition or statement of the cause was filed April 16, 1875, and is the first paper appearing in the transcript. At the same time, apparently, at any rate on the same day, an affidavit and bond were filed, and thereupon the writ was issued.

The petition states the plaintiffs to be Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky, doing business under the firm name of Bennett Brothers & Co., at Silver City.

The affidavit is made by "Joseph F. Bennett, of the firm of Bennett Brothers & Co.," and states that the defendant is indebted to said Bennett Brothers & Co.

In the writ the plaintiffs are named as Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky.

The court below ruled and this court has decided that the writ was invalid because the plaintiffs mentioned in the

aforesaid writ do not appear to have been the same persons as those named as plaintiffs in the affidavit.

In the affidavit the name is Bennett Brothers & Co., Joseph F. Bennett being one of said firm; in the writ no firm is mentioned at all, but the parties suing are separately named, as Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky.

It is held that we cannot presume that these are the same, and that the affidavit cannot be cured by information obtained from other sources.

This might be so if the writ were based on the affidavit alone, as under the act of 1855; but in this instance, it appears to me, that the writ is based on both the petition and the affidavit, The petition is first named in the law, and in fact is filed as the foundation of the suit. I think, then, that we have a right to examine it to ascertain whether the parties named in the affidavit are the same as those named in the writ.

The cases cited by counsel, from Arkansas: *Cheadle v. Riddle*, 6 Ark., 480, and *Kinney v. Heald*, 17 Ark., 397, go far beyond this, in overlooking irregularities, but I think they should not be followed to their full extent. But I think the true rule is laid down in Drake on Attachment, sec. 93, when it says that if certain matters "appear by the record" it is not essential that they should have been stated in the affidavit. The precise case there cited is, that where it is required that the affidavit be made by a party to the suit, the fact that he is a party may appear by the record without being set up in the affidavit.

In the case before us, if we have recourse to the petition we find it distinctly stated therein that Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky constituted the firm of Bennett Brothers & Co., and so all difficulty in connecting the affidavit and writ ceases. It appears while the plaintiffs were differently stated, yet they were in fact identically

the same. Believing that under the circumstances the court had a right to examine this petition, which constitutes part of the record, and specially as it is one of the papers on which the writ was issued, and made necessary for that purpose by the law, I think that the writ of attachment was good, and that the motion to quash the attachment proceedings should have been denied.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW MEXICO,

JANUARY TERM, 1882.

THE TERRITORY OF NEW MEXICO, Appellee, v. ELEUTERIO BACA, Appellant.

January 10, 1882.

ACEQUIA LAW. (1) *Violations of, not crimes: Proceedings to enforce.*

1. The acequia law of New Mexico (Act January 7, 1852, Gen. Laws N. M., Prince, 14), provides (section 18) that "If any person obstruct, interfere with or disturb any of said ditches or use the water from it without the consent of the overseer during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recovered" (section 17) "by the overseer before any justice of the peace in the county." And section 18 further provides for the recovery, in addition, "of all damages that may have accrued to the injured parties, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works."

Held, That these provisions created no public crime for which a person may be arrested in the first instance and prosecuted on behalf of the territory, and fined and imprisoned in default of payment. That the word "fine" should be construed to mean a pecuniary penalty merely that may be sued for by the overseer, in his official capacity, in a civil action, and when recovered by him, applied to the repairs of the acequia. That if the defendant is too poor to pay the amount adjudged against him, he may be compelled to work fifteen days on the public works, and the only restraint that can legally be placed on his liberty, is such as may be reasonably necessary to compel him to perform such work.

Held further, That a judgment under these provisions of the acequia

law by a justice of the peace, that the defendant pay a fine to the territory, and costs, and that he be imprisoned in the common jail until such payment, is without authority of law, and the whole proceeding was unauthorized as a criminal prosecution.

Appeal from the District Court of San Miguel county.

Eleuterio Baca, the defendant, appellant in this cause, was brought before a justice of the peace in the county of San Miguel, on a sworn declaration charging him with taking water from the acequia.

In said declaration no name is given to the acequia, it is not stated in what county the supposed offense was committed, nor even that it was committed in this territory. No time when the offense was committed is charged. The defendant was found guilty before the justice of the peace and an appeal taken to the district court of San Miguel county.

When the case was called for trial in the district court, the defendant moved the court to quash the indictment or sworn declaration for want of jurisdiction. The motion was overruled and the case proceeded to trial. There was a verdict of guilty. Defendants filed motions for a new trial and in arrest of judgment, which were overruled.

The bill of exceptions shows that the court, against objection of the defendant, permitted the prosecution to prove that the defendant had taken water from an acequia called Acequia de Nuestra Señora de los Dolores, and that said acequia was within the boundaries of San Miguel county, New Mexico, and also permitted proof as to the time when said water was taken.

Conway & Risque, for appellant.

I. The court below erred in refusing to quash the complaint or indictment, because:

First. There is no venue laid.

Second. No time when the supposed offense was committed is averred

Third. The complaint does not set forth any offense known to the laws of this territory.

As to venue and time: "Indictment must be certain as to time and place. Time and place must be added to every material fact in an indictment. In an indictment for offenses of commission, every act which is a necessary ingredient, must be laid with time and place:" Archibold's Criminal Pleading, p. 46. The place must be such as in strictness the jury who are to try the case should come from: *Ibid.*, p. 47. The time and place must be laid with certainty: *Ibid.*, p. 49.

No offense known to the law of this territory is charged. This prosecution is sought to be maintained under sec. 18, art. 1, chap. 1, Compiled Laws of 1865, p. 22, viz.: "If any person in any manner obstruct, interfere with or disturb any of said (acequias) ditches or use the water from it, without the consent of the overseer, during the time of cultivation, he shall pay," etc.

The acequias referred to in this section are public acequias. It is not alleged in the complaint that the acequia was a public acequia, that the water was taken out of the acequia without the consent of the overseer, or that it was during the time of cultivation. This being the case, the complaint is necessarily fatally defective.

II. The court below erred in permitting the introduction of testimony proving that defendant had taken water from an acequia by name Nuestra Señora de los Dolores, that the same was within the boundaries of San Miguel county, New Mexico, and in permitting proof as to time when said water was taken. It having been shown that the complaint is fatally defective, it follows as a necessary sequence, that the justice of the peace had no jurisdiction; the district court has no original jurisdiction, and by appeal to it, acquires only such jurisdiction as the justice had, and it was error to admit the testimony above mentioned.

III. For the reasons and upon the authorities and statutes above cited, the court below erred in overruling motions for new trial and in arrest of judgment.

——— ———, for appellee.

This being a civil case, no statement of the cause of action is required, pleading being all verbal.

No technicality can be insisted on, especially if the objection has not been raised in the court below.

The justice says he tried the cause on the evidence taken in the case. See *State v. Stewart*, 47 Mo., pp. 382–4; *Ford v. State*, 3 Pinney, p. 450.

Conway & Risque, in reply.

The only point relied upon by plaintiff is a claim that the action is a civil one. An examination of section 18, Compiled Laws of 1865, page 22, under which this action is brought, will settle the fact of its being a criminal action.

It there appears a fine is the penalty, and that defendant may even be "sentenced to fifteen days' labor on public works," which is equivalent to an imprisonment.

Bristol, Associate Justice: This case is here by appeal from the district court, first judicial district, and county of San Miguel.

The case came to the court below by appeal from a judgment rendered by a justice of the peace of said county. This case in form is a criminal prosecution, wherein the territory is plaintiff and Eleuterio Baca is defendant. The supposed offense for which the defendant was tried and convicted in the court below appears by a complaint in the words and figures as follows, to wit:

"Territory of New Mexico,
County of San Miguel.

"Before me, the undersigned, justice of the peace of the above county, personally presented himself Pablo Dominguez, a mayor domo of the acequia, and under oath declares

that he accuses the following persons, to wit: Eleuterio Baca * * * * in this, in having taken water out of the acequia, and that they committed this act boldly, audaciously, and in disobedience of the authorities—this being against the laws and municipal regulations; therefore they make this declaration, to the end that the said aggressors may be arrested and their cause examined, and that it be treated in conformity with the law made and provided in such cases.

"PABLO his × mark. DOMINGUEZ.

"Sworn and subscribed before me, to-day, the 1st of July, 1880.

"ARTHUR MORRISON,
"*Justice of the Peace.*"

In the court below, and before the commencement of the trial, a motion was made, on behalf of the defendant, to quash the complaint for want of jurisdiction appearing thereby. This motion was overruled by the court.

A trial was thereupon had before a jury, who rendered a verdict of guilty, and assessed the punishment of the defendant at a fine of one dollar.

Motions for a new trial and in arrest of judgment were interposed on behalf of the defendant, and overruled by the court.

The following judgment on the verdict was rendered, from which this appeal is taken, to wit:

"It is considered and adjudged by the court that the defendant, Eleuterio Baca, pay into the territory of New Mexico, the sum of one dollar, the amount of the fine assessed by the jury in their verdict rendered herein, together with the costs of this prosecution to be taxed, and that execution issue therefor, and that the said defendant be committed to the common jail of the county of San Miguel, until said fine and costs be fully paid and satisfied, and that a warrant of commitment be issued against him."

The only law under which there can be any pretense for

sustaining this prosecution is the acequia law of this territory, providing for the enforcement of a pecuniary penalty against persons interfering with, disturbing or using the water of any public acequia without the consent of the owner thereof; which law was enacted on the 7th of January, 1852: General Laws N. M., Prince, 14.

This act provides for the establishment of public ditches for irrigating purposes, and for their construction; it also provides for their repairs, management, and the distribution under the direction of overseers thereof, and for the collection by suit, by the overseer, of certain pecuniary penalties against delinquents who neglect or refuse to obey his directions, and for the application thereof by him to the necessary repairs of the acequia under his charge.

Section 18 of the act provides as follows: "If any person shall in any manner obstruct, interfere with or disturb any of said ditches, or use the water from it without the consent of the owner, during the time of cultivation, he shall pay for each offense, a sum not exceeding ten dollars, which shall be recovered in the same manner prescribed in the foregoing section (sec. 17), for the benefit of said ditch, and shall further pay all damages that may have accrued to the injured parties, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works."

The section referred to as the "foregoing section" (sec. 17), provides as follows: "If any proprietor of any land irrigated by any such ditch shall neglect or refuse to furnish the number of laborers required by the overseer, as prescribed by section 6 of this act, after having been legally notified by the overseer, he shall be fined for each offense in a sum not exceeding ten dollars, for the benefit of said ditch, which shall be recovered by the overseer, before any justice of the peace in the county, and in such cases the overseer may be a

competent witness to prove the offense, or any fact that may serve to constitute the same."

By transposing the language of both sections and bringing the same together so far as applicable, with a view of arriving at its true intent and meaning, it would read somewhat as follows: If any person shall in any manner obstruct, interfere with or disturb any such ditch, or use the water from it without the consent of the owner, during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recovered by the overseer, before any justice of the peace in the county, for the benefit of said ditch, and shall further pay all damages that may have accrued to the parties injured, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works.

Section 19 of the same act provides that "all fines and forfeitures recovered for the use and benefit of any public ditch, shall be applied by the overseer to the improvements, excavations and bridges for the same."

The first question that presents itself is as to the nature of the judicial proceedings to be instituted to recover the "fine," or pecuniary penalty by the overseer. Is it a criminal prosecution to be instituted by the overseer in his own name and official capacity, for the recovery of a sum of money, not exceeding ten dollars, from the delinquent, which sum is to be received by the overseer and by him applied toward the needed improvements of the acequia?

There is a broad distinction between a mere pecuniary penalty to be recovered by a public officer, and applied to a specific object, and a fine imposed as a punishment for a public crime for which the criminal has been tried and convicted.

It is true that in section 17 of the act is the language that "he (the delinquent) shall be fined for each offense," etc., language which is usually applied to crimes or public offenses,

while, further on, are the provisions, that such fine shall be recovered by the overseer, and when so recovered, shall be applied by him to the benefit of the acequia—language usually applied to civil proceedings.

To authorize any interference with the liberty of the citizen by arrest or imprisonment, the authority for the same should be free from any doubt.

Public crimes are not created by mere inuendoes or inference, from the use of a single word in a statute.

The language of this statute is very loose and inaccurate, but considering all of its provisions with the view of giving it a reasonable and consistent construction, we are of the opinion that no public crime is created thereby, for which a person may be arrested in the first instance and prosecuted on behalf of the territory, and fined on conviction, sentenced to pay a fine to the territory, and imprisonment in default of its payment. That the word "fine" should be construed to mean a pecuniary penalty merely, that may be sued for by the overseer in his official capacity, in a civil action, and when recovered, received by him, and applied to the repairs of the acequia. If the defendant is too poor to pay the amount adjudged against him, then he may be compelled to work fifteen days on the public works, and the only restraint that can legally be placed on his liberty is such as may be reasonably necessary to compel him to perform such work.

The judgment, therefore, that the defendant pay a fine to the territory, and costs, and that he be imprisoned in the common jail until such payment, is without authority of law, and the whole proceeding from first to last was unauthorized as a criminal prosecution.

None of these irregularities are assigned as error. This was not necessary in a criminal prosecution under our practice. (*Vide* sec. 32, p. 290 of General Laws, N. M. per Prince.)

Other questions are presented, the decision of which we do not consider necessary or important in this case.

Judgment reversed. All concur.

THE TERRITORY OF NEW MEXICO, Appellee, v. TOMAS TAFOYA, Appellant.

January, 1882.

Acequia law. Taking water from acequia not a crime: *Territory v. Baca, ante,* p. 183, affirmed.

Appeal from the District Court of San Miguel county.

Defendant was charged, under sec. 18, art. 1, chap. 1, p. 22, Comp. Laws, 1865, with taking water from an acequia, was tried before a justice of the peace for San Miguel county, and the case brought to the district court of San Miguel county on appeal, and verdict rendered against the defendant. The cause comes into this court on appeal. Motions for new trial and in arrest of judgment were filed in proper time and overruled.

Conway & Risque, for appellant.

The court below erred in admitting any testimony in the case.

First. Because there is no crime or charge alleged against defendant known to the laws of this territory. The section of the statute above referred to is as follows: "If any person shall in any manner obstruct, interfere with or disturb any of said (acequias) ditches, or use the water from it without the consent of the overseer, during the time of cultivation, he shall," etc. There is no allegation that it was during the time of cultivation, none that it was without the consent of the overseer, and none that the acequia was a public acequia, such as is contemplated by the statute. This

being the case, it follows that no offense is charged known to the laws of this territory.

There being no venue or time laid in said complaint, and the same being otherwise fatally defective, as above noted, the justice of the peace, on the face of the complaint, has no jurisdiction; the district court having no original jurisdiction, and acquiring, on the appeal of the case, only such jurisdiction as the justice had, it is manifest error to admit any evidence at all.

As to necessity for certainty as to time and venue *vide* Archibold's Criminal Pleading, pages 46, 47 and 49.

For the reasons above stated, it was error in the court below to overrule motions for new trial and in arrest of judgment

BRISTOL, Associate Justice: This case is here by appeal from the district court, first judicial district, county of San Miguel.

The case came to the court below by appeal from a court of a justice of the peace of that county.

It is a criminal prosecution in form, instituted on behalf of the territory, as plaintiff against the defendant, Tomas Tafoya.

The supposed offense for which the defendant was tried and convicted before the justice of the peace, and on appeal was re-tried and convicted in the court below, is set out in a complaint in the words and figures as follows:

"TERRITORY OF NEW MEXICO, }
"COUNTY OF SAN MIGUEL. } SS

"Before me, Arthur Morrison, a justice of the peace in and for the county and territory aforesaid, personally presented himself, Pablo Dominguez, an overseer of the Acequia Nuestra Senora de los Dolores of Las Vegas, and under oath declares and says that he accuses * * * Tomas Tafoya

in having taken and obstructed the flow of the water towards the town which was ordered by the county commissioners to be free from there above along the whole river for the period of eight days. And the said accused owners having obstructed the flow of the water in violation of such order of the county commissioners.

"I ask that he be arrested and brought to answer such complaint, and that he be treated in conformity with law.

"PABLO his + sign DOMINGUEZ,
"*Overseer of the Acequia of Nuestra Senora de los Dolores, in the C. de V.*

"Sworn to and subscribed, this 3d day of July, A. D. 1880.
"ARTHUR MORRISON,
"*Justice of the Peace.*"

The defendant was tried on the above complaint in the court below by a jury who rendered a verdict of guilty, and assessed the punishment at a fine of four dollars.

No exceptions appear to have been taken before or during the trial. After verdict, among other things a motion in arrest of the judgment was interposed by the defendant for want of a sufficient complaint and for want of jurisdiction which was overruled by the court below. Judgment was thereupon rendered and entered against defendant as follows:

"It is considered and adjudged by the court that the said defendant Tomas Tafoya, pay into the territory of New Mexico, the sum of four dollars, the amount of the fine assessed by the jury in their verdict rendered herein together with the costs of this prosecution to be taxed, and that execution issue therefor, and that the said defendant be committed to the common jail of the county of San Miguel, until said fine and costs be fully paid and satisfied, and that a warrant of commitment issue against him."

This case was evidently brought under the Acequia Law of 7th Jan., 1852 (Prince's Gen. Laws, N. M., 14)

And as the same questions that arose in the case of the *Territory v. Eleuterio Baca*, *ante*, p. 183, decided at the present term, are presented in this case, the judgment herein is on the grounds reversed.

All concur.

LOUIS BADEAU, Appellee, v. ROMALDO BACA, Appellant.

January 10, 1882.

JUDGMENT. (1) *When not set aside as being against evidence.*

1. A judgment will not be set aside by the supreme court upon the ground of the insufficiency of the evidence to sustain the verdict of the jury when the lower court has refused to do so, unless there is such a decided preponderance of evidence against it, as to create a conviction that it was the result of mistake or misconduct on the part of the jury.

Appeal from District Court of San Miguel county.

This is an action of assumpsit, brought by Louis Badeau, appellee and plaintiff below, against Romaldo Baca, appellant and defendant below in the district court for the county of San Miguel, New Mexico, to recover the sum of $3,572.94. The jury found for the plaintiff below and assessed his damages at $1,225.79. The defendant below moved for a new trial, which was refused by the court, whereupon the defendant below prayed an appeal to this court, which was granted.

Prichard & Sena, for appellant.

We submit to the court that in this case there was not sufficient evidence upon the part of the appellee in the court below to entitle him to a judgment for any sum whatever. The verdict was against the weight of evidence, and there can be no question a verdict of this character should be set aside, and the court below erred in not doing so. See *Mum-*

ford v. Smith, 1 Caines, 520; *Gordon v. Crooks*, 11 Ill., 142; *Lyle v. Robbins*, 25 Cal., 437; *Cox v. Hamilton*, 24 Texas, 777; *Bronde v. Wilson*, 12 Florida, 543; *Wells v. Lewis*, 28 Texas, 185. See Hilliard on New Trials, page 444, and other authorities there cited. See *Tilly v. Spalding*, 44 Ill., 80.

Fiske & Warren, for appellee.

The only errors alleged are that the court below erred in not setting aside the verdict of the jury, because, "the verdict was against the weight of evidence and against the evidence," and because—

"Taking the evidence as a whole, there was nothing offered upon which a jury could find the verdict which they did."

Some of the authorities cited in brief for appellant we are unable to find, but of those cited which we have found and examined, we submit:

First. That *Lyle v. Robbins*, 25 Cal., 487, 490, does not support the position of appellants, and besides, the decision in that case was governed by a special statute of the state of California, quoted from on page 490 of 25th Cal. report, by which it appears one of the grounds for granting a new trial in that case, is, "insufficiency of the evidence to justify the verdict."

Second. Hilliard on New Trials, p. 444, simply sets out and treats of when a verdict may be set aside in the discretion of the court below, not of whether, for the reasons given, it would be error for such a court to refuse to grant a new trial for such reasons.

Third. *McCarroll v. Stafford*, 24 Ark., 224, 228, is an authority for appellee and not for appellant. The decision on page 228 substantially agrees with that of the supreme court of New Mexico in *Territory of N. M. v. Webb*, Jan-Term, 1881.

PARKS, Associate Justice: This was an action in assumpsit, in the district court of San Miguel county, in which the plaintiff recovered a judgment for $1,225.79 on an account of $3,572.94. Defendant moved for a new trial, which motion was overruled and the case was brought here by appeal.

In the argument before this court, both parties seemed to rest the case upon the question whether there was sufficient evidence before the district court to sustain the verdict of the jury, and in this view we agree with them.

Various authorities are cited in the briefs of the attorneys as to the law of the case. We are referred on both sides to the case of *McCarrol et al., Ads., v. Stafford*, 24 Ark., 228. In that case the court say: "The familiar and well established rule is that this court will not reverse the decision of the circuit court for having refused to grant a new trial upon a mere question of the weight or preponderance of the evidence, but only in cases where they find without evidence, or directly contrary to evidence, unless in extreme cases, where the verdict is so palpably contrary to evidence as to shock our sense of right and justice." In Hilliard on New Trials the rule is deduced from a large number of authorities "that a verdict will not be set aside unless clearly, palpably, decidedly and strongly against the evidence, or so much against the weight of evidence, as on the first blush of it, to shock the sense of justice, or unless there has been a flagrant abuse of discretion, that courts will never, in the absence of the most satisfactory evidence that the verdict is erroneous, substitute their impressions for the opinion of the jury."

It is held in Ohio that "a mere difference of opinion between the court and jury does not warrant the former in setting said the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact." In Illinois the decisions are numerous upon the subject of new trials. In *Har-*

ris v. Hoopner, 44 Ill., 307, it is said the court never interfere to reverse a judgment because the verdict is not supported by the evidence, except in a clear case, never where there is no more than a doubt of the correctness of the finding.

The *Territory of New Mexico v. Webb*, *ante*, p. 147, decided at the last term of this court, was a much stronger appeal to this court to reverse the district court than the present case, and yet the court refused to do so. The rule applicable to the present case, is, perhaps, as briefly, clearly and correctly stated in Nevada as in any authority to which we have been referred. It is that "a verdict will not be set aside by the appellate court upon the ground of the insufficiency of the evidence to sustain it, when the lower court has refused to do so, unless there is such a decided preponderance of evidence against it as to create a conviction that it was the result of mistake or misconduct on the part of the jury." As to the evidence in this case, it is not material to determine whether all that was admitted by the court was competent. The testimony of the plaintiff himself shows an indebtedness greater than the amount found by the jury, and is supported by other evidence. Taking all the evidence of both parties, which was competent, the preponderance may or may not be in favor of the defendant. But we cannot say the district court erred in refusing to set aside the verdict of the jury and grant a new trial. Still less can we say that that court so far abused its discretion as to require this court to reverse its judgment. The objection that the record shows expressly that an important part of the evidence is omitted from the bill of exceptions was not insisted upon, and may briefly be disposed of. This court, in *Rosenthal v. Chisum*, 1 Gildersleeve, p. 633, has given its opinion of what is necessary to constitute a correct and proper bill of exceptions, and need not repeat it here.

The judgment of the district court is affirmed.

All concur.

SEFERINO CROLOT, Appellee, v. THOMAS MALOY, Appellant.

January 14, 1882.

JUSTICE OF THE PEACE. (1) *Pleadings, whether to be written or oral.*
SAME. (2) *Same, must be sufficient to make an issue.*
SAME. (3) *Same, common-law rules of, not applicable in justice's court.*
SAME. (4) *Same, what writings may form.*
SAME. (5) *Appeal from, no reversal, but trial de novo to be had in district court.*
PLEADING. (6) *General issue need not be pleaded in writing.*
JUSTICE OF THE PEACE. (7) *Pleading, affidavit in attachment held sufficient declaration.*
BILL OF PARTICULARS. (8) *When it may be asked.*
JUSTICE OF THE PEACE. (9) *Substitution of demands before.*
EVIDENCE. (10) *Jury to judge of weight and credibility.*

1. The statute, secs., 13, 23 and 36, relating to justices of the peace, Prince's Laws N. M., pp. 88, 89, 92, providing that the pleadings before a justice of the peace may be oral, and that the plaintiff's cause of action shall be entered on the docket of the justice by a brief statement thereof, is directory merely, and does not preclude the filing of written pleadings, setting out the cause of action by the the plaintiff and a denial thereof or statement of any other defense by the defendant.
2. Though strict formality is not required in pleadings before a justice of the peace and they are to be treated with great liberality with a view to substantial justice between the parties, yet the substance of an issue in some way must be formed.
3. The technical rules of common-law pleading have no application to suits before justices of the peace.
4. In such suits any allegations or indorsements in writing or accounts sued on in whatever form they may be, if sufficient to apprise the opposite party of what is intended and which would be sufficient to bar another suit for the same cause, should be considered good pleading.
5. The rule that if the plaintiff's statement of a cause of action be objected to by the defendant as insufficient in substance to constitute a cause of action, and is erroneously decided to be defective in substance, the judgment will be reversed, cannot be applied in appeals from judgments of justices of the peace in New Mexico, as, whatever may be the errors in law committed by the justice in a case of which

he has jurisdiction of the subject matter, on appeal to the district court, the case must be tried on its merits *de novo*.

6. No pleadings, oral or in writing, on the part of the defendant are necessary to raise an issue on the plaintiff's statement of a cause of action as the general issue will be presumed by law, and need not be formally pleaded.
7. Where no written pleadings were filed, and no entry made on the justice's docket showing that plaintiff had a cause of action, a statement in an affidavit for an attachment that the demand is a money demand for $99 belonging to plaintiff and had and received by the defendant, is a sufficient declaration by plaintiff to warrant a trial, especially as no objection to its sufficiency was interposed by the defendant.
8. A defendant in a suit before a justice of the peace, considering himself not sufficiently apprised of the cause of action, may demur or demand a bill of particulars.
9. A plaintiff in an action before a justice of the peace for money had and received, may substitute another demand, *e. g.*, a demand for work and labor done by plaintiff for defendant. And where the defendant makes no objection to the evidence introduced to support the claim for work and labor, but instead of objecting, introduces evidence in rebuttal upon that issue, he will be considered as having waived any objections he might have urged against the competency of plaintiff's evidence to sustain his original claim for money had and received.
10. It is the exclusive province of the jury to determine the weight and credibility of testimony, and their determination is not subject to review.

Appeal from the District Court of Santa Fe county.

This is an action brought by attachment before a justice of the peace in Santa Fe county, taken from that court by appeal to the district court, said county, and thence by appeal to this court. Claim was made for ninety-nine dollars for money received by said defendant belonging to plaintiff. Judgment in district court was for full amount claimed. The plaintiff below was the only witness to sustain claim, and upon his testimony alone the truth or falsity of the existence of a just claim depended. The principal error relied upon by appellants is the failure of the court below to grant a new trial upon all the facts brought out by plain-

tiff, and upon the affidavit filed by defendant in support of motion for new trial.

Conway & Risque, for appellant.

The evidence did not sustain the claim made by plaintiff below, as no proof was given to show that defendant had received any money whatever pertaining to plaintiff.

The court should have granted a new trial. The action of the court in refusing so to do was an unsound use of its discretion, and this court has power to review such action when clearly wrong: Hibbard on New Trials, title "Surprise," p. 521, secs. 1, 3, 5, note "A," and authorities there cited; California Digest, New Trials, head "Surprise," and authorities there cited.

Fiske & Warren, for appellee.

The courts of justices of the peace are of special and limited jurisdiction, and have no powers except those conferred by statutes.

Sec. 19, p. 129, and sec. 38, p. 143, Revised Statutes of N. M., Prince's ed., provides for denying the truth of the affidavit in attachment in the district courts, and a separate trial upon the issue thus made, but there is no statute of the territory authorizing such issue and trial in cases before justices of the peace.

Sec. 120, p. 109, and sec. 77, p. 101 Revised Statutes N. M., Prince's ed., provides for trial *de novo* in appeals from justices of the peace to the district courts, and that in the trial in the latter court on such appeals the rules of courts of justices of the peace shall govern.

There is positive evidence in the record to support the verdict of the jury in this case, and nothing therein to show ground for setting same aside on motion for new trial. The affidavit upon which that motion was chiefly based was defective in many particulars, and notably in not stating when the witnesses who were to give the newly discovered testimony could be produced in court, or that they could ever

be so produced: Bouvier's Law Dict., 12th ed., vol. 2, p. 222, secs. 9 and 10.

The court properly overruled the motion in arrest of judgment. This motion was made because there was "nothing in the pleading or complaint filed which would support a judgment." We submit that the record does not support that conclusion, and especially see the attachment affidavit, but if it did, it would make no difference in this case. A mere appearance in the justice's court is all that the rules or customs of that court in this territory require, and there need be no written complaint or pleadings there. The record shows that the appellant appeared before the justice.

But even if he had never appeared, the case, when taken on appeal, was governed in the district court by the rules applicable to the court of the justice of the peace: Rev. Stats., Prince's ed., p. 101, sec. 77. No complaint or pleadings in the case were required in the justice's court, and consequently none on appeal in the district court. The appellant did not, when he appeared in the district court, raise any question denying jurisdiction, but by his general appearance he waived all jurisdictional objections, and he was properly in court regardless of all matters of complaint or pleadings.

Of the authorities cited in appellant's brief, the California cases are based upon the code of that state: Revised Stats. Cal., vol. 2, p. 1000, sec. 10657 and p. 1003, sec. 10662.

Of the remaining citations, all from the American decisions: *Brown v. Frost*, 2 Bay. (S. Ca.), 126, vol. 1, p. 633, is a case treating of when the court below in the exercise of its discretion may grant a new trial. In *Ross v. Overton*, 2 Cal. Va., 309, vol. 2, pp. 552, 555, the court says, that a new trial, because the verdict was contrary to the evidence, "ought to be granted only in case of a plain deviation and not in a doubtful case, merely because the court if on the jury would have given a different verdict." In *Houston v.*

Gilbert, 3 Brown (S. Ca.), p. 63, vol. 5, pp. 542, 547, the verdict was set aside because it was "unlawful," etc., requiring the defendant to find his slave at a remote place. See the case for peculiarities of the verdict.

Eagle Bank v. Smith, 4 Conn. 71, vol. 13, pp. 37, 38. The verdict in this case was clearly against the evidence, and was so held under a statute of Connecticut (Conn. Stats. 54, sec. 68), providing for such cases in the following language: "That the verdict is against the evidence in the cause."

Turnbull v. Rivers, 3 McCord (S. Ca.), 131, vol. 15, pp. 622–5. On page 625 Am. Dec., vol. 15, the court says: "The court will therefore grant a new trial *toties quoties*, where the verdict is contrary to law, and where there is no evidence on which the jury can find a verdict."

Am. Dec., vol. 20, pp. 156–8 (3 J. J. Marshall, Ky., 440). On page 158, the court says: "A new trial ought to have been granted for the foregoing reasons;" and proceeds saying, the evidence is of such a character "as to leave no reasonable excuse for doubt in an intelligent and disinterested mind." See, also, *McCarroll v. Stafford*, 24 Ark., 228; *Territory of New Mexico v. Webb*, *ante*, 147.

In Tennessee, proceedings before justices are commenced by summons which the statute of Tennessee requires, shall set out the form of action: Tenn. Code, sec. 4146. There is no provision in that code that the proof shall govern regardless of the pleadings, except in cases where one of the parties fails to appear. In such cases, the Tennessee Code provides that the justice shall "hear the allegations and proof of the" party present, "and shall render judgment thereon:" Tenn. Code, secs. 4155 and 4156.

The statute of New Mexico provides that in the absence of either party, the "justice shall proceed to hear the proofs" (not combined with the allegations, as in Tennessee) "of the

party present, and render judgment thereon:" Rev. Stats. N. M., Prince's ed., p. 92, sec. 35.

In Tennessee, the justice must furnish on appeal, a transcript "including the process and written evidence filed, and the entries on his docket:" Code Tenn., sec. 4164. And in the court on appeal, the "court shall allow all amendments to the form of action:" Code Tenn., sec. 4177.

This is substantially what the Statutes of New Mexico require as to transcript, but the Tenn. Code, sec. 4177, presupposes a written "form of action," which may be amended on appeal, while the statutes of New Mexico expressly provides that "each party may plead orally:" Rev. Stats. N. M., Prince's ed., p. 89, sec. 23.

Yet the supreme court of Tennessee say in an action in which the cause of action was stated to be "in a plea of debt that these words of a 'plea of debt' must be moulded to apply to accounts, assumpsit, to damages for the non-compliance with a contract or legal duty," etc.: *Bodenhamer v. Bodenhamer*, 6 Hump. (Tenn.), 267–8.

In Illinois the statute sets out clearly and distinctly the different forms of actions to be used in justice courts, such as money had and received, goods sold and delivered, work and labor, etc.: Rev. Stats. Ill., vol. 1, p. 686. Also, that "the justice shall proceed to hear and examine the "respective allegations and proof, and shall thereupon give judgment" against the party proved to be indebted: Rev. Stats. Ill., vol. 1, p. 702.

The statutes of New Mexico are much more liberal in this respect than the statutes of Illinois, in that our statutes do not require technical causes of action to be filed, or any written mention of cause of action, but expressly provides the pleadings may be oral: Rev. Stats. N. M., Prince's ed., p. 89, sec. 23. And in Illinois "the allegations and proof" are to determine the justice's action (Rev. Stats. Ill., vol. 1, p. 702), while in New Mexico the rule in justice's courts, so

far as shown by our statutes, require the justice to be guided by the "proof" alone, regardless of the "allegations:" Rev. Stats. N. M., Prince's ed., p. 92, sec. 35.

Yet the supreme court of Illinois hold that proof alone must determine the right to recover before a justice of the peace, and "although the plaintiff or the justice might call the case ejectment or larceny, the statute requires the court to hear the proofs, and if it makes out a case of which the justice has jurisdiction, the plaintiff is entitled to recover: *Chicago etc. R. R. v Reid*, 24 Ill., 144; *Brewster v. Grover*, 29 Ill., 248.

In Missouri the law requires it should be the "same cause of action tried on appeal that was tried before the justice," and the court says it will not consider "any technical inaccuracies as to the name of the action., whether it be for work and labor, or on account of wages, or *quantum meruit*, or on special agreement:" *Metz v. Eddy*, 21 Mo., 14, 15.

In Texas, a judgment containing nothing more than the heading of the justice's judgment, in this case was held good: *Wahrenberger v. Horan*, 18 Tex., 58.

In Mississippi, "cases brought from justice of the peace into the circuit court may be tried without any written pleadings whatever," and even "character of the party suing could be shown by evidence," that is, a party might sue in his individual capacity, and recover in a representative capacity: *Hairston v. Francher*, 7 S. & M. (Miss.), 249 and 255. "The proceedings in actions before a justice of the peace are throughout in a summary manner, without the forms of pleading:" *Thurston v. McClanahan*, 5 Mo., 521.

The pleadings in this case were oral and distinct from the attachment proceedings, and the fact that the justice noted down in his docket only the names of parties and the words "Debt No. 99," which was before the district court on appeal, is sufficient: 6 Hump. (Tenn.), 267, 268; 18 Tex., 58; 24 Ill., 144; 29 Ill., 248; 7 S. & M. (Miss.), 249, all cited

above. And it is especially sufficient, because a failure of the justice of the peace to note down in writing oral pleadings cannot prejudice the parties: *Sinnamon v. Melbourn*, 4 Green (Iowa), 310.

Under our statute failure of the district court in that regard had the same effect as in the justice court, and no more.

But if the attachment proceedings are the pleadings, then they must all be examined to find the cause of action; that is, not the affidavit alone, but the bond, writ and citation, or, in other words, all the papers filed by plaintiff below, before the appearance of the defendant. These show a money demand, or debt due, without reference to technical forms of action, and that is sufficient under the authorities cited.

There was no surprise, because the justice law of New Mexico provides that if the pleadings are not specific enough, or, in the words of the act, if the "opposite party" require it, the plaintiff shall furnish "a bill of particulars of his demand," and "then" the justice may, on cause shown, adjourn the cause not exceeding thirty days: Rev. Stats. N. M., Prince's ed., p. 89, sec. 23. If the pleadings were not satisfactory in the justice court, or, under our statute, in the district court, he had his remedy by demanding a bill of particulars.

But, if we admit in this case:

1st. That the oral pleadings were not sufficiently stated in writing outside the attachment proceedings.

2d. That the failure of the justice of the peace or of the district court to note the oral pleadings down in writing was a fault or error which can prejudice us here.

3d. That attachment proceedings are pleadings; that being such, they state a technical cause of action, money had and received; and, notwithstanding the authorities cited to the contrary, that we were bound to prove a technical case of money had and received.

Then we say there could be at most only a variance which was cured by the verdict. In this case, the testimony of "work and labor" was not only admitted without objection, but appellant introduced evidence to rebut it, showing conclusively that appellant was not surprised, but fully understood and acquiesced in and assented to the issue below.

On this point the supreme court of Mississippi say: "But for a variance the proper course is to exclude the proof; and no motion to that effect was made. The testimony was admitted without objection: *Stiers v. Surget*, 10 Smedes and M. (Miss.), 158.

Bristol, Associate Justice: This case was originally brought by the appellee, Crolot, against the appellant, Maloy, before a justice of the peace of Santa Fe county, in the first judicial district, by attachment. The amount claimed as due him from the defendant is ninety-nine dollars.

No property of the appellant seems to have been attached, but one John Faber was summoned as garnishee, who appeared and acknowledged an indebtedness to the appellant in the sum of thirteen dollars. Both parties appeared before the justice. There is no record before this court showing that any pleadings were put in before the justice by either party, either oral or otherwise, except the affidavit of appellee for attachment, stating, among other things, that the appellant, Thomas Maloy, owes him, after allowing the just credits and offsets, the sum of ninety-nine dollars, which debt arose upon money which the said Thomas received belonging to the said Seferino Crolot, and a written plea of the appellant, not traversing the affidavit as to the alleged cause of action, constituting the indebtedness, but denying the statements in the affidavit as to the specific grounds for the attachment.

A jury having been waived, the cause was tried before the

justice, who found and entered judgment in favor of the appellee, in the sum of sixty dollars, and costs.

From this judgment an appeal was taken to the district court for the first judicial district and county of Santa Fe, where the cause was tried *de novo*, before a jury, who rendered a verdict for appellee in the sum of ninety-nine dollars, and judgment for him in that sum and costs was entered accordingly. The case is here on appeal from that judgment.

The errors assigned are: *First.* There is no evidence to sustain the plaintiff's claim. *Second.* The court below erred in overruling the motion for a new trial.

The law of this territory governing proceedings in civil actions before justices of the peace specifically provide how parties may form an issue to be tried. Section 23 of the act relating to justices of the peace, provides as follows: "Upon return of any process, each party may plead orally, but shall give a bill of particulars of his demand, if required by the justice or opposite party": Prince's ed., Laws N. M., 89.

Section 13 of the same act provides that, "every justice shall keep a docket," in which he shall enter among other things, "a brief statement of the nature of the plaintiff's demand, and the amount claimed." *Id.*, 88.

Section 36 of the same act provides for impanelling a jury to try the cause "after issue joined." *Id.*, 92.

While the statute provides that the pleadings may be oral, and that the plaintiff's cause of action shall be entered in the docket of the justice by a brief statement thereof, yet this is directory merely, and does not preclude the filing of written pleadings, setting out a cause of action by the plaintiff, and a denial thereof, or statement of any other defense by the defendant.

Though strict formality is not required in pleadings before a justice of the peace, and they are to be treated with great liberality with a view to substantial justice between the par-

ties, yet the substance of an issue in some way must be formed: *Phillips v. Bridges*, 2 Wis. 270. The technical rules of common-law pleading can have no application to suits before justices of the peace: *Bodenhamer v. Bodenhamer*, 6 Humph., 264. In such suits, any allegations or indorsements in writing, or accounts sued on in whatever form they may be, if sufficient to apprise the opposite party of what is intended, and which would be sufficient to bar another suit for the same cause, should be considered good pleading. In the case of *Stone v. Case*, 13 Wend., 283, it was decided in effect that if the plaintiff's statement of a cause of action in a justice's court be objected to by the defendant as insufficient in substance to constitute a cause of action, and the justice decides that it is sufficient, when in fact it is defective in substance, the judgment will be reversed. But this rule cannot be applied to judgments of justices of the peace in this territory, as whatever may be the errors in law committed by the justice in a case of which he has jurisdiction of the subject matter, on appeal to the district court the case must be tried on its merits *de novo*. On such appeal, however, the rule laid down in *Stone v. Case*, *supra*, would apply if the defects in the declaration were not cured by amendment. As the case is to be tried *de novo* on such appeal, amendments would be allowed by the court. No pleading, oral or in writing, on the part of the defendant, is necessary to raise an issue on the plaintiff's statement of a cause of action, as the general issue will be considered as in by law, and need not be formally pleaded: *Howard v. Cobb*, 6 Ind., 5; *McHatton v. Bales*, 4 Black, 63.

There is nothing in the record before us showing that in the court below there were any allegations of the appellee on file, or any entry in the justice's docket, showing that he had a cause of action, except that already stated as a part of his affidavit for an attachment made before the justice at the inception of the suit, to wit: a money demand of ninety-nine

dollars, belonging to the appellee, and had and received by the appellant. This, though nowhere appearing in the proceedings, except in the affidavit, was a sufficient declaration on the part of the appellee, to authorize a trial, especially as no objection to its sufficiency was interposed by the appellant. If the appellant considered that he was not sufficiently apprised of the cause of action, he might have demanded a bill of particulars under the statute, or he might have demurred.

The evidence is all made a part of the record by a bill of exceptions, and is before us.

The evidence discloses the fact that the cause of action that was really tried was a demand of ninety-nine dollars for work and labor performed by the appellee for the appellant, and at his instance and request. There is no evidence whatever to support the claim for money had and received. Is this good ground for reversing the judgment if there is sufficient evidence of work and labor performed by the appellee for the appellant, and unpaid for, to sustain the verdict, had that been the issue?

We are of the opinion that it is not. The conduct of both parties during the whole trial was such as to amount to an abandonment, by mutual consent, of the original issue as to money had and received, and to the substitution of the issue for work and labor. This might be done though there were no formal pleadings, oral or written, to that effect. The appellant raised no objection to the evidence introduced by the appellee to support the claim for work and labor, but instead, thereof, introduced evidence in rebuttal upon that issue, and no other. By this, he must be considered as having accepted that issue, and as having waived any objections he might have urged against the competency of appellee's evidence, to sustain his original claim for money had and received. It is clear, however, that had the appellant stood upon his rights and objected to such evidence as not being

pertinent to the issue, and the same had been overruled, and the appellant forced to trial without any amendment of the pleadings, it would have been error and good ground for reversing the judgment.

The case of *Allen v. Nichols, Jr.*, 68 Ill., 250, in some respects was similar to this. The plaintiff, before a justice, sued the defendant in trover for the value of a wagon, and recovered judgment in the sum of $40. On appeal to the circuit court, evidence of a witness was received without objection tending to show that the plaintiff, who sued as administrator of one Hiram Allen, deceased, was entitled to —not the value of the wagon sued for—but the sum of $10, which the deceased, during his lifetime, had furnished towards paying for the wagon. The jury found a verdict in the circuit court in favor of the administrator for this $10, instead of for the value of the wagon in trover, which would have been, at least, $35. Judgment for the $10 was rendered by the circuit court after overruling a motion for a new trial. On appeal to the supreme court, that court refused to disturb the judgment, as no objection had been interposed to the evidence respecting the $10 claimed.

On this point the court said, "Where evidence is received or a witness admitted without objection, we must presume that all grounds of exception are waived, and having been waived, the party cannot afterward object."

The court, in that case, took occasion further to say that, "In a justice's court there are no pleadings, and it has been held by this court that the plaintiff is not required even to file an account in a suit before a justice of the peace; and on bringing an action in that court, if the plaintiff proves any grounds of recovery, he is entitled to a judgment, if the justice of the peace has jurisdiction of the subject matter." This general doctrine thus laid down by the supreme court of Illinois is too broad to be applied to suits before justices of the peace in this territory under our present statute,

except in cases where evidence is introduced without objection in reference to causes of action not embraced in any pleadings, but we quote the rule established in that state to show to what extent the courts have gone in their liberal construction of pleadings and proceedings in justice's courts.

The evidence in the case now under consideration disclosing, as it does, the issue that was actually tried by the implied assent of the parties, and the same being a part of the record, the appellant is well protected against any future prosecution for the same cause. The testimony of the appellee in his own behalf, if true, is sufficient to sustain the verdict.

Such evidence is flatly contradicted by the testimony of the appellant, but it was the exclusive province of the jury to determine the weight and credibility of all the testimony. Such determination is not subject to review by this court.

The record discloses no error.

Judgment affirmed. All concur.

THEODORE WAGNER, Plaintiff in Error, v. CYRUS EATON ET AL., Defendants in Error.

January 14, 1882.

PRACTICE, REVIEW. (1) *Bill of exceptions not certified to contain all the evidence is not reviewable.*

SAME, SAME. (2) *Verdict or finding; presumption as to correctness.*

RECORD. (3) *Accounts, affidavits, copies of instruments sued on, how made a part of record.*

STENOGRAPHER. (4) *Duty of court to employ.*

PRACTICE. (5) *Appeals involving small sums discouraged.*

1. Where the bill of exceptions had attached to it no certificate that it contained all the evidence in the case, and referred the court to a transcript for a very important affidavit which was used on the trial as evidence but which was not incorporated in the bill of exceptions,

the supreme court will not examine the evidence on a motion for a new trial.

2. Verdict of jury, or finding by court, presumed correct until the contrary is shown.
3. Copies of instruments sued on, copies of accounts and affidavits filed in an action at law are not parts of the record, unless embodied in the bill of exceptions.
4. To facilitate the drawing of bills of exceptions and to secure the rights of parties against errors in the evidence, each district court should have a competent reporter to take testimony in all important trials; and any want of authority there may be in existing laws to appoint and pay such officers, should be supplied by appropriate legislation.
5. The practice of the supreme court is to discourage appeals to it in cases involving small sums.

Error to District Court of San Miguel county.

The facts appear sufficiently in the opinion of the court.

Lee & Fort, for defendants in error.

This suit was upon a written instrument. The names and description of parties are the same as designated in said instrument. See Prince's Statutes, page 123.

A motion for a continuance is addressed to the sound discretion of the court, and there is nothing in this case to show any abuse of it.

The plea of the defendant put in issue the execution of the note, and the evidence introduced was legitimate under this issue.

The judgment is regular in every respect. We ask the judgment affirmed with damages.

PARKS, Associate Justice: In this case the plaintiff in error, Wagner, admits the execution of a note to the defendants in error for $125, but denies that the note as executed by him was to draw interest. The interest found by the jury was $16.67.

The errors assigned are nine in number. Before the plaintiff in error can consistently ask us to examine so many

errors for so small an amount, he should furnish us with a correct bill of exceptions. There is no certificate to this bill of exceptions that it contains all the evidence in the case. On the contrary, we are referred in the bill itself to the transcript for a very important affidavit which was used on the trial as evidence, and is not incorporated in the bill of exceptions. The supreme court of Illinois in *McPherson v. Nelson*, 44 Freeman, say that they have "uniformly held that when the bill of exceptions fails to show that it contains all of the evidence, they will not examine the evidence on a motion for a new trial. The presumption is, until the contrary is shown, that the finding is correct and that there was evidence which may not be in the record that warranted the finding." The same court in *Garrity v. Losano et al.*, 83 Ill., 597, say: "Copies of instruments sued on, copies of accounts and affidavits filed in an action at law, are not parts of the record unless so made by being embodied in the bill of exceptions." This court has so recently expressed its concurrence with this statement of the law and practice, that it is rather remarkable that attorneys in preparing bills of exception, do not conform to it. To facilitate the drawing of bills of exception and to secure the rights of parties against errors in the evidence, each district court should have a competent reporter to take the testimony in all important trials, and any want of authority there may be in existing laws to appoint and pay such officers, should be supplied by appropriate legislation. In *Rosenthal v. Chisum*, 1 Gildersleeve, which involved about $2,400, the court expressed its regret that owing to the defects in the bill of exceptions, it could not decide the case upon its merits. In the present case, there is not much occasion for regret. If this court had the prerogative to set aside a practice so long and so firmly established and try the case upon its merits regardless of the errors in the bill of exceptions, it would probably decline to do so.

We are not disposed to encourage appeals to this court in cases where so little is involved.

The judgment of the district court is affirmed.

All concur.

ESTANISLAO MONTOYA v. JOHN DONOHOE.

January 21, 1882.

PRACTICE. (1) *District court cannot order nonsuit in ejectment peremptorily against the will of plaintiff.*

DECISIONS OF U. S. SUPREME COURT. (2) *Duty of New Mexico courts to follow.*

1. An action of ejectment was brought to trial, a jury impanelled and the case opened by plaintiff's attorney, when, before any testimony was taken, the court, of its own motion, acting under the 24th section of the Practice Act of 1851 (General Laws, page 119), providing that "When any matter is pleaded by either party at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury, to consider and determine upon the sufficiency of the matter, whether excepted to or not," directed a nonsuit to be entered in said cause, and the jury to be discharged, because of a defect in the declaration.

   Held (affirming *Herrera v. Chaves, ante,* p. 86), that the district courts could not in any case order a peremptory nonsuit against the will of the plaintiff; that the foregoing statutory provision devolved upon the court the duty of doing only what could be done on motion or objection by a party, but did not give it authority to perform any act which it could not legally do in any other case, even upon motion or objection of a party; that the defect merely rendered the declaration demurrable, and that it was the duty of the court so to determine and to order an amendment of the declaration.

2. It is the duty of the courts of New Mexico to follow the decisions of the United States supreme court, so long as New Mexico remains a territory.

Writ of error to the District Court of Bernalillo county.

This is an action of ejectment brought by plaintiff in error,

to recover the possession of a tract of land, described in the petition as situate in precinct No. 20, Socorro county, and bounded on the north by a little hill which encloses a vega or meadow; on the east by the Rio Grande river; on the south by a "Lome Parda," and on the west by the hills.

Defendant appeared and pleaded not guilty, and took a change of venue to Bernalillo county. The cause was once tried and the jury did not agree; on coming on for trial the second time, after the jury had been sworn, and plaintiff had opened the case to the jury and before he was permitted to introduce any evidence, the court directed a nonsuit in the case on the ground of uncertainty of the description of the property as is set out in the judgment of nonsuit entered.

Breeden & Waldo and *Catron & Thornton*, for plaintiff in error.

It is not the practice to order a nonsuit upon the opening statement of the plaintiff's counsel on the assumed insufficiency of the facts stated to recover in the action. See *Fisher v. Fisher*, 5 Wis., 472.

A "nonsuit" cannot be ordered by the court without the consent and acquiescence of the plaintiff. See *De Wolf v. Robord*, 1 Pet., 497; *Crane v. Morris*, 6 Pet., 609; *Wills v. Gaty*, 8 Mo., 685; *Booe v. Davis*, 5 Blackf., 115; *Hill v. Rucker*, 14 Ark., 709.

The description in this case is good and sufficient. In English practice it is not necessary to give any local description of the premises beyond a statement of the county in which they lay. See Taylor on Eject., 393.

All the authorities say that a general description is good unless the statutes of the state require description to be more specific: *Id.*, 6 Peters, 50.

Conway & Risque, for defendant in error.

There is no error in the record in this case. The court below committed no error in ordering nonsuit after plaintiff

had opened his case to the jury and before he was permitted to introduce any evidence.

The record shows that the plaintiff did not ask for leave to amend his declaration. Defendant insists that it was proper to order a nonsuit at the stage of the cause at which it was ordered by the court below.

"Where any matter is plead by either party, at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury to consider and determine upon the sufficiency of the matter, whether excepted to or not:" Prince's General Laws of New Mexico, p. 119, sec. 24.

Where the pleadings are so defective as to justify an arrest of judgment, the court may order the plaintiff to be nonsuited: *Mason v. Lewis*, 1 Green's Iowa, 494.

The court may order the plaintiff to be nonsuited against his consent: *Ringgold v. Haven*, 1 Cal., 108; *Dalrymple v. Hausen*, 1 Cal., 125; *Maters v. Brown*, 1 Cal., 221.

In a clear case the judge should direct a nonsuit, though not asked to do so: *Alegro v. Duncan*, 24 How. (N. Y.), 210.

The description of the land in the declaration is so vague, indefinite and uncertain as to render the same bad. The description of the land must be such as will enable the sheriff to deliver possession after judgment: *Fenwick v. Floyd*, 1 Har. & G. (Md.), 172; *Hitchcox v. Rawson*, 14 Gratt. (Va.), 526. The premises must be described with certainty: Chitty's Pleadings, vol. 1. p. 191.

The cases quoted by plaintiff in error, in support of his position that court cannot order a nonsuit without consent of plaintiff, are based upon the common law in the absence of a statute, and in view of the fact that we have a statute governing in such cases, as above indicated, are not in point and do not apply in this case.

Additional points and authorities of plaintiff in error.

First. After a plea a defective description in a petition in ejectment is waived. A verdict may supply the description: *Bolling v. Mayor, etc.*, 3 Randolph (Va.), 578–585 (especially the remarks on page 585); *Farrow v. Farrow*, 2 J. J. Marshall, 388; *Reese v. Middleton*, 1 A. K. Marshall, 6 margin.

Second. General description in an action of ejectment is good: *Barclay v. Howell*, 6 Peters, 500 and 501.

Third. If an objection is taken to a defective description, it must be on demurrer; after plea or verdict it is too late: *Whitney v. Buckman*, 19 Cal., 30.

Fourth. It is enough if the premises demanded are described in the declaration with such substantial accuracy that they can be identified by the application of the evidence to the description. As the question properly goes to the jury whether the proof is sufficient to enable them to identify the premises with those described: *Munson v. Munson*, 30 Conn., 436.

Fifth. The verdict may supply defects of description in the declaration: *Fisher v. Larick*, 7 S. & R. (Pa.), 101; *Hagen v. Delweiler*, 35 Pa., 413.

Sixth. Jury may find for a part of the land only, etc.: *Bowles v. Sharp*, 4 Bebb., 550; *Little v. Bishop*, 9 B. Mon., 240.

Seventh. The courts take judicial notice of the local divisions of their country into counties, cities and towns, etc., and of the acts of incorporation of cities which are public. They will take notice of counties in their own territory, but not that there are other counties of the same name in other territories: 1 Greenleaf Ev., sec. 6; *Woodward's Admr's v. C. & N. W. R. R. Co.*, 21 Wis., 314, and authorities there cited.

Eighth. Even if the description is artificial, it is waived by joining issue, and would be cured by the verdict.

If the district judge has power to direct a nonsuit at all,

or even dismiss a case on his own motion, that power could not be exercised when there could be a trial, a good verdict and proper judgment. After the defendant waived the defects, the pleadings were good, if they had ever been bad. We claim here they never had been bad. But if they had been and a proper verdict and judgment could be rendered, then the case had reached that stage at which there could be no defect. It would be preposterous to allow a judge to dismiss a case when he has enough before him to render a good verdict and judgment on the merits of the whole case.

The law cited does not say what the judge shall do when he looks into the pleadings. It certainly did not intend to give him a discretion to dismiss cases at his pleasure; if it did, it would be more power than any other American judge has.

If he has this discretion, then he cannot be reviewed. To say the least, he should be held to as strict rules as the defendant in objecting.

In this case there had been issue joined, afterwards a change of venue, then a trial and disagreement, and finally a jury impanelled and sworn to try the case, and plaintiff's case stated to the jury, before the judge elected to nonsuit the plaintiff.

Prince, Chief Justice: This case is brought by writ of error from the second judicial district.

It is an action of ejectment, and was originally commenced in Socorro county, where the property in question is situate, the declaration being filed October 16, 1877. The defendant pleaded, March 14th, 1878, by W. L. Rynerson, Esq., his attorney, and afterwards, on the 15th of May, 1878, interposed another plea by Messrs. Conway & Risque. Thereupon issue was joined, and the case tried before a jury, May 17, 1878, resulting in a disagreement of the jury. Having been continued on motion and affidavit at the October, 1878, term, it came up for trial again on the 15th of May, 1879.

On that day the record shows that a jury was called and sworn, and thereafter the plaintiff's attorney, "having opened his cause to the jury, and before any testimony had been introduced, the court having examined the said declaration in said cause, and being of the opinion, and so ruling, that the same was insufficient and void, for reason of the uncertainty in the description of the premises in question, the court directed a nonsuit to be entered in said cause, and the jury to be discharged."

"To this opinion and ruling of the court, the plaintiff, by his counsel then and there objected and excepted."

The specific assignments of error are:

1. The court erred in directing a nonsuit without permitting the plaintiff to introduce any evidence.

2. The court erred in directing a nonsuit without the consent of the plaintiff.

3. The court erred in deciding on its own motion that plaintiff's petition was insufficient.

On the hearing of the appeal, quite elaborate arguments were made, and numerous authorities cited, for and against the proposition that the description of the land in the declaration was so vague and uncertain as to make the declaration defective, and, therefore, justify action in the court below.

These questions, however, are not important if the court did not in any case have the power to direct a nonsuit without the consent of the plaintiff. That question is the primary one for consideration.

The action of the court in directing the nonsuit on its own motion, after an examination of the declaration, was evidently based upon the 24th section of the Practice Act of 1851 (General Laws, p. 119), which reads as follows:

"When any matter is plead by either party, at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury,

to consider and determine upon the sufficiency of the matter, whether excepted to or not."

In this particular case, not only had no objection been made by the defendant to the sufficiency of the declaration, but he had twice pleaded to it, and the case had been once already tried before a jury, on the pleadings so made up. The action, therefore, was entirely that of the court, as was altogether proper under this 24th section; and the question that arises is, whether the precise kind of action taken was correct under the law as existing here.

This court, at its last session, in the case of *Herrera v. Chaves*, *ante*, p. 86, decided that the district courts have no power in any case to order a peremptory nonsuit against the will of the plaintiff, basing that decision on the uniform rulings of the Supreme Court of the United States, in a long series of cases, from the time of *Elmore v. Grimes & Beatie*, 1 Peters, 468, to the present, and the fact that the decisions of that court are conclusive upon the courts of New Mexico so long as it remains a territory.

It was contended on the argument herein by counsel for the defendant, that the line of decisions of the Supreme Court of the United States, and that of this court, in the case of *Herrera v. Chaves*, *supra*, only applied to cases arising under the common law, where there was no statutory regulation, and that the section above cited from the Practice Act of 1851 gave, by direct enactment of the legislature, this power to the courts in the cases included within its scope. The precise language of that section is, "It shall be the duty of the court to consider and determine upon the sufficiency of the matter, whether excepted to or not." The intention is, we think, to give the court the power, or, rather, to devolve upon it the duty of doing certain things of its own volition, which otherwise would only be done on motion or objection by a party, but not to give it authority to perform any act which it could not legally do in any other case, even on such

motion or objection. It means that it shall be the duty of the court to do precisely as much on its own motion as it might do were the motion made by a party, and to do it in the same way. The most natural action of the defendant, on finding the plaintiff's declaration defective, would be to demur, and we think the practical effect of this statute is to place every declaration in the same position before the court as if a demurrer had been filed against it. Whatever action the court could take, if such or any other appropriate course had been pursued by the defendant to bring in question the sufficiency of the declaration, it has the right, under that statute to take, without any suggestion or action by the defendant whatever, but no more.

Section 26 of the same act (General Laws, p. 119), says: "When legal exceptions are sustained, the opposite party shall have leave to amend." The most appropriate form of the action of the court would probably be in exact conformity with the statute, to enter its determination, that the matter in the declaration was insufficient, with leave to amend. But, at all events, it has no greater power to direct a nonsuit in such a case, against the will of the plaintiff, than in a similar case where such action is directly asked by the opposing party by motion. This case was tried long before the adjudication in this court of the case of *Herrera v. Chaves*, *supra*, and at a time when, as the record shows, even the plaintiff's counsel suggested and insisted that, for a proper cause it was correct practice at that stage of the case to direct and order a nonsuit; but this does not change the law, nor lessen the obligation of the decisions of the U. S. Supreme Court, by which we are bound so long as we are a territory. It may not be improper to add here that, were New Mexico a state, and, consequently, possessing independent power to settle its own practice, it is more than doubtful whether this court would have followed the decisions of the U. S. Supreme Court in this matter, rather than the preponderance of deci-

sions in state courts, which conflict with it. Without considering it necessary to inquire into any of the other points involved in the case, we have to hold that it was error for the court below to direct a nonsuit against the will of the plaintiff. The judgment, therefore, is reversed, and the case remanded to the district court for a new trial.

All concur.

THE TERRITORY OF NEW MEXICO, Appellee, v. DAVID RUDABAUGH, Appellant.

January 21, 1881.

PRACTICE ON REVIEW. (1) *Insufficient bill of exceptions.*

1. The bill of exceptions stated that the defendant excepted to an instruction asked for by himself and given by the court. It referred to the transcript for matter which was intended to be part of the bill of exceptions. It omitted to state a number of instructions which it stated were refused by the court, and such refusal excepted to by the defendant. It had, at the close of the testimony, no certificate of the judge that it contained all of the evidence.

   Held, unnecessary to examine the case, and that, perhaps, the appeal might properly have been dismissed, but that judgment would be affirmed.

Appeal from District Court of Santa Fe county.

PARKS, Associate Justice: The appellant in this case seems to have abandoned his appeal, and as the bill of exceptions is imperfect, it may be briefly disposed of.

There is no certificate of the presiding judge at the close of the testimony that it contains all of the evidence. In the body of the bill, there is a reference to the transcript for matter which is thus intended to be made a part of the bill of exceptions.

A number of instructions which it is stated were refused

by the court are nowhere to be found in the bill or transcript, although it is stated they were refused by the court, and such refusal excepted to by the defendant. And the defendant, as excepting to an instruction, asked for by himself and given by the court.

As we understand the case, it is not necessary to examine it further. Perhaps the court might properly have dismissed the appeal, but we deem it better to affirm the judgment.

Judgment affirmed.

HENRY BARRUEL, Appellee, v. WILLIAM K. IRWIN, Appellant.

January 21, 1882.

APPEALS FROM JUSTICE OF THE PEACE. (1) *District court governed by what laws as to jurisdiction and procedure.*

REPLEVIN. (2) *Value must be stated in affidavit, or writ will be quashed: Statute requiring this not repealed.*

SAME. (3) *Omission to state value in affidavit not cured by verdict.*

DEMURRER. (4) *Rule that pleading over waives demurrer is not applicable in justice's court.*

COURT OF JUSTICE OF THE PEACE. (5) *Replevin: Plea of not guilty not presumed where not, in fact, made.*

APPEAL FROM JUSTICE. (6) *Jurisdiction of justice must appear in order to enable district court to try case de novo.*

REPLEVIN. (7) *Dismissals in, under statute.*

SAME. (8) *Dismissals for fatal irregularity in affidavit.*

SAME. (9) *Property lost or destroyed, remedy of defendant.*

1. District courts, in the trial and disposition of causes upon appeals from justices' courts, are to be governed by the same laws relating to jurisdiction, and the kind of judgments to be entered, as well as the nature of the pleadings and the modes of acquiring jurisdiction by the court of the parties and subject matters within such jurisdiction that are prescribed by law to be observed in like proceedings before justices of the peace. That is, the district court upon appeals from justices of the peace sits as a court of special and limited jurisdiction, and not of general jurisdiction.

2. The statute required the affidavit for a writ of replevin to be issued by a justice of the peace to state the value of the goods or chattels sought to be replevied, but in a subsequent section it prescribed a form for such an affidavit, in which the statement as to value was not included.

   Held, That the adoption of this form in the statute was not a repeal of the preceding section requiring the value to be given.

   Held, That the affidavit for a writ of replevin before a justice of the peace must contain an averment of value in order to authorize the issuing of the writ. That such statement of value was necessary in order to show that the justice had jurisdiction, and, also, in order to estop the plaintiff from showing a different value should it become his interest to do so. And the affidavit being insufficient because it contained no statement of value, the writ should have been quashed.

3. Where the affidavit in replevin before a justice of the peace omits to state the value of the property, and is objected to for this reason, but the objection is overruled, trial had and verdict rendered, the defect in the affidavit is not cured by the verdict.

4. The rule that pleading over by a defendant to a declaration adjudged good on demurrer is a waiver by him of any right he might have had to question in the appellate court the correctness of the decision by the lower court on such demurrer, is a technical rule respecting written pleadings in a court of general jurisdiction. In an action of replevin, before a justice of the peace, a motion to quash the writ for a defect in the affidavit was made and overruled, after which the parties proceeded to trial.

   Held, That the motion to quash was not, in effect, a demurrer, and that pleading and going to trial after the motion to quash was not a waiver of the defect in the writ.

5. Where, in an action of replevin, before a justice of the peace, no plea of not guilty was ever filed, nor, if oral, was it entered upon the docket of the justice, no such plea can be assumed to have been made.

6. On appeal from a justice of the peace, the district court has no right to proceed to trial *de novo,* without having before it a *prima facie* case showing that the justice had jurisdiction. Such jurisdiction cannot be presumed.

7. Section 53 of the act relating to justices of the peace (Gen. Laws N. M., Prince ed., 96) providing that, "If the plaintiff discontinue, suffer a nonsuit, or if he should otherwise fail to prosecute his suit to final judgment, it shall be the duty of the justice to summon a jury as hereinbefore provided, to impanel and swear the same to inquire and assess the value of the goods and chattels replevied, together with adequate damages for the detention of the same; or, if on trial of the issue joined the jury shall find for the defendant, the value of the goods and

chattels, together with adequate damage for the detention thereof, shall be assessed by the jury, and the justice shall render judgment in favor of defendant for such value and damages so found by the jury, but, if the jury shall find that the defendant did detain such goods, and that they were the property of the plaintiff, they shall assess adequate damages for such detention," relates exclusively to actions of replevin that have been in all respects regularly and properly commenced and the statute fully complied with so that so far as the regularity of the proceedings is concerned, a trial upon the merits might have been had. It does not apply to dismissals for irregularity, *e. g.*, defect in affidavit occasioned by omission to state value of property replevied therein.

8. If the action of replevin is dismissed for an irregularity which precludes a trial upon the merits, *e. g.*, a defect in the affidavit, consisting of an omission to state the value of the property, the court is to order a return of the property to the defendant with nominal damages; but there should be no assessment of value or of damages by a jury and judgment therefor. The plaintiff is not precluded by this from bringing a new action to determine his right to the property.

9. If, during the pendency of the proceedings in replevin the property shall have been lost, destroyed, or disposed of so that no return thereof can be made, the only remedy of the defendant would seem to be either to sue on the bond, or to sue for damages for the unauthorized and unlawful taking and conversion of the property.

Appeal from the District Court of Colfax county, PRINCE, J.

This is an action of replevin brought before FRANCIS MAYLAND, a justice of the peace, in precinct No. 2, Colfax county, on the fourth day of June, 1881, by Henry Barruel, plaintiff below, against William H. Irwin, defendant below, for the recovery of a gray mare.

Plaintiff's action was based upon an affidavit made by him, that he had "good right to the possession of the following described goods and chattels, and that the same were wrongfully detained by the said William K. Irwin, one gray mare." Upon such affidavit, the justice issued his writ of replevin, the property was replevied, a trial had and a verdict and judgment rendered in favor of plaintiff, from which defendant appealed to the district court for Colfax county.

Afterwards, at the August term, A. D. 1881, of said court held in said county, the defendant filed his motion to quash

the writ, and dismiss said cause and alleged and set forth the following reasons therefor:

First. It does not appear from the affidavit or otherwise, that the justice had jurisdiction to try said cause.

Second. No affidavit as required by law was filed by the plaintiff to authorize the issuance of the writ.

Third. The affidavit filed in said cause does not state the value of the property claimed.

Fourth. The affidavit filed does not contain any sufficient description of the property claimed.

Which motion was by the court denied, to which defendant then and there excepted.

The cause was thereupon tried by a jury in said court, and a verdict returned in favor of the plaintiff, upon which verdict the court rendered judgment for plaintiff. Defendant, by his counsel, then entered motions to arrest judgment, and for a new trial, which were denied.

He therefore brings this cause here by appeal, and relies upon the following grounds for a reversal of the judgment of the court below. viz.:

First. It does not appear from the affidavit or otherwise, that the justice of the peace had jurisdiction to try said cause.

Second. No affidavit, as required by law, was filed by the plaintiff to authorize the issuance of the writ.

Third. The affidavit filed in said cause, does not state the value of the property claimed.

Fourth. The affidavit filed does not contain any sufficient description of the property claimed.

Frank Springer and *Catron & Thornton*, for appellant.

As to the first ground of exception, it is absolutely necessary that the affidavit in an action of replevin before a justice of the peace, should set forth such a statement of facts as will clearly confer jurisdiction. Justice's courts are courts of special, limited and inferior jurisdiction, and their authority is derived wholly from the statutes, and must be

strictly pursued: *Matlock v. Strange*, 8 Ind., 57; *Evans v. Pierce*, 3 Ill. (2 Scam.), 468; *Pendleton v. Fowler*, 6 Ark., 41; *Reeves v. Clark*, 5 Ark., 27; *Martin v. Fales*, 18 Me., 23; *Levy v. Sherman*, 6 Ark., 182; *Everett v. Clements & Thompson*, 9 Ark., 478; *Williams v. Bower*, 26 Mo., 601; *Butler et al v. Wilson*, 10 Ark., 313; *Van Bibber v. Van Bibber*, 10 Humph., 53.

As to the second ground of exception, the statute has clearly set forth what the affidavit in replevin before a justice of the peace shall contain (Prince's General Laws of New Mexico, page 95, sec. 50), and without such specific compliance with the statute, the justice has no authority to issue his writ or to proceed in any other respect in the cause. In such a proceeding he derives jurisdiction, if at all, wholly from the affidavit which is the foundation of the suit.

The jurisdiction of a justice of the peace must appear from the records of the proceedings and will not be presumed: *Reeves v. Clark*, 5 Ark., 27; *Jolley v. Foltz*, 34 Cal., 321; *Trader v. Kee*, 2 Ill. (1 Scam.), 558; *Straughan v. Inge*, 5 Ind., 157; *State v. Hartwell*, 35 Me., 129; *Lane v. Crosby*, 42 Me., 327; *State v. Hall*, 49 Me., 412; *Bridge v. Ford*, 4 Mass., 541.

As to the third ground of exception, an allegation of the value of the property is necessary to give jurisdiction to the justice. The language of the statute not only is positive, but prohibitory. It declares that no writ of replevin shall issue, unless the plaintiff, etc., shall file an affidavit with the justice, stating, etc., and stating the value of the property, and every writ of replevin issued without such affidavit shall be quashed: General Laws N. M., p. 95, sec. 50.

There is nothing in the form prescribed in the justice of the peace act in conflict with this, or which in any manner supersedes the necessity of stating value. In construing two statutes relating to the same subject, that which is positive and certain must prevail: In the matter of Watts,

1 New Mexico, 541; Potter's Dwarris on Statutes, etc., 110, 154 and 155.

As to the fourth ground of exception, the description, "one gray mare," is too vague and indefinite. The property should be described with such particularity that a judgment in the case could be pleaded in bar in another action.

Furthermore, the value is part of the description, just as material and essential as any other; the purpose of a description is to enable the court to act in the case, to determine the propriety of the remedy sought, its jurisdiction to try, and its capacity to render a judgment. If the description fails to furnish the court with this information, it is fatally defective.

In this respect the affidavit does not comply with the form prescribed, which requires that it shall describe the goods and chattels.

Jurisdiction of courts of limited jurisdiction must appear from the record: 8 Peters, 444.

If legislature prescribes a rule, although it may be technical, the court is bound by it: 7 Wall., 310, 311.

Appearance does not waive want of jurisdiction of the subject matter: *United States v. Yates*, 6 How., 608; 29 Conn., 417; 30 Ala., 602.

Breeden & Waldo, for appellee.

The affidavit for replevin was sufficient, as it literally followed the form prescribed by the statute: Prince's Statutes, sec. 124, page 109; Prince's Statutes, Form, page 113.

The description of the property was sufficient, as it appears that the officer who held the writ was able to find and did find the property sought to be replevied.

A description in replevin need only to be sufficient to enable the officer to find the property and execute the writ: *Hill v. Robinson*, 16 Ark., 90; *Stevens v. Osman*, 1 Mich., 92; *Farwell v. Fox*, 18 Mich., 166.

The defendant's objection to the affidavit came after he had appeared and pleaded and after a trial upon the merits.

It was, therefore, too late: *Brown v. Keller*, 32 Ill., 151.

A motion based upon irregularity in issuing the writs, or insufficiencies in the affidavit, comes too late after pleading to the merits. Such irregularities and insufficiencies are waived by pleading to the merits, and cured by verdict: *Frink v. Flanagan*, 6 Ill., 35; *Smith v. Emmerson*, 16 Ind., 355; *Bales v. Scott*, 26 Ind., 202.

The affidavit and writ in this case, if defective, were amendable: *Jacques v. Sanderson*, 8 Cush., 271; *Frink v. Flanagan*, 6 Ill., 35; *Perkins v. Smith*, 4 Blackford, 299; 8 Hump. (Tenn.), 697; Prince's Statutes, 119.

If the affidavit was amendable, insufficiencies and defects therein were cured by verdict: *Haverhill v. Cronin*, 4 Allen (Mass.), 141; *Robinson v. English*, 34 Pa. State, 324; *Bean v. Mitchell*, 13 Mich., 207; *Lane v. Maine M. F. Ins. Co.*, 12 Me., 44.

The defendant's motion to quash in the district court was in effect a demurrer, and the objection was waived by pleading over: *United States v. Boyd*, 5 Howard, 29; *Walkins v. United States*, 9 Wall., 762; *Beall v. Terty*, 1 New Mex., 513.

The defendant had two trials on the merits and two verdicts against him. Substantial justice having been done, the court should not disturb the judgment: *Dawson v. Wisner*, 11 Iowa, 36; *Karney v. Paisley*, 13 Iowa, 89–94; 46 Ill., 112; 47 Ill., 178; 5 Ohio, 109; 1 Peters, 183; 1 Ohio, 355.

Bristol, Associate Justice: This is an action of replevin originally before a justice of the peace of Colfax county, in the first judicial district, by Henry Barruel, for the recovery of the possession of a domestic animal described as a "gray mare," and for damages.

The case was tried before the justice by a jury, who ren-

dered a verdict in favor of the appellee and against William K. Irwin, the appellant, on the main issue and for damages in the sum of five dollars.

It does not appear from the record that any formal judgment was entered by the justice on this verdict, and perhaps none was necessary for the purpose of an appeal to the district court.

The case was appealed on behalf of the appellant to the district court for that county. A trial *de novo* was held in that court before a jury, who rendered a verdict of guilty against the appellant. No value of the property replevied or damages seem to have been assessed by the jury.

The only judgment rendered by the court below was that the appellee (plaintiff below), Henry Barruel, "have and retain possession of the property heretofore replevied herein, and also that he recover of the said defendant (appellant here), William K. Irwin, his costs in this behalf expended as well as in the court below (justice's court) as in this court (the district court below) taxed at $38.60, and that he have execution therefor." The case is here by appeal from that judgment.

The affidavit for the writ of replevin made before the justice, and on which the case was originally tried before him and on which a trial *de novo* in the court below was had, is as follows:

"HENRY BARRUEL }
v. }
WILLIAM IRWIN. }

"The above named Henry Barruel, being duly sworn, says that he has good right to the possession of the following described goods and chattels, and that the same are wrongfully detained by the said William Irwin, one gray mare.

"HENRY BARRUEL.

"Sworn to and described before me, }
this 4th day of June, 1881. }

"FRANCIS MAYLAND,
"*Justice of the Peace Precinct No. 2, Colfax County.*"

On this affidavit a writ of replevin in the usual form was issued by the justice and placed in the hands of a constable to be served.

The constable returned the writ of the justice with his written indorsement thereon as to his doings thereunder, as follows:

"Served on the 4th day of June, 1881.

"F. E. FRANKLIN,
"*Constable.*"

The affidavit for a writ of replevin, and the writ itself with the aforesaid return of the constable indorsed thereon, being in this condition, the case was presented to the court below for trial; but before any other proceedings therein took place, the appellant, by his attorney, appeared and interposed the following motion, viz.; "Now comes the said defendant and moves the court to quash the writ in the above entitled cause, and to dismiss said cause for the following reasons:

"*First.* It does not appear from the affidavit or otherwise that the justice had jurisdiction to try said cause.

"*Second.* No affidavit as required by law was filed by the plaintiff to authorize the issuance of the writ.

"*Third.* The affidavit filed in said cause does not state the value of the property claimed.

"*Fourth.* The affidavit filed does not contain any sufficient description of the property claimed."

This motion was argued by counsel for the respective parties, and after being submitted, was overruled by the court, and an exception to such ruling was taken by the appellant. After this, leave was granted for the officer to amend his return to the writ by showing service on the defendant, and taking the "chattel described in the writ, to wit, the gray mare," from the defendant, and delivering the same to the plaintiff before the return day of this writ. The parties then went to trial, resulting in the verdict and judgment aforesaid.

The only question raised by the appellant is whether the overruling the motion to quash the writ by the court below, is such error as will justify this court in reversing or modifying the judgment below.

Section 77 of the act relating to justices of the peace as to appeals, provides as follows: "The case upon such appeal shall be tried *de novo*, and the same rules shall govern the district court in said trial, that are prescribed for the government of justices' courts:" General Laws N. M., Prince's ed., 101. We understand from this that district courts, in the trial and disposition of causes upon appeals from justices' courts, are to be governed by the same laws relating to jurisdiction and the kind of judgments to be entered, as well as the nature of the pleadings and the modes of acquiring jurisdiction by the court, of the parties, and subject matters within such jurisdiction, that are prescribed by law to be observed in like proceedings before justices of the peace. That is, the district court, upon appeals from courts of justices of the peace, sits as a court of special and limited jurisdiction, and not of general jurisdiction.

In referring to the statutory proceedings before justices of the peace, touching the action of replevin, we find that sections 48, 49 and 50 of said act provide as follows:

Section 48. "Whenever any goods or chattels are wrongfully taken or obtained, the value of which shall not exceed one hundred dollars, an action of replevin may be brought by the person having a right to the immediate possession for the recovery thereof, and the damages sustained by reason of the unjust capture or detention, as is hereinafter specified."

Section 49. "Actions of replevin shall in all cases be commenced by a writ which shall be returnable in the same manner as a summons."

Section 50. "No writ of replevin shall issue unless the plaintiff, his agent or attorney, shall file an affidavit with the justice, stating that the goods and chattels are wrongfully

detained by the defendant, and stating the value thereof, and that he has a right to the possession thereof; and every writ of replevin issued without such affidavit, shall be quashed at the cost of the plaintiff: *Id.*, 95.

Section 124 of the same act is as follows, viz.: "The following forms are prescribed for the use of justices of the peace in the actions mentioned, and shall be used by them in all cases:" *Id.*, 109.

After which follow various forms, and among them is a form for an affidavit for a writ of replevin, as follows:

"A. B. } In replevin before E. F., Justice of the Peace for .....
"C. D. } township, in ..... county.

"The above named A. B., being duly sworn, says, that he has good right to the possession of the following described goods and chattels, and that the same are wrongfully detained by the said C. D. (here describe goods and chattels.)

"Sworn to and subscribed before me, } .....
this.... day of ..... 18 . } *Justice of the Peace.*" *Id.*, 113.

It will be observed that in this form of affidavit, the allegation of value of the property to be replevied, required by the aforesaid section 50, is omitted.

The affidavit in this case is in pursuance of this form, and omits the averment of the value of the property.

By no rule of construction of statutes can the adoption of this form, under the circumstances, be construed as a repeal of as much of said section 50, as requires an averment of value in the affidavit. Both of these sections, with all their provisions, are still in force. There is no inconsistency or conflict between them that cannot be perfectly harmonized. The averment of value in the affidavit is as necessary now as before the adoption of the form. The provisions of said section 50 being still in force, they must be considered as controlling the form. The affidavit, therefore, among other requirements, must contain an averment of value in order to

authorize the issuing of the writ. It is a necessary and substantial requirement, and something more than a mere technicality of the law. On general principles applicable to courts of inferior and limited jurisdiction, where nothing can be presumed to be regular, such averment in the affidavit as to the value of the property becomes a necessity in order to show that such value is within, and does not exceed the jurisdiction of the justice. Upon this ground the defendant has a right to insist upon this requirement before going to trial. He also has the right to insist upon to estop the plaintiff from attempting to show a different value, should it become his interest to do so. The statute in this respect is mandatory in its terms, and determines what the result shall be if there is any material omission in the affidavit. Replevin being a special and extraordinary remedy, the provisions of the statute must be strictly complied with: Wells on Replevin, secs. 649, 661, 662 and 664. The overruling the motion to quash the writ for insufficiency of the affidavit, was error. The affidavit was the foundation of the suit: *Id.*, 651. It is what must confer jurisdiction on the justice to entertain the suit upon appeal; it is what the district court must look to as conferring upon it the right to proceed to a trial *de novo*. The appellant interposed his objections to the sufficiency of the affidavit at the proper stage of the proceedings. They were overruled and excepted to. The questions involved relating to jurisdiction and the ruling erroneous, it became and is reversible in this court. But it is contended, on behalf of the appellee, that inasmuch as the affidavit was amendable, any defect therein was cured by verdict, and we are referred to the case of *Tug Boat, E. P. Dorr, v. Asa E. Waldron et al.*, 62 Ill., 221, as authority. That was an action brought in a court of general jurisdiction by attachment against a vessel, for supplies furnished. In the appellate court it was objected that the proceedings failed to show that the court had jurisdiction, and that the

affidavit did not show that the supplies were furnished at the home port of the vessel, and that she was a domestic vessel.

It was held by the appellate court that as the objection was one that might have been obviated by amendment, if made in the court below, it came too late when urged for the first time in that court.

This is not an authority in this case: 1st. Because this action originated in a justice's court, where jurisdiction is never presumed, but must appear affirmatively upon the record; and 2d. The objection was properly raised in the court below and improperly overruled. It is not, therefore, urged for the first time in this court. Defects which would be fatal on demurrer on other forms of legal exception, are never cured by verdict except on the ground that the objection was not interposed at the proper time.

It is further contended on behalf of the appellee that the motion to quash was in effect a demurrer, and that the objection to the affidavit raised thereby was waived by pleading over.

The rule that pleading over by the defendant to a declaration adjudged good on demurrer is a waiver by him of any right he might have had to question in the appellate court the correctness of the decision by the lower court on such demurrer, is a technical rule respecting written pleadings in a court of general jurisdiction. This rule, in our opinion, can have no application to the question now under consideration in this case. There are no formal pleadings by either party appearing of record. The only thing indicating the appellee's cause of action is this defective affidavit for a writ of replevin. Although the statute provides for a formal plea of not guilty on the part of the defendant below (Gen. Laws N. M., Prince's ed., 96), yet no such plea was ever filed, or if oral, none was entered in the docket of the justice, and being a court of special and limited jurisdiction, no such plea by the act of the defendant can be assumed.

The plea of the defendant was in by operation of law, if at all. His appearance in court after having raised by motion the proper objections to the sufficiency of the affidavit and the decision of the court overruling the same, cannot be considered as a pleading over and a waiver of such objections.

The court below had no right to proceed to trial before having before it a *prima facie* case showing that the justice had jurisdiction.

There is nothing upon the record showing the value of the property or the jurisdiction of the justice or of the court below. It cannot be presumed.

Amendments to the affidavit may be permitted to correct mistake and in furtherance of justice, but leave to amend rests in the sound discretion of the court, to be exercised in the first instance with caution: Wells on Replevin, sec. 665, note 6. If it is quashed, the suit is no longer pending for any purpose except to render the proper judgment in favor of the defendant: *Ibid.*, sec. 518. The question here presents itself as to what should be done and as to what kind of judgment should be rendered in case the writ is quashed and the suit dismissed on the sole ground of informality and irregularity. In consequence of such irregularity, there has been no opportunity to try the case on its merits, or in any manner to determine the question of title or right of possession. In such case no evidence of the plaintiff's title can be given, when, perhaps, if an opportunity had been afforded him, he might have been able to show by competent proof, that he was the owner of the property and entitled to its possession: *Ibid.*, sec. 47. Heretofore it may have been considered, perhaps, that sec. 53 of the act relating to justices of the peace (Gen. Laws N. M., Prince's ed., 96), prescribe the kind of judgment to be rendered in such case, and what is to be done as the basis of such judgment. That section provides as follows: * * * "If the plaintiff discontinue, suffer a nonsuit, or if he should otherwise fail to prosecute his suit

to final judgment, it shall be the duty of the justice to summon a jury as hereinbefore provided, to impanel and swear the same to inquire and assess the value of the goods and chattels replevied, together with adequate damages for the detention of the same; or if on the trial of the issue joined, the jury shall find for the defendant, the value of the goods and chattels, together with adequate damages for the detention thereof, shall be assessed by the jury, and the justice shall render judgment in favor of defendant for such value and damages so found by the jury; but if the jury shall find that the defendant did detain such goods and that they were the property of the plaintiff, they shall assess adequate damages for such detention."

This section of our statute, in our opinion, relates exclusively to actions of replevin that have been in all respects regularly and properly commenced and the statute fully complied with, so that so far as the regularity of the proceeding is concerned, a trial upon the merits might have been had. If, after a suit has been in this way regularly and properly commenced, the plaintiff on his own motion dismisses it, such action on his part may be considered as an admission by him that he has no cause of action, and that the defendant is entitled to the property. No such presumption can arise when the suit is dismissed for irregularity on motion of the defendant. We hold, therefore, that the section of the statute last aforesaid does not apply to dismissals of this kind for irregularity. In such case the court would be justified in ordering a return of the property to the defendant, with, perhaps, mere nominal damages; but there should be no assessment of value or of damages by a jury and judgment therefor: *Ibid.*, sec. 518; 35 Vt., 396; 46 Vt., 399; 15 Me., 345. This rule seems very reasonable and just.

If the suit be dismissed merely on the ground of irregularity, there being no opportunity to determine the rights of either party to the possession, the plaintiff could not be pre-

cluded thereby from bringing a new action to determine his right thereto. If, however, upon such dismissal for irregularity, the defendant is to have the same judgment that he would be entitled to on a verdict in his favor upon a trial on the merits, very great injustice might accrue to the plaintiff. If, for instance, upon a dismissal for irregularity, judgment should be rendered in the defendant's favor for the value of the property, instead of for a return thereof to him, in accordance with the provisions of the aforesaid section 53, of the statutes, what kind of new action could the plaintiff bring to recover back the amount of the judgment or to free himself from its obligations by proving himself to be the real owner of the property? The only proper and consistent thing for the court to do under the circumstances would seem to be to follow the rule above laid down and order a return of the property to the defendant with merely nominal damages, and to award him his costs. If this is done the plaintiff will be at liberty to bring a new action for its recovery, wherein the rights of the parties might be determined. On the other hand, if during the pendency of the proceedings, the property shall have been lost, destroyed or disposed of, so that no return thereof could be made, the only remedy of the defendant would seem to be either to sue on the bond or to sue for damages for the unauthorized and unlawful taking and conversion of the property, the same as for any other unlawful taking and conversion, and wherein his right thereto, if any he had at the time, might be established by competent proof.

The judgment should be reversed and judgment in this court rendered in favor of the appellant for a return to him of the property and for his costs, but without damages.

And it is so ordered.

JOHN L. SAMPLES, Plaintiff in error, v. FRANK SAMPLES, Defendant in error.

January 21, 1882.

PROMISSORY NOTE—AGENCY. (1) *Collection of claims due maker of note held on payment thereof.*

1. The maker of a promissory note sent the holder of it with a power of attorney to Virginia and Kentucky to collect certain claims for money due the maker, and agreed that out of the proceeds of such collection the note was to be paid, and the excess remitted to the maker. The holder proceeded to Kentucky, whence he sent a third person on to Virginia to collect the claim of the maker of the note. That person collected more than enough to pay the note. In an action on the note by the holder against the maker, *Held,* that so far as the collection, receiving, and possession of the money obtained in Virginia, affects the rights of the maker of the note, the holder (plaintiff) and his messenger to Virginia are one; that the possession of the money by such messenger is that of the plaintiff; that whether or not the money was actually and literally applied to the payment of the note, the law so applied it, and that the note was paid.

Error to the District Court of Mora County.

The suit in this case was brought on a promissory note held by plaintiff against the defendant. The defendant plead the general issue, and on trial the court permitted the defendant to introduce evidence tending to show that at some time previous the defendant gave the plaintiff a power of attorney to collect certain moneys. That this power of attorney was a settlement of the note, or that the claims when collected were to be in settlement of the note. The court also charged the jury that defendant was entitled to be credited on the note with any sums collected under the power of attorney, and if he sacrificed any claim, then with the amount such claims were worth at the time of such sacrifice.

The defendant did not plead a set-off for the amount collected or any other special plea claiming negligence in col-

lecting the claims. The jury gave a verdict for the defendant, and the plaintiff appeals to this court.

C. H. Gildersleeve and *Breeden & Waldo*, for plaintiff in error.

The giving of the power of attorney by defendant to plaintiff to collect claims and appropriate the proceeds to the extinguishment of the note sued on was not a payment of the note: *Jose v. Baker*, 34 Maine, 446; *Hoar v. Clute*, 15 Johnson (N. Y.), 224, and a parole release of a note not accompanied with delivery is not good, it must be under seal: Story on Promissory Notes, 410, and notes.

If plaintiff was guilty of negligence in the collection of these claims, then defendant could recover in an action therefor (6 Selden, 261), but cannot give proof of such negligence under the general issue, in an action by the plaintiff on the note. He must plead it specially: Stephens on Pleading, 161; Gould Pleading, 306; Tidd's Practice, 663, 664, and notes; Parsons on Notes and Bills, vol. 2, p. 619; *Brown v. Hall*, 4 Iowa, 430. Prince's Laws of New Mexico, pp. 119, 124, with reference to set-off, states the defendant "may plead" a set-off or counter-claim.

The only inference to be drawn from the statute and from the well settled rule of the common law is that the only way the court could possibly have admitted evidence on the trial in set-off against the note, would have been under a special plea of the defendant.

Catron & Thornton, for defendant in error.

The action in this case was assumpsit on a promissory note made by the defendant. Plea, general issue. The errors assigned are the admission of evidence tending to prove that the defendant gave to plaintiff a power of attorney to collect certain debts due him, with the understanding that he was to take the indebtedness due, with the power to collect it in satisfaction of the note; was to send the note to him as soon as he reached Kentucky, where the note was.

Proof was introduced to show that the indebtedness was more than sufficient to pay the note, and that plaintiff did collect, or cause to be collected, an amount sufficient to pay this note.

Defendant insists that under the general issue any evidence tending to show that at the time the suit commenced, the defendant was not indebted to plaintiff, was competent. Under the general issue, any matter which showed that the plaintiff never had cause of action, might be given in evidence; and also that, under that plea, most matters, even in discharge of the action, and which showed that at the commencement of the suit, the plaintiff had no subsisting cause of action might be taken advantage of: 1 Chitty on Pleading, section 478 and note; Stephen on Pleading, section 162, and note.

"Under a plea of non-assumpsit may be given in evidence anything which shows there was no cause of action at the time of the action brought:" 1 Chitty on Pleading, section 478, note 2; 4 Taunton, 165; 10 Wendell, 164.

The authorities cited by plaintiff have no bearing on the case.

The reference in Stephen on Pleading, 161, is an authority under the Westminster rules, Reg. Hiliary term, 4 W., 4, as is expressly shown, for the author goes on to state that prior to those rules, the practice was different. See note 20, pp. 161, 162. These rules have never been adopted in this territory, and but few of the states of the Union have ever adopted them: Stephen on Pleading, 161, note 20.

The evidence offered in this case all tended to show that at the time the suit was brought no action did exist. It showed the acceptance of the transfer of another indebtedness and power of attorney, in satisfaction of the debt, and that the debts or accounts transferred were of sufficient value to pay the note. A release or parol discharge can be given in

evidence under this plea: 1 Chitty on Pleading, 477; 10 Wendell (N. Y.), 164.

"The authority referred to in Tidd's Practice does not sustain the plaintiff. On the contrary, that author says: "In short, the question in assumpsit upon the general issue is whether there was a subsisting debt or cause of action at the time of commencing suit." See page 646.

The case in 10 Wendell, 165, and 16 Johnson (N. Y.), 224, are both stronger cases and go further in support of defendant's position than defendant asks in the case. Not any authority cited by plaintiff supports his case except those decided under a code of practice, or in some state where the rules of Hiliary term have been adopted.

PARKS, Associate Justice: In this case the plaintiff in error sued the defendant in error on a note assigned to him by Charles Samples, the payee, which note was dated April 22, A. D. 1865, due one day after date, for the sum of $200, bearing ten per cent. interest, and on which note $40 was credited in June, 1876, and $150 was credited in January, 1877.

Defendant pleaded the general issue. There was a trial by jury, verdict for defendant, and judgment against plaintiff for costs. A motion for a new trial was overruled, and the case came to this court by writ of error.

The plaintiff introduced the note and assignment thereof to him without objection. The defendant, Frank Samples, testified as follows: In the fall of 1876—in September, I think—the plaintiff, who had the note, came to this county to make a settlement with me. I had some money coming to me in Virginia, and a brother of mine in Kentucky owed me fifty dollars, and I gave the plaintiff a power of attorney to go to Virginia and collect what was due me, and, after taking out the amount of the note, to send me the balance. There was near six hundred dollars due me in Virginia from

my brothers', father's and grandfather's estate. I gave plaintiff power of attorney to receive this, and also fifty dollars due me by my brother in Kentucky. It was understood that the power of attorney paid the note sued on, and plaintiff was to send me what was over, together with the note. It was understood the power of attorney paid the note sued, and the plaintiff was to go to Virginia and collect the money coming to me there. Plaintiff had no authority to sell my claim and interest.

On cross-examination, plaintiff testified that:

It was understood the power of attorney settled the note; the plaintiff was to go to Virginia and collect the money and send me what was over. The plaintiff distinctly agreed that the power of attorney should pay and settle the note. The note was not delivered to me because plaintiff said it was then in Missouri; he was to send it to me. Plaintiff afterwards wrote to me that he went as far as Kentucky, was taken sick, and sold out my interest for the pitiful sum of $250. He wanted me to pay the balance of the note, but I refused, because the note was paid by the power of attorney. At the time I gave the power of attorney, I was solvent and able to pay my debts and acknowledged that I owed the note in question. I was not to pay the plaintiff for going to Virginia. I do not remember whether or not I agreed to pay part of his expenses. He was to send me what he collected in excess of the amount of the note.

This testimony of the defendant is uncontradicted, and as the plaintiff did not offer himself as a witness and did not produce the power of attorney, there is no reason why entire credit should not be given to the statement of the defendant.

The only other evidence which it is material to notice is that W. P. Samples, by whom it is proved that S. G. Samples collected in Virginia, on the power of attorney, $465, that being more than the amount of the note. From this evidence, it appears:

1st. That there was no sale of the power of attorney to S. G. Samples, the alleged sale being unauthorized and void, and having been repudiated by the defendant as soon as he heard of it.

2d. That whether the plaintiff, John L. Samples, was authorized by the power of attorney to appoint any one to go to Virginia and get the money or not, yet as a matter of fact, he did do so.

3d. That said agent or messenger received or collected, of the moneys belonging to the defendant in Virginia and which by the agreement between the plaintiff and defendant was to be appropriated to pay the note sued on, an amount amply sufficient to pay it.

The question before this court is, briefly, whether the verdict of the jury is so clearly wrong that it is our duty to reverse the verdict of the district court in refusing to set it aside and grant a new trial. We cannot say that it is.

On the contrary, we think the better opinion is, that so far as the collection, receiving and possession of the money obtained by S. G. Samples in Virginia affects the rights of the defendant in this suit, the plaintiff and his said messenger or agent are one that the possession of this money by the agent is the possession of the plaintiff, that whether the money was actually and literally applied to the payment of the note or not, the law so applied it and the note was paid.

As to the question of pleading raised by this record, we think the evidence was properly admitted under the general issue, and as the instructions did not mislead the jury it is not necessary to discuss them. The judgment of the court below is affirmed.

JOHN B. LAMY, Plaintiff in error, v. LUCIEN REMUSON, Defendant in error

January 30, 1882.

REPLEVIN. (1) *Presumption as to execution of writ.*
SAME. (2) *Affidavit of plaintiff, evidence of value.*
PRACTICE. (3) *Correction of erroneous orders after continuance.*
REPLEVIN. (4) *Abandonment of action by plaintiff, proceedings, and judgment of court upon.*

1. It is the duty of the plaintiff in replevin to know, before he compels the defendant to plead, what has been done with the writ and the property, and where a plaintiff sues out a writ of replevin, and on his motion the defendant is ruled to plead, and does plead to the merits, and the case is continued to the next term of the court without any question being raised by the plaintiff as to the whereabouts of the writ or the status of the property, till the final act of the court in assessing the value of the property, these acts by the plaintiff raise a strong presumption in the court below that the writ has been fully executed, and that the property is replevied and is in plaintiff's possession. In the supreme court this presumption under such circumstances will be conclusive.
2. The affidavit of the plaintiff as to the value of the property in suing out the writ is competent but not conclusive evidence of that value in any trial of that issue as against the plaintiff.
3. A case having been continued and remaining upon the docket for disposition next term, the court has the right to correct any erroneous orders previously made in such case, there having been no trial, verdict, or judgment in it.
4. Where plaintiff by dismissal abandons his suit in replevin, the court may retain the cause for the benefit of the defendant, and as against plaintiff and in favor of the defendant, the court may assess the damages and the value of the property, and render judgment therefor in defendant's favor. Such an assessment of the damages and the value of the property is not an invasion of the constitutional right of trial by jury.

Error to the District Court of Rio Arriba county, PRINCE, J.

This is an action of replevin brought by plaintiff in the district court for the county of Rio Arriba, first judicial dis-

trict of New Mexico, for the recovery of the following mentioned property, to wit: "One chalice or communion cup, one ciborium, and one remonstrance that were heretofore used in the catholic church in Santa Cruz." This writ was returnable at the September term, 1880, of said court.

At the return term of said court, and before any return of the writ of replevin by the sheriff had been made, the plaintiff, by his attorneys, dismissed his suit, or offered to do so, at the costs of plaintiff, but the court continued the cause for the purpose only of assessing the damages of the defendant.

And at the next regular term of the court, April, 1881, the court, upon motion of defendant, by his attorney, changed the order or judgment of the court at the former term, and entered a different judgment, *nunc pro tunc*, in said cause; and while no return had yet been made of the writ of replevin by the sheriff, proceeded to assess the damages of the defendant, and did assess the damages of defendant at the sum of $200, the only proof before the court being the affidavit of plaintiff filed in said cause to obtain a writ of replevin, and judgment was entered and execution ordered.

Conway & Risque for plaintiff in error.

Plaintiff was not compelled to prosecute his suit, nor could the defendant be damaged, unless the writ was executed, and the court had no evidence before it, nor does the record show that such was the case: Prince's Laws N. M., p. 162, sec. 7.

Judgment could not be rendered against the plaintiff for the assessed value of the property and damages for the use of the same from the time of the delivery, unless the writ had been executed. No such proof was before the court.

Catron & Thornton, for defendant in error.

In this action plaintiff sued out a writ of replevin, which was put in the hands of the sheriff of Rio Arriba county, who replevied the property mentioned to the plaintiff. It

seems the writ is not included in the transcript. At the return term, the defendant appeared and plaintiff ruled him to plead. Defendant then pleaded, after which plaintiff asked to dismiss his action, but the court continued the cause for certain purposes. At the next term defendant applied and had the order amended so as to assess the value of the property.

In the second order, which is amendatory of the first, the court says, "It is considered and adjudged by the court that the defendant do recover back from the said plaintiff the possession of the property replevied herein or the assessed value thereof, at his option. And in the part that makes up the final judgment the court says, "It is considered, etc., that defendant, Luciano Remuson, recover of the said plaintiff, John B. Lamy, the sum of two hundred dollars, the assessed value of the property heretofore replevied herein," etc., etc.

Plaintiff was present all the time, as appears by his bill of exceptions.

Plaintiff makes three exceptions, as will be seen by his bill, viz.:

1st. To amending the order on motion.

2d. To the court assessing the value of the property, instead of a jury.

3d. To the giving of the affidavit of replevin in evidence.

The plaintiff admitted the replevin of the property by his ruling the defendant to plead.

The court in the judgment finds twice that the property has been replevied.

The record imports absolute verity. The plaintiff did not object to an assessment of the value of the property, nor did he object to any judgment.

All he did object to was to amending the record, to the court assessing the value of property, and to the affidavit as evidence of value.

He made no motion for a new trial or in arrest of judgment, or did he object there had been no property replevied.

The amendment was proper. The assessment by the court was proper. The affidavit of plaintiff was competent evidence.

There is no error, and the judgment should be affirmed.

PARKS, Associate Justice: This court cannot discuss at length all the questions raised before it by assignment of errors or otherwise. In the present case a brief ruling is all that is necessary. Upon the record the court holds:

1st. The writ of replevin sued out in this case by the plaintiff was his suit, and to a very considerable extent under his control. The primary object was the possession of the property in dispute. It was the duty of the plaintiff to know, before he compelled the defendant to plead, what had been done with the writ and the property. On his motion the defendant was ruled to plead, and did plead, to the merits. The case was continued to the next term of the court, and no question was raised by him as to the whereabouts of the writ or the status of the property, till the final act of the court in assessing the value of the property. These acts on the part of the plaintiff raised a strong presumption in the court below that the writ had been fully executed and the property replevied and in his possession. In this court such presumption under the circumstances is conclusive.

2d. That the affidavit of the plaintiff to the value of the property, in suing out the writ is competent, but not conclusive evidence of that value in any trial of that issue as against the plaintiff.

3d. That the case having been continued, and remalning on the docket for disposition at the next term, the court had the right to correct any erroneous order previously made in the case, there having been no trial or verdict of a jury, or judgment upon such trial or verdict.

4th. The question of the right of the court to assess the value of the property or the damages, is the only one of which

we have had any doubt. But the weight of the decisions in the states upon similar statutes is in the affirmative. The supreme court of Illinois, more than twenty years ago, decided that statutes conferring upon courts the right to fix the value of the property and assess the damages in replevin were not an invasion of the constitutional right of trial by jury. And the supreme court of Iowa, upon a statute very similar to ours, has held that, where upon plaintiff's motion, an action of replevin has been dismissed and is again reinstated on defendant's motion, for the assessment of the damages, the plaintiff is treated as a party in default, and cannot demand a jury.

In this case, we think there was no error in the court's fixing the value of the property or assessing the damages, for in the record those expressions are used interchangeably. It is also to be considered that a reversal in this case could not benefit the plaintiff. The judgment against him is only $200, the value of the property fixed by himself in his affidavit, and on a new trial he would be estopped from proving any less sum.

We also call the attention of the attorneys to the fact that the bill of exceptions herein is materially defective, as is so often the case, and that we might affirm the judgment on that account alone.

The judgment of the district court is affirmed.

THE TERRITORY OF NEW MEXICO, Appellee, v. GEORGE W. MAXWELL, Appellant.

January 30, 1882.

JURY (1) *Finding by, not disturbed.*

EMBEZZLEMENT. (2) *Indictment need not state purpose for which accused received money.*

SAME. (3) *Accused need not have received money from some one other than principal.*

SAME. (4) *What relation must be shown between accused and his principal.*

SAME. (5) *Money need not be specifically described.*

COMMON LAW. (6) *What is not, as to embezzlement.*

1. The jury are the judges of the weight and credibility of evidence, and where there is a conflict of testimony, their finding will not be disturbed if sustained by any testimony.
2. An indictment for embezzlement need not state the object for which the money embezzled was originally received by the accused.
3. Under the statute of New Mexico (Gen. Laws, sec. 22, page 268) relating to embezzlement and providing that "If any officer, etc., 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," etc., it is not necessary to show, in order to convict of embezzlement, that the money was received by the defendant from some one on account of the defendant's principal, and not from such principal directly. There is no limitation in the statute of New Mexico as to the manner of the money coming into the possession or control of the accused, nor as to the person from whom it may so come to him.
4. To sustain an indictment for embezzlement it is enough if the relation between the accused and his principal be shown to have been the relation of principal and agent. He need not have been technically the "clerk" or "servant" of the principal.
5. In an indictment for embezzling money it is not necessary specifically to describe each particular coin or bill embezzled. All that is required is the best description which the circumstances will permit, both in the indictment and upon the trial.
6. The act of parliament passed in 1799 (39 Geo. III.) relating to embezzlement and the decisions of courts construing it, are not part of the common law of New Mexico.

Appeal from District Court of Doña Ana county, BRISTOL, J.

At the November term, A. D. 1877, of the district court, Doña Ana county, the appellant was indicted for the crime of embezzlement, and was tried at the June, A. D. 1878, term of said court, and convicted and sentenced to pay a fine of $500 and costs of prosecution.

The testimony adduced at the trial shows that appellant was intrusted with $10,000 in money, the property of one Mrs. Daily (afterwards Mrs. Rea). That said Mrs. Daily was, at the time she gave the money to appellant, a partner in business (general merchandise) with appellant; that said money was originally given to appellant by his said partner to loan out at interest; that said money was so loaned out to different parties by appellant, and finally was loaned by appellant to the firm of "G. W. Maxwell & Co.," which said firm was composed of said appellant and Mrs. Daily; that the money was never paid back by appellant to Mrs. Daily, except the sum of $1,060—the balance of the said $10,000 was expended in paying the debts of said copartnership; that appellant on August 17, 1877, rendered an account of this money to Mrs. Daily, showing the amounts he had expended on her account and the balance still due her; that upon the dissolution of said company, appellant turned over to Mrs. Daily all the property and effects of said company, valued at about $31,000, and Mrs. Daily was to pay the debts due by the company, which amounted to some $16,000.

———, for appellant.

First. The indictment charges that the money was received in the name and for the account of Mrs. Daily.

The testimony shows receipt of money with directions to be loaned at interest.

Second. The indictment does not prescribe any particular article alleged to have been embezzled, sufficiently: *State v.*

Edson, 10 Louisiana "A.," 228; *People v. Cox*, 40 Cal., 277; Russell on Crime, 185.

Third. The proofs show the money was loaned to a partnership and in effect paid back, and only shows bad judgment, and at most a breach of trust, but not embezzlement.

Fourth. The indictment does not show the object for which the money was received by the defendant: 2 Russell on Crimes, 195.

Fifth. Proofs do not show the conversion of any single article by description, which does not establish embezzlement: Russell on Crimes, 184, 186.

Sixth. The proofs show that defendant made no concealment, but shows that defendant admitted loaning money to the partnership, alleging a right in himself to so do. This is not embezzlement: Fisher's Dig. Crim. Law, 119; Roscoe Crim. Ev., 416, 402.

Seventh. Proofs show that the money was received by defendant from his principal direct, and not from some one else for and on her account, which cannot be embezzlement: *King v. Howe*, Fisher's Dig., 119; Russell on Crimes, 166, 180; 2 Bishop Crim. Law, 352.

W. L. Rynerson and William Breeden, for appellee.

Upon all the points and propositions of fact relied upon for the defense, there was a conflict of evidence, which the jury passed upon, and it is not competent for this court to review the finding or attempt to settle conflicts of evidence, or the credibility of witnesses.

As to first point of appellant. The evidence shows that the money was intrusted to the defendant for a certain purpose. If he appropriated or converted it to his own use, he was guilty of embezzlement: Compiled Laws of New Mexico, sec. 23, p. 334.

Further, the evidence shows that the defendant loaned the money intrusted to him to Barela and others, and that he afterwards received the same from these parties for and on

account of Mrs. Daily (Rea), which would make the conversion of the same to his own use embezzlement under the common law definition and under our statute: Compiled Laws of N. M., sec. 22, p. 334.

The description in the indictment of the property embezzled is sufficient, as is also the description in the evidence; it was money, and could not be more accurately described: Archibold's Crim. Pleading, 60, 330.

In the concealment and accounting by defendant there is a conflict of evidence which was purely a matter for the jury to determine.

There was sufficient to show and to authorize the jury to find that the defendant received ten thousand dollars from the witness, Mrs. Daily, and that he never returned or repaid it to her, although required so to do. This would make embezzlement under section 23, above cited, of our statute.

And also that he received the money for and on account of Mrs. Daily, from Barela and others, which money was never in her hands or possession, and that the defendant has never paid over the same to Mrs. Daily, although she demanded it of him. This would be embezzlement under the strict common-law definition, and under section 22 of our statute.

The questions involved are matters of fact which it was the province of the jury to determine, and which the jury did determine. This court cannot undertake the trial of the cause upon the evidence, or review the finding of the jury upon conflicting evidence.

Prince, Chief Justice: This is a case of embezzlement arising in the third district court, and brought here by appeal.

The defendant was indicted by the grand jury of Doña Ana county, on the 16th day of November, 1877, the indictment setting out that the said Maxwell, on the first day of May, 1877, being then and there employed as agent and

servant of and to Mariacita C. Daily, did, by virtue of his said employment, and while he was so employed, as aforesaid, receive and take into his possession certain money, to wit, etc. (giving seven different descriptions), of the value of $10,000, for and in the name and on the account of the said Mariacita C. Daily, his principal and employer, and the said money * * then and there fraudulently and feloniously did embezzle and convert to his own use, he, the said G. W. Maxwell, not then and there being an apprentice, nor a person under the legal age of sixteen years, and so, etc., "said money, notes and coin, the property of the M. C. Daily, his said principal and employer, from the said M. C. Daily, unfully did steal, take and carry away."

On the next day the defendant interposed a demurrer to the indictment, giving as causes thereof, the following, substantially:

1. That the money or property is not described with sufficient particularity.

2. That it is not set out specifically.

3. There should be a description of both number and denomination of both coin and notes.

This demurrer was overruled by the court, on the nineteenth of November, and thereupon the defendant pleaded "not guilty." The trial then proceeded, and on the twenty-first, the jury rendered a verdict of guilty, and assessed the judgment at a fine of $500.

Thereupon a motion in arrest of judgment was interposed, which was overruled. Judgment was pronounced in accordance with the verdict, and the defendant appealed to this court.

The appellant made his argument on seven points, which appear on his brief, and which we will consider separately, so far as their nature will permit.

The first and the sixth points may be disposed of together, as in each case there was evidence adduced, as to the truth

of which the jury were the sole judges, sufficient to support the verdict. The first point is that, while "the indictment charges that the money was received in the name and for the account of Mrs. Daily," the testimony shows receipt of money with directions to be loaned at interest. As matter of fact there is evidence from defendant himself, as well as from other witnesses, that the greater part, if not all, of the precise money which defendant is charged with embezzling, was received directly from Lesinsky, Barela & Co.; that it was so received "for the account of Mrs. Daily," and so literally "in the name" of that lady; that two of the receipts put in evidence are signed, "Mariacita Daily, pr G. W. Maxwell." The jury had the right to believe this evidence, if satisfied of its truth.

The sixth point is: "The proofs show that defendant made no concealment, but shows that defendaut admitted loaning money to the partnership, alleging a right in himself to so do. This is not embezzlement." Without commenting on this proposition as matter of law, it is sufficient to say that there is much in the evidence for which the jury could conclude, if so disposed, that the reverse of the above statement of fact, was, as to concealment, the case. For example, Mrs. Daily, in her evidence, says: "He always told me it was on interest; it was loaned. * * * Two days before August I asked him where the money was. He told me, 'part in the safe, and part was loaned out at interest.' Two days thereafter, he said it was in the company, etc., and again, on the day of the dissolution, he said it was with Lesinsky, Schultz & Barela and in the safe." It is such a well established rule as scarcely to require repetition, that, when there is competent evidence, the jury are the judges of its credibility, and the weight to be attached to it.

From the evidence before them, the jury in this case had a right to believe, if satisfied of its truth, that the defendants made these statements as to the money being loaned out

long after that money, or the most of it, had come back into his possession, and when they were palpably false. The same right of the jury to decide as to questions of fact covers the subject of the fifth point also.

The fourth point is that "the indictment does not show the object for which the money was received by the defendant." One authority only is cited as showing the necessity for such an allegation in the indictment, and that is 2 Russell on Crimes, 195. On examination, this authority will not be found to apply to our statute at all. The case there cited was one brought under the English statute 7 and 8 George IV. C. 29, sec. 49 of that statute provided, among other things, that if any chattel, etc., shall be intrusted to any banker, etc., "for safe custody," it should be a misdemeanor, etc. In the case of *Rex v. Mason* (D. & R. N., p. 22), in which the defendant was the proprietor of what was called a weekly savings bank, but which was in reality a kind of lottery, the indictment charged under the statute that the defendant had received the money of the plaintiff "for safe custody." The judge held that "there did not seem to be any such keeping for safe custody as was contemplated by the statute. It will be observed that the point in this case was that the object for which the money was received was wrongly stated, not that it was not stated at all; and at all events, it could have no bearing on an indictment under our statute, which does not refer in any way to the object of the reception.

This brings us to the consideration of the two subjects of most importance and apparent difficulty involved in the case.

The first of these is that raised in the seventh point of the appellant's, which reads as follows:

"Proofs show that the money was received by defendant from his principal direct, and not from some one else for and on her account—which cannot be embezzlement."

Many cases are cited (and they might have been multi-

plied indefinitely) in which it has been held, to use the language of Roscoe, that "the chattel, money or valuable security embezzled by the prisoner must be such as has not come to the possession of his master—if it has come to his possession, the offense is larceny and not embezzlement:" Roscoe Cr. Ev., 445; *Luck v. Smith*, Russ. & Ry., 267; *R. v. Peck*, 2 Russ. Crimes, 180; *Com. v. Berry*, 99 Mass., 428; *Com. v. O'Malley*, 97 Mass., 584; *Com. v. Davis*, 104 Mass., 548; *U. S. v. Hulchanson*, Whart. Prac., 461, and many cases cited in 2 Bishop on Criminal Law, 352.

The cases go so far even as to apply this principle to money received by one clerk from another in the same employ, because the latter was the agent of the owner: *John Murray's Case*, C. C., 275; 5 C. & P., 145.

These authorities would be of much weight, and no doubt might control the determination of this court, if the statutes under which they were promulgated were the same as ours. But in reality the statutes differ in exactly the essential particular required to make those decisions authorities with us.

In both the English Statutes of 39 Geo. III, c. 85, and 7 and 8 Geo. IV, c. 20, the wording is as follows:

"If any clerk or servant, etc., shall, by virtue of such employment receive or take into his possession any chattel, money or valuable security for, or in the name, or on the account of his master," etc.

The recent act of 24 and 25 Victoria, c. 96, in the corresponding section (68), while differing in some other particulars from the older statutes, preserves this same language, that portion of the section reading as follows: "Whosoever being a clerk, etc., shall fraudulently embezzle any chattel, money or valuable security, which shall be delivered to, or received, or taken into possession by him, for, or in the name, or on the account of his master, or employee," etc. In Massachusetts and many other states this language was followed, and all the decisions which make it essential that the property,

money embezzled should have been received from some or other than the employer, will be found to have been pronounced under such statutes. And under these circumstances they are undoubtedly correct as this language, "for or in the name or on the account of," certainly implies that the articles are received for some third party.

But in the law under which we are acting, these words are not employed. In many ways our statute is broader than those which we have quoted, and this is one of the most important of those respects. The wording here is (sec. 22, p. 268, Gen. Laws), "If any officer, etc., 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 his employment, he shall be deemed," etc.

There is no limitation as to the manner of the coming to his possession, or under his control, or the person from whom they may so come. This widens the scope of the law very much, and renders the decisions made under the more restrictive language of the older statutes entirely inapplicable. This we could hold from the very nature of the language employed, and the difference obviously made by the omission of the old restrictive clause without the need of any previous adjudication on the subject; but for those who think that precedent in such cases is of specially great importance, we have also the benefit of previous decisions, rendered under statutes analagous to our own. Thus, in New York the statutory language is as follows: "If any clerk, etc., shall embezzle and convert to his own use, or take, make away with, or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employers, any money, goods, rights in action, or other valuable security, or effects whatever, belonging to any other person, which shall have come into his possession or under his care, by virtue of such employment or office, he shall be, etc.:" 2 R. S. of

N. Y., 678, sec. 59. Under this law, Judge Cowan, in rendering the decision in the case of *People v. Dalton*, 15 Wendell, 581, said, "The statute is intended to provide for a fraudulent conversion of money or goods by a servant when they are delivered to him as such, either by his master or mistress, or in their behalf by a stranger. That was but a breach of trust at common law, because the money or goods came to his hands by delivery. The statute intended to convert such a breach of trust into a crime."

In Alabama, the language of the statute on this subject, is almost identical with our own. It reads: "Any officer, etc., who embezzles or fraudulently converts to his own use, any property of another, which has come into his possession by virtue of his employment, must on conviction," etc.: Alabama Code, sec. 3143. The court of that state in a case in which a clerk was indicted for embezzling a bill of exchange which came into his possession from that of his employer, says: "The language of this section is much more comprehensive than either of the English statutes. It embraces and provides punishment for every case of embezzlement of property of another, which has come into the possession of the clerk or agent by virtue of his employment." "The case is within the very letter of the statute," and Judge Stone, in his opinion of the case, draws very clearly the distinction between the decisions under the English analagous statutes and those whose scope has been enlarged, as those in New York and Alabama, and we may add, New Mexico. He says: "The words in the English statutes 'for, or in the name or on account of, his master,' show clearly that the money, goods, etc., to come within those statutes, must have been taken or received from some person other than the master and employer. To say that a clerk received or took goods, etc., from his employer, for, or in the name or on the account of said employer would be palpable solecism. We think the English decisions upon their statutes are manifestly

correct. Our statute contains no such clause as that copied and commented on above:" *Lowenthal v. State*, 32 Ala., 589.

We have dwelt to this extent on this topic because the point was raised and argued at some length on the hearing in this case, and is of such importance that it did not seem proper to pass it by without disposing of it. If, however, our statute had been similar to that of England, we think there was no error in this regard in this particular case, as there was evidence to prove that the money, or, at least, the greater part thereof, with the embezzling which the defendant is charged in this case, was received by him from various persons other than Mrs. Daily, that is to say, from Messrs. Lesinsky, Barela & Schultz. The fact that the amount represented by the sums received by the defendant from these parties had originally come from Mrs. Daily, even if that was absolutely established, would not affect the case, as the question under the English statutes is as to the person for whom the precise and identical money embezzled was obtained. In one well known case, for example, upon an indictment for stealing a £5 note and certain silver coin, it appeared that the prisoner's master gave him the £5 note to get change; this he did, saying that his master had sent him and that the change was for him. He never returned to his master, however. The judges, on a case reserved, held that as it was the silver which had been taken and not the £5 note, and as the silver had never been in the possession of the master, it was a case of embezzlement under the statute of 39 Geo. III, and not stealing: *Rex v. Sullins*, R. & M. C. C. R., 129; and several analagous cases are cited by Wharton (sec. 1013) as *R. v. Winnall*, 5 Cox C. C., 326; *R. v. Reena, 11 Ibid.*, 123; *R. v. Gale, 13 Ibid.*, 340, etc.

Before proceeding to the consideration of the points relative to the description of the property, we will allude to one other subject which was commented on to some extent in the

argument, that is, that the necessary relation between the defendant and the owner of the property was not charged or made out by proof in this case so as to bring it within the definition of embezzlement. We refer to this here because the answer to the object we thus raised is substantially the same as that to the question just discusssed, viz.: that the statute of this territory is much broader in its language than those under which the law quoted to us on the subject was promulgated. The English statute from 39 Geo. III. to 25 Victoria, confine the operations of the law to "any servant or clerk or person employed for the purpose or in the capacity of a servant or clerk," and an enormous amount of time and erudition have been employed during the last century in discussion as to the exact definition of these terms "servant" and "clerk," and as to those who were properly to be considered within or excluded from those classes. The text books are full of refinements on this subject, and the cases cited show that an almost infinite variety of questions have arisen with regard to it. See 2 Russell, 168 to 180; Wharton, sec. 1011 to 1020; 2 Archibold, 449–454, side paging, etc.

But we are saved from difficulty as to this point by the introduction in our statute (sec. 22, p. 268, General Laws) of the word "agent," which greatly enlarged the application of the law, and makes unquestionable its bearing on many cases which might otherwise be doubtful. While it might be seriously questioned whether a person intrusted with one business affair for another or performing some one act without renumeration, is a servant, there can generally be no such doubt as to his falling under the definition of an agent; and at all events on the state of facts as developed in this case, there can be no such doubt.

In speaking of the effect of the introduction into the statutes of this word "agents," Mr. Wharton, whose views as to the crime of embezzlement are generally more technical and contracted than those of other writers on the subject, says:

"As used in the Massachusetts statutes, the term 'agents' is much wider in its signification than 'servants' or 'clerks;' the latter are restricted to the performance of specific acts in a specific way; the former may or may not be restricted, and may, in fact, be clothed with full powers to represent their principal with the same discretion as he might exercise himself:" 1 Wharton's Crim. Law, sec. 1022, and referring to *Com. v. Young*, 9 Gray, 5, and *Com. v. Libbey*, 11 Met., 64.

There can be no doubt that the defendant acted as the agent of Mrs. Daily in the transactions which form the basis of this indictment and trial. His own evidence is to that effect, and in the receipt signed by him across the face of the $6,000 note dated Apr. 20, 1877, he uses that precise term, the signature being "Mariacita Daily per G. W. Maxwell, Agt."

This brings us to what is, perhaps, the most important of the objections raised by the defense to the validity of the indictment and correctness of the judgment, those presented in the second and fifth points. The second point is: "The indictment does not describe any particular article alleged to have been embezzled sufficiently." The fifth point is: "Proofs do not show the conversion of any single article by description, which does not establish embezzlement." For convenience of consideration we will group these two together, as they both relate to the lack of particular description of the property embezzled or any part of it.

On this subject we were referred by counsel to a large number of authorities, and the investigation of the question which seemed necessary for its satisfactory determination, has involved the examination of many more. The indictment in this case charges the defendant with embezzlement of ten thousand dollars, and this is set up in various forms, viz.: As $10,000 in United States currency (commonly called greenbacks); $10,000 in United States national currency notes; $10,000 in United States fractional currency notes; $10,000

in gold coin of the coinage of the United States of America; $10,000 in silver coin of the coinage of the United States of America; $10,000 in gold coin of the coinage of the Republic of Mexico, and $10,000 of silver coin of the coinage of the Republic of Mexico; each being alleged to be of the value of $10,000. It is obvious then that the property charged to have been embezzled was money. Several of the authorities which are cited do not bear directly on the point, because they refer to the embezzlement of chattels, articles other than money, and it is so obvious that a rule of description which might with justice and propriety be enforced as to an ordinary chattel, might not necessarily apply equally to money, either in specie or the usual circulatory paper currency.

The first of these authorities is, *State v. Edson*, 10 Louisiana Annual Repts., 229. In this case, the articles alleged to have been embezzled were "a certain lot of furniture of the value of $400, with a certain lot of lumber of the value of $150, and with certain tools, commonly called cabinet-maker's tools, of the value of $250."

The court decided that the property was not described with legal certainty: "The indictment should have set out specfically, at least one article of the property embezzled." The rule as to such articles and the reason of it, are so well set forth in this decision, that we copy the clause on that subject, especially as it is the rule which the defendant and appellant herein insists should be applied to money as well as ordinary chattels.

The court says, "the rule applicable to indictments for embezzlement, as well as to indictments for larceny, is, that the goods stolen or embezzled should be described, at least in part, with such a certainty as will enable the jury to decide whether the chattel proved to have been stolen or embezzled is the very same with that upon which the indictment was founded, and show judicially to the court that it could have

been the subject matter of the offense charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment to the same chattel." The next case cited, that of *Stewart v. The Commonwealth*, 4 S. & R. (Pa.), 193, relates to promissory notes. The *State v. Thomas*, 2 McCord, 527, has no special application, a new trial being granted on account of the omission of certain words (not of description) in the indictment, and because the value of a pocketbook was not proven; the real reason as stated by the court being that there were "circumstances which call on the court to exercise a humane discretion," the penalty for the crime (grand larceny, second offense), then being death in South Carolina. The case of *State v. Stinson*, 24 N. J. Law, 22, is a more important authority, and while it involves at least two questions other than that under discussion, viz.: the lack of any allegation of value of the bank notes alleged to have been embezzled, and the attempted introduction into the case of a "promissory note" which the court decided was not within the words or meaning of the statute, yet in other respects it is a good authority for the appellant, so far as any decision of a state court is authority here. It was brought, however, under a special modern statute, directed solely against the officers and agents of incorporated banks of the state of New Jersey (N. J. Revised Statutes, 125), and is quite technical in its provisions. While so far as it touches on this point, it favors the appellant's view, yet we cannot consider it of itself a controlling authority for New Mexico. These are all of the authorities specially quoted, all being American; and we will now consider the law as produced to us from the best books and the cases cited therein. The books referred to in appellant's brief are, Bishop's Cr. Law; Bishop's Cr. Prac. and Roscoe's Cr. Evidence, with the English decisions therein quoted. These at first sight, all seem to uphold the theory of the appellant, that the indictment must specially describe, and the evidence identify at

least some one part of the articles charged to have been embezzled. Thus Bishop in his Criminal Law (p. 358) says, "the indictment under the statute must set out specifically some article of the property embezzled;" an allegation, that the prisoner "took and received divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £10, and afterwards embezzled the same, not being sufficient:" *Rex v. Flowers*, 5 B. & C., 736; *Rex v. Freeman*, Russ. & Ryan, 335. "In other words, the indictment must describe according to the fact, some of the identical goods or money. So the evidence must establish the embezzlement of the specific articles described:" *Rex v. Tyers*, Russell & Ryan, 402.

In the case of *Rex v. McGregor* (2 East. P. C., 576), the reason of this particularity is stated as follows: "For that the new offense created by the act of parliament being a larceny, it must be described in the indictment as such, and with all the properties of a larceny." Roscoe says (Criminal Evidence, 447), "It was held upon the statute of 39 Geo. III., that the indictment ought to set out specifically some article of the property embezzled, and that the evidence should support that statement. Therefore, where the indictment charged that the prisoner embezzled the sum of one pound, eleven shillings, and it did not appear whether the sum was paid by a one pound note, and eleven shillings in silver, or by two notes of one pound each, or by a two pound note, and change given to the prisoner, on a case reserved, the judges were of opinion that the indictment ought to set out specifically, at least, some articles of the property embezzled, and that the evidence should support the statement, and they held the conviction wrong" (quoting the cases of Freeman and Tyer, *supra*).

The reason of this rule in case of chattels is of course obvious. They should be so described in the indictment that the defendant will be thereby informed with precision

as to the offense with which he is charged, and so proved on the trial as to be identified as the same mentioned in the indictment. It is also proper, in order to afford the defendant an opportunity to prove, if afterwards accused of the same offense, that he has previously being tried therefor. This reasoning applies equally to money, either in specie or current bills, whenever they can be described; but with regard to them a peculiar difficulty arises, which does not exist in ordinary larceny.

In larceny, by the legal theory, the accused takes some article of personal property out of the possession of the owner. The owner consequently is acquainted with the article, and able to give a description of it. But in embezzlement, as a rule, the article taken had never been in the actual possession of the owner, and he therefore has not the means of accurate description which he would otherwise possess. In case of the embezzlement of a chattel, some kind of description fairly accurate, can usually be obtained from the person from whose possession it came to the accused, and in case of a large number of chattels, some one or more, at all events, can be described with sufficient accuracy. But with money, the case is different. After the lapse of a little time, it would be a rare case indeed, in which the third party from whom it was received and who had no special cause or inducement for recollection, could describe the exact bills or pieces of specie which composed it. This is more especially the case at present in this country, where the natural currency is uniform in appearance, instead of presenting the great variety of designs which distinguished bank bills previous to the establishment of the National Bank system, and where the coin does not present even the variety produced in other countries by the change in the monarch's head on the obverse in each succeeding reign.

Even in England, and as long ago as 1827, the impossibility of describing embezzled money in such a way as to

meet the requirements of the law as laid down in the cases cited by the appellants, was so obvious, that the statute 7 and 8 Geo. IV., chap. 29, was passed to remedy the difficulty. Section 48 of that statute provided that, "In every such indictment, except where the offense shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved."

Similar statutes to this have since been passed in nearly all the states of our union, and of course obviate the difficulty of which we are speaking; so that in the more recent writings on criminal law, little is said of the questions which arose under the older and more imperfect form of enactment. But our statutes do not contain this provision, and hence it is claimed by the appellant, that we are bound by the rules and decisions promulgated in England, previous to the statute of Geo. IV., as part of the common law.

To ascertain if this is correct, we must examine briefly the history of the law of embezzlement. Unlike many branches of criminal law, it is purely statutory. No part of it came down from any remote antiquity or was any part of the common law. It is made up of additions to the common law of larceny, enacted at various times in order to meet classes of criminality which arose in the changing condition of society, and were not embraced within the scope of the definitions or adjudged limits of larceny. The first of these statutes is 8 Henry VIII., chap. 7, passed in 1517, which recites, "That before this time divers as well noblemen, as other the king's subjects, had, upon confidence and trust, delivered unto their servants, their caskets, safely to keep to the use of their said masters or mistresses, and after

such delivery the said servants had withdrawn themselves, and gone away from their said masters, or mistresses, with the said caskets, jewels, money, goods and chattels, or part thereof, to the intent to steal the same," etc., and thereupon enacts, "That if the said caskets, jewels, money, goods or chattels, that any such servant shall go away with, or which he shall imbezil, with purpose to steal it, as is aforesaid, be of the value of 40 shillings, or above, that then the same false, fraudulent and untrue act and demeanor, from thenceforth shall be deemed and adjudged felony": 1 Hawkins, P. C., 138. The recital here shows the special occasion of the enactment and the subsequent ones were passed on like necessity. The next of these statutes enacted in 1589, provided that any one having charge "of the king's armour, ordnance, or munition," and embezzling the same, should be guilty of a felony: 31 Eliz., ch. 4. The next, passed in 1610, related to persons employed in various manufacturing occupations, who should embezzle any of the materials with which they were entrusted: 7 Jac. I., chap. 7. The next statute was directed against lodgers who "imbezilled or purloined" the furniture of their lodgings: 3 and 4 W & M., chap. 9.

Thus there were various statutes passed at considerable intervals to meet special cases, but none of a general nature until the 39 Geo. III, ch. 85, which may be said to be the first that caused embezzlement to be raised to the rank of a separate crime. The provisions of the previous statutes will be found in the older books under the head of "Simple Larceny" (Hawkins' Pleas of the Crown, p. 134).

All of the English decisions to which we have alluded as being referred to by the appellant herein as authority to show what the common-law doctrine was with regard to this crime, were under this statute of 39 Geo. III; and the language of the text books which we have quoted was based on those decisions. But the 39th year of Geo. III was long

after the date of the independence of the United States, in 1776, which is the latest period, according to the most liberal view, that the law, as held in England, was of any authority here, or composed part of that common law which became the legal heritage of the American people. Neither the act of 1799 (39 Geo. III), nor any decisions under it, could have any binding force here, and can only be held in the same esteem with which we regard the adjudication of other foreign tribunals of weight and respectability.

In settling, therefore, what should be the practice in this territory, in cases arising under our statute relative to embezzlement, we are, fortunately, not confined by decisions and precedents which might prove far from applicable to our circumstances, or suited to our times. It is obvious that in a case like that now under discussion it would be practically impossible ever to indict or ever to convict if it were necessary to describe specifically the money embezzled, and prove its identity on trial. Even if the doctrine contended for had been fixed as part of the common law of England prior to 1776, it is very questionable whether, over a hundred years after, under entirely changed conditions, it would have been incumbent on us to submit to the imposition of rules which would have made the administration of justice and the punishment of crime, so far as this offense is concerned, impossible.

In laying the foundations for a future practice, on what is comparatively virgin soil, we have a right, we think, to regard the circumstances of the age and the locality to some extent, and, at any rate, to preserve sufficient independence for self-protection. It could not be good law, we believe, to impose on a people by whom it has never before been recognized, and among whom it has no claim to authority, by usage or precedent, as common law, that which would require an impossibility as essential to the enforcement of their criminal statute.

We hold, then, that all that is to be required in cases of embezzlement, under our law, is the best description which the circumstances will permit, both in the indictment and and upon the trial.

We quote here as singularly appropriate a few words from the concluding remarks of Mr. Bishop, on this particular crime:

"As we leave this subject, let us bear in our minds that embezzlement is merely a statutory offense, not an offense at the common law, and that the statutes creating it differ somewhat in their terms. * * * Let us remember that we are now upon a branch of the law not very thoroughly considered in our books, and not as yet expanded by judicial decision to its ultimate and complete proportions * * * and that we merely respect the modern English adjudications, but do not seriously follow them. * * * The legal difficulty is to know, and state in the indictment what particular coin or bank notes are embezzled. This difficulty merely runs the question into one of pleading, and we may observe that a court departs from its duty when it does not allow some form of pleading to cover every form of offense known in the law. * * * The law of embezzlement is not so firmly fixed in the adjudications of any one of our states as to render improper a fresh examination of it by the judges, in the light of our judicial science, and in the experience of past imperfection and present necessities, as well as of actual judicial decision:" 2 Bish. Cr. Law, 366 to 370.

The judgment of the court below is affirmed.

All concur.

PHILIP HOLZMAN, Plaintiff in Error, v. FELIX MARTINEZ, Defendant in Error.

February 1, 1882.

PRACTICE. (1) *Appearance to move to quash writ of attachment for irregularity, not general, but special.*

SAME. (2) *Forthcoming bond in attachment not a general appearance or waiver of irregularities.*

ATTACHMENT. (3) *Effect of forthcoming bond.*

PRACTICE. (4) *Judgment by default assumes no appearance to have been made.*

SAME. (5) *When judgments nil dicet and on ground of non-appearance should be rendered.*

SAME. (6) *Judgment by default, what necessary to authorize in attachment.*

ATTACHMENT. (7) *Power of probate clerks to issue writs of.*

PRACTICE. (8) *Service of copy of declaration.*

SAME. (9) *Attachment, service of writ.*

SAME. (10) *Service of writ and copy of declaration must precede judgment in personam.*

SAME. (11) *Attachment, writ returnable on impossible day and term.*

1. When a party appears for the purpose of making a motion for irregularity in a writ of attachment, and states specifically in the motion that he appears for that purpose and no other, it is a special and not a general appearance.
2. A bond given by the owner of property attached to the sheriff for the purpose of enabling the owner to keep possession of the property, is not a waiver by such owner (defendant in the attachment suit) of all preceding irregularities in such suit, and does not operate as a general appearance by him for all purposes.
3. Under the statute, the giving of a forthcoming bond in attachment does not release the property from the attachment lien. It simply constitutes the defendant in attachment the bailee of the sheriff for the safe keeping of the property and for its return to the sheriff in case the plaintiff shall recover, and in default of which the liability of the bond attaches to the defendant and his sureties.
4. A court which renders judgment by default against a defendant does so on the assumption that there has been no appearance by the defendant.
5. If there has been a general appearance by the defendant, it is irregular to proceed to assess damages and enter judgment before first

entering a rule to plead and showing non-compliance with it, and in such a case judgment *nil dicet* instead of for non-appearance, is the proper proceeding.

6. In case the defendant does not appear, it is always incumbent on the court before proceeding in the cause, to see that the preliminary proceedings have been so far regular and sufficient as to confer not only jurisdiction of the subject matter of the suit, but also of the person of the defendant. In an attachment case this is to be determined by the affidavit and bond for an attachment, the writ with the officer's doings thereunder as shown by his return, the declaration and service of a copy thereof, and the authority of the officer issuing the writ.
7. *Quaere*, whether the statutory authority conferred upon probate clerks to entertain applications for and to issue writs of attachment returnable to the district court, does not repeal so many positive requirements of the law previously existing in relation to authenticating the writ and approving the bond in attachment as to render such authority of probate clerks exceedingly doubtful and impracticable.
8. In case of personal service of process, a copy of the declaration must be served on defendant before the court can treat the defendant as in default.
9. The service of a writ of attachment is never complete without also serving the petition or other lawful statement of the cause of action.
10. Where there is nothing before the court in an attachment proceeding to show that the writ has ever been served on the defendant or that the declaration or other statement or notice of the cause of action was ever served on him, the court has no authority to render judgment *in personam* against him.
11. A writ of attachment was in September, 1880, issued and made returnable "at the next March term, 1880."

    Held, That the writ of attachment having been made returnable on a day and to a term of court then past, such writ was returnable to an impossible day and term. That all proceedings under it were void, and that the defendant need not have paid any attention to it, even if it had been served.

    PRINCE, C. J., dissented, holding that "1880" had been written in the writ by clerical error, and that the word "next" made it sufficiently apparent that "1881" was intended, and that such day and term were not impossible.

Error to the District Court for San Miguel county.

This is an action of assumpsit in which a writ of attachment was issued by the probate clerk of San Miguel county, on the declaration, affidavit and bond being filed with him.

The writ of attachment is in the Spanish language, and is directed to the alguacil (constable) of the county of San Miguel. It commanded him to attach of the goods, chattels, moneys, effects, credits, etc., of Philip Holzman sufficient to pay the sum of $2,000, in order that it be and appear before the district court in and for the county of San Miguel at the next March term, 1880, before the Honorable L. Bradford Prince, to answer a suit of Felix Martinez; also commanding him to summon said Philip Holzman to appear before the said judge at the time and place aforesaid and answer to the action of the plaintiff.

The writ was dated the twenty-first day of September, A. D. 1880, being the same date on which declaration, affidavit and bond were filed with the said probate clerk.

The writ was also signed and issued by said probate clerk.

Said writ of attachment nowhere states any amount of damages claimed, or what kind of action was brought by Martinez against Holzman.

There is nothing in the writ or indorsed on it to show whether it was an action *ex contractu* or *ex delicto*. It has no indorsement whatsoever of the nature or cause of action or the amount of damages claimed.

The said writ itself is made returnable at no time or place, but directs the property attached to be produced at a term six months previous to the date of the writ, and that the defendant Holzman be summoned to appear before the Hon. L. Bradford Prince at the same time.

The only indorsement on said writ is made by Desiderio Romero, sheriff, by Jose D. Romero, deputy. This indorsement is claimed to be the return of the sheriff of San Miguel county as to his manner of serving said writ, and states that he served the order, having attached property sufficient to cover the debt, as the inventory shows, which property remained in the possession of the defendant, he having given

bond to retain possession of the same. This return is dated the day of September, 1880.

Said return does not show that the property attached belonged to Holzman, or that the writ was served on Holzman.

The declaration does not ask for any judgment, and is nowhere referred to in the writ.

The declaration is indorsed, "Filed Sept. 21, 1880, Jesus Ma Tafoya, P. clerk."

The affidavit is indorsed in the same manner.

The bond is indorsed "Filed at my office, Sept. 21, 1880, Jesus Ma Tafoya. P. clerk."

The bond has no particular date, but purports to be on the blank day of September, 1880, and there is no acknowledgment by its makers, or any justification of sureties indorsed thereon, and it does not show that the sureties thereon are residents of the territory of New Mexico.

The writ appears to have been filed by the sheriff of San Miguel county on the twenty-second day of January, 1881. On the eighth day of March, 1881, Felix Martinez, by his attorney, filed in the clerk's office of the district court the declaration, affidavit and attachment bond included in the record; the same in no way showing that they were filed or returned by the probate clerk for the county of San Miguel, and were not filed on or before the first day of the court to which they were made returnable in the body of said writ, nor on or before the first day of the next succeeding term of the district court for the county of San Miguel, after said twenty-first day of September, 1880.

The record does not show why the said papers were not filed on or before the first day of the court in which they were made returnable, or the first day of the March term, 1881, and shows no leave to file the same.

On the ninth day of March, the defendant appeared specially for the purposes of his motion and no other, and moved

to quash the writ for the reasons therein stated, which said motion is included in the record.

On the fifteenth day of March, 1881, the court rendered judgment, overruling this motion, and, afterwards, the court attempted to enter a judgment by default against the defendant, and thereafter, on the eighteenth day of March, 1881, the court, after hearing proofs in behalf of the plaintiff, assessed his damages in the sum of $2,000, and gave judgment in favor of said Martinez and against said Holzman for this sum.

Louis Sulzbacher and *Catron & Thornton* for plaintiff in error.

The probate clerk has no authority to issue any process instead of the clerk of the district court: R. S. of U. S, sec. 1871.

All suits in the district court must be commenced by filing a declaration in the office of the clerk of the court, and upon so doing the clerk shall issue the summons to the defendant: Prince's New Mexico Statutes, secs. 54 and 55, p. 122, act of 1878.

Said writ should have been directed to the defendant: *Ib.*

The writ directed to the constable is void: *Ib.*, also sec. 2, p. 527, also sec. 7, p. 137.

A writ returnable to an impossible day, or an impossible term, is void: *Holliday v. Cooper*, 3 Mo., 286.

The summons must state the time of holding the court at which the defendant is summoned to appear: *Thompson v. Bishop*, 24 Texas, 302; *Neill et al. v. Brown*, 11 Texas, 17; *Covington v. Burleson*, 28 Texas, 368; *Wright v. Wilmot*, 22 Texas, 398.

A wrong or impossible date for the return of the writ renders the same void: *Holliday v. Cooper*, 3 Mo., 286.

A valid writ or summons should specify the nature of the action, and a particular day on which it is returnable: Bouvier's Law Dict. (Title Summons), vol 2, p. 559; Viner's

Abridgment (Title Summons); Blackstone Commentaries, book 3, p. 279; Bacon's Abridgment (Title Summons).

Every writ of summons returnable to the district court shall be issued by the clerk of the district court, and shall have a brief statement of the cause of action, nature of the suit, the amount of the damages claimed, and for what demand the suit is brought: 4 Prince's Statutes, sec. 55, p. 122; *Id.*, chap. 29, sec. 1, p. 131; *Howell et al v. Hallett*, 1 Minn., p. 102; *Stone v. Cordell*, 3 Western Law Jourl., 79; Prince's Stats. of New Mex., sec. 42, p. 140, showing that writs of probate clerks must conform to writs of the district clerks.

Persons must be summoned to appear before the court, and not before the judge. A valid writ must have the seal of the district court affixed: Prince's Statutes of New Mex., sec. 3, p. 116; *Foss v. Isett*, 4 G. Green (Iowa), 76; *Shäffer v. Sundwall et al*, 33 Iowa, 579; *Fross v. Schlumpff*, 2 Texas, 522; *Boal v. King*, 6 Ohio, 11; *Smith v. Affanassieffe*, 2 Rich (S. C.), 334.

It must appear by the officer's return, that the property seized belonged to the defendant, otherwise, the attachment is void. Also that the summons was served on defendant as an ordinary citation: *Mason et al v. Anderson*, 3 Monroe, 293; *Anderson v. Scott*, 2 Mo., 15; *Clay v. Neilson*, 5 Randolph, 592; 1 Prince's Statutes of New Mex., sec. 9, p. 139.

When there has been no service on defendant, the judgment is a nullity: *Parker v. Jennings*, 26 Ga. 140.

An insufficient bond renders the attachment void. To make a valid bond, it must appear that the sureties were residents of the county, and acknowledged the bond: *Simonds v. Parker*, 42 Mass., 508; *Moore v. Parker*, 3 Mass., 310; Drake on Attachment, sec. 117; *Houston v. Belcher*, 12 Smedes and Marshall, 514; *Tyson v. Hamer*, 2 Howard (Miss.), 669; *Bank of Alabama v. Fitzpatrick*, 4 Hum-

phrey, 311; Prince's Statutes of New Mexico, Act of 1874, sec. 44, p. 144; *Id.*, sec. 5, p. 136.

A writ is a nullity when made returnable to a wrong or impossible day or term; nothing can be done by virtue of it, nor can it be amended: *Dame v. Fales*, 3 N. H., 70; *Parsons v. Lloyd*, 3 Wilson, 341; 2 Wm. Blackstone, 845; *Bun v. Thomas & King*, 2 Johns., 190; *Burk v. Barnard*, 4 Johns., 309; *Shirley v. Wright*, 2 L. Raym., 775; *Green v. Rivet*, 2 L. Raym., 772; *Mills v. Bond*, 1 Strange, 399.

The affidavit should also state on what account the sum claimed is owing: *Sullivan v. Fugate*, 1 Heiskell, 22; *Moneyhan v. Tarter*, 1 *Ibid.*, 20; *Stewart v. Mitchell*, 10 *Ibid.*, 489; *Rumbough v. White*, 11 *Ibid.*, 261; *Johnson v. Luckadoo*, 12 *Ibid.*, 273; *Willey v. Riorden*, 2 Bax., 227; *Hickman v. Gest*, 1 Sneed, 297.

In actions of attachment begun before the clerk of the probate court, all the papers pertaining thereto shall be returned to the district court on or before the first day of the next term (Prince's Statutes of New Mexico, sec. 23, p. 140), otherwise the proceedings will be invalid.

A statute authorizing proceedings by attachment, must be strictly construed and strictly pursued: *Planters' Bank of Tennessee v. Byrne*, 3 La Ann., 687; *Shirley, Escott & Co. v. Owners of Stmr. Bride*, 5 *Ibid.*, 260; *City of New Orleans v. Garland*, 11 *Ibid.*, 438; *May v. Baker*, 15 Ill., 89; *Pool v. Webster*, 3 Metc. (Ky.), 278; *Wilkie v. Jones*, 1 Morr. (Iowa), 97; *Wooster v. McGee*, 1 Texas, 17; *Humphrey v. Wood*, Wright (Ohio), 566; *Buckley v. Lowry*, 2 Mich., 418; *Mc Pherson v. Snowden*, 19 Md., 197; *Chevalier, v. H. H. Williams & Co.*, 2 Texas, 243.

The plaintiff should set forth the nature of the relief sought (Prince's Statutes of New Mex., sec. 22, p. 118), and ask for some sort of judgment, otherwise the court can grant no relief, nor render any judgment in his behalf whatever.

Lee & Fort, for defendant in error.

In the attachment proceedings below, as appears in the record, the writ in the suit was levied upon certain goods by Desiderio Romero, sheriff of San Miguel county, as the property of the defendant in attachment, and thereupon the defendant, Philip Holzman, made and executed to Desiderio Romero, sheriff of said county, a delivery or forthcoming bond, and the property attached was redelivered to him. We hold that by making and executing the bond, the defendant, Philip Holzman, entered an appearance in the suit, and thereby waived all objections to the irregularities in the attachment proceedings: *Dierolf v. Winterfield*, 24 Wis., 143; *Childress v. Fowler*, 9 Ark., 159; *Gillespie v. Clark*, 1 Tenn., 2; *Harper v. Bell*, 2 Bebb., 221; *People v. Cameron*, 7 Ill., 468; *Fife v. Clark*, 3 McCord., 347; *Reynols v. Jorden*, 19 Ga., 436; *Wharton v. Conger*, 9 Sm. & M., 510; *Barry v. Foyles*, 1 Peters, 311; *Payne v. Snell*, 3 Missouri, 409; *McMillan v. Dana*, 18 Cal., 339; *Blyles v. Kline*, 64 Penn., 130; *Whiting v. Budd*, 5 Missouri, 443; *Evans v. King*, 7 Missouri, 411; *McGee v. Collow*, 4 Cranch, 251; *Shields v. Borden*, 6 Ark., 459; *Morrison v. Alpine*, 23 Ark., 136; *McCroy v. Austin*, 9 Louisiana, 360; *Paddock v. Mathews*, 3 Mich., 18; *Swan v. Cameron*, 2 Gillm., 468; *Pixley v. Winshell*, 17 Cow., 366; Drake on Attachments, pp. 318 and 480.

The defendant moved to quash the writ in the attachment proceedings. We hold that such a motion is an appearance in the cause, whether he was served with process or not, and it is so held in *Whiting v. Budd*, 5 Mo., 443; *Evans v. King*, 7 Mo., 411; 15 Ind., 194; *Swan v. Cameron*, 2 Gillm., 468.

Therefore, while it is not admitted that the proceedings are irregular or void in any particular, yet it is claimed that even if they are, the plaintiff in error is estopped from rais-

ing any question in regard to such irregularities, and therefore the judgment should be affirmed.

Louis Sulzbacher and *Catron & Thornton*, in reply:

The giving of a bond under our statutes is no appearance in court and no waiver of irregularities: *Childress v. Fowler*, 9 Ark., 174, 175; *Coplinger v. Steamboat*, 14 Ind., 48; *Glidden v. Packard*, 28 Cal., 649; *Clark v. Bryan*, 16 Mo., 171; *Billin v. White*, 15 La., 624.

A motion to quash the writ is only a special appearance, and a special appearance is only an appearance for the purposes specified in the motion and cannot confer jurisdiction: *Camp v. Tibbetts*, 2 E. D. Smith (N. Y.), 20; *Uye v. Liscomb*, 21 Pickering (Mass.), 263; *Ames v. Winsor*, 36 Mass., 247; *Simcock v. First National Bank*, 14 Ks., 529.

Persons being in presence of the court do not authorize a judgment to be rendered against them unless they have been brought in by legal means: *Jones v. Kenny*, Hardin (Ky.), 103.

The following steps are held not to constitute an appearance: Indorsing an admission of service on a summons: *National Bank v. Rogers*, 12 Minn., 529. Giving bail after arrest under bail process: *Lanneau v. Erwin*, 12 Richardson, (S. C.), 31. Giving a bond by third parties to dissolve an attachment; *Clark v. Bryan*, 16 Mo., 171. Giving an attachment bond in a suit *in rem* in order to get possession of a seized vessel, and taking deposition: *Coplinger v. Steamboat*, 14 Ind., 48. Giving notice of a motion to dissolve an attachment where there had been no personal service: *Glidden v. Packard*, 28 Cal., 649. Making a motion to quash: *Ferguson v. Ross*, 5 Ark., 517; *Girch v. Jeter*, 5 Ark., 383; *Wheeler v. Lampman*, 14 Johnson, 480. Applications raising the question of jurisdiction are no appearance: *Huff v. Shepard*, 17 Post, Mo., 242; *Smith's Administrator v. Rollins*, 25 Mo., 408; 8 U. S. Digest, Action; *Abbott v. Semple*, 25 Ill., 107; *Flake v. Carson*, 33 Ill., 518; *Campbell v.*

Swasey, 12 Ind., 70; *Allen v. Lee*, 6 Wis., 478. A defendant's special appearance to object to the jurisdiction does not cure the defect: *Hodges v. Brett*, 4 Green (Iowa), 345; *Milburn v. Fouts, Ibid.*, 346; *Olmer v. Hiatt, Ibid.*, 439. An appearance for the purpose of moving to quash the writ for want of jurisdiction or insufficiency of service, will not subject the party so appearing to the jurisdiction of the court: *Johnson v. Buell*, 26 Ill., 66; *Weil v. Loewenthal*, 10 Iowa, 575. Defects apparent on record may be taken advantage of by motion: *Simonds v. Parker*, 42 Mass., 508; *Willey & Kelly v. Riorden & Ward*, 2 Baxter, 227; *Fingley v. Pateman*, 10 Mass., 343; *Guild v. Richardson*, 6 Pickering, 364. A motion to quash is to be examined on error: 3 Ala., 57; 2 Baxter, 228; Drake on Attachment, 312, 327, 422; 7 Howard (Miss.), 505.

We therefore ask that the judgment of the district court refusing to quash the writ, be reversed.

Bristol, Associate Justice: On the 21st day of Sept., 1880, Felix Martinez, the defendant in error, before one Jesus M. Tafoya, the then probate clerk of said county, made an affidavit for an attachment against the property of Philip Holzman, the plaintiff in error, to secure a debt claimed to be due in the sum of $2,000. The affidavit contains no statement as to the cause or grounds of the indebtedness.

On the same day the said Tafoya, as such clerk of the probate court, issued under his official signature and the seal of said probate court, a writ of attachment directed to the constable of said county, commanding him to attach sufficient of the goods, chattels and estate of the plaintiff in error, to pay the said sum of $2,000 with interest and costs. The writ was made returnable to the next March term of said district court for the year 1880.

On the 22d day of January, 1881, the sheriff of said county filed said writ in the office of the clerk of said district court

with the return of his doings thereunder, indorsed thereon as follows:

"I certify that I have served this order, having attached property sufficient to cover the debt, as the inventory shows, which property remained in possession of the defendant, having given bond to retain possession of the same. Done this day of Sept., 1880.

"DESIDERIO ROMERO, *Sheriff.*
"By JOSE D. ROMERO, *Deputy.*"

On the said 22d day of January, 1881, said sheriff also filed in the office of said clerk of the district court, a receipt signed by the plaintiff in error, dated Sept. 22, 1880, to the effect that he had received of said sheriff the goods and chattels that had been attached by him in a suit of Felix Martinez against him, in which receipt the goods and chattels are described; and on said 22d day of January, 1881, said sheriff also filed in said office of the clerk of the district court, a bond executed by the plaintiff in error as principal and by two sureties in the penal sum of $4,000, payable to said sheriff, bearing date the 22d day of September, 1880, to be void if the said plaintiff in error shall have the property attached by said sheriff under a certain writ of attachment sued out by the defendant in error before the said probate clerk against the plaintiff in error for the sum of $2,000, when and where the court shall direct, and shall abide the judgment of the court in the premises. Such bond recites that said writ is returnable "to the district court for said county at the March term, as mentioned in said writ."

On the eighth day of March, 1881, the defendant in error filed in the office of the clerk of the court below, a declaration alleging facts constituting a cause of action against the plaintiff in error for a money demand in the sum of $2,000 and interest; such declaration having been previously indorsed as follows:

"Filed Sept. 21, 1880.

"JESUS M. TAFOYA,
"*Clerk.*"

Also on the eighth day of March, 1881, the defendant in error filed in the office of the clerk of the court below, the affidavit for attachment above mentioned; the same having been previously indorsed as follows:

"Filed September 21, 1880.

"JESUS M. TAFOYA,
"*Probate Clerk.*"

Also on the eighth day of March, 1881, the defendant in error, filed in the office of the clerk of the court below, a bond for an attachment against the goods, chattels and estate of the plaintiff in error for the sum of $2,000 bearing date the — day of September, 1880, and reciting among other things, that whereas, the defendant in error had that day "sued out an attachment before JESUS M. TAFOYA, clerk of the probate court, against Philip Holzman, for the sum of two thousand dollars, returnable to the next March term of the district court, for the county of San Miguel," etc.; the same having been previous to such filing with the clerk of the court below, indorsed as follows:

"Approved by me this 21st day of Sept., A. D. 1880.

{ PROBATE COURT SEAL, NEW MEXICO, COUNTY OF SAN MIGUEL. }

"JESUS M. TAFOYA,
"*Probate Clerk.*"

And further indorsed as follows:

"Filed in my office Sept. 21, 1880.

"JESUS M. TAFOYA,
"*Probate Clerk.*"

On the ninth day of March, 1881, at the regular March term of the court below, the plaintiff in error, filed with the clerk of such court, the following motion, viz.:

"And now comes the said defendant (plaintiff in error), and for the purpose of this motion and for no other, and moves the court to quash the writ of attachment herein for the following reasons, to wit:"

First. Said writ of attachment is void on its face.

Second. Said writ of attachment is returnable to an impossible day and impossible term, if to any term at all.

Third. Said writ of attachment is returnable before the Hon. L. Bradford Prince, and not before any court.

Fourth. The summons in said writ is also returnable before the Hon. L. Bradford Prince and not before the court.

Fifth. Said writ bears no teste of any court.

Sixth. The said writ has no indorsement containing a brief statement of the cause of action thereon, as required by law.

Seventh. Said writ is otherwise uncertain, defective and insufficient in many other respects as appears from the face thereof.

Thereafter at the last aforesaid term of the court below, and before any other proceedings were had in the case, the plaintiff in error appeared for the purpose of said motion, and for no other purpose, and the same being argued by counsel for the respective parties, was submitted and overruled.

Thereafter at the term of the court below last aforesaid, the following and no other proceedings were had in the case as appears from the record, the recital of which is as follows, to wit:

"FELIX MARTINEZ
v.
PHILLIP HOLZMAN. } *Assumpsit begun by attachment.*

"Now comes the said plaintiff (defendant in error), by his attorney, G. W. Prichard, Esquire, and the defendant (plaintiff in error), although three times solemnly called, comes not, but makes default. It is therefore considered by the court that the said plaintiff ought to recover of the said defendant, his damages by reason of the premises."

Afterwards, at the same term, the record recites the following proceedings in the same court, to wit:

"FELIX MARTINEZ
v.
PHILIP HOLZMAN.
} *Assumpsit begun by attachment.*

"Now comes the said plaintiff, by his attorney, G. W. Prichard, Esq., and the said defendant, having made default on a former day of the present term, and no jury being demanded by the said plaintiff, the court, after hearing the evidence, assesses the damages of the said plaintiff by reason of the premises, at two thousand dollars. It is therefore considered and adjudged by the court, that the said plaintiff, Felix Martinez, recover of the said defendant, Philip Holzman, the sum of two thousand dollars, his damages assessed as aforesaid, and also his costs in this behalf expended, taxed to sixty-six dollars and thirty cents, and that he have execution therefor."

A great many errors claimed to appear on the face of the record, are argued on behalf of plaintiff in error, and a multitude of questions are raised in behalf of either party; they cannot all be considered within our limited time.

The question was elaborately argued as to whether there had been a general appearance in the court below on the part of the plaintiff in error.

It has been uniformly held by all the courts of the territory, that when a party appears for the purpose of making a motion for irregularity, and states specifically in the motion that he appears for that purpose, and no other, it is a special, and not a general appearance. It was persistently urged on behalf of the defendant in error, that the giving of the bond by the plaintiff in error for the purpose of retaining possession of the property claimed by the sheriff to have been attached, was in law a general appearance for all purposes, and was a waiver of all preceding irregularities. Numerous authorities were cited to sustain that assumption, but those decisions were all made upon special statutes differing from ours, many of which expressly providing that among

the conditions of the bond, there shall be one binding the defendant to appear, or suffer default. And all of them providing that such bond shall in effect dissolve the attachment proceedings by transferring the security from the property attached to the bond itself.

No doubt in these cases, the decisions in part were based upon the fact of the regularity of the proceedings so far as to confer jurisdiction upon the court of the subject matter of the suit and over the property attached, as well as of the person of the defendant.

Under our statute, the giving of what is sometimes called a forthcoming bond in attachment, does not release the property from the attachment lien. It simply constitutes the defendant the bailee of the sheriff for the safe keeping of the property, and for its return to the sheriff in case the plaintiff shall recover, and in default of which the liability of the bond attaches to the defendant and his sureties. The doctrine that such a bond constitutes a general appearance on behalf of the defendant, and a waiver by him of all irregularities at a time when no citation has been served on him, and no notice whatever of the cause of the action, either by the declaration or statement in the writ, or otherwise, and that it will so far waive irregularities as to confer upon the court jurisdiction of the subject matter of the suit where none had previously existed, is, in our opinion, manifestly unjust and contrary to sound principles of law.

But outside of these considerations, any question as to whether there was a general appearance in the court below by the plaintiff in error, is determined by the record, which shows conclusively that the damages were assessed by the court, and judgment therefor entered on the ground that there had been no appearance by the defendant below. This was clearly considered and adjudged by the court below.

If there had been a general appearance, then it would have been irregular to proceed to assess damages and enter judg-

ment before first entering a rule to plead, and showing non-compliance therewith. If this had been the case, then judgment *nil dicet*, instead of for non-appearance, would have been the proper proceeding. The record, therefore, discloses the fact that there was no general appearance of the plaintiff in error in the court below, and no waiver by him of any irregularities in the proceedings of that court.

In case the defendant does not appear, it is always incumbent on the court before proceeding in the cause to see that the preliminary proceedings have been so far regular and sufficient, as to confer not only jurisdiction of the subject matter of the suit, but also of the person of the defendant.

In an attachment case this is to be determined by the affidavit and bond for an attachment, the writ with the officer's doings thereunder, as shown by his return, the declaration and service of a copy thereof, and the authority of the officer issuing the writ. In the present case the affidavit was taken and filed with the probate clerk. The bonds were approved by and filed with him, and even the declaration in the first instance was so filed. The writ was issued by him, and authenticated by the seal of the probate court, and not by the seal of the court below.

The statute under which the preliminary proceedings of this case were instituted before and by the probate clerk is as follows, to wit:

"Any person wishing to sue his debtor by attachment, when the debt or sum claimed exceeds the sum of one hundred dollars, may do so by first filing with the clerk of the district court of the county in which the debtor lives, or before the clerk of the probate court of the county in which the suit is brought, an affidavit and bond, as now required to be done before the clerk of the district court, which shall authorize the clerk before whom said affidavit and bond shall be filed to issue writs of attachment the same as clerks of the district courts; which attachment, together with the affidavit

and bond, when issued by the clerks of the probate court, shall be by them made returnable to the next term of the district court for the proper county, and shall be by them returned to said district court on or before the first day of said term :" Gen. Laws N. M., Prince's ed., 140.

The provisions of this statute conferring authority on probate clerks to entertain applications for and to issue writs of attachment returnable to the district courts, in order to be effective, must be considered as repealing, by the remotest implication, so many positive requirements of the law previously existing, especially in the face of the organic act and legislation of congress providing for the appointment of clerks for the district courts of the territories, as to render the authority so conferred on probate clerks exceedingly doubtful and impracticable. For instance, it must be conceded that process of every description cognizable by the district court must be authenticated. "The district court of each county * * * shall have a seal, which shall be kept by the clerk thereof, and with it he shall authenticate all documents emanating from his office needing authentication :" Gen. Laws N. M., sec. 3, p. 116.

By this law the clerk of the district court is made the custodian of its seal, and all process which he is authorized to issue must be authenticated by him with such seal. Without such seal the court will not recognize it as authentic.

The probate clerks are to issue writs of attachment, the same as the district court clerks, with no express provisions in the statute as to how the probate clerks are to authenticate the writs.

The statute provides that the district court clerk issuing a writ of attachment shall approve the bond in attachment, both as to the amount of the penalty and sufficiency of the surety; but there is no express provision for such approval by the probate clerk. Before the clerk of the district court is authorized to issue a writ of attachment, a declaration, as

well as affidavit, must be filed in his office: Gen. Laws N. M., Prince ed., sec. 2, p. 136 ; but there is no express provision for filing a declaration with the probate clerk. The policy of congress in conferring on the territorial district courts the authority to appoint their own clerks was no doubt to grant to them the exclusive right to determine who shall perform the duties of that office, and to insure to such courts a wholesome supervision over them.

In view of the legislation of congress on the subject, it may well be doubted whether the territorial legislature has the power to arbitrarily create and impose on the courts any other office the duties of which shall be to supersede any of those of their own clerks.

It is not necessary for the final disposition of the case to decide this question.

The record shows that there was nothing before the court below showing that the writ had ever been served on the plaintiff in error, or that the declaration, or any statement of notice of the cause of action was ever served on him. The court below, therefore, at the time the judgment was rendered, had acquired no jurisdiction of the person of the plaintiff in error, and had no authority to render a judgment *in personam* against him.

Under the rules of practice prescribed for the district courts in case of personal service of process, a copy of the declaration must be served before the court can treat the defendant as in default. This was not done.

The service of a writ of attachment is never complete without also serving the petition or other statement of the cause of action: *Ibid.*, subd. 1 of sec. 9, p. 137.

The writ, by its term, was made returnable on a day and to a term of court then past. It was, therefore, returnable on an impossible day and to an impossible term. This rendered the writ void upon its face and all proceedings thereunder void also, and excused the plaintiff in error from pay-

ing any attention to it, even if it had been served: 3 N. H., 70; 2 Johns., 190; 4 *Ibid.*, 309; 3 Wilson, 341; 3 Mo., 286.

The writ being void and the plaintiff in error not appearing in the court below, except for the special purpose of moving to quash for irregularity, the attachment should be dissolved; the plaintiff in error and his sureties on said forthcoming bond discharged from liability thereon; the judgment reversed, and the case remanded to the court below for issuance and service of proper process and such other and further proceedings as may be in conformity to law, and it is so ordered.

PRINCE, Chief Justice, dissenting: While concurring in much contained in the opinion of the majority of the court in this case, I feel constrained to put on record my dissent from the statement therein appearing that "the writ, by its terms, was made returnable on a day and to a term of court then past. It was, therefore, returnable on an impossible day and to an impossible term." There is no question of the fact that there was a clerical error—a *lapsus calami* in the writ. The question is whether this was sufficiently serious and of a character so liable to cause mistake or deception as to be fatal.

The plaintiff made his affidavit for attachment before Jesus Ma. Tafoya, probate clerk of San Miguel county, on the twenty-first day of September, 1880, as the verification shows. It is also marked filed on that day. Said clerk forthwith issued the writ of attachment which is dated on said 21st of September, 1880. On the next day the goods of the defendant were attached, the defendant Holzman, with two sureties, gave his bond, commonly called a forthcoming bond, which bears date Sept. 22, 1880, and binds the obligors to have the attached property forthcoming when and where the court shall direct, etc.

On receiving his goods, on the filing of this bond, the

defendant Holzman, also gave a receipt therefor, which is dated on the same 22d of September, 1880. The writ, to the validity of which objection is made, is written in Spanish, and the return day is stated as follows: "Ante la corte del distrito en y por el condodo de San Miguel, en el proximo termino de Marzo de 1880," or as translated in the transcript "before the district court in and for the county of San Miguel, at the next March term, 1880." In my opinion, the words "next March term," made the time sufficiently plain and distinct for any one of ordinary understanding to comprehend it. The writ being dated in September, 1880, and the goods attached retaken and bond given, all in the same month, there could be no possible mistake as to what term is meant by the "next March term." The addition of "1880" instead of "1881," is evidently a clerical error, not unnatural or unusual in using the date which the copyist was constantly writing during that year. No one could be deceived by it, taking the whole substance together. The word which controls and fixes the meaning definitely and beyond mistake is "next." It was attempted to be shown on the argument, that "next" meant "nearest," and therefore March, 1880, was as likely to be "next" to the date in September, 1880, as March, 1881. But this is too far-fetched and strained a construction to require much argument or illustration to show its fallacy. When we say "next year," although we may be speaking in February, we do not mean the year past, but the year to come. If even on a Monday, we speak of "next Sunday," we mean the ensuing Sunday, and not the one just past; although the latter is much the nearer in point of time. No one could possibly mistake the meaning in such cases. And so when in September, 1880, a writ names the "next March term," it can have no other signification than the March term ensuing, viz.: that of 1881. A large number of authorities were quoted by the appellant in the endeavor to show that "the writ was void, because returnable on an im-

possible day," but on examination it will be found that not one of them affects the case in question.

There is no doubt that when a writ is returnable on an impossible day, or a day when there is no term, it is void. This is what was held in *Holliday v. Cooper*, 3 Mo., 285, the writ being returnable on the first Monday of July, 1883, when there was no term till the fourth Monday. The same is the point in *Mills v. Bond*, as long ago as the sixth year of George I, when the process was returnable out of a term time: 1 Strange, 399.

The point decided in *Dame v. Fales*, was that oral evidence was not admissible to vary the written date of a writ: 3 N. H., 70.

Other of the cases cited, are simply to the effect that when a writ is returnable to a term not immediately succeeding its issuance and date, it is void. This is the point decided in the following of the authorities cited in the brief, viz.: *Bunn v. Thomas & King*, 2 Johnson, 190; *Burk v. Barnard*, 4 Johns., 309; *Parsons v. Loyd*, 3 Wilson, 341.

The same has also been frequently held in Illinois and other states. See, *Calhoun v. Webster*, 2 S. C., 221; *Hildreth v. Hough*, 20 Ill., 331; *Elee v. Wait*, 28 Ill., 70; *Miller v. Handy*, 40 Ill., 448; *Hochlander v. Hochlander*, 73 Ill., 618.

These include all of the cited cases that I have been enabled to examine. There is no authority quoted which even tends to show that a term described as is that in the writ in this case, is an "impossible term," and none which on the real point in question, which is, that the word "next" in the writ, fixes the term beyond ambiguity. Were that word not in the writ no doubt it would be fatally faulty, and void under the decisions, but the language being as it is, I hold that it was good, and gave the defendant the legal notice required of the return day. That it gave him actual notice, is evident from the fact that he appeared at the proper time by his counsel.

THE TERRITORY OF NEW MEXICO, Appellee, v. EDWARD M. KELLY, Appellant.

February 1, 1882.

CRIMINAL LAW; PRACTICE. (1) *Admissibility of affidavits and counter-affidavits on application for change of venue.*

SAME. (2) *Change of venue: Requisites of affidavits upon applying for.*

SAME. (3) *Continuance discretionary with court.*

SAME. (4) *Jury: List of talesmen need not be furnished prisoner in advance.*

SAME. (5) *Trial: Rule as to removing irons from prisoner.*

SAME. (6) *Trial: Irons should be removed from prisoner while jury is being made up.*

SAME. (7) *Trial: Failure to remove irons from prisoner, review by supreme court.*

SAME. (8) *Review: Bill of exceptions too meagre.*

SAME. (9) *Evidence of threats, admissibility of.*

1. In a criminal case, on an application for a change of venue under Gen. Laws N. M., Prince ed., p. 117, sec. 17, if the proper affidavit is made by the party moving for a change of venue and is supported by the affidavits of two or more disinterested persons, such affidavits are to be considered as conclusive as to the county in which the suit is then pending, and the court has no discretion to refuse such application so far as changing the venue from that county. In determining, however, which is the nearest county thereto, and whether the same be free from exceptions within the meaning of the statute, the affidavits on behalf of such moving party are not conclusive. These are questions the determination of which rests in the sound discretion of the presiding judge, and it is not only proper, but it is the duty of the judge to receive such evidence from whatever source as will satisfy his conscience in the exercise of his discretion. Counter-affidavits held admissible on exception being taken to the county to which it is proposed to send the cause to be tried.
2. The affidavit of the party moving for a change of venue as well as those in support of the same, in order to be conclusive as to the county in which the suit is then pending, must be positive in all material averments and not made on information and belief merely.
3. A motion for a continuance is addressed to the discretion of the court, whose ruling in the absence of a clear abuse of discretion is not reviewable.

4. The "list of jurors summoned," which by Gen. Laws N. M., p. 288, sec. 20, is to be "given to the defendant in all capital cases twenty-four hours before the trial, and in all other cases before the jury is sworn, if required," refers to the regular panel summoned and accepted for the term, and does not include talesmen summoned to complete the trial jury after such regular panel has been exhausted.

5. A prisoner when brought to the bar of the court for trial, is entitled to have his irons removed before the trial commences, unless the court be of the opinion that their retention upon the limbs of the prisoner is a reasonable precaution to prevent an escape or to insure the safety of the by-standers and the orderly conduct of the prisoner.

6. The calling and examination of jurors is a part of the proceedings of a trial, and it is irregular to compel the prisoner at this stage of the trial to appear at the bar in irons for no better reason than that it would be inconvenient to remove them, or that their removal would cause a delay of a few hours in the trial.

7. When the record affirmatively discloses the fact that there was no reason whatever for placing shackles or manacles upon the prisoner against his protest while undergoing trial, a question of law arises which may be reviewed on appeal and the judgment reversed; but when the record discloses some valid or reasonable ground of apprehension that the prisoner may attempt to escape, or injure the by-standers, or the officers in charge, or will be otherwise disorderly or dangerous, it should be left entirely to the discretion of the trial court to determine whether the prisoner should be ironed or not; and when the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during the trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed.

Held, In the present case, that had the irons remained on the prisoner during his trial or for any considerable portion thereof, the court would be compelled to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, it was decided that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground.

8. An objection was made to testimony as to what occurred "on that day." The bill of exceptions did not state enough to show what day was meant. *Held*, that the court could not review a ruling upon such a detached, disconnected fact, evidence of which might or might not be admissible, according to the circumstances.

9. Evidence of threats, though uncommunicated to the defendant, is competent.

Appeal from the District Court of San Miguel county. PRINCE, J.

The defendant, charged with the murder of one John Reardon in the month of October, 1880, was indicted and arraigned at the February term, 1881, of the district court held in and for the county of Santa Fe, and pleaded not guilty. He filed a motion for a change of venue to the nearest county free from exception, declaring against the counties of Santa Fe, San Miguel and Mora. This motion was resisted by the attorney-general, who filed a counter-affidavit, among others of the affiants to which were the foreman and various members of the grand jury finding the indictment against the defendant, alleging a belief that San Miguel county was free from the exception claimed by the defendant. The court overruled and denied the motion, in so far as it applied to changing the venue beyond San Miguel county, to which county the cause was sent for trial.

At the succeeding (March) term of the district court held in and for San Miguel county, the defendant moved for a continuance of his cause until the next regular term the court, urging as a necessity therefor the absence of an important material witness, one Thompson, whose testimony, defendant alleged, by affidavit, could not be produced at the then present term of court, and without which he could not safely go to trial. This motion was resisted by the attorney-general, and, although none of the facts which the defendant alleged could be proved by the witness, were admitted by the attorney-general, the motion was denied. The defendant, subsequently, and during said March term, again moved the court to grant him a continuance, and alleged extraordinary efforts to find and communicate with said witness, who was then reputed to be in the Black Range, in this territory. This motion was also denied.

This case was called for trial at 7.30 o'clock on the night of the last day but one of the term, and the prisoner brought into court shackled. The defendant, before trial, moved the court to have his shackles removed. This motion was denied and the impanelling of a jury directed to proceed. Seven jurors were accepted during the evening session, some of whom were summoned from the bystanders, or the county at large, before the regular panel was exhausted, and whose names had not been furnished to the defendant twenty-four hours before the trial. On the following day, prior to the incoming of the court, the shackles were removed from the defendant.

During the course of the trial, the defendant offered to show that after the shooting he was jumped upon, kicked, and otherwise abused, by the prosecuting witnesses, and that at the time of the shooting they (prosecuting witnesses) threatened to hang defendant. Also, that defendant had never had any difficulty prior to the killing charged in this case.

The defendant also offered to prove threats of the deceased prior to the difficulty. All of which evidence was ruled out by the court.

The jury found the defendant guilty of murder in the first degree.

The defendant moved for a new trial, which was denied. Defendant then moved an arrest of judgment, which was also denied.

Cayples & Breeden for appellant.

It was error for the court to receive a counter-affidavit on a motion for a change of venue: *Barrows v. The People*, 2 Ill., 121; *Baxter v. The People*, 2 Gil., 578; Gen. Laws N. M., Prince's ed., sec. 17, pp. 117, 118, "Shall."

The court erred to the prejudice of the defendant in changing the venue to the county of San Miguel, to which objection was made and shown to exist by appellant's affida-

vit: Gen. Laws N. M., Prince's ed., sec. 17, pp. 117, 118, "Free from exceptions."

The defendant's application for continuance at the February, 1881, term of the district court for Santa Fe county should have been granted: *People v. Diaz*, 6 Cal., 248; *People v. Dodge*, 28 Cal., 445, and cases there cited; *People v. Brown*, 46 Cal., 103.

The defendant was entitled to a complete list of jurors, who were to try him, twenty-four hours before the trial, and the court erred in permitting persons to be sworn and to sit as jurors whose names had not been so furnished the defendant: Gen. Laws N. M., Prince's ed., sec. 20, p. 228; Bishop on Crim. Proced., sec. 931, and cases there cited; *Woodside v. State*, 2 How. (Miss.), 655.

The defendant should have been relieved of his shackles before being brought to trial, and the judgment should be reversed for a failure so to do: *People v. Harrington*, 42 Cal., 165; *State v. King*, 1 Mo., 438; Bishop on Crim. Proced., sec. 955; *Lee v. State*, 51 Miss., 566.

Defendant was entitled to show that he was jumped upon, kicked and beaten by prosecuting witnesses, and the court erred in refusing to permit him so to prove, and also to prove that some of the prosecuting witnesses, at the time of the killing, threatened to hang the defendant.

The court erred in refusing to permit the defendant to prove that he never had any difficulty prior to the killing charged in this case.

The court erred in refusing to permit the defendant to prove threats by the deceased not communicated to the defendant: *People v. Scroggins*, 37 Cal., 676; *People v. Crowin*, 34 Cal., 192; *Stokes v. People*, 53 N. Y., 164; Whart. Crim. Ev., sec. 757, and cases there cited; Whart. Crim. Law, sec. 1027; *Holler v. State*, 37 Ind., 57; *State v. Turhin*, 77 N. C., 473; 93 U. S., 465; 19 Vt., 116; 16 Ill., 17.

The court should have directed the jury to find the defendant not guilty.

The court should have given the instructions asked for by the defendant.

A new trial should have been allowed, and the court erred in refusing the same.

William Breeden, attorney-general, for the territory of New Mexico, appellee.

The defendant's application for a change of venue from Santa Fe county was granted; this was all he was entitled to.

The receiving of the affidavits presented in opposition, was in the discretion of the court, and the defendant was not prejudiced thereby.

An application for a continuance is addressed to the discretion of the court, and is not reviewable: 1 Gildersleeve, pp. 371, 372; 1 Bishop Crim. Proced., sec. 951, and numerous cases there cited.

The defendant was entitled only to a list of the jurors summoned to attend the term—which he received: Prince's Statutes, sec. 20, p. 288. He was only entitled to such list upon requiring the same. It does not appear that such list was required or applied for.

The defendant's shackles were removed before the trial commenced: 1 Bishop Crim. Proced., sec. 955, and cases there cited.

Threats by the deceased, in cases like this, are only admissible when there is a doubt as to which party was the aggressor, or commenced the assault: 19 Vt., 116; 93 U. S., 465; 16 Ill., 17. In this case there was no doubt or conflict of evidence on that point.

The defendant had a right to prove that he had previously been of a good reputation as a man of peace and good order, but evidence of particular facts, or that he had never before had a difficulty were not admissible: 1 Bishop Crim. Pro-

ced., sec. 1117; 2 Ind., 91; 57 N. H., 245; 74 N. C., 591; 119 Mass., 342; 4 Humphrey, 381; 76 N. C., 216.

The instructions asked for by the defendant were clearly improper.

The motion for a new trial was addressed to the discretion of the court, and its action in denying the same is not reviewable: 1 Bishop Crim. Proced., sec. 1274; 65 Ill., 17 to 24; 57 Ga., 482; 56 Ga., 84; 2 Texas Appeal, 46.

Bristol, Associate Justice: The material facts disclosed by the record are substantially as follows:

The appellant, Edward M. Kelly, was indicted for the crime of murder in the first degree, at the February term, 1881, of the district court of Santa Fe county, in the judicial district aforesaid; and after being arraigned, and pleading not guilty, at the term aforesaid, the appellant made an affidavit for a change of venue from the county aforesaid to the nearest county free from exceptions. This affidavit, in addition to positive averments sufficient for a change of venue from Santa Fe county where the cause originated, contained the averment that the same objections existed in San Miguel county, and in several other counties specified. Counter-affidavits were received and read under objection and exception by the appellant as to the grounds of exception to San Miguel county, upon appellant's motion for a change of venue upon his said affidavit, which was supported by two other affiants. The court, upon all the affidavits under objection and exception by the appellant, ordered a change of venue to said San Miguel county, in the judicial district aforesaid. The then next succeeding term of the district court for said county of San Miguel commenced on the 7th day of March, 1881. On that day, at such term, the cause was set for trial the following Monday, the 14th day of March, 1881. On the sixteenth day of that month, the appellant made a motion for a continuance to the then next term, based on affidavits

made by him and by others on his behalf therefor. This motion was overruled, and such ruling excepted to the same day. On the last day but one of the term, at 30 minutes past 10 in the evening, the case was brought on for trial. The prisoner being brought before the court for trial, with shackles on his legs, he moved the court to have them removed, whereupon the sheriff having the prisoner in charge, informed the court, "That the irons were riveted on, and in order to remove them, the prisoner would have to be taken to a blacksmith's shop; that no such shop was open at that hour, and he did not believe he could find a blacksmith; and that even in the day time it would take quite a while." Thereupon the court directed the case to proceed without removing the irons, but ordered that before the jury was accepted and sworn the following day, the irons must be removed.

Thereupon several jurors (how many does not appear), were examined as to their qualifications to try the cause, and passed upon.

The next morning before any other proceedings in the case were had, or other jurors examined, or any juror was accepted or sworn, the irons were removed from the prisoner.

The regular panel of petit jurors being exhausted, except as to one Robert Oakley thereon, who, after being called, did not respond, and the sheriff, after being directed to find him, had reported that he could not be found, and neither party requiring an attachment for such absent juror, the regular panel was regarded by the court as exhausted, whereupon talesmen were brought into court for the purpose of completing the trial jury. The names of such talesmen were not furnished to the prisoner twenty-four hours before trial.

A trial jury was finally accepted and sworn. The appellant was tried and convicted of murder in the first degree. Motions for a new trial and in arrest of judgment were interposed, overruled and excepted to. Sentence and judgment

were pronounced and entered in the usual form upon the verdict.

Upon the foregoing proceedings, errors are assigned as follows:

First. That the court erred in receiving and considering counter-affidavits, as to appellant's exceptions to San Miguel county averred in his affidavit for a change of venue.

Second. That the court erred in ordering a change of venue to said county of San Miguel.

Third. That the court erred in overruling the motion for a continuance.

Fourth. That the court erred in permitting the appellant to be tried without being furnished, twenty-four hours before trial, with the names of talesmen summoned after the regular panel of the petit jurors had been exhausted.

Fifth. That the court erred in directing the parties to enter upon and proceed with the calling and examination of jurors to try the cause while the prisoner had his irons on, and after he had asked to have them removed.

Covering the first assignment of error in regard to change of venue, the statute provides, as follows: "The venue shall be changed in all cases, both civil and criminal, to the nearest county free from exceptions, when the judge is interested, or when the party moving for a change, shall make oath that he cannot have justice done him in the county in which the suit is then pending, setting forth the cause of such obstruction of justice, which oath must be supported by the additional oaths of at least two disinterested persons, provided that neither party shall be allowed to change the venue in the same case more than twice:" General Laws N. M., Prince's ed., 117, sec. 17. The construction we give to this statute is, that if the proper affidavit is made by the party moving for a change of venue, and supported by the affidavits of two or more disinterested persons, such affidavits are to be considered as conclusive as to the county in which

the suit is then pending, and that the court has no discretion to refuse such application, so far as changing the venue from that county. In determining, however, which is the nearest county thereto, and whether the same be free from exceptions within the meaning of the statute, the affidavits on behalf of such moving party, are not conclusive. These are questions, the determination of which rests in the sound discretion of the presiding judge, and it would be not only proper, but the duty of the judge to receive such evidence from whatever source as will satisfy his conscience in the exercise of his discretion.

The application of any other rule of construction would give to the party moving a change the power of preventing a trial altogether by raising exceptions to every county in the territory.

We will here take occasion to remark, that the affidavit of the moving party as well as those in support of the same, in order to be conclusive as to the county in which the suit is then pending, must be positive in all material averments, and not made on information and belief merely. In this respect the sufficiency of the supporting affidavits in this case is doubtful.

The court having granted a change of venue from the county in which the suit was then pending to the county of San Miguel, there was no error in receiving and considering counter-affidavits to exceptions to the latter county.

This disposes also of the second assignment of error. The overruling the motion for a continuance, which is the third assignment of error, was a matter addressed to the sound discretion of the court. The record does not disclose any such abuse of discretion under the circumstances as will justify the court in disturbing the judgment on that ground.

The statute covering the fourth assignment of error is as follows:

"A list of the jurors summoned shall be given to the

defendant in all capital cases twenty-four hours before the trial, and in all other cases before the jury is sworn, if required: Gen. Laws N. M., Prince's ed., 288, sec. 20."

The "list of the jurors summoned" within the meaning of this statute evidently refers to the regular panel summoned and accepted for the term, and does not include talesmen summoned to complete the trial jury after such regular panel has been exhausted.

The fifth assignment of error presents a question of more serious import. There can be no doubt that a prisoner, when brought to the bar of the court for trial, is entitled to have his irons removed before the trial commences, unless the court be of the opinion that their retention upon the limbs of the prisoner is a reasonable precaution to prevent an escape, or to insure the safety of the bystanders and the orderly conduct of the prisoner.

Neither can there be any doubt that the calling and examination of jurors to try a cause is a part—and to the prisoner at the bar a very important part—of the proceedings of a trial. It would be irregular at this stage of the trial to compel the prisoner to appear at the bar in irons for no better reason than that it would be inconvenient to remove them, or that their removal would cause a delay of a few hours in the trial.

In the case of the *People v. Harrington*, 42 Cal., 165, the defendant having been indicted for robbery, was brought before the court for trial with irons on his limbs. His counsel asked for their removal, which was denied, the court stating that the defendant should be tried in irons, and that none of his rights were violated by being tried in irons without his consent. The bill of exceptions contained a statement in effect that there were no circumstances or facts before the court showing any excuse or grounds for compelling the prisoner to be tried in irons. Exceptions to this ruling hav-

ing been taken, the judgment on appeal was reversed on this ground alone.

The judge who pronounced the opinion of the court said: "A prisoner on his trial in court is in the custody of the law, and under the immediate control of and subject to the orders of the court. Should the court refuse to allow the prisoner on trial for felony to manage and control in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial should be reversed. In my opinion, any order or action of the court, which without evident necessity imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf. Again, to require a prisoner during the progress of his trial before the court and jury, to appear and remain with chains and shackles upon his limbs without evident necessity for such restraint, for the purpose of securing his presence for judgment, is a direct violation of the common-law rule."

The case of the *State v. King*, 1 Mo. Appeals, 438, was decided in 1876. The defendant having been indicted for murder in the criminal court of St. Louis, was brought to the bar of that court for trial, being ironed with handcuffs or manacles upon his hands and wrists, his counsel made a motion to the court for their removal, which was overruled, the court stating as a reason, that the prisoner had made an assault on J. G. Broemsor, the husband of deceased, in open court, when the accused was last in court, and exceptions

were taken. The trial proceeded, resulting in a conviction and sentence to be hanged.

On appeal to the St. Louis court of appeals, the judgment was reversed on this ground alone, and on appeal therefrom to the supreme court, the judgment of the court of appeals was affirmed: 64 Mo., 591. In this case the court made a distinction between manacles on the hands or wrists and shackles on the legs, holding that while the latter might be permitted in cases of necessity to prevent an escape, it would be error under all circumstances to compel the prisoner to be tried with irons upon his hands, and quotes Hawkins (2 P. C., ch. 28), as authority.

In the *Case of Layer*, 16 Howell's St. Tr., 94, the rule is clearly laid down as to when or what stage of the proceedings the irons should be removed, and in this respect a distinction is made between the argument and trial. On this point the Lord Chief Justice said:

"No doubt when he comes upon his trial, the authority is that he is not to be *in vinculis* during his trial, but should have the use of his reason and all advantages to clear his innocence. Here he is only called on to plead by advice of his counsel, he is not to be tried now; when he comes to be tried, if he makes that complaint, the court will take care that he shall be in a condition proper to make his defense; but when he is only called on to plead and his counsel by him to advise him what to plead, why are his chains to be taken off this minute to be put on again the next?"

A rule somewhat in conflict with that laid down in 42 Cal., 165, and 1 Mo. Appeals, 438, *supra*, has been adopted in the more recent case of *Faire v. State*, reported in Southern L. J., 348. In this case it is held that the right to manacle persons during trials exists, and should be left to the discretion of the court. The prisoner had been tried with shackles on his feet or ankles, though his counsel, on his behalf, asked their removal. The prisoner was found guilty of murder.

The reason given by the court for refusing to order the shackles to be removed, was that the prisoner had threatened that, if found guilty, he would never come out of the court house alive, but that he would escape, or that the officers would have to shoot him.

The case was appealed for the reason that the court below had ordered the prisoner's feet to be shackled during his trial. The appellate court refused to reverse the judgment, and held that, while it ought to require an extreme case to justify the placing of shackles or manacles upon the prisoner when undergoing trial; yet, whether it is necessary or not should be left to the discretion of the trial court, and cannot be reviewed on appeal: Central L. J., Dec. 2, 1881, 426.

This decision, in our opinion, comes nearer to the enunciation of the true rule of law founded in sound reason than any that has preceded it. We cannot, however, concur in this decision to the extent that no case of this kind is reviewable on appeal.

The better rule would seem to be that when the record affirmatively discloses the fact that there was no reason whatever for placing shackles or manacles upon the prisoner against his protest, while undergoing trial, a question of law arises which may be reviewed on appeal, and the judgment reversed; but when the record discloses some valid or reasonable ground of apprehension that the prisoner may attempt to escape, or injure the bystanders, or the officers in charge, or will be otherwise disorderly or dangerous, it should be left entirely to the discretion of the trial court to determine whether the prisoner should be ironed or not; and when the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed.

In the present case, had the irons remained on the prisoner

during his trial, or for any considerable portion thereof, we would be compelled under this rule to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time, while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, we are of the opinion that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground.

The bill of exceptions brings into the record only detached and disconnected parts of the testimony. There is no evidence before the court showing, or even indicating, any of the facts and circumstances attending or connected with the killing of the deceased by the appellant; for this reason we are unable to perceive whether the rulings of the court below on questions raised in taking this testimony were erroneous or not.

For instance, on the cross-examination of Martin H. Barber, one of the witnesses for the prosecution, as appears by the bill of exceptions, this detached and disconnected question was asked by appellant's counsel, to wit:

"Did you, or did you not, hear any party or parties order Kelly and Thompson to be hung at any time on that day?" To which the witness answered: "I didn't hear anybody order it, but I heard some of the parties holler, 'hang him, hang him!'"

The witness was then asked this question: "Did you hear any of the prosecuting witnesses say that?"

This question was objected to on behalf of the prosecution, the objection sustained by the court, and the ruling of the court excepted to by appellant's counsel.

Was this ruling of the court error? We are unable to determine from the record what day or occasion is referred to in the first mentioned question by the words, "at any time on that day"—whether it was on the day of the killing,

or some other day and occasion wholly disconnected therefrom. Unless there is enough before us to determine whether there was error or not, we must presume that the ruling of the court below was proper.

On the cross-examination of this same witness this detached and disconnected question was asked, viz.:

"Did you, on the day of this occurrence, hear the deceased make any threats toward the defendant?"

This was objected to on behalf of the prosecution, "on the ground that threats of the deceased to be admissible must first be proved to have been communicated to the defendant."

The objection was sustained by the court and such ruling excepted to.

In a proper case, threats, though uncommunicated to the defendant, would be admissible as competent testimony. There is nothing before us to show whether this was a proper case to render such testimony admissible or not.

Errors may have occurred during the progress of the trial, but the evidence appearing in the bill of exceptions is too meagre and disconnected to enable us to discover them.

The judgment is affirmed

All concur.

THE TERRITORY OF NEW MEXICO, Appellee, v. ELIJAH FRANKLIN, Appellant.

February, 1882.

CRIMINAL LAW. (1) *Murder: Intoxication as a defense.*
SAME. (2) *Practice, right of judge to comment upon evidence.*
SAME. (3) *Jury: Review of verdict by supreme court.*

1. Where the evidence given on a trial for murder shows the prisoner to have been drunk at the time of the killing, it is not erroneous to

instruct the jury to the effect that if the defendant was conscious of and understood what was done and said by himself and others present at the time of the killing so as to give an intelligent and true account of it at the trial, in that case he is responsible for his conduct at that time.

2. *Quære.* Whether the statute forbidding the judge to comment upon the weight of evidence applies to criminal cases.

A statement by the court to the jury that a man cannot at the same time be drunk and sober, conscious and unconscious, responsible and irresponsible, is not a comment upon the weight of evidence, but merely a statement of a truth in mental philosophy.

3. It is the province of the jury to pass upon the facts, and their finding will not be reviewed except where clearly contrary to the evidence or manifestly the result of prejudice. Finding that defendant was guilty of murder in the first degree affirmed.

Appeal from District Court of Grant county. BRISTOL, J.

Murder. The facts appear in the opinion of the court.

PARKS, Associate Justice: At the A. D. 1881 term of the district court of Grant county, the defendant was tried and convicted of murder in the first degree, was sentenced to death, and appealed to this court. The record shows that during the trial, his counsel admitted that the defendant killed the deceased at the time and place and with the weapon described in the indictment, but claimed that the killing was accidental. For a proper understanding of the case, we will quote part of the testimony and instructions. The evidence we reproduce here is somewhat lengthy, but as it substantially and fairly, as we think, represents the whole case on both sides, it will obviate the necessity for any extended argument or lengthy opinion by the court. For the prosecution James H. Fowler testified as follows:

"I live in Central City, in this county; I know the defendant, Elijah Franklin here (here the witness points out the prisoner and identifies him); I know the deceased, Thomas Williams; I was in Central City when he was shot; I did not see the defendant shoot him, because Tom Williams was between me and Franklin at the time; I saw the smoke from

Franklin's pistol, and just about that time Tom Williams ran and grabbed for a pistol; this was in my saloon in Central City, Grant county, territory of New Mexico; there were five or six persons in the saloon at the time, Catarino Maldonado, Jack Winters and others were in there; the prisoner and Tom Williams were the parties to the difficulty; there was a table right in front of me and Tom was standing near the corner of the table and near the wall; he then came around to the corner of the table next to the stove and sat down; he was sitting in a chair and was lying with his head in his hands on the corner of the table; while he was in this position I heard the prisoner say: 'Boys, good-bye,' and then he turned to some others and said: 'Let us go home;' just at that time I heard a shot fired, and some one in the crowd says: 'Tom Williams is shot;' the deceased was sitting in a chair with his head on the corner of the table; Franklin had just at that time come around to the corner of the table where the deceased was sitting and shot him in the left side; just before he shot he bid the boys good-bye and said he was going home; right away after the shot, the deceased got up from his chair; he looked like he had been asleep and he waked up and went around by the bar and fell; I don't think deceased had a pistol about him; I told him he was shot, and he said: 'No, I ain't shot, let me alone;' this was all he said; I saw the prisoner up to the time the deceased fell; then he (the prisoner) ran out of the house; the first I noticed of the pistol being in Frankin's hand, was after the shot was fired that killed Williams; at the time of the shooting, the other parties, some of whom were around the stove and some around the table; the defendant was just around the corner in front of them; the deceased was only shot once; he was shot through the left side; the ball did not go through him; Williams died a few minutes after the shot, so I afterwards understood; that is all I know of the circumstances."

John H. Winters, testified as follows:

"I was present when this shooting took place. It was on the 27th of November last, that the defendant and two other soldiers came into the saloon in Central City; Franklin had a pistol, similar to the one produced here (here the witness was shown a pistol by the district attorney); Williams the deceased, was a deputy sheriff at the time. The deceased told the defendant he must take his pistol off; defendant said he was going home and would not take it off; deceased then told him to go home, and if he came with his pistol on any more he would have to arrest him; defendant then said 'neither you nor Jesus Christ couldn't take this pistol from me; it is my property, and I bought and paid for it;' after this, Franklin and some one or two others went out and were gone for a little while; when after a while defendant came in, he had fell into an adobe hole outside, near the house; he told me he had fell into this hole, and said somebody had taken his pistol; I got a light and went out to where he said he had fallen, and I found the pistol in the adobe hole; when the defendant came into the saloon, he laid down on some benches and went to sleep; the deceased and a man by the name of Moraldes had went out the second time after defendant come there, and after a little while came back, and the defendant was still asleep; there were several others came in about the time Williams and Moraldes came, and then they all commenced singing; the singing waked Franklin up; he then got up and stood some time; the deceased was then sitting down on a corner of a bench with his head on his hand, leaning on the corner of the table; the table was in something like the same position of this table in the court room; I was sitting at the centre of the table, and Mr. Fowler was sitting beyond me, near the stove; he was further over on a bench with his back towards the wall; Williams was sitting at the other corner of the table; while they were singing, Lockey said he was going up to the post, and Franklin said he would go up with him;

just about this time the defendant told me to make a cigarette for him, which I done; Franklin while sitting there had a pistol in his hand; the muzzle of it was pointed towards me; I turned the muzzle of the pistol the other way, as I didn't care about having it pointed toward me; after I gave him the cigarette, he said, 'I will go home now;' just then he pulled his pistol, pointing it at the deceased and fired; I was close enough to the defendant at this time to put my hands on him; I saw the defendant and was looking at him when he raised the pistol; he pointed at the deceased; he pulled his pistol off—(By the Court), is the pistol in the court, Mr. Garrison? Yes, sir. (Here the witness took the pistol in his hand and held it in a horizontal position, pointing it and illustrated how the prisoner held it when he shot deceased). (Witness) The pistol was a self-cocking pistol, and will fire off either by cocking it or pulling the trigger."

The defendant testified as follows:

"I was down in Central City on Saturday night; I don't know what date of the month it was; before I left the "post," I went to the sutler's store and got two bottles of whisky there; I then went down and played billiards, and afterwards went into a man's saloon by the name of Jim; I don't know his other name; he was a white man.

Q. Was it Mr. Fowler here?

A. Yes, sir; that is the man; we went into his saloon and got a drink in there; then I went to Mr. Vest's house and got more whisky; after I staid there a little while, I went into Carrol's house again and got more whisky there; then I came back, and by this time, I was pretty drunk. I laid down on the bench to take a sleep, and the pistol fell out of my pocket; I picked it up and put it back, and it fell out again; I was so drunk at this time that I could hardly walk, and a man in there asked Winters what was the matter; I didn't hear what Winters said; then he asked me what was the matter with me; I did'nt say anything; I laid

a little while, I don't know how long, and I fell off the bench; I got up again somehow, and I laid down on the bench again; I soon got up again and thought I would go home, but I could not walk, I was so drunk, so I laid down again, and staid for some time; after a while I started out of the house intending to go home, and I got from the house a little piece when I fell into a hole where they had been making adobes; I was there some time before I could get out, and after I got out, I seen I was too drunk to undertake to go to the post, so I came back to the house again, and when I came back some one asked me what I done with my pistol; I said I didn't know, and one of the boys said "You carried it out with you when you said you were going to camp;" I said "If it is gone, why let it go;" when I left camp that day I never took any pistol with me at all; I never carry a pistol; I had a pistol of my own, but did not take it with me; the pistol that I had at the saloon was not mine; I don't know how I came by it that day; the only way I can account for having it somebody must have put it in my pocket when I didn't know it; after I came back, when I got out of the adobe hole, somebody brought the pistol in and said they found it in the adobe hole and gave it back to me. While I was laying down, several Mexicans came in and, after awhile, commenced singing; that woke me up, and when I awoke I was very sick; I wanted to vomit; I sat up a little while on the bench I was lying on near the stove, and took out a bottle of whisky and passed it around; I then went around to the corner of the table and Jack Winters gave me a cigar and also gave Lacadue one; I sat there awhile, and I says to Jack "I can't smoke it," and he says "You are too drunk." I had the pistol on the corner of the table, because I did not want to carry it in my pocket, as it had fell out of my pocket twice before, and I was afraid if it fell on the floor it might go off; after I started to get up off the corner of the table, the pistol went off; I don't know how it came to go off; I

know that I had no intention of shooting anybody, because I had nothing against anyone there; I do not recollect of seeing Tom Williams at all until after the pistol went off; Jack says, "Franklin, you shot Tom;" I said, "No, what would I shoot Tom for," and I looked around and saw Tom standing out on the floor; I started towards Tom, and they all said, "Shoot him" (meaning defendant), and I says, "No, gentlemen, I didn't shoot him;" I didn't think I had, because I hadn't seen Tom at all before that, and I never had a thing against him; as soon as they all commencing hallooing "Shoot him," I started to walk out of the door, and they said, "You shot Tom Williams;" I said I didn't come here to shoot any one, that the shooting was done accidentally;" some one in the house then came up and struck me over the head with a six-shooter; I told them not to kill me, that if I shot Tom Williams, I did not mean it, that it was done accidentally, that I did not come here to shoot any one;" I went to the outside of the door, and they carried me back to the house inside; then I went and asked Tom if I shot him; that if I did, I have no recollection of it, that it was accidental; he said, "Go away, don't bother me, you shot me," and I said no more to him.

Q. How long did you know Tom Williams?

A. I had known him twelve years.

Q. Now take this pistol and explain to the court and jury the position it was in when it went off? (Here the witness takes the pistol and goes to the corner of the table in the court-room and sits on the corner of the table in a leaning position with his right arm across his leg and resting on it, with pistol in right hand and the muzzle of it in range with the table, the end of the barrel ranging downwards and nearly touching the table; the position of the witness and the manner in which the pistol was held rather indicated indifference and carelessness—Reporter.) Explain to the jury the position of the pistol when it was discharged.

A. I am not certain that this is the pistol—the pistol—I had never saw it before that night; I just picked the pistol off the table like, and took hold of the stock, as near as I can remember; I never owned a pistol like this in my life, and didn't know anything about it; I have a government pistol, but did not take it with me that day; if I had wanted to shoot anybody, I could have taken it along with me; the pistol I did have was like this (the one in court).

Q. Was this pistol you had there a self-cocking pistol?

A. I don't know whether it was or not; I never had it in my hand before that day.

Q. Can you tell me how it came the pistol went off; that is, what caused it to be discharged?

A. No, sir; I cannot tell what caused it to go off.

Q. Where did you take your first drink on that day?

A. I took it at the hospital, and a short time after me and Bill Bemkins took two drinks apiece more, and then Bank came down to the hospital with a bottle of brandy and two cigars, and we drank again; we must have drank six or seven drinks apiece; then we went down to the sutler shop and got two bottles of whisky over there; we staid in there some time, and came out and took another drink; we staid around there until we must have taken four or five drinks more out of the bottle; then we took two or three drinks more on the road to Sam's; we got more whisky at Carrol's, and drank two or three times there; I was drinking all the time since the time I took my first drink at the hospital until the time I left the saloon that night, except about a half an hour. I laid down on the benches at the saloon.

Q. Who all were in the room when this accidental shooting occurred?

A. I don't recollect who were there except Jack Winters, Lacadue Henderson; I don't know the Mexicans who were in.

Q. Were you drunk when the shooting occurred?

A. I don't recollect whether I was drunk or not; I know

I had a great deal of liquor in me, and I tried to go home and couldn't; I went out of doors once to go home, and I was so drunk I had to come back, because I couldn't make my way, and when I came back I had to set down; this was just before the shooting; if I started to go home, I knew I was liable to fall down somewhere and get lost; I didn't see Williams in the room at all that night; the first time I saw Williams was when I first went down to Central City; I remember the thing he said, to put that pistol up; I said I bought that pistol, and paid for it; I might have said that neither he nor Jesus Christ could take it from me; I don't remember what I said; I suppose I talked like a drunk man would; I cannot say whether I made that remark or not; somebody must have put the pistol in my pocket at the quarters; I know I never had the pistol in my hands before that night, I have seen the same pistol before; I know who it belongs to.

By the Court—You say you know who it belongs to?

A. Yes, sir. (Here witness was again asked to describe the position he occupied and the manner he held the pistol when it was discharged, and he related the position substantially as given before—Reporter.) When I picked the pistol up it went off, but I cannot caused it to go off; I did not intend it to go off. When I took hold of it I think I must have placed my finger on the hammer; if it was not a self-cocking pistol, it never could have went off in the world; that was the reason the pistol must have went off; when I lifted the pistol up, I intended to go home; I didn't see Williams at all then.

Q. You say you had no trouble with any one that was there that night?

A. No, sir; I had nothing against any one there.

Q. Did you ever have trouble with any one in that neighborhood?

A. There was a man by the name of Davis who said he "allowed to kill me if he caught me."

There was other testimony, but it does not materially change the case made by the evidence of these three witnesses. There is no ground of reversal in the action of the jury in finding a verdict of guilty on this evidence. They evidently thought that the pistol went off because the defendant desired it to do so, and we cannot say from the evidence that they were wrong in this opinion.

As to the instructions excepted to they expressly leave the mental condition of the defendant to be formed by the jury. It is true the court told the jury in effect that a man cannot at the same time be drunk and sober, conscious and unconscious, responsible and irresponsible, a truth about as obvious as that two bodies cannot occupy the same space at the same time.

This was not a comment on the weight of evidence. It was merely the statement of a truth in mental philosophy, which formed the foundation of the instructions objected to by defendant.

This objection assumes that the statute forbidding the judge to comment on the weight of evidence applies to criminal cases, which is by no means settled, and which it is unnecessary now to determine.

Changing the form but not the obvious meaning of the instructions may be expressed thus:

If the jury believe from the evidence that at the time of the killing, the defendant was so drunk as to be unconscious and irresponsible, in that case his testimony as to what took place while he was in that condition is of little or no value. Or, transposing it, if the jury believe from the evidence that the defendant was conscious of and understood what was done and said by himself and others present at the time of the killing so as to give an intelligent and true account of it

at the trial, in that case he is responsible for his conduct at that time.

The instructions did not advise, direct or instruct the jury what to find, but left them free to exercise their own judgment.

The motion for a new trial was properly overruled, and the judgment is affirmed.

Instructions omitted (accidentally) in the opinion:

If the defendant at the time the pistol was discharged, resulting in the death of Williams, was so intoxicated that he was totally unconscious of the events transpiring around him, and particularly of his own acts and the operations of his own mind, then he was incapable of any motive or intention, and was quite irresponsible for his acts, and that being the case, he is not guilty.

In determining this question you will well consider all the facts and circumstances in proof and bearing on this point, and particularly as to the accuracy and clearness of his recollection now as to what then took place. If he was so drunk at that time that he was unconscious of his own acts and of what took place, then his evidence now is of little or no weight as to what took place.

If he does now clearly recollect any of the circumstances then transpiring at the time of the shooting of Williams, it would tend to show that at that time he had his consciousness and knew what he was about. It is exclusively your province to determine from the evidence whether he knew what he was about. If he did, then he is responsible for any criminal act he may have committed.

ROBERT N. KING, Appellee, v. NELSON WARRINGTON, Appellant.

February, 1882.

MORTGAGES. (1) *Absolute deed held a mortgage: Right of redemption.*

1. A conveyance which on its face is an absolute, unconditional deed, may be made a mortgage by the agreement of defeasance of the parties. Such agreement may be proved by parol, and a right of redemption exists in the grantor and descends to his heirs. No tender is necessary to preserve that right.

The appellee, King, brought his bill in equity in the district court of the third judicial district of the territory of New Mexico, within and for the county of Grant, against the appellant, Warrington, to have the deed therein mentioned, declared a mortgage, and for redemption of the same. The bill charges and the answer admits that the deed, although absolute on its face, was given as a mortgage to secure the payment of the sum of $110 due from King to Warrington. According to the plaintiff the property was to be redeemed at any time within five years, according to the defendant, two years, which would expire in September, 1879, and which was fixed as the time. Both parties agree in the statement that Warrington was to do the assessment work necessary to hold the property under the mining laws of the United States.

Warrington sets up in his answer and testifies that he afterwards extended this time to December 15, 1879, and says that he then told King that if he did not pay the money by that time he might not get the property. This is what the defendant calls the "new contract." On December 3, 1879, $100 was paid Warrington by King towards the extinguishment of the debt. Prior to the filing of his bill King caused the sum of $500, which was in excess of the amount due to

Warrington for the original loan and for advances made by Warrington for annual assessment work on the mine, to be tendered to Warrington, who refused to accept the same, claiming that he owned the mine absolutely. There was a decree for the complainant, and Warrington appeals.

Conway & Risque, for appellee.

I. The deed, though absolute in its terms, but given simply as security for the payment of money, is a mortgage with all the incidents of that instrument, and the rights and obligations of the parties are the same as if the deed had been subject to a defeasance expressed in the body thereof or executed simultaneously with it: *Odell v. Montross*, 68 N. Y., 499; Perry on Trusts (3d ed.) vol. 1, foot note 5, p. 272; Story's Equity Jurisprudence, vol. 2, p. 202, sec. 1018; Hilliard on Mortgages, vol. 1, p. 32, sec. 2.

II. The subsequent agreement set up in the answer is not sustained by the proof, but even if it were, it would be invalid and could not cancel the complainant's right to redeem. A mortgage being intended simply for security, and the nature of the transaction affording opportunity and temptation to the lender to take advantage of the necessities of the borrower, courts of equity have strenuously resisted all attempts to abridge the right of redemption, and held express agreement for that purpose to be wholly void. The maxim upon which they proceed is: "Once a mortgage, always a mortgage:" Hilliard on Mortgages, vol. 1, p. 69, *et seq.*; Kent's Commentaries, vol. 4 (11th ed.), pp. 173–4, sec. 159, foot note C.

So inseparable, indeed, is the equity of redemption from a mortgage, that it cannot be disannexed even by express agreement of the parties. If, therefore, it should be expressly stipulated that unless the money should be paid at a particular date, or by or to a particular person, the estate should be irredeemable, the stipulation would be utterly void: Story's Equity Jurisprudence, vol. 2, p. 203, sec. 1019. An agree-

ment subsequent to the making of the mortgage between any one intrusted as mortgagee and the mortgagor or his assignee to limit the right of redemption to any certain time, is held invalid: Hilliard on Mortgages, vol. 1, p. 90, secs. 26 and 27.

The decree in this case is equitable and just in its terms, warranted by the pleadings and evidence, and in accordance with the principles above laid down, and should be sustained.

PARKS, Associated Justice: This was a bill to redeem. The court below decreed that the complainant pay to the respondent four hundred and fifty-seven dollars in five days, and that upon such payment, respondent convey the property in question to complainant. Respondent brings the case to this court.

The rules governing this case constitute a remarkable illustration of the powers of a court of chancery. They are that a conveyance which on its face is an absolute, unconditional deed may be made a mortgage by the agreement of the parties, and that the agreement may be proved by parol; that being a mortgage hardly any failure or neglect of the parties can change its character; that the right to redeem is so sacred that as a general rule it descends to the heir unimpaired by any act or omission of the ancestor, and that no tender is necessary to preserve that right. In discussing the humane and generous principles upon which it will administer upon the doctrine of mortgages, Chancellor Kent seems to exult in the power of a court of chancery. That great judge, in speaking of the almost unalienable right of the debtor to redeem, becomes truly eloquent. No lawyer can read his splendid eulogy upon courts of equity, without feeling that the office of administering justice upon such principles is a noble one.

We have examined this record and find no error in it. The answer admits that the deed was given to secure the debt.

The decree is a proper one upon the case made by the proof, and is affirmed.

Decree affirmed.

THOMAS J. BULL, Appellee, v. JAMES W. SOUTHWICK, Appellant.

JOHN D. BARNCASTLE, Appellee, v. MARTIN AMADOR, Appellant.

EVANGELISTO CHAVES, Appellee, v. MAXIMO CASTENADA, Appellant.

August and November, 1882.

ELECTIONS. (1) *Duties of canvassing boards ministerial, not judicial.*

SAME. (2) *Judges of election; their failure to take oath does not vitiate their returns.*

SAME. (3) *Canvassing boards, duty of, as to counting votes returned.*

SAME. (4) *Contest to be made in district court.*

SAME. (5) *False returns rejected as evidence.*

SAME. (6) *Mode and form of making up returns.*

SAME. (7) *Contest, amendment of pleadings in.*

SAME. (8) *Contest, pleadings, failure to deny, admits allegations.*

SAME. (9) *Contest, nature of proceeding.*

SAME. (10) *Quo warranto not superseded by statutory proceedings to contest.*

1. Canvassing boards of elections have only ministerial functions to canvass and count votes as returned by the judges of election, to ascertain and declare the respective majorities of votes received by the respective candidates for office from the aggregate number of votes so returned by the judges of election. They have no judicial powers whatever to pass upon and decide as to the illegality of individual votes received and returned to them by the judges of election.
2. The canvassing board of elections cannot reject as illegal the votes of any precinct, on the ground that the judges of election in such precinct did not take and subscribe the oath of office as required by law. The judges of election of such precinct, notwithstanding they may not have taken and subscribed the oath required by the statute, are

nevertheless *de facto* judges of election, and their official acts otherwise regular, are entitled to full faith and credit. Their omission to take the oath, while it might render them liable to prosecution and severe penalties, can not in any way affect the legality of votes received and returned by them; and it is the duty of the canvassing board to canvass and count all such votes for the respective candidates for whom they are cast.

3. Whenever votes have passed the judges of election, and have been received by them as votes, and as such returned by them to the canvassing board, as having been cast for certain candidates respectively —the returns showing in an intelligible manner the number of votes, and for whom cast—it becomes the ministerial duty of the canvassing board to count all such votes, and declare the result from such returns alone, without sitting as a court of review—in the absence of the parties interested—for the purpose of passing upon the illegality or legality of individual voters whose votes have been so returned to them.

4. After votes have been received and regularly returned by the judges of election, and questions as to the illegality of any such votes shall subsequently be raised, the respective candidates for whom such votes are cast are on principle and as a matter of law, as much entitled to their day in court, and to be heard thereon before such votes are rejected, as are the litigants in any other form of judicial proceeding. The only lawful tribunal having original jurisdiction to determine questions of this kind is the district court, which is to proceed in the mode prescribed by the act of 1876: Prince's Laws N. M., 134.

5. When the election returns of a certain precinct were false, in that certain persons were therein stated to have voted, who did not in fact vote at such precinct at all, and it further appeared from such returns that all the voters at such precinct voted in *alphabetical order*, and it could not be ascertained from the poll books and returns of such precinct, for whom or what ballot any voter voted, it was held that they were not evidence that any of the persons whose names were recorded in such poll books and returns voted, and that to determine this matter a resort must be had to evidence *aliunde*.

6. The mode and form prescribed by law for making out poll books and election returns, is as follows: The ballot of the first voter appearing at the polls and voting is to be numbered one by the judges of election. The same number is to be put down by them in the poll books, and opposite the same number in the proper column therein, is to be written the name of such voter. The ballot so numbered is then to be deposited in the ballot box.

The ballot of the second voter appearing and voting is to be num-

bered two, and the same number put down in the poll book next in order after No. 1, and the name of the voter voting that ballot so numbered is to be written down opposite that number in the poll book, and the ballot then deposited in the ballot box.

The same numerical order and record is to be observed and kept with each voter as he appears and votes.

At the close of the polls the names of the respective candidates voted for by each ballot so numbered and recorded are to be written down in the appropriate columns, and in the proper column under the name of each candidate so voted for, and opposite the same number in the poll book which the ballot bears, and opposite the name of the voter voting the same, is to be recorded the vote showing that the voter has cast one vote for each candidate so voted for by him.

The poll books of the several precincts with the proper certificates attached and so filled out, constitute the returns of the judges of election, to be transmitted to the canvassing board.

7. The notice of contest alleged the illegality of sixty-nine votes. The respondents failed to deny this allegation in their answers, but some time after the expiration of the time allowed by law for them to answer in, moved for leave to file a supplemental answer denying this allegation, urging that the failure to deny in the first answer was solely owing to the negligence and omission of counsel. This motion was overruled.

Held, that the statutory provisions as to the time of filing and serving the notice of contest, answer and reply are in effect, statutes of limitation, taking from the judge all discretion as to extending the time.

8. The failure to deny such allegation admits it to be true, and if evidence is taken, as if an issue had in fact been made by filing a denial in proper time, such evidence will be disregarded as immaterial.

9. A proceeding to contest an election is a proceeding exclusively between rival candidates for office, and the people are in no sense parties to it.

10. The proceedings authorized by statute to contest elections do not supersede the proceeding on behalf of the people by writ of *quo warwanto*, to oust from office one who was not elected thereto by a majority of legal votes. PRINCE, Chief Justice, dissents.

Appeals from the District Court of Doña Ana county

These were proceedings under the statute to contest the respective elections of appellants to the offices of sheriff, treasurer and judge of probate for the county of Doña Ana, at

an election held on November 2, 1880. By stipulation of counsel the three cases were heard and determined together in the court below, and they were in like manner argued and submitted in this court.

In the first case Thomas J. Bull served and filed notice of contest upon the respondent, James W. Southwick, for the office of sheriff of Doña Ana county. In the notice of contest, the contestant used printed forms, alleging, among other things, illegal votes cast and counted for respondent at the last election for said office, and set out various causes, rendering said votes illegal. The contestant also alleged irregularity of the returns of the election at the Las Cruces precinct.

The respondent replied, serving and filing his answer within the time required by the statute, specifically denying the allegations in contestant's notice, except that in the denials, which were made in the order of the allegations in contestant's notice, by a clerical error, one of the allegations is not specifically denied.

Following the several specific allegations touching the individual voter, the contestant, in his notice, alleges generally that the vote, etc., was unlawfully registered, received, and counted, etc. These allegations are specifically denied by the respondent's answer.

The contestant filed his replication, and served the same within the time contemplated by law.

The respondent applied to the judge to fix the time within which to take testimony, and at the same time applied for leave to file an amendment to his answer, which motion for leave was overruled by the court, and the respondent excepted. Thereafter, upon notice by respondent to contestant, testimony was taken. Contestant took testimony regarding quite all the votes alleged by him to be illegal votes. The contestant introduced no proof to sustain his allegations as to the Las Cruces precinct, except the poll-book and tally

list of votes. The respondent introduced proof to show the regularity of the election at Las Cruces precinct, etc., etc.

The respondent asked again for leave to amend his answer. The court overruled motion for leave to amend, and ruled out certain evidence, to wit, all evidence of the respondent's touching the legality of the votes alleged by contestant's notice to be illegal votes, and without finding that the contestant received a majority of the votes cast at said election, rendered judgment in favor of contestant. To all of which respondent excepted.

On June 1, 1881, the case was argued and submitted, and on December 14, 1881, the court rendered its judgment.

The facts found and the conclusions drawn by the court are the following:

That it appears from the returns of the judges and clerks of election, from each of the precincts in the county, that the contestant, Thomas J. Bull, received for the office of sheriff two more votes than the respondent, James W. Southwick; contestant, Barncastle, received nine more votes for the office of treasurer than respondent, Amador, and respondent Casteñada, received twelve more votes than contestant, Chaves, for the office of judge of probate.

That the board of county commissioners, acting under the statute as, *ex officio*, a board of canvassers, illegally assuming judicial functions, went behind the returns and rejected certain votes as illegal, in such manner as to show a majority for Southwick of nine votes, for Amador of two votes, and for Casteñada of twenty-three votes, and (wrongfully as to the first two) issued to them, respectively, the certificates of election to the several offices.

That the returns of the judges and clerks of precinct No. 3, which gave a majority of fifty-six votes for Southwick, of sixty votes for Amador, and of eighty-nine votes for Casteñada, were so false, contradictory and unreliable as to render

it impossible to determine therefrom what persons voted for the respective offices.

That the testimony taken before the master on the part of respondents against the objection of contestants, tending to show that the sixty-nine persons before mentioned had been residents of the county for three months immediately preceding said election, was irrelevant, improperly taken and not to be considered, and that said sixty-nine votes for respondent were illegal, as appeared by the pleadings.

The contestant Bull received a majority of the legal votes cast, and was entitled to the office of sheriff. The same result followed in the other two cases, and judgment was accordingly entered, from which the respondents respectively appealed to this court.

No motion for a rehearing or in arrest of judgment appears to have been made.

The other cases are the same in facts and questions of law as *Bull v. Southwick.*

S. B. Newcomb, *W. L. Rynerson* and *John D. Bail*, for appellants.

The judge did not, in his opinion, find facts upon which to base his judgment.

The court below erred in refusing the amendments to supply what is plainly a clerical omission. This is evident from the answer itself: Act of N. M. Legislature, 1878, par. 54, p. 1220, Prince's Statutes.

The special law of 1876 in regard to the mode of procedure in contested election cases has been changed and modified by statute of 1878 above cited, and secs. 1, 2 and 5, at p. 54, Session Laws 1878.

The main question to be decided by this court is: Did the court below err in refusing to allow the appellants to amend their answers? In order to arrive at a true solution of this question, it will be necessary to briefly review the general principles underlying all election laws in reference to contests.

The rule is universal that the person having a legal majority of the votes cast must prevail. And to arrive at this determination the case must be considered upon the merits. It is true different states have different laws and methods of trying cases of this description, but they all have the same end in view; all conform to the same universal doctrine, that the will of the people, as expressed through the ballot box, must be respected; in other words, whoever has received a majority of the legal votes cast shall be entitled to and shall receive the office to which he was elected by the people.

Such proceedings are not to be strangled by technicalities, but examined upon their merits, and the courts are to adjudge and decree which of the candidates received the highest number of legal votes: *Re* Duffy, 4 Brews. (Pa.), 531; United States Digest, new series, vol. 4, p. 259, sec. 24.

"Mistakes should always be corrected, and in determining this and similar questions, on cases of contested elections, it should be kept constantly in mind that the ultimate purpose of the proceeding is to ascertain and give expression to the will of the majority as expressed through the ballot box and according to law. Rules should be adopted and construed to this end and to this end only:" McCrary, p. 137, sec. 132.

The problem is to secure, first, to the voter a free and untrammelled vote, and secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. But these rules are only means. The end is freedom and purity of elections. To hold that these rules are mandatory and essential to a valid election, is to subordinate substance to form, the end to the means:" McCrary, p. 155, sec. 200.

An election with us is the deliberate choice of a majority or plurality of the electors. Any doctrine which opens the way for minority rule in any case is anti-Republican and anti-American: McCrary, p. 209, sec. 234.

The broad doctrine was asserted that in this country an election by a minority of the persons voting is not to be tolerated under any circumstance: *Id.*, sec. 235.

A contested election case, whatever the form of the proceedings may be, is in its essence a proceeding in which the people are primarily interested: *Id.*, sec. 316; *Whisor v. Kidder*, 43 Cal., 237; *Saunders v. Haynes*, 13 Cal., 154; *Learey v. Snow*, 15 Cal., 118.

Nowhere does a different doctrine obtain. Can it be conceived, then, that it has been left to New Mexico alone to run counter to all recognized law and authority on this subject? Did the legislators of New Mexico intend to make a law that would turn a man out of an office to which the people had duly elected him, because, forsooth, his attorneys had made a mere slip of the pen? The learned judge below admits that Castañada was duly and fairly elected. Still he turns him out and puts into his place a man whom the people had rejected. Could the makers of the law ever have intended or even contemplated the possibility of such a proceeding? To state so startling a proposition is to answer it.

Keeping in view these well settled principles, how should our statute be construed? So that the will of the people should be disregarded and minority condidates inducted into office, or rather that the will of the people should be respected and the candidate who received a majority of the votes cast, should be declared elected?

That the candidate receiving a majority of the legal votes cast, shall in all cases prevail, the authorities say, is the chief object of all legislation on this subject; and, indeed, our own statute—this arbitrary, tyrannical, technical statute, as counsel for appellees would have us believe—positively enacts that whoever receives the majority of the legal votes shall be declared elected; thereby conclusively showing that they never intended that a minority candidate should receive the office under any circumstances whatever.

Counsel for appellees say that the words in the statute, "within the time aforesaid," render it mandatory and nullify the clause that a majority shall prevail. This we deny. We say the majority clause qualifies and explains the limitation clause. We have clearly shown that all election laws must be construed to give effect to the will of the people as expressed at the ballot box. To this end all such laws are made. In the construction of statutes, affirmative words enjoining the performance of an act by a public officer are generally regarded as directory only; negative words make a statute imperative: Dwarris on Statutes, 175; *Stephenson v. Lawrence*, Brightley's Leading Cases on Elections, p. 527; Bacon's Abridgment, vol. 9, p. 234.

In our statute no negative words are employed. It is in effect the same as the statutes of other states, where they provide that whatever is not specifically denied in pleadings shall be taken as true. The Iowa statute provides that "a reply shall be filed before noon of the day succeeding that on which the answer was filed," and if not so filed, the material allegations of the answer shall be deemed true. Under this statute the court allowed a reply to be filed after the time allowed for the filing had elapsed: *Williams v. The Niagara Fire Ins. Co.*, 50 Iowa, 562.

California has a similar statute, and there amendments are allowed: *Fish v. Redington*, 31 Cal., 185 to 195.

The Illinois statute provides that a person desiring to contest an election "shall, within thirty days after the person whose election is contested is declared elected, file with the clerk of the proper court a statement in writing setting forth the points on which he will contest the election."

The supreme court decided that such could be amended after the expiration of the thirty days: *Dale v. Snow*, 78 Ill., 171.

Here we have three supreme courts, under statutes in effect the same as ours, deciding that amendments should be al-

lowed. No case can be found where a contrary doctrine has been held under like statutes.

We understand that the chief justice of this court allowed (and properly) full and liberal amendments to petitions in contested election cases, under our statute, after the time limited by said law had elapsed.

It is undoubtedly a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the legislature to be taken from the whole. It is also true that when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature is plain, in which case it must be obeyed:" *Fisher v. Blight*, 2 Cranch, 386; Marshall, C. J.

Can it be contended that the meaning of the legislature is plain that no amendments can be allowed in these cases under our statutes in furtherance of justice? From the principles and authorities above quoted, it is evident the legislature never intended to deprive a legally elected candidate of his office on a mere mistake or clerical error, or failure to make a mere denial. Is not the great inconvenience to the public plain here? They are deprived of their choice by a narrow, illiberal and technical construction of an election law, which all the authorities say should be liberally construed, and with the sole end in view of seating the candidate whom the people elected—who had a majority of the legal votes.

A material admission in an answer against a defendant even after evidence taken, upon application should be amended: United States Digest, first series, vol. 1, secs. 1211, 1212, 1213, 1214 and 1215, p. 238; *Taylor v. Dodd*, 5 Porter (Ind.), 246; *Stringer v. Davis*, 30 Cal., 318.

As to amendments generally, see United States Digest, first series, vol 1, secs. 422, 424 and 437, p. 202; *Ib.*, sec. 772, p. 218; *Ib.*, sec. 1034, p. 232; *Soper v. Soper*, 5 Wend. (N.

Y.), 112; Wait's N. Y. Digest, vol. 2, secs. 2042, 2048, p. 1333.

The learned judge below raises a point, viz.: That the answer of Casteñada was not served until after the twenty days allowed by law. A sufficient answer to this objection is that the contestant Chaves replied to the answer and went to trial without objection. He thereby waived the irregularity, if any there was; under these circumstances it would make no difference if the answer had never been served. This principle is so well settled that we hardly deem it necessary to quote authorities. We may refer, however, to McCrary on Elections, sec. 394, p. 330, and Wait's N. Y. Digest, secs. 70, 71, p. 1396.

When a court has a discretion to allow amendments and refuses on the ground of want of power, such refusal is error: Ct. App., *Russell v. Conn.*, 20 N. Y. (6 Smith), 81; 3 Wend., 336; Hill & Denio, 103; 12 Abbt., 16; Wait's N. Y. Digest, vol 1, sec. 9, p. 79.

As to Cruces precinct, No. 3. Informality in making election returns not allowed to operate to disfranchise voters: 29 Ill., 414; *People v. Cook*, 14 Barb., 259; *Andrews v. Saucier*, 13 A., 301; *Weaver v. Given*, 1 Brewster (Pa.), 140, Contested Election, 5 Phil. (Pa.), 102.

Names arranged alphabetically, no objection: McCrary, sec. 100; *Hogan v. Pile*, 2 Bartlett, 281.

Ballot implies secrecy: U. S. Digest, new series, vol. 4, sec. 10, p. 258; McCrary, sec. 413, p. 353, also same, p. 455, Maine court.

Our own statutes provide for a secret ballot: Compiled Laws, sec. 22, p. 436.

As to the second count of ballots, we contend that the county commissioners had no authority to reopen the ballot boxes and recount the ballots. The only semblance of authority for such proceeding is to be found in sec. 22 of the act of 20th of July, 1851, p. 426, Compiled Laws. The

mode of contesting elections under that law, was entirely different from the present (see secs. 48 to 55, of said act), the whole machinery of which has been repealed, this recounting section included. The law simply states that the result (of such recount) shall be forwarded to the powers authorized by law, to determine the legality of the election. The law entirely fails to state what "the powers" shall do with it, when they get it, and what effect it shall have. This is certainly not conclusive evidence. It might possibly be used to assist the court in the examination of the case, as briefs of counsel, but can have no greater effect. We consider this proceeding an unlawful and unauthorized interference with the ballot boxes, and at least gave an opportunity for tampering with the ballots. This recounting of the ballots after the result has been declared, is not favored by the courts: Mc Crary on Elections, secs. 93 to 96, 279, 280.

We are satisfied that the recount in the case of *Bull v. Southwick*, was not correctly made; that there are no such ballots as "Aimes Sandi" or as "Sandique." We believe this latter ballot will be found to read upon examination, "Saudique," the Mexican way of spelling Southwick, and the first named ballot will be found to read "llimes saure," also the Mexican way of spelling James Southwick.

As to imperfect ballots, the whole law on the question of imperfect ballots is fully laid down in McCrary on Elections, secs. 395 to 398, inclusive.

The county commissioners, in their pretended recount of January 6th and 7th, 1881, have reported the following, as imperfect ballots voted for the office of sheriff, to wit:

T. J. Bull,	6
Thomas Bull,	3
T. Bul,	1
Th. Bull,	2
James Southwick,	4
Southwick,	3

James M. Soulhowyck, - - - - - - -	1
J. M. Southwick, - - - - - - - -	3
James Southwith, - - - - - - - -	1
Sandique, - - - - - - - - -	5
Aimes Sandi, - - - - - - - -	1

We think that the ballots written "Thomas Bull," and "James Southwick," are not imperfect ballots. A man's middle name, is no part of his name in law. Therefore we think the three votes cast for "Thomas Bull" and the four cast for "James Southwick," should be counted for Thomas J. Bull and James W. Southwick respectively, without proof *aliunde* as to their identity.

The law is well settled, that if ballots are cast for a candidate, written with merely the initials of his first name, or even his surname alone without initials, if proof be introduced showing that they were cast for that candidate, such as, that there was no other person of that name running for that office, or that the candidate commonly wrote his name in that way, or that others commonly wrote his name in that way, etc., the ballot must be counted for the party intended.

The contestant, Thomas J. Bull, has entirely failed to offer any evidence tending to show that any of these imperfect ballots were intended for him, therefore, none of them can be counted for him; while on the other hand, the respondent, James W. Southwick, has introduced evidence plainly showing that the ballots written "James Southwick," "Southwick," "J. W. Southwick," "James Southwith," "James W. Soulhowyck," "Saudique" (reported by commissioners "Sandique"), "llimes saure" (reported by commissioners "Aimes Sandi"), were intended and cast for him. The ballots James W. Soulhowyck and James Southwith, although poorly spelled, are so evidently intended for the respondent, that, in fact, they prove themselves upon their face; they are in fact *idem sonians.* As to the ballots "Saudique" and "llimes saure," it will be remembered that they are written

by Mexicans in the Spanish language, and in the manner in which they spell and pronounce "Southwick," as shown by the evidence.

By a strict construction of law none of the imperfect ballots can be counted for the contestant, Bull; but respondent's proof as to the imperfect ballots is amply sufficient to admit them for him. The presumption is very strong, that the judges and clerks of election counted these imperfect ballots for the persons for whom they were intended; for this reason, we think it fair that they all be counted for the respective parties, as certified by the judges and clerks of the respective precincts, but we are not willing that they should be counted for the contestant, and any of the respondent's thrown out.

There is another question worthy of the serious consideration of the court: From the fact that no allegation has been made on either side in reference to these imperfect ballots, will the court go behind the certificate of the judges and clerks of election to ascertain for whom they were cast? Or, in other words, will the court, in the absence of all allegations in the pleadings, change the count as certified by the judges and clerks of election, and reject these votes, simply on the ground of their informality?

The identity of parties will be presumed from identity of names. It was intimated by contestants' counsel that the respondents, in proving up the three months' residence of the voters challenged by contestants, failed to prove the identity of the men examined by them, with that of the men challenged by contestants. We reply that "the identity of name is *prima facie* evidence of the identity of the person." See *People v. Thompson*, 28 Cal., 215; *Garwood v. Garwood*, 29 Cal., 515; *Douglass v. Dakin*, 46 Cal., 50; *Thompson v. Maureu*, 1 Cal., 428; 1 Greenleaf on Evidence, sec. 575, note 1.

We again call the attention of the court to the legal points made by us in the beginning of this case.

First. The question to be decided in this case, is: Which party really received a majority of the legal votes cast? This question must be determined by the proofs: Brightley's Leading Election Cases, p. 381; McCrary on Elections, secs. 132, 544.

Second. A liberal construction should be given to election laws, with the view of ascertaining and giving effect to the will of the people, as expressed by them at the polls: McCrary on Elections, secs. 387, 554, 353; U. S. Digest (new series), vol. 9, sec. 20, p. 259.

Third. The ordinary rules of procedure and practice ought not to be strictly applied, because the people as well as the adversary parties are interested, whatever the form of the procedure—whether by *quo warranto*, or under a special statute: *Budd v. Holden*, 28 Cal., 139; McCrary on Elections, secs. 316, 374, 382.

Fourth. The case must be determined upon the merits, and judgment rendered for the party which the proofs show received the majority of the legal votes: Prince's Statutes, p. 346, sec. 8. And judgment cannot be given upon the pleadings; the law itself negatives such a conclusion. And this is the principle running through all the authorities: *Keller v. Chapman*, 34 Cal., 640; *Searcy v. Grow*, 15 Cal., 119; *Minor v. Kidder*, 43 Cal., 236, 237, 238; McCrary on Elections, sec. 359; United States Digest (new series), vol. 4, p. 258, secs. 19, 24.

Fifth. The court below erred in refusing to allow respondents to amend their answers. See authorities cited on this and last page. The pleadings can be amended at any time in the furtherance of justice: *Kneass's Case*, Brightley's Leading Election Cases, p. 337, *et seq.*, and note; McCrary on Elections, secs. 283, 285. And this may be done *nunc pro tunc* at any time before judgment or decree.

In conclusion, according to the returns, as certified to by the judges and clerks of election of the respective precincts, the whole number of votes cast and counted for the respective parties hereto, stood as follows: Thomas J. Bull, sheriff, 643; James W. Southwick, sheriff, 641; J. D. Barncastle, treasurer, 638; Martin Amador, treasurer, 629; Evangelisto Chaves, probate judge, 629; Maximo Casteñada, probate judge, 641.

The following statement shows the state of the poll of the respective parties, after deducting the illegal votes cast, as shown by the evidence:

Thomas J. Bull, - - - - - -	643	
Illegal votes, - - - - - -	63	
Legal vote for Bull, - - - -		580
James W. Southwick, - - - -	641	
Illegal votes, - - - - - -	15	
Legal vote for Southwick, - -		626
Majority for Southwick, - - -		46
John D. Barncastle, - - - -	638	
Illegal votes, - - - - - -	66	
Legal vote for Barncastle, - -		572
Martin Amador, - - - - -	629	
Illegal votes, - - - - - -	15	
Legal vote for Amador, - - -		614
Majority for Amador, - -		42
Evangelisto Chaves, - - - - -	629	
Illegal votes, - - - - - -	66	
Legal vote for Chaves, - - -		563
Maximo Casteñada, - - - -	641	
Illegal votes, - - - - - -	15	
Legal vote for Casteñada, - - -		626
Majority for Casteñada, - -		63

We claim that the three votes proven to have been illegal, in the evidence taken in the case of *Chaves v. Castenada*, above alluded to, should be deducted from the number of votes cast for Bull. This would leave Southwick's majority 49.

It will be observed that we have conceded in the above statement that the contestants have proven that fifteen of the votes cast for respondents were illegal. We think this is a liberal estimate, and that we have over, rather than under, stated the number. This concession is made, upon our view of the law, and understanding of the evidence; applying the same rules to these fifteen persons, which we insist should be applied to the sixty-six, which we claim should be deducted from contestants.

Finally, we insist that the evidence is conclusive that all the respondents were fairly elected by a majority of all the legal votes cast. That the will of the people, thus expressed at the ballot box, should, and we believe will, be respected by the court, and judgment given for the respondents accordingly.

A. J. Fountain, Catron & Thornton and *Fiske & Warren*, for appellees.

As to the pleadings. The court below correctly held that "any material fact alleged in the notice of contest, not specifically denied by the answer, within the time aforesaid, shall be taken and considered as true." This is the clear and unmistakable language of the act of 1876; Prince's Comp., p. 344.

Was there any material fact so alleged and not denied? It is incontestable, and stands admitted, that the notice named sixty-nine different persons who voted for appellant, as to each of whom it is distinctly charged that "he had not resided in said county of Doña Ana for three months immediately preceding said election." That this is a "material fact" must be conceded: Act of 1868, Prince's Comp.,

339. That no specific denial of this fact, within twenty days, was made, is also undisputed. The inevitable conclusion is that reached by the trial court, that this fact was admitted by the pleadings, and hence, that these sixty-nine persons did not possess one of the indispensable qualifications, and their ballots were absolute nullities in contemplation of law.

Inasmuch as these sixty-nine illegal votes are essential to give appellants any pretense of a majority, under any claim whatever, it would seem unnecessary to pursue the matter further, unless there be some authority higher than the legislative assembly to negative its plainly expressed will, or some mysterious power of construction vested in the courts which, while admitting the plain enactment, can dispense with obedience to its requirement.

Counsel for the appellants say the case must be determined upon the evidence and the merits, and that judgment cannot be given upon the pleadings, yet they allege as error that the court below refused leave to appellant to amend his answer.

It would seem an idle thing to ask leave to amend a pleading which cuts no figure in the proceedings; and if counsel really believed that the judgment of the trial court in this statutory proceeding must be based only upon the evidence produced, without regard to the pleadings, they surely would not have asked leave more than fifty days after the time had elapsed for answering, after the reply had been filed and evidence taken, to amend the answer or to file a supplemental answer; or, if they did so, they would not assign as error in this court, the refusal of such leave. By their own act they admit that which is too evident for argument, that their proposed amendment, denying the allegation of notice of contest as to the three months' residence in the county of the sixty-nine voters in question, was material and necessary.

The only point to consider is whether the refusal of leave to amend constituted error sufficient for reversal.

This is a special statutory proceeding. The legislature has spoken in plain language, and there is no room for judicial construction or legislation. The answer must be filed within twenty days, and any material fact "not specifically denied within the time aforesaid, shall be taken and considered as true."

The court has no discretionary or dispensing power, even in matters of practice when the legislature has spoken: Sedgwick on Stat. and Const. Law, p. 322; Dwarris on Stat. Law, p. 477. Where a statute declares that a judge at chambers may direct a new trial if application is made within ten days after judgment it has been said "he can no more enlarge the time than he can legislate in any other matter:" *Seymour v. Judd*, 2 Const., 464; *Bleeker v. Wiseburn*, 5 Wend., 136.

When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice. So, where an appeal to be valid must be made within ten days, it is void if taken on the eleventh: *Bleeker v. Wiseburn, supra; Seymour v. Judd, supra; Ex parte Ostrander*, 1 Denis, 680–1; *Barclay v. Brown*, 7 Paige, 245; *Caldwell v. The Mayor, etc.*, 9 Paige, 572; *The Queen v. The Mayor, etc.*, 11 A. and E., 512; Hobert, 298 (K. B., 1625); Siderfin, 56 (K. B., 1670); Strange, 1125 (K. B., 1710); 2 T. Rep., 395; *The Bank, etc., v. Widner*, 11 Paige, 529.

The proceedings in cases of contested elections are properly regulated by territorial legislation under the organic act. It is "a rightful subject of legislation."

Each state has provided for itself some summary method of proceeding in such cases, incorporating such provisions as seemed to its legislative power wisest and best adapted to its peculiar condition.

The power of each state is only limited by constitutional

restriction, state or federal, and that of each territory only by the constitution and acts of congress.

In the absence of such restriction, the act of our legislative assembly is supreme, and it is the plain duty of the courts, as of all others, to give it obedience.

The diversity of state legislation upon the subject renders the local decisions of one state of little aid in construing the election laws of another. Each act must be viewed in the light of the legislative will, as expressed, and hence the citations of authorities by appellee under the particular enactments of different states, such as California and Pennsylvania, are inapplicable here.

In California an election may be contested by any elector, and "the court must be governed in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable: Codes of Cal., vol. 2, secs. 11,111–11,122.

In other words, the general law governing other actions are expressly made applicable to this special proceeding, so far as applicable.

In Pennsylvania the statute, as appears in *Boileau's Case*, 2 Parsons, 503, cited in Brightley's Leading Cases on Elections, p. 268, required the court to proceed "upon the merits" of the election, but this is not held to mean that the pleadings are not to be considered.

In *Kneass's Case*, Brightley, 338, *et seq.*, which seems to be much relied upon by appellant, the Court of Quarter Sessions, Philadelphia, simply held that under their statute there was nothing to prevent the exercise by the trial court of the common law discretionary power of permitting amendments under certain circumstances.

Such is not the case under our statute, which we are justified in saying stands unexcelled among the many similar

enactments, not only for clearness and simplicity, but for wise precautions against frauds and partisan manipulations.

While the fullest opportunity is afforded both parties for the vindication of their rights, the delays and subterfuges by which justice is so often defeated, are effectually prevented.

It was not intended to, and does not, leave anything to the "discretion" of the court, and in this respect, it profits by the universal experience of mankind as expressed in the often quoted language of Lord Camden cited in the note to *Kneass's Case, supra.*

"Any material fact alleged in the notice of contest not specifically denied by the answer, within the time aforesaid, shall be taken and considered as true."

No precedent can be found among the most extreme instances of judicial legislation, for pretending that this language is merely directory, and not mandatory. The words, "within the time aforesaid," were wholly unnecessary unless for the express purpose of limiting the time, and where the legislative purpose appears in the act, no court has ever gone to the extent of disregarding it. The widest latitude allowed is that "when statutes direct certain proceedings to be done in a certain way, or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded:" Sedg. on Stat. Law, p. 368.

And this is only when the language used fails to enjoin a strict compliance, and when the requirement relates to some immaterial matter, where a compliance is a matter of convenience rather than of substance:" *The People v. Schermerhorn*, 19 Barb., 540; Sedgwick, p. 374.

Of course the provision of the civil procedure act in regard to amendments of pleadings in actions generally do not apply to this special proceeding. It is complete in itself.

We might well submit this point, upon the plain proposi-

tion that the court, in refusing leave to amend the answer, was simply acting in obedience to the law.

But even if the court had possessed either the statute or common-law power of permitting the amendment in question, there can be no possible doubt that the exercise of the power was a matter resting in the sound discretion of the trial court, which this court will not review.

The case in Pennsylvania cited by appellant is conclusive upon this subject. The court says: "From these and many other authorities which might be cited, it is well settled that amendments not regulated by the act of 1806 must be granted or refused under the exercise of a sound discretion of the court, for the furtherance of justice, and is not the subject of revision by a higher court; in short, it is an appeal to the conscience of a judge:" *Kneass's Case*, 2 Parsons 553; *Harrison v. Colton*, 31 Iowa, 16; *Bloom v. Price*, 44 Miss., 73; *Mott v. Mustian*, 43 Ga., 380; *Clark v. Spencer*, 14 Kan., 398; *Culvet v. Hide & L. Bank*, 78 Ill., 625; *Cross v. Johnson*, 30 Ark., 396; *Scarlett v. Academy*, 43 Md., 203; *Dobson v. Chambers*, 78 N. C., 334; *Reid v. Allen*, 18 Tex., 241; *Forrest v. Forrest*, 25 N. Y., 501; *Phincle v. Vaughan*, 12 Barb. (N. Y.), 215; *Sayre v. Frazer*, 46 Barb. (N. Y.), 26; *Walden v. Craig*, 9 Wheaton, 576; *Mandeville v. Wilson*, 5 Cranch, 15; *Church v. Syracuse*, 32 Conn., 372; *Schermerhorn v. Wood*, 30 How. (N. Y.), Pr., 316; *Moore v. Shaw*, 47 Me., 88; *United States v. Buford*, 3 Peters, 12; *Ensworth v. Barton*, 67 Mo., 622.

If the court should go farther, and wish to review the action of the court below, we respectfully refer to the record to show that, so far from the refusal of leave to amend being an abuse of discretion, permission, if given, would have been a gross outrage upon the contestant, and would virtually have deprived him of his rights under the law.

It will be seen that leave was not asked until February 17, 1881; this was fifty-five days after the answer was filed—

forty-eight days after the reply had been filed and served, calling specific attention to the omission—and forty-eight days after the period of taking testimony had commenced to run, which was limited by law to three months, or ninety days. Contestant was not bound to take evidence on this point before: *Moore v. Sanborin*, 42 Mo., 490.

Of course the effect of the amendment would have been to require proof on the part of contestant as to the residence of these sixty-nine voters, and to deprive him of the time which had elapsed, and which the law gave him; and in support of this application the respondent filed no affidavits and furnished no excuse for their delay which could be considered by the court.

Assuredly the court, under such circumstances, exercised a most sound discretion in refusing an application which would have enabled the respondent, by means of his own laches, to deal the contestant so fatal a blow.

Bristol, Associated Justice: The above three contested elections cases for the respective offices of sheriff, treasurer and judge of probate, are here by appeal from the third judicial district court for the county of Doña Ana.

Over seventy cases of illegal voting on various grounds are alleged by each of the contestants, and between two hundred and three hundred by each of the respondents.

The testimony is very voluminous, each alleged ground of illegality in voting presents a separate and distinct issue to be ruled upon. I will consider the several cases together without reference to the testimony taken before the master, except so far as may be necessary for a final disposition of the case.

The official returns of the judges of election for each of the precincts in the county are in evidence.

From these returns it clearly appears that the contestant, Thomas J. Bull, for the office of sheriff, received two more

votes than the respondent, James W. Southwick. That the contestant, John D. Barncastle, for the office of treasurer, received nine more votes than the respondent, Martin Amador, and that the respondent, Maximo Casteñada, for the office of probate judge, received twelve more votes than the contestant, Evangelisto Chaves.

Casteñada having received a majority of votes, very properly received his certificate of election from the canvassing board.

This same canvassing board, however, refused to issue certificates to either Bull or Barncastle, but instead thereof gave certificates of election to the minority candidates, Southwick and Amador.

Why was this?

There is nothing before me to clear up this mystery, except certain undisputed facts in relation thereto, appearing on the face of the pleadings, and the official returns of the judges of election of the several precincts.

The notice of contest for the office of sheriff, among other things, contains the allegations substantially, that the judges of election of precinct No. 2, returned to the canvassing board for the contestant, Bull, sixty-four votes; that of said votes the canvassing board unlawfully, designedly and fraudulently neglected and refused to canvass and count for the contestant one of said votes.

Also that the judges of election of precinct No. 8, returned to said canvassing board forty votes for said contestant, Bull; that of said votes the canvassing board unlawfully, designedly and fraudulently neglected and refused to canvass and count for the contestant two votes.

And also that the judges of election of precinct No. 9, returned to said canvassing board nineteen votes for the contestant, Bull; that of said nineteen votes the canvassing board unlawfully, designedly and fraudulently neglected and re-

fused to canvass and count for the contestant each and every one of said votes.

The respective notices of contest for the offices of treasurer and probate judge contain the same allegations as to the return of votes from precincts Nos. 2, 8 and 9 respectively, except that for treasurer. Barncastle received sixty-six votes in precinct No. 2, and forty votes in precinct No. 8. Also that the contestant, Chaves, received sixty-seven votes in precinct No. 2, and thirty-nine votes in precinct No. 8.

The answers of the respective respondents to these allegations are somewhat peculiar, and deserve especial notice. Each of these answers is to the same effect, and one will answer for all. I will take that of the respondent, Amador, for office of treasurer as a sample. He denies generally:

"That the said county commisioners failed at any time or neglected or refused to count, canvass, or allow for said contestant the full number of votes returned as having been cast for him, said contestant, at said county for said office of treasurer, and denies that said commissioners as a canvassing board at the canvass of returns of said election did wrongfully, unlawfully or fraudulently neglect or fail or refuse or omit to count, canvass and allow you, the said contestant, for said office of treasurer twenty-two votes or any number whatever which appeared from said returns to have been received by said contestant for the said office of treasurer; and he, said respondent, denies that at said canvass of the election returns of said election for said office of treasurer the commissioners unlawfully or fraudulently or without sufficient cause threw out or refused to consider or canvass the returns of precinct No. 9 of said county, or to in any manner deprive him, said contestant, of nineteen votes or any vote or votes whatever. This respondent denies that the county commissioners sitting as a canvassing board as aforesaid, ever at any time wrongfully or fraudulently or in violation of law, did omit or fail or neglect or refuse to count and canvass and allow for said

contestants the full number of votes returned as having been cast and counted at precinct No. 8, or any other precinct of said county at said election for said office of treasurer; and denies that said contestant was by said commissioners then and there as aforesaid deprived of the benefit of any votes whatever, which or any of which had been lawfully cast, counted or returned for said contestant at said election for said office of treasurer.

"This respondent avers the fact to be that at the election aforesaid at precinct No. 2, the vote of Adolph Lea was received by the judges of election at said precinct, which vote was illegal and not entitled to be cast, canvassed or counted; the said Adolph Lea not then being registered at said precinct, nor having a certificate of registration as required by law.

"And that at precinct No. 8, aforesaid, the votes of Atanacio Rivera and Senobio Nevares, were each and both received by the judges of election at said precinct; which votes and each of them were illegal; they, the said Atanacio Rivera and Senobio Nevares, and each of them not then and there being citizens of the United States, and not then and there being registered as voters as provided by law; and this respondent charges and specifies that the votes of said Adolph Lea and of Atanacio Rivera and Senobio Nevares, and each and every one of them so illegally voted and received, were voted for you for said office of treasurer, and wrongfully attempted to be counted for you, said contestant. * * *

"And" (this respondent) "avers the fact to be that the returns and papers to wit: poll books and registration lists of said precincts, to wit: precincts Nos. 2, * * * 8 and 9 respectively, * * * show that at precinct No. 2 aforesaid, John D. Barncastle received but sixty-five votes * * * at said precinct No. 8, John D. Barncastle received but thirty-eight votes, at said precinct No. 9, John D. Barncastle received no votes."

Answers substantially the same were made to these allegations in the notices of contests for the offices of sheriff and probate judge by the respective respondents, Southwick and Casteñada, with the exceptions of the averments in the answer of Southwick that Bull received but sixty-three votes in precinct No. 2, and but thirty-eight in precinct No. 8; and in the answer of Casteñada that Chaves received but sixty-six votes in precinct No. 2, and but thirty-seven in precinct No. 8. The logic, significance and effect of these several answers to the allegations under consideration, are virtual admissions that the canvassing board threw out one vote for the contestants from precinct No. 2, also two votes from precinct No. 8, and the entire returns from precinct No. 9, accompanied, however, by the general denial that this was done unlawfully or fraudulently.

That in precinct No. 2, one vote, that of Adolph Lea, was received by the judges of election for the respective contestants, and counted and returned by them as such to the canvassing board; but, as is claimed by the respondents, such vote being an illegal vote, was no vote, and being no vote, the several contestants received in that precinct one vote less than the number returned by the judges of election, and on that ground the canvassing board canvassed and counted for the contestants one vote less from that precinct than was returned by the judges of election.

That in precinct No. 8, two votes, those of Atanacio Rivera and Senobio Nevares, were in like manner received by the judges of election for the respective contestants, and counted and returned by them to the canvassing board as legal votes, but such votes being illegal were not votes, and not being votes, the contestants received in said precinct No. 8, two votes less than were returned by the judges of election, and therefore the canvassing board canvassed and counted for the contestants two votes less than were so returned.

And that in precinct No. 9, neither of the contestants received either nineteen or any votes whatever—and therefore none were or could be canvassed and counted by the canvassing board for either of the contestants.

That is to say, the canvassing board usurped the functions of the judges of election and assumed the powers of a judicial tribunal—in the absence of the parties interested—to decide and determine the legality of the vote of Adolph Lea in precinct No. 2, as also the legality of the votes of Atanacio Rivera and Senobio Nevares in precinct No. 8.

The returns from precinct No. 9 by the judges of elections certainly show that nineteen votes were cast for each of the contestants. These returns in every respect are in strict conformity to the requirements of the statute, except that the printed form of the oath to be taken by the judges of election is not filled up and signed by them, nor is there any evidence appearing thereby that they took such oath. It may be fairly assumed, therefore, that the only ground on which the canvassing board and the respondents considered or pretended that neither of the contestants received any votes at all in precinct No. 9, is that the judges of election thereof did not take and subscribe the oath required by law, and therefore, in consequence of that omission, all the votes cast in that precinct were illegal, and being illegal, were not votes, and were not and ought not to be counted or canvassed by the canvassing board. In this instance, also, the canvassing board assumed the functions of a judicial tribunal to pass upon the legality of the votes cast in precinct No. 9.

Long before these answers were put in by the respondents, these same questions came before me in a *mandamus* proceeding instituted to compel this canvassing board to canvass and count for one of these contestants said nineteen votes so thrown out by them from precinct No. 9; also said two votes from precinct No. 8, and the one vote from precinct No. 2, so thrown out by them.

There were various delays in consequence of the case not being properly presented with all the facts, but it was finally presented with all the returns and data that were before the canvassing board, and upon which they based their action in the premises, and all these questions arose upon a motion to quash the alternative writ of *mandamus*.

The law was carefully considered, precedents and authorities were cited and read. The motion to quash was overruled, and the canvassing board ordered to canvass and count said votes or show cause to the contrary by a certain day. An evasive return was put in, which was quashed and the board ordered to file a proper return by another day. In the meantime, the board went out of office and a new board became their successors, and the case was never pressed for a final determination.

On the motion to quash the alternative writ of *mandamus*, all the questions were ruled upon. It was then decided that the canvassing board had only ministerial functions to canvass and count the votes as returned by the judges of election, to ascertain and declare the respective majorities of votes received by the respective candidates for office from the aggregate number of votes so returned by the judges of election. That they had no judicial powers whatever to pass upon and decide as to the illegality of individual votes received and returned to them by the judges of election, and particularly so as to precinct No. 9. That the judges of election of that precinct, notwithstanding they may not have taken and subscribed the oath as required by statute, were nevertheless *de facto* judges of election, and their official acts otherwise regular, were entitled to full faith and credit; and that their omission to take such oath, while it might render them liable to prosecution and severe penalties, could not in any way affect the legality of votes received and returned by them; and that it was the duty of the canvassing board to

canvass and count all such votes for the respective candidates for whom they were cast.

In making these rulings, I simply followed the uniform decisions of the courts on the subject. I had not then, nor have I now, any doubts as to their correctness. Each of these respondents in their answers has substantially reiterated the same grounds so ruled against, in justification of the acts of the canvassing board in throwing out the returns from precinct No. 9; one vote for the contestants in precinct No. 2, and two votes in precinct No. 8.

In precinct No. 9, nineteen votes were cast for each of the contestants, eleven for each of the respondents. By throwing out the returns from this precinct by the canvassing board, the result of the election, as shown by the returns, was changed so that the contestant, Bull, instead of having a majority of two for the office of sheriff, his competitor, Southwick, had a majority of six. And the contestant, Barncastle, instead of having a majority of nine votes for the office of treasurer, had only one majority. And the respondent, Casteñada, instead of having a majority of twelve for the office of probate judge, had a majority of twenty; and by throwing out one vote for each of the contestants in precinct No. 2, and two votes in precinct No. 8, the result of the election, as shown by the returns of the judges of election, was further changed so as to give Southwick, for sheriff, a majority of nine; to Amador, for treasurer, a majority of two, and to Casteñada, for judge of probate, a majority of twenty-three.

This then, is the explanation, and the reason why Southwick received from the canvassing board the certificate of election for sheriff, instead of Bull; and why Amador received the certificate of election for treasurer instead of Barncastle.

The powers and duties of the county commissioners as a

canvassing board are clearly and specifically defined in the ninth subdivision of section 4, of the act of 1876.

The provision of the act is as follows:

"Said board of commissioners shall" * * * "also act as boards of canvassers of the elections within their respective counties; and shall count the votes cast in any election within their respective counties, and shall determine the result thereof from the returns of the judges of election of the various precincts, and shall declare the result of said election, and shall immediately issue a certificate to the person that may have received the highest number of votes for any office." * * * "The votes cast in any election shall be canvassed and counted within the time now prescribed by law, and the said board of commissioners shall discharge all the duties, and shall exercise all the powers now exercised by the several probate judges, relative to elections, as now required by law, and shall be subject to the same penalties for any failure in the discharge of their duties, or abuse or usurpation of power:" *Vide* laws of N. M., by Prince, chief justice, page 226, sub. 9, sec. 14. This law is concise and plain. Whatever votes have passed the judges of election, and received by them as votes, and as such returned by them to the canvassing board as having been cast for certain candidates respectively—the returns showing in an intelligible manner the number of votes and for whom cast—it becomes the ministerial duty of the canvassing board to count all such votes, and declare the result from such returns alone, without sitting as a court of review—in the absence of the parties interested—for the purpose of passing upon the illegality or legality of individual voters, whose votes have been so returned to them.

But it was suggested by one of the counsel for respondents, that at and previous to the date of the act creating county commissioners and conferring upon them the powers of a canvassing board and of probate judges in regard to elections,

the judges of probate did possess some sort of judicial power to determine the illegality of votes at the time the returns were canvassed; and that under the provisions of the statute last above quoted, the canvassing board could exercise the same functions in determining the illegality of voters.

The only provision of statute at any time in force, on which any such suggestion could be based is contained in the act of July 20th, 1851, which provides as follows:

"Within six days after the election, the probate judge shall call to his assistance one of the justices of the peace of the county, and publicly examine the votes polled for each candidate, giving notice thereof two days previous, which notice shall be posted up at the court house for the information of the people where the examination is to be held, and any citizen shall have the right to question the legality or illegality of any vote:" Laws N. M., Prince's ed., sec. 17, p. 328.

Whatever significance may be given to this statute, it certainly never conferred the power on the canvassing officers to determine the illegality of votes and to reject them on that ground, for section 55 of the same act specifically prescribes the mode in which the illegality of votes shall be determined and the votes rejected. That section provides as follows:

"To reject any illegal votes that may be polled at any election in this territory it shall not be necessary to contest or question them at the polls, but they may be rejected by the authorities qualified by law to determine the validity of said elections, by being proved, after due notice is given by the party contesting said election to the opposing party; said notice in any county election shall not be less than eight days, and shall, in all cases be within thirty days thereafter:" Laws N. M., Prince's ed., sec. 55, p. 333.

This, then, was the only mode by which illegal votes received and returned by the judges of election could be deter-

mined and rejected under the former administration of the probate judges; and that mode certainly was not to be executed by the canvassing officers at the time the returns from the several precincts were canvassed by them.

It is a well authenticated fact that one of the most disgraceful episodes in the history of the politics of this same county was, some years ago, enacted by a judge of probate and justice of the peace, acting as a canvassing board under the supposed authority of sec. 17 of said act of 20th July, 1851.

As such board of canvassers, they assumed judicial power to pass upon the illegality of and reject votes without any other ceremony than because partisan bystanders challenged them as illegal.

In this way hundreds of votes were thrown out and the result of the election thereby arbitrarily changed. This is but another illustration of what experience has long since demonstrated, which is, that if such judicial power should be conferred upon mere canvassing boards, to be exercised at the close of a hotly contested election—in the absence of the real parties interested, and almost always with the partisan advisors of such boards in the background—their sittings would be marked by the exercise of arbitrary power that would be more aggressive and odious than that of the ancient court of Star Chamber.

After votes have been received and regularly returned by the judges of election, and questions as to the illegality of any such votes shall subsequently be raised, the respective candidates for whom such are cast are, on principle and as a matter of law, as much entitled to their day in court and to be heard thereon before such votes are rejected, as are the litigants in any other form of judicial proceeding.

The only lawful tribunal having original jurisdiction to determine questions of this kind is the district court: Act of 1874, Prince's Laws N. M., 344.

The only mode by which such questions can be determined

by the district court in a proceeding between rival candidates alone, is that prescribed by the act of 1876: Prince's Laws N. M., 134.

For the reasons assigned it is clearly my opinion, as a matter of law that the canvassing board, wrongfully and without authority of law, issued certificates of election to Southwick and Amador; that such certificates ought to have been issued to Bull for sheriff, and to Barncastle for treasurer; that by reason of said certificates so as aforesaid wrongfully issued, the respondents, Southwick and Amador, have improperly held the respective offices in question, pending the termination of these contested election cases; that in the meantime, though said respondents have been such officers *de facto*, and their official acts entitled to full faith and credit as such, yet they have not been such officers *de jure*.

I have gone over this branch of the case very much in detail and as thoroughly as I was able, because the questions involved are really important, and have not, to my knowledge, ever been ruled upon by our courts. If there is any misapprehension in the minds of canvassing boards as to their precise powers and duties, it is of the greatest importance to the public, as well as for their own protection against severe statutory penalties, that the matter should be settled and determined by the courts.

There is another branch of the cases, bearing upon certain duties of judges of election, that is of sufficient importance to merit some attention.

The judges of election of precinct No. 3 returned 114 votes for the respondent, Southwick, for sheriff, and 58 for the contestant, Bull; also 114 votes for Amador for treasurer, and 54 for the contestant, Barncastle; also 129 votes for the respondent, Casteñada, for probate judge, and 40 for the contestant, Chaves; all the respondents receiving large majorities.

In each of the notices of contest for the respective offices

in question there are allegations, substantially, that the returns and poll books of this precinct show upon their face that they are so contradictory, unreliable, defective and tainted with fraud as to render them entirely worthless as election returns, because: 1st. It cannot be determined from said returns and poll books, with any degree of certainty, how many or what particular persons voted thereat for said officers respectively. 2d. Because the numbers written respectively on the tickets voted thereat do not conform to the respective numbers set opposite the names of voters on the poll book. 3d. Because the whole conduct of the election officers who held said election at precinct No. 3, then and there amounted to such a disregard of their official duties as to render their doings unintelligible and unworthy of credence, and the results of their action unreliable for any purpose. 4th. Because it appears from the poll books of said precinct that S. H. Newman voted for each of said respondents for the said respective offices for which they were candidates, whereas, in truth and in fact, said Newman did not vote at said precinct at all, and did not vote at said election for either of the respondents. 5th. Because it appears from the poll book that one Jacinto Armijo then and there voted for the respondents, Southwick and Casteñada, and for the contestant, Barncastle, whereas, in truth and in fact, he did not then and there so vote. 6th. Because it appears from said poll book that one S. M. Blun voted for each of said respondents, whereas, in truth and in fact, he did not so vote; and, 7th. Because it appears from such poll book of precinct No. 3 that S. B. Newcomb and Wm. L. Rynerson voted at said precinct at said election, whereas, in truth and in fact, neither of them then and there voted.

In response to these allegations the respective respondents in their answers deny all fraud, negligence and irregularity on the part of the judges of election of this precinct.

As to the allegations in regard to the voting of S. H.

Newman, Jacinto Armijo and Wm. L. Rynerson, they simply deny that they, or either of them, at said election, voted at said precinct; thus virtually admitting the allegations in respect thereto contained in the notices of contest.

There is no answer to the allegations in regard to the voting of S. B. Newcomb and S. M. Blun—which allegations are of course admitted.

In further answer to such allegations the respondents aver that the county clerk, Horace F. Stephenson, a strong partisan of the contestants, wilfully, corruptly and fraudulently neglected and refused to deliver the poll books and ballot box of said precinct to the judges of election thereof, for the purpose of obstructing and preventing a full and fair election thereat; and that he left the same locked up in his office on the morning of the day of said election, and absented himself, so that said poll books and ballot box could not be obtained at the time for opening the polls for said election, nor were they obtained until the doors of his office had been forced open, when they were conveyed to said judges of election.

In further response to said allegations they aver that any irregularity touching said returns from precinct No. 3 was the result of said action on the part of said Stephenson. They further aver that by the numbers on the ballots and the numbers opposite each voter's name on the poll books it can be determined by whom and for whom each and every ballot was cast.

Now, it is apparent from an examination of the returns of this precinct, that in some respects either these returns are false, or these answers are false. For instance, these answers aver that said S. H. Newman, Jacinto Armijo and W. L. Rynerson did not, at said election, at said precinct, vote in any manner whatever; whereas the judges of election thereof certainly recorded in the poll books and returns that said S. H. Newman did vote thereat ballot numbered 161, for each

of the respondents; also that said Jacinto Armijo thereat voted ballot numbered 3, for each of the respondents, Southwick and Castañada, and for the contestant, Barncastle; also that said W. L. Rynerson voted ballot numbered 183, for no candidate whatever; that is to say, he voted a blank ballot so numbered. These poll books and returns further show that said S. M. Blun voted thereat ballot numbered 41, for each of the respondents, and that S. B. Newcomb voted ballot numbered 160, for Manuel Nevares, for justice of the peace, and for no other candidate.

But the returns from another precinct (No. 10), show that thereat, at said election, said S. B. Newcomb voted ballot numbered 3, for each of the respondents, on a certificate of registration from precinct No. 3; also that the returns from precinct No. 18 show that W. L. Rynerson voted thereat ballot numbered 112, for each of the respondents, on a certificate of registration from said precinct No. 3.

On examining the poll books and returns from this precinct, No. 3, the first thing that must impress anyone as extraordinary and incredible is the fact that, according to such returns, all the voters at said precinct marched to the polls and voted in alphabetical order.

That is, all those voters whose surname commenced with the letter "A"—thirty-nine in all—voted before anyone else with names commencing with any other letter voted. Those voters under the initial "A" are recorded as having voted ballots numbered from and including ballot numbered 1, to and including ballot numbered 39, in regular numerical order.

After these had all voted, then all those voters, the initial letter of whose surnames was "B," voted in regular numerical order ballots numbered from and including ballot numbered 40, to and including ballot numbered 60—twenty-one in all. Then, in like manner, all those under the initial "C" voted, and then those under the initial "D," and so on through

the entire alphabet in regular numerical order, until the initial "Q" is reached. The "Qs" commenced with ballot numbered 175. One voter, the first under this initial—one Jesus Quesada—is recorded as having voted that ballot. Those under the remainder of this initial "Q," and extending through the initials R, S, T, U, V, W and Y, in regular alphabetical and numerical order—fifty in all—from and including ballot numbered 176, to and including ballot numbered 225, are recorded as having voted blank ballots.

The law in regard to making out these poll books and returns is very plain and simple. The statute has not only prescribed the mode, but has prescribed a form for executing that mode. The judges of election of precinct No. 3 had one of these forms in print, with appropriate columns marked and with suitable headings, also in print, indicating precisely how the poll books and returns should be made out.

The mode and form prescribed by law is as follows: The ballot of the first voter appearing at the polls and voting is to be numbered one by the judges of election. The same number is to be put down by them in the poll book, and opposite the same number, in the proper column therein, is to be written the name of such voter. The ballot so numbered is then deposited in the ballot box.

The ballot of the second voter appearing and voting is to be numbered two, and the same number put down in the poll book next in order after No. 1, and the name of the voter voting that ballot so numbered is to be written down opposite that number in the poll book, and the ballot then deposited in the ballot box.

The same numerical order and record are to be observed and kept with each voter as he appears and votes.

At the close of the polls the names of the respective candidates voted for by each ballot so numbered and recorded are to be written down in the appropriate columns, and in the proper column under the name of each candidate so voted

for, and opposite the same number in the poll book which the ballot bears, and opposite the name of the voter voting the same, is to be recorded the vote, showing that the voter has cast one vote for each candidate so voted for by him.

The poll books of the several precincts with the proper certificates attached and so filled out, constitute the returns of the judges of election to be transmitted to the canvassing board.

With these printed forms of poll books and returns before them, what excuse was there for the judges of election of this precinct to make out false returns as to who voted and how they voted? If the clerk, Stephenson, was guilty of the charges alleged in the answers, he certainly merits the severest censure, and ought to be prosecuted for gross breach of duty.

But I am unable to perceive how this breach of duty, under the circumstances, could be the occasion for or constitute any justification for making out a false return in any respect. The judges of election could not proceed without the ballot box and poll books. There may have been some delay in procuring them. But it seems they did procure them and proceed with the election. They had the legal forms before them. They filled out these forms in a certain illegal mode, so as to bear falsity on their face in the respects I have pointed out.

It is quite clear that it cannot be ascertained from the poll books and returns of this precinct how or for whom or what ballot any voter voted, nor are they in and of themselves any evidence that can be relied on that any of the persons whose names are recorded in the poll books and returns voted at all, and that to determine this matter a resort must be had to evidence *aliunde*.

In these answers it is averred that from the ballots cast at this precinct the number of votes for each candidate may be determined. That may be true, but the ballots sealed up

and locked up in the ballot box and deposited for safe keeping pending any election contest that might be instituted, constitute no part of the returns of the judges of election to be canvassed by the board of canvassers.

The contestants complain—and I think justly—that in consequence of the falsity of the returns from this precinct, in recording the names of votes opposite the numbers of ballots which they did not vote, it was impossible for them to ascertain therefrom what illegal votes, if any, had been cast for the respondents, and that thereby they were prevented from including any such illegal votes in their notices of contest. If this was designed, it was certainly a fraud.

Whether designed or not, it was an infringement of the rights of candidates desiring to contest the election.

Whether there was or was not any fraud committed at this precinct, one thing is quite certain, and that is, that by reason of the falsity of the returns that I have pointed out, the door was opened whereby the grossest frauds might have entered, and the greatest obstacles thrown in the way of their detection.

The notices of contest for the respective offices of sheriff and treasurer were duly served on the respective respondents, Southwick and Amador, on the fourth day of December, 1880, and the notice of contest for probate judge was served on the respondent, Castañada, on the seventh day of December, 1880.

The provisions of statute under which the cases are brought, so far as they relate to the question involved, are as follows:

"In all cases of contested elections triable in the district court, the notice of contest when filed and served as now provided by law, shall be taken and considered as the only petition and process necessary for the court to acquire jurisdiction."

"The respondent shall file his answer to the notice of con-

test within twenty days from and after the service of such notice of contest upon him exclusive of the day of such service; and any material fact alleged in the notice of contest, not specifically denied by the answer within the time aforesaid, shall be taken and considered as true."

"The respondent may allege in his answer any matter material to the issue, showing that the contestant is not legally entitled to the office in controversy; and if he claims that illegal votes have been cast or counted for the contestant, he must specify in his answer the name of each person whose vote was so illegally cast or counted, the precinct where he voted, and the facts showing such illegality."

"The contestant shall file his reply to any new matter set up in the answer, and serve a copy thereof on the respondent within twenty days from and after the service of the answer, exclusive of the day of such service; and any new matter in the answer material to the issue not specifically denied by such reply within the time aforesaid, shall be taken and considered as true:" Act 1876, Prince's General Laws N. M., 344–5.

Under the foregoing provisions of law, the time for answering and specifically denying each material allegation in the respective notices of contest for the offices of sheriff and treasurer, and filing and serving the same expired at the end of the 24th day of December, 1880, and the time for so answering and denying the allegations in the notice of contest for probate judge, and filing and serving the same expired at the close of the 27th day of December, 1880.

Each of the notices of contest contained allegations that sixty-nine voters, naming them and the precincts where they voted, voted at said election for each of the respondents.

That each of said voters was not qualified to vote, on the ground, among others, that he had not resided in said county for three months immediately preceding the election.

These allegations, of course, are material, and if true rend-

ered the vote of each of said voters illegal and void; and whatever the number of illegal votes the testimony may show were cast for the contestants, it is clear they are insufficient in numbers to overbalance these sixty-nine alleged illegal votes for respondents; and that if these allegations are to be considered as true, then it necessarily follows that each of these cases must be decided in favor of the contestants, Bull, Barncastle and Chaves.

The respondents, Southwick and Amador, filed and served answers on the 24th day of December, 1880, that being the last day on which the same could be done. But in neither of said answers is there any denial of any of the aforesaid allegations as to the illegality of these sixty-nine votes.

The respondent Casteñada, filed an answer on the 27th of December, 1880, that being the last day for such filing; but such answer was not served until the expiration of the time for such service, to wit: on the 22d day of that month. Neither does this answer contain any denial of the aforesaid allegations touching the illegality of said sixty-nine votes.

On the 17th day of February, 1881, fifty-nine days after the expiration of the time for Southwick and Amador to answer, and fifty-two days after the time expired for Casteñada to answer, each of the respondents made a motion for leave to file a supplemental answer denying the allegations as to the illegality of said sixty-nine votes, a proposed supplemental answer being attached to the motion in each case.

These motions were set down for hearing on notice to opposing counsel on the first day of February, 1881. A hearing was had on that day—all the parties appearing by counsel, and the application for leave to file such supplemental answers was denied and overruled by the court.

Nothwithstanding this ruling, the respondents, under objection by contestants, have taken testimony before the master, tending to show that said sixty-nine voters had been residents of the county for three months prior to the election.

This testimony has been reported by the master. On the final hearing of the causes, the respondents renewed their motions for leave to file said supplemental answers, for the purpose of having the pleadings conform to the evidence. These motions also, were overruled by the court, and excepted to by respondents.

It is my opinion that this evidence was improperly taken, and ought not to be considered; the same not being responsive or pertinent to any issue in either of the cases.

It is also my opinion that the very object of the statute, in regard to the pleadings and practice in contested election cases, is to afford, and at the same time to compel the observance of, a speedy mode for conducting and terminating such cases. Its language is plain and free from all ambiguity. There is no room for mistaking its purport and meaning, and I cannot conceive of any reasonable excuse for not following its provisions by either party.

These statutory provisions, as to the time of filing and serving the notice of contest, answer and reply, are in effect statutes of limitation, taken from the judge all discretion as to extending the time.

In my opinion this is one of the most salutary of our statutory laws. Experience has demonstrated that without some such compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might, and would be successfully resorted to, so that a final determination could not be reached before the term of office would expire.

At the time the motions for leave to file the supplemental answers were made and heard, no excuse whatever was presented for the delay, nor was any excuse at any time offered, except the negligence and oversight of counsel for the respondents.

If any error was committed by the court below in the premises, it was in overruling the motions in the first instance.

After such ruling, the contestants and their counsel had a right to consider that issue disposed of, and were excused from offering any evidence in support of their allegations.

Nevertheless it was claimed by respondents' counsel on the argument of the cases, that inasmuch as the people were interested in securing the officers of their choice, the contestants were bound to prove those allegations, though not denied by the answers.

In reply to this, it may be said, 1st, that it is absurd to introduce evidence to prove the truth of what the law declares "shall be taken and considered as true;" 2d, that this is a proceeding exclusively between rival candidates for office, in which the people in no sense are parties.

That it is competent for an officer to resign—to admit facts that will deprive him of an office and give it to another in a proceeding between them—or by his own negligence in conducting his defense, to produce the same result, there can be no doubt.

If by any such means the candidate should obtain the office, who, in fact, was not elected in a majority of legal votes, and this could be shown by competent evidence, the people would have their remedy in a direct proceeding on their part, by writ of *quo warranto*. And if successful, while it would not restore to office the candidate who had lost it by his own act or omission, it would oust the other candidate. Both would then be out of office, and the vacancy could be filled in the mode prescribed by law.

The theory of our statute in regard to the institution and prosecution of contested election cases between rival candidates undoubtedly is, that such candidates, being personally interested and desirous of obtaining and holding the office in question, will do all that is necessary to secure their respective rights under the law.

It must be conceded that this statute, when followed by the parties, affords a speedy, consistent and effectual rem-

edy, whereby the rights of the parties, as well as the interests of the people, are well protected.

It is clear, however, that this statutory remedy does not supersede the proceeding by writ of *quo warranto*, on behalf of the people. It is also clear that under this statutory remedy no act or omission by either party can jeopardize the rights of the people, and if by any such act or omission the wrong candidate should obtain office, the people could resort to their remedy by *quo warranto.*

This statutory proceeding between rival candidates alone is a special proceeding complete in itself, conferring a special jurisdiction on the district court, and to which the general law and rules of the court as to the time of pleading and the discretion of the district judge in extending such time, do not apply.

The special proceeding, therefore, must be strictly followed. It is so plain that there can be no excuse for not following it. When followed, no occasion can ever arise for resorting to a writ of *quo warranto.*

From the opinion herein expressed, it follows that the record discloses no error, and that the judgment of the court below in each of these contested election cases ought to be affirmed.

PARKS, Associate Justice: Nearly a year since in a contested election case in my own district, I was obliged to examine and construe the statute which is in question in this. I then held that the law was mandatory, and have not found any reason in the argument or in the examination of this case to change my opinion.

The correct rule for the interpretation of such statutes is that "no specific requirement of a statute may be dispensed with except when it is clearly manifest that the legislature did not deem a compliance with it material, or unless it appears to have been prescribed simply as a matter of form." "If it is evident from the ordinary grammatical construction

of the words used that it intended a right should be enjoyed only upon some specified conditions, there is no power in the courts or elsewhere to dispense with the conditions imposed, or to hold that a thing which it deemed essential to be done at one time, may nevertheless be done at another."

It is insisted that the statute is directory and that the court had the right in its discretion to give the respondents time to amend their answer in a vital point or to extend the time for answering on one material point, which is substantially the same thing, and that the refusal of the court to do so was an abuse of its discretion. One and a sufficient answer to this is, that leave to amend the answer or to file an amended answer was not asked for till nearly eight weeks had elapsed after the time for answering had expired, and that a corresponding liberality in the court in the exercise of its discretion in all other respects, would defeat the manifest object of the law, which is a prompt and speedy trial of election contests. It is laid down in McCrary on the Law of Elections, that amendments should be immediate and for reasons too obvious to need statement here. If the district court had the discretion to permit amendments as claimed, that discretion must be reasonably exercised, and could not be extended so as to relieve the respondents in this case from the consequences of their long and unreasonable delay in asking leave to amend. The authorities cited on the argument were numerous, and many of them not applicable. Mr. McCrary's doctrine that election laws are only means to an end, is not applied by him and cannot be properly applied by anybody to the trial of contested election cases, and the eloquent opinion of the supreme court of Maine, quoting the still more eloquent speech of Mr. Lincoln, is subject to the same objection.

It is not intended to review these authorities. Many of them are profitable study, but none of them are conclusive of this case. It is the duty of the court to avail itself of all

such lights, but to use its own judgment in construing this statute and not permit it to be practically repealed by a construction not only too liberal to be wise, but too loose to be safe.

The opinion of the district court is filed with the record in this case, and is believed to be correct. It is so full and complete as to obviate any necessity there might otherwise be for a more lengthy and thorough opinion by this court.

The judgment of the district court is affirmed.

PRINCE, Chief Justice, dissenting: In the argument on the appeal in these cases it was agreed, in substance, that the question of fact relating to the legality of votes and eligibility of voters raised by the evidence should not be considered, but that the question as to the correctness of the ruling of the judge below in denying the application of the respondents for leave to amend their answer to the notice of contest, should alone be discussed. It was also stipulated by counsel that all of the three cases should be argued and considered together, as they were substantially the same, involving the same questions, and differing only in immaterial details. They will, therefore, be treated here as one case.

The judge presiding in the second district, who decided the appeal herein by affirming the decision of the court below, not having filed an opinion, and it being uncertain whether an opinion will be filed by Judge Bristol, it appears necessary, in order to lay a foundation for the proper understanding of the reasons which constrain me to dissent from the decision of the court, to recapitulate briefly the facts of the case.

At the general election, held in November, 1880, in the county of Doña Ana, James W. Southwick was declared elected sheriff over Thomas J. Bull, Martin Amador was declared elected treasurer over John D. Barncastle, and Maximo

Castañada was declared elected probate judge over Evangelisto Chaves.

The provisions of the territorial statutes relating to contested election cases, so far as they relate to the time of pleadings, etc., are briefly as follows: The act of 1874 provides that the contestant shall file his notice of contest within 30 days after the day of counting the votes: Laws of 1874, chap. 29 (General Laws, p. 344). The act of 1876 provides that "the respondent shall file his answers to the notice of contest within thirty days from and after the service of such notice of contest upon him: Gen. Laws, chap. 26, sec. 2, p. 344. The contestant shall file his reply to any new matter set up in the answer, and serve a copy thereof within twenty days after the service of the answer: Gen. Laws, chap. 26, sec. 4, p. 345.

On December 1, the above-named candidates not declared elected, viz., Messrs. Bull, Barncastle and Chaves, filed notices of contest, and shortly after (December 4 on Southwick and Amador, and December 7 on Castenada), notice was served on the respondents to answer such notices.

These notices were similar in their character, each averring that a large number of illegal votes had been fraudulently and unlawfully cast, counted and returned for the respondents, praying the court that upon the trial of contest such votes should be stricken from the poll and disallowed, and alleging that when such illegal votes were thus subtracted from the number returned for the respondent, the contestant would be found to be elected by a substantial majority.

In the only one of the cases in which the full record is before me—that of Barncastle against Amador—the number of votes thus alleged to have been illegally cast and counted for the respondent is 71, but the number does not differ materially, if at all, in the other cases. For all practical purposes the cases are exactly similar.

It may be remarked here that only in four instances out of the 71 does the notice of contest give to the respondent any definite information as to the facts which it was claimed made the vote illegal.

In the case of Francisco Lucero, the allegation is that the voter had been convicted of a felony; in the case of Gregorio Miranda, that he was not a citizen; in the case of Rafael Abalos, that he was not a citizen and was also under age; in the case of Omogon Armijo, that he had not resided in the county and precinct for the required length of time; but in the other sixty-seven cases the allegation does not particularize any specific cause of disqualification whatever, but enumerates for each individual of the sixty-seven (using a uniform printed blank for the purpose), every one of the five disqualifications known to the law, viz.: that he was an alien, that he was under age, that he had not resided in the territory six months, nor in the county three months, nor in the precinct thirty days.

In no one out of the sixty-seven, so far as the record shows, and as is conceded as matter of fact, was this true; nor was any attempt made to prove it by evidence—the effect of such a kind of statement being, of course, to deprive the respondent of any information whatever as to the real issue to be met in the case of these sixty-seven voters. This was a flagrant and manifest evasion, if not violation of the law, the intention of which is to give the respondent precise information as to the cause of contest, and the objection raised to each vote, in order that he may be ready, in the required time, either to admit or deny the allegations. Such a vicious system of pleading, unless legally objected to, and the notice ordered to be made specific, could only be answered in one way to be effectual, and that was by denying, *seriatim*, the five allegations thus made as to each of the challenged voters.

On the 24th and 27th days of December, respectively, the

respondents filed their answers as required by the law of 1876, above cited.

These answers, so far as they relate to seventy of the seventy-one voters referred to in the notice of contest (the one excepted being Francisco Lucero), are written on printed forms, the first portion of which reads as follows:

"This respondent denies specifically that at said election held on the said second day of November, A. D. 1880, for the said office of ——— at the said county of Doña Ana, and at, to wit, Precinct No. —, of said county, certain persons named in contestants' notice of contest, to wit, ———, and each and every one of them were not then and there citizens of the United States or minors under the age of twenty-one years, and denies that they and each and every one of them had not resided in said territory for a period of six months immediately preceding said election, and denies that they and and each and every one of them had not resided in said precinct No. —, of said county, for a period of thirty days immediately preceding said election, and denies that they and each and every one of them were then and there disqualified by the laws of said territory from being registered as voters and from voting at the said election."

It will be observed that this specifically denies each allegation with regard to each voter, except that which states that he "had not resided in said county of Doña Ana for a period of three months immediately preceding said election."

The answer then goes on to charge that various illegal votes had been cast and counted for the contestant, using a printed blank for the purpose, and the charge in most cases in the same general and improper manner adopted by the contestant.

On the sixth day of January, 1881, the contestant filed and served his reply, in which, after specifically denying all the new matter in the answer, he says that "a certain material fact in and by said notice of contest, specifically alleged and

charged, to wit, that at said election so held at said county of Doña Ana, on the second day of November, 1880, for the the office of treasurer, certain persons, to wit: (naming them) did each and every one vote for the said respondent for said office of treasurer, and that they and each of them had not then and there resided in the said county of Doña Ana for a period of three months immediately preceding said election, is not by the said answer specifically denied or attempted to be denied," and, therefore, prays that said alleged fact be taken as confessed. On the seventeenth day of February, 1881, the respondent filed an amended answer, verified by Mariano Barela, containing the specific denial omitted in his original answer, and to the omission of which attention was drawn by the language just quoted from the reply of the contestant; with a motion for leave to file such amended answer. The judge set down the motion for hearing on February 21, at Chambers at Mesilla, where an extended argument took place, and the court, after consideration, overruled and denied the motion for leave thus to amend.

It is conceded that this decision was not made as an exercise of the discretionary power of the judge as to allowing amendments, but upon the distinct ground that the judge possessed no power or discretion in the matter; to use the language of the learned judge in his written opinion, that the statutory provisions "are really statutes of limitation taking from the judge all discretion as to extending the time." Counsel for the respondents stated in their argument on appeal that it was on account of the early announcement of this opinion of the judge, that they did not then present the affidavits which they had prepared, explaining the clerial error in their original answers and the reason for the lapse of time before their application to amend, which affidavits were only appropriate or useful if the subject was considered within the discretion of the judge.

An order of reference having been made, the respective parties thereupon commenced the taking of proofs before the master; and in the course of the proceedings the respondent insisted on introducing evidence in support of the legality of the sixty-nine votes called in question by the notice of contest and affected by the omission of the clause as to ninety days' residence in the printed blank used by respondents in their answer. This was objected to by the contestant on the ground that the respondent, by failing to deny the allegation of the notice as to the ninety days' residence of those voters, had admitted the truth of that allegation; that the fact thus alleged and not denied was under the law to "be taken and considered as true," and hence that the subject of the legality of those votes was settled, and not subject to be changed by proof. The evidence as to the residence of these voters was then taken by the master, subject to the objection, and reported to the judge.

On the final hearing on the 1st of June, 1881, after the coming in of the master's report, the respondents again moved (having filed the motion, May 24), to be allowed to amend their answer by a denial of the allegation of non-residence, with a request that the amendment be filed *nunc pro tunc* as of the date of filing the original answer, when it was intended by said respondents' counsel to include in his said answer the substance and words of this said amendment." This was supported by the affidavit of Col. Rynerson, one of the counsel for the respondents, setting forth that in his draft of the answer sent to the printer, the denial of non-residence in the county had been properly inserted, but that the printer inadvertently dropped it out in setting up the matter in type, and that the omission was not observed by respondents' counsel until about the time of the first motion to amend.

After long consideration, the judge refused to allow the

amendment, and rendered a decision in favor of the contestant in each case (December 14, 1881).

The respondents appealed to this court. While the testimony is very voluminous and the briefs and arguments are of great length, yet the real questions necessary to be decided are few.

1. The respondents held that although their answers did not contain any specific denial of the allegation relative to residence in the county, yet as they did contain a denial that the voters in question "were then and there disqualified by the laws of said territory from being registered as voters and from voting at said election," that this general denial of disqualification put in issue every separate allegation of cause of disqualification, and brought up the whole question to be determined by the proofs as fully as if every separate allegation had been distinctly, separately and specifically negatived.

In this I think the respondents are wrong. The case in 31 Cal., 185 (*Fish v. Redington*), and others cited by counsel, seem almost conclusive as to this; but apart from any authorities I should have no doubt on the point. The law distinctly says that "any material fact alleged in the notice of contest, not specifically denied by the answer, shall be taken and considered as true."

The object of the law is, evidently, to frame a distinct issue as to each vote called in question.

The notice of contest is to state distinctly the ground of objection, and the answer is to deny the same specifically, or else it will be taken as confessed.

It is true that, in this case, the contestants disregarded or evaded the law, by not specifying in sixty-seven instances any particular ground of objection; but this fault should have been remedied by application to the court to have the notice made more definite. When the respondents answered they waived the impropriety of form, and subjected them-

selves to answering the notice just as it was. The law, in terms, requires a specific denial of each allegation, and no general denial could take the place of the specific denials required. Were this so, every contestant would simply deny, in general terms and in bulk, all the allegations contained in the notice, and thus the clear and distinct issue which the law was intended to provide for would be lost. It is plain, therefore, that under the pleadings (notice and answer) as they stood at the time of the reference—unamended—the respondents had no right to introduce evidence as to the county residence. That was not at issue, but by the default of the respondents was to "be taken and considered as true." If the judge had committed error in not allowing them to amend by inserting the omitted clause, their rights were all preserved by an appeal.

2. The respondents claimed that inasmuch as this was a kind of proceeding in which the people at large had an interest, no default or neglect on the part of the respondent could obviate the necessity of the case of contestant's being actually proved by evidence before the master.

In this, also, I think, they were in error. The object of the law, as before said, was to frame distinct issues as to each vote called in question The notice might charge A with being an alien, B with being under age, C with not being registered, etc., etc.

On examination, the respondent might discover that the charge against B was correct. He would then deny, specifically, the allegation respecting A and C, but by silence admit the truth of that relating to B.

In such case, it would, obviously, be unnecessary to produce testimony as to B. No issue as to him is presented. It is conceded that his vote was illegal. So the law says very properly that in such cases the fact thus admitted by lack of denial "shall be taken and considered as true."

In this instance the allegation as to non-residence in the

county for the required length of time was uncontradicted and so was "taken as true," without proof.

This I believe to be the correct rule and practice, and the authorities are to that effect. See *Moore v. Sanborin*, 42 Mo., 495, etc.

On the case, then, as presented by the pleadings, as they went before the master, I consider that the subsequent proceedings and judgment were regular and correct.

This brings us to the main and vital question involved in the case, viz.: whether the application of the respondents for leave to amend their answer should have been granted; or, rather, whether the court has power in a proper case and in furtherance of justice to grant such an order.

In the instance before us, it is obvious that the omission of a specific denial of this one of the five allegations against the respondents was the result of accident, either from carelessness in writing the manuscript from which the form of this part of the answer was to be printed, or by omission in setting the type from which it was printed. The printed form of answer follows the printed form of the notice, with the exception of this omission; and the five words at the end of the preceding clause "had not resided in said territory for a period of six months immediately preceding said election" being exactly the same as those of the omitted clause, "had not resided in said county of Doña Ana for a period of three months immediately preceding such election," made it very natural for the compositor to skip the clause by thinking that he was at the end of the latter when really at the end of the former.

But however the mistake occurred, it is not questioned that the respondents intended to deny the allegations of the notice *seriatim*, as they were stated.

The failure to do so was practically giving up their case in advance.

An answer containing such an omission was equal to no

answer at all. The contestant was as fully entitled to judgment on this one omission, as if the denials of the entire series of allegations in the notice had been omitted, and, of course, no one would intentionally incur the trouble and expense of a protracted litigation on pleadings known to be defective as a foundation.

It was argued by counsel for the contestant that under the circumstances could the decision of the court below in denying the motion to amend be reviewed here, because:

1st. If the provisions of the election law are mandatory, then the judge had no power to grant an amendment, and his refusal of course cannot be reviewed; and,

2d. If those provisions are not mandatory, and hence the judge below had power to allow an amendment, then the subject was one of those entirely within his sound discretion—appealing to his judicial conscience—and not subject to revision on appeal.

But in this they ignored a third possible situation, viz.: If the judge below possessed the discretionary power to allow an amendment, but believed that he did not possess it, and consequently denied the motion not in the exercise of his judicial discretion, but distinctly on the ground that he did not possess any power or discretion at all.

In this last case, the action of the judge would be founded on a mistake of law, and consequently reviewable, and the appellate court in overruling his decision, would simply remand the question to the judge for the exercise of that sound discretion which he had declined to act upon before, because he believed that he did not possess the power.

The allowal or refusal of an amendment is generally a matter of discretion with the judge to whom the application is made; and had the learned judge below considered this application upon its merits, and decided it in the exercise of his judicial discretion, it is at least doubtful whether this court could have properly overruled his determination on appeal.

On this point the contestant's counsel argued ably and fully, producing a long array of authorities to sustain their position, that the execution of this discretion is not reviewable in an appellate court, but I do not think that this question really enters into the consideration of this case; for, as appears from the language of the judge himself, in his written opinion, and as was conceded by all parties on the argument, the judge denied the motion for leave to amend, not on its merits or in the exercise of his discretion, but on the express ground that the judge in such cases has no discretion at all to exercise.

His words are, "these statutory provisions as to time of filing and serving the notice of contest, answer and reply, are really statutes of limitation, taking from the judge all discretion as to extending the time."

This, then, is the real question for consideration, "whether the judge, before whom an election contest is being tried in a proper case, has a discretionary power to grant leave to amend after the expiration of the time for answering fixed by statute?"

There is no doubt that where such power really exists, and a judge declines to exercise it for the avowed reason that he believes he does not possess such power, it is good ground for reversal.

"Where a judge at circuit has a discretion to allow an amendment of the pleadings, but refuses to exercise it, on the ground of want of power, such refusal is error of law and ground of appeal." See *Russell v. Conn*, 20 N. Y., 81, and other cases cited; 1 Wait's N. Y. Digest, 79; 17 Minn., 296, in analogous.

Before proceeding to examine the question of power, I think it not out of place to remark that in the first judicial district, it has been exercised in various cases since the enactment of the existing law, and without a single suggestion by counsel, even in contests exciting much public interest, that

there was doubt of the existence of such power, or the propriety of its exercise.

Thus in the case of *Santos Munes v. Juan Sanchez*, which was one of the so called "Taos election cases," which created some excitement in 1879, the notice of contest was filed December 11th, the answer was not filed till February 11th, the time having been extended by consent; on February 28th a replication was filed; and as late as April 9th notice was given by the respondents of a motion to amend their answer by inserting new matters. It was not opposed, although the case was being strongly contested, and an order was made granting the leave, yet the amendment was a very material one, involving no less than 107 votes in ten different precincts, which were then for the first time alleged to be illegal. This was of course a far stronger case than that now in question, in which simply a denial, obviously omitted by accident, was to constitute the amendment, but it is only referred to as showing that the power of the judge, in the execution of his judicial discretion to allow such an amendment, had not been doubted hitherto in the first district.

The territorial statutes relative to election contests contain nothing whatever as to amendments.

It is at least very doubtful whether the liberal provisions of law relative to amendments in ordinary civil cases, which have existed in this territory for over thirty years (see Act 27 of July 12, 1851), apply to a contested election case under the recent statutes. So that we are compelled to look for guidance to the rules of the common law, and the general principles which should govern such cases.

Much stress has been laid by counsel on the words "within the time aforesaid" in section 2 of the act of 1876, p. 344, General Laws, and the precise technical signification and power of those words gave rise to a large amount of discussion.

On the one side it was contended that they were "words of

limitation;" that they absolutely and irremediably limited the time in which a denial of the alleged facts could be interposed, and that on the expiration of that time there was no power in the courts to extend it or allow an amendment of such denial, no matter how strongly the application might appeal to its sense of right and justice. Though the sickness of the contestant, or the death of his counsel, might have delayed the filing of the answer; though the messenger charged with it might have been waylaid on his journey; though by accident, or fraud or collusion, some material words might be omitted from it; though evidence of gigantic fraud might be discovered the day after the expiration of the twentieth day; though it might become patent to all that the will of the people was being disregarded and subverted, yet, according to this view, these words presented such an absolute and positive barrier to any remedial action by the court, that all opportunity for relief was cut off.

On the other hand, it was argued that these words, while they fixed the time in which, in ordinary cases and without the direct action of the court, the answer should be served, and the issues made up, yet that neither by the language used, nor according to the intent and purpose of the law, were they so distinctly mandatory and absolutely prohibitory, as to prevent the court, in a proper case, in furtherance of justice, and in the exercise of its sound judicial discretion, from allowing an amendment afterwards.

So far as the precise language employed is concerned, it was shown that it does not differ materially from that used in many statutes in various states as to times for pleadings both in ordinary cases, and also in election contests, in construing which the courts have held not only that the limitation did not prohibit the allowance of an amendment in furtherance of justice, but that the time might be extended in a proper case and for good cause shown, for the filing and serving of the entire pleading. Not to go outside of cases

of election contests for precedents or illustrations, the case of *Dale v. Irwin*, 78 Ill., 171, is an important one, and specially so with us, because the statute under which the election contest, which is its subject, was conducted, is quite analagous to ours.

This statute is chapter 46 of the system of laws which, under the new constitution, went into effect July 1, 1872.

Section 113 provides that the persons desiring to contest an election, shall, " within 30 days " after the declaration of the result, file with the clerk of the court, a statement in writing, setting forth the points on which he will contest the election.

The election in question was held April 13, 1874, and the "statement" was filed within 30 days. At the October term of the court, the defendant moved to quash the petition, and the motion was granted.

" Whereupon the petitioner obtained leave to amend the petition, which was done." Afterwards, at the same term, leave was granted to the petitioner to amend his amended petition, which was done.

The defendant moved to strike the amended petition from the files, and subsequent to the second amendment, again moved to strike from the files, both of which motions were disallowed.

On appeal, the court says, " The ground assumed by the appellee in his exception to the order allowing the petition to be amended is, that this being strictly a statutory proceeding, the petitioner should be confined to the points made in his original statement, or petition; that the proceeding being neither in chancery, nor at the common law, the court had no power to allow amendments of any kind, but should be guided by the statute alone, and as no provision is made therein for amendments, the court was powerless to allow them. * * * We cannot think the position taken by defendant as to the meaning and purpose of this act, tenable or just. If he is right in seeking to confine the contestant

to the points contained in his original statement, great injustice might be done in many cases." And the court sustained the amendments.

It will be observed that in this case the amendments were made five months after the prescribed time had expired, and when the period for actual trial had arrived.

Again, the act of congress as to contested elections (Feb. 19, 1851), provides that the contestant shall, "within thirty days after said election, give notice," etc. Yet the allowance of amendments and of more time to prepare and file this notice are frequent, and in one case (*Wright v. Fuller*, 1 Bartlett, 112), the true rule of construction was tersely stated as follows: "This statute shall receive a reasonable construction; one that will carry out and not defeat its spirit and purpose."

A case very nearly analogous is found in *Stevenson v. Lawrence* tried in Pennsylvania, in 1862. This was a contested election case, and the question which arose was based on the following language in the statute, being part of the fifth section of the act of July 2, 1839: "The court shall hear and determine such contested election at the next term after the election shall have been held." On the one side it was contended that no action having been taken by the court at the "next term" after the election, its jurisdiction had ceased and its power was gone; that the language was mandatory and imperative, and the limitation absolute.

On the other hand, it was insisted that the provision should be counted to be merely directory, and that there should not be a denial of justice and a disregard of the expressed will of the people at the polls, simply on account of an informality in the method or time of bringing the matter before the court. The decision of the court sustained the latter view, and the following language of the opinion delivered then is so appropriate, that it might almost have been written for this case, and is well worthy to be reproduced here. It was as

follows: "The design of the law is to secure an investigation of a matter in which the citizens generally and the candidate claiming title to the office by election are deeply interested. Questions are involved in such an issue of the gravest importance, affecting alike the highest principles of honesty and fair dealing between man and man, the purity of the ballot box, and the vindication of the elective right of the citizens of the commonwealth; to guard these rights, each of them sacred and worthy of legislative protection, the courts are enjoined to investigate the merits of the case, and finally determine the same according to law. * * * Is the law to be regarded as a dead letter? Are the citizens and contestants alike to be turned away and told that the stroke of the clock has paralyzed the arm of the court, and that they must go without remedy for an alleged violation of public and private rights, because that which was not of the essence of the thing to be done had not been complied with by the officer of the law, either with or without cause? I think not. I can gather no such meaning from the act, and can regard the command as to time only in the light of an injunction to the judges to speed the cause, and at the next term, if possible, fulfill the material requirements of the law, by finally determining the case upon its merits. Any other view, it seems to me, reverses the natural order of things; prefers the unimportant to the material; gives to the minor consideration, namely, the time within which a decision is to be rendered, precedence of the more substantial and weighty matters of the law under consideration, for, certainly, it is far more essential that the courts shall decide the main question than allow it to fall dead before the judges, who are enjoined to decide upon it finally, and upon its merits, by language quite as explicit as that used to indicate the time within which it ought to be determined:" Brightley, p. 532. The only words, according to the established rules of construction, which are absolutely prohibit-

ory, *per se*, are words of negation. Negative words are required in order to make a statute so imperative as to cut off all remedial power of the courts.

Bacon's Abridgment, vol. 9, p. 234, under the title "Statute," states the proposition distinctly, and gives a number of illustrations, among which are the following: If a statute without any negative words declare that deeds shall have in evidence a certain effect, provided particular requisites are complied with, this does not prevent their being used as evidence, though the requisites were not complied with: *Jackson v. Bradt*, 2 Caines, 169.

"Though 54 Geo. III, c. 84, enacted that the Michaelmas quarter sessions shall be held in the week next after the eleventh of October, it is held merely directory, and those sessions may still be held at another time; but negative words would have made the statute imperative:" *Rex v. Justice of Leicester*, 7 Bar., etc., 6.

In Dwarris on Statutes, 2d London ed., 417, after laying down this distinction very clearly, and enforcing it by a number of cases, the following example is cited, which seems quite pertinent to the question now under consideration: "So, where the question was whether an appointment of overseer, made after the expiration of the time limited by a statute for such appointment was valid, it was held to be so, for the statute (43 Eliz., c. 4) ought to receive a liberal construction. Although the statute be introductory of new law, no negative ought to be implied:" *Rex v. Sparrow*, Bolt, 11.

Had the language of our law under consideration been, "within the time aforesaid and not afterwards," or had it contained some such provision as, "and no pleading shall be filed, and no amendment thereto allowed, after the time hereinbefore designated," the language itself would have been in such form as to have admitted of no question as to its mandatory character. The negative words would have shown that the legislature's intent was absolutely to prohibit

any action after the periods designated, and we should have been precluded from any other construction, however unfortunate such a provision might have been in its results, or however strongly such an imperative limitation might appear to work against the object intended to be accomplished by the law.

For it is the first principle of the legal construction of statutes that courts cannot alter by judicial interposition or construction that which is clear and unambiguous in the law itself. Thus Vattel says, "the first general maxim of interpretation is that it is not allowable to interpret what has no need of interpretation." Domat expresses the same idea as follows:

"If the language of a law clearly expresses its meaning and intent, that intention must be carried out" (sec. 284), and Sedgwick briefly states the proposition, that "where the statute is plain, no room is left for construction:" Sedgwick on Statutes, etc., 231, citing *Forber v. Blight*, 2 Cranch, 358 and 399.

But in the statute in question, no such negative words appear. Those employed are affirmative, and while they certainly direct as to the manner in which the legislature desired the proceedings on the contest to be conducted, yet we are not precluded from considering whether the fulfillment of the intent of the law and the accomplishment of its objects, may not be of such paramount importance as to justify a court in the execution of its sound discretion in allowing an amendment to a pleading even after the time so designated.

The object of a law is always the first thing to be considered. Laws are passed by legislatures with the intention of accomplishing something—not of being mere aggregations of words in the statute book, without force or effect. And when that object is clear and obvious, it is unreasonable to suppose that the legislature intended that some provision as

to the details of the methods arranged for its accomplishment should be so strictly construed as to defeat the attainment of the object itself. This would be making the means paramount to the end, and elevating the form above the substance. Sedgwick says, in examining such matters, the first matter for consideration is "the object to be attained," the second, "the means to be employed:" Const. Stat. Law, 229. And this is but putting into language what is the common sense of the matter, because the object is not selected in order to provide certain means, but the means to carry out the object. The methods prescribed are of no consequence of themselves, they are simply valuable in order to attain the object sought. If they do not succeed in accomplishing that, they are useless; if they actually prevent its accomplishment, they are worse than useless. They then cease to be means, and become obstructions.

Now let us apply these suggestions to the law before us. The object of the law as to contested elections is obvious. There is and can be, no dispute about it. It is to carry out the will of the people as expressed at the election, by putting into office the persons really elected. That is its object and only object.

To accomplish this, it provides certain methods of procedure; that an issue shall be framed as to disputed points and submitted to a court, and that in such framing each party shall have a certain time in which to file his statement, etc. These are convenient and proper provisions, looking to the orderly administration of justice in such cases. But these details of practice are not to be construed as of such cast-iron rigidity as to defeat the whole object of the law itself.

Had the power of decision been delegated to a clerk or some ministerial officer, whose authority could extend no further than the simple counting of votes, and declaring a result, there might have been no redress in case of accident or mistake. But the law very properly provides for adjudi-

cation by a court or a tribunal which has the inherent power subject to the limitation of statutes, to allow amendments in furtherance of justice, and to construe uncertain expressions in laws so as to uphold rather than defeat their primary object.

Several cases cited by the counsel for contestant apparently opposed to this view, will be found to refer only to a failure to file and serve the first notice in the case, that which is its initiatory step, in the time specified: *Costillo v. St. Louis County Court*, 28 Mo., 259; *Corbett v. Bradley*, 7 Nev., 107, etc. But that is an entirely different proposition, for this particular failure goes to the jurisdiction of the court itself. If the case is not commenced within the prescribed period, then the court has no jurisdiction of it, and it cannot possibly give to itself jurisdiction by any act of its own—it cannot allow an amendment or grant an extension, in a matter which is not legally before it at all; but when its jurisdiction has once been gained by a proper commencement of the proceedings, then the court has full power to do whatever is necessary for its proper progress in future.

Again, it was argued, and several authorities were cited to sustain the proposition, that courts should not look with favor on applications to amend made after the time prescribed because the party injured by the defective pleading is in that position by his own fault, laches or mistake, and if he has neglected the proper measures for defense, he must abide the result of his own carelessness; and that in the construction of statutes which prescribe precise and definite times for the performance of certain things, this principle should be applied and a strict construction be adopted.

But this rule, while applying generally to actions between individuals, I think is too narrow to be necessarily followed in cases where far broader and more extensive interests are involved.

In most cases which involve only the rights of the respec-

tive parties and affect no one else, a party may lose his rights and remedies by laches, inattention or mistake of law, and this is necessary for the prompt adjudication of questions and is perhaps but a fair and proper penalty for the carelessness of the party or his attorney. He only is interested, and he can by consent or stipulation or default abandon all his rights, as fully as he has power to control, give away or waste his property if he is so disposed.

But there are certain classes of cases which are not simply between the parties appearing on the record, but by which the whole community is affected, and in which it has an interest.

In divorces, for example, there are questions of public policy and the maintenance of the institutions of society involved, which are considered by the law as paramount, even to the desires of the individuals concerned, and no decree can be obtained by the laches, the default or even the consent or request of the parties alone.

Such a course would be *contra bonos mores*, would place an institution which lies at the basis of the frame-work of modern society at the mercy of the caprice of individuals, and could not be tolerated for a moment without an entire change in our civilization.

In the case of an election the public interest is even broader.

The official is not elected solely for his own gratification or emolument, but for the public good. The people select him as their chosen representative to perform the duties of a particular position, and it is they who have the primary and greatest interest in the result of the election. In many states the performance of the duties of certain offices is made obligatory on those elected or appointed; they are not permitted to decline to act, and are subject to penalties for a failure to perform the duties.

In no case can an elected officer, by declination or resigna-

tion, alter the intention of the people so far as to elect some one else, whom they have not chosen.

It may be broadly stated that the minority cannot elect in any case. Thus, in this country, it is well settled that where it appears that the majority candidate is ineligible, and, therefore, cannot assume the duties of the office, yet that does not elect the candidate having the next highest number of votes. It has been evident, by the result of the election, that he is not the choice of the majority, and he cannot be forced into office by the courts after being rejected by the people: *Commonwealth v. Cluley*, 56 Pa. St., 270; *Saunders v. Haynes*, 13 Cal., 145; *State (Wisconsin) v. Giles*, 1 Chand., 112; *State v. Smith*, 14 Wis., 497; Opinion of Judges, 32 Me., 597; *State v. Boal*, 46 Mo., 528, etc.

If A and B are candidates for an office, and A receives 300 votes and B 200, A cannot, by declining or resigning, put B into the office. It is not a question between A and B, but one in which the people, who are to elect, have the highest and most vital interest. In such a case, whether A accepts the office or not, it is certain that B is not their choice; and no action on the part of the one individual A can change the expression of the popular will, or put into office a man not elected by the people. And if A cannot do this by resignation, it is equally obvious that he cannot do it by stipulation or consent, or abandonment, or collusion, or by any act of his own. He is not the electing power, but the whole people of the state, county or district are. The object of a popular election is to ascertain the choice of the people, and the object of laws relating to elections and election contests, is to carry into effect the people's will, as there expressed.

The language of Chief Justice Field of California, now of the Supreme Court of the United States, tersely states what I believe to be the true doctrine in cases of this nature.

"The public is interested in a contest of this character; it is not a matter solely between the parties to the record, and

the popular will is not to be set aside upon a mere failure of a party to respond:" *Slarcy v. Grove*, 15 Cal., 119.

From a consideration of the whole subject, I believe that there was no intention on the part of the legislature which enacted our contested election law so to restrict and hamper the action of the courts as to prevent the accomplishment of the great object for which that law was enacted, and to put into office those rejected by the people, instead of those elected. I am satisfied that after the court had once obtained jurisdiction, it had the power, in the exercise of a sound discretion, to do all such things as would tend to a determination of the contest in accordance with the facts; and bring about a judicial result in conformity with the expressed will of the people at the polls. I have no doubt, as the law in terms says (sec. 8) that, "judgment shall be rendered in favor of the party for whom a majority of the legal votes shall be proven to have been cast at the election," that when it is shown to a judge that by a clerical error such a judgment is rendered impossible, unless such error be corrected, it is the duty of that judge to entertain an application to amend such error and decide on such application as the facts shown and the expressed intent of the statute require.

So believing, I think that the learned judge below erred in not considering the motion to amend the respondent's answer on its merits, and in holding that he had no power or discretion to allow any amendment.

The case, in my opinion, should be remanded to the judge presiding in the third district for the exercise, by him, of his judicial power and discretion in the decision of the motion made by respondents for leave to file their amended answer on the facts as presented on their application.

CASES DETERMINED

BY THE

SUPREME COURT OF NEW MEXICO,

JANUARY TERM, 1883.

THE TERRITORY OF NEW MEXICO, Appellee, v. MILTON J. YARBERRY, Appellant.

January, 1883.

MURDER. (1) *Indictment, in whose name to be found.*

SAME. (2) *Practice on review: Objections to grand and petit jurors not considered.*

SAME. (3) *Evidence, statements of prisoner before and after committing the crime not part of res gestæ: Rule as to res gestæ.*

SAME. (4) *Instruction as to reasonable doubt held properly refused.*

SAME. (5) *Evidence of conversation prior to shooting held not admissible.*

PRACTICE. (6) *Exceptions to charge of court, must be specific.*

MURDER. (7) *Instruction as to nature of crime.*

PRACTICE. (8) *Matters outside of record not reviewable.*

NEW TRIAL. (9) *Not granted for newly discovered evidence merely cumulative.*

MURDER. (10) *Assessment of punishment by jury.*

MURDER. (11) *Trial: Presence of accused necessary:* (12) *and will be presumed.*

1. An indictment for murder found in the name of the territory of New Mexico for a violation of territorial law, is proper. It need not be in the name of the United States of America, for a violation of a United States statute.
2. Objections to grand and petit jurors not taken until after trial and conviction for murder, cannot be considered by the Supreme Court on appeal.

The defendant Yarberry, on trial for murder, was a peace officer whose duty it was to disarm persons carrying concealed weapons.

Shortly after hearing a shot in the street in the evening, he went out in company with two other men, Yarberry making some remark just before the three went in the direction of the shot. Then going on, Yarberry found the deceased, Campbell, a stranger to him, and unarmed, slowly leaving the place where the shooting occurred. Yarberry called upon Campbell to stop and to hold up his hands, and at the same instant he and one of his companions, Boyd, immediately commenced firing at Campbell, who fell forward on his face and instantly expired, pierced by six balls, all from behind—all entering his back. Yarberry, without going near the body of the deceased, turned and went into a saloon. At this place, four or five minutes after the shooting, the sheriff asked Yarberry "What is the trouble, Milt?" to which he made some reply. At the trial, counsel for defendant asked witnesses three questions, which were ruled out by the court, as to what Yarberry said when he and his companions started to go to the scene of the shooting, what he said in reply to the sheriff's question, and what he said just prior to the shooting.

Held, that the questions were properly disallowed, what the defendant said at the times mentioned not being part of the *res gestæ*. The cries of bystanders while the thing is being done, are original and not hearsay evidence, because they are part of the *res gestæ*, but a defendant may not manufacture evidence for himself, either before or after or in the moment of the assault, and claim its admission as part of the *res gestæ*. In no just sense can words spoken several moments before or after be considered a part of the thing done.

4. Under such a state of facts as shown above, an instruction to the jury that "if you have reasonable doubt growing out of the evidence as to whether or not Milton Yarberry, the defendant, inflicted mortal wounds upon Charles Campbell which caused his death, you must acquit the defendant," is properly refused by the court, as it would have put the jury upon an unnecessary inquiry and tended to confuse their minds.
5. It is not admissible, on a trial for homicide, to show a conversation between the deceased and a bartender prior to the shooting, the defendant and the deceased being strangers to each other and such conversation not being in the nature of threats, it not having been shown that the deceased had committed, attempted or threatened to commit a felony, and the conversation not having come to the ears of the defendant, Yarberry.
6. A general exception to the charge of the court to the jury will not be considered by the Supreme Court on review. The several matters excepted to must be distinctly specified.
7. Instruction to jury that the evidence showed the offense with which

the defendant was charged was either murder in the first degree or justifiable homicide, held not erroneous.

8. A point not made a part of the record will not be considered.
9. Newly discovered evidence that is merely cumulative will not warrant the granting of a new trial.
10. Where the indictment charges murder in the first degree, the punishment for which is fixed by law as death, a verdict that the jury "unanimously find the defendant guilty as charged in the indictment," is not objectionable for not assessing the punishment.
11. In cases of felony, the defendant must be personally present during all the proceedings and must so appear on record. But a formal averment of defendant's presence during trial is not necessary when it can be inferred from the record, from averments therein as to his being present at arraignment, his giving evidence, his presence when the verdict was rendered and at the motion for a new trial.
12. The presence of the prisoner during trial for a felony is presumed.

Appeal from the District Court for Bernalillo county.

John H. Knaebel, for appellant.

I. The defense was clearly entitled to prove what was said by the deceased, shortly before the homicide, in the presence of the witness Greenleaf; and the objection to the said statement, namely, that it was incompetent and irrelevant, ought not to have been sustained.

1. If the course of examination was objectionable on any other ground, the failure to specify such other ground amounts to a waiver of further objection, and the prosecution can now insist only on the ground actually specified: *Marston v. Gold*, 69 N. Y., 220–228.

2. The prosecution objected prematurely, and having, in making the objection, assumed that the suppressed statement would, if permitted to be proved, disclose incompetency and irrelevancy, such objection was bad, unless such statement could not in any view be competent or relevant.

3. The prisoner was entitled to the benefit of the statement, if anything at the interview in question could possibly have been said by the deceased that would have been competent, relevant and material evidence for the defense.

4. The prisoner was not bound to ask leading questions, or, in the absence of any inquiry from the court, to make any statement or offer respecting what he intended to prove by the witness.

5. Every intendment is against the prosecution for suppressing the testimony, and in favor of the importance of the latter. See *Stokes v. People*, 53 N. Y., 183.

6. Therefore the appellant is now entitled to claim that, if the statement of the deceased had been allowed in evidence, it would have established animosity on his part against the appellant, and the utterance by the deceased, shortly before the homicide, of threats against the appellant.

7. Such proof would have been material, and possibly controlling in the appellant's favor, when taken in connection with the other circumstances of the killing, as presented in the appellant's evidence.

It would have tended directly and effectually to the corroboration of the appellant's account of the occurrence: *Stokes v. People*, 53 N. Y., 164, 175; *People v. Arnold*, 15 Cal., 476; *People v. Scroggins*, 37 Cal., 676; *Wiggins v. People*, 93 U. S., 465; *Davidson v. People*, 4 Col., 145.

II. The defense was also entitled to prove, as part of the *res gestæ*, first, by the witness Ronan, what appellant said, after the "first shot" was fired, and immediately preceding the tragedy; and, secondly, by the witness Annijo, what the appellant said to the sheriff who arrested him, in response to a question of the latter, four or five minutes after the tragedy.

1. It must always be borne in mind that the appellant was an officer of the law (a constable), charged with the duty of arresting the deceased for the latter's infraction of the law against carrying and using deadly weapons: Prince's Laws, 314, secs. 9, 13; see, also, *Id.*, p. 258, secs. 4, 5; and for malicious and disorderly conduct: *Id.*, p. 259, sec. 5, chap. 3; and that, in this view, the *res gestæ* commenced, as soon

as, by the information and pursuit, the appellant was brought into official relation with the deceased, pursuing and attempting to arrest the latter on complaint made, no warrant or display of official badge or authority being necessary: Prince's Laws, 314, sec. 9; *Caufort v. People*, 5 Ill., 404, *Head v. State*, 44 Miss., 731; *McKee v. People*, 36 N. Y., 113; *Commonwealth v. McPike*, 3 Cush., 181, 1 St. Ev., sec. 108, and note; Opinion, Thatcher, J., 9 Cush., 36.

III. The newly discovered evidence upon which the motion for a new trial was in part based, was highly relevant and material, and had it been before the jury it would undoubtedly have changed the result.

1. The affidavit of Reese (the coroner) shows that the evidence was not communicated to the prisoner or his counsel before the trial, and it is evident, or highly probable, that it was not only not obtainable, but actually concealed from the prisoner and his counsel, by unscrupulous accusers.

2. Such evidence would have strongly corroborated the prisoner's account of the affray, and have tended to prove him either guiltless, or answerable only for a less offense.

3. It would also have contradicted some of the most important testimony of the prosecution—that which tended to show the deceased to have been a harmless, unarmed man, wickedly set upon by a malicious murderer—and would have afforded a basis for the effective employment against such testimony of the maxim *falsus in uno, falsus in omnibus.*

IV. There being no proof of a conspiracy or common purpose existing between the appellant and his companion, the court erred in refusing to charge the fifth instruction requested.

V. The judge's charge amounts to a "comment on the weight of evidence." See *Stokes v. People*, 53 N. Y., 182.

VI. The judge was required to charge "the law of the case"—that is to say, comprehensively and fully, not in part only, nor upon a particular theory of guilt. He failed in his

charge to comply with this duty, so interpreted: Prince's Laws, 126, § 23; and see *Stokes v. People*, 53 N. Y., 182.

VII. The "Crimes' Act of 1790" (1 St. 112, § 3; U. S. R. S., § 5339), is in force in New Mexico as a "district of country" within its terms; and therefore the indictment ought to have been in the name of the United States for violation of the United States law of murder, instead of in the name of the territory for violation of the territorial law; the grand jury had no jurisdiction to find the indictment; and the court below had no jurisdiction of the person of the accused or of the offense charged against him.

1. New Mexico is a "district of country." Compare the terms "district" and "district of country" in various statutes and legal opinions: U. S. R. S., § 5339, etc.; Const., art. 1, § 8, sub. 7, 17; McLean, J., in *Scott v. Sandford*, 19 How., 541, 543; 1 St., 51, note; also *Id.*, 29, 73, 94, 98, 99, 101, 106, 123, 130, 189; *United States v. Terrel*, Hemp. C. C., note.

2. The statute should be construed according to its terms: *Tynan v. Walker*, 35 Cal., 642. *Franklin v. United States*, 1 Col., 34, to the contrary, is a bad precedent.

3. The northwestern territory was probably not within the act: Construction, 98, note. Nor the lands claimed by the Indian tribes: Wheaton Int. Law, 69, 70; 3 Kent Com., 382, 383, etc.; *Worcester v. State of Georgia*, 6 Pet., 515; *sed vide United States v. Rogers*, 4 How., 572.

4. Notwithstanding the general rule as to the continuing force of foreign laws in territory acquired, not by discovery: 1 Bl. Com., 107; 1 Kent Com., 343, 473; 1 Story Cons., §§ 147, 148; *Town of Pawlet v. Clark*, 9 Cranch, 333; *Bogardus v. Trinity Church*, 4 Paige, 178, 198; *Canal Appraisers v. The People*, 17 Wend., 584, 622; *Van Rensselaer v. Hays*, 19 N. Y., 93; also, 1 Kent Com., 473, note; but by conquest or peaceable cession: Authorities *supra*; *American Ins. Co. v. Cauter*, 1 Pet., 542, 543; *United*

States v. Perchman, 7 Pet., 87; *Mitchel v. United States*, 7 Pet., 87; *Leitensderfer v. Webb*, 20 How., 177, 178; 17 Wend., *ubi supra*, also, 585, 586, 587, 588; the Crimes Act ought to be held to extend over New Mexico, *ex proprio vigore:* 1 Bl. Com., 108; *Scott v. Sandford*, 19 How., 393; also, the second clause of Article VI. of the Constitution; *United States v. Seveloff*, 2 Sawyer, 311; *Cross v. Harrison*, 16 How., 78; *United States v. Hudson*, 7 Cranch, 32; 1 St., 930, art. 9; 15 St., 542, art. 3; Bowyer Universal Public Law, 160, 327, 365.

5. That act has by various enactments been extended over all, or nearly all, newly acquired territory, in pursuance of a cautious legislative policy: 4 St., 729, § 25 (and previous Indian country acts); 2 St., 383, § 7; 2 St., 743, §§ 4, 16; 3 St., 654, § 9; also, District of Columbia Act (U. S. Laws, 1871). See *United States v. Guiteau*, not reported; see, also, various territorial acts.

6. The 17th section of the organic act declares such extension in New Mexico; that section being equivalent to a declaration that the general laws should extend to and have full force and effect in this territory. Compare similar clauses in various acts admitting states and organizing territories.

The indictment is fatally defective, because it is drawn in the name of the territory, for violation of the territorial law, instead of in the name of the United States, for violation of the act of congress, relating to the crime of murder.

The Crimes Act of 1790 (1 St., 113, § 3), provides "that if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on being convicted thereof shall suffer death."

Substantially the same provision is embodied in the United States Revised Statutes, under the general head of "Maritime

and Territorial Jurisdiction of the United States:" United States Revised Statutes, sec. 5339.

Although the necessity of exercising the constitutional prerogative of legislation over places ceded (a large part of New Mexico was ceded to the Union by the state of Texas—*vide* Organic Act, 981, 446), or to be ceded to the Union by the state, for military, naval and governmental purposes: Const., art. 1, sec. 8, subd. 17, may have prompted the enactment of certain provisions of the Crimes Act; yet it is evident that the act, taken in its whole scope and purpose, was intended as an assertion of the sovereignty of the Union, for the protection of its citizens throughout the national jurisdiction, against the more aggravated forms of lawlessness, by which their lives or property might be imperilled.

On the adoption of the constitution, the United States became a nation, with the rights and duties of exclusive sovereignty within a constitutionally limited jurisdiction, whose territorial extent was susceptible of indefinite extension by means of cessions from the several states and of foreign acquisition.

Although the political duty of protecting the citizens was constitutionally imposed on the nation, and the nation was vested with the correspondent power to declare and punish crimes, yet, until action under this power, there could be no practical protection to the citizens against criminal offenders; for the constitution did not adopt the common law code of crimes, but left to congress the establishment of all criminal laws: 1 Kent Com., 331; *United States v. Hudson*, 7 Cranch, 32.

The first crime which received the attention of congress was treason, which threatens the nation's life; the next crime was murder, which threatens the life of the citizen: 1 St. 112, sec. 1, 2, 3. And, as in the former case, the first Crimes Act defined treason and provided for its punishment, commensurately with the existing political necessity, and

hence so as to comprehend the offense whenever committed within the national jurisdiction, so, in the latter case, the same act declared the crime of murder and provided for its punishment whenever the crime should take place upon territory under "the sole and exclusive jurisdiction of the United States."

The political duty to provide for the punishment of the high crime of murder, when committed within the exclusive jurisdiction of the United States, was self-evident at the time of the enactment of the Crimes Act; the words of the act are so comprehensive as to imply that the act was passed in recognition of this duty and for its full discharge; and it would stultify the national legislature, and entail public disaster, so narrowly to construe its provisions as to cramp and obstruct its operation and energy.

If the statute was needed to supply a political want, and a literal construction of the statute will fully supply that want, it is the part of the courts to give to the words employed their plain and natural meaning, and not to seek by technical subtlety to defeat the legislative intent.

The purpose of the section under discussion was to declare that murder, which, by the law of nature, is a high crime, but which for artificial reasons could not be punished within the exclusive jurisdiction of the United States, without a statutory provision, is, in the estimation of this nation, a crime deserving of death, and amenable to that punishment whenever committed within its exclusive jurisdiction.

It has been suggested that the specification in the statute in question of "fort, arsenal, dock-yard, magazine," ought, under the rule of *ejusdem generis*, to control the succeeding words, "any other place or district of country," so as to restrain the application of the latter to cases of establishments similar to those specifically enumerated.

But the rule of *ejusdem generis* is much misunderstood. Fairly stated, it is the rule which requires that when in any

statute there is a specific enumeration of things to which it applies, followed by a general word evidently intended to include all other things of similar nature, and when the statute does not in its origin or purpose contain or imply reason for a more liberal construction, the general word shall be deemed limited in signification to things of the general nature of those actually specified. There are, however, two reasons why this technical rule is not applied.

1st. So narrow a construction would violate the intent of the law, which was to provide for all cases of murder occurring upon territory "under the sole and exclusive jurisdiction of the United States."

"It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add to it:" *Tynan v. Walker*, 35 Cal., 642, citing *Beckford v. Wade*, 17 Vesey, Jr., 87.

To illustrate the proposition that the technical rule must yield to the real intent otherwise gathered, I cite the second clause of the second section of the fourth article of the constitution, which provides for the recaption of fugitives from justice. Such a fugitive is referred to as "a person charged in any State with treason, felony or other crime," yet, the general word "crime" is not judicially construed as signifying only crimes *ejusdem generis* with "treason," and "felony," but as meaning literally all crimes, even inclusive of merely statutory offenses: *In re Fetter*,, 3 Zabriskie, 311; *In re Clark*, 9 Wend., 212; *In re Haywood*, 1 Sand., S. C., 701; *Johnston v. Riley*, 13 Geo., 97; see also *Regina v. Edmundson*, 2 E. & E., 75.

2d. Both the word "place" and the term "district of country" were employed, not as indefinite expressions for whose interpretation a resort might he had to the previous

specific words, but rather as definite certain expressions limited in signification by the succeeding words, "under the sole and exclusive jurisdiction of the United States." While certain establishments were referred to specifically in order to make it plain that congress intended to include all the military and naval places specified in the constitution (*ubi supra*), yet a broader phraseology was used, for the purpose of extending the enactment to all places within the exclusive jurisdiction of the United States. Although according to the views here maintained the words "any other place" might fairly be construed as bringing within the operation of the statute all places over which congress had the right of exclusive legislation, yet, the framers of the statute, having apparently in view the possible application of the rule of *ejusdem generis*, in restriction of the ordinary meaning of the word "place," and desiring to avoid the possibility of such abortive construction, added the words "district of country," in order to make the legislative intent absolutely clear; for, whatever plausibility there is in the suggestion that a general word, following specific words, and having a signification suggestive of a genus to which all the specific words appropriately belong as species, ought to be limited in its application to subjects analogous to those intended by the specific words, such plausibility does not attach to a distinct term or phrase introduced in the same sentence, after and in addition to such general word (*e. g.* after the word "place") and not appropriate as a general term to cover the specific words previously enumerated. On the contrary, the use of such independent phrase indicates a new subject, and makes it manifest that the legislative mind in framing the statute passed from the subject-matter previously considered to the consideration of a new and different subject.

No one would think of characterizing either "fort," "arsenal," "dock-yard," or "magazine," as a "district of coun-

try," although each of such establishments might be properly characterizd as a "place."

Indeed, the very authorities which may be cited as tending to show that the narrow rule of construction in question applies, admit that congress intended by the act to provide, not only for forts, arsenals, dock-yards, magazines, and like places, but also for the "District of Columbia," then in contemplation, although not a "place" *ejusdem generis* with "fort," etc.; and that the words "district of country" were employed so as to comprehend the new district.

This admission of course destroys all the force of the suggestion that the restrictive rule applies. And, inasmuch as the words district of country," qualified in meaning by the preceding adjectives "any other," are not limited to any particular district, but are used with reference to any "district of country" within "the sole and exclusive jurisdiction of the United States," we must hold the same to include whatever national territory can fairly come within the term in its ordinary sense. The statute says, "*any* other place or *district of country*." It employs a term signifying any unorganized extent of country. So far from intending simply the contemplated "District of Columbia," it avoids the use of any limiting term and adopts language emphatically general. The constitution, in providing for the seat of government, does not refer to a "district of country," but simply to a "district not exceeding ten miles square," and it implies a much more limited area than the general term "district," or the term 'district of country," as used in the statute. "District" is a very large and comprehensive term. It is used in ordinary conversation, in military orders, in municipal laws, and in geographical description, to designate large tracts of country over which civil or military authority is exercised. Thus we have judicial districts, revenue districts, military districts, and police districts. We have the "District of Columbia."

Justice McLean, in *Scott v. Sanford*, 19 How., 541, says: "The word 'territory,' according to Worcester, means 'land, country, a district of country under a temporary government.' The words, 'territory or other property,' as used, do imply from the use of the pronoun 'other,' that territory was used as descriptive of land; but does it follow that it was not used also as descriptive of a district of country? In both of these senses it belonged to the United States—as land, for the purpose of sale; as territory for the purpose of government."

Again, on page 543:

"The sovereignty of the federal government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of congress to punish our citizens for crimes committed in districts of country where there is no organized government. Criminals are brought to certain territories or states designated in the law for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limits of any organized territory or state; and no one doubts that such a jurisdiction was rightfully exercised."

Justice Curtis says in the same case, at page 598:

"Dr. Emerson was an officer in the army of the United States. He went into the territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular state, and within the exclusive jurisdiction of the United States."

The ordinance of 1787 declared the northwestern territory to be "one district:" 1 St., 51, note.

Several statutes passed before the Crimes Act provide for revenue districts (1 St., 29), and judicial districts (1 St., 73), or otherwise refer to "districts" (1 St., 94, 98, 99, 101, 106), and many later statutes refer to United States territory as "districts:" 1 St., 123, 130, 189. In describing territory, and

especially unorganized territory of the United States, we very naturally refer to it as "a district of country."

The statute is a general statute enacted for the protection of the citizen, not only within the military and naval establishments, and districts of country, then possessed by the United States, but also within such as it might possess at any future time, and, although nearly a century has passed since the passage of the statute, it has proved adequate during all that period, for the prevention and punishment of murder within all places which have come under the sole and exclusive jurisdiction of the United States.

It is in no sense a local act, but it operates as an adequate and abiding provision in the national criminal code, defining and punishing the crime of homicide throughout the national jurisdiction; of equal dignity with the principles of the common law, under which murder was for centuries recognized and punished as a crime. Indeed the statute effected a transfer of the common law of murder to the national jurisdiction.

It is to be observed that only such murders were provided for as should occur within "the sole and exclusive jurisdiction of the United States."

It is doubtful whether, in view of the ordinance of 1787, and the contractual and fiduciary nature of its provisions, the legislators of that day would have been disposed to regard the northwestern territory as a district of country under the "sole" and exclusive jurisdiction of the United States. But the question has never judicially arisen.

The ordinance, adopted in 1787, and continued in force under the constitution by the act of 1789 (1 St., 50), contained special provisions respecting crimes, under which the territorial council, composed of the governor and judges, was required to select for the northwestern territory and there put in force such criminal laws of the original states as it might deem necessary: 1 St., 51.

It is well known that at that time murder was punished

capitally in every state, and it might well be that, knowing the state laws on the subject to be either the common law, or statutes substantially declaratory thereof, thus conforming to the intent and spirit of the act of 1790, congress did not intend by that act to supplant the territorial legislative power previously conferred. Besides, there is a well settled rule of law, under which the special provisions of the ordinance would be held not repealed by a subsequent general act not necessarily involving repugnancy to those provisions: Sedgwick on Construction, 98, note (2d ed.), and cases cited. Again, in the application of the statute to territory occupied by Indian tribes, under claim of sovereignty, it might well be doubted whether such Indian country could be properly considered as under the "sole and exclusive jurisdiction of the United States." The status of such tribes has been considered by high authority. "The political relation of the Indian nations on this continent towards the United States is that of semi-sovereign states, under the exclusive protectorate of another power:" Wheaton's Int. Law, 68. "The United States Supreme Court held that the Cherokees constituted a distinct political society capable of managing its own affairs and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war and responsible in their political capacity. * * They were a domestic dependent nation:" Wheaton's Int. Law, 69; *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1. "The British crown considered them as nations competent to maintain the relations of peace and war and of governing themselves under its protection. The United States, who succeeded to the rights of the British crown, in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only

binding the Indians to the United States as dependent allies. A weak power does not surrender its independence and right to self government by associating with a stronger and taking its protection. This was the settled doctrine of the law of nations, and the Supreme Court, therefore, concluded and adjudged that the Cherokee nation was a distinct community, occupying its own territory in the boundaries accurately described, within which the laws of Georgia could not rightfully have any force, and into which the citizens of that state had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress:" Wheaton's Int. Law, 69, 70; 3 Kent Com., 382, 383, etc.; *Worcester v. State of Georgia*, 6 Pet., 515. Although later decisions of the Supreme Court indicate a tendency to abridge the claims of the Indian tribes to legal recognition as *quasi* sovereign (*United States v. Rogers*, 4 How., 572); yet the prevailing opinion at the time of the passage of the Crimes Act of 1790, and for a long time subsequently, must have been that the country occupied by Indian tribes under claim of sovereignty, was not under the "sole and exclusive jurisdiction of the United States." Of course, at that time the relation of vagabond tribes to the national government had not been considered.

It may well be that, in view of this question regarding the *quasi* sovereignty of Indian tribes, even the express extension of the Crimes Act to the Louisiana purchase (2 St., 283, § 7; *Id.* 331; *Id.* 322) did not make it judicially clear that the vast tracts claimed and occupied by Indian tribes were intended to be affected by the extension. Whatever the motive, whether that here suggested, or whether the precaution which induced so much other cumulative and supererogatory legislation, congress deemed it prudent, in the statutes defining and regulating the "Indian country" (3 St., 383; 4 St., 733, § 25), to extend the general criminal acts over the districts of country comprehended within the term;

and it is possible that this express extension was deemed the more necessary, because certain parts of the "Indian country" were within state boundaries, and presented complicated questions of jurisdiction: 6 Pet., 515, *supra.*

On this subject of the Indian country, I refer to the opinion of Judge Wells, formerly district judge of Missouri, reported 1 Western Law Journal, p. 246; also Hempstead C. C., p. 413, note, who, criticising the opinion of Judge Catron, cited by him, says: Judge Catron, in his opinion, says, "In the case supposed of the commission of murder or robbery on the water in the Indian country, it would be a capital felony committed in a place and district of country under the sole and exclusive jurisdiction of the United States, and be punishable by the eighth section of the act of 1790." Now, I deny that the Indian country, even technically, either land or water, is under the sole and exclusive jurisdiction of the United States. The United States have not, in any instance within my knowledge, exercised such sole and exclusive jurisdiction. By the acts of 1817 and 1834, above referred to, nothing of the kind is attempted. They both expressly except crimes committed by Indian on Indian, and confine their operations to regulating trade and commerce, and preserving peace. A sole and exclusive jurisdiction would exclude all Indian laws and regulations, punish crimes committed by Indian on Indian, and regulate and govern property and contracts, and the civil and political relations of the inhabitants, Indians and others, in that country. It would be wholly opposed to a self-government by any Indian tribe or nation. This self-government is expressly recognized and secured by several treaties between the United States and Indian tribes in the Indian country attached by the act of 1834 to Arkansas and Missouri districts for certain purposes. This may be seen from the treaty with the Choctaws in 1830, and the treaty with the Creeks in 1832, and other Indian treaties.

"The United States could not, therefore, assume a sole and

exclusive jurisdiction over the Indian country without violating their treaties, which treaties are the supreme law of the land.

"I conclude, therefore, that the Indian country is, neither in fact nor in law, under the sole and exclusive jurisdiction of the United States.

"Indeed if congress considered the Indian country as being under the sole and exclusive jurisdiction of the United States, it was wholly unnecessary to extend to that country the laws for the punishment of crimes committed in places under the sole and exclusive jurisdiction of the United States."

In this proposition last above cited, Judge Wells admits that the Crimes Act extends *ex proprio vigore* to all new territory which comes under the sole and exclusive jurisdiction of the United States.

Nevertheless, there is some obscurity among juridical writers of the highest repute respecting this self-extending force of general laws over newly-acquired territory.

While it is generally admitted that new territory acquired by right of discovery is to be governed by the existing laws of the sovereignty to which it becomes thus attached, so far as the same are reasonably applicable, and, on this principle, it is generally held that the American colonists brought with them such laws of their ancestors as were adapted to colonial life: 1 Bl. Com, 107; 1 Kent Com., 343, 473; 1 Story Const., §§ 147, 148; *Town of Pawlet v. Clark*, 9 Cranch, 333; *Bogardus v. Trinity Church*, 4 Paige, 178, 198; *Canal Appraisers v. The People*, 17 Wend., 584, 622; *Van Rensselaer v. Hays*, 19 N. Y., 73; also 1 Kent. Com., 473, note.

Yet even this proposition is "full of vagueness and perplexity," owing to the difficulty of determining the question of applicability: 1 Story Const., § 149.

Even greater difficulty is encountered in the case of coun-

tries acquired by arms or ceded by treaty, wherein a body of laws more or less enlightened is found in actual operation.

There is authority for the proposition that during belligerent occupation, and before definitive conquest, the ordinary municipal laws of the occupied country remain in force: Per Field, J., in *Coleman v. Tennessee*, 97 U. S., 517. And after acknowledged conquest, or peaceable cession, it is generally held that the old municipal laws of the acquired territory continue in force until changed by the expressed will of the new sovereign: Authorities *supra; American Ins. Co. v. Canter*, 1 Pet., 542, 543; *United States v. Percheman*, 7 Pet., 87; *Mitchel v. United States*, 9 Pet., 734; *Leitensdorfer v. Webb*, 20 How., 177, 178; 17 Wend., *ubi supra*, also pp. 585, 586, 587, 588.

Nevertheless, this proposition, respecting the continuing force of the old laws of acquired territory, is subject to the qualification that the old laws can continue only so far as is consistent with the constitution, policy and moral code of the new sovereign: 1 Bl. Com., 108; *Scott v. Sandford*, 19 How., 393; also the second clause of Article VI of the Constitution.

It is also subject to the qualification that they may be abolished and supplanted, not merely by the action of the legislative department of the new sovereignty, but in default of such legislative interference, by the mere will of the executive department. Such exercise of executive authority was usual in the government of the dependencies of the English crown: *Canal Appraisers v. The People*, 17 Wend., 585, 586.

And even in our own history, California and New Mexico afford examples of Mexican laws changed and supplanted under American executive authority by military and provisional governors; and certain provisional laws thus promulgated have received the sanction of the Supreme Court of the United States and have by that tribunal been held not only

to operate as effectual repeals of the old laws but also to continue in force after the cessation of military or provisional government: *Cross v. Harrison*, 16 How., 78; *Leitensdorfer v. Webb*, 20 How., 177, 178.

Such decisions, however, refer only to the laws concerning the relations between individuals, and other subjects of the ordinary municipal code; but they do not extend to cases provided for by the constitution or general statutes, which in their nature operate throughout the nation.

I submit that in a country like our own, existing under a written constitution, which recognizes no common law crimes, except such as congress provides for by statute (7 Cranch, 32, *supra*), the general doctrine, above alluded to, ought to be subjected to the further qualification that, except during belligerent occupation and prior to a consummated acquisition of territory, not only the constitution, with the bill of rights, but also all general statutes intended to assert the sovereignty of the nation over its entire domain, should be deemed in full force over all acquired districts, and be held to supplant all repugnant prior laws whether ancient or provisional.

In the sixth article of the constitution, it is expressly provided that "This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This provision covers not only the law of murder, in question here, but the laws for the prevention of mail robberies and other crimes enumerated in the Crimes Acts of 1790 (1 St., 112) and 1825 (4 St., 115).

Within the spirit of this constitutional provision, it ought to be held that the moment that new territory is acquired and accepted by both the executive and legislative departments

of the government as part of the national domain and jurisdiction, all foreign and provisional laws and regulations that previously operated on subjects upon which the constitution and general laws of the Union are intended to operate, should be deemed merged in the latter, in order that the latter should carry equal dignity and force into every part of the national jurisdiction. Such is the principle declared in *Scott v. Sandford*, 19 How., 393. Such is the intent of the treaties with Mexico ceding California and New Mexico (9 St., 930, art. 9), and with Russia ceding Alaska (15 St., 542, art. 3).

It is necessary to beware of false analogies sometimes suggested between our institutions and those of England.

"In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the president of the United States and the authority and sovereignty which belong to the British crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own constitution and form of government must be our only guide:" *Fleming v. Page*, 9 How., 618.

In the opinion of the Supreme Court of the United States in the case of *Cross v. Harrison*, 16 How., 198, it is said that "the ratifications of the treaty made California a part of the United States, and that as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right." * * * *

"In this case foreign trade had been changed in virtue of a belligerent right before the territory was ceded as a conquest, and after that had been done by a treaty of peace, the

inhabitants were not remitted to those regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed.

"We have said in a previous part of this opinion that the sovereignty of a nation regulated trade with foreign nations, and that none could be carried on except as the sovereignty permits it to be done."

The court quotes, with apparent approval, from a despatch of Secretary Buchanan (*Ib.*, p. 184), who says with reference to the political condition of California after the treaty of peace: "The termination of the war left an existing government, a government *de facto*, in full operation, and this will continue with the presumed consent of the people, until congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

"This government *de facto* will, of course, exercise no power inconsistent with the provisions of the constitution of the United States, which is the supreme law of the land.

"For this reason no import duty can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California; nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States."

Equality under the constitution and general laws is suggested not only by the genius of the American government, but by political philosophy: *Vide* Bowyer on Universal Public Law, pp. 160, 327, 365.

Theoretically, even colonies participate in the legal privileges enjoyed in the mother country.

"When a nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws or treaties make no distinction between them, everything said of the territory of a nation must also extend to its colonies:" Bowyer *supra*, p. 365, citing *Vattel*, book 1, ch. 18.

The "Kearney Code," under which New Mexico was provisionally governed, was promulgated by General Kearney, September 22, 1846.

Under the head of "Crimes and Punishments," it provides as follows:

"SECTION I. The crimes mentioned in the first article of this law being defined with sufficient accuracy by the laws heretofore in force in this territory, it is deemed unnecessary to do more than to annex the punishments to the respective offenses.

"ARTICLE I.

"SECTION I. If any person shall be convicted of the crime of willful murder, such person shall suffer death. If any person or persons shall be convicted of manslaughter, such person or persons shall be imprisoned not exceeding five years, and fined not exceeding one thousand dollars."

The provisional organic law promulgated by General Kearney on the same day (September 22, 1846), provided (Art. 3), for a territorial legislative assembly; the treaty of peace was signed February 2, 1848: 9 St., 942. The present organic law was approved September 9, 1850: 9, St., 446.

Yet no interference with the above cited provisions of the Kearney Code respecting homicide was attempted by the territorial legislature, either provisional or permanent, except the act of July 14, 1851, adopting the Kearney Code (Prince's Laws, 373) until February 15, 1854, when the legislative assembly assumed to reform the law of homicide: Prince's Laws, 256.

Thus it will be observed that the prosecution in this case is forced to the absurdity of claiming that, after the cessation of military occupation, and during the whole period from September 9, 1850, to February 15, 1854, in face of the definite and adequate provisions of the Crimes Act of 1790, the courts of this territory were obliged to consult the Mexican law for the definition of the crime of murder committed on American territory.

The law of homicide adopted and declared by the Kearney Code was in fact a merely provisional regulation established for a present emergency by a temporary military commander. Why, then, should not such provisional regulation or expedient yield, upon the cessation of military rule, to the superior dignity and efficacy of a national law of general nature upon the same subject, expressive of the will of congress and intended to apply to every part of the national jurisdiction?

A similar question may some day arise respecting the immense territory of Alaska. No civil government has yet been provided for that district of country. No express statute has extended over it the Crimes Act of 1790.

It is not a part of the "Indian country" defined by the act of 1834: 4 St., 729; *United States v. Seveloff*, 2 Sawyer, (U. S. C. C.), 311.

Yet, is it therefore a land of immunity and refuge for murderers? If not, is the United States compelled to search the statutes of Russia for the law under which to punish such a crime?

I suggest that the only egress from the dilemma is found in the adoption of the wholesome rule that laws of a general nature, like the Crimes Act, extend *ex proprio vigore* to newly acquired territory.

This suggestion is confirmed by the consideration that our territorial acquisitions are immediately annexed to the national domain as part of our common country, entitled equally with the rest of the country to all the privileges guaranteed by the constitution and to an equal standing under the laws, and are not mere dependencies, like British provinces, nor of the nature of mere colonies: *Scott v. Sandford*, 19 How., 393.

There is a marked distinction between the condition of new territory acquired by the kingdom of Great Britain and that of new territory acquired by the United States: *Fleming v. Page*, 9 How., 618.

In the former case, the new territory is a mere dependency, largely under the king's control, and not entitled to all the privileges of the British constitution or of the general acts of parliament: 1 Bl. Com., 108, and context.

In the latter case, the new territory is incorporated into the Union as a constituent part thereof, under the same constitutional privileges and under the protection of the same general laws as those enjoyed by the nation at large: *Scott v. Sandford*, 19 How., 393.

This is illustrated by the fact that, although, according to the common law, acts of parliament did not extend to Ireland, the Isle of Man, the American colonies, and other dependencies, unless the latter were expressly named therein (1 Bl. Com., 101, *et seq.*), yet in the United States general acts of congress operate throughout the Union, inclusive of all outlying territory.

But whether or not the Crimes Act extended *ex proprio vigore* to the territory of New Mexico upon its consummated acquisition under the treaty of peace, it is plain that

the 17th section of the present organic act declares such extension: 9 St., 446.

That section provides: "That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States.

It has for many years been the policy of congress, in providing for the government of newly organized districts of country, to make express declaration of its intent to extend over such territory the criminal and other general laws of the Union; abundant caution inducing such legislative declaration even in cases where there can be no possibility of doubt that the laws would extend themselves without legislative aid.

On this subject Judge Deady remarks (*U. S. v. Seveloff*, 2 Sawyer C. C., 318): "It has been so common a habit of congress upon the acquisition of territory to specially extend the laws of the United States over it, that an impression seems to prevail that, without such action, these laws would not affect territory acquired after their passage. For my own part, I can see no good reason why any general law of the United States does not become in force at once in any country acquired by it without reference to the time of its passage."

In pursuance of this cautious congressional policy—the very adoption of which discloses the jealousy of the government respecting its constitutional authority—the general laws of the United States, including the Crimes Act of 1790, were expressly extended to the territories of Orleans (2 St., 283, § 7), Louisiana (2 St., 283, § 7), Missouri (2 St., 743, §§ 4, 16), and Florida (3 St., 654, § 9), and to the Indian country (3 St., 383; 4 St., 729), and provisions similar to the 17th section of our organic act were incorporated in the organic acts of other territories, carved out of the French and Mexican cessions: (*e. g.*), Utah, 9 St., 453, § 17; Kansas, 10 St.,

277, § 32; Nebraska, 10 St., 277, § 14; Colorado, 12 St., 172, § 16; Nevada, 12 St., 209, § 16; Dakota, 12 St., 239, § 16; Idaho, 12 St., 808, § 13; Montana, 13 St., 85, § 13; Wyoming, 16 St., 183, § 16; also see U. S. R. S., § 1891, as well as in the acts under which many of the states have been admitted into the Union (*vide infra*).

Pursuant to the same policy, many of the territorial organic acts contain wholly unnecessary precautionary provisions forbidding encroachments by territorial legislatures on the congressional prerogative and reserving certain powers of supervision and repeal to congress, and these provisions are retained in codified form in the United States Revised Statutes: §§ 1839, 1840, 1851.

In view of the sovereignty of the Union over the territories, the supererogatory nature of such legislation respecting the territories is obvious: *National Bank v. County of Yankton*, 101 U. S., 129.

And it seems equally clear that, in view of the equality of the several states under the constitution, the statutory extension of general laws to new states is also supererogatory: Const., art. 6, second clause; *Id.*, art. 4., § 2; *U. S. v. McBratney*, 104 U. S., 621.

The plain intent of the 17th section of the organic act is to declare the constitution and general statutes of the United States to be of like dignity, force and effect in the territory of New Mexico as elsewhere in the United States—in other words, to insure the full operation in this territory of the constitution and general laws in every case in which they can be applied. In face of this intent, any merely grammatical quibbling tending to restrict the scope and effect of the provision is petty and puerile.

The various statutes purporting to extend the general laws of the United States to newly organized territories or states are all *in pari materia*, inspired by the same intent, and effective of the same object, although clothed in variant

phraseology—many being in form identical with the 17th section in question: 10 St., 277, §§ 14, 32; 12 St., 172, § 16, and other citations *supra;* others declaring that the general laws shall "extend," and shall have "full force and effect:" 3 St., 554, § 9; 3 St., 750, § 11; 2 St., 283, § 7; others declaring that they shall be "in force:" 4 St., 729, § 25; 9 St., 453, § 17; but all regarding the general laws as already of full force and effect elsewhere in the United States, and intending to declare them to have equal force and effect in the newly organized districts of country.

The Crimes Act of 1790 should be construed in the light of the various statutes, *in pari materia*, expressly extending it over newly organized districts of country: Orleans and Louisiana, 2 St., 283, § 7; Florida, 3 St., 654, § 9; Indian Country, 3 St., 383; 4 St., 729, § 25; District of Columbia, 16 St., 419, § 34; and of the judicial decisions respecting its effect in such districts; and so construed it is plain that it is potent to reach the crime of murder whenever committed upon territory "under the sole and exclusive jurisdiction of the United States:" *United States v. Rogers*, 4 How., 567; *United States v. Osage Indians*, Hempstead C. C., 27; *United States v. Terrel, Id.*, 411, and note at page 419; *United States v. Scroggins, Id.*, 478; *United States v. Sanders, Id.*, 483; see also *United States v. Guiteau, infra.*

These applications of the Crimes Act amount to a legislative declaration of the signification of the terms "place" and "district of country," as used in the act; and this construction has in the cases above cited received authoritative judicial sanction.

The section of the organic act (9 St., 446, sec. 17), declaring the laws of the United States in force in the territory, when not locally inapplicable, must be deemed to operate upon those laws as already interpreted by congress and the courts; and, so operating, it must put the murder statute in full force as the only law of homicide in the territory.

The 25th section of the Indian country act of 1835 (4 St., 729, sec. 25), reads as follows:

"That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country: *Provided*, That the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

It is evident that this section of the Indian country act is less emphatic and explicit in its phraseology than the 17th section of our organic act; yet in the case of *United States v. Rogers*, 4 How., 567, in which the Supreme Court of the United States considered the question whether the proviso above cited, included the case of a white man charged with murder, who had become a member of an Indian tribe, the court expressly held that "by the twenty-fifth section of the act, the prisoner is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso," etc.; thus holding that the meagre language of the section then under consideration was sufficient to extend the murder statute to the Indian country as a "place" or "district of country."

In the case of *Hornbuckle v. Toombs*, 18 Wallace, 648, a section of the Montana organic act, whose phraseology is precisely similar to that of the section of our organic act in question (13 St., 85, sec. 13), is construed as follows:

"That clause has the effect undoubtedly of importing into the territory the laws passed by congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application, but not those of a specific application" (like, for instance, the case cited by the court, of the statute authorizing the supreme court to employ a reporter).

Even more direct authority, regarding the proper construction of the phraseology in question, is found in the decision

of the appellate court of the District of Columbia in the recent case of *United States v. Guiteau.* Guiteau, the assassin of the late President Garfield, was indicted for murder under the Crimes Act of 1790 as incorporated in the United States Revised Statutes, sec. 5339.

The language of the Crimes Act, "any other place or district of country," is certainly broad enough to include the district of Columbia as a district of country: *Vide United States v. Bevans*, 3 Wheaton, 390, 391; *Cohens v. Virginia*, 6 Wheaton, 426.

But in 1801 the laws of Maryland were extended by act of congress over the District of Columbia: 2 St., 103, sec. 1. And the counsel for Guiteau claimed before the court *in banco*, that the Maryland laws thus introduced furnished the only murder law in force in the district, and that therefore the indictment, being founded upon the provisions of the Crimes Act of 1790, was unauthorized and void.

The court in considering the question of repugnancy thus raised between the law of 1801 and the Crimes Act of 1790, alludes to the 34th section of the District of Columbia act of February 21, 1871 (16 St., 419, sec. 34), which is similar in form to the 17th section of our organic act, and proceeds:

"If any questions were raised about the incongruity of these two statutes, none certainly can be raised since the act of February 21, 1871 (16 St., 419), the thirty-fourth section of which act providing that all the laws of the United States not locally inapplicable shall have the same force and effect within the district as elsewhere in the United States. If the law of 1790 was put aside by the law of 1801, its operation was restored in 1871. The usual rule of construction as to repeals is that a special provision relating to a particular case or locality is not superseded by a general provision for all places and cases; but no such problem is presented here. Both the act of 1801 and the act of 1871 made a comprehensive provision for a whole body of laws which should be in

force here, and to the extent of its purview the later provision necessarily supersedes the earlier. We are of opinion then that section 5339 of the Revised Statutes of the United States applies to murder committed in the District of Columbia:" *Vide* Washington Post, May 23, 1882.

Judge Hallett, of Colorado, has, in the case of *Franklin v. United States*, 1 Col., 3, expressed views, respecting the territorial application of the Crimes Act, opposed to those here presented. Judge Hallett is a jurist of great ability and high reputation. Nevertheless, he sometimes fails in the construction of statutes to display that logical energy and masterly comprehension which characterize his judicial efforts in other branches of law; and consequently we find that on several occasions his decisions regarding the force and effect of important acts of congress have, because of their restrictive tendency, been condemned by the Supreme Court of the United States and overruled.

Judge Hallett's first proposition is couched in the following language (p. 37): "We must first inquire whether this territory is a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of the law mentioned. We may find an answer to this inquiry in the sixteenth section of the act establishing this territory (*i. e.*, Colorado Act, 12 St., 172), which declares 'that the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of Colorado as elsewhere within the United States. Within the several states, section 3 of the act of 1790, provides for punishing murder, where committed in a fort, arsenal, dock-yard or the like place, owned by the general government, and the above mentioned section of the organic act declares it shall have the same force and effect in this territory. It may be suggested that the words 'force and effect' used in the organic act, refer to the penal power of the law, and were not designed to limit

its operation to places owned by the general government as in the several states. But a law is presumed to be effectual to accomplish its purposes, and therefore it was not necessary to declare what force and effect the act of 1790 should have in this territory, except for the purpose of limiting the places within which it should obtain. If, by the terms of the act, it is in force in the territory, its power is declared in the language of the act itself, and the limitation in the organic act that it shall have the same force and effect as elsewhere in the United States can refer only to the places in the territory within which it shall operate. If, then, in obedience to the sixteenth section of the organic act, we give section 3 of the act of 1790 the same force and effect in this territory which it has elsewhere in the United States, we shall apply it to murder committed in forts, arsenals and the like places belonging to the United States and in the Indian territory."

This extraordinary reasoning, respecting the office of the words "force and effect' in the application of general statutes of the United States, savors of the fantastic subtlety of a class of antiquated cases which have long since been buried by the common sense of the profession.

It implies that the provision in question was not intended to give full force and effect in the newly organized territory to the constitution and general laws, but rather to curtail and limit their operation. The provision relates equally to the constitution and to the laws, and, according to Judge Hallett, so far from evincing an intent to provide for the full application of the constitution and laws, it operates as a declaration that the "supreme law of the land" shall not be applied in the territory in conformity with its terms, but in a cramped and mitigated sense.

The "United States" is used in the section as the title of the nation and not simply to indicate the individual states, and the only purport of the provision in question is to declare the constitution and laws to be forceful and effective in the

territory, even as they are forceful and effective throughout the rest of the national domain; not to limit or cramp their operation, but, declaring them to be in operation, to leave their force and effect to be determined by their own terms and by relation to the subject matter affected.

The genesis of the provision furnishes a convincing argument in favor of the construction here claimed. Vermont was by the act of 18th February, 1791 (1 St., 191), declared to be admitted from and after 4th March, 1791, "as a new and entire member of the United States." No lawyer of that day would have denied that the mere fact of admission into the Union would extend over Vermont the constitution and general laws passed thereunder. Yet this extension of the constitution and laws over a new state, would be largely theoretical and not effectual, unless by further legislation proper local provision respecting judicial and revenue districts, courts, judges, attorneys, marshals and other officers should be made. This political need led congress, in the case of Vermont, to pass the supplemental act of 2d March, 1791 (1 St., 197), which enacts "that from and after the third day of March next all the laws of the United States which are not locally inapplicable ought to have and shall have the same force and effect within the state of Vermont as elsewhere in the United States;" "and to the end that" the judiciary act of 1789 should have due effect, provision is then made for a judicial district, etc. And in like manner provision is made for the collection of revenue, the taking of the census, etc. This is the first occasion on which a provision like that in question appears in the statutes of the United States, although in one or two previous statutes laws were applied to new districts by a declaration that they should have "force" in the latter: 1 St., 99, § 6; *Id.*, 108, cl. 8.

It is obvious that no such intent can be imputed to this original use of the provision as that imputed by Judge Hallett to the use of like provisions in the territorial organic acts.

In providing for the admission of Tennessee, congress declared (1 St., 491), "That until the next general census the said state of Tennessee shall be entitled to one representative in the house of representatives of the United States, and in all other respects as far as they may be applicable the laws of the United States shall extend to and have force in the state of Tennessee in the same manner as if that state had originally been one of the United States."

Of course this provision was constitutionally unnecessary; but I cite it to show that the central idea of the provision in question can be conveyed by the use of words not in any view susceptible of Judge Hallett's restrictive interpretation.

But this act of admission not providing Tennessee with courts, judicial or collection districts, or officers, further provisions were needed to secure the due execution of the theoretically extended laws, and hence another act was passed (1 St., 496), to supply this need, and, in pursuance of the supererogatory policy before alluded to, a cumulative provision was introduced similar to that above cited from the Vermont act (1 St., 197).

Still no legislative intent can be perceived to accomplish by the language used any other purpose than to declare the laws in full force, and to leave to their own terms the expression of the nature and extent of their operation. So, in the case of Ohio, which being admitted on an equal footing with the other states (2 St., 173), and thus made by implication subject to all applicable laws, still needed legislative provision for judicial and other official machinery, this need was supplied 19th February, 1803 (2 St., 201), by an act which, passed according to the recital "in order therefore to provide for the due execution of the laws of the United States within the said state of Ohio" first unnecessarily declares, "That all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said state of Ohio as elsewhere within the United States,"

and then enacts the needed provisions establishing courts, etc. So in the admission of Louisiana and Alabama the same provision was adopted, with the addition of a clause declaring that the laws "shall be extended to the said state:" 2 St., 701, sec. 2; 3 St., 664; sec. 1. And, so on, as a rule, the same provision generally identical in form with that in our organic act, and in that of the late territory of Colorado, appears in connection with other provisions providing the official means for carrying the laws into execution: Mississippi, 3 St., 472; Illinois, 3 St., 502; Missouri, 3 St., 653; Arkansas, 5 St., 50; Michigan, 5 St., 61; Florida, 5 St., 788; Iowa, 5 St., 789; Wisconsin, 9 St., 57; California, 9 St., 521; Minnesota, Oregon, 11 St., 383; Kansas, 12 St., 126; Nevada, 13 St., 30; Nebraska, 13 St., 47; Colorado, 19 St., 61.

But in the cases of Kentucky (1 St., 180), and Maine (3 St., 544, *Id.* 554), there appears to have been no express statutory extension of the laws. And in the case of Texas, which was admitted by resolution on an "equal footing" (9 St., 108), it was provided (9 St., 1), by "An act to extend the laws of the United States over the state of Texas and for other purposes," that "all laws of the United States are hereby declared to extend to and over, and to have full force and effect within the state of Texas, admitted at the present session of congress into the confederacy and union of the United States."

I submit that the phraseology in the Texas act is only the fair equivalent of the more usual provisions: *Vide Smith v. Cockrill*, 6 Wallace, 758.

So, with reference to the territories, there is the same tendency to employ the usual phraseology in the provisions extending the laws, but with occasional variations, which, discarding the words "same force and effect," which have misled Judge Hallett, are still effectual to declare the extension intended.

In the case of the territories of Orleans and Louisiana

(2 St., 283, sec. 7), and Florida (3 St., 654, sec. 9), the general acts intended to be extended, are expressly named by theif titles, including the Crimes Act of 1790; but in the case or Florida (3 St., 654, sec. 9), the specific enumeration of extended statutes is supplemented by the addition of "all other public laws of the United States which are not repugnant," etc, and in each case, the general acts referred to are declared to "extend to and have full force and effect" in the respective territories.

In the later Florida organic act (3 St., 750, sec. 11), the specific enumeration of extended statutes is discarded as unnecessary and cumbersome, and a general provision is substituted in the following form:

"That the laws of the United States relating to the revenue and its collection, subject to the modification stipulated by the fifteenth article of the treaty of the twenty-second of February, one thousand eight hundred and nineteen, in favor of Spanish vessels and their cargoes, and all other public acts of the United States, not inconsistent or repugnant to the provisions of this act, now in force, or which may hereafter be in force, shall extend to and have full force and effect in the territory aforesaid."

But, generally, the language employed is that in question here: New Mexico, 9 St., 446, sec. 17; Nebraska, 10 St., 277, sec. 14; Kansas, 10 St., 277, sec. 32; Colorado, 12 St., 172, sec. 16; Nevada, 12 St., 209, sec. 16; Dakota, 12 St., 239, sec. 16; Idaho, 12 St., 808, sec. 13; Montana, 13 St., 85, sec. 13; Wyoming, 16 St., 183.

Nevertheless, at the very session of congress, at which the organic act of New Mexico was passed (9 St., 446), and on the same day, congress, in the Utah organic act, which is substantially like our own, uses the following language, in applying the constitution and general laws (9 St., 453, sec. 17): "That the constitution and laws of the United States are hereby extended over and declared to be in force in said ter-

ritory of Utah, so far as the same, or any provision thereof, may be applicable."

It is manifest that Judge Hallett's special reasoning could not find even the semblance of an excuse in the language of the Utah act, and yet it is equally manifest that congress had no other or different intent in the one case than in the other respecting the application of the constitution and general laws.

The true construction, then, of the provision in question is to hold that it put the constitution and general laws of the United States in full force in New Mexico wherever applicable.

The language previously cited from the Indian country act (4 St., 729, sec. 25), declaring the Crimes Act to be "in force" could only be interpreted as putting the act in force according to its terms, and in this application of the Crimes Act to the Indian country its operation in respect to murder, maiming, etc., was not limited to forts, arsenals, or other like establishments, but it extended over each and every part of the Indian country as a "district of country:" 4 How. 567; Hempstead C. C., 27; *Id.*, 478; *Id.*, 483; also *United States v. Guiteau, supra.*

In 1850, at the time of the passage of the New Mexico organic act (9 St., 446), the term "district of country" as used in the Crimes Act had received a most extensive practical interpretation by a series of acts in *pari materia*, declaring the act in force over the vast districts of country purchased from France and Spain (*vide* citations *supra*), and, that at that time, it still furnished the only law of murder for a very extensive territory west of the Mississippi.

New Mexico, so recently the possession of a hostile power, was at that time in no position to claim greater immunity from the sovereignty of the Union than that enjoyed by the Louisiana and Florida territories at the time of their peaceable acquisition, and there was no reason or policy for waiv-

ing in respect to New Mexico that national jurisdiction on the subject of the crime of murder which had theretofore been exercised over all new territory that had come "under the sole and exclusive jurisdiction of the United States."

If any places "elsewhere" were to be referred to in order to determine the "force and effect" of the Crimes Act, they were precisely those districts of country over which the government had thoroughly and effectually applied it, including the vast Indian country in which the act was still in force, as well as the district of Columbia.

With reference to the provision, it is said in a recent case in the Supreme Court of the United States (*United States v. McBratney*, 104 U. S., 621):

"Such a provision has a less extensive effect within the limits of one of the states of the Union than in one of the territories of which the United States have sole and exclusive jurisdiction."

The historical relation of the organization of the territory of New Mexico, to the organization of other territories, is significant as a factor in determining the degree in which congress intended to delegate to the legislative assembly the national sovereignty.

I have already shown that, by reason of its contractual and fiduciary relation to the Union, the northwestern territory was a district *sui generis*—it was land held on an express trust for the formation of new states, and governed upon a system established before the enactment of the Crimes Act, and not intended to be disturbed by the latter. When new territories were formed out of this peculiar domain, it was natural to preserve to them the laws, rights and privileges under which their inhabitants had been educated; and consequently we find these laws, rights and privileges expressly saved to such new territories: Indiana, 2 St., 58; Illinois, 3 St., 514; Michigan, 2 St., 309; 3 St., 769, sec. 2, also sec. 6, repealing inconsistent U. S. laws; Wisconsin, 5 St., 10.

The same policy was naturally followed respecting the territories of Mississippi and Alabama, which were formed out of lands ceded to the Union by some of the states: 1 St., 549; 3 St., 371.

Again, some parts of the vast Louisiana purchase were settled by emigrants from the northwestern territory, who carried with them the traditions, laws, and customs under which they had been reared, and who proved to be a very trustworthy class of citizens. Hence it was desirable in providing new territorial governments for these districts of country to permit the inhabitants to retain their old laws and customs and to assimilate their government to that of the government under which their citizenship had developed. With the exception of Orleans, which was quite advanced in civilization (2 St., 322), the only territorial governments affecting the Louisiana purchase, established under these special conditions prior to the organization of New Mexico (A. D. 1850) were, first, that country west of the Mississippi and north of the Missouri, attached to the Michigan territory in 1834 (4 St., 701), and afterwards that of Wisconsin (5 St., 10), Iowa (5 St., 235), and Minnesota (9 St., 403), formed, except a part of Wisconsin, out of the same district. Oregon was equally privileged (9 St., 323).

As to Oregon, that was for a long time a district more or less in dispute between the United States and Great Britain *vide* Treaty 1848, 9 St., 869); and it had been settled and considerably developed early in the century through the efforts of men who brought with them the traditions and customs of the east: *Vide* Irving's *Astoria.*

It was therefore advisable to assimilate its territorial government to that of the northwestern territory.

But, in dealing generally with the vast territory acquired from France and Spain—a territory inhabited principally by savages and by unstable whites—congress held a tighter rein. It expressly put the Crimes Act and general laws in force: 2

St., 1804, and amendments; 3 St., 654, and amendments; 4 St., 729, sec. 25.

This was the situation when congress passed the organic act of New Mexico: 9 St., 446.

I have shown the exceptional nature of the organization of Wisconsin, Iowa, Minnesota and Oregon, the only territories organized in the interval between the organization of Arkansas (carved out of Missouri, 3 St., 494), and that of New Mexico, and I have referred to the express provisions of the organic acts of the four territories first named, which grant to those territories exceptional privileges and larger governmental powers.

But New Mexico—an acquisition by means of hostilities only lately ended—clearly called for the same cautious political treatment as that employed for Loiusiana, Florida and Missouri.

That the Crimes Act was the only law of murder in force over the greater part of the national domain is a well known historical fact. On this subject, Judge Wells remarked, in 1843 (Hempstead C. C., p. 419), "In the territories of Florida and Louisiana, and perhaps others, certain laws, including the act of 1790, were declared to be in force. They are of course yet in force in Florida, and what remains of Louisiana, as purchased from France; and I presume in other territories." He adds that the Crimes Act was "in full force" in the territory of Missouri.

Judge Hallett thus proceeds in his second proposition, p. 38: "We may reach the same conclusion without referring to the sixteenth section of the organic act. In all its legislation congress pursues the authority given in the constitution, and we may refer the section under consideration to the sixteenth clause of section 8, article 1, of that instrument. In that clause of the constitution, congress is invested with exclusive legislative authority over such district (not exceeding ten miles square), as may, by cession of particular

states, and the acceptance of congress, become the seat of government of the United States, and like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and their needful buildings. The description of places in the act is nearly the same as in this clause. The words 'fort, arsenal, dock-yard and magazine,' are found in the act and in the constitution, and the words 'other place or district of country,' occurring in the act but not in the constitution, were probably inserted out of abundant caution, or probably they refer to the District of Columbia, which at the time of this enactment had no existence, but was in contemplation." * * * "Beyond doubt this law was enacted in execution of the power conferred in this clause of the constitution. Now there is nothing concerning the territories of the United States in this clause: it refers only to the federal seat of government, and to forts, arsenals, etc." * * * * "The law we are discussing is not more comprehensive than the clause of the constitution upon which it rests, and therefore this territory, as a territory, is not within its descriptive terms."

In this proposition, Judge Hallett fails to consider that, when a statute is enacted to supply a want or to remedy a mischief, the legislating body rarely limits itself to the single subject which moved it to action, but, in acting upon that subject, usually employs language broad enough to cover all cases coming within the same legislative principle.

For instance, in the very act in question, congress, while moved to action by the constitutional clause cited by Judge Hallett, and intending to cover all the cases embraced in that clause, naturally conceived the larger purpose of legislating, not simply for the limited jurisdiction described in the clause, but rather for the entire national jurisdiction; thus making the enactment commensurate with the political need. Therefore, while the constitutional clause refers only to forts

and other establishments on sites within state limits, and ceded by states to the Union, the Crimes Act is not limited in its terms to forts and other establishments of the class mentioned in the constitution, but it expressly extends to all forts and other national places, even including those which then might be (and which in fact have since been) built on territory acquired under the war power and the treaty power; of which latter class of establishments (not within the purview of the constitutional clause cited), we have many instances in the vast French, Spanish and Mexican cessions.

So, while the same constitutional clause made mention of only one district of country, *i. e.*, such as might be acquired for the seat of government, the Crimes Act, while using terms broad enough to include such a district, evinces no intent to limit its operation to any one special district, but expressly extends to "any district of country" whatsoever: Sedgwick on Construction, p. 198, *et seq.*

Arguing in support of this proposition, Judge Hallett, p. 39, refers to congressional legislation purporting to extend the operation of the Crimes Act, and, having cited the 25th section (*vide supra*) of the Indian Country Act of 1834, he continues: "The Indian country at that time comprised the greater part of the national territory, and congress found it necessary to extend the section we are considering to that country. If the territory of the United States had been within the terms of the law, it would have been in force in the Indian country before the act of 1834, and that enactment would have been unnecessary."

From this language the inference is reasonable that Judge Hallett had not made a thorough historical search on the subject of which he wrote; else he would have become aware that, independently of the self-extending force of the Crimes Act over newly acquired districts of country, that act had been expressly extended to the Louisiana purchase as early

as 1804 (2 St., 283, § 7, cited *supra*); that, as I have shown, congress had been in the habit of repetitious legislation on this subject (Statutes *supra;* also 2 Sawyer, C. C., p. 318), and that the only doubt ever judicially suggested respecting the self-extending force of the Crimes Act over the "Indian country" was based, not on any interpretation of the term "district of country," but on the fact that the "Indian country," being occupied by *quasi* sovereign Indian tribes, who there administered their own laws—"dependent nations" with whom the United States had entered into treaties, binding as "the supreme law of the land,"—was not, so far as so occupied, "under the sole and exclusive jurisdiction of the United States:" Per Wells, J., Hempstead C. C., p. 422; *ubi supra.*

Judge Hallett then considers (pp. 39, 40, 41) the ordinances of 1787, and declares, as I agree, that "ample power was conferred upon the northwest territory to enact a full code of civil and criminal laws, subject only to the limitations contained in the ordinance itself."

He adds: "This ordinance subsequently became the organic law of Illinois, Indiana, Michigan, Mississippi and Alabama territories, which were established after the act of 1790 was passed. The language of the ordinance above set forth undoubtedly conferred authority to enact the law of homicide, and from this it sufficiently appears that congress did not propose to exercise that authority directly and by its own act. Congress certainly did not intend to confer upon these territories authority to do that which it purposed to do or had done itself, and which, being done by congress, could not be modified or in any manner affected by the territories. If the law under consideration was the law of homicide in Illinois and the other territories last named, why should congress confer upon those territories authority to legislate upon that subject?"

I have already referred to the singular *status* of the north-

western territory. It is familiar history that it was a domain conceded to the Union under a special compact which was viewed with peculiar jealousy, not only by the individual states, but also by the large and intelligent population which settled in that territory in expectation of its speedy division into states of the Union, and on the faith of the continuance meanwhile of its pledged form of temporary government. I have shown why, on familiar principles, the Crimes Act might be held not to repeal by implication any provision of the ordinance.

As to the territories of Illinois, Indiana and Michigan, they having been originally a part of the northwestern territory and subject to the ordinance, good faith and sound policy required that, on their organization as separate territories, their old laws should be continued in force. And as to the territories of Mississippi and Alabama, they having been originally part of the territory of some of the states and ceded by them to the Union, on certain conditions, were wisely placed on a footing with the northwestern territory and the various territories carved out of the same: Statutes *supra*.

This assimilation of the government of certain later territories to that of the northwestern territory, I have already alluded to as exceptional, although politically justifiable for special reasons which I have stated.

In Illinois, Indiana, Michigan, Mississippi and Alabama, specified by Judge Hallett, the Crimes Act law of murder was probably never in full force, because the first three were part of the northwestern territory and the last two were assimilated to that territory, in point of government, immediately on their acquisition: 1 St., 549; 3 St., 371.

But there were six territories in which, although the Crimes Act was originally in full force (2 St., 283; 4 St., 729, § 25), yet, on the formation of distinct territorial governments, some of the provisions of the Crimes Act were

probably repealed in order that they might enjoy all the privileges of the northwestern territory and its successors—I refer to Iowa, Orleans, Minnesota, a part of Wisconsin, Oregon and Washington.

Thus we find that certain territories were never subject to the full operation of the Crimes Act law of murder; that others, although so subject as parts of the Louisiana purchase, were released from its operation by force of the peculiar phraseology of their organic acts; and that others have always been under its full operation.

The superficial nature of Judge Hallett's research on this subject is seen in his remarks on page 41: "Again, in an act respecting Florida territory (4 St., 164), in defining the jurisdiction of the superior courts of that territory, it is declared that they 'shall have and exercise original and exclusive jurisdiction of all crimes and offenses committed against the laws of said territory, where the punishment shall be death.' In this country, murder is commonly punished with death, and we do no violence to language when we say that that crime was referred to in the clause we have cited. If so, the law of homicide in that territory was provided, not by the act of 1790, but by the act of the territory. It appears to us that congress has already acted in the belief that the territory of the United States is not a place or district of country under the sole and exclusive jurisdiction of the United States, within the meaning of the law under consideration."

The Florida statute (4 St., 164) cited by Judge Hallett, was passed in 1826, and it does not contain any provisions defining crimes. Congress had already—in the organic act of 1822—most emphatically extended the Crimes Act over Florida (3 St., 654), the ninth section of that act providing "that the following acts, that is to say 'An act for the punishment of certain crimes against the United States,' approved April thirteenth, one thousand seven hundred and ninety,

and all acts in addition or supplementary thereto which are now in force, * * * shall extend to and have full force and effect in the territory aforesaid." See also opinion of Judge Wells, cited *supra*.

Consequently, having an express statute to inform us as to the law of Florida, in respect to homicide, we are not forced to draw an illogical inference from a statute enacted with no reference to the subject.

Other acts of congress, above cited, show, moreover, that congress has most impressively manifested its belief that the territory of the United States acquired from foreign powers is a "district of country" subject to the United States law of murder: 2 St., 283, and amendments; 2 St., 743; 3 St., 654, and amendments; 4 St., 729, sec. 25.

Judge Hallett proceeds, on page 42: "Since the ordinance of 1787 was disused, the language in which legislative power has been conferred upon territories is similar to that found in our own act, which is:

"'The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act.'

"More comprehensive language than this could not have been used, and we cannot doubt that it was designed to confer as full authority as that used in the ordinance. Unquestionably the powers conferred upon territories recently established are as full and complete as were those of the territories established under the ordinance. As the power to legislate upon the subject of homicide was conferred by the ordinance, so also it is conferred by our own act, and this, as we have seen, excludes the notion that the law of homicide in this territory is to be found in the act of 1790."

This suggestion still proves the error, above pointed out, of considering all the later territories on an equal footing with the northwestern territory. Even the late Chief Justice Chase fell into a similar error in treating the Wisconsin

organic act (5 St., 10), as the model on which all later territorial organic acts have been drawn: *Clinton v. Englebrecht*, 13 Wallace, 444.

The Chief Justice failed to notice that the territory of Wisconsin was assimilated to the northwestern territory by a provision in its organic act (5 St., 10, sec. 12), which is wanting in the organic acts of most of the territories, formed out of the French and Mexican cessions; the provision being as follows:

"SECTION 12. That the inhabitants of the said territory shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven, and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said territory. The said inhabitants shall also be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Michigan, and to its inhabitants, and the existing laws of the territory of Michigan shall be extended over said territory so far as the same shall not be incompatible with the provisions of this act, subject nevertheless to be altered, modified or repealed by the governor and legislative assembly of the said territory of Wisconsin; and further the laws of the United States are hereby extended over and shall be in force in said territory so far as the same or any provision thereof may be applicable."

Besides, very few of the provisions of the Wisconsin act first appear in that act. Even the language quoted by Judge Hallett as that usually employed in conferring territorial legislative power did not first appear in the Wisconsin act.

Indeed, a historical review of the evolution of the present

usual form of territorial organic acts, confutes absolutely Judge Hallett's argument.

The organic acts of Wisconsin and all subsequently organized territories, including Colorado (12 St., 172), and New Mexico (9 St., 446), may, in respect to their provisions, be summarized as follows:

1st. Declaration of a temporary government, in a defined district of country, under a specified name.

2d. The deposit of executive power with a governor, declared to be *ex officio* commander in chief of the militia and superintendent of Indian affairs, and empowered to approve all legislative acts, to pardon territorial offenses and to reprieve United States offenses; to commission all officers appointed under territorial laws, and to take care that the laws be faithfully executed.

3d. Provision for a secretary to record and preserve legislative and executive acts, to transmit copies of the laws to the president, and to act as vice-governor.

4th. Deposit of legislative power with the governor and a legislative assembly composed of a council and house of representatives to be elected in a manner specified.

5th. Qualifications of voters.

6th. Limitation of legislative power as follows: "The legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect."

7th. Mode of appointment of local officers.

8th. Specification of disqualifications of legislators and United States officers respecting holding certain offices.

9th. Deposit of judicial power with a supreme court, district courts, probate courts, and justices of the peace, and a limitation of jurisdiction, provision for a clerk of each district court, and limitation of right of appeal to Supreme Court of the United States.

10th. Provisions for a United States attorney and marshal.

11th. Provisions for appointment of governor, secretary, chief justice, associate justices, attorney and marshal, by the president with the advice and consent of the senate, oaths of office, salaries, appropriations, etc.

12th. Provisions respecting the first assembly, and other sessions of the legislative assembly.

13th. Provisions for election of a delegate to congress.

14th. Provisions for grant of school lands.

15th. Provisions for judicial districts.

16th. Provisions declaring the constitution and applicable laws of the United States in force.

17th. Bill of rights.

The germ of many of these provisions is found not only in the ordinance of 1787, but in several of the colonial charters and organic laws (1 Story Cons. Book I, *passim.*) But the first assume a form substantially analogous to the present in the organic act of March 26, 1804 (2 St., 283), which may be compared with the later acts above analyzed by reference to the following summary:

1st. There is a similar declaration of temporary government over a defined district.

2d. There are similar provisions respecting a governor and a secretary.

3d. The legislative power is vested in a governor and council, who are declared to "have power to alter, modify or repeal the laws which may be in force at the commencement of this act. Their legislative power shall also extend

to all the rightful subjects of legislation, but no law shall be valid which is inconsistent with the constitution and laws of the United States." There are analogous provisions for reporting laws to congress, and for their nullification by disapproval. "The governor or legislative council shall have no power over the primary disposition of the soil, nor to tax the lands of the United States, nor to interfere with the claims to land within the said territory."

4th. There is an equally broad grant of judicial power, accompanied with provisions respecting judicial sessions, appointment of a clerk, juries, habeas corpus, bail, etc.

5th. There are analogous provisions respecting the appointment of governor, secretary and judges, and respecting official oaths and salaries.

6th. In the seventh section, twenty acts of congress, including the Crimes Act, are enumerated specifically, and declared "to extend to and have full force and effect in the said territories (*i. e.* Orleans and Louisiana).

7th. There are provisions as to a United States district court, and as to an attorney and marshal, and respecting the qualifications of jurors, as well as others not material to this illustration.

In this Orleans act we find a grant of legislative power in language substantially like that employed in all later organic acts, including those of Wisconsin (5 St., 10), New Mexico (9 St., 446), and Colorado (12 St., 172.)

Nevertheless, the provisions of the seventh section (2 St., 283, sec. 7), extending the Crimes Act expressly and putting it in "full force and effect," show beyond doubt that the grant of legislative power by the language in question, was not intended to oust the United States of its jurisdiction over the crime of murder, nor to leave the territory destitute of a law of homicide, should its legislature see fit to decline action on that subject: *Vide* 4 How., 567.

In harmony with all that is here contended for, congress

passed, in 1871, "An act to provide a government for the District of Columbia (16 St., 419), which is strictly modeled on the usual form of territorial organic acts, embracing all the usual provisions, with the addition of many special provisions appropriate to the peculiar situation of the district.

The first section declares that "all that part of the territory of the United States included within the limits of the District of Columbia be and the same is hereby created into a government by the name of the District of Columbia."

The eighteenth section is as follows: "That the legislative power of the district shall extend to all rightful subjects of legislation within said District of Columbia consistent with the constitution of the United States and the provisions of this act; subject nevertheless to all the restrictions imposed upon states by the tenth section of the first article of the constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the congress of the United States, and nothing herein shall be construed to deprive congress of the power of legislation over said district in as ample a manner as if this law had not been enacted."

Of course this exception to the grant of legislative power was unnecessary, since it would have been implied by law: (101 U. S., 129.)

The thirty-fourth section contains the words construed with reference to the Crimes Act in *U. S. v. Guiteau, supra*, viz.:

"The constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

From the time of the enactment of the first Orleans organic act, we observe a disposition on the part of congress to conform all new territorial organic acts to the same standard; the first idea in each case being to preserve in full force and effect over the new territory the constitution and general

laws of the United States, and the next idea being to confer upon the newly created territorial legislature the power to enact laws consistent with the constitution and not repugnant to the existing laws of congress, which being general in their nature and evincing a uniform policy over all the territories not already provided with laws on the same subjects ought to prevail. In this connection, it is to be observed that wherever congress has favored new territories, by putting them on a footing with the northwestern territory, it has invariably by the organic acts immediately applied a full code of laws, criminal and civil, to such new territory, by adoption, either directly from the northwestern territory, or mediately from some territory formed on the model of the latter and already having a sufficient code; and it would be vain to search the national statutes for any instance in which congress has left a territory in a state of anarchy, in respect to any of the high crimes mentioned in the Crimes Act.

It is also worthy of remark that, in the early days of territorial governments, the sovereignty of the Union was more cheerfully acknowledged than it was after the slavery agitation gave birth to the doctrine of "squatter sovereignty" so called; and, accordingly, all prosecutions were conducted in the name of the United States, whether for crimes in violation of acts of congress or for crimes in violation of territorial acts. See cases in Hempstead, pp. 30, 61; Morris (Iowa), pp. 164, 341, 412; also, 1 Wisconsin, pp. 73, 93, 124, 276, 841. And indictments for such offenses properly conclude "against the peace and dignity of the United States:" *United States v. Lemmons*, Hemp., 62.

And, at the present day, notwithstanding the practice of prosecuting territorial crimes in the name of the territory, the highest governmental officers, executive and judicial, are, as I am advised, of opinion that, within the meaning of the pardon clause of the constitution, all territorial offenses are offenses against the United States: *In re Edward M. Kelley.*

Wherever there is a general statute of the United States that can reasonably be applied to the territories, every intendment is in favor of the intention of congress under that statute to assert the sovereignty of the Union, rather than to commit the exercise of that sovereignty to any delegated authority: *Vide National Bank v. County of Yankton*, 101 U. S., 129.

Especially ought this principle to be applied in the case of statutes declaring high crimes like treason and murder.

It seems absurd to hold that congress, while deeming it important in 1862 to pass the Bigamy Act (U. S. R. S., § 5352), and in 1873 to pass the Obscene Literature Act (U.S. R. S., § 5389), both expressly extending to the territories, and referring to them as places under the exclusive jurisdiction of the United States, and while having expressly extended the Crimes Act to the Louisiana and Florida purchases (2 St., 283, § 7; 3 St., 654, § 9), should have been willing to waive the jurisdiction of the Union over the crime of murder in the territories acquired from Mexico and Russia.

These provisions in the Revised Statutes clearly imply that a territory is a "place" within the meaning of the provisions, just as the Indian country act (4 St., 729, § 25) implies that the word "place" in the Crimes Act is applicable even to so extensive a district as the Indian country.

There are some old records in the office of the clerk of the district court of the first district which tend strongly to confirm the views which I have expressed regarding the force of the constitution and general statutes of the Union in newly acquired territory, and even to suggest a greater efficacy than I have imputed to them.

Among these records are the indictment, verdict, death sentence, and other proceedings in the case of *The United States v. Antonio Maria Trujillo*, from which it appears that as early as March 9th, A. D. 1847, under the provisional government and even before the treaty of peace, a grand

jury of New Mexico, in the name of the United States, indicted the defendant for the crime of treason, charging, among other things, that he did in New Mexico "levy and make war against the said government of the United States and did then and there maliciously and traitorously attempt and endeavor by force and arms to subvert and destroy the constitution and laws of the government aforesaid in contempt of the constitution and laws of the government aforesaid," etc.

It was under this indictment that the defendant was convicted and sentenced to be hanged, which sentence was probably carried into effect on the 16th day of April, A. D. 1847.

The proceeding was evidently under the Crimes Act of 1790, for the violation of that act and of the United States constitution. As a writer in the New American Cyclopædia (15 Appleton, p. 583) well observes, with reference to the crime of treason—"the foundation of the law itself and of our knowledge of it must be the clause in the constitution * * and, as there is no common law of the United States, this clause would have remained inoperative but for the act of 1790, chap. 36, sec. 1."

Another of these old records is entitled *United States v. John Armstrong*, and is an indictment and proceedings thereunder, against the defendant for committing murder in a "cantonment" of United States troops at Taos. The prosecution was evidently founded on the provisions of the Crimes Act of 1790.

Judge Hallett says at page 43: "As the laws of congress can be better enforced than those of the territory, we would be glad to adopt a different view, if it were possible to do so, but we cannot indulge our wishes or preferences in opposition to the law."

There can be no doubt of the wisdom and policy of applying the Crimes Act to cases of territorial homicide, if the law will justify the application. I have sought to show that

the law, properly interpreted, not only justifies this application, but denounces as a gross heresy the prevailing territorial opinion; and, I add, in conclusion of this subject, that the same suggestions of wisdom and policy, which, according to Judge Hallett, lead to the judicial wish to hold the Crimes Act in force, must have been controlling with congress to prevent its repeal or degradation.

The territorial law of homicide is unconstitutional. The organic law is the territorial constitution. Any legislation in conflict therewith is void *ab initio*. No disaffirming act of congress is necessary to establish this invalidity; and the failure of congress to expressly disaffirm is immaterial. A disaffirmance by congress is in such case supererogatory; and it is absurd to attempt to uphold such legislation on the bare negative that congress has taken no action on the subject.

In *Goodbe v. Salt Lake City*, 1 Utah, 79, it is said by McKean, Ch. J., respecting a statutory provision then under judicial consideration, "If, in any particular, this provision conflicts with the organic act, in such particular it is null and void, unless it has been affirmatively approved by congress."

So, in *Smith v. Odell*, 1 Wisconsin, 449, it is said in the opinion (pp. 454, 455): "The act of congress organizing this territory is in the nature of a constitution of a state. It is supreme and the legislative assembly cannot pass an act in opposition to or in violation of it. The courts cannot be required to enforce such an act. It should be treated as a nullity."

To the same effect is *Cass v. Davis*, 1 Col., 43, and, quite recently, Associate Justice Bell, while holding the Socorro district court, disregarded, as violative of the organic act, a statute which had been enacted by the territorial legislature nearly thirty years ago.

It requires no argument to show that a law of congress, applicable to this territory, is supreme and cannot be invaded, avoided or nullified by a territorial act. It is evident that

when the will of congress is once declared, the legislative assembly can set up against it no other will on the same subject of legislation. As Judge Hallett well observes (1 Col., p. 40), any territorial law, "so far as it should correspond with the federal law would have been unavailing, and so far as in conflict with the federal law, it would have been void because of its repugnance thereto."

The judgment of this court, not being forestalled by any authoritative adjudication on the point here presented, the court is in duty bound to examine the question fully and as freely as if this case had arisen for discussion immediately after the enactment of the organic act.

As the highest appellate court in the territory it is called upon to decide the question upon principle, according to its judicial conscience, untrammelled by the ignorance and prejudice of the past.

The question never having been raised before in this court or in the Supreme Court of the United States, the rule of *stare decisis* is not applicable as an artificial obstacle to truth and justice.

With reference to the authority of precedents, there exists "an obvious distinction between the cases where the point decided was not the leading or chief point in the cause; where it did not receive full discussion at the bar, or was incidentally decided, without full examination, and those cases where the point in question was singly presented, fully discussed by counsel, and distinctly passed upon by the court:" *Olcott v. Tioga R. R. Co.*, 26 Barb., 158. See also opinion Denio, J., in same case, 20 N. Y., 226; *Justice v. Lang*, 52 N. Y., 325.

A learned judge has said (Johnson, J., 4 Cranch., pp. 103, 104): "I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right, or exempted from the necessity, of

examining into the correctness or consistency of its own decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which, in the case of *The United States v. Moore*, February, 1805, acknowledged that in the case of *The United States v. Sims*, February, 1803, it had exercised a jurisdiction it did not possess. Strange, indeed, would be the doctrine that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice."

William Breeden, Attorney-General, for the appellee:

1st. There was no error in excluding the question asked the witness Greenleaf. It referred to a remark made by deceased, not to or in the presence of the defendant, and it was not disclosed in any way that the remark in any way affected or referred to the defendant, or that, if so, it was ever communicated to the defendant. The evidence of Greenleaf clearly shows that the remark which the question sought to bring out, could not be of the *res gestæ* of the case or in any way proper or material to the defense.

It was not a part of or made in connection with the meeting with the defendant by the deceased, and deceased and defendant had no feud or quarrel: Wharton's Crim. Evidence, 262.

2d. The question asked Ronan was with reference to a remark by defendant, upon hearing a shot fired some moments before the shooting of the deceased, when it was not known who fired the shot, and the record does not show that it could in any way be material or proper evidence in the case. It was not of the *res gestæ*: Wharton's Crim. Evidence, 262.

3d. The question asked the witness Armijo, as to what the defendant said about the shooting four or five minutes after it occurred, was properly excluded. The statements of de-

fendant at that time were not admissible for defense, and he could not be permitted to make evidence for himself of statements made by him after the commission of the act, and after he had had time for consideration and to prepare a story, it was not of the *res gestæ*: Wharton's Crim. Evidence, 262, 690.

4th. The ruling of the court on the motion for a new trial is not reviewable, as has been repeatedly decided in this court.

The newly discovered evidence referred to in the motion for a new trial was merely cumulative and tending to show, if anything, only an alleged fact of which direct evidence had been given to and considered by the jury.

5th. The minutes of evidence in the record show that there was evidence that the defendant and Boyd were acting together, and besides it is not pretended that all the evidence in this case was preserved or is before this court.

Therefore, it must be held that the fifth instruction asked by defendant was properly refused.

6th. The charge of the court was unexceptionable and no objection was made or exception taken to any specific portion thereof, but only a sweeping general exception to the whole charge, which this court cannot consider.

It was the province of the court to give the jury the law applicable to the facts of the case, which was done. There was no error in the failure of the court to instruct as to second, third and fourth degrees, and there was no exception taken on that account. The instructions given as to justifiable and excusable homicide, comprehended all that the defendant was entitled to: 6 Cal., 214; 29 Cal., 507; 32 Cal., 280; 31 Mo., 147; 18 Texas, 343; *Territory v. Romine*, *ante*, p. 114; *Territory v. Young*, *ante*, p. 93.

7th. The Crimes Act of the United States does not apply to cases like this. This indictment was properly brought and prosecuted in the name of the territory. New Mexico is

not a district of country under the exclusive jurisdiction of the United States in the sense of the Crimes Act of 1790: *Franklin v. The United States*, 1 Col., 35.

It is too late to object to the constitution of the grand jury or the qualifications of jurors for the first time in this court. Any objection to the jury or jurors which may have existed, was waived by defendant when he assented to go to trial without objection: 1 Bish. Crim. Law, 995, *et seq.*, particularly 997 and authorities there cited; *Territory v. Romine*, New Mexico Supreme Court, Opinion, Book; 1 Bish. Crim. Proced, 895, *et seq*, and particularly 887, authorities cited; Wharton's Crim. Pleadings and Practice, 350, *et seq.*

The only question properly brought into this court by defendant's exceptions is the exclusion of one question to witness Greenleaf, one to Armijo and one to Ronan. The general question of jurisdiction is proper to be considered. But the court can properly consider none of the other questions suggested in the assignment of errors and brief for the reason that they are not brought into this court so as to be reviewed.

The instructions were liberal to the defendant, and fairly stated the law of the case, and the case was fairly submitted to the jury upon the evidence before them.

The judgment should be affirmed.

Axtell, Chief Justice: The defendant, Yarberry, was indicted for murder in the second district court of the county of Bernalillo, May term, A. D. 1882.

He was tried at the same term, convicted of murder in the first degree and sentenced to be hung; he appeals to this court, and urges particularly the following reasons why he ought to be granted a new trial:

The first reason given is "that the court had no jurisdiction of the person or subject-matter, and the indictment is void on its face for lack of jurisdiction, the said indictment

part of the said record is not in the name of the United States of America, for the violation of section 5339 of the United States Revised Statutes, and the indictment is fatally defective because it is drawn in the name of the territory, for violation of the territorial law, instead of in the name of the United States for violation of the act of congress relative to the crime of murder."

The organic act establishing a territorial government for New Mexico was approved September 9th, 1850.

It has now been in force over thirty-two years, and has been acquiesced in during all that period by every department of the general government. As early as the December term, 1857, in the case of *Leitensdorfer v. Webb*, the Supreme Court of the United States recognized the validity and binding force upon them of this organic act.

The court says: "It was undoubtedly within the competency of congress to define directly by their own act the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the territorial government. This power," they continue, "we consider, was in fact delegated by congress to the territorial government by the seventh section of the act of 1850, which declares that the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and with the provisions of this act:" 20 Howard, p. 177. Congress in the exercise of its undoubted right to govern the territories, has deemed it inconvenient or inexpedient to provide a body of municipal laws for them, but has erected territorial governments and delegated to them authority to enact such laws: *Franklin v. United States*, 1 Col., 35.

A year prior to the decision in *Leitensdorfer v. Webb*, which went up from this territory, the celebrated Dred Scott case had been decided, the venerable Chief Justice Taney delivering the opinion of the court. This great judge does

not limit congress in their power to govern territories to the clause of the constitution which enables them to make all needful rules and regulations respecting the territory or other property belonging to the United States, but puts it on the broad ground of sovereignty. "The right to govern is the inevitable consequence of the right to acquire territory." As to form of territorial government he says: "In some cases a government consisting of persons appointed by the federal government would best subserve the interests of the territory." In other instances it would "be more advisable to commit the power of self-government to the people who had settled in the territory, as being most competent to determine what was best for their own interests:" 19 How., pp. 443–449. The expression in this opinion "to commit the power of self-government to the people" is the equivalent of "delegate the authority requisite," used in *Leitensdorfer v. Webb.*

Strictly within the limits of this grant of power, the legislature of New Mexico has declared that the unlawful killing of a human being with premeditated design to effect death is murder in the first degree, and that any person convicted of the same shall suffer death. This statute is consistent with the constitution and laws of the United States. It would be inconsistent with the foregoing reasoning to hold that New Mexico is either a fort, arsenal, dock-yard, magazine or district of country under the sole and exclusive jurisdiction of the United States. We therefore conclude that this indictment was properly found in the name of the territory of New Mexico for violation of territorial law.

The second class of objections are to the grand and petit jurors. These were not taken till after trial and conviction, and cannot now be considered: *Territory v. Abeita*, 1 N. M., p. 546; 1 Bishop, pp. 875–887; Wharton's Criminal Pleadings and Practice, p. 350, and authorities there cited.

The third class of objections is to conduct of trial, par-

ticularly as to ruling out certain evidence offered by defendant. Before proceeding to consider these objections it will be proper to state some of the facts of the case; for it is only by reference to the facts that the rulings of the court below can be clearly understood.

The evidence shows that the defendant, Milton Yarberry, was at the time of the homicide acting as a peace officer in the city of Albuquerque, where the killing occurred. That it was within the scope of his duties to prevent the carrying and using of deadly weapons by persons other than peace officers; that by the statutes of New Mexico it is a misdemeanor to carry such weapons, and all peace officers are required to arrest and disarm persons unlawfully carrying or unlawfully using the same in towns or cities; that, on the night when the homicide was committed, Yarberry and a person by name of Ronan, and another by name of Boyd, were together, when they heard a shot fired down the street some doors below them. They did not start immediately in the direction whence the shot came, and Yarberry said something to one of these men just before he went in the direction where the shot was heard. The defense asked this question:

"Mr. Ronan, please state what was said by Yarberry, the defendant, when his attention was attracted to where this first shot was fired immediately preceding this occurrence?"

On objection, this question was ruled out. Yarberry and Boyd went down the street to where the shot was heard. It was between 8 and 9 o'clock at night, a number of men were in the vicinity, the deceased, Charles Campbell, was walking slowly along from where the shot was fired. Yarberry called out to him to stop, and to hold up his hands, and at the same instant Yarberry and Boyd commenced firing at Campbell, he fell forward on his face and instantly expired, pierced by six balls, all from behind—all entering his back. Yarberry did not go to the body of the dead man.

but turned and went into a saloon. At this point the second question asked was excepted to as follows: "The court below erred in ruling that it was not competent or relevant for the appellant to show what statement he had made to the sheriff, Perfecto Armijo, on the occasion of the appellant's arrest by the latter four or five minutes after the occurrence in question, in answer to the question of the latter, 'What is the trouble, Milt?'" The third question asked was as to what deceased said a short time prior to the shooting. It is in evidence that the prisoner and deceased were strangers to each other. This is the statement of the prisoner himself. The question is as follows: On the direct examination of J. H. Greenleaf, a witness on behalf of the defense, witness testified that a short time before the occurrence of the shooting which resulted in the death of Campbell, the deceased was in his (witness') father's saloon, and witness was then asked to state what occurred there at that time; to which question he answered: "Well, he was in there, and he shook the dice with my father for drinks, and my father beat him. My father asked him to pay for the drinks, and he said:" Objected to on the ground of irrelevancy; objection sustained. The first two questions relate to what the prisoner said a short time before and a short time after the shooting. It is claimed by defendant's counsel that they ought to have been admitted as part of the *res gestæ*. "The general rule as to *res gestæ* is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gestæ*, in other words, a part of the thing done." The cries of the bystanders while the thing is being done are original, and not hearsay evidence, because they are part of the *res gestæ*, but a defendant may not manufacture evidence for himself, either before or after or in the moment of the assault, and claim its admission under this head, and in no

just sense can words spoken several moments before or after the event be considered a part of the thing done. We think the objections to these questions were properly sustained.

It was sought to introduce the testimony of Greenleaf to show declarations of Campbell and his motives, but we cannot see what this can possibly have to do with the case; he was not acquainted with Yarberry, and it is not claimed by defendant that he had committed or attempted, or threatened to commit any felony, nor that his words, whatever they were, came to the ears of Yarberry. All this conversation was clearly irrelevant, and no error was committed by the court in excluding it. The defendant's counsel calls our attention to the case of *Wiggins v. People*, 3 Otto, Supreme Court Reports, p. 465. A portion of the syllabus is as follows:

"In a trial for homicide, where the question whether the prisoner or the deceased commenced the encounter which resulted in death is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner." The reason assigned for admitting these uncommunicated threats is to aid the jury in determining the question who fired the first shot. But it must be remembered that Yarberry and Campbell were strangers to each other, and also that there was no offer to prove that deceased made any threats of violence against the prisoner.

The fourth class of objections relate to the charge of the learned judge who tried the case. After referring to the charge as a whole, the prisoner, by his counsel, excepts to each and every part of said charge and does not except to any particular error in law in said charge. Our rules require that he should specify distinctly the several matters in law to which he excepts; otherwise this court will not consider such general exceptions. Upon argument before us it was contended that the judge erred in limiting the jury to murder

in the first degree, or in effect stating to the jury that the evidence showed either a murder in the first degree or a justifiable homicide. We cannot see by a careful consideration of all the charges asked by defendant and given by the court that the prisoner's counsel took any other view of the case, or requested the court to instruct the jury in any other manner. The facts and the law applicable to them were fairly before the jury and we cannot see that they were misled. All of defendant's instructions were given except the fifth, which is in the following language:

"The court further instructs the jury that if you have a reasonable doubt growing out of the evidence as to whether or not Milton Yarberry, the defendant, inflicted mortal wounds upon Charles Campbell, which caused his death, you must acquit the defendant."

It will be necessary to consider the evidence in this case somewhat farther before determining whether this instruction was properly refused. The record shows that the deceased was walking slowly along the street between 8 and 9 o'clock of a clear but not moonlight night, the lights from the stores were bright, and he was distinctly seen by two persons who were smoking their cigars on a platform in front of a store not thirty feet from him. These witnesses testify that they heard a cry: "Hold up your hands!" Then turning their eyes in the direction from which the command came they saw two men, Yarberry and Boyd, some thirty feet behind the deceased, and one of these witnesses, a merchant of the city, testifies that he recognized Yarberry's voice as giving the command, "Hold up your hands." At the same instant these two men commenced firing upon deceased, as rapidly as they could pull trigger—as many as ten or twelve shots were fired instantly; six of them entered the body of Campbell, all from behind; he fell forward on his face, and was a dead man before anyone reached him. Both of these witnesses testify that deceased did not have a pistol,

did not even turn his body, but only looked back over his shoulder. Yarberry did not go to the body, but turned into a saloon. A citizen asked him: "Milt, why did you do this?" He replied: "I did it, and there he lies." To another he said: "He shot at me, but I was too quick for him, and I downed the son of a bitch." As this case presents a state of society which is now nearly impossible, and will soon become incredible, it may be well to say that where all persons are presumed to be armed, the order, "Hold up your hands," is to prevent an assaulted person from seizing his pistol, usually carried at his hip. The command is not only given by officers making an arrest, but also and more generally by highwaymen—and in the eloquent language of the attorney-general, "The cry was the cry of a robber, and the shot the shot of an assassin." Yarberry, in his own testimony, says that he first called "stop! I want you, that Campbell;" then "went for his pistol," and said, "go back;" I then, continued Yarberry, "fired at him, and he fired at me; I do not know who fired first." There is no dispute but what Yarberry shot him several times. Boyd, who was with Yarberry, also shot him. There were six bullets entering his body, all from behind, all coming out in front. He was instantly shot to death, shot through and through by these two men, one of them a peace officer! both of them assisting each the other, to make an arrest of a man for a supposed misdemeanor! The evidence is conclusive that Yarberry and Boyd acted in concert. They were in pursuit of a common purpose and were each responsible as principals.

As the instruction, if given, would have put the jury upon an unnecessary inquiry and tended to confuse their minds, we think it was properly refused. The point raised as to the original verdict as given in the Spanish language we cannot consider, for it is not a part of the record. The newly discovered evidence, the finding of some pistol cartridges upon the person of deceased, has a tendency to strengthen some

testimony that the deceased was armed at the time of his death, but is merely cumulative and would not justify the granting of a new trial. Yarberry's statement was that he attempted to arrest this man, that the man turned and fired upon him; that he returned the shot and killed him. Had the jury believed this statement they would have acquitted him. They disbelieved it and found him guilty. The evidence discloses a case either of justifiable homicide or willful and deliberate murder.

The jury have passed upon it and we are not disposed to disturb their verdict. As to the objection that the verdict does not assess the penalty as required by statute, we are disposed to take the view that it does assess it.

The verdict is in the following language: "We, the jurors, unanimously find the defendant guilty, as charged in the indictment." The statute provides as follows: "All questions of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict, and the court shall render judgment accordingly." In finding the prisoner guilty, as charged in the indictment, the jury instructs the court exactly what judgment to render. The indictment charges murder in the first degree. The law which binds the jury as well as the court, assesses the penalty to be death. To assess this penalty in words would be surplusage, to assess any other on this finding, would be illegal. This question has, however, been settled by previous descriptions of this court, which are here affirmed: *Territory v. Romine, ante*, p. 114; *Territory v. Young, ante*, p. 93.

The only remaining question relates to the presence of the prisoner in court during his trial. It is a well established practice that in cases of felony the defendant must be personally present during all the proceedings, and must so appear on record. But a formal averment of defendant's presence during trial is not necessary when it can be inferred from the record. We think the record in this

case shows the presence of the prisoner, although not every day by formal averment. At the arraignment the record says: "Now comes the said defendant in his own proper person." At the trial defendant is sworn and gives evidence. This is just as convincing of his presence as a formal statement. On motion for new trial and in arrest of judgment "the defendant in his own proper person moves the court." At the sentence the record says: "Now comes the said plaintiff by her district attorney and the said defendant in his own proper person and by his attorneys." The eleventh specification in the motion for a new trial is in the following words: "The jury was not polled as the defendant had a right to have done, owing to the absence of his counsel, when the verdict was rendered late at night." This is as much a part of the record as if made by the clerk of the court, and we think the averment that his counsel was absent plainly implies that the prisoner was present. The absence of any statement in the assignments of error that the prisoner was not at all times present, raises a very strong presumption that he was so present. But without resorting to presumptions, we think the record shows enough to convince any reasonable mind that the prisoner was personally present in court during all his trial. We are asked to presume that he was not. The contrary doctrine is the true one: That in a court of general jurisdiction all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary be shown: *Territory v. Webb*, *ante*, p. 147.

The judgment of the court below is affirmed.

THE UNITED STATES OF AMERICA, Appellee, v. CHARLES LEWIS, *alias* CHARLES FOSTER, Appellant.

January, 1883.

CRIMINAL LAW. (1) *Feloniously obtaining registered letter; Principal and agent, authority of latter to take letter from the office: Demurrer to evidence.*

NEW TRIAL. (2) *Refusal of court to grant new trial an abuse of discretion when, under the evidence, the defendant should have been discharged.*

APPEAL. (3) *Discharge of prisoner upon appeal to Supreme Court.*

1. Where it had been the custom of several persons living some distance from the post-office to delegate one of their number to bring their mail from the post-office whenever he called there, this amounts to a general authority to such one to get such mail matter, and if, pursuant to such authority, he takes a registered letter from the office belonging to one of such persons, he is not guilty of fraudulently and feloniously obtaining such letter from the postmaster, although after thus obtaining it from the postmaster he converts it to his own use; and if indicted for feloniously obtaining the letter and the evidence shows the foregoing state of facts, a demurrer to such evidence will lie upon which the defendant should be discharged.
2. Where, in such case, the evidence is not demurred to, but instead a motion for a new trial is made, a new trial should be granted, and if refused, the refusal is an abuse of the discretion of the court below as to granting new trials, and its judgment will be reversed.
3. There being no evidence in the court below to sustain the conviction of one charged with a felony, on appeal to the Supreme Court, that tribunal will not remand the case for a new trial, but will direct that judgment below be reversed, and that the defendant be discharged.

Appeal from the District Court of the First Judicial District.

Caypless & Breeden, for appellant.

Sidney M. Barnes, United States District Attorney, for the United States.

There is no error in the finding of the jury or the judgment of the court. The judgment of conviction should be sustained; the indictment in this case is under section 5469 of the Revised Statutes of the United States, page 1060.

The case of *Webb v. Territory of New Mexico*, decided at January term, 1881, *ante*, p. 147, is conclusive of this case and an affirmance is asked.

BELL, Associate Justice: The appellant was convicted under an indictment which charged that he did unlawfully and feloniously, and by fraud and deception, obtain from Edward H. Bergman, postmaster, at Springer, N. M., one registered letter addressed to William H. Breen, at that place, and which letter contained money.

This is the substance of the charge, which is stated formally. It is not disputed that the appellant received the letter in question from Mr. Bergman, the postmaster at Springer, and that it contained money, and the only issue presented to the jury was whether the appellant unlawfully and by fraud and deception obtained it as charged in the indictment.

The evidence on the trial showed that the appellant and Breen were both employed on the ranch of one Myers, some 45 miles from Springer. That the appellant had frequently theretofore gone to Springer from the ranch and brought out the mail of the complaining witness, of Mr. Myers and other persons in that vicinity. The testimony of the postmaster, Mr. Bergman, in that regard is as follows:

"Lewis had been in the habit of coming to the post-office at Springer; he had been there time and again to receive mail matter for Mr. Myers and the vicinity."

The complaining witness, Wm. H. Breen, testified as follows:

Q. Did you at any time before the 10th day of May, 1880, (the day the letter was received by the appellant) give him (the appellant) any directions or authority to receive your mail from the postmaster at Springer?

A. I did, sir.

Q. When?

A. I couldn't exactly tell what time; he would go to

Springer and I would tell him to get my mail; it was the custom of that part of the country.

Q. When did you last authorize him to get letters for you?

A. I think it was on the 4th of May.

Q. Now, on the 4th day of May, when you saw Lewis last, what were you and Lewis doing?

A. We were in the house talking; he was going to Springer and I told him to get my mail, if there was any there.

Q. Was that the last time you saw him before he got the letter?

A. That was the last time.

* * * * * * * * * *

Q. Had you authorized Mr. Lewis before to get your mail?

A. Yes, sir.

* * * * * * * * * *

Q. Mr. Breen, was it not customary for yourself and others who were working for Mr. Myers at that ranch to send after mail by Mr. Lewis to Springer?

A. It was.

Q. And Mr. Lewis brought the mail frequently, did he not?

A. Yes, sir.

* * * * * * * * * *

This witness further testified that he had not authorized the appellant to get that particular letter, but that was immaterial, as the evidence does not show that he either expected the letter in question or knew that it was in the post-office at the time of its delivery. The authority given to him was to get his, the complainant's, mail generally, and of course that included all letters of any kind that might be at the office.

The postmaster testified, in addition to his testimony already quoted, that the appellant came to his office on the 9th of May, and that he then refused to give him the letter, but on the 10th he delivered it to him on his representation

that Breen was twelve or fifteen miles away from the ranch and could not come for it. There was no evidence to disprove this statement of the appellant.

This is substantially all the evidence showing how the accused became possessed of the letter. The jury convicted him of the offense charged in the indictment.

A motion for a new trial was then made, for the following reasons:

First. "That the verdict was contrary to the law and the evidence in said cause.

Second. "That the jury was not authorized to find a verdict of guilty upon the evidence produced upon the trial of said cause, and that said verdict was unwarranted by the facts."

The motion was denied, and error is assigned on this denial.

We are of opinion that had a demurrer been interposed to the evidence, it would have been the duty of the court below to have directed an acquittal of the defendant.

That course was not taken, but we are asked to review the action of the judge who presided in denying a new trial.

The rule of law is, we think, well settled, that a motion for a new trial is addressed to the discretion of the court and is not ordinarily reviewable. But when the discretion of court has been abused and has resulted in injustice, then the appellate court will interfere. A difference of opinion as to the proper course of proceeding would not be sufficient. An appellate court must be able to say that the course pursued was not only improper, but that it operated unjustly and injuriously to the party: ——— *v. State*, 11 Ohio St., 114. We think the case at bar comes fairly within the class of cases referred to in the case cited.

It is quite certain, from the evidence, that the appellant was fully authorized to receive the letter in question, and though the authority under which he acted on the particular

occasion was given to him some four days before he acted on it, yet when the distance of post-office from the ranch is considered, and the fact that he had been acting on similar authority for some months at least, it is not to be presumed that the mere lapse of a few days had operated to revoke the general authority with which it seems that he was vested. The authority was not revoked expressly, according to the evidence of the complainant, and we think he was entirely justified in acting on it.

What he did with the letter and its contents after receiving it is wholly immaterial, though it is probable that the belief in the minds of the jury that he improperly converted them to his own use was what led them to convict him.

On all the evidence, it was, in our judgment, clearly the duty of the presiding justice to set the verdict aside and order a new trial; it was an abuse of the discretion with which he was vested to do otherwise.

The case being now in this court, we are also of opinion that, on the evidence, no conviction could properly be had and, therefore, we do not send it to the court below for a new trial, but direct that the judgment be reversed and the defendant discharged from further custody under this indictment.

AXTELL, C. J: I concur.

BENITO MARTINEZ, Appellant, v. EDUARDO MARTINEZ, Appellee.

January, 1883.

PRACTICE. (1) *Affidavit in replevin amendable on appeal to district court.*
REPLEVIN. (2) *Nature of the action.*

1. In replevin before a justice of the peace, the affidavit filed was insufficient in that it did not state that the person who made the affidavit was the agent or attorney of the plaintiff, and it did not state that plaintiff had a right to the possession of the property sought to be replevied. Trial was had and a verdict and judgment rendered for the plaintiff. The defendant appealed to the district court. Then the plaintiff moved in that court to amend the affidavit, but the district court overruled the motion, quashed the writ, and restored the property replevied to the defendant. *Held,* that the district court should have allowed the amendment, and that its refusal to do so was error.
2. The action of replevin is not an extraordinary remedy in derogation of the common law like the proceeding by attachment. On principle the owner of personal property ought to have the same right to recover the possession of it in specie when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice.

Appealed from the District Court of San Miguel county.

This was an action of replevin commenced in the justice court and on judgment being rendered for the plaintiff, an appeal was taken to the district court.

In the district court the plaintiff asked leave to amend the affidavit for replevin so as to conform to the exact language of the statute with reference to the necessary affidavits on the subject of replevin. The original affidavit had left out the words alleging the plaintiff had good right to the possession of the horse in question. Plaintiff also presented with his motion his proposed amended affidavit in full. The court refused to allow the amendment to be filed. The de-

fendant then moved the court to quash the writ on account of the defect of the affidavit, which was allowed, and judgment rendered against the plaintiff for a return of the horse and one dollar damages.

Catron & Thornton, for appellant:

The court should have allowed the amendment to be filed: Prince's Stat., sec. 120, p. 109; Prince's Stat., secs. 25 and 26, p. 119; *Sanches v. Luna*, 1 N. M., 239; *Helling v. Wright*, 14 Pa. St., 375; *Applewhite v. Allen*, 27 Tenn., 698.

Our statutes are mandatory in terms as to amendments.

Breeden & Waldo, for appellee.

BRISTOL, Associate Justice: This is a case of replevin originally brought before a justice of the peace in San Miguel county, in the first judicial district, for the recovery of a horse of the alleged value of thirty dollars.

The affidavit on behalf of plaintiff Benito Martinez, on which the writ of replevin was issued by the justice is as follows:

"TERRITORY OF NEW MEXICO,
COUNTY OF SAN MIGUEL.

"*Honorable Justice of the Peace, Florencio Aragon, Precinct No. 3 of said county:*

"SIR—I, the undersigned, under the most solemn oath, declare and say that in possession of Eduardo Martinez is found a wolf-colored colt of the age of two years past, going on three, of the property of Benito Martinez, of the value of thirty dollars. Said colt has been detained unjustly by the said Eduardo Martinez, and therefore I ask, in virtue of the law, that the said colt be replevied, in conformity with the law, and that the said Eduardo Martinez be summoned before your court to answer to the plaintiff for twenty-five dollars damages, for the unjust taking and detention of said

colt, etc., and I promise to prove all that is put in this declaration, and I swear that I do not proceed with malice, etc.

"JULIAN BACA,
"*Deponent.*

"Witnesses:

BENITO MARTINEZ,
JOSÉ ARCHIBEQUE,
AGAPITO GARCIA,
MANUEL MARTIN,
FERNANDO BACA.

"Sworn and subscribed before me, this 29th day of November, A. D., 1881.

"FLORENCIO ARAGON,
"*Justice of the Peace.*"

On this affidavit the justice issued a writ of replevin. The colt in question was taken thereon; a trial was had, both parties appearing. The jury rendered a verdict that the colt was the property of the plaintiff, and that the plaintiff recover twenty-five dollars damages.

No formal judgment was rendered on the verdict by the justice, unless the words of the justice immediately following the verdict in the transcript may be considered a judgment, which words are as follows:

"Approved by me this above day of the said date."

From this disposition of the case by the justice an appeal was taken to the district court of San Miguel county.

In the latter court, the plaintiff and appellee made a motion for leave to amend the affidavit on which the writ of replevin was issued, so as to show that at the time the action commenced the plaintiff had, and still has, good right to the possession of the colt in question, and accompanied the motion with the proposed amended affidavit to that effect, in words as follows:

"BENITO MARTINEZ
vs. } ss.
EDUARDO MARTINEZ.

"In replevin appealed from before Florencio Aragon, justice of the peace for precinct No. 3, in the county of San Miguel.

"By leave of the court first had.

"Julian Baca, being duly sworn, says he is the agent of Benito Martinez, the plaintiff in the above entitled suit; that said plaintiff has, and at the time of suing out the writ in above entitled cause had, good right to the possession of the following described chattel, and that the same was at the time of suing out, and the service of said writ in the above entitled cause wrongfully detained by the said defendant, Eduardo Martinez, to wit: one dun or clay-bank horse, of the age of two years, going on three, of the value of thirty dollars, at, to wit, the precinct aforesaid.

"Plaintiff therefore brings suit, and asks the judgment of this court for the possession of said horse, together with twenty-five dollars damages for the wrongful detention thereof, together with his costs."

"JULIAN BACA,
"*Agent of Benito Martinez, Plaintiff.*

"Subscribed and sworn to before me, this March 9th, 1882.

"F. W. CLANCY,
"*Clerk.*"

This motion was overruled by the court below, and the plaintiff excepted.

The defendant thereupon moved the court to quash the writ on the ground, among others, that the affidavit or verified complaint filed with justice for the purpose of obtaining the writ, did not allege that the plaintiff had a right to the possession of the colt in question. This motion was sustained by the court and the plaintiff excepted.

Final judgment was then rendered by the court below for the return of the colt by the plaintiff to the defendant; that he pay the defendant one dollar as damages and his costs.

From this judgment the plaintiff appeals to this court.

The record presents a single question for our consideration, and that is, whether the court below erred in refusing leave to the plaintiff to amend his affidavit in replevin.

To justify the issuing of a writ of replevin by a justice of the peace, the statute requires that "the plaintiff, his agent or attorney, shall file an affidavit with the justice, stating that the goods and chattels are wrongfully detained by the defendant, and stating the value thereof, and that he has a right to the possession thereof, and that every writ of replevin issued without such affidavit, shall be quashed at the cost of the plaintiff."

The affidavit that was filed with the justice, and on which the writ was issued, and the colt replevied was clearly insufficient in two particulars: one was, that it did not appear that Julian Baca, who made the affidavit, was either the agent or attorney of Benito Martinez, the plaintiff; and the other was, that it did not state that the plaintiff had a right to the possession of the colt.

Unless the affidavit was amendable, and the plaintiff offered to amend, it follows that it was incumbent on the court below to quash the writ, and render the proper judgment.

Was the affidavit amendable? In 1876 the legislature passed an act, entitled an act to define the qualifications, powers and jurisdiction of justices of the peace, and regulating the practice in their courts.

This act contains 125 sections. Sections 48 to 55, both inclusive, relate to actions of replevin. Section 120 provides as follows: "All causes removed into the district court in pursuance of the foregoing sections, shall be tried *de novo*, and the court shall allow all amendments which may be

necessary in furtherance of justice in all cases appealed by petition, *certiorari*, or in the ordinary mode."

That this section covers the action of replevin, as well as every other action that may be brought before a justice of the peace, there can be no doubt.

The action of replevin is not an extraordinary remedy in derogation of the common law, like the proceeding by attachment. On principle, the owner of personal property ought to have the same right to recover the possession of it in specie when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice.

The fact that the statute expressly provides that if the writ be issued without the required affidavit, it shall be quashed, adds nothing to the mandatory character of the statute, for that result would uniformly follow, without any such possession.

The provisions of the statute in regard to actions of replevin before justices of the peace, and in regard to amendments on appeals from their courts, in all cases being parts of the same act, must be construed together, and harmonized, if possible.

This is not difficult. If the plaintiff inadvertently has made an insufficient affidavit for a writ of replevin, and takes no steps to rectify it, but rests his case thereon, the writ will be quashed, as a matter of course. But after discovering its insufficiency, if he applies at the proper time for leave to amend, there can be no objection to its allowance, if justice will be promoted thereby.

It is quite evident from the record that the court below refused the amendment on the ground that it had no discretion to allow it under the statute. This was error. The refusal of the court to allow the affidavit to be amended was virtually a final disposition of the case in favor of the defendant, without a trial on the merits.

There can be no doubt from the facts appearing on the record, that granting leave to the plaintiff to amend his affidavit, would have been in furtherance of justice, and that refusing it was an abuse of discretion of the court below.

Judgment reversed, and cause remanded with instructions to grant leave to the plaintiff to amend his affidavit, and thereupon to further proceed according to law.

All the justices concur.

THE TERRITORY OF NEW MEXICO, Appellant, v. G. H. WELLER, Appellee.

January, 1883.

JUSTICE OF THE PEACE. (1) *Powers of.*

PERJURY. (2) *Surety on appeal bond, swearing falsely as to his property is guilty of: Examination of surety by justice of the peace as to former's ownership of property is a judicial proceeding.*

1. The powers of a justice of the peace or magistrate in New Mexico are not less or narrower than the powers of the same officer elsewhere.
2. It is the duty of a justice of the peace to see that sureties offered on appeal bonds are worth the sum for which they intend to become sureties, in such property as can be reached by legal process. In order to ascertain this, the justice may examine, upon oath, the persons offering to go upon the bond, and he may also call and examine witnesses upon the subject. This examination and the approval of the bond by the justice constitute a judicial proceeding, in which the justice has legal power to administer oaths, and if the sureties proposed swear falsely to a material matter in such proceeding, they may be indicted and punished for perjury.

Appeal from the District Court of Santa Fe county.

William Breeden, attorney-general, for the territory.

Fiske & Warren, for the appellee.

AXTELL, Chief Justice: The defendant was indicted by the grand jury of Santa Fe county, February term, 1882, for perjury.

The indictment was found upon the following facts: In January, 1882, an action of forcible entry and unlawful detainer, had been tried before a justice of the peace in Santa Fe county, and a judgment rendered in favor of plaintiffs. The defendant appealed and offered G. H. Weller, defendant in this action as one of his sureties on his appeal bond.

Weller was thereupon duly sworn, and took his corporal oath in due form of law, before the said justice of the peace, to true answers make, touching his sufficiency as such surety and the value and character of the property of which he was then possessed. The indictment then alleges in due form then and there, that he swore falsely in regard to his property.

The defendant appeared to the indictment and filed his motion to quash the same for the following reasons: That the same is insufficient in law to constitute any crime or offense, and the same does not allege any crime or offense indictable under the laws of this territory.

The statute relating to perjury is as follows, Chap. LIV, sec. 2, Laws of New Mexico:

If any person of whom an oath shall be required by law, shall willfully swear falsely in regard to any matter or thing respecting which such oath is required, such person shall be deemed guilty of perjury.

There is no statute of the territory requiring the sureties on an appeal bond, to make affidavit that they are worth the amount for which they bind themselves, nor is there any statute except the general statute hereafter referred to, authorizing or requiring a justice of the peace to examine under oath, a person offering himself as bondsman, touching his ability pecuniarily to go on such bond. The contention is upon this point, the defendant claiming that there was

no oath required by law, and consequently no perjury for swearing falsely.

The court below took this view of the case and quashed the indictment. The territory took an appeal to this court.

It was contended by defendant in argument before us, that justices of the peace in New Mexico, had less authority and were confined within narrower limits, than the same officers in the old colonial states; because it was argued that the colonists brought with them from the mother country, some of the common law, while we have only such as govern us by express statute. We find by reference to the organic act, sec. 10, that the judicial power of the territory shall be vested in a supreme court, district courts, probate courts and in justices of the peace; and we find in our general statutes, secs. 122 and 123 of the act, in regard to justices of the peace, that all justices of the peace of this territory are hereby declared to be magistrates, and are empowered to administer oaths and affidavits and to take depositions. This power is general and the definition of justice of the peace is enlarged by the term magistrate. It is difficult to see how these terms can have any larger significance in the old colonial states than is given to them by the organic act and statutes of New Mexico; the powers of a magistrate or justice of the peace over subjects within their proper jurisdiction, are the same in New Mexico as elsewhere.

In the case before us, it was the duty of the justice to see that the sureties to the appeal bond were worth the amount for which they went upon the bond and in such property as could be reached by legal process, for he must approve the bond, and this approval is a judicial act. Before he could intelligently approve this bond he must, by some process, be able to judge and determine the sufficiency of the security. This is a judicial proceeding and the general power conferred upon the justice to administer oaths, is sufficient to enable him to proceed and determine the question to his own satis-

faction by examining the person offering to go upon the bond upon oath, and if he is not satisfied, by calling and examining other witnesses.

His powers as a magistrate and justice of the peace at common law—the duty imposed upon him by statute to take and approve the bond—the whole tenor and course of judicial proceedings justified him in requiring this defendant to be sworn, and when the justice required him to be sworn he was required by law, within the meaning of our statute. Possibly the justice could not have compelled him to swear, but had he refused to do so, it would have answered the same purpose, and the justice would have rejected him, but if, when required by the justice, he voluntarily comes and swears falsely, he commits perjury. The statute of New Mexico provides (chapter XXVII., sec. 18), that in criminal cases the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision. At common law it was perjury to take a false oath in justifying bail in any of the courts or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding. Again, one of the best common-law definitions of the crime is, that perjury is committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely and falsely in a matter material to the issue. This was a judicial proceeding, the justice had a legal right to administer the oath, the matter inquired of was material in the case and the false swearing was perjury. It follows that the district court erred in quashing the indictment.

The judgment is reversed and the cause remanded.

All concur.

THE TERRITORY OF NEW MEXICO, Appellee, v. DAMIAN ROMERO, Appellant.

January 16, 1883.

NEW TRIAL. (1) *Granting of, discretionary: Decision not reviewable except where discretion abused.*

GRAND-JUROR. (2) *Objection to, must be made, when.*

PRACTICE. (3) *Review of matters extraneous to record.*

MURDER. (4) *Instruction as to degrees.*

SAME. (5) *Instruction limiting jury to consider evidence only with reference to first degree.*

1. The granting of a new trial is discretionary with the court below, whose decision will not be reviewed or reversed except for a manifestly gross abuse of its discretion, causing great injustice.
2. An objection to a grand juror, that he was not a citizen of the United States, comes too late after a plea to the merits. It is not ground for a motion in arrest of judgment.
3. Matters outside of the record are not reviewable by the Supreme Court.
4. A trial court is only required to charge as to such degrees of the crime of murder as there is evidence in the case tending to sustain. It is, however, its duty to charge as to *all* such degrees, and a failure so to do is error, if objected to in time.
5. It appeared from the evidence that the defendant, charged with murder, was arrested more than a hundred miles from the scene of the crime, having in his possession the watch, coat and cap of the deceased, and that, when arrested, he confessed to having taken also a race horse which had belonged to the deceased, and which he had sold in the vicinity where he was arrested; and there was, besides, other evidence which led the jury to believe that the defendant killed the deceased for the purpose of robbery: *Held*, that an instruction to the jury that there was "no evidence whatever to show that the killing of the deceased was justifiable or excusable, or that there were any circumstances to bring it within the definition of any degree of murder less than the first," is not erroneous.

Appeal from the District Court for Colfax county.

William Breeden, attorney-general, for the territory, appellee.

Frank Springer and *W. D. Lee*, for appellant.

BELL, Associate Justice. The appellant in this cause was indicted for the offense of murder in the first degree, at the regular term of the district court of the first judicial district of the territory of New Mexico, held in and for the county of Colfax at the March term of said court for 1882.

Thereafter, and at the same term of the said court, he was tried by a petit jury and convicted of the offense charged in the indictment, to wit, the crime of murder in the first degree. Following the conviction a motion was made for a new trial, for various reasons set forth in the notice of said motion filed in the cause, and appearing upon the record.

The court below denied the motion for a new trial.

That motion is not reviewable in this court, excepting only in a case where the discretion with which the court is vested, in that regard, has been grossly abused and great injustice has followed.

The question was recently considered in this court in the case of the *United States v. Lewis*, and the law held to be as herein stated.

In the case of the *Territory v. Webb*, *ante*, p. 147, the rule is laid down to be: "When the evidence is contradictory and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the cause, in their discretion, their decision denying the same is not examinable by an appellate court:" *Territory v. Webb*, Opinions of Supreme Court, p. 70, *ante*, p. 147, citing, *State v. Cruise*, 16 Mo., 391; *Herbon v. The State*, 7 Texas, 69.

In the same case, this court further holds that, "if there had been no part of the evidence, which if true, would sustain the verdict, then an error of law would have been apparent from the record upon which we could reverse the judgment.

"Under the rules governing the judicial administration of the criminal laws of this territory, this court can only review and determine errors of law appearing on the face of the

record:" *Territory v. Webb, supra*, and citing *Cathcart v. The Commonwealth*, 37 Pa., 108. This view of the law we reaffirm in this case.

We are clearly of the opinion, upon examination of the evidence, that it was not an abuse of the discretion of the court below to deny the motion, and therefore we cannot consider it here.

After the denial of the motion for a new trial, counsel for the appellant filed a motion in arrest of judgment, based upon affidavits charging that one of the grand jurors who presented the indictment against him to the court, was not a citizen of the United States.

That motion was also denied and we think properly so.

From the record it appears that this question was not raised until after the verdict.

It is perfectly well settled, that objection to the character of the grand jury, or the qualification of an individual member of it, comes too late after plea to the merits.

Bishop, as the result of an examination of the decisions on this subject, states the rule to be: "The courts will refuse to hear objections to the persons composing the grand jury or the manner in which it is impanelled, after the case has been tried by the petit jury:" 1 Bish. Crim. Law, 997, and the numerous cases there cited.

The same author in his work on procedure: "It is too late, after the verdict, to raise an objection of this class; as, that the grand jury was not lawfully constituted or a particular member disqualified:" 1 Bish. Crim. Prac., 887, and cases there cited.

It follows from the authorities cited, that there was no error in the court denying the motion in arrest of judgment for the reason assigned.

We now come to the consideration of the only question, which, we think is properly presented by the record for the determination of this court.

Error is assigned upon the following instructions given by the court to the jury: "In this case there is no evidence whatever to show that the killing of the deceased was justifiable or excusable, or that there were any circumstances to bring it within the definition of any degree of murder less than the first."

It is contended by the counsel for the appellant, that the court should have instructed the jury as to all the degrees of murder declared by the statute of the territory.

This is the only exception taken to the charge of the court below, and is therefore the only question which is reviewable here.

We think the law upon this subject is well settled, not only in this territory, but throughout the states of the Union, and we think the rule to be, that the court is only required to charge as to such degrees of the crime of murder as there is evidence in the case tending to sustain.

We deem it to be the duty of the court to charge as to all such degrees, and that a failure to do so is error, if objected to at the proper time.

In the *People v. Williams*, the Supreme Court of California held: "It is not error for the court to refuse an instruction in a criminal case which is not pertinent to the facts: 32 Cal., 280.

The same court in another case similar to the one at bar, used the following language: "If on the trial for murder there is no evidence of facts and circumstances, such as would under the law reduce the crime charged to manslaughter, the judge may so inform the jury, and charge them that they cannot consider the question of manslaughter:" *People v. King*, 27 Cal., 507.

In the case of *State v. Grant*, 7 Oregon R., cited by counsel for the defendant, the court holds that the degree of guilt, as well as the question of guilt, should be left to the jury,

but that was only in cases where there was evidence of more than one degree of crime.

The court in that case nowhere holds that it is the duty of the presiding judge to charge as to every degree of murder, whether there is evidence tending to sustain all the degrees or not.

In the case of *The State v. Glyden*, 51 Iowa, also cited by defendants' counsel, the court there expressly holds that it was not error for the court below to limit the consideration of the jury to the question of murder in the first degree, for they say that, from an examination of the record, they are of opinion that the facts showed the case to be one of murder in the first degree.

The counsel for the defendant also cited the case of *The People v. Dun*, 1 Idaho, p. 74.

That case decides the law to be precisely as we have here declared it.

It says: "A court is not bound to give instructions based on a supposed state of proof which does not exist. A defendant may insist on instructions that are sound law in the abstract, but, unless they have some application to the proof in the case, the court should refuse them, as having a tendency to confuse and mislead the jury. In the trial of a prisoner on a charge of murder, involving the penalty of death, while it is safe to give him the benefit of all presumptions, yet if the court sees no evidence to reduce the grade of the offense, it has the right to withhold an instruction which presupposes such testimony."

In this territory the same view of the law has been uniformly taken by the Supreme Court.

In the case of *The Territory v. Young*, *ante*, p. 93, where exactly the same question was raised, the court says: "The reading of the entire law as to homicide to a jury in each case would not only be useless, and as to some of the sections absurd, but would tend to confuse their minds, and make it

almost impossible for them to distinguish what the real crime, as proved is, and to agree on a proper verdict." *

* * * * * * *

"It is within the power, and we think it is the duty of the judge presiding to simplify and make clear the duties of the jury as far as possible, by eliminating from these degrees, which are in effect made by our law distinct crimes, any which the case certainly is not:" *Territory v. Young*, Opinions of Supreme Court, p. 36, *ante*, p. 93.

A careful examination of the evidence, as shown by the record, satisfies us that the appellant was either guilty of murder in the first degree, or he was innocent of the crime charged.

All the evidence shows that the deceased, William A. Brocksmidt, was assassinated for the purpose of robbery.

The testimony of the appellant himself is, in substance, that Rael, the Indian, killed the deceased, robbed him of his money, which he divided with him (the appellant), and that they then departed together, leaving the murdered man lying in the house.

The jury evidently did not believe this story, but were satisfied that the appellant himself killed Brocksmidt, in order to rob him.

They were entirely justified in taking this view.

The appellant was arrested, as the evidence shows, more than a hundred miles away from the scene of the crime, having in his possession the watch, coat and cap of the deceased, and when arrested, confessed to having taken also a race horse, which had belonged to the deceased, and which he had sold in the vicinity of where he was arrested.

We cannot see now, under the circumstances disclosed by this evidence, and all the other evidence in the case, the court could have been required, or even justified, in leaving the case to the jury on any other degree of crime than that of murder in the first degree.

We are of the opinion that there was no error in the instructions excepted to, and that the judgment should be affirmed.

All concur.

THOMAS KEENEY ET AL., Appellees, v. JOSE ANTONIO CARILLO ET AL., Appellants.

January, 1883.

WATER. (1) *Appropriation, rights conferred by:* (2) *Forfeiture of such rights by abandonment:* (3) *Enforcement, by injunction of such rights.*

CHANCERY PLEADINGS. (4) *Bill need not state evidence.*

SAME. (5) *Sufficient allegation of diversion of water.*

WATER. (6) *Right to subterranean stream.*

EVIDENCE. (7) *Answer under oath, how overcome.*

PLEADINGS. (8) *Misnomer of complainant.*

1. Complainants built a house near two springs, at the mouth of a cañon, took possession of them, and by an acequia, conducted water from them to a farm. Subsequently complainants dug ditches through a cienega, or marsh, several miles up the cañon, to drain the same, and collect and turn the water into the natural channel of the cañon below, wherein it continued to run upon the surface of the ground, about twenty cubic inches in volume, two or three miles to a place in the cañon, where it sank. To prevent the sinking and wasting of the water at this place, complainants constructed a dam, and made a ditch, conducting the water by and beyond the place of sinking, and turning it again into the natural channel of the cañon, wherein it continued to run to within about two miles of the springs at the mouth of the cañon, where it again sank, and entirely disappeared from the surface. Complainants' intention was to conduct the water by channels on the surface, natural and artificial, from the cienega to their lands in the plain below; but aside from having made the small acequia from the springs to such lands, they only prosecuted the work so far as to conduct the water to the place where it sank the second time, and then abandoned it for want of means and time. This was in 1876.

The respondents in September, 1877, commenced work, and succeeded thereby in conducting water from the cienega to the mouth of the cañon upon the surface, and thence to their lands on the plain below. The effect of this work was to dry up the lower springs at the mouth of the cañon where complainants had received their water, and conducted it to their lands, and complainants applied for an injunction to restrain the diversion of their water.

Held, That the land of the cañon being public unoccupied land, of no value whatever, save as a natural water course, complainants had a right in good faith to commence the necessary work to conduct to and upon their lands all or any part of the water of the springs, stream or cienega, and that if they had continued their work with due diligence to final completion within a reasonable time, their right to the water actually appropriated, would be valid, and would relate back to the time of commencing work, but that complainants had failed to prosecute the necessary work with due diligence, and that in consequence they had failed in appropriating *all* the water of the cienega.

2 That not having time and means requisite to a completion of the work within a reasonable time, would be no excuse; and a discontinuance on that ground for an unreasonable time would work the forfeiture of any right that might have been acquired and retained by due diligence in completing the work.

3. But that complainants had acquired a right by prior appropriation and use of the water flowing from the lower springs; that this amount was cut off by respondents' works, which took all the water from the cienega, and diverted the supply that otherwise would have reached complainants' springs; hence they were decreed one-fourth of the entire quantity of water.

4. Evidence need not be set forth in a bill of complaint.

5 Allegations in bill held sufficient to charge diversion of water by cutting off percolating water.

6. A well-defined and constant subterranean stream is protected to the owner as much as though it ran in a natural channel on the surface.

7. An answer under oath may be overcome by the testimony of one witness, corroborated by other facts and circumstances in the case.

8. One of the complainants was described in the bill as James Aguallo, but in the other papers and proceedings, was called José Maria Aguallo. This variance appeared to be the result of a clerical error. It was not objected in the court below, and was not prejudicial to defendants. *Held*, Immaterial.

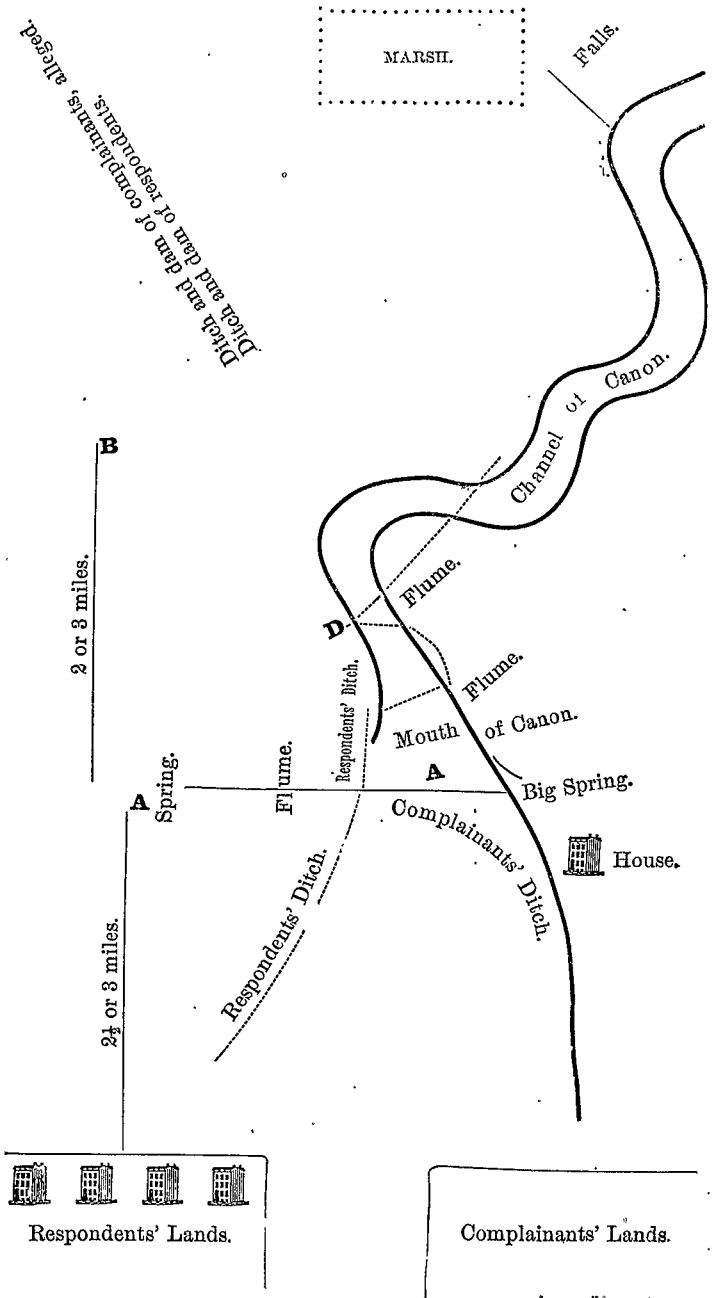
Appeal from the District Court for Doña Ana county.

This suit is brought by Thomas Keeney, James Hill, Humphrey Hill and James Aguallo, complainants and appellees, against José Antonio Carillo, Juan Lopez, Sebero Bargas and Francisco Maes, respondents and appellants, to enjoin the respondents from directing and using any of the water from cienegas and springs in the Alamo cañon in Doña Ana county, and from in anywise interfering with ditch of complainants there situate. Complainants' bill is sworn to, and requires answer under oath. Respondents answer under oath, and deny having interfered with complainants' ditches or water. Both parties claim the water flowing in said cañon above certain springs at the mouth of the cañon. Respondents make no claim to water of the springs last named, nor to ditches leading down from them. The proofs show that said cañon is from seven to fifteen miles long, and at head of cañon is a marsh, or cienega.

At the mouth of said cañon are two springs. A map, showing approximately the matters referred to in evidence, is herewith attached.

In October, 1876, complainants, with one Eugene A. Dow, went up into the said cañon, and did some work at cienega C, and in the cañon down to point D; also at elbow at flume, and at the springs at mouth A A, in all six days' work of five men, including a day occupied in going up and coming back from cienega, that is in all, thirty days' work. Work had been previously done at points named. Complainants built a house at mouth of cañon A, and dug ditch from springs A A to their lands below at E. But little water flowed from these lower springs, not enough to irrigate lands with. It is not shown that the work above increased the flow of water from springs at A A. Complainants failed to get water to flow further down cañon than to point at D, when it sank.

Complainants did no more work in cañon, abandoned the


Ditch and dam of complainants, alleged.
Ditch and dam of respondents.
MARSH.
Falls.
Channel of Canon.
B
2 or 3 miles.
Flume.
D
Flume.
Respondents' Ditch.
Mouth of Canon.
A
Big Spring.
A
Spring.
Flume.
Complainants' Ditch.
House.
Respondents' Ditch.
2½ or 3 miles.
Respondents' Lands.
Complainants' Lands.

enterprise and left the canon. Complainants show that it would have required only an expenditure of fifty or a hundred dollars to have conducted the water out of the cañon. None of the water in the cañon above springs at A A was ever appropriated by complainants to any useful purpose, and but slight evidence of an appropriation of water of springs at A A, and if it was appropriated, it seems to have been abandoned abont a year afterwards, in 1877. Respondents and associates went to cañon, took up lands out from mouth of cañon, and went to work to appropriate water. They opened ditch in March, built dam and made a ditch at D, and thence conducted water by means of ditch and flumes out of cañon and into their lands at F. The dotted line represents the ditch. Respondents made no claim to nor interfered with springs and ditches at mouth of cañon, claimed by complainants. These ditches and springs are below respondents' ditches, and water from them cannot flow into respondents' ditch. Respondents, from eight to eighteen in number, worked constantly from one to two months at construction of their ditch, about forty days. They appropriated the water irrigating their lands below. When respondents were about getting their ditch in cañon completed, complainants appeared and claimed water in the cañon as their property. Afterwards, when respondents had completed work and appropriated water of cañon, complainants came back to the mouth of the cañon and claimed the water. This suit was not instituted until December, 1878, but in the summer previous, by an agreement between parties, complainants had use of respondents' ditch to get water to lands for a time, which was not to prejudice either party's rights to premises. During the time they (complainants) were thus getting water from respondents' ditch, complainants built a cabin or two on their lands, and did one planting. The complainants, up to time of commencement

of this suit, did not attempt to build a ditch in cañon from D to mouth of cañon.

W. L. Rynerson and T. B. Catron, for appellants:

The judge who heard the cause found that the complainants only are entitled to the water of the springs at mouth of cañon, and that the respondents, by constructing their ditch and diverting the water of the cienega, decrease the water of the springs at mouth of cañon. This question was not presented by complainants' bill, and the witness Dow, who gave the only testimony on this point, shows by his own testimony that the assumption that the springs last named are supplied by the water of the cienega at head of cañon is not sustained.

In referring to complainants, it is to be understood that complainant, James Aguallo, has established no right whatever, and that one José Maria Aguallo, not named in complainants' bill, was an equal partner in all that the other complainants acquired, or attempted to acquire. It is apparent that there is a misjoinder of parties plaintiff, which is fatal to complainants' bill.

As to the effect of constructing respondents' ditch upon springs at mouth of cañon, there being only one witness testifying on that point, and answer of respondents having been made on oath, his oath cannot prevail against averment in answer: See Grisley's Equity Evidence, p. 227.

Evidence only opinion, and therefore will not warrant injunction: See Hilliard on Injunction, par. 23, p. 19, etc.

To warrant injunction, clear and certain rights and full disclosure of facts must appear. Complainants should have set up in their bill facts touching diverting water by cutting off percolating water: See Hilliard on Injunction, par. 18, p. 16, and authorities there cited.

Complainants cannot enjoin use of percolating waters: Angell on Water Courses, pp. 152, 173 and 176.

Allegations and proofs must correspond to: U. S. Digest, 390, § 6155; 21 Ill., 17.

Allegations denied by answer must be proven by two witnesses, or one and corroborating circumstances: *Id.*, 6163; 7 Blackford, 162; 10 Foster, 500–509.

S. B. Newcomb, for appellees:

The appellants assume, in the statement of their case, both as to the facts and the law applicable thereto, that they had a clear legal right to appropriate the water in the Alamo cañon, and that their going into said cañon and doing the work they did in no way trespassed upon or interfered with the prior rights of complainants. Upon no other hypothesis could they claim to have any legal or equitable standing in a court of equity. If their going there was a trespass upon, or an interference in any way with, the prior rights of complainants, then they do not come into this court with clean hands; they cannot invoke the aid of this court to perpetuate that wrong. He who seeks equity must do equity.

Now, we say that the defendants had no business in that cañon in the first place. They were trespassers from the beginning; they knew before they went there that the complainants had been in possession of this cañon, including the cienegas and springs at its head for a long time previous. They knew that complainants had taken up, or were occupying, land below the mouth of said cañon; that they (complainants) had had their stock there; had built a house at the mouth of the cañon, had lived there, were striving to make a home for themselves and their families; they knew that the complainants had done work in and at the head of the cañon. They also knew perfectly well, as every one in the country knew, that the lower springs derived their supply of water from the marshes and springs above; they were well aware that if they succeeded in carrying the water out of the cañon above the lower springs, that those springs would dry up (as they did), and the complainants would be

literally "starved out;" would be compelled to leave their lands and homes; be obliged to take away their stock and abandon all the property they had acquired and the work they had done. This is what defendants intended to do when they went there, and that is what they will succeed in doing should this court sustain their view of this case. They did not want these complainants there; they intended to force them to leave.

We contend that complainants had possession of not only the mouth of the cañon and the grounds below, but of the cañon itself, up to its very head, long before the defendants went there at all. The bill alleges, and the answer admits, that said cañon is a narrow, rugged gorge in the mountains; the evidence shows that it is even impossible to pass all the way up through this cañon to its head. It was absolutely impossible for complainants to fence in this cañon. They could under no circumstances take exclusive possession of it any further than they did, that was by building a house at its mouth, and they also built a small house up at the cienega; they dug ditches through the cienega, and also at different places in the cañon. They, or some of them, lived at the mouth of the cañon, not all the time, it is true, they were absent occasionally, but they kept their cattle there, and farmed lands in the vicinity. This, we contend, was taking actual continual possession of the cañon; they could do no more under the peculiar formation of the country, and it was sufficient actual possession as against mere trespassers, such as these defendants. These defendants knew, when they first went there, that complainants claimed possession of this cañon. Their own witness, Sylvanio Gabaldovia, who was one of the party who worked for and with the defendants, says, "We had heard, before we went there, that plaintiffs were in possession of mouth of cañon; we had heard that the Hills were living in the house at the mouth of the cañon." Again, their own witness admits that Hum-

phrey Hill served a notice on them not to work, or in any way interfere with this cañon, and that the complainants claimed the possession and ownership of the same. One witness testifies that he stopped work as soon as this notice was served, he having some sense of right and justice, acknowledged complainants' claim, and abandoned the enterprise. The complainants' possession was good as against all the world, save the United States Government.

It is abundantly evident from the evidence, that the lower springs are fed from the cienega and upper springs; all the facts and circumstances indicate this beyond a doubt. This fact can only be shown by the circumstances and the opinion of men who are acquainted with the cañon and springs; why it was that every party who undertook to settle there, and utilize the water at this place, went up to the cienega to make ditches and clean out the springs up there, the first thing they did. The party who went there some eleven years before this suit was commenced, went up there to work to increase the flow of water. Alexander Hill, some years later, did the same thing. These plaintiffs did the same, and so did the defendants; all parties had to do this, and why? simply because the lower springs furnished no water save what came from above. How did it happen that as soon as defendants cut off the water above one of the lower springs dried up entirely, and the other nearly so? Can there be a doubt about this? None in the least; and this is why complainants took possession of the whole cañon and claimed it as theirs. There was no land in the cañon that could be utilized or used; the water was all there was on it, and the springs at the mouth and the land below were of no use to any one without the springs and water above.

We further contend, that the complainants had not lost their right of prior possession and appropriation of this upper water, that under the circumstances of the place and country, one year, or two years, would not be too long for

them to be engaged in bringing down this water. It is a barren, desolate country, at times very dangerous, on account of Indians. The complainants were poor men, struggling hard for a living; they were doing all they could to complete this work; they had to go slow, stop occasionally for want of time and means, but they did not give up their possession; they still held on to their lands and houses and water, and they should be protected in their rights. These defendants had no business there; they were trespassers, and cannot claim any right to the water in question, in equity.

Defendants claim that because their answer is sworn to, therefore we must contradict in every instance by more than one witness; when we examine this answer, and see what they have sworn to, we think the court will have little difficulty in disposing of this matter. Defendants swear that complainants never did any work up the cañon, nor built any house at the cienega, and now they admit, in the statement of facts, that complainants did do thirty days' work up in the cañon; and the evidence shows conclusively that they did a large amount of work up there, and that they did build a house at the cienega. So much for this very truthful answer. The point that James Aguallo is made plaintiff, instead of José M. Aguallo, is taken a little too late in the day to be available; at most it is a mere clerical error, and can be amended.

The defendants admit plaintiffs' right to the lower springs, and in this admission they give away their case.

It is a well-settled law, that the owner of a spring has a perfect right to it against all the world, except those through whose land it comes. Strangers cannot take it away or destroy it, even though it be derived from lands which do not belong to the owner of the spring. See Angell on Water Courses, p. 182, also 153, *Id.*, 99, 150.

The question of fact whether the lower springs are supplied with water from this upper, has been decided by the

chancellor in the case in the affirmative, and being a question of fact its decision by the judge has the same force as if decided by a jury, and this court will not disturb the finding.

BELL, Associate Justice: The judgment entered in the court below decreed that the appellants herein (respondents in the court below), are entitled to the exclusive use of three-fourths of the water running in their acequia at the mouth of Alamo canon, mentioned in the bill. It further decrees that the appellants "are entitled to one-fourth of the water running in said acequia."

The decree then provides the manner of dividing the water in these proportions between the respective parties, and maintaining the ditches in good order.

It closes with a restraining order enjoining "either party from in any manner interfering with, or preventing or obstructing the free and exclusive use by the other party, or either of them, of that proportion of said water which such party is hereby decreed to be entitled to."

Each party is required to pay his own costs.

From an examination of the evidence taken before the master we think the facts are fairly set forth in the opinion of the court below, which is as follows:

THOMAS KEENEY ET AL. v. JOSÉ ALBINO CARILLO ET AL.	*District Court, County of Doña Ana—In Chancery.*

This suit was brought to enjoin the respondents from using or obstructing the use by the complainants of the water flowing from the mouth of the Alamo cañon, situated in Doña Ana county.

Both complainants and respondents claim the water on the ground of prior possession and appropriation, for the purpose of irrigating lands.

From the testimony taken and reported by the master it

seems that the complainants first attempted to appropriate the water in question, and to some extent succeeded, in the year 1876.

It is evident, however, that all the water actually appropriated by the complainants was taken from certain two springs at or near the mouth of the cañon.

Several miles up the cañon is situated a cienega, or marsh. In 1876 the complainants dug ditches in and through this cienega to drain the same and collect and turn the water into the natural channel of the cañon below, wherein it continued to run upon the surface of the ground, about twenty cubic inches in volume, two or three miles to a place in the cañon where it sank.

To prevent the sinking and wasting the water at the latter place, the complainants constructed a dam and made a ditch, conducting the water by and beyond the place of sinking and turning it again into the natural channel of the cañon, wherein it continued to run to within about two miles of the said springs at the mouth of the cañon, where it again sank and entirely disappeared from the surface.

The complainants commenced the work above mentioned, and prosecuted it to the extent specified, with the intention of conducting the water from the cienega at the head of the cañon by channels on the surface, partly natural and in part artificial, to their lands on the plain below.

But, aside from having made a small acequia from the springs to their lands to be irrigated, they only prosecuted the work so far as to conduct the water to the place where it sank the second time. This was in 1876.

There is nothing in the testimony showing, or tending to show, any intention since that time on the part of the complainants to resume and complete the work. In the language of one of their witnesses, the work was then discontinued for want of means and time.

The question now is, how much water had the complainants, up to this time, appropriated to some useful purpose?

The respondents the year following, 1877, in September, commenced work, and succeeded thereby in conducting water from the cienega to the mouth of the cañon upon the surface, and thence to their lands on the plain below.

The effect of this work was to dry up the lower springs at the mouth of the cañon, where the complainants had received their water, and conducted it by an acequia to their lands. That these lower springs were fed by the water coming from the cienega above is quite evident.

But if the water from the cienega flowed under ground for any considerable distance before reaching the lower springs, it is evident that a large amount, which, percolating through the ground beneath the surface, would be absorbed, and never make its appearance at the springs.

It is also very probable that the work of the complainants in conducting the water on the surface to the place where it sank the second time would to some extent increase the flow of water from the lower springs, but what this increase was does not satisfactorily appear from the evidence.

In fact, the testimony on both sides as to the amount of water appropriated by either complainants or respondents is so very loose and indefinite, that it is quite impossible to come to any very satisfactory conclusion as to the equity of the case on that point. My impression from the testimony, however, is that the complainants had acquired a right by prior appropriation and use of the water flowing from the lower springs; that this amount, whatever it was, was cut off by the respondents' acequia, which took all the water from the cienega and diverted the supply that otherwise would have reached their springs.

That the labor performed by the respondents in conducting the water to the mouth of the cañon was, perhaps, more than four times as much as that performed by complainants,

and was more than four times as effective for the purpose; and that the water flowing from the mouth of the cañon, in the respondents' acequia, was at least four times as much as that previously flowing from the springs, and appropriated by the complainants.

The respondents, of course, in any event had the right by their labor to increase the flow of water from the mouth of the canon, over and above that actually appropriated by complainants from the springs and acequia, the right and title to such increase.

The complainants seem to place great reliance upon the fact that they were before the respondents in *commencing* work for the appropriation of this water; that they had built a house in the cañon and taken possession of the *land* at its mouth, etc.

It is true that a party may in good faith commence the necessary work to conduct to and upon his lands all, or any part of the water of a spring, stream or cienega, and continue the work with due diligence to final completion within a reasonable time, and in that case his right to the water actually appropriated by him will relate back to the time of his commencing work, and, in the meantime, and before the expiration of what would be a reasonable time, under the circumstances, he would be protected in what he could show that he intended to appropriate by his works as against any trespasser: *Weaver v. Eureka Lake Co.*, 15 Cal., 271; *Kimbal v. Gearhart*, 12 Cal., 28.

Not having the time and means requisite to a completion of the work within a reasonable time, would be no excuse, and a discontinuance on that ground for an unreasonable time would work the forfeiture of any right that might have been acquired and retained by due diligence in completing the work: *Kimbal v. Gearhart*, 12 Cal., 28.

In the case under consideration, the complainants, though they may have commenced work in 1876, with the intention

of saving and appropriating all the water that could be made to flow from the cienega to the mouth of the cañon, have failed to prosecute the necessary work therefor with due diligence to completion within a reasonable time, and, in consequence, have failed in appropriating all of such water. And in my opinion they are, under the circumstances, entitled to no more than a fourth of the water running in the respondents' acequia.

For these reasons I have concluded to grant the decree rendered this day in this suit. Dated this, the 29th day of June, A. D. 1880.

WARREN BRISTOL,
District Judge Third District N. M.

From the decree based upon this opinion, and which has been recited above, this appeal has been taken. It is objected that complainants should have set up in their bill facts touching diverting water—by cutting off percolating water—that failing to do so, they are not entitled to the relief given to them by the decree.

The rule is well settled, that it is not necessary to plead the evidence in a bill of complaint, and we are of opinion that the bill in this case sufficiently sets up a division of the water by which the springs are now supplied through a subterranean passage.

The bill charges that after the plaintiffs, at great labor and expense, had opened said springs and cienega, and after they constructed ditches, dams and acequias, to conduct and lead said water on to their lands, and after they, by the means set forth, acquired an exclusive right to the use of the said water for irrigation purposes, and while they were in actual and peaceable possession of said lands and of the cienega and springs, and of the water flowing from said cienega and springs, and the use thereof, that the defendants did forcibly and violently, and without the consent, and against the will

of the plaintiffs, take said water and appropriate it to their own use.

The complaint further charges that the defendants have already diverted and are still diverting all of the said water from the ditches and acequias of the complainants into other acequias and ditches, by means whereof the flow of water in the ditches and acequias constructed by the complainants, has entirely ceased. Under these allegations, we are of opinion that evidence was admissible, showing that the waters which flowed from the springs, at the mouth of the cañon, into one of the acequias of the complainants, ceased to flow, after the diversion of the waters by the defendants from the ditch built by the complainants, in the upper part of the cañon.

The court below finds that to be the fact, and the pleadings and evidence justify the finding. The channel of the water was for part of the distance subterranean, but a well-defined and constant stream in a subterranean channel is protected to the owner as much as though it ran through a natural channel on the surface: *Taylor v. Welch*, 6 Oregon, 198. We think the evidence in this case shows that the water flowing from the springs at the mouth of the cañon was furnished through as well-defined a subterranean channel as it would ordinarily be practicable to describe.

The evidence shows that the waters flowing from the complainants' ditch in the upper part of the cañon disappeared at a certain point in the natural gulch, and that it again came to the surface regularly and constantly at the springs at the mouth of the cañon.

It was not a case of percolating water within the meaning of the law; the natural conformation of the soil made it quite certain that the water flowed in the direction of the springs, and the fact that the water ceased to flow from them after the defendants had diverted the water from the ditch of complainants in the upper part of the cañon, is almost

conclusive evidence that the water of the springs was furnished from the complainants' said ditch.

It is also to be noted that this is not the case of an adjoining owner diverting percolating water in his own soil from flowing into his neighbor's land. Here the land of the cañon was public unoccupied land, of no value whatever, except as a natural water-course; the complainants went on it, did work by which their supply of water was increased to them; they were in the actual use and enjoyment of that water; that the defendants then came, and without any right whatever, went into the cañon and dug ditches, which entirely cut off the supply of water which the complainants had theretofore enjoyed.

Surely these facts warrant the interference of a court of equity.

The court below held that under the circumstances the complainants were entitled to the continued use and enjoyment of at least so much of the water flowing through the said canon, as they had previously enjoyed.

In that view we concur.

We think the law is clear on the subject: "A subterranean stream which supplies a spring with water, cannot be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use:" *Smith v. Adams*, 6 Paige, 435; Angell on Water Courses, sec. 112A. In this case there is no pretence of ownership by the defendants of the lands above the complainants. The law in regard to percolations is different, *ex necessitate rei*, for they "spread themselves in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land:" Angell on Water Courses, *supra*. It is alleged by the appellants that the answer being under oath, it must be overcome by the evidence of more than one witness, and that as to the effect of constructing appellants' ditch upon the springs at the mouth of the cañon, but

one witness was examined. Entertaining the views already expressed, we think that the evidence of the witness on that point was sufficiently corroborated by the other facts and circumstances in the case.

It is objected that the court erred in finding a decree in favor of James Aguallo.

From an examination of the record, it would appear that though one of the complainants in the bill is described as James Aguallo, in the other papers and proceedings he is called José Maria Aguallo.

It would appear to have been a clerical error in thus describing him by different Christian names, but as the defendants are not in any way prejudiced by it, we deem it of little importance. The question was not raised in the court below, and we will not further consider it here.

We find no error in the record presented.

The judgment should be affirmed.

All concur.

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ABANDONMENT.

See CONTRACT FOR WORK AND LABOR; REPLEVIN, 16; WATER, 2.

ACCESSORY.

See CRIMINAL LAW AND PRACTICE, 2, 3, 5.

ACCORD AND SATISFACTION.

Executory agreement to pay out of proceeds of mine is not.

The maker of a promissory note for $250 agreed to give the holder a portion of the proceeds of an interest in a mine, and claimed that the same was agreed to be in full payment for the note. At one time he paid the holder out of such proceeds the sum of $86, which was credited upon the note. Subsequently, he tendered the holder $50, all of the further proceeds of the mining interest, but the holder refused to accept this sum in full payment for the note and to surrender the note, and brought suit upon it.

It appeared that neither at the time the agreement was made nor subsequently did the holder surrender the note, give a receipt, or execute a release, and that he kept the note and credited all the money paid on it. It also appeared that at the time of the agreement the maker did not demand the note, or a receipt; that two years afterwards he paid the $86 on the note, and that five years later tendered the $50.

Held, That an agreement to settle a claim or demand in order to constitute an accord and satisfaction, and as such bar an action, must be executed. That this agreement was not executed but executory, since the money with which to pay the note was to be produced from the mine; and held, further, that the acts of the parties showed no intention to treat the agreement as an accord and satisfaction. *Frick v. Joseph,* 138

ACEQUIA LAW

Violations of, not crimes: Proceedings to enforce.

The acequia law of New Mexico (Act January 7, 1852, Gen. Laws N. M., Prince, 14), provides (section 18) that "If any person obstruct, interfere with or disturb any of said ditches or use the water from it without the consent of the overseer during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recovered" (section 17) "by the overseer before any justice of the peace in the county." And section 18 further provides for the recovery, in addition, "of all damages that may have accrued to the injured parties, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works."

Held, That these provisions created no public crime for which a person may be arrested in the first instance and prosecuted on behalf of the territory, and fined and imprisoned in default of payment. That the word "fine" should be construed to mean a pecuniary penalty merely that may be sued for by the overseer, in his official capacity, in a civil action, and when recovered by him, applied to the repairs of the acequia. That if the defendant is too poor to pay the amount adjudged against him, he may be compelled to work fifteen days on the public works, and the only restraint that can legally be placed on his liberty, is such as may be reasonably necessary to compel him to perform such work.

Held further, That a judgment under these provisions of the acequia law by a justice of the peace, that the defendant pay a fine to the territory, and costs, and that he be imprisoned in the common jail until such payment, is without authority of law, and the whole proceeding was unauthorized as a criminal prosecution. *Territory v. Baca,* 183; *Territory v. Tafoya,* 191

AFFIDAVIT.

See REPLEVIN, 9, 10, 15.

AGENCY.

See CRIMINAL LAW AND PRACTICE, 25, 26; PROMISSORY NOTES

AMENDMENT.

See ATTACHMENT, 4; PRACTICE, 22.

APPEAL.

See CRIMINAL LAW AND PRACTICE, 9, 40; JUSTICE OF THE PEACE, 7; PRACTICE, 7, 8.

From justice: District court governed by what rules: Jurisdictional amount.

1. In the trial and determination of causes in the district court upon appeals from judgments rendered by justices of the peace the district court must be governed by the same rules that are prescribed by law for the government of courts of justices of the peace in like causes. The law provides that no justice of the peace shall have jurisdiction over a debt or damages in an amount exceeding $100, and the verdict and judgment being for more than double ($270 + $46) this sum, they are erroneous. *Garland et al. v. Bartel Brothers,* 1; *Barruel v. Irwin,* 222

Same: Jurisdiction of justice must appear in order to enable district court to try case de novo.

2. On appeal from a justice of the peace, the district court has no right to proceed to trial *de novo,* without having before it a *prima facie* case showing that the justice had jurisdiction. Such jurisdiction cannot be presumed. *Barruel v. Irwin,* 222

Description of parties: Replevin, judgment against sureties on replevin bond: Reformation of judgment upon appeal.

3. William Garland commenced an action of replevin before a justice of

the peace against Julius Bartels and Gus Bartels as Bartels Brothers. He gave the sheriff a bond with B. H. Hopper and J. H. Hopper as sureties, and 900 ties were replevied of defendants. Julius Bartels appeared and a trial was had before the justice of the peace. It resulted in a verdict by the jury and an assessment of costs by the justice "against Julius Bartels," who appealed to the district court. In the record of that court Bartels Brothers are stated to be "appellants." Neither Garland, nor his sureties, appeared in the district court to contest the appeal, and, upon default, a jury was impanelled to ascertain the damages sustained by Bartels. It assessed them at $270, for which sum, and $46 costs, the district court rendered judgment in favor of "appellants," and against the plaintiff and his sureties.

Held, That the parties ought to have been described on appeal to the district court by the same name as in the action commenced originally before the justice of the peace. That in entitling the cause, rendering judgment or otherwise proceeding upon the appeal in the district court, it was irregular to describe the defendants merely by the firm name of Bartels Brothers, but that the judgment ought not to be disturbed for this irregularity, since it in nowise affected plaintiff, and that the judgment of the district court against the sureties was invalid for want of jurisdiction, they not appearing and never having been summoned; but that if there were no other irregularities, the Supreme Court might reform the judgment so as to obviate this error. *Garland et al. v. Bartels Brothers*, 1

Discharge of prisoner upon appeal to Supreme Court.

4. There being no evidence in the court below to sustain the conviction of one charged with a felony, on appeal to the Supreme Court, that tribunal will not remand the case for a new trial, but will direct that judgment below be reversed, and that the defendant be discharged. *United States v. Lewis*, 459

APPEARANCE.

See CAPIAS AD RESPONDENDUM; PRACTICE, 15, 16, 17, 18.

ASSESSMENT OF PUNISHMENT.

See CRIMINAL LAW AND PRACTICE, 18, 19, 45.

ASSUMPSIT.

Instruction to find for defendant.

In an action of assumpsit it is proper for the court to instruct the jury to find a verdict for the defendants where no evidence is adduced tending to prove either an express or implied obligation or promise by defendants, or either of them, as the plaintiff alleged in his declaration. *Herrara v. Chaves*, 86

ATTACHMENT.

See PRACTICE, 17, 19.

Variance in pleadings as to description of parties.

1. The declaration, affidavit, writ, bond, judgment and execution in

attachment, must not vary in their description of parties. Affirming *Bennett v. Zabriski.* PRINCE, C. J., dissenting. *Bennett v. Zabriski,* 176

Writ, allegations of, traversable.

2. A writ of attachment is traversable. Every material fact alleged in it may be denied, and trial had upon it without reference either to the petition or to the declaration, which cannot be relied upon to supply deficiencies in the writ. *Bennett et al. v. Zabriski,* 8

Pleadings in, description of parties: Variance.

3. The plaintiffs must be described in substantially the same way in the affidavit, writ, and declaration in attachment. If different descriptions are given in the affidavit and in the writ, it will not be presumed that the plaintiffs named in each are the same.

Thus, where the affidavit in attachment was in behalf of the firm of Bennett Bros. & Co., but did not show of what persons said firm was composed, and the writ of attachment was issued in favor of Cornelius Bennett, Joseph F. Bennett, and Henry Lesinsky, but did not show that these persons composed the firm of Bennett Bros. & Co., or any other firm, it was held that all proceedings founded upon such affidavit and writ were properly quashed upon motion by defendant. *Ibid.*

Amendment of Writ.

4. In the absence of statutory authority so to do, a writ of attachment cannot be amended. *Ibid.*

Effect of forthcoming bond.

5. Under the statute, the giving of a forthcoming bond in attachment does not release the property from the attachment lien. It simply constitutes the defendant in attachment the bailee of the sheriff for the safe keeping of the property and for its return to the sheriff in case the plaintiff shall recover, and in default of which the liability of the bond attaches to the defendant and his sureties. *Holzman v. Martinez,* 271

Service of Writ.

6. The service of a writ of attachment is never complete without also serving the petition or other lawful statement of the cause of action. *Ibid.*

Power of probate clerks to issue writs of.

7. *Quaere,* whether the statutory authority conferred upon probate clerks to entertain applications for and to issue writs of attachment returnable to the district court, does not repeal so many positive requirements of the law previously existing in relation to authenticating the writ and approving the bond in attachment as to render such authority of probate clerks exceedingly doubtful and impracticable. *Ibid.*

Writ returnable on impossible day and term.

8. A writ of attachment was in September, 1880, issued and made returnable "at the next March term, 1880."

Held, That the writ of attachment having been made returnable on a day and to a term of court then past, such writ was returnable to an impossible day and term. That all proceedings under it were void, and that the defendant need not have paid any attention to it, even if it had been served.

PRINCE, C. J., dissented, holding that "1880" had been written in the writ by clerical error, and that the word "next" made it sufficiently apparent that "1881" was intended, and that such day and term were not impossible. *Ibid.*

BILL OF EXCEPTIONS.

See CRIMINAL LAW AND PRACTICE, 35; PRACTICE, 9, 11, 13.

BILL OF PARTICULARS.

When it may be asked.

A defendant in a suit before a justice of the peace, considering himself not sufficiently apprised of the cause of action, may demur or demand a bill of particulars. *Crolot v. Maloy,* 198

BURGLARY.

Prosecution for, under general railroad law.

The general railroad act, ch. 1, tit. 8, section 8, provides that "any person who shall in the day or night time enter by force or otherwise, any car of any corporation, formed under this act, with intent to steal any valuable thing then and there being, shall be deemed guilty of burglary, and upon conviction thereof shall be punished as in other cases of burglary." This provision applied only to corporations created under this general act, but subsequently the legislature passed an act conferring upon all corporations organized before the passage of the general railroad law, "all the powers, *privileges* and exemptions conferred upon corporations organized" under that act. Upon the theory that the "privileges" thus conferred would give to corporations formed before the passage of the general railway law, the "privilege" of being protected from burglary in the means provided by the section of the general law quoted above, the defendants were indicted under section 8, ch. 1, tit. 8 of the general railroad act for burglarizing the cars of the N. M. & S. P. R. R. Co., a company organized before the general railroad statute was passed.

Held, That the word "privilege," as used in the second act, does not confer the right to prosecute any one for burglary under section 8 of the general railroad act, ch. 1, tit. 8, where the burglary was of cars owned by a company organized before the general act was passed; but that the defendants could be prosecuted under the criminal code of New Mexico.

PRINCE, C. J. dissents, holding the general railroad law of the territory in effect divided the railway corporations of the territory into two classes, one of which possessed the privilege of protection from robbery and depredation by burglars, while the other class, consisting of corporations not organized before the passage of the general railroad law, did not possess this privilege; that this statute in conferring upon one class of companies privileges of protection denied to the other class, conflicted with section 1889, U. S. Rev. Stat. prohibiting the granting of especial privileges to any corporation or individual; that the object of section 1, chapter 3, Laws of 1878 was to place all the railroad companies organized under the laws of the territory upon the same footing, to permit no inequality of rights or privileges, but to bring about an entire uniformity and equality in their position before the law; and that under this enactment a person might be indicted, tried and convicted of burglary of

the cars of a railway company notwithstanding it was organized after the enactment of the general railroad law. *Territory v. Stokes,* 161

BOND.

See APPEAL, 3; ATTACHMENT, 5; PRACTICE, 17.

CAPIAS AD RESPONDENDUM.

Appearance by attorney to plead.

A person arrested on a *capias ad respondendum,* who gives a bond to appear on the first day of a subsequent term of court, need not appear until the second day of such term, and then he may appear by attorney for the purpose of traversing the affidavit and pleading to the declaration; being only bound by law to render himself in custody to abide the judgment, order or decree of the court, he need not appear in person for any other purpose. *Magruder v. Weisl,* 21

CHANCERY.

See WRIT OF ERROR.

COMMON LAW.

What is not, as to embezzlement.

1. The act of parliament passed in 1799 (39 Geo. III.) relating to embezzlement and the decisions of courts construing it, are not part of the common law of New Mexico. *Territory v. Maxwell,* 250

Duty of New Mexico courts to follow.

2. It is the duty of the courts of New Mexico to follow the decisions of the United States supreme court, so long as New Mexico remains a territory. *Montoya v. Donohoe,* 213

CONSTITUTIONAL LAW.

Special act of congress not necessary to annul territorial statute.

1. It is not true that because a territorial statute has never been directly abrogated by act of congress, it is, therefore, certainly valid. Action by congress in annulling territorial statutes is rare, and only takes place where they are not void of themselves, but simply improper or inexpedient without being illegal, *per se.* The usual way of declaring a territorial statute which is inconsistent with the higher law of congress inoperative, is through the courts, just as in states statutes would be adjudged unconstitutional. *In re Attorney General,* 49

What is the constitutional law of a territory.

2. In a territory the constitution and laws of the United States, and especially the organic act of the territory itself, stand exactly in the position that a state constitution occupies in a state. *Ibid.*

What classes of official vacancies governor of territory can fill without consent of council.

3. Congress having, in the law of 1872, relating to appointments by the governor (Rev. Stat., U. S., sec. 1858), distinctly designated two

classes of vacancies which the governor can fill without the consent of the council, the maxim "*expressio unius est exclusio alterius*," and the legal construction as well as the reasonable interpretation of this enactment is to exclude the governor from filling any other kind of a vacancy than these two, without the consent of the council, as fully as if he were expressly excluded in terms from so doing. *Ibid.*

CONTINUANCE.

See CRIMINAL LAW AND PRACTICE, 30.

CONTRACT.

See ASSUMPSIT; PLEADING, 1.

CONTRACT FOR WORK AND LABOR.

Abandonment—Recovery notwithstanding.

Plaintiff contracted to paint defendant's house, etc., without delay, and the latter agreed to furnish defendant with the necessary materials to do the job, and did so as to part of the job and paid plaintiff part of the contract price, but before the contract was completed locked the house and refused to allow plaintiff to continue work, telling him that there were no materials, and that he would be notified when to resume. He never notified plaintiff to resume.

Held, That the furnishing of materials was a condition precedent to plaintiff's performance of the work; that plaintiff having done work amounting to $789, and having been paid $372 30, was entitled to judgment for the balance, with interest, notwithstanding he did not fully complete the work.

Quære, whether defendant was not so far at fault as to justify plaintiff in abandoning the contract, for under the terms of the contract whereby defendant obligated himself to furnish the materials, without any mention as to time, the law will imply an agreement to furnish them within a reasonable time. *Baca v. Barrier*, 131

CRIMINAL LAW AND PRACTICE.

See ACEQUIA LAW; APPEAL, 4.

Murder, Evidence, Admissions: Competency of, how affected by time of making admissions, and by time of occurrence of facts admitted.

1. The time when an admission is made does not affect its competence as evidence, even though it be made years after the commission of the crime to which it relates. The time of the occurrence of the facts admitted is of more consequence, however, and if remote from the date of the crime, a serious question might be raised as to the competence of the admissions concerning them. But not so, if the facts occurred within a short while after the crime was committed.

Held, That where, within a day after the murder was committed, the prisoner said: "You need not blame the boys for robbing him of his clothes;" that "in Germany there was a case of the kind where a man was murdered and the body was identified by the clothing," and that that was the reason why she sent the sack along to bring the clothes home, both the admissions and facts were sufficiently proximate to the murder to be competent evidence. So

also, an admission by the prisoner as to the concealment of the coat in a quilt, was held competent. *Territory v. Dwenger,* 73

Murder: Accessory, guilt of principals to be established.

2. In the trial of a person as accessory to a murder committed by several, the guilt of the principals, or of some one of them, must first be established by competent testimony. *Ibid.*

Evidence, principal and accessory.

3. An admission by one of the principals, a son of the accessory, that "my mother and Mr. Young put up the job that we were to kill him; the plan was made at the breakfast table the morning we went out to kill him," relates not only to the guilt of the principals but also to the guilt of the accessory, and is competent as to both issues. An instruction which would exclude this admission from the jury is erroneous. *Ibid.*

Instruction limiting application of such evidence.

4. But where certain evidence relates wholly to the principals, perhaps an instruction may be framed requiring the jury to limit the application of that evidence to them alone, and requiring the jury not to consider it with reference to action or complicity of the accessory. *Ibid.*

Evidence of guilt of principals and of accessory.

5. In such a case there is no distinction between the competency of evidence as to the guilt of the principals and of evidence as to the guilt of the accessory. Any testimony which is competent evidence regarding either branch of the case is admissible. *Ibid.*

Murder: Instruction held not a comment by judge upon weight of evidence: Instruction as to degree.

6. In a murder case a statement by the judge to the jury that "there is no evidence before you tending to show that the killing of Henry F. Dwenger is murder in any other degree than the first degree of murder" is not erroneous, as being a comment by the judge upon the weight of the evidence before the jury. It is a statement that there is no evidence of a certain kind; but if, in fact, there was evidence of the kind named, such a statement would be erroneous, and it is not improper for the judge to designate the degree of murder which the evidence shows was committed by the accused. *Territory v. Young,* 93

Jurors need not be absolute "owners" of fee of real estate.

7. Under the law requiring a juror to be the "owner" of real estate, it is not necessary that jurors shall be absolute owners of the fee. The statute is to be construed liberally, and the requirement of ownership is met, if the juror be in possession of, or have a qualified interest in real estate. *Ibid.*

Erroneous acceptance of juror cured by peremptory challenge.

8. An error of the court in refusing to exclude a person from the jury, upon the ground of non-citizenship, is cured by the party objecting to such juror, peremptorily challenging him. *Ibid.*

Dismissal of appeal from justice of the peace by district court, need not be ordered until indictment found or information filed.

9. But if it appears by evidence, that the misdemeanor complained of was committed by the defendant, the appeal from the justice of the peace may remain undisposed of in the discretion of the district court until the prosecuting attorney shall have filed an information, or the grand jury found an indictment, when the proceedings under the

appeal may be dismissed and the district court take original jurisdiction of the offense and proceed to trial while the defendant and witnesses are present in court. *Territory v. Valencia,* 108

Trial by jury: Whether trial by a jury who speaks only Spanish is.

10. The defendant in a criminal case took a change of venue from a county where the English element largely predominated, to one where the Spanish population is very largely in the majority. The jurors who sat in the trial were all Mexicans, and none of them understood the English language, in which the proceedings at the trial took place.

Held, That this was a sufficient "trial by jury," and that there is no law in New Mexico requiring the jurors to speak any particular language. *Territory v. Romine,* 114

Instructions: Writen in English, but translated orally to Mexican jury.

11. The instructions were written in English and translated orally to the jury.

Held, That the object of the law requiring instructions to be written was simply to enable them to be preserved in the files, so as to be available for exception or on appeal, and that the oral translation of them to the jury did not render them violative of the law, as being oral instructions. *Ibid.*

Murder: Instruction as to degree.

12. It is not error for the court to instruct the jury in a murder case, that the killing in question was either murder in the first degree, murder in the fourth degree, or justifiable homicide, where there is no evidence in the case which could bring the case within the definition of any degree not given. *Ibid.*

Verdict, naming degree.

13. All verdicts in murder cases should specifically name the degree of murder of which the accused is found guilty, but a verdict of "guilty as charged in the indictment," where the indictment charged murder in the first degree, is sufficient. *Ibid.*

Instruction as to justifiable homicide.

14. Where the words of an instruction are broad enough to cover all the evidence, it is not necessary that the instruction should include both causes of justifiable homicide named in the statute. *Ibid.*

Same, as to fourth degree.

15. The use of the words "on which some part of the evidence, if true, has some bearing" by the judge in defining murder in the fourth degree to the jury, *held,* not objectionable. *Ibid.*

Same, as to weight of defendant's testimony.

16. An instruction to a jury as to the testimony of defendant in a murder case that "it will be proper for you to consider the fact that he is the defendant, and that the greatest possible temptation is presented to him to testify in his own favor, if he is really guilty" is not erroneous, but the wisest course in similar cases is to instruct the jury generally that they have the right in determining the credibility and weight of evidence, especially where there is a conflict of testimony, to consider the peculiar circumstances or position of any witness which might have the effect of influencing his evidence without selecting the testimony of any particular witness for such comment. *Ibid.*

Malice and premeditation, proof of.

17. Malice and premeditation in a case of murder may be inferred by the jury from actions or words of the accused, or collateral circumstances

properly proved before them. There must be *some* evidence of malice or premeditation before the jury to warrant it in finding the defendant guilty of murder in the first degree. *Ibid.*

Assessment of punishment in murder case.

18. The provisions of the statute (Gen. Laws, chap. 57, sec. 22, p. 289), that "all issues of fact in a criminal case shall be tried by a jury, *who shall assess the punishment in their verdict,*" does not refer to a case of murder in the first degree, wherein the jury need not assess the punishment in their verdict, nor to any other offense the punishment for which is fixed absolutely by the statute, being an undeviating penalty. It refers to offenses the limits of whose punishment are fixed by law, within which a discretion as to the amount of punishment is to be exercised by the jury, according to the circumstances of each case. In such cases only are they to assess the punishment in their verdict. *Ibid.*

19. A jury finding a verdict of guilty of murder in the first degree, need not assess the punishment. *Territory v. Webb,* 148

Verdict of jury.

20. Where the testimony is conflicting, but the verdict of the jury is sustained by positive evidence, it will not be set aside as being contrary to the evidence. *Ibid.*

Pardon, power of governor to grant.

21. The governor of the territory has discretionary power to grant a full pardon or mitigate the punishment, and in determining the question of executive clemency the governor may properly consider matters that are beyond the province of the Supreme Court. *Ibid.*

Murder, trial, omission to ask prisoner if he has anything to say, before sentencing him.

22. It is not error for the court to omit to ask, before pronouncing final judgment, whether the prisoner has anything to say why sentence should not be pronounced against him, especially where the omission does not appear affirmatively from the record, but is only presumed from the fact that the record is silent as to such question. *Ibid.*

Jury, finding by, not disturbed.

23. The jury are the judges of the weight and credibility of evidence, and where there is a conflict of testimony, their finding will not be disturbed if sustained by any testimony. *Territory v. Maxwell,* 250.

Embezzlement. Indictment need not state purpose for which accused received money.

24. An indictment for embezzlement need not state the object for which the money embezzled was originally received by the accused. *Ibid.*

Same. Accused need not have received money from some one other than principal.

25. Under the statute of New Mexico (Gen. Laws, sec. 22, page 268) relating to embezzlement and providing that "If any officer, etc., 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," etc., it is not necessary to show, in order to convict of embezzlement, that the money was received by the defendant from some one on account of the defendant's principal, and not from such principal directly. There is no limitation in the statute of New Mexico as to the manner of the money coming into the possession or control of the accused, nor as to the person from whom it may so come to him. *Ibid.*

Same. What relation must be shown between accused and his principal.
26. To sustain an indictment for embezzlement it is enough if the relation between the accused and his principal be shown to have been the relation of principal and agent. He need not have been technically the "clerk" or "servant" of the principal. *Ibid.*

Same. Money need not be specifically described.
27. In an indictment for embezzling money it is not necessary specifically to describe each particular coin or bill embezzled. All that is required is the best description which the circumstances will permit, both in the indictment and upon the trial. *Ibid.*

Admissibility of affidavits and counter affidavits on application for change of venue.
28. In a criminal case, on an application for a change of venue under Gen. Laws N. M., Prince ed., p. 117, sec. 17, if the proper affidavit is made by the party moving for a change of venue and is supported by the affidavits of two or more disinterested persons, such affidavits are to be considered as conclusive as to the county in which the suit is then pending, and the court has no discretion to refuse such application so far as changing the venue from that county. In determining, however, which is the nearest county thereto, and whether the same be free from exceptions within the meaning of the statute, the affidavits on behalf of such moving party are not conclusive. These are questions the determination of which rests in the sound discretion of the presiding judge, and it is not only proper, but it is the duty of the judge to receive such evidence from whatever source as will satisfy his conscience in the exercise of his discretion. Counter-affidavits held admissible on exception being taken to the county to which it is proposed to send the cause to be tried. *Territory v. Kelly,* 292.

Change of venue: Requisites of affidavits upon applying for.
29. The affidavit of the party moving for a change of venue as well as those in support of the same, in order to be conclusive as to the county in which the suit is then pending, must be positive in all material averments and not made on information and belief merely. *Ibid.*

Continuance discretionary with court.
30. A motion for a continuance is addressed to the discretion of the court, whose ruling in the absence of a clear abuse of discretion is not reviewable. *Ibid.*

Jury: List of talesmen need not be furnished prisoner in advance.
31. The "list of jurors summoned," which by Gen. Laws N. M., p. 288, sec. 20, is to be "given to the defendant in all capital cases twenty-four hours before the trial, and in all other cases before the jury is sworn, if required," refers to the regular panel summoned and accepted for the term, and does not include talesmen summoned to complete the trial jury after such regular panel has been exhausted. *Ibid.*

Trial: Rule as to removing irons from prisoner.
32. A prisoner when brought to the bar of the court for trial, is entitled to have his irons removed before the trial commences, unless the court be of the opinion that their retention upon the limbs of the prisoner is a reasonable precaution to prevent an escape or to insure the safety of the by-standers and the orderly conduct of the prisoner. *Ibid.*

Trial: Irons should be removed from prisoner while jury is being made up.
33. The calling and examination of jurors is a part of the proceedings of a trial, and it is irregular to compel the prisoner at this stage of the

trial to appear at the bar in irons for no better reason than that it would be inconvenient to remove them, or that their removal would cause a delay of a few hours in the trial. *Ibid.*

Trial: Failure to remove irons from prisoner, review by Supreme Court.

34. When the record affirmatively discloses the fact that there was no reason whatever for placing shackles or manacles upon the prisoner against his protest while undergoing trial, a question of law arises which may be reviewed on appeal and the judgment reversed; but when the record discloses some valid or reasonable ground of apprehension that the prisoner may attempt to escape, or injure the bystanders, or the officers in charge, or will be otherwise disorderly or dangerous, it should be left entirely to the discretion of the trial court to determine whether the prisoner should be ironed or not; and when the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during the trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed.

Held, In the present case, that had the irons remained on the prisoner during his trial or for any considerable portion thereof, the court would be compelled to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, it was decided that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground. *Ibid.*

Review: Bill of exceptions too meagre.

35. An objection was made to testimony as to what occurred "on that day." The bill of exceptions did not state enough to show what day was meant. *Held,* That the court could not review a ruling upon such a detached, disconnected fact, evidence of which might or might not be admissible, according to the circumstances. *Ibid.*

Murder: Intoxication as a defense.

36. Where the evidence given on a trial for murder shows the prisoner to have been drunk at the time of the killing, it is not erroneous to instruct the jury to the effect that if the defendant was conscious of and understood what was done and said by himself and others present at the time of the killing so as to give an intelligent and true account of it at the trial, in that case he is responsible for his conduct at that time. *Territory v. Franklin,* 307

Right of judge to comment upon evidence.

37. *Quære.* Whether the statute forbidding the judge to comment upon the weight of evidence applies to criminal cases.

A statement by the court to the jury that a man cannot at the same time be drunk and sober, conscious and unconscious, responsible and irresponsible, is not a comment upon the weight of evidence, but merely a statement of a truth in mental philosophy. *Ibid.*

Jury: Review of verdict by Supreme Court.

38. It is the province of the jury to pass upon the facts, and their finding will not be reviewed except where clearly contrary to the evidence or manifestly the result of prejudice. Finding that defendant was guilty of murder in the first degree affirmed. *Ibid.*

Murder: Indictment, in whose name to be found.

39. An indictment for murder found in the name of the territory of

New Mexico for a violation of territorial law, is proper. It need not be in the name of the United States of America, for a violation of a United States statute. *Territory v. Yarberry*, . 391

Same: Practice on review: Objections to grand and petit jurors not considered.

40. Objections to grand and petit jurors not taken until after trial and conviction for murder, cannot be considered by the Supreme Court on appeal. *Ibid.*

Same: Evidence, statements of prisoner before and after committing the crime not part of res gestæ: Rule as to res gestæ.

41. The defendant Yarberry, on trial for murder, was a peace officer whose duty it was to disarm persons carrying concealed weapons. Shortly after hearing a shot in the street in the evening, he went out in company with two other men, Yarberry making some remark just before the three went in the direction of the shot. Then going on, Yarberry found the deceased, Campbell, a stranger to him, and unarmed, slowly leaving the place where the shooting occurred. Yarberry called upon Campbell to stop and to hold up his hands, and at the same instant he and one of his companions, Boyd, immediately commenced firing at Campbell, who fell forward on his face and instantly expired, pierced by six balls, all from behind—all entering his back. Yarberry, without going near the body of the deceased, turned and went into a saloon. At this place, four or five minutes after the shooting, the sheriff asked Yarberry "What is the trouble, Milt?" to which he made some reply. At the trial, counsel for defendant asked witnesses three questions, which were ruled out by the court, as to what Yarberry said when he and his companions started to go to the scene of the shooting, what he said in reply to the sheriff's question, and what he said just prior to the shooting.

Held, That the questions were properly disallowed, what the defendant said at the times mentioned not being part of the *res gestæ*. The cries of bystanders while the thing is being done, are original and not hearsay evidence, because they are part of the *res gestæ*, but a defendant may not manufacture evidence for himself, either before or after or in the moment of the assault, and claim its admission as part of the *res gestæ*. In no just sense can words spoken several moments before or after be considered a part of the thing done. *Ibid.*

Same: Instruction as to reasonable doubt held properly refused.

42. Under such a state of facts as shown above, an instruction to the jury that "if you have reasonable doubt growing out of the evidence as to whether or not Milton Yarberry, the defendant, inflicted mortal wounds upon Charles Campbell which caused his death, you must acquit the defendant," is properly refused by the court, as it would have put the jury upon an unnecessary inquiry and tended to confuse their minds. *Ibid.*

Same: Evidence of conversation prior to shooting held not admissible.

43. It is not admissible, on a trial for homicide, to show a conversation between the deceased and a bartender prior to the shooting, the defendant and the deceased being strangers to each other and such conversation not being in the nature of threats, it not having been shown that the deceased had committed, attempted or threatened to commit a felony, and the conversation not having come to the ears of the defendant, Yarberry. *Ibid.*

Same: Instruction as to nature of crime.

44. Instruction to jury that the evidence showed the offense with which

the defendant was charged was either murder in the first degree or justifiable homicide, held not erroneous. *Ibid.*

Same: Assessment of punishment by jury.

45. Where the indictment charges murder in the first degree, the punishment for which is fixed by law as death, a verdict that the jury "unanimously find the defendant guilty as charged in the indictment," is not objectionable for not assessing the punishment. *Ibid.*

Trial: Presence of accused necessary, and will be presumed.

46. In cases of felony, the defendant must be personally present during all the proceedings and must so appear on record. But a formal averment of defendant's presence during trial is not necessary when it can be inferred from the record, from averments therein as to his being present at arraignment, his giving evidence, his presence when the verdict was rendered and at the motion for a new trial.

The presence of the prisoner during trial for a felony is presumed. *Ibid.*

Feloniously obtaining registered letter; Principal and agent, authority of latter to take letter from the office: Demurrer to evidence.

47. Where it had been the custom of several persons living some distance from the post-office to delegate one of their number to bring their mail from the post-office whenever he called there, this amounts to a general authority to such one to get such mail matter, and if, pursuant to such authority, he takes a registered letter from the office belonging to one of such persons, he is not guilty of fraudulently and feloniously obtaining such letter from the postmaster, although after thus obtaining it from the postmaster he converts it to his own use; and if indicted for feloniously obtaining the letter, and the evidence shows the foregoing state of facts, a demurrer to such evidence will lie upon which the defendant should be discharged. *United States v. Lewis,* 459

Perjury: Surety on appeal bond, swearing falsely as to his property is guilty of: Examination of surety by justice of the peace as to former's ownership of property is a judicial proceeding.

48. It is the duty of a justice of the peace to see that sureties offered on appeal bonds are worth the sum for which they intend to become sureties, in such property as can be reached by legal process. In order to ascertain this, the justice may examine, upon oath, the persons offering to go upon the bond, and he may also call and examine witnesses upon the subject. This examination and the approval of the bond by the justice constitute a judicial proceeding, in which the justice has legal power to administer oaths, and if the sureties proposed swear falsely to a material matter in such proceeding, they may be indicted and punished for perjury. *Territory v. Weller,* 470

Murder: Instruction as to degrees.

49. A trial court is only required to charge as to such degrees of the crime of murder as there is evidence in the case tending to sustain. It is, however, its duty to charge as to *all* such degrees, and a failure so to do is error, if objected to in time. *Territory v. Romero,* 474

Same: Instruction limiting jury to consider evidence only with reference to first degree.

50. It appeared from the evidence that the defendant, charged with murder, was arrested more than a hundred miles from the scene of the crime, having in his possession the watch, coat and cap of the deceased, and that, when arrested, he confessed to having taken also a race horse which had belonged to the deceased, and which he had

sold in the vicinity where he was arrested; and there was, besides, other evidence which led the jury to believe that the defendant killed the deceased for the purpose of robbery: *Held*, That an instruction to the jury that there was "no evidence whatever to show that the killing of the deceased was justifiable or excusable, or that there were any circumstances to bring it within the definition of any degree of murder less than the first," is not erroneous. *Ibid.*

DAMAGES.

See REPLEVIN, 1, 7, 8.

DEEDS.

See MORTGAGE.

DEMURRER.

See PLEADING, 3.

DEMURRER TO EVIDENCE.

See CRIMINAL LAW AND PRACTICE, 47.

DISMISSAL.

See REPLEVIN, 6, 11, 12.

DISTRICT COURT.

See APPEAL, 1; OFFICE OF ATTORNEY GENERAL, 5; STENOGRAPHER.

ELECTIONS.

Duties of canvassing boards ministerial, not judicial.

1. Canvassing boards of elections have only ministerial functions to canvass and count votes as returned by the judges of election, to ascertain and declare the respective majorities of votes received by the respective candidates for office from the aggregate number of votes so returned by the judges of election. They have no judicial powers whatever to pass upon and decide as to the illegality of individual votes received and returned to them by the judges of election. *Bull v. Southwick*, 321

Judges of election: their failure to take oath does not vitiate their returns.

2. The canvassing board of elections cannot reject as illegal the votes of any precinct, on the ground that the judges of election in such precinct did not take and subscribe the oath of office as required by law. The judges of election of such precinct, notwithstanding they may not have taken and subscribed the oath required by the statute, are nevertheless *de facto* judges of election, and their official acts otherwise regular, are entitled to full faith and credit. Their omission to take the oath, while it might render them liable to prosecution and severe penalties, can not in any way affect the legality of votes received and returned by them; and it is the duty of the canvassing board to can-

vass and count all such votes for the respective candidates for whom they are cast. *Ibid.*

Canvassing boards, duty of, as to counting votes returned.

3. Whenever votes have passed the judges of election, and have been received by them as votes, and as such returned by them to the canvassing board, as having been cast for certain candidates respectively —the returns showing in an intelligible manner the number of votes, and for whom cast—it becomes the ministerial duty of the canvassing board to count all such votes, and declare the result from such returns alone, without sitting as a court of review—in the absence of the parties interested—for the purpose of passing upon the illegality or legality of individual voters whose votes have been so returned to them. *Ibid.*

Contest to be made in district court.

4. After votes have been received and regularly returned by the judges of election, and questions as to the illegality of any such votes shall subsequently be raised, the respective candidates for whom such votes are cast are on principle and as a matter of law, as much entitled to their day in court, and to be heard thereon before such votes are rejected, as are the litigants in any other form of judicial proceeding. The only lawful tribunal having original jurisdiction to determine questions of this kind is the district court, which is to proceed in the mode prescribed by the act of 1876: Prince's Laws N. M., 134. *Ibid.*

False returns rejected as evidence.

5. When the election returns of a certain precinct were false, in that certain persons were therein stated to have voted, who did not in fact vote at such precinct at all, and it further appeared from such returns that all the voters at such precinct voted in *alphabetical order*, and it could not be ascertained from the poll books and returns of such precinct, for whom or what ballot any voter voted, it was held that they were not evidence that any of the persons whose names were recorded in such poll books and returns voted, and that to determine this matter a resort must be had to evidence *aliunde*. *Ibid.*

Mode and form of making up returns.

6. The mode and form prescribed by law for making out poll books and election returns, is as follows: The ballot of the first voter appearing at the polls and voting is to be numbered one by the judges of election. The same number is to be put down by them in the poll books, and opposite the same number in the proper column therein, is to be written the name of such voter. The ballot so numbered is then to be deposited in the ballot box.

The ballot of the second voter appearing and voting is to be numbered two, and the same number put down in the poll book next in order after No. 1, and the name of the voter voting that ballot so numbered is to be written down opposite that number in the poll book, and the ballot then deposited in the ballot box.

The same numerical order and record is to be observed and kept with each voter as he appears and votes.

At the close of the polls the names of the respective candidates voted for by each ballot so numbered and recorded are to be written down in the appropriate columns, and in the proper column under the name of each candidate so voted for, and opposite the same number in the poll book which the ballot bears, and opposite the name of the voter voting the same, is to be recorded the vote showing that the voter has cast one vote for each candidate so voted for by him.

The poll books of the several precincts with the proper certificates

attached and so filled out, constitute the returns of the judges of election, to be transmitted to the canvassing board. *Ibid.*

Contest, amendment of pleadings in.

7. The notice of contest alleged the illegality of sixty-nine votes. The respondents failed to deny this allegation in their answers, but some time after the expiration of the time allowed by law for them to answer in, moved for leave to file a supplemental answer denying this allegation, urging that the failure to deny in the first answer was solely owing to the negligence and omission of counsel. This motion was overruled.

Held, That the statutory provisions as to the time of filing and serving the notice of contest, answer and reply, are in effect, statutes of limitation, taking from the judge all discretion as to extending the time. *Ibid.*

Contest; pleadings, failure to deny admits allegations.

8. The failure to deny such allegation admits it to be true, and if evidence is taken, as if an issue had in fact been made by filing a denial in proper time, such evidence will be disregarded as immaterial. *Ibid.*

Contest, nature of proceeding.

9. A proceeding to contest an election is a proceeding exclusively between rival candidates for office, and the people are in no sense parties to it. *Ibid.*

Quo warranto not superseded by statutory proceedings to contest.

10. The proceedings authorized by statute to contest elections do not supersede the proceeding on behalf of the people by writ of *quo warwanto,* to oust from office one who was not elected thereto by a majority of legal votes. *Ibid.*

EMBEZZLEMENT.

See COMMON LAW, 1; CRIMINAL LAW AND PRACTICE, 24, 25, 26, 27.

EQUITY OF REDEMPTION.

See MORTGAGES.

EVIDENCE.

See CRIMINAL LAW AND PRACTICE, 1, 3, 4, 5, 6, 16, 17, 37, 41, 43, 47; GARNISHMENT, 2; JUDGMENT, 1; NEW TRIAL, 2; PRACTICE, 9.

Jury to judge of weight and credibility.

1. It is the exclusive province of the jury to determine the weight and credibility of testimony, and their determination is not subject to review. *Crolot v. Maloy,* 198

Evidence of threats, admissibility of.

2. Evidence of threats, though uncommunicated to the defendant, is competent. *Territory v. Kelly,* 292

3. Evidence need not be set forth in a bill of complaint. *Keeney v. Carillo,* 480

4. An answer under oath may be overcome by the testimony of one witness, corroborated by other facts and circumstances in the case. *Ibid.*

GARNISHMENT.

Case stated.

1. The allegations of the plaintiff in a proceeding of garnishment stated that the garnishees were indebted to the judgment debtor for work, labor and services, in the sum of $700 or some other sum. The answers stated that the garnishees composed a firm, that the judgment debtor had performed work, labor and services in their store, that he had performed such work for about twelve months, and that they had not paid him anything for such work. Upon the trial the plaintiff introduced evidence of the services rendered by the principal debtor and of their value, and rested. The garnishees introduced no evidence at all.

   Held, That there was no evidence on which a jury, or a judge sitting in place of a jury, could find for the garnishees, and that a judgment in their favor under such circumstances, is erroneous. *Zanz v. Stover,* 29

Answer not evidence.

2. The answer of the garnishee, although sworn to by him, is not evidence; neither is any other pleading in garnishment. *Ibid.*

Pleadings in.

3. In a proceeding of garnishment the allegations, answers and denials are to be regarded and treated simply as pleadings. The allegations stand in place of the ordinary complaint or declaration; the answers in place of the ordinary answer or plea; the denial in place of the ordinary reply. *Ibid.*

GOVERNOR.

See CRIMINAL LAW AND PRACTICE, 21; OFFICE OF ATTORNEY-GENERAL.

GRAND JURY.

Prisoner need not be brought into court when grand jury impanelled in order to challenge.

1. Under the statute (sec. 3, Act February 7, 1854) providing that a person held to answer a charge "may challenge the panel of the grand jury, or an individual grand juror," it is not necessary to bring persons accused of crime, and incarcerated in jail, into court at the time of impanelling the grand jury to enable them to exercise such right of challenge, and a failure to do so will not invalidate an indictment. *Territory v Young,* 93

Objection to juror must be made, when.

2. An objection to a grand juror, that he was not a citizen of the United States, comes too late after a plea to the merits. It is not ground for a motion in arrest of judgment. *Territory v. Romero,* 474

INDICTMENT.

See CRIMINAL LAW AND PRACTICE, 9, 24, 39.

INFORMATION.

See CRIMINAL LAW AND PRACTICE, 9.

INJUNCTION.

See WATER, 3.

IRONS UPON PRISONER.

See CRIMINAL LAW AND PRACTICE, 32, 33, 34.

INTOXICATION.

See CRIMINAL LAW AND PRACTICE, 36.

JUDGMENT.

See APPEAL, 3; PRACTICE, 15, 18, 19; REPLEVIN, 4, 6, 7.

When not set aside as being against evidence.

1. A judgment will not be set aside by the Supreme Court upon the ground of the insufficiency of the evidence to sustain the verdict of the jury when the lower court has refused to do so, unless there is such a decided preponderance of evidence against it, as to create a conviction that it was the result of mistake or misconduct on the part of the jury. *Badeau v. Baca,* 194

Non Obstante Veredicto: Discretionary with court.

2. The rendition of judgment *non obstante veredicto* is discretionary with the court. *Frick v. Joseph,* 138

JURY.

See CRIMINAL LAW AND PRACTICE, 7, 8, 10, 11, 31; GRAND JURY, 1.

JUSTICE OF THE PEACE.

See ACEQUIA LAW; APPEAL, 1, 2: CRIMINAL LAW AND PRACTICE, 9.

Jurisdiction of, limited, and must appear affirmatively.

1. The jurisdiction of a justice of the peace is inferior, special and limited by statute to specific territorial boundaries, established by law as a county, town, or incorporated city, and to specific subject matters, such as assault and battery, suits to recover debts where the amount claimed does not exceed $100, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed. *Territory v. Valencia,* 108

Complaint before, must show jurisdictional and substantial facts.

2. In a complaint for a misdemeanor before a justice of the peace, all the technicalities of an indictment need not be observed. If there be a substantial statement of the offense, it will be sufficient. But the facts conferring jurisdiction upon the justice must appear, and where a complaint for an assault and battery failed to show where the offense was committed, except that it was done upon the property of the prosecuting witness (not showing the county in which that property was situate, or that it was within the jurisdiction of the justice),

the prosecution under such complaint should be dismissed on appeal to the district court. *Ibid.*

Pleadings, whether to be written or oral.

3. The statute, secs. 13, 23 and 36, relating to justices of the peace, Prince's Laws N. M., pp. 88, 89, 92, providing that the pleadings before a justice of the peace may be oral, and that the plaintiff's cause of action shall be entered on the docket of the justice by a brief statement thereof, is directory merely, and does not preclude the filing of written pleadings, setting out the cause of action by the the plaintiff and a denial thereof or statement of any other defense by the defendant. *Crolot v. Maloy,* 198

Same, must be sufficient to make an issue.

4. Though strict formality is not required in pleadings before a justice of the peace and they are to be treated with great liberality with a view to substantial justice between the parties, yet the substance of an issue in some way must be formed. *Ibid.*

Pleadings before.

5. The technical rules of common-law pleading have no application to suits before justices of the peace. *Ibid.*

Pleadings before, what writings may form.

6. In such suits any allegations or indorsements in writing or accounts sued on in whatever form they may be, if sufficient to apprise the opposite party of what is intended and which would be sufficient to bar another suit for the same cause, should be considered good pleading. *Ibid.*

Appeal from, trial de novo to be had in district court.

7. The rule that if the plaintiff's statement of a cause of action be objected to by the defendant as insufficient in substance to constitute a cause of action, and is erroneously decided to be defective in substance, the judgment will be reversed, cannot be applied in appeals from judgments of justices of the peace in New Mexico, as, whatever may be the errors in law committed by the justice in a case of which he has jurisdiction of the subject matter, on appeal to the district court, the case must be tried on its merits *de novo.* *Ibid.*

Pleading, affidavit in attachment held sufficient declaration.

8. Where no written pleadings were filed, and no entry made on the justice's docket showing that plaintiff had a cause of action, a statement in an affidavit for an attachment that the demand is a money demand for $99 belonging to plaintiff and had and received by the defendant, is a sufficient declaration by plaintiff to warrant a trial, especially as no objection to its sufficiency was interposed by the defendant. *Ibid.*

Substitution of demands before.

9. A plaintiff in an action before a justice of the peace for money had and received, may substitute another demand, *e. g.*, a demand for work and labor done by plaintiff for defendant. And where the defendant makes no objection to the evidence introduced to support the claim for work and labor, but instead of objecting, introduces evidence in rebuttal upon that issue, he will be considered as having waived any objections he might have urged against the competency of plaintiff's evidence to sustain his original claim for money had and received. *Ibid.*

Justice of the peace: Replevin: Plea of not guilty not presumed where not, in fact, made.

10. Where, in an action of replevin, before a justice of the peace, no plea

of not guilty was ever filed, nor, if oral, was it entered upon the docket of the justice, no such plea can be assumed to have been made. *Barruel v. Irwin,* 222

Powers of.

11. The powers of a justice of the peace or magistrate in New Mexico are not less or narrower than the powers of the same officer elsewhere. *Territory v. Weller,* 470

LETTER, FELONIOUSLY OBTAINING.

See CRIMINAL LAW AND PRACTICE, 47.

MISNOMER.

See APPEAL, 3; ATTACHMENT, 1; PLEADING, 5.

MORTGAGES.

Absolute deed held a mortgage: Right of redemption.

A conveyance which on its face is an absolute, unconditional deed, may be made a mortgage by the agreement of defeasance of the parties. Such agreement may be proved by parol, and a right of redemption exists in the grantor and descends to his heirs. No tender is necessary to preserve that right. *King v. Warrington,* 318

MURDER.

See CRIMINAL LAW GENERALLY.

NEW TRIAL.

Granting of, discretionary: Decision not reviewable except where discretion abused.

1. The granting of a new trial is discretionary with the court below, whose decision will not be reviewed or reversed except for a manifestly gross abuse of its discretion, causing great injustice. *Territory v. Romero,* 474; *Territory v. Webb,* 149

Not granted for newly discovered evidence merely cumulative.

2. Newly discovered evidence that is merely cumulative will not warrant the granting of a new trial. *Territory v. Yarberry,* 391

Refusal of court to grant new trial an abuse of discretion when, under the evidence, the defendant should have been discharged.

3. Where, under the evidence, the defendant should have been discharged, and the evidence is not demurred to, but instead a motion for a new trial is made, a new trial should be granted, and if refused, the refusal is an abuse of the discretion of the court below as to granting new trials, and its judgment will be reversed. *U. S. v. Lewis,* 459

NONSUIT.

See PRACTICE, 2, 10.

OFFICE OF ATTORNEY-GENERAL.

Nature of.

1. The attorney-general of New Mexico is not a township, district, or county officer, but a territorial one. He is the legal adviser of the governor and all other territorial officers. *In re Attorney General,* 49

Incumbent does not "hold over" in case no successor named.

2. The incumbent of the office of attorney-general does not "hold over" in case his term expires and no person is appointed to succeed him. *Ibid.*

What is not a vacancy in, "from resignation."

3. Where one incumbent of the office of attorney-general of New Mexico resigned, and the vacancy thus created was filled by the governor whose appointee held until the expiration of the term and then the office became vacant, owing to the failure of the territorial council to confirm the governor's nominee for the next term, *held,* that such vacancy was not a vacancy "from resignation," because founded originally on the resignation of an incumbent of the office. *Ibid.*

Governor cannot fill without consent of council.

4. The governor of the territory of New Mexico has no authority conferred upon him to make any appointment to the office of attorney-general without the concurrence of the council, after the organization of the territory, except to fill vacancies occurring during the recess of the legislative council, from resignation or death. *Ibid.*

Vacant.

5. Ever since the adjournment of the last session of the territorial legislature, the office of attorney-general has been, and still is vacant.

   Held, therefore, that no action can be maintained by one who claims to be, but is not, attorney-general, against one who is alleged to have been wrongfully introduced into such office and to have wrongfully received fees as such officer. *Ibid; Fiske v. Breeden,* 70

Vacancy in, power of court to appoint some one to perform duties.

6. In case a vacancy in the office of attorney-general, the court has power, as occasion arises, to appoint some suitable person to represent the territory in the prosecution or defense of cases before it. *In re Attorney General,* 49

OFFICES, VACANCIES IN.

See CONSTITUTIONAL LAW, 3; OFFICE OF ATTORNEY-GENERAL.

PARDON.

See CRIMINAL LAW AND PRACTICE, 21.

PARTIES.

See APPEAL, 3; ATTACHMENT, 1.

PERJURY.

See CRIMINAL LAW AND PRACTICE, 48.

PLEADING.

See ATTACHMENT, 1, 2; EVIDENCE, 3, 4; JUSTICE OF THE PEACE, 2, 3, 4, 5, 6, 8, 9; REPLEVIN, 2, 3, 4, 5.

Quantum meruit: Where special contract.

1. A contractor may sue generally for work and labor, as well as under his special contract. *Baca v. Barrier,* 131

General issue need not be pleaded in writing.

2. No pleadings, oral or in writing, on the part of the defendant are necessary to raise an issue on the plaintiff's statement of a cause of action as the general issue will be presumed by law, and need not be formally pleaded. *Crolot v. Maloy,* 198

Demurrer: Rule that pleading over waives demurrer is not applicable in justice's court.

3. The rule that pleading over by a defendant to a declaration adjudged good on demurrer is a waiver by him of any right he might have had to question in the appellate court the correctness of the decision by the lower court on such demurrer, is a technical rule respecting written pleadings in a court of general jurisdiction. In an action of replevin, before a justice of the peace, a motion to quash the writ for a defect in the affidavit was made and overruled, after which the parties proceeded to trial.
   Held, That the motion to quash was not, in effect, a demurrer, and that pleading and going to trial after the motion to quash was not a waiver of the defect in the writ. *Barruel v. Irwin,* 222

4. Allegations in bill held sufficient to charge diversion of water by cutting off percolating water. *Keeney v. Carillo,* 480

Misnomer.

5. One of the complainants was described in the bill as James Aguallo, but in the other papers and proceedings, was called José Maria Aguallo. This variance appeared to be the result of a clerical error. It was not objected in the court below, and was not prejudicial to defendants. *Held,* Immaterial. *Ibid.*

PRACTICE.

Trial by court, finding not reviewable.

1. Where a jury is waived and a trial had before the court, so far as its decision of questions of fact is concerned, its verdict will not be set aside, nor the judgment founded thereupon reversed, where there is any evidence whatever on which its finding of fact could have been based. *Zanz v. Stover,* 29

Nonsuit, district court cannot order peremptorily.

2. The district courts have no power to order a peremptory nonsuit against the will of the plaintiff. PARKS, A. J., dissenting. *Herrara v. Chaves,* 86

Translation of proceedings to other languages.
3. In all counties where the jury contains members representing each language, or where the persons speaking each are before the court, all the proceedings are to be translated by a sworn interpreter, into the other language from that in which they originally take place. *Territory v. Romine,* 11

Presumption of regularity of proceedings.
4. A court of general jurisdiction having obtained jurisdiction, all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary is shown. *Territory v. Webb,* 148

Rehearing: Changing decision upon.
5. Unless convinced that it is wrong, the court will not change a unanimous opinion deliberately formed and announced. *Bennett v. Zabriski,* 76

Verdict or finding; presumption as to correctness.
6. Verdict of jury, or finding by court, presumed correct until the contrary is shown. *Wagner v. Eaton,* 211

Record: Accounts, affidavits, copies of instruments sued on, how made a part of record.
7. Copies of instruments sued on, copies of accounts and affidavits filed in an action at law are not parts of the record, unless embodied in the bill of exceptions. *Ibid.*

Appeals involving small sums discouraged.
8. The practice of the Supreme Court is to discourage appeals to it in cases involving small sums. *Ibid.*

Bill of exceptions not certified to contain all the evidence is not reviewable.
9. Where the bill of exceptions had attached to it no certificate that it contained all the evidence in the case, and referred the court to a transcript for a very important affidavit which was used on the trial as evidence but which was not incorporated in the bill of exceptions, the Supreme Court will not examine the evidence on a motion for a new trial. *Ibid.*

District court cannot order nonsuit in ejectment peremptorily against the will of plaintiff.
10. An action of ejectment was brought to trial, a jury impanelled and the case opened by plaintiff's attorney, when, before any testimony was taken, the court, of its own motion, acting under the 24th section of the Practice Act of 1851 (General Laws, page 119), providing that "When any matter is pleaded by either party at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury, to consider and determine upon the sufficiency of the matter, whether excepted to or not," directed a nonsuit to be entered in said cause, and the jury to be discharged, because of a defect in the declaration.

Held (affirming *Herrara v. Chaves, ante,* p. 86), that the district courts could not in any case order a peremptory nonsuit against the will of the plaintiff; that the foregoing statutory provision devolved upon the court the duty of doing only what could be done on motion or objection by a party, but did not give it authority to perform any act which it could not legally do in any other case, even upon motion or objection of a party; that the defect merely rendered the declaration demurrable, and that it was the duty of the court so to determine and to order an amendment of the declaration. *Montoya v. Donohoe,* 213

Insufficient bill of exceptions.

11. The bill of exceptions stated that the defendant excepted to an instruction asked for by himself and given by the court. It referred to the transcript for matter which was intended to be part of the bill of exceptions. It omitted to state a number of instructions which it stated were refused by the court, and such refusal excepted to by the defendant. It had, at the close of the testimony, no certificate of the judge that it contained all of the evidence.
Held, unnecessary to examine the case, and that, perhaps, the appeal might properly have been dismissed, but that judgment would be affirmed. *Territory v. Rudabaugh*, 221

Correction of erroneous orders after continuance.

12. A case having been continued and remaining upon the docket for disposition next term, the court has the right to correct any erroneous orders previously made in such case, there having been no trial, verdict, or judgment in it. *Lamy v. Remuson*, 245

Exceptions to charge of court, must be specific.

13. A general exception to the charge of the court to the jury will not be considered by the Supreme Court on review. The several matters excepted to must be distinctly specified. *Territory v. Yarberry*, 391

Matters outside of record not reviewable.

14. A point not made a part of the record will not be considered. *Ibid.*

Judgment by default assumes no appearance to have been made.

15. A court which renders judgment by default against a defendant does so on the assumption that there has been no appearance by the defendant. *Holzman v. Martinez*, 271

Appearance to move to quash writ of attachment for irregularity, not general, but special.

16. When a party appears for the purpose of making a motion for irregularity in a writ of attachment, and states specifically in the motion that he appears for that purpose and no other, it is a special and not a general appearance. *Ibid.*

Forthcoming bond in attachment not a general appearance or waiver of irregularities.

17. A bond given by the owner of property attached to the sheriff for the purpose of enabling the owner to keep possession of the property, is not a waiver by such owner (defendant in the attachment suit) of all preceding irregularities in such suit, and does not operate as a general appearance by him for all purposes. *Ibid.*

When judgments nil dicet and on ground of non-appearance should be rendered.

18. If there has been a general appearance by the defendant, it is irregular to proceed to assess damages and enter judgment before first entering a rule to plead and showing non-compliance with it, and in such a case judgment *nil dicet* instead of for non-appearance, is the proper proceeding. *Ibid.*

Judgment by default, what necessary to authorize in attachment

19. In case the defendant does not appear, it is always incumbent on the court before proceeding in the cause, to see that the preliminary proceedings have been so far regular and sufficient as to confer not only jurisdiction of the subject matter of the suit, but also of the person of the defendant. In an attachment case this is to be determined by the affidavit and bond for an attachment, the writ with the officer's doings thereunder as shown by his return, the declaration and service of a copy thereof, and the authority of the officer issuing the writ. *Ibid.*

Service of copy of declaration.
20. In case of personal service of process, a copy of the declaration must be served on defendant before the court can treat the defendant as in default. *Ibid.*

Service of writ and copy of declaration must precede judgment in personam.
21. Where there is nothing before the court in an attachment proceeding to show that the writ has ever been served on the defendant or that the declaration or other statement or notice of the cause of action was ever served on him, the court has no authority to render judgment *in personam* against him. *Ibid.*

Affidavit in replevin amendable on appeal to district court.
22. In replevin before a justice of the peace, the affidavit filed was insufficient in that it did not state that the person who made the affidavit was the agent or attorney of the plaintiff, and it did not state that plaintiff had a right to the possession of the property sought to be replevied. Trial was had and a verdict and judgment rendered for the plaintiff. The defendant appealed to the district court. Then the plaintiff moved in that court to amend the affidavit, but the district court overruled the motion, quashed the writ, and restored the property replevied to the defendant. *Held*, that the district court should have allowed the amendment, and that its refusal to do so was error. *Martinez v. Martinez,* 464

Review of matters extraneous to record.
23. Matters outside of the record are not reviewable by the Supreme Court. *Territory v. Romero,* 474

PRESENCE OF PRISONER.

See Criminal Law and Practice, 46.

PRINCIPAL AND AGENT.

See Criminal Law and Practice, 25, 26, 48.

PROBATE CLERKS.

See Attachment, 7.

PROMISSORY NOTE.

See Accord and Satisfaction.

Collection of claims due maker of note held on payment thereof.
1. The maker of a promissory note sent the holder of it with a power of attorney to Virginia and Kentucky to collect certain claims for money due the maker, and agreed that out of the proceeds of such collection the note was to be paid, and the excess remitted to the maker. The holder proceeded to Kentucky, whence he sent a third person on to Virginia to collect the claim of the maker of the note. That person collected more than enough to pay the note. In an action on the note by the holder against the maker, *Held*, that so far as the collection, receiving, and possession of the money obtained in Virginia, affects the rights of the maker of the note, the holder (plaintiff) and his messenger to Virginia are one; that the possession

of the money by such messenger is that of the plaintiff; that whether or not the money was actually and literally applied to the payment of the note, the law so applied it, and that the note was paid. *Samples v. Samples,* 239

QUANTUM MERUIT.

See PLEADING, 1.

QUO WARRANTO.

See ELECTIONS.

REASONABLE DOUBT.

See CRIMINAL LAW AND PRACTICE, 42.

RES GESTÆ.

See CRIMINAL LAW AND PRACTICE, 41, 43.

REPLEVIN.

See APPEAL, 3; JUSTICE OF THE PEACE, 10; PRACTICE, 22.

Value of property and damages for detention must both be assessed.

1. In any action of replevin brought before a justice of the peace where the plaintiff fails to prosecute his suit to final judgment, a jury must be impanelled, and sworn to inquire and assess the value of the property replevied, together with the damages for the detention of the same, and the justice shall render judgment in favor of the defendant for such value and damages as assessed. Therefore, where the jury was sworn to assess damages only, the oath, as administered, did not include the assessment of the value of the property replevied, and the judgment was rendered for damages only, and not for the value of the property replevied. Such verdict and judgment were held erroneous. The value and damages should be stated separately, both in the verdict and judgment. *Garland et al v. Bartels Brothers,* 1. See *Brannin v. Bremen,* 40

Protest and allegations of innocence to be filed with whom.

2. Whether the defendant in replevin is required to file the protest and allegations of innocence provided for by the statute (*Session Laws 1868, page 76*), with the clerk of the probate court, or the clerk of the district court, *quære. Abren v. Brown,* 11

Affidavit, protest and allegations of innocence considered as pleadings.

3. It would seem to be a fair construction of the statute (*Session Laws, 1868, page 76*), to hold that the plaintiff's affidavit in replevin should be treated as his verified declaration in replevin, and that the defendant's protest and allegations of innocence should be regarded as his plea in bar upon the merits. *Ibid.*

Failure to file protest and allegations of innocence, whether judgment is valid.

4. As to the statute (*Session Laws 1868, page 76*), providing that the default of the defendant in replevin in filing the protest and allegations of innocence as provided for in that statute, "shall be decreed an abandonment of all claims in the premises," it is queried. (1) By what tribunal such abandonment shall be decreed? and (2) If not by the district court, whether such determination of the right to personal property through the default of the defendant to file his protest and allege his innocence without any adjudication by a competent tribunal, is not a determination of the right to personal property without due process? *Ibid.*

Protest and allegations of innocence, default in filing, waiver of, by going to trial.

5. An affidavit being made and filed with him, the probate clerk of Colfax county issued a writ of replevin, which was served, and the property placed in possession of plaintiff. The defendant failed to file his protest and allegations of innocence within thirty days after the replevying of the property as required by statute(*Session Laws 1868, page 76*), thus making default. By the writ of replevin, the defendant was also cited to appear in the district court, and plead within a specified time long after the expiration of the thirty days. At such time plaintiff declared against the defendant in that court, and the defendant appeared and pleaded the general issue. Both parties then agreed to a continuance after the expiration of which the court, on motion of the plaintiff, struck the cause from the docket on the ground that defendant had defaulted in failing to file his protest and allege his innocence within the thirty days as required under the statute.

Held, That even if the statute in question was a valid law, the plaintiff by appearing, pleading, and consenting to a continuance after the default of defendant, in not filing his protest and allegations, waived such default. That the court acquired jurisdiction of both parties to the cause by the service of the writ with the citation therein contained, by the appearance of both parties, and by their submission to such jurisdiction long after the expiration of the thirty days, as well as by the filing of their respective pleadings, and by their agreement to a continuance. That the court having thus acquired jurisdiction, neither party was at liberty to withdraw without the consent of the other, so as to prevent a final determination of the right to the possession of the property as between them. *Ibid.*

Dismissal by plaintiff: Defendant's right to verdict and judgment.

6. The plaintiff in a replevin suit cannot by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property. Therefore, where a plaintiff in replevin moved to dismiss the suit at his own costs, and the court ordered the case to be dismissed except to assess the value of the property and the damages and to render judgment for the defendant, it was *held* that such a "dismissal" amounted merely to an abandonment of the case by the plaintiff with the consent of the court, and that it did not affect the defendant's right to a verdict and judgment in his favor, nor deprive the court of jurisdiction of the suit. *Brannin v. Bremen,* 40

Informality in verdict not fatal to judgment: Assessment of "damages" instead of "value."

7. A party will not be deprived of a recovery merely because of a bare informality in a verdict. Thus, while a verdict by a jury in

a replevin suit that they "do assess damages of the property mentioned in the declaration at $825, and the actual damages of the defendant at six per centum per annum to be $24.75," is not well expressed in that the word "damages" is used with reference to the property instead of the word "value," a correct judgment rendered upon it will not be set aside. Such a verdict is not objectionable for non-conformity to the law which requires the "value" of the property to be assessed. *Ibid.*

8. Double damages may be assessed in replevin by a jury, for the detention of the property. *Ibid.*

Value must be stated in affidavit, or writ will be quashed. Statute requiring this not repealed.

9. The statute required the affidavit for a writ of replevin to be issued by a justice of the peace to state the value of the goods or chattels sought to be replevied, but in a subsequent section it prescribed a form for such an affidavit, in which the statement as to value was not included.

Held, That the adoption of this form in the statute was not a repeal of the preceding section requiring the value to be given.

Held, That the affidavit for a writ of replevin before a justice of the peace must contain an averment of value in order to authorize the issuing of the writ. That such statement of value was necessary in order to show that the justice had jurisdiction, and, also, in order to estop the plaintiff from showing a different value should it become his interest to do so. And the affidavit being insufficient because it contained no statement of value, the writ should have been quashed. *Barruel v. Irwin*, 222

Omission to state value in affidavit not cured by verdict.

10. Where the affidavit in replevin before a justice of the peace omits to state the value of the property, and is objected to for this reason, but the objection is overruled, trial had and verdict rendered, the defect in the affidavit is not cured by the verdict. *Ibid.*

Dismissal in, under statute.

11. Section 53 of the act relating to justices of the peace (Gen. Laws N. M., Prince ed., 96) providing that, "If the plaintiff discontinue, suffer a nonsuit, or if he should otherwise fail to prosecute his suit to final judgment, it shall be the duty of the justice to summon a jury as hereinbefore provided, to impanel and swear the same, to inquire and assess the value of the goods and chattels replevied, together with adequate damages for the detention of the same; or, if on trial of the issue joined the jury shall find for the defendant, the value of the goods and chattels, together with adequate damage for the detention thereof, shall be assessed by the jury, and the justice shall render judgment in favor of defendant for such value and damages so found by the jury, but, if the jury shall find that the defendant did detain such goods, and that they were the property of the plaintiff, they shall assess adequate damages for such detention," relates exclusively to actions of replevin that have been in all respects regularly and properly commenced and the statute fully complied with so that so far as the regularity of the proceedings is concerned, a trial upon the merits might have been had. It does not apply to dismissals for irregularity, *e. g.*, defect in affidavit occasioned by omission to state value of property replevied therein. *Ibid.*

Dismissals for fatal irregularity in affidavit.

12. If the action of replevin is dismissed for an irregularity which precludes a trial upon the merits, *e. g.*; a defect in the affidavit, consist-

ing of an omission to state the value of the property, the court is to order a return of the property to the defendant with nominal damages; but there should be no assessment of value or of damages by a jury and judgment therefor. The plaintiff is not precluded by this from bringing a new action to determine his right to the property. *Ibid.*

Property lost or destroyed, remedy of defendant.

13. If, during the pendency of the proceedings in replevin the property shall have been lost, destroyed, or disposed of so that no return thereof can be made, the only remedy of the defendant would seem to be either to sue on the bond, or to sue for damages for the unauthorized and unlawful taking and conversion of the property. *Ibid.*

Replevin: Presumption as to execution of writ.

14. It is the duty of the plaintiff in replevin to know, before he compels the defendant to plead, what has been done with the writ and the property, and where a plaintiff sues out a writ of replevin, and on his motion the defendant is ruled to plead, and does plead to the merits, and the case is continued to the next term of the court without any question being raised by the plaintiff as to the whereabouts of the writ or the status of the property, till the final act of the court in assessing the value of the property, these acts by the plaintiff raise a strong presumption in the court below that the writ has been fully executed, and that the property is replevied and is in plaintiff's possession. In the Supreme Court this presumption under such circumstances will be conclusive. *Lamy v. Remuson,* 245

Affidavit of plaintiff, evidence of value.

15. The affidavit of the plaintiff as to the value of the property in suing out the writ is competent but not conclusive evidence of that value in any trial of that issue as against the plaintiff. *Ibid.*

Abandonment of action by plaintiff, proceedings and judgment of court upon.

16. Where plaintiff by dismissal abandons his suit in replevin, the court may retain the cause for the benefit of the defendant, and as against plaintiff and in favor of the defendant, the court may assess the damages and the value of the property, and render judgment therefor in defendant's favor. Such an assessment of the damages and the value of the property is not an invasion of the constitutional right of trial by jury. *Ibid.*

Nature of the action.

17. The action of replevin is not an extraordinary remedy in derogation of the common law like the proceeding by attachment. On principle the owner of personal property ought to have the same right to recover the possession of it in specie when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice. *Martinez v. Martinez,* 464

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See WATER.

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STENOGRAPHER.

Duty of court to employ.

1. To facilitate the drawing of bills of exceptions and to secure the rights of parties against errors in the evidence, each district court should have a competent reporter to take testimony in all important trials; and any want of authority there may be in existing laws to appoint and pay such officers, should be supplied by appropriate legislation. *Wagner v. Eaton,* 211

SUBSTITUTION.

See JUSTICE OF THE PEACE, 9

TRANSLATION OF PROCEEDINGS IN FOREIGN LANGUAGES.

See PRACTICE, 3.

VARIANCE.

See ATTACHMENT, 1, 3.

VENUE.

See CRIMINAL LAW AND PRACTICE, 28, 29.

VERDICT.

See CRIMINAL LAW AND PRACTICE, 13, 20, 23, 38; PRACTICE, 1, 6, REPLEVIN, 10.

WATER.

See PLEADING, 4.

Appropriation, rights conferred by.

1. Complainants built a house near two springs, at the mouth of a cañon, took possession of them, and by an acequia, conducted water from them to a farm. Subsequently complainants dug ditches through a cienega, or marsh, several miles up the cañon, to drain the same, and collect and turn the water into the natural channel of the cañon below, wherein it continued to run upon the surface of the ground, about twenty cubic inches in volume, two or three miles to a place in the cañon, where it sank. To prevent the sinking and wasting of the water at this place, complainants constructed a dam, and made a ditch, conducting the water by and beyond the place of sinking, and turning it again into the natural channel of the cañon, wherein it continued to run to within about two miles of the springs at the mouth of the cañon, where it again sank, and entirely disappeared from the surface. Complainants' intention was to conduct the water by channels on the surface, natural and artificial, from the cienega to their lands in the plain below; but aside from having made the small acequia from the springs to such lands, they only prosecuted the work so far as to conduct the water to the place where it sank the second time, and then abandoned it for want of means and time. This was in 1876
The respondents in September, 1877, commenced work, and succeeded thereby in conducting water from the cienega to the mouth of the cañon upon the surface, and thence to their lands on the plain below. The effect of this work was to dry up the lower springs at the mouth of the cañon where complainants had received their water, and conducted it to their lands, and complainants applied for an injunction to restrain the diversion of their water.
Held, That the land of the cañon being public unoccupied land, of no value whatever, save as a natural water course, complainants had a right in good faith to commence the necessary work to conduct to and upon their lands all or any part of the water of the springs, stream or cienega, and that if they had continued their work with due diligence to final completion within a reasonable time, their right to the water actually appropriated, would be valid, and would relate back to the time of commencing work, but that complainants had failed to prosecute the necessary work with due diligence, and that in consequence they had failed in appropriating *all* the water of the cienega. *Keeney v. Carillo*, 480

Forfeiture of rights by abandonment.

2. That not having time and means requisite to a completion of the work within a reasonable time, would be no excuse; and a discontinuance on that ground for an unreasonable time would work the forfeiture of any right that might have been acquired and retained by due diligence in completing the work. *Ibid.*

Enforcement by injunction of rights in.

3. But that complainants had acquired a right by prior appropriation and use of the water flowing from the lower springs; that this amount was cut off, by respondents' works, which took all the water from the cienega, and diverted the supply that otherwise would have reached complainants' springs; hence they were decreed one-fourth of the entire quantity of water. *Ibid.*

Right to subterranean stream.

4. A well-defined and constant subterranean stream is protected to the owner as much as though it ran in a natural channel on the surface. *Ibid.*

WRIT OF ERROR.

Record, no objections entertained to matters outside.

1. Objections to a bond which is not made part of the record, brought up on error, will not be considered. *Brannin v. Bremen,* 40

In Chancery.

2. In New Mexico, a writ of error does not lie in chancery cases. Such cases taken up on writ of error will be dismissed upon motion. *Kidder v. Bennett et al.,* 37

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