Case 8.4 18

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE TERRITORY

OF

NEW MEXICO.

FROM

JANUARY TERM, 1883, TO JANUARY TERM, 1886, INCLUSIVE.

WITH NUMEROUS ANNOTATIONS.

ALSO A TABLE OF CASES REPORTED, A TABLE OF CASES CITED, A TABLE OF CASES OVERRULED, AFFIRMED, ETC., AND AN INDEX.

R. M. JOHNSON,
OFFICIAL REPORTER.

NEW MEXICO REPORTS, VOL. 3.

ST. PAUL:
WEST PUBLISHING CO.
1890.

Copyright, 1890,

BY

WEST PUBLISHING COMPANY.

Rec. Dec. 29, 1890

PREFACE.

At the 1887 session of the Legislature provision was made for the reporting and publication of those decisions of the Supreme Court of the Territory not contained in volumes 1 and 2 of New Mexico Reports; and the undersigned having been appointed by that body to perform this delicate and somewhat difficult task, has prepared the present volume, containing the decisions of the court from 1883 to 1886, inclusive, and respectfully submits the same to the public.

The adjudications of the court, constituting a part of the law of the country, should be generally known, and to that end be placed before the court, the bar, and the people in a compact form; and it is hoped that their publication in this manner will be found useful, and prove generally satisfactory to the profession.

While it is not anticipated that the work will be found entirely free from imperfections, still the decisions of the court as rendered have been accurately reported, and no exertion has been spared to make this volume conform to the best standards, and meet the approval of the bar.

It was originally intended to precede each opinion of the court with a concise statement of the facts and a short synopsis of the briefs of counsel, accompanied by a full citation of the authorities relied on and presented to the court by them; but on examination it appears that the court has in nearly all cases followed the excellent plan of stating the facts as a part of its opinion, and their repetition by the reporter would only increase the size of the volume without adding value to it. It was likewise discovered that it would be impracticable to give systematically synopses of the briefs of counsel in all cases, as many of the briefs had been lost or mislaid; and it was therefore believed that to give a synopsis of part of the briefs arbitrarily, and without regard to the importance of the case, or to give the brief of one counsel in a case and not that of the other, would be unsatisfactory. In place of these (which are in their nature annotations) the cases have been profusely annotated with references, not only to the earlier and later decisions of the Territorial Supreme Court, but also to recent decisions in point by the leading tribunals of the whole country. The reporter trusts that these copious annotations will add no little value to the volume, and confidently hopes they will be found more useful and serviceable to the court and the bar than a synopsis of such briefs of counsel as are at this time accessible.

A chronological table, showing the names of the various Chief Justices and Associate Justices of the court, and the dates of their respective appointments, has also been added, and will be found an interesting feature of the work; while a list of the names of the members of the bar of the Supreme Court of the Territory, and their present residences as practicing attorneys, is given to aid the profession in their courteous exchanges with each other.

The tables of cases will be found unusually full and complete; and the citations and quotations in the volume have been carefully verified by comparison with the originals, and may be relied upon as accurate.

It may not be amiss to call attention to the fact that while the number of pages in this volume is less than that contemplated by the statute, and the type somewhat larger than that used in volume 2, New Mexico, yet owing to the larger page and more compact typography much more matter is contained in this book than in either of the previous volumes; so that whereas volume 2, New Mexico, contains reports of 43 cases, volume 3 contains reports of no less than 86 cases.

The reporter, recognizing and acknowledging that generous spirit which has always characterized the members of the profession towards him, and hoping for its continuance, cheerfully confides this volume, thus constituted, to the favorable consideration of the court and bar of the Territory.

R. M. JOHNSON.

LAS VEGAS, NEW MEXICO, October 27, 1890.

SUPREME BENCH

OF

NEW MEXICO.

August 18, 1846, was the beginning of the jurisdiction of the United States over the territory of New Mexico.

DISTRICTED 1846 TO 1860.

From 1846 to 1860, the territory was districted as follows, to-wit:

First District. Santa Fe, San Miguel, and Santa Ana Counties, with headquarters at Santa Fe.

Second District. Bernalillo, Valencia, Socorro, Dona Ana, and Arizona, with headquarters at Albuquerque.

Third District. Taos and Rio Arriba, headquarters at Taos.

JUDGES.

First District.

JOAB HOUGHTON,[1]	Appointed,	1846
GRAFTON BAKER,[1]	"	1851
J. J. DAVENPORT,[1]	"	1853
KIRBY BENEDICT,[1]	"	1853

Second District.

ANTONIO J. OTERO,	Appointed,	1846
JOHN S. WATTS,	"	1851
PERRY E. BROCCHUS,	"	1853
W. F. BOON,	"	1859

Third District.

CHARLES BEAUBIEN,	Appointed,	1846
HORACE MOWER,	"	1851
KIRBY BENEDICT,	"	1853
WM. G. BLACKWOOD,	"	1858

[1] Chief Justices.

REDISTRICTED 1860.

First District. Santa Fe, Santa Ana, San Miguel, Mora, Colfax, Taos, and Rio Arriba Counties.

Second District. Bernalillo, Valencia, and Socorro Counties.

Third District. Dona Ana, Grant, and Lincoln Counties.

JUDGES.

First District.

Kirby Benedict,[1]	Appointed,	1862
John P. Slough,[1]	"	1866
John S. Watts,[1]	"	1868
Joseph G. Palen,[1]	"	1869
Henry L. Waldo,[1]	"	1876
Charles McCandless,[1]	"	1878
L. Bradford Prince,[1]	"	1879
Samuel B. Axtell,[1]	"	1882
William A. Vincent,[1]	"	1885
Elisha V. Long,[1]	Designated,	1885
Elisha V. Long,[1]	Appointed,	1886

Second District.

Sydney A Hubbell,	Appointed,	1861
Perry E. Brocchus,	"	1869
Hezekiah S. Johnson,	"	1870
John I. Redick,	"	1876
Samuel B. McLin,	"	1877
Samuel C. Parks,	"	1878
Joseph Bell,	"	1882
William H. Brinker,	"	1885

Third District.

Joseph G. Knapp,	Appointed,	1861
Joab Houghton,	"	1865
Abraham Bergen,	"	1869
Benjamin J. Waters,	"	1870
Daniel B. Johnson,	"	1871
Warren Bristol,	"	1872
Stephen F. Wilson,	"	1884
William B. Fleming,	Designated,	1885
William F. Henderson,	Appointed,	1885

[1] Chief Justices.

REDISTRICTED 1887.

First District. Santa Fe, San Juan, Rio Arriba, and Taos Counties.

Second District. Bernalillo, Valencia, and Socorro Counties.

Third District. Dona Ana, Sierra, and Grant Counties.

Fourth District. San Miguel, Colfax, Mora, and Lincoln Counties.

JUDGES.

First District.

REUBEN A. REEVES,	Appointed,	1887
WILLIAM H. WHITEMAN,	"	1889
EDWARD P. SEEDS, (vice W. H. Whiteman, resigned,)	"	1889

Second District.

WM. H. BRINKER, as above.

WILLIAM D. LEE,	Appointed,	1889

Third District.

WILLIAM F. HENDERSON, as above.

JOHN R. MCFIE,	Appointed,	1889

Fourth District.

ELISHA VAN LONG,[1] appointed as above.

JAMES O'BRIEN,[1]	Appointed,	1890

REDISTRICTED 1889.

First District. Santa Fe, San Juan, Rio Arriba, and Taos Counties.

Second District. Bernalillo and Valencia Counties.

Third District. Dona Ana, Grant, and Sierra Counties.

Fourth District. San Miguel, Mora, and Colfax Counties.

Fifth District. Socorro and Lincoln Counties with Chavez and Eddy when organized.

JUDGES.

First District.

EDWARD P. SEEDS,	Appointed,	1889

Second District.

WM. D. LEE,	Appointed,	1889

[1] Chief Justices.

Third District.

JOHN R. MCFIE, - - - - -	Appointed, 1889

Fourth District.

JAMES O'BRIEN,[1] - - - - -	Appointed, 1890

Fifth District.

ALFRED A. FREEMAN, - - - -	Appointed, 1890

[1] Chief Justice.

A LIST OF THE CLERKS

OF THE

SUPREME COURT OF NEW MEXICO.

James M. Giddings,	Appointed,	1852
Louis D. Sheets,	"	1854
Augustine de Marle,	"	1856
Samuel Ellison,	"	1859
William M. Gwynne,	"	1866
Peter Connelly,	"	1867
Samuel Ellison,	"	1868
William Breeden,	"	1869
Rufus J. Palen,	"	1873
John H. Thompson,	"	1877
Frank W. Clancy,	"	1880
Charles M. Phillips,	"	1883
Ruel M. Johnson,	"	1886
Robert M. Foree,	"	1887
Summers Burkhart,	"	1889

OFFICERS OF THE SUPREME COURT

NOW IN OFFICE.

HON. JAMES O'BRIEN, Chief Justice and Presiding Judge of Fourth Judicial District, composed of the counties of San Miguel, Mora, and Colfax, with headquarters at Las Vegas, in San Miguel county.

HON. EDWARD P. SEEDS, Associate Justice and Presiding Judge of the First Judicial District, composed of the counties of Santa Fe, San Juan, Taos, and Rio Arriba, with headquarters at Santa Fe, Santa Fe county.

HON. WILLIAM D. LEE, Associate Justice and Presiding Judge of the Second Judicial District, composed of the counties of Bernalillo, Valencia, and Socorro, with headquarters at Albuquerque, in Bernalillo county.

HON. JOHN R. MCFIE, Associate Justice and Presiding Judge of the Third Judicial District, composed of the counties of Dona Ana, Grant, Sierra, and Lincoln, with headquarters at Las Cruces, in Dona Ana county.

HON. A. A. FREEMAN, Associate Justice and Presiding Judge of the Fifth Judicial District, composed of the counties of Socorro, Lincoln, Chaves, and Eddy when organized, with headquarters at Socorro, in Socorro county.

HON. EUGENE A. FISKE, U. S. Attorney, - - - Santa Fe
HON. TRINIDAD ROMERO, U. S. Marshal, - - Santa Fe
HON. EDWARD L. BARTLETT, Solicitor General of N. M., - Santa Fe
HON. SUMMERS BURKHART, Clerk, - - - Santa Fe
R. M. JOHNSON, Official Reporter, - - - - Las Vegas

MEMBERS OF THE BAR

OF THE

SUPREME COURT,

TERRITORY OF NEW MEXICO.

SEPTEMBER, 1890.

ANCHETA, JOSEPH A., Silver City.
AXTELL, S. B., Santa Fe.
BREEDEN, WM., Santa Fe.
BAIL, JOHN D., Silver City.
BARTLETT, EDWARD L., Santa Fe.
BELL, JOHN J., Silver City.
BERGER, W. M., Santa Fe.
BONHAM, JOS. F., Las Cruces.
BOWMAN, W. C., Las Cruces.
BURKHART, SUMMERS, Santa Fe.
CATRON, T. B., Santa Fe.
CLANCY, F. W., Santa Fe.
CLANCY, HARRY S., Santa Fe.
CONWAY, T. F., Silver City.
CHILDERS, W. B., Albuquerque.
CHAVEZ, J. FRANCO, Las Lunas.
CHAVEZ, FRANCISCO P., Abiquiu.
COLLIER, N. C., Albuquerque.
DOWNS, FRANCIS, Santa Fe.
EMMETT, LAFAYETTE, Las Vegas.
ELLIOTT, A. B., Hillsborough.
FISKE, EUGENE A., Santa Fe.
FOREE, ROBT. M., Santa Fe.
FIELD, NEILL B., Albuquerque.
FIELDER, IDUS L., Silver City.
FERGUSON, H. B., Albuquerque.
FOUNTAIN, A. J., Las Cruces.
FORT, L. C., Las Vegas.
FRANKS, E. B., Raton.
FROST, MAX, Santa Fe.
GILDERSLEEVE, CHAS. H., Santa Fe.
HAMILTON, H. B., Socorro.
HAWKINS, W. A., Silver City.
HAZELDINE, WM. C., Albuquerque.
HEWITT, JOHN Y., White Oaks.
JOHNSON, R. M., Las Vegas.
JONES, A. A., Las Vegas.
KNAEBEL, JOHN H., Santa Fe.
KNAEBEL, GEORGE W., Santa Fe.
KOOGLER, JOHN H., Las Vegas.
LLEWELLYN, W. H. H., Las Cruces.
LEONARD, FRANK A., Socorro.
LAUGHLIN, N. B., Santa Fe.
LONG, E. V., Las Vegas.
MILLS, W. J., Las Vegas.
MILLS, M. W., Springer.
MASTERSON, MURAT, Deming.
NEWCOMB, S. B., Las Cruces.
O'BRYAN, J. D., Las Vegas.
O'BRYAN, H. J., Las Vegas.
PRINCE, L. BRADFORD, Santa Fe.
PINO, PINITO, Las Cruces.
PICKETT, H. L., Hillsborough.
POSEY, G. GORDON, Silver City.
PRICHARD, GEO. W., Las Vegas.
PRESTON, GEO. CUYLER, Santa Fe.
PURDY, JAMES H., Santa Fe.
PEARCE, JOHN C., Santa Fe.
PRICE, EDWARD V., Silver City.
RYNERSON, W. L., Las Cruces.
RITCH, W. G., Engle.
READ, BENJAMIN M., Santa Fe.
READ, LARKIN G., Santa Fe.
READ, ALEXANDER, Tierra Amarilla.
RODEY, BERNARD S., Albuquerque.
SULZBACHER, LOUIS, Las Vegas.
SPRINGER, FRANK, Las Vegas.
SEWARD, E. B., Santa Fe.
SENA, JOSE D., Santa Fe.
SMITH, THOS., Santa Fe.
SNIFFEN, JOHN S., Socorro.
SLOAN, W. B., Santa Fe.
SNYDER, KARL A., Albuquerque.
SALAZAR, MIGUEL, Las Vegas.
THORNTON, W. T., Santa Fe.
TWITCHELL, R. E., Santa Fe.
TRIMBLE, L. S., Albuquerque.
VANDEVEER, P. L., Santa Fe.
VINCENT, W. A., Las Vegas.
VICTORY, JOHN P., Santa Fe.
VEEDER, JOHN D. W., Las Vegas.
WALDO, H. L., Santa Fe.
WOODWARD, J. B., Socorro.
WARREN, H. L., Albuquerque.
WHITEMAN, W. H., Albuquerque.
WILLIAMSON, J. A., Albuquerque.
WILEY, MOSES, Lincoln.
WADE, EDWARD C., Las Cruces.
YOUNG, J. MORRIS, Hillsborough.

CASES REPORTED.

[The figures in the right hand column refer to the page where a case is reported in this volume, and the reference in parentheses shows where the same case appears in the Pacific Reporter.]

Alexander v. Tennessee & Los Cerrillos Gold & Silver Min. Co. (3 P. 735).... 173
Archuleta, Waldez v. (5 P. 327).... 195
Armijo v. Baca (6 P. 938).... 294
Armijo v. Board of County Com'rs of Bernalillo County (7 P. 19).... 297
Armijo v. New Mexico Town Co. (5 P. 709).... 244
Atchison, T. & S. F. R. Co. v. Walton (9 P. 351).... 319
Atchison, T. & S. F. R. Co., Board of County Com'rs of Valencia County v. (10 P. 294).... 380
Atchison, T. & S. F. R. Co., Gonzales v. (9 P. 247).... 302
Atchison, T. & S. F. R. Co., MacVeagh v. (5 P. 457).... 205
Atlantic & P. R. Co., Board of Com'rs of Valencia County v. (9 P. 519).... 352
Atlantic & P. R. Co., Staab v. (9 P. 381).... 349
Attorney General, In re (9 P. 249).... 304
Ayers v. Chisum (1 P. 856).... 52

Baca v. Fulton (5 P. 467).... 215
Baca, Armijo v. (6 P. 938).... 294
Baxter Mountain Gold Min. Co. v. Patterson (3 P. 741).... 179
Bent v. Maxwell Land Grant & Ry. Co. (3 P. 721).... 158
Board of County Com'rs of Bernalillo County, Armijo v. (7 P. 19).... 297
Board of County Com'rs of Santa Fe County v. New Mexico & S. P. R. Co. (2 P. 376).... 116
Board of County Com'rs of Santa Fe County, Laughlin v. (5 P. 817).... 264
Board of County Com'rs of Valencia County v. Atchison, T. & S. F. R. Co. (10 P. 294).... 380
Board of County Com'rs of Valencia County v. Atlantic & P. R. Co. (9 P. 519).... 352
Borel v. Mead (2 P. 222).... 84
Boren, Gonzales v. (5 P. 336).... 204
Bowman, United States v. (5 P. 333).... 201
Browning v. Browning's Estate (9 P. 677).... 371
Brunswick v. Winter's Heirs (5 P. 706).... 241

Chaves v. Chaves (5 P. 331).... 199
Chaves v. Perea (2 P. 73).... 71
Chenowith, Territory v. (5 P. 532).... 225
Chisum, Ayers v. (1 P. 856).... 52
Collier, Robbins v. (5 P. 538).... 231
Colter v. Marriage (9 P. 383).... 351
Corkins v. Prichard (3 P. 746).... 184
Crabtree v. Segrist (6 P. 202).... 278
Cromwell, Milligan v. (9 P. 359).... 327

De Gallegos, Perea v. (3 P. 246).... 151
Denver & R. G. Ry. Co. v. Harris (2 P. 369).... 109
Dold v. Robertson (9 P. 302).... 313
Douglass v. Lewis (9 P. 377).... 345
Duran, Territory v. (3 P. 53).... 134

Favor, Kent v. (5 P. 470) 218
Finane v. Las Vegas Hotel & Imp. Co. (5 P. 725) 256
Finane, Straus v. (5 P. 729) 260
Fuller, United States v. (9 P. 597) 367
Fulton, Baca v. (5 P. 467) 215

Garcia y Ortiz, Staab v. (1 P. 857) 53
Garland, Price v. (6 P. 472) 285
Gonzales v. Atchison, T. & S. F. R. Co. (9 P. 247) 302
Gonzales v. Boren (5 P. 336) 204
Gonzales, Romero v. (1 P. 171) 35

Hager, Orman v. (9 P. 363) 331
Harris, Denver & R. G. Ry. Co. v. (2 P. 369) 109
Harvey, Horner v. (5 P. 329) 197
Herlow v. Orman (6 P. 935) 291
Hersch, Speigelberg v. (4 P. 705) 185
Hersch, Staab v. (3 P. 248) 153
Hobbs v. Spiegelberg (5 P. 529) 222
Hopkins, Orr v. (1 P. 181) 45
Hopkins, Orr v. (3 P. 61) 142
Horner v. Harvey (5 P. 329) 197
Houghton v. Las Vegas Hotel & Imp. Co. (5 P. 729) 260

Jaramillo, Staab v. (1 P. 170) 33

Kent v. Favor (5 P. 470) 218
Kinney, Territory v. (2 P. 357) 97
Kinney, Territory v. (9 P. 599) 369

Lamb v. San Pedro & Canon del Agua Co. (9 P. 525) 358
Las Vegas Hotel & Imp. Co., Finane v. (5 P. 725) 256
Las Vegas Hotel & Imp. Co., Houghton v. (5 P. 729) 260
Laughlin v. Board of County Com'rs of Santa Fe County (5 P. 817) 264
Ledoux, Pinkerton v. (5 P. 721) 252
Lewis, Douglass v. (9 P. 377) 345
Leyser v. Rindskopf (5 P. 540) 233
Lopez, Territory v. (2 P. 364) 104
Luna v. Mohr (1 P. 860) 56
Luna, Territory v. (3 P. 241) 146

McAfee, Whitney v. (1 P. 173) 37
MacVeagh v. Atchison, T. & S. F. R. Co. (5 P. 457) 205
Marriage, Colter v. (9 P. 383) 351
Maxwell Land Grant & Ry. Co., Bent v. (3 P. 721) 158
Maxwell Land Grant & Ry. Co., Thompson v. (6 P. 193) 269
Mead, Borel v. (2 P. 222) 84
Milligan v. Cromwell (9 P. 359) 327
Mohr, Luna v. (1 P. 860) 56
Monte, United States v. (3 P. 45) 126
Montoya, Smith v. (1 P. 175) 39
Murray v. Silver City, D. & P. R. Co. (9 P. 369) 337

New Mexico Lumber Ass'n, Rupe v. (5 P. 730) 261
New Mexico Lumber Ass'n, Rupe v. (9 P. 301) 312
New Mexico Town Co., Armijo v. (5 P. 709) 244
New Mexico & S. P. R. Co., Board of County Com'rs of Santa Fe County v. (2 P. 376) 116
Newton v. Thornton (5 P. 257) 189
Nichols, Territory v. (2 P. 78) 76

Orman v. Hager (9 P. 363) 331
Orman, Herlow v. (6 P. 935) 291
Orman, Texas, S. F. & N. R. Co. v. (9 P. 253) 308
Orman, Texas, S. F. & N. R. Co. v. (9 P. 595) 365

Orr v. Hopkins (1 P. 181) 45
Orr v. Hopkins (3 P. 61) 142
Osborne v. United States (5 P. 465) 213

Patterson, Baxter Mountain Gold Min. Co. v. (3 P. 741) 179
Perea v. De Gallegos (3 P. 246) 151
Perea, Chaves v. (2 P. 73) 71
Pinkerton v. Ledoux (5 P. 721) 252
Post v. Spiegelberg (5 P. 529) 222
Price v. Garland (6 P. 472) 285
Prichard, Corkins v. (3 P. 746) 184
Probst v. Trustees of the Board of Domestic Missions (5 P. 702) 237

Randall, Talbott v. (5 P. 533) 226
Randall, Talbott v. (5 P. 537) 230
Raynolds, Seewald v. (9 P. 376) 344
Remuzon, Territory v. (9 P. 598) 368
Rindskopf, Leyser v. (5 P. 540) 233
Robbins v. Collier (5 P. 538) 231
Roberts v. Trujillo (1 P. 855) 50
Robertson, Dold v. (9 P. 302) 313
Rodey v. Travelers' Ins. Co. (9 P. 348) 316
Romero v. Gonzales (1 P. 171) 35
Romero, Wagner v. (3 P. 50) 131
Rupe v. New Mexico Lumber Ass'n (5 P. 730) 261
Rupe v. New Mexico Lumber Ass'n (9 P. 301) 312

Salazar, Territory v. (5 P. 462) 210
San Pedro & Canon del Agua Co., Lamb v. (9 P. 525) 358
Saxton, Texas, S. F. & N. R. Co. v. (6 P. 206) 282
Seewald v. Raynolds (9 P. 376) 344
Segrist, Crabtree v. (6 P. 202) 278
Silver City, D. & P. R. Co., Murray v. (9 P. 369) 337
Smith v. Montora (1 P. 175) 39
Speigelberg v. Hersch (4 P. 705) 185
Spiegelberg, Hobbs v. (5 P. 529) 222
Spiegelberg, Post v. (5 P. 529) 222
Staab v. Atlantic & P. R. Co. (9 P. 381) 349
Staab v. Garcia y Ortiz (1 P. 857) 53
Staab v. Hersch (3 P. 248) 153
Staab v. Jaramillo (1 P. 170) 33
Straus v. Finane (5 P. 729) 260

Talbott v. Randall (5 P. 533) 226
Talbott v. Randall (5 P. 537) 230
Tennessee & Los Cerrillos Gold & Silver Min. Co., Alexander v. (3 P. 735) 173
Territory v. Chenowith (5 P. 532) 225
Territory v. Duran (3 P. 53) 134
Territory v. Kinney (2 P. 357) 97
Territory v. Kinney (9 P. 599) 369
Territory v. Lopez (2 P. 364) 104
Territory v. Luna (3 P. 241) 146
Territory v. Nichols (2 P. 78) 76
Territory v. Remuzon (9 P. 598) 368
Territory v. Salazar (5 P. 462) 210
Territory v. Yee Shun (2 P. 84) 82
Texas, S. F. & N. R. Co. v. Orman (9 P. 253) 308
Texas, S. F. & N. R. Co. v. Orman (9 P. 595) 365
Texas, S. F. & N. R. Co. v. Saxton (6 P. 206) 282
Thomas, Williams v. (9 P. 356) 324
Thompson v. Maxwell Land Grant & Ry. Co. (6 P. 193) 269
Thornton, Newton v. (5 P. 257) 189
Travelers' Ins. Co., Rodey v. (9 P. 348) 316
Trujillo, Roberts v. (1 P. 855) 50
Trustees of the Board of Domestic Missions, Probst v. (5 P. 702) 237

United States v. Bowman (5 P. 333)..... 201
United States v. Fuller (9 P. 597)..... 367
United States v. Monte (3 P. 45)..... 126
United States, Osborne v. (5 P. 465)..... 213

Wagner v. Romero (3 P. 50)..... 131
Waldez v. Archuleta (5 P. 327)..... 195
Walton, Atchison, T. & S. F. R. Co. v. (9 P. 351)..... 319
Whitney v. McAfee (1 P. 173)..... 37
Williams v. Thomas (9 P. 356)..... 324
Winters' Heirs, Brunswick v. (5 P. 706)..... 241

Yee Shun, Territory v. (2 P. 84)..... 82

CASES CITED.

Page

Adams v. State, 29 Ohio St. 412 80
Addington v. Etheridge, 12 Grat. 436 187
Adkins v. Holmes, 2 Ind. 203 325
Albany Nat. Bank v. Maher, 20 Blatchf. 341-343, 9 Fed. Rep. 884 385
Albertson v. Landon, 42 Conn. 209 191
Allen v. Ormond, 8 East, 4 51
Anderson v. Kerr, 10 Iowa, 233 49
Arellano v. Chacon, 1 N. M. 269 373
Armijo v. Town Co., 3 N. M. 244, 5 Pac. Rep. 709 347
Armstrong v. Tuttle, 34 Mo. 432 187
Atherton v. Fowler, 91 U. S. 144 357
Attorney General v. Lamplough, 3 Exch. Div. 223-227 128
Austin v. Stevens, 24 Me. 520 191

Backhouse v. Mohun, 3 Swanst. 434, *n* 88
Baldwin v. Bank, 1 Wall. 234 ..... 63, 64
Baldwin v. Simpson, 12 Cal. 560 238
Baltimore & P. R. Co. v. Jones, 95 U. S. 439 178
Bank of New York v. Bank, 29 N. Y. 619 66
Barton v. Murrain, 27 Mo. 238 240
Bates v. Clark, 95 U. S. 204 128
Bates v. Coster, 1 Hun, 400 335
Baxter v. People, 3 Gilman, 385 77
Bay v. Gage, 36 Barb. 447 191
Beall v. New Mexico, 16 Wall. 535 314
Beaver v. Taylor, 1 Wall. 637 318
Beebe v. Stutsman, 5 Iowa, 275 344
Bethje v. Railroad Co., 26 Tex. 604 323
Boardman v. Griffin, 52 Ind. 101 344
Board of County Com'rs of Santa Fe County v. Railroad Co., 3 N. M. 116, 2 Pac. Rep. 376 381
Bondurant v. Watson, 103 U. S. 278 356
Bornadith v. Saxton, 2 Tenn. Ch. 699 364
Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. Rep. 15 310
Bosworth v. Sturtevant, 2 Cush. 392 247
Boyce's Trustees v. Mooney, 40 Mo. 104 240
Bradley v. Spofford, 3 Foster, (N. H.) 444 241
Breen v. Sullivan, 5 Bradw. 449 54
Bronson v. Schulten, 104 U. S. 410 369
Brooks v. Wimer, 20 Mo. 503 187
Brown v. Cockerell, 33 Ala. 45 238
Brown v. Hummel, 6 Pa. St. 86 191
Brown v. Railroad Co., 33 Mo. 309 324
Brown v. Smith, 5 How. 387 348
Brown v. Tarkington, 3 Wall. 377 326
Brumley v. State, 20 Ark. 77 350
Burt v. Panjaub, 99 U. S. 182 240
Bush v. Jackson, 24 Ala. 273 342
Butts v. Dean, 2 Metc. 76 281
Butz v. Muscatine, 8 Wall. 575 267

Caldwell v. Murphy, 11 N. Y. 416 239
Calhoun v. Cook, 9 Pa. St. 226, 228 238

Page
Camden v. Doremus, 3 How. 515-530 341
Campbell v. Rankin, 99 U. S. 262 240
Canal-Boat v. Simmons, 11 Ohio, 459 317
Carpentier v. City of Oakland, 30 Cal. 439 42
Carver v. Jackson, 4 Pet. 100 191
Casad v. Holdridge, 50 Ind. 530 195
Cason v. Cheely, 6 Ga. 554 336
Chase v. Ries, 10 Cal. 517 144
Cheezem v. State, 2 Ind. 149 346
Chestnut Hill Turnpike Co. v. Rutter, 4 Serg. & R. 16 112
Chicago R. Co. v. Patchin, 16 Ill. 198 323
Chicago & A. R. Co. v. Mock, 72 Ill. 142 344
Child v. Chappell, 9 N. Y. 246 51
Christy v. Scott, 14 How. 290, 292 240
Church v. Crocker, 3 Mass. 21 149
Clark v. Nichols, 107 Mass. 547 335
Clayton v. Andrews, 4 Burr. 2101 334
Clement v. Hayden, 4 Pa. St. 139 ..... 196, 292
Coleman v. Bank, 53 N. Y. (Court of Appeals, 8 Sickels,) 388 ..... 67, 69
Collier v. Gamble, 10 Mo. 473 348
Collins v. Gilbert, 94 U. S. 753 293
Commonwealth v. Bailey, 13 Allen, 541 128
Commonwealth v. Emery, 2 Gray, 81 240
Commonwealth v. Holmes, 127 Mass. 424 ..... 101, 102
Commonwealth v. McCaul, 1 Va. Cas. 271 79
Conard v. Insurance Co., 1 Pet. 387 45
Conard v. Nicoll, 4 Pet. 306 45
Cooke v. Millard, 5 Lans. 243 335
Course v. Stead, 4 Dall. 22 ..... 355, 356
Covington v. Comstock, 14 Pet. 43 47
Cowell v. Buckelew, 14 Cal. 640 49
Crabtree v. Segrist, 3 N. M. 282, 6 Pac. Rep. 206 319
Crampton v. Zabriskie, 101 U. S. 601 265
Crowell v. Horacek, 12 Neb. 622, 12 N. W. Rep. 99 229

Danner v. Railroad Co., 4 Rich. 329 ..... 322, 323
Dash v. Van Kleeck, 7 Johns. 477 191
Davis v. Ransom, 18 Ill. 396 187
Dickinson v. Maguire, 9 Cal. 46 36
Dillon v. Railway Co., 3 Dill. 319 178
Dooley v. Watson, 1 Gray, 414 86
Doss v. Waggoner, 3 Tex. 515 350
Downs v. Ross, 23 Wend. 270 335
Drury v. Cross, 7 Wall. 299 364

Eastwood v. People, 3 Parker, Crim. R. 44 79
Eaton v. Campbell, 7 Pick. 12 240
Eaton v. Green, 39 Mass. 530, 22 Pick. 531 140
Edgell v. Hart, 13 Barb. 380 187
Eggleston v. Bradford, 10 Ohio, 312 247
Elmore v. Grymes, 1 Pet. 469 178
Ely v. Holton, 15 N. Y. 595 191
Ensign v. Kellogg, 4 Pick. 1 86
Evans v. Commonwealth, 3 Metc. 453 347
Evans v. Hettich, 7 Wheat. 453 326
Evans v. Trustees, 15 Ind. 319 241

Faulkner v. Davis, 18 Grat. 651 171
Faxon v. Barnard, 2 McCrary, 45, 4 Fed. Rep. 702 181
Ferris v. Douglass, 20 Wend. 626 356
Ferris v. Higley, 20 Wall. 375 ..... 374, 376
Field v. Boland, 1 Dru. & Walsh, 46 88
Finane v. Improvement Co., 3 N. M. 256, 5 Pac. Rep. 725 ..... 260, 261, 263
Finley v. Steele, 23 Ill. 56 348

Page
Flattes v. Railroad Co., 35 Iowa, 191 324
Fletcher v. Oliver, 25 Ark. 289 266
Flint v. Corbitt, 6 Daly, 429 335
Ford v. Williams, 3 Kern. 13 N. Y. 577 187
Frazier v. Hanlon, 5 Cal. 156 36
Freeman v. Rawson, 5 Ohio St. 1 187
French v. Millard, 2 Ohio St. 44 317
Frey v. Clifford, 44 Cal. 343 247

Galusha v. Butterfield, 2 Scam. 227 350
Garlick v. Dunn, 42 Ala. 404 350
Garmstone v. Gaunt, 1 Colly. 577 171
Gavett v. Railroad Co., 16 Gray, 501 179
Goddard v. Binney, 115 Mass. 450 335
Goembel v. Arnett, 100 Ill. 34 229
Good v. Martin, 95 U. S. 94 293
Goodwin v. Lightbody, Dan. 153 88
Gordon v. Court, 3 How. 133, 147 ..... 123, 124
Gordon v. Darnell, 5 Colo. 302 90
Grand Rapids R. Co. v. Judson, 34 Mich. 507 323
Gratz v. Ewalt, 2 Bin. 95 250
Gray v. Hawes, 8 Cal. 562 42
Great Western R. Co. v. Morthland, 30 Ill. 451 323
Green v. Richards, 8 C. E. Green, 32 89
Groves v. Buck, 3 Maule & S. 178 334
Gunn v. Brantley, 21 Ala. 644 325

Hallam v. Jacks, 11 Ohio, 692 196
Hancock v. Rand, 94 N. Y. 1 198
Harper v. Commissioners, 23 Ga. 566 266
Harris v. Youman, 1 Hoff. Ch. 178 277
Hawes v. Oakland, 104 U. S. 450 363
Hawks v. Kenebec, 7 Mass. 463 356
Hayden v. Souger, 56 Ind. 42, 47 317
Haynes v. State, 5 Humph. 120 347
Hernandez v. James, 23 La. Ann. 483 350
Herrera v. Chaves, 2 N. M. 86 179
Hicks v. Gleason, 20 Vt. 139 293
Hiester v. Laird, 1 Watts & S. 249 240
Hinde v. Longworth, 11 Wheat. 199 341
Hoadley v. Transportation Co., 115 Mass. 304 207
Hodge v. Williams, 22 How. 87 ..... 354, 355
Hogan v. Taylor, Hemp. 20 49
Hoghtaling v. Osborn, 15 Johns. 119 77
Holbrook v. Bliss, 91 Mass. 75 149
Hornbuckle v. Toombs, 18 Wall. 648 375
Howard v. Reedy, 29 Ga. 152 238
Hypes v. Griffin, 89 Ill. 134 65

Indianapolis & C. R. Co. v. Means, 14 Ind. 30 323

Jackson v. Bard, 4 Johns. 233 240
Jackson v. Dillon's Lessee, 2 Tenn. 261 240
Jackson v. Ludeling, 21 Wall. 616 364
Janes v. Martin, 7 Vt. 92 240
Jones v. Green, 1 Wall. 330 229
Jones v. Tyler, 6 Mich. 364 94
Jones v. Wood, 30 Vt. 271 ..... 293, 294
Judson v. Blanchard, 3 Conn. 579 169

Kan-gi-shun-ca, Ex parte, 3 Sup. Ct. Rep. 396 ..... 127, 130, 149
Kearney v. Vaughan, 50 Mo. 284 171
Kennedy v. Bank, 8 How. 586 42
Kentucky R. Co. v. Talbot, 78 Ky. 621 324

Page
King v. State, 2 Ind. 523 346

Laber v. Cooper, 7 Wall. 565 239
Lafayette & I. R. Co. v. Adams, 26 Ind. 76 317
Lane v. Nelson, 79 Pa. St. 407 191
Laning v. Cole, 4 N. J. Eq. 229 90
Latham v. Morgan, 1 Smedes & M. Ch. 611 250
Lawrence v. Tucker, 23 How. 14 45
Leitensdorfer v. Webb, 1 N. M. 34 373
Lester v. Matthew, 58 Ga. 403 364
Lincoln v. Claflin, 7 Wall. 132 239
Little Rock & Ft. S. Ry. Co. v. Henson, 39 Ark. 413 324
Little Rock & Ft. S. Ry. Co. v. Holland, 40 Ark. 336 324
Loan Ass'n v. Topeka, 20 Wall. 655 267
Long v. Mulford, 17 Ohio St. 485 277
Lounsbery v. Locander, 10 C. E. Green, 554 90
Lyndsay v. Railroad Co., 27 Vt. 643 323

McCauley v. Weller, 12 Cal. 500 36
McConville v. Jersey City, 39 N. J. Law, 38 346
McCormick v. Fitch, 14 Minn. 252, (Gil. 185,) 267
McCoy v. Railroad Co., 40 Cal. 534 322
McCracken v. San Francisco, 16 Cal. 591 267
McCreary v. Turk, 29 Ala. 244 342
McGregor v. Supervisors, 37 Mich. 388 300
McKissock v. Railway Co., 73 Mo. 456 323
McLean v. Bank, 3 McLean, 185, 415, 503, 587 187
McNevins v. People, 61 Barb. 307 80
McPheeters v. Railroad Co., 45 Mo. 22 317
McRee v. Brown, 45 Tex. 508 293
Magill v. Kauffman, 4 Serg. & R. 318 112
Mallison v. State, 6 Mo. 399 109
Manchester v. Ericksson, 105 U. S. 349 200
Mayor and City Council v. Railroad Co., 6 Gill, 288, 295 124
Mechanics' Bank of Alexandria v. Bank, 5 Wheat. 326 ..... 63, 64
Memphis & C. R. Co. v. Reeves, 10 Wall. 176 207
Merchants' Bank v. Bank, 10 Wall. 604, 645 ..... 110, 179
Miles v. Boyden, 3 Pick. 213 169
Milligan v. Cromwell, 3 N. M. 327 344
Mills v. Dennis, 3 Johns. Ch. 367 277
Mills v. Hoag, 7 Paige, 19 311
Mixer v. Howarth, 21 Pick. 205 335
Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. Rep. 566 239
Mobile & O. R. Co. v. Hudson, 50 Miss. 572 323
Montoya v. Donohoe, 2 N. M. 214 179
Moore v. McClure, 8 Hun, 557 66
Moore v. Pierson, 6 Iowa, 279 94
Moshier v. College, 32 Ill. 155 325
Mossman v. Higinson, 4 Dall. 12 355
Mullins v. People, 24 N. Y. 399 300
Mushlitt v. Silverman, 50 N. Y. 360 259

Nashville R. Co. v. Franklin County, 7 Amer. & Eng. R. R. Cas. 260 267
National Bank v. Bank, 99 U. S. 608 ..... 356, 357
National Bank v. Graham, 100 U. S. 702 110
National Bank v. Matthews, 98 U. S. 628 239
New Jersey R. Co. v. Pollard, 22 Wall. 341 322
New Orleans R. Co. v. Enochs, 42 Miss. 603 323
Newson v. Luster, 13 Ill. 180 240
Noll v. Swineford, 6 Pa. St. 187 259
Nolle v. Thompson, 3 Metc. (Ky.) 121 ..... 234, 235
Norwood v. Kenfield, 34 Cal. 333 350

Onderdonk v. Mott, 34 Barb. 106 171

Page
Osborn, Ex parte, 24 Ark. 479 350
Owens v. Andrew County Court, 49 Mo. 379 299

Pacific R. Co. of Missouri v. Railway Co., 111 U. S. 505, 4 Sup. Ct. Rep. 583 .. 363
Parish v. Ellis, 16 Pet. 451 375
Parks v. Ross, 11 How. 362 ..... 199, 200
Parsons v. Bedford, 3 Pet. 433 374
Patrick v. McClure, 1 Bibb, 52 325
Patterson v. Doe, 8 Blackf. 237 344
Patterson v. Winn, 5 Pet. 233 376
Pearsall v. McCartney, 28 Ala. 110 342
Pennington v. Gibson, 16 How. 65 42
Pennoyer v. Neff, 95 U. S. 714 44
People v. Ah Kong, 49 Cal. 6 212
People v. Bumberger, 45 Cal. 650 109
People v. Douglass, 4 Cow. 26 79
People v. Goodwin, 5 N. Y. 568 300
People v. Ransom, 7 Wend. 423 79
People v. Sanders, 3 Hun, 16 300
People v. Sanford, 43 Cal. 29 109
People v. Shepard, 36 N. Y. 285 347
People v. Stevens, 5 Hill, 616 326
People v. Trim, 37 Cal. 274 109
Piatt v. People, 29 Ill. 72 344
Piggot v. Railroad Co., 54 E. C. L. 233 322
Pinner v. Sharp, 23 N. J. Eq. 274 90
Pittsburgh, C. & St. L. R. Co. v. McMillan, 37 Ohio St. 554, 7 Amer. & Eng. R. Cas. 588 323
Pleasants v. Fant, 22 Wall. 121 ..... 179, 199
Pool v. Devers, 30 Ala. 675 342
Powell v. Lyles, 1 Murph. (N. C.) 348 250
Powers v. Briggs, 79 Ill. 493 65
Prine v. Commonwealth, 18 Pa. St. (6 Harris,) 103 107
Pueblo of Laguna v. Pueblo of Acoma, 1 N. M. 220 373

Randolph v. Carlton, 8 Ala. 606 317
Rankin v. Tenbrook, 6 Watts, 390 240
Ray v. Wooters, 19 Ill. 82 109
Reed v. Pelletier, 28 Mo. 173 187
Regina v. Baldry, 2 Ben. & H. Lead. Crim. Cas. 494 368
Reynolds v. O'Neil, 11 C. E. Green, 223 90
Rickets v. Dickens, 1 Murph. (N. C.) 343 250
Ripley v. Warren, 2 Pick. 594 356
Roberts v. Graham, 6 Wall. 581 341
Robinson v. Elliott, 22 Wall. 513 186
Robinson v. Railroad Co., 16 Fed. Rep. 57 209
Roebuck v. Dupuy, 2 Ala. 535 250
Rogers v. Dill, 6 Hill, 415–417 171
Rothgerber v. Wonderly, 66 Ill. 390 144
Rupe v. Association, 3 N. M. 261, 5 Pac. Rep. 730 312
Rush v. French, 1 Ariz. 125 342
Russel v. Russel, 1 Moll. 525 171

Satterfield v. Keller, 14 La. Ann. 606 94
Savings Bank v. Collector, 3 Wall. 495, 513 ..... 128, 149
Scanlan v. Keith, 102 Ill. 634 65
Scanlan v. Wright, 13 Pick. 527 240
Schneir v. Railroad Co., 40 Iowa, 337 323
Scott v. Railroad Co., 4 Jones, 432 324
Sebree v. Dorr, 9 Wheat. 558 47
Seckel v. Scott, 66 Ill. 107 344
Shealy v. Toole, 56 Ga. 210 293
Shirras v. Caig, 7 Cranch, 34 45
Short v. Price, 17 Tex. 397 94

Page
Simpson v. Shafer, 20 Ind. 306 49
Slavers, The, 2 Wall. 358 42
Smith v. Houston, 8 Ala. 736 317
Smith v. Martin, 2 Tenn. 209 240
Smith v. Railroad Co., *43 N. Y. 180 335
Smith v. Reynolds, 8 Fed. Rep. 696 ..... 90, 94
Society for the Propagation of the Gospel v. Wheeler, 2 Gall. 140, 143 191
Sohn v. Waterson, 17 Wall. 596 378
Southeastern R. Co. v. Knott, 10 Hare, 122; 17 Eng. Law & Eq. 555 87
Southern Cross Co. v. Europa Co., 15 Nev. 385 181
Spicer v. Spicer, 23 Vt. 678 ..... 293, 294
Staab v. Railroad Co., 3 N. M. 349, 9 Pac. Rep. 381 351
Stanley v. Green, 12 Cal. 163, 166 ..... 240, 247
Stansbury v. Fringer, 11 Gill & J. 149 88
Starling v. Blair, 4 Bibb, 289 247
State v. Bailey, 34 Mo. 350 368
State v. Branin, 23 N. J. Law, 484 124
State v. Cooper, 5 Day, 250; 45 Mo. 64 ..... 109, 347
State v. Craig, 23 Ind. 185 346
State v. Gibbons, 10 Iowa, 118 344
State v. Keel, 54 Mo. 182 368
State v. Liedtke, 9 Neb. 468, 4 N. W. Rep. 61 346
State v. Murray, 5 Pac. Rep. 55 212
State v. Railroad Co., 23 N. J. Law, (3 Zab.) 368, 369 ..... 110, 111
Stewart v. Fagan, 2 Woods, 215; 7 U. S. Dig. (N. S.) 224 229
Stiles v. Davis, 1 Black, 107 208
Stipp v. Railroad Co., 54 Ind. 16 317
Stokes v. Saltonstall, 13 Pet. 181 322
Stone v. Lawrence, 4 Cranch, C. C. 11 47
Stovall v. Banks, 10 Wall. 583 ..... 310, 311
Sullivan v. Adams, 3 Gray, 476 346
Sutherland v. Briggs, 1 Hare, 34 88

Taylor v. Philips, 2 Ves. Sr. 23 171
Tennent v. Battey, 18 Kan. 324 229
Territory v. Flowers, 2 Mont. 531 376
Territory v. Maxwell, 2 N. M. 250 374
Territory v. Nichols, 3 N. M. 76, 2 Pac. Rep. 78 210
Territory v. Perea, 1 N. M. 627 109
Territory v. Romero, 2 N. M. 474 80
Territory v. Romine, 2 N. M. 114 80
Territory v. Stokes, 2 N. M. 63 305
Territory v. Yarberry, 2 N. M. 391 239
Territory v. Young, 2 N. M. 93 80
Terry v. Bank, 92 U. S. 454 364
Terry v. Shively, 64 Ind. 106 344
Texas, S. F. & N. R. Co. v. Orman, 3 N. M. 365, 9 Pac. Rep. 253 365
Thacher v. Dinsmore, 5 Mass. 299 281
Thompson v. Allen, 12 Ind. 539 94
Thompson v. Cross, 16 Serg. & R. 349 ..... 196, 292
Thompson v. Maxwell, 95 U. S. 391, 393 ..... 171, 172, 277
Thurber v. Blanck, 50 N. Y. 80 229
Tompkins v. Hyatt, 19 N. Y. 534 311
Towers v. Osborne, 1 Str. 506 ..... 334, 335
Tucker v. Ferguson, 22 Wall. 527 ..... 121, 122

United States v. Alberty, Hemp. 444 128
United States v. Dawson, 15 How. 467 128
United States v. Jackalow, 1 Black, 484 128
United States v. McBratney, 104 U. S. 621 129
United States v. Norton, 91 U. S. 568 266
United States v. Percheman, 7 Pet. 51 376
United States v. Rogers, 4 How. 567 128
United States v. Starr, Hemp. 469 128

Page
United States v. Ta-wan-ga-ca, Hemp. 304 128
United States v. Tynen, 11 Wall. 88 266
United States Bank v. Beverly, 1 How. 134 233
United States Bank v. Smith, 11 Wheat. 179 200
Utley v. Mining Co., 4 Colo. 369 239

Vanderbilt, The, 6 Wall. 225 144
Vanderkarr v. Vanderkarr, 11 Johns. 122 348
Van Doren v. Robinson, 1 C. E. Green, 256 89
Van Namee v. Groot, 40 Vt. 74 325
Van Riper v. Van Riper, (4 N. J. Law,) 1 South. 156 78
Vose v. Bradstreet, 27 Me. 156 247
Vourman v. Voight, 46 Cal. 397 341

Waldez v. Archuleta, 3 N. M. 195, 5 Pac. Rep. 327 292
Walker v. Newhouse, 14 Mo. 373 240
Walsh v. Railroad Co., 8 Nev. 111 324
Wardell v. Railroad Co., 103 U. S. 651 364
Watson v. Whitney, 23 Cal. 375 36
Webb v. Insurance Co., 10 Ill. 223 325
Weems v. McCaughan, 7 Smedes & M. 422 ..... 347, 348
Weinland v. Cochran, 9 Neb. 480, 4 N. W. Rep. 67 229
Western Railroad v. Babcock, 6 Metc. 346 88
West Feliciana R. Co. v. Johnson, 5 How. (Miss.) 276 120
West Wis. R. Co. v. Supervisors, 93 U. S. 595 ..... 121, 122
Wheaton v. Peters, 8 Pet. 658 376
Whitcomb v. Williams, 4 Pick. 228 281
White v. State, 69 Ind. 279 239
Whitney v. Wyman, 101 U. S. 397 239
Whitt.er v. Railroad Co., 26 Minn. 484, 5 N. W. Rep. 372 324
Wicks v. Ludwig, 9 Cal. 175 350
Wiley v. Traiwick, 14 Tex. 669 234
Williamson v. Berry, 8 How. 498, 551 171
Williamson v. Johnson, 5 N. J. Eq. 621 325
Wilson, Ex parte, 114 U. S. 417, 5 Sup. Ct. Rep. 935 367

York v. Railroad Co., 3 Wall. 113 326

*

CASES OVERRULED,

FOLLOWED, AND APPROVED BY DECISIONS PUBLISHED IN THIS VOLUME.

ARMIJO v. TOWN CO., 3 N. M. 244, 5 Pac. Rep. 709. Overruled in Douglass v. Lewis, 3 N. M. 347, 9 Pac Rep. 379.

FINANE v. IMPROVEMENT CO., 3 N. M. 256, 5 Pac. Rep. 725. Followed in Straus v. Finane, 3 N. M. 260, 5 Pac. Rep. 730; Rupe v. Association, 3 N. M. 261, 5 Pac. Rep. 732.

HERRERA v. CHAVES, 2 N. M. 86. Approved in Alexander v. Mining Co., 3 N. M. 179, 3 Pac. Rep. 741.

MILLIGAN v. CROMWELL, 3 N. M. 327, 9 Pac. Rep. 359. Followed in Seewald v. Raynolds, 3 N. M. 344, 9 Pac. Rep. 376.

TERRITORY v. ROMAINE, 2 N. M. 114. Followed in Territory v. Nichols, 3 N. M. 80, 2 Pac. Rep. 82.

TERRITORY v. YOUNG, 2 N. M. 93. Followed in Territory v. Nichols, 3 N. M. 80, 2 Pac. Rep. 82.

WALDEZ v. ARCHULETA, 3 N. M. 195, 5 Pac. Rep. 327. Followed in Herlow v. Orman, 3 N. M. 292, 6 Pac. Rep. 936.

Orr v. Hopkins (1 P. 181) 45
Orr v. Hopkins (3 P. 61) 142
Osborne v. United States (5 P. 465) 213

Patterson, Baxter Mountain Gold Min. Co. v. (3 P. 741) 179
Perea v. De Gallegos (3 P. 246) 151
Perea, Chaves v. (2 P. 73) 71
Pinkerton v. Ledoux (5 P. 721) 252
Post v. Spiegelberg (5 P. 529) 222
Price v. Garland (6 P. 472) 285
Prichard, Corkins v. (3 P. 746) 184
Probst v. Trustees of the Board of Domestic Missions (5 P. 702) 237

Randall, Talbott v. (5 P. 533) 226
Randall, Talbott v. (5 P. 537) 230
Raynolds, Seewald v. (9 P. 376) 344
Remuzon, Territory v. (9 P. 598) 368
Rindskopf, Leyser v. (5 P. 540) 233
Robbins v. Collier (5 P. 538) 231
Roberts v. Trujillo (1 P. 855) 50
Robertson, Dold v. (9 P. 302) 313
Rodey v. Travelers' Ins. Co. (9 P. 348) 316
Romero v. Gonzales (1 P. 171) 35
Romero, Wagner v. (3 P. 50) 131
Rupe v. New Mexico Lumber Ass'n (5 P. 730) 261
Rupe v. New Mexico Lumber Ass'n (9 P. 301) 312

Salazar, Territory v. (5 P. 462) 210
San Pedro & Canon del Agua Co., Lamb v. (9 P. 525) 358
Saxton, Texas, S. F. & N. R. Co. v. (6 P. 206) 282
Seewald v. Raynolds (9 P. 376) 344
Segrist, Crabtree v. (6 P. 202) 278
Silver City, D. & P. R. Co., Murray v. (9 P. 369) 337
Smith v. Montora (1 P. 175) 39
Speigelberg v. Hersch (4 P. 705) 185
Spiegelberg, Hobbs v. (5 P. 529) 222
Spiegelberg, Post v. (5 P. 529) 222
Staab v. Atlantic & P. R. Co. (9 P. 381) 349
Staab v. Garcia y Ortiz (1 P. 857) 53
Staab v. Hersch (3 P. 248) 153
Staab v. Jaramillo (1 P. 170) 33
Straus v. Finane (5 P. 729) 260

Talbott v. Randall (5 P. 533) 226
Talbott v. Randall (5 P. 537) 230
Tennessee & Los Cerrillos Gold & Silver Min. Co., Alexander v. (3 P. 735) 173
Territory v. Chenowith (5 P. 532) 225
Territory v. Duran (3 P. 53) 134
Territory v. Kinney (2 P. 357) 97
Territory v. Kinney (9 P. 599) 369
Territory v. Lopez (2 P. 364) 104
Territory v. Luna (3 P. 241) 146
Territory v. Nichols (2 P. 78) 76
Territory v. Remuzon (9 P. 598) 368
Territory v. Salazar (5 P. 462) 210
Territory v. Yee Shun (2 P. 84) 82
Texas, S. F. & N. R. Co. v. Orman (9 P. 253) 308
Texas, S. F. & N. R. Co. v. Orman (9 P. 595) 365
Texas, S. F. & N. R. Co. v. Saxton (6 P. 206) 282
Thomas, Williams v. (9 P. 356) 324
Thompson v. Maxwell Land Grant & Ry. Co. (6 P. 193) 269
Thornton, Newton v. (5 P. 257) 189
Travelers' Ins. Co., Rodey v. (9 P. 348) 316
Trujillo, Roberts v. (1 P. 855) 50
Trustees of the Board of Domestic Missions, Probst v. (5 P. 702) 237

United States v. Bowman (5 P. 333)..... 201
United States v. Fuller (9 P. 597)..... 367
United States v. Monte (3 P. 45)..... 126
United States, Osborne v. (5 P. 465)..... 213

Wagner v. Romero (3 P. 50)..... 131
Waldez v. Archuleta (5 P. 327)..... 195
Walton, Atchison, T. & S. F. R. Co. v. (9 P. 351)..... 319
Whitney v. McAfee (1 P. 173)..... 37
Williams v. Thomas (9 P. 356)..... 324
Winters' Heirs, Brunswick v. (5 P. 706)..... 241

Yee Shun, Territory v. (2 P. 84)..... 82

CASES CITED.

Page

Adams v. State, 29 Ohio St. 412 80
Addington v. Etheridge, 12 Grat. 436 187
Adkins v. Holmes, 2 Ind. 203 325
Albany Nat. Bank v. Maher, 20 Blatchf. 341-343, 9 Fed. Rep. 884 385
Albertson v. Landon, 42 Conn. 209 191
Allen v. Ormond, 8 East, 4 51
Anderson v. Kerr, 10 Iowa, 233 49
Arellano v. Chacon, 1 N. M. 269 373
Armijo v. Town Co., 3 N. M. 244, 5 Pac. Rep. 709 347
Armstrong v. Tuttle, 34 Mo. 432 187
Atherton v. Fowler, 91 U. S. 144 357
Attorney General v. Lamplough, 3 Exch. Div. 223-227 128
Austin v. Stevens, 24 Me. 520 191

Backhouse v. Mohun, 3 Swanst. 434, *n* 88
Baldwin v. Bank, 1 Wall. 234 ..... 63, 64
Baldwin v. Simpson, 12 Cal. 560 238
Baltimore & P. R. Co. v. Jones, 95 U. S. 439 178
Bank of New York v. Bank, 29 N. Y. 619 66
Barton v. Murrain, 27 Mo. 238 240
Bates v. Clark, 95 U. S. 204 128
Bates v. Coster, 1 Hun, 400 335
Baxter v. People, 3 Gilman, 385 77
Bay v. Gage, 36 Barb. 447 191
Beall v. New Mexico, 16 Wall. 535 314
Beaver v. Taylor, 1 Wall. 637 318
Beebe v. Stutsman, 5 Iowa, 275 344
Bethje v. Railroad Co., 26 Tex. 604 323
Boardman v. Griffin, 52 Ind. 101 344
Board of County Com'rs of Santa Fe County v. Railroad Co., 3 N. M. 116, 2 Pac. Rep. 376 381
Bondurant v. Watson, 103 U. S. 278 356
Bornadith v. Saxton, 2 Tenn. Ch. 699 364
Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. Rep. 15 310
Bosworth v. Sturtevant, 2 Cush. 392 247
Boyce's Trustees v. Mooney, 40 Mo. 104 240
Bradley v. Spofford, 3 Foster, (N. H.) 444 241
Breen v. Sullivan, 5 Bradw. 449 54
Bronson v. Schulten, 104 U. S. 410 369
Brooks v. Wimer, 20 Mo. 503 187
Brown v. Cockerell, 33 Ala. 45 238
Brown v. Hummel, 6 Pa. St. 86 191
Brown v. Railroad Co., 33 Mo. 309 324
Brown v. Smith, 5 How. 387 348
Brown v. Tarkington, 3 Wall. 377 326
Brumley v. State, 20 Ark. 77 350
Burt v. Panjaub, 99 U. S. 182 240
Bush v. Jackson, 24 Ala. 273 342
Butts v. Dean, 2 Metc. 76 281
Butz v. Muscatine, 8 Wall. 575 267

Caldwell v. Murphy, 11 N. Y. 416 239
Calhoun v. Cook, 9 Pa. St. 226, 228 238

Page
Camden v. Doremus, 3 How. 515-530 341
Campbell v. Rankin, 99 U. S. 262 240
Canal-Boat v. Simmons, 11 Ohio, 459 317
Carpentier v. City of Oakland, 30 Cal. 439 42
Carver v. Jackson, 4 Pet. 100 191
Casad v. Holdridge, 50 Ind. 530 195
Cason v. Cheely, 6 Ga. 554 336
Chase v. Ries, 10 Cal. 517 144
Cheezem v. State, 2 Ind. 149 346
Chestnut Hill Turnpike Co. v. Rutter, 4 Serg. & R. 16 112
Chicago R. Co. v. Patchin, 16 Ill. 198 323
Chicago & A. R. Co. v. Mock, 72 Ill. 142 344
Child v. Chappell, 9 N. Y. 246 51
Christy v. Scott, 14 How. 290, 292 240
Church v. Crocker, 3 Mass. 21 149
Clark v. Nichols, 107 Mass. 547 335
Clayton v. Andrews, 4 Burr. 2101 334
Clement v. Hayden, 4 Pa. St. 139 ..... 196, 292
Coleman v. Bank, 53 N. Y. (Court of Appeals, 8 Sickels,) 388 ..... 67, 69
Collier v. Gamble, 10 Mo. 473 348
Collins v. Gilbert, 94 U. S. 753 293
Commonwealth v. Bailey, 13 Allen, 541 128
Commonwealth v. Emery, 2 Gray, 81 240
Commonwealth v. Holmes, 127 Mass. 424 ..... 101, 102
Commonwealth v. McCaul, 1 Va. Cas. 271 79
Conard v. Insurance Co., 1 Pet. 387 45
Conard v. Nicoll, 4 Pet. 306 45
Cooke v. Millard, 5 Lans. 243 335
Course v. Stead, 4 Dall. 22 ..... 355, 356
Covington v. Comstock, 14 Pet. 43 47
Cowell v. Buckelew, 14 Cal. 640 49
Crabtree v. Segrist, 3 N. M. 282, 6 Pac. Rep. 206 319
Crampton v. Zabriskie, 101 U. S. 601 265
Crowell v. Horacek, 12 Neb. 622, 12 N. W. Rep. 99 229

Danner v. Railroad Co., 4 Rich. 329 ..... 322, 323
Dash v. Van Kleeck, 7 Johns. 477 191
Davis v. Ransom, 18 Ill. 396 187
Dickinson v. Maguire, 9 Cal. 46 36
Dillon v. Railway Co., 3 Dill. 319 178
Dooley v. Watson, 1 Gray, 414 86
Doss v. Waggoner, 3 Tex. 515 350
Downs v. Ross, 23 Wend. 270 335
Drury v. Cross, 7 Wall. 299 364

Eastwood v. People, 3 Parker, Crim. R. 44 79
Eaton v. Campbell, 7 Pick. 12 240
Eaton v. Green, 39 Mass. 530, 22 Pick. 531 140
Edgell v. Hart, 13 Barb. 380 187
Eggleston v. Bradford, 10 Ohio, 312 247
Elmore v. Grymes, 1 Pet. 469 178
Ely v. Holton, 15 N. Y. 595 191
Ensign v. Kellogg, 4 Pick. 1 86
Evans v. Commonwealth, 3 Metc. 453 347
Evans v. Hettich, 7 Wheat. 453 326
Evans v. Trustees, 15 Ind. 319 241

Faulkner v. Davis, 18 Grat. 651 171
Faxon v. Barnard, 2 McCrary, 45, 4 Fed. Rep. 702 181
Ferris v. Douglass, 20 Wend. 626 356
Ferris v. Higley, 20 Wall. 375 ..... 374, 376
Field v. Boland, 1 Dru. & Walsh, 46 88
Finane v. Improvement Co., 3 N. M. 256, 5 Pac. Rep. 725 ..... 260, 261, 263
Finley v. Steele, 23 Ill. 56 348

Page
Flattes v. Railroad Co., 35 Iowa, 191 324
Fletcher v. Oliver, 25 Ark. 289 266
Flint v. Corbitt, 6 Daly, 429 335
Ford v. Williams, 3 Kern. 13 N. Y. 577 187
Frazier v. Hanlon, 5 Cal. 156 36
Freeman v. Rawson, 5 Ohio St. 1 187
French v. Millard, 2 Ohio St. 44 317
Frey v. Clifford, 44 Cal. 343 247

Galusha v. Butterfield, 2 Scam. 227 350
Garlick v. Dunn, 42 Ala. 404 350
Garmstone v. Gaunt, 1 Colly. 577 171
Gavett v. Railroad Co., 16 Gray, 501 179
Goddard v. Binney, 115 Mass. 450 335
Goembel v. Arnett, 100 Ill. 34 229
Good v. Martin, 95 U. S. 94 293
Goodwin v. Lightbody, Dan. 153 88
Gordon v. Court, 3 How. 133, 147 ..... 123, 124
Gordon v. Darnell, 5 Colo. 302 90
Grand Rapids R. Co. v. Judson, 34 Mich. 507 323
Gratz v. Ewalt, 2 Bin. 95 250
Gray v. Hawes, 8 Cal. 562 42
Great Western R. Co. v. Morthland, 30 Ill. 451 323
Green v. Richards, 8 C. E. Green, 32 89
Groves v. Buck, 3 Maule & S. 178 334
Gunn v. Brantley, 21 Ala. 644 325

Hallam v. Jacks, 11 Ohio, 692 196
Hancock v. Rand, 94 N. Y. 1 198
Harper v. Commissioners, 23 Ga. 566 266
Harris v. Youman, 1 Hoff. Ch. 178 277
Hawes v. Oakland, 104 U. S. 450 363
Hawks v. Kenebec, 7 Mass. 463 356
Hayden v. Souger, 56 Ind. 42, 47 317
Haynes v. State, 5 Humph. 120 347
Hernandez v. James, 23 La. Ann. 483 350
Herrera v. Chaves, 2 N. M. 86 179
Hicks v. Gleason, 20 Vt. 139 293
Hiester v. Laird, 1 Watts & S. 249 240
Hinde v. Longworth, 11 Wheat. 199 341
Hoadley v. Transportation Co., 115 Mass. 304 207
Hodge v. Williams, 22 How. 87 ..... 354, 355
Hogan v. Taylor, Hemp. 20 49
Hoghtaling v. Osborn, 15 Johns. 119 77
Holbrook v. Bliss, 91 Mass. 75 149
Hornbuckle v. Toombs, 18 Wall. 648 375
Howard v. Reedy, 29 Ga. 152 238
Hypes v. Griffin, 89 Ill. 134 65

Indianapolis & C. R. Co. v. Means, 14 Ind. 30 323

Jackson v. Bard, 4 Johns. 233 240
Jackson v. Dillon's Lessee, 2 Tenn. 261 240
Jackson v. Ludeling, 21 Wall. 616 364
Janes v. Martin, 7 Vt. 92 240
Jones v. Green, 1 Wall. 330 229
Jones v. Tyler, 6 Mich. 364 94
Jones v. Wood, 30 Vt. 271 ..... 293, 294
Judson v. Blanchard, 3 Conn. 579 169

Kan-gi-shun-ca, Ex parte, 3 Sup. Ct. Rep. 396 ..... 127, 130, 149
Kearney v. Vaughan, 50 Mo. 284 171
Kennedy v. Bank, 8 How. 586 42
Kentucky R. Co. v. Talbot, 78 Ky. 621 324

Page
King v. State, 2 Ind. 523 346

Laber v. Cooper, 7 Wall. 565 239
Lafayette & I. R. Co. v. Adams, 26 Ind. 76 317
Lane v. Nelson, 79 Pa. St. 407 191
Laning v. Cole, 4 N. J. Eq. 229 90
Latham v. Morgan, 1 Smedes & M. Ch. 611 250
Lawrence v. Tucker, 23 How. 14 45
Leitensdorfer v. Webb, 1 N. M. 34 373
Lester v. Matthew, 58 Ga. 403 364
Lincoln v. Claflin, 7 Wall. 132 239
Little Rock & Ft. S. Ry. Co. v. Henson, 39 Ark. 413 324
Little Rock & Ft. S. Ry. Co. v. Holland, 40 Ark. 336 324
Loan Ass'n v. Topeka, 20 Wall. 655 267
Long v. Mulford, 17 Ohio St. 485 277
Lounsbery v. Locander, 10 C. E. Green, 554 90
Lyndsay v. Railroad Co., 27 Vt. 643 323

McCauley v. Weller, 12 Cal. 500 36
McConville v. Jersey City, 39 N. J. Law, 38 346
McCormick v. Fitch, 14 Minn. 252, (Gil. 185,) 267
McCoy v. Railroad Co., 40 Cal. 534 322
McCracken v. San Francisco, 16 Cal. 591 267
McCreary v. Turk, 29 Ala. 244 342
McGregor v. Supervisors, 37 Mich. 388 300
McKissock v. Railway Co., 73 Mo. 456 323
McLean v. Bank, 3 McLean, 185, 415, 503, 587 187
McNevins v. People, 61 Barb. 307 80
McPheeters v. Railroad Co., 45 Mo. 22 317
McRee v. Brown, 45 Tex. 508 293
Magill v. Kauffman, 4 Serg. & R. 318 112
Mallison v. State, 6 Mo. 399 109
Manchester v. Ericksson, 105 U. S. 349 200
Mayor and City Council v. Railroad Co., 6 Gill, 288, 295 124
Mechanics' Bank of Alexandria v. Bank, 5 Wheat. 326 ..... 63, 64
Memphis & C. R. Co. v. Reeves, 10 Wall. 176 207
Merchants' Bank v. Bank, 10 Wall. 604, 645 ..... 110, 179
Miles v. Boyden, 3 Pick. 213 169
Milligan v. Cromwell, 3 N. M. 327 344
Mills v. Dennis, 3 Johns. Ch. 367 277
Mills v. Hoag, 7 Paige, 19 311
Mixer v. Howarth, 21 Pick. 205 335
Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. Rep. 566 239
Mobile & O. R. Co. v. Hudson, 50 Miss. 572 323
Montoya v. Donohoe, 2 N. M. 214 179
Moore v. McClure, 8 Hun, 557 66
Moore v. Pierson, 6 Iowa, 279 94
Moshier v. College, 32 Ill. 155 325
Mossman v. Higinson, 4 Dall. 12 355
Mullins v. People, 24 N. Y. 399 300
Mushlitt v. Silverman, 50 N. Y. 360 259

Nashville R. Co. v. Franklin County, 7 Amer. & Eng. R. R. Cas. 260 267
National Bank v. Bank, 99 U. S. 608 ..... 356, 357
National Bank v. Graham, 100 U. S. 702 110
National Bank v. Matthews, 98 U. S. 628 239
New Jersey R. Co. v. Pollard, 22 Wall. 341 322
New Orleans R. Co. v. Enochs, 42 Miss. 603 323
Newson v. Luster, 13 Ill. 180 240
Noll v. Swineford, 6 Pa. St. 187 259
Nolle v. Thompson, 3 Metc. (Ky.) 121 ..... 234, 235
Norwood v. Kenfield, 34 Cal. 333 350

Onderdonk v. Mott, 34 Barb. 106 171

Page
Osborn, Ex parte, 24 Ark. 479 350
Owens v. Andrew County Court, 49 Mo. 379 299

Pacific R. Co. of Missouri v. Railway Co., 111 U. S. 505, 4 Sup. Ct. Rep. 583 .. 363
Parish v. Ellis, 16 Pet. 451 375
Parks v. Ross, 11 How. 362 ..... 199, 200
Parsons v. Bedford, 3 Pet. 433 374
Patrick v. McClure, 1 Bibb, 52 325
Patterson v. Doe, 8 Blackf. 237 344
Patterson v. Winn, 5 Pet. 233 376
Pearsall v. McCartney, 28 Ala. 110 342
Pennington v. Gibson, 16 How. 65 42
Pennoyer v. Neff, 95 U. S. 714 44
People v. Ah Kong, 49 Cal. 6 212
People v. Bumberger, 45 Cal. 650 109
People v. Douglass, 4 Cow. 26 79
People v. Goodwin, 5 N. Y. 568 300
People v. Ransom, 7 Wend. 423 79
People v. Sanders, 3 Hun, 16 300
People v. Sanford, 43 Cal. 29 109
People v. Shepard, 36 N. Y. 285 347
People v. Stevens, 5 Hill, 616 326
People v. Trim, 37 Cal. 274 109
Piatt v. People, 29 Ill. 72 344
Piggot v. Railroad Co., 54 E. C. L. 233 322
Pinner v. Sharp, 23 N. J. Eq. 274 90
Pittsburgh, C. & St. L. R. Co. v. McMillan, 37 Ohio St. 554, 7 Amer. & Eng. R. Cas. 588 323
Pleasants v. Fant, 22 Wall. 121 ..... 179, 199
Pool v. Devers, 30 Ala. 675 342
Powell v. Lyles, 1 Murph. (N. C.) 348 250
Powers v. Briggs, 79 Ill. 493 65
Prine v. Commonwealth, 18 Pa. St. (6 Harris,) 103 107
Pueblo of Laguna v. Pueblo of Acoma, 1 N. M. 220 373

Randolph v. Carlton, 8 Ala. 606 317
Rankin v. Tenbrook, 6 Watts, 390 240
Ray v. Wooters, 19 Ill. 82 109
Reed v. Pelletier, 28 Mo. 173 187
Regina v. Baldry, 2 Ben. & H. Lead. Crim. Cas. 494 368
Reynolds v. O'Neil, 11 C. E. Green, 223 90
Rickets v. Dickens, 1 Murph. (N. C.) 343 250
Ripley v. Warren, 2 Pick. 594 356
Roberts v. Graham, 6 Wall. 581 341
Robinson v. Elliott, 22 Wall. 513 186
Robinson v. Railroad Co., 16 Fed. Rep. 57 209
Roebuck v. Dupuy, 2 Ala. 535 250
Rogers v. Dill, 6 Hill, 415-417 171
Rothgerber v. Wonderly, 66 Ill. 390 144
Rupe v. Association, 3 N. M. 261, 5 Pac. Rep. 730 312
Rush v. French, 1 Ariz. 125 342
Russel v. Russel, 1 Moll. 525 171

Satterfield v. Keller, 14 La. Ann. 606 94
Savings Bank v. Collector, 3 Wall. 495, 513 ..... 128, 149
Scanlan v. Keith, 102 Ill. 634 65
Scanlan v. Wright, 13 Pick. 527 240
Schneir v. Railroad Co., 40 Iowa, 337 323
Scott v. Railroad Co., 4 Jones, 432 324
Sebree v. Dorr, 9 Wheat. 558 47
Seckel v. Scott, 66 Ill. 107 344
Shealy v. Toole, 56 Ga. 210 293
Shirras v. Caig, 7 Cranch, 34 45
Short v. Price, 17 Tex. 397 94

Page
Simpson v. Shafer, 20 Ind. 306 49
Slavers, The, 2 Wall. 358 42
Smith v. Houston, 8 Ala. 736 317
Smith v. Martin, 2 Tenn. 209 240
Smith v. Railroad Co., *43 N. Y. 180 335
Smith v. Reynolds, 8 Fed. Rep. 696 ..... 90, 94
Society for the Propagation of the Gospel v. Wheeler, 2 Gall. 140, 143 191
Sohn v. Waterson, 17 Wall. 596 378
Southeastern R. Co. v. Knott, 10 Hare, 122; 17 Eng. Law & Eq. 555 87
Southern Cross Co. v. Europa Co., 15 Nev. 385 181
Spicer v. Spicer, 23 Vt. 678 ..... 293, 294
Staab v. Railroad Co., 3 N. M. 349, 9 Pac. Rep. 381 351
Stanley v. Green, 12 Cal. 163, 166 ..... 240, 247
Stansbury v. Fringer, 11 Gill & J. 149 88
Starling v. Blair, 4 Bibb, 289 247
State v. Bailey, 34 Mo. 350 368
State v. Branin, 23 N. J. Law, 484 124
State v. Cooper, 5 Day, 250; 45 Mo. 64 ..... 109, 347
State v. Craig, 23 Ind. 185 346
State v. Gibbons, 10 Iowa, 118 344
State v. Keel, 54 Mo. 182 368
State v. Liedtke, 9 Neb. 468, 4 N. W. Rep. 61 346
State v. Murray, 5 Pac. Rep. 55 212
State v. Railroad Co., 23 N. J. Law, (3 Zab.) 368, 369 ..... 110, 111
Stewart v. Fagan, 2 Woods, 215; 7 U. S. Dig. (N. S.) 224 229
Stiles v. Davis, 1 Black, 107 208
Stipp v. Railroad Co., 54 Ind. 16 317
Stokes v. Saltonstall, 13 Pet. 181 322
Stone v. Lawrence, 4 Cranch, C. C. 11 47
Stovall v. Banks, 10 Wall. 583 ..... 310, 311
Sullivan v. Adams, 3 Gray, 476 346
Sutherland v. Briggs, 1 Hare, 34 88

Taylor v. Philips, 2 Ves. Sr. 23 171
Tennent v. Battey, 18 Kan. 324 229
Territory v. Flowers, 2 Mont. 531 376
Territory v. Maxwell, 2 N. M. 250 374
Territory v. Nichols, 3 N. M. 76, 2 Pac. Rep. 78 210
Territory v. Perea, 1 N. M. 627 109
Territory v. Romero, 2 N. M. 474 80
Territory v. Romine, 2 N. M. 114 80
Territory v. Stokes, 2 N. M. 63 305
Territory v. Yarberry, 2 N. M. 391 239
Territory v. Young, 2 N. M. 93 80
Terry v. Bank, 92 U. S. 454 364
Terry v. Shively, 64 Ind. 106 344
Texas, S. F. & N. R. Co. v. Orman, 3 N. M. 365, 9 Pac. Rep. 253 365
Thacher v. Dinsmore, 5 Mass. 299 281
Thompson v. Allen, 12 Ind. 539 94
Thompson v. Cross, 16 Serg. & R. 349 ..... 196, 292
Thompson v. Maxwell, 95 U. S. 391, 393 ..... 171, 172, 277
Thurber v. Blanck, 50 N. Y. 80 229
Tompkins v. Hyatt, 19 N. Y. 534 311
Towers v. Osborne, 1 Str. 506 ..... 334, 335
Tucker v. Ferguson, 22 Wall. 527 ..... 121, 122

United States v. Alberty, Hemp. 444 128
United States v. Dawson, 15 How. 467 128
United States v. Jackalow, 1 Black, 484 128
United States v. McBratney, 104 U. S. 621 129
United States v. Norton, 91 U. S. 568 266
United States v. Percheman, 7 Pet. 51 376
United States v. Rogers, 4 How. 567 128
United States v. Starr, Hemp. 469 128

Page
United States v. Ta-wan-ga-ca, Hemp. 304 128
United States v. Tynen, 11 Wall. 88 266
United States Bank v. Beverly, 1 How. 134 233
United States Bank v. Smith, 11 Wheat. 179 200
Utley v. Mining Co., 4 Colo. 369 239

Vanderbilt, The, 6 Wall. 225 144
Vanderkarr v. Vanderkarr, 11 Johns. 122 348
Van Doren v. Robinson, 1 C. E. Green, 256 89
Van Namee v. Groot, 40 Vt. 74 325
Van Riper v. Van Riper, (4 N. J. Law,) 1 South. 156 78
Vose v. Bradstreet, 27 Me. 156 247
Vourman v. Voight, 46 Cal. 397 341

Waldez v. Archuleta, 3 N. M. 195, 5 Pac. Rep. 327 292
Walker v. Newhouse, 14 Mo. 373 240
Walsh v. Railroad Co., 8 Nev. 111 324
Wardell v. Railroad Co., 103 U. S. 651 364
Watson v. Whitney, 23 Cal. 375 36
Webb v. Insurance Co., 10 Ill. 223 325
Weems v. McCaughan, 7 Smedes & M. 422 ..... 347, 348
Weinland v. Cochran, 9 Neb. 480, 4 N. W. Rep. 67 229
Western Railroad v. Babcock, 6 Metc. 346 88
West Feliciana R. Co. v. Johnson, 5 How. (Miss.) 276 120
West Wis. R. Co. v. Supervisors, 93 U. S. 595 ..... 121, 122
Wheaton v. Peters, 8 Pet. 658 376
Whitcomb v. Williams, 4 Pick. 228 281
White v. State, 69 Ind. 279 239
Whitney v. Wyman, 101 U. S. 397 239
Whitt.er v. Railroad Co., 26 Minn. 484, 5 N. W. Rep. 372 324
Wicks v. Ludwig, 9 Cal. 175 350
Wiley v. Traiwick, 14 Tex. 669 234
Williamson v. Berry, 8 How. 498, 551 171
Williamson v. Johnson, 5 N. J. Eq. 621 325
Wilson, Ex parte, 114 U. S. 417, 5 Sup. Ct. Rep. 935 367

York v. Railroad Co., 3 Wall. 113 326

*

CASES OVERRULED,

FOLLOWED, AND APPROVED BY DECISIONS PUBLISHED IN THIS VOLUME.

ARMIJO v. TOWN CO., 3 N. M. 244, 5 Pac. Rep. 709. Overruled in Douglass v. Lewis, 3 N. M. 347, 9 Pac Rep. 379.

FINANE v. IMPROVEMENT CO., 3 N. M. 256, 5 Pac. Rep. 725. Followed in Straus v. Finane, 3 N. M. 260, 5 Pac. Rep. 730; Rupe v. Association, 3 N. M. 261, 5 Pac. Rep. 732.

HERRERA v. CHAVES, 2 N. M. 86. Approved in Alexander v. Mining Co., 3 N. M. 179, 3 Pac. Rep. 741.

MILLIGAN v. CROMWELL, 3 N. M. 327, 9 Pac. Rep. 359. Followed in Seewald v. Raynolds, 3 N. M. 344, 9 Pac. Rep. 376.

TERRITORY v. ROMAINE, 2 N. M. 114. Followed in Territory v. Nichols, 3 N. M. 80, 2 Pac. Rep. 82.

TERRITORY v. YOUNG, 2 N. M. 93. Followed in Territory v. Nichols, 3 N. M. 80, 2 Pac. Rep. 82.

WALDEZ v. ARCHULETA, 3 N. M. 195, 5 Pac. Rep. 327. Followed in Herlow v. Orman, 3 N. M. 292, 6 Pac. Rep. 936.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE TERRITORY

OF

NEW MEXICO.

ZADOC STAAB and another

v.

DIONICIO JARAMILLO.

Filed ——, 1883.

1. PLEADING—INCONSISTENCY—NON ASSUMPSIT—NON EST FACTUM.
Where a declaration on a note contains one count only, in special *assumpsit*, and defendant pleads *non est factum* and *non assumpsit*, and the plaintiffs subsequently amend, adding a count for goods sold and delivered and a count on account stated, and the defendant's pleas remain unchanged, plaintiffs cannot, by withdrawing the common counts of their declaration, confine the defendant to his single plea of *non est factum*. The pleas of *non assumpsit* and *non est factum* are not so inconsistent that they cannot both be left on the record.
2. PLEADING AND PROOF—EVIDENCE—COMPETENCY.
The admission in evidence of a note of a different date and amount from the note in suit, and payable on its face before the alleged cause of action arose, is error.

Error to first judicial district, San Miguel county.

BELL, J. Although not set out with entire clearness in the record before us, it is to be deduced with sufficient certainty from the record as it stands, and from the representations and admissions of counsel, that this action was commenced by a declaration containing one count only, namely, in *special assumpsit* on the note in suit; that the defendant pleaded *non est factum* and *non assumpsit;* that thereafter the plaintiffs, by permission of the court, on motion, filed an amended

declaration, containing the common count for *goods sold* and *delivered*, and a *count* on *account stated*, in addition to the original count on the note; that the defendant's pleas were not changed, and they pleaded *non assumpsit* to the additional counts, and that the case proceeded to the trial, which resulted in the judgment now appealed from upon this state of pleadings; that, after closing their testimony in chief, the plaintiffs withdrew the common counts of their declaration, leaving only the original one on the note.

The plaintiffs insist that by waiving the counts added to the declaration by amendment, namely, the common counts so added, they confined the defendant to his single plea of *non est factum*. But it is, to say the least, doubtful if, after issue joined and the conclusion of the plaintiff's case before the jury, the plaintiffs could of their own motion, and without asking or obtaining leave of the court or consent of the defendant,—neither of which is disclosed by the record before us,—so change the pleadings as to deprive the defendant of any portion of his defense to any portion of the plaintiff's original case. The pleas of *non est factum* and *non assumpsit* are, moreover, not repugnant or so inconsistent as to make them inadmissible, and so we think they were both properly left on the record. 1 Burr. Pr. 174; 1 Chit. Pl. 563.

We therefore think the defendant had a right, in the state of the pleadings at the time, to give evidence under his plea of *non assumpsit*, and that there is no error, as is urged, in admitting the following question: "Were you indebted to plaintiffs, at the date of the note or at the commencement of this suit? *Answer*. No." Such a question admitted evidence of payment, which, under the plea of *non assumpsit*, was proper.

The next assignment of error is, however, a serious one. It is urged that the court erred in admitting in evidence the note of $951.31. We are of the opinion that its admission was clearly improper. That note was dated 10 months prior to the date of the note in suit, was for a different amount, and, being payable four months from its date, was presumptively paid, and indeed the defendant was permitted to prove its payment long before the time of the alleged transactions out of which it is claimed that the note in suit in this action arose. It was not proof of payment either of the note in suit or of the debt for which the note in suit was given; not being a paper otherwise properly in the case, it could not be introduced for a comparison of handwriting, and having been once admitted for any purpose, it was easily liable to abuse as a specimen of defendant's handwriting and signature. Its admission was calculated to seriously deceive and mislead the jury in many ways, and we certainly cannot, therefore, say that its admission was immaterial error which had no effect upon the result of the case. Indeed, it is fairly to be inferred that the jury was improperly influenced by its admission. This, together with the objection urged to the admission of evidence of payment above adverted to, are the only allegations of error presented by the record on which we think it material to pass specifically.

But for the error above set forth we are of opinion that the judgment herein should be reversed and a new trial granted.

(All concur.)

MANUEL ROMERO

v.

CANDELARIO GOZALES.

Filed March 21, 1883.

FORCIBLE ENTRY AND DETAINER—ACTUAL FORCE—EVIDENCE.

An unlawful entry, unaccompanied by actual force, is not a constructive forcible entry sufficient to sustain a judgment in an action of forcible entry and detainer under the New Mexico statute.[1]

Appeal from first judicial district, Mora county.

BRISTOL, J. This action was brought originally before a justice of the peace of Mora county, in the first judicial district, under the forcible entry and detainer act. An appeal was taken to the district court of that county, and having been tried in the latter court, and judgment rendered in favor of Romero, the plaintiff, the defendant appealed to this court. There is no controversy as to the identity of the premises entered upon by the defendant and claimed by the plaintiff. In the court below the plaintiff in his complaint alleged as specific grounds of the action that the defendant entered upon plaintiff's "said premises" unlawfully, and by force, stealth, intimidation, and fraud. Upon the conclusion of the plaintiff's testimony, on the trial in the court below, the defendant moved the court to instruct the jury that there was no testimony sufficient to justify a verdict for the plaintiff, and that they should find for the defendant. This motion was overruled by the court, and the case submitted to the jury under the instructions of the court. The jury found for the plaintiff. Defendant interposed a motion for a new trial on substantially the same grounds as his previous motion. This also was overruled by the court. Judgment was entered upon the verdict. Defendant took proper exceptions, and appealed to this court.

The only assignment of error on behalf of the appellant that is necessary for this court to consider is that there was no evidence before the trial jury to sustain their verdict. The legal title to land, or even the right to the possession of land, cannot be determined in this form of action. The main point on which every forcible entry and detainer suit must be maintained, if at all, is the fact that the defendant, by the mode of his entry or detention, has committed a wrong in the nature of a public offense, and the object of the statute is to

[1]See note at end of case.

punish the wrong-doer by a restitution of the premises to the plaintiff without inquiry as to which has the legal right of possession.

It was claimed by counsel for the appellee, on the argument of the case, that every *unlawful* entry upon land is necessarily a forcible entry, within the meaning of the statute. With this view we cannot concur. There may be a peaceful entry by one person upon the lands of another without actual force, stealth, intimidation, or fraud, under an honest though mistaken belief that he had a legal right to the possession.

While such an entry might be without the authority of law, it would be a trespass simply, and not within the statute of forcible entry and detainer. It is clear that an unlawful entry, unaccompanied by *actual* force, is insufficient to maintain this action on the ground of its being constructively a forcible entry.

Under the California forcible entry and detainer statute an unlawful entry is specified as one of the causes of action. But there the courts hold, and, no doubt, correctly, that to maintain this action solely on the ground of an "unlawful entry" there must be some ingredient of fraud or willful wrong on the part of the party making the entry. *Dickinson* v. *Maguire*, 9 Cal. 46. Our statute does not include an unlawful entry among the causes of action distinct from the other causes mentioned. Under the California statute, which, like ours, specifies a forcible entry as one of the causes of action, it is held that where *force* is relied on, *actual* force, in the nature of a breach of the peace, must be shown. *Frazier* v. *Hanlon*, 5 Cal. 156; *McCauley* v. *Weller*, 12 Cal. 500; *Watson* v. *Whitney*, 23 Cal. 375. As already intimated, the main object and purpose of the statute is to prevent persons from disturbing the public peace, or perpetrating gross and willful wrongs, by maintaining by actual force or fraud what they claim as private rights in the possession of land. The bill of exceptions, containing all the evidence on the material issues, being silent on the several issues of force, stealth, intimidation, and fraud in the defendant's mode of entry, it follows that there was no evidence to sustain the verdict.

It is accordingly ordered that this judgment be reversed, appellant to recover his costs, and the cause remanded to the court below, with instructions to dismiss this action.

(All concur.)

NOTE.

FORCIBLE ENTRY AND DETAINER—WHEN LIES—PROCEDURE. This action does not lie to recover incorporeal rights, as a right of way. Roberts v. Trujillo, 3 N. M. 50, 1 Pac. Rep. 855. Nor can the widow's right to the possession of the dwelling-house for the year succeeding the husband's death be recovered in this action. Aiken v. Aiken, (Or.) 6 Pac. Rep. 682. Nor will a mere casual or "scrambling" possession support the action, as possession taken by the plaintiff just as defendant's tenant is moving out, and abandoned on the same day. Castro v. Tewksbury, (Cal.) 11 Pac. Rep. 339. Where the acts complained of amount simply to a trespass, the action will not lie. Castro v. Tewksbury, supra. So where the plaintiff takes possession in the absence of defendant, but on defendant's return permits him to come upon the land peaceably, and then, on being told roughly by defendant to leave, he does so, the action cannot be maintained. Brooks v. Warren, (Utah,) 13 Pac. Rep. 175. So where plaintiff claims a tract

of uninclosed agricultural land, a part of which only he has put in cultivation, he cannot oust a defendant, in an action of forcible entry, who moved upon the uncultivated portion, claiming to pre-empt it, but who in no way interfered with the possession of plaintiff of that part actually occupied by him. McCormick v. Sheridan, (Cal.) 19 Pac. Rep. 419. But where defendant, with a number of men, enters and tears down plaintiff's fence, and removes it some distance, and afterwards proceeds to cultivate a part of the land thus exposed by the removal of the fence, his acts amount to more than a simple trespass, and constitute a forcible entry, to redress which the action will lie. Ely v. Yore, (Cal.) 11 Pac. Rep. 868. Where defendant takes possession immediately upon the moving out of the plaintiff's tenant, plaintiff can recover the possession in forcible entry. Porter v. Murray, (Cal.) 12 Pac. Rep. 425. So where defendant takes possession during the absence of plaintiff, and prevents plaintiff's re-entry by displaying a pistol, which he does not threaten to use, and which in fact is unloaded, the possession is held by force, and may be recovered in forcible entry. Bank v. Taaffe, (Cal.) 18 Pac. Rep. 781. But where one claiming title refuses to vacate on notice, but makes no threat or demonstration of holding the possession by force, it cannot be recovered by the rightful owner in forcible entry. Harrington v. Watson, (Or.) 3 Pac. Rep. 173.

The complaint should particularly describe the land, and the mode in which defendant got or held possession should be specified. Sanchez v. Luna, 1 N. M. 238; and a complaint which omits to allege that plaintiff was possessed or entitled to the possession is fatally defective. Gonzales v. Boren, 3 N. M. 204, 5 Pac. Rep. 336; but an allegation that plaintiff is "entitled to the possession" of the premises, instead of that he is "entitled to the premises," is sufficient. Harris v. Barber, 9 Sup. Ct. Rep. 314.

JOEL P. WHITNEY and another

v.

ROBERT MCAFEE.

Filed July 30, 1883.

PUBLIC LANDS—MEXICAN GRANT—HOMESTEAD ENTRY.

Under Act Cong. July 22, 1854, directing the surveyor general of New Mexico to ascertain and report to congress on all claims to lands under the laws, usages, and customs of Spain and Mexico, and reserving lands so claimed "from sale or other disposal by the government" until final action by congress, a report by the surveyor general that a certain Mexican grant has not been surveyed, but is "reported" to contain a certain number of acres; that the grant is valid and the title perfect in representatives of the grantee,—has the effect to segregate the land from the public domain of the United States, and a homestead entry thereon is void as against the claimants under the Mexican grant.

Appeal from the second judicial district court, (BELL, J., presiding,) Bernalillo county.

BRISTOL, J. The appellees, Joel P. Whitney and Franklin H. Story, brought an action of ejectment against the appellant, Robert McAfee, to recover the possession of certain lands, and for damages for the wrongful withholding of such possession from them, and obtained judgment in their favor in the court below. Appellees claim, as the source of their title, under a grant of lands from the republic of Mexico, made prior to the cession to the United States by that republic of the territory under and by virtue of the treaty between the two governments of July 4, 1848, commonly called the treaty of Guadalupe Hidalgo. Said grant includes the Berrendo springs, in

Valencia county, claimed by the appellant, and covers the land in controversy. The grant was made in the year 1845 to Antonio Sandoval. Sandoval, the original grantee, conveyed to Gervacio Nolau, who in 1858 died seized of the premises covered by the grant. The heirs of Gervacio Nolau conveyed the entire grant to Joel P. Whitney, one of the appellees, who thereafter conveyed an undivided one-half thereof to Franklin H. Story, the other appellee.

The defense of Robert McAfee, the appellant, is based mainly upon the ground, as claimed by him in the court below, that the land in controversy belonged to the public domain of the United States, and that he had settled upon and located the same under the homestead laws of the United States. The turning point in the case, therefore, is the question whether the lands in controversy are public lands of the United States, covered by the laws of congress providing for the disposal of the public domain, or have been segregated therefrom and excepted from the operation of the homestead laws under section 8 of the act of congress of July 22, 1854, entitled "An act to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers and for other purposes." Said section 8 provides as follows:

"And be it further enacted, that it shall be the duty of the surveyor general, under such instructions as may be given by the secretary of the interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States. * * * Such report to be made according to the form which may be prescribed by the secretary of the interior, which report shall be laid before congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of congress on such claims, all lands covered thereby *shall be reserved from sale or other disposal by the government,* and shall not be subject to the donations granted by the previous provisions of this act." 10 U. S. St. at Large, 309.

Under this provision of the act of congress the surveyor general of New Mexico is clothed with judicial powers and duties with reference to Mexican and Spanish grants of land made prior to the acquisition of the territory by the United States. Neither this court nor the court below has any authority to review, reverse, or modify any decision of the

surveyor general as to the validity or invalidity of any such grant, made in a case regularly before him. That power and authority rests with congress alone, and until reversed or modified by congress any such decision of the surveyor general is binding upon this court and must be regarded as *res judicata*. The record discloses the fact that so long ago as 1855, and during the life-time of said Gervacio Nolau, and after the aforesaid conveyance to him, he made a formal application to the then surveyor general to investigate and report upon the validity of said grant, and that such proceedings were had thereon, that in January, 1873, the surveyor general made his official report to the effect, among other things, that the said grant had not been surveyed, but was "reported" to contain about 300,000 acres of land; that the grant is valid and the title perfect in the legal representatives of said Gervacio Nolau.

The legal effect of this decision of the surveyor general was to segregate from the public domain all the lands covered by the grant as reported on by him; to except and reserve them from the operation of the homestead and other general laws of the United States providing for the disposal of the public domain; and, pending the final action of congress on such report of the surveyor general, to vest by necessary implication in the grantee, and those claiming under him, the exclusive right of possession in and to the entire tract covered by the grant as reported. It is clear, therefore, that the appellant cannot rightfully claim possession by virtue of his homestead entry. He is a mere trespasser without color of right.

There are various other questions raised, but it is not necessary to pass upon them, as they would not change the result.

Judgment below affirmed, with costs.

AXTELL, C. J., dissenting.

GUSTAVUS A. SMITH

v.

FELICIANO MONTOYA.

Filed October 11, 1883.

1. ATTACHMENT—NON-RESIDENT DEFENDANT—PUBLICATION.

The provision of the statute regulating attachments (Prince, St. p. 138, § 11) that published notice to a non-resident defendant shall inform him that his property has been attached, and that, unless he appears, judgment will be rendered against him and the property sold to satisfy it, is not modified or repealed by the act of 1862, (Id. p. 143, § 36,) which merely changed the law as to the persons authorized.

to make publication; nor by the act of 1874, (Id. p. 133,) which, in addition to the previous law of attachments, provided for the citation of non-residents by publication in ordinary actions at law and suits in chancery, and a notice published in an action of *assumpsit*, which omits these requisites, will not give jurisdiction in attachment.

2. JURISDICTION—PRESUMPTION IN FAVOR OF.

The jurisdiction of a court of general jurisdiction will be presumed from the record of a judgment in evidence, but this presumption may be rebutted by the record of the entire case disclosing a want of jurisdiction.

3. JURY—INSTRUCTIONS—FRAUDULENT CONVEYANCE.

The submission to a jury of the validity of a mortgage set up as against attaching creditors, without submitting the facts on which its validity must be determined, is error.

Error to the first judicial district, Santa Fe county.

BRISTOL, J. The record in this case shows that Feliciano Montoya, the defendant in error, on the twenty-sixth of December, 1878, sued out an attachment against the property of Jerome J. Hinds, George E. Kirk, Ulyses E. Fisher, and George L. McDonaugh, to satisfy his money demand, in the sum of $400. On the following day said Montoya filed his declaration in *assumpsit* against said Hinds, Kirk, Fisher, and McDonaugh *as copartners*, and alleging them, and each of them, to be non-residents of the territory, and claiming damages in the sum of $350. On the same day that the declaration was filed,—that is, the twenty-seventh of December, 1878,—the plaintiff in error herein, Gustavus A. Smith, was summoned as garnishee.

The following notice was published in a weekly newspaper at Santa Fe, for four successive weeks, commencing on the fourth of January, 1879, to-wit:

"IN THE DISTRICT COURT, COUNTY OF SANTA FE.

"*Feliciano Montoya* v. *Jerome J. Hinds, Geo. E. Kirk, Ulyses E. Fisher, and Geo. L. McDonaugh.*

"The said defendants, Jerome J. Hinds, Geo. E. Kirk, Ulyses E. Fisher, and Geo. L. McDonaugh, are hereby notified that a suit by attachment has been commenced against them in the district court for the county of Santa Fe, territory of New Mexico, by said plaintiff, Feliciano Montoya, for the work and labor, care, and diligence, of the plaintiff, horse-feed, horse and mule hire, corn, hay, meat and drink, rent, wood, board and lodging, had by the said defendants of and from the said plaintiff. Damages claimed, four hundred dollars. That unless you enter your appearance in said suit on or before the next February term of said court, commencing on the tenth day of February, A. D. 1879, judgment by default therein will be rendered against you. JOHN H. THOMPSON, Clerk.

"C. H. GILDERSLEEVE, for Plaintiff."

That at some term of the court below, in 1880,—but which term of that year the record does not disclose,—judgment by default to ap-

pear was rendered against said Hinds, Kirk, Fisher, and McDonaugh, and the damages of the plaintiff assessed by a jury at $373.50, and judgment in *assumpsit* rendered for that sum and costs, in favor of the plaintiff, Montoya. At the February term of the court below for 1879, the plaintiff, Montoya, filed allegations in the garnishee proceedings against Smith, covering money, property, and effects belonging to the defendants, in his hands or under his control, and at the same term filed and exhibited appropriate interrogatories touching any property, effects, and credits of the defendants in the hands of said garnishee. Some of the answers of the garnishee to the interrogatories were traversed by the plaintiff, Montoya, and upon the issues thus joined a trial was had before a jury, whereby the following facts, among others, seem to have been established:

That on the fourteenth day of November, 1878, the defendants in this "action of *assumpsit*, by the name of the Fisher Stage-line Company, by Jerome J. Hinds, president and general manager," executed to the garnishee, Smith, a chattel mortgage covering all the property of defendants that subsequently came to the possession of said garnishee.

That the consideration of said mortgage purported on its face to be the sum of $2,500, to them at that date advanced by said Smith, the receipt whereof was thereby acknowledged by said defendants, and in the further consideration that said Smith should thereafter advance all money necessary to honor and pay all drafts then drawn and thereafter to be drawn for the benefit of said stage company, and to enable said Hinds, as such president and general manager, to carry on the business of said stage company.

That the conditions of said mortgage were that the same should be void if said company should pay, or cause to be paid to said Smith, said sum of $2,500, and all moneys advanced and paid by him on draft, or for the benefit of said company, *or otherwise*.

That the possession and control of the property covered by the mortgage to be in said Smith, but the said company to have the privilege of using and employing the same in its said business, with the understanding that if any other creditor *should attach the same*, or if any member of said company should attempt to remove or dispose of the same, then said Smith was to take the property from the hands of the company for his own use and disposal.

That, notwithstanding the said recitals in the mortgage, no moneys had been advanced to said company at the time of the execution and delivery of the mortgage, or prior thereto.

That from the time of the execution and delivery of the mortgage on the fourteenth of November, 1878, up to the time said Smith was summoned as garnishee, on the twenty-seventh of December of the same year, he had altogether advanced to said company not to exceed the sum of $300, but that he had obligated himself under the terms

of the mortgage to pay upwards of $4,000. Up to that date it does not appear how he had obligated himself to pay that sum in the aggregate, except the general obligation under the mortgage to make future advances, except it may be some $500 which he obligated himself to pay by indorsement of a draft drawn on the company in Washington, by said Hinds, in favor of the Second National Bank of Santa Fe, and another draft between the same parties, but not indorsed by Smith, in the sum of $1,000, which he claims he became obligated to pay through some parol agreement and taking charge of the company's stock. For what particular purpose these drafts were drawn does not clearly appear.

That Smith, after he had been summoned as garnishee, and before answering the interrogatories propounded in the garnishee proceedings against him, had property of said company in his possession under said mortgage, the value of which was much more than enough to satisfy the judgment rendered in favor of the plaintiff, Montoya.

A trial was had on the issues joined in the garnishee proceedings, resulting in a judgment against Smith, as garnishee, in the sum of $424 and costs.

A multitude of errors are assigned upon the record, only a few of which, based upon the foregoing statement of the case, do we deem it necessary to notice. The first question of importance raised is as to whether the court below had acquired jurisdiction to render a judgment in favor of the plaintiff, Montoya, against Hinds *et al.*, in the action of *assumpsit*, and to order a sale of attached property. As no judgment could be legally rendered against Smith, as garnishee, until after judgment had been rendered against the defendants in the action in which he was summoned as garnishee, it follows that the garnishee had the right as a matter of defense to show either by the record, or, if the record was silent, by other competent proofs, that the judgment was void for want of jurisdiction. Upon the trial between the plaintiff and garnishee the plaintiff offered in evidence the record of the judgment alone rendered by default in his favor and against Hinds *et al.* This was objected to on the ground that there was nothing in the record as presented showing that the court had acquired jurisdiction.

This objection was prematurely raised and properly overruled at the time, since the jurisdiction of a court of general jurisdiction will be presumed from the judgment itself, though the record does not recite the fact conferring jurisdiction. 8 How. 586; 2 Wall. 358; 16 How. 65; 30 Cal. 439. But this presumption does not arise when the record of the entire case discloses a want of jurisdiction. 8 Cal. 562. And the question here presents itself whether other parts of the record did not disclose facts showing affirmatively that the court had not acquired jurisdiction to render the judgment it did against Hinds and his co-defendants.

The act of 1874, (Prince, St. 133,) in regard to the service of cita-

tions by publication, did not change the law then in force as to the form and substance of published notices in attachment proceedings. That act expressly prescribes that the notice therein provided for "shall conform as far as practicable, in form, *time, and substance*, to the laws governing publication in causes of attachment." This language is clearly inconsistent with the assumption that the legislature intended to change the form and substance of the notice in attachment proceedings. It is true that the act itself prescribes a form of notice; but it is quite evident, from the tenor of the whole act, including the form of notice prescribed, that its provisions were intended as an addition to the notice in attachment proceedings, and to cover only citations by publication in ordinary actions at law and suits in chancery.

Among the necessary parts of the notice to be published in attachment proceedings under the Kearney Code, was a notice to the defendant that "his property had been attached," and that "unless he appeared, etc., judgment would be rendered against him, and his property sold to satisfy the same." Prince, St. § 11, p. 138. This requirement has never been repealed by subsequent legislation. The act of 1862 merely changed the law as to the officers or persons authorized to make publication. Id. § 36, p. 143. While the aforesaid act of 1874 makes another change, by conferring the authority on the clerk of the court, and, in addition to the previous law as to attachments, as already stated, providing for citation on non-residents by publication in ordinary actions at law and suits in chancery, the record discloses the fact that the only notice to the non-resident defendants, Hinds *et al.*, was the notice already set out in full in the statement of the case. This contains no notice to the defendants that their property had been attached, nor that such property would be sold to satisfy the judgment that would be rendered against them on their failure to appear as therein cited. These constituent parts of the notice, as provided by statute, (Prince, St. § 11, p. 138,) are certainly material, and their omission—the defects not having been cured by a voluntary appearance of the defendants—renders the notice ineffectual and void.

As a citation and notice to non-resident defendants by publication is in derogation of the common-law mode of personal service, the statutory requirements as to what the notice shall contain must be strictly complied with. Unless this is done in the case of non-resident debtors who do not appear, the court acquires no jurisdiction for any purpose whatever as against them or their property. Even in proceedings *in rem* against the property of non-resident debtors, the citation by publication or otherwise to the defendant, as expressly provided by law, must be given, whereby they may have their day in court, otherwise the court will acquire no jurisdiction or authority to adjudge a sale of their property to satisfy their debts. Even when citation and notice by publication in the mode provided by statute is

given to a non-resident defendant who does not appear, no valid *personal* judgment can be rendered against him. 95 U. S. 714. In such case, if the non-resident defendant has property within the territorial jurisdiction of the court, the same may be reached by attachment properly instituted, and the court, upon seizure of the property under the writ of attachment and proper notice by publication, so far acquires jurisdiction of the property, as a proceeding *in rem*, as to ascertain the pecuniary obligations of the defendant, and to apply the proceeds of the attached property in satisfaction of the same. Id.

We have a statute substantially to the same effect, which is as follows: "When the defendant shall be notified by publication as aforesaid, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded to final judgment as in ordinary actions, but such judgment *shall only bind* the property attached, and shall be no evidence of indebtedness against the defendant in any subsequent suit." Prince, St. § 12, p. 138.

This is all the court could do in any event in the present case. Everything, therefore, relating to jurisdiction depends upon the regularity and sufficiency of the attachment proceedings. As the proper citation and notice were not published, it follows that the court below had acquired no authority to adjudge a sale of the attached property to satisfy the plaintiff's demand; and as a legal judgment against the attached property was a necessary prerequisite to a valid judgment against the garnishee, it further follows that the final judgment rendered against the garnishee, Smith, was premature and unauthorized.

Several errors are assigned on the charge of the court to the trial jury, only one of which do we deem it necessary to notice. Among other things the court said to the jury as follows: "Smith says, by way of defense, that the property he held of Hinds' was held under a mortgage, and he puts this mortgage in evidence. If this mortgage is a valid one, and covers the property which is claimed to have been garnished in Smith's hands, and Smith has not received from the property received therefor enough money to cover the total amount secured by said mortgage, then he is not responsible in any sum to the plaintiff. If said mortgage was not valid, then, of course, it is no defense." This part of the charge was objected to on the ground that, as to the mortgage, it only submitted to the jury the question of its validity. The objection being overruled the same was excepted to. This submission to the jury of the validity of the mortgage, without submitting the facts on which its validity or invalidity must be determined, was error, that was well calculated to confuse and mislead the jury. The tenor and terms of the mortgage, and what transpired under it, were sufficient to cast grave suspicions on it as to the *bona fides* of the transaction. The only ground on which the mortgage could be attacked was that of fraud in making a disposition of the property with the view of hindering or delaying the creditors of the

defendants Hinds *et al.* in the collection of their demands. The fact that the mortgage was given to secure future advances, if drawn in good faith, was not objectionable. But the question of bad faith may be properly raised in all such cases, and especially where the mortgage is interposed as a shield against attaching creditors. 1 Pet. 387; 4 Pet. 306; 7 Cranch, 34; 23 How. 14. The questions of fact as to the *bona fides* and the purpose of the mortgage ought to have been submitted to the jury as a prerequisite to the determination of its validity.

Judgment reversed, and the cause remanded to the court below, with instructions to grant leave to the plaintiff to proceed to a proper citation of the defendants Hinds *et al.*, and to proper proceedings thereon, and thereupon to proceed with a new trial between the plaintiff and the garnishee, Smith; the defendant in error to recover his costs.

(All concur.)

WILLIAM C. ORR and another

v.

LAMBERT N. HOPKINS.

Filed October 14, 1883.

1. PROMISSORY NOTE—"WITH EXCHANGE."
The words "with exchange," inserted in a promissory note, by its terms made payable at a certain place, are mere surplusage, without significance, and do not affect the character of the instrument as a note.[1]

2. SAME—EVIDENCE—VARIANCE—COMMON COUNTS.
Though the note in evidence is fatally variant from the note declared on in the special count, it will be received in support of a count for an account stated.

3. SAME—INTEREST.
Interest at the legal rate only can be recovered on the common counts, though the note bear a higher rate by its terms.

Appeal from the second judicial district, Bernalillo county.

BRISTOL, J. The declaration in this case, in addition to the common counts in *assumpsit*, contains a special count upon a promissory note in the words as follows: "For that whereas the said defendant, heretofore, to-wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-one, at, to-wit, the city of Saint Louis, Missouri,—that is to say, at, to-wit, the county of Valencia aforesaid, written St. Louis,—made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to-wit, the day and year aforesaid, and thereby then and there promised to pay, four months after the date thereof, to the order of the said plaintiffs the sum of thirteen hundred and fourteen and 65-100 dollars, for value received, with interest at the rate of ten per cent. per

[1] See note at end of case.

annum from maturity, and then and there delivered the said promissory note to the said plaintiffs, by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay the said plaintiffs the said sum of money in the said promissory note, (mentioned,) and being so liable, he, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at, to-wit, the county of Valencia aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified according to the tenor and effect thereof."

At the time of filing the declaration there was also filed therewith a promissory note in writing in the words and figures as follows:

"$1,314.65. St. Louis, October 1, 1881.

"Four months after date, I, the subscriber, of Fort Wingate, county of ———, state of New Mexico, promise to pay to the order of Orr & Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley) thirteen hundred and fourteen 65-100 dollars, with exchange, for value received, with interest at the rate of two per cent. per annum after maturity, until paid, without defalcation or discount, negotiable and payable at First National Bank, Santa Fe, N. M. L. N. Hopkins, Jr."

The defendant pleaded the general issue. Upon the trial the plaintiffs offered in evidence the promissory note filed with the declaration. This was objected to on the ground that it was not a negotiable promissory note, in that it provided for the payment of exchange over and above the principal and interest therein specified, which rendered the amount to be paid thereon unliquidated and uncertain, and, not being a promissory note, it did not import a consideration. The note was further objected to as evidence, on the ground of variance between it and the note declared on in the special count. Both of these objections were overruled by the court, and the note was received in evidence under exceptions. The only additional evidence for the plaintiffs was that of the witness Childers, which was very brief and as follows:

"*Gentlemen of the Jury:* I state, under my oath to you, that, on or about the seventh day of March of this year, I went to Fort Wingate for the purpose of seeing the defendant in this case, Lambert N. Hopkins, in regard to the note sued on and the collection of the debt of which it is the evidence. I presented this note to L. N. Hopkins. Hopkins admitted the indebtedness and asked me not to bring suit on it before the first day of April; that on that day he would pay it. He failed to pay it and I therefore brought suit. I have computed the interest on the note and find it to be $84.83; note, $1,314.65; total, $1,399.48."

This testimony, also, was objected to on behalf of defendant, on the ground of its being immaterial, incompetent, and improper. The objections were overruled, and the evidence went to the jury under exceptions. No testimony was offered on behalf of the defendant. No instructions were asked for by either party. The court, therefore, on its own motion, charged the jury to find for the plaintiffs. This instruction was excepted to on behalf of the defendant. The jury rendered a verdict for plaintiffs in the sum of $1,399.48. Defendant interposed motions in arrest of judgment and for a new trial, which were overruled, and judgment rendered for the plaintiffs in the amount specified in the verdict and costs.

Numerous errors are assigned on behalf of the plaintiff in error, but it is necessary to consider only those that are based upon the objections and exceptions already referred to. Whether, under any circumstances, the terms as to payment of exchange would destroy the character of an instrument in writing as a promissory note which otherwise would be a perfect promissory note,—which may be doubted, —no such question can arise in this case. The terms of the note as to exchange are mere surplusage and have no significance whatever. The note was made negotiable and payable at the First National Bank of Santa Fe, and payment at that bank, principal and interest, *without payment of any exchange,* would have been a full and complete satisfaction of the note. The note received in evidence is in all respects, upon its face, a valid negotiable promissory note, and the law implies a consideration for the promise therein contained. The objection to the note received in evidence, that it varies from the note as declared on, is no doubt well taken, so far as the special count in the declaration is concerned. No principle of law is better settled, under any system of pleading, than when a promissory note, bill of exchange, or other instrument in writing is sued on it must be set out in the declaration in each and all its material terms and conditions, according to their precise legal effect. 1 Chit. Pl. 305, with note 3, and authorities cited.

What constitutes the variance between the note as declared on in this case and the note received in evidence is, the former is made negotiable and payable generally or absolutely, while a limitation is placed upon the latter, in that it is made negotiable and payable at a particular specified place. It cannot be said, therefore, that the terms of both have the same legal effect. This has always been considered a fatal variance. 1 Chit. Pl. 309; 14 Pet. 43; 9 Wheat. 558; 4 Cranch, C. C. 11. Had the declaration contained only the special count on the promissory note, it is clear that, upon the evidence received under objection, it would have been error to have rendered judgment thereon for the plaintiffs in any sum whatever. But it seems that now the practice is sanctioned by high judicial authority of receiving promissory notes and bills of exchange as *prima facie*

evidence in support of any or all the common counts in *assumpsit* between the immediate parties. 2 Greenl. Ev. § 112.

It is difficult to comprehend the reasonableness of this practice to the extent it has been carried by some of the courts. It must necessarily lead to many absurdities. For instance, upon the common count for money lent, if supported by oral testimony, it would be necessary to prove that the transaction was essentially a loan of money; yet it is held that a promissory note, though it may have been given for work and labor, may be received to support the common count for money loaned. However this may be on principle, it is clear that every promissory note or bill of exchange necessarily includes an account stated between the immediate parties thereto; that is, that there had been a prior transaction or transactions between the parties, involving an indebtedness from one to the other,—a mutual settlement thereof upon examination, an acceptance thereof by them, resulting in finding a certain amount in money to be due, and a promise, express or implied, to pay the same. Upon every account stated the law implies a valuable consideration, and it is not necessary to inquire into the nature or items of the original account. 1 Chit. Pl. 358. Proof of a settlement and stated account between the parties makes out a *prima facie* case. A promissory note, therefore, is from its very terms the most satisfactory evidence that there had been a settlement between the parties, and that the principal sum therein specified had been found to be due from the maker to the payee. Chit. Cont. (10th Amer. Ed.) 723. The promissory note, therefore, was properly received in evidence in support of the common count, upon an account stated.

As no judgment could be properly rendered under the evidence on the special count on the promissory note, then we are to consider the case on the common counts exclusively, and as though no such special count was in the declaration. In this view of the case it is evident that the judgment is for a larger sum than is claimed under the common counts, which cannot exceed the sum of $1,314.65, and interest at 6 per cent. per annum from the date of the stated account between the parties to the date of the judgment. This is all that can be claimed under the common counts, and is all that is claimed in the declaration on these counts. At common law, in the absence of any statutory provisions as to interest, none could be recovered on any of the common counts. 1 Chit. Pl. 356. If, at the date of the account stated, there was a promise to pay interest at a stipulated rate above legal interest, then to recover the same, in addition to the amount due on the account stated, there should have been a count therefor alleging forbearance as the consideration for the promise. *Vide* "Count for Interest," 2 Chit. Pl. 88. Our statute allows interest at 6 per cent. per annum on money due upon the settlement of matured accounts. Prince, St. 414. This, of course, covers an account stated, and may

be recovered on a count on an account stated. Judgment cannot be rendered for a greater amount than the damages laid in the declaration. *Hogan* v. *Taylor*, Hemp. 20. On the common counts, therefore, the plaintiff is entitled to recover only the sum of $1,314.65, and interest thereon from the first day of October, 1881, at 6 per cent. per annum, instead of 10 per cent., as in the judgment rendered.

The proper practice on an appeal, where the record shows a judgment in excess of the amount laid in the declaration, and the amount of the excess is capable of exact computation, seems to be to permit the judgment creditor to file a remission of the excess, and, if done, to affirm the judgment as to the residue; otherwise, to reverse the judgment and order a new trial. 14 Cal. 640; 10 Iowa, 233; 20 Ind. 306.

It is ordered that the defendant in error have leave, until the second Monday of January, 1884, to file a remission, as indicated by this opinion, and, if done within that time, the judgment to be affirmed as to the residue; and on failure so to do, the judgment to be reversed and the cause remanded for a new trial.

(All concur.)

NOTE.

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—WHAT DESTROYS. The weight of federal authority is to the effect that a note payable "with exchange" is non-negotiable, for such a stipulation renders the amount to be paid at maturity uncertain, the rate of exchange not being fixed, and this uncertainty violates an elemental principle of negotiable instruments. Hughitt v. Johnson, 28 Fed. Rep. 865; Bank v. McMahon, 38 Fed. Rep. 283; Bank v. Strother, (S. C.) 6 S. E. Rep. 313. In Bank v. McMahon, supra, it was held that the stipulation to pay "with exchange" destroyed the negotiability of the note and defeated the jurisdiction of the federal court, where that depended on the fact of the negotiability of the instrument sued on.

The courts are entirely divided as to the effect of a provision for the payment of counsel fees and costs of collection in case suit is brought on the note. In *Minnesota*, *Wisconsin*, *Dakota*, *Michigan*, *Pennsylvania*, *Missouri*, and *South Carolina* it is held that the stipulation to pay costs and attorney's fees destroys the negotiability of the note. Jones v. Radatz, (Minn.) 6 N. W. Rep. 800; Morgan v. Edwards, (Wis.) 11 N. W. Rep. 21; Bank v. Larsen, (Wis.) 19 N. W. Rep. 67; Garretson v. Purdy, (Dak.) 14 N. W. Rep. 100; Bank v. Wheeler, (Mich.) 42 N. W. Rep. 963; Altman v. Rittershofer, (Mich.) 36 N. W. Rep. 74; Altman v. Fowler, (Mich.) 37 N. W. Rep. 708; Bank v. Purdy, (Mich.) 22 N. W. Rep. 93; Bank v. Strother, supra; Bank v. Gay, 63 Mo. 33; Daly v. Maitland, 88 Pa. St. 384; Woods v. North, 84 Pa. St. 407; Adams v. Seaman, (Cal.) 23 Pac. Rep. 53. The *California* decision rests upon a provision in the Code of that state that negotiable instruments shall be made payable "without any condition not certain of fulfillment," the court holding that, as suit may not be brought for collection, the condition upon which attorney's fees and costs are to be paid is uncertain.

On the other hand, it is settled in the courts of *Iowa*, *Illinois*, *Louisiana*, *Kansas*, and *Kentucky*, and by the weight of federal authority, that such stipulations do not affect the negotiability of the instruments containing them. Nelson v. Everett, 29 Iowa, 184; Sperry v. Horr, 32 Iowa, 184; Weatherby v. Smith, 30 Iowa, 131; Nickerson v. Sheldon, 33 Ill. 372; Dietrich v. Baylie, 23 La. Ann. 767; Seaton v. Scovill, 18 Kan. 435; Gaar v. Banking Co., 11 Bush, 182; Adams v. Addington, 16 Fed. Rep. 89; Schlesinger v. Arline, 31 Fed. Rep. 649; Bank v. Ellis, 2 Fed. Rep. 45. In Hardin v. Olson, 14 Fed. Rep. 705, it was decided that such a stipulation did destroy the negotiability of the instrument, but the decision was placed distinctly on the ground that the point had so been decided in *Minnesota*, where the federal court was sitting, and where the instrument in question was executed and made payable. In Adams v. Addington, however, it was held that the question was one of general commercial law, and that the federal courts were not bound by the decisions of the state courts. The only federal decision which denies the validity of a stipulation to pay costs and attorney's fees is Bank v. Sevier, 14 Fed. Rep. 662, where CALDWELL, J., held that such a stipulation was invalid, as contrary to public policy, and that it could not be enforced at all. The cases maintaining that the stipulation to pay costs and attorney's fees does not render the instrument non-negotiable go upon the ground that there is no uncertainty as to the amount

necessary to discharge the note at maturity, because the provision for the payment of costs of collection, etc., only takes effect after maturity, upon the dishonor of the note.

The waiver of homestead and exemption benefits in a note does not render it non-negotiable. Lyon v. Martin, (Kan.) 2 Pac. Rep. 790; Hughitt v. Johnson, supra.

The addition of the maker's seal to his signature destroys the negotiability of the instrument. Rawson v. Davidson, (Mich.) 14 N. W. Rep. 565; Brown v. Jordhal, (Minn.) 19 N. W. Rep. 650. But if the maker is a corporation, *contra*. Auerbach v. Mill Co., (Minn.) 9 N. W. Rep. 799.

A condition contained in a memorandum written on the back of the note, that it shall only be paid in case a certain other note is not paid, destroys its negotiability. Grimison v. Russell, (Neb.) 16 N. W. Rep. 819. And so does a condition that the time of payment may be extended indefinitely, at the option of the payee. Smith v. Van Blarcom, (Mich.) 8 N. W. Rep. 90.

PLEADING—DESCRIPTION OF INSTRUMENT SUED ON—VARIANCE. Owing to the liberality of the legislatures and courts in allowing amendments to conform the pleadings to the evidence, the question of variance in actions on instruments in writing seldom arises. It has been determined that where a declaration in covenant describes the contract as one for the sale of "certain loose foundry property," at a given price, and the contract produced is an agreement under seal for the sale of land and buildings thereon, and also for the loose property described in the declaration for an entire consideration, the variance is fatal. Garner v. Cleaver, (Pa.) 19 Atl. Rep. 408. And where the declaration is on a promissory note, but the instrument produced in evidence is under seal, the variance is fatal. McCrummen v. Campbell, (Ala.) 2 South. Rep. 482. But where the declaration on a note contains three counts, two of which correctly describe it, but in the third there is a variance between the note described and the one proved, it is immaterial whether all consideration of the case under the third count be withdrawn from the jury or not. Roberts v. Hawkins, (Mich.) 38 N. W. Rep. 575. And where a bill to foreclose a mortgage describes the notes as made by one person, when in fact they are made by two, the variance is immaterial. Botsford v. Botsford, (Mich.) 12 N. W. Rep. 897. And where, in a suit on a bond, the petition states that it is for $6,000, but a certified copy of the bond made a part of the petition shows that it is for $6,500, the bond for the latter amount is admissible in evidence, as the variance is not misleading. Mast v. Nacogdoches Co., (Tex.) 9 S. W. Rep. 267. That the declaration on a policy of insurance states the consideration of the contract to be the premiums, while the policy itself expresses that it is made "in consideration of the representations made in the application" and the premiums, does not constitute a variance. Insurance Co. v. Raddin, 7 Sup. Ct. Rep. 500. In a suit on time-checks described in the petition, but not stated to bear indorsements, the fact that they are indorsed does not constitute a variance. Railway Co. v. Cockvill, (Tex.) 10 S. W. Rep. 702.

THOMAS ROBERTS and others

v.

LORETO TRUJILLO and others.

January Term, 1884.

FORCIBLE ENTRY AND DETAINER—PLEADING—COMPLAINT.

In an action of forcible entry and detainer, a complaint alleging that plaintiffs are entitled to and possessed of the "entrances and exits" of a certain tract of land, and that the defendant illegally and by force entered upon the land, and withholds the same, makes no claim to the property, and will not sustain a judgment.

C. H. Gildersleeve, for plaintiffs in error.

Fiske & Warren, for defendants in error.

BELL, J. This is an appeal from the judgment of the district court of Santa Fe county, entered therein by default. The action was orig-

inally brought in a justice's court for precinct No. 4 of said county. Judgment was there rendered against the defendants, the plaintiffs in error here. Appeal was taken to the district court for Santa Fe county, and there the appellants failing to docket their appeal, it was, under the rule, docketed by the appellees and the judgment of the justice's court affirmed by default. Had the attention of the chief justice who presided in the district court been called to the record, the motion to affirm the judgment would undoubtedly have been denied and the complaint dismissed.

The action is intended to be an action of forcible entry and detainer, but an examination of the complaint shows that it alleges nothing upon which such an action could be maintained. The language used in the complaint is that the plaintiffs "were legally entitled and possessed freely to the entrances and exits of a certain tract of land situated in precinct No. 4 of said county, and known and described as the entrances and exits of the house of Rosario Arias, and being thus legally entitled to the said entrances and exits upon said land, as above said, the said defendant Thomas Roberts, on or about the twentieth day of August, 1880, and in the county aforesaid, illegally and by force entered upon said land or tract of land and detained and kept the same in possession, and still keeps it in possession, against the plaintiffs," etc. This complaint is wholly insufficient, and no judgment could be properly rendered on it. It does not allege that the plaintiffs owned or were entitled to the possession of any lands or tenements whatever in that behalf. The only allegation is that they were entitled to "certain entrances and exits." What is meant by these words it is somewhat difficult to say. They may mean doors, or gates, or openings, or, perhaps, passages. By the construction most favorable to the plaintiffs, they might be held to mean a right of way over certain lands.

An action of ejectment or forcible entry and detainer does not lie to enforce such a right. *Child* v. *Chappell*, 9 N. Y. 246. It is incorporeal, and, of course, could not be delivered by the sheriff. An action on case may be sustained for its obstruction, (*Allen* v. *Ormond*, 8 East, 4,) or equity may be invoked to restrain interference, but no relief can be granted on the present form of action.

The judgment should be reversed and the complaint dismissed at the costs of the plaintiffs.

(All concur.)

JOHN AYERS, Ex'r, etc.,

v.

JOHN CHISUM.

January Term, 1884.

PAROL EVIDENCE—DEPOSITIONS IN FORMER SUIT.

Where it is sought to prove, not the contents of certain depositions, but simply the fact that they were properly taken and used in a previous suit between the same parties touching the same subject-matter, this may be done by parol evidence, and the record of the former suit need not be introduced.

Appeal from the First judicial district court, Santa Fe county.

William Breeden and *T. B. Catron*, for plaintiff.

Conway & Risque, for defendant.

AXTELL, C. J. This was a suit brought by John Ayers, executor of William Rosenthal, deceased, to recover upon three promissory notes. On the trial, plaintiff introduced certain depositions to prove the making and indorsing of said notes. These depositions, it was alleged, had been taken between the same parties, touching the same subject-matter, in the Second judicial district. Defendant objected to the introduction and reading of said depositions, because the only evidence offered of the existence of the former suit was by parol. Defendant contended that the record of said suit ought to have been introduced. This is the only error we deem important to notice, for if the depositions were properly admitted, there was evidence sufficient to go to the jury. This is not a case of proving the contents of a document, and every other fact, speaking generally, must be proved by parol evidence. It was not sought to prove the contents of the depositions, but simply and only to establish the fact that they had been properly taken, introduced, and used in the Second judicial district in a suit touching the same subject-matter, and between the same parties. This fact was properly proved by oral evidence. The depositions once introduced, there is a fair issue of fact. This has been passed upon by a jury. The finding of the jury, when lawfully and fairly reached, ought to stand. Another jury might find differently, and might not; but whether they would or not, this was the jury to whom, under the law, the responsibility was committed, and whose decision must not be disturbed unless error or mistake or unfairness has been shown to have brought it about. Nothing of that kind is shown, and we see no good ground for setting aside their verdict. Judgment affirmed.

(All concur.)

ZADOC STAAB and another

v.

EUSEBIO GARCIA Y ORTIZ.

January Term, 1884.

1. PROMISSORY NOTE—GENERAL ISSUE.
In a suit on a promissory note, a partial failure of consideration may be proved under the general issue, and is a good defense *pro tanto.*

2. SAME—PLEADING—SET-OFF.
Under the New Mexico practice act of 1880, (Prince, St. p. 124, § 11, subd. 3,) new matter constituting a cause of action in favor of defendant is available as a set-off, even in an action on a note given in final settlement of account between the parties.

3. SAME—EVIDENCE—CONDITION PRECEDENT.
Where it is clear from the evidence that certain goods were not to be paid for until the quartermaster's receipt or voucher had been issued, no action can be maintained for such goods without proof of its issuance.

Appeal from the district court of the First judicial district, county of San Miguel; PRINCE, C. J.

W. T. Thornton, for appellants.

S. M. Barnes, for appellee.

BELL, J. This is an action of *assumpsit* against the defendant, on a promissory note made by him to the plaintiffs, and was brought in the district court of San Miguel county, but subsequently moved by a change of venue to Santa Fe county. The defendant pleaded the general issue and also filed a plea of set-off, with a bill of particulars of the same. The cause was tried by a jury and judgment rendered on the verdict for plaintiffs for the sum of $31.22. Plaintiffs have appealed from that judgment, and counsel, in their behalf, has filed numerous assignments of error. It will not be necessary for us to consider all these assignments, most of them being immaterial, in our judgment. We shall confine ourselves to the consideration of the three errors alleged, which we regard as the most important.

It is urged by the plaintiffs that a partial failure of consideration could not be shown under the general issue, and that, therefore, the court below erred when it permitted the defendant to show partial failure of the consideration upon which the promissory note in suit was given. This was not error, in our judgment. The right of the defendant to prove partial failure of consideration in an action on a promissory note, under the settled rules, cannot, we think, be doubted. Edw. Bills, § 467. The author there says: "It is now settled that this doctrine is applicable even when the defendant imputes no fraud, but only complains that there has been a breach of contract on the

part of the plaintiffs;" and same author says, (Id. § 469:) "Where the note given on the settlement of the account is by mistake drawn for a greater sum than was due, there is only a partial want or failure of consideration. * * * There is a plain distinction between mere inadequacy and a total or partial failure of consideration. Inadequacy of consideration is not, in itself, any defense to an action on a bill or note, but a total failure or want of consideration is a perfect defense, and a partial failure is a good defense *pro tanto.*" The same doctrine is laid down by Greenleaf, from whom it is not necessary to quote, but I cite 2 Greenl. (13th Ed.) § 136, and notes.

These authorities also dispose of the claim made by plaintiffs' counsel that the note having been made in final settlement of the account between the parties, cannot be met by a defense of set-off; but if there is any doubt on that subject, it seems clear to us that, under the Statutes of the territory in this case, the defendant was clearly entitled to his plea of set-off. Section 11 of the practice act of 1880, Prince's Comp'n, 124, is as follows: "A defendant may plead as set-off or counter-claim any of the following matters, and may recover judgment thereon, if proved, for any excess thereof over the plaintiffs' demand as proved,—*First,* when the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or, *second,* a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some one of them, arising out of the transactions or contracts set forth in the declaration or connected with the subject of the action; or, *third,* any new matter constituting a cause of action in favor of the defendant, or all of the defendants, if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead."

It is further claimed by plaintiffs that, under the plea of set-off, the defendant was not entitled to show a failure to deliver some of the goods for which the note in suit was given, as though they were goods sold and delivered by the defendant to the plaintiffs. I do not understand that it is claimed that such failure could not be made the subject of a cross-action, but in that form it could not be shown, as the defendant claimed he had a right to show it, *i. e.,* under a plea of goods sold and delivered. This in our opinion is not the law. Averments of a plea of set-off are sufficient when they would disclose a cause of action if embodied in a declaration. *Breen* v. *Sullivan,* 5 Bradw. 449.

The rules applicable to defendant's bill of particulars are the same as those applicable to the plaintiff's bill. Burrill, Pl. 433, (4th Ed.) 1840. These rules require that the bill should set forth the nature of the defendant's claim with sufficient particularity to enable the plaintiffs to meet it at the trial. It should state the items of the demand, and when and how it arose. * * * It need not be in any partic-

ular form. Id. 432. It seems that the object of the rule is to fully and thoroughly apprise the plaintiffs of what the claim of the defendant is, so that they shall not be misled or taken by surprise, and that where, as in this case, the bill of particulars shows exactly what the various items of defendant's claim are, that objection is not well taken—to the mere form in which it was put. The defendant was permitted to show failure of plaintiffs to deliver certain goods under the specifications in his bill of particulars; that they were goods sold and delivered by him to the plaintiffs. Were the plaintiffs in any way misled or prejudiced thereby? We think not. It is not so claimed by plaintiffs' counsel, and therefore, under the rule I have stated, it was not, in our judgment, error for the court below to allow the proof.

There is, however, another assignment of error made by counsel for appellants, which we think is serious. Among the items of set-off claimed by defendant in his bill of particulars is one, as follows: "For 14,241 lbs. corn delivered at Fort Stanton, in New Mexico; being a part of 40,000 lbs. of corn on account of contract of Z. Staab & Co., which amount has not been paid to defendant by plaintiffs, September 27, 1878, at $2\frac{3}{4}$ c. per lb., $391.62." Defendant was permitted to prove this item of corn delivered by him on account of plaintiffs, and their failure to pay him therefor. It is urged by appellants' counsel that it was error for the court to have permitted this evidence to go to the jury, without the defendant's first showing that the quartermaster of Fort Stanton had receipted to plaintiffs for the corn in question, such receipt being in accordance with the evidence of the defendant himself, a condition precedent to payment. We think that the point is well taken. Upon this subject the testimony of the defendant is as follows: (See page 154 of the record.) "*Question.* At the time that you signed that note, Mr. Garcia, (note in question,) what settlement or agreement did you have with Mr. Staab? *Answer.* I had an agreement that when the quartermaster had reported about all the corn that he would deduct the amount from my note." Further on, in answer to another question, (page 156 of record,) the defendant said: "My answer to that question is that I understood that he (Staab) would have to return the value of the corn when the quartermaster reported it."

J. Francisco Chaves, a witness for the defendant, testified (pages 22 and 23, record) that he was present when the disputed item for corn was discussed by plaintiffs and defendant, and further testified as follows: "Mr. Staab told him (Garcia) that there was twenty-five thousand and odd pounds of corn that had been credited to him already, but Mr. Garcia said, 'I can't accept that as the whole, because I took over forty thousand pounds to Fort Stanton.' Mr. Staab said he could not settle that matter until he heard from the quartermaster, and said: 'As soon as I hear from the quartermaster, you shall be credited with the full amount, whatever it may be.' "

No evidence whatever was offered to show that the quartermaster at Fort Stanton had ever receipted for the corn in question. It is clear from the defendant's evidence that it was not to be paid for until such receipt or voucher had been issued, and that without proof of its issuance he could not have maintained an action against the plaintiffs for its value. In the absence of some such proof he should not have been allowed to prove it as an offset to plaintiff's claim. Whether or not the jury allowed this item to the defendant in arriving at their verdict is not certain, but it cannot be said from the result that they did not. The evidence was allowed to go to them without proof of the condition precedent, and that, we think, was clearly error, for which the judgment below should be reversed and a new trial ordered.

(All concur.)

JESUS MARIA LUNA and another
v.
PAUL MOHR.

January Term, 1884.

1. BILL OF EXCHANGE—PAROL EVIDENCE.

In *assumpsit* against defendant personally, as drawer of a bill of exchange, which is made neither in his name nor in that of the firm of which he is a member, but is signed by a third person as "agent," and is drawn on defendant's firm, it is not competent to show by parol evidence that the drawer is defendant's agent, and that defendant is the real maker of the draft.[1]

2. SAME—SPECIAL COUNTS—PLEA—DEFECTIVE VERIFICATION.

In such a case, where special counts of the declaration seek to charge the defendant as drawer, through his agent or partner, the defective verification of defendant's plea, denying his signature under oath, as required by Prince, Gen. Laws, p. 119, § 30, will not be taken as an admission of the truth of the special counts. It is essential to establish his connection with the instrument by competent proof.

3. PRACTICE—PLEADING AND PROOF.

Where a demurrer has been sustained to one of the counts in the declaration, it is error to permit such count to be read to the jury, or to receive evidence thereupon.

4. ASSUMPSIT—PLEA—NON ASSUMPSIT—NON EST FACTUM.

In *assumpsit* on a bill of exchange, the proper plea is *non assumpsit*, a denial under oath of the signature. Prince, Gen. Laws, p. 119, § 30. The plea under oath of *non est factum*, as required by section 31, Id., is only applicable to instruments under seal.

Catron & Thornton and *Gildersleeve & Knaebel*, for plaintiffs.

Fiske & Warren, for defendant.

[1] See note at end of case.

BRISTOL, J. The plaintiffs in the court below, J. M. Luna & Bro., as copartners, brought suit and obtained judgment against the defendant, Paul Mohr, in the sum of $12,525 damages and $107.55 costs. The case is here on appeal by the defendant below, Paul Mohr, and was argued and submitted at the last term. The original declaration contained the common counts, and, in addition thereto, a special count, as follows, viz.: "For that whereas the defendant, by his duly authorized agent, Max Lichtenthal, heretofore, to-wit, on the twenty-fifth day of November, A. D. 1876, at, to-wit, the county of Valencia aforesaid, according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date day and year aforesaid, and then and there directed the said bill of exchange to the said defendant by the name of Mohr & Mohr, by which said bill of exchange the said defendant, by his agent, Max Lichtenthal, then and there requested the said defendant by the name of Mohr & Mohr, three days after sight, to pay to the order of said plaintiffs by the name, style, and firm of J. M. Luna & Bro., ten thousand dollars, for value received," and averring presentation and protest for non-acceptance.

To this declaration the defendant pleaded *non-assumpsit*. And to the special count on the bill of exchange, the defendant also pleaded what is called in the record "*non est factum.*" Afterwards, by leave of the court, the plaintiffs amended the said special count on the bill of exchange by averring that defendant, with some other person or persons to them unknown, trading and doing business under the firm name and style of Mohr & Mohr, by their agent, Max Lichtenthal, written "Max Lichtenthal, agent," (meaning agent for said Mohr & Mohr,) made the draft or bill of exchange in question, and averring demand and protest for non-acceptance and non-payment.

To this special count as amended the defendant interposed a demurrer, which was sustained by the court below, with leave to the plaintiffs to file two additional special counts by way of amendment of the declaration, which was accordingly done. One of these additional special counts is upon said bill of exchange and alleges, among other things, that the defendant and some other person or persons to the plaintiffs unknown, "trading and doing business under the firm name and style of Max Lichtenthal, agent, at Santa Fe, New Mexico; that is to say, at the county of Valencia aforesaid, to-wit, on the twenty-fifth day of November, A. D. 1876, made their certain bill of exchange in writing, under and by the said firm name and style of "Max Lichtenthal, agent," and avers demand and protest for non-acceptance and non-payment, etc. The other of said additional special counts is also upon said bill of exchange, and alleges, among other things, that the defendant, Paul Mohr, together with some other person or persons whose names are to the plaintiffs unknown, trading and doing business

under the firm name and style of Mohr & Mohr, at Santa Fe, New Mexico; that is to say, at the county of Valencia aforesaid, heretofore, to-wit, on the twenty-fifth day of November, 1876, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to themselves, the said Messrs. Mohr & Mohr, at Cincinnati, etc., and avers demand and protest for non-payment and non-acceptance, etc.

On motion of defendant, and order of the court, the plaintiff filed a bill of particulars as follows, viz.:

(1) "The bill of exchange is the same one on file in the cause declared on in the first count of plaintiff's original petition.

(2) "The second (common) count is for ten thousand head of sheep or more which plaintiffs sold to defendant and some one else, whose name is to plaintiff unknown, and offered and tendered at La Junta, Colorado, as per contract made by defendant by his agent with plaintiffs some time in the month of December, 1876, or January, 1877, or thereabouts, plaintiffs not being able to remember now the exact date, $16,000.

(3) "For money, about that time last mentioned, the exact date plaintiffs do not now remember, lent and advanced to said defendant, through his agent, $10,200.

(4) "For money paid, laid out, and expended by plaintiffs to the said defendant, and to the agent of said defendant, for the use of said defendant and some other person, whose name is unknown at the time last aforesaid, the exact date of which plaintiffs cannot now state, $10,200.

(5) "For money received by said defendant and some other person at present unknown to plaintiffs, through the agent of said defendant, for the use and benefit of said defendant, at about the time last aforesaid, the exact date of which plaintiffs cannot now remember, $10,200.

(6) "For an account stated by and between plaintiffs and defendant's agent, acting for and on behalf of defendant, found due, the exact date of which plaintiffs cannot now remember, but about February or March, 1877, $10,200."

The plaintiffs' cause of action, therefore, is presented by the two special counts last aforesaid, the common counts and bill of particulars covering the entire declaration.

The bill of exchange, which was filed with the declaration, is as follows:

"$10,000. SANTA FE, NEW MEXICO, Nov. 25, 1876.

"Three days after sight pay to the order of J. M. Luna & Bro., ten thousand dollars, value received, and charge the same to account of Messrs. Mohr & Mohr, Cincinnati, Ohio.

"MAX LICHTENTHAL, Agent."

To the cause of action thus presented the defendant pleaded the general issue, and also interposed a special plea to the two special counts on the bill of exchange, such special plea being as follows: "And for a further plea in this behalf, as to the last and additional counts of the said second amended petition or declaration, the said defendant says that the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says that the said supposed bills of exchange in the said two counts mentioned are not his deeds, and that he never executed the said instruments, nor either of them, nor authorized any person to execute them, or either of them, for him, and that the signatures thereto are not his signatures, and of this he puts himself upon the country," etc.

This special plea (designated in the record and by the parties as a plea of *non est factum*) purports to have been verified by the oath of the defendant, before a notary public, in the state of Ohio; but the record discloses no evidence of the notary's official character, or of his authority under the laws of Ohio to administer oaths other than what purports to be his signature, certificate, and notarial seal. Plaintiffs demurred to this special plea on the ground that it did not appear that the plea had been verified before an officer authorized to administer oaths. The demurrer was overruled and the ruling was excepted to. Issues having been joined upon this condition of the pleadings, the parties went to trial, resulting in a verdict and judgment for the plaintiffs for damages and costs as aforesaid. A large amount of evidence, with numerous rulings thereon, with exceptions, is presented by appellant's bill of exceptions. The court below, on its own motion, gave an elaborate charge to the jury, much of which was excepted to by the appellant as well as to refusals to charge as requested by him. Every step taken by either party during the progress of the trial seems to have been objected to by the opposite party. An interminable number of questions are thus presented by the record; it would be unseemly to attempt to pass upon all of them.

The first question naturally presenting itself relates to defendant's special plea to plaintiffs' special counts on the bill of exchange, designated in the record as a plea of "*non est factum.*" The plea of *non est factum* is only applicable in actions on written instruments under seal. In common law pleadings this plea was never interposed as a defense to an action of *assumpsit* on any simple contract in writing, as a promissory note or bill of exchange. Our statute in express terms makes this distinction. Section 30, Prince, Gen. Laws 119, is as follows: "When any party to a suit, either as principal or security or indorser, founded on any written contract, covenant, or agreement whatsoever, shall deny his signature, he shall do the same under oath." The next succeeding section (31) is as follows: "In all cases where a suit has been instituted upon any writing obligatory, or may be so instituted, the execution of the instrument shall be regarded as proven and the plea of *non est factum* shall be regarded

as unavailing, until the person filing such plea shall have made oath that he never executed the said instrument nor authorized any person to execute it for him."

A "writing obligatory" is a bond, or some written obligation under seal. It is a term that is never applied to simple contracts, though they may be in writing. These two sections of our statutes are quite distinct and independent, and refer to two separate classes of written instruments. Section 30 can only apply to simple written contracts, such as bills of exchange and promissory notes, and other written instruments not under seal. It specifically relates to the signature to any such simple contract of the party sought to be charged thereby, and the denial thereof by him, and to nothing else. The proper special plea, under this provision of the statute, would be that such signature is not the signature of the defendant. The plea that it is not his deed does not apply. The bill of exchange in question has upon its face the signature of Max Lichtenthal, agent, as drawer, and the name of the firm of Mohr & Mohr as drawees. The plaintiffs seem to have experienced great difficulty and doubt as to the capacity in which the defendant should be sued, and it is extremely doubtful that the two special counts of the declaration on the bill of exchange can be reconciled as consistent and proper in the same declaration. In one of these counts, it is sought to charge defendant as a member of the firm of Max Lichtenthal, agent, composed of the defendant and other persons unknown to plaintiffs, while in the other of said counts it is sought to charge the defendant as a member of the firm of Mohr & Mohr, composed of the defendant and other persons unknown to the plaintiffs. It is nowhere alleged that these firms are identical in membership. For aught we know they may be distinct partnerships, with separate and distinct liabilities, though the defendant may be a member of each. The plaintiffs, in their bill of particulars, seem to have concluded themselves on this point at the outset by admitting that there was but one bill of exchange sued on. It is evident that the defendant could not be sued in both capacities in the same action, on the same bill of exchange.

Appellees' counsel claim that in consequence of the defective verification of appellant's special plea to the two special counts in the declaration, it should be considered as an admission on his part that the signature to the bill of exchange is his. This construction would be by far too broad, even under the peculiar allegations of the declaration in the two special counts on the bill of exchange. A person's signature is his name, in his own proper handwriting, or, if he cannot write, then some mark, or symbol, or sign, adopted by him as his signature, and made or impressed on an instrument in writing, by his own hand. If he is sued on an instrument in writing, purporting to have been executed by him over his signature, but as a matter of fact was not, then his liability must be established, if at all, not upon the ground that it is his signature, but by proofs that he expressly author-

ized some agent or procurator to bind him by writing what purports to be his signature. So, in this case, even if the appellant could be held liable on the bill of exchange in the manner claimed in the declaration, such liability must be established by competent proofs, showing his connection therewith, instead of relying on the ground that the signature to the bill of exchange is his, as it is evident from the face of the bill that it does not bear his signature, within the meaning of section 30, of the statute aforesaid. The action is not brought against the partnership firm of Max Lichtenthal, agent, nor that of Mohr & Mohr, but against Paul Mohr, in his individual capacity as a member of each. The necessary proofs to establish appellant's liability on the bill of exchange, if such liability exists, could be given under the general issue. Appellant's special plea, therefore, may be treated as surplusage and immaterial.

In this connection it may be well to consider the fact that Tranquilino Luna, one of the appellees, who, it seems, negotiated for and took the bill of exchange on behalf of appellees, in his testimony on the trial, in answer to the question, "For what consideration was this draft in question given?" said, "The consideration was some sheep I sold him," and to the next succeeding question, "sold who?" he replied, "Max Lichtenthal, as agent for Mohr & Mohr." This evidence of one of the appellees should be conclusive as showing that the signature "Max Lichtenthal, agent," cannot be considered as the signature of the defendant within the meaning of the statute. And all the evidence introduced, under objection, tending to show a liability on the part of appellant as a member of the firm of "Max Lichtenthal, agent," was improper evidence to be considered by the jury, and constituted error.

The lower court, in charging the jury, among others, gave the following instructions: "The plaintiffs sue the defendant on a certain draft or bill of exchange dated November 25, 1876, for the sum of $10,000, said instrument being signed, "Max Lichenthal, agent." Their declaration or complaint contains three separate counts, besides others that do not seem to be insisted on in the trial. If they have proved their case to your satisfaction, under either of these counts, they are entitled to a verdict. The first one of these counts alleges that said draft was made by the defendant, doing business under the firm name of Mohr & Mohr, by Max Lichtenthal, his agent. The second alleges that the defendant and one or more others unknown were doing business under the firm name of Max Lichtenthal, agent, and as such made said draft. The third alleges that the defendant and one or more others unknown were doing business under the firm name of Mohr & Mohr, and that they made the draft."

To these instructions the defendant duly excepted. The first special count on the bill of exchange was permitted to be read to the jury, though objected to by defendant's counsel, and during the progress of

the trial evidence bearing upon the said count was permitted to be given to the jury, though objected to by defendant's counsel. This certainly was error under the state of the pleadings, as a demurrer had been sustained to such first count, and it no longer formed a part of the declaration. The lower court at the request of plaintiffs, though objected to on behalf of the defendant, gave also the following instructions to the jury: "If the jury believes from the evidence that the defendant and Max Lichtenthal, either alone or with any one else, were partners in the year 1876, under the name and style of 'Max Lichtenthal, agent,' and that while they were so partners Max Lichtenthal, as a member of said firm, drew the draft in question by the said firm name on the defendant, either individually or as the firm of Mohr & Mohr, they shall find a verdict for the plaintiffs," etc. * * *

This instruction is so adroitly worded as to be well calculated to mislead the jury. The jury even might have apprehended from its phraseology that if Max Lichtenthal executed the draft on his own individual and private account, the defendant would be liable under the circumstances, though a strict grammatical construction would not sustain that view. The instruction is otherwise erroneous, inasmuch as the declaration contains no count covering the defendant's liability as the member of any firm of which Max Litchtenthal was also a member. Max Lichtenthal was necessarily known to plaintiffs, and as we have seen from the evidence of one of such plaintiffs, the transaction was entered into upon the representations of Lichtenthal that he was acting as the agent of Mohr & Mohr, and that the draft was taken with the understanding that the firm of Mohr & Mohr was to be looked to as the responsible party; in other words, that Mohr & Mohr drew the draft on themselves through their agent, Lichtenthal, in favor of appellees. The representations of Lichtenthal as to the capacity in which he was acting may have been false and fraudulent, but unless it be shown that appellant was in some way connected with the fraud, he could not be held responsible. There were several other instructions that were given and excepted to on behalf of appellant, and several that were asked to be given that were refused, and the refusal excepted to on his behalf. It may be that other errors would be discovered upon a further examination of the record in reference to such instructions, but enough has been disclosed already to justify a reversal.

There is another question presented by the record that overshadows all the others in importance, since upon its determination rests the determination of the further question whether there should be a new trial granted or a final judgment rendered by this court in favor of the appellant. This relates to the peculiar character of this bill of exchange; neither the name of the appellant nor of the firm of Mohr & Mohr, of which he is a member, appearing on the face thereof as drawer. The question presented is whether any party through parol testimony *aliunde* can be made liable as principal upon a negotiable

instrument under the circumstances presented in this case, whose name is not disclosed thereon. This question has been argued by counsel on either side with signal ability, indicating careful and extensive research. It is one of those questions about which there is a great deal of apparent conflict in judicial opinions. Upon this point, in support of the proposition that a party may be charged as principal though his name is not disclosed on the negotiable instrument, we are referred by appellees' counsel as authority to the case of *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326, and to the case of *Baldwin* v. *Bank of Newbury*, 1 Wall. 234. Any decision, unreversed, of the supreme court of the United States covering the case before a territorial court, would be necessarily conclusive on such court, irrespective of the weight of authority of the various state courts. In the first of these cases (5 Wheat. 326) an action of *assumpsit* was brought upon a bank-check made and issued in the ordinary course of business as a bank transaction; but the check was in the following form, taken from the printed check-book in common use by the bank, viz.:

Mechanics' Bank of Alexandria.	(No. 18.) MECHANICS' BANK OF ALEXANDRIA, June 25, 1817. *Cashier of the Bank of Columbia:* Pay to the order of P. H. Minor, Esq., ten thousand dollars. $10,000. WILLIAM PATTON, JR.

William Patton, Jr., who signed this check, was the cashier of the Mechanics' Bank of Alexandria, and Minor, the payee named in the check, was the teller. The check was offered in evidence, but objected to on the ground that it could not be used in evidence against said Mechanics' Bank because it did not appear therefrom that it was the check of said bank, and because no parol or other testimony could be received to explain its character; but the objection was overruled, and other evidence showing it to be a bank transaction, and so regarded by the parties, was received, together with the check. On writ of error, the United States supreme court affirmed the judgment, but it was on the ground mainly that the corporate name of the bank appeared on the face of the check, leading to the belief that it was a corporate and not an individual transaction, to which consideration were added the circumstances that the cashier was the drawer, and the teller, the payee; that the evidence on the face of the bill predominated in favor of its being a bank transaction. Under these circumstances it was held, in effect, that in this class of cases, whatever there was of patent ambiguity on the face of the check, might be explained by parol testimony. On this point the court said: "Had the draft signed by Patton borne no marks of an official character, the case would have presented more difficulty; but if marks of official character not only exist on the face, but predominate, the case is re-

ally a very familiar one. Evidence to fix its true character becomes indispensable."

In the other of said cases (1 Wall. 234) is a somewhat stronger case in support of appellees' position. It was an action of *assumpsit* brought upon a promissory note, a copy of which is as follows:

"$3,500. BOSTON, December 9, 1853.

"Five months after date I promise to pay to the order of O. C. Hale, Esq., cashier, thirty-five hundred dollars, payable at either bank in Boston, value received. J. W. BALDWIN."

The suit was brought by the Bank of Newbury, a corporation of Vermont, against Baldwin, the signer of the note. The action was brought in Massachusetts, where Baldwin resided, and where the note was made and payable. In the mean time Baldwin had obtained a discharge from his debts under the then bankrupt laws of his state. He pleaded this discharge in bar of the action on the note. He also pleaded the general issue, and under this plea the objection was raised on his behalf that the note declared on was not competent evidence to support the declaration in that it appeared on the face of the note that Hale, in his individual capacity, was the payee, and not the bank of Newbury, the plaintiff corporation. And upon this point there was the following agreed statement of facts by the parties, viz.: "It is agreed that O. C. Hale was *in fact the cashier of the Bank of Newbury* at the time of the making said note; and in case the court would admit such evidence, after objection by the defendant, and not otherwise, and not waiving his objection to the same as incompetent, the defendant admits that said Hale mentioned in said note, in taking said note, was acting as the cashier of and agent for the plaintiff corporation. If, upon the foregoing facts, the plaintiff has made out a legal cause of action in his favor, and the defendant's discharge, etc., is ineffectual as a bar of said action, the defendant is to be defaulted, otherwise the plaintiff is to become nonsuit."

One of the points raised and decided in this case was practically the same as that raised in the first of the foregoing cases, (5 Wheat. 326,) and was decided in the same way. On this point the court said: "Promise, as appears by the terms of the note, was to O. C. Hale, *cashier*, and the question is whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note he acted as the cashier and agent of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the bank under the orders of the directors. His acts within the sphere of his duty are in behalf of the bank, and to that extent he is the

agent of the corporation. *Viewed in the light of these well-known facts,* it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument."

There is some general language used in each of these decisions that has been construed by appellees' counsel as deciding that in all cases of negotiable instruments between private parties, any person whose name does not appear thereon may be made liable as maker or drawer by parol testimony. But they are not so comprehensive as that. They rest upon grounds peculiar to banking institutions and their officers, their purport being that if a bill of exchange, check, or promissory note is made by or to a *cashier*, in contemplation of law, the strong presumption arises that it is a bank transaction, and if that is the fact, whatever uncertainty there may be can be cleared up by parol testimony. This is as far as they go. It is within the knowledge of every business man that in the multitude of daily transactions of banking institutions, they have fallen into the habit of a very summary mode of executing checks, bills, and notes, and when the word "cashier" is attached to a name without anything else to indicate the official character of the instrument, it is commonly understood to relate to a bank transaction. In this class of cases the rule of law on the point now under consideration seems to be quite well settled.

In a very late case, decided in May, 1882, the supreme court of Illinois, in the case of *Scanlan* v. *Keith*, 102 Ill. 634, very clearly makes this distinction. The language of the court is as follows: "Whatever may be the decisions elsewhere, the authorities of this state are full to the point that a party will not be permitted to show by oral testimony that his written agreement understandingly entered into was not, in fact, to be binding upon him; accordingly it was held, in *Hypes* v. *Griffin*, 89 Ill. 134, mainly on the authority of *Powers* v. *Briggs*, 79 Ill. 493, that where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties it was to be the note of the church corporation, and not the note of the trustees executing it. The principle, running through that and other cases in this court, is that such instruments will be construed as the parties made them, without the aid of extrinsic evidence. That rule would seem to be as well settled in this state as any rule can be. But there is another principle declared in *Hypes* v. *Griffin, supra,* that has more immediate application to the case in hand. It is that where a party signs his name as cashier or agent of a banking, railroad, or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness in its ordinary business, if it appears or is made to appear it is the obliga-

tion of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence. Most generally there is that on the face of the instrument itself, and especially when the execution is witnessed by the seal of the corporation attached thereto, that indicates unmistakably it is the obligation of the corporation. It is seldom any one takes such paper under the belief it is the obligation of the officers executing it on behalf of the corporation. But parol testimony is admissible to establish the facts, collateral though they sometimes may be, that will make it appear past all doubt whose obligation it is."

This decision, with the distinctions therein made, is in perfect accord with the decisions of the United States supreme court above referred to. In the case of *Bank of New York* v. *Bank of Ohio*, 29 N. Y. 619, it was expressly decided that a "bill drawn to D. C. Converse, *cashier*, is, in judgment of law, payable to the bank of which he is the officer." There is another class of adjudications, notably the modern decisions of the court of appeals of the state of New York, on the subject, which put it upon much broader grounds, apparently, by applying the same principles to bills and notes between private individuals as are applied to the same kind of negotiable instruments made by or to cashiers of banks in the ordinary business of such institutions. The case of *Moore* v. *McClure*, 8 Hun, 557, decided October, 1876, by that court, is to that effect, and is much relied on by the appellees. This was an appeal from the order of the lower court, sustaining a demurrer to a count of the complaint. The count demurred to was as follows: "And for a second and further cause of action, the plaintiff alleges that on the seventh day of January, 1874, the said defendant, by J. S. McClure, her said agent, made and delivered to this plaintiff her promissory note, in writing, of which the following is a copy:

"'CANANDAIGUA, January 7, 1874.

"'Twenty days after date I promise to pay to the order of C. T. Moore, sixty-one and sixty-two one-hundredths dollars at Williams & Remington's Bank. Value received, with use and exchange on New York. JOHN S. MCCLURE, Agent.'

"That said note was given by said McClure to plaintiff for and as the agent of said defendant, and that said note was given by said defendant, by her said agent, for and on account of goods, wares, and merchandise theretofore sold and delivered by said plaintiff to said defendant." In rendering the decision the appellate court used the following language: "The demurrer was sustained on the ground that the note does not refer to the defendant by name, and the court does not show that J. S. McClure had authority, as the agent of the defendant, to make the note, or that it was made in the business of his agency. We think the count is sufficient; it avers that the defend-

ant by her agent, in consideration of goods, etc., sold and delivered to her, made her note. * * * The fact that the name of the principal does not appear on the face of the note, under the modern decisions of this state, is not at all conclusive. * * * The order sustaining the demurrer is reversed."

The case of *Coleman* v. *Nat. Bank of Elmira,* 53 N. Y. (Court of Appeals, 8 Sick.) 388, is to the same effect, though the action was upon a bank deposit. These New York decisions are in conflict with the great preponderance in the weight of authority on the subject. And when we consider the Code practice of that state, wherein the original transaction constituting the consideration of the note is set out in the same count in the complaint, in which is also set out the note, it is not at all surprising that, upon the whole statement of facts taken together, it should be held that the count contained a cause of action, since all the authorities agree that all the parties, although a party may not be held liable on a bill or note unless his name appears thereon, yet, if it be true that his connection with the original transaction and consideration out of which the negotiable bill or note arose was such as to render him liable, may be sued on such original consideration. 1 Pars. Notes & Bills, 92, 95; 1 Daniel, Neg. Inst. (2d Ed.) § 305, p. 251.

In case an action is brought on such original consideration, parol testimony may of course be received showing such liability. The distinction being that, according to the "law merchant," bills and notes must be in writing, and cannot be varied by parol; such a thing as a parol bill of exchange is unknown to the law. This distinction is by no means an idle thing, since there can be no doubt that it is of the greatest advantage in commercial transactions to have all the terms, conditions, and parties to such paper expressed with certainty in writing. No case could be invented that would better illustrate the soundness and reasonableness of this principle than the difficulties and uncertainties attending the very case we are now considering. Surely, the liability as principal on any negotiable instrument in writing should rest on some more certain foundation than the weak, conflicting, and unsatisfactory parol testimony disclosed in the record in this case. This view is not only supported by the preponderance of judicial authority, but is sustained in the text of every law-writer on the subject.

In the very late and valuable work of Daniel, Neg. Inst. in vol. 1, (2d Ed.) § 300, that author says: "It is a general principle of commercial law that a negotiable instrument must wear no mask, but must reveal its character on its face; and it extends to the liability of parties thereto, who must appear as distinctly as the terms of the instrument itself in order to be bound by those terms." Again, in section 301, he says: "If a bill be payable to A. B., describing him as agent, it is generally considered mere *descriptio personæ,* and if he

should indorse it in like manner, we should say he was personally liable; and we can see no difference between such a case and those in which it is held, that where the maker of a negotiable note adds the word 'agent,' he and he alone is bound; the terms being regarded as descriptive only." Again, in section 303, he says: "* * * No party can be charged as principal upon a negotiable instrument unless his name is therein disclosed. The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'a courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto, unless his name is in some way disclosed upon the instrument." In section 305, he further says: "If the agent sign a note with his own name and discloses no principal, he is personally bound. The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself thereon appearing, it must be construed as his note or as a nullity, and though he term himself agent, such suffix to his name will be regarded as mere *descriptio personæ*, or as an earmark of the transaction, and may be rejected as surplusage. And this principle applies, although it could be proven that the payee knew of the agency when the note was made, and it was understood that the principal and not the agent should be bound, for such evidence would vary the terms of the note."

The very latest decision on the subject that has come to our knowledge is that of the *Ohio Nat. Bank* v. *Cook*, decided by the supreme court of Ohio in January, 1883, and reported in the Review, January 11, 1883, under the head of "Commercial Law." The action was upon three drafts signed by "Cook" as treasurer, and made to his own order as "treasurer," the corporation of which Cook was treasurer, being the defendant. The plaintiff in the lower court obtained judgment, but the supreme court reversed it. Judge WHITE, in the opinion, said: "The name of the corporation of which Cook is the treasurer, and which he declares is his principal, nowhere appears on the face of the bill as a party to it, and parol evidence is not admissible to add a party to the instrument when there is no notice on its face. Whoever takes negotiable paper, enters into a contract with the parties who appear on the face of the instrument, and no other person can be looked to for payment. The addition of treasurer to Cook's name does not relieve him of personal responsibility; that is merely *descriptio personæ*." There can be no doubt that this view is in accord with the general current and weight of authority on the subject. In our opinion no valid reason can be assigned for doing violence to this long established and wholesome rule of law, since, as we have seen, there need be no failure of justice in rejecting a bill as that of an undisclosed principal, so long as an action may be maintained

against him on the original transaction and consideration, unattended with any of the difficulties as to parol testimony that surround negotiable paper.

In each of the New York cases referred to, the real issue practically, was upon the original consideration on which parol testimony was admitted. In one of these cases (*Coleman* v. *First Nat. Bank of Elmira*), Judge ANDREWS, in delivering the opinion, said: "The real issue on the trial was whether the bank or Van Campen was the depositary." This issue related exclusively to the original consideration for which the certificate of deposit sued on in connection therewith was given. These cases apparently were disposed of without much thought or deliberation. In either case the complaint, under the Code, no doubt contained a cause of action setting out, as it did in the same count, the original consideration in connection with the note. There was therefore no occasion for considering the terms of the note as having been varied by parol, as judgment might have been rendered on the allegation and proof of defendant's connection with and liability on the original transaction and consideration for which the note was given. With us such a complaint would not be considered good pleading, but under our common-law pleadings and practice the same result may be attained in another way by setting out the original consideration under the common counts. This was done in this very case, and testimony was received on the trial that might have been properly applied to the common count covering the original transaction in regard to the sale and delivery of sheep, but the court below at the outset, in charging the jury, took from their consideration the common counts and submitted to them only the special counts on the bill of exchange, and no objection was raised by either party. In proceeding upon the common counts covering the original consideration, the bill of exchange, no doubt, in some way should be brought into the case and not be left outstanding; and while it could not be received in evidence for the purpose of charging an undisclosed principal thereon, it might, for some purposes, be received as explanatory of the original transaction, and that the judgment might become a bar to any future action thereon. We hold that the appellant cannot be held liable on the bill of exchange as drawer, his name not appearing thereon as such, and that the only remedy of the plaintiffs is to proceed on the original consideration.

A new trial is ordered.

(All concur.)

NOTE.

NEGOTIABLE INSTRUMENTS—PROCURATION—INSTRUMENTS SIGNED BY "AGENT"—PAROL TESTIMONY. The decisions are scarcely reconcilable in respect to the admissibility of parol testimony to show the true parties to a negotiable instrument when their names do not appear on the paper itself. It has been held that the real owner of a note made to another, described as "agent," can maintain an action in his own name, and show by parol testimony that he is the principal. Guano Co. v. Holleman, 12 Fed. Rep. 61. In *Vermont*, it is settled that where negotiable paper is made or indorsed to a payee with the addition of the word "agent," "cashier," or "treasurer" to the name, an action may be maintained in the name of the real principal, whose interest may be shown by

parol testimony. Bank v. Burton, 3 Atl. Rep. 756; Railway Co. v. Cole, 24 Vt. 33. In *Utah*, it has been determined that a note made to the financial agent or "commercial director" of a mining company in which the payee was described as "M., Com. Dir.," could be recovered on by the company even though it was shown that the maker thought that it was a personal transaction between himself and the agent, and intended to become liable to the agent alone. Société des Mines, etc., v. Mackintosh, 18 Pac. Rep. 363. The circumstances of this case are somewhat peculiar, and there is a dissenting opinion, so that it is of doubtful authority. The dissent, however, does not proceed on the theory that parol testimony is inadmissible to show the true parties to the contract, but is placed distinctly on the ground that in this case it was insufficient after being admitted to show a liability on the part of the maker to the company. It was shown that, though the maker did not intend the note to be negotiated, and gave it as an accommodation to the payee, yet he knew that the payee intended to use it as representing assets belonging to his principal; and though the maker did not intend to perpetrate a fraud upon the payee's principal, yet he was cognizant of the fact that his note was to be used for the purpose of representing an asset not really existing. The agent absconded with funds of the company to the amount of the note. This element of fraud renders the case of less value as an adjudication on the simple point of the admissibility of parol evidence. In *Nebraska*, the courts hold that an undisclosed principal cannot be made liable on a negotiable instrument by parol evidence. Webster v. Wray, 27 N. W. Rep. 644. But in *Georgia*, the original payee can maintain an action against the principal on a note signed, "A. B., Agt." Merchants' Bank v. Central Bank, 1 Ga. 418; Lockwood v. Coley, 22 Fed. Rep. 192. The weight of authority seems to be against this proposition, and the last case above cited rests upon the authority of a previous case (Merchants' Bank v. Central Bank, supra) decided in the same state.

As to notes made or intended to be made by corporations, and signed by their agents, the cases conflict in respect to the admissibility of parol testimony for the purpose of relieving or charging the agents as individuals. In *Wisconsin*, it is held that a note reading "We promise to pay," and signed, "San Pedro Mining and Milling Company. F. Kraus, President," shows no ambiguity on its face, and is the note of the company alone, and that parol evidence is inadmissible to show that the president signed it in his individual capacity. Liebscher v. Kraus, 43 N. W. Rep. 166. In *Iowa*, on the other hand, it has been decided that a note reading, "We promise to pay," and signed, "Belle Plaine Canning Co. H. Wessel, Sec'y. A. J. Hartman, President," is the note of all the signers, and that parol evidence is inadmissible to show that the president and secretary signed only in their official capacities. McCandless v. Canning Co., 42 N. W. Rep. 635. In *Massachusetts*, a note beginning, "We promise to pay," and signed, "John Roach, Treasurer," with the corporate seal, on which the name of the corporation was inscribed, impressed over the signature, has been determined to be the note of the corporation alone, without the aid of any extrinsic testimony. In *California*, it has been decided, in an action by the payee on a note reading, "We promise to pay," and signed, "Pioneer Mining Company. John E. Mason, Sup't," that parol evidence is admissible to show that the entire consideration went to the company, and that the superintendent did not intend to bind himself, nor did the payee then intend to bind him. It is intimated, however, that the rule would be different if the action were brought by a subsequent holder without notice of the character of the transaction. Bean v. Mining Co., 6 Pac. Rep. 86.

CHAVES *v.* PEREA, Adm'r, etc.

January Term, 1884.

1. APPEAL FROM PROBATE COURT—JURISDICTION.
The probate court being a court of limited jurisdiction, jurisdiction must affirmatively appear on its record. Therefore, where, on appeal from the disallowance of a claim against an estate, the record fails to show the appearance of the administrator, or that he was cited to appear, the probate court was without jurisdiction, and the district court could only acquire the case for the purpose of dismissing the proceeding.

2. SAME—CONDITIONS AND REQUISITES.
Under Comp. Laws N. M. p. 122, § 4, (Prince, St. p. 76, § 4,) providing that "appeals from the judgment of the probate judge shall be allowed to the district court in the same manner, and subject to the same restriction, as in case of appeals from the district to the supreme court," and also Comp. Laws N. M. p. 184, § 5, providing that "appeals from the probate courts shall be taken hereafter in the same manner as from justices of the peace at the term when the order or judgment appealed from shall have been rendered, and the bond shall be approved by the probate judge," it is essential to the validity of an appeal from the probate court to comply with the requisites of both kinds of appeals.

Fiske & Warren, for appellant.

C. C. McComas and *Catron & Thornton*, for appellee.

BRISTOL, J. This case originated in the probate court of Bernalillo county, in the Second judicial district. It was appealed therefrom to the district court of that county, where the appeal was dismissed for irregularity, and it is here on appeal from such final determination thereof in the court below. The proceeding was instituted in the probate court for the allowance of a claim or account against the estate of Salvador Armijo, deceased, in favor of Chaves, the plaintiff below, and appellant here. The account is as follows:

ALBUQUERQUE, N. M., June 9, 1879.

The estate of Salvador Armijo, to J. Francisco Chaves,

		Dr.
1877.		
March 19.	To 572 sheep @ 1 75, - - -	$1001 00
Feb. 22.	To 100 ewes @ 1 75, - - - - -	175 00
Feb. 22.	To 100 withers @ 1 25, - - -	125 00
1879.		
April 1.	To two years' legal services @ $250 00 per annum as per contract, - - - -	500 00
1878.		
Oct. 10.	To one house, - - - - - -	30 00
1879.		
May 13.	To one house taken, - - - -	150 00
May 13.	To one house taken, Salvador Gonzales, - - - - - - -	30 00
		$2011 00

It seems from the record that this account, in the first instance, had been presented to the defendant below, Jesus Ma. Perea, who was

the administrator of the estate of the deceased Armijo, who had refused to allow or pay the same. The account thereupon was presented to the probate court at a regular term thereof, on July 7, 1879. That court made an order embracing this and other claims against the estate, to the effect that "they not having been approved by the administrator, proof shall be introduced to substantiate such claims at a regular term." The record of the probate court further shows that thereafter, at a regular term held September 22, 1879, this account was called up for hearing by the plaintiff, and after hearing arguments on his behalf the claim was disallowed, and the entire account rejected. It does not appear from the record that any evidence was offered by plaintiff, or received by the court; but instead thereof the case was disposed of in the absence of the administrator on arguments for the plaintiff. The record not only fails to show the appearance of the administrator, but is also silent as to whether he had even been cited to appear, so as to confer jurisdiction to entertain the case. The probate court, having only an inferior and limited jurisdiction, conferred by express provisions of statute, jurisdiction must appear affirmatively upon its record. It cannot be presumed. The proceeding was in no sense a suit against the administrator to recover judgment for the amount of the claim. It was simply an application to the probate court to admit or allow the claim, as authority, perhaps, to the administrator to pay it, and to exempt him from personal liability if he did pay it. A suit, no doubt, could have been instituted in the district court to recover judgment thereon, wherein all issues of fact could have been litigated and settled whether the probate court had passed upon the question of allowing the claim or not, there being no statute requiring such allowance as a condition precedent to bringing an action.

For the purpose of the proceeding involved in the case at bar, however, the probate court *had exclusive original jurisdiction*, and while an appeal would lie from a final determination thereof to the chancery side of the district court, yet the latter court could not take jurisdiction except for the purpose of dismissal unless the inferior court had acquired jurisdiction. The provision of our statutes under which the probate court was authorized to act in the premises is as follows: "It shall be the duty of the probate judge to admit all claims against the estate *if properly sustained by legal evidence:* provided, the administrator be present at court to settle the said claims if admitted."

Several legal propositions are sustained under this statute: *First*, money demands upon unpaid accounts against the estates of intestates must be allowed, if at all, upon legal evidence sustaining the same. *Second*, such evidence must be taken and the claim passed upon at a regular session of the probate court; and, *third*, the administrator of the estate against whom the claim is made must either be present in court while the evidence is being taken and the claim passed upon, or at least he must have had an opportunity to be present and to

be heard by having a citation to appear served on him. In no other way could the probate court have acquired jurisdiction to act in the premises. Our crude and inefficient administration laws do not prescribe the practice to be pursued in this as in a multitude of other cases that may arise; yet it is obvious from the very nature of the proceeding and the right to be passed upon that the administrator should have an opportunity to be present in person or by counsel.

Probate courts, under the laws of this territory, only have jurisdiction over the *personal* estates of intestates. The legal title to any such personal estate is vested in the administrator, in the nature of a trust, for the settlement of the estate. Hence, it follows that all proceedings, whether by suit to recover judgment or a proceeding for the allowance of claims which have for their object the payment thereof out of such personal estate, should be instituted against the administrator, and in such a manner as will give him his day in court, he being the only person through whom a defense can be interposed. The administrator in this case not having been present at the time appellant's claim was passed upon by the probate court and rejected, nor having been cited to appear, that court acquired no jurisdiction, and its determination of the case is void and of no effect whatever. And if an appeal had been regularly taken to the district court, there would have been nothing to do except to dismiss the entire proceeding for want of jurisdiction. This proceeding could not be pleaded in bar of another, and, unless cut off by some statute of limitation, there is nothing to prevent a proceeding *de novo*, in the regular way, for the same purpose.

That irregularities should occur in the proceedings of probate courts and in the acts of administrators, is not at all surprising under the present condition of the law. No state or territory, it may be presumed, anywhere within the jurisdiction of the United States, has such a lame and inefficient code of administration laws as that which obtains in New Mexico. Judges of probate are elected to office and invested with complicated powers and duties touching the probate of wills, letters of administration, accounts against estates, accounts of executors and administrators, and hearing and determining rights in regard to the same. Administrators also are appointed and charged with the exercise of various powers and duties respecting the settlement of estates. But there are scarcely any laws upon our statute book prescribing the details of the duties of either, or the specific modes in which they may be performed. That valuable estates should melt away and mysteriously disappear, fictitious claims be allowed, honest debts left unpaid, and beneficiaries never receive what they are entitled to, in numerous instances, under our crude system of administering estates, is rather to be expected than wondered at. All this may happen without imputing any intentional fraud to these officials. It is the fault, mainly, of an imperfect system.

The appeal was dismissed by the court below, on the ground that the proper affidavit was not made. This is the only matter that is assigned as error. The point raised simply involves a construction of statutes. The first statute in regard to appeals from the probate to the district court came from the Kearney Code, and is as follows: "Appeals from the judgment of the probate judge shall be allowed to the district court in the same manner and subject to the same restriction as in case of appeals from the district to the supreme court." Comp. Laws, p. 122, § 4; also, Prince's St. p. 76, § 4.

The statute in regard to appeals from the district to the supreme court is as follows:

"Sec. 3. No such appeal shall be allowed, unless—*First*, the appeal be taken at the same term at which the judgment or decision appealed from was rendered; and, *second*, unless the appellant or his agent shall during the same term file in the court his affidavit, stating that such appeal is not taken for the purpose of vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

"Sec. 4. Upon the appeal being made, the circuit court shall make an order allowing the same; such allowance shall stay the execution in the following cases, and no others: *First*, when the appellant shall be executor or administrator, and the action be by or against him as such; *second*, when the appellant or some responsible person for him, together with two sufficient securities, to be approved by the court during the same term at which the judgment or decision appealed from was rendered, enter into a recognizance to the adverse party in a sum sufficient to secure the debt, damages, and costs, etc. * * *

"Sec. 6. * * * The appellant shall file, in the office of the superior court, at least ten days before the first day of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the case," etc. Comp. Laws, p. 106, §§ 3, 4, 6; also Prince's St. p. 68, §§ 3, 4, 6.

This statute also is taken from the Kearney Code. Both statutes are among the first enactments of the territorial legislature, and are still in force. But in regard to appeals from the probate courts, several material changes have been made in the law from time to time, but ultimately they were all placed upon the statute book, and reenacted as one law. Thus in 1853 an act was passed as follows: "All appeals from inferior tribunals to the probate or district courts shall be tried anew in said courts on their merits as if no trial had been had below." Comp. Laws, p. 206, § 14, and Prince's St. p. 166, § 14. In 1859 a general act in regard to the jurisdiction and duties of justices of the peace was passed, in which was injected a provision as follows: "Appeals from the probate courts shall be taken hereafter in the same manner as from justices of the peace at the term when the order or judgment appealed from shall have been rendered, and the bond shall be approved by the probate judge." Comp. Laws, p. 184, § 5.

There are several provisions in regard to appeals from justices' courts, but the only ones having any bearing on this case are as follows:

"Sec. 81. Any person aggrieved by any judgment rendered by any justice (Alcalde) may appeal, by himself, his agent, or attorney, to the district court of the county where the same was rendered: provided, however, that no appeal shall be allowed unless the party appealing shall file a bond to the adverse party in a sum sufficient to secure such judgment and costs, with one or more sureties, to be approved by the justice, (Alcalde.)

"Sec. 82. Upon an appeal being made according to the foregoing section the justice (Alcalde) shall allow the same and make an entry of such allowance on his docket, and all further proceedings on the judgment shall be suspended by the allowance of the appeal.

"Sec. 83. On or before the first day of the next term of the district court for the county the justice (Alcalde) shall file in the office of the clerk of said court a transcript of all the entries made in his docket relating to the case, together with all the papers relating to the suit." Comp. Laws, N. M. p. 162, §§ 81, 82, 83.

Also another act, as follows: "That from and after the passage of this act in all appeals from the sentences of justices of the peace to the probate court or to the district court, the appellant shall cause to be filed in the office of probate court or in the office of the district court, as the case may be, a *certified* transcript of the record and proceedings had before the justice of the peace, together with the original oath, recognizance, and other original papers in the cause, on or before the return day of the appeal." Id. p. 172, § 114.

On January 24, 1865, an act was passed, and among its provisions are the following: "That the Revision of the statutes commencing with article one, entitled 'Acquests,' and ending with article sixty seven, entitled 'Woods and Prairies,' with all and each of the articles and chapters inclusive, be and the same are hereby declared to be the Revised Statutes and laws of the territory of New Mexico, and as such shall have full force and effect in all courts thereof."

The Revised Statutes here referred to are what are commonly known as the Compiled Laws of New Mexico. Id. 742. This act, establishing as law the various enactments embraced within the compilation of statutes of that date, covers all the laws above recited in regard to appeals from probate courts. From this legislative *snarl* the question is presented as to *how* so simple a matter as an appeal from the probate to the district court must be taken. It is one of those complicated anomalies in legislation that can have but little to commend it beyond an amusing puzzle for courts and lawyers.

On behalf of the appellant it is claimed that the modes of appeal from justices' courts and from district courts are so radically different that they cannot be harmonized and applied to appeals from probate courts, and that the mode of appeal from justices of the peace is the only one that can be applied. We cannot concur in this view. There

is one way only in which these various acts can be harmonized, and that is by a substantial compliance with them all. Appeals from the district courts require an affidavit of non-vexation and delay; that the appeal be taken at the same term at which the judgment or decision is rendered; that a transcript of the record be sent up, and a bond as a conditition precedent to a *supersedeas*, etc., while appeals from justices' courts require a bond as a condition precedent to an appeal. The appeal itself operates as a *supersedeas*—not only a transcript of the docket entries, but also the original papers must be transmitted to the appellate court, and in cases of "sentences" the transcript must be *certified* to. No one need have any difficulty in complying with all these provisions of the law, so far as they are applicable to appeals from probate courts.

In the light of these views it follows that if, on an appeal from the probate, at a term thereof, to the district court, the proper affidavit of non-vexation and delay were made and filed, the proper bond covering the damages and costs executed and filed, the order allowing the appeal entered, and a *certified* transcript of the record, together with the original papers in the case, were transmitted to the appellate court, the appeal would be regular.

It appearing from the record that all the conditions precedent to an appeal were not complied with, our opinion is that the appeal was irregular and properly dismissed.

Judgment below affirmed.

AXTELL, C. J. I concur.

TERRITORY *v.* NICHOLS.

January Term, 1884.

1. CRIMINAL LAW—VERDICT ON SUNDAY.
A verdict is not vitiated by the fact that it was returned on Sunday.

2. SEPARATION OF JURY.
The unauthorized separation of the jury in a capital case, after a verdict has been reached, written out, signed by each juror, and sealed up, though gravely reprehensible, will not avoid the verdict, where there was no actual abuse, and the defendant was not prejudiced.[1]

3. SAME—INSTRUCTIONS—DEGREES OF CRIME.
The court must submit to the jury the consideration of every degree of the crime charged which the evidence tends to prove, and the exclusion of any grade is error, whether asked for by counsel or not, and warrants a reversal of the judgment.

Appeal from First district.

[1] It is within the sound discretion of the court to permit the jury to separate. Territory v. Chenowith, (N. M.) 5 Pac. Rep. 532. Separation was held harmless in Boyett v. State, (Tex.) 9 S. W. Rep. 275; Cooper v. State, (Ind.) 22 N. E. Rep. 320; State v. Washburn, (Mo.) 4 S. W. Rep. 274.

William Breeden, Atty. Gen., for appellee.

W. D. Lee, for appellant.

BELL, J. The prisoner was indicted for murder in the first degree at the September term of the district court for the county of Colfax. Thereafter, at the same term of the said court he was tried upon this indictment, and convicted of the offense of murder in the second degree and sentenced to imprisonment for life. From this judgment thus pronounced against him he has appealed to this court. Various errors are assigned upon the record before us, which we will consider in their order. The first is, that the verdict in this case was returned on Sunday, and is therefore a nullity. Authorities are cited to sustain this view, and some of them do so, but a careful review of the modern decisions leads us to the conclusion that the common-law rule has been so modified in most of the states as to make it proper to receive a verdict on Sunday, though perhaps not to pronounce a judgment thereon. The distinction is made by many of the decisions between acts judicial and ministerial, and it is held that the receiving of a verdict is ministerial, or, at most, only *quasi* judicial. It may be done when no strictly judicial act can be; as, "though Sunday is *dies non juridicus,* wherein no judicial act is valid, but ministerial acts are, a verdict received on Sunday is good, yet not a judgment on the verdict." 1 Bish. Crim. Proc. § 1001, and numerous cases cited; *Hoghtaling* v. *Osborn,* 15 Johns. 119; *Baxter* v. *People,* 3 Gilman, 385. The reason assigned by some of the judges against the propriety of receiving a verdict on Sunday is, in substance, that it is a desecration of the Sabbath day; that, in the language of the supreme court of Iowa, "courts of justice should, at least, by their practice and decisions, maintain the sanctity of that time-honored and heaven-appointed institution." We cannot see the force or good sense of such reasoning. Is it to be said that the sancity of the day is violated by discharging from unnecessary confinement 12 citizens who have completed important and honorable service for the state? Is it desecration to permit them to return to their homes and join with their families in such observation of the day as may seem good to their consciences? We think not; and are therefore clearly of the opinion that the return of the verdict in this case on Sunday was proper.

The common-sense view of this subject is so well presented in a New Jersey case that we quote from it: "Although it is the solemn duty both of courts and juries so to arrange their business and so to discharge their duties as never to encroach in the smallest degree on the Sabbath, if it be possible to avoid it, yet when the jury have been compelled to reach the morning of that day before the verdict was prepared, I see no mode of proceeding so proper as to receive the verdict, dismiss the jury and parties, and at such future day

as may be convenient and proper take the subsequent proceedings. This must be done *ex necessitate rei.*" *Van Riper* v. *Van Riper*, (4 N. J. Law,) 1 South. 156.

The second alleged error is upon the refusal of the court below to set aside the verdict of the jury for the reason, that, after being sent out to deliberate upon their verdict, the jury, without the permission of the court, separated, and mingled with the people, and afterwards returned a sealed verdict. This was a grave irregularity and merited severe reprehension from the court. It is quite probable that the jurors themselves may not have been aware of the serious consequences which might flow from the act of separation, but it would seem almost impossible that the officers having them in charge could have furnished any good excuse for their neglect of duty; they were sworn to keep the jurors together, and should have been held to strict responsibility for their failure to do so. We do not think, however, that the court below erred in refusing to set the verdict aside in the case at bar for the reason assigned. From the record it appears that the jury agreed upon their verdict at about 4 o'clock in the morning; that they wrote it out, and each juror signed it, and that the written verdict thus signed was placed in an envelope, sealed, and taken in charge by the foreman of the jury; that the jurors then separated and reassembled at the court house at about 8 o'clock of the same morning, and then returned their verdict to the court convened for that purpose. The following also appears in the bill of exceptions as returned: "It is not claimed that the verdict was in any way changed after the jury separated, but it is agreed that the verdict which they agreed to, signed, sealed up in an envelope, and delivered to their foreman, is the same verdict upon which they were polled." However reprehensible the unauthorized separation of the jury may have been, we think the record shows clearly that no prejudice to the prisoner came from it. The best authorities on the subject now hold that when the separation was under such circumstances as that there was no reasonable ground to believe that any abuse followed, a verdict will not be disturbed. In regard to irregularities on the part of a juror or the panel, Bishop says: "The doctrine * * * is that if the defendant has been deprived of a substantial right, or if he has suffered injury or been put in danger of suffering it from an irregularity, and has been convicted, the verdict will be set aside; otherwise not." 1 Bish. Crim. Proc. § 999, and cases cited.

The supreme court of New York, in an elaborate discussion of this question, says: "Anciently, the utmost rigor and strictness was observed in keeping the jury together, and when once charged with a cause, they never could be discharged till they had agreed upon their verdict; but the practice has been much relaxed in modern times in both these particulars. On looking into the books we do not find that a mere separation of the jury has ever been held a sufficient cause for

setting aside a verdict, either in a civil or criminal cause, if we except, perhaps, the case of *Com.* v. *McCaul*, 1 Va. Cas. 271. We think that the mere fact of separation, unaccompanied with abuse, should not avoid the verdict, even in a capital case. We do mean to be understood as saying that the mere separation of the jury without any further abuse is not sufficient ground for setting aside a verdict, though it may deserve severe reprehension from the court." *People* v. *Douglass*, 4 Cow. 26; *People* v. *Ransom*, 7 Wend. 423.

In another case in the same state, Judge SELDEN says: "In New York mere separation (of the jurors) without permission appears formerly to have been *prima facie* evidence of misbehavior, but the better opinion now is that to vitiate a verdict reasonable suspicion of abuse must exist." *Eastwood* v. *People*, 3 Parker, Crim. R. 44.

The reasoning in the cases cited seems to us to express the correct view of the law. In the case at bar, the record, as we have said, shows clearly that no abuse followed the unauthorized separation of the jury, and there is not left even a suspicion that the defendant was thereby prejudiced. We are therefore of the opinion that the court below correctly refused to set the verdict aside on account of this irregularity.

The next point made by counsel for the appellant is that "the evidence in this case is of such a nature that the jury might have found the defendant guilty of murder in the fourth degree, and it was error in the court in not instructing as to murder in the fourth degree." By the bill of exceptions certified to this court, it appears that "said judge who presided at said trial instructed the jury impaneled to try said case only in relation to murder in the first degree and murder in the second degree; and the said defendant did not, either personally or by his counsel, ask for instructions in any other degree or degrees of murder." It is, we think, so well settled as to become almost elementary law that the court in its instructions to the jury in a criminal case must give to them all the law applicable to the evidence elicited at the trial. This, indeed, is the very purpose of instructions from the court, and it is only properly fulfilled when the jury retire to their room fully informed of the principles of law which is to govern them in considering the testimony. The law makes this the duty of the presiding judge, and he must perform it whether requested to do so or not. Suppose the evidence in a capital case clearly pointed to a particular degree of the crime as defined by the statute, and the presiding judge failed, through inadvertency or otherwise, to charge as to that degree, and the defendant was thereby prejudiced, can it be said that because his counsel did not ask for instructions as to that particular degree, that he cannot avail himself of the error in the appellate court? We think not; and as we have said already, we think the law on this subject is well settled. Bishop, in his work on Criminal Procedure, says:

"The charge should state the law in its application to the facts, as

already explained, correctly and fully. If, for example, there are different degrees of an offense, the law of each degree, which the evidence tends to prove, should be given, but not of any degree which it does not tend to prove." 1 Bish. Crim. Proc. § 980, and numerous cases cited.

Another writer says: "As to the grade or character of the offense, it is the duty of the court to define, in all its elements, the offense charged; to point out what constitute the different grades of the offense charged in an indictment, as in the case of homicide." Proffatt on Jury Trial, section 328. Wharton, on this subject, says: "The law is to come from the court, and the court is bound to give the law; and it has been repeatedly declared that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal." Whart. Crim. Pl. & Pr. § 709. "It is error for the judge, unless there be an entire absence of evidence to prove a particular grade of murder, to exclude such grade from the consideration of the jury." Id. § 713; *McNevins* v. *People*, 61 Barb. 307; *Adams* v. *State*, 29 Ohio St. 412.

We have quoted thus far from the text-writers; but the law is made clear in this territory not only by the statute but by several adjudications. The practice act of 1880, section 23, provides, among other things, that "the court shall instruct the jury as to the law of the case, but shall not comment on the weight of evidence." Prince's Comp. 126. This statute of course can only mean that the court shall instruct the jury as to all the law applicable to the evidence in the case, and this being so, a failure to do so would be error. The court is not permitted to wait until it is asked to charge as to a particular degree of crime to which the evidence is applicable, but it must do so as a part of its duty in the case. The question has, however, been passed upon in this court. In *Territory* v. *Young*, this court said: "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 in that there is no testimony whatever which would make a verdict of one of these degrees possible, for if there is the least 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." 2 N. M. 93. In another case, at the same term, this court said, in considering the same question in a capital case: "If there is any evidence whatever which could bring the case within the definition of any degree not given, the limitation of the degree in the charge to the jury would be error which would be good cause for reversal." *Territory* v. *Romine*, 2 N. M. 114. See, also, *Territory* v. *Romero*, 2 N. M. 474.

Did the court below err in its instructions to the jury in this case? The evidence on both sides was to the effect that the prisoner, the deceased, and two other persons were seated at a table playing cards

together; that the prisoner charged the deceased with cheating, and then jumped up and either drew a pistol or tried to do so, when the deceased clinched with him and both fell to the floor, the deceased being on the top; one of the other players took prisoner's pistol away from him; that then he and the deceased got up, and that after getting up the prisoner stepped about four feet to where his overcoat was, drew from it another pistol and immediately fired at deceased. One witness says that three or four minutes elapsed between the scuffle on the floor and the firing, but it is apparent from all the evidence that the events of the strife followed in rapid succession until it culminated in the death of one of the parties. The testimony of the several witnesses to the occurrence, called by both the prosecution and defense, varies but little from the above statement of the evidence. The court, upon this state of proof, charged as to the degrees of murder as follows: "If he (prisoner) premeditated the death of deceased, it is murder in the first degree, and the punishment is death. If he killed him upon a sudden impulse, and in great heat of passion, but under circumstances which showed an abandoned mind, regardless of human life, he is guilty of murder in the second degree."

No other degree of the crime of murder was given to the jury. Passing over the first degree of the crime as given by the court, and which it is unnecessary to consider, as the prisoner was not convicted of it, we think the court below erred in its definition of the second degree of murder, and to the prejudice of the prisoner. Correctly defined, under our law, murder in the second degree consists of "the killing of a human life, being without authority of law, * * * when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. * * *" The killing in the case at bar was not such a killing as is contemplated by this defined degree of murder. This statute does not contemplate a homicide committed "upon a sudden impulse and great heat of passion," as stated by the presiding judge in his charge in the court below, but a killing perpetrated by an act imminently dangerous to others, and without design to effect the death of any particular person, and evincing a reckless disregard of human life, such as recklessly firing a pistol into a crowd, or casting a stone from the top of a house into a crowded street without thought or regard of the consequences of such acts, or as to who should be injured or killed thereby. The prisoner in this case, upon all the evidence, either unlawfully killed the deceased from a premeditated design to effect his death, in which case he should have been convicted of murder in the first degree, or he killed the deceased under circumstances which would have warranted his conviction of the crime of murder in the fourth degree as defined in our law. One of those definitions is: "The killing of another in the heat of passion without design to effect death, by a dangerous weapon. * * *"

We are of the opinion that upon the evidence the court below erred in not defining to the jury this degree of murder. The prisoner and deceased had a fight, and the jury might very well have found on the evidence that, in the heat of passion consequent on it, and immediately following it, the prisoner fired the shots which caused his death, but without design to effect it. All the evidence shows that the prisoner fired the shots, and fired them at deceased, either with design to effect his death or without that design. There can be no question but that the shots were intended for the deceased, and him alone, and so the case could not be one of murder in the second degree. The prisoner was, upon the evidence, improperly convicted of that degree of crime, and we think that this resulted from the erroneous definition of that offense given by the presiding judge in the court below, and from his failure to submit to the jury the definition of murder in the fourth degree as being applicable to the evidence in the cause.

The judgment must be reversed and a new trial ordered.

BRISTOL, J. I concur.

TERRITORY *v.* YEE SHUN.

January Term, 1884.

WITNESS—COMPETENCY—RELIGIOUS BELIEF.

A Chinaman, who believes in the Chinese religion, but takes the ordinary form of oath, without objection, and testifies that he regards it as binding, is, as far as concerns religious belief, a competent witness.[1]

Appeal from First district.

Wm. Breeden, Atty. Gen., for the Territory.

T. A. Green, for appellant.

BELL, J. The appellant was convicted, at the August term of the district court for the county of San Miguel, for the crime of murder in the second degree, and was sentenced to imprisonment for life. He has taken an appeal to this court. The only error assigned is that on the trial in the court below, Joe Chinaman, who testified and gave material evidence in the case, was incompetent for want of religious belief. From the record it appears that before being sworn, this witness was examined by counsel for defendant as to his competency, as follows: "*Question.* I will ask you if you believe in the Chinese worship, their Joss-houses; do you believe in the Chinese

[1] See Territory v. Duran, (N. M.) 3 Pac. Rep. 53; Taylor v. State, (Tex.) 3 S. W. Rep. 753; State v. Powers, (N. J.) 17 Atl. Rep. 969; Jones v. Railroad Co., 3 N. Y. Supp. 253; McKelton v. State, (Ala.) 7 South. Rep. 38; McGuff v. State, (Ala.) 7 South. Rep. 35; Hroneck v. People, (Ill.) 24 N. E. Rep. 861.

Joss? *Answer.* I live in a Chinese house. *Q.* I will ask you if you believe in the Chinese Joss-house, where they worship, where they have their religious services? Do you go with Chinamen in this country when they worship? Do you understand what a God is? *A.* I don't know what it is. Yes, I believe the Chinese religion. *Q.* Have you ever changed from Chinese to Christian religion since you came to this country? *A.* I am a Chinaman and believe in the Chinese religion. *Q.* Was you ever a witness in court before? *A.* Yes. *Q.* Do you know anything about the obligations of an oath under the Christian religion? *A.* I don't know it." To the question put by the attorney general, the witness answered as follows: "*Question.* Ask him if he knows what he is required to do when he takes an oath here as a witness? *Answer.* He come here for a witness to prove that a man got killed. *Q.* Ask him what he is to do or what his duty is in telling his story as a witness; if he knows what his duty is as to telling the truth? *A.* I can tell the truth in this case. *Q.* Do you know that you are sworn here so that you are to tell the truth? *A.* Yes." The witness was then sworn, and permitted to testify, over the objection and exception of the prisoner's counsel.

The record shows the objection to have been in form as follows: "Objection by Mr. Green to the form of the oath as administered, and the admissibility of the witness. Objection overruled; exception." This objection, we think, was properly overruled. There is nothing in the record to show that the witness was not entirely competent. The witness said that he was a Chinaman, and believed in the Chinese religion. What that religion teaches in regard to the existence of a supreme being, or in regard to future rewards and punishments, does not appear. The only question here is whether, whatever may be the religious belief of the witness, he took an oath which would bind his conscience to tell the truth. The witness testified that he was sworn in such manner as that he was to tell the truth. In considering this question, Greenleaf says: "If the witness is not of the Christian religion, the court will inquire as to the form in which the oath is administered in his own country, or among those of his own faith, and will impose it in that form. But if the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked whether he thinks the oath binding on his conscience." 1 Greenl. Ev. § 371. Of course, he can as well be asked before as after being sworn, as was done in this case. The defect of religious faith is never presumed. Id. § 370. It is therefore incumbent on the party objecting to the competency of a witness on this ground to show such want of religious belief as to render him incompetent, and this must be shown by evidence *aliunde.* Id., and note. This the appellant has failed to do.

The judgment must be affirmed.

BRISTOL, J. I concur.

BOREL and others *v.* MEAD and others.

January Term, 1884.

1. CONTRACT UNDER SEAL—CONSIDERATION—SPECIFIC PERFORMANCE.
A contract under seal is presumed to be for good consideration, and a bill for specific performance of it is not demurrable because it does not show what the consideration was.

2. SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT.
A bond to convey a mine, upon the payment of a certain sum of money, will be specifically enforced notwithstanding it is unilateral, and signed only by the party to be charged.[1]

BRISTOL, J., dissenting.

Error to the Third Judicial District Court, Grant county.

T. F. Conway, for plaintiffs in error.

John D. Bail, for defendants in error.

AXTELL, C. J. This is a case of an option or what is sometimes called bonding a mine. The owners of the mine, defendants herein, desiring to sell their mine, entered into a written agreement, in form of a penal bond, with plaintiffs, that upon payment by them to defendants at a future day, of a stipulated sum of money, defendants would convey to plaintiffs their mine. This agreement is in writing, is certain and fair in all its parts, is capable of being performed, and is under defendants' hand and seal. Plaintiffs signed no agreement. Upon the day stipulated in said agreement, plaintiffs tendered the sum of money agreed upon and demanded the mine; defendants declined the money, and refused to comply with their agreement. Plaintiffs bring this suit in equity, and ask the court to enforce the contract. Defendants demur to plaintiffs' bill for want of equity and set up as specific ground of demurrer that the bill does not show upon its face what the consideration was, if any, that defendants had or were to receive for entering into the contract to convey; also that there was no mutuality; that the contract was unilateral; that defendants alone were bound. The court sustained the demurrer, and plaintiffs appealed.

To the first point, it is sufficient to say the contract being under seal, imports a consideration; to sustain the demurrer on the ground that there was not a valuable consideration was not only assuming the fact but also depriving the plaintiffs of an opportunity of proving a consideration. The contract being under seal, we must presume

[1] See note at end of case.

that there was a valuable consideration till the contrary is shown. The court, in sustaining the demurrer, prevented the plaintiffs from doing this.

As to the second point, the condition of mutuality is, in general, sufficiently satisfied if there be any consideration of the one side as well as the other. It is also held that a court of equity, in actions for the specific performance of optional contracts and covenants to lease and convey lands, will enforce the covenant, although the remedy is not mutual, provided it is shown to have been upon a fair consideration. So it is also held not to be necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient. The want of mutuality is no objection to its enforcement. The very nature of an option is unilateral; one party has property to sell, the other has only, perhaps, ability to make sales. The skill and ability of the one is the consideration which induces the other to bond the mine. If the agreement is fair in every respect, and neither party was deceived in making it, there can be no objection to enforcing it. There is certainly sufficient mutuality to support it, if we take the facts, as stated in the bill, to be true, and this the demurrer does. See 5 Wait's Act. & Def. 788, and authorities there cited.

We are of opinion that the court below erred in sustaining the demurrer, and the case is remanded for further action in accordance with this opinion.

Bell, J. This is an appeal from a judgment of the court below sustaining a demurrer of the defendants to a bill in a suit for specific performance. The suit is brought for the specific performance of what is claimed in the bill to be a contract to convey an interest in a mining claim, situated in the Lake Valley mining district, in the county of Grant, executed by one William Mead to the grantors of the plaintiffs. The instrument is one that is commonly called a mining bond. The defendants demurred to the bill, and set forth as grounds of their demurrer—*First*, that the said bill contains no matter of equity whereon this court can ground any decree, or give complainants, or either of them, any relief against defendants, or either of said defendants; *second*, upon the facts stated in the said bill, the complainants have a plain, adequate, and complete remedy at law for their alleged grievance, if any they have; *third*, the bond, memorandum in writing, contract, and agreements referred to in said bill, and upon which the said suit is professedly founded, is without consideration or mutuality between the parties thereto, and imposed no valid, binding, or equitable obligation on the defendants which the court will enforce.

We shall not consider the first ground of demurrer separately, as

it is disposed of by the reasoning applicable to the other two grounds, which we proceed to consider.

We do not think that the second ground or cause for demurrer is well founded. We do not think that the plaintiffs have a plain, adequate, and complete remedy at law for their alleged grievance. In considering the question we are called upon to determine, if possible, what the real intent of the parties was at the time of the execution of the instrument in question. It seems entirely clear to us that at that time the intent of the parties was that the plaintiffs' assignor should be entitled, upon the payment of the sum of $3,300 within the time limited to the defendant Mead, to a good and sufficient conveyance of a one-third interest in the property referred to in the instrument. This intent is, we think, fairly to be inferred from an inspection of the instrument itself; and, in the absence of any proof of fraud, undue influence, or want of actual consideration, the instrument is binding and valid, and can be enforced by a decree of a court of equity. That a court of equity has power to decree specific performance of such an instrument is well settled upon the best authority.

In the case of *Ensign* v. *Kellogg*, 4 Pick. 1, the court says, "we are satisfied that no subject is more proper for the power of a court of chancery in decreeing specific performance than a contract for the sale of real estate; for what is agreed to be done ought in conscience to be done, nor is the remedy at law for damages complete or adequate, for the thing contracted for is wanted,—and the value in money may often be unsatisfactory compensation."

That case was one brought upon a bond in a penal sum conditioned for the conveyance of certain real estate upon the payment of a stipulated price. In that case, a part of the consideration was paid upon the making of the bond, and the remainder on the last day named in the condition, and in the case at bar the consideration for the mine was tendered within the time limited by the condition of the bond, and is to be regarded in law as paid when tendered. Upon this subject Judge STORY says: "What these courts seek to be satisfied of, is that the transaction in substance amounts to, and is intended to be, a binding agreement for a specific object, whatever may be the form or character of the instrument. Thus, if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the payment of a penalty, although it has assumed the form of a condition only. Courts of equity, in all cases of this sort, look to the substance of the transaction and the primary object of the parties; and, where that requires a specific performance, they will treat the penalty as a mere security for its due performance and attainment." 1 Story, Eq. Jur. § 715; citing numerous authorities in support.

In the case of *Dooley* v. *Watson*, 1 Gray, 414, Chief Justice SHAW says: "The promise of the defendant to pay plaintiff one hundred

dollars, if the defendant should fail to perform his agreement to convey the land, was a mere security for the performance of that agreement. Courts of equity have long since overruled the doctrine that a bond, for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out."

It seems to us, upon principle, and upon careful examination of the authorities cited, that, in the suit at bar, it was clearly the intention of the parties that the plaintiffs' assignor should have a right to a conveyance of the property, and should not be relegated to his action at law upon the bond for damages; and that that was the principal object of the parties, and should be carried out.

We come now to consider the third ground of demurrer, which is that the bond, *memoranda* in writing, contract, and agreements referred to in the bill are without consideration or mutuality between the parties. We shall have to treat the questions of consideration and mutuality separately. And first as to consideration: The instrument itself, which is the basis of the suit, is in the form of a bond. It is under seal. Can it be urged, upon demurrer, that such an instrument is without consideration? We think not. The seal imports consideration. It imports valuable consideration. In a case at law the presumption of consideration is so strong the defendant would be estopped from denying it, or offering proof tending to impeach it. In a case in equity this presumption of consideration, imported by the seal, still remains; and, while in such a suit the court will permit a party to rebut that presumption by proof of the facts, yet, until the presumption is met by an answer alleging the actual want of consideration, it must stand, and a party will not be permitted to say of an instrument executed by him, and under seal, that no consideration is shown upon its face. We are therefore of opinion that the question of want of consideration is not properly before us on the demurrer, and for that reason the demurrer must be overruled.

We now come to the question of the alleged want of mutuality between the parties. This is a question of some difficulty, and its meaning appears to have been variously understood by the courts. Parsons, in his Work on Contracts, has collated the authorities in a note appended to page 409 of vol. 3 of the sixth edition. Reference to some of these cases is pertinent here: "The meaning of the rule of equity requiring that contracts must be mutual, is not very clear; nor is it easy to make a classification of the cases in which it has been announced as the ground of decision. By mutuality seems sometimes to be intended mutuality of *remedy*, in other cases mutuality of *agreement;* and in neither sense is the rule of universal application. *Southeastern R. Co.* v. *Knott,* 10 Hare, 122; 17 Eng. Law & Eq. 555. It

is now perfectly established that a purchaser may compel a conveyance, although the vendor could not have enforced specific performance because of some infirmity in the title. *Sutherland* v. *Briggs*, 1 Hare, 34. And in cases within the statute of frauds, it is now clear (although a contrary opinion upon this point was expressed by Lord REDESDALE) that the circumstance that the defendant only signed the agreement so that he could not have compelled the plaintiff to perform it, constitutes no good ground of objection to the plaintiff's suit." *Backhouse* v. *Mohun*, 3 Swanst. 434, *n.*, and other authorities cited.

In one case cited in the note in question, it was held that the plaintiff's filing a bill for specific performance is a sufficient assent to remove an objection of want of mutuality. *Goodwin* v. *Lightbody*, Daniell, 153. See *Field* v. *Boland*, 1 Dru. & Wal. 46.

The case of *Stansbury* v. *Fringer*, 11 Gill & J. 149, strongly supports the views above expressed. There it was agreed between A. and B. that A. should hold certain lands of B. for a term of years, paying taxes and making certain improvements; and it was further agreed that A. might at any time during the term, at his pleasure, become the purchaser of the land, at a stipulated price, and A., having tendered the price, filed a bill to compel B. to make the conveyance. It was objected, that the contract was not mutual, because there was no obligation to purchase upon the plaintiff; but the court held that by occupying the land, paying taxes, and making the stipulated improvements, he had given a consideration for his privilege to purchase the land, and specific performance was decreed.

In the case of *Western R. R.* v. *Babcock*, 6 Metc. 346, it appears that the owner of a certain parcel of land entered into an agreement under seal with the railroad company, by which he granted them the privilege of running their road through his land, upon payment of a certain compensation for the soil appropriated and the damage occasioned. In the bill filed by the company for a specific performance, it was contended that the contract wanted mutuality inasmuch as the plaintiffs were under no obligation on their part to take the land or pay the price. But the objection was overruled. From a portion of the opinion of Chief Justice SHAW in this case, it can be inferred that it was held that a positive agreement existed on the plaintiff's part to act under the contract, where in the event of his acting under it, there will be a certain obligation upon him to pay a consideration,—in other words, that the license to act is sufficiently supported by the promise to pay for using the license in case he does use it. The circumstance that a substantial consideration did not need to be shown *at law*, the contract being under seal, was also adverted to.

The doctrine of the common law that mutuality is only necessary where the want of mutuality would leave one party without a valid or available consideration for his promise, seems to express all the mutuality in the *agreement* of the parties as distinguished from reciprocity of remedy that equity requires as a necessary condition to

a specific performance. "It is the general rule that where the obligation to perform rests upon one of the parties only, equity will enforce the contract." *Van Doren* v. *Robinson*, 1 C. E. Green, 256. But in the same case the chancellor held that "the principle does not apply when the contract, *by its terms*, gives to one party a right to the performance which it does not give to the other; as where a lease contains a covenant on the part of the lessor for a renewal of the lease at the expiration of the term. It is now settled that such a covenant may be enforced against the lessor, though there is no reciprocal obligation on the part of the lessee to accept the renewal." Citing Fry, Spec. Perf. § 948. Such a contract being founded on considerations, can and should be enforced, when it was evidently the intent of the parties, as in this case, to give to the obligee the right to take the property upon the payment of the stipulated price. The question of the consideration we have already passed upon.

In the case of *Green* v. *Richards*, 8 C. E. Green, 32, the following paper was held to be a contract which could be specifically enforced:

"Received from Mrs. Catherine Green one hundred (100) dollars on account of payment on house No. 71 Ferry street; due on account of rent, one hundred and twenty (120) dollars.

[Signed] "THOMAS E. RICHARDS."

Indorsed on the foregoing receipt was the following:

"This is to show that I agree to sell to Mrs. Capt. Green the house and lot No. 71 Ferry street, for the sum of twenty-five hundred (2,500) dollars; and that when there is five hundred (500) dollars paid, and the back rent, I will give her a deed, and take a mortgage for two thousand (2,000) dollars.

[Signed] "T. E. RICHARDS."

The chancellor in this case says: "This is a contract certain and definite as to the subject-matter, the price, and the condition precedent. * * * This agreement does not come within the decisions which hold that an agreement to entitle to specific performance must be mutual, and such that the defendant could have had that remedy. These decisions themselves are controverted and conflicting. But they do not apply to a case where the complainant has paid a part or the whole of the consideration, *or a consideration for the defendant signing the agreement;* or to a case of a lease for years, with the option of purchasing during the term; or to cases where the contract, by its terms, gives one party a right to the performance which it does not give to the other; citing *Van Doren* v. *Robinson, supra.* In such cases specific performance is constantly decreed."

In a well-considered case in the same state (New Jersey) Chancellor PENNINGTON says in a case for specific performance upon a unilateral contract: "The complainant did not, indeed, sign the

paper, (an instrument under seal to convey land,) and it was never intended that he should; but the papers contain conditions on his part which the evidence shows he faithfully performed. The case is this: A party signs an agreement to do certain things, after the other shall have performed on his part conditions which are precedent; these conditions being performed, upon requiring the party who signed the agreement to fulfill his part, he says, 'I am not bound, because you never signed the agreement.' I can see no propriety in such a view of the case. There was mutuality in the very terms of the agreement." *Laning* v. *Cole*, 4 N. J. Eq. 229. Optional contracts are not favored in equity, though if founded on consideration and free from objection in other respects, are enforced. *Pinner* v. *Sharp*, 23 N. J. Eq. 274. Any sufficient consideration would make such unilateral contracts binding in equity. 10 C. E. Green, 554. See, also, *Reynolds* v. *O'Neil*, 11 C. E. Green, 223.

Upon all authorities above cited and upon principle, we see no reason why a person may not, for a good consideration, bind himself to do a thing, though he has no reciprocal remedy against the person to whom he is bound. If such unilateral agreement is based upon good consideration, and there be no other objection to it, we think that it should be enforced. In the case before us, it does not appear but that there was a perfectly valid consideration; one is presumed, as we have already decided, upon the record before us.

I have dwelt thus at length upon the subject of alleged want of mutuality, because my learned associate, in his opinion in the court below, principally bases the result arrived at there, upon the fact, that because there was no promise to pay, or actual payment and acceptance, there was no mutuality and no completed contract that equity would enforce. That opinion seems to have been based upon a *dictum* of Judge HALLETT in the case of *Smith* v. *Reynolds*, 8 Fed. Rep. 696. The judge in that case, which was one brought upon a similar instrument to the one before us, but where the question was before him upon an exception to the answer setting forth want of consideration, and not upon a demurrer, seems to have proceeded upon the assumption that no case could be maintained upon an instrument unless there was a reciprocity of remedy. He cites no authorities, but says: Was it possible that one party could be bound to sell, while the other party was not bound to buy? He does not pretend to have considered the law with care; for he adds, that at the final hearing, and upon a more extended examination of the authorities, his views might be modified. After all, the question before Judge HALLETT was, whether or not an answer to an action for specific performance upon an instrument similar in form to the one at bar, setting up want of consideration, was a good answer, and he holds that it was. I am of the opinion that he was right, but this case does not come before us upon that question.

The case of *Gordon* v. *Darnell*, 5 Colo. 302, was also relied upon

in the court below as upholding the doctrine that such an instrument as is here sued upon, is void for want of mutuality. A careful examination of that case does not sustain the position. The court in that case says, in regard to an instrument similar in its character to the one before us, "until acceptance by the obligee or the performance of some act equivalent to an election to purchase under the terms mentioned therein, it is *nudum pactum*. Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money, or performance of its conditions, whatever they may be, within the time stated and before the seller withdraws the offer to sell." It therefore holds that such a contract becomes binding, at least, if within the time limited the party desiring to purchase makes tender of the purchase money. We simply go further and say that such a contract, if based upon good consideration, is binding upon the obligor until the time limited by its terms has expired and there has been a failure on the part of the obligee to avail himself of the privilege granted.

It follows, from the views here expressed, that the judgment sustaining the demurrer below should be reversed.

BRISTOL, J., *dissenting*. This case is here on a writ of error to the district court for the Third district and county of Grant. Suit was instituted in the court below for the specific performance of what is claimed in the bill a contract to convey a certain mining claim. A demurrer was interposed to the sufficiency of the bill, which demurrer was sustained by the court below, and the suit dismissed without prejudice. The case having been argued and submitted before this court and a majority thereof having reversed the judgment of the lower court, I hereby dissent therefrom, for the reasons specified in this opinion, in addition to the allegations of the bill in reference therein to what the complainants designate as a memorandum in writing of the contract sought to be performed, a copy of which is attached to the bill and made a part thereof. This writing is as follows:

"Know all men by these presents that I, William Mead, of Hillsborough, Dona Ana county, New Mexico, am hereby held and firmly bound unto Miller and Teal, of Lake Valley, Socorro county, New Mexico, in the sum of ten thousand ($10,000) dollars, lawful money of the United States of America, to be paid to the said Miller and Teal, their executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

"Sealed with my seal, and dated the fifteenth day of March, one thousand eight hundred and eighty-one.

"The condition of the above obligation is such that if the above-bounden obligor shall, on the fifteenth day of June, one thousand eight

hundred and eighty-one, make, execute, and deliver unto the said Miller and Teal, or to their assigns, provided that said Miller and Teal, their heirs or assigns, shall, on or before that day, have paid to the said obligor the sum of three thousand and three hundred ($3,300) dollars, lawful money of the United States of America, the price by said parties agreed to be paid therefor, a good and sufficient deed for conveying and assuring to the said Miller and Teal, their heirs, or assigns, free from all incumbrances, all his right, title, and interest, estate, claim, and demand, both in law and equity, as well in possession as in expectancy of, in or to that certain portion, claim, and mining right, title, or property, on a certain vein or lode of rock containing precious metals of gold, silver, and other minerals, and situated in the Lake Valley mining district, county of Grant, Dona Ana, or Socorro, and territory of New Mexico, and described as follows, to-wit: All say one-third ($\frac{1}{3}$) interest in the Columbia mine, of the Lake Valley mining district of Grant, or Socorro, or Dona Ana county, New Mexico, then this obligation to be void, otherwise to remain in full force and virtue. WILLIAM MEAD. [Seal.]

"Signed, sealed, and delivered in the presence of
"MARIAN TURNER."

The foregoing instrument in writing does not appear to have been acknowledged by Mr. Mead, the obligor, yet it was, without authority, filed for record, and recorded in the probate clerk's office, March 22, 1881. This instrument in writing is something more than a mere memorandum, as styled in the bill. It must be taken and considered as embracing the actual terms of the transaction between the parties, and must necessarily control the allegations of the bill. Any allegations in the bill that are outside of, or inconsistent with, the terms of this written instrument must be disregarded. There is no latent ambiguity about this writing that can lay the foundation for parol testimony to explain its meaning. The writing itself embodies the entire transaction. And what is its whole meaning and import? As I understand it, it is simply a proposition on Mr. Mead's part, without consideration, either received or promised, to give a three-months' option to buy a mining claim for $3,300. He not having received that sum, or any part of it, nor accepted any promise to pay it, or any part of it, in consideration of executing the option bond, it could not, therefore, become a binding contract until something had been paid and accepted, or promised, and the promise accepted on Mr. Mead's part as a consideration; until such acceptance he was at liberty to withdraw the option. An option contract can be made as binding as any other contract, but a valuable consideration is as necessary to the validity of this kind of a contract as it is to any other. A contract of option to buy a piece of property is quite distinct from a contract of purchase of the same property. The usual consideration of an option contract is a certain sum of money, or

some designated property of value, that is put up as a forfeit in case the proposed purchaser does not conclude to purchase the property constituting the subject of the option.

Can it be contended with any show of reason that the obligees named in this bond were in any way bound to purchase this mining property for the sum named, or any sum whatever? Is it equitable that these obligees shall secure, without consideration, the exclusive privilege of purchasing valuable mining property, keep it tied up, and out of market for months, and finally abandon all idea of purchasing it? After placing themselves in this condition, can they reasonably ask a court of equity to enforce a gratuitous option thus obtained, after the obligor has refused to accept their terms? This species of bond, called mining bonds, are quite well known throughout the several mining states and territories. They are of comparative recent origin. They have been invented in the interest of mining speculators, whereby they hope to acquire an undue advantage over the unwary prospector and miner, free of cost, and for such time as they may discover that the property is of much greater value than supposed, when they will purchase, and if found otherwise as to value, they may refuse either to purchase, or to pay anything for the option,—a scheme, I apprehend, that cannot well commend itself to the favor of a court of equity.

The complainants cannot rightfully claim as innocent purchasers without notice. This option bond was assigned to them on the twenty-first day of May, 1881, by a brief indorsement on the bond. But before this assignment, and less than a month after executing the bond, Mead and his wife, by bargain and sale and deed of conveyance, had conveyed the premises in controversy to the respondent, Crittendon. This deed was executed and duly acknowledged on the twelfth of April, 1881, and duly recorded on the twenty-fifth day of the same month. This conveyance operated as a repudiation on Mead's part of the gratuitous option contained in his bond of the fifteenth of March, 1881, to Miller and Teal; and the same having been recorded prior to the assignment to the complainants, it was notice to them of such repudiation.

It is true that the bill contains allegations that "it was agreed between the said William Mead and the said Miller and Teal, that the price of $3,300 should be paid by the said Miller and Teal, their heirs or assigns, to said William Mead, on or before the fifteenth day of June, 1881," etc. But the said bond of the fifteenth of March, 1881, which must be considered as embodying in its terms the entire transaction between the parties, contains no such agreement. This bond must be regarded as conclusively negativing such allegations. This bond is not signed by Miller and Teal, or by either of them, and it contains no stipulation on their part, or of either of them, to pay any sum of money, or to do or not to do any act whatever to the advantage of Mead or assigns. Had Mead not conveyed to Crittendon

or any one else, so that on the fifteenth of June, 1881, it would have been in his power to execute a good and sufficient deed of conveyance, no action at law even could have been maintained by him against Miller and Teal or their assigns upon tendering a deed and demanding said sum of $3,300, and a refusal on their part to pay it for the simple reason that the bond does not show that they ever promised to pay that or any other sum. For this want of mutuality between the parties there was no such completed contract as equity will enforce by decree of specific performance. *Smith* v. *Reynolds*, *supra*.

It is contended in this suit that the seal affixed to the bond by Mead to Miller and Teal, imparts a consideration. This is true; but in suits for specific performance a mere seal is not a sufficient showing of the consideration to justify the chancellor in granting a decree to specifically perform. In any action at law where the point was raised, the consideration imparted by a seal would be considered as *prima facie* sufficient. But this rule does not apply to suits in equity for specific performance of contracts, though they be executed under seal. A mere seal may import no other consideration than moral duty and affection, and while that might be considered as sufficient to sustain a deed of conveyance, it is never so regarded for the purpose of compelling a conveyance by a court of equity. Before decreeing specific performance the chancellor must be advised of what the consideration consists, that he may see that the contract sought to be enforced is just, equal, and fair as between the parties. A mere seal is not sufficient. Ad. Eq. 78; 6 Iowa, 279; 6 Mich. 364; 12 Ind. 539; 14 La. Ann. 606; 17 Tex. 397. Upon demurrer for insufficiency to a bill for specific performance, a failure to show a consideration other than that imported by a seal will be fatal to the bill. Upon demurrer, the bill in this class of cases to be sustained must allege all the facts, which, if true, would justify a final decree without further proof.

It is true, as claimed on behalf of plaintiffs in error, that courts of equity will regard the *substance* rather than the form of the contract. To support this view, authorities are cited showing that "if a bond, with a penalty, is made upon condition to convey certain lands upon payment of a certain price, it will be deemed in equity an agreement to convey the land at all events." But that does not meet the objection in this case. Such authorities only go to show that there was no controversy over the *validity* of the bond; but an effort merely to avoid a conveyance by paying the penalty specified in the bond. This course would be a direct acknowledgment of the validity of the contract.

In the case now under consideration there can be no doubt that the bond executed by Mead to Miller and Teal contains a stipulation to convey *at all events;* but the real question is, whether it is not a *nudum pactum*, there being no stipulation on the part of Miller and Teal to pay the price *at all events*. If the price, or any part of

it, at any subsequent time even, had been paid and accepted, then the bond would have become a valid contract to convey, and equity would have enforced it by specific performance. Up to the time of such acceptance, however, Mead had the right to withdraw from and repudiate the gratuitous option. It also would have been a valid contract to convey if Miller and Teal had paid, or promised to pay, anything for the option; or, in other words, if, upon a valuable consideration, they had purchased the exclusive right to purchase the mining interest in controversy, within the time specified, then, upon proof of tender of the price within the designated time, equity would have decreed specific performance. The complainants have not brought themselves within either of these categories. Decrees for specific performances of contracts can never be demanded as an absolute right. Bills for such decrees are always addressed to the sound discretion of the chancellor. Story, Eq. Jur. §§ 742, 749. A refusal to grant any such decree, in effect simply leaves the complainant to his remedy at law.

All the facts and circumstances considered, I am unable to discover wherein there was an abuse of discretion on the part of the lower court in refusing specific performance on the facts stated in the bill, by sustaining the demurrer thereto; and I am still of the opinion that the judgment below ought to have been affirmed.

NOTE.

EQUITY — SPECIFIC PERFORMANCE — MUTUALITY — CONSIDERATION. The conclusion reached by the majority of the court in the case to which this note is attached is supported by the great weight of American authority. It is now well settled that these optional contracts are capable of being specifically enforced. The question of their mutuality is no longer discussed by the courts. If the contract is itself fair, and supported by a consideration, the holder of the option will be entitled to specific performance, if he elects to accept the offer within the time specified. In Johnston v. Trippe, 33 Fed. Rep. 530, it was decided that one who had secured an option on some lots for a year, in consideration of $50, which was to be applied to the purchase price in case the land was bought, or to be forfeited if it was not, was entitled to a specific performance of the contract to convey, and that it was immaterial, as a matter of defense, that the lots increased greatly in value after the contract of option was made. In *Tennessee*, it has been decided that an option, good for two years, is a binding contract, and that the holder is entitled to a conveyance if he signifies his intention to take the land at any time before the expiration of the option. Bradford v. Foster, 9 S. W. Rep. 195. In *California* and *Alabama*, optional contracts are declared to be specifically enforceable. Morrill v. Everson, (Cal.) 19 Pac. Rep. 190; Moses v. McClain, (Ala.) 2 South. Rep. 741. So in *Indiana*, it is held that a lessee who has an option to purchase the premises at the expiration of his lease may compel a specific performance on the part of the lessor. Herman v. Babcock, 3 N. E. Rep. 142. In *Michigan*, however, it is said that an optional contract will not be specifically enforced; but the case in which this doctrine was announced really went off on another point,—that the contract was within the statute of frauds. Maynard v. Brown, 2 N. W. Rep. 30. A contract to convey, entered into by the husband and wife in a common-law state, where the wife's contracts are invalid, will not be specifically enforced at the suit of the husband and wife; for the contract, not being binding on the wife, cannot be enforced against her, and hence is not mutual. Railway Co. v. Dunlop, (Va.) 10 S. E. Rep. 239.

Where there is an actual contract of sale, signed only by the vendor, and to be consummated within a given time by the performance of the conditions on his part by the vendee, otherwise the earnest money generally paid with such contracts to be forfeited, it is held that the vendee may compel a specific performance, even though he fails to perform the conditions within the time specified; for time is not of the essence of the contract, unless expressly made so, and the want of mutuality is overcome by the action of the vendee in seeking to enforce the contract, so that he then becomes bound. Appeal of Born, (Pa.) 19 Atl. Rep. 337; Austin v. Wacks, (Minn.) 15 N. W. Rep. 409.

The mere fact that a contract is unilateral seems to be no longer an obstacle to its specific enforcement, if it ever was. Thus a unilateral covenant in a deed, that the grantor shall have the right to repurchase the estate after the death of the grantee, will be specifically enforced, though clearly the grantor could not be compelled to repurchase unless he elected to do so. Woodruff v. Woodruff, (N. J.) 16 Atl. Rep. 4. And so a unilateral contract to purchase may be specifically enforced by the vendor. Miller v. Cameron, (N. J.) 15 Atl. Rep. 842.

Although it is frequently said that in order to entitle one to the relief of specific performance the contract must be mutual in its inception, yet this is not always the case, for it has been held that, where a father agreed to give his daughter a tract of land if she and her husband would live on it, he would be compelled to convey after the daughter and her husband had lived there, in pursuance of the agreement, for 15 years, though the daughter could not be compelled to continue to live there, nor could she have been compelled to live there at all when the contract was entered into. Welch v. Whelpley, (Mich.) 28 N. W. Rep. 744. A railway company which has erected its depot at a particular place, in pursuance of a contract with the owner of the land to convey it in consideration of the maintenance of a depot thereon, and of $1,000, may compel a specific performance of the contract. Railway Co. v. Cox, (Iowa,) 41 N. W. Rep. 24.

Although the contract may be legal, and held to be binding in law, yet, if it appears in a suit for specific performance that there was a *bona fide* misapprehension on the part of one of the parties, which yet did not amount to such a mistake as would entitle the party to positive relief had the contract been carried out, specific performance will not be decreed. Hamlin v. Wistar, (Minn.) 18 N. W. Rep. 145; Burkhalter v. Jones, (Kan.) 3 Pac. Rep. 559.

TERRITORY *v.* KINNEY.

January Term, 1884.

1. CHANGE OF VENUE—PREJUDICE—DISCRETION OF TRIAL COURT.
The ruling of the trial court refusing a change of venue because of local prejudice will not be disturbed where the trial judge was himself a resident of that county, and personally cognizant of the feeling of the community, and where the jury was drawn from the body of the whole district, and not alone from the county in question.

2. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES.
Where the defendant, indicted for larceny, was charged with the purchase of cattle, knowing them to have been stolen, the refusal of a continuance on account of the absence of witnesses who could prove an *alibi*, and also would testify from whom defendant had bought the cattle, will not be disturbed as an abuse of discretion, where it appears that subsequently, at the trial, defendant himself failed to take the stand and testify as to these facts in his own behalf.

3. SAME—EVIDENCE OF ACCOMPLICE.
Though the uncorroborated evidence of an accomplice should be received with great caution, it is not error for the court to refuse to instruct that such evidence is insufficient to warrant a conviction.

4. SAME—CORROBORATION.
Though the testimony of an accomplice is not corroborated by evidence that defendant was present at the scene of a crime the evening before its commission, such evidence becomes material and pertinent by its contradiction of witnesses to establish an *alibi* showing that defendant was at that time in another town, many miles distant.

William Breeden, for the Territory.

W. T. Thornton, for appellant.

BELL, J. The appellant was jointly indicted with several other persons in the district court for Dona Ana county, at the March term, 1883. The offense charged was the larceny of certain cattle. He was tried separately, convicted, and sentenced to imprisonment for five years, and to pay a fine of $500. From this judgment against him he has appealed.

The errors alleged to have been committed in the court below are—*First*, an abuse of discretion on the part of the court in refusing to change the venue. The rule of law is that the appellate court will not ordinarily entertain an appeal from the ruling of the court below on a matter that is purely in the discretion of that court. Before doing so it must appear that the discretion has been so grossly abused as to amount to a perversion of justice. The question of a change of venue is addressed to the sound discretion of the court, and is, perhaps, more than any other exercise of discretion, a difficult one to review. The appellate court can never have before it all the facts and circumstances as they appeared to the presiding judge in the court below, and upon which his ruling was founded. The change of venue was prayed for in this case because of the alleged prejudice which existed among the residents of Dona Ana county against the defendant. It was supported by the affidavits of several

citizens of that county. These affidavits charge, in substance, that it would be impossible to secure in that county an impartial jury. The court thought otherwise, and denied the motion. In considering the appeal from that ruling, this court must be justly influenced by the fact that the learned judge who presided in the lower court has, for many years, been himself a resident and citizen of Dona Ana county. He was personally cognizant of the condition of feeling existing in that community, and was, of course, the very best judge of its possible effect upon the trial of the defendant. The ruling of the court on the question, therefore, may have been based upon much better evidence than the record here affords us. In addition to these considerations, this court will also take judicial notice that the panel of jurors selected to try causes at the district court for the Third judicial district of the territory, and held at Las Cruces, were, under the law, drawn from the body of the whole district, which comprises three of the largest counties of the territory, and that, therefore, local prejudice in Dona Ana county—if such prejudice existed—would not necessarily prevent securing a jury from the other counties of the district. We cannot say that there was any abuse of discretion, and we are consequently of the opinion that there was no error in denying the motion.

The next alleged error is, *second*, an abuse of discretion in refusing a continuance. The motion for a continuance was made upon the affidavit of the defendant himself, and asked that the trial be postponed until the following term of the court. Various reasons are assigned for the continuance in this affidavit, but the principal ones are that witnesses were absent who could prove an *alibi* for him, and also witnesses who could prove from whom he had purchased certain cattle, with the purchase of which he was charged, knowing them to be stolen. The affidavit also alleges that the defendant was not aware of the charges against him until the second week of the term of court at which he was tried, and too late to get his witnesses at that time. This latter charge is denied explicitly by an affidavit of the officer who arrested him, who says that three days after the arrest he visited the defendant in jail, and there informed him of all the charges against him; that he read to him a statement of the charges, which he had fully written out.

As to the first portion of the affidavit which we have recited, alleging inability to secure the attendance of witnesses to prove an *alibi*, and of witnesses to prove how he became possessed of certain cattle alleged to have been stolen, it is quite enough to say that the record shows that, though the defendant, of all other persons in the world, was best informed on these subjects, he failed to take the stand as a witness and testify to these facts in his own behalf. In considering the question of the alleged error for abuse of discretion in denying a continuance, the court cannot shut its eyes to so important a fact, disclosed by the record. On appeal from such a ruling, the court is

authorized to examine the whole record, as well subsequent to as before the ruling, in order to determine whether there was any abuse. It is also entirely proper to take into consideration the fact that the defendant did not himself take the stand as a witness, as it is only at his trial, and before the facts are passed upon by the jury, that failure to do so shall not raise any presumption against him. After trial, and on the review, the appellate court can consider it. That the defendant should have failed to take the stand as a witness on his own behalf, under the advice of learned and zealous counsel, cannot change the effect which that course must necessarily have upon the court in considering this particular question. To say that the court below grossly abused its discretion, under such a state of the record, would be, in our judgment, wholly unwarranted. We find no error in the ruling.

The next assignment of error is upon the refusal of the court to give the following instructions:

First. "The jury is instructed that the testimony of the witness Sierra is not of itself sufficient to warrant the conviction of the defendant in this case: and further, if the jury believes from the testimony that the defendant Kinney was not present when the crime charged in this indictment was committed, but was in El Paso, then he must be acquitted."

Second. "The court instructs the jury that the testimony of the accomplice is always received with caution, and that while the jury are the sole judges of the credibility of the witness and of the weight to be given to his testimony, that it is the duty of the court to caution you of the danger of convicting upon the testimony of an accomplice alone."

Third. "I instruct the jury that they will not be justified in finding the defendant guilty upon the uncorroborated testimony of the accomplice, Margarito Sierra, and he must be corroborated, not only as to the circumstances of the commission of the crime, but he must be corroborated as to the defendant's connection with it; for it will be presumed that as the witness was present when the crime was committed, and participated in it, that he will tell the circumstances truly. The danger is that after having stated the circumstances truly, that he may accuse some innocent person of the crime in order that he may derive some fancied benefit himself."

Fourth. "In weighing the evidence of the witness Margarito Sierra, they should remember that he is a self-convicted thief; that he admits that he helped to steal the cattle; that he admits he was present when they were sold, and that there were witnesses to prove his presence at the sale and connection with the cattle, and that he was liable to prosecution therefor, and that he hoped and expected immunity from his own crimes as a reward for his testimony."

It was not error, in our opinion, for the court below to refuse to charge the first of these proposed instructions, taken as a whole.

The latter part of it, which requests the court to charge the jury that if the defendant was not present when the crime was committed, but was at El Paso, which the evidence shows to be a town many miles distant from the place where the crime was committed, had it stood alone, would have been sound law. But the first part of this instruction, which asks the court to charge that the testimony of the accomplice, Sierra, is not sufficient of itself to warrant the conviction of the defendant in the case, is not the law, in our opinion.

Counsel, in his brief and on the argument, cited section 380, Greenl. Ev., as supporting the proposition that the jury should have been instructed that they could not find the defendant guilty upon the uncorroborated testimony of an accomplice. The part of the section cited is as follows: "It is now so generally the practice to give them said advice, that its omission would be regarded as an omission of duty on the part of the judge." Counsel would have the court believe that this language was used in support of his proposition. Such, however, is not the fact. The whole of the section in question from which counsel cited the portion of a sentence only above quoted, in our judgment, fairly expresses the law on the subject and is as follows: "*The degree of credit* which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence, and without doubt just caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly contended that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges *in their discretion will advise* a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration." Then follows, as part of the sentence, the language which counsel cites, as though the author had used it to support the proposition that a conviction could not be had upon the uncorroborated evidence of an accomplice.

For a judge in his discretion to advise a jury not to convict upon the testimony of an accomplice, uncorroborated, is a very different thing from telling them that they could not convict upon such testimony. Of course, it is now and always has been the law that the evidence of a *partnership business* is competent to go to a jury. If such evidence is allowed to go to a jury it logically follows that they have the power to believe and act upon it. It differs only from other evidence in that it necessarily comes from a corrupt source, and is to be viewed with suspicion and received by the jury with the greatest caution. Tayl. Ev. lays the rule down in the same language used by Greenleaf in the section quoted by us. He evidently borrowed it from that author. In the rule as laid down by Taylor, there is, however, this additional proposition: "The jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without

any confirmation of his statement." Phil. Ev. lays down the rule to be: "Since accomplices are competent witnesses, it appears to follow that, if their testimony is believed by the jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence." Phil. Ev. 110, and notes. In the exercise of a sound discretion the judge will doubtless, in many cases, strongly advise the jury against convicting on such evidence, but the law does not require him to do so, and he is to be governed in the exercise of his discretion by the facts in each particular case.

In the case mostly relied upon by counsel for appellant,—but for another purpose, as we will see later,—Chief Justice GRAY begins the opinion of the court in the following language: "It has always been held that a jury might, if they saw fit, convict on the uncorroborated testimony of an accomplice. Lord HALE, Lord HOLT, and Lord MANSFIELD treated the question of his credibility as one wholly for the determination of the jury, without any precise rule as to the weight to be given to his testimony." *Com.* v. *Holmes*, 127 Mass. 424.

We are, therefore, clearly of the opinion that the court properly refused the first of these proposed instructions.

It was not error for the court to refuse the second instruction asked for, the instructions given by the court having covered it. From the suspicious, and, as we have observed, necessarily corrupt character of the evidence of an accomplice, courts have uniformly instructed juries specially in regard to the mode in which they are to treat it. These instructions vary in the language in which they have been couched, but in effect are that the jury shall receive such testimony with great caution, scrutinize it with much care, and act on it after careful consideration of its source. In the case at bar the court below complied with this rule. On this subject the court charged the jury: "It is a well-settled principle of the law of evidence that the testimony of an accomplice should be received by the jury with great caution; and while you alone are to determine the weight and credibility of the testimony, it is my duty to inform you that in determining the credibility of the testimony of this accomplice, it will be proper for you to consider the fact that he is an accomplice. Also, you should consider the question whether the accomplice had any interest in giving his testimony that might influence him in giving false testimony." This instruction, as we have stated, fully complied with the duty of the court in regard to this question, as we have seen from the numerous authorities cited and considered.

The four instructions asked for we have already fully disposed of by our opinion in regard to the first, and the court properly refused to charge it.

We come now to the final assignment of error, which is the giving of the following instruction by the court: "There is also testimony which, if true, corroborates in some material points the testimony of this accomplice." This instruction the counsel insists was error, for

the reason that there was no evidence to corroborate the accomplice Sierra, which convicted the defendant with the crime. The case of *Com.* v. *Holmes, supra*, is cited as authority on this subject. That case, which was most elaborately examined by the supreme court of Massachusetts, decides, and we think correctly, that to corroborate the evidence of an accomplice does not mean simply to corroborate his story in a general way, as to the fact of the crime itself, but that he must be corroborated by evidence tending to show that the defendant took part in the commission of the crime. The case was cited by the counsel to show that the evidence which was introduced in that case to corroborate the accomplice was similar to what was relied on by the territory in the case at bar; that the supreme court of Massachusetts reversed the judgment in the former case for error in admitting the evidence objected to; and that this court will do so in this cause, because of the similarity of evidence introduced in both cases.

In the Massachusetts case the defendant, Holmes, was indicted for burning the barn and shed of John C. Munson in the night-time of September 11, 1876. An accomplice, Charles Sumer, who had himself been tried and convicted of the same offense, was examined as a witness for the prosecution. He testified, among other things, that on the evening of September 2, 1876, being Saturday, he left his father's house, walked to the village of Housetown, about two miles off, arrived there at 8 o'clock, attended a lecture, which closed at 9 o'clock, went out of the hall, walked with William Moore and two girls whom they found in the street, and that he and Moore separated a little after 10 o'clock; and that he (Sumer) walked alone towards his father's house, and as he approached Munson's barn on his way home he saw a man gather up some straw which lay there, strike a match, and set the straw on fire; that he approached and saw the defendant, who said, "You have caught me;" that he (the witness) put the lighted straw out; that the defendant then told him he would set the barn on fire on the next Saturday, and for him (the witness) to keep still and be prepared to show where he was on that evening, and that after the fire witness should give it out that witness burned the barn, and that he would make it all right with witness; that witness then went home, where he arrived about 12 o'clock at night, and was let in by his father; that during the following week defendant gave witness four ten-dollar bills.

To corroborate the evidence of this accomplice, the prosecution called Uriah Sumer, his father, who testified that his son did come home at 12 o'clock on the night in question, and that he let him in. The defendant objected to the admission of this evidence as immaterial, incompetent, and not admissible to corroborate young Sumer, and as not tending to corroborate him in any material point. But the judge admitted the evidence and defendant excepted. Under like objection and exception the prosecution was permitted, as corroborative of the evidence of the accomplice, to prove that during the week

preceding, as well as the week after the fire, the accomplice was seen with one or more ten-dollar bills. In reversing the judgment in the case, on the ground that the evidence cited was erroneously admitted as corroborating the accomplice, the supreme court said: "The whereabouts of the witness, when not in defendant's company, on the evening of September 2d, was wholly immaterial. The possession of the bank bills before and after the fire, even if it tended to show that he had been hired to commit the crime, had no tendency to prove that the defendant was the person who so hired him. None of this testimony had the slightest tendency to prove any facts connecting the defendant with the crime charged." We think the court was clearly right in the view of the law expressed.

In the case at bar the testimony which it is claimed corroborated the evidence of the accomplice, Sierra, was that of Joseph Hull. Hull testified that he lived at Rincon, and knew the defendant, knowing who also lived at that place. He further testified as follows: *Question.* You say you are quite positive you saw Kinney the day before the cattle were brought in? (Referring to the stolen cattle.) *Answer.* Yes, sir. *Q.* That is, you got up in the morning and found the cattle in the corrall? *A.* Yes, sir. *Q.* And the night before you saw Kinney at Rincon? *A.* Yes, sir.

This evidence, standing alone, does not tend to corroborate the evidence of the accomplice, Sierra, as to the defendant's complicity in the larceny. The fact that Kinney lived where the witness saw him, and in the vicinity of the place where the stolen cattle were corralled, according to the evidence of the accomplice, ought not of itself to affect the question of his guilt or innocence, for the reason that seeing him in the vicinity of his own home would be seeing him where it was usual and proper for him to be. But in view of the defense in this case the evidence in question assumes a totally different aspect. The defendant chose to call several witnesses to prove that he was not at Rincon, where he lived, and where the stolen cattle were taken to, at the time when the accomplice testified he was there and took part in the larceny, but that he was at El Paso, many miles away. This was his defense to the charge, and what he relied upon to establish his innocence. In view of this defense, was it not most important and material evidence to prove that he was in fact not at El Paso, as his witnesses testified, but at Rincon, where the offense was committed. We think that the evidence, in view of the defense interposed, was material, and did tend to prove his complicity in the crime. This being so, it follows that any evidence tending to corroborate the accomplice in this regard was competent and material. The answer of the counsel to the proposition that Hull's evidence was not material, because seeing defendant in the vicinity of his home was not to be taken against him, as that was where he would be naturally, loses all its force when, as the record shows, he destroyed the presumption arising from that evidence in favor of the

defendant by attempting to prove that he was not there, but somewhere else. We therefore find that the accomplice was corroborated by this evidence of Hull as to a material point, and that the instructions of the presiding judge in the court below were sustained by the evidence.

The judgment is affirmed.

TERRITORY *v.* LOPEZ and another.

January Term, 1884.

1. DISQUALIFICATION OF JUROR—VOIR DIRE.
Technically, upon the trial of a juror for general or absolute disqualification under the statute, and expressly for bias, the challenge should be first interposed and the evidence introduced afterwards; but where, upon a *voir dire*, it appears that the juror is not the head of a family, a challenge therefor may be disposed of upon the evidence already received.

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—ABSENCE OF DEFENDANT.
It is error for the court, on trial for felony, after the jury have retired, to receive them again, in the absence of the defendant and his attorney, and give them further instructions verbally as to the law of the case.

3. SAME—REASONABLE DOUBT.
In a criminal case, it is error to instruct the jury that they must determine a fact "according to the evidence, and just as they would determine any fact in their own private affairs." The jury must be satisfied, to the exclusion of every reasonable doubt, that such fact has been established by the evidence.

William Breeden, Atty. Gen., for the Territory.

Catron, Thornton & Clancy, for appellants.

BRISTOL, J. The defendants below, Crecencio Lopez and Manuel Casias, who are appellants here, were jointly indicted for cattle stealing in the district court for the first judicial district and county of Colfax, and convicted and sentenced to five years' imprisonment in the territorial prison. A large number of errors are assigned on behalf of the appellants; only a few of which do we deem it necessary to notice. Two of these errors are that the court below abused its discretion in severally overruling motions for a change of venue and for a continuance. Upon a careful examination of the whole record, including the affidavits on which such motions were made, and the evidence disclosed on the trial, and especially the evidence of the defendants themselves, we cannot conceive how the defendants could have acquired any advantage by a change of venue or a continuance, except the possible opportunity that might arise for them to escape or for the evidence to be suppressed by the death or absence of wit-

nesses. Under the circumstances, there was no abuse of discretion in overruling the motions for a change of venue and for a continuance.

Another error assigned is that the court below erred in overruling challenge to the juror John Carico on the trial thereof, the ground of the challenge being that he was not the head of a family. Our statute specifies as one of the necessary qualifications of every juror, grand or petit, that he must be the head of a family. If not the head of a family he is absolutely disqualified as a juror; and if challenged on that ground, and on the trial thereof it is conclusively shown by the evidence that he is not the head of a family, it would be error on the part of the court to allow the juror to remain on the trial panel, however worthy he may be in character and in other qualifications required by law. As to this assignment of error, the record discloses the following facts: "That one John Carico was called as a juror in said cause, who also being duly sworn the truth to speak as to his qualifications as a juror in said cause, did then and there under oath say to the court that he was not the head of a family; that he was not a married man; that he had no children; that he and his partner kept a mess and house, at which he, his partner and employes ate and lived; that he, his partner, and their employes were all adults, and that no other persons ate or lived with them. Therefore the said defendants, through their attorneys, challenged and objected to said Carico as a juror in said cause for the reason that he was not a qualified juror according to law to try said cause, he not being the head of a family; but the court then and there rendered its judgment and decision overruling said challenge and objection, and directed and ordered said Carico to be sworn as a juror to try said cause."

As presented by the record it would seem that no evidence was taken *after* the challenge had been interposed, but that the court disposed of the same on the evidence received in the previous examination of this juror as to his general qualifications. Our statutes do not specially prescribe the manner in which a challenge to an individual petit juror shall be tried. But they do provide that the necessary qualifications of grand and petit jurors shall be the same; and they further provide how a challenge to an individual grand juror shall be tried, when the ground of challenge is that he is a minor, or that he is an alien, or that he is insane, or that he is the prosecutor upon a charge against the defendant, or that he is a witness on the part of prosecution, or that such a state of mind exists on his part in reference to the case of either party which satisfies the court in the exercise of a sound discretion, that he cannot act impartially and without prejudice to the substantive rights of the party challenging. Comp. Laws N. M. (1865) 502. As to the trial of each of the foregoing causes of challenge to any grand juror, the statute provides as follows: "The challenge * * * must be entered upon the minutes and

tried by the court, provided that no person of the grand or petit jury shall be challenged after he has been sworn." Id.

The uniform practice of the courts has been to try all challenges to individual jurors, whether grand or petit, in the manner here pointed out. To be technically correct, therefore, on the trial of any such challenge, the challenge should be interposed first, and the evidence introduced afterwards. On this point Mr. Bishop, in his work on Criminal Procedure, (3d Ed.) vol. 1, § 934, says: "* * * A formal challenge to the juror or jurors specifying the objection is, in some of our states, required; in others the examination on the *voir dire* precedes the challenge." Be this as it may, there can be no doubt that the juror Carico was disqualified, it appearing conclusively from the evidence that he was not the head of a family.

Objection to a juror on the ground of general or absolute disqualification under the statute, must be considered in a different light from an objection on the ground of bias, merely. The latter is addressed to the sound discretion of the trial judge, while if the former is sustained by the evidence, the rejection of the juror becomes mandatory under an arbitrary rule of law. This court is not disposed to favor this particular ground of challenge by any very strict construction of what constitutes the head of a family. But the term must be understood and applied in its ordinary acceptation. And the most liberal interpretation that could be given necessarily requires that the head of a family must be in a position to exercise some degree of authority or control over the conduct and means of support of a person or persons who live with him, and who look to him for guidance and support. Even the relations of parents and son may be such as to place the son at the head of the family. This relation would subsist if his parents lived with him and looked to and depended on him for their support. But two equal partners living together in the same house, and under a contract with their employes as a part of the consideration should board and lodge them at their house, and all, partners and employes, should eat at the same table, would not, in and of itself, constitute the family relation within the meaning of the statute. Such relation must consist of some tie closer in its moral obligations, and of greater permanence in its character than merely boarding employes during the limited term of their service; and as to two equal partners living and messing together as a matter of convenience and economy, perhaps, in their business relations, neither could be considered the head of the other in the sense of the *family* relation.

It is also assigned as error that after the jury had been charged by the court and had retired to deliberate they returned and received verbal instructions from the court in the absence of the defendants and their attorneys. The record relating to this ground of error is as follows: "The jury * * * having heard the evidence and the instructions of the court that were given in writing retired to

their room * * * to deliberate on their verdict. * * * That said jury not having agreed upon a verdict in said cause * * * they were brought by the sheriff into court, *in the absence of the defendants and their attorneys* and in the absence of the attorney of the territory, when the judge of the court stated to them *verbally*, in substance, and not in writing, in answer to an inquiry by one or more of said jurors *as to where those men were driving those cattle, that the jury must determine that fact according to the evidence, and just as they would determine any fact in their own private affairs.*"

The defendants were being tried for grand larceny, which under our law is a felony. The doctrine seems to be well settled that after the jury have been instructed and have retired to consider of their verdict, in all trials for felony it would be irregular and improper for the court to receive the jury, or to have any communication with them touching the case submitted to them, in the absence of the defendant. In all such cases the presumption of law is that the irregularity *per se* constitutes error. On this subject Mr. Bishop says: "It is a principle pervading the entire law of procedure in criminal causes, that after indictment found, nothing shall be done in the cause in the absence of the prisoner." 1 Bish. Crim. Proc. § 682. To this principle as a rule of law there are no exceptions other than in the lower class of misdemeanors where a fine only, and no corporal punishment may be imposed, and in a few instances of orders within the discretion of the presiding judge, such as an order on a motion for a continuance. And even such motions, if made on behalf of the prosecution, cannot be entertained except on notice to the prisoner or his counsel. Id. §§ 684, 685. In regard to felonies Mr. Bishop further says: "In felonies it is not in the province of the prisoner, either by himself or by his counsel, to waive the right to be personally present during the trial." Id. § 686. This is strong language, but it is unquestionably the law. Giving instructions to the jury are as much a part of the trial as is the taking of testimcny or receiving the verdict. The charge to the jury is often the most important incident in the trial in its influence upon the minds of the jury in finding a verdict. If at any time during the progress of the trial it can be to the interest of the prisoner with his counsel to be present in open court, it is while the presiding judge is instructing the jury as to any rule of law to be observed by them in arriving at a verdict.

In the case of *Prine* v. *Com.* 18 Pa. St. (6 Harris,) 103, the record disclosed the facts that the prisoners were tried and convicted of burglary, but at the time of the rendition of the verdict the prisoners' counsel were present and the prisoners *absent*. Defendant's counsel thereupon waived the presence of the prisoners and had the jury polled, when they severally answered that they found the defendants guilty. On writ of error the appellate court held that it is undoubtedly error to try a person for felony in his absence, even with his consent. * * * No precedent can be found in which his pres-

ence is not a postulate *of every part of the record.* * * * These things are matter of substance and "not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. * * * It is unnecessary, however, to speak of delegated authority; for the right of the prisoner to be present at his trial *is inherent and inalienable.*"

After the jury have been charged by the court, and they have retired to deliberate, it is always proper for them to ask the bailiff in charge to conduct them before the court for further instructions. But in all such cases the proper practice would be to send for the prisoner and his counsel, and, as soon as they come into court, to have the names of the jurors called, and if all are found to be present, the court will then receive any communication they have to make, and instruct them accordingly. Mr. Bishop more elaborately puts it thus: "After the jury have retired to deliberate on their verdict, there may be further communication between them and the court at the desire of either. If at the court's, an officer is sent for them, and it takes place in open court; the judge has no right to visit them for the purpose in their room, or otherwise communicate with them in private. If at the jury's, they are conducted for the purpose into open court. The counsel and the parties should be notified, *and their presence is a right or necessity, the same as during the prior parts* of the trial. The instructions desired on the one side or the other and required by the circumstances will then be given." 1 Bish. Crim. Proc. (3d Ed.) § 1000.

If the court, on an occasion of this kind, deems it proper to give the jury any further instructions or advice as to how they should determine any question of fact or any rule of law to be observed by them in arriving at a verdict, such instructions, under our statute, must be in writing, and should properly enunciate the law on the subject. If there be a failure in either of these legal propositions, it would be error. The inquiry of the jury as to "where those men were driving those cattle," may or may not have been material, and this court may well assume that it was material from the fact that the court below deemed it proper to give an instruction thereon. In saying to them, however, "that the jury must determine that fact according to the evidence, and just as they would determine any fact in their own private affairs," was not a proper instruction as to how they should determine any question of fact in the case. This instruction was well calculated to mislead the jury, as they might infer therefrom that they were at liberty to determine every question submitted to them by the same rule.

The only proper instruction under the law that can be given to the jury as a guide in determining any question of fact necessary to a conviction, is that they should be convinced or satisfied from the evidence, to the exclusion of every reasonable doubt, that such fact has

been established. The court may, however, and in the higher grades of felonies it is often its duty to go further and explain what constitutes a reasonable doubt. This rule of law should be applied not only as a general proposition in determining the defendant's guilt, but also to the establishment of each and every element or fact constituting the crime charged. It is always unsafe to attempt any substitute for such an instruction. 1 Bish. Crim. Proc. (1st Ed.) §§ 818, 819. The instruction to the jury that they should determine a question of fact "just as they would determine any fact in their own private affairs," was therefore a violation of this rule of law, and was erroneous. The instruction was also objectionable on the ground of its not being in writing.

In the case of *Territory* v. *Perea*, 1 N. M. 627, this court said that "the statute requiring instructions to a trial jury to be in writing is not directory merely, but mandatory in its terms. In states where similar statutes have been enacted their respective superior courts have uniformly held that oral instructions in whole or in part are error, and sufficient cause for setting aside the judgment and ordering a new trial. The adjudication on this subject present an array of precedents that cannot well be ignored. * * * We are of the opinion that the only proper mode in giving instructions as a charge to a trial jury, and particularly in regard to the higher grades of crime denominated felonies, is for the district court to give in writing all that it deems necessary or even proper to say to the jury in its charge." *Vide*, 45 Mo. 64; 6 Mo. 399; 19 Ill. 82; 43 Cal. 29; 37 Cal. 274; 45 Cal. 650.

Judgment below reversed and cause remanded for a trial *de novo*.

BELL, J. I concur.

DENVER & R. G. RY. CO. *v.* HARRIS.

January Term, 1884.

1. CORPORATION—ULTRA VIRES—TRESPASS VI ET ARMIS.

Where defendant railroad company, by means of a strong body of armed employes, took forcible possession of the railroad and property of another company, and plaintiff, an employe of the latter company, while on a hand-car in the discharge of his duty, was fired upon and wounded by defendant's employes, defendant is liable for the injury, and cannot plead that the trespass was the individual act of its servants, and *ultra vires*.[1]

2. INSTRUCTIONS—MODIFICATION—ERASURE.

The statute providing that modifications of instructions asked must not be by interlineation or erasure is merely directory, and an erasure not prejudicial to the party objecting thereto is not ground for reversal of the judgment.

[1]This decision was affirmed by the supreme court of the United States. See 7 Sup. Ct. Rep. 1286, and cases there cited. See, also, Hussey v. King, (N. C.) 3 S. E. Rep. 923; Improvement Co. v. Steinmeier, (*Md.*) 20 Atl. Rep. 188; Buffalo Lubricating Oil Co. v. Standard Oil Co., (N. Y.) 12 N. E. Rep. 825.

William Breeden, for plaintiff in error.

C. H. Gildersleeve and *John H. Knaebel*, for defendant in error.

BRISTOL, J. This case is here on writ of error to the district court for the First judicial district and county of Santa Fe. Harris, the plaintiff below, brought an action of trespass against the Denver & Rio Grande Railway Company, a corporation under the laws of the state of Colorado, to recover damages in the sum of $10,000 for bodily injuries inflicted by the agents and employes of the defendant corporation while in and about the employment of their principal, and recovered judgment in the sum of $9,000. As to the merits of the case the whole controversy turns upon the question whether the injuries were inflicted by the agents or employes of the defendant corportion or other persons acting on their own behalf exclusively, or acting within the scope of their employment by such corporation. A corporation being an artificial body created by law, all its acts necessarily must be performed by its agents and servants. And when a corporation is sued in an action founded on the unlawful or tortious acts of the agents or servants, the fact whether the acts complained of were done on their own account exclusively or on behalf of the corporation within the line of their employment is not ordinarily to be established by the plaintiff by proof of what occurred in some meeting of the directors of the corporation,—the evidence of which is under the control of such directors,—but by proof of what the agents and servants of the corporation had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and especially if attained, and the corporation accepted the same and used the fruits thereof as its own, proof thereof might be received to establish the corporate liability.

The old common-law doctrine that "A corporation cannot be aiding to a trespass," nor "give a warrant to do a trespass without writing," or that "it could authorize no agent, do no act, and give no assent but by deed," was long since exploded. The doctrine as now understood and applied by the courts is that corporations are liable for every wrong, every trespass, and every tort committed by their agents and employes within the scope of their employment as such, and to the same extent as individuals under like circumstances; and the doctrine of *ultra vires*, as formerly understood and applied, does not under the modern decisions have any application to such cases. *Merchants' Bank* v. *State Bank*, 10 Wall. 645; *Nat. Bank* v. *Graham*, 100 U. S. 702; *State* v. *Morris & E. R. Co.* 23 N. J. Law, (3 Zab.) 368, 369.

The doctrine of *ultra vires*, as formerly understood and applied by the courts to corporations, was that such institutions were endowed with a species of infallibility; that they in their corporate character could not do or sanction any act by and through their agents or

servants which they were not authorized to do by their respective charters conferring corporate powers; that because they were not authorized to do wrongful and tortious acts they could therefore do no wrong. But it was soon ascertained that these institutions, notwithstanding they had no legal authority to do wrong, yet they often assumed powers *ultra vires* to do and actually did commit all sorts of trespasses and unlawful and wrongful acts through wholly irresponsible servants and employes, often caused the greatest losses and damages to private individuals and their property; and the courts, to protect society, were finally impelled *ex necessitate* to place the responsibility of corporations on a more enlightened and reasonable basis.

The doctrine of *ultra vires*, as now interpreted by the courts, and applied to corporations, signifies merely such acts and doings by any corporation which, though it may have the power to perform or to adopt and sanction through its agents or servants, yet it has no legal authority to do under its charter of corporate powers; in the same sense precisely that every act performed by a natural person which the law either in express terms or by necessary implication does not sanction, nor confer on him any right to do, would be illegal, and might be termed *ultra vires*.

In the well-considered case of *State* v. *Morris & E. R. Co. supra*, in which this whole subject is ably reviewed, and the modern doctrine clearly expressed, the court by its chief justice used the following language: "But it is said that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. * * * The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, *nor a vote of the corporation constituting the agency or authorizing the act.* * * *

"It is further objected that a corporation aggregate cannot be liable to indictment for a crime because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from

all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney in his argument in *Chestnut Hill Turnpike Co.* v. *Rutter*, 4 Serg. & R. 16: 'According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal and they are not answerable for the consequences.' If the act be not within the range of their corporate powers they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice. * * * It is said, again, that the individuals who concur in making the order or in doing the work are individually responsible. And so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been to look to the principal rather than to the mere agent; and in the case of corporations it is the clear dictate of sound law not only, but of public policy, to look rather to the corporation at whose instance and for whose benefit the wrong is perpetrated than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who, in a great majority of cases, would be alike unknown and irresponsible."

The authority of the agents and servants of the corporation, and the approval and acceptance of their work and its fruits by their principal, may be proved by the acts and conduct of the corporation in relation thereto, whether the same are manifested by it collectively or through its officers, agents, tenants, etc. Ang. & A. Corp. (9th Ed.) § 186.

In *Magill* v. *Kauffman*, 4 Serg. & R. 318, the supreme court of Pennsylvania held that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting business relative to the corporation, as well as evidence of what passed at the meeting of the congregation when assembled on business in relation thereto, were admissible to show the possession of the corporation of land and the extent of its claim of its boundaries.

We cite this authority in answer to the assumption of counsel for plaintiff in error, that the acts and declarations of the agents of the defendant corporation on the trial below ought not to have been received in evidence to establish its liability for the acts of its agents, and to show that it was implicated in taking possession of the railroad in question, and holding the same.

Under the modern, and as it would seem controlling, adjudications on the subject, there can be no doubt as to a legal proposition, that if the defendant corporation (plaintiff in error here) in any manner had formed the purpose of seizing, through its agents and employes,

the Denver & Rio Grande Railway while in the peaceable possession of the Atchison, Topeka & Santa Fe Railway Company, and seizing the same by force, if necessary, and either directed, commanded, or counseled the same, or assented thereto, then it followed as a matter of law that the acts of its agents or employes, in taking possession in pursuance thereof, were the acts of the corporation. And if in taking such possession, under such circumstances, its agents or employes committed acts of violence amounting to trespasses or torts, for which an action would lie for damages, the corporation, as well as its agents and employes engaged in the same, would be liable to respond in damages to the injured parties; and as proper circumstantial evidence tending to prove the connection of the corporation with the acts of its agents in taking possession, such acts of its agents, as well as their declarations in respect thereto, and the object thereof, may be received. And if the corporation accepted and received into its possession and assumed control of the railroad so seized, and commenced, and for a time continued, to use and operate the same as its own, it would be a very strong circumstance indeed tending to establish the fact that its agents and employes, in taking possession, were acting within the scope of their employment, and under the direction of their principal.

The record discloses the fact that there was evidence on the trial in the lower court to the effect that about the tenth or twelfth of June, 1879, the Atchison, Topeka & Santa Fe Railway Company were in peaceable possession, by its agents and employes, of a certain railroad in the state of Colorado, running from Alamosa to the city of Pueblo, in that state; that at or about that date, and while the Atchison, Topeka & Santa Fe Railway Company were so in possession of said railroad, the plaintiff in error, the Denver & Rio Grande Railway Company, by an armed force of several hundred men, acting as its agents and employes, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employes of said Atchison, Topeka & Santa Fe Railway Company, having charge of said railroad, and forcibly drove them from the same, and took forcible possession thereof; that there was a demonstration of armed men all along the line of the railroad seized, and while this was being done and the seizure was being made, the defendant in error, who was an employe of the Atchison, Topeka & Santa Fe Railway Company, on said line of railroad, and while on the track of the road, and on a hand car thereon, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured; that immediately upon the seizure of the railroad, as aforesaid, the plaintiff in error accepted it, and at once entered into possession thereof, and commenced, and for some time continued, to use and operate the same as its own.

But, notwithstanding this strong circumstantial evidence, it is con-

tended on behalf of the plaintiff in error that inasmuch as there is no direct proof that the identical men who did the shooting had any specific orders or directions from the corporate authorities to act in the premises, we ought to assume that no such orders or directions existed, and that these particular men were acting entirely on their own behalf and independently of the corporation. This would be too much like an assumption that skirmishers in battle, because somewhat detached from the main body of troops, did not belong to the army, but were fighting independently on their own account, and without orders from the officer in command. All this might be possible, but the strong presumption would be the other way. The fact that these men committed the violent assault with deadly weapons at the time and place, and in the manner and under the circumstances, detailed in the evidence, gives rise to a very strong presumption that they were a part of the armed force employed to seize the railroad. These facts and circumstances, together with the declarations of the agents and officials of the plaintiff in error, under whom this armed force acted and from whom they received their directions, were competent to go to the jury as evidence tending to establish the corporation's liability.

If the acts of trespass complained of were the acts of the agents, employes, or other persons on their own account, and were in no way authorized or sanctioned by the corporation, it was within the actual knowledge of some of its officers or agents, and could have been easily proved. No attempt of this kind having been made, the strong presumption arises that these armed men, including those who did the shooting, were acting in concert within the line of their employment by the corporation, for the attainment of a specific object on its behalf. The question as to which of these railway companies were legally entitled to the line of railroad in controversy between them does not arise in this case. Even if the Denver & Rio Grande Railway Company had been legally entitled to the possession, it would not have justified the manner of seizure. The excessive violence committed, in either event, would have constituted a trespass for which an action for damages would lie. We hold, therefore, that there was sufficient evidence submitted to the jury, which, if true,—and it was for the jury to determine its credibility,—justified a verdict for the plaintiff.

A long list of specific instructions, founded mainly on the ancient doctrine that a corporation was incapacitated from doing or sanctioning any act of its servants not authorized by its charter of corporate authority, thus exempting it from all liability for the wrongful acts of its employes, though directed by its principal officers and managers, were asked to be given to the jury on behalf of plaintiff in error, and were refused by the court, except two, one of which was given as demanded and the other given with a part erased; to the ruling

of the court on each one of which, except the one given, the defendant below excepted. All the unconditional refusals to charge as demanded were proper, and constituted no error.

The instruction given by the court as demanded by the defendant corporation was as follows: "Agents or managers of the affairs of a railroad corporation such as the defendant cannot be *legally* employed by such company to shoot a person, nor are the officers, agents, or managers of such company, in the usual course of their employment as such officer, agent, or manager, authorized to employ any one to shoot another person." This instruction was given in full as demanded on behalf of the defendant corporation. There was no exception to this instruction on behalf of the plaintiff below, and we quote merely to show that it was more liberal to the defendant corporation than just. While it was true as a legal proposition as far as it went, yet it was well calculated to mislead the jury. Having been given as an independent instruction, the jury might have inferred from its phraseology that if the company could not *legally* authorize its agents to commit the trespass, it would not be liable. The instruction, to be proper, ought to have contained the qualifying words that notwithstanding the company could not *legally* authorize or sanction the wrongful act, yet if, as a matter of fact, it actually did not only authorize, but sanction the same, it would be liable.

The other instruction that was, as aforesaid, partly given and partly refused, is as follows: "Before a railroad company can be held liable for the willful act of any employe or agent in shooting a person, or causing a person to be shot, it must appear from the evidence, to the satisfaction of the jury, that such employe or agent had been employed by the company under authority of its board of directors to do such acts, or that it in some way ratified the said act. Failing in such proofs in this case the jury should find for the defendant."

The latter clause of this instruction was erased evidently by the trial judge, and marked in the margin by him so that it stands upon the record thus: ~~"Failing such proof in this case the jury should find for the defendant.~~ Given except as to part lined out."

This instruction was excepted to on behalf of the plaintiff in error on the ground that the entire instruction was not given. But the part that was given was open to the criticism of being liable to improperly mislead the jury, since they might have inferred therefrom that to render the corporation liable for the trespass committed by its agents or employes, it must have been directed or sanctioned at some meeting of the board of directors, which, as we have seen from the authorities, does not follow as a necessary prerequisite to establish such liability, since the same may be implied or inferred from the acts of officials and agents of the corporation, and the attendant circumstances, without any formal meeting of the board of directors to consider the matter. The plaintiff in error cannot be injured or prejudiced by this instruction, as it is more in his favor than

the law would seem to justify. But the erasure in this instruction is an irregularity under our statute, which provides as follows: "If the court refuse a written instruction as demanded, but gives the same with a modification, which the court may do, such modification shall not be by *interlineation or erasure*, but shall be well defined, and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded." Prince's St. p. 127, § 24.

The erasure in this instruction by the judge was clearly a violation of the statute. But as the statute on the subject may properly be considered as directory merely, and not mandatory, and as the erasure cannot be considered as prejudicial to the plaintiff in error, it is not such an irregularity as will justify a reversal.

No substantial error appearing from an examination of the record, it is ordered that the judgment below be affirmed.

Board of County Com'rs of Santa Fe Co. *v.* New Mexico & S. P. R. Co. (Two Cases.)

January Term, 1884.

1. Taxation—Exemption of Railroads—Constitutional Law.

By the railroad incorporation act of February 2, 1878, § 3, it is provided that, to aid and encourage the construction of railroads, all the property of every kind and description of every corporation formed under that act shall be exempt from taxation until the expiration of six years from the completion of its road. By act of February 12, 1878, this exemption was extended to all corporations organized under the laws of the territory for the purpose of constructing railroads. By act of February 15, 1878, the words "six years from the completion of its road" are defined, and the exemption limited to a period of 12 years from the commencement of its construction. *Held*, that the granting of this exemption from taxation to corporations not organized under the act of February 2, 1878, is not in contravention of Act Cong. March 2, 1867, § 1. forbidding the legislative assemblies of the territories from granting private charters or special privileges.

2. Same—Legislative Contract—Validity.

The offer of this exemption to railroad companies not organized under the act of February 2, 1878, was not a mere gratuity and without consideration, but upon its acceptance, by complying with its conditions by constructing and operating a railroad, it became a binding contract, from which the territory cannot recede

3. Same—Railroad Company—Capital Stock.

The capital stock of a railroad company is included in the exemption of "all the property, of every kind and description," granted by these acts, and when the conditions are complied with it cannot be taxed during the period specified.

Appeal from district court, First judicial district, county of Santa Fe.

C. H. Gildersleeve and *John H. Knaebel*, for the board of county commissioners.

Henry S. Waldo, for the railroad company.

BRISTOL, J. Each of the above entitled causes was instituted in the district court for the First judicial district and county of Santa Fe, by the defendant in error, the New Mexico & Southern Pacific Railroad Company, a corporation organized and existing under the laws of the territory, against the board of county commissioners of said county of Santa Fe, by filing a verified petition alleging the existence of such corporation and the construction of its several lines of railroad in said county, the time of their construction and the several acts of the legislative assembly under which the corporation was organized, and its powers, privileges, and exemptions created; showing also that the capital stock of the plaintiff corporation had been assessed for purposes of taxation for the years 1881 and 1882, and praying for a writ of *certiorari* to said board, commanding them to produce such assessments and all records relating to the same. All of which was accordingly done, and such proceedings were had in the court below as that after hearing the parties, judgment was entered setting aside and vacating such assessments and for plaintiff's costs. The case is here on writ of error sued out on behalf of said board of county commissioners. The questions raised in either case are essentially the same, the only difference being that one covers the assessment for 1881, and the other that of 1882, and such difference as may have been created in the *status* of the plaintiff corporation as to taxation by the act of the legislative assembly on the subject of "revenue," approved March 1, 1882. The two cases will be considered together and disposed of in the same opinion.

The judgments below in both of the cases are evidently based upon the theory that at the date of each assessment the property or capital stock of the plaintiff corporation covered by the assessments was exempt from taxation under the law. The plaintiffs in error claim that such capital stock was not exempt from taxation, and assign this as ground of error. The parties have filed as part of the record an agreed statement of facts in effect as follows: That the defendant in error on the sixth day of February, 1878, filed its articles of incorporation, and thereby became and was duly organized as a body corporate under the laws then in force; that the object for which said corporation was formed and organized was the construction, maintenance, and operation of lines of railroad and of telegraph, extending from a point in the Raton pass, on the north line of said territory, through the counties of Colfax, Mora, San Miguel, Santa Fe, Bernalillo, Valencia, and a portion of the county of Socorro, to the town of San Marcial, in the last-named county, and for no other purpose whatever; that said corporation did not enter upon the construction of any of its lines of railroad in said territory until the latter part of the year 1878; that the property at any time owned, constructed, operated, or maintained by said corporation is and has been railroad property exclusively; that the only property owned or constructed by said corporation since its organization is the lines of railroad aforesaid, together with rolling stock, depot stations, round-houses, etc. necessary to the equipment and operation of said lines of railroad

and telegraph in connection therewith, except its capital stock, represented largely by the said property; that said lines of railroad and telegraph were constructed by said corporation; and that no part of such lines of railroad or telegraph was so constructed in any part of said territory for the period of six years.

The sole question to be determined is whether, at the time that either of the assessments was made, the property covered thereby was the property of said corporation, and was exempt from taxation under any contract between the territory and such corporation, created by statutory enactment, either in express terms or by necessary implication in law. To determine this question it will be necessary to review all the legislation on the subject.

The first enactment having any bearing on the questions involved is an act of congress approved March 2, 1867, containing the following provisions:

"Section 1. That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." 14 U. S. St. at Large, p. 426, § 1.

Under the restrictive authority conferred by this act the legislative assembly of the territory passed an act, which was approved December 27, 1867, providing as follows:

"Section 1. Corporations for mining, manufacturing, and other industrial pursuits may be formed according to the provisions of this act, such corporations and members thereof being subject to all the conditions and liabilities herein imposed, and to none others."

The act then, in its subsequent sections, provides how such corporations shall be organized and defines their powers, privileges, and management.

Next in order comes an act of congress approved June 10, 1872, amending the aforesaid act of congress of March 2, 1867, and containing the following provision: "That the first section of an act approved March second, eighteen hundred and sixty-seven, * * * so far as it relates to incorporations which have been or which may hereafter be created and organized for the business of mining, manufacturing, or other industrial pursuits, or the construction or operation of railroads, * * * and the colonization and improvement of lands in connection therewith, * * * and for all rightful subject of legislation consistent with the constitution of the United States under the general incorporation laws of any territory of the United States, shall be construed as having authorized and authorizing the legislative assemblies of the territories of the United States by general incorporation acts to permit persons to associate together as bodies corporate for purposes above named." 17 U. S. St. at Large, 390.

Under the last act of congress the legislative assembly of the territory passed an act which was approved January 5, 1876, amending the first section of the previous act of December 27, 1867, as follows: "That the first section of an act approved December twenty-seventh, eighteen hundred and sixty-seven, entitled 'An act to create a general incorporation act,' etc., * * * shall be and hereby is amended so as to read as follows: 'Corporations for mining, manufacturing, or other industrial pursuits, or the construction or operation of railroads, * * * and the colonization and improvement of lands in connection therewith, * * *. may be formed according to the provisions of this act; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others.'" Subsequently, the legislative assembly of the territory passed two acts, both of which were approved January 30, 1872, one of which provided for mortgaging and consolidating lines of railroad, and the other for the exercise of eminent domain in acquiring lands for lines of railroad; neither of which, however, have any bearing on the questions involved in this case.

Such, then, was the condition of the law under which the defendant in error was organized as a body corporate on the sixth day of February, 1878. At this date none of its property, if it had any within the territory, was exempt from taxation.

On the second day of February, 1878, four days prior to the organization of the defendant in error as a body corporate, an act of the legislative assembly was approved. This is a general incorporation act in regard to railroad companies exclusively. It provides, at great length and with minute detail, for the organization of such corporations, their by-laws, election of directors, and their powers and duties, the *status* of corporate stock and its transfer, their corporate powers, the exercise of eminent domain, the regulation and management of their trains, and their privileges and exemptions, etc. Section 3 of chapter 9 of this act provides as follows:

"Sec. 3. To aid and encourage the construction of railroads in this territory, all the property of every kind and description of every corporation formed under this act shall be exempt from taxation of every kind and description until the expiration of six years from and after the completion of its road or roads."

On a subsequent day of the same session an act was passed by said legislative assembly, which was approved the twelfth day of February, 1878, which provides as follows:

"Section 1. That all the powers, privileges, and exemptions conferred upon corporations organized under an act to provide for the incorporation of railroad companies, and the management of the affairs thereof, and other matters relating thereto, approved February 2, A. D. 1878, are hereby conferred upon all corporations, under the laws of this territory, for the purpose of constructing railroads," etc.

The said act of the second of February, 1878, contains no repealing clause, nor any provisions as to when it should go into effect; but

the legislative assembly, at the same session, passed still another act on the subject of railroad corporations, which was approved the fifteenth day of February, 1878, and provides as follows:

"Section 1. That for the purposes of taxation any railroad or railroads constructed under the provision 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 2, 1878, shall be deemed and hereby declared to have reached completion, whether at the end of six years from the time of the commencement of the construction thereof the point to which construction has progressed, and to which said road or roads have been put in operation, is the place of destination of said road or roads, as named in the articles of incorporation of the company building or who built the same, or some point intermediate between the *termini* of said road or roads, as named in said articles of incorporation, and that the exemption from taxation for six years from and after the completion of said road or roads provided for in the above-mentioned act shall be understood and intended to be exemption from taxation for six years from and after the completion of said road or roads, as such completion is defined and expressed in this act, and not otherwise. And it is hereby expressly provided that in no event shall any line of railway, or part of any line of railway, or any part or portion of its property, real or personal, privileges, rights, or franchises, be exempt from taxation for a longer period than twelve years from and after the date of the commencement of the construction of such railway or railways.

"Sec. 2. This act shall be construed to go along with as a part of the above-mentioned act, and shall take effect and be in force from and after its passage."

Upon the approval of this act its provisions and the provisions of the act of second February, 1878, at once went into effect. *West Feliciana R. Co.* v. *Johnson*, 5 How. (Miss.) 276.

There can be no doubt as to the real intention of the legislative assembly in passing these several acts of the second, twelfth, and fifteenth of February, 1878. At that time the territory of New Mexico was the most inaccessible portion of the dominion of the United States to enterprise and commerce. Every branch of industry was languishing, as it had been for centuries, for lack of cheap and rapid transportation to the leading marts of the country. To expend millions in constructing long lines of railway to and through this remote region was a hazardous undertaking—an experiment—a venture—which any but the boldest minds would readily shrink from. At that date not a foot of railroad had been constructed anywhere within the borders of New Mexico. It was under this condition of things that the territory, through its legislative assembly, made a bid for railroads under fair and explicit terms, and upon a consideration of great public importance. As plainly as it could be expressed by acts of the legislative assembly the territory said to all railroad corporations

then existing under the laws of the territory, or thereafter to be organized under such laws, that in consideration of the public benefits to be derived from the construction and operation of railroads within the territory, upon the completion of any such railroad by any such corporation, its corporate property therein and connected therewith shall be exempt from taxation for six years after such completion; but in no case to exceed twelve years after the commencement thereof. There was no uncertainty or ambiguity as to the intention, the object, or the terms and conditions of the proposed compact. With this view, the three several acts last aforesaid are to be construed *in pari materia* and as parts of one act; and, considered together, the exemption from taxation applies as well to the defendant in error after the completion of its lines of railway as to any corporation created under the special provisions of the act of second February, 1878.

It is earnestly contended by one of the counsel for plaintiffs in error that any enactment of the legislative assembly that had for its object the bestowal of this exemption from taxation on any railway corporation not organized under said act of second February, 1878, would be especial legislation, conferring special privileges, and therefore repugnant to the aforesaid acts of congress, and void. This view cannot be maintained. Indeed it may well be assumed that it was the intention of the legislative assembly to avoid especial legislation by placing all railway corporations on the same footing as to this exemption, irrespective of the laws under which they had been organized and authorized to construct and operate railways in the territory. To confer this exemption on corporations organized under the act of second February, 1878, and exclude it from all existing railway corporations otherwise organized, might well be considered as conferring special and exclusive privileges by especial legislation, and in conflict with the act of congress. It is evident, therefore, that if the exemption has not been extended to the defendant in error, then no railway corporation operating lines of road in the territory under the act of February 2, 1878, can rightfully claim it, and that this exemption in such case must be considered as an absolute nullity as to all railway corporations alike.

It is further contended, in behalf of the plaintiffs in error, that no contract existed between the territory and the defendant in error whereby such exemption can be sustained; that it was and is a mere gratuity, supported by no consideration, and therefore a *nudum pactum.* If this is true, if it be a gratuity merely, and no consideration as the foundation thereof has passed territory, then it necessarily follows that it is a *nudum pactum,* and no exemption from taxation has accrued under it. In support of the doctrine that this exemption from taxation is a mere gratuity, we are referred as authority to *Tucker* v. *Ferguson,* 22 Wall. 527; *West Wis. R. Co.* v. *Sup'rs,* 93 U. S. 595.

These cases and the one at bar are by no means parallel in prin-

ciple. In the case of *Tucker* v. *Ferguson, supra,* congress had granted lands to the state of Michigan to be held by the state for the purpose of aiding in the construction of railroads, and to be applied under certain safeguards prescribed in the grant. The state accepted the grant upon the conditions imposed, and by an act of its legislature vested certain of the lands in a railway company subject to management and disposal by the board of control of the state, in aid of the construction of the company's railways. Not being authorized to sell the lands under the conditions of the grant before the construction of the railroad, the company issued its bonds, and the lands were mortgaged to trustees with power to sell the mortgaged lands and apply the proceeds to the payment of the bonds. In this way the money was raised and the railroad was constructed. Upon the completion of the road but a small portion of the lands had been sold by the trustees, and but few of the bonds had been paid. In this condition of things—the residue of the bonds remaining unpaid, and the bulk of the lands remaining in the hands of the trustees and unsold—the state taxed them. It was to avoid the tax on these lands that the suit was brought, it being claimed that the lands were exempt from taxation under a statute then in force, which provided that a certain tax on the railway corporation, a specific annual tax of 1 per cent. on the cost of the road, and reserving a right to impose a further tax upon gross earnings, should be in lieu of all other taxes to be imposed within the state. But it was held that the lands had been sold within the meaning of the act of congress, and that though the state, while holding the title as trustee of the United States, could not tax them, she could after such title had been conveyed. It was further held that the tax imposed by the state had reference only to the railroad itself, and had no relation to the lands which were neither necessary nor used in the exercise of the corporation's franchise or in operating its line of railroad. It was upon this statement of facts that the ruling was made that an agreement by the state to exempt from taxation, when there is no consideration, is a promised gratuity, spontaneously made, and is a "nude pact" which may be kept, changed, or recalled at pleasure.

In *West Wisconsin Ry. Co.* v. *Sup'rs, supra,* the facts and rulings were substantially the same.

The principles of law enunciated in those cases can have no application to the case at bar, and under the particular circumstances attending it we can not concur in the view taken by counsel for the plaintiff in error.

It is true, however, that at the time of the passage of the three several acts of the legislative assembly, in February, 1878, as aforesaid, no valid contract as to this exemption was created. The defendant in error had just been organized as a body corporate, but there was not at that time any formal acceptance of the conditions of the exemption, nor any promise to construct and operate any lines of railway. There was no provision in any of those acts for any such

formal acceptance or promise, as there was in *Gordon* v. *Appeal Tax Court*, 3 How. 133. But, as we have already intimated, these several acts were in the nature of a bid on the part of the territory for railroads, with a promise on her part to each and all railway corporations that on condition of their constructing and operating lines of railway within the territory their corporate property therein should be exempt from taxation for six years after completion. It was a proposition in effect extended to all railway corporations to enter into a contract with the territory for this exemption, the consideration being the advantage to be derived from cheap and rapid transit, and the acceptance of the terms being the actual construction of lines of railway. It was on the same principle as a proposed option on the part of the territory. There was nothing to bind the mere option. At any time before acceptance and compliance with its terms it might have been withdrawn; but as soon as accepted and the consideration had passed it would become a completed contract. In the case at bar the actual constructions of its lines of railway by the defendant in error is the consideration on which this contract for exemption is founded. The date of such construction, instead of the date of the corporation's organization, is what must determine the date of the contract and its validity.

It is not, therefore, as contended for by counsel for plaintiffs in error, the mere organization of railway corporations under the act of second February, 1878, or the particular code of by-laws controlling the management of their affairs in all their details, that constitutes the paramount consideration for such exemption from taxation. It is the construction, equipment, and the operating of lines of railway in any efficient manner whereby the public will be benefited by more convenient, cheaper, and more rapid transit for persons and property.

It is further claimed in behalf of plaintiffs in error that the kind of property covered by these assessments is not covered by the aforesaid terms of exemption from taxation. The language of the assessment, as it was determined by the board of county commissioners on appeal, and as it stands for adjudication, is as follows: "The New Mexico & Southern Pacific Railroad Company * * * assessed in the sum of one million dollars, which is the capital stock of said company, as appeared in the articles of incorporation filed in the office of the probate court." While the words of the exemption are: "All the property of any kind and description of every corporation formed under this act shall be exempt from taxation of every kind and description, until the expiration of six years from and after the completion of its road or roads." All the property of a railway corporation, and all the capital stock of the same corporation, for the purposes of taxation, may be considered as convertible terms. The value of one is controlled by the value of the other. Each may be viewed in the light of a representative of the other. Whatever lessens the value of one necessarily depreciates the value of the other. And a tax upon one is practically a tax upon the other.

This principle was enunciated in *Gordon* v. *Appeal Tax Cases, supra.* In that case the legislature by an act had continued the charters of certain banks to a certain specified time, upon condition that they would make a certain road and pay a school tax, which would have exempted their franchises, but not their property, from taxation. But in another clause of the act there was a provision that upon any of the banks accepting of and complying with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters. This was held to be a contract and to exempt, not only their franchises from taxation, but also the stock of individual stockholders. On this point the court (page 147) said: "Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption by it, or to what does it apply? Does it exempt the respective capital stocks of the banks as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both."

In *Mayor and City Council* v. *Baltimore & O. R. Co.* 6 Gill, 288, the court of appeals of Maryland, in its opinion on this subject, (page 295,) said: "But it is said that although by the charter of the Baltimore & Ohio Railroad Company its shares of stock may be exempt from all taxation, yet that such exemption in no wise protects from taxation the specific articles of the company. If such specific property be deemed liable to the imposition of taxes, no sufficient reason can be assigned why the franchise should not be subject to a like imposition. It is as much an ingredient in the shares of stock and component part of their value as is any portion of the corporate property of the company; and if, under such an express legislative exemption as that now before us, the one be exempt from taxation, so also is the other. The design contemplated by the legislature in the insertion of this clause of exemption in the act of assembly was to confer a certain substantial, not a nominal, benefit on the stockholders, and to induce capitalists to risk their money in a novel and hazardous enterprise. To impute to the legislature in the case before us an intention to exempt the shares of stock from taxation, and at the same time to reserve the right to tax anything that constituted it a stock and gives to it its value, would be gratuitously to cast an imputation upon the legislature inconsistent with every principle of judicial courtesy." To the same effect is *State* v. *Branin*, 23 N. J. Law, 484, and authorities cited.

This unquestionably is a sound judicial interpretation of a legislative enactment of that kind, and applies with great force to the question now under consideration. At the time the assessment of 1881 was made the revenue act of 1876 was in force, which contained the following provision: "The capital stock and shares of all * * * corporations subject to pay tax in this territory shall be assessed and taxed in the county where the same or the principal office or place of

business thereof may be located. Such assessment shall be made against the corporation, and such corporation shall pay the tax, and may charge the same as expense or to its stockholders, according to their respective shares." While at the time of the assessment for 1882 the revenue act of first March, 1882, was in force, which contains the following provisions: "The property of every * * * corporation must be assessed in the county where the property is situated, and in the name of the * * * corporation. Such * * * corporation shall pay tax, and may charge the same to its * * * stockholders according to their respective shares. The owner or holder of stock in any * * * corporation, the entire capital or property of which is assessed, shall not be assessed individually for such stock."

Under the revenue law of 1876 the assessment of the defendant in error for 1881 could not have been made, since under the terms of that act it was not subject to pay tax. And, upon another ground, neither the assessment for that year under the revenue law of 1876, nor for the next succeding year, under the revenue law of 1882, can be upheld, for the reason that prior to either assessment the lines of railway of the defendant in error had been completed. The consideration had been received by the territory; the terms of the compact had been complied with, and in law accepted by the contracting parties; and the territory, if so inclined, was inhibited from enacting any law impairing its obligation. For the territory now to attempt to evade the obligations of this compact is neither wise nor prudent as a measure of public policy. No state can afford to impair its good faith and credit in this way. That "honesty is the best policy" applies with even greater force to states than to individuals. This six years limitation, as to all lines of railway now constructed, will soon expire. By that time the revenue that will be derived from corporate property in railways, and from the advanced values of every other kind of property, indirectly caused by the advent of railways, will have reached a magnitude which otherwise would not have been attained for a century. Under these circumstances, to claim that this exemption is a mere gratuity; that no consideration has been received by the territory, is but the idlest cavil. It may be said that these powerful corporations, after acquiring power, are often oppressive and extortionate; but these are evils which must be overcome, if at all, by some other and more potent means than by attempting to impair the obligations of fair and reasonable compacts legally entered into by and with them.

In the light of these views, we have no hesitancy in saying that to sustain the tax exemption involved in these cases, is but the dictates of sound law as well as of common honesty.

Both judgments affirmed.

BELL, J., concurs.

UNITED STATES *v.* MONTE.

Filed February 6, 1884.

1. FEDERAL COURTS—JURISDICTION—MURDER—INDIAN COUNTRY.
Under Rev. St. U. S. § 2145, extending the criminal jurisdiction of the United States to offenses committed in "Indian country," the district court in a territory will take jurisdiction of a homicide on an Indian reservation, within the territory, on the United States side of the court, as a federal court, to the exclusion of territorial jurisdiction, and the prosecution is properly conducted in the name of the United States.

2. SAME—EXCEPTIONS—TREATY.
Where such homicide is committed by an uncivilized Mescalero Apache Indian on a white man, the case does not fall within any of the exceptions to the jurisdiction of the United States contained in Rev. St. U. S. § 2146, nor is there any provision in the treaty with the Apaches, of July 1, 1852, (10 U. S. St. 979,) putting such an offense within the tribal jurisdiction of the Indians.

G. W. Prichard, U. S. Atty., for the United States.

BELL, J. The defendant in the court below, and the appellant here, was indicted, tried, and convicted in the district court for the Third judicial district, for the crime of murder, and the case has been brought into this court for review upon a record which presents only one material exception, namely, to the decision of the court below overruling a plea to its jurisdiction. The indictment was found in the name of the United States and on the United States side of the district court, that is, the branch of the court sitting for the trial of causes arising under the constitution and laws of the United States throughout the whole district, as distinguished from causes having no reference to the laws of the United States, the venue for which is laid in the several counties composing the district. From the facts presented to us by the record, it appears that the defendant is an uncivilized Mescalero Apache Indian; that the homicide was committed on the Mescalero Apache Indian reservation, in the Third judicial district of this territory; and that the person killed was a white man, and not an Indian. We understand the defendant's position to be that the United States have not exclusive jurisdiction of the case, and that therefore the prosecution should be in the name of the territory, and disposed of on the territorial side of the court, or be disposed of by the Indians themselves to whose tribe the defendant belongs. While the territorial district courts, for the purposes of the United States cases, possess all the jurisdiction of circuit and district courts of the United States, still that jurisdiction is strictly statutory, either as regards the nature of the case or locality in which it arises. This applies to criminal as well as civil cases, and an in-

dictment for murder committed within the territory lies in the name of the territory, and is to be tried in the territorial, as distinguished from the United States, side of the district court, unless the case falls within a statutory provision which would give the courts of the United States jurisdiction thereof.

The crime of murder is within the jurisdiction of the United States, when committed within any place or district of country under the exclusive jurisdiction of the United States. U. S. Rev. St. § 5339. And "the jurisdiction vested in the courts of the United States * * * shall be exclusive of the courts of the several states of all crimes and offenses cognizable under the authority of the United States." Id. § 711.

For the purposes of this case, the words "in places under the exclusive jurisdiction of the United States," extend to and include the Indian country. U. S. Rev. St. § 2145. It has been held by the supreme court of the United States at its last term, (October, 1883,) in *Ex parte Kan-gi-Shun-ca*, 3 Sup. Ct. Rep. 396, that the term "Indian country" includes Indian reservations situated within the geographical limits of existing territories; that the United States has jurisdiction of the crime of murder committed within such reservations; and that an indictment for such offense is triable in the United States, as distinguished from the territorial, branch of the district court, for the judicial district of the territory within the boundaries of which the reservation in question is situated.

The decision of the supreme court referred to, set forth in an opinion by Mr. Justice MATTHEWS, not yet appearing in the official reports, is of such interest and importance in connection with the administration of justice in the territories that it seems advisable to quote at length the portion relating to the question now under consideration:

"The district courts of the territory of Dakota are invested with the same jurisdiction in all cases arising under the laws of the United States as is vested in the circuit and district courts of the United States. Rev. St. §§ 1907–1910. The reservation of the Sioux Indians, lying within the exterior boundaries of the territory of Dakota, was defined by article 11 of the treaty concluded April 29, 1868, (15 St. 635;) and by section 1889, Rev. St., it is excepted out of and constitutes no part of that territory. The object of this exception is stated to be to exclude the jurisdiction of any state or territorial government over Indians within its exterior lines, without their consent, where their rights have been reserved and remain unextinguished by treaty. But the district courts of the territory having, by law, the jurisdiction of district and circuit courts of the United States, may, in that character, take cognizance of offenses against the laws of the United States, although committed within an Indian reservation, when the latter is situate within the space which is constituted by the authority of the territorial government the judicial district of such court. If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized territorial government, it would require an act of congress to attach it to a judicial district, of which there are many instances, the latest being the act of Janu-

ary 6, 1883, by which a part of the Indian Territory was attached to the district of Kansas, and a part to the Northern district of Texas. 22 St. 400. In the present case, the Sioux reservation is within the geographical limits of the territory of Dakota; and being excepted out of it only in respect to the territorial government, the district court of that territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offenses made punishable by them committed within its limits, *U. S.* v. *Dawson*, 15 How. 467; *U. S.* v. *Jackalow*, 1 Black, 484; *U. S.* v. *Rogers*, 4 How. 567; *U. S.* v. *Alberty*, Hemp. 444, opinion by Mr. Justice DANIEL; *U. S.* v. *Starr*, Id. 469; *U. S.* v. *Ta-wan-ga-ca*, Id. 304. The district court has two distinct jurisdictions. As a territorial court, it administers the local law of the territorial government; as invested by act of congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts; so that, in the former character, it may try a prisoner for murder committed in the territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life, (Laws Dakota, 1883, *c.* 9;) and, in the other character, try another for a murder committed within the Indian reservation, under the law of the United States, which imposes, in case of conviction, the penalty of death.

"Section 2145 of the Revised Statutes extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the Indian country, and it becomes necessary, therefore, to inquire whether the locality of the homicide, for which the prisoner was convicted of murder, is within that description.

"The first section of the Indian intercourse act of June 30, 1834, defines the Indian country as follows:

"'That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country.'

"Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new states, and by the organization of territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, has nevertheless omitted all definition of what must now be taken to be the 'Indian country.' Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it never had been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule, in the interpretation of statutes, that clauses which have been repealed may still be considered in construing the provisions that remain in force. BRAMWELL, L. J., in *Atty. Gen.* v. *Lamplough*, 3 Exch. Div. 223-227; Hardc. St. 217; *Sav. Bank* v. *Collector*, 3 Wall. 495, 513; *Com.* v. *Bailey*, 13 Allen, 541. This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S. 204, decided at the October term, 1877. It was said, in that case, by Mr. Justice MILLER, delivering the opinion of the court, that 'it follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or act of congress.'

In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition of that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state not excepted from its jurisdiction by treaty or by statute at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. *U. S.* v. *McBratney*, 104 U. S. 621. This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to the most important provisions of existing legislation for the government of Indian country. It follows that the *locus in quo* of the alleged offense is within Indian country, over which, territorially, the district court of the First judicial district of Dakota, sitting with the authority of a circuit court of the United States, had jurisdiction."

It is to be noticed, also, that the terms "Indian country" and "reservation" seem to be used indiscriminately and synonymously in the statutes relating to the Indians, and that all laws regulating trade and intercourse with the Indian tribes were extended over the Indian tribes in the territory of New Mexico by the act of the twenty-seventh of February, 1851, (9 U. S. St. 587.) The only limitation to the jurisdiction of territorial district courts, sitting as United States courts, over crimes committed on Indian reservations, is contained in section 2146 of the Revised Statutes of the United States, which is as follows:

"The preceding section (section 2145, extending the jurisdiction of the United States to the Indian country) shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offense is, or may be, secured to the Indian tribes respectively."

The exception of crimes "committed by one Indian against the person of another Indian" does not apply to the present case, as the person killed by the defendant was a "white person," as it appears by the record; that is, was not an Indian. The exception of an offense committed by an Indian "who has been punished by the local law of the tribe" is not urged in the present case, nor is anything cited or shown to support this exception.

There is therefore left for our consideration only the third exception, namely, "cases where by treaty stipulations the exclusive jurisdiction over such offenses is, or may be, secured to the Indian tribes respectively." The only treaty with the tribe in question—the Apaches—which can bear upon the point was made at Santa Fe on July 1, 1852, and is found in 10 U. S. St. 979. Articles 1, 4, and 6 of this treaty are as follows:

Article 1. "Said nation or tribe of Indians, through their authorized chiefs aforesaid, do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

Art. 4. "All said nation or tribe of Indians hereby bind themselves to refer all cases of aggression against themselves or their property and territory to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes."

Art. 6. "Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he, or they, shall be arrested and tried, and, upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said states."

These are the only treaty stipulations in reference to the subject under consideration, and there is nothing in any of them tending to secure exclusive jurisdiction over any offense to the Indians themselves. This was a treaty made with the "whole Apache nation of Indians situate and living within the limits of the United States." See preamble and treaty. We are not aware that a stipulation can be found in any treaty with Indians giving them jurisdiction over an offense committed by one of their number against a white person. In all treaties of such character which pretend to be complete there are provisions to the effect that the Indian committing such an offense shall be delivered up by his fellow-Indians to the United States, to be tried and punished by its laws. See the treaty with the Sioux tribe, commented on in *Ex parte Kan-gi-Shun-ca, supra,* and with the Navajos, made at Fort Sumner, June 1, 1868, (15 St. 667.) Nor can it be supposed that the government would ever leave the punishment of a crime committed by an uncivilized Indian upon a white person to the exclusive jurisdiction of his fellow-Indians. This exception, however, has lost all force as regards the future, as, by the act of March 3, 1871, it is provided "that no Indian nation, or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty." Rev. St. § 2079.

It is therefore our opinion that the United States branch of the district court had exclusive jurisdiction of the crime alleged in the indictment, and proved in the case, and that the judgment of the court below must be affirmed.

AXTELL, C. J. I concur.

WAGNER and another v. ROMERO, Sheriff, etc.

Filed February, 1884.

1. ATTACHMENT—JUDGMENT—AMENDMENT.
An order in an attachment suit that the property shall be "forthwith delivered to the sheriff of S. county" sufficiently designates both the time and place of delivery, and a defendant, in an action on the forthcoming bond, is not prejudiced by an irregular amendment of the record making the order more specific in that respect.

2. SAME—DEFECTIVE WRIT—WAIVER—APPEARANCE.
Appearance and judgment waive objection to the writ as being issued by the clerk of the probate court, rather than by the clerk of the district court, and it is too late to raise the question in an action on the forthcoming bond.

3. EVIDENCE—LOST INSTRUMENT—FORTHCOMING BOND.
Where the forthcoming bond sued on was properly filed in the clerk's office of the lower court, and a copy of it was preserved among the papers of the plaintiff, but at the trial the original could not be found, after diligent search, the copy was properly admitted in evidence.

4. PARTIES—CONTRACT FOR BENEFIT OF ANOTHER.
Under the practice act of 1880, § 2, providing that a party in whose name a contract is made for the benefit of another may sue on it in his own name, the sheriff is the proper party plaintiff, in an action on a forthcoming bond.

5. SAME—JOINT AND SEVERAL CONTRACTS.
Under Act 1878, c. 4, § 56, (Prince, St. p. 122,) providing that "all contracts which by common law are joint only shall be held and construed to be joint and several," an action may be maintained against the sureties on a forthcoming bond, without joining the principal, or showing that judgment has been obtained and the remedy exhausted against him.

Appeal from First judicial district, San Miguel county.

D. P. Shield and *T. F. Conway*, for appellants.

Breeden & Waldo, for appellees.

BELL, J. This is an appeal from a judgment against the appellants here, and defendants in the court below, in an action brought against them on a forthcoming bond, given to the plaintiff as sheriff of San Miguel county, in an action commenced by attachment in the district court of that county. Various questions were raised upon the trial in the court below, but we shall only consider here such questions as have been urged by counsel for the appellants in his brief, which has been submitted to the court.

The first error assigned is that there was no order made at the time when the cause was tried, as to when and where the property mentioned in the said bond should be delivered. It appears from the evidence of William Breeden (page 45 of record) that one or two days after the trial and judgment herein he discovered that following the entry of judgment the proper order in his opinion designating the place for the return of the property did not appear on the official record of the court; that he then called the attention of the court to the fact, and asked to have the record in that respect amended,

and that the court granted the request; and that then and there, in the presence of the court, the following words were added to the record: "And that said property be delivered at Las Vegas, New Mexico, at the court-house of San Miguel county." That portion of the record material to the question raised was before amendment as follows: "It is further considered that the property attached in this cause be forthwith delivered to the sheriff of San Miguel county, and that the same be sold, and the proceeds of said sale be applied to the satisfaction of this judgment." Following these words were the words quoted above, and added by the way of amendment.

The statute providing for the giving of a forthcoming bond is section 13 of that portion of the Kearney Code relating to attachments and garnishments, and is as follows:

"When property of the defendant found in his possession or in the hands of any other person shall be attached, the defendant, or such other person, may retain possession thereof, by giving bond and security to the satisfaction of the officer executing the writ—to the officer or his successor—in double the value of the property attached, conditioned that the same shall be forthcoming when and where the court shall direct, and shall abide the judgment of the court." Prince, Comp. 138.

We are of opinion that the judgment in the case at bar and the order of the court, before the amendment complained of, sufficiently complied with the provisions of the statute quoted. The order of the court was that the property attached in this cause be forthwith delivered to the sheriff of San Miguel county, and that the same be sold, and the proceeds of said sale be applied to the satisfaction of the judgment. This order was sufficiently definite; the time when the delivery was to be made was "forthwith," and the "place where" was to the sheriff of San Miguel county. The sheriff of San Miguel county is a public officer, with an official residence within the county, and when an order is entered directing property to be returned to the sheriff of San Miguel county it must be held to mean that the property shall be returned to the sheriff at the official residence of that sheriff within said county. And even if this were not so, we are of opinion that the amendment of the order, in the respect complained of, made in the presence and by the authority of the court, at the same term of the court at which the judgment was rendered, was proper, and the only criticism to be made upon it is that, in our judgment, it would have been more regular to have had it appear upon the record that the amendment was made at a subsequent date, and upon motion of counsel. This, we think, would have been more regular and better practice. The defendants were in no way prejudiced by the amendment, and there is therefore no reason for disturbing the judgment on that account.

It is next urged that the writ of attachment issued in the original action, in which the forthcoming bond was given, upon which this suit was brought, was void, for the reason that the writ was issued by the clerk of the probate court, and not by the clerk of the district

court. That question cannot be considered here. The defendants appeared in the action, made no objection to the writ, and judgment was obtained against them. It is too late now to question the character of the writ, though, in our judgment, it might well have been questioned in the original action.

The next alleged error is that the forthcoming bond was not sufficiently proved upon the trial in the court below. From the record it appears, by the evidence of the clerk of the court, and of William Breeden, one of the attorneys in the case, that the original bond was properly filed in the clerk's office of the lower court; that a copy of it, examined by the clerk and Col. Breeden, was preserved among the papers of the plaintiff; and that when the case was called for trial the original bond could not be found, though the clerk made diligent search for it in his office where it had been deposited. This evidence of the loss of the original bond, and evidence tending to show that the copy of the instrument produced in court was a correct copy, was, in our opinion, sufficient to warrant the admission of the copy in evidence at the trial. It is urged that the copy of the bond introduced is not a copy of such a bond as is required by the statute, or such as the sheriff was authorized by the statute to take. Section 13 of the Kearney Code, already cited, is cited by the counsel in support of this position; but an examination of the bond, as it appears in the record, shows that its condition was in strict compliance with the requirements of this statute.

Two other questions were raised in the court below, which, though not urged by counsel in the brief submitted, we think worthy of consideration. One is that the action was not in the name of the proper plaintiff. As it already appears, the action was brought in the name of the sheriff for the use and benefit of the real parties in interest. This course, we think, is fully authorized by section 2 of the practice act of 1880, which provides as follows:

"An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the suit is prosecuted."

The sheriff in this case was clearly the proper party plaintiff, as the contract was made with him "for the benefit of another."

It was also urged in the court below that the action could not be maintained against the sureties on the bond without joining the principal, or without showing that judgment had been obtained against the principal, and the plaintiff had exhausted his remedy against him. This point, in our judgment, was not well taken. By section 56 of the act of 1878, *c.* 4, (Prince, Comp. 122,) it is provided:

"All contracts which by the common law are joint only shall be held and construed to be joint and several; and in all cases of joint obligations or assumptions by partners and others, suit may be brought and prosecuted against any one or more of the parties liable thereon; and when more than one person is joined as defendant in any such suit, such suit may be prosecuted and judgment rendered against any one or more of such defendants."

The instrument sued upon in the case at bar was a writing obligatory, and, by its terms, would appear to be joint only; but, by the authority of this statute, it must be considered to be joint and several, and it follows that the plaintiff herein had a right to bring his action against any one or more of the parties to the obligation.

We find no error in the record as presented, and the judgment below must be affirmed.

AXTELL, C. J. I concur.

TERRITORY *v.* DURAN and another.

January Term, 1884.

WITNESS—COMPETENCY—UNEDUCATED DEAF MUTE.

A deaf and dumb child, who has never been educated in the deaf and dumb language, who cannot be made to understand anything of the nature of an oath, and who can do nothing more than give an account by signs only of what he saw, without affording any means of examination or cross-examination, is not a competent witness, especially in a capital case. BRISTOL, J., dissenting.

Wm. Breeden, Atty. Gen., for the Territory.

BELL, J. The defendants in the court below, and appellants here, were indicted, tried, and convicted of the crime of murder in the first degree, at the July term of the district court for Grant county, for 1883. The bill of exceptions is submitted to this court without argument. The defendants were indicted for the murder of a Chinaman by the name of Wy Poi, alleged to have been killed by them on the third day of February, 1883, in the evening of that day. Numerous exceptions were taken by counsel for the defendants in the court below, but it will be unnecessary for us to consider more than one of them.

The principal witness offered for the prosecution at the trial was a deaf and dumb child, who, at the time of the commission of the offense, was less than nine years of age, and at the time of the trial was but little more than nine years old. He was the only witness offered, who, it was claimed, had been an eye witness to the commission of the offense. Objection was made to his competency as a witness, both for the reason that he was so young a child, and that his physical infirmities were such as to make it impossible for him to intelligently narrate the occurrences which it was claimed he had witnessed. It was also claimed, that the child being wholly uneducated in the language of the deaf and dumb, that it was not possible for him to understand such questions as might be put to him touching the transaction. These objections were all overruled by the presiding judge in the court below, and exceptions were duly noted.

From the record it appears that the mother of the deaf and dumb

boy, Luther Carey, was called, and sworn to act as an interpreter for the child. She testified in substance that he never had been educated in the deaf and dumb language, but that she could make herself understood to him by signs, and that generally she could understand him. The court asked her this question: *Question.* "Ask him [the deaf and dumb boy] what will be done to him if he should tell an untruth as a witness here,—if he should tell a lie while he is giving his testimony, what would be done to him?" Here, the record shows, Mrs. Carey made several signs and gestures to the deaf mute with her hands. *Answer.* "I cannot make him understand." *Q.* "You say you cannot make him understand?" *A.* "No sir; I cannot. He has the idea of the murder fixed in his mind, and he wants to tell that." *Q.* "Can you convey to him an idea that he will be punished if he does not testify truly?" Here the witness again repeats the signs and gestures to the mute. *A.* "I cannot make him understand me; he is telling how the murder was committed, and what he saw. He thinks he is wanted to tell what took place at the Chinaman's house that night."

It is very evident from the testimony of the mother and brother of the deaf mute that their only knowledge of what he said to them was inferential, and based upon their familiarity with his signs and gestures, and only extended to the most ordinary every-day affairs of life; that no exact code of conversation existed between them, but that in a limited way they understood his gestures and pantomime in their reference to his every-day wants. The court, however, admitted the testimony of the child, and in doing so, used the following language:

"This little boy has no education, yet I am inclined to believe that, notwithstanding the fact that the mother is unable to communicate to this little boy any questions tending to test his knowledge of an accountability to the Supreme Being, yet as a psychological fact, growing out of his mental condition, he would be incapable of communicating any evidence except such as he saw. He would be incapable of manufacturing or inventing a falsehood as to the material facts, unless he saw them. In my opinion this would be a better test of the truth or at least as good a test of the truth as would be the belief of a man of mature age and clear understanding in his accountability to the Supreme Being. This of course breaks into the general rule of law as to the competency of witnesses, yet, all the facts in the case considered, I believe my view of the case to be the law, and that this case presents a well grounded exception to the general rule. My opinion is that the witness is competent; the very fact that ordinary ideas about things and events which he has not seen cannot be communicated to him is a better test of the credibility of what he is able to communicate by signs than would his mere belief in his accountability to the Supreme Being. The other class of ideas which he entertains would spring from the sensations of touch, taste, and smell. In this view of the case, I believe it is impossible for the boy to entertain ideas in regard to passing events unless he had actually witnessed them."

The boy was then examined, and, as interpreted by his mother, gave material testimony in the cause.

We are of opinion that the admission of this testimony, under all

the circumstances, was erroneous. As the learned judge in the court below said, the admission of such testimony broke into the general rule of law as to the competency of witnesses. It appears to us to transgress several well-settled rules; it was not shown that the child had any intelligent idea whatever of the nature or sanctity of an oath; on the contrary, it was shown by the testimony of his mother that she could not explain to him its nature, or the consequence of telling a falsehood while testifying as a witness. There is no case which we can find in the books in which a person was permitted to testify under such circumstances. A case of such gravity as this would not, in our judgment, warrant the relaxation of the rule that there must be some sanction under which the oath is taken before the testimony could be properly admitted. Not only was it impossible to explain to him the nature of an oath, but it was quite as impossible, on his subsequent examination, to make him understand the questions which were put to him; for example, his mother was asked:

Question. "Can you communicate to him now, so as to find out from him what he was doing there?" [Meaning at the place where the murder took place.] *Answer.* "No, sir; I cannot." *Q.* "How are you able to state that he was there holding the horses?" *A.* "He marked it out as he did here. He placed himself holding horses near the Chinaman's house." *Q.* "Explain where the horses were while the men were dismounted during this killing. Ask the boy that." *A.* "I cannot explain it to him in that way; all that he can tell is that the men were killed, and who they were, and who did the killing."

We are clearly of the opinion that such testimony should not have been permitted to go to a jury in any cause, and least of all in a capital case.

The constitution of the United States, and bill of rights, provide that, "in all criminal cases, the accused has a right to be heard by himself and counsel, to demand the nature and cause of the accusation, * * * and to meet the witnesses against him, face to face." Of course, this language means that the accused shall have the right to be confronted by the witnesses against him, under such circumstances as that their intelligence and truthfulness may be subjected to the test of thorough examination and cross-examination. It is entirely evident in this cause that the counsel for the accused, or the accused themselves, could not by any possibility have intelligently tested either the recollection or the truthfulness of this deaf and dumb child, by reason of the inability of any one to either fully interpret their questions or his answers.

We are unable to concur in the view of the learned judge in the court below, that, "as a psychological fact, growing out of his mental condition, he would be incapable of communicating any evidence, except such as he saw. He would be incapable of manufacturing or inventing falsehood as to material facts, because he could have no idea of the facts unless he saw them. * * * I believe it is impossible for the boy to entertain ideas in regard to events, unless he

had actually witnessed them." In other words, the presiding judge was of opinion that the boy could not tell a lie, for the reason that he could only tell of such events as he had actually seen transpire. This was an assumption unwarranted by the facts. We see no reason why the imagination of that boy could not have been so developed as to have invented or fabricated a story of occurrences which had never taken place. Is it to be said that because a person is deaf and dumb that he wholly lacks imagination? We think not. Deaf and dumb persons have frequently, according to the experience of men, not only given evidence of strong imagination, but in several instances have been successful writers of fiction. It is no answer to this view to say that this child was uneducated; it only makes it more difficult to say to what extent his imagination may have been developed and may have acted.

We are therefore of opinion, for the reasons stated, that the court below erred in admitting the evidence of the deaf and dumb child, Luther Carey, as that of a competent witness.

We arrive at this conclusion with reluctance, as there is much reason to believe from an examination of the record that the defendants are guilty as charged. That fact, however, we cannot consider here. "A court inquiring after the regularity of proceedings never asks whether or not the defendant is guilty. A guilty man, when the proceedings are irregular, has the same right to escape from the grasp of the law as an innocent one; on the other hand, an innocent man has no rights in this respect which a guilty one has not." 1 Bish. Crim. Proc. § 92. The same authority in the following section adds: "The result is that one accused before the court has the same right to protest against the proceedings as to protest his innocence. And counsel who appear on his behalf have the same right, and are under the same obligation, to do the one as the other. * * * Human laws are meant merely to conserve the outward order of society, and a part of this order, not less essential than any other part, consists in pursuing the exact methods which the law has laid down in bringing criminals to justice. * * *" Id. § 93.

It is of the highest importance that, in so grave a case as the one under consideration, the exact methods which the law has laid down should be pursued with the greatest strictness.

For the reasons stated herein, the judgment of the court below must be reversed, and a new trial ordered.

AXTELL, C. J. I concur.

BRISTOL, J., *dissenting*. The appellants, Abel Duran and Aurelio Lora, were indicted jointly with Carlos Chaves, for the crime of murder in the first degree. Chaves, having been tried separately and convicted, Duran and Lora were afterwards, but at the same term, jointly tried, convicted, and sentenced to be executed. This case is here

on appeal. This court having rendered its decision reversing the judgment and remanding the cause for a new trial, I dissent therefrom for the reasons herein stated.

The learned judge, in rendering the opinion of this court, quoted only so much of the evidence relating to the competency of the deaf and dumb boy as a witness as relates to the inability of his mother as an interpreter of his gestures and signs to communicate to him any question that he could comprehend touching his understanding of the obligation of an oath or the consequences to him in case he should utter a falsehood. The ruling of the court below in admitting the statements of the boy, through his natural signs and gestures, was not based on that part of the evidence at all, except so far as the fact of his immaturity of age, his inexperience, and the impossibility of communicating any but the simplest ideas to his mind, rather strengthened the moral certainty that he could communicate only what he had actually seen. The murder was committed on Saturday evening about 8 o'clock, as the evidence by other witnesses conclusively shows. Other evidence on the examination of the boy on his *voir dire*, and addressed to the court, was received from his mother, as follows:

"*By the Court.* Do you know whether this little boy made any communication to any one in regard to this murder before it was known in the community that the murder had been committed? *Answer.* Yes, sir; he did to me *that Saturday night. By the Court.* Please explain that. *A.* He came into the house, and came to the room where I was. The child was very much excited and commenced hallooing, and when I looked around at him he was excited. I knew that something uncommon had happened, and he commenced showing me that somebody was stabbed, and making signs of a throat being cut by drawing his hand across his throat. He then commenced beating himself with a stick, and showed that shooting had been going on by pointing, as though he had a gun. He drew his hand across the back of his head and fell over, and was very much excited all the while. There was a soldier in the house, and I says to the soldier, 'Do you know what the child means? Something has happened, and he is trying to tell me about it.' The soldier said he did not know, without it was about a fight a couple of soldiers had at the post a few days before. The soldier looked at the child and pointed to himself, trying to tell him that it was about the fuss at the post; but the little boy pushed the soldier away, and pointed at *Duran*, [one of defendants,] who was sitting there on the end of the bench. [The Careys, parents of the boy, kept a public house.] I said to Duran, 'What have you been doing? The boy is telling something on you.' The child made signs, by putting his hand on the back of his head, and showing that they were Chinamen, by representing their long queues, and made signs that they would not put him in jail, because they were Chinamen, and it made no difference. He then put the stick under his arms, and commenced beating with both hands. [All this testimony objected to on behalf of defendants, objection overruled and exception taken by district attorney.] *Q.* When did you first hear of this murder? *A.* Not until next morning. *Q.* You say the child was very much excited that evening? Was his conduct something unusual? *A.* Yes, sir; I knew something serious had happened, but of course I could not then tell what it was. *Q.* How did Duran act when the little boy pointed at him after he pushed the soldier aside? *A.* Duran just sat there on the end of the bench.

He knew something had happened just as well as I did. *Q.* Did the little boy appear to be excited when he first came into the house? *A.* Yes, sir; he was very much excited. He called mam! mam! two or three times, and then went on trying to show me what had happened. I tried to pay no attention to him several times, but he would keep on, insisting that I should know what had happened. * * * *By the Court.* Did not this little boy on the other trial, [the trial of Carlos Chaves, one of the three jointly indicted,] in answer to the question put to you as interpreter, as to whether he knew the penalty he would incur if he told a falsehood, say in answer to that inquiry that he would be burned up? *A.* Yes, sir; when I made signs to him about his God then, and what would become of him if he told a lie, he understood me, and made signs that he would be burned up, but I cannot make him understand that now."

At a previous stage of the examination the mother had testified that the boy was between nine and ten years of age; that he was uneducated. "He knows the alphabet, but he cannot form words. He can spell 'dog' and 'cat' and 'boy,' and simple words like that; that is the extent of his education."

It was upon this evidence addressed to the court, and not to the jury, as to the mental condition of this deaf and dumb boy, and the true facts and circumstances of his first revelations to his mother of what he knew of the murder of the Chinamen, that the court below ruled as follows:

"This little boy has no education. I am inclined to believe that, notwithstanding the fact that the mother is unable to communicate to him any questions tending to test his knowledge of and accountability to the Supreme Being, yet as a psychological fact, growing out of his mental condition, he would be incapable of communicating any events, except such as he had seen. He would be incapable of manufacturing or inventing falsehood as to material facts, because he could have no idea of the facts unless he saw them. In my opinion, this would be a better test of the truth or at least as good a test of the truth as would be the belief of a man of mature age and clear understanding in his accountability to the Supreme Being. This, of course, breaks into the general rule of law as to the competency of witnesses. Yet, all the facts in the case considered, I belive my view of the case to be the law, and that this case presents a well-grounded exception to the general rule. My opinion is that the witness is competent. The very fact that the ordinary ideas about things and events which he has not seen cannot be communicated to him, is a better test of the credibility of what he is able to communicate by signs than would his mere belief in his accountability to the Supreme Being. The other classes of ideas which he entertains would spring from the sensations of touch, taste, and smell. In this view of the case I believe it to be impossible for the boy to entertain ideas in regard to passing events unless he had actually witnessed them."

To this ruling exceptions were duly taken on behalf of the defendants, and constitutes the ground of error on which this court has reversed the judgment.

The only evidence adduced on the trial in the lower court, whereby the defendants could be identified as having taken part in perpetrating the murder, is the evidence of this deaf and dumb boy. It can be seen from the record that to go to trial without this evidence must necessarily result in an acquittal. No one can read the entire testi-

mony adduced on the trial, and consider it carefully, in connection with corroborating circumstances, without being profoundly impressed with the fact that what the boy was able clearly to communicate immediately after the murder,—on the same evening it occurred,—embracing the horrible details of the crime with wonderful accuracy and precision as to time, place, persons, specific acts, blows, shots, and attending circumstances, *was the truth*, with as high a degree of moral certainty as is possible to be attained from evidence. The very fact that the boy was unable by signs to make his mother understand the facts as to the murder, and in a manner to identify the tragedy, was proof positive that if the boy had not actually witnessed it and gazed upon it with his own eyes it was a psychological impossibility for any one to have communicated to him the minute details of the crime so as to enable him to describe them with such accuracy.

Courts will always take judicial notice of the well-known and uniform laws of nature. It would not be necessary, for instance, if the fact became material on a trial, to prove that a body in the air of a greater specific gravity than the air, and with no resistance to overcome except that of the air, would certainly descend to the earth. There are laws governing the human mind that are as well known and uniform in their operation as is the law of gravitation. Every sound human mind is endowed with that wonderful faculty or power termed consciousness, whereby the mind is enabled to look in upon itself and perceive its own successive sensations, perceptions and emotions, as well as other mental phenomena, and the order in which they occur. That sensation must precede perception, and that both must precede consciousness thereof, are uniform laws of the human mind that are well known and understood in the common experiences of mankind. The mind of this lad, uneducated in any deaf and dumb language whereby ideas as to unseen passing events could be communicated to him, was necessarily a blank as to any minute details respecting the same. This was a fact, which, under the clear and positive evidence as to his mental condition, the court could take judicial notice of. If there was any room for doubt from the examination of the boy on his *voir dire*, all doubt on the subject must have been removed by the facts and corroborating circumstances adduced on the trial.

The second day after the murder, and before the boy had any opportunity to visit the place of the tragedy after its occurrence, in order to test his knowledge of the crime, signs were made to him to lead on the trail of the men who committed the deed he was trying to explain. He was put upon a horse; he took the lead; keeps considerably in advance of the party following; struck the trail or tracks of the horses which the murderers rode, and followed it on a circuitous and out-of-the-way route, off from any road, through a bushy and unfrequented part of the country, to the place where the murder

was committed. He led to the very house in which the three Chinamen had been killed. On looking in he expressed his astonishment by signs and actions at not finding the dead Chinamen, (they had been taken out and buried in the meantime.) He was unable to make any intelligible statement as to the details of the tragedy by mere signs or gestures, but with paper and pencil he very readily drew a rude plat of the house and grounds and objects in the immediate vicinity, the roads to and from the place, and its location with reference to Fort Bayard, that was clear and intelligible. On this plat he marked out the position of each of the defendants while in the act of killing the Chinamen, as also his own position holding the horses. He also designated on the plat the three Chinamen where they fell. With the aid of his plat he was able by signs and gestures to express very intelligently the manner in which the Chinamen were killed, and the part each defendant took in perpetrating the deed; each of the three defendants was so perfectly marked that he could easily identify them by signs. One was distinctly pock-marked, another had a very peculiar broken-down nose, and the other had a plain mark or line around his neck. The boy designated and identified him by making a circling motion around his own neck with his hand. It was evidently this motion when the boy was trying to tell his mother what had happened on the very night of the murder that she mistook for a sign that some person's throat had been cut in the presence of the child. It would seem that after killing the Chinamen and secreting the plunder the murderers abandoned the boy to get home, some two miles and a half distant, as best he could. He hastened home at once, and under great excitement endeavored by signs to tell his mother what had happened. In the light of all the evidence, including the limited mental capacity of the child and his inability to receive or to communicate ideas as to passing events, except as they came to him through the sensation of sight, it was impossible for him to have imagined and fabricated the details of the tragedy with such wonderful accuracy and precision.

The presence of the boy at the scene of the murder is reasonably accounted for from the evidence of other witnesses. The defendants and the boy, with his parents, lived in the same town. The defendants owned saddle-horses; the boy was with the defendants a great deal; was very fond of riding on horseback, and often rode with the defendants; they evidently supposed the boy could not be a witness, as he was speechless.

The books nowhere furnish a precedent like this. If the law of evidence in no way opens the door for testimony of this kind, then all I have to say is that the law in this respect is certainly at fault, and the sooner it is changed, either by judicial precedent or by legislalation, the better. The sole object of every judicial investigation, upon evidence, is to ascertain the truth as to the issue involved. Being satisfied of the absolute truthfulness of this deaf and dumb boy's

communications as to the details of the murder, and who committed it, it is my opinion that if he cannot be considered competent as an ordinary witness, because he cannot be communicated with and made to understand the legal and technical obligations of an oath, then under the very extraordinary circumstances attending the case, his communications ought to have been considered as having been properly received as circumstantial evidence, proven by his mother, who understands them, in precisely the same manner as tracks or a trail leading to an identification of the murderers, might have been proven and received as competent evidence; and that it would have been proper for this court to have established a precedent of that kind.

ORR and others *v.* HOPKINS.

January Term, 1884.

APPEAL-BOND—REMITTITUR—LIABILITY OF SURETIES.

Where the substantial ground of the appeal is that there is no evidence to sustain a judgment in any amount whatever, and the decision of this court is that the appellees file a *remittitur* of the excess of interest awarded them in the court below, and have the judgment affirmed as to the residue, or else submit to a reversal and a trial *de novo*, this does not amount to such a reversal of the judgment as will release the appellant's sureties on the appeal bond.[1]

Catron & Thornton, for appellees.

W. B. Childers, for appellant.

BRISTOL, J. This case was argued and submitted at the last term. A decision was rendered during vacation to the effect that the judgment below was in excess of the amount in which appellees were entitled to recover upon their declaration,—the excess being in the amount of interest they were entitled to on the money demand sued on; that the excess of interest being a matter of exact computation, the appellees should have leave until the second Monday of January 1884, to file a *remittitur* of such excess, and if done within that time the judgment below to be affirmed as to the residue, and on failure so to do, the judgment to be reversed and the cause remanded for a new trial. The *remittitur* was filed within the time specified, but the judgment of this court has been delayed for the determination of the question whether its rendition should be against the appellant's sureties on his appeal bond, as well as against himself, or against himself alone. The question is presented on the motion of the appellees that judgment be rendered as well against the sureties as the appellant. The sureties have appeared by counsel and resist the motion.

[1] See note at end of case.

The provisions of the statute in relation to this question are as follows:

"In case of appeal in a civil suit, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond." Prince, St. p. 242, § 5.

The judgment of this court, under our previous ruling, must necessarily be rendered against the appellant, but it is claimed by counsel for the sureties that inasmuch as the judgment appealed from has been modified by this court, the sureties are discharged from liability.

The statute in regard to appeal bonds in appeals to this court is as follows:

"Upon the appeal being made, the district court shall make an order allowing the same. Such allowance shall stay the execution, * * * when the appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court during the same term at which the judgment or decision appealed from was rendered, enters into a recognizance to the adverse party in a sum sufficient to secure the debt, damages, and costs recovered by such judgment or decision, together with the interest that may grow thereon, and the costs and damages which may be recovered in the supreme court: conditioned that the appellant shall prosecute his appeal with due diligence to a decision in the supreme court, and that if the judgment or decision appealed from be affirmed, or the appeal be dismissed, he will perform the judgment of the district court, *and that he will also pay the costs and damages that may be adjudged against him upon his appeal.*" Id. p. 68, § 4.

The condition of the appeal bond in this case is in compliance with the above statute on the subject; and in case of an affirmation of the judgment, or a dismissal of the appeal, it covers not only payment of the judgment appealed from, but also all damages and costs that shall be adjudged against the appellant by this court. The precise point on which the *remittitur* was permitted to be filed in this court was not raised in the court below. It is true, however, that there were general objections and exceptions to all the proceedings, including all the evidence adduced on the trial; but it is quite evident, from an examination of the record, that the gist of the defense was that there was no evidence to sustain a judgment in any amount whatever, and this also is the substantial ground of the appeal. Neither was this question raised by counsel in this court. It was raised for the first time by this court on its own motion, which, no doubt, it might do, in the exercise of its discretion in the furtherance of justice; the statute against entertaining any exception not taken in the court below being directory and permissive only. On the case as submitted, either of these modes of final disposition was open to us. Under the statute, that "no exception shall be taken in an appeal to any proceeding in the district court, except such as shall have been expressly decided in that court," (Id. p. 68, § 5,) we might have affirmed the entire judgment on this ground. That the question as to the excessive interest was not

raised in the court below, or in any manner alluded to by either party, and was not, therefore, specifically ruled on, (6 Wall. 225,) or the excessive interest, being a matter of exact computation, we might have given judgment for the proper amount in this court under the following provision of the statute: "The supreme court, in appeals or writs of error, shall examine the record, and on the facts thereon contained alone shall award a new trial, reverse or affirm the judgment of the circuit court, *or give such other judgment as to them shall seem agreeable to law.*" Id. p. 69, § 7. Or we could, as was done in this case, give the appellees their option to file a *remittitur* covering the excessive interest, and have the judgment affirmed as to the residue; otherwise, to submit to a reversal and trial *de novo.* Neither of these modes of disposition can be considered as a reversal so as to discharge the securities on the appeal bond, except on failure to file the *remittitur.* Had the point as to the excessive interest been raised in the court below and overruled and excepted to, the case, no doubt, would have been viewed from a different standpoint; but that specific question not having been raised or ruled upon, the appeal cannot be considered as having been taken to correct that irregularity. It may be fairly presumed that, had the point been raised, the irregularity would have been promptly corrected in the court below.

The cases of *Rothgerber* v. *Wonderly*, 66 Ill. 390, and *Chase* v. *Ries*, 10 Cal. 517, are much relied on by the sureties in this appeal bond as authority showing their exemption from liability; but in each of those cases the judgment appealed from was actually reversed and remanded to the court below, with instructions to enter a different judgment. In the case at bar there is no such reversal and remanding for a different judgment.

The judgment of this court upon our previous ruling should affirm the judgment below, after deducting therefrom the amount of the *remittitur* filed as aforesaid, and that the appellees recover of the appellant and his securities named in his appeal bond the specified amount of such residue and their costs, and that they have execution therefor.

AXTELL, C. J. I concur.

NOTE.

APPEAL-BONDS—LIABILITY OF SURETIES. The judgment in this case was affirmed in the supreme court of the United States, Mr. Justice GRAY delivering the opinion. As to the remission of interest, he says: "By the judgment of the supreme court of the territory, affirming the judgment of the district court as to the principal sum due, and also as to interest to the extent of 6 per cent. upon the plaintiff's remitting the excess of 4 per cent. interest, the judgment of the district court was affirmed, within the meaning of the territorial statutes and of the appeal-bond. Butt v. Stinger, 4 Cranch, C. C. 252; Page v. Johnson, 1 D. Chip. 338." 8 Sup. Ct. Rep. 590.

In an action against two persons, the surety on the appeal-bond is not discharged by a discontinuance in the appellate court as to one of them, who is there shown to be a minor. Taylor v. Dansby, (Mich.) 3 N. W. Rep. 267. Where the defendant neglected to avail herself of the defense of coverture, the sureties on her appeal-bond cannot set it up as a defense, in an action against them. McCormick v. Hubbell, (Mont.) 5 Pac. Rep. 314. The appellant's failure to file his transcript within the time allowed by law

does not release the sureties on his appeal-bond, when the appeal is not in fact dismissed for his neglect. And it seems that they are liable even though it is dismissed. Thalheimer v. Crow, (Colo.) 22 Pac. Rep. 779. The sureties are liable even though the case was not appealable. Gudtner v. Kilpatrick, (Neb.) 15 N. W. Rep. 708. When the appeal has been perfected, a dismissal thereof is equivalent to an affirmance of the judgment below, and the sureties on a bond conditioned to satisfy the judgment and costs, in case of affirmance, are still liable. Coon v. McCormack, (Iowa,) 29 N. W. Rep. 455. On appeal from a justice's judgment, the sureties are liable for the amount thereof, as well as the costs, even though the appellant dismiss the appeal. Fitzgerald v. Wellington, (Kan.) 15 Pac. Rep. 582.

Where an appeal-bond was signed by two defendants and a surety, and the judgment was affirmed as to one defendant, but reversed as to the other, the latter was not discharged from liability on the bond, but was liable to reimburse the surety, who paid the judgment against the former. Cotton v. Alexander, (Kan.) 4 Pac. Rep. 259. But see Warner v. Cameron, (Mich.) 31 N. W. Rep. 42. And on appeal from a joint judgment against a number of defendants, the sureties on the bond are liable although the judgment was reversed as to all but one. Gilpin v. Hord, (Ky.) 3 S. W. Rep. 143. So in an action on a contract and for foreclosure of a chattel mortgage, the sureties on the appeal-bond are liable, although the appellant prevails as to the mortgage, but not as to the judgment. Cotulla v. Goggan, (Tex.) 13 S. W. Rep. 742. But where, in replevin, the court found that the right of property and the possession was in the plaintiff, but failed to enter judgment in accordance therewith, and an appeal was taken, and dismissed for want of a judgment, the appeal-bond was held to be a nullity. Brounty v. Daniels, (Neb.) 36 N. W. Rep. 463.

On appeal to the general term from a judgment of foreclosure, the sureties bound themselves to pay any deficiencies which should occur on a sale of the mortgaged premises. Pending an appeal to the court of appeals from a judgment of affirmance defendant obtained a stay of proceedings by giving a bond like the first, but for a larger amount. Held, the sureties on the original bond were not released, although the latter appeal was against their wishes, and the property depreciated in value. Mackellar v. Farrell, (Super. Ct. N. Y.) 8 N. Y. Supp. 307. A judgment entered on *remittitur* from the court of appeals remains in force, and an action on the appeal-bond lies, notwithstanding that the *remittitur* has been subsequently remanded to the court of appeals. Murray v. Jones, (City Ct. N. Y.) 2 N. Y. Supp. 486.

The liabilities of the sureties on an appeal-bond cannot be extended by implication. They have a right to stand upon the exact letter of their contract. Henrie v. Buck, (Kan.) 18 Pac. Rep. 228. And they are not liable for a judgment against their principal in another action on the same demand, although the action in which the bond was given was enjoined. Bank v. Hudgins, (Ga.) 10 S. E. Rep. 501. But, on the other hand, a debt due from the appellees to the appellant cannot be set off in favor of the sureties, in an action upon the appeal-bond, where the appellant is not a party to such action. Thalheimer v. Crow, (Colo.) 22 Pac. Rep. 779.

The surety is estopped by the recitals of his bond from denying that an appeal has been taken, although the appeal was in fact abortive, because of failure to file the bond in the time allowed. Adams v. Thompson, (Neb.) 26 N. W. Rep. 316; Meserve v. Clark, (Ill.) 4 N. E. Rep. 770. Also to deny that judgment below was rendered against the principal. Thalheimer v. Crow, (Colo.) 22 Pac. Rep. 779. Any misrepresentation of the justice accepting the bond as to the liability of the surety cannot affect the latter's liability, when not brought to the notice of the judgment creditor. Davenport v. Searfoss, (Pa.) 13 Atl. Rep. 956.

Where, on appeal from a justice's judgment, the undertaking is to pay the amount remaining unsatisfied of any judgment rendered against the appellant after the return of execution against him, an amendment above increasing the sum claimed does not release the sureties. Hare v. Marsh, (Wis.) 21 N. W. Rep. 267.

By the act of signing the bond the sureties submit themselves to the jurisdiction of the appellate court, and are concluded by the judgment, without further notice. Cline v. Mitchell, (Wash.) 23 Pac. Rep. 1013; Phelan v. Johnson, (Iowa,) 46 N. W. Rep. 68.

For further recent decisions as to the liability of sureties on appeal-bonds, see Oakley v. Van Noppen, (N. C.) 5 S. E. Rep. 1; Osborn v. Rogers, 9 N. Y. Supp. 736; Bauer v. Wasson, (Mich.) 33 N. W. Rep. 186.

TERRITORY *v.* LUNA.

Filed March 1, 1884.

TAXATION—STATUTORY CONSTRUCTION—REPEAL.

The revenue act of 1872 (Prince, St. p. 513, §§ 6, 7) provides for a poll-tax to be "applied to school purposes exclusively." The act of 1874 (Id. p. 515, § 5) provides for its collection by the constable of each precinct, who shall turn it over to the county treasurer. The revenue act of 1882, (Prince, St. 1882, p. 712, § 118,) which embraces all the subjects of taxation, makes the sheriff *ex officio* collector of all taxes, and provides for the distribution of other taxes, but is silent as to the disposition of the poll-tax. The repealing clause repeals all conflicting laws, and further provides that "all laws or parts of laws heretofore in force, regarding the raising of revenue from taxation or from licenses, are by this act hereby repealed." *Held*, that it was not the legislative intent in the act of 1882 to change the disposition of the poll-tax, and that the provision of the act of 1872 devoting it to school purposes is still in force, and that the money should properly be turned over to the county treasurer for the school fund.

Error to the district court of Valencia county.

McComas & Breeden, for defendant in error.

Fiske & Warren, for plaintiff in error.

BRISTOL, J. This is an action of *assumpsit*, brought by the territory, in the lower court, against Patrocinio Luna, the sheriff and *ex officio* collector of taxes for Valencia county, to recover the sum of $1,000, collected by him as a poll-tax. By consent of the parties a jury was waived and the cause tried by the court. The case was submitted to the lower court for its decision and judgment on the following agreed statement of facts, viz.:

"It is hereby stipulated and agreed, by and between the said parties, that this suit is brought to recover the amount of poll-tax collected by defendant, as sheriff and *ex officio* collector of the county of Valencia, during the years 1882 and 1883; that the amount of such tax, so collected by defendant, is correctly stated in the declaration in this cause; that this cause shall be submitted to the court upon the following statement of facts, for his decision and judgment, with the right of either party to except to said decision and take the same to the supreme court of the territory of New Mexico by appeal or writ of error; that such judgment may be given in vacation, and shall be entered as of the present term and have the same force and effect as though actually entered at this term."

Upon this statement the court found for the plaintiff in the sum of $1,000, and entered judgment accordingly, to which finding and judgment the defendant excepted.

The only question raised is whether this poll-tax should be paid into the territorial treasury or go to the school fund of the county. Counsel for the defendant in error contend that the prior statute, which provided, among its provisions, that the poll-tax should go to the school fund, has been repealed *in toto*, and that, inasmuch as there is no express provision under the present law for the appropriation of this poll-tax, it goes to the territorial treasury by implica-

tion of law, while counsel for plaintiff in error hold the contrary doctrine. The question is one of construction of the statutes on the subject. In 1872 a revenue act was passed which, among other provisions, contained the following:

"All real estate situated in the territory, and all personal property of residents of this territory, wheresoever the same may be, and all other personal property in this territory, on the first day of March of each year, excepting the value of five hundred dollars to each head of a family resident in this territory, * * * shall be subject to an *ad valorem* tax of one per centum upon each dollar of the value thereof, which shall be assessed and collected as is now, or as may hereafter be, provided by law for the assessment and collection of taxes; *one-half thereof to be applied solely and exclusively for territorial purposes, one-fourth in like manner for county purposes, and the remaining one-fourth to be in like manner applied to school purposes in the county where collected.* * * * There shall be assessed upon and collected from every male citizen, above the age of twenty-one years, resident of this territory, idiots and persons of unsound mind excepted, an annual poll-tax of one dollar each, and the tax so collected shall be applied to school purposes exclusively." Prince's St. p. 513, §§ 6, 7.

In 1874 an act was passed, and, among others, contained the following provisions:

"The assessors are hereby required to make out separately a complete list of all persons in each precinct of his county who are liable to pay a capitation tax, which said list shall be delivered to the constable of the corresponding precinct, who is hereby authorized and constituted collector of said capitation tax in his precinct. * * * Said constable shall make, at each term of the probate court, a report of all taxes collected by him, and shall immediately turn over to the county treasurer the same." Id. p. 515, § 5.

In 1876, an act was passed, providing as follows:

"Any person required by law to pay a poll-tax, the full value of whose property shall not exceed three hundred dollars, shall be liable and required to pay for such poll-tax the sum of fifty cents, and no more." Id. p. 524, § 11.

In 1882 a general revenue act was passed embracing all the subjects of taxation, including property tax, real and personal, license taxes, and poll-tax, and providing that the sheriff of each county shall be *ex officio* the collector of all these taxes within his county. It provides for the distribution of the property tax, also of the various license taxes, but is silent as to the disposition of the poll-tax. The repealing section of this act is as follows:

"The provisions of this act shall be in full force and effect from and after its passage, and all laws and parts of laws in conflict herewith are hereby repealed, and all laws and parts of laws heretofore in force *regarding* the raising of revenue from taxation or from licenses are by this act hereby repealed." Prince's St. (1882) p. 712, § 118.

This act provides for the raising and distribution of the property tax as follows:

"There shall be levied and assessed upon the taxable property within this territory in each year the following taxes: For territorial revenue, one-half of one per cent.; for ordinary county revenue, one-fourth of one per cent.; for maintenance and support of public schools, one-fourth of one per cent." Id. p. 688, § 6.

The provision for the distribution of the license taxes is as follows:

"License taxes, one-half of which shall be for territorial and one-half for county purposes, shall be imposed each year as follows." Id. p. 707, § 96.

Then follows an extended list of taxes on a variety of licensed occupations. The act provides for a poll-tax as follows:

"A poll-tax of one dollar shall be assessed against every able-bodied male inhabitant of this territory over the age of twenty-one years, whether a citizen of the United States or an alien, and collected in the same manner as other taxes." Id. p. 712, § 113.

The duty of the sheriff, as *ex officio* collector, in paying over tax moneys collected by him, is provided for in the act as follows:

"On or before the tenth day of each month the collector shall pay to the county treasurer all moneys due the county for taxes and licenses, or otherwise, collected by him for county or school purposes, remaining in his hands on the first day of that month, and to the territorial treasurer all moneys due the territory on any account in his hands on the first day of that month." Id. p. 698, § 56.

There being no provision in this act as to what disposition shall be made of the money collected as a poll-tax, the question arises whether it should be applied to school purposes, under the revenue act of 1872 aforesaid, and paid to the county treasurer, or whether the provisions of that act, that the poll-tax should "be applied to school purposes exclusively," as well as all of its other provisions, was repealed by the aforesaid act of 1882, thus leaving the poll-tax without any express provisions of law as to its disposition; and, in the latter case, whether, by implication merely, it should be paid over to the territorial treasurer, and applied to general territorial purposes. The poll-tax is a part of the system for raising a revenue, and the repealing clause of the act of 1882 repealed all previous laws "regarding the raising of revenue," by a poll-tax as well as by a property and license tax. And it also repeals all prior laws in regard to the distribution of the revenue arising from property and license taxes, since it contains plain and unambiguous provisions as to its disposition; but does it repeal the provisions of the act of 1872 as to the disposition of the poll-tax? In the act of 1876 a modification of the poll-tax was made in regard to persons the value of whose property did not exceed $300; but this could not affect the prior law as to the disposition of the revenue from that source. So the act of 1882 makes a modification of the poll-tax, but such modification alone cannot affect its distribution.

In construing statutes, the legislative intent, if clearly ascertainable, must of course govern; and if uncertain or ambiguous, then the probable intent, as near as it can be ascertained, should control judicial construction. In cases of this kind prior legislative enactments on the same subject, though repealed, are often resorted to in order to determine the probable legislative intent in a doubtful statute of a later date. A case of this kind arose at an early day in Massachu-

setts. Prior to 1783, the statute of 12 Wm. III. *c.* 7, in regard to devises, was in force as common law. During that year (1783) the legislature of that state passed an act on the subject of devises containing a repealing clause as follows: "All acts and laws, so far as they relate to the devising any estate, are repealed." It was doubtful whether the statute of 12 Wm. III. *c.* 7, was within this repealing section, as all the provisions of that statute vest distributive shares in the cases there mentioned, where in fact there was a will; but on reference to the act of 1783, in which was the repealing clause, it was found to be entitled "An act prescribing the manner of devising lands, tenements, and hereditaments," and that it re-enacted the provisions of the statute of 12 Wm. III. *c.* 7, excepting the third section. It was held that the legislature intended to repeal the statute of William; and as the third section of that statute had not been re-enacted, it was further held that a marriage without issue was no longer as to the widow a revocation of a will made before marriage. *Church* v. *Crocker*, 3 Mass. 21. On this subject, in *Eaton* v. *Green*, 39 Mass. 530, 22 Pick. 531, the court said:

"It is a familiar rule of construction where any section or clause of a statute is doubtful, its meaning is to be ascertained, if may be, by taking into consideration the whole statute, and even the preamble, in order to discover the probable intention of the legislature. * * * The general system of legislation upon the subject-matter may be taken into consideration in order to aid the construction of a statute relating to the same subject; and all statutes *in pari materia, whether they be* repealed or unrepealed, may be considered with the same view."

This doctrine was affirmed in *Holbrook* v. *Bliss*, 91 Mass. 75, and quoted as authority in the late case of *Ex parte Kan-gi-Shun-ca*, 3 Sup. Ct. Rep. 396.

In *Savings Bank* v. *Collector*, 3 Wall. 495, it was decided that in interpreting a section of the statute which remains in force, resort may be had to a proviso in it, though the proviso be repealed.

In the light of these adjudications, there can be no doubt that in the absence of any express provision in the revenue act of 1882, as to the disposition of the revenue arising from the poll-tax, a resort may be had to the act of 1872 to determine the probable intention of the legislature on the subject under the act of 1882. The fact that in the latter revenue law there are express provisions as to the distribution of the revenue from all sources except the poll-tax, and none in regard to that tax, is a circumstance tending to show there was no intention to change the law as to the application of the poll-tax. The repealing section of the act of 1882, above quoted, is somewhat peculiar; it contains two repealing clauses; one is, "All laws and parts of laws in conflict herewith are hereby repealed." If the repealing action ended there, it would have left the provision of the act of 1872, applying the poll-tax to the county school fund, in force, beyond any doubt. The other and additional repealing clause is as follows: "And all laws and parts of laws heretofore in force regard-

ing the raising of revenue from taxation or from license are by this act repealed." A law is a rule of action prescribed by the legislature. A complicated revenue act like ours, prescribing as it does the modes of assessment, collection, paying over, and the distribution of taxes by the various officers designated by law for the purpose, contains several separate and distinct rules of action; and in that sense the revenue act may be regarded as containing several separate and distinct laws. There is one law for the assessment of the property tax; another for the assessment of the poll-tax; several others for the assessment of the various license taxes; another for the collection of taxes; others for the distribution of the tax moneys; and still others for the payment of the same to the respective county and territorial treasurers. Repealing the laws or rules of action in regard to the various modes of raising revenue, which relate alone to the assessment and collection of taxes, does not of itself necessarily repeal the law or rule of action as to the distribution of the revenue after it has been raised. It is quite clear that before the revenue arising from the poll-tax can be legally paid into the territorial treasury, it must be reasonably certain that by the act of 1882 it was the intention of the legislature, among other things, to change the application of the poll-tax from the county school fund to the territorial treasurer. It is certainly very difficult to arrive at that conclusion from the legislation on the subject. The act of 1872 appropriated the poll-tax, whatever it might be, to the school fund exclusively, and in the plainest and most explicit terms. By that act the policy of the territory on the particular subject was settled. And it is against the rules of statutory construction to consider a change as having been effected from vague implications. All the circumstances and the various provisions of the statutes, *in pari materia*, duly considered, I am of the opinion that there has been no legislative intention to change the law of distribution of the poll-tax, and that so much of the law of 1872 as appropriates the same to the county school fund is still in force.

BELL, J. This case came to the supreme court upon a *pro forma* judgment entered in the court below. The case was not there examined, it being understood that the question had been decided in another district, but that no appeal had been taken from that judgment, and it was desired that the question should be reviewed by this court. After an examination of the authorities in the light of the learned opinion of my associate, Judge BRISTOL, I am fully in accord with the views he expresses. The judgment of the court below should be reversed, and the case sent back, with instructions to enter judgment absolute for the plaintiff.

PEREA and others, Adm'rs, etc., v. DE GALLEGOS.

Filed February 27, 1884.

FRAUDULENT CONVEYANCES—CREDITORS' BILL—AMENDMENT.

Where a husband, being insolvent, conveys real estate to his wife, who continues to hold the same after his death, a single creditor of the husband, who has obtained a judgment in the probate court against the estate, cannot by a bill in equity have the conveyance declared a trust for his benefit, and have a receiver turn the widow out during the pendency of the suit. It is, however, reversible error for the court, in sustaining a demurrer to such a bill, to dismiss the suit absolutely. An equity appearing from the allegations of the bill to have the conveyances set aside, on behalf of all the creditors, and the property applied to the payment of the debts, the complainant should have had leave to amend.

Catron & Thornton, for appellants.

Breeden & Waldo, for appellees.

BRISTOL, J. The record discloses the following facts:

Jose Leandro Perea, now deceased, filed a bill in equity in the lower court, during his life-time, against the appellee, Candelario Montoya de Gallegos.

A summary statement of so many of the material facts alleged in the bill as are necessary to be considered is in effect that in 1868 the appellee was married to and became the lawful wife of one Manuel Gallegos; that they lived together as man and wife until his death, which occurred about the year 1876; that for a long time prior to his death said Manuel Gallegos was insolvent, and had not property sufficient to pay more than one-third of his indebtedness; that prior to his death, and during such insolvency, and while he was indebted to various creditors to the amount of about $30,000, among which creditors was said Jose Leandro Perea, to the amount of about $4,000, the said Manuel Gallegos conveyed by deed to his said wife, now the appellee, certain pieces or parcels of real estate described in the bill; that said conveyance was executed without consideration, and for the purpose of covering up his property and defrauding his creditors; that at the date of the death of said Manuel Gallegos he was indebted to said Jose Leandro Perea to the amount of $10,809.40 on a judgment rendered by the probate court, and that the same is still due and unpaid; that the said Jose Manuel Gallegos left no estate out of which said indebtedness could be paid other than the real estate so, as aforesaid, conveyed to the appellee; that the appellee still holds and is possessed of said real estate under said conveyance, and is utterly insolvent and unable to respond in damages for rents, and profits. The prayer of the bill is that the appellee be declared a trustee, and to hold the said real estate so conveyed to her, and the rents and profits thereof in trust for the use and benefit of said Jose Leandro Perea until his said demand shall be fully paid off and discharged; that she be decreed to account for all rents, issues, and profits by her received from said real estate, to be applied towards such payment; that a receiver be appointed to take charge of said real estate, with authority to lease, rent, and manage the same and receive the rents, issues, and profits thereof pending the litigation, and that said real estate be sold and the proceeds applied on and towards the payment of the indebtedness so as aforesaid due and unpaid to said Jose Leandro Perea.

A demurrer to the bill was interposed, the specific grounds of which are as follows:

"(1) The judgment upon which said complainant bases his right to bring said bill is not such a judgment as will support a bill of that nature. (2) There is not shown any privity to exist between the said complainant and the said defendant by which any trust has been created or can attach as against said defendant. (3) It does not appear from said bill that said complainant was in any way connected with the transactions by which defendant acquired the premises in question. (4) It does not appear in said bill that there is any judgment or lien in favor of said complainant upon, or any estate or interest of any kind whatsoever in, said premises, in said complainant, by reason whereof any trust can be implied in favor of or result to said complainant. (5) It does not appear by said bill that the complainant ever acquired any lien upon the said real estate, or that he obtained any judgment upon his alleged demand in the life-time of the said Jose Manuel Gallegos, so as to give him any right in or upon said real estate."

At this stage of the proceedings Jose Leandro Perea, the complainant, died, and upon his death, being suggested, the now appellants, Jesus Maria Perea, Mariano Perea, and Pedro Perea, as administrators of the estate of said Jose Leandro Perea, were substituted as complainants. The demurrer was heard and sustained by the court below, and a decree entered dismissing the suit. The case is here on appeal from that decree.

The only questions that are necessary to consider are whether, upon this demurrer, the suit ought to have been dissmissed absolutely so as to constitute a bar to any further proceedings in equity for relief, on the statement of facts contained in the bill; whether the appellants ought to have had leave to amend the prayer of their bill upon the demurrer being sustained; and, in case of dismissal, whether it ought not, at least, to have been "without prejudice." The facts alleged in the bill, if true, and the demurrer admits them to be true, clearly entitle the appellants to equitable relief, though perhaps not in the mode indicated in the prayer of the bill. It would not, under the circumstances, be equitable to turn the widow out and place a receiver in possession of the premises pending the determination of the suit. Neither can we see the propriety of treating the conveyance of the premises to the appellee, under the circumstances alleged in the bill, as creating a resulting trust in the appellee for the benefit of the appellants. If the conveyance is fraudulent as against creditors, as the allegations of the bill, if true, seem to indicate, it would be proper for a court of equity to entertain a suit for the purpose of annulling the conveyance as *against creditors* on the ground of fraud, and decreeing a sale of the premises and applying the proceeds to the payment of debts contracted by Manuel Gallegos, during his life-time, provided it appears that there is no personal estate out of which to pay the same. Probate courts have the undoubted right to pass upon and allow claims against the estates of deceased persons; but it is doubtful whether they have authority, or that the legislature, under the organic act,

can confer on such courts the authority, to entertain actions at law to recover judgments against administrators in sums mentioned in the bill and enforce the collection thereof by their own executions.

We are of the opinion that the decree rendered by the court below, dismissing the suit *absolutely*, ought to be reversed and the cause remanded to the court below, with directions to grant leave to the appellants to amend the bill, and thereupon to proceed according to the regular course and practice in equity to a final decree; the parties to pay their own costs of the appeal, respectively; and it is so ordered.

BELL, J. I concur.

STAAB and another *v.* HERSCH.

Filed February 27, 1884.

ATTACHMENT—DEMANDS NOT DUE—ASSUMPSIT.

Attachment proceedings auxiliary to an action of *assumpsit*, but each characterized by separate pleadings and a distinct practice, may be commenced together for the same demand. But, where it appears that the demand is not yet due, it is error to render judgment for plaintiff thereon in the action of *assumpsit*, although the attachment may be sustained upon the trial of that issue, the effect of which is only to create an attachment lien in advance of an action on the claim itself, when it becomes due.[1]

Breedin, Catron, Thornton & Clancy, for appellees.

Gildersleeve & Knaeble, for appellant.

BRISTOL, J. The case is here by appeal from the district court of Santa Fe county. The record discloses the following facts:

On the twentieth day of January, 1883, Zadoc Staab and Abraham Staab, as the members of a partnership, as Z. Staab & Bro., the appellees, filed in the court below their declaration in *assumpsit* against the appellant, Luis Hersch. The declaration contains but one count, which is as follows: "For that whereas the said defendant heretofore, to-wit, on the sixteenth day of January, A. D. 1882, at the county of Santa Fe, aforesaid, was justly indebted to the said plaintiffs in the sum of $545.67 for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendant, and at his special instance and request, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year aforesaid, at the county of Santa Fe, aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money above mentioned, when he, the said defendant, should be thereunto afterwards," etc. The count then contains the usual allegation of non-payment, and demands judgment. On the same day on which the declaration was filed the appellees filed an affidavit for an attachment, the affidavit being as follows:

[1]See note at end of case.

"*Territory of New Mexico, County of Santa Fe—ss.:* This day personally appeared before me, the undersigned, clerk of the district court for said county, Abraham Staab, and being duly sworn, says that Luis Hersch is justly indebted to the said Abraham Staab and Zadoc Staab, doing business under the name of Staab & Bro., in the sum of five hundred and forty-five dollars and sixty-seven cents, after allowing all just credits and offsets, on account of goods, wares, and merchandise sold and delivered; said sum of money is not yet due and payable according to the contract of sale and delivery of the goods, but the sum of two hundred and eighty-six dollars and twenty cents will become due and payable on the first day of February next, and the whole of the residue thereof on the fifteenth day of February, A. D. 1882; and that this affiant has good reason to believe, and does believe, that the said Luis Hersch is about fraudulently to dispose of his property or effects so as to hinder, delay, or defraud his creditors. ABRAHAM STAAB.

"Subscribed and sworn to before me this twentieth day of January, 1882.
"F. W. CLANCY, Clerk."

On the eighth day of February, 1882, the appellant pleaded the general issue of *non-assumpsit* to the declaration, (but without concluding to the country.) On the fourth day of December, 1883, a jury was called in the court below to try the issues raised upon the affidavit for attachment. Upon the conclusion of the evidence, and while the jury were out considering of their verdict, on the following day, the appellees moved the court to proceed to the trial of the cause on the issue raised by the plea of *non-assumpsit* to the declaration. This was objected to, on behalf of appellant, on the ground that such trial was premature, and could not properly be proceeded in until the determination of the issues as to the truth of the affidavit for attachment; and upon the further ground that it appeared on the record of the attachment proceedings that the action was brought to recover demands before they were due and payable. Each of these objections being overruled, exceptions were duly taken. A trial thereupon was then had. A sale of the goods, wares, and merchandise, as alleged in the declaration, was established, except as to the time of payment; the appellees admitting on the trial that, under the contract of sale, a credit was given until some time in February, 1882. Upon this condition of the evidence, appellant moved for a nonsuit, on the grounds that the attachment issue had not yet been disposed of; that the trial of the main issue was premature; and that it appeared from the plaintiff's own evidence that no part of the claims sued on was due or payable when the action was commenced. This motion was overruled, and an exception taken. The appellant then, on substantially the same grounds, moved the court to instruct the jury to find for the defendant. This motion was overruled, and an exception taken. The court thereupon instructed the jury to find for the plaintiffs, to which instruction the appellant excepted. The jury brought in a verdict for appellant in the sum of $561.04, and judgment was rendered thereon for that sum, and costs. Thereafter, the jury, in the attachment proceeding, came in, and announced their disagreement, and, without finding a verdict, were discharged.

The questions raised in this court are upon the exceptions taken in the court below. As the law now stands in this territory, attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleadings and a distinct practice. The affidavit for an attachment has never been considered sufficient as a declaration, under our practice. This common-law declaration must be responded to by a common-law plea in order to raise an issue. If the defendant desires to raise an issue on the affidavit for an attachment,

he must do so by a specific denial of some material fact or facts contained in the affidavit instead of pleading by a general denial; the statute on the subject being as follows:

"In all cases where property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer, without oath, denying the truth of any material fact contained in the affidavit, to which the plaintiff may reply. A trial of the truth of the affidavit shall be had at the same term, and on such trial the plaintiff shall be held to prove the existence of the facts set forth in the affidavit *as the ground of the attachment.*" Prince's St. p. 139, § 16.

In 1874 an act was passed containing, among others, the following provisions:

"In all cases hereafter commenced by attachment, in which the truth of the affidavit for attachment, or of any material allegation therein contained, shall be denied, and the issue thus formed shall, upon the trial, be found for the defendant, the attachment shall be dismissed, and all property, rights, effects, and credits held or affected thereby or thereunder shall be released and discharged from the operation thereof; *but the dismissal of the attachment shall not abate the suit, but the same shall proceed as in ordinary cases.*" Id. p. 143, § 38.

This statute removes all doubt as to the mode of proceeding on matured money demands. A common-law action may be commenced, attended with common-law pleadings and practice, and, simultaneously, proceedings by attachment, auxiliary thereto, may be instituted and attended with statutory pleadings. If, on trial of the issues, as to the grounds of the attachment alleged in the affidavit, a verdict is rendered for the defendant, the attachment is dissolved, but the action at law proceeds to final judgment. But what should be the mode of procedure in cases of an attachment on demands not due? The only provision of statute on this question is as follows:

"An attachment may be issued on a demand not yet due, in any case where an attachment is authorized, in the same manner as upon demands already due." Id. p. 143, subd. 3, § 37.

All the other provisions of statute on the subject of attachment relate to demands due at the institution of the proceedings. Can this statute, thus injected into attachment proceedings, be construed as authorizing by implication an action at law to be commenced before demands are due, for the purpose of obtaining judgment thereon after they become due? The statute is silent as to the mode of procedure in a contingency of this kind. Attachment proceedings, being in derogation of the common law, must be construed strictly; nothing can be inferred. If an action be commenced on demands not due, when should the defendant be cited to appear and plead to the declaration? It cannot be inferred from this brief statute that he must interpose his defense, if he has any, before he can be called on to pay the demand. There being no statute regulations on the subject, this court no doubt has authority to prescribe by rule what the practice may be, so as to give effect to attachments covering demands not due, without

in the least changing the practice in actions at law to recover judgment on the same demands. The sole object of an attachment is to create a prior lien on the property of the attachment debtor, as security on any judgment that may thereafter be obtained against him on the demands covered by the attachment. When this extraordinary remedy is resorted to, covering demands not due, and especially where long credits are given, and the grounds of the attachment are traversed, a speedy determination of that issue becomes of the greatest importance; but it is evident that the main issue on the indebtedness cannot be raised, nor any defense interposed, until the maturity of the demand sued on, except to show that no such demands exist on which an attachment will lie.

Under our common-law pleadings and practice the only consistent mode of procedure in cases of this kind would be to treat the attachment proceedings on debts not due as separate and distinct from any action at law to recover judgment thereon, and to go no further than to create an attachment lien in advance of the commencement of such action,—the writ of attachment to contain a citation to the defendant to appear and answer the affidavit; the issue, if any, thus raised in the attachment proceedings, to be speedily tried, and the attachment lien dissolved or continued, according to the verdict of the jury for or against the defendant; if sustained, the attachment to remain a subsisting lien on the property of the debtor, and, upon the maturity of the demand, a declaration to be filed and the defendant cited to plead thereto; if the plaintiff recover judgment, then a writ of *venditioni exponas* to be issued for the sale of the property attached and the proceeds applied to the satisfaction of the judgment. The record in this case discloses the fact that, in addition to the affidavit for an attachment covering demands not due, a common-law declaration was at the same time filed, containing a single count for goods, wares, and merchandise sold and delivered, etc., and a promise on the part of the defendant *to pay on demand.* The defendant pleaded that he did not so promise. On the issue thus raised the parties went to trial, resulting in a verdict and judgment for the plaintiffs. The commencement of the action was the plaintiffs' demand for payment; and if the count in the declaration were true, the demand at once became due and payable. But the plaintiffs on the trial admitted that the demand, at the time mentioned in the declaration, was not due and payable, and did not become due for some time thereafter, under the express contract of sale and delivery of the goods. This was conclusive upon the plaintiffs, and left them without any evidence to support their count in the declaration. The count was not true, and the plea of *non-assumpsit* was sustained by the evidence. As to the attachment, the indebtedness alleged in the affidavit does not correspond with that specified in the declaration. In the affidavit it consists of two demands, due at different specified future dates, while the declaration is upon a single demand, due and payable on demand.

The plea of the declaration of *non-assumpsit* does not conclude to the country, and technically no issue was tendered thereby.

The parties having appeared generally in all the proceedings in the court below, and as irregularities have been committed on either side, we are of the opinion not only that the judgment below ought to be reversed, but that the cause should also be remanded to the court below, with directions to grant leave to the plaintiffs to file a new declaration in accordance with this opinion, and thereupon to proceed by due course of law and practice to final judgment. And it is so ordered.

BELL, J., concurring.

NOTE.

ATTACHMENT—GROUNDS—PRACTICE.

1. GROUNDS. An assignment for the benefit of creditors, fraudulent in law because of its failure to comply with the statutory requirements of such assignments, is ground for attachment, though there is no fraud in fact, Leitensdorfer v. Webb, 1 N. M. 34; and such assignment may be attacked by attachment by a general creditor; and on the trial of the issues in attachment it is admissible in evidence to show that the property had been disposed of, as charged in the affidavit, with intent to hinder and defraud creditors. The assigument is evidence of the disposition of the property merely, and the fraud must be shown by other evidence. Meyer v. Black, 4 N. M. —, 16 Pac. Rep. 620. In *Kansas*, however, a void assignment for the benefit of creditors will not sustain an attachment on the grounds of fraudulent disposition of property. Cooper v. Clark, 24 Pac. Rep. 422. So in *Missouri*, fraud in law will not sustain an attachment under the statute providing that attachment may be had "where the defendant has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors;" there must be actual fraud in fact. Iron-Works v. Hill, 22 Fed. Rep. 195. But where the assignment is otherwise valid, and not intended to defraud, hinder, or delay creditors, it will not sustain an attachment because its incidental effect is to hinder and delay creditors somewhat. Torlina v. Trorlicht, 4 N. M. —, 21 Pac. Rep. 68. An assignment with preferences, by an insolvent corporation, is no ground for attachment, Foster v. Mill Co., (Mo.) 4 S. W. Rep. 260; but a fraudulent mortgage is, Implement Co. v. McWhorter, (Kan.) 21 Pac. Rep. 86. An attempt to make a general assignment for the benefit of creditors is no evidence of fraud. Bank v. Rosenfeld, (Wis.) 28 N. W. Rep. 370; Wearne v. France, (Wyo.) 21 Pac. Rep. 703. Nor is a debtor's confession of judgment in favor of a *bona fide* creditor a ground for attachment. Wyman v. Wilmarth, (S. D.) 46 N. W. Rep. 190. That a debtor refuses to give one creditor security, but gives mortgages to secure other *bona fide* creditors, is no evidence of a fraudulent intention that will sustain an attachment. Ray v. Gore, (Mich.) 41 N. W. Rep. 329. Nor is the preference in any other way of one creditor over another. Britton v. Boyer, (Neb.) 43 N. W. Rep. 356; Farwell v. Brown, 1 Fed. Rep. 128. But giving one creditor a mortgage on a much greater amount of property than is necessary to secure the debt is a fraudulent disposition, that will sustain an attachment. Smith v. Boyer, (Neb.) 45 N. W. Rep. 265; Gallagher v. Goldfrank, (Tex.) 12 S. W. Rep. 964.

2. PRACTICE. Where the citation by publication omits a part of the notice required by statute to be given, the court acquires no jurisdiction, and the judgment *in rem* is void. Smith v. Montoya, 3 N. M. 39, 1 Pac. Rep. 175. Where the writ is made returnable to an impossible day, as to a day prior to its issuance, the proceedings thereunder are void. Holzman v. Martinez, 2 N. M. 271. The petition or other statement of the cause of action must be served with the writ, in order to complete the service. Id. A forthcoming bond does not operate to release the lien of attachment. Id. The bond and affidavit must be filed before the issuance of the writ. Waldo v. Beckwith, 1 N. M. 97. And where the record discloses that they were not so filed, it cannot be corrected by a *nunc pro tunc* entry, based on extraneous testimony. Id. Where the attachment is against a resident debtor, who has absconded, a valid service may be had by leaving a copy of the writ at his usual place of abode, with some person over 15 years of age, and publication is unnecessary. Spiegelberg v. Sullivan, 1 N. M. 575. A variance in the description of the parties between the affidavit and writ is fatal, even though the petition filed with the affidavit conforms to the writ. Bennett v. Zabriski, 2 N. M. 176. But see Robinson v. Hesser, 4 N. M. —, 13 Pac. Rep. 204, in which Bennett v. Za-

briski is strongly disapproved, though not expressly overruled, and it is held that an affidavit which follows the form prescribed by statute is good though it violates common-law rules of pleading.

3. WRONGFUL ATTACHMENT. An attorney who, in pursuance of instructions from his client, and acting in good faith, on information that would lead a prudent man to suppose that good grounds of attachment exist, is not liable for malicious attachment. Leyser v. Field, (N. M.) 23 Pac. Rep. 173. Malice and want of probable cause are both essential to maintain an action for malicious attachment, and the burden of proof as to both is on plaintiff. They are distinct ingredients of the wrong, and neither one is dependent on or necessarily inferred from the other; but the jury may infer malice from the circumstances which go to establish want of probable cause. Grant v. Reinhart, 33 Mo. App. 74. Besides showing that there were no grounds for attachment, the plaintiff, in an action for malicious attachment, must also show want of probable cause and malice. Collins v. Shannon, (Wis.) 30 N. W. Rep. 730. An action for malicious attachment is maintainable though the goods are never actually levied on, and defendants in the attachment settle the attachment by paying the debt; for the fact that a malicious attachment is terminated by compromise does not deprive the attached debtor of his right to recover damages for the wrong. Brand v. Hinchman, (Mich.) 36 N. W. Rep. 664.

BENT and others *v.* MAXWELL L. G. & RY. CO. and others.

Filed May 3, 1884.

1. ABATEMENT OF SUIT—ANOTHER SUIT PENDING.

Where it appears, in a bill to establish the right of infant claimants to an undivided interest in land to which all the parties interested are made parties, that another proceeding in equity, brought by some of the defendants only to terminate and extinguish the claim of complainants is still pending, a demurrer on the ground of another suit pending will be overruled, for it is apparent that the rights of complainants cannot be fully adjudicated in that cause for the lack of parties.

2. ACTION BY INFANT—APPOINTMENT OF "NEXT FRIEND"—PRESUMPTION.

Where a bill is brought on behalf of infant complainants by their "next friend," it will be presumed that the "next friend" was duly appointed by the court, and leave given to file the bill. A demurrer for failure to show these facts on the face of the bill will be overruled.

3. EQUITY—SETTING ASIDE FRAUDULENT DECREE.

A bill to annul a consent decree, on the ground that it was fraudulently obtained, where the effect will be to re-establish a prior decree in the same cause, is not demurrable because it fails to show that the decree which is to be so re-established was a proper one. That issue is not before the court.

4. SAME.

A bill to impeach a consent decree, on the ground that it was fraudulently obtained, is not a bill of review where the parties to it necessarily differ from the parties to the proceeding in which the decree sought to be annulled was rendered.

5. SAME—CONSENT DECREE.

A bill to annul a decree is not demurrable because it appears that the decree was entered by consent, where it is charged that the complainants were infants, and the consent, if any, was obtained by fraud and imposition.[1]

[1] As to power of guardian *ad litem* to bind an infant, see Kingsbury v. Buckner, 10 Sup. Ct. Rep. 638; Walters v. Hermann, (Mo.) 12 S. W. Rep. 890; Biddinger v. Wiland, (Md.) 10 Atl. Rep. 202; Bennett v. Bradford, (Ill.) 24 N. E. Rep. 630; Luck v. Atkins, (Ark.) 13 S. W. Rep. 1097; Cates v. Pickett, (N. C.) 1 S. E. Rep. 763.

6. SAME—WANT OF EQUITY—INFANCY—FRAUD.

A bill to set aside a decree, entered by consent against minor defendants, divesting them of an undivided interest in a large Mexican grant, and authorizing its conveyance by their guardian *ad litem*, in pursuance of a compromise, for a sum less than its real value, which charges that there was no consent in fact; that if it was given it was obtained by fraud, imposition, and false representations practiced upon their guardian *ad litem*, a Mexican woman, ignorant of the English language, unfamiliar with business or the proceedings of courts, unacquainted with the rights of complainants, with her duties as guardian, and with the land itself, its extent and value, and ignorant of the fact that congress had confirmed the grant, and that the court had, by decree, established the rights of complainants' ancestor, and of the share or right claimed by the latter in his life-time; and further setting out in detail the fraudulent devices by which she was convinced that complainants would be excluded from all enjoyment of the grant by the other owners thereof, and was persuaded to consent to the decree and execute the conveyance in pursuance of it,—is not demurrable for want of equity.

7. SAME—CONTROL OF INFANTS' REAL ESTATE.

Complainants' ancestor, in a proceeding to establish an equitable right to an undivided interest in land, recovered judgment, and a partition was ordered, but before the decree could be executed he died. *Held*, that his equitable right had become converted into a legal title, and so descending to complainants, his infant heirs, vested in them as a legal estate in land, which a court of equity is without jurisdiction to divest, in the absence of statutory authority, even for the purpose of nurture and maintenance, much less in pursuance of a compromise by their guardian *ad litem*, and this notwithstanding an equitable proceeding was still necessary to determine and separate their interest in the property.

8. VENUE—SUIT INVOLVING LAND—DIVISION OF COUNTY.

Where land was originally in one county, but by a new division it became located in another county, a suit, of which an interest in the land is the subject-matter, is properly brought in the county in which the land lies at the time the suit is brought, under chapter 2, Act 1876, § 1, (Prince's Laws, p. 130.)

Wells, Smith & Macon and *Caldwell Yeaman*, for plaintiffs in error.

T. B. Catron and *Frank Springer*, for defendants in error.

BELL, J. This suit was brought to impeach a decree of the court in a former suit, to which the complainants herein were parties, on the grounds of fraud, imposition, and error.

From the facts stated in the bill it appears that about the twelfth day of September, A. D. 1859, Alfred Bent, Estefana Hicklin, Alexander Hicklin, her husband, and Teresina Bent instituted in the district court for the county of Taos (in which county the whole of the lands in question were then situate) their certain bill in equity against Guadalupe Miranda, Charles Beaubien, Lucien B. Maxwell, and Joseph Pley, alleging that Charles Bent, father of the said Alfred, Estefana, and Teresina, was, in his life-time, by virtue of a certain parol agreement made between him, said Charles Bent, of the one part, and said Beaubien and Miranda, of the other part, entitled in equity to the equal undivided one-third part of a certain grant of land, in the said bill fully described and set forth; that said Charles Bent departed this life intestate, leaving the said Alfred, Estefana,

and Teresina as his sole heirs at law, and in and by the said bill the said Alfred, Estefana, and Teresina prayed that they might be decreed entitled to said one-third part of the said lands, and that partition thereof might be made; that, pending said suit, said Charles Beaubien departed this life, and his necessary personal representatives were made parties thereto; that all said parties answered, denying the equities claimed in the said bill; that, pending said suit, said Teresina also intermarried with Aloys Scheurick, and the said Aloys was made party to the suit with the said Teresina; that said cause was continued, from time to time, until the May term, 1865, and that at said term, and on or about the third of June, 1865, a decree was made and entered in said cause, by which, among other things, it was ordered, adjudged, and decreed that the said Alfred, Estefana, and Teresina were, and were thereby declared to be, the heirs at law of the said Charles Bent, deceased, and as such heirs fully and absolutely entitled to and seized of the undivided one-fourth part of the said grant of lands, which said grant is now commonly known as the "Maxwell Grant," and which was then situated partly in the county of Taos and partly within the limits of the then territory of Colorado, and is now situate within the limits of the county of Colfax, in this territory, and partly in the state of Colorado; that by the said decree the said undivided one-fourth part of the said grant of lands was declared established and confirmed to them, the said Alfred, Estefana, and Teresina, and to their heirs and assigns forever, with the full and perfect right, power, and authority to possess and enjoy the same; and it was decreed that a just and equitable partition of the said grant should be made between the said Alfred, Estefana, Teresina, and the other parties to said suit who were declared by the said decree entitled to the remainder of the said lands; and that commissioners therein appointed to make said partition should lay off one-fourth of the said grant to the said Alfred, Estefana, and Teresina, and the remaining three-fourths to the said other parties entitled thereto; that by the said decree certain persons therein mentioned were appointed commissioners to make the said partition.

The bill further shows that, after the entry of the said decree of partition, and on or about the ——— day of December, 1865, and before partition of the said premises had been affected in pursuance of the said decree, the said Alfred Bent departed this life, intestate, leaving as his sole heirs the complainants herein, Juliano Bent and Alberto Silas Bent, then and still infants of tender years, and the complainant Charles Bent, then also an infant, and who since, and on or about the twenty-sixth day of April, A. D. 1881, hath come of lawful age; that on or about the ninth day of April, 1866, at a term of the said district court for Taos county then sitting, the death of the said Alfred Bent was suggested of record, and the complainants

herein, as his children and heirs at law, were made parties complainant in the cause in his stead; and that afterwards, at the same term of the court, an order was made in the cause, wherein, after reciting an agreement of the parties thereunto, Guadalupe Bent was appointed guardian *ad litem* and commissioner in chancery for the complainants herein, being the minor children of Alfred Bent, with full power to execute deeds, or carry into execution all sales or transfers made of their interests in and to the real estate therein described, to Lucien B. Maxwell, one of the defendants in that cause, and the said cause was then continued to the next term of the court; that afterwards, at the September term, 1866, of the said district court, begun and held on or about the tenth day of September, 1866, a certain other order or decree was made and entered of record in the same cause, wherein, after reciting the aforementioned decree appointing commissioners to divide and separate one-fourth of the said lands to the complainants in said cause, and that said decree had never been carried into effect, and that, since the rendition thereof, a mutual agreement had been made between the parties to that cause, settling and determining all equities in the same, it was ordered, adjudged, and decreed that the decree aforesaid, and all orders made under it by virtue of the same, should be set aside; and it was further ordered, adjudged, and decreed, by mutual consent and agreement of said parties, that the said Lucien B. Maxwell should pay to the complainant in that cause eighteen thousand (18,000) dollars, as follows, to-wit: To the said Teresina and Aloys, her husband, one-third part; and to the said Estefana and Alexander, her husband, one-third part; and to the complainants herein, the children and heirs of Alfred Bent, deceased, the remaining one-third part, to be equally divided among the said complainants, and to be paid into the hands of Guadalupe Bent, widow of the said Alfred Bent, and guardian *ad litem* of the complainants, for the purposes of the said division. And it was further ordered, adjudged, and decreed that the said Estefana, Alexander, Teresina, and Aloys, and the said Guadalupe Bent, guardian *ad litem* of the complainants, within 10 days thereafter, should make, execute, and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim, and demand of, in, and to the lands in controversy in that cause; the said Guadalupe Bent in the name of the complainants herein, and the others of the said complainants in that cause in their own names; and that each of the said parties should pay the separate costs in this suit made by them.

The bill then charges that although the said decree purports to be made by consent of parties, nevertheless it does not appear by whom these complainants were represented in that behalf, or who assumed to consent to the said decree in behalf of these complainants.

The bill further charges that said decrees and orders, and each thereof, were duly enrolled in the said court.

The bill further shows that before the entry of the said last above-mentioned decree, and about the month of May, 1866, the said Aloys Scheurick, and Teresina, his wife, and the said Alexander Hicklin, and Estefana, his wife, by their deeds, in due form of law, had conveyed to the said Lucien B. Maxwell all the interest of the said Estefana and Teresina, being the undivided two-twelfths interest in the said grant of lands, and that likewise before the entry of said last-mentioned decree, and about the third day of May, 1866, the said Guadalupe Bent had also executed her deed of conveyance, wherein, after reciting that she had been appointed guardian *ad litem* and commissioner in chancery for these complainants, the minor heirs of the said Alfred Bent, deceased, by order of the said district court, the said Guadalupe Bent, by virtue of the power and authority in her confided by the said decree, and in consideration of the sum of six thousand (6,000) dollars, in her conveyance recited to have been paid to her by the said Lucien B. Maxwell, assumed and pretended to grant, bargain, and sell unto the said Maxwell all the right, title, and interest of the complainants herein, in and to the lands and grant in question, to-wit, the undivided one-twelfth interest in the said lands and grant.

The bill further shows and charges that the said Guadalupe Bent is the mother of the complainants herein; that she is a Mexican woman, and at the time of her appointment as guardian *ad litem* to these complainants, and at the time of the execution of the said pretended conveyance, and at the time of the entry of the said last-recited decree, she was wholly ignorant of the English language, unable to read, write, or speak the same; unfamiliar with business or proceedings of courts of law; unacquainted with the rights of the complainants, or her duties in that behalf, or of the bounds or extent of the said lands and grant, or of the character or value thereof; and ignorant of the confirmation of said grant by act of congress; and ignorant of the decree of the said district court directing partition of the said grant, as hereinbefore set forth, or of what part or share in the said grant was claimed by the father of these complainants in his life-time.

The bill then charges, fully and in detail, the various alleged false representations made to the said Guadalupe Bent by the said Maxwell, and by the said Scheurick, by procurement of the said Maxwell, and that, among other things, it was represented to the said Guadalupe Bent that the land or grant in question was comparatively worthless; that it contained little or no minerals, and was only fit for grazing land, and that it only extended to the north line of the territory of New Mexico, and that the said Maxwell was the owner of the

major part of the said grant, and was about to purchase the shares and interest of all the other owners therein, and would control the whole of said grant, and would exclude these complainants from all share and part thereof; and that she, the said Guadalupe Bent, was authorized to sell and convey the interest of these complainants, and that unless she should accept the said sum of six thousand (6,000) dollars, neither she nor these complainants would ever realize anything for the interest of these complainants in the said grant.

The bill then charges that, being moved and induced by the said representations, and by the great power and influence of the said Maxwell, the said Guadalupe Bent executed the pretended conveyance of the interest of these complainants in the said premises.

It further charges that the said Maxwell never paid to the said Guadalupe Bent, nor to these complainants, nor to any one for them, the said sum of $6,000.

It further charges that neither at the time of the entry of the said last-recited decree, at the September term, 1866, of the said district court, nor at any time before or after, did the said Guadalupe Bent, or counsel or solicitor for said Guadalupe Bent, or any other person authorized to agree or consent for these complainants in that behalf, in fact agree or consent as in said last-mentioned decree is falsely recited, or agree or consent to the entry of the said last-mentioned decree, or the vacation or setting aside of the former decree hereinbefore recited.

And it further charges that the said order and decree at the said September term, 1866, of the said district court, was procured to be entered in the absence of the said Guadalupe Bent, and without notice to her of any intention to apply therefor.

It further charges that if the said Guadalupe Bent ever did consent to the entry of the said decree, at the September term, 1866, of the said district court, said consent was obtained by the importunity and fraudulent and false representations of the said Scheurick, and without explanation to the said Guadalupe Bent of the true meaning, purpose, or effect of said decree; and that the said Guadalupe Bent, in and about giving such consent, was entirely ignorant of the effect of the said decree, and ignorant of the former decree, whereby the said Alfred, Teresina, and Estefana were invested with the one-fourth part of the said grant.

The bill further charges that the said Maxwell, or some other person or persons, by procurement of the said Maxwell, caused it to be falsely represented to the said district court that these complainants, or the said Guadalupe Bent in their behalf, had agreed and consented to the setting aside of the said decree first herein recited, and to the entry of the said last-mentioned decree, as the same was entered of record at the September term, 1866, of the said district court; and

that solely by reason of such false representations, and the concealment hereinafter charged, the said district court, without any reference to the master, and without any inquiry or judicial examination as to whether the said decree would be beneficial to the complainants herein, gave and entered the said decree.

The bill further sets forth the great value of the lands in the said grant, and that at the time of the entry of the decree at the September term, 1866, of the said district court, the interest of these complainants was reasonably worth the sum of one hundred thousand (100,000) dollars, and the same hath ever since then been appreciating in value.

The bill further shows that the father of these complainants, said Alfred Bent, left a considerable estate in houses and lands, other than said grant, and in money and personal property; and that the said Guadalupe Bent, the mother of these complainants, out of the said estate, was then and always afterwards well able to support and educate these complainants; and that at the time of the entry of the said decree, at the September term, 1866, aforesaid, of the said district court, there was no necessity for the sale of the interest of these complanants in the said lands.

The bill further shows that, all and singular, the facts therein set forth, by which the value and extent of the said grant, and the estate, real and personal, other than the said grant, left by the said Alfred Bent, and the ability of the said Guadalupe Bent, out of the said estate, to maintain and educate these complainants, and that, all and singular, the before-mentioned facts, touching the execution by the said Guadalupe Bent of the said pretended conveyance to the said Lucien B. Maxwell, and the fraud and imposition practiced upon her in procuring said conveyance, were, by procurement of the said Maxwell, concealed from the said district court at the time of the entry of the said last-recited decree, at the September term, A. D. 1866.

The bill then recites at length the various errors of law alleged to have been committed by the district court upon the foregoing statement of facts.

It further charges that the decree, so as aforesaid entered at the September term of the said district court, 1866, for Taos county, hath never hitherto been carried into execution; that no such conveyance as the said decree directed has ever been made by the said Guadalupe Bent, nor has the said Lucien B. Maxwell, or any one for him, ever paid the amounts therein directed to be paid to the said Guadalupe Bent.

The bill further recites that the said Maxwell Land Grant & Railway Company (assignee of said Maxwell) and the said Lucien B. Maxwell and Luz B. Maxwell, his wife, about the year 1870, exhibited in the district court, in and for the said county of Colfax, their

bill of complaint against the complainants herein and the said Guadalupe Bent, (then known as Guadalupe Thompson, she having intermarried with one George W. Thompson,) as administratrix of the estate of the said Alfred Bent, and George W. Thompson, her husband, setting forth, among other things, the said two decrees of the said district court of the county of Taos, and praying that the trust in said mentioned decrees established and declared might be adjudged terminated and extinguished; that these complainants, by George Boyles, their guardian *ad litem,* as also the other defendants, answered the said bill of complaint, and that thereafter a decree was entered in the said district court, whereby it was decreed that the said premises be and were held by the said Maxwell Land Grant & Railway Company free and discharged of any and all trusts, right, title, and interest in or to the same in favor of or appertaining to the said Guadalupe Thompson, either in her own right, or as admistratrix of the said Alfred Bent, deceased, the said George W. Thompson, her husband, and the said complainants herein, Charles Bent, Alberto Silas Bent, Juliano Bent, or any or either of them; that upon appeal of all of said defendants to the supreme court of the territory the said last-mentioned decree was affirmed, and that upon the further appeal of all of the said defendants to the supreme court of the United States the said last-mentioned decree was reversed, and the said cause was remanded back to the supreme court of the territory, and thence into the district court of the said county of Colfax; and that in the said last-mentioned court the said Maxwell Land Grant & Railway Company hath amended its bill in divers particulars, but sets up, nevertheless, the decree so as aforesaid entered at the September term, 1866, of the district court of said Taos county, and relies thereon, and prays as in the said original bill before amended; all of which these complainants allege is contrary to equity and good conscience.

The bill further shows that by reason of the decree so as aforesaid made and given at the September term, 1866, of the district court for Taos county, and the pretended conveyance by the said Guadalupe Bent of the interest of these complainants in the said premises, these complainants have been unable hitherto to have execution of the decree made and given as is above set forth, or to have partition of the said lands as in the said recited decree directed.

The bill then recites the conveyance in July, 1870, by the said Lucien B. Maxwell and Luz B. Maxwell, his wife, of most of the lands in the said grant to the Maxwell Land Grant & Railway Company, and it further recites the conveyance by said Maxwell and wife of portions of the excepted lands to various other parties, who are all made parties to this suit, so far as their names are known or could be learned.

The bill then prays that the decree of the said district court for said county of Taos, made and entered of record at the May term, A.

D. 1865, establishing the right of the complainant's ancestor, and the said Estefana and Teresina, in and to the equal undivided one-fourth part of the said grant of lands, and directing partition thereof, may stand, and be enforced and carried into execution in all things, and that, if need be, other commissioners be appointed to effectuate the said partition, (some or all of the original commissioners having died or left the territory,) and that, if need be, an inquiry be had, in such manner as the court may direct, as to what lands, if any, have at any time been conveyed by the said Maxwell to any person or corporation; that the decree aforesaid made and entered at the September term, A. D. 1866, of the said district court, in and for said county of Taos, be reversed, annulled, and from henceforth held for naught; that the pretended conveyance of the interest of these complainants in and to the said grant of lands, so as aforesaid pretended to be executed by the said Guadalupe Bent, (now Thompson,) may be declared null and void, and delivered up to be canceled, and that an accounting may be had with the parties who have held the lands since the time that the right of these complainants to share in them was determined, and that such net gains and profits as may be found to be due to the complainants be paid to them.

The complainants then pray for such further, or other and different, relief as may seem according to equity and good conscience.

To this bill, the material allegations of which we have recited, the defendants interposed a demurrer, which was sustained by the court below. The case comes before us now for review of the alleged errors of the court below in sustaining the demurrer. Several special causes of demurrer were assigned by the defendants, which we shall consider in their order.

The first is: "That it appears, from the said bill of complaint, that all the matters and things set forth in said bill, and the issues involved therein, are involved in another cause now pending in this court, wherein all the necessary parties to the said bill are parties."

It does appear by the said bill that another cause is pending in the court below between the plaintiffs and some of the defendants herein, but it is quite evident that to secure the relief prayed for by these plaintiffs all the parties necessary are not parties to the bill referred to. By this bill the plaintiffs demand relief against all persons now claiming to have an interest in the lands in question in both suits, and have properly made parties to it all the parties to the original bill, the decree in which this suit is brought to impeach, and every person claiming through or under any or either of them. It is quite clear that without making all the persons privately interested in the land in question parties to the suit the complainants would not be entitled to the relief they ask for, it being a well-established principle that no one ought to be affected by any decree without his first being heard, and certainly every person now claiming interest in these

lands would be affected by the relief which is prayed for on behalf of the plaintiffs. The rule, as laid down by high authority, is as follows:

"If it appears by the bill that another suit is pending relating to the same matter a defendant may demur, Such demurrer, however, will not hold unless it appears by the bill that the suit already pending will afford to the plaintiff the same relief as he would have been entitled to under the bill which is the subject of the demurrer." 1 Daniell, Ch. Pr. 561.

For the reasons stated we think that this cause for demurrer was not well founded.

The second cause for demurrer assigned is "that the said bill is brought to reverse and annul a decree made and entered by consent, as appears upon the face of the decree itself, without making any sufficient showing that said consent was not given."

It is a well-settled rule of law that a decree made and entered by consent cannot afterwards be impeached by the parties consenting thereto, but this rule is confined to cases where the parties being *sui juris*, and with full knowledge of the force and effect of the proposed decree, have knowingly consented thereto. "A decree by consent between competent parties is binding, unless procured by fraud." Jer. Ch. 203; 1 Barb. Ch. Pr. 373. The bill in this case, as we have seen, charges, not only that no consent was, in fact, given to the entry of the decree sought to be reversed, but it further charges fully and explicitly that, if any such consent was given, it was obtained by fraud, false representation, and imposition. The second special cause for demurrer should, in our opinion, have been overruled.

The next cause for demurrer is: "That the said bill is, in fact, a bill of review brought to reverse and annul a decree rendered by consent, and does not set forth facts sufficient to entitle complainants to the relief prayed for."

This leads us to consider more fully the character of the bill in question. It was brought by the plaintiffs in the court below, for the purpose of impeaching a decree formerly rendered in another cause, by consent, upon the ground that that consent was obtained by fraud, imposition, and false representation. It is so far only a bill of review as any original bill would be which had for its object the reconsideration of a decree entered in another cause; but the parties to it necessarily differ from the parties to the bill of review, inasmuch as that no person is properly made party to a bill of review save parties to the original bill sought to be reviewed, and their privies. We think that, in order to obtain the relief asked for, these plaintiffs were not only entitled to proceed by original bill, but that in no other manner could they secure relief. The rule, as laid down by the text writers, is:

"When a decree has been made by consent, and the consent has been fraudulently obtained, the party aggrieved can only obtain relief by original bill. A bill to set aside a decree for fraud must state the decree, and the proceed-

ings which led to it, with the circumstances of fraud upon which it is impeached. The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decree." Ad. Eq. 420. "A bill to impeach a decree for fraud used in obtaining it, sufficiently explains its own character. It may be filed without leave of the court, because the alleged fraud is the principal point in issue, and must be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be." Id. 419, 420. "If, however, a decree has been obtained by fraud, relief may be had against it by original bill." 1 Jer. Ch. 203; 1 Barb. Ch. Pr. 373. "Where a decree has been made by consent, and the consent has been fraudulently obtained, the party aggrieved can only be relieved by original bill. A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached." 2 Daniell, Ch. Pr. 1584, 1585.

It is clear from these authorities that the bill in this case was properly brought as an original bill, and it does, we think, set forth facts sufficient to entitle the complainants to the relief prayed for, and that this assignment of cause for demurrer is not well founded.

The fourth special cause assigned for demurrer is: "That the said bill in effect seeks to re-establish a decree that has been set aside and annulled by the court that rendered it, without any showing that the decree sought to be re-established was a proper decree, or founded either in law or in fact."

It is a sufficient answer to this cause for demurrer that it is not the duty of this court at this time to consider whether or not the decree sought to be re-established was a proper decree. That decree is not attacked by this proceeding, and for the purposes of considering this case it must be assumed that that decree was properly rendered by a court of competent jurisdiction, upon a sufficient showing of facts to warrant its entry. Whether that decree was well founded either in law or in fact is therefore not now before us.

The fifth cause assigned for demurrer is: "That the said bill appears to be brought on behalf of Juliano Bent and Alberto Silas Bent, infants, by one George W. Thompson, their next friend, without any leave of court being given to the said Thompson to file the same in behalf of said infants, and without said Thompson being lawfully appointed as next friend for said infants."

We are not aware of any rule of law which requires that it should be shown in the bill that an order appointing a *prochein ami* had been entered of record before the bill was filed. The recital of the fact that the infants appear by a next friend, is in our judgment sufficient; the presumption being that whatever steps, if any, were necessary to be taken to warrant that appearance had been properly taken before the bill was brought. Every presumption is in favor of the regularity of the proceedings of a court of general jurisdiction, and unless, as in some states, the statute requires an order of that kind to be entered before the suit will be entertained, we do not think that it is neces-

sary that the bill should recite the fact of such an order. "The next friend will be admitted by the court without any other remark than the recital in the court." *Miles* v. *Boyden*, 3 Pick. 213; *Judson* v. *Blanchard*, 3 Conn. 579. We think, therefore, that this cause for demurrer cannot be sustained.

The sixth special cause for demurrer assigned is: "That the said bill does not show that the complainants are entitled to have the said decree that was set aside re-established or enforced, or that the said decree was a lawful or proper decree under the circumstances and evidences and pleadings of that cause."

This question is not before us, as we have already stated fully in considering the fourth cause for demurrer. That decree has not been attacked, and we are not authorized here to review the law and facts upon which it is founded.

The seventh special cause for demurrer assigned is that "said bill does not show sufficient facts to entitle complainants to have the decree entered by consent set aside, or to have the one that has been set aside by the court reinstated and enforced."

This brings us to a consideration of the ground upon which the relief sought for is asked. The decree which is sought by this proceeding to set aside and annul was entered, as the decree itself recites, by the consent of the parties. Among the parties whose consent was necessary were the complainants in this case, all of them at the time being infants of tender years. It is now alleged on their behalf that that consent was in fact never given, but that if it was given it was given through fraud, imposition, and false representation, practiced upon their guardian *ad litem* in that case, whom they allege was an ignorant person, and wholly ignorant of the rights of these plaintiffs in the premises. Had the proceedings been regular, had the court been fully advised of the law and the facts, had no fraud been practiced, and had the court jurisdiction to make the decree in question, these infants would undoubtedly be bound by it to the same extent as would adults under the same circumstances. Nor does it matter in this case that the decree complained of was apparently a decree in favor of the infant complainants; if it was obtained by fraud, it can be as well attacked whether the complainants here were plaintiffs or defendants in that cause. Upon this subject the text writers say:

> "Though an infant is, in ordinary cases, bound by the effect of any suit or proceeding instituted in his behalf, and for his benefit, yet, if there has been any mistake in the form of such suit, or of the proceedings under it, or in the conduct of it, the court will, upon application, permit such mistake to be rectified." 1 Daniell, Ch. Pr. 73.

Of course, it follows that if the court will, upon application, permit a mistake to be rectified in such a case, for stronger and better reason the court will rectify such mistake where it has resulted from fraud and false representation.

"To impeach a decree on the ground of fraud or collusion, an infant may proceed either by a bill of review, or a supplemental bill in the nature of a bill of review, or he may proceed by original bill. He may also impeach a decree on the ground of error by original bill, and he is not obliged, for that purpose, to wait until he has attained twenty-one." Id. 164-173.

As we have already stated, a court of chancery, always jealous of the rights of its wards, will interfere to rectify a wrong committed against their persons or property, whether they have been in form plaintiffs or defendants in the proceeding in which the wrong was inflicted. The rule upon this subject is laid down to be as follows:

"An infant, when complainant, is as much bound by a decree as an adult. In this respect courts of equity follow the rule of law, but if gross laches appear upon the part of the *prochein ami*, the infant may open the decree by a new bill. In general, infants are bound as much as adults by the conduct of their solicitors, as respects matters of practice, acting *bona fide* in their behalf, but not as to matters of mistake, fraud, or collusion." Jer. Ch. 821. "As respects infants, although the court will not, when they are concerned, make a decree by consent without referring it, yet, when once a decree has been pronounced without it, the infant will not be permitted to dispute it, unless upon the same ground as an adult might; such as fraud, collusion, or error." Id. 202; 1 Daniell, Ch. 164; 1 Smith, Ch. 419.

We think that the bill under consideration does state facts sufficient to warrant the interference of a court of equity in their behalf, and that, under the authorities cited, they have properly brought their bill in the form of an original bill to impeach the decree complained of on the grounds of fraud, imposition, and error. But, aside from any question of fraud or false representation, we are of opinion that the decree complained of was wholly erroneous, in undertaking, at that time and under the circumstances, to direct the sale and conveyance of all the right, title, interest, estate, claim, and demand of the complainants in the real property therein referred to.

There can be no doubt but that the decree of the third of June, 1865, of the district court of Taos county, referred to and set forth at length in the bill herein, vested in Alfred Bent, the father of these complainants, a legal estate to the undivided one-twelfth part of the lands therein referred to, and now commonly known as the Maxwell Grant or Estate, as one of the heirs at law of Charles Bent, deceased. The recital in that decree is as follows:

"Furthermore, that the said Alfred, Estefana, and Teresina, upon the death of their said father, inherited, succeeded to, and became seized of the said undivided one-fourth part interest and estate which belonged or pertained to the said Charles Bent, in law and equity, in and to the lands or real estate in the entire tract or grant aforesaid at the time of his decease; and that the said Alfred, Estefana, and Teresina are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant. Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land, or real estate, be and hereby is declared established and confirmed to them, the said Alfred, Estefana, and Teresina, and to their heirs and assigns, forever, with the full and perfect right, power, and authority to possess and enjoy the same."

This, as we have already stated, vested in Alfred Bent a legal estate in the said lands, and when, in December, 1865, the said Alfred Bent died intestate, leaving these complainants as his sole heirs at law, the legal estate so vested in him passed, by operation of law, to these complainants.

It has been suggested by counsel for the defendants in error, in their argument, that the estate vested in these infants was only equitable, because it required a suit in equity to ascertain and determine it, and because the interlocutory decree, on which the plaintiffs in error rely, found that they were justly and equitably entitled; and, further, that it was equitable, because the supreme court of the United States refers to it as such in *Thompson* v. *Maxwell*, 95 U. S. 393; the language of the court in that case being: "The original bill was instituted by the heirs of Charles Bent to establish an equitable interest in the undivided share of the lands." We hardly think this suggestion or argument is worthy of further consideration. It is enough to say that the decree of the court in that suit in equity changed what had theretofore been an equitable interest into a substantial and well-defined legal interest. It was for that very purpose that that suit was brought, and its purpose was accomplished and declared by the decree in question. It being a legal estate with which these infants were vested, it was error for the district court of Taos county, at that time, to make a decree authorizing any person to divest them of that estate. The law on this subject is well-settled:

"With reference to the real estate of an infant, it may be said that neither a court of law nor equity has any inherent jurisdiction to direct a sale of it." Tyl. Inf. & Cov. § 193, p. 299.

And, discussing the subject, the same author says:

"Chancellor HART said, in a recent case: 'I have no authority to bind an infant's real estate. That was decided long ago by Lord HARDWICKE, in *Taylor* v. *Philips*, 2 Ves. Sr. 23.' The chancellor has never since attempted to deal with the legal inheritance of infants without the aid of parliament." *Russel* v. *Russel*, 1 Moll. 525.

"The jurisdiction, therefore, in cases of this kind, rests altogether upon the statute. Independently of an authority derived from the legislature, the court has not the right to entertain the question, or direct a sale." *Garmstone* v. *Gaunt*, 1 Colly. 577; *Rogers* v. *Dill*, 6 Hill, 415–417; *Onderdonk* v. *Mott*, 34 Barb. 106.

"By reason of this rule, statutes exist, both in England and in all of the American states, conferring jurisdiction upon the courts to order the sale and conveyance of an infant's real estate in the cases specifically provided for. * * * It seems to be the doctrine, sustained by the preponderance of authority, that a court of equity has no power, as a part of its jurisdiction over infants, to order a sale of the infant's real estate for the purpose of maintenance, education, or investment." 3 Pom. Eq. Jur. § 1309; *Williamson* v. *Berry*, 8 How. 498, 551; *Rogers* v. *Dill*, *supra*; *Faulkner* v. *Davis*, 18 Grat. 651; *Kearney* v. *Vaughan*, 50 Mo. 284.

Another authority says:

"In cases where a trust exists, the degree of authority, as well as the manner of its exercise, will depend on the terms of the instrument creating it.

In either case the court is thrown upon its inherent jurisdiction, and has authority to manage the estate during minority, and to apply the proceeds for the infant's benefit; but there is no inherent power to dispose of or alter the estate itself." Ad. Eq. 284.

In the light of these authorities we think that the decree complained of by the complainants was clearly erroneous, because the court had no jurisdiction whatever to make it. While, as stated in some of the authorities cited, in all the American states special statutory authority has been given to the courts of chancery to dispose of infants' real estate, under specified restriction, we find that in the territory of New Mexico no such statute was in existence at the time the decree was made, in 1866, nor was any such statutory authority conferred upon the courts of this territory until 1872, when, evidently recognizing the necessity of legislation of that kind, the legislature enacted as follows:

"The district and also the probate courts, in this territory, shall have jurisdiction, within the counties wherein the same are held, to decree the sale, hypothecation, or other disposal of the real estate, situated in said counties, of minors and persons known as *non compos mentis.*" Act 1872, *c.* 16, (Prince's St. p. 485.)

Without such authority as was conferred upon the court by this act, we are of the opinion that the district court for Taos county erred when it made the decree in question in this suit, and that the complainants herein are entitled to maintain the bill which they have filed for the correction of this error, by which they have, as we think, been unlawfully divested of their legal interest in the grant of lands in question.

It is suggested by counsel, though not in the court below, and therefore not necessarily considered here, that this suit was improperly brought in the county of Colfax. In respect of this suggestion, we are of opinion that the suit could not have been brought elsewhere under the statute.

By chapter 2 of the acts of 1876 (Prince's Laws, p. 130) it is provided:

Section 1. "All civil actions which may hereafter be commenced in the district courts, shall be brought and shall be commenced in counties as follows, and not otherwise: * * * (4) When lands or any interest in lands are the subject of any suit, in whole or in part, such suit shall be brought in the county where the land or any portion thereof is situated."

The land in question in this suit was originally a part of Taos county, but by various legislative enactments, changing the boundaries of counties and creating new counties, it had come to be within the limits of Colfax county at the time that this suit was brought, and therefore the suit was properly brought in that county. The counsel who have suggested this propositton acted upon this theory of the law when they brought their suit of *Thompson* v. *Maxwell*, to review the decree of the court which is in question here. They brought that

suit in Colfax county, and, doubtless, for the reason that, under the law, they would not have been authorized to bring it elsewhere.

No other questions have been raised by the demurrer than those we have considered.

It follows, from the views which we entertain, that the court below erred in sustaining the demurrer interposed herein, and that the judgment entered therein should be reversed; and it is so ordered.

BRISTOL, J. I concur.

ALEXANDER v. TENNESSEE & LOS CERRILLOS GOLD & SILVER MINING CO.

Filed May 3, 1884.

1. NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries, where it appeared that plaintiff, the foreman of a mine, before he entered the service of the defendant mining company, was cognizant of a defect in the hoisting machinery, by means of which he was subsequently injured, and brought it to the attention of the superintendent, but undertook the employment notwithstanding, without any promise that it should be remedied, the court properly held him guilty of contributory negligence, and directed a verdict for defendant.[1]

2. FEDERAL PRACTICE—DIRECTING A VERDICT.

Although a court of the United States has no authority to enter a peremptory nonsuit, it has authority to direct a jury to find a verdict for a defendant, and it should always do so when it will not permit a verdict for the plaintiff to stand.

This case was tried at the February, 1883, term of the First judicial district court within and for the county of Santa Fe, before the Hon. S. B. AXTELL, chief justice.

Fiske & Warren, for appellant.

H. L. Waldo and *Wm. Breeden*, for appellee.

BELL, J. The appellant was the plaintiff in the court below. The action was brought to recover damages for injuries received by the plaintiff while in the employment of the defendant, in consequence of the failure on the part of the defendant to provide and maintain safe, proper, and sufficient brakes, apparatus, and appliances in connection with a certain whim used for hoisting ore out of the mine of the defendant company. Upon the trial evidence was introduced by the plaintiff to the following effect: That he, the plaintiff, was a miner by profession, having had an experience of 15 years in that employment, and that he regarded himself as an expert in that business;

[1] As to servants' continuing in employment after notice of danger, see Railroad Co. v. Mares, 8 Sup. Ct. Rep. 321; Snowberg v. Paper Co., (Minn.) 45 N. W. Rep. 1131; Rogers v. Railroad Co., (Tex.) 13 S. W. Rep. 540; Railway Co. v. Hines, (Ill.) 23 N. E. Rep. 1021.

that on some day subsequent to the twenty-fifth day of April, 1881, the plaintiff was employed by the defendant company, through the agency of its superintendent, W. E. Parish, as foreman of the company, and placed in charge of the work at the mine. According to his own testimony the work was substantially all done under his supervision and direction. He employed and discharged the laborers in and about the mine, assigned them to such work as he deemed proper, and directed the general course of the work. This he did under the general supervision of Mr. Parish, but it would appear from all the testimony that as to the conduct of the actual work at the mine the plaintiff was in substantially supreme control.

Before entering into the employment of the defendant company as its foreman, as aforesaid, and on or about the twentieth of April, 1881, there had been in use at the mouth of the mine a certain whim, for the purpose of hauling up ore from the bottom of the shaft. At about the last-mentioned day, the whim thus in use was broken or destroyed, or its usefulness in some manner so much impaired that it was cast aside, and, under the superintendence of Mr. Parish, a new whim was erected. This took place on or about the twenty-third of April. At that time, and when the whim was being put up, the plaintiff was present at the mine, though not in the employment of the company. While the whim was being erected, the plaintiff testifies that he heard a certain man, whose name he gives, speak to Mr. Parish in reference to it, and tell him, in substance, that there should be an iron band placed around the whim at or near its top, in order to strengthen it there, and keep together more firmly and securely the staves out of which the whim was constructed. After this occurrence, and on or about the twenty-fifth of April, the plaintiff himself testifies that he spoke to Mr. Parish in reference to the whim, and said that he should put a band around the top of the drum, being substantially the same advice that had already been given to Parish by another person in the plaintiff's presence; and that Parish represented it to the plaintiff to be a good whim, and all right in every respect; that subsequent to this time, but how long exactly does not appear from the record, the plaintiff, with knowledge of what he deemed the faulty construction of the whim in question, and though nothing had been done to strengthen it in any way, so far as the record shows, entered into the employment of the defendant, as its foreman, and continued in such employment until the sixteenth day of September, 1881, upon which day the accident took place which resulted in the injuries to the plaintiff for which this action is brought.

It does not appear that when the plaintiff thus entered into the employment of the company there was any promise or assurance on the part of the defendant that the alleged defect in the construction of the whim would thereafter be remedied. It appears that upon the sixteenth day of September, 1881, in the morning thereof, the plaintiff, having on the day prior thereto employed a new hand to work in

the mine, went down into the shaft in order to assign him to the work which he wished him to do in the mine; that, having done so, and while on his way up the shaft, the ore bucket, which had been drawn to the top of the shaft, filled with material from the mine, fell violently down the shaft and struck the plaintiff with such force as to cause the injuries for which seeks to make the defendant liable. It appears that the bucket, laden with material, had been drawn up to the mouth of the shaft, and that when it had arrived there, and was some distance above the trap-doors, which were so arranged as to shut the mouth of the shaft, in accordance with the instructions theretofore given by the plaintiff himself to the man in charge of the whim, the brake was applied to the whim, and the sweep which fastened into the ratchet-wheel at the top of the whim was thrown out of gear; that the brake failed to act properly; that the whim slipped and the bucket began violently to descend, the trap-doors not being closed, and that then the man at the whim, in his effort to stop the descent of the ore bucket, applied his lever to the sweep and threw it into gear upon the ratchet-wheel, but that, owing to the momentum acquired by the bucket, or the alleged insufficiency in strength of the whim, the staves of the whim were torn out, the bucket continued to descend, and struck and injured the plaintiff. It appears that had the trap-doors at the top of the shaft been closed before the sweep was thrown out of gear, and then the brake had failed to perform its office, no damage could have been done, as the bucket would have been arrested by the trap-doors.

The plaintiff testified that according to his instructions the trap-doors were not to be closed until after the brake was applied, and the sweep thrown out of gear. This is also the evidence of Beckwith, the man in charge of the whim, and who was called as a witness for the plaintiff. He also testified that in his judgment the trap-doors should have been closed before the sweep was thrown out of gear, and that that course was not taken because of the order which he had received upon that subject from the plaintiff. It appears that the ordinary legitimate purpose for which this sweep was placed in gear upon the ratchet-wheel was to enable the horse fastened to the sweep to wind up the rope upon the drum, which was attached to the ore bucket, and thereby draw it up from the bottom of the mine. Whether or not it was any part of the legitimate function of the sweep to be thrown in gear and to act as a brake does not appear. The plaintiff, though a man of great experience as a miner, testifies that he did not know that it was to be applied for any such purpose. The evidence shows that from the date of its erection, in April, 1881, until the day of the accident, September 16, 1881, the whim had satisfactorily performed its legitimate office of drawing up ore and other material from the bottom of the mine.

Evidence was also introduced showing that the plaintiff was seriously injured by reason of the descending bucket colliding against

his person. This was in substance the evidence for the plaintiff, and after its introduction counsel for the defendant moved the court to instruct the jury to find for the defendant. The court thereupon directed the jury to find a verdict for the defendant, which was done. To this ruling and action of the court the plaintiff then and there excepted. The only question presented by this record is, was the plaintiff entitled to recover upon the evidence introduced in his behalf? If upon that evidence the plaintiff was entitled to recover, the court necessarily erred in directing a verdict for the defendant.

Two questions were presented: *First*, was there negligence on the part of the defendant for which it should be held liable? *Second*, was there such contributory negligence on the part of the plaintiff as to relieve the defendant from any liability?

We think it is only necessary, in this case, to consider the latter of these two propositions. It is not entirely clear, from the evidence introduced, that the plaintiff himself was not the vice-principal of the defendant. He was there in practical charge of the operations of the mine of the defendant company, according to his own evidence and the evidence of the superintendent of the company. He discharged and employed such persons connected with the conduct of the work as he deemed best for the interests of the defendant. It does not appear that he was limited as to the number of persons whom he might employ, or the work to which he might assign any person so employed. We refer to this latter fact because it would appear, from the facts in evidence, that the trap-door at the mouth of the mine, if shut before the sweep was thrown out of gear, would have prevented the accident which resulted in the plaintiff's injury. The witness Beckwith, who had charge of the whim and work at the mouth of the mine, testified that in his judgment that course should have been taken, and that in such case the accident could not have taken place. It does not appear from Beckwith's evidence but that he might have closed these trap-doors without difficulty before throwing the sweep out of gear and applying the brake; but the plaintiff testified that it would not have been possible for Beckwith to have closed the trap-doors, and at the same time have properly operated the two levers connected respectively with the brake and sweep. If this be true, it does not appear but that the plaintiff, empowered as he was to employ such persons as he deemed proper or necessary for the conduct of the work, and assign them to such duty as he might choose in connection therewith, might as well have supplied an additional hand, if that were necessary, to close these trap-doors, which would have made such an accident as did occur impossible, according to the evidence of all the witnesses. We think that it was negligence upon the part of the plaintiff not to have provided this safeguard, not only for the protection of himself, but for the protection of the other employes as well, in and about the mine.

The plaintiff's case seems to have been wholly based upon the al-

leged defects in the construction of the whim used for hoisting. In that behalf it is said that the whim should have been encircled by a certain iron band fixed to it near the top, and that it would then have been constructed in a proper and safe manner. According to all the evidence the legitimate and ordinary office performed by this whim was to draw up the laden ore buckets from the bottom of the mine. The ratchet-wheel around the top of the drum served as a rest within which the sweep when in gear was fixed for the purpose of turning the whim. It appears that for the period of about five months the whim had been in constant use, and had performed this office in a satisfactory manner. It does not appear from the evidence that it was any part of the legitimate functions of that ratchet-wheel to serve as a brake to prevent the descent of the bucket into the mine, and at the time of the accident the throwing of the sweep into gear was but a desperate effort as a last and only resort to arrest the falling bucket. How much momentum had been acquired by this laden bucket before the sweep was thrown into gear the evidence does not disclose; but it is quite certain that when the sweep was thrown into gear a heavily laden ore bucket was descending into the mine at a high rate of speed. It is difficult to estimate what power it would have required, applied to the ratchet-wheel by throwing the sweep into gear, to have arrested its revolution.

We think it is quite clear that it was not intended that the whim itself should be constructed of sufficient strength to do this work. The real defect in the appliances in use at the time appears to us to have been in the brake, of which, however, no complaint has been made. Had the brake properly done its work no such accident could have occurred.

But the plaintiff complains of the faulty construction of the whim, and seeks to show that the accident arose solely from its faulty construction. If this were so, we think that the plaintiff, by his contributory negligence, has relieved the defendant from any liability arising from that source. The evidence shows that, before he went into the employment of the company, he was aware of the improper construction of the whim in question, not only from hearing the attention of the superintendent called to it by another person, but it also appears that he himself had spoken with the superintendent in regard to it, and had called his attention to the defects alleged to have existed in its construction. With this knowledge, and after these conversations in regard to the whim, and without any promise that any change would be made by which the alleged defects would be cured, the plaintiff took service from the defendant, without condition in this regard, and continued in that service for several months before the accident took place. This, we think, was such contributory negligence as relieved the defendant from any liability whatever to the plaintiff, under the circumstances.

The rule of law is perfectly well settled, and is as follows:

"If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow-servant, in connection with which or with whom he is to labor, is unsafe or unfit in any particular, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him." 2 Thomp. Neg. p. 1008, § 15; Wood, Mast. & Serv. §§ 377, 384; *Dillon* v. *U. P. Ry. Co.* 3 Dill. 319.

The principle of law thus laid down is sustained by all the authorities, and is so well settled as to be elementary. Some exceptions and limitations there are to the rule, but the case at bar does not, in our judgment, come within any of them.

In another section of the same work the author says:

"There is no reason, however, why, in plain cases, the question of the servant's accepting the risk by continuing in the service after knowledge of the defect should not be resolved against him as a matter of law. It was done, with obvious propriety, in a case where an engineer had been in charge of a particular locomotive for about three months, which had no signal-bell, in consequence of which he was injured. He did not allege that he had complained of the want of such bell, or that he had asked to have one supplied, or that he had objected to serving for that reason. It was held that his petition was bad on demurrer." 2 Thomp. Neg. p. 1015, § 20; *Billon* v. *U. P. Ry. Co.*, *supra*.

We think that the plaintiff's case comes clearly within the doctrine enunciated by these authorities; that, upon all the evidence introduced in his behalf, he was not entitled to recover; and that the court properly directed a verdict for the defendant.

It is objected, by counsel for the appellant, that a court of the United States has no power to order a peremptory nonsuit. That, no doubt, has been the law ever since the decision of *Elmore* v. *Grymes*, 1 Pet. 469; but that course was not taken in this case,—a nonsuit was not ordered by the court, but a verdict was directed for the defendant, because the evidence failed to establish the right of the plaintiff to recover. Under such circumstances it is not only right, but it is the duty of the court to so instruct the jury, and the power to do so has been declared in numerous adjudications of the supreme court of the United States. In *Railroad Co.* v. *Jones*, 95 U. S. 439, this authority is expressly affirmed. The court says in that case:

"One who has, by his negligence, brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such case is entitled to no relief. * * *"

That was a case where the plaintiff had recovered damages for the alleged negligence of the defendant railroad company in running into a train of cars standing in a tunnel. The plaintiff was riding upon the pilot of the locomotive. The court held that this was such contributory negligence upon his part that, as matter of law, he was not

entitled to recover, and that it would have been error upon the part of the trial court to have refused to direct a verdict for the defendant, had it been requested so to do. The court says:

"The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse." Citing *Gavett* v. *M. & L. R. Co.* 16 Gray, 501; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Pleasants* v. *Faut*, 22 Wall. 121.

It is doubtless true, as urged by counsel, that the court has the right to exercise this power only when the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. One of the tests, and perhaps the most satisfactory test, for the exercise of this power, is, would the court have permitted a verdict for the plaintiff to stand? If, upon the evidence, the court would have felt compelled to set a verdict for the plaintiff aside, it would be its duty to direct the jury to find for the defendant.

It is urged for the plaintiff that the courts of the territory, not being in strict sense courts of the United States, adjudications of the supreme court of the United States do not necessarily govern their decisions; but that is not law. In *Herrera* v. *Chaves* the rule is properly laid down to be:

"We are constrained to regard the decisions of the supreme court of the United States 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 United States supreme court." 2 N. M. 86; *Montoya* v. *Donohoe*, Id. 214.

It follows, from these views, that there was no error on the part of the court below in directing a verdict for the defendant. The judgment should be affirmed; and it is so ordered. BRISTOL, J. I concur.

BAXTER MOUNTAIN GOLD MINING CO. *v.* PATTERSON and others.

Filed May 3, 1884.

MINING CLAIM—NOTICE OF LOCATION.

A notice of the location of a mining claim, under the laws of the United States and the territory of New Mexico, which does not describe the limits of the claim by reference to natural objects or permanent monuments, is not sufficient, although it describes the claim as bounded by certain other claims.[1]

AXTELL, C. J., dissents.

Beall, Chandler & Hough and *W. T. Thornton*, for appellants.

W. B. Childers, for appellees.

[1] *Contra*, McGregor v. Donnelly, (Cal.) 7 Pac. Rep. 422. As to sufficiency of notice and description, see Carter v. Bacigalupi, (Cal.) 23 Pac. Rep. 361; McBurney v. Berry, (Mont.) 5 Pac. Rep. 867; Leggatt v. Stewart, (Mont.) 2 Pac. Rep. 320; Russell v. Chumasero, (Mont.) 1 Pac. Rep. 713.

BELL, J. This is an appeal from a judgment entered against the plaintiff and appellant in the district court for Lincoln county at the October term, A. D. 1883. The plaintiff brought its action in ejectment to recover the possession of a certain mining claim known as the "Oro Cash" lode, situated at White Oaks. The only question presented by the record is whether the notice of location, offered in evidence by the plaintiffs in support of their action, was improperly excluded by the court. The notice is as follows:

"Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States, and of the local customs, laws, and regulations, has located 'Oro Cash' lode, ledge, or deposit of mineral bearing rock, situated in White Oaks mining district, county of Lincoln, and territory of New Mexico, and described as follows: Situated on Baxter mountain, west of Baxter gulch; bounded on the west by Homestake lead, on the south end by Silver Cliff claim, on the north end by Rip Van Winkle claim; running (600) six hundred feet in a southerly direction, and (100) one hundred feet in a northerly direction, three hundred feet in width. Discovered November 4, 1880; located November 18, 1880. G. R. NICKEY, Locator.

"Attest:

"JAMES W. LAWSON.

"J. O. NABOURS.

"Filed for record this twelfth day of January, A. D. 1881, at 10 o'clock A. M., and duly recorded as above. BEN. H. ELLIS, Recorder.

"By WM. O. BURT, Deputy."

"*Territory of New Mexico, County of Lincoln—ss.:* I, S. R. Corbett, probate clerk and *ex officio* recorder in and for the county of Lincoln, in the territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the location notice of the 'Oro Cash' mine, as recorded in Book H, page 141, of the mining records of this office.

"In witness whereof, I have hereunto set my hand and official seal the twentieth day of August, A. D. 1883. S. R. CORBETT,

"[Seal.] Probate Clerk and *ex officio* Recorder, Lincoln County, N. M."

Counsel for the defendants objected to the introduction of this notice, alleging that it was void for insufficiency as a location notice, and failed to properly describe a mining claim. The court sustained the objection, and to this action an exception was taken; and that is the only question presented for our consideration.

By the statutes of the United States all records of mining claims shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. By the laws of this territory the locator is required to post upon the claim a notice, which shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. It will thus be seen that the statutes of the territory, in providing what was to be a sufficient location notice, follows the language of the United States Statutes as to what shall be a necessary description to be inserted in the

record of the claim. We are of opinion that the location notice offered in evidence on behalf of the plaintiffs in this case fails to comply with the notice required by the laws of the territory, and that, consequently, the court rightfully refused to permit its introduction as evidence. The purpose of the law is, in our judgment, to require such notice and description of the claim as would enable any person going upon the ground to identify it by means of the references made to natural objects or permanent monuments. We think that the boundary lines of other adjoining claims are neither natural objects nor permanent monuments. They are, in fact, imaginary lines which are to be determined by the natural objects or permanent monuments actually existing upon such other claims. Those claims themselves may be well marked and defined by natural objects or permanent monuments, but no reference is made to either in the notice in question in this case. If the notice of location in this case is held to be good, then the court, in effect, will hold that, in order to locate the claim covered by the notice, the person attempting it must make a survey of each of the other claims referred to in it, in order to correctly fix the lines of the claim which is bounded by them. This, in our opinion, cannot have been the intention of the law. It seems clear to us that the natural objects or permanent monuments required by our statute must be such as will enable a person, endeavoring to locate the claim, to correctly make a survey of it by means of the references made to such natural objects or permanent monuments.

The case cited by counsel for appellant, and much relied upon, is the *Southern Cross Co.* v. *Europa Co.* 15 Nev. 385. That case bears analogy to this case only because the notice of location, which called for stone monuments at each corner of the claim, also described it as bounded by four other claims. The court sustained the sufficiency of the notice upon the fact that it called for the stone monument on each corner, which, of course, was satisfactory. It in effect decided that these monuments were all that were necessary, for in the opinion the court says:

"If it were necessary in order to support the findings of the court below, we would presume that these other claims were well known, and defined by permanent monuments. If they were so defined, there can be no question that plaintiff's notice was sufficiently definite as to the *locus* of the claim."

In other words, the court holds that in order to sustain the findings they would presume that evidence of permanent monuments upon the other claim was presented to the court below. The court nowhere intimates that a location notice, making alone as boundries the lines of four other claims, would be sufficient.

In *Faxon* v. *Barnard,* 2 McCrary, 45, S. C. 4 Fed. Rep. 702, Judge HALLETT says:

"There is, however, another objection to defendant's certificate of location, that it does not refer to a natural object or permanent monument from which the claim may be identified. We are not asked to consider what may be a

natural object or permanent monument to which reference may be made, but whether the language of the certificate in making such reference is sufficient under the law; for there is not in the certificate anything whatever as to any natural object or monument. It is said that the claim is situated on the north side of Iona gulch, about timber line on the west side of Bald mountain. Said claim is staked and marked as the law directs. It is utterly impossible to find in this language any reference to a natural object or permanent monument defining the location, and the only question is as to the effect of the omission. The act of congress requires such reference to be made in the description of the claim, (Rev. St. § 2324,) and the state legislature has declared that the certificate shall give such description as shall identify the claim with reasonable certainty. Gen. Laws Colo. 630. * * * The government gives its lands to those citizens who make discovery of precious metal ores thereon, upon condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government, or on the part of other citizens who may be seeking like bounty. This is reasonable and necessary to justly administer the law, and therefore, it must be said, without such description a certificate of location is void."

As we have seen, under the statutes of New Mexico the location notice must describe the claim with reference to natural objects or permanent monuments. That those natural objects or permanent monuments mean substantial objects which can be seen by the eye, and made the basis for a survey, we have no doubt. The very foundation and basis of a mining claim is a correct location notice. Without that, no proof of possesion or boundary can be made. The notice in the case at bar is deficient in this description, and consequently void, and was properly excluded from the record by the court below.

Judgment must be affirmed; and it is so ordered.

AXTELL, C. J., *dissenting*. The plaintiff, to support its case, offered in evidence a certified copy of the original location notice, which said certified copy was in words and figures as follows:

"NOTICE OF LOCATION.

"Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States, and of the local custom, laws, and regulations, has located 'Oro Cash' lode, ledge, or deposit of mineral bearing rock, situated in White Oaks mining district, county of Lincoln, and territory of New Mexico, and described as follows: Situated on Baxter mountain, west of Baxter gulch; bounded on the west by Homestake lead, on the south end by Silver Cliff claim, on the north end by Rip Van Winkle claim; running (600) six hundred feet in a southerly direction, and (100) one hundred feet in a northerly direction, three hundred feet in width. Discovered November 4, 1880; located November 18, 1880. G. R. NICKEY, Locator.

"Attest:

"JAMES W. LAWSON,

"J. O. NABOURS.

"Filed for record this twelfth day of January, A. D. 1881, at 10 A. M., and duly recorded as above. BEN. H. ELLIS, Recorder,

"By WM. O. BURT, Deputy."

To the introduction of which the defendants objected, because the same was void for insufficiency as a mining location notice, [the objection that this was not the original location notice was waived by an agreement of record,] and the only objection made by the defendants was the insufficiency of the location notice to properly describe a mining claim. The objection was sustained by the court, to which objection the plaintiff then and there excepted. The plaintiff then offered to show that the mining claim referred to in the location notice as boundaries of said "Oro Cash" claim were old and well-known mines, with well-defined and established boundaries, and that they were situated, as to the "Oro Cash" claim, as described in the notice of location, and at the point of discovery the notice of the "Oro Cash" location was posted; that the lines of the claim were well marked upon the ground, as the law required, and properly staked and monumented at each and every corner thereof, with end stakes at the points in the end of the claim where the vein passes out, and to show that immediately after the location of the said claim that the locator went into possession thereof, and remained in possession until the claim was transferred to the plaintiff by proper deed, and that the plaintiff remained in possession from the time of said conveyance until ousted by defendants, in the month of June, 1883; that the "Oro Cash" was a well-known claim; that it was well known throughout the camp by its name and boundaries, as marked upon the ground, and to be the property of the plaintiff. The defendants objected to the introduction of this evidence, or any part thereof, and the objection was sustained, to which ruling the plaintiff then and there excepted. At this point plaintiff took a nonsuit, with leave to set aside, and afterwards final judgment was entered in favor of defendants. Plaintiff appealed to this court, and assigned as error the refusal of the court below to receive the evidence offered.

A location of a mining claim, when perfected, has the effect of a grant by the United States of the right of present and exclusive possession and enjoyment of all the surface included within the lines of the location. These lines must be distinctly marked upon the ground, so that the boundaries of the claim can be readily traced. In addition to the marking upon the ground, the statutes of the United States and of this territory require that the claim shall be recorded, and a notice posted in some conspicuous place upon the claim, giving the name or names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify the claim. A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations. A mining claim thus perfected is property in the highest sense of that word.

The plaintiff below offered to prove that all the requirements of the laws of congress and of this territory had been substantially com-

plied with; that the mining claims which are referred to in the notice of location were old and well-known mines, with well defined and established boundaries. Whether this was so or not was a matter of proof, and the plaintiff ought to have had an opportunity to make good his declarations.

CORKINS *v.* PRICHARD and others.

Filed May 3, 1884.

APPEAL—CONFLICTING EVIDENCE—VERDICT.

Where there is a substantial conflict in evidence, the verdict of a jury will not be disturbed unless error in law occurred on the trial.

Appeal from a judgment entered in favor of plaintiff, Corkins, in an action for forcible entry and unlawful detainer.

T. F. Conway, for appellee.

G. W. Prichard and *M. Salagar*, for appellants.

AXTELL, C. J. This action was brought by Corkins against Prichard, before a justice of the peace in San Miguel county, and, on appeal to the district court, Corkins had judgment.

The assignments of error are: (1) That there was no sufficient description of the property; (2) no possession was shown to have existed in plaintiff prior to bringing the suit; and (3) that no forcible entry was proven.

All these assignments of error are facts about which the record shows a substantial conflict in the evidence. In such a case this court will not disturb a verdict of a jury unless it is shown that some error in law occurred upon the trial. The fourth and only assignment of error in law is that the court refused to admit certain evidence. The evidence thus refused to be admitted by the court was an offer to prove that defendant Prichard desired to rent a piece of land "on the other side of the ridge of rock." This witness was asked: "Do you know where the quarries are that Mr. Corkin has been taking rock from?" *Answer.* "No, sir." "Are you acquainted with Hugh Prichard?" "I am." "Under what circumstances did you become acquainted with him?" "He came to me to rent a piece of land out on the other side of the ridge of rocks, to get some rocks from the side of the land." We fail to see in what possible way the exclusion of the offer to prove that Prichard desired to rent or did rent land "out on the other side of the ridge" could affect the case. The court did perfectly right in excluding this evidence. Judgment affirmed.

We concur: BELL, J.; BRISTOL, J.

SPEIGELBERG and others v. HERSCH and others.

Filed ——, 1884.

1. CHATTEL MORTGAGE—POWER OF DISPOSITION IN MORTGAGOR—FRAUD.
A chattel mortgage executed by a merchant to his brother-in-law upon his stock in trade, according to the terms of which instrument the mortgagor is to retain possession of the goods, and go on with his business just as before it was given, is fraudulent, and as to creditors void.

2. SAME—PALPABLE EFFECT TO DELAY CREDITORS—PURPOSE IMPUTED BY LAW.
A chattel mortgage which allows the mortgagor power to dispose of the goods hypothecated by it, is no security to the mortgagee; and if on its face it shows, as a legal effect, the delaying of creditors, the law imputes to it a fraudulent purpose.[1]

Breeden & Waldon, for appellants.

Gildersleeve & Knaebel, for appellees.

AXTELL, C. J. The issue in this case was the truth of an affidavit for attachment. The affidavit charges that defendants had fraudulently concealed and disposed of their property with intent to hinder, delay, and defraud their creditors. The facts proved are substantially as follows: Defendants were merchants in Santa Fe, engaged in a general retail trade; they were indebted to plaintiffs in the sum of about $1,000; that defendant L. Hersch, at Santa Fe, made his certain promissory note to his brother-in-law, Sigmund Praeger, of New York, for the sum of about $6,000; that to secure payment of this note he executed to said Praeger a chattel mortgage upon his stock of goods in his store at Santa Fe, said mortgage covering nearly his entire stock; that it was understood and agreed between Hersch and Praeger that Hersch was to remain in possession of said goods and carry on the business exactly the same as before the mortgage was given, and in fact he did so remain and so conducted the business.

There are some other circumstances in proof which might slightly vary or shade the above statement of facts, but it is believed that there is enough stated to bring out clearly the point made by plaintiff in favor of sustaining the attachment. Plaintiff asked the court to instruct the jury as follows:

"In law no one can mortgage a stock of goods, and yet remain in possession and carry on the business in the usual way, without paying all the proceeds on the account of the mortgage debt. If there be other creditors, such mortgage is a fraudulent transfer as to creditors; and if the jury believes, from the evidence, that such were the facts in this case, they must find for the plaintiff."

The effect of this instruction was to take the case from the jury by instructing them that such a mortgage was a fraud in law as to other creditors. The court refused to give the instructions. The jury found

[1] See note at end of case.

for defendant and against the truth of the affidavit for attachment, and plaintiff appeals to this court. Substantially, there was no other proof of fraud, or hindering, delaying, and defrauding, except giving this mortgage. Is such a mortgage a fraud in law as to creditors? In *Robinson* v. *Elliott*, 22 Wall. 513, Mr. Justice DAVIS elaborately reviews the authorities, and reaches the conclusion that such a mortgage is a fraud in law as to creditors. In the language of that opinion: "It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession, accompanied with power to dispose of it for the benefit of the mortgagor alone." The latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and, of itself, furnishes a pretty effectual shield to a dishonest debtor;" and, as in that case, so in the case at bar. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell their goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.

The mortgage in the case at bar is simply a fraudulent attempt, under the forms of law, to provide a shield by means of which a dishonest tradesman might ward off his creditors for an indefinite period, and the transaction reflects discredit upon all persons connected with it. The note pretended to be secured is on demand. There is no provision in the mortgage when it is to be paid; but, for fear this should not be a sufficient protection, there is a provision in this dishonest instrument that it shall be a mortgage on goods thereafter to be bought, so long as such purchases shall not exceed the limit mentioned, which is set at $30,000,—about three times as large a stock as the store usually carried. There is also a provision in this fraudulent and scandalous instrument that Praeger, the mortgagee and brother-in-law of the mortgagor, may at any time, upon default of payment of said note, which is payable upon demand, take immediate possession of said stock of goods. So, if the court upholds this mortgage, the mortgagee can at any moment demand his money, and, upon failure to pay, take immediate possession of all the goods in the stock, leaving other creditors without remedy.

In this case, according to the testimony, "the business was to go on just as it had been going on; the store was to be kept open, and Hersch was to go on selling goods; that he was to use the proceeds of sales for expenses and pay his debts in Santa Fe, and remit to Praeger *as he could*." And it might have been well added that when

he got ready to break, Praeger would own the store in Santa Fe, and he would probably own the one in New York. That this fraudulent transaction should be carried up under the forms of law is simply a scandal to an honorable profession. The law gives no sanction to such arrangements, and will hold them void as against creditors, as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands. *Davis* v. *Ransom*, 18 Ill. 396; *Ford* v. *Williams*, 3 Kern. 13 N. Y. 577; *Edgell* v. *Hart*, 13 Barb. 380; *McLean* v. *Lafayette Bank*, 3 McLean, 185, 415, 503, 587; *Addington* v. *Etheridge*, 12 Grat. 436; *Freeman* v. *Rawson*, 5 Ohio St. 1; *Brooks* v. *Wimer*, 20 Mo. 503; *Reed* v. *Pelletier*, 28 Mo. 173; *Armstrong* v. *Tuttle*, 34 Mo. 432.

Judgment reversed.

BELL, J. I concur in the result.

NOTE.

CHATTEL MORTGAGES—MORTGAGOR'S POSSESSION—POWER OF SALE—DISPOSITION OF PROCEEDS. The question here decided has been a fruitful subject of litigation, and the courts are not by any means in accord upon it. The case of Robinson v. Elliott, 22 Wall. 513, first presented the question to the supreme court of the United States. It arose in *Indiana* under a mortgage which provided that the mortgagor "*may remain in possession* of said goods, wares, and merchandise, and may sell the same as heretofore, and supply their places with other goods," which were to be subject to the mortgage. The mortgage was held to be fraudulent upon its face. Justice DAVIS, delivering the opinion, said: "If chattel mortgages were formerly, in most of the states, treated as invalid, unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing, (the cases to the contrary being exceptional,) conceded the right to the mortgagor to retain possession, if the transaction is on good consideration, and *bona fide*. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bona fide* mortgages of it, to secure creditors, without any actual change of possession. But the creditor must take care in making the contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of the kind. It will not allow the creditor to make use of his debt for any other purpose than his indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. * * * As the question has never before been presented to this court, we are at liberty to adopt the rule on the subject which seems safest and wisest. It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession accompanied with power to dispose of it for the benefit of the mortgagor alone. The former is permitted by the laws of Indiana, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is no protection for the mortgagee, and of itself furnishes a pretty effectual shield for dishonesty."

While, in general, the statutes make the recording of the mortgage a substitute for change of possession, yet, in accordance with the views expressed by the supreme court, it is held by one line of decisions that when it is apparent from the face of the mortgage that it does not, and is not intended to, subserve the purpose originally accomplished by change of possession, then it is constructively fraudulent, and invalid as to creditors, and subsequent purchasers in good faith. Thus, under these decisions, the validity of the mortgage generally turns upon whether by its terms the proceeds of sales made by the mortgagor may be used in his business as before, and for his own benefit, or are to be applied to the discharge of the debt. In the former case the mortgage is constructively fraudulent and void. Bannon v. Bowler, (Minn.) 26 N. W. Rep. 237; Wilcox v. Jackson, (Colo.) 4 Pac. Rep. 966; Brasher v. Christophe, (Colo.) 15 Pac. Rep. 403; Gregory v. Whedon, (Neb.) 1 N. W. Rep. 309; Hubbell v. Allen, (Mo.) 3 S. W. Rep. 22; Bank v. Martin, (Idaho,) 23 Pac. Rep. 920; Potts v. Hart, (N. Y.) 1 N. E. Rep. 605. The mortgage is void, whether such stipulation appears from its face or from parol agreement, tacit understanding, or mere permission. Huschle v. Morris, (Ill.) 23 N. E. Rep. 643; Morgan v. Pierson, (Wis.) 25 N. W. Rep. 543; Johnston v. Tut-

tle, (Miss.) 4 South. Rep. 553; Wilson v. Voight, (Colo.) 13 Pac. Rep. 726. But where the mortgage provides that the proceeds of the sales made by the mortgagor in possession shall be applied to the discharge of the debt, it is not fraudulent *per se*, but valid until fraud is proved *aliunde*. Murray v. McNealy, (Ala.) 5 South. Rep. 565; Langert v. Brown, (Wash. T.) 13 Pac. Rep. 704. Yet, in *Nebraska*, it is held that a chattel mortgage containing a provision that the mortgagor may sell in the usual course of business, for the sole purpose of raising money to pay the debt secured, he agreeing to account to the mortgagee for the proceeds, is presumptively fraudulent, but may be shown to have been made in good faith. Davis v. Scott, 34 N. W. Rep. 353. Where there is a provision that the mortgagor may sell in the usual course of trade, and nothing is said as to the disposition of the proceeds, the mortgage is void, since it implies that the mortgagor may use them for his own benefit, Leopold v. Silverman, (Mont.) 16 Pac. Rep. 580; and though there be a provision for an accounting to the mortgagee, the mortgage is void when it appears that, by the mortgagee's consent, the mortgagor actually received part of the proceeds, Id. The *Montana* statute requires an affidavit as to the good faith of the debt secured to be filed with the mortgage, and it is held that a mortgage is not entitled to record without the affidavit; and, when filed without the affidavit, it is void as to a subsequent mortgagee, even though the latter had actual notice of the existence and good faith of the debt. Manufacturing Co. v. Johnson, 24 Pac. Rep. 17. In *North Carolina*, the presumption of fraud, arising from possession and sale by the mortgagor, may be rebutted. Kreth v. Rogers, 7 S. E. Rep. 682. So also in *Nebraska*. Marsh v. Burley, 13 N. W. Rep. 279; Severance v. Leavitt, 20 N. W. Rep. 273.

In other jurisdictions, however, it is held that the mortgagor's possession, with a stipulation in the mortgage that he may sell in the ordinary course of trade, and apply the proceeds to his own use, is not evidence *per se* of fraudulent intent, and the mortgage will be upheld, unless actual fraud is proved. See the *Iowa* cases: Clark v. Hyman, 7 N. W. Rep. 386; Sperry v. Ethridge, 19 N. W. Rep. 657; Jaffray v. Greenbaum, 20 N. W. Rep. 775; Meyer v. Gage, 22 N. W. Rep. 892; Meyer v. Evans, 23 N. W. Rep. 386. Cases in the federal courts arising in *Iowa* seem to be in conflict with this rule. See Crooks v. Stuart, 7 Fed. Rep. 800; Wells v. Langbein, 20 Fed. Rep. 183; Maish v. Bird, 22 Fed. Rep. 576. But in Lyon v. Bank, 29 Fed. Rep. 566, SHIRAS, J., attempts to reconcile the state and federal cases in a very interesting and instructive opinion. The decisions in *Michigan*, *Kansas*, *Indiana*, *Vermont*, *Kentucky*, and *Dakota* are in substantial accord with those of Iowa. See Bank v. Bates, 7 Sup. Ct. Rep. 679; Morse v. Riblet, 22 Fed. Rep. 501; Hills v. Furniture Co., 23 Fed. Rep. 432; Leser v. Glaser, (Kan.) 4 Pac. Rep. 1026; Howard v. Wulfekuhler, (Kan.) 13 Pac. Rep. 566; Whitson v. Griffis, (Kan.) 17 Pac. Rep. 801; Stix v. Sadler, (Ind.) 9 N. E. Rep. 905; Fisher v. Syfers, (Ind.) 10 N. E. Rep. 306; Dice v. Irvin, (Ind.) 11 N. E. Rep. 488; Peabody v. Landon, (Vt.) 17 Atl. Rep. 781; Rosenberg v. Thompson, (Ky.) 8 S. W. Rep. 895; Reichert v. Simons, (Dak.) 42 N. W. Rep. 657.

Where there is no change of possession, an unrecorded chattel mortgage is void against the levy of a creditor, Jewell v. Simpson, (Kan.) 16 Pac. Rep. 450; but valid between the parties, and therefore as against the mortgagor's assignee in bankruptcy, Lloyd v. Foley, 11 Fed. Rep. 410. *Contra*, Crooks v. Stuart, 7 Fed. Rep. 800.

Under the *Colorado* statute, which provides that every sale of chattels, unless accompanied with immediate delivery, and followed by continued change of possession, shall be conclusively presumed to be fraudulent and void, it is held that a chattel mortgage, unaccompanied by change of possession, though duly filed, becomes presumptively fraudulent immediately on default in the debt secured, unless change of possession then takes place, since the mortgage is a conditional sale, which becomes absolute on default. Atchison v. Graham, 23 Pac. Rep. 876.

Though possession by the mortgagor with power of sale invalidates a mortgage, the invalidity is cured by an actual taking possession by the mortgagee before attachment by other creditors. Dobyns v. Meyer, (Mo.) 8 S. W. Rep. 251.

NEWTON *v.* THORNTON and another, Receivers, etc.

Filed January 8, 1885.

EJECTMENT—RETROSPECTIVE LAW—VESTED RIGHTS—IMPROVEMENTS ON PROPERTY.

Where an action of ejectment is brought to recover the possession of land, and the defendant, under section 3 of the act of 1878, (Prince's St. 486,) claims the value of improvements which he had erected thereon prior to the passage of the act, the owner, by vested right, is entitled to recover the improvements as well as the land, and the statute, so far as it attempts to divest that right, is *void.*[1]

Error to the First judicial district court, San Miguel county.

W. D. Lee and *S. M. Barnes*, for plaintiff in error.

Frank Springer and *T. B. Catron*, for defendants in error.

AXTELL, C. J. This is a suit in ejectment which was begun at the August term, 1880, of the district court of Colfax county, by the defendants in error, to recover possession of certain real estate which was held by plaintiff in error. To the declaration the defendant below pleaded the general issue, and a special plea setting up the fact that he had made large and valuable improvements on the real estate in question, and praying judgment against the plaintiffs below for the value of said improvements, in case said plaintiffs were entitled to a judgment for the possession of the property. The venue of the case was subsequently changed to the district court of the county of San Miguel, and came on for trial in the latter court at the August term, 1881. Upon the trial, the defendant appears to have offered no evidence whatever as to the right to the possession of the property, confining his evidence solely to proof as to the value of his improvements. The jury returned a verdict finding the defendant guilty, assessing the rents and profits of the property in question during the time it had been held by defendant at $300, and the value of the improvements made by the defendant thereon at $1,050. Upon this verdict plaintiffs moved the court to enter judgment for the possession of the property, and $300, while the defendant moved for a judgment against the plaintiffs for $750, being for the value of the improvements in excess of the rents and profits. The court refused both of these motions, and gave judgment in favor of the plaintiffs for the possession of the property, and costs. Both parties excepted to the ruling of the court, and have had their exceptions embodied in the record which is now before us.

We have two statutes in this territory relative to improvements made upon real estate by defendants in this class of cases. The first is the act of 1858, (Prince's St. 153,) which touches only those cases where "the defendant, or tenant in possession, in such suit shall have

[1] See note at end of case.

title of the premises in dispute, either by grants from the governments of Spain, Mexico, or the United States, or deed of conveyance founded upon a grant or entry for the same." This statute has no bearing upon this case, as it nowhere alleged in the pleadings, nor set up in evidence, that the defendant below had title to the premises in dispute, either by grant, or deed of conveyance founded on a grant, or entry for the same. The defendant below evidently relied upon section 3 of the other statute on this subject, an act of 1878, (Prince's St. 486,) which section is as follows:

"When any person or his assignors may have heretofore made, or may hereafter make, any valuable improvements on any lands, and he or his assignors have been, or may hereafter be, deprived of the possession of said improvements in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of the said improvements assessed in his favor as of the date he was so deprived of the possession thereof; and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof, situate in the same county, until paid; but no improvements shall be assessed which may or shall have been made after the service of summons in an action of ejectment on him in favor of the person against whom he seeks to have the said value assessed for said improvements."

At common law, any person making improvements on the lands of another of such a nature that they became part of the realty, lost his time and labor, and the improvements inured to the benefit of the owner of the land. On behalf of the defendants in error it is contended that, so far as this case is concerned, the common law was unchanged up to 1878; that all the improvements claimed by the plaintiff in error having been made prior to 1878, they acquired a vested right in those improvements, and that, so far as this statute attempts to divest that right, it is void. The plaintiff in error insists, on page 6 of his printed brief, that this act has no retrospective effect, and this, it seems to us, concedes the point made by defendants in error. But plaintiff in error further insists that even if it is retrospective, it is not therefore void, because the constitution of the United States does not prohibit the legislature from passing retrospective acts. This is undoubtedly true, as a general proposition; but it is also undoubtedly true that no statute, whether retroactive in its terms or not, should be so construed as to injuriously affect any vested rights. In this case, as the record comes up to us, it cannot be contended for a moment that the plaintiff in error would be entitled to any compensation for his improvements, were it not for the statute of 1878. It appears, from his own evidence, that all of the improvements for which he asks judgment were made in 1876 and 1877. It seems clear to us that at the time the act of 1878 was passed, these improvements were absolutely the property of the owner of the land, and no legislature can take or destroy private property for private use by statutory enactments; and, so far as this statute

attempts anything of that kind, it is clearly void. *Bay* v. *Gage*, 36 Barb. 447; *Ely* v. *Holton*, 15 N. Y. 595; *Austin* v. *Stevens*, 24 Me. 520; *Society, etc.*, v. *Wheeler*, 2 Gall. 140 *et seq.*; *Albertson* v. *Landon*, 42 Conn. 209; *Carver* v. *Jackson*, 4 Pet. 100; *Dash* v. *Van Kleeck*, 7 Johns. 477; *Lane* v. *Nelson*, 79 Pa. St. 407; *Brown* v. *Hummel*, 6 Pa. St. 86.

In the case of *Lane* v. *Nelson*, above cited, the court said: "It is settled by a current of authority that the legislature cannot, by an arbitrary edict, take the property of one man and give it to another." And again: "To exercise judicial powers is not within the legitimate scope of legislative functions; and when vested rights are divested by acts of that character, they will, and ought to be, adjudged inoperative, null, and void." In the case of *Society, etc.*, v. *Wheeler*, 2 Gall. 143, the court says:

"It is difficult to perceive the foundation of the equitable or moral obligation which should compel a party to pay for improvements that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights; for if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold that a wrong should prevail against a lawful exercise of the right of property. In the case of a tortious confusion of goods, the common law gives the sole property to the other party without any compensation; yet the equity in such a case, where the shares might be distinguished, would seem much stronger than in the present case. There would also have been plausibility in the argument if the statute had confined itself to visible erections made by the tenant, who had been six years in possession under a supposed legal title. But the improvements may be altogether in the soil, and even made by the original wrong-doer, and yet the compensation must be allowed, and they may be just such improvements as, in the case of a rightful tenancy, would, at common law, be deemed waste. It is sufficient, however, that no such equitable right as is now contended for is recognized in law; and, indeed, it has been deemed so far destitute of moral obligation that even an express promise to pay for improvements made by a person coming in under a defective title has been held a *nude pact*. As to the argument that the demandants had no vested title in the improvements until a recovery, it is clearly unfounded in law. In respect to the amelioration of the soil by labor, (which is embraced both by the statute and the verdict,) it would be absurd to contend that the amelioration was a thing separate from the soil, and capable of a distinct ownership. In respect to erections, the common law is clear that everything permanently annexed to the freehold passes with the title of the land, and vests with it. And here lies the distinction as to fixtures during a lease. They are not deemed to be permanently annexed to the soil, and may, therefore, well be removed; and so, indeed, would the law be as to like fixtures by a mere trespasser. The right, then, to permit erections follows as a necessary and inseparable incident to the right of the soil, and is not acquired, but is merely reduced into possession by a subsequent suit. On the whole, if the statute must have a construction which will embrace the case at bar, with whatever reluctance it may be declared, in my judgment it is unconstitutional, inasmuch as it divests a vested right of the demandants, and vests a new right in the tenants, upon considerations altogether past and gone."

Citations and quotations might be multiplied indefinitely to the same effect. The authorities on this point are unanimous, conclusive, and most emphatic. This practically disposes of the case. There are some other points made and exceptions taken by defendants in error which are unimportant, and on many of them it would be impossible for the court to pass, as those parts of the record to which they refer are not sufficiently before us. The judgment of the court is that the judgment of the court below be affirmed.

WILSON and BELL, JJ., concur.

NOTE.

VESTED RIGHTS. The doctrine announced in the principal case is controverted by an *Arkansas* decision, where just the opposite conclusion is reached. It is there said that the owner's common-law right to recover the improvements with the land is not a vested right, and that the statute allowing a defendant compensation for permanent improvements is remedial, and applies to improvements made before as well as those made after its passage. Beard v. Dansty, 2 S. W. Rep. 701. This case goes so far as to hold that the fact that the action was pending when the statute was passed is an immaterial circumstance, and that the plaintiff has no "vested right" in respect of the improvements until he recovers judgment. These diametrically opposed decisions illustrate the divergent views held by different courts on the subject of "vested rights." The principal case proceeds upon the theory that unauthorized improvements put upon the land vest absolutely in the rightful owner from the time they are made, whereas the *Arkansas* case maintains that the rightful owner has only a right of action for the land, with an ancillary right to recover the improvements also, provided no change is made in the law before judgment. It is said there that the bringing of a suit does not entitle a party to any particular decision, but his case must be determined by the law as it stands at the time of the judgment. "The right to a particular remedy is not a vested right. This is the general rule, and the exceptions are of those peculiar cases in which the remedy is a part of the right itself." Cooley, Const. Lim. (6th Ed.) 442.

In *New Jersey*, it has been held that a statute authorizing suit and execution against a husband for the debt of his wife, arising out of her contract made without his assent, is void as to marriages contracted before its passage, because it interferes with a vested right acquired by the antecedent contract of marriage. Marx v. Addoms, 12 Atl. Rep. 909. In *California*, it has been decided that a police officer has no vested right in a bounty given by statute in case of his death, and that the statute may be constitutionally repealed before the death of any one who became an officer after its enactment. Pennie v. Reis, 22 Pac. Rep. 176. An act providing that no sewer shall be permitted to empty into any stream within three miles above a point from which a water supply is obtained does not deprive a town of a vested right, even though it may have a sewer partly constructed at the time of the passage of the act. Water-Supply Co. v. City of Potwin Place, (Kan.) 23 Pac. Rep. 578. An act declaring that tax-deeds shall only be set aside on condition that the claimant pays to the person holding the deed all taxes and legal costs cannot be given a retrospective operation, as that would interfere with vested rights. Riverside Co. v. Townsend, (Ill.) 9 N. E. Rep. 65. The repeal of a statute exempting a testator's real estate from sale for the payment of his debts, after the lapse of three years from his death, does not affect estates already exempted by the lapse of that time, for such exemption is then a vested right. Gates v. Shugrue, (Minn.) 29 N. W. Rep. 57. The right to foreclose a mortgage under a power of sale contained in it pursuant to a statute in force at the time of its execution cannot be taken away by subsequent legislation. O'Brien v. Kreuz, (Minn.) 30 N. W. Rep. 458. A county has no vested right in the legislative appropriation of the funds arising from the sale of licenses to the support of the county poor. Richland Co. v. Village, (Wis.) 18 N. W. Rep. 497. A municipality acquires a vested right in taxes levied, and cannot be constitutionally deprived of them by a retrospective law. Independent Dist. of Union v. Independent Dist. of Cedar Rapids, (Iowa,) 17 N. W. Rep. 895. An act permitting judgments obtained by perjury or fraud to be set aside by a proper proceeding brought within three years applies to judgments recovered after its passage in suits commenced prior thereto, Spooner v. Spooner, (Minn.) 1 N. W. Rep. 838.

EJECTMENT—MESNE PROFITS—IMPROVEMENTS—RIGHTS OF BONA FIDE OCCUPANT. At common law, the rightful owner was under no obligation to pay for unauthorized improvements put upon his property by another, whether a *bona fide* claimant under color of title or a mere trespasser. This doctrine came to be modified in equity, where a *bona fide* claimant was permitted to offset the value of lasting improvements against

the mesne rents and profits or damages. Putnam v. Tyler, (Pa.) 12 Atl. Rep. 43; Sedg. & W. Tr. Title Land, § 691. It is sometimes said in the cases that at common law the permanent improvements could be set off against plaintiff's claim for rents or damages, Kerret v. Nicholas, (Ala.) 6 South. Rep. 698; but this arises from an inaccurate apprehension of the meaning of the term "common law," and is authority only for the correct proposition that the courts of law in many jurisdictions have, without the intervention of any statute, ingrafted the equitable doctrine on the common law, Putnam v. Tyler, supra. The statutes in regard to the allowance of the value of permanent improvements are very similar in their general outlines and requirements, so that the decisions of each state are valuable in the others.

NOTICE OF ADVERSE CLAIM. In *Arkansas*, under a statute giving compensation for permanent improvements made by an occupant "believing himself to be the owner," it is held that constructive notice, as a recorded deed of a superior title, does not deprive a *bona fide* occupant under color of title of his right to compensation for improvements. Beard v. Dansty, 2 S. W. Rep. 701; Shepherd v. Jernigan, 10 S. W. Rep. 765. But in *West Virginia*, where the statute allows compensation for improvements made "at a time when there was reason to believe" that the occupant's title was good, it has been determined that constructive notice of an adverse claim, as a prior recorded deed to the same land, is sufficient to apprise the occupant of an outstanding adverse title, and to defeat his claim for compensation for improvements, though he had no actual notice of such adverse title. Dawson v. Grow, 1 S. E. Rep. 564; Hall v. Hall, 5 S. E. Rep. 260. In *North Carolina*, however, under an exactly similar statute, it is held that such constructive notice of a superior title does not affect the defendant's right to recover the value of his improvements, and that it is a question of fact to be determined by the jury whether or not the occupant had "reason to believe" that his title was good. Railway Co. v. McCaskill, 4 S. E. Rep. 468. It has been decided that a defendant, who, with knowledge of the terms of a trust-deed, received a conveyance from the trustee in breach of trust, is entitled to compensation for improvements, especially in light of the fact that no objection was made for years by the *cestui que trust* to his title, which, under the advice of counsel, he supposed to be good. Rabb v. Flenniken, (S. C.) 10 S. E. Rep. 943.

CHARACTER OF OCCUPANT'S POSSESSION. A defendant who takes possession of a portion of an entire tract which is in the possession of the real owner cannot receive compensation for improvements made while holding such "scrambling" possession. Coonradt v. Myers, (Kan.) 2 Pac. Rep. 858. Nor can a mere trespasser, however long continued his possession may be, recover the value of improvements. Stille v. Schull, (La.) 6 South. Rep. 634. Nor can the grantee in a conditional conveyance who himself violates the condition upon which his estate depends. Walker v. Walker, (N. H.) 5 Atl. Rep. 460. A defendant claiming under certificates of sale issued at tax-judgment sales is not a holder under color of title, within the *Minnesota* statute allowing compensation to "a defendant holding under color of title adversely to the claim of plaintiff in good faith," McLellan v. Omodt, 33 N. W. Rep. 326; for such certificates of sale confer no title or color of title until the expiration of the period allowed for their redemption. Under the *Iowa* statute allowing compensation to an occupant, who, under color of title, and in good faith, makes improvements, an occupant whose only title is derived from adverse possession is not entitled to compensation for improvements made before such adverse possession ripened into color of title. Snell v. Mechan, 45 N. W. Rep. 398. A purchaser who, with knowledge of a prior incumbrance, puts improvements on the land, cannot, when ejected by the prior incumbrancer, receive compensation for their value under the *Vermont* statute allowing it in case defendant has purchased "supposing the title to be good in fee." Jones v. Stone Cutter Co., 20 Fed. Rep. 477. But improvements made by a defendant holding under a quitclaim deed fall within the *Connecticut* statute allowing the value of permanent improvements to a defendant who made them "in good faith, believing that he had an absolute title to the land in question," Griswold v. Bragg, 6 Fed. Rep. 342; and a verbal notice of an adverse claim, which was considered dubious by both plaintiff and defendant, will not deprive defendant of his right to the value of improvements made after the receipt of such notice, Griswold v. Bragg, supra.

CHARACTER OF TITLE. In *Michigan*, it has been decided that the statute allowing compensation for permanent improvements only applies to those cases in which plaintiff establishes his title to the fee, and that if a recovery is had by the life-tenant compensation cannot be allowed. Burkle v. Judge, 4 N. W. Rep. 192. The grantee in fee of a life-tenant cannot have compensation for improvements made during the life-time of the life-tenant, for such improvements inure to the benefit of the remainder-men. Curtis v. Fowler, (Mich.) 33 N. W. Rep. 804; Barrett v. Stradl, (Wis.) 41 N. W. Rep. 439; Bryan v. Uland, (Ind.) 1 N. E. Rep. 52; Van Bibber v. Williamson, 37 Fed. Rep. 756; but for improvements made after the death of the life-tenant the defendant is entitled to compensation, Barrett v. Stradl, supra.

CHARACTER OF IMPROVEMENTS. A sidewalk constructed by the occupant in compliance with a city ordinance is a permanent improvement, for which he is entitled to

compensation. Hentig v. Redden, (Kan.) 16 Pac. Rep. 820. The fact that the improvement is not beneficial to plaintiff because it is of a character for which he has no use does not affect defendant's right to recover compensation for it if it is found to enhance the value of the land. A railway company must allow compensation for a store erected on its right of way by defendant acting in good faith under the supposition that the land was his. Railway Co. v. McCaskill, (N. C.) 4 S. E. Rep. 468. An oil-well is a permanent improvement, the value of which must be allowed. Appeal of Phillips, (Pa.) 18 Atl. Rep. 998. So is a mine. Kille v. Ege, 82 Pa. St. 102, 84 Pa. St. 333. In *Pennsylvania*, there is no statute giving compensation for improvements, but the courts there have adopted the equitable doctrine allowing permanent improvements to be set off against the mesne profits.

VALUE OF IMPROVEMENTS. In Van Bibber v. Williamson, 37 Fed. Rep. 756, JACKSON, J., laid down the rule that the measure of compensation is the value of the improvements to the property at the time of the institution of the suit, irrespective of their original cost. The same rule is announced in McMurray v. Day, (Iowa,) 28 N. W. Rep. 476.

WALDEZ *v.* ARCHULETA.

Filed January 13, 1885.

1. PRACTICE—APPEARANCE OF PARTIES IN PERSON—KNOWLEDGE PRESUMED.
When, in the trial of an action at law, the parties appear in person, and undertake its management, each for himself, without the aid of counsel, the law presumes them to have full knowledge of the situation of their case.

2. SAME—PLEA—ISSUE.
Where a cause is tried in a lower court without any plea having been filed or issue joined, as required by law, and no objection or exception is made thereto, the verdict of the jury will not be disturbed, and the judgment will be sustained.

3. SAME—APPEAL—ASSIGNMENT OF ERROR—RECORD.
When, upon an appeal from the judgment of the trial court, it is assigned as error that no issue was joined by the parties, and the record, on its face, affirmatively shows that issue was joined, the record imports absolute verity, and, whether an issue appears from the language of the pleadings or not, the error complained of cannot be sustained.

Error to First judicial district court, Rio Arriba county.

Catron & Thornton, for plaintiff in error.

John H. Knaebel, for defendant in error.

WILSON, J. This was a suit in replevin for a horse. When the case came on for trial in the court below, the parties appeared in person and undertook the management of the trial, each for himself, without the aid of counsel. Whatever these parties knew or did not know of the technical state of the pleadings, the law presumes them to have full knowledge of the situation of their case. The trial resulted in a verdict for the defendant, upon which verdict the court entered a judgment. The plaintiff obtained a writ of error, and assigned as error as follows: "Now comes the said plaintiff and says that there is manifest error in the record and proceedings of this cause, in this: that said cause was tried in the court below without any plea having been filed or issue joined as required by law."

The counsel for plaintiff has cited a large number of authorities demonstrating the necessity of technical pleading, and that a cause cannot be properly tried before a jury until after issue joined. The court recognize to the fullest extent these authorities, and will and always have enforced compliance to their most technical requirements, provided their enforcement be asked at the proper time. The complaint is that the cause was tried before issue was joined. It is proper to remark that it is not complained that injustice resulted as a consequence of the mistrial.

A case similar in principle is reported in 50 Ind. 530, (*Casad* v. *Holdridge*.) In that case the defendant pleaded specially such a plea as would entitle him to a judgment in his (the defendant's) favor, and the record standing thus, the case was tried and judgment was rendered for the plaintiff. The defendant appealed, and assigned as

error that his plea had not been answered. The supreme court of Indiana refused to sustain the error assigned, and say "that going to trial without answer, it will be deemed to have been controverted as if a denial had been filed;" and cites a large number of authorities as sustaining this ruling. In another case in the same state it was held that by going to trial the defendant waived the reply, and thereby consented to treat the answer as though denied. A similar case is reported in 11 Ohio, 692, (*Hallam* v. *Jacks*.) On an appeal from a justice of the peace the parties went to trial before a jury without any pleadings. The supreme court refused to disturb the verdict, and sustained the judgment.

In Pennsylvania, in a case heard and determined in the supreme court, the error assigned was that the defendant was forced to trial when the case was not at issue. The court say: "The exception is without foundation, for it does not appear that the defendant objected to going to trial without a formal joinder of issue. As he took the chance of a verdict then, he shall not object now." *Clement* v. *Hayden*, 4 Pa. St. 139. In another case in Pennsylvania, decided as early as 1827, the case had been tried in the court below without issue having been joined. The error assigned was that there had been no replication filed before the trial in the court below. The supreme court, in dismissing the case, say: "We will not permit an exception like this to be argued. We have repeatedly declared that we will not listen to objections such as this. Even though there should have been no issue at all, it would be a scandal to the administration of justice if we were longer to hear objections after a trial on the merits." *Thompson* v. *Cross*, 16 Serg. & R. 349.

At the time these decisions were rendered in Pennsylvania, the same system of pleading existed there as is practiced in this territory now. The record itself contradicts the assignment of error, viz.: "Now come the said parties, plaintiff and defendant, in their own proper persons, and issue being joined between them," etc. The record, therefore, on its face affirmatively shows that issue was joined by the parties before the jury were sworn to try the case. A record imports as absolute verity now as it did in the days of Blackstone. In the light of authorities cited, and under the state of the record, it is evident that the error complained of cannot be sustained. The judgment of the court below is affirmed.

AXTELL, C. J., concurs.

HORNER *v.* HARVEY.

Filed January 13, 1885.

INNKEEPERS—GUESTS—LOSS OF GOODS—DAMAGES.

An employe of a railroad company, making his regular trips and stopping over at the end of his route at the hotel, where he rents a room by the month, is not a guest, in the legal sense, which fixes the liability of the innkeeper as an insurer of his property, and cannot maintain an action for damages against the innkeeper for the loss or injury to the same.

Assumpsit. Appeal from the Third judicial district court, Grant county.

Murat Masterson, for plaintiff and appellee.

Conway & Posey, for defendant and appellant.

AXTELL, C. J. The facts in this case are substantially as follows: Harvey was a hotel-keeper at Deming, the terminus of the Atchison, Topeka & Santa Fe Railroad. Horner was employed as conductor on said railroad, and Deming was at one end of his route. He and some other conductors rented a room in Harvey's hotel at a specified rate per month, and, when at Deming, used this room both as a sleeping-room and as a place where they could make up their accounts, and also as a place where they could receive their friends, and for social amusements. When the train was in, and his duties for the trip were over, he came to this room at his pleasure. The key was always left in the door. He did not register at the office of the hotel, nor did he inform any one of his arrival. He took his meals wherever he pleased,—sometimes at the hotel restaurant, where he had specified rates, and sometimes in the town. This method of living at this hotel had continued for about four months, when he came one morning, bringing with him a satchel containing over $700 in gold coin. He went directly to his room. He was asked, "How did you get in?" "I went to the door, rapped on it, and waked up the conductor who was sleeping in there. There was always a conductor there, in the absence of others. After he made his run, he would use the room, and when the next conductor came down he would occupy the room in his place." He took his satchel, with the coin in it, into this room, and that night his satchel was opened and the coin stolen. No one connected with the hotel was informed by him that he had this money till after it was lost.

There was evidence and argument as to gross carelessness upon the part of plaintiff, but, in the view we take of this case, it is not necessary to refer to this. The primary question in the case is, was the relation between the parties that of innkeeper and guest? If we decide this question in the negative, it will not be necessary for us to go further. The answer to this question, after certain facts found and admitted, is a question of law, to be decided by the court. The liability of innkeepers is strict, and justly so; but it is a liability limited to their relation to travelers or wayfaring men. The law of civilized countries benignantly protects men away from home, and

from those resources with which the denizen or citizen can guard himself from wrong, and protect his property from loss or injury. When the traveler comes to an inn and is accepted, he instantly becomes a guest; the innkeeper, when he accepts him and his goods, becomes his insurer, and the innkeeper must answer in damages for the loss or injury of all goods, money, and baggage of his guest, brought within his inn and delivered into his charge and custody, according to the usage of travelers and innkeepers; but he must be a guest, and before he can be a guest he must be a traveler. When he ceases to be a traveler, or a transient or wayfaring man, and takes up a permanent abode even in an inn, he ceases to be an object of the law's especial solicitude, and he is no longer a guest, but a boarder; no longer a traveler, but a citizen.

In considering the liabilities of innkeepers in this connection, the words "traveler" and "guest" are always used correlatively. At common law the innkeeper was compelled to furnish lodging and entertainment for travelers and passengers, and he was bound to protect the property they brought with them, when delivered into his care, and was liable if it was lost or injured. The length of time a man is at an inn makes no difference, so he retains his character as a traveler. Officers of the army and navy, and sailors and soldiers, are to be considered, *prima facie*, travelers and wayfarers; and it was upon this distinction that the case of *Hancock* v. *Rand*, 94 N. Y. 1, was decided; but are the employes of railroads engaged in running trains to be so considered? An engineer or conductor, who follows his employment, and runs his regular trips, stopping over at each end of his route, either at his own house or at a hotel, is neither a traveler, a wayfaring man, nor a transient person. He is a citizen of the community at both ends of his route. The fact that he works upon a train which runs 30 miles an hour does not make him a traveler any more than if he worked in the company's shops. If he goes to a hotel and rents a room by the month, he is no more a guest, in the legal sense which fixes the liabilities of innkeepers, than if he were a mechanic in the shops, or a permanent citizen of the place. If Horner was not a traveler, he could not be a guest; and if he was not a guest, he could not maintain this action. On the evidence in this case, there was nothing for a jury to consider. It is a conclusion of law, from the facts disclosed by his own evidence, that Horner was not a guest, and the court should have directed a verdict for defendant.

The judgment of this court is that the judgment of the district court be reversed, and the action dismissed; and that defendant recover his costs, both in the district and supreme courts to be taxed; and that he have execution for the same.

WILSON, J., concurs.

CHAVES *v.* CHAVES.

Filed January 13, 1885.

SET-OFF—SPECIAL PLEA—STATUTE OF LIMITATIONS—SUBSEQUENT PROMISE.

Where an action is brought upon a promissory note, and the defendant, besides pleading the general issue, files a special plea of set-off, to which the plaintiff replies that the matters of set-off were barred by the statute of limitations, and the defendant, on the trial, introduced evidence of subsequent promises, which, he claimed, took them out of the statute, an instruction by the court to the jury that defendant had failed to sustain his plea of set-off, and that they must find a verdict for the plaintiff, was *error*, for which the defendant was entitled to a new trial.

Appeal from the Second judicial district court, Bernalillo county.

Fisk & Warren, *S. M. Barnes*, and *J. F. Chaves*, for appellant.

W. B. Childers, for appellee.

AXTELL, C. J. Plaintiff brought suit on a promissory note. Defendant pleaded *non-assumpsit* and set-off. Plaintiff joined issue as to the plea of *non-assumpsit*, and filed replications to the matters of set-off that said supposed counts of set-off did not accrue within either six or ten years. Defendant introduced proof of subsequent promises, which he claimed took it out of the statute, after the evidence had all gone to the jury. The court, upon the request of the plaintiff, instructed the jury that defendant had failed to sustain his plea of set-off, and directed a verdict for plaintiff. Defendant appealed. We will consider only the second assignment of error, which is that the court erred in instructing the jury to find for the plaintiff. The right of trial by jury, in actions of common law, where the amount in controversy exceeds $20, has been secured to the citizen by the constitution of the United States. The province of the jury, however, is simply to find the facts. It is for the court to determine the legal effect of the facts when found. When it is desirable to take the opinion of the court as to whether the facts proved constitute a legal cause of action, the earlier practice was to demur to the evidence. In this practice, the party demurring admits the truth of all the facts which his opponent claims to have been proved, and everything which the jury could reasonably infer from the evidence is to be considered as admitted, and the judgment of the court is then taken as to whether these facts constitute a cause of action.

In *Pleasants* v. *Fant*, 22 Wall. 121, Mr. Justice MILLER says:

"In the case of *Parks* v. *Ross* [11 How. 362] this court held that the practice of granting an instruction to find a verdict had superseded the ancient practice of demurrer to evidence, and should be tested by the same rules. It will not be contended that the modern practice at all enlarges the powers of the court, or in any way abridges the right of trial by jury. It is and must always be true that the jury finds the facts and the court decides the law."

In the case of *Pleasants* v. *Fant* the contention was as to what facts would establish a partnership. Here was a legal conclusion which the court was properly called upon to decide. In a case de-

cided in our own supreme court recently, the question was whether the facts proved constituted such negligence as would render a party liable; and the supreme court sustained the judge at *nisi prius*, who took the case from the jury, and decided that the facts proved did not constitute culpable negligence. While it is important to confine the jury to their proper sphere, it is equally important that the court should not trench upon that sphere; and it will be found, on careful examination of the reported cases, that judges have only taken upon themselves to decide upon the legal effect of evidence, not upon the credibility of witnesses. In *Parks* v. *Ross* the question was whether an agent, who contracts in the name of his principal, is liable to a suit on such contract, and the court instructed the jury to find for the defendant, even though they believed the plaintiff's evidence to be true; that is, the court drew a legal conclusion from the facts found by the jury, or that might properly be found by them in this case. Mr. Justice GREER says: "A demurrer to evidence admits, not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom." Mr. Justice THOMPSON, in *U. S. Bank* v. *Smith*, 11 Wheat. 179, says: "Everything which a jury could reasonably infer from the evidence demurred to is to be considered as admitted. The court is in no case to determine upon the credibility of witnesses. The evidence must be permitted to go to the jury without comment upon its weight, and as if it was entirely true." In the light of these general principles, can it be said that there was not evidence in this case which might have justified the jury in finding that the defendant's set-off, or some portion of it, was true? Might not different minds honestly have drawn different conclusions from the testimony? If the statute of James I. was in force, was there not evidence which, if admitted to be true, proved a subsequent promise, and thus took the case out of the statute? The following *memoranda* from the record of testimony is very pointed:

"*Question.* How long has it been since he wanted to pay it to you, if you know? *Answer.* He wanted to pay it to me in goods all the time. He always wanted to pay it to me, and promised to pay it. When he sued me for the note I claimed from him what he owed me. I showed him his account. All he said was that he was ready to pay me. *Q.* What did he say about that item of $1,200? *A.* That he would pay it to me. *Q.* When was that? *A.* I don't remember the date. I have been there very often since suit was commenced, (April 24, 1882,) so as to do away with the suit. *Q.* In the conversation, what did he say in reference to your account, as to whether he owed you or not? *A.* He said that he owed it to me. He never denied it, but always told me that he owed it to me."

There is much more evidence to the same point by the same witness, the defendant, and however incredible it may have seemed to the court, to sustain this instruction it must be taken to be strictly and literally true. In *Manchester* v. *Ericksson*, 105 U. S. 349, Mr. Justice MILLER says: "It is error to withdraw from the jury the determination of a disputed fact in issue. Where there is a substantial con-

flict of testimony, it is for the jury, and not the court, to decide." In this case the conflict of testimony is very substantial indeed, and the facts can only be ascertained by a jury. The judgment in favor of the plaintiff must be set aside, and a new trial had; and it is so ordered.

WILSON, J., concurs.

UNITED STATES *v.* BOWMAN.

Filed January 14, 1885.

1. ROBBERY OF UNITED STATES MAIL—SECTION 5472, REV. ST. U. S.

   When in the trial of an indictment the evidence proves that the accused took by force, from the possession of the postmaster, a package directed to another person, which was a part of the United States mail, although such package was not in the post-office, and had been removed to some other place, and although the postmaster may have intended to appropriate the same for a private debt due to himself, the accused is guilty of robbing the mail, within the meaning of section 5472 of the Revised Statutes of the United States.

2. SAME—PUNISHMENT—PROVINCE OF COURT—UNITED STATES LAW—TERRITORIAL STATUTE.

   Where a person is found guilty of robbing the mail, it is the province of the court, under the law of the United States, to assess his punishment. The statute of the territorial legislature has no application to this class of cases.

Appeal from the Second judicial district court.

G. W. Prichard, U. S. Atty., for appellees.

Bernard Rodey, for appellant.

AXTELL, C. J. The defendant was indicted, under section 5472 of the United States Revised Statutes, for robbing the mails. He was tried, convicted, and sentenced to seven years in the penitentiary. His counsel has made a very elaborate and painstaking defense for his client before this court, and has argued with force and ingenuity a number of points to sustain his allegation that there were sufficient errors committed at the trial to entitle him to a reversal. There were two assignments of error which especially interested this court: one was that evidence was excluded which tended to show that the articles taken from possession of the postmaster were not in the post-office nor in the possession of the United States at the time they were taken; the other, that the court ought to have permitted the jury to assess the punishment. These are the only points we shall consider.

The facts in this case are substantially that defendant came into the post-office and inquired for a package, and was informed that there was none for him; that he then inquired for a package for James Smith, and was informed that there was a package for said Smith. He was, at his request, shown this package, and saw by marks upon it where it was from. He then claimed this package, and endeavored to satisfy the postmaster that this package was intended for him; but the postmaster still refused to deliver it to him, saying that he knew James Smith, and could only deliver it to him, or to his order. Bowman then went away from the post-office, and in his absence the

postmaster opened the package, and found that it contained what he believed to be burglars' tools, and what he believed to be improper matter to be carried in the United States mails. He took the articles—a bulls'-eye lantern and a pair of nippers—from the package, and put the lamp upon a shelf in his store and the nippers in a drawer. Defendant soon after returned, made a demand for the goods, was again refused, when he suddenly forced the postmaster at the point of a pistol to give him the lamp and nippers, and he carried said articles away. For the information of the police, it may be well enough to state at this point that these articles were obtained from the firm of Montgomery, Ward & Co., of Chicago, Illinois.

Section 5472, under which this prosecution is had, reads as follows:

"Sec. 5472. Any person who shall rob any carrier, agent, or other person intrusted with the mail, of such mail, or any part thereof, shall be punishable by imprisonment at hard labor for not less than five years and not more than ten years; and, if convicted a second time of a like offense, or if, in effecting such robbery the first time, the robber shall wound the person having the custody of the mail, or put his life in jeopardy by the use of dangerous weapons, such offender shall be punishable by imprisonment at hard labor for the term of his natural life."

The court instructed the jury as to degree of punishment or grade of offense as follows:

"Your duties, gentlemen, will be, first, under certain previous instructions, to determine whether the prisoner is guilty or not guilty of any offense. If he is guilty of an offense, whether that offense is the simple offense of robbing a person of the mail, or of some part of it, or if he is guilty of robbing the person having charge of the mail, or of some portion of it, accompanied with putting his life in jeopardy by the use of dangerous weapons."

And the jury having found him guilty under the first clause only, he was afterwards sentenced by the court to seven years in the penitentiary. Why the jury did not find him guilty of the graver offense of putting the postmaster's life in jeopardy by the use of a dangerous weapon, can only be accounted for by the almost universal disposition of jurors to be merciful. On the trial the defendant produced as witnesses Charles Ross, William Land, and William Hight, and offered to prove by each of them that the witness for the prosecution, John B. Hall, postmaster at Cooliadge, on the day of the alleged robbery, and previous to the commission of the same, showed them the lamp and nippers in controversy, unwrapped and separated, as described, and declared to them and each of them that James Smith, the person to whom they were addressed, owed him a small account and had left without paying it, and that he intended to confiscate, or, in his own language, "freeze onto those goods" until the account was paid. The court excluded this evidence and defendant excepted. This is all the evidence offered to establish the proposition that these goods, at the time they were taken, were not in the possession of the postmaster. We cannot see that this offered evidence tends in the

remotest degree to prove that proposition. The section of the United States law under which this prosecution is had says nothing about a post-office,—nothing about mail-sacks,—but is directed against any person who shall rob any carrier, agent, or other person intrusted with the mail, of such mail, or any part thereof. Hall was postmaster—he was intrusted with the mail. This package was a part thereof, and it was taken from him by this defendant by force, and putting him in bodily fear and danger of his life. It is not of the slightest importance where the postmaster had these goods, or what he intended to do with them. He might have had them in his store or upon the highway, and he might have intended thereafter to steal them; it does not matter—they were a part of the United States mail—they were intrusted to him by the United States. He was their lawful custodian, and they were robbed from him by this defendant. We are of opinion that this evidence was properly excluded, and that defendant could not possibly be injured by its exclusion, nor could he have been benefited by its admission.

The next point raised in favor of defendant is on the following instruction asked by defendant and refused by the court: "The court is asked to instruct the jury that, if they find the defendant guilty, they must assess the punishment in their verdict." The request so to instruct the jury is founded upon the following provision of our territorial statute: "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." The provision of the statute that the jury must assess the punishment within the limits prescribed by the legislature is in derogation of the common law, and must be strictly limited to cases intended by the territorial legislature. It is true that a law of the United States is to be administered in the same manner as one enacted by the territorial assembly, but the punishment of an offense as fixed by the United States law, between certain limits, as in this case, at not less than five nor more than ten years, was, in contemplation of the law-makers at the time the statute was enacted, to be in the discretion of the judge and not of the jury, for that had been and was the invariable custom of the courts. It is just as clear to our minds that this was the intention of the law-making power as if they had said, in the statute, "not more than ten nor less than five years, in the discretion of the court." We are of this opinion, for it had so been the custom of the courts for a period of time to which the memory of man ran not to the contrary, and it is not now to be tolerated that this shall be changed by a statute of our territorial legislature, which, it is to be presumed, had in contemplation only its own enactments. The peculiar province of juries is to find facts, and the assessing of punishments is not a fact. This is an act of legislation, a provision of law, and where a discretion is given it should be lodged in the court, which is more apt to be intelligent, impartial, and unbiased. We do not favor extending this provision of our territorial legislature to United States

laws,—laws passed many years before this territory had an existence, and which had been administered by courts that had uniformly exercised this delicate and important duty of discriminating in the punishment of criminals. We are of opinion that the judgment of the district court ought to be affirmed; and it is so ordered.

WILSON, J., concurs.

GONZALES and others *v.* BOREN.

Filed January 13, 1885.

FORCIBLE ENTRY AND DETAINER—APPEAL—PRACTICE.

In an action of forcible entry and detainer, tried before a justice of the peace, there was no allegation in the complaint that the plaintiff was possessed or entitled to the possession of the property, nor did it set forth any of the statutory grounds on which the action could be brought. The justice rendered a judgment in favor of the plaintiff, from which defendant appealed to the district court, at the next term of which he failed to appear. The plaintiff then docketed the case, and moved to dismiss the appeal, at the same time asking that the judgment of the justice be affirmed, and a new judgment rendered against defendant and his sureties. The district court thereupon dismissed the appeal and affirmed the judgment. *Held*, that this was error.

Error to First judicial district court, Taos county.

Catron & Thornton, for plaintiffs in error.

M. W. Mills, for defendant in error.

AXTELL, C. J. This cause was brought into this court by writ of error to the district court for the county of Taos. It appears to be an action of forcible entry and detainer, begun before a justice of the peace. The complaint, however, does not allege that the complainant, Boren, was possessed or entitled to the possession of the property in question, nor does it set forth any of the statutory grounds upon which such an action can be brought. Judgment was rendered by the justice in favor of Boren for the possession of the property, and $99.95 damages, from which judgment the defendant Gonzales appealed to the district court, at the next term of which he failed to appear to prosecute his appeal. The appellee, Boren, then docketed the case, and moved to dismiss the appeal, at the same time asking that the judgment of the justice be affirmed, and a new judgment rendered against Gonzales and his sureties. Thereupon, the court entered a judgment dismissing the appeal and affirming the judgment of the justice, and also gave a new judgment for the property, and damages against Gonzales, and his sureties on his appeal-bond. This was error. No judgment whatever could have been properly entered upon the complaint in favor of Boren, and the district court had no authority to dismiss the appeal, and at the same time affirm the judgment of the justice. The judgment of the district court is therefore reversed, and the cause remanded to said court, with directions to proceed therein in accordance with this opinion, and the law applicable to the case.

WILSON, J., concurs.

MacVeagh and others v. Atchison, T. & S. F. R. Co.

Filed January 19, 1885.

1. Common Carrier—Stopping in Transitu—New Order to Ship—Contract—Party.
   A common carrier who, upon notice from the owner of goods to stop them *in transitu* and hold them for such owner, complies, does not become party to a new contract of carriage by the subsequent order of the owner to ship them to another person and place.
2. Same—Loss of Goods—Responsibility Generally—Proximate Cause.
   A common carrier is only liable where the injurious act complained of is the proximate and not the remote cause of the loss.
3. Same—Seizure of Goods under Legal Process—Liability of Carrier.
   Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment.
4. Same—Attachment Levy—Duty of Carrier.
   It is not the duty of a common carrier to remove goods committed to him, in order to prevent their being subjected to an attachment levy.
5. Same—Seizure of Goods—Knowledge by Owner—Notice—Responsibility.
   If property in the hands of a common carrier is seized under legal process, and the owner has timely knowledge thereof, the carrier has a right to presume that such owner will take the proper steps in the premises without formal notice from him. In such a case the negligence and laches of the owner, if it does not occasion the loss, so far contributes towards it that he must bear the burden of it, and he cannot be heard to attribute the fault to another.

Appeal from district court, Bernalillo county.

W. B. Childers, for appellants.

H. L. Waldo, for appellee.

Axtell, C. J. This is an action brought to recover the value of certain goods, wares, and merchandise alleged to have been shipped by the plaintiffs over the railroad of the defendant, and to have been lost by the negligence of the defendant. The declaration contains two counts—one in case, the other in trover. The defense was the general issue, and a special plea setting up the seizure of the goods under legal process. The court, on the trial below, directed a verdict for defendant. It appears from the evidence that Franklin MacVeagh & Co., a firm in Chicago, having sold on credit certain groceries to Richards & Co., a firm at Cerillos, in Santa Fe county, New Mexico, on the sixteenth day of February, 1882, delivered these goods at Chicago to the Chicago, Burlington & Quincy Railroad Company, to be shipped over said company's road to Atchison, Kansas, and thence over the railroad of the defendant to Cerillos, a station on the line of defendant's road. After the goods were shipped, Richards & Co., the consignees, became insolvent, still indebted to plaintiffs for the goods. On the twenty-sixth day of February, plaintiffs requested Ripley, agent of the Chicago, Burlington & Quincy Railroad Company at Chicago, to stop the goods, if possible, at Pueblo, and change con-

signment to read: "Order Franklin MacVeagh & Co." Or, if too late to stop at Pueblo, to make consignment read: "To order Franklin MacVeagh & Co., Cerillos." The plaintiffs were advised, March 6th, that the goods were held at Cerillos, as requested by them. Subsequently, plaintiffs, through the Chicago, Burlington & Quincy Railroad Company, ordered these goods to be shipped to one C. A. Stein, at Albuquerque. It does not appear from the record at what precise time this order was received, although it is to be gathered from a letter of Peabody, defendant's agent at Atchison, under date of March 31st, that he had some previous knowledge of such order. The goods were never shipped by the defendant from Cerillos, but remained there until the sixteenth day of March, when one N. B. Laughlin presented his authority as deputy sheriff of Santa Fe county, produced and read certain writs of attachment, declared to the agent that he attached the goods in question as the property of Richards & Co., and would hold the railroad company responsible for them, but did not take the goods into manual possession, nor summon the defendant as garnishee. Thereafter the goods remained in the possession of the defendant until April 19th, following, when, as alleged by defendant, they were actually seized and taken possession of by the sheriff under said writs of attachment. These goods having reached their place of destination and been held for plaintiffs, as requested, we think the contract of carriage had terminated, and the liability of the defendant as a warehousemen had begun. It makes no difference that the goods had not been removed from the car.

It is in evidence that the defendant had no depot or warehouse building at Cerillos; its business being transacted in a box car. To render the defendant liable as a common carrier for the loss of these goods, a new contract must be shown to have been entered into between the plaintiffs and defendant, followed by a loss through the negligence of the defendant. The order to ship to Stein, at Albuquerque, of itself does not constitute such a contract. Some promise or undertaking by the defendant to carry as ordered must appear, but the evidence does not disclose it. For refusing to carry when ordered or requested so to do, a common carrier will be subjected to liability. The obligation is to carry, and he may not ignore it; but the cause of action stated does not proceed upon the theory that defendant refused to carry, but that it undertook and through negligence failed to deliver. It is contended that this acknowledgment by the defendant that it held the goods at Cerillos subject to the order of plaintiffs as requested by them, and the subsequent order to ship to Stein, at Albuquerque, constituted a contract. Fairly construed, this acknowledgment by the defendant had no other object or effect than to recognize the ownership of the goods as being in the plaintiffs instead of Richards & Co. against whom they were exercising the right of *stoppage in transitu*, and merely changed the destination of the goods at Cerillos to MacVeagh & Co. The right of action, if any, was

against the defendant as a warehouseman for failing to forward, and not as a common carrier. But should it be conceded that the facts proved constituted a contract to carry to Albuquerque, and, the goods being in the hands of the defendant, liability as a common carrier thereby attached, still the defendant is not liable for the delay in keeping these goods at Cerillos, by means whereof they became exposed to seizure under legal process. A common carrier, the same as any other person, is only liable where the injurious act complained of is the proximate and not the remote cause of the loss. That these goods would not have been seized upon legal process as the property of a third person, and hence not lost to the plaintiffs, if they had been forwarded promptly to Albuquerque, does not make the defendant liable. Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment. There is no pretense in this case that there was any collusion on the part of the defendant to have these goods seized, but only that the delay exposed them to seizure. For this the defendant is not liable. The injury complained of must be shown to be the direct consequence of the defendant's negligence. It is not enough that the negligence of the defendant contributed as a remote cause to the loss which happened. The failure to ship promptly and the detention at Cerillos, at most, was the remote cause of the loss. *Hoadley* v. *Transportation Co.* 115 Mass. 304; *Railroad Co.* v. *Reeves*, 10 Wall. 176. Nor is it considered that the delay occurring after the sixteenth of March, the action of the deputy-sheriff lacking as it did some of the technical essentials of a valid levy, and although it might have been reasonably anticipated that it might be followed by a more formal proceeding, was changed into the class of proximate as distinguished from remote causes. Besides, it is not altogether certain, under the circumstances, whether the obligation even of the common carrier imposed the duty of secretly or openly removing these goods beyond the reach of the sheriff of Santa Fe county, for the mere purpose of avoiding service of writ of attachment. A decent respect for the law, and the process by which it is enforced, whatever may be the character or station to whom it may be applied, is always commendable, and to pursue a course of sharp practice with it under any circumstances cannot be too severely reprehended.

It is contended that there was no valid seizure of the goods. In addition to what transpired on the sixteenth of March, the evidence shows that the deputy-sheriff kept a sort of surveillance over these goods until the morning of the nineteenth day of April, when he again went to the defendant's agent at Cerillos, as deputy-sheriff, and demanded possession of the goods, to which demand the agent opposed a refusal, saying that he wanted to see the sheriff and get his receipt. A few days prior to this Laughlin had been appointed receiver of Richards & Co. On that same day, and a few hours after, the sheriff, in person, together with Laughlin, went to the agent and demanded

possession of the goods, paid the freight, and, turning to Laughlin, told him to go and get the goods. The agent went with the deputy, opened the car, and said to him, "Here are the goods." Laughlin obtained permission to leave the goods in the car, went away, and, for want of a team that day, came back the next and took away the goods. There is no color for saying these acts did not constitute a valid seizure under the writs of attachment. The most scrupulous precaution had been taken by the agent to deliver these goods to Laughlin in his character of deputy-sheriff. That the sheriff should permit him (Laughlin) to take the goods as receiver, cannot alter the situation of the defendant so as to make it liable for a wrongful delivery in obedience to legal process.

A more difficult question to be decided is as to the notice which plaintiffs had or ought to have had of the seizure of these goods under the attachment. In *Stiles* v. *Davis*, 1 Black, 107, a leading case in this branch of the law, nothing is said about the necessity of giving the owner notice of the seizure. The court decides that seizure under legal process of goods or the property of a third person constitutes a good defense to an action by the true owner, and says that the remedy pursued in that case, an action of trover, was a mistaken one; that the officer or the plaintiffs in the attachment suits directing the levy were the proper parties to have been sued. The language of the court is so broad and sweeping in its declaration of legal principles applicable to this class of cases, that there seems to have been left no room for introducing a lack of notice to the owner of the seizure, as a fact that would modify the principle therein announced; and were it not that courts of the highest respectability have confined the rulings in that case as applying only to actions of trover, and not when the suit is brought on the contract of carriage, we should be inclined to hold, upon that decision, that seizure under legal process constituted a valid defense, with or without notice thereof to the owner. But it must be admitted there are strong reasons for requiring prompt notice to be given of the seizure of his goods to the owner, especially in a proceeding to which he is not a party, and of which he could have no notice; reasons so cogent that sound law seems imperatively to require that the owner should have such notice, or that he should be in possession of such knowledge of the danger menacing his property, and under such circumstances as that a mere technical performance of the requirements of the law by the common carrier would not place him in any better situation in relation to his property than the knowledge already possessed by him enabled him to occupy. If property has been seized under legal process, and the owner has timely knowledge thereof, and was as much in a position, by the exercise of ordinary and proper diligence, to protect it as if formal notice had been given, the common carrier may well presume that such diligence will be employed, and thus be excused from the refined and technical observance of the rule as to the notice and kind

of notice which, by some decisions, seem to be required. In such case, the negligence and laches of the owner, if it do not occasion the loss, so contributes towards it that he should bear the burden of it, and not be heard to attribute it to the fault of another. The rule laid down in *Robinson* v. *Railroad Co.* 16 Fed. Rep. 57, is a very stringent one; but, as applied to the facts of that case, none too much so; nor is there anything said by the court in that case which conflicts with the views herein expressed. Knowledge, under certain circumstances, is recognized as fully taking the place of formal notice.

In this case, the first steps towards an attachment had been taken on the sixteenth day of March. That the agent regarded these goods as attached is quite manifest, and so held the goods subject thereto. On the fourth of April, in answer to an inquiry from Peabody, defendant's agent at Atchison, he informed him by letter that the goods were attached by the sheriff. This letter, in the usual course of railroad communication, was transmitted to the various offices along the lines over which the goods had been shipped until it reached Chicago, when it was sent, as it seems from the indorsement thereon by Ripley, the Chicago, Burlington & Quincy agent, to the plaintiffs, who received it not later than the eleventh day of April. In contemplation of law, notice is nothing more than the knowledge of a fact, state of facts, or condition of things communicated by one whose duty it is so to do to another, who has the right to receive it, or some interest in receiving it. In this case, the fact which plaintiffs were interested to know was that writs of attachment were in the hands of the sheriff, and their property was menaced or affected in a hostile manner thereby. The question is, were they not, by this letter, coming from defendant's agent, written in the regular line of his duty, transmitted through the proper channels, and which reached them eight or nine days before the final act, dispossessing the defendant of the goods, duly and timely admonished of their jeopardy? Certainly, they were thereby placed in a much better position for the purpose of exercising the proper and necessary care to protect and rescue their property than if, upon the seizure of the same on the nineteenth of April, the most prompt and formal notice had been given. If these facts do not satisfy the technical requirements of the law of notice as applicable to common carriers in cases of this kind, they do make out such a full and timely knowledge on the part of the plaintiffs of the situation of their goods with reference to the attachment proceedings, and under such circumstances as call for prompt and immediate action in their own behalf, a failure to give which can be designated as negligence and laches on their part, and, if loss resulted, to them must attach the blame and consequences. No error appearing in the record, the judgment of the court below is affirmed.

WILSON, J., concurs.

TERRITORY *v.* SALAZAR.

Filed January 17, 1885.

1. CRIMINAL LAW—MURDER—EVIDENCE—QUESTION FOR THE COURT.

It is a question of law for the court to say, upon the evidence, whether the time which elapsed between the provocation in any given case and the stroke was sufficient for the heat of passion to subside.

2. SAME—DEGREE OF CRIME—HARMLESS ERROR.

Where the evidence justifies a verdict of murder in the first degree, an instruction as to murder in the second degree, if erroneous at all, is harmless error.

Appeal from First judicial district court, Rio Arriba county.

BELL, J. The defendant was indicted at the May term, 1884, for the killing of Jose Martin. The case was tried at that term, and he was convicted of murder in the second degree. A motion for a new trial was denied, and defendant was sentenced to imprisonment for life, from which sentence appeal was taken to this court. The errors assigned are as follows: *First*, the refusal of the court to give the tenth instruction asked by defendant; *second*, the giving by the court of any instruction as to murder in the second degree; *third*, the said instruction as to murder in the second degree is misleading, and does not correctly state the law.

The tenth instruction asked for by defendant is as follows:

"If the jury believe from the evidence that defendant, in the heat of passion, went out from the store or saloon where deceased was killed, and went a distance of one hundred or one hundred and fifty yards, and returned, running as fast as he could, both going and returning, the court instructs the jury that there may not have been sufficient time for defendant's anger to cool, and it is for the jury to say whether there was sufficient time."

This leads us to consider the whole evidence in the case, and to what degree or degrees of crime it pointed. It was undoubtedly the duty of the court to instruct the jury as to all the law applicable to the evidence in the case, and it is error for the judge, unless there be an entire absence of evidence to prove a particular grade of crime, to exclude such grade from the consideration of the jury. *Territory* v. *Nichols*, 2 PAC. REP. 78,[1] and cases cited. On the other hand, the court is not required to instruct the jury as to any degree of crime which is not supported by the evidence.

In the case at bar the evidence shows that on the morning of the eleventh day of November, 1883, the defendant, with a number of other men, among whom was the deceased, were together at the store or saloon of Santiago Candelaria, drinking and gambling; that the deceased and the defendant had a quarrel, and that the defendant drew a pistol from his pocket, evidently with the design to use it against the deceased. Some of the other persons, however, who were present, seized the pistol in his hand and took it from him; then the defendant took up his money from the table, and turning to the proprietor asked him how much he owed him; that the proprietor told him $21; defendant said he would go and get it; that he then left

[1] Same case, *ante*, 76, and cases cited.

the saloon and went to the house of Manuel Salazar, which was a hundred or a hundred and fifty yards distant, got another pistol which he had there, returned to the saloon where he had left the deceased, and immediately shot him. There is little or no conflict in the evidence of the witnesses. The defendant himself testified substantially in accordance with the above statement. There is some difference in the testimony as to the distance of the house to which the defendant went to get his pistol. None of the witnesses described the distance as less than a hundred yards, and some of them testified that it was a hundred and fifty yards. There was also some difference among the witnesses as to the duration of his absence, but all agree with the prisoner himself that he went a distance of a hundred or a hundred and fifty yards, got the pistol, returned, and shot the deceased. The evidence of at least one of the witnesses shows that when the defendant returned, he addressed the deceased and said to him, "You are the one that called me a s—— of a b——," and then shot him. It does not appear that he said anything about the money which he owed Candelaria, and which, when he went out, he said he was going to bring. Upon this evidence we are of opinion that the defendant was not entitled to the instruction asked for, and which we are now considering. That instruction is based upon the theory that the defendant was entitled upon the evidence to have the jury instructed as to the offense of murder in the fourth degree.

We do not think that the evidence in this case required the court to submit to the jury the fourth degree of murder. It is very evident that the killing of the deceased was intentional and premeditated. The attempt to draw a pistol upon the deceased in the saloon, the immediate announcement of his intention to go and bring the money due to Candelaria, the amount of which he inquired about after the first pistol had been taken away from him, his going then to a house 100 or 150 yards distant, securing another pistol, returning to the saloon, saying nothing about the money which he had said that he was going to bring, but instead thereof shooting the deceased, all tend to show that the killing was a willful and premeditated murder. The judge rightfully refused the instruction under consideration. It is a question of law for the court to say, upon the evidence, whether the time which elapsed between the provocation in any given case and the stroke, was sufficient for the heat of passion to subside. Upon this subject Greenleaf gives us the rule as follows:

> "If, therefore, after the provocation, however great it may have been, there was time for passion to subside, and for reason to resume her empire, before the mortal blow was struck, the homicide will be murder. And whether the time which elapsed between the provocation and the stroke was sufficient for that purpose, is a question of law to be decided by the court." 3 Greenl. § 125.

The second assignment of error, namely, "the giving by the court of any instruction as to murder in the second degree," was not, in our

judgment, such error, if error at all, as would entitle the defendant to a reversal, upon the evidence as presented by the record. We are of opinion that the court might properly have left the case to the jury as one simply of murder in the first degree, for the reasons that we have stated in considering the first assignment of error. That being the case, the giving to the jury an instruction as to murder in the second degree was more favorable to the defendant than the evidence in the case warranted. It was, therefore, if error at all, such error as was not prejudicial to him, and of which, consequently, he has no right to complain. The rule is that "one cannot object to an instruction which has done him no harm, as, for example, that it is too favorable to him." 1 Bish. Crim. Proc. § 980.

In a case in California in which this question was considered, and in which the court below had instructed the jury as follows:

"If the jury believes from the evidence that both defendants entered into a conspiracy to feloniously shoot and kill Ah Sam, the deceased, and that they both feloniously shot at him in pursuance of such agreement and that the deceased died of the wounds so inflicted by one or both of the defendants, the jury will find them guilty of murder in the second degree;"

—the court said:

"The defendants object to this instruction on the ground that, upon the facts which it assumes, the jury should have been instructed to convict the defendants in the first degree instead of the second degree. The obvious answer to the objection is that, if the instruction was more favorable to the defendants than it should have been, they could not have been damaged by it." *People* v. *Ah Kong*, 49 Cal. 6; *State* v. *Murray*, 5 PAC. REP. 55.

In that case, as in the case under consideration, the defendant was indicted for murder in the first degree, and all the evidence pointed clearly to a willful and deliberate killing. The court, however, gave to the jury the case as one of murder in the first degree, and also one of murder in the second degree. The jury convicted one of the defendants of murder in the second degree, and the other defendant of manslaughter. An appeal was taken, and the principal question presented was the alleged error of the court in giving the instruction as above quoted. The court there very properly took the view that, whether the instruction was or was not in form erroneous, the defendants could not complain of it, as it was more favorable to them than the evidence warranted. In this case, as we have already stated, we do not think that the defendant was entitled to have his case presented to the jury as one of murder in the second degree, as that was more favorable to him than the facts justified. It was, therefore, not error, if error it was, of which he had a right to complain. The consideration which we have given to the first and second assignments of error disposes of the third. The judgment should be affirmed; and it is so ordered.

WILSON, J., concurs.

OSBORNE v. UNITED STATES.

Filed January 19, 1885.

1. PLEADING—EJECTMENT—DECLARATION—AVERMENT—RIGHT OF POSSESSION.
The very foundation of the right to maintain an action in ejectment, both at common law and under the statute of the territory, is the plaintiff's right to the possession of the premises. Unless it contains an averment to that effect, a declaration in ejectment cannot be sustained.

2. SAME—AVERMENT—"UNJUSTLY WITHHOLDS."
The averment that the defendant "unjustly withholds" the premises is not equivalent to the allegation that he "unlawfully withholds" them, as required by the statute.

Error to First judicial district court.

William Breeden, for plaintiff in error.

G. W. Prichard, U. S. Atty., for defendants in error.

BELL, J. This action was commenced by the filing of a declaration, which it is claimed is a declaration in ejectment; the essential part of it, which we are called upon to consider, is as follows:

"In the district court for the First judicial district, within and for the territory of New Mexico, for the trial of causes arising under the laws of the United States and of said territory of New Mexico.

"Your petitioner, the United States of America, at the instance of Benjamin H. Brewster, who prosecutes for her, and on behalf of the aforesaid United States of America, aided and assisted by George W. Prichard, United States attorney for the territory of New Mexico, complains of David K. Osborne, being in custody, etc.:

"For that, whereas, the said United States, by and through her proper agents and representatives, on the first day of January, A. D. 1883, was possessed of a certain building, with the appurtenances, situated in the city of Santa Fe, in the county of Santa Fe, in the First judicial district aforesaid, being known and designated as the building, [here follows the description;] which premises the said United States claims in fee; and said United States being so possessed thereof, the said defendant afterwards, to-wit, on the tenth day of April, A. D. 1883, entered into said premises, and ejected the said plaintiffs therefrom, and unjustly withholds from the said plaintiffs the possession thereof, to the damage of the said plaintiffs of one thousand dollars; and thereof plaintiffs bring suit.

[Signed] "BENJAMIN H. BREWSTER,
"Atty. Genl. of the U. S.
"By G. W. PRICHARD,
"U. S. Atty. for New Mexico."

To this declaration the defendant filed the following plea:

"Now comes the said defendant, by his attorney, and defends the wrong and injury, etc., and says that he is not guilty of the said trespasses and premises, or any part thereof, in manner and form as the said plaintiffs have above complained, and of this the said defendant puts himself upon the country.

[Signed] "WILLIAM BREEDEN, Attorney for the Deft."

Upon the issue thus raised a trial was had, and the record recites that the jury, after hearing the evidence, the arguments of counsel, and the instructions of the court, "upon their oaths do say that they find in favor of the said plaintiffs, and assess their damages at seventy-five dollars." A motion was made for a new trial, but upon what

grounds the record fails to disclose. This was denied. A motion was then made to arrest the judgment upon the verdict theretofore rendered, for the reasons: "*First*, because said declaration is not a declaration in ejectment, and cannot support a judgment for the possession of the property in question; *second*, because said declaration does not ask for any judgment whatever." This motion was also denied, and thereupon a judgment was entered that the United States of America recover from the said defendant the possession of the premises described in the declaration, and also that they recover of the said defendant the sum of $75, and that they have a writ of possession and execution therefor.

The assignments of error are: "*First*. That the declaration is defective, and is not a declaration in ejectment, and does not conform to or state a cause of action under the statute." The second assignment of error is not insisted upon by the plaintiff in error and will not be considered. "*Third*. That the court erred in overruling the motion of plaintiff in error to arrest the judgment in said cause." "*Fourth*. That the court erred in entering judgment for the plaintiffs below, because the said declaration was fatally defective as a declaration in ejectment, and contained no prayer for judgment."

We are of opinion that the declaration in this case is fatally defective as a declaration in ejectment, under the statute of New Mexico. Nor would it be a good declaration, as claimed by counsel, at the common law. No declaration at the common law ever began by describing the plaintiff as a petitioner; and at the common law the nature of the action would appear upon the face of the declaration. We think the declaration in this case might be good in this territory as a declaration in trespass. The plea to it, filed by the defendant, certainly treated it as an action in trespass. The verdict found by the jury would seem to indicate that they treated it as an action in trespass, for they found for the plaintiffs, with damages in the sum of $75. According to the law and the well-established practice in this territory their verdict would be, in an action of ejectment, that they found the defendant guilty, and that the plaintiff was entitled to recover some sum fixed by them as damages, being the value of the rents and profits of the premises. The verdict in this case does not warrant the judgment which was entered upon it by the court. Under the laws of this territory, ejectment is a special statutory remedy. By section 1 of the act of December, 1847, which is still the law of the territory, it is provided: "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises." Section 4 of the same act is as follows:

"It shall be sufficient for the plaintiff to declare in his petition that on some day in such petition named, he was entitled to the possession of the premises, (describing them;) and that the defendant, on the day named in the petition, afterwards entered into said premises, and unlawfully withheld from the plaintiff the possession thereof, to his damage, for any sum he may name." Prince's Comp. 152.

The declaration or petition in this case fails to comply with the essential requirements of this statute. It fails to aver that the plaintiffs were entitled to the possession of the premises in question, but avers that the plaintiffs were possessed of them, and that they claimed them in fee, and that, being so possessed, the defendant entered and ejected them therefrom, and unjustly withheld them from the plaintiffs, to their damage. It might very well be that the plaintiffs were in possession of these premises, and that they claimed them in fee, and yet, at the same time, they might not be entitled to their possession. They may own the premises and yet the defendant may be entitled to their possession as a tenant; and they may have possessed themselves unlawfully of them as against their tenant. The statute requires that the plaintiff shall aver that the defendant unlawfully withholds the premises; the averment in this declaration is that he unjustly withholds them. This unjust retention might be equitable in a given case, and not necessarily unlawful. In this respect the declaration is also clearly defective. The very foundation of the right to maintain an action in ejectment, both at common law and under our statute, is the plaintiff's right to the possession of the premises. The declaration under consideration in this case neither avers such right directly, nor in terms which could be claimed to be equivalent. We are of opinion that the court below erred in overruling defendant's motion in arrest of judgment. The judgment is reversed, and the cause remanded to the court below for such further action as may be proper in accordance with these views.

WILSON, J., concurs.

BACA *v.* FULTON.

Filed January 22, 1885.

ACCORD AND SATISFACTION—RECEIPT—TWO INNOCENT PARTIES.

Plaintiff assigned an account against defendant to a third party, and executed a receipt therefor, in consideration of a diamond pin, and a sum of money. Upon the discovery that the diamond was worthless, he tacitly acquiesced in the proposal of the third person to furnish another. *Held*, that he cannot afterwards rescind the contract and recover the amount from defendant, who has meanwhile innocently paid it to the third party on faith of the receipt.

Appeal from Second district, Bernalillo county.

Fiske & Warren and *A. J. Barr*, for appellant.

Stone & Stone, for appellee.

WILSON, J. The plaintiff below commenced this suit against Kate Fulton, defendant below, by attachment; the amount alleged to be due in the plaintiff's affidavit being $336. Judgment by default was rendered against the defendant. The defendant came into court and filed an affidavit of merits, and asked the court to set aside the judgment, which upon hearing was granted, and, by leave of the court,

the defendant put in a plea of *nil debet* and *actio non*. At a subsequent term of the court the case came on for trial. The parties waived a jury. The court, upon hearing, rendered judgment in favor of the plaintiff for the amount of his claim, whereupon the defendant moved the court for a new trial for the reasons following: (1) The judgment of the court rendered herein is contrary to the law and the evidence; (2) that the said judgment is without authority of law, and without evidence to support the said judgment; (3) for newly-discovered evidence. Motion for new trial was refused by the court, whereupon the defendant appealed, and assigned the same reasons as specifications of error. The amount claimed in plaintiff's declaration was not denied by the defendant; but, as a defense, the receipt of the plaintiff, in full, for the very account claimed on was given in evidence on the trial by the defendant. The plaintiff did not deny the genuineness of the receipt, but insisted that it ought not to be allowed as a defense, for the reason that it was obtained for a diamond pin which proved to be defective; and on the trial the plaintiff was called as a witness, and testified as follows:

"Captain Gray bought into my business as a partner, and when we were looking over our accounts he saw this account against Kate Fulton, and he said, 'I will give you this diamond pin and a hundred dollars for that account.' He had a diamond pin and he showed it to me. I said, 'All right; I will ask Mr. Sharrick and Bayse the value of the pin, and if it was good I would take it; I was not a judge of diamonds.' I took the pin and gave him a receipt for the account.

"*By the Court.* How much was the diamond pin put in at?

"I had to give him a hundred dollars in addition to the account."

He further testified that the next day he took the pin and showed it to Mr. Bayse, and Bayse said it was worth about a hundred and fifty dollars. He said it was not clear diamond; it was full of flaws. He then showed it to Sharrick, and he told him the same thing. And then he says he brought it to Capt. Gray, and told him, "I would not take it." He took the diamond and said Mr. Favor had ordered two diamonds, worth $500 each, and when they came, "I will give you one, and you can give me two hundred dollars." When they came he took one, but did not give me the other."

The defendant called C. D. Favor as a witness, and he testified, among other things, as follows:

"In January, 1883, or first of February, Mr. Baca was trying to buy a diamond stud of me. Finally, he wanted to pay me part cash, and part in an account against Kate Fulton. He offered me $150 and the account, on Sunday. On Monday I called on her to see how much I could get for the account. On Tuesday I called on Baca, and he gave me two hundred dollars in money, and told Reynolds to receipt Kate Fulton's account, and give it to me. I told him he had commenced suit; and he said, 'Yes; but I will dismiss the suit.' Then she gave me her note, and paid it in sixty days." "You had a transaction with her?" "Yes, sir." "You settled in full, and Baca receipted the bill?" "He told Mr. Reynolds to receipt the account and give it to me. This is the receipt. Mr. Baca agreed to dismiss his case and pay his own costs."

The plaintiff was recalled, and testified in his own behalf:

"I never had any transaction with Favor. I have with Mr. Gray. Mr. Gray sold me the diamond I referred to. My transaction was with Mr. Gray, and not with Mr. Favor. * * * I gave this account to Mr. Gray, and $100; but I returned the diamond. Then I had paid him $436. Then Mr. Gray presented the diamond to his son, and agreed to get me another diamond from Favor, who, he said, had ordered two, and when they arrived I could take one instead."

These quotations show substantially the whole strength of plaintiff's case. Baca's own testimony proves that he gave or authorized a receipt to be given; that he received the diamond pin, which was the consideration for the receipt. While he does not testify to any express agreement that he was allowed the privilege to rescind the contract if the diamond was not "good," yet a jury would, perhaps, be warranted to draw that inference. But his own testimony shows clearly that he never has claimed or asked a rescission of the agreement. On the contrary, he says that when he delivered the pin to Gray, Gray agreed to get another diamond from Favor, who he said had ordered two, and when they arrived I could take one instead. This is most evidently no rescission of the original contract, but a compromise in affirmance of it. It is proved, and not contradicted, that Kate Fulton, the defendant below, gave Favor her note for this same claim and paid it, according to its tenor, in 60 days after its date; and this latter statement is corroborated by the fact that when the trial was reached she produced the receipt in her defense.

The first error assigned is "that the judgment of the court herein is contrary to the law and the evidence." Upon a careful examination of the evidence we cannot avoid the conclusion that the weight of evidence is with the defendant below. It follows that if the judgment is against the evidence it is likewise against law; but, to apply a familiar principle of law to this case, that if one of two innocent persons must suffer a loss, the one that occasioned it must bear it, there is no evidence in the case from which an inference can be legally drawn that the defendant below acted in collusion with either Favor or Gray to defraud Baca; but if she was induced to part with her money on the faith of that receipt, she ought not to be compelled to pay it again.

The first assignment of error is sustained, and the judgment of the court below is reversed and a new trial ordered.

AXTELL, C. J., concurs.

KENT *v.* FAVOR.

Filed January 22, 1885.

1. PRACTICE—CONTINUANCE—AFFIDAVIT.
   In order to force the continuance of a cause, the affidavit upon which the application is founded must state all the facts required in the statute to be stated.[1]
2. SAME—INSTRUCTION TO JURY—CONFLICTING WITNESSES.
   In case of conflicting testimony it is eminently proper for the court to tell the jury to decide which witness has told the truth.
3. SAME—LACK OF FACT IN RECORD—PRESUMPTION.
   When there is nothing in the record and no evidence *aliunde* to show that the court instructed the jury orally instead of in writing, as required by the statute, the presumption is in favor of the court's observance of the law.

Appeal from Second judicial district court, Bernalillo county.

Childers & Fergusson, for appellee.

A. J. Barr and *Fiske & Warren*, for appellant.

WILSON, J. This action was commenced by the plaintiff below in the Second judicial district against the defendant, in which the plaintiff claimed a balance of rent against the defendant amounting to $256.66. The defendant denied that he owed any part of plaintiff's claim. A trial was had, and verdict and judgment were rendered in favor of the plaintiff in the court below for the amount of his claim. From this judgment, by regular process of law, the defendant appealed, and assigned the following specifications of error: (1) The court erred in admitting improper and irrelevant evidence on the part of the plaintiff; (2) the court erred in refusing the defendant a continuance and compelling him to go to trial, etc.; (3) the court improperly instructed the jury to find for the plaintiff against the defendant for $256.66, etc.

The first error assigned was virtually abandoned on the argument and is not sustained. To sustain the second error assigned, the counsel for the appellant cites only the statute of New Mexico; hence the inference arises that no fixed rule has yet been established how far the supreme court will review the action of a territorial judge in refusing an application to continue a case when it is regularly reached for trial. I am not at liberty to state the opinion of the court on this point, as I am not advised of their collective or individual opinion on the subject; but my own judgment, so far as I am advised, is adverse to regarding it as a subject of review by this court, believing it to be a matter of discretion to be exercised by the judge having charge of the case. This case does not require a judicial decision of the question, as a careful examination of the affidavit upon which the application for a continuance was founded does not disclose that it contains a statement of facts required by the statute to entitle the appellant to the continuance moved for in the court below.

The act referred to requires the affidavit to set forth "what particular facts, as distinguished from legal conclusions, the affiant believes

[1] See note at end of case.

the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved." To comply with the requirements of this statute, the affidavit states that he expects to prove by the witnesses that he has fully paid plaintiff for all rent sued for, and that he does not owe the plaintiff anything whatever, but that the plaintiff is "justly indebted to affiant for goods, wares, and merchandise sold and delivered to him at his special instance and request." Instead of particular facts, as the statute requires, the affidavit sets forth a confused complication of legal conclusions and facts combined, and, instead of saying that affiant "believes the witnesses will prove," he substitutes "expects" for belief; and, instead of setting forth "that he knows of no other witnesses by whom such facts can be fully proved," it is stated that he "cannot prove the same facts by any other persons present." If a party expects to force the continuance of a cause by virtue of an authority contained in a statute against the best convictions of the court, the provisions of the statute must be strictly complied with, which, in this case, was not done, and consequently the second error assigned is not sustained.

The third and fourth errors relate to the charge of the court, and may be considered together. It is immaterial in this case whether a verbal lease for one year and an occupancy beyond its termination constitute a tenancy from year to year or not, as the plaintiff does not seek to charge the defendant for rent beyond the term that the defendant or his subtenant occupied the premises.

The plaintiff testified, in substance, that the defendant, by special arrangement after he had occupied the premises a year or more, agreed to pay him, the plaintiff, per month, $83.33 rent for the months of June and July, and $60 per month for the months of July and August, 1883, and that the defendant had paid him $30, which ought to be applied as payment on the same, and that left a balance of $256.66 rent due by the defendant to him, the plaintiff. A man by the name of Easterday was called as a witness by the plaintiff, who had occupied a portion of the premises as subtenant under the defendant. While this witness seemed to forget everything that was material to either plaintiff or defendant, yet, upon the whole, his testimony to some extent corroborated the plaintiff's evidence. The defendant testified in his own behalf, and denied every material fact testified to by the plaintiff, and expressly denied that he owed the plaintiff for rent, or in any other manner. The testimony of these three witnesses was the whole evidence in the case. Under substantially the foregoing state of facts the court charged the jury:

"Now, gentlemen, comes the question of fact, who tells the truth, and you cannot avoid passing upon that question, and I cannot throw any light upon it. It is for you to say whether the story of the plaintiff, Kent, and Dr. Easterday, under all the circumstances, is true, or whether the story of the defendant, Favor, is true. If you find for the plaintiff, you will find for him in the sum of $256.66; otherwise, you will find for the defendant."

These instructions, instead of being error, were eminently proper, under the evidence in the case. It is further complained, as error, that "the court erred in giving his instructions of law orally to the jury, contrary to the statute in such case made and provided." The record on its face does not sustain the error complained of, and there is no evidence *aliunde;* hence the legal presumption is that the charge of the court was delivered to the jury according to law. In a thorough examination of the whole record in this case we are unable to discover any error of which the defendant has any right to complain. The judgment of the court below is affirmed.

AXTELL, C. J., concurs.

NOTE.

CONTINUANCE—SUFFICIENCY OF AFFIDAVIT—DISCRETION. The granting or refusing a continuance is a matter within the sound discretion of the trial court, and no appeal lies from its ruling in that respect, except in case of palpable abuse of discretion. Territory v. Kinney, 3 N. M. 97, 2 Pac. Rep. 357; Westheimer v. Cooper, (Kan.) 19 Pac. Rep. 852; State v. O'Neil, (Or.) 9 Pac. Rep. 284; Davis v. Read, (Ark.) 12 S. W. Rep. 558. In *Pennsylvania* and *South Carolina*, it is held that a refusal to grant a continuance is not assignable as error. Lingenfelter v. Williams, (Pa.) 9 Atl. Rep. 653; Dial v. Insurance Co., (S. C.) 8 S. E. Rep. 27. But the general doctrine is that while the action of the court in granting or refusing a continuance is discretionary, yet, in case of abuse of discretion, its action will be reviewed by the appellate court. The following points of practice in respect of continuances have been decided in the *New Mexico* cases. There is no abuse of discretion in refusing a second continuance when the affidavit in support of the application is inconsistent with the one made in support of the application for the first continuance. Thomas v. McCormick, 1 N. M. 369. So where the continuance is asked, on the ground that the record of a former recovery for the same cause of action is absent, it is properly refused when there is no plea under which such record would be admissible in evidence. Waldo v. Beckwith, Id. 182. See, also, as to the necessity that the evidence shall be admissible under the pleadings, Clark v. Mullen, (Neb.) 20 N. W. Rep. 642. The affidavit must set out the evidence that the absent witness is expected to give, so that the court can judge of its relevancy and materiality. Beall v. Territory, 1 N. M. 507.

The affidavit must not only set out the testimony which the absent witness will give, but also all the facts that will make the testimony material, and, if it fail to do this, it is proper to deny the motion for a continuance. Thus an affidavit alleging that the absent witness will testify that he received from defendant a sum of money for the plaintiff in payment of his demand is insufficient for want of an allegation that the witness was plaintiff's agent, or otherwise authorized to receive the money on his behalf. Dold v. Dold, Id. 397. Where the affidavit shows that defendant has used all possible diligence to procure the attendance of the absent witness, and the prosecution refuses to admit what he expects to prove by the witness, the court has no discretion in the matter, but defendant is entitled to a continuance as a matter of right under the statute. Territory v. Kinney, 3 N. M. 369, 9 Pac. Rep. 599. The statute requires that the affidavit shall contain a statement of particular facts instead of legal conclusions, and it has been decided that an affidavit, stating that the absent witness would prove that he had located the land in controversy as a mill-site in connection with a mining claim, is insufficient, as it alleges a conclusion of law. Deemer v. Falkenburg, 12 Pac. Rep. 717.

Parties must keep track of their own causes, and their absence is never ground for continuance unless good cause be shown. Allis v. Distilling Co., (Wis.) 29 N. W. Rep. 543. That a defendant left after the commencement of the term, by the advice of his attorney, who told him that the case would not be called at that term because the administrator of the dead plaintiff had not entered his appearance as substituted plaintiff, is not a sufficient excuse for his absence. Brandt v. McDowell, (Iowa,) 2 N. W. Rep. 1100. The affidavit of an attorney that he believes his client's absence to be due to sickness in his family is insufficient to entitle him to a continuance. McBride v. Stradley, (Ind.) 2 N. E. Rep. 358. So where the only evidence of the party's sickness is the certificate of his physician, unsupported by any affidavit, a continuance is properly refused. Harlow v. Warren, (Kan.) 17 Pac. Rep. 159; but where the party's physician makes affidavit that his patient is ill, and unable to attend court, and will be for several days, the continuance should be granted. Mathews v. Willoughby, (Ga.) 11 S. E. Rep. 620. A party's mistake as to the day of trial is not a sufficient ground for con-

tinuance, for he could have avoided such a contingency by having his own deposition taken. Mayer v. Duke, (Tex.) 10 S. W. Rep. 565. In the above cases relating to parties, the materiality of the absent party's testimony is admitted.

Where the affidavit, in support of the application for a continuance, conforms to the statutory requirements and rules of court, and states substantially good grounds, it is an abuse of discretion to refuse the continuance. Johnson v. Dinsmore, (Neb.) 9 N.W. Rep. 558; Parks v. Insurance Co., (Iowa,) 28 N. W. Rep. 424. And where it appears that the subpœna was inadvertently made out to and served on the brother of a material witness instead of on the witness, and that the mistake was not discovered until too late to rectify it, a continuance should be granted, Myers v. Trice, (Va.) 11 S. E. Rep. 428; but the refusal to grant a continuance on the ground of the suppression of a material deposition, which the attorneys had orally agreed should be admitted, is not an abuse of discretion, Borland v. Railway Co., (Iowa,) 42 N. W. Rep. 590.

The affidavit must set out the facts constituting diligence, and must not allege generally that the affiant has been diligent in his efforts to procure the attendance of the absent witnesses, and it must also show that the witnesses, or their evidence, will be produced by the next term. Ingalls v. Noble, (Neb.) 15 N. W. Rep. 351; Kilmer v. Railway Co., (Kan.) 14 Pac. Rep. 465; Watson v. Manufacturing Co., (Tex.) 2 S. W. Rep. 353. The diligence disclosed by the affidavit must be actual and active, and, where it appears that the deposition of the absent witness could have been taken, there is no abuse of discretion in refusing a continuance. Railway Co. v. Wheat, (Tex.) 3 S. W. Rep. 455. That an absent witness will prove that the value of the property sued for is less than claimed in the petition is no ground for continuance. Railway Co. v. Horne, (Tex.) 9 S. W. Rep. 440. The affidavit must show affirmatively that the absent testimony will be procured, Rowland v. Shephard, (Neb.) 43 N. W. Rep. 344; that there are no other witnesses who can prove the facts expected to be proved by the absent witness, State v. Marshall, (Nev.) 8 Pac. Rep. 672; and, when there are no written pleadings, it must show that issues will arise in the trial upon which the facts to be proved by the absent witness will be material, Hewes v. Andrews, (Colo.) 20 Pac. Rep. 338.

In *Iowa* and *Nebraska*, the affidavit in support of an application for a continuance is not traversable, but the facts alleged must be taken to be true, State v. Dakin, (Iowa,) 3 N. W. Rep. 411; Hair v. State, (Neb.) 16 N. W. Rep. 829; but in *California* and *Georgia*, counter-affidavits may be filed, Kneebone v. Kneebone, (Cal.) 23 Pac. Rep. 1031; Waldrup v. Maxwell, (Ga.) 10 S. E. Rep. 597. Where the party resisting the continuance admits the testimony set out in the affidavit, he simply admits that the absent witness will testify to those facts, but does not admit their absolute truth. Sanford v. Gates, (Kan.) 16 Pac. Rep. 807.

HOBBS and others *v.* SPIEGELBERG and others.

POST and others *v.* SAME.

Filed January Term, 1885.

1. MECHANIC'S LIEN—STATUTE OF NEW MEXICO—PURPOSE AND REQUIREMENTS.
The purpose of the statute is accomplished when a person claiming a lien files within the prescribed time, for record in the proper office, a sworn statement of the amount due him, together with the other facts required to be stated in section 6 of the act of 1880. All these facts may be stated in ordinary language, and sworn to before an officer authorized to administer an oath.

2. SAME—SUBCONTRACTOR—STATUTE—COMMON LAW.
Under the statute of New Mexico the property is affected by the lien of a subcontractor as well as the head contractor. The object of a lien is to protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged. The statute has enlarged the operation of liens, not introduced any new principles. It is not in derogation of the common law, and therefore not necessarily to be subjected to a strict construction.

3. SAME—PRACTICE—JURISDICTION—LAW AND EQUITY.
There is concurrent jurisdiction in law and equity on the subject of liens.

Appeal from Second judicial district court, Bernalillo county.

Fiske & Warren and *A. J. Barr*, for appellees.

S. M. Barnes, for appellants.

AXTELL, C. J. These were suits in chancery to foreclose mechanic's liens. The questions raised in both are essentially the same, and they will be considered together. The principal assignments of error in this court are—*First*, that the notice of lien does not comply with section 6 of the act of 1880 as to filing the claim in the office of the county recorder, in this, that it does not use the words of the statute. *Second*, that it is not proved that defendants were indebted to the contractor; and, as these plaintiffs were subcontractors, it must be shown that defendants were indebted to the contractors before a subcontractor can recover. *Third*, these proceedings ought to have been actions at law instead of bills in equity. These are substantially all the assignments of error.

On the first point it is claimed that the notice of lien filed with the recorder was fatally defective, because it failed to use the exact and full language of the statute, in that the notice omitted to state that the amount claimed was due after allowing all just credits and offsets. The language used is as follows: "And that there remains due and unpaid thereon, after deducting all credits, the sum of five hundred and seven (507) dollars." The statute provides "that the person claiming the benefit of this act must file for record * * * a claim containing a statement of his demands, after deducting all just credits and offsets, * * * which claim must be verified by the oath of himself or some other person." This claim is simply the ac-

count of the laborer or material-man. It might be filed for record simply in the form of ordinary book-keeping, showing on one page the debits, on the opposite page the credits, striking a balance, and alleging under oath that the amount there stated was due. The words of the statute need not be followed if the substance is preserved. "He who considers merely the letter of an instrument goes but skin deep into its meaning." The purpose of the law is to give notice of the amount claimed, and this, we are of opinion, was fully accomplished in the present instance. It not only asserts that there remains due and unpaid the sum of $507, but—and we think it surplusage—says it remains due and unpaid after deducting all credits. We fail to see how it could remain due and unpaid if it had been paid. The purpose of the statute is accomplished when the person claiming a lien files within the prescribed time, for record in the proper office, a sworn statement of the amount due him, together with the other facts required to be stated in section 6 of the act of 1880. All these facts may be stated in ordinary language, and sworn to before any officer authorized to administer an oath. It is said in defendant's brief that this statute is in derogation of the common law, and must be strictly construed. We fail to see how this statute is in derogation of the common law; nor is it possible for us to see any necessity for construction. The directions of the statute are exceedingly minute and explicit, and can easily be followed by any man of ordinary education and intelligence.

The second assignment of error is that it does not appear that defendants were indebted to the contractor, and that, therefore, he cannot be compelled to pay a subcontractor, material-man, or laborer, as he was not primarily indebted to them, their contracts having been solely with the principal contractor, and there being no privity of contract between the owner of the ground and building (this defendant) and the laborers and subcontractors, and that unless the defendant owes the contractor and is under garnishment, he cannot be required to pay another man's debt. This principle of law is so absolutely elementary that it is confusing to find it pressed with a serious face before the supreme court. There could be no reply to it except that the statute has given one. Section 1 of the act of 1880 defines a lien to be a charge imposed upon specific property, by which it is made security for the performance of an act. Section 2 provides that "every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any building, * * * or who performs labor in any mining claim, has a lien upon the same, * * * whether done or furnished at the instance of the owner *or his agent;* * * * and every contractor shall be held to be *the agent of the owner* for the purposes of this act." Section 12 provides: "In case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor the amount of such judgment and

costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

The object in quoting so much of section 12 is to show that the statute itself fully replies to the point relied upon as error. The statute was enacted for the very purpose of doing what defendant gravely calls error; the statute expressly makes the defendant liable for a debt he never contracted. He is in privity of contract, by force of the statute, with every laborer who works upon his building. We think the statute provides safeguards for the owner as well as for the laborer; nor do we think that the doctrine of liens is either new, in derogation of common law, or inequitable. The object of a lien is to protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged. The statute has enlarged the operation of liens, not introduced any new principle. If I give my servant or agent money to pay for repairing my watch and he squanders or misapplies it, it is no reason in law or equity why the watch-maker should not enforce his lien and retain it until he is paid for his services. It is not his fault that I employed a dishonest agent. Without the aid of the statute, the point assigned as error would be impregnable; with the statute, it is unworthy of serious consideration.

The third assignment of error is that this proceeding ought to have been at law and not in equity. Our statute is silent upon this subject, and we must look for a guide in the general principles which govern actions. We now leave the region of substantive law and consider the law of procedure. We have retained in this territory the distinctions between law and equity in our modes of procedure, and, on principle, if the plaintiff had a plain, speedy, and adequate remedy at law, he ought not to have gone into equity, unless there existed concurrent jurisdiction. Then, under our system, he would have been at liberty to pursue either method, and the one he chose would have been exclusive of the other. The proceeding to foreclose a mechanic's lien resembles a suit for the foreclosure of a mortgage by judicial sale. Pomeroy (Eq. § 1269) says: "It is true that these liens, being created by statute, are legal in their essential nature, rather than equitable." Yet the suit to enforce them results in a decree for a sale and the distribution of the proceeds, and therefore it has a feature of equity proceeding. There can be no doubt but that the lien of the contractor could be enforced at law, the same as a lien by attachment; nor are we satisfied that all liens could not be so enforced; yet we see no reason why they could not also be enforced in equity. From a careful consideration of the subject, we are inclined to believe that the jurisdiction is concurrent; if not, it would be safer to declare it exclusively in equity, and we find that these suits were

properly brought. No error, therefore, appearing upon the record, the judgment of the court below ought to be affirmed; and it is so ordered.

WILSON, J., concurs in result.

TERRITORY *v.* CHENOWITH.

Filed January 17, 1885.

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—PRESENCE OF ACCUSED.
   While it would be error in a case of felony to proceed with the trial in the absence of the accused, yet, after verdict and before sentence, it is now the universal rule that the prisoner need not be present at the hearing of a motion for a new trial.
2. SAME—TRIAL OF CASE—SEPARATION OF JURY.
   Even in cases of capital felony it is in the sound discretion of the court as to whether the jury may be permitted to separate, during the trial, before the case has been given in charge to them.

Appeal from Third judicial district court, Grant county.

William Breeden, for appellee.

John J. Bell, for appellant.

BELL, J. The defendant was convicted at the July term of the district court for Grant county of the crime of assault with intent to murder, and sentenced to the penitentiary for two years. The record shows that a motion for a new trial was argued and overruled while the prisoner was absent, being, at the time, in custody and in jail. This motion was denied, and afterwards the order denying the same was set aside, and counsel was directed to renew the motion for a new trial while the prisoner was present in the court. This was done, and the motion was again denied.

It is claimed that the court erred in hearing the motion for a new trial during the absence of the defendant, as above stated, and that the error was not cured by setting aside the order which had been made in his absence, and causing the motion to be reheard in his presence. We think that it was not error for the court to hear the motion for a new trial in the absence of the prisoner. While it would be error, in a case of felony, to proceed with a trial in the absence of the prisoner, yet, after verdict and before sentence, it is now the universal rule that the prisoner need not be present. In 1 Bish. Crim. Proc. § 276, the rule is stated as follows: Between the verdict and sentence "it is not necessary that the prisoner be at any time personally present in court, even where the offense of which he stands convicted is a capital one." "His counsel," it is added, "may ask for a new trial in his absence;" and authorities are cited to sustain this rule. The right of the prisoner to be present during his trial is based upon his constitutional right to be confronted with his accus-

ers, and to have an opportunity to see and examine the jurors by whom he is to be tried. After verdict, when mere matters of law affecting the trial, which has ended, are to be discussed, there is no reason for his presence. As Bishop rightly says, in discussing this question: "Yet it may be suggested, as a general proposition, resting rather in the reason of the thing than in any precise light of adjudication, if there is to be adjudged a mere matter of law before the court, there is no reason why it should not be done in the absence of the prisoner."

This is now, we believe, the universal rule both in England and the United States. It might as well be said that the prisoner would be entitled to be present at the argument of his case in the appellate court, as that he should be present at the argument of a naked question of law which arose upon a motion for a new trial, which is based upon substantially the same grounds as an appeal to a higher court.

It is further claimed, as error in this case, that after the jury were impaneled, and during the day upon which the case was tried, they were permitted to separate, during the noon recess, without being accompanied by a sworn officer. It appears that after the evidence was in, and before the arguments of counsel and instructions of the court, that the jurors were permitted by leave of the court, and after being carefully admonished to permit no one to address them on the subject of the trial, to separate during the dinner hour. This was not error. It is a rule of practice universally adopted both in this country and in England. In capital cases, there is, in some of the states, either a statute or a rule of practice requiring the jury to be kept together. But the well-settled doctrine in substantially all the states of the Union, as well as in England, now is, that even in cases of capital felony it is in the sound discretion of the court as to whether the jury, during the trial, may be permitted to separate. It would have been different had the jury been permitted to separate without leave of the court after the case had been given to them in charge, and before the rendition of their verdict. But even in such case, before a verdict will be set aside, it must be shown that the prisoner was in some way prejudiced by the separation. The judgment is affirmed.

AXTELL, C. J., and WILSON, J., concur.

TALBOTT *v.* RANDALL and others.

Filed January 26, 1885.

EQUITY—FRAUDULENT CONVEYANCES—INJUNCTION.

Equity will enjoin any transfer of a debtor's property, made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors a preference over others. But such power in the court can only be invoked in behalf of creditors who have established their claims in a court of law, and will not be exercised on behalf of mere contract creditors at large, whose claims are not reduced to judgment.

Appeal from Second judicial district court, Bernalillo county.

Niell B. Field and *Warren Bristol*, for appellant.

William B. Childers, for appellees.

AXTELL, C. J. The very able opinion filed in this case by BELL, J., before whom the proceedings were had, is adopted by us as the law of the case; and, for the reasons set forth in said opinion, the judgment and decree of the lower court should be affirmed; and it is so ordered.

WILSON, J., concurs.

Opinion of the Lower Court in Above Cause.

This is a bill in equity, brought to set aside a conveyance heretofore made by the defendant John W. Randall and his wife to the defendant John Randall, on the ground that the same was fraudulent and void as to this and the other creditors of the said John W. Randall. It appears from the bill that the complainant had, prior to the commencement of this suit, brought his action at law against the said John W. Randall to recover an alleged indebtedness, amounting to about $1,700. In his action at law the plaintiff therein and complainant here had sued out a writ of attachment and endeavored thereunder to levy upon the real property of the said John W. Randall, but failed because of the conveyance aforesaid, by which the legal title to the property had passed to the defendant John Randall. Upon the filing of this bill the court granted to the complainant a preliminary injunction, restraining the defendants from further conveyance of the property until the final hearing and determination. The injunction granted was accompanied by an order upon the defendants to show cause why the same should not be continued. The case now comes up for hearing upon that order. The only question presented by the bill is whether the complainant has the necessary standing in court to entitle him to the relief prayed for. Courts of equity have invariably intervened, when applied to by creditors who have established their claims in an action at law, to remove such obstructions as may exist to the collection of the debts thus established by enjoining defendants from so transferring their property as to place it beyond the reach of execution, and by setting aside conveyances which are found to be void as against such creditors. The general rule is that equity will enjoin any transfer of a debtor's property made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors preference over others. But I think it is well settled that such power in the court can only be invoked in behalf of creditors who have established their claims by judgment in a court of law, and will not be exercised on behalf of mere contract creditors or creditors at large whose claims are not reduced to judgment. The rule and the reasons for it are aptly stated by a learned author, who says:

"Equity has jurisdiction of fraud, but it does not collect debts. A creditor must establish his demand at law, and obtain a lien upon the property before the transfer interferes with his rights, or he has any title to claim relief in equity. No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property, out of which he has a specific right to be satisfied, is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered, and defrauded by the conveyance." Bump, Fraud. Conv. 534, 535.

Another author says:

"A judgment creditor only can inquire into the transmutation of his debtor's property." Jer. Ch. 405.

High (Inj. § 1403) says:

"It is to be observed, however, that the jurisdiction is not exercised in favor of mere contract creditors, or creditors at large, whose claims are not reduced to judgment; and, in the absence of statutory provisions authorizing relief, courts of equity will not, at the suit of other than a judgment creditor, interfere by injunction to restrain a debtor from any disposition of his property, however fraudulent, which he may see fit to make. The principle upon which the rule is based, is that until the creditor has established his claim by judgment he has no right to question the action of his debtor, and has no concern with his frauds; and to allow the interference in behalf of mere general creditors before judgment, would lead to an unjustifiable and often oppressive interruption of the debtor's right to control his property."

Further on, the same author discusses the precise question arising in this case, and says:

"Upon the question whether an attaching creditor, whose demand is not yet reduced to judgment, may properly invoke the aid of equity to enjoin the transfer of the debtor's property, the authorities are not altogether uniform. The better doctrine, however, seems to be that such creditor occupies no better position in this respect than one who sues by the ordinary process of the courts, and he will not, therefore, be allowed to enjoin the disposal of the debtor's property on execution, even if the judgments under which the execution is issued were fraudulently confessed by the debtor. Nor can the debtor, by instituting a suit in attachment, and by service of garnishee process therein, acquire such a lien upon property in the garnishee's hands as to warrant a court of equity in enjoining the latter from disposing of the property before judgment and execution in his attachment suit. Such a creditor, having no judgment, execution, or lien upon the property, occupies the same position as any simple contract creditor, and an allegation of danger of loss will not give the court jurisdiction in such cases to grant an injunction." High, Inj. § 1405.

The same author further says:

"The general rule, denying relief by injunction against transfers of their debtor's property in behalf of creditors whose demands have not been reduced to judgment, has been modified by legislation in some of the states." Id. § 1407.

Legislation modifying the rule has been had in New Jersey, Maryland, and several other states; but this legislation was had in view of the rule that requires a debt to be established before a court of equity will interfere. Because a creditor sues out an attachment, it cannot be said that his debt is thereby established. He only differs from other general creditors in that the law, for special reasons named in the statute, lends to him the auxiliary aid of a writ of attachment. The debt is by no means thus established, nor does it tend to establish the debt any more than the ordinary sworn complaint of the plaintiff, in an action at law, does to establish the debt for which the action is brought.

In the numerous cases which I have examined, where the question at issue here has been carefully considered, the rule as laid down by the text-writers has been uniformly adhered to. The precise question is exhaustively considered in the case of *Thurber* v. *Blanck*, 50 N. Y. 80, and the rule, as furnished by the text-writers quoted, is therein held to be the law in that state. From numerous cases in other states I quote the following as being directly in point, and in support of the views which have been heretofore given: "No creditor, not a judgment creditor, can enjoin his debtor from transferring his property." *Crowell* v. *Horacek*, 12 Neb. 622; S. C. 12 N. W. Rep. 99. "Plaintiff must obtain a judgment at law before he can maintain a bill to set aside a sale of a stock of goods on the ground of fraudulent preference." *Goembel* v. *Arnett*, 100 Ill. 34. "Before a creditors' bill can be maintained to subject property of the debtor, fraudulently conveyed, to the payment of the complainant's claim, such claim must, as an indispensable prerequisite, have been first reduced to judgment." *Stewart* v. *Fagan*, 2 Woods, 215; 7 U. S. Dig. (N. S.) 224. "Before obtaining judgment upon his demand, an attaching creditor cannot maintain an action to have an alleged fraudulent conveyance of real estate set aside." *Weinland* v. *Cochran*, 9 Neb. 480; S. C. 4 N. W. Rep. 67. "In general, a creditor's suit cannot be maintained by an attaching creditor until he has recovered judgment." *Tennent* v. *Battey*, 18 Kan. 324.

We think the same principle is recognized by the supreme court of the United States in the case of *Jones* v. *Green*, 1 Wall. 330. In that case Mr. Justice FIELD, who delivered the opinion of the court, says:

> "A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the property, or some fraudulent transfer of it."

In that case the bill was filed to subject certain real property of the judgment debtor to the lien of an execution before an attempt had been made to secure satisfaction of the debt by issue of execution at law thereon. It follows, of course, that where the legal claim, as in this case, was not even established by judgment, the court will not

interfere to set aside a conveyance for alleged fraud, or restrain further conveyance. In the light of all the authorities cited, and others examined, I am of opinion that the complainant herein is not in a position to be entitled to the relief asked for, and that the temporary injunction heretofore granted must be dissolved.

TALBOTT *v.* RANDALL.

Filed January 26, 1885.

ATTACHMENT—AFFIDAVIT—MISTRIAL.

Upon the trial of issues as to the grounds of attachment, the affidavit itself was mislaid, the counsel had never seen it, and the case was tried, both by the court and counsel, upon the theory that but one ground of attachment was laid in the affidavit, viz., that defendant fraudulently disposed of his property, when in fact it contained the further ground that the debt was fraudulently contracted. *Held* a mistrial, and that a new trial should be ordered.

Appeal from Second judicial district court, Bernalillo county.

Niell B. Field and *Warren Bristol*, for appellant.

William B. Childers, for appellee.

AXTELL, C. J. This was a trial as to the truth of the allegations of an affidavit for attachment. In this proceeding, under the statutes of New Mexico, the affidavit for attachment is the complaint in the case, and a simple denial of its truth puts the case at issue, and the trial proceeds before the court and jury as in other cases at law. Counsel who tried the case at *nisi prius*, and who presents the case to us for review, was not regularly of counsel in the case, and had never seen the affidavit at the time of the trial. It is stated to us in open court, and not denied, that the affidavit for attachment or complaint in the case had been mislaid, and was not produced or read at the trial, and that the trial proceeded, and rulings upon introduction of evidence were made upon the theory that there was but one ground for attachment laid in the complaint, viz., that the defendant "had fraudulently conveyed, assigned, and disposed of his property or effects so as to hinder, delay, or defraud his creditors, "when in fact, as appears from the record before us, the complaint or affidavit for attachment contained another count, viz., that the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit was brought. We cannot, in justice to the learned judge who presided at the trial, consider his rulings upon the admission of evidence in the light of the second count, for it was not called to his attention, and it is not to be tolerated that a judge at *nisi prius* is to be held responsible for rulings upon points to which his attention was not distinctly called. But we think that error crept into this case because the allegations contained in the complaint were not all before the court, and we are, therefore, of opinion that it was a mistrial, and that a new trial should be had; and it is so ordered.

WILSON, J., concurs.

ROBBINS v. COLLIER.

Filed January 29, 1885.

EQUITY—CAUSE DECIDED IN COMMON-LAW COURT.

A court of equity will not consider a cause pending between parties who, upon a matter substantially the same, have already had their controversy adjudicated in a court of law.

Error to First district, San Miguel county.

William Breeden and *Catron, Thornton & Clancy*, for plaintiff in error.

D. P. Shield, J. H. Koogler, and *W. B. Childers*, for defendant in error.

WILSON, J. Joseph B. Collier, the defendant in error, filed his bill in equity against Augustus O. Robbins, plaintiff in error, alleging that "he and Collier, on or about the first day of February, 1879, agreed to become partners in the business of making, buying, and selling furniture and such other goods as are usually made, bought, and sold in a wholesale and retail furniture store, including the making, buying, and selling coffins, caskets, metallic cases, and general undertaking business, to be carried on at Las Vegas, New Mexico, and such other places in said territory as might thereafter be agreed upon." He further alleged that the said defendant had possession of all the assets of the firm, and that a large sum was due him as such partner, and alleging, also, in said bill, that in the month of February, 1880, the said Robbins, by false and fraudulent representations, with intent to cheat, swindle, and defraud, procured or induced him, the said Collier, to sign a bill of sale of all his interest in the said goods and partnership effects to said Robbins, with a prayer that an account might be taken and the partnership dissolved, etc. The said Robbins filed an answer to said bill, under oath, denying the existence of said partnership, and denying that any indebtedness existed, and also denying that the complainant had any interest in, or that there was due to him any sum whatsoever from, the assets or business referred to in said bill, and alleging that Collier had merely been hired by him as salesman, etc., and for which services he had received all he was entitled to, and had gone out of the business after selling and transferring to Robbins all right, share, and interest which he ever had, or might have had, in said assets and business, and that the consideration for such transfer had been fully paid; and further, that in a suit at law brought against him by said Collier, in the same court, upon the same subject-matter, and upon the same demand, a verdict and judgment had been rendered in favor of him, the said Robbins. A master was appointed, who reported in favor of the complainant for the sum of $1,826.75, which report was affirmed by the court, and upon a writ of error the case was brought into this court for review.

The errors assigned were: (1) That the plaintiff below transferred and assigned all the interest and rights, on account of which he sought

to recover, to defeat, delay, and defraud his creditors, and to cover his property from them, to avoid the payment of his debts, and that the transfer was voluntary and fraudulent. (2) That the same subject-matter and demand upon which the bill of complaint was filed and relief sought, had been tried in a suit at law between these parties, and a verdict and judgment thereon in said suit rendered in favor of Robbins, and that a judgment in a suit at law, rendered by a court of competent jurisdiction, upon the same demand for which this suit is brought, was a complete bar to this suit.

It is denied by the defendant in error that the cause of action was the same in the two suits; but an examination of the bill and declaration in the suit at law demonstrates, we think, clearly, that the cause of action is substantially and materially the same in each. In the action at law the defendant in error alleged that there had been a partnership settlement between them, and that there was a balance due him from the defendant of $3,000 "for goods, cash, and merchandise." And to sustain this charge in his declaration filed in the suit at law, Joseph B. Collier, the defendant in error, testified as follows:

"*Question.* Tell the jury all you know, if anything, in reference to the indebtedness to you. Give all the facts and circumstances in the case. *Answer.* We run a partnership business for about a year. That was closed by my selling out to him, and we were to invoice everything in the partnership; and as soon as we could find out what was really due me, he was to pay me whatever he found due from the invoices of the goods of the two places, our accounts, and everything."

In the equity suit under consideration he alleges the transfer of the goods and partnership effects was obtained by Robbins through false representations. The facts stated in the bill and declaration are substantially the same, and the evidence given in each to sustain the allegations in each is substantially alike. The cause of action set forth in each is for the same alleged partnership transactions and effects. Yet the counsel for defendant in error insist that the cause of action is not the same in the two cases. The action at law was not dismissed for want of jurisdiction, nor for the reason that there was not sufficient remedy at law. It was tried on its merits, and a verdict and judgment rendered against the complainant herein. Can it be supposed that if the defendant in error had recovered his claim in his action at law between the same parties, that he would be here now, asking a dissolution of the partnership, and praying "that an account may be taken, under the directions of this honorable court, of all and every, the copartnership dealings and transactions?" A quotation from the declaration of the action at law between the same parties will show the absurdity of such an attempt: "And also the further sum of $3,000, the balance due plaintiff from defendant for goods, cash, and merchandise on a partnership settlement between plaintiff and defendant."

We think the quotations given demonstrate that the plaintiff could not recover his claim in each case, for the reason apparent on the record of both cases, that they are for one and the same cause of action. Hence a defeat in the first action is as much and as successful a bar to a recovery in the present suit as if he had recovered his whole claim in his action at law. This view of the case relieves the court from the necessity of noticing any other assignment of error in the case. It was settled in the case of *U. S. Bank* v. *Beverly*, 1 How. 134, that a matter decided by court of competent jurisdiction cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law, and a decree of a court of equity. This doctrine is too well recognized to require the citation of authorities to sustain it. The second assignment of error is therefore sustained, and it is ordered, adjudged, and decreed that the decree and judgment of the court below be reversed, and the bill dismissed, at the cost of Joseph B. Collier, defendant in error. BELL, J., concurs.

LEYSER *v.* RINDSKOPF and others.

Filed January 30, 1885.

SET-OFF—ASSUMPSIT—DAMAGES—ATTACHMENT.

Under a statute limiting the right of set-off to causes of action "in favor of defendant arising out of the contracts or transactions set forth in the declaration, or connected with the subject of the action," the defendant in *assumpsit* for goods sold and delivered cannot plead damages for an unsuccessful attachment for the same debt six months after the sale was consummated.[1]

Error to Second judicial district, Sorocco county.

Fiske & Warren, for plaintiff in error.

Neill B. Field, for defendants in error.

WILSON, J. This was an action of *assumpsit*, commenced in the court below upon a declaration containing the common counts in *indebitatus assumpsit*. The defendant below filed the usual plea of *non-assumpsit*, and also pleaded specially that he had a cause of action against the plaintiffs below for damages sustained by reason of the plaintiffs below having sued out an attachment prematurely, to recover for the same goods, etc., sued for in the action of *assumpsit*. The facts set forth in the plea were not denied. The plaintiffs demurred to the special plea, and, upon hearing, the court sustained the demurrer.

The only question in this case is, did the court below commit error in rejecting the defendant's defense contained in his special plea? Set-off in this territory is regulated by statute, which provides that a defendant may plead, as a set-off or counter claim, "a cause of action in favor of the defendant arising out of the contracts or transactions set forth in the declaration or connected with the subject of the action." The statute had been more liberal, and permitted the defendant to set off any cause of action which he held against the plaintiff which

[1] See note at end of case.

was matured at the time of pleading. This liberality, upon experiment, was found to operate injuriously or unsatisfactorily, and after a trial of some two years the legislature repealed the clause last stated. It is not claimed by the plaintiff in error that ordinary actions of tort can be set off under the existing statute; but it is claimed that the action offered to be set off, although tort, had the merit of arising out of the contract upon which the plaintiff claimed to recover in the action of *assumpsit*, or was connected with the subject of the action. Counsel for plaintiff in error have cited several Texas cases, some of them, apparently, much like the case under consideration. But it is not shown how nearly, if at all, the Texas statute of set-off is like the statute in this territory; and what is equally unsatisfactory to me, is that the reasoning of the judges of Texas, added to the elaborate argument of the counsel, was unsuccessful in bringing the reasons for their conclusions to my comprehension.

It is still an unsolved problem in my mind how an unsuccessful attachment was connected with a sale and purchase of goods that had been consummated six months before the writ of attachment was issued or executed. If this theory be true, then, if an action of trespass had been commenced by the defendant below, in the language of Chief Justice HEMPHILL, in 14 Tex. 669, (*Wiley* v. *Traiwick*,) for "wrongfully, maliciously, and oppressively" suing out the attachment, and levying the same on his goods and effects, then the claim for the value of the goods sued for in the *assumpsit* suit would have been a proper subject of set-off in the action of trespass, for the reason that it arose out of the same transaction or was connected with it. This position would hardly have been sustained by the Texas court, yet I am not able to see why it would not be a necessary result, upon the same basis of reasoning. The case in 3 Metc. (Ky.) 121, (*Nolle* v. *Thompson*,) is, in facts and principle, identical with the case under consideration. There, as here, an attachment had been sued out to secure the claim that was in controversy in the action pending between the parties. The attachment there, as in this case, had been wrongfully sued out and levied. There, as here, the defendant pleaded it specially as a set-off, with the additional allegations that the plaintiffs were non-residents, and had no property out of which he could make the damages asked to be set off. Judge DUVALL, in refusing to allow the set-off, said:

"Now, the cause of action attempted to be set off did not arise out of the contract set forth in the petition as the foundation of the plaintiffs' claim; nor can it be said to have arisen out of any transaction set forth in the petition as the foundation of the action. On the contrary, the matters alleged in the counter-claim are wholly foreign to anything constituting the foundation or subject of the plaintiffs' claim. The debt due upon the note sued on constitutes the only foundation or subject of the action, and the facts set up in the answer have no connection with that debt, and relate exclusively to the remedy or mode of proceeding adopted by the plaintiffs to enforce the collection of the debt."

While the Texas cases and the Kentucky case are all entitled to great respect and profound consideration, yet neither of them is binding on us further than the reasoning convinces our judgment. The case in 3 Metc., (Ky.,) above cited, being in facts and principle like the case under consideration, and the reasoning of the judge in that case being in harmony and accord with ours, we arrive at the same conclusion: that the set-off offered in the court below was properly refused. The error assigned is overruled, and the judgment of the court below is affirmed.

AXTELL, C. J., concurs.

NOTE.

SET-OFF—SAME TRANSACTION—SUBJECT OF THE ACTION. A suit on a promissory note given in final settlement of an account between the parties may be met by a plea of set-off as well as any other note; and the averments of the plea of set-off are sufficient when they disclose a cause of action which would be sufficient if embodied in a declaration. Staab v. Garcia y Ortiz, 3 N. M. 53, 1 Pac. Rep. 857. In a suit on the bond of a deputy postmaster to recover the amount of a defalcation, the postmaster's unaudited claim against the government cannot be pleaded as a set-off. U. S. v. Howland, 1 N. M. 550.

Where one who has contracted to purchase land brings an action against the executor of his deceased vendor to recover earnest money paid, on the ground that the land may possibly be sold to pay debts, it is proper to plead a counter-claim for specific performance of the contract. Such counter-claim is based on the contract set forth in the complaint. Moser v. Cochrane, (N. Y.) 13 N. E. Rep. 442. Under a statute allowing a counter-claim of "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claims, or connected with the subject of the action," it is allowable, where the complaint alleges title and possession in plaintiffs, and prays to enjoin defendant from committing waste, and for general relief, to set up, by way of counter-claim, title and exclusive possession in defendant, and to ask to have title adjudged in him. Title and possession are the "subject of the action." Grignon v. Black, (Wis.) 45 N. W. Rep. 122. But in *California* it is held under a like statute that where the complaint alleges defendant's unlawful entry, and ouster of plaintiff, and asks damages, rents, and profits, it is improper to plead a counter-claim alleging defendant's ownership, a contract by which plaintiff became his tenant, and asking rent for use and occupation. Carpenter v. Hewel, 8 Pac. Rep. 314. In an action for trespass by cutting timber on plaintiff's land, a counter-claim for damages to defendant's land by reason of plaintiff's act in raising a mill-dam so as to overflow it is not "connected with the subject of the action," and cannot be maintained. Bazemore v. Bridgers, (N. C.) 10 S. E. Rep. 888. But where an attorney in fact has conveyed to himself land covered by his power of attorney, and is sued by his principal to set aside the deed, his answer that the land was originally bought by himself and his principal together, that he furnished all the money though title was taken in the principal's name, sets up new matter "connected with the subject of the action," and is therefore a good counter-claim. Davis v. Davis, (Mont.) 23 Pac. Rep. 715.

In an action upon a judgment against plaintiff and others, plaintiff compromised the claim against him, and took from defendant a bond of indemnity against any payments he might have to make on account of the suit or the claims on which it was based. Afterwards defendant repudiated the compromise, alleging fraud, and brought another suit against plaintiff on the claim. That suit was dismissed, whereupon plaintiff brought this suit upon the bond to recover costs and expenses therein incurred. Defendant set up a counter-claim, alleging fraud in procuring his signature to the bond, and asking damages therefor. Held, the counter-claim was good as "arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action." Thompson v. Sanders, (N. Y.) 23 N. E. Rep. 374. And under the *New York* statute it is allowable, in an action for breach of contract of partnership, to counter-claim upon the allegation that plaintiff did not bring to the firm the amount and kind of business he had agreed to when the partnership was formed; but a counter-claim for an accounting and adjustment of the partnership affairs is not good, because an equitable cause of action cannot be set off against a legal demand. Church v. Spiegelburg, 31 Fed. Rep. 601. Under a like statute it was held that in an action to recover a certain sum alleged to have been obtained from plaintiff through duress of imprisonment upon a void warrant for fornica-

tion with defendant's daughter, and by threats of further prosecution for the same, a counter-claim for debauching her, and getting her with child, whereby defendant lost the use of her services, was not allowable. Heckman v. Swartz, (Wis.) 12 N. W. Rep. 439. In *Minnesota*, the court held that the statute allowing counter-claims should be liberally construed; and that in an action for rent the tenant may counter-claim for the wrongful interference by the landlord with his enjoyment of the rented premises. This claim is "connected with the subject of the action." Goebel v. Hough, 2 N. W. Rep. 847. But, in an action for goods sold and delivered, defendant cannot counter-claim against plaintiff for maliciously bringing an action for the price, and attaching his goods, before the debt was due. The court says: "If the cause of action alleged in the answer is one solely for malicious prosecution, depending for its existence on malice and want of probable cause, it is an action for tort. It does not arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim; nor is it connected with the subject of the action, but is an entirely independent cause of action, arising upon facts subsequent to and independent of those on which plaintiff's cause of action rests. Such is the nature of the cause of action, unless the bringing prematurely of the action for the price of the goods was such a breach of the contract of sale that a cause of action would thereupon arise in favor of the defendant. Malice or good faith in bringing such an action would not affect that question. * * * The case is different from Goebel v. Hough, supra, for in that case the wrongful act of the plaintiff constituted a breach of the covenant for quiet enjoyment in the lease upon which the action was brought." Schmidt v. Beckenbah, 12 N. W. Rep. 349.

Under a similar statute it is held in *Arkansas* that, in an action by a prison guard against the keeper of the penitentiary for damages for an assault and battery committed immediately upon the discovery that the guard had just allowed a number of convicts to escape from his charge, the damage caused the keeper by such escape is not a proper subject of counter-claim. After reviewing the authorities at considerable length, the court says: "The subject of this action was the right of Massey to immunity from personal violence. The breach or infringement of that right constituted his cause of action. The cause of action of defendant, which was the escape of three convicts through the alleged negligence of Massey, had no connection whatever, direct or remote, with the subject of this action, and was not a proper subject of counter-claim." Ward v. Blackwood, 3 S. W. Rep. 624.

In an action on a bond given to secure the purchase price of a horse, it is allowable to set off damages for a breach of warranty of the soundness of the horse, and of an agreement to keep him insured for one year. Such claim was held to arise from the "transaction set forth in the complaint as the foundation of plaintiff's claim." McKinnon v. Morrison, (N. C.) 10 S. E. Rep. 513. And in an action for the possession of a schooner, alleged to have been wrongfully detained by defendant, with damages for its detention, a claim for services rendered in caring for such schooner is "connected with the subject-matter of the action," and may be pleaded as a set-off. Lapham v. Osborne, (Nev.) 18 Pac. Rep. 881.

PROBST *v.* TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA.

Filed January 29, 1885.

1. ADVERSE POSSESSION—EVIDENCE—CHARACTER OF POSSESSION.
   In an action of ejectment, where the defense is the statute of limitations, evidence that the defendant went upon the land for the purpose of raising one or two crops, together with vague testimony that he claimed the land, there being no evidence of residence, improvement, inclosure, customary cultivation, or other use showing continued actual appropriation, is insufficient to establish the character of his possession as adverse, especially where his own testimony indicates that in going upon the land he merely mistook his boundary.
2. SAME—RELIGIOUS CORPORATION—FAILURE TO FILE CORPORATION PAPERS—EFFECT AS TO POWER TO SUE.
   The fact that a religious corporation had not, previously to the commencement of a suit, caused the papers and certificates required by chapter 3 of the Laws of 1880 to be filed in the office of the secretary of the territory, does not debar it from access to the courts in protecting its previously vested estate in the territory.
3. SAME—SECONDARY EVIDENCE—FOUNDATION.
   In a case of disputed title, one of the litigants being a religious corporation, proof should be obtained directly from the corporate office, in which the corporate papers are usually kept, before admitting secondary evidence of documents presumed by law to be in the corporate custody.
4. SAME—PAPER TITLE NOT NECESSARY IN DEFENSE AGAINST TRESPASSER.
   A regularly derived paper title is not necessary for recovery against a defendant who, without title, has intruded upon a prior possession.
5. SAME—CORPORATION HOLDING LAND BY AGENT—PRESUMPTION FROM FACTS.
   The fact that a Presbyterian clergyman, recognized as such, claimed to hold certain specific property in Santa Fe for a religious corporation in New York; that said corporation could not, on account of its distance, occupy its lands except by means of servants, agents, tenants, or other representatives; the statements of such clergyman, and his position in Santa Fe,—raise a strong presumption that he was acting for the plaintiff corporation, and that his possession was the possession of the corporation.

Error to the First district, Santa Fe county.

Catron, Thornton & Clancy, for plaintiff in error.

Gildersleeve & Knaebel, for defendant in error.

WILSON, J. The corporation (plaintiff below) claims to have acquired title to the *locus in quo*, accompanied by actual possession, in April, 1870. The defendant below controverts the corporate title, denies its capacity to sue, and sets up the statute of limitations. The plaintiffs, in the district court, introduced in evidence, under objection, the records of several conveyances, showing a regular chain of title to the *locus in quo*, beginning with a conveyance by one Lovato, who was in possession of the land as early as 1846, and continuing through several mesne conveyances to the plaintiff, whose immediate grantor was, according to the record on the recorder's books, Daniel T. McFarland. McFarland's deed to the plaintiff was recorded April 25, 1870. The defendant below testified that he

went into possession of the *locus in quo* in the spring of 1871, and had continued in such possession ever since. It appears, however, that McFarland lived in a house upon contiguous land, exercised acts of ownership upon the premises in question, and occupied them prior to the defendant's entry, and that, about the time of recording the alleged deed to the plaintiff, he claimed to hold the premises in their behalf. McFarland was in under legal title extending over the whole of the *locus in quo*, and, upon familiar principles, the possession thus held would be presumed to continue until the establishment of an adverse possession within the meaning of the law. A mere trespass, not amounting to a disseizin, does not constitute adverse possession in such sense as to set the statute in operation. A trespass must be hostile, open, notorious, clearly defined, exclusive, uninterrupted, and under claim, real or pretended, in order to make the statute available to the intruder.

The evidence in this case is insufficient to establish an adverse possession continued during 10 years. It is not enough for a party to prove that he has been in possession in general terms. Mere possession does not satisfy the statute. It is the nature and circumstances of the possession that are controlling in such cases. Nothing can be implied in favor of a wrong-doer who bases a claim on his own wrong. If he seeks to gain an estate by his own hostile acts, without title, he must affirmatively prove the existence of all the conditions necessary to the achievement of that result. Here the evidence discloses no specific facts indicating adverse possession, except going upon the land for the purpose of raising one or two crops, unless we regard the vague testimony as to the defendant's claiming the land in the same light. There was no residence, no improvement, no inclosure, no customary cultivation, or other use, showing a continued actual appropriation. The facts are much weaker as evidence of adverse possession than those proved in the case of *Baldwin* v. *Simpson*, 12 Cal. 560, wherein the court held the possession not to be adverse in the sense of the statute. The doctrine on this subject is well settled, and it is maintained in several of the cases cited in the brief of the plaintiff in error. Moreover, if we regard the *quo animo* of the entry, as disclosed by the defendant below in his own testimony, it appears that he had title papers to adjoining land, first as mortgagee and afterwards as vendee, and that in going upon the *locus in quo* he merely mistook his boundary. This negatives the idea of an adverse possession under the circumstances of this case. The defendant's own title papers made the land of McFarland his southern boundary, and in the endeavor to ascertain that boundary, the defendant might ignorantly have transgressed it. *Brown* v. *Cockerell*, 33 Ala. 45; *Howard* v. *Reedy*, 29 Ga. 152; *Calhoun* v. *Cook*, 9 Pa. St. 226, 228; Tyler, Ej. 886; and other cases cited on the brief of the defendants in

error. Upon the merits, therefore, we believe the verdict against the defendant below to be proper.

The plaintiff in error seeks a reversal of the judgment upon the assignment of several errors in the rulings of the court below. He objected, and excepted to the charge of the court in the following terms: "To the giving of each of which said instructions defendant then and there duly objected, but the court overruled said objections, and defendant then and there duly excepted to the ruling and decision of the court in overruling said objections and giving said instructions to the jury." On the assignment counsel have called our attention to some parts of the charge that seem to be too favorable to the plaintiff below, but in our view of the merits, as disclosed by the record, we cannot relax the rule requiring such exceptions to be specific. They are entirely too broad to be available in this court. *Territory* v. *Yarberry*, 2 N. M. 391; *Lincoln* v. *Claflin*, 7 Wall. 132; *Mobile & M. Ry. Co.* v. *Jurey*, 111 U. S. 584; S. C. 4 Sup. Ct. Rep. 566; *Caldwell* v. *Murphy*, 11 N. Y. 416. Exceptions in better form are made to the refusal to give certain instructions asked for by the defendant below; but all that is legal or appropriate to the case in these instructions was substantially given to the jury in the instructions charged. *Laber* v. *Cooper*, 7 Wall. 565.

The defendant below also excepted to the admission of proof of the corporate charter, on the ground that the corporation had not, previously to the commencement of the suit, caused the paper and certificates required by chapter 3 of the Laws of 1880 to be filed in the office of the secretary of the territory. We do not construe this statute, either in its terms or in its intent, as operating to debar a corporation, which fails to make the filing mentioned, from access to the courts in protecting its previously vested estate in the territory. It is, therefore, unnecessary to inquire how far the corporation has, in fact, made the filing. *Utley* v. *Clark-Gardner L. M. Co.* 4 Colo. 369; *National Bank* v. *Matthews*, 98 U. S. 628; *Whitney* v. *Wyman*, 101 U. S. 397; *White* v. *State*, 69 Ind. 279.

More serious questions arise upon the objection to the admission of the records of the deeds under which it is claimed that the plaintiff below became vested with the title in the *locus in quo*. The originals were not proved to be lost, and the only evidence tending to show that they were not in the custody of the plaintiff was the testimony of Dr. Eastman, its agent in New Mexico, who testified, in substance, that he did not have them, and, so far as he knew, they were not in the possession or control of the plaintiff, but who, on cross-examination, further declared that he did not know whether or not they were in the plaintiff's office in New York; although it is suggested by counsel for the defendant in error that Dr. Eastman may be presumed to be the proper custodian of the papers pertaining to the corporation's New Mexico property, and that the force and effect of his testimony were to be determined by the trial court in its dis-

cretion; in support of which latter proposition he refers us to *Janes* v. *Martin*, 7 Vt. 92. We are unwilling to accept this view of the nature of such preliminary proof. While courts should be more indulgent towards the proofs made as preliminary to the introduction of an official record than towards the proof offered as a foundation for oral testimony respecting missing documents, (*Smith* v. *Martin*, 2 Tenn. 209; *Jackson* v. *Dillon's Lessee*, Id. 261; *Newson* v. *Luster*, 13 Ill. 180,) yet we think that, in a case like the present, proof should be obtained directly from the corporate office, in which the corporate papers are usually kept, before admitting secondary evidence of documents presumed by law to be in the corporate custody. This presumption exists as to the deed from McFarland to the corporation. The antecedent deeds are not, however, presumed to be in the control of the corporation. The presumption is that they are in other hands; and we accordingly hold, in harmony with the courts of Missouri, from which state our law on the subject was derived, that the records of the deed to McFarland and of the prior deeds, as well as of the deeds under which the defendant below claimed the adjoining property, were admissible as primary evidence. *Walker* v. *Newhouse*, 14 Mo. 373; *Barton* v. *Murrain*, 27 Mo. 238; *Boyce's Trustees* v. *Mooney*, 40 Mo. 104; *Eaton* v. *Campbell*, 7 Pick. 12; *Scanlan* v. *Wright*, 13 Pick. 527; *Com.* v. *Emery*, 2 Gray, 81. Whether, however, the judgment should be reversed because of the admission of the registry of the McFarland deed to the corporation, is to be determined by the relation that registry has to the case as it appears on the whole record. If this belonged to the class of cases in which a regularly derived paper title is necessary to be shown as a condition of recovery, the objection under consideration would be fatal. But title of such dignity is not necessary for recovery against a defendant who, without title, has intruded upon a prior possession. In such case, the mere fact of prior possession in the plaintiff is a sufficient title for the maintenance of the suit. *Christy* v. *Scott*, 14 How. 290, 292; *Burt* v. *Panjaub*, 99 U. S. 182; *Campbell* v. *Rankin*, Id. 262.

McFarland, a Presbyterian minister, was in possession of the *locus in quo*, claiming to hold it for the Presbyterian board at the time of the entry complained of. The *situs* of the corporation was on the Atlantic seaboard. It could not occupy its lands in this territory except by means of servants, agents, tenants, or other representatives. The declarations of McFarland while in possession, and his position in Santa Fe as a Presbyterian minister, raise a strong presumption that he was acting for the plaintiff corporation, and that his possession was the possession of the corporation. A trespasser has no right to call upon a prior possessor for better proof of title. It is enough to say that a declaration of McFarland as to the nature of his possession, which is good enough *prima facie* against him or his privies, (*Hiester* v. *Laird*, 1 Watts & S. 249; *Jackson* v. *Bard*, 4 Johns. 233; *Rankin* v. *Tenbrook*, 6 Watts, 390; *Stanley* v. *Green*, 12 Cal. 163,)

is good enough against a mere trespasser. *Bradley* v. *Spofford*, 3 Foster, (N. H.) 444. In this connection, the record of the deed to the corporation was admissible, not as proving the deed, but as proving a corporate act; the fact of registry tending to characterize and assert the claim of the corporation in accordance with this declaration of McFarland.

In this view, the fact of causing such a registry of title to be officially made, contemporaneously with such declaration of the party occupying the land, is like the fact of paying taxes, or others of the class of facts which, though they do not prove title by themselves, aid as links in a chain of evidence tending to that end. An instrument, imperfect as a conveyance, may be admissible to explain possession, and show extent of boundaries and claim; and declarations of parties in possession, especially when self-deserving, are well-recognized forms of evidence respecting the character of a possession, under the rule of *res gestæ*. In *Evans* v. *Board Trustees W. & E. Canal*, 15 Ind. 319, the only title shown in trespass was the recognition of the plaintiff as owner in certain official lists of the state, and in subsequent statutes, not importing a grant; and it was contended by the defendants, on appeal, that this evidence was insufficient to show title. The court, regarding the question as whether such evidence of title, although it might be valid as between the state and her bondholders, could be given against the defendant, held that there was no error of which the defendant below could complain, and that, *prima facie*, there was a case made against them.

Upon the whole case, we see no substantial error, no prejudice to the defendant below, and we therefore affirm the judgment.

BELL, J., concurs.

BRUNSWICK and others *v.* WINTERS' HEIRS.

Filed January 30, 1885.

MINES AND MINING—ADVANCEMENTS FOR DEVELOPMENT—LIEN.

Parties accepting a fourth interest in a mine in consideration of "one dollar," and the understanding that they will furnish the money and do the work necessary to develop the property, and who, in doing so, have the work entirely in their own hands, and can stop whenever they see fit, cannot, when the development has advanced to a certain stage, and the indications are good, shut down the mine, refuse to work it themselves, or allow their co-owners to work it, demand instant payment of all the money expended, and establish a lien on the whole property therefor.

Appeal from Third judicial district, Grant county.

Catron, Thornton & Clancy, for appellees.

Childers & Fergusson, for appellants.

AXTELL, C. J. The facts in this case are substantially as follows:

In August, 1879, John V. Winters was the owner of 750 feet of mineral ground known as the Homestake mine, situated in White Oaks mining district, Lincoln county, New Mexico. There had been

no mining work done upon this mineral ground, and it was called a mine out of compliment to a quartz boulder bearing gold which cropped out upon its surface. In December of the same year, Winters offered to give J. J. Dolan 250 feet of his 750 feet for "friendship's sake." Dolan said: "Jack, we are too poor to develop this mine, and I will give part of my interest to raise development money." Then Jack said: "Well, Jimmie, if you are so generous as that, I will add another 100 feet and make it 350 feet." On the twenty-third day of December of same year, Winters executed a deed to Dolan's wife for this 350 feet of said mine. The consideration expressed in the deed was "one dollar, together with other good and sufficient considerations." On the same day, Dolan and wife, for same consideration expressed as in former deed, conveyed one-half of their interest to Joseph A. La Rue, one of these plaintiffs. It afterwards appeared that Brunswick was a silent partner of La Rue. There are no other written contracts or agreements, but the record is quite full of oral statements and admissions as to what the parties did, and what their understanding was. Brunswick and La Rue advanced a large sum of money—from $6,000 to $10,000—for the purpose of working the mine. It was not so much development work as it was mining. They sunk a shaft, run drifts, and took out gold-bearing ore. The mine appeared to be very good, and all parties went forward with hope and courage. Some $1,000 or $2,000, at least, had been taken out of the ore, and there appeared to be "millions in it." The value of the mine was estimated as high as $120,000, and Winters, with his share of what was contained in one of the pockets, bought a "wagon load of whisky and made the whole town drunk." At last he reached "his homestake," and died about March, 1881.

At this point Brunswick and La Rue presented a bill of over $10,000 against the mine, and claimed a lien for that amount, as it was money, provisions, and so forth furnished for development work, and demanded instant payment. Winters' heirs sought to work the mine, but were enjoined. The injunction was dissolved and this bill was filed. A receiver was prayed for and appointed. A master was also appointed, and hundreds of pages of testimony taken. A trial was had and a decree obtained by the plaintiffs in their favor. By this decree it was found that $6,259.44.02$\frac{1}{3}$ is the sum which the complainants are in equity entitled to secure in the first instance out of this mining property after payment of the costs and expenses of this suit. "It is therefore ordered, adjudged, and decreed that the aforesaid mining claim, known as the 'North Homestake,' together with all and singular the ores extracted therefrom and undisposed of, and all tools, materials, machinery, and other property, be sold at public auction for cash." This consummation is reached nearly four years after the poor old man's exit, and equity rejoices that every man comes by his own, even to the one-third of a mill. From this decree Winters' heirs appeal. The defendants assert that their ancestor made a gift to Dolan of 250 feet for "friendship's sake," and added another 100 feet for development work, but upon the same day Dolan deeded one-

half of his interest to La Rue, and that afterwards the consideration for this deed, while expressed at "one dollar, and other good and sufficient considerations," was, in fact, for the consideration, and with the express understanding and agreement, that La Rue should furnish means, viz., money, tools, etc., to prospect or work this mineral ground to determine whether or not there was a mine there; whether the claim was worth working. It seems especially important at this point in the case to determine what position Winters occupied as to the other two. What understanding, if any, existed between Dolan and La Rue we are not called upon to consider. Winters owned 750 feet of mining ground. He gave 350 feet of it to other persons without any present consideration other than friendship and for development work in future. This not only gave these other persons permission, but it invited them, to dig upon this ground at any point they saw fit, to ascertain whether or not it was valuable for mining purposes.

This brings us at once to the pivot of this case: Could La Rue and Dolan, by expending work and money in developing this mine, and without some express agreement, compel Winters to be their debtor, or did they go forward voluntarily, and at their own risk? From the evidence it appears certain that they controlled the working of the mine. They were at liberty to stop any day they pleased. It is not claimed that there was any agreement for them to go forward, nor any understanding as to how much money they were to expend, nor how much work they were to do. They were prospecting their own mine,—a mine which had been given them,—and when they reach a certain stage in its development, they stop work, shut down the mine, will not work it themselves, nor permit Winters' heirs to work it, and demand payment for all the money they have put in the mine, not for a contribution as partners, but to foreclose a lien upon the whole mine. They do not claim any debt due from Winters personally, but claim that the whole mine is responsible to them for the whole amount put in. We are not called upon to determine what relation Dolan holds in this proceeding,—whether he ought to be plaintiff or defendant. We are simply considering the position which Winters occupies. The man who originally owned all the ground, and who gave away nearly one-half of it for friendship's sake and development work—can he be made the involuntary debtor of the men who accepted his gifts and have voluntarily expended their money in hunting for gold upon his and their ground, and sold out because they failed to get their money back? As well might the thousands of miners who have spent years of toil and millions of money in unsuccessful search for mines, sue the United States, by a bill in equity, and claim a lien upon the public domain, because the general government gave them permission to search for mines.

If called upon to presume anything, we would presume that La Rue and Dolan agreed to do a certain amount of development work; but, in the absence of any agreement, we cannot presume even this; and certainly we cannot presume that Winters promised to pay them

for the work which they did, or caused to be done, upon the mine. That Winters, Dolan, and La Rue might have incurred debts, and that the mine might have been sold on execution to satisfy the same, is quite true; but that is not the case before the court. La Rue himself says that when he took an interest in the mine "it was a mere matter of chance whether the lead would turn out anything or not. If it did, we all wanted to make all the money we could; if it did not, that was the end of it." Again he says: "As the mine showed up promising, we all agreed to develop it further." The bill itself says that there was an agreement that all the moneys advanced by plaintiff should be repaid to them out of the first proceeds of said mine derived either from working or sale thereof. There is evidence that La Rue was to look to the mine to repay him for his advancements. He himself says: "If the mine had turned out valueless, I would have lost the money I first advanced." Again he says: "I always thought the mine could be sold for any amount I risked in it; that there was no individual liability; that the mine itself was responsible." There is also testimony to the effect that he had a lien upon the mine for his pay; that it would pay him back his money with big interest, etc. That is, that all the parties engaged in the enterprise hoped it would turn out well and pay them big. But from all this we cannot find that he had such a lien as the one contemplated in this bill. We are of opinion that the decree of the district court must be vacated and set aside, and the bill dismissed, and that defendants recover their costs both in the district and supreme courts; and it is so ordered.

BELL and WILSON, JJ., concur.

ARMIJO *v.* NEW MEXICO TOWN CO.

Filed January 31, 1885.

1. DEED—VAGUE DESCRIPTION—RULE OF EVIDENCE.
   If the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, it is sufficient to sustain the conveyance, and a deed containing such a description may properly be admitted in evidence.

2. SAME—PAROL EVIDENCE TO IDENTIFY PREMISES.
   In a deed, that is sufficiently certain which can be made certain by competent evidence. Parol evidence is, therefore, admissible to identify the premises in dispute with the description in the deed.

3. SAME—CONFLICTING TITLES—LACK OF EXECUTION, ACKNOWLEDGMENT, AND RECORD.
   A deed to one party, alleged to antedate a deed to another, yet not on record at the time of the execution and delivery of the latter deed, and bearing no evidence of having been executed or acknowledged, the proof being that the grantee under it had never assumed possession of the premises it concerned, may properly be excluded from evidence.

4. SAME—WORDS "BARGAINED AND SOLD"—STATUTE OF NEW MEXICO—CONSTRUCTION.
The words "bargained and sold," contained in a deed, do not, according to the strict construction of the statute of New Mexico referring thereto, amount to a covenant on the part of the grantor that he was possessed of a valid fee-simple title to the premises conveyed; and it is proper that that statute be strictly construed.

5. SAME—ACKNOWLEDGMENTS—LAW OF NEW MEXICO.
The statute of New Mexico (Prince's Laws, 239) cures defective acknowledgments, but does not supply the want or obviate the necessity of an acknowledgment.

6. INSTRUCTION—DIRECTING A VERDICT BY COURT.
It is proper for the court to direct a verdict in all cases when there is no disputed question of fact to be submitted to the jury.

7. SAME—TEST FOR COURT IN DIRECTING A VERDICT.
In any case where there is no evidence to warrant an adverse verdict, and where the court would feel bound to set aside such verdict if rendered, it is proper for the court to direct a verdict for the party entitled thereto.

Appeal from Second judicial district court, county of Bernalillo.

William B. Childers, for appellant.

William Breeden, for appellee.

AXTELL, C. J. This is an action for breach of covenant. The plaintiff's declaration alleges that the defendant, by its three several deeds of conveyance made in the months of February and March, 1881, and for the consideration named therein, conveyed to the plaintiff certain lots, pieces, and parcels of ground situate in the town of Albuquerque, county of Bernalillo, described in said declaration as lots Nos. 18, 19, 20, 21, 22, 23, and 24, in block 11; and lots 15, 16, and 23, in block 12; and lot 12, in block 18, of said town of Albuquerque, according to a map of said town made by John C. Fulton, filed in the office of the recorder of said county of Bernalillo on the fifth day of May, 1880. Copies of the deeds were filed with the declaration, and appear in the record as exhibits in connection therewith. They are all in form what are usually known and described as "bargain and sale" deeds, and contain no express covenants. The language used in each of said deeds to effect the conveyance is as follows, to-wit: "That the grantor has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey, and confirm," unto the grantee the lots and premises described in the deed. For a breach of covenant constituting his cause of action the plaintiff's declaration alleges "that the defendant, at the time of the making and delivery of the said several deeds, was not lawfully seized of an estate in fee-simple in and to the said real property, and had not good right and full power to convey the same." To this declaration the defendant interposed seven separate pleas, five of which, in somewhat varying form, alleged and were to the effect that the defendant was, at the time it executed the said conveyances, lawfully seized of an estate in fee-simple in and to the premises conveyed, and had good right and full power to convey the same. The other two pleas further averred, in substance, that there had been no ouster or assertion of a better title to the said property, whereby

the possession of the plaintiff was either disturbed or threatened. The plaintiff replied to the said five pleas, and issue was joined thereon. To the said last-described pleas a demurrer was interposed and sustained by the court, upon the ground that the action was for breach of covenant of seizin, and not for breach of covenant of warranty.

The cause went to trial upon the issues formed by and upon the five pleas to which replications were filed, which were in substance and to the effect that the defendant had performed its covenant, and the only covenant which could be imputed to it or implied from its said deeds of conveyance. The court held that the burden of proof, under the state of the pleadings, was upon the defendant. No point is made upon this ruling, but we are of opinion that it was correct. Defendant then introduced evidence in support of its pleas, and plaintiff thereafter also introduced evidence, both oral and written, and at the close of the trial the court, upon motion of defendant, instructed the jury to find for the defendant, upon the ground that there was no question of fact for the jury to pass upon. The jury rendered a verdict accordingly, and a judgment was thereupon entered for the defendant, from which judgment the plaintiff appealed to this court. No regular assignment of error was filed, but the plaintiff has suggested and discussed numerous propositions and divers alleged errors in the court below in the course of the trial. We agree with the position taken by the counsel for the defendant that the questions necessary to be considered in the determination of this case are—

First. Did the court err in admitting as evidence for the defendant the deed of Martin *et al.* to Talbott *et al.*? (Defendant's Exhibit D, page 35 of Record.) *Second.* Did the court err in admitting parol evidence to explain said deed of Martin, and to show that the town lots in question were within the lands conveyed by it? *Third.* Did the court err in excluding the deed of Martin *et al.* to Garcia, (Plaintiff's Exhibit D, Record, p. 73,) and deed of Garcia to Greening? (Plaintiff's Exhibit, Record, p. 95.) *Fourth.* Did the court err in directing a verdict for the defendant?

Another question is presented by the record which is of such importance as to merit serious consideration, and will be considered further on. There can be no serious difficulty, in view of the facts which appear in the record, in correctly answering the foregoing queries. The deed of Martin *et al.* to Talbott *et al.*, the admission of which, as evidence for the defendant, was objected and excepted to, was the foundation of the defendant's title to the premises in question. It was a bargain and sale deed, with special covenant of warranty, and was duly executed January 1, 1880, and properly recorded on the first day of May, 1880. The plaintiff claims, and his ground of objection to the admission of this deed is, that it was absolutely void for uncertainty in the description of the property intended to be conveyed. The language used to describe the premises is as follows:

"A tract or parcel of land situated and being in the county of Bernalillo, territory of New Mexico, known as the place were Jesus Maria Martin resided, being one hundred and thirty-seven yards, from north to south, wide,

containing about —— acres; bounded on the south by the lands of Christiana Armijo, and on the north by the lands of M. Lopez."

That such a deed is not void, and may be effectual to convey lands, is too clear, upon reason and authority, to require serious argument. "It is undoubtedly essential to the validity of a conveyance that the thing conveyed must be so described as to be capable of identification; but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence,"—is the apt language used by the court in *Stanley* v. *Green*, 12 Cal. 166.

The general rule is that if the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, it is sufficient to sustain the conveyance. *Vose* v. *Bradstreet*, 27 Me. 156; *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Eggleston* v. *Bradford*, 10 Ohio, 312. Accordingly, it was held in *Frey* v. *Clifford*, 44 Cal. 343, that a deed of "all the right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereon," was valid and sufficient to convey the lots in controversy. Also, in *Starling* v. *Blair*, 4 Bibb, 289, the court held that a deed of all the lots the grantor owned in the town of Frankfort was good for all the lots that could be identified as belonging to the grantor at the date of his deed. Adjudged cases in which similar conclusions have been reached, and which show conclusively that the deed in question was not void for uncertainty of description, might be cited indefinitely, but it is unnecessary to multiply authorities upon this point; in such cases, that is sufficiently certain which can be made certain by competent evidence. We therefore hold that the deed in question was not void, and was properly admitted in evidence. It necessarily follows from the foregoing that parol evidence was admissible, and was properly admitted, to identify the premises in dispute, and connect them with the deed. Such evidence was not offered and did not tend to vary, modify, or contradict the deed, but simply to apply it to its subject-matter, and to identify the lands intended to be conveyed. That parol evidence is admissible for such purposes has been, we believe, almost uniformly held by courts of the highest character and authority, and is stated as a settled rule by standard authors in elementary works upon the law of evidence. The parol evidence identifies the subject upon which the deed operates, and then the estate passes by force of the deed. In this case, after the introduction of the deed in question, the defendant proceeded to identify by parol evidence the lots in controversy as being within the limits of the place where Jesus Maria Martin resided, and in the opinion of the court which tried the cause, and of this court, proved that the lots described in plaintiff's declaration were a portion of the lands conveyed by the deed of Martin *et al.* to Talbott *et al.*

Mariano Armijo, one of the grantees, testified that the grantor, Martin, lived and had his residence upon the lands conveyed by the

deed at the time of his conveyance of the same to Talbott *et al.*, (Talbott and the witness;) that they measured the land at the time they bought it, and that by such measurement the lots in controversy were included; that the lots in controversy were a part of the land described by Jesus Maria Martin in said deed as the place where he resided. Defendant then showed that Talbott and Armijo conveyed the lands acquired by them from Martin *et al.* to Huning *et al.*, who in turn conveyed the same to the defendant by deed dated May 8, 1880, and duly recorded on the same day, and proved that the defendant took immediate possession of said lands, including the lots in controversy, by causing them to be surveyed and laid off into lots and blocks as a part of the town of Albuquerque, and a plat thereof prepared and filed in the office of the recorder of Bernalillo county, and proceeded to sell and dispose of the lots, and it nowhere appears that the possession and right of the defendant were questioned in any way until after its conveyance to the plaintiff; how long afterwards, or whether ever questioned except by the plaintiff, does not appear in the record. The defendant having rested, the plaintiff, after introducing his deeds of conveyance from the defendant, offered in evidence the deed of Martin *et al.* to Juan Garcia, dated March 12, 1864, and recorded August 21, 1880. Upon objection by the defendant, the court excluded and refused to admit said deed in evidence. This deed is marked "Plaintiff's Exhibit D," and we think was properly excluded. It was not recorded at the time the deed of Martin *et al.* to Talbott *et al.*, under which defendant claimed, was made and delivered, and bore no evidence of having been executed or acknowledged. Neither was it recorded until after the defendant took the land by conveyance from Huning *et al.* and entered upon the possession thereof. It appears from the evidence that no change of possession followed the alleged execution of the deed to Garcia, who himself testified that he only bought the land and left it in the possession of the alleged grantor. There was no suggestion that either defendant or Huning *et al.*, or Talbott and Armijo, ever had any notice of any kind of the existence of said deed, or of any claim of Garcia to the premises in question, or of any claim adverse to Jesus Maria Martin, whose title is recognized by both parties, and who, according to the evidence, resided upon the lands conveyed by him to Talbott and Armijo at the time of that conveyance, and when they measured and took possession thereof, including the lots in dispute.

The plaintiff claims that "the defect in the acknowledgment of the deed was cured by the act of 1874, (Prince's Comp. Laws N. M. 239,)" but the statute does not have the effect sought to be given it by the plaintiff. That act cures defective acknowledgments; it does not supply the want nor obviate the necessity of an acknowledgment. As between the parties thereto, this deed would doubtless have been admissible, but it clearly could not be received against the defendant in this case; nor could proof that, as a matter of fact, its execution had

been acknowledged, which was offered by plaintiff, make this deed admissible as evidence against the defendant, who was an innocent purchaser without notice, and in possession under valid conveyances, before the deed in question was recorded. We are of opinion that the said deed was not admissible in this case against the defendant for any purpose; and this brings us to the last question necessarily to be determined in disposing of this case, which is as to the propriety of the instruction by the court to the jury to find for the defendant. It is proper for the court to direct a verdict in all cases where there is no disputed question of fact to be submitted to the jury. In any case where there is no evidence to warrant an adverse verdict, and where the court would feel bound to set aside such verdict if rendered, it is folly to submit the case to the jury, and the proper practice, under such circumstances, is for the court to direct a verdict for the party entitled thereto. We think that, in this case, there was nothing for the jury to determine,—no evidence to warrant a verdict for the plaintiff; that the defendant was entitled to a verdict; and that the direction to the jury to find accordingly was correct.

We have thus determined the four material questions above mentioned in favor of the defendant, and of the correctness of the rulings and judgment of the court in this case; but, had our conclusions been otherwise, there is another question presented, which, as before stated, we regard as entitled to serious consideration, and entirely too important to be passed over, and which, in our opinion, entitled the defendant to and required the court to give to the jury the instruction to find for the defendant. There were no covenants expressed in the defendant's deeds to the plaintiff, and no covenants of any character contained therein, except such as could be implied from the conveyances, and the words used therein to effect the conveyance. The plaintiff contends that, under the statute of New Mexico, the use of the words "bargained and sold," in said deeds, amounts to an express covenant, on the part of the grantor, that it was possessed of a valid fee-simple title to the premises conveyed; and it is upon this claim alone that his right of action exists. Unless such covenant is properly to be implied, the plaintiff has no pretense of a cause of action. The language of the statute invoked, or that portion of it material to be considered, is as follows, to-wit:

"The words 'bargained and sold,' or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: *First*, if the conveyor, at the time of the execution of said conveyance, is in possession of an unreclaimed title in fee-simple to the property so conveyed; *second*, if the said real estate, at the time of the execution of said conveyance, is free from all incumbrance made or suffered to be made by the conveyor, or by any person claiming the same under him."

It seems to be admitted that this statute was taken from Missouri, and intended to be a copy of the statute of that state; and we think

this is probably the fact. Similar language is used in the Missouri statute, and it is not unlikely that an attempt was made to copy it; but if so, the copyist failed in his purpose, as the material words of the Missouri statute, declaring the effect of the use of the words relied upon, to-wit, "shall be construed to be the following express covenants," are wholly omitted from our statute, and we are asked to supply them by implication and construction, and to give the statute the effect claimed for it by reason of the use of the words mentioned, by intendment as to the intention of the legislature. Such implied covenants, or to imply covenants of an important character from the granting words in a deed, are not favored by the courts. In the language of Chancellor KENT, "to imply such covenant is making those words operate very often as a trap to the unwary." We think such statute must be strictly construed in favor of the person executing the conveyance, from the words of which such covenant is sought to be implied.

In 4 Kent, Comm. 474, the learned author says:

"In Pennsylvania, Delaware, Illinois, Indiana, Missouri, Mississippi, and Alabama, it is declared by statute that the words 'grant, bargain, and sell,' in conveyances in fee, shall, unless especially restrained, amount to a covenant that the grantor was seized of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment as against his acts; but in *Gratz* v. *Ewalt*, 2 Binn. 95. it was adjudged that those words in the Pennsylvania statute (and the decision will equally apply to the same statutory language in other states) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act nor created any incumbrance whereby the estate might be defeated. Upon this construction the words of the statute are divested of all dangerous tendency, and they amount to no more than did the provision of the English statute of 6 Anne, *c.* 35, § 30, upon the same words."

And the eminent commentator adds:

"It may not be very inconvenient that those granting words should imply a covenant against the secret acts of the grantor; but beyond that point there is great danger of imposition upon the ignorant and unwary, if any covenant be implied that is not stipulated in clear and express terms."

We fully concur in this view, and would be unwilling to give our statute any broader construction and effect, unless constrained to believe that we could not justly avoid it. This was the interpretation given to similar language in New York prior to the adoption of their Revised Statutes, which effected a change; also in North Carolina and Alabama. *Rickets* v. *Dickens*, 1 Murph. (N. C.) 343; *Powell* v. *Lyles*, Id. 348; *Roebuck* v. *Dupuy*, 2 Ala. 535. And in Mississippi, in *Latham* v. *Morgan*, 1 Smedes & M. Ch. 611, the statute of that state, containing a like provision, was so construed.

There was considerable discussion as to the meaning and effect of a covenant of seizin, and the distinction between seizin and title, but we will not now consider that subject. The claim of the plaintiff is, in substance, clearly, that the effect of the statute is to create a warranty of title by the use of the words "bargained and sold," and we can-

not consent that the statute operates to create any such implied covenant. We go further and hold that by reason of the omission of the operative words of the Missouri and other statutes of like character, that the use of the words "bargained and sold" "shall be construed to be the following express covenants," our statute is so defective as to be practically meaningless; that the legislature failed to intelligibly declare the effect of the use of words; and that the statute is not effective to create the covenant which we are asked to imply from the use of the words "bargained and sold;" and that, therefore, the use of these words has no other or greater effect than was given them by the English statute above quoted.[1] Hence it follows that the plaintiff could under no circumstances be entitled to a verdict and judgment in this case. We find no error in the record to the prejudice of the plaintiff, and the judgment is therefore affirmed.

WILSON, J. I concur in affirming the judgment of the court below, but express no opinion upon the construction of the statute.

[1]Overruled in Douglass v. Lewis, *post*, 345, 9 Pac. Rep. 377.

PINKERTON *v.* LEDOUX.

Filed January 31, 1885.

1. EJECTMENT—VERDICT—EVIDENCE.
In ejectment, where the issue is whether the premises sued for lie within a certain grant, the title of which is conceded to be in plaintiff, and, the location of the premises sued for being known, the sole question is as to the location of the grant; and where the evidence on this question, viz., the description in the original petition for the grant, and that contained in the act of juridical possession, and the testimony of witnesses familiar with the locality, are vague and indefinite,—a verdict of "not guilty" will not be disturbed.

2. SAME—DEFECTIVE DESCRIPTION—INSTRUCTIONS.
Where the descriptions contained in the original petition for the grant and in the "writ of possession," both of which are in evidence, differ materially in their entire detail, instructions that if in finding the monuments called for as the boundary the jury could find the monuments called for in the original petition, those should have preference in the location of the grant, are not erroneous.

3. TRIAL—INSTRUCTIONS—ISOLATED ERRORS.
Although the assignments of error must point out specific errors in the instructions, still, where the charge as a whole fairly presents the case to the jury, the judgment will not be reversed, because of incidental errors, and isolated sentences open to criticism, which are contained in it.

4. SAME—HARMLESS ERROR—UNNECESSARY INSTRUCTIONS.
The refusal of an unnecessary instruction, or the giving of one not in prejudice of the interest of the complaining party, will not sustain an assignment of error.

Error to First judicial district, Mora county.

Catron, Thornton & Clancy, for plaintiff in error.

William Breeden and *M. W. Mills*, for defendant in error.

WILSON, J. This is an action of ejectment, commenced in the county of Colfax by the plaintiff in error against the defendant in error, in which the plaintiff claimed the title and right of possession to 160 acres of land in said county, which was in the possession of the defendant. The plaintiff claimed the land and right of possession, alleging that the land in controversy is a part and parcel of a larger tract of land known as the "Nolan Grant," which said grant, the plaintiff alleges, has by sundry legal conveyances been vested in him. By agreement of parties the case was transferred to Mora county, and there tried, resulting in a verdict and judgment in favor of the defendant. The case came into this court upon writ of error, on application of the plaintiff, who assigns the following as errors:

(1) That the verdict is directly contrary to the evidence. (2) That the court erred in refusing to give the instruction asked for by the plaintiff. (3) The court erred in instructing the jury, without any reservation or exception, that the original petition for the Nolan grant must control the writ or act of judicial possession. (4) The court erred in instructing the jury that they must determine what the boundaries of said grant were from the words used in the petition and the writ of possession. (5) That the court erred in instructing the jury that if, upon comparing description given in the original petition and the act of judicial possession, they could not make them agree, they must give greater weight to the words and description of the petition. (6) The court erred in instructing the jury that they would not be justified in going 500 *varas* west of Los Ceritos de Santa Clara for the western boundary

of the grant, unless they found some authority for doing so in the words and description of the petition. (7) The court erred in instructing the jury that if, from the description and words in the petition and writ of possession, they were unable to definitely locate the boundary of the grant, they must find the defendant not guilty. (8) The court, in effect, submitted to the jury the question of the validity of the grant, which had been favorably reported by the surveyor general. (9) The court, in effect, took away from the consideration of the jury the act of juridical possession.

To ascertain whether any error was committed upon the trial of this cause, it is well to settle definitely what questions were in dispute between the parties. The plaintiff asked to recover from the defendant the possession of that "certain tract and parcel of land lying and being situated in the county of Colfax, in the territory of New Mexico, and being a portion of that larger tract of land commonly known as and called the "Nolan Grant," "being the same 160 acres of land upon which the said defendant now resides and occupies." This quotation from the plaintiff's declaration shows that it was incumbent on the plaintiff, to entitle him to recover, to prove title and right of possession to the larger tract, which included the land in controversy, viz., the Nolan grant. To obviate the necessity of proving title in the plaintiff, the counsel for the defendant admitted "that the plaintiff had acquired title of the original grantees in and to the western one-half of that portion of the grant in question lying north of a line running east and west across said grant through the Santa Clara hills." This left but two questions open for consideration: *First*, the location of the Nolan grant; *second*, is the land in dispute included in its boundaries? The land in dispute has a known location, so that really but one question remained to be settled, viz., where is the Nolan grant located? To inform the jury of the monuments which mark the exterior boundaries of the Nolan grant, so that its location might be determined, the originial petition asking the grant, the grant itself, and the report of the justice of the peace who put the petitioner, Nolan, into possession, (which latter is called the act of "juridical possession,") were all given in evidence at the trial. The description in the original petition is as follows:

"Being situated to the south of the possessions of Messrs. Miranda and Beaubien; on the south, one league in a direct line, including the Sapello river, according to its current, (*corrillera;*) on the west, one other league from Red river and its current; and on the south-east, the Little hills of Santa Clara, with their range to the Little canon of the Ocate."

In the report of juridical possession the description of the Nolan grant is:

"He was at the same time pointed out the boundaries of said possessions. They are, on the north, the lands of Don Guadalupe Miranda and Don Carlos Beaubien; on the south, one league south of the Sapello river, following the same range; on the east, one league east of Red river, with the same range of the river; and on the west, the Little canon of the Ocate, and five hundred *varas* west of the Little hills of Santa Clara, in a direct line."

Mrs. Mary McKeller was called as a witness for the plaintiff, and testified:

"I have seen the fence where the boundary of the Beaubien and Miranda grant runs. Defendant's house is two or more miles south of the fence that marks the boundary. * * * Defendant has lived there ever since I came to the country, four years and a half ago."

It is worthy of notice that no evidence was given on the trial to definitely fix the location of the Beaubien and Miranda grant, which the Nolan grant calls for as its northern boundary. Some other parol testimony was given by the plaintiff tending to locate the Nolan grant, and tending to prove that the land in controversy is included within its boundaries. A map was also exhibited to the jury, purporting to show the location of the Beaubien and Miranda grant on the north, Red river on the east, the Sapello river on the south, and the canon of the Ocate on the west, and also marking the location of the Little hills of Santa Clara on the west. This outline of the facts is necessary in ascertaining whether the court committed any error in the charge to the jury, and especially necessary in determining whether the verdict of the jury is against the evidence in the case. The first error assigned is, the verdict of the jury is directly against the evidence. Upon an examination of the evidence given upon the trial, considering its vagueness and want of certainty, we think the jury were justified in regarding the location of the Nolan grant too uncertain to warrant them in returning a verdict for the plaintiff.

The second error assigned is, the court erred in refusing to give the instruction asked by plaintiff, viz.: "That when a claim to a Spanish or Mexican grant has been favorably reported by the surveyor general of New Mexico, as the one here in question has been, the grantees, or their heirs or assigns, are entitled to the absolute and exclusive possession of the land embraced within the limits of such grant; and in this case it is admitted that the plaintiff has all the right, title, and interest of the original grantees to all that portion of said grant north of an east and west line running through the *ceritos* of Santa Clara, and west of a north-west and south-east line half way between the east and west boundaries of said grant."

It is evident that this point was intended to confirm the title to the Nolan grant in the plaintiff. It is equally evident that it was not necessary, for the reason that the title to the Nolan grant had already been admitted by the defendant to be in the plaintiff. This assignment of error cannot be sustained, because such instruction was not necessary. The eighth error is equally easy to dispose of. The error complained of is as follows: "The court, in effect, submitted the question of the validity of the grant which had been favorably reported by the surveyor general." The court, in its charge, instructs the jury that "if they believe from the evidence that the land of which the defendant is in possession is within the limits of the grant which has been favorably reported by the surveyor general, they must find the defendant guilty." The charge of the court refutes the eighth assignment of error. The sixth error complained of is as follows: "The

court erred in instructing the jury that they would not be justified in going five hundred *varas* west of Los Ceritos de Santa Clara for the western boundary of the grant, unless they found some authority for doing so in the words and description of the petition."

This instruction, whether right or wrong, makes the west line of the Nolan grant more favorable for the plaintiff's recovery in this suit than if run as the plaintiff claimed, which is abundantly demonstrated by the plat given in evidence on the trial by the plaintiff. Hence this error, if it be one, is not available. The third, fourth, and fifth assignments of error all relate to the same subject, and may be considered together. The *gravamen* of the charge in the whole three is that the jury are instructed that the description of the land contained in the original petition, which is the grant itself, must "control" these instructions,—must be taken as intended to apply to the evidence given in the case. The petition and the writ of juridical possession had both been given in evidence, and each professed to describe the Nolan grant. In their entire detail of description they were not alike, and the gist of the instructions complained of is that the court, in substance, instructed the jury that if, in finding the monuments called for as the boundary, they could find the monuments called for in the original petition, that they should have preference in the location of the grant. This instruction, we think, is right. Therefore, the third, fourth, and fifth assignments of error cannot be maintained. The seventh error assigned is as follows: "That the court erred in instructing the jury that if, from the descriptions and words in the petition and writ of possession, they were unable definitely to locate the boundaries of the grant, they must find the defendant not guilty."

Without giving special effect to some particular word used in the point under consideration, the substance of this sentence in the charge is virtually this: The plaintiff has given in evidence the petition for the Nolan grant, and also the act of juridical possession. Each contains specified objects to aid you in definitely locating that grant. If, from the descriptions contained in both, you cannot fix the location of the grant, you must find the defendant not guilty. No other description was given in evidence by the plaintiff differing from the boundaries described in the petition and juridical possession. Consequently, we cannot see any reason for sustaining the seventh assignment of error. The ninth error assigned is as follows: that the court, in effect, took away from the consideration of the jury the act of juridical possession. In the fourth error assigned, the court recognized the writ of juridical possession as follows: "The jury must determine the boundaries of said grant from the words used in the petition and 'writ of possession.'" In the seventh error assigned, the court instructed the jury "that if, from the descriptions in the petition and writ of possession, they were unable to locate the grant, they must find for the defendant." Here are twice, at least, that the court

instructed the jury that the act of juridical possession was on equal footing with the petition in locating the Nolan grant. This evidently quiets the complaint contained in this, the ninth assignment of error.

While the rules of court require that specifications of error shall point out specifically errors assigned against a charge of the court to the jury, yet a court does not favor criticising too closely isolated sentences selected from a general charge, and they have gone so far, frequently, that incidental errors, even when they plainly appear, will not be cause of reversal, provided the charge as a whole fairly submits the law and the facts of the case to the jury. It will be remembered that the only question in this case, as before illustrated, was the location of the Nolan grant. To illustrate how faithfully and fairly this case was submitted to the jury, I copy from the charge itself, as follows:

"You must be satisfied by a preponderance of evidence that the defendant is within the boundaries petitioned for by Nolan, and into which he was inducted by the writ of possession, and unless you are so satisfied, you must find the defendant not guilty. You must determine what these boundaries are from the words used in the petition and writ of possession. If, from the description thus given, and from the extraneous evidence furnished by the plaintiff, you are not convinced that the defendant is upon the land petitioned for and given by writ of possession to the said Nolan, you must find the defendant not guilty. Upon the other hand, if you are satisfied from all the evidence that the defendant is upon said land, you must find him guilty."

These instructions cover the whole case and are unexceptionable, and, upon a critical examination of the whole case, we have not discovered error that would justify a reversal of the case. The judgment of the court below is affirmed.

BELL, J., concurs.

FINANE and another *v.* LAS VEGAS HOTEL & IMP. CO.

Filed January 31, 1885.

1. MECHANIC'S LIEN—PROPER TRIBUNAL TO ENTERTAIN PROCEEDINGS.
   In the absence of a plain statutory provision making it an action at law, the proceeding to enforce a mechanic's lien must be taken upon the equity side of the court.
2. SAME—VERIFICATION OF LIEN—NEW MEXICO STATUTE.
   By strict construction of the laws of the territory, (Prince's Laws, p. 409, par. 6,)—and mechanic's lien laws should be strictly construed,—the instrument, when filed, should have been verified; and it should appear upon its face to have been verified, before it can be made the basis of a proceeding to enforce the claim based upon it.

Appeal from First judicial district court, San Miguel county.

Lee & Fort, for appellees.

Catron, Thornton & Clancy, for appellant.

BELL, J. This is an action of *assumpsit*, (trespass on the case upon promises,) brought by the plaintiffs against one John B. Wooten, jointly with the appellant. The declaration contains the common

counts in *assumpsit*, alleging indebtedness by Wooten, his promise to pay, and the breach. This is followed by a special count, setting forth that the "work, labor, service, and materials" were performed and furnished for and about the construction of a building, the property of the appellant, and also setting up the making and filing of a claim for lien on the real estate of the appellant, upon which the building was erected, in accordance with the statutory requirements. These counts are followed by a prayer for judgment against Wooten "for the said several sums of money, and that said real estate, or so much thereof as is necessary to satisfy plaintiffs' claim, be sold for said purpose, pursuant to law in such case made and provided." To this declaration the defendant Wooten pleaded the general issue. The appellant herein appeared separately and pleaded, first, the general issue to the common counts, and then added a special plea specifically denying each and every allegation in the special count in the declaration. The appellant also filed a plea in abatement, alleging that, since the commencement of this action, the plaintiff had brought another proceeding in equity, in the same court, for the same cause of action, and between the same parties. To this plea the plaintiffs demurred, which demurrer was sustained by the court below. Upon the issues thus framed, trial was had, which resulted in a general verdict against Wooten, assessing plaintiffs' damages at $464.44, and the special finding against the appellant that the lien of plaintiffs was duly filed against the property of appellant, as set forth in the special count in the declaration. Before judgment was entered, motions were made on behalf of the appellant for a new trial and in arrest of judgment, both of which were denied. All the evidence is brought up by the bill of exceptions.

Various errors are assigned in the proceedings in the court below, some of which we will consider. The first, second, and third may be considered together. The first is that such a suit could not be properly brought as an action at law. The second is that two causes of action, one at law, the other in equity, are improperly joined. The third is, the judgment against this defendant is not such as can be properly rendered in a court of law. We think these points well taken. A careful examination of the law applicable to the enforcement of mechanics' liens, leads us to the conclusion that, in the absence of plain statutory provisions making it an action at law, the proceeding must be one taken upon the equity side of the court. While the right to a lien and its enforcement is purely the creation of statute, it is so complex in its nature, because of the relations of the parties to each other and the mixed character of the relief granted, that the proceeding is one necessarily utterly at variance with the forms of proceeding in an action at law, and can only be properly dealt with upon the equity side of the court, in the absence of statutes upon the subject. This must always be the case where the statute creating the lien does not specifically point out a method for its enforcement. In

many of the states, special provisions are made in the mechanic's lien laws for the methods of procedure for their enforcement, and these methods, it is universally held, must be strictly followed. Of course, where the law itself provides complete machinery for its enforcement, it becomes a special statutory proceeding, and may, in such cases, partake both of the character of an action at law and of a suit in equity. It is, as it is termed in New York, a special proceeding in which the statutory methods are to be strictly pursued. As is said by Phillips in his work on this subject:

"The character of the proceeding, whether legal or equitable, depends upon statutory provision. A legislature has the constitutional power to frame acts, making the proceeding partly according to the course of the common law and partly according to proceedings in equity." Phil. Mech. Liens, par. 308.

By the laws of this territory, no method is prescribed for the enforcement of the liens created by statute. In such case, the learned author from whom we have just quoted says:

"Where no special mode of proceeding is pointed out for enforcing the lien, the remedy should be in accordance with the general principles and practice relating to the enforcement of liens. Thus, on a subcontractor bringing suit to enforce his lien, he should make his employer a party as well as the owner of the land, so as to have adjudicated the amount of the debt due at the same time, and also to make others who have liens parties, to settle their validity and adjust their priority." Id. 309.

The author is treating of a proceeding similar to the one at bar, and where no statutory method of procedure is pointed out. It is perfectly clear that, in such a case, a suit upon the equity side of the court could be the only proper method of enforcing the lien. In the absence of statutory provisions to the contrary, no lien of any kind can be enforced except by a proceeding in equity. The form of action in the case at bar was that of a common-law action, and in it, two causes of action—one at law, in which a judgment at law is asked; the other in equity, in which equitable relief is prayed for—are joined. We are of opinion that the suit was improperly brought, and that the judgment could not properly be rendered against the defendant in such a form of action, and that, therefore, the motion to arrest the judgment should have been granted. The sixth assignment of error is: The court erred in admitting in evidence the pretended record of the mechanic's lien sued on. The rights conferred by these liens are purely statutory, and were utterly unknown at the common law or in chancery. They are in violent derogation of the rights of property at the common law, and must be strictly construed. On this subject Phillips says:

"The lien of mechanics and material-men on buildings, and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the 'creation of statute,' and was unknown either at common law or in equity." Id. par. 1.

Treating of the construction of these laws, the same author says:

"As the laws call for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions, [citing *Noll* v. *Swineford*, 6 Pa. St. 187;] so an act authorizing property to be incumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used, [citing *Mushlitt* v. *Silverman*, 50 N. Y. 360.] * * * Statutory provisions permitting the summary enforcement of private charges, such as mechanics' liens, on property without the consent of the owner or judicial sanction, cannot be extended in their operation beyond the plain and fair sense of the terms in which they are expressed. A title, therefore, under the mechanic's lien law, is purely statutory, and its validity depends on an affirmative showing that every essential statutory step in the creation, continuance, or enforcement of the lien has been duly taken." Id. par. 18.

An examination of the record of the mechanic's lien, or rather the claim for lien, which was filed in the probate clerk's office, and which was offered and received in evidence at the trial in the court below, over the objection and exception of appellant, discloses the fact that though it purports to have been sworn to, neither the signature nor seal of the officer before whom it purports to have been verified appears. This, we think, should have been fatal to the admissibility of the paper as a claim of lien, and fatal to the right to enforce any lien based upon it. The lien statute of the territory requires that the claim of lien to be filed for record must be verified by the oath of the person making the claim, or of some other person. Prince's Laws, p. 409, par. 6. This is a substantial and necessary requirement, and must be complied with in order to make the claim of lien effectual. The statute makes it obligatory by the use of the word "must," and we think it was error for the court below to have admitted the paper in evidence. Nor was the error cured by proof at the trial that the claim of lien was in fact sworn to before being placed upon file. We think that the instrument, when filed, should have been verified, and that it should appear upon its face to have been verified before it could be made the basis of a proceeding to enforce the claim based upon it. We do not deem it necessary to examine the other assignments of error, as, for the reasons we have already stated, the judgment in this case must be reversed, and the complaint dismissed, with costs to appellant.

WILSON, J., concurs.

HOUGHTON *v.* LAS VEGAS HOTEL & IMP. CO.

Filed January 31, 1885.

Appeal from First judicial district court, San Miguel county.

W. L. Pierce, for appellee. *Catron, Thornton & Clancy* and *L. Sulzbacher*, for appellant.

BELL, J. The record in this case raises substantially the same questions that were considered in the case of *Finane* v. *Same Appellant, ante*, 256.[1] The cases were argued together, and the result which has been arrived at in that case must govern the disposition of this one. In this, however, we do not pass upon the sufficiency of the claim of lien filed, as it differs materially from the claim of lien filed in the other; but, for the other reasons stated in the opinion in the case of Finane & Elston, the judgment herein must be reversed and the complaint dismissed, with costs to the appellant.

WILSON, J., concurs.

STRAUS *v.* FINANE and another.

Filed January 31, 1885.

1. MECHANIC'S LIEN—ENFORCEMENT OF—PROPER COURT TO BE INVOKED.
   Proceedings to enforce a mechanic's lien must be brought on the equity side of the court. *Finane* v. *Las Vegas Hotel & Imp. Co., ante*, 256.[1]
2. SAME—ASSUMPSIT—JUDGMENT.
   In an attempt to enforce a mechanic's lien by an action of *assumpsit*, the purchaser of the property to be charged, if not a party to the contract, as set out in the declaration, is improperly made a defendant, and cannot be included in the judgment.

Error to First judicial district, San Miguel county.

Louis Sulzbacher, for plaintiff in error.

Lee & Fort, for defendants in error.

BELL, J. The plaintiff in error was one of the defendants in the action in the court below. That action was brought to enforce a mechanic's lien. The declaration, if it may be so called, charged that a contract was entered into by one Hershell Halstead, as the owner of certain houses, with the plaintiffs below, to paint, canvas, and paper the said houses for the sum of $110; that the plaintiffs began the work, and while engaged on it, but before its completion, Halstead sold and conveyed the said houses to A. Straus, the plaintiff in error; that after Straus became the purchaser, the defendants in error were notified not to complete the work, and were not permitted to do so by the said Straus; that they presented their bill for the work to both Halstead and Straus, but neither of them paid the same, and thereupon they filed their lien upon the whole of the said property; that the work is still unpaid for, and that there is still due and owing to them the sum of $110. The declaration then closes as follows:

"Wherefore, the premises considered, your petitioners pray judgment against each of the defendants herein for said sum, damages, interest, and costs, and that this honorable court adjudge the sale of said premises upon which said work was performed, and that the proceeds of such sale be applied to the payment of your petitioners' claim, and the costs of these proceedings, and that a reasonable sum be allowed them as their damages herein."

[1] Same case, 5 Pac. Rep. 725.

The defendants below demurred to the declaration, for the reason, among others, that the action was brought in *assumpsit*, and not by bill in equity, and that the court had, therefore, no jurisdiction. The demurrer was overruled. Had the defendants stood upon it and come to this court, we should have felt compelled to sustain it; for, as we have decided in *Finane* v. *Las Vegas Hotel & Imp. Co.*, *ante*, 256,[1] at the present term of court, proceedings to enforce a mechanic's lien must, in this territory, be brought on the equity side of the court. After the demurrer was overruled, the defendants pleaded *non-assumpsit*. Thereafter a trial was had before the court, without a jury, and a judgment rendered for plaintiffs, "that the plaintiffs have and recover of the defendants the sum of one hundred and ten dollars, the amount of their claim, with interest at the rate of six per centum per annum from the twenty-seventh day of May, 1882, until this judgment is paid, together with their costs in and about the filing of said lien." And the court goes on further to direct that the property in question be sold to satisfy the judgment, etc.

We are of opinion that it was error for the court below to have rendered this judgment and directed its entry. It is clear that as the plaintiff in error here was not a party to the contract, as set forth in the declaration, he could not be jointly charged with his co-defendant, Halstead, and that no judgment could be entered against him, as he was improperly joined with Halstead, and a judgment entered against both. The judgment must be reversed, and the complaint dismissed, with costs to the appellant; and it is so ordered.

WILSON, J., concurs.

RUPE and others *v.* NEW MEXICO LUMBER ASS'N.

Filed January 31, 1885.

1. MECHANIC'S LIEN — CHARGE IN COMPLAINT — JOINT LIABILITY — JUDGMENT AGAINST INDIVIDUALS.

   When, in an action at law, a joint liability is charged, judgment cannot be entered separately against one of the parties.

2. SAME—ASSUMPSIT.

   In an action in *assumpsit* a judgment to enforce a mechanic's lien cannot be entered. *Finane* v. *Las Vegas Hotel & Imp. Co.*, *ante*, 256.[1]

Error to First judicial district court, San Miguel county.

Frank Springer and *Breeden & Vincent*, for plaintiffs in error.

Lee & Fort, for defendant in error.

BELL, J. The defendant in error commenced a proceeding in the court below to enforce a mechanic's lien. From the record it appears that the first step taken was to file what was entitled a declaration in *assumpsit*. The plaintiff therein was a subcontractor, having furnished to the defendants Rupe & Bullard, contractors, certain lumber, which, it is charged, was furnished for and used by them in the construction of a building which they had agreed to erect for the co-de-

[1] Same case, 5 Pac. Rep. 725.

fendants, Duncan and Oakley, as owners. The first counts in the declaration are all common counts in *assumpsit*, and charge the four defendants jointly with the value of the lumber furnished the contractors by the plaintiff. Then comes the usual demand for judgment against all the defendants for the amount claimed.

Following the demand for judgment another count appears, which recites a joint contract with the defendants Rupe & Bullard as contractors, and Duncan and Oakley, as owners of certain described lands, by which the plaintiff agreed to furnish lumber for the erection of a certain livery stable by the said contractors for the said owners, on said lands; that the lumber was furnished, as agreed upon, and was used in the construction of the stable; and that within the time limited by law the plaintiff filed for record a claim of lien upon the said building, in manner and form prescribed by statute; that the time for payment for said material had passed; but that the defendants had neglected and refused to pay for the same, to the damage of plaintiff. This count then closes with a prayer for relief, as follows:

"Your petitioner, therefore, prays your honor to grant the plaintiff a mechanic's lien, as by the statute in such case made and provided, and that the said property be made subject to the judgment awarded herein; and further, that the court allow, as part of the costs, the cost of filing and recording the said lien, and reasonable attorney's fees, as provided by statute, and for other relief."

To this so-called declaration in *assumpsit* the defendants pleaded the general issue as to the common counts, and special denial to each of the allegations contained in the special count. Upon the issues thus raised the parties went to trial. By stipulation a jury was waived and the cause tried by the court, which, after hearing the evidence and arguments of counsel, found for the plaintiff as follows:

"* * * For the plaintiff personally against the defendants Albert C. Rupe and Edward Bullard, in the sum of three hundred and seventy-four dollars and fifty-nine cents. It is therefore considered by the court that the said plaintiff, the New Mexico Lumber Association, do have and recover of and from the said defendants Albert C. Rupe and Edward Bullard the sum of three hundred and seventy-four dollars and fifty-nine cents, and the costs and charges in this behalf paid, laid out and expended, taxed at ——— dollars; and the court further finds that the said judgment for three hundred and seventy-four dollars and fifty-nine cents was for material furnished by the plaintiff for the erection of a frame livery-stable on lots numbered 19, 20, and 21, of block number 15, of Lopez addition, in the city of Las Vegas, county of San Miguel, and territory of New Mexico, for which said Rupe and Bullard were the contractors, and the said James Duncan and Robert Oakley were the owners; that the said plaintiff, on the ninth day of June, 1883, it being within sixty days after the furnishing the said material, filed in the office of the probate clerk of San Miguel county, New Mexico, a claim for a mechanic's lien, in accordance with the provisions of the statutes. It is therefore ordered, adjudged, and decreed by the court that the said property is hereby subjected to a mechanic's lien for the payment of said judgment of three hundred and seventy-four dollars and fifty-nine cents, and that all of the right, title, and interest of the said James Duncan and Robert Oak-

ley in and to said property be sold as other property is sold upon execution, and the proceeds thereof be applied to the payment of said judgment."

It is assigned as error that "the court erred in finding separately against Duncan and Oakley for a sale of their property, and against Rupe & Bullard in a general judgment for the purchase money, when the declaration was on a joint liability." We think that this objection is well taken, and is fatal to the judgment. It is not necessary to cite authority to sustain the proposition that when, in an action at law, a joint liability is charged, judgment cannot be entered separately against one of the parties. It is equally clear that in an action in *assumpsit* a judgment to enforce a mechanic's lien cannot be entered against any or all the parties. The question of the form of the action was not raised by the record before us, and so we cannot consider it here. It is considered, however, in another case argued at the present term of the court, (*Finane* v. *Las Vegas Imp. Co.*, *ante*, 256,[1]) and the views expressed in that case may serve as a guide in the future conduct of this one. As the judgment must be reversed for the reasons already stated, we will not review the other alleged errors.

Judgment reversed, and case remanded to the court below for such further action as may be proper.

WILSON, J., concurs.

[1] Same case, 5 Pac. Rep. 725.

LAUGHLIN *v.* BOARD OF COUNTY COM'RS OF SANTA FE CO. and another.

Filed January 31, 1885.

1. TAXATION—RIGHT OF INDIVIDUAL TO TEST VALIDITY OF A TAX LAW.
   The decision of the United States supreme court in the case of *Crampton* v. *Zabriskie*, 101 U. S. 601, establishes the right of an individual tax-payer to obtain relief by a direct suit in his own name against a threatened *devastavit* of public funds in which he has a tax-payer's interest, or against threatened illegal taxation by which his property might be imperiled.
2. SAME—REVENUE LAW OF 1882—INTENTION OF LAW.
   The revenue law of 1882, *c.* 62, was intended as a codification and amendment of the pre-existing revenue laws, and to be thoroughly comprehensive respecting the several subjects with which it dealt. It did not contemplate other sources of public income than revenues and licenses of the classes enumerated in its several sections.
3. SAME—REVENUE—SIGNIFICATION OF THE TERM.
   The term "revenue," when used in reference to funds derived from taxation, is best interpreted, in the absence of qualifying words or circumstances implying a different signification, as confined to the usual public income taxation.
4. SAME—REVENUE ACT—SIXTH SECTION—SCOPE OF THE SECTION.
   The provision of the sixth section for an annual levy, for territorial revenue, of one half of 1 per cent., for ordinary county revenue of one-fourth of 1 per cent., and for the public schools, of one-fourth of 1 per cent., though a restriction of the power of taxation as to those purposes, has no reference to extraordinary taxation for special purposes under particular statutes.
5. SAME—REVENUE ACT—AID VOTED THE TEXAS, SANTA FE & NORTHERN RAILROAD COMPANY—VALIDITY.
   The provisions of the general revenue act do not operate to make illegal the aid voted to the Texas, Santa Fe & Northern Railroad Company, and the principal and interest of the county bonds issued for that purpose, when earned under the conditions of the vote, are properly payable out of the proceeds of taxes to be levied and collected in conformity with the act of February 1, 1872, either as part of the general tax levy, or by a levy special to the purpose.

Error to the First judicial district, Santa Fe county.

N. B. Laughlin, for self.

Gildersleeve & Preston and *John H. Knaebel*, for board of county commissioners.

WILSON, J. The plaintiff in error filed his bill of complaint in the district court for the county of Santa Fe, of which county he is a property owner and tax-payer, praying for an injunction to restrain the board of county commissioners of that county from issuing or delivering to the Texas, Santa Fe & Northern Railroad Company, or to its successors, assigns, or order, any bonds, under the authority of a certain vote or election held in the county of Santa Fe on the eleventh day of August, 1884, by which bonds to the amount of $250,000 appear to have been voted in aid of that railroad company by the qualified electors; and in case such bonds should be issued or delivered, then to restrain the board of county commissioners from levying or causing to be collected under the provisions of the territorial

statute, approved February 1, 1872, any tax to pay the interest or principal of the said bonds as the same might become due and payable according to the terms of any such bonds; and also to restrain the said railroad company from receiving the said bonds, and from receiving any money that may be directed to be paid on account of any tax that may be levied or collected according to the provisions of the same statute.

The bill is based upon the suggestion set forth therein that the statute authorizing county aid to railroad corporations (Laws 1872, c. 30) has, by means of the revenue act of 1882, (chapter 62,) been repealed, either in its entirety, or at least so far as it authorized the levy and collection of a special tax to meet the principal and interest of the voted bonds as they mature. The bill shows that all the proceedings had in relation to the voting of the bonds in aid of the railroad company have been in strict conformity with the statute of February 1, 1872, and there appears to be no ground whatever for equitable intervention on the subject, unless it be that that statute has been impaired in its efficiency by later legislation. The defendants below demurred to the bill, controverting the legal proposition upon which it is founded, and denying its equities. The court below sustained the demurrer, and a final decree duly passed dismissing the bill upon the merits. From this decree the complainant below appeals to this court.

Since the decisions of the supreme court of the United States in the case of *Crampton* v. *Zabriskie*, 101 U. S. 601, no suggestion can be properly entertained in the courts of this territory against the rights of an individual tax-payer to obtain relief by a direct suit in his own name against a threatened *devastavit* of public funds in which he has a tax-payer's interest, or against threatened illegal taxation by which his property might be imperiled. Acquiescing thus in the decision of a tribunal which is controlling in the territories, we are happily relieved from the consideration of the question of chancery jurisdiction which has given rise to much conflict of decision throughout the various states. It is contended by the plaintiff in error that the express and obvious purpose of the revenue law of 1882 (chapter 62) is to substitute its provisions for all antecedent laws or parts of laws on the subject of revenue, and to repeal all previous laws regarding the raising of revenue, and therefore that so much of the county bonding act of 1872 (chapter 30, § 4) as provides for the levying and collection of a special tax under its provisions is thus expressly repealed, and the other parts of the same act are repealed by necessary implication, since it would be impossible to satisfy the indebtedness thereby contemplated by means of one-quarter of 1 per cent. *ad valorem* tax devoted to county purposes by the revenue act of 1882. If we could give to the revenue act in question the broad construction contended for, we might well hold that no county in the territory can aid a railroad under the act of 1872, except so far as it can furnish

aid out of what it can spare from its share—one-quarter of 1 per cent.—of the stated annual tax.

But we are unable to yield our assent to this view of the scope and intent of the revenue act. That statute was evidently designed as a codification and amendment of the pre-existing revenue laws. The statutes relating to the levying and collection of the regular taxes,—such as designated the subjects of taxation, specified exemptions, provided the rate of taxation, the mode of collection, etc.,—as well as those relating to the subject of licenses, and which were only to be found scattered through the statute-books for a considerable series of years, were grouped together, revised, and amended in one general act in 1882. The legislative intent was to make that act thoroughly comprehensive respecting the several subjects with which it dealt, and this intent, quite evident from the very terms of the act, is only emphasized by the repealing clause, which refers not only to all acts and parts of acts "in conflict," but also to "all acts and parts of acts * * * regarding the raising of revenue," etc. It is very doubtful whether the last-cited clause added anything to the effect of the previous repealing clause, and whether, independently of any repealing clause, the act might not well be interpreted as intended to embrace in one complete system the whole subject of ordinary revenues and licenses, and to operate as a repeal by implication of any non-included parts of the old law on the same subject. *U. S.* v. *Tynen*, 11 Wall. 88. The fullness of the repealing clause relieves the act from any judicial doubt on this point, and thus accomplishes some purpose. In view of this manifest intent of the revenue act, it would be an unnatural and strained construction to hold that it contemplated other sources of public income than revenues and licenses of the classes enumerated in its several sections; that is, such as arise in and are required for the ordinary course of official administration. Courts have frequently had occasion to construe similar phraseology, and, in such construction, they hold almost uniformly that the term "revenue," when used with reference to funds derived from taxation, is best interpreted, in the absence of qualifying words or circumstances implying a different signification, as confined to the usual public income taxation. *U. S.* v. *Norton*, 91 U. S. 568; *Fletcher* v. *Oliver*, 25 Ark. 289; *Harper* v. *Commissioners*, 23 Ga. 566.

When we consider how minute a catalogue of subjects is included in the revenue act in question, it is impossible to believe that the legislative mind intended, while expressly enumerating these, to leave to mere implication the inclusion of other matters of great and special moment, such as the extraordinary power in counties of creating a large debt by popular vote, and the power in the several counties to levy taxes for the payment of judgments. Laws 1876, *c.* 1, § 7. The general revenue act contains no express limitation upon the power of taxation. Nevertheless, the provisions of the sixth section, viz.: "There shall be levied and assessed upon the taxable property

within this territory, in each year, the following taxes: For territorial revenue, one-half of one per cent; for ordinary county revenue, one-fourth of 1 per cent; for maintenance and support of public schools, one-fourth of one per cent.,"—may well be construed to imply a restriction on the taxing power, so far as it relates to the subjects specified. In the absence of such a restriction, expressed or implied, the power to contract and to incur public indebtedness, implies the power to raise by taxation the funds needed for the execution of the former power. *Loan Ass'n* v. *Topeka*, 20 Wall 655. But the provisions above cited have exclusive reference to taxation for the ordinary purposes of the government,—the usual disbursements during each fiscal year in the ordinary administration of public affairs. They have no reference whatever to the execution of extraordinary powers under special statutes, and which are wholly outside of the common course of administration. *Nashville R. Co.* v. *Franklin Co.* 7 Amer. & Eng. R. R. Cas. 260; *McCormick* v. *Fitch*, 14 Minn. 252, (Gil. 185.) Even an express limitation on the rate of taxation is not generally operative to prevent taxation for extraordinary purposes; as, for instance, that of satisfying judgments against a municipality. *Butz* v. *Muscatine*, 8 Wall. 575; *McCracken* v. *San Francisco*, 16 Cal. 591.

It could hardly be seriously contended that any of the provisions of the general revenue act operate to limit a special power previously granted to the several boards of county commissioners to levy taxes for the payment of judgments, (Laws 1876, *c.* 1, § 7,) or tend to affect the funding acts of the same session. The provisions requiring the proper officers to levy a stated annual tax of 1 per cent. for ordinary purposes appear to have been first enacted at the same legislative session at which the county bonding act in aid of railroads was passed. They occur in chapter 22 of the Laws of 1872, § 6. The county bonding act is chapter 30 of the same session. It is obvious, as well from this coincidence in the time of enactment as from the phraseology of the fourth section of the later act, that the legislature intended to put both acts in force according to their terms, and to promulgate the former as relating to ordinary governmental purposes, and the latter as relating to an extraordinary purpose, dependent upon the express will, to be declared by vote of the tax-payers immediately affected. The re-enactment of these provisions in the general revenue act of 1882 evinces no legislative intent to impart to them any greater meaning or efficacy than they imported at the time of their original enactment. On the contrary, it is plain that they carry with them into the latter statute only the same force and effect that they possessed in their original form. Thus illustrated by the circumstances of their adoption, they exhibit all the more clearly their entire consistency with the provisions of the county bonding act. We are therefore of opinion that the aid voted in favor of the defendant railroad company was legally voted, and that the principal and interest of the county bonds, when earned under the conditions of

the vote, are properly payable out of the proceeds of taxes to be levied and collected in conformity with the requirements of the act approved February 1, 1872, (chapter 30, Laws 1872, § 4,) either as part of the general tax levy, or by a levy special to the purpose. The decree of the district court is affirmed.

BELL, J., concurs.

THOMPSON, Adm'x, etc., and others *v.* MAXWELL LAND GRANT & RY. Co. and others.

Filed March 14, 1885.

1. EQUITY PLEADING—AMENDMENTS.
   Upon the amendment of a bill, the defendant is entitled to file an amended answer making, if he wishes, an entirely new defense; and this right is not affected by an order of the supreme court reversing a former decree in the case, with leave to plaintiffs to amend their bill, and allowing defendants to answer any new matter introduced therein.
2. SAME—INFANT DEFENDANT.
   An infant defendant, having become of age, is entitled to his day in court, and may file his separate answer, making, if he choose, an entirely new defense.
3. EQUITY PRACTICE—BILL TO ENFORCE DECREE.
   On bill to enforce a decree, defendants must be permitted to attack it, and the court will look into the case for the purpose of seeing whether it was equitable and just.

Error to the district court for Colfax county.

Caldwell, Yeamans, Wells, Smith & Macon, for plaintiffs in error.

Catron, Thornton & Clancy and *Frank Springer,* for defendants in error.

BELL, J. The facts in this case are substantially as follows:

On the first day of August, 1870, the Maxwell Land Grant & Railway Company, Lucien B. Maxwell, and Luz B. Maxwell, his wife, filed in the district court of Colfax county their bill in equity against Guadalupe Thompson and George W. Thompson, her husband, and Charles Bent, Juliano Bent, and Alberto Silas Bent, three infant children of the said Guadalupe Thompson, by Alfred Bent, her former husband.

An amended bill was filed on the eleventh day of January, 1873. This amended bill states that in 1841 the republic of Mexico granted certain lands to Charles Beaubien and Guadalupe Miranda,—the same now commonly known as the Maxwell land grant; that in 1860 the grant was confirmed by act of congress; that afterwards Maxwell and his wife became the sole owners of the said premises, and, in 1870, conveyed them to the Maxwell Land Grant & Railway Company. With certain exceptions, the bill then sets forth that in September, 1859, Alfred Bent, since deceased, Estefana Hicklin, and Alexander Hicklin, her husband, Teresina Bent, and Aloys Scheurick, her husband, instituted their bill in the district court for Taos county against the said Maxwell and wife, and sundry other persons, claiming an undivided one-fourth part of this grant, as heirs at law of Charles Bent, their father and ancestor; alleging, in substance, that, by parol agreement between the original grantees and the said Charles Bent, the said Charles Bent was equitably entitled to such undivided interest; and praying that the defendants in that bill might be declared to hold the premises, in respect to the undivided one-fourth, in trust for the said complainants.

The bill further sets forth that at the May term, 1865, of the Taos district court a decree was entered, which in this bill is termed interlocutory in substance, establishing the rights of the plaintiffs, and declaring that in the lifetime of the said Charles Bent, Beaubien and Miranda held the legal title and estate in and to one undivided one-fourth part of the grant in trust for Charles

Bent; that, upon the decease of the said Charles Bent, the complainants in this suit succeeded to this equitable interest; and decreeing partition; that commissioners were appointed, etc.

The bill further sets forth that afterwards, and in the life-time of the said Alfred Bent, the plaintiffs in the said suit being all *sui juris*, before any steps had been taken to execute the decree, entered into an agreement of compromise with Maxwell, whereby, in consideration of $18,000 to be paid them by Maxwell, they agreed to release Maxwell and wife of the said trust in equity; that afterwards, and about the fifteenth of December, 1865, Alfred Bent died, leaving as his sole heirs at law three minor children, to-wit: Charles Bent, Juliano Bent, and Alberto Silas Bent; that at the April term of the Taos district court, in 1866, the death of the said Alfred Bent was suggested, and the said three minors were made parties plaintiff, and their mother, Guadalupe Bent, was appointed their guardian *ad litem;* and it was afterwards made to appear to the court that the aforesaid agreement had been entered into for the extinguishment of the said claim and trust, and thereupon, at the request and with the consent of the solicitors of the parties, it was ordered that interlocutory decree, declaring said trust and equity, and all orders made in virtue thereof, be vacated; that Maxwell should pay to the plaintiffs $18,000, one-third to Scheurick and wife, one-third to Hicklin and wife, and one-third to and among the children of Alfred Bent, to be paid to their guardian *ad litem;* and that the said Hicklin and wife, Scheurick and wife, and Guadalupe Bent, guardian *ad litem* of the infant defendants, should, within 10 days from the date of that decree, execute and deliver to Maxwell a good and sufficient conveyance of their right.

The bill further sets forth that on the third day of May, 1866, Maxwell paid said sum of $18,000, as directed by the said court, except that the said sum of $6,000 was paid to the said Guadalupe Bent, as administratrix of the estate of Alfred Bent, and not as guardian *ad litem* of the infants; that on the third day of May, 1866, Hicklin and wife executed a like conveyance; and that on the third day of May, 1866, the said Guadalupe Bent undertook to convey to the said Maxwell all right and interest of the said children of Alfred Bent in the premises.

The bill further alleges that by reason of certain errors and irregularities in said proceedings, it is doubtful whether, as against the minor heirs of the said Alfred Bent, it sufficiently appears that they have no equitable or other interests in the said premises; and that such doubt creates a cloud upon the title to the premises, which can only be removed by the interposition and decree of the court; that among other irregularities are the following: That it does not appear, as the fact is, that the agreement for the sale of the equitable interest of the said Alfred Bent was made between the said Maxwell and the said Alfred Bent in the life-time of the latter; that the interlocutory decree should not have been set aside, but should have been modified; that the money payable for the equitable interest of the said Alfred Bent should have been directed to have been paid to the personal representatives of the said Alfred Bent, and not to the guardian *ad litem* of the minor children; that the court ought, by a proper decree, to have adjudged the trust, or the equitable claim, extinguished; and that the court had no jurisdiction to order a conveyance by the guardian *ad litem* of the infants.

The bill further alleged that in fact the share of the said Alfred Bent in said $18,000 had passed into the hands of the personal representatives of the said Alfred Bent, namely, said Guadalupe Thompson, (late the said Guadalupe Bent, widow of the said Alfred Bent, but now the wife of the said George W. Thompson,) who, on the twelfth of April, 1866, was appointed administratrix of the estate of Alfred Bent by the judge of the probate court of the county of Taos; and the bill thereupon prayed that for the errors at law appearing upon the face of the decree of September 10, 1866, the same may be

reviewed and reversed in the points complained of; that the trust aforesaid might be decreed to be extinguished and terminated as against the defendants; and that plaintiffs might be decreed to hold the premises free of all trust in favor of the defendants, and all persons claiming under them, etc.

To this bill the infant defendants filed their answer by their guardian *ad litem*, asserting their infancy, and submitting their rights to the protection of the court. The adult defendants, having previously answered the original bill, filed their answer to the amended bill, responding only to the amendments, and denying that Guadalupe Bent undertook to convey to the said Maxwell the right, title, and interest of the minor children. Their answer to the original bill admits the grant and confirmation thereof; denies that Maxwell and his wife were at any time the sole owners of the premises, as alleged in the bill; denies the conveyance to the Maxwell Land Grant & Railway Company; admits the institution of the suit in equity of the said Alfred Bent and others, heirs at law of Charles Bent, and that the decree was given therein as alleged in the bill; denies that Alfred Bent at any time entered into any such agreement of compromise or sale as alleged in the bill; admits his death and the heirship of the minor children; and as to the proceedings alleged to have taken place at the April term of the court in 1866 refers to the record without admitting the validity or legality of the same, but protesting against the same as illegal, unjust, and void as to the minor heirs of Alfred Bent; denies that the minor heirs of Alfred Bent were in any manner divested of their estate in the grant; avers that Guadalupe Thompson, in making the pretended deed alleged to have been executed by her, was wholly ignorant of her duties and obligations as guardian *ad litem;* avers that the supposed deed of conveyance of the said Guadalupe Bent was illegal and void; and denies that $6,000 have passed into the hands of the said Guadalupe Thompson from the said Maxwell; but admits that a portion of the $6,000 may have so passed, but whether it was paid to her as administratrix or as guardian *ad litem*, she is, and was at the time of the payment, wholly ignorant.

Upon the issues thus raised, depositions were taken, and at the August term, 1873, a final decree was made and entered, declaring that the decree of September 10, 1866, in the Taos district court, was erroneous in sundry particulars, and directing that the said decree of September 10, 1866, given in the Taos district court, be in the said respects vacated and set aside, and that the premises be held by the Maxwell Land Grant & Railway Company, free of all trust in favor of Guadalupe Thompson, either in her own right or as administratrix of Alfred Bent, deceased, the said George W. Thompson, or the said Charles Bent, Alberto Silas Bent, and Juliano Bent, or either of them. An appeal was taken to this court from the said decree, but the same was affirmed. An appeal was then prosecuted to the supreme court of the United States, and in that court the decree was reversed.

On February 25, 1880, there was filed in the office of the clerk of the Taos county district court a mandate of the supreme court of the territory, reciting that the decree of the Taos district court of September 4, 1878, the decree of affirmance given in the supreme court of the territory, and the decree of the supreme court of the United States, whereby the decree of the supreme court of the territory was reversed, and the cause remanded with directions to allow the plaintiffs to amend their bill as they should be advised, with liberty to the defendants to answer any new matter introduced therein; and the order of the supreme court of the territory at the January term, 1880, remanding the cause to the Colfax district court with liberty to amend, etc. At the March term, 1880, of the Colfax district court an order was entered, allowing the plaintiffs to amend their bill as they should be advised, and the defendants were allowed to answer any new matter which should be introduced in such amended bill. The effect of these amendments was to strike from the origi-

nal bill the allegations that the alleged agreement of compromise was entered into in the life-time of Alfred Bent, and aver that it was entered into after his death; to strike out also all the allegations of the bill which charged error in the proceedings had in the Taos district court on the tenth day of September, 1866. On the ninth of April, 1880, the defendants filed their answer to this amended bill, reiterating substantially the allegations and denials of their former answer, but containing also the following allegations and denials, which were struck out upon exceptions to them filed by the plaintiffs, to wit: A denial that the claim of the said Alfred Bent, or of the infant respondents herein after his death, was ever regarded as doubtful or uncertain; averring that, on the contrary, the same was a valid and subsisting claim and right, and confirmed and established by the decree of the court. An allegation that the proceedings had in the Taos district court, on the ninth of April, 1866, or at any subsequent term or terms were illegal, unjust, and void as to the minor respondents. A denial that the decree setting aside the former decree, which established the right and interest of Alfred Bent, was made at the request or with the consent of the solicitors of the respondents, or any of them, or any one having authority to represent them; and an averment that the pretended agreements and the said proceedings were fraudulent as to the infant defendants, and invalid and ruinous, and an illegal sacrifice of the just and valid rights and interests of the said infants; that the interest of the said infants, alleged to have been released and surrendered for the sum of $6,000, was at that time worth not less than $100,000, and was now worth much more. An allegation that the alleged settlement and compromise was not in any way beneficial or advantageous to the infant defendants, or necessary to their support or maintenance. A denial that the sum of $6,000 was paid to the respondents or Guadalupe Thompson as administratrix of Alfred Bent, or at all; but admitting that not exceeding $1,000 may have been paid to her as guardian *ad litem;* that such payment, if made at all, was made in personal property and not in cash, and that neither the estate of Alfred Bent nor the infant defendants ever received any portion of the said $1,000. An averment that the alleged conveyance of Guadalupe Thompson was procured by deceitful and fraudulent representations and practices on the part of the said Maxwell and other confederates with him. An averment that the proceeding, order, and decree setting aside the former decree, which established the right of Alfred Bent in the premises, was obtained by fraud and deceitful practices on the part of said Maxwell.

On the fourth day of April, 1882, Charles Bent filed his petition showing that since the last term of the court he had become of age, and prayed leave to demur or plead to the amended bill, or to file a new answer. At the same term, the complainants obtained leave to amend their bill by striking out the name of Lucien B. Maxwell, and the petition of Charles Bent was allowed. On the same day, Charles Bent filed his answer. This answer, among other averments and denials, contained the following, all of which were afterwards struck out on exception by the plaintiffs:

An averment that by the terms of the decree of the Taos district court of May 29, 1865, one-fourth part of the grant was established and confirmed to the said Alfred Bent, Estefana Hicklin, Teresina Scheurick, their heirs and assigns forever, with full and perfect right, power, and authority to possess and enjoy the same. An averment that Guadalupe Bent, the guardian *ad litem* of the said Charles, Juliano, and Alberto Silas Bent, is a Mexican woman, and at the time of her appointment as guardian *ad litem*, and at the time of her pretended conveyance of the interests of the said wards, and at the time of the entry of the decree setting aside the decree declaring the trust in favor of the said Alfred, Estefana, and Teresina in the lands in question, the said Guadalupe Bent was wholly ignorant of the English language, and unable to read, write, or speak the same; unfamiliar with business or

proceedings of courts; unacquainted with the rights of the said infants; ignorant of the bounds, extent, and character or value of the said grant; ignorant of the fact that the grant had been confirmed by act of congress; ignorant of the entry of the decree of the Taos district court establishing the right of the said Alfred Bent in said grant, and directing partition thereof; and ignorant of what share in the grant was in fact claimed by the said Alfred Bent in his life-time. An averment that in and about the management of her business, property, and affairs, she was at all times wont to consult with and rely upon the advice of the said Scheurick; that Scheurick was then residing near the said Guadalupe Bent, and was always, after the death of the said Alfred Bent, accustomed to profess great friendship and regard for her and her children, and a desire to protect and assist her in the management of the estate and property left by the said Alfred Bent, and to protect the interests of her said infant children; and that by reason of these professions, and the connection in marriage which subsisted between the said Scheurick and the said Alfred Bent in his life-time, the said Guadalupe Bent reposed at all times special trust and confidence in the said Scheurick; that the said Lucien B. Maxwell was at all times aforesaid, and long before that, as the said Guadalupe and the said Scheurick well knew, a man of great wealth and influence; that well knowing the weakness, ignorance, and inexperience of the said Guadalupe Bent, and her want of information as to the extent, value, character, and confirmation of the grant, and of the decree establishing the rights of her infant children, said Maxwell procured her to be appointed guardian *ad litem* of the said infants, and procured the pretended conveyance of the rights of the said infants to be prepared for execution by her, and procured Scheurick to believe and represent, and the said Scheurick did by the procurement of the said Maxwell or otherwise represent, to the said Guadalupe Bent that the said lands were, for the most part, only fit for grazing; that the same contained little or no mineral of value; that it extended only to the northern line of New Mexico; that Maxwell was the owner of the major part of the grant, and would control the whole, and exclude the infants from all their share thereof; that she, the said Guadalupe Bent, was duly authorized to sell and convey the interests of the said infants, and unless she would accept the $6,000, and convey the same to the said Maxwell, neither she nor her infant children would ever realize anything from the interest of the said infants in the grant. An averment that the said Guadalupe Bent, confiding in the representations of the said Scheurick, and not knowing the contrary thereof, and moved by the said representations, and by her knowledge of the wealth, power, and influence of the said Maxwell, the said Guadalupe Bent did assume to execute a pretended conveyance of the interests of the said infants, as in the said bill mentioned; that the conveyance was not read or interpreted to her; that it was executed without the advice of counsel, and at the time thereof the said Guadalupe Bent was in entire ignorance of the character, extent, or value of the grant, and of the rights and shares of the said infants therein. An averment that neither then nor at any time did the said Maxwell pay to the said Guadalupe Bent, in any capacity, the sum of $6,000, or any sum of money whatsoever, for, or on account of, the rights and interest of the heirs of Alfred Bent in the said grant; nor was any such payment, or sum of money whatsoever, made by the said Maxwell, either to the infants, or to any person authorized to receive the same, on behalf of them or either of them. An averment that the grant contains 2,000,000 acres or thereabouts, and abounds in valuable mines of gold and silver, and other minerals and metals; that it contains a large extent of well-watered, irrigable lands, extensive forests of pine and other trees; that all the residue thereof is valuable for grazing; that the interest of the infants at the time of the conveyance to Maxwell was reasonably worth $100,000 or more, and ever since has been appreciating in value, and that the grant in fact extends be-

yond the northern boundary of New Mexico; that 200,000 acres, or thereabouts, of valuable lands, situated within the limits of the state of Colorado, are, and always have been, part of said grant; that all these matters were known to Maxwell at the time of procuring the said pretended conveyance, and unknown to the said Guadalupe Bent. An averment that the respondent's ancestor, Alfred Bent, left a considerable estate in houses and lands other than the said grant, and in moneys and personal property; that the said Guadalupe Bent, with said other estate, was then and afterwards well able to support and educate the said infants; and neither then nor at any time was there any necessity for the sale or disposition of the interests of the infants in the grant in question. A denial that said Guadalupe Bent, or any solicitor representing her or either of the said infants, ever requested or consented to the decree of the Taos district court directing that the said Guadalupe Bent should convey the interests of the said infants to the said Maxwell; or that the said Guadalupe Bent, or any person on behalf of respondents, ever consented or agreed, as in said order and decree is falsely recited; or assented or agreed to the setting aside of the former decree establishing the right of the said Alfred Bent, Estefana Hicklin, and Teresina Scheurick in the said grant. An averment that the entry of the order and decree at the September term, 1866, of the Taos district court was procured in the absence of the said Guadalupe Bent, without notice to her of any intention to apply therefor, and by false representations of the said Lucien B. Maxwell, or the said Aloys Scheurick, or other persons to the respondents unknown, made to the said court, that the said Guadalupe Bent would consent to the entry of the said decree. An averment that all the facts in the answer before set forth, touching the ignorance, weakness, and inexperience of the said Guadalupe Bent, the imposition practiced upon her, the extent and value of the grant, and the estate, real and personal, left by the said Alfred Bent, the ability of the said Guadalupe Bent to maintain and educate said infants, were concealed from the said district court at the time of the decree entered at the September term, 1866; and solely by reason of such concealment and false representations, without any reference to a master, and without any inquiry or judicial examination as to whether the said decree would or would not be beneficial to the said infants, the said district court, at its September term, 1866, gave and entered the decree in the bill set forth. A denial that the said Maxwell did at any time pay the said sum of $18,000 to the persons or in the proportions directed by the said decree. An averment that the decree was made and entered into more than four months after the third day of May, 1866, the date of the conveyance by said Guadalupe Bent. A denial that the sum of $6,000, or any sum, was ever paid to the said Guadalupe Bent in any capacity whatever. A denial that what were alleged to be true copies of the decree and conveyance were in fact so, inasmuch as defendants had never had an opportunity to examine the originals thereof, or compare the same, etc. An averment that, as respondent is advised, the said Alfred Bent, in his life-time, became entitled to and acquired an undivided one-twelfth part of the said grant; and that his heirs at law are entitled to have the same set off to them in severalty. An averment that defendant is advised that by the amended bill it appears that plaintiffs have not any title to the relief demanded, nor hath this court any jurisdiction to entertain the bill; and craves the same benefit of this defense as if he demurred, etc.

As we have already stated, all the averments before recited, both in the answer of the adult and infant defendants, and in the separate answer of Charles Bent, filed by leave of the court, after he had arrived at the age of 21 years, were stricken out upon exceptions. Error is assigned upon the orders of the court sustaining the exceptions filed to these answers. The exceptions filed to the joint and several answers of the adult and infant defendants, and to the additional answer of Charles Bent, are substantially the same; and are,

in substance, that these answers are not responsive to any new matter contained in the complainant's bill of complaint as amended, but are in the nature of a new defense to the allegations of the original bill of complaint in the case, and that they are not in accordance with the mandate of the supreme court of the territory, and to the order of the district court, giving to the defendants leave to answer the amended bill of complaint.

The plaintiffs below appear to have proceeded upon the idea that because the amendments to the original bill of complaint, which they were permitted to make under the mandate of the supreme court of the United States, were made by eliminating from the original bill certain portions thereof, and not by additions thereto, that therefore there was no new matter in the bill which, under the order of the supreme court of the United States, the defendants would be entitled to make answer to. The fact is, however, that by these eliminations the whole character of the bill was radically changed; from being a bill of review, it became a bill for the enforcement of a decree. The main purpose of the original bill was to establish the fact that the agreement of compromise, by which the right of Alfred Bent and his heirs in the Maxwell land grant was to be extinguished, was made during the life-time of Alfred Bent; and that the compromise decree should explicitly set forth that fact, so that it would more clearly appear that the heirs at law of the said Alfred Bent inherited from him no interest in the Maxwell estate. The supreme court of the United States, however, held in this case that the complainants wholly failed to establish that fact. Of course, had the purpose of the original bill been effected, the infant heirs of Alfred Bent could have had no interest whatever in the Maxwell land grant, and all, at most, that they would have been entitled to claim would have been that the sum which it is alleged was to have been paid to their ancestor, and which they say was not paid, should be recovered for them. By the eliminations made in their original bill, the plaintiffs came into court, omitting the averment of compromise during the life-time of Alfred Bent, and averring a compromise made with the plaintiffs in the original bill brought to establish the right of Alfred Bent; and, instead of asking that the consent decree of September 10, 1866, should be modified by declaring the compromise to have been made during the life-time of Alfred Bent, they asked that the decree be enforced as a decree well founded and accurate in its character. Of course the issue, so far as these infant heirs are concerned, became entirely different to the prior issue raised by the original bill. The amended bill in substance charges that the agreement of compromise was made with them, and not with their father. By this amendment their position in the case was most radically changed, and the answer which they could properly make to the original bill was very different to the answer which they would be entitled to make to the amended bill. We think that it was error for the court below to have struck out the matter contained either in the joint and several answer of the defendants, or in

the separate answer of the defendant Charles Bent. The fact that the complainants got leave to and did file an amended bill, would, under the well-settled rules of practice, have entitled defendants to interpose an entirely new answer.

The rule, as laid down by a distinguished author on this subject, is as follows:

"Any amendment to the bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making an entirely new defense, and even contradicting his former answer." 1 Daniell, Ch. Pr. 409.

The position taken by the plaintiff below is that, because the mandate of the supreme court gave liberty to the defendants to answer any new matter introduced in their amended bill, they were thereby limited to answering new allegations of matters that did not appear in the original bill. We do not think that it was the intention of the supreme court to change the rule by which a defendant in every case is entitled to file a new answer to an amended bill. That liberty, as we have seen, is given to them by a well-settled rule, and the supreme court simply, in our opinion, meant to say that, in addition to any answer which they might be advised to interpose to matters set forth in the original bill, as amended, they should have leave to answer any new matter that appeared only in the amended bill. In the view, however, that we take of the amendments to the original bill, we think, as we have already stated, the entire character and purpose of the bill was so changed as that it might be said that the whole amended bill was new matter, to which the defendants would have a right to have answered as they have, under the strictest construction to be given to the language of the supreme court in that regard. These answers constitute, as we think, a direct attack upon the decree which the amended bill seeks to enforce, and should properly have been permitted to stand. Aside from this, there can be no doubt, we think, that the defendant Charles Bent, having arrived at the age of 21, was, as the court held when it permitted him to file an additional separate answer, entitled to a day in court, and to make a new defense, if he chose, to the bill filed against him. We think that the law on this subject is well settled:

"Where an answer has been put in by a guardian on behalf of an infant defendant, and the infant comes of age and is dissatisfied with the defense put in by his guardian, he may apply to the court for leave to amend his answer, or to put in a new one; and it seems that this privilege applies as well after a decree has been made as before." 1 Daniell, Ch. Pr. 170, and numerous cases there cited.

This is the general rule in all cases in which relief has been sought against infants. In cases, however, in which suit is brought to recover moneys alleged to be due from the estate of the infants, a stricter rule prevails, as in cases of foreclosure; but in regard to such cases it is said:

"That in cases of foreclosure, the only cause which can be shown by the infant, after attaining the age of 21, against making the decree absolute, is error in the decree, and that he will not be permitted to unravel the account, nor even redeem the mortgage on paying the amount due. This strictness, however, must not be understood as applying to cases in which fraud or collusion has been made use of in obtaining the decree." 1 Daniell, Ch. Pr. 172.

Another authority says:

"But there can be no valid decree against an infant by default, or an answer by a guardian; and the infant must generally have a day in court, if, after he is of age, he shows error in the decree. Tyler, Inf. & Cov. 175; *Mills* v. *Dennis*, 3 Johns. Ch. 367; *Harris* v. *Youman*, 1 Hoff. Ch. 178; *Long* v. *Mulford*, 17 Ohio St. 485.

There are, therefore, these additional reasons why the answer of the defendant Charles Bent should have been permitted to stand as filed.

As we have already stated, this was an action to enforce a decree alleged to have been made by consent, and there are many grave reasons, we think, set forth in the portion of the answers which have been stricken out, why the defendants should have been permitted to attack the decree as they sought to do. In such a suit as this, the defendants should be permitted to defend against the execution of a decree sought to be enforced; and it is the duty of a court to examine with care such reasons as are alleged against its enforcement, and refuse to enforce it if, upon the evidence, the court is satisfied that the decree itself was erroneous. The rule on this subject is as follows:

"There can be little doubt, upon the authorities, that the court has full power, upon a bill to carry a decree into execution, to look into the case for the purpose of seeing whether the former decree is equitable and just; and if it is not, to refuse to enforce it." 1 Story, Eq. Pl. § 429, note *a*, and authorities there cited.

The supreme court of the United States, when this case was before them, very properly said:

"A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached." *Thompson* v. *Maxwell*, 95 U. S. 391.

What the defendants now ask to do by their answers, is to impeach this decree for fraud and illegality; and we think that their answers, charging these matters of impeachment, should have been permitted to stand.

It is not necessary for us to consider at this time the other alleged errors. We think the judgment of the court below must be reversed, with costs. The case is remanded to that court, with instructions that the defendants be permitted to restore to their answers the portions thereof which were stricken out on exceptions, and thereafter to proceed to final hearing and judgment, in accordance with the

mandate of the supreme court of the United States as to proofs; and it is so ordered.

WILSON, J., concurred.

CRABTREE *v.* SEGRIST and others.

Filed March 14, 1885.

1. APPEAL—QUESTION NOT RAISED BELOW.
   A question not raised in the trial below cannot be considered on appeal by the higher court. Prince's Laws, § 5, pp. 68, 69.
2. CONDITIONAL SALE—NOTES FOR PAYMENT—SEIZURE OF GOODS TO SATISFY NOTES.
   A party, having sold cattle to another and taken the purchaser's notes for them, upon the condition that the title is to remain in him until the notes are paid, cannot, while holding the notes, seize or sell the cattle in order to make the debt good.
3. SAME—EVIDENCE, ABSOLUTE OR CONDITIONAL—QUESTION FOR JURY.
   Whether a transaction in which the seller delivered a bill of sale of the goods to the purchaser and accepted the latter's notes for payment was a conditional or an absolute sale, is a question that the jury may properly decide from the evidence.
4. SAME—GIVING AND ACCEPTANCE OF A NOTE—EVIDENCE.
   The giving and acceptance of a note is *prima facie* evidence of a settlement between the parties of the difference between them growing out of the transactions with which it is connected.

Appeal from the district court for the county of San Miguel.

Lee & Fort, for appellee.

Catron, Thornton & Clancy, for appellants.

BELL, J. This is an action in trover, brought to recover the value of certain cattle claimed to belong to appellee, the plaintiff in the court below, and unlawfully taken from him and converted by defendants to their own use. The facts of the case are briefly as follows: In 1880 the plaintiff bought of one Babb the remnant, as it is termed in the record, of the latter's herd of cattle, then to be found on certain ranges in Texas. The plaintiff came after said cattle and secured them. At the time of making this arrangement, plaintiff gave Babb notes for the amount agreed upon as the purchase money, and received from Babb a bill of sale for the cattle. Thereafter plaintiff secured and took possession of the cattle; but how many head there were, does not appear from the evidence in the record before us.

The only serious contention in the evidence is as to whether this transaction was an absolute or merely a conditional sale; the plaintiff insisting, and giving evidence tending to show, that the sale was absolute, accompanied by a bill of sale absolute on its face, and by delivery of the possession of the cattle as fast as they could be found and secured by him, and that his notes were given in full satisfaction. These notes consist of two promissory notes, each for the sum of $800, one payable in September, 1881, and the other in September, 1882. The defendants, however, insist, and introduce evidence tending to show, that the sale was conditional upon the payment of the notes at maturity; it being agreed between the plaintiff and Babb that the

title to the cattle should remain in the latter until the notes were paid, and that if not paid when due, he might assert his title and resume possession of the cattle. After the cattle were secured by the plaintiff, he drove them from the range in Texas, upon which they had been found by him, into Lincoln county, New Mexico.

The notes were not paid at maturity; and thereafter, in January or February, 1882, Babb undertook to sell the cattle to the defendants. He sent his son, armed with a power of attorney, to take possession of the cattle. This son, accompanied by the defendants, or some of them, went to the range in New Mexico, where the cattle were being herded in connection with other cattle belonging to the plaintiff, in charge of an employe of the plaintiff, and took possession of them, and sold them to the defendants. It does not appear that this employe of the plaintiff had any authority to give up the possession of the cattle. No exceptions whatever to the evidence are contained in the record; and, while interesting questions might have been presented as to the propriety of admitting parol testimony tending to contradict the terms of the bill of sale, and to change it from a bill of sale absolute to a conditional one, or from a bill of sale from Babb to Crabtree into a chattel mortgage from Crabtree to Babb; and as to the identity of the cattle taken by defendants with the cattle transferred by Babb to plaintiff; and as to Babb's right to take the enforcement of the condition of the sale, even if proved, into his own hands, and to take the cattle from the plaintiff's possession without any legal proceeding; and as to the right of Babb or his agent to take possession of the cattle, sell them, and appropriate the entire proceeds to his own use, when at most all that could be claimed, upon the defendant's theory of the case, would be that he had such a lien upon the property as would authorize him to take and sell it for the purpose of recovering such payment for the cattle as was reserved by the bill of sale,—we are now confined by the record to certain exceptions to the charge as given, and refusals to charge as requested.

The only other points to which our attention has been called by the appellants, are assignments of error, to the effect that there is no evidence to sustain the verdict against any defendant other than Segrist, and that there is no evidence of a demand before suit. It does not appear that either of those points was raised or insisted upon at the trial, and we are therefore of opinion that they cannot now be presented and urged before us. The general rule that only such assignments of error can be presented to the appellate court as were brought to the attention of the trial judge, so as to permit of their correction by him, is strengthened in this territory by the statutory provision that "no exception shall be taken in an appeal to any proceeding in the district court, except such as shall have been expressly decided in that court." Prince's Laws, § 5, pp. 68, 69. The record discloses an exception to the giving of plaintiff's second request to charge, but this exception appears to be now abandoned by its omission from the

assignments of error. Aside from this, we think the request was properly given.

The following instructions and refusals to charge are, however, properly before us, being presented both by the record and the assignment of errors:

"If you find from the evidence that the plaintiff or his brother purchased the cattle from W. M. or W. T. Babb, and that he or they gave their promissory notes therefor, and the same were accepted by the Babbs,—although the notes were deemed only as conditional payment, yet that would be *prima facie* evidence of payment,—and the said Babbs, while holding said notes, could not proceed to take possession of the said cattle and horses as their own, their remedy would be upon the notes, or to cancel the trade; and if you find from the evidence that the said Babbs did, under the circumstances just mentioned, take possession of the said cattle without the authority of the plaintiff, and dispose of them to the defendants, you will find for the plaintiff in the value of the cattle and horses at the time of taking the same, with interest."

We think this instruction was proper. It cannot be contended that Babb had the right to both retain the notes and also take possession of the property. He could not affirm the sale by retaining the notes and the cause of action merged in them,—that is, the consideration for the cattle,—and at the same time seek to rescind and abrogate the contract of sale by asserting his title to, and taking possession of, the cattle. Error is assigned upon the giving of the plaintiff's fourth request to charge, which is as follows:

"If you believe from the evidence that the plaintiff purchased a portion of the cattle in dispute from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle were at the time scattered on the range, and it being inconvenient or impossible for a manual delivery, the bill of sale would be an actual delivery whenever found; and if, at the time of the delivery of the bill of sale, said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would be a payment therefor, and the said vendors would have to look to their notes for payment."

This instruction proceeds upon the theory that the sale from Babb to plaintiff was an absolute one, a theory as to which the evidence is conflicting, but one which the jury would have been fully warranted in finding; and if the jury found that the sale was absolute and without any condition for the return of the cattle, Babb's only right against the plaintiff would be for the purchase money. The plaintiff's fifth request to the court to instruct the jury is also assigned for error. It is as follows:

"If the jury find from the evidence that W. T. Babb at the time sold the cattle, or any of them, to the plaintiff, in the 'Whit' brand, and that the sale was on credit with reservations, and that soon thereafter the plaintiff executed and delivered to the said W. T. Babb his note in payment therefor, which note was accepted by said W. T. Babb, the acceptance of this note by said W. T. Babb, on account of this prior indebtedness, is *prima facie* satisfaction of the said debt and the discharge of the said conditions and reservations."

We think that this instruction was proper. The giving and acceptance of a note is *prima facie* evidence of a settlement between the parties of the differences between them, growing out of the transactions with which it is connected. In Massachusetts it was formerly held that the taking of a note was to be regarded as an absolute payment and discharge of the debt. *Thacher* v. *Dinsmore*, 5 Mass. 299; *Whitcomb* v. *Williams*, 4 Pick. 228. This was doubtless for the reason that the maker might be called upon to pay, not only the vendor of the goods for which the note was given, but also a possible innocent holder of the note, who had taken it for a valuable consideration; but now in that state, and we think generally, the rule is that it is only to be treated as a presumption of payment which may be rebutted. *Butts* v. *Dean*, 2 Metc. 76. And while now, doubtless, unless otherwise agreed upon between the parties, a note is to be regarded as presumption of payment, and the creditor may proceed upon the original cause of action upon failure by the debtor to pay the note, yet acceptance of a note is certainly to be regarded as a waiver of any lien upon the property. "The vendor waives his lien by taking from the buyer a bill of exchange, or other security, payable at a different date." Benj. Sales, § 1185. "The vendor's lien is abandoned when he makes a delivery of the goods to the buyer." Id. § 1186. In this case Babb could not both accept and retain the notes, and at the same time insist upon the performance of the conditions which they were given to obviate.

Error is assigned because the court refused to give to the jury the first instruction asked for by the defendants, which is as follows:

"If the jury believe from the evidence that the cattle in question were agreed to be sold to plaintiff by W. M. Babb, or by W. I. Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands, and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by the defendants; and that unless the notes that were given for them were paid, the cattle were to remain the property of Babb; and that the bill of sale was simply given to enable the defendants to gather the cattle; and if the jury further believe that the notes were not paid at maturity, and have not since been paid, but have been surrendered to plaintiff and accepted by him,—then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle, and selling them to Segrist or any one else, in which event the jury should find for the defendant."

This request was properly refused, as it was based upon a state of facts not supported by the evidence in the case.

There is nothing in the testimony showing such a surrender of the notes by Babb as would avail the defendants in this suit. The only evidence on the subject is that the notes were handed to the plaintiff by Babb in June, 1884, more than two years after the taking by defendants of the cattle in question, and two years after the suit was commenced.

Certain portions of the instructions, given by the court of its own

motion, were also excepted to; but we think that although certain isolated paragraphs, taken by themselves, may be open to criticism, they are fully cured by subsequent observations. The whole tone and purport of the charge is certainly as favorable to the defendants as they could ask or expect. In fact, it leaves fully to the jury the only disputed question in the case, namely, was the transaction between Babb and the plaintiff an absolute and irrevocable, or a conditional and revocable, sale and transfer of the cattle? and instructed them that if they found the sale to have been an absolute one, they should render a verdict for the plaintiff, and if they found the sale to have been a conditional one, their verdict should be for the defendant. This was, in effect, the whole case, and we think it was very fairly left to the jury.

The defendants' position was most strongly and favorably presented in their second charge, which was given by the court, and is as follows:

"If the jury believe from the evidence that the title to the cattle remained in the Babbs until the notes were paid, and that said notes were not paid on the day of maturity, or at any time since then, Babb had the right to retake the cattle and sell them to others; and if he did so, and sold them to Segrist, the jury should find the defendants not guilty."

This certainly was the most favorable view which the jury could possibly be permitted to take of the transaction. We do not think that the evidence would have justified them in taking such a view, but the court left it to them to do so, and certainly the defendants cannot complain. Taken as a whole, we do not think the charge can be said to have misled the jury, or in any manner prejudiced the defendants, so as to justify a new trial.

The judgment should be affirmed; and it is so ordered.

WILSON, J., concurred.

TEXAS, S. F. & N. R. CO. *v.* SAXTON and another.

Filed March 14, 1885.

1. PLEADING AND PRACTICE — BILL OF EXCEPTIONS — SIGNING BY JUDGE AFTER TIME REQUIRED BY LAW.

   A bill of exceptions, not settled and signed by the presiding judge below within the time required by law, is not properly before the appellate court.

2. SAME—RULE 21—RULES OF COURT—NEW MEXICO.

   Rule 21 of the rules of the supreme court of New Mexico, requiring the plaintiff in error or his agent to file the affidavit therein prescribed, was made under the authority of the practice act of 1874, which act was superseded by the practice act of 1880; and this rule, therefore, is abrogated.

3. SAME—PLEA IN ABATEMENT—VERDICT—JUDGMENT.

   Where on the trial of an issue raised by a plea in abatement the verdict is against the plea, the proper judgment is *quod recuperet*, and the defendant cannot be allowed to plead over to the merits. A judgment, however, for the amount of unliquidated damages claimed, without an inquest to determine the damages actually sustained, is reversible error.

Error to the district court for the county of Santa Fe.

C. H. Gildersleeve, for plaintiff in error.

E. L. Bartlett, for defendants in error.

BELL, J. This was an action in *assumpsit*, brought by the defendants in error in the court below, to recover damages for an alleged breach of a railroad construction contract which they had theretofore made with the plaintiff in error. To the declaration the plaintiff in error interposed a plea in abatement, which in substance alleged that the contract sued upon was made by it, not with the two defendants in error, but with Lionel D. Saxton alone. This plea was accompanied with interrogatories, filed for the purpose of examining Saxton, in support thereof. Replication to the plea was filed, and thereafter, upon the issue so joined, the parties proceeded to trial before the court, having by stipulation waived their right to trial by jury. The court found for the defendants in error, whereupon the plaintiff in error asked for leave to plead over, and offered to file *instanter* its plea in bar to the plaintiff's several causes of action. The court denied this motion, and thereupon counsel for the defendant in error moved the court to render peremptory judgment for the amount of the damages claimed, to-wit, $25,000, which motion was then and there granted, and judgment entered against the plaintiff in error for that sum. Before granting the motion for judgment, the plaintiff here, and defendant in the court below, moved the court to impanel a jury to try the cause, which motion was also denied.

No evidence whatever was introduced to support the claim of the defendants in error to the sum set forth in their declaration as the damages sustained by them, or of any other sum, and judgment was entered against the plaintiff in error without any evidence whatever being introduced upon the merits. A motion was then made for a new trial, for a number of reasons; among others, "that the plaintiff's suit was for unliquidated damages, and no witnesses whatever were sworn, and no proofs whatever were adduced on said trial to prove the plaintiffs had sustained any damages whatever;" and also that "the judgment against the defendants was rendered without any proof whatever to sustain the plaintiff's action, no witnesses or other evidence being produced on said trial to prove any damage in favor of said plaintiff." This motion was denied. A motion was also made in arrest of judgment for substantially the same reasons. This motion was also denied. A bill of exceptions was subsequently prepared and filed and settled, but we are of opinion that they are not properly in the record before us, as they were not settled and signed by the presiding judge within the time required by law. A writ of error was sued out by the plaintiff in error, and that brings before us the entire record, excluding the aforesaid bill of exceptions.

We shall only consider two of the questions seriously urged before us. The first was raised upon a motion to dismiss the writ of error, because rule 21 of this court had not been complied with, in that neither the plaintiff in error nor his agent or attorney had filed the

necessary affidavit therein prescribed. That rule was made under the authority of the practice act of 1874, requiring the supreme court to make rules for the government of the practice in writs of errors in common-law actions. Inasmuch, however, as the practice act of 1880 provides that "the clerk of the supreme court shall issue a writ of error to bring into the supreme court any cause finally adjudged or determined in any of the district courts, upon a *præcipe* therefor, filed in his office by any of the parties to such cause, his attorney or solicitor, at any time within one year from the date of such judgment or determination, and on giving security for costs therein to the satisfaction of the clerk," we are of opinion that it was not necessary for this plaintiff to have complied with the rule of the supreme court before quoted, the statute having superseded it, and in effect abrogated it. We are therefore of the opinion that the case is properly before us upon the writ of error.

The other question to be considered is, did the court err, as alleged by the plaintiff here, in entering judgment against it in the court below for the entire amount of unliquidated damages, alleged to have been sustained by the defendants in error in their declaration, without the introduction of evidence? The plaintiff in error here claims that, upon its plea in abatement being overruled, it was entitled to plead over to the merits. This is not in accordance with the well-settled rule of law in that regard. Where a plea in abatement has been filed which raises an issue of fact, and the issue thus formed is tried by a jury, or, as in this case, by the court, trial by jury being waived, if the verdict is against the truth of the plea, the proper judgment is *quod recuperet*, and not *respondeat ouster*. The defendants in error were therefore entitled to their judgment to recover upon the verdict on the plea in abatement. We are of opinion, however, that thereupon the well-settled rules of practice required that an inquest should be taken, to enable the court or jury, as the case may be, to determine from the evidence what amount of damages the plaintiffs had sustained. Upon such inquest, the defendant in the court below would have been entitled to resist, by proper evidence, the claim of the plaintiffs to recover anything more than nominal damages, and should have had that opportunity afforded it to that end. In the case at bar no evidence was permitted to be introduced on either side, but a peremptory motion, as it is called in the record, was granted, giving to the plaintiffs a verdict for the entire amount of their unliquidated damages. We think the court erred in granting this motion, and in entering judgment thereon. The judgment of the court below is therefore reversed, and a new trial ordered, with the costs to abide the event.

WILSON, J., concurred.

PRICE and others *v.* GARLAND.

Filed April 13, 1885.

1. CONTRACT—SUBCONTRACTOR, HOW AFFECTED BY ORIGINAL CONTRACT.
   A railroad contractor having made a general contract with another person to perform a portion of the work, undertaken according to the original contract with the railroad company, the two contracts are so connected, and the one so dependent on the other, that they form one contract; and the subcontractor is entitled to the same benefits, as well as bound by the same conditions, as affected the first contractor under the original contract.
2. SAME—EVIDENCE—COST OF WORK—REASONABLE COST.
   In an action by a contractor against a subcontractor to recover the amount lost by the plaintiff through the defendant's failure to perform the work agreed to be performed, the plaintiff must prove, not only that the work did cost the amount claimed, but also that it was the reasonable and necessary cost.
3. SAME—BOOKS OF ACCOUNT—WHO CAN REFRESH MEMORY.
   Books or writings in the nature of *memoranda* can be referred to in order to refresh the memory only by the person in whose handwriting they are.
4. EVIDENCE—ADMISSIBILITY—PRELIMINARY PROOF REQUIRED.
   Ledgers and books of account are not admissible in evidence unless it is first shown that the person in whose handwriting they are cannot be produced in court.

Appeal from the Second judicial district court, Bernalillo county.

Childers & Fergusson and *Catron, Thorton & Clancy*, for appellees.

Neill B. Field and *Warren Bristol*, for appellant.

AXTELL, C. J. This was a suit for breach of contract, and is in form an action of trespass on the case. It appears from the record that on the first day of April, 1881, John R. Price, for himself and his co-plaintiffs, entered into a contract with the Atlantic & Pacific Railroad Company to perform certain work in the construction of said company's line of railroad, consisting of grubbing, clearing, grading, and masonry; also to furnish material, and to complete the roadbed and prepare the same to receive the superstructure, or ties and rails. This contract is very minute in its specifications as to the character of the work, and the mutual rights and liabilities of the parties thereto. It was provided that the work should be completed on or before November 1, 1881. On the same day that their contract was made, said Price and his associates (the plaintiffs herein) entered into a contract with the defendant, Garland, by which said defendant agreed to do 15 miles of the work which Price and his associates had undertaken to do for said railroad company. Plaintiffs' claim in this suit is based upon the allegation that the defendant wrongfully abandoned the work which he had contracted to do, and left the same uncompleted; that they were compelled to complete the same at a cost greatly exceeding the contract price for which the defendant undertook the same, whereby they were damaged, etc.

Defendant pleaded the general issue, "not guilty," and two special pleas, the first of which, in substance, set up and averred that the

said contract between Price and the railroad company became and was a part and parcel of the contract between Price & Co. and the defendant, and that he (the defendant) did not fail or refuse to perform his contract, or in any way violate any of the provisions, conditions, or specifications of the contract of Price with the railroad company under which the work in question was to be done; that neither the plaintiffs nor any one for them ever gave him any notice such as Price & Co. were entitled to under their contract; and that the plaintiffs wrongfully entered upon and completed the work which he had engaged to do, without any notice or opportunity to him to complete the same, against his protest, and in violation of his rights.

The second special plea was substantially like the first, except that it averred that by the usage and custom of contractors and subcontractors for building railroads the contract between Price and the railroad company became and was a part of the contract between Price & Co. and the defendant. The allegations as to non-failure, want of notice, etc., being practically identical with those in said first special plea, to both special pleas demurrers were interposed by the plaintiffs and sustained by the court, the defendant excepting. Thereafter the case went to trial upon the issue joined upon the plea of not guilty, and a verdict was rendered therein in favor of the plaintiffs for $15,000. A judgment was entered thereon, the defendant moving to set aside the verdict, and for a new trial and in arrest of judgment, which motions were overruled; whereupon the defendant appealed to this court, and the case is here by virtue of that appeal.

On the trial a large number of questions were raised, objections made, and exceptions taken, and the appellant has filed here no less than 31 specifications of alleged error. Many of the rulings objected to were with reference to matters entirely discretionary in the court, many others appear to be unimportant, and we deem it unnecessary to consider more than three or four of the grounds upon which a reversal is claimed, as they appear to us to be the serious and controlling points in the case:

First, as to the ruling of the court in sustaining the demurrer of the plaintiffs to the defendant's first special plea. The contract between Price & Co. and the defendant was what is known as a subcontract; that is, by that contract the defendant undertook to do a portion of the work which Price had contracted to do for the railroad company. The language used is: "that the said party of the first part (Price & Co.) *sublets* to the party of the second part." The contract with the defendant refers to the contract of Price & Co. with the railroad as to the price to be paid, and the time and manner and amount of payments, and as to the total compensation the defendant was to receive, which was 85 per cent. of what the railroad company was to pay to Price. It is stipulated therein that the work was to be done under the direction of the engineer in charge, (meaning, undoubtedly, the engineer of said railroad company,) and subject to his accept-

ance, and in such manner as he might direct, and it is provided that the appellant should have the advantage of the reduced rates of transportation guarantied to Price in his contract with the railroad company.

It was contended by counsel for appellees that the contract between them and the appellant was complete in itself, and that the contract of Price with the railroad company could only be considered in those particulars in which it was specially referred to by the contract with appellant; that the parties had designated what portions and provisions of the original contract should be referred to and considered in connection with their contract; and that by so doing they had excluded all other provisions, stipulations, and conditions; and the court below seems to have adopted this view. Was the position taken by counsel for appellees in their demurrer to said first special plea, and sustained by the court below, correct? We think the statement of a single proposition will suffice to answer this query. The contract between Price and the railroad company provided for the permanent suspension of the work by the railroad company before the completion of the contract, upon notice in writing to the contractor, and stipulated that in case of such suspension the contractor should be paid for all work done under the contract at the stipulated prices, upon the estimate of the engineer, which estimate was to be final and conclusive, and Price was to have no claim for damages or anticipated profits which he might have made if allowed to complete the work.

The contract with the appellant was for 15 miles of road-bed to be graded and completed suitable for the laying down of ties, and to be completed on or before the first day of November, 1881. There is no provision in said contract for any permanent suspension of the work, and no reference appears therein to the above-cited stipulations in the original contract. If the appellant's contract is to be taken and construed as being complete in itself, and no reference to be had to the original contract in connection therewith, except in the particulars specially designated in the contract, then appellant was to do and was entitled to do the entire work which he contracted to perform, and receive pay therefor, and he might have gone on and completed the work and been entitled to the full contract price of the work undertaken, although before its completion the railroad company might have determined to permanently suspend the work to be done on its contract with Price, and notify Price accordingly, and cut him off from any claim for work done thereafter, before appellant had completed a mile of his work or even commenced it.

It will hardly be contended that defendant, under his contract, could have gone on with the work and compelled payment by appellees after a suspension by the railroad company, and notice thereof to Price. There can be no doubt that if the company had so determined, and had notified Price that the work was permanently suspended, Price would have notified appellant and claimed that he was bound by

said stipulation in the original contract; that he contracted in view of and with reference to that provision; and we would undoubtedly have so held, if the matter had been presented to us in that aspect.

Again, the original contract contained a provision to the effect that if the party of the first part, (Price,) should refuse or unreasonably neglect to remedy any imperfections which might be pointed out by the engineer, or in any manner violate the conditions of the contract, so that in the judgment of the engineer there should be just ground of apprehension that the work would not be completed in the manner and within the time specified, it should be the duty of the party of the second part (the railroad company) to serve a written notice on the party of the first part, setting forth the grounds of the engineer's apprehension, giving reasonable time in which said party might cause such grounds to be removed, and, if not removed, empowering the engineer to declare the contract forfeited.

The defendant's contract contains no similar provision, and no reference is therein made to said provision in the original contract; yet we do not believe that it will be contended that the defendant was not bound thereby, and did not contract with reference and subject to that provision. This seems to demonstrate beyond question that appellant was affected by stipulations in the original contract not referred to in his contract, and we are of the opinion that if he was subject to and affected by such provisions, he was equally entitled to the benefit of any provisions, stipulations, or conditions in the original contract which might have been to his advantage, and to the same benefits of notice and otherwise to which the original contractor was entitled from the railroad company. In short, we think the original contractors, in their contract with appellant, intended to do and did do just what they said they did; that is, they *sublet* to appellant 15 miles of the work which they had undertaken to perform. In other words, they were contractors and appellant a sub-contractor for the performance of the work.

There can be no doubt that the work which appellant undertook was to be done under and according to the original contract. His contract was not in any sense an independent one; it was based upon and made under the original contract, and depended upon it, and was made with reference and subject to all its provisions and conditions. The effect of the contract with the appellant, which *sublet* to him the work which he undertook to perform, was to assign and transfer to him so much of the contract, or work under the contract, between Price and the railroad company, as was specified therein. Appellees simply substituted the appellant for themselves as to the 15 miles of road-bed which he agreed to construct. He was to do the work for them under *their* contract, and according to *its* terms and conditions,—the appellees reserving, as a consideration for such transfer and assignment, 15 per cent. of the contract price; and appellant, by his contract, took such assignment and transfer subject to all the conditions

and provisions of the original contract. He was subject to all the terms and conditions thereof, and was equally entitled to the benefit of all the provisions and stipulations therein contained, including the right to notice of the apprehension of the company's engineer that the work would not be completed in the manner and time specified, and the grounds of such apprehension, and to reasonable time to remove the grounds of apprehension, and to notice that his contract was declared forfeited, before the appellees or the railroad company were entitled to enter upon the work or attempt to complete it. In short, we are of the opinion that the two contracts were so connected, and the one so dependent upon the other, that they formed one entire contract, and that the court below erred in sustaining the demurrer to said first special plea.

It appears by the record that the appellant proved that on his application one of the appellees consented to an extension of the time for the completion of the contract, provided the engineer of the railroad company should also consent to and approve such extension, and offered to prove that the said engineer did so consent and approve, and that the court struck out such evidence, and excluded evidence of the consent and approval of the engineer. We think this was error; that it was competent for the appellant to prove such extension, and the consent to and approval thereof by the company's engineer in charge and having direction of the work; that such evidence was material and should have been received. Evidence introduced and stricken out, together with that offered and rejected, would seem to show an enlargement of time, and a waiver of the right to insist upon performance within the specified time. It was made before any breach of the contract occurred; it was not the making of a new contract, but merely the enlargement of time for the completion of the old. It appears that the defendant may have acted upon it, and that otherwise he could and would have completed his work within the time originally specified. The railroad company did not claim performance within the time fixed by the original contract, but permitted plaintiffs to complete it after that time had expired.

A very material question presented by the record is as to the admissibility of the books of account designated as subcontractors' ledgers Nos. 1, 2, and 3, and pay-roll book. We think no sufficient foundation was laid for the introduction of these books and the entries therein as evidence. The book-keeper, in whose handwriting most of the entries in the ledgers were, was not produced, nor was the failure to produce him sufficiently accounted for. It appeared in evidence that he was living, and that the plaintiffs might easily have had him in court, and the pay-roll book was clearly not a book of original entries, but consisted of entries made in "monthly ledgers" from time-books, and copied monthly from the "monthly ledgers." Neither the time-books nor monthly ledgers were offered in evidence. It is contended for the appellees that these books were admissible to refresh

the memory of a witness. Any writing or *memoranda* made by the witness or by his direction at the time of the transaction, or soon afterwards, or read and examined by him, he at the time having personal knowledge of the correctness thereof, may be referred to, to refresh the memory of the witness; but such was not the fact in this case, and besides the books were not used for that purpose or in that way, but were offered and admitted as evidence of the facts and accounts therein appearing, we think improperly.

The statute of the territory providing for the admission of books of account does not apply in this case, as the books in question were clearly not shown to be within its terms; nor do we think the fact that defendant called upon the plaintiffs to produce the books for inspection made them admissible. It does not appear that they were produced pursuant to a notice; and we think if they had been so produced, and upon inspection were found to be improper and inadmissible under the general rules of evidence, that they should not have been admitted, against objection, merely because the defendant had called for their production, without stipulating that they might be introduced in evidence regardless of their character. This character of evidence should always be received with great caution, and the rules regulating its admission should not be relaxed except, perhaps, in extreme cases. It seems that at the trial below the plaintiffs were allowed to prove (by what appears to us in many respects irregular methods) the cost or amount paid by them for the completion of the work undertaken by defendant, without showing that it was the reasonable and necessary cost. We think the plaintiffs should be held to prove, not only that the work did cost the amount claimed, but also that it was the reasonable and necessary cost. Any other rule might operate to the great injury of a party; and, in this case, if the plaintiffs are entitled to recover, they might, under a ruling permitting them to recover actual outlays, charge upon the defendant outlays and expenses extravagantly and unnecessarily made, and possibly so made for the purpose of wronging him, and swelling the amount of damages attempted to be charged upon him.

We observe in the record various other minor matters in which it appears to us that error was committed. And indeed it would be most remarkable if, in a trial occupying so much time as did the trial of this case, in which so much evidence was offered and so many questions raised, errors and mistakes were not committed. We deem it unnecessary to notice any other questions in the case. Other errors, if such there be, will doubtless be avoided and corrected by the learned judge of the court below when the case again comes on for trial.

The judgment of the court below in this case should be reversed, and the cause remanded for such proceedings as shall conform to law and to this opinion, and for a new trial; and it is so ordered.

WILSON, J., concurs.

HERLOW *v.* ORMAN.

January Term, 1885.

1. PRACTICE—ISSUE—NON-JOINDER OF—AFTER TRIAL.
   After having participated in a trial upon the merits, a party cannot be heard to object that there was no issue joined.
2. NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENT.
   An indorsement has as a legal effect the making of the note indorsed negotiable.
3. SAME—DELIVERY AFTER INDORSEMENT.
   After indorsement by the payee, simple delivery of the notes has the effect of transferring the notes and the money secured thereby to the person to whom they were delivered.
4. GARNISHEE—PLEAS IN SUIT BY HIS OWN CREDITOR.
   While a garnishee may plead judgment, he cannot plead in bar the pendency of garnishment proceedings against him in defense of a suit brought by his immediate creditor.

Error to the First judicial district court, Santa Fe county.

Fiske & Warren, for plaintiff in error.

P. L. Van der Veer, for defendant in error.

WILSON, J. This was an action of *assumpsit*, in which the plaintiff below sought to recover the amount of two notes: one dated at Santa Fe, New Mexico, October, 1882, in which Paul F. Herlow, the defendant below, 90 days after the date thereof, for value received, promised to pay to the order of the Texas, Santa Fe & Northern Railroad Company $500, at the office of the Second National Bank of New Mexico, in Santa Fe, with interest at the rate of 12 per cent. per annum from date until paid. The other note was for $350, payable four months after date, and in all other respects like the first note. Each note was indorsed by the Texas, Santa Fe & Northern Railroad Company.

The defendant below, by his counsel, pleaded the general issue, and two special pleas. Upon the trial the court rendered judgment in favor of the plaintiff below for the amount of said notes and interest. The defendant below sued out his writ of error, and assigns as errors—

"(1) The court erred in refusing to allow him to plead his special plea, setting up his garnishment at the suit of said Hager. (2) The court erred in trying said cause without an issue. (3) The court erred in admitting improper and immaterial testimony in said case. (4) The court erred in not granting a new trial for the causes, or some of them, in said motion made for that purpose, as shown by the record. (5) That the court erred in not arresting the judgment in said case, for the reasons set forth in the motion for that purpose, as shown by the record."

Counsel for the appellant, in their paper book, further set forth:

"POINTS AND AUTHORITIES.

"(1) The declaration fails to state a cause of action, in that it does not show that the notes were indorsed to Orman, and hence no testimony could

properly be introduced in proof of that fact. (2) There was no proof that the said notes were indorsed or delivered before maturity. (3) No proper foundation was laid for the introduction of the notes sued on. (4) There can be no trial without an issue; and there was no issue made in this case, no replication having been filed to the special pleas."

I do not understand why the assignments of errors and points should not be alike. In this case, some are alike and others are not; but without determining how far we will in the future consider specifications of errors and points that are calculated to create confusion, rather than to elucidate, we will dispose of them as we find them. The fourth point and the second error assigned are in substance alike, the second error being, "The court erred in trying said cause without an issue." The fourth point is: "There can be no trial without an issue; and there was no issue made in this case, no replication having been filed to the special pleas." The case of *Waldez* v. *Archuleta*, 5 PAC. REP. 327,[1] decided at this January term, 1885, determines these against the appellant, and we here insert a quotation from the opinion in that case:

"In Pennsylvania, in a case heard and determined in the supreme court, the error assigned was that the defendant was forced to trial when the case was not at issue. The court say: 'The exception is without foundation, for it does not appear that the defendant objected to going to trial without a formal joinder of issue; as he took the chance of a verdict then, he shall not object now.' *Clement* v. *Hayden*, 4 Pa. St. 139. In another case in Pennsylvania, decided as early as 1827, the case had been tried in the court below without issue having been joined. The error assigned was that there had been no replication filed before the trial in the court below. The supreme court, in dismissing the case, say: 'We will not permit an exception like this to be argued. We have repeatedly declared that we will not listen to objections such as this, even though there should have been no issue at all. It would be a scandal to the administration of justice if we were longer to hear objections after a trial on the merits.' *Thompson* v. *Cross*, 16 Serg. & R. 349."

But in this case the error complained of is contradicted by the record itself, viz.:

"Now comes the said plaintiff, by his attorney, P. L. Van der Veer, Esq., and the said defendant comes by his attorney, Eugene A. Fiske, Esq., and issue having been joined between the said parties," etc.

The authorities and the record are against the fourth point, and second error assigned.

To pursue the points in their reverse order, it would seem that the third, second, and first points relate to the indorsement and delivery of the notes by the Texas, Santa Fe & Northern Railroad Company to James B. Orman, the plaintiff below, and may be considered together. The notes were indorsed by the payees, and no question was raised on the trial but that the indorsement was made by proper authority; as the notes were permitted to be given in evidence without requiring proof of the indorsements, no objection being made to the notes for want of proof of the indorsements by the payees. What

[1] Same case, *ante*, 195.

was the effect of those notes, being indorsed as they were, and delivered to Orman? The first legal effect was, the indorsement made the notes negotiable paper; and the second legal effect was that after the indorsement by the payees, simply delivering for value, the title to the notes and the amount of money called for on their face became transferred to the person to whom they were delivered.

Daniel on Negotiable Instruments, vol. 1, p. 1, says:

"An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only."

Again, on page 2, he says:

"But negotiable paper carries the right to the whole amount it secures on its face, and is subject to none of the defenses which might have been made between the original or intervening parties against any one who acquired it in the usual course of business before maturity. It is a circulating credit, like the currency of the country, and before maturity the genuineness and solvency of the parties are alone to be considered in determining its value."

Chief Justice GIBSON termed it a "courier without luggage."

Another legal consequence of the transfer and delivery of a negotiable note is that the law presumes them to have been transferred before they fell due, in good faith and without notice of any infirmity attaching to them. *Good* v. *Martin*, 95 U. S. 94; *Collins* v. *Gilbert*, 94 U. S. 753; 1 Daniel, Neg. Inst. 583, and cases cited in note.

The only further assignment of error requiring attention in this case is: "The court erred in refusing to allow him [the defendant below] to plead his special plea setting up his garnishment at the suit of said Hager." This may be a new question in this territory, but has been decided elsewhere repeatedly. The paper book in this case recites that the "plaintiff in error presented to the court the record of a cause therein pending, by which it appeared that, by order of the court, the said plaintiff in error had, *after the filing* of his said pleas, been directed by process of garnishment, properly issued, to hold and account for all moneys, debts," etc. This quotation shows that no judgment had been obtained in the attachment case; but while the garnishee may plead judgment, it has been held that he cannot plead in bar the pendency of garnishment proceedings against him in defense of a suit brought by his immediate creditor. *Shealy* v. *Toole*, 56 Ga. 210; Drake, Attachm. 702, note; *Spicer* v. *Spicer*, 23 Vt. 678; *McRee* v. *Brown*, 45 Tex. 508; *Hicks* v. *Gleason*, 20 Vt. 139.

In *Jones* v. *Wood*, 30 Vt. 271, POLAND, J., says:

"It will be seen upon slight reflection that to hold the mere pendency of a trustee (attachment) suit could be made to abate a subsequent suit by the principal debtor, and much more to hold that it could be pleaded in bar, would work the greatest injustice. It seems absolutely necessary, therefore, to hold that the principal debtor may sue notwithstanding the pendency of the trustee

(attachment) suit. But the court will be careful to see that the trustee is not subjected to any danger of being compelled to pay his debt twice."

In *Spicer* v. *Spicer*, 23 Vt. 678, the court ordered the execution to be stayed until the plaintiff should procure the defendant to be released from the trustee or attachment suit. In *Jones* v. *Wood*, 30 Vt. 271, before cited, Judge POLAND ordered stay of execution until the attachment was dissolved or satisfied.

The judgment of the court below is affirmed, and it is ordered that when the judgment is paid or collected by execution, the money, when paid or collected on execution, shall be paid into court, to abide the result of the attachment proceedings.

BELL, J. I concur.

ARMIJO *v.* BACA.

January Term, 1885.

EQUITY—JURISDICTION—INJUNCTION—USURPING OFFICE OF SHERIFF.

A court of chancery has jurisdiction to interfere by injunction with a person who is endeavoring to usurp the office of sheriff.

Appeal from the Second judicial district court, Bernalillo county.

Neill B. Field and *Childers & Fergusson*, for appellee.

Stone & Stone, for appellant.

WILSON, J. This is a proceeding in equity praying that a writ of injunction may be issued, directed to Santiago Baca, enjoining and restraining him from usurping or attempting to usurp the office of sheriff of Bernalillo county, or the office of collector of taxes and licenses of Bernalillo county, and from ousting or attempting to oust Perfecto Armijo, the appellee, and from embarrassing or attempting to embarrass, and from hindering or attempting to hinder, and from in any manner interfering or attempting to interfere, with Perfecto Armijo, appellee, in the discharge of his duties or the exercise of his functions as sheriff of the county of Bernalillo, in the territory of New Mexico, or as collector of taxes and licenses for the county of Bernalillo, in said territory. The appellant demurred to the appellee's bill, and the court overruled the demurrer, and the appellant elected to abide by his demurrer and appealed to this court.

The strength of the appellant's standing in this case, if he has any, is in his allegations that "a court of chancery is without jurisdiction or power to restrain by injunction a *claimant* to an office from exercising or discharging, or attempting to exercise or discharge, the duties thereof at the suit of another claimant to the same office." Were the title to the office of sheriff of Bernalillo county the issue in this case, this position would be impregnable. But an examination of the record proves that no such issue exists or was ever made in the case, and, as a consequence, the authorities cited by the counsel for the appellant are not applicable, and need not be reviewed.

Perfecto Armijo, the appellee, sets forth in his bill that in the year A. D. 1882 he was duly and legally elected, and duly and legally qualified, sheriff of Bernalillo county, as provided by the requirements of the statutes of the territory of New Mexico in such case made and provided, and he then and there became, ever since has been, and still is, sheriff of said county, duly elected and qualified, and entitled to exercise the functions and discharge the duties of said office, and to receive the fees and emoluments arising therefrom; and he further alleges that, by virtue of said office, he is *ex officio* collector of taxes and licenses for said county of Bernalillo, and is entitled to exercise the functions and discharge the duties of said office of collector of taxes and licenses, and to receive the fees and emoluments arising therefrom. He further alleges that he has never resigned or vacated either of said offices; that *he has never been lawfully removed therefrom;* and that the *term* for which he was so elected and qualified has not expired.

Santiago Baca, the appellant, by his demurrer admits that the foregoing facts are all true, and then stops without claiming that he was ever elected or appointed sheriff or collector of taxes and licenses for the county of Bernalillo. It is not possible to add argument to this record to make it plainer that the title to the office of sheriff is not at issue between these parties in this action; nor does it weaken this position that the appellee has set forth in his bill that the board of county commissioners of Bernalillo county, acting without authority of law, declared the office of sheriff vacant, and that "Lionel Sheldon, governor of the territory of New Mexico, wrongfully, and without warrant or authority of law, and although no vacancy existed in either of the said offices, and while [the said Perfecto Armijo] was in the exercise of the duties and discharge of his said offices, did issue to Santiago Baca a pretended commission as sheriff of the county of Bernalillo, in the territory of New Mexico." And these allegations by the demurrer are admitted to be true.

The bill proceeds, and alleges that Santiago Baca, the appellant, is attempting to usurp Perfecto Armijo's said offices of sheriff of the county of Bernalillo, and collector of taxes and licenses of the county of Bernalillo, and to discharge the duties and exercise the functions of said offices, and to receive the fees and emoluments arising therefrom; and the bill further alleges Santiago Baca will, unless restrained by the order and process of the court, usurp the said offices of sheriff of the county of Bernalillo, and collector of taxes and licenses of the county of Bernalillo, and will oust the appellee therefrom, and will greatly embarrass and hinder the appellee in the discharge of his duties and exercise of his functions as sheriff and collector aforesaid, to the appellee's irreparable injury, and to the irreparable injury of the public business intrusted to him (Perfecto Armijo) in his official capacity; and further charges that "all of which acts, doings, and proceedings of the said Santiago Baca are contrary

to equity and good conscience, and tend to the manifest injury and oppression of the said Perfecto Armijo in the premises." And the appellee adds that he is without remedy in the premises, save in a court of equity. All these allegations, severally and collectively, are admitted by the demurrer to be true. We think the foregoing recapitulation of the allegations and admissions of the parties make it abundantly manifest that a court of chancery has jurisdiction in the premises, and that equity requires that the appellant should be enjoined, as prayed for in the appellee's bill. The decree of the court below is affirmed, and it is ordered that the appellant pay the costs.

AXTELL, C. J. I concur.

ARMIJO *v.* BOARD OF COUNTY COM'RS OF BERNALILLO CO.

January Term, 1885.

1. COUNTY COMMISSIONERS—DEFAULTING SHERIFF—JURISDICTION.
   A board of county commissioners, in considering the case of a defaulting sheriff, with a view to declaring his office vacant in case the default is proved, act in a *quasi* judicial capacity. They are a board of special and inferior jurisdiction, and there is no presumption arising in their favor as to the regularity of their proceedings. Their jurisdiction, therefore, must be made to appear upon the record of said proceedings, and evidence of it cannot be sought *aliunde.*
2. SAME—CERTIFICATE OF COUNTY CLERK OR TERRITORIAL AUDITOR.
   In such proceedings, under Act N. M. March 1, 1882, § 3, a certificate of the default, by the county clerk or territorial auditor, is essential to jurisdiction, and the commissioners cannot proceed without it.
3. SAME—CERTIORARI—WHAT THE WRIT BRINGS UP.
   The common-law writ of *certiorari* to review a summary conviction under a penal statute brings up not only questions affecting the jurisdiction of the magistrate, but whether there was sufficient evidence to warrant a conviction of the party accused; and in such case the evidence must appear on the face of the record, or the conviction will be quashed.

Certiorari. Appeal from Second district court, Bernalillo county.

Neill B. Field and *Childers & Fergusson,* for petitioner and appellee.

Stone & Stone, for respondents and appellants.

BY THE COURT. This case is affirmed for the reasons given in the opinion of the learned judge before whom the case was tried in the court below.

(*Opinion of Lower Court.*)

BELL, J. This is a *certiorari* granted by the district court for the county of Bernalillo, and directed to the board of county commissioners of the said county. The writ was granted upon the petition of the relator, setting forth that at a special session of the board of county commissioners of the county of Bernalillo, held on the twenty-first of February, 1884, the following proceedings were had: That the report of the clerk of the said board of county commissioners was filed, by which said report it was pretended to be shown and certified by the said clerk that he, the said Perfecto Armijo, then and there being the sheriff and *ex officio* collector of the said county, was indebted to the said county in the sum of $5,509.94; that thereupon the said report was pretended to be approved by the said board of county commissioners as submitted, and that the said board of commissioners attempted to pass and did pass a resolution declaring the offices of the relator as such sheriff and *ex officio* collector to be vacant. The petitioner then charges that under the law the said county commissioners had no sufficient showing before them to justify the removal of the petitioner from his said offices. The petition also sets forth other matters, but it is not necessary to recite them here.

Upon this petition the writ was issued, requiring the said board of commissioners to transmit to this court, for its examination and review, all original papers, and a full and complete transcript of all the proceedings, in the matter of the removal or attempted removal of the relator from his offices of sheriff

and *ex officio* collector of the county of Bernalillo, and in the matter of declaring the said offices vacant.

To this writ the board of commissioners made a return, showing certain proceedings of the board upon August 6, 1883, by which it appears that, at a meeting of the board on that day, certain persons, who had been appointed by the board as accountants, at a prior session, to examine into and report upon the accounts of the various county officials, made their report, and that the clerk was instructed to give notice to the collector to proceed at once and collect certain outstanding licenses and certain taxes. That afterwards, and on third day of September, the board held another meeting, at which the following proceedings were had: "The report of J. W. Barton and Charles F. Pierce, the experts appointed to examine into the condition of the accounts of the various county officials, was called for and presented, and after due consideration, on motion of W. E. Talbott, it was ordered that the report and statement be received and published in the *Morning Journal*, of Albuquerque. Perfecto Armijo, sheriff and collector, appeared, as per order of the prior meeting, and submitted his accounts, with the statement that he could explain and account for the differences between the same and the statement of the accountants. After due investigation it was unanimously ordered that the clerk be instructed to spread the following orders on the records, and furnish copies of the same to the parties interested.

"Upon an investigation of the accounts of the county officers, ordered to be made by the board of county commissioners, at the regular meeting, held on the seventh day of July, A. D. 1883,—said investigation having been made under such order, and a report made in pursuance therewith on the third of September, A. D. 1883, as ordered; and also a report having been made by Perfecto Armijo, sheriff of Bernalillo county, New Mexico; also by Charles W. Lewis, treasurer of said county,—it appears by said reports that Perfecto Armijo, sheriff as aforesaid, is indebted to the said county of Bernalillo as follows, to-wit:

To the county fund, - - -	$3,589 96
To the school fund, - - - - - - -	746 90
Total indebtedness of sheriff, - - -	$4,336 86

"And it is therefore ordered that the said Perfecto Armijo, sheriff as aforesaid, be, and he is hereby, ordered to make his accounts good, and settle said indebtedness, on or before the first Monday in October, A. D. 1883, and the clerk of said board is hereby required to notify him of said order."

The return further shows that on the twenty-first day of January, 1884, a meeting of the board was held, at which the following proceedings were had, to-wit: "On motion of J. R. Armijo, seconded by W. E. Talbott, J. W. Barton and C. F. Pierce were sworn to the correctness of the accounts of the various county officers, as examined and reported by them to this board September 3, 1883. On motion of J. R. Armijo, seconded by Ortiz, it was ordered that a statement of the collector's accounts with the county be forwarded to the governor; the vote on the same standing, J. R. Armijo and Antonio Ortiz in the affirmative, and W. E. Talbott in the negative; whereupon the collector asked that an extension of time be granted in order to allow him to compare accounts with the clerk; and upon motion of Antonio Ortiz the vote was reconsidered, and time of forwarding of statement extended to the next regular session."

The return does not show when the next regular session was to be held, but the proceedings of the session of January 21, which appears to have been a special session, are followed in the return by the proceedings of a special session held February 19, 1884, at which the following proceedings were had, to-wit:

"The collector presented his report for the consideration of the board. On account of the absence of the county attorney, a motion was made by J. R. Armijo to place the report on file until the next meeting, which was seconded by Ortiz, and carried."

The return then continues as follows:

"Special session, February 21, 1884. Session opened in due form. Present: J. R. Armijo, president; Antonio Ortiz and William E. Talbott, commissioners; Perfecto Armijo, by Henry Richmond, deputy. The report of the clerk of the collector's accounts, as filed by him, and as shown by the clerk's records, was called for and submitted, showing the said collector to be indebted to Bernalillo county in the sum of $5,509.94, after deducting all delinquent taxes, as claimed by him. The report was approved as submitted. A motion was made by J. R. Armijo, and seconded by Ortiz, that the offices of collector and sheriff be declared vacant; J. R. Armijo and Antonio Ortiz voting in favor of the motion, and W. E. Talbott voting against. A motion of Francisco Armijo y Otero to extend time to the sheriff to present his explanations was carried; Talbott and Ortiz voting in favor, and J. R. Armijo voting against. A motion of J. R. Armijo to adjourn *sine die* was carried unanimously.

[Sgd.] "J. R. ARMIJO,
"ANTONIO ORTIZ."

To these proceedings, or rather to the record of these proceedings, a certificate of the clerk of the board of commissioners is attached. On behalf of the relator a motion was filed to quash the proceedings set out in the return, for the following reasons: "*First.* Because it does not appear from the said return that the said board of county commissioners had jurisdiction of the subject-matter in controversy in said proceedings mentioned. *Second.* Because it does not appear from the said return that said board had jurisdiction of the person of the petitioner, against whom the said proceedings were had. *Third.* Because it does not appear from the said return that the said board had any evidence before them upon which to base the judgment attempted to be rendered by them in the said cause."

The first question raised upon the motion is as to the jurisdiction of the county commissioners to act in the premises. The only provision of law authorizing the board of county commissioners to remove the *ex officio* collector of the county is section 3 of the act of the legislative assembly of the territory of New Mexico, approved March 1, 1882, which provides as follows:

"Whenever any county collector shall fail to pay into the county or territorial treasury any moneys in his hands due the county or territory respectively, at the time prescribed by law, and such default continues for thirty days after the time so prescribed, he shall, in addition to other penalties, forfeit his office, and be deemed a public defaulter; and the county commissioners, immediately upon the receipt of a certificate of such default, under the hand and seal of the clerk or territorial auditor, shall declare said office vacant, and fill such vacancy by appointment."

There can be no doubt that the action authorized by this section of the law is summary and penal in its character, and in derogation of the common law. In such cases it is well settled that, in order to justify such action as is authorized, a strict compliance with the provisions of the statute must be made before action is warranted.

The authorities on this subject are uniform, and the principle is fairly stated in the case of *Owens* v. *Andrew Co.* 49 Mo. 379, where the court says: "It is a principle of universal recognition that all statutory provisions authorizing proceedings of a summary character, and contrary to the course of the common law, are to be strictly construed." The board of commissioners in this case undoubtedly acted in a *quasi* judicial capacity. They are a board of special and inferior jurisdiction, and there is no presumption arising in their

favor as to the regularity of their proceedings. Their jurisdiction must therefore be made to appear upon the record of said proceedings, and evidence of it cannot be sought *aliunde*. Upon this subject the court of appeals of New York, in an elaborately considered case, says: "Inferior magistrates, when required by writ of *certiorari* to return their proceedings, must show affirmatively that they had authority to act; and whereas, in the present case, their authority and jurisdiction depend upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it, for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate in relation to all other facts is conclusive and final, and will not be reviewed on a common-law writ of *certiorari;* but the main object of this writ being to confine the action of inferior officers within the limits of their delegated powers, the reviewing court re-examines, if required, the decision of the magistrate on all questions on which his jurisdiction depends, whether of law or of fact." *People* v. *Goodwin*, 5 N. Y. 568. That case arose under a statute of New York, by which the commissioners of highways were empowered, under certain circumstances, to lay out and open roads, but were prohibited from opening a road through any building without the consent of the owner. The question was whether the court could, upon a common-law writ of *certiorari*, review the evidence, under an issue in the case, as to whether the consent of the owner had in fact been obtained; and it was held that as this was a jurisdictional fact, the existence of which was absolutely essential to give any validity to the proceedings of the commissioners, the evidence in relation to it was properly returned, and entitled to be considered.

In the case at bar, the board of county commissioners were authorized to act "whenever any county collector shall fail to pay into the county or territorial treasury any moneys in his hands due the county or territory, respectively, at the time prescribed by law, and such default continue thirty days after the time so prescribed, * * * immediately upon the receipt of a certificate of such default under the hand and seal of the clerk or territorial auditor. * * *" No such certificate appears in the return of the proceedings of the board. It is entirely clear that the very foundation of their jurisdiction would necessarily be such a certificate as is prescribed by the statute quoted. Without it, they would have absolutely no jurisdiction to act. The recital in the record of their proceedings of the twenty-first February, 1884, when the action complained of was taken, shows neither such a certificate of record, nor is there any allusion whatever to the receipt of such a certificate. It is claimed by counsel for the board that the recital in those proceedings, as follows: "The report of the clerk on the collector's accounts, as filed by him and as shown by the clerk's records, was called for and submitted, showing the said collector to be indebted to Bernalillo county in the sum of $5,509.94, after deducting all delinquent taxes as claimed by him,"—is a sufficient compliance with the provisions of section 3 of the statute. This view of the law is hardly worth consideration. It is sufficient to say that the recital does not even pretend to recite such facts as the statute requires shall appear in the certificate of the clerk to be returned to them; but even if it did, the failure to return the certificate required by the statute necessary to show the jurisdiction of the board to act, would be fatal to the proceedings.

"It is well settled that the common-law writ of *certiorari* to review a summary conviction under a penal statute, brings up not only questions affecting the jurisdiction of the magistrate, but also the question whether there was any evidence to warrant the conviction, and in such cases the evidence must appear on the face of the record, or the conviction will be quashed." *Mullins* v. *People*, 24 N. Y. 399; *People* v. *Sanders*, 3 Hun, 16.

The case of *McGregor* v. *Board Sup'rs Gladwin Co.* 37 Mich. 388, was one

very analogous to the case at bar. That was the case of a *certiorari* to the board of supervisors to review their proceedings, by which they declared the office of the relator, McGregor, to be vacant, because of his failure to file a new and additional bond, as he was required by them to do. The court says:

"It appears from the records which have been sent up here, in response to the writ of *certiorari*, that the plaintiff had filed his official bond, which was approved by the board, but that subsequently a new bond was required of him, and that he was given until June 26, 1877, to file it. On the day last mentioned the time for filing it was extended to July 17th. The board was in session July 17th, and on motion of one of its members a resolution was unanimously adopted, declaring the office of county treasurer vacant. The record does not show that plaintiff in error was present at this meeting, or that he was notified thereof, or notified that any action against him was proposed. A writ of *certiorari* having been sued out and certified, the board returned that the new bond was demanded because it was found that the sureties in the first were not responsible. They also return that the plaintiff in error was notified of the demand, and appeared before the board and stated that he would give the bond required, if he could procure sureties, but that he failed so to do, and stated that he was unable; whereupon the board proceeded to remove him. The sufficiency of this return as an answer to the writ is the question before us. My brethren think that before the board could proceed to a removal, it should have appeared from their own records that all the facts existed which would authorize the board to take action. This would involve some finding or resolution that the existing bond was insufficient, the requirement of a new bond, notification of the defendant of the fact, a failure on his part to comply, and proceedings subsequently for his removal, of which he should have notice, and an opportunity to make defense. They also think that the deficiencies in the record in this regard cannot be supplied by the return to the writ of *certiorari*. Removal from a public office is a matter of serious consequence, and it is plain that all the facts which would justify it ought properly to be of record, and my brethren think it essential."

I quote thus fully from the Michigan case, not only because of its strong analogy upon the facts otherwise to this case, but also because in this case it is claimed that the certificate of the county clerk, attached to the return of the proceedings, set forth in effect that the board of county commissioners, at their meeting on February 21, 1884, were in receipt "of a certificate under the hand and seal of the clerk, as provided by section 3 of the act of 1882," and that this amounted in effect to the certificate required by law to be before them. This certificate of the clerk, as in the Michigan case, is no part of the record, and cannot be considered as part of the proceedings which are to be reviewed in this court. It in no way cures the defect in the record itself of the proceedings; nor does the record in this case show either that the defendant was present at the meeting when the action complained of was taken against him, or that he had any notice of such meeting, or intention on the part of the board of commissioners I am of opinion that he was entitled to such notice, and entitled to be heard, before the board would be authorized to act; otherwise, I am of opinion that the statute under which authority to act is claimed, would be null and void, as no person should be deprived of such rights as he had in his office without being given his "day in court."

It follows from these views that the motion to quash the proceedings of the board of county commissioners must be granted; and it is so ordered.

GONZALES *v.* ATCHISON, T. & S. F. R. Co.

Filed January 11, 1886.

SUPREME COURT OF NEW MEXICO—PRACTICE—RULES OF COURT—RECORD.

Under rule 24 of the rules of court of the supreme court of New Mexico, the appellant must, within the proper time after judgment rendered, present, along with his bill of exceptions, a proposed record, containing the pleadings and proceedings in the case, to the trial judge, and the opposing party or his attorney; otherwise the case cannot be entertained above.

Francis Downs, for appellant.

Henry L. Waldo, for appellee.

HENDERSON, J. On the second day of the term appellee filed a motion to strike from the files of this court the record filed in the cause. The motion is in the following form, to-wit:

"IN THE SUPREME COURT, TERRITORY OF NEW MEXICO,—JANUARY TERM, 1886.

"*Nasario Gonzales, Appellant*, vs. *Atchison, Topeka & Santa Fe Railroad Company, Appellee.*

"Now comes the said appellee by its attorney, Henry L. Waldo, Esq., and moves the court to strike from the files of this court the pretended record on file in this cause, for the reasons set forth in the affidavits accompanying this motion, and as shown by the certificate of the clerk of the district court attached to said pretended record: That appellant has failed to comply with the provisions of rule twenty-four (24) of the rules of this court as to the preparation of records for review in this court.

[Signed] "HENRY L. WALDO, Attorney for Appellee."

Two affidavits accompanying this motion were filed in which the failure on the part of appellant to comply with the rule referred to is specifically pointed out. The first is that of Henry L. Waldo, Esq., in substance as follows: That at the time of bringing this suit he was, and thence hitherto has been, and now is, the attorney of the said Atchison, Topeka & Santa Fe Railroad Company, and the designated agent, residing at Santa Fe, territory of New Mexico, of said company, upon whom process might be served, and the attorney of record in said cause; that no proposed record of the pleadings and proceedings containing a proposed bill of exceptions was ever served upon him as the attorney of record in said cause, nor as the designated agent of said company, nor was any proposed record of any kind or in any form ever submitted to him as such attorney or designated agent; and that he has never had any notice or knowledge of such a record having been proposed or offered for settlement to the presiding judge of the First judicial district court of said territory of New Mexico, nor to either of the judges of the Second or Third judicial district courts of said territory, acting for said judge of said First judicial district court. The remaining portion of the affidavit refers to cer-

tain correspondence contained in the transcript of the record in this cause.

The other affidavit is that of Summers Burkhart. He states that he is now, and was during the entire year of 1885, chief deputy of the clerk of the First judicial district court of this territory, and as such is, and was during that time, familiar with the files and records of said clerk's office; that he made the copies of the papers, record entries of proceedings in the case of *Nasario Gonzales* v. *Atchison, Topeka & Santa Fe Railroad Company*, lately pending in the First judicial district court of said territory, now on file in the office of the clerk of this court, and attached the certificate of the clerk thereto as deputy; that no proposed record, or prepared or made record, in said cause, settled or not settled by the district judge, has ever been filed, or tendered to be filed, in said cause, and that the transcript made by him as such deputy as aforesaid was not made from any proposed record, or prepared or made record, filed in said cause under rule 24 of the rules of the supreme court; that the only paper filed, or tendered to be filed, in said cause since the determination of said cause in the First judicial district court by the appellant or his attorney, was the paper mentioned in the said certificate as the paper filed and indorsed, "Bill of Exceptions," together with certain letters and affidavits accompanying the same.

So much of rule 24 as may be necessary for the consideration of the proposition presented by the motion is as follows, to-wit:

"Whenever it shall be intended to review by appeal or writ of error a judgment of the district court, a record of the pleadings and proceedings in the case, containing a proposed bill of exceptions, if the appellant desire to present exceptions not appearing on the record, shall be prepared by the appellant, and a copy thereof served on the opposite party, or his attorney, within ten days after the entry of judgment, unless the time is extended by the court; and the party served may, within ten days after such service, propose amendments to the proposed record and exceptions, and serve a copy of such amendments on the appellant, who may then, within five days thereafter, serve the appellee with a notice that the proposed record and exceptions, with the proposed amendments, will be submitted, at a time and place to be specified in the notice, to the district judge before whom judgment was obtained, for settlement. The said judge shall thereupon correct and settle the proposed exceptions, and determine what portion of the record of proceedings in the case shall be transmitted to the supreme court. The time for such settlement, to be specified in said notice, shall not be less than ten nor more than twenty days after service of such notice. If the appellant shall omit to make a proposed record, with exceptions, if exceptions are to be presented, within the time limited by law, or as extended by the court, *he shall be deemed to have waived his right thereto.*"

Counsel for appellant does not question the power of this court to make and enforce the rule in question, but insists that a fair and liberal interpretation of it, when considered by the light of the facts presented in the record, will not compel or even authorize this court to strike the record from the files. The power to make the rule being

conceded, and it appearing to be free from uncertainty or ambiguity, nothing is left for construction by the court.

The only question presented is, was there a substantial, if not a literal, compliance with the provisions of this rule? We think not. No proposed record containing the pleadings and proceedings, or any part thereof, in the cause, accompanied the bill of exceptions tendered counsel for appellee; nor was such record, or any part thereof, within the meaning of said rule, presented with the bill of exceptions to the judge when offered for settlement.

The letter addressed by counsel for appellee to that of appellant, on returning the proposed bill of exceptions, cannot be construed as a waiver of the right to be served with a copy of "the record of the pleadings and proceedings in the case." Nor can his acts be construed as consenting that the bill of exceptions, containing a reference to some of the pleadings, may be considered as a proposed record, as well as the exceptions contained in the tendered bill. The rule is of doubtful utility, and imposes needless costs in perfecting appeals; but it is in force, and must be observed in this case. The motion will be sustained and the record stricken from the files; and it is so ordered.

LONG, C. J., and BRINKER, J., concurring.

In re ATTORNEY GENERAL, etc.

Filed January 11, 1886.

ATTORNEY GENERAL DE FACTO—PRESUMPTIONS.

In an informal proceeding to determine the right to the office of attorney general between two parties, one of whom claims under an appointment by the present governor, and the other under an appointment previously made for a term not yet expired, according to a commission exhibited in court, the court presumes, from the presence of the latter party, that he is not dead, and from his acts and declarations that he has not resigned, and decides, accordingly, that he is *de facto* attorney general; the question as to who is so *de jure* being reserved for determination until such time as a proper case shall have been formally submitted and heard.

LONG, C. J. Col. William Breeden and Hon. N. B. Laughlin are before this court each claiming that he is the attorney general of the territory of New Mexico, and entitled to recognition as such, and to exercise the functions of that office. The duty is therefore upon the court to determine who shall be recognized. On the fourth day of the term, cause No. 175, "*Territory of New Mexico* v. *John Kinney*," was called, whereupon Mr. Breeden, assuming to be attorney general, as such appeared therein for the territory, and was proceeding to take action when he was interrupted by Mr. Laughlin, who addressed the court, claiming to be the attorney general both *de jure* and *de facto*, and presented in support of such claim a commission, in all particulars regular upon its face, signed by Edmund G. Ross, governor of

the territory of New Mexico, properly sealed and attested, bearing date November 15, 1885, together with the oath of office thereon. Under this commission and oath of office Mr. Laughlin asked to be recognized by the court as attorney general, and to be allowed to appear as such, to the exclusion of Mr. Breeden, who then presented to the court a commission, in all particulars regular and formal, signed "LIONEL A. SHELDON, Governor of New Mexico," duly sealed and attested, together with the oath of office, and demanded the right to proceed as attorney general. His commission bore the date April, A. D. 1884. By permission, Judge WARREN addressed the court on behalf of Mr. Laughlin, and Judge BELL and Mr. Knaebel for Mr. Breeden.

In this way the question is before the court, who shall be recognized as attorney general *de facto?* It is not a proceeding in *quo warranto*, or a voluntary appearance by parties under a stipulation, or an issue legally joined in a court with jurisdiction to render a judgment binding on the parties after a judicial examination of the evidence. The contestants have not come here in any way to submit to the jurisdiction of the court, and ask judgment on the *merits* of their respective claims. The question is here, under these circumstances, rather in the nature of an inquiry by the court to determine who is the *de facto* officer. In the proper exercise of its functions in the transaction of public business the court must in this informal manner determine who is the attorney general in fact, for the time being, upon such facts as are before it on the face of the respective commissions, and with those of which the court may take judicial notice. We shall not determine who is the officer *de jure* holding legal title. To procure a determination of that matter an issue binding on the parties must be made.

It is contended in behalf of Mr. Laughlin that inasmuch as he holds the commission latest in date the court should presume, in favor of his claim, the commission lawfully issued; that the presumption of law is the officer executing it did so only within his legal powers. This may be true as a general rule, but it is equally true that the court, in acting of its own motion to ascertain who are its officers, must also know, as matters of law, not only the extent, but also the legal limit, of executive power, as declared by its own decided cases. The court must take notice of its own decisions; and where, in its adjudications, the power of the executive has been defined and declared, the court will not presume against its own rule, the existence of wider authority.

In the case of *Territory* v. *Stokes*, 2 N. M. 63, the power of the governor to appoint an attorney general during a recess of the territorial council was carefully considered by this court upon full argument. It was there clearly held that when a vacancy in the office of attorney general occurred "by death or resignation during the recess of the legislative council," the governor might appoint to fill such vacancy, but not to fill one occurring in any other way. Under the

facts reported in that case, it was held the office of attorney general was vacant otherwise than by the death or resignation of the incumbent, and the governor wholly without legal power to fill the same, and so, for want of this legal right, the office continued for some time vacant.

That decision stands as the declared law, and we are bound to respect it until overruled or modified in a regular proceeding. This court would not be in the rightful exercise of power, under the circumstances here, with neither cause, parties, nor issues before it, in attempting to modify or reconsider its own adjudication regularly made. That cause stands, not as the opinion of the judges upon the bench, but as the solemn adjudication of the highest judicial tribunal of the territory, binding upon this court, and must be to us, in this informal consideration, the measure of the governor's power to appoint. The inquiry, then, must be, was Mr. Laughlin appointed to fill a vacancy in the office of attorney general arising by death or resignation?

It is conceded Mr. Breeden's term had not expired by limitation. We are asked to presume that, at the date of Mr. Laughlin's commission, Mr. Breeden was either dead, or had resigned, in order to give effect to the act of a co-ordinate branch of the government. Is there any unyielding rule of law calling upon the court to ignore every other fact and act upon such a presumption? If so, it is the duty of this tribunal to follow the rule. While it is the duty of each department, as far as can legally be done, to give to every other due consideration, respect, and credit, yet, in applying this principle, each particular case must, subject to legal rules, stand upon its own facts. The presumption sought to be maintained here may be rebutted and overcome. With Col. Breeden in the very presence of the court, transacting business there in person, could the court presume him dead? Certainly not. Suppose, to illustrate, court had been for a month, at the date of Mr. Laughlin's commission, in session, and during every day of that time Mr. Breeden had in person appeared therein as attorney general, exhibiting his commission, and acting thereunder in prosecution of causes, thus bringing openly to the knowledge of the court his continuous claim to the office; and while so engaged a commission as attorney general were presented from the executive department, with claim to the office, would any court, under such conditions, presume resignation, and thus exclude the possessor from his place? We believe not. In this inquiry, however it might be upon a regular issue, the court is not bound by any strict rule compelling the adoption of a technical presumption, excluding a consideration of important facts of such prominent, open, and notorious public character as to be matter of general public history, and thereby within the judicial knowledge of the court.

The court should also take cognizance of its own records and proceedings, with the daily personal appearance of the attorney general

before it, in the discharge, in fact, of official duty. Such records carry to the court, without other proof, knowledge that Mr. Breeden has continuously appeared herein as attorney general, and herein performed the duties of his office. These facts, thus before us, with his appearance, in the open discharge of official duties, continuously in the various courts of the territory, in the most public manner, receiving herein official recognition by the judges of this court, and allowance therefrom for services as attorney general, both before and after the date of Mr. Laughlin's commission, the continuous assertion in the most vigorous and public manner, in the courts and through the public press, of his intention and right to hold under his commission, with his appearance here in causes of the territory as attorney general, are matters which the court may legally know, without proof, as matter of judicial knowledge, and constitute such an actual presence in and possession of office under claim of right as to rebut the presumption of resignation. We cannot legally turn away from these facts to permit an officer so openly and notoriously in possession of office in fact, in the very presence of the court, to be informally excluded, by presumption, without trial of his legal right, upon the mere demand, under such circumstances, of a contestant.

Other facts are properly within the judicial knowledge of the court. The executive has made open and public announcement, through the press and by circular proclamation, of his right to remove Mr. Breeden, of the fact of removal, with statement of the alleged cause, thereby making this executive action a conspicuous part of the current public history of the territory. Further, the executive department of the territorial government brought officially to the notice of a majority of the judges of this court, by formal written communication, the fact that Mr. Breeden was by the governor removed from the office of attorney general for cause. This was done, no doubt, to place before the judicial department of the territory, in a formal way, knowledge, upon which it should act, of the official action of a coordinate branch of the territoral government. Shall the court presume such communication was for no public purpose, or, treating the executive department with that high respect to which it is entitled, give the communication to this department the dignity and force it deserves, as official information of the formal assertion by the executive of the right of removal? Certainly the latter.

Thus the presumption upon which Mr. Laughlin relies is overcome here by the considerations stated. This court must consider and give effect to its own record; to the appearance in office, in the actual discharge of duty in the courts, of its officer; to the public proclamation of the executive; to the most open and notorious public facts of current history in the territory; to the executive communications to the courts,—rather than presume against them all, to thereby exclude a public officer from place, while in possession and discharging official duty. We pass upon no question of executive power or legal

right, except, on this informal inquiry, to presume the law on that subject to be as declared by the highest judicial tribunal of the territory, until overruled or modified by a cause in court. If the judgment of this tribunal is to be invoked as to the correctness of that decision, it must be upon a cause in court, with proper parties and issues. Authority is not cited in support of this ruling, as it is believed the principles upon which it is made are so well settled and universally recognized as to commend themselves without citation.

The court will recognize Mr. Breeden as the *de facto* attorney general. In this ruling, as to all its parts, each member of the court fully concurs.

BRINKER and HENDERSON, JJ., concur.

TEXAS, S. F. & N. R. CO. *v.* ORMAN.

Filed January 12, 1886.

WRIT OF ERROR—FINAL ORDER—SUPPLEMENTAL DECREE.

After a decree establishing a lien on railroad property, and directing a sale to satisfy it, a second decree consolidating the cause with others like it, and directing a sale as before ordered, but providing that the proceeds shall be paid into court pending an investigation into the priorities of the liens, does not affect the appealable character of the first decree as a final order.

Error to district court, Santa Fe county.

Gildersleeve & Preston and *Catron, Thornton & Clancy*, for plaintiff in error.

H. L. Waldo, Wm. Breeden, and *John H. Knaebel*, for defendant in error.

BRINKER, J. This is a motion to quash the writ of error. There are various grounds set up in the motion. In our opinion it is only necessary to consider the fifth, which is as follows: "For that the said writ of error does not bring up for review in this court a final decree or determination of the district court." If this ground is sustained, the writ must be quashed. But if it is not sustained by the record, the motion must be denied. The record discloses the following facts: On the tenth day of November, 1883, complainants filed a bill in chancery, in the district court of Santa Fe county, against the Texas, Santa Fe & Northern Railroad Company, to enforce a mechanic's lien for work and labor performed, and materials furnished the railroad company, in the construction and grading of the road-bed of the railroad company upon that part of its line know as the "San Juan Division." Such proceedings were had in the cause thereafter that on the thirteenth day of June, 1884, a decree was rendered in which the court finds that complainants performed the work and labor, and furnished the materials, for which a lien was claimed; that a notice of lien was filed in the proper office, as required by law; the amount remaining due and unpaid; declared that amount to be a lien upon the San Juan division of the road-bed, including bridges,

grading, culverts, ties, timber, and other material pertaining to said road-bed; ordered and decreed that said lien be enforced by a sale of the premises; appointed a master to make the sale; directed the advertisement, manner, and terms of sale; and ordered the master to distribute the proceeds of the sale, after paying the cost and charges of making the sale, and a master's fee of $500, as follows: To complainants' solicitors, $3,000; to the complainants, in satisfaction of their lien, $29,657.14. The residue to be paid into the registry of the court. On the fifth day of July, 1884, the master advertised that he would, on August 21, 1884, at the court-house door, in Santa Fe, sell the property covered by the lien in the manner and upon the terms directed by the decree.

The record also shows that Adam J. Hager, Lionel D. Saxton and others, and Samuel L. Bachelder, had each filed bills to enforce liens against said railroad. It further appears that on August 2, 1884, the complainants, with Hager, Saxton and others, and Bachelder, entered into, and filed in said court, a stipulation, in which they agreed that the purpose of the decrees and proceedings in said four causes should be consolidated; that a decree be entered in said causes so consolidating, modifying the decrees theretofore entered in said causes, and each of them, so that but one sale of said property should be made; that such sale be made in the *Case of Orman & Crook*, by the master appointed in that case, upon the terms in the decree rendered therein, and upon the notice and advertisement already made by said master; that the master, instead of paying out the proceeds of the sale as directed in that decree, should bring the same into court, to abide the further order of the court; that the court should, upon the bringing in of said money, determine the priority of the several liens, and distribute the funds accordingly.

On the same day the court made and entered of record an order or decree in said four causes, upon the stipulation of the several complainants, in which it recites the decrees in said causes, and orders "that, for the purposes hereinafter set forth, said four * * * causes shall be and are * * * united and consolidated, and the same [shall] proceed and be heard and determined together, and the said respective decrees heretofore rendered in said causes are hereby modified and vacated *in all respects conflicting herewith.*" It then proceeds to order the property sold, for the purpose of paying the demands of the respective complainants; that the sale ordered and advertised in the *Orman & Crook Case* proceed in the manner and upon the terms so ordered by the decree in that case; that the master appointed in that case conduct the sale as therein directed, but, instead of paying out the money as ordered in the *Orman & Crook Case*, that he bring it into court; that upon the bringing in of the money the respective complainants should have permission to apply to the court for participation in the distribution of the money, and that the

court should determine the rank and priority of the respective liens as between the several complainants; that on such hearing and determination nothing in any of said decrees should prevent the investigation of any and all facts necessary to a correct finding and determination of the priority of the several liens between the respective complainants, and for that purpose further testimony might be introduced by either or all of the complainants.

The railroad company was not a party to the stipulation, and seems not to have been consulted as to the disposition of the proceeds of the sale of its property. It was, however, in court when the order or consolidated decree of August 2d was rendered.

How the stipulation and consolidated order happen to be in this record we are unable to say. They are not properly before us in this case. The writ of error was not issued to bring up the records in the consolidated causes for review, and we can only consider it in the light of a supplemental order or direction appended to the June decree, unless its effect is to vacate that decree in some essential particular. The June decree was rendered in vacation, but it was conceded on the argument that it was final in form and substance down to August 2d, when, it is claimed, it was vacated by the consolidated order of that date. That it was a final decree prior to the entering of the consolidated order we think there can be no doubt, independent of this concession. The parties to the cause in which it was rendered were Orman & Crook, complainants, and the railroad company, respondent. The finding was that complainants had performed the labor and furnished the materials for which they claimed a lien,—the amount due upon the lien; that they had complied with the law regulating the filing of notice; that they were entitled to a lien for the amount of their demand; the description of the property affected by the lien; and ordered that the lien be enforced against that specific property; that the property be sold to satisfy the lien; that a master be appointed to make the sale; directed the terms and manner of sale, the advertisement, the distribution of the money. This, then, was in all essentials a final decree. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; S. C. 1 Sup. Ct. Rep. 15; *Stovall* v. *Banks*, 10 Wall. 583.

It is insisted with much force and ability that the consolidated order of August 2d vacated the June decree, and thus destroyed its finality, so that a writ of error would not lie to bring it here for review. An examination and analysis of that part of the order of August 2d which refers to the June decree shows that this contention cannot be sustained. That order only purports to vacate so much of the June decree as "conflicts" with the order of August. The only conflict between that order and the June decree is that the June decree directs the master to advertise and sell the property in a specified manner, upon a designated notice, and distribute the proceeds; while the August order directs the same master to sell the property in the same manner under the identical advertisement begun under the June de-

cree, and not then expired, and pay the proceeds into court, when the court would determine the rank and priority of the several liens, not between the complainants and the railroad company, but between the several complainants. The rights of the railroad company had been finally adjudicated, and any further proceedings in the district court under either of the decrees would not affect it.

From the terms of this August order it seems that the liability of the railroad company had been theretofore settled, and what remained to be done was simply to divide the proceeds of sale among the complainants contending for priority, in which the railroad company could have no interest. In our opinion the August order was at most a supplemental or decretal order, requiring the proceeds arising from the sale under the June decree to be paid into court for distribution. It does not in any respect vacate the substance of the June decree, or destroy its finality. It has no greater effect either in its letter or spirit than if it had been appended to the June decree by way of directions as to the distribution of the money arising from the sale.

In *Stovall* v. *Banks*, *supra*, the supreme court of the United States say:

"It is not unusual in courts of equity to enter decrees determining the rights of the parties, and the extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final."

In *Mills* v. *Hoag*, 7 Paige, 19, the court say: "A decree is not the less final in its nature because some future orders of the court may possibly become necessary to carry such final decree into effect." This case is quoted with approval by the court in *Stovall* v. *Banks*.

The case of *Tompkins* v. *Hyatt*, 19 N. Y. 534, is not in point. In that case, after rendering a decree in favor of plaintiff for the amount of his demand, and the enforcement of his lien, a reference is made to a master to ascertain the amount of the indebtedness of plaintiff to defendant, and to deduct such indebtedness from the sum ordered to be paid plaintiff; clearly recognizing the fact that defendant had a further interest in the controversy which was still undetermined. No such fact appears in this case. The questions in which the railroad company was interested had been finally adjudged against it.

A number of authorities have been cited to show that the court had complete control over its decrees during the term, and that it could modify or vacate them at any time during the term. This principle is so well settled that we have deemed it unnecessary to review the authorities sustaining it.

We are unable to agree with counsel that the court did in fact vacate the June decree by its order of August 2, 1884. It follows, therefore, that the motion must be denied; and it is so ordered.

LONG, C. J., and HENDERSON, J., concurring.

RUPE *v.* NEW MEXICO LUMBER ASS'N.

Filed January 15, 1886.

MECHANIC'S LIEN—ASSUMPSIT TO FORECLOSE MECHANIC'S LIEN.

The supreme court having held that a mechanic's lien cannot be enforced by an action of *assumpsit*, and the lien having been thereupon sought to be enforced through a suit in equity, with the identical pleadings as before, the supreme court has respect for its former decision, and reverses and remands the cause.

Error to district court, San Miguel county.

O'Bryan & Pierce, for plaintiff in error.

W. D. Lee and *T. B. Catron*, for defendant in error.

HENDERSON, J. This was an action of *assumpsit*, brought in the district court of San Miguel county for the purpose of enforcing a mechanic's lien on certain real estate described in the declaration. On appeal to this court at the last term, (5 Pac. Rep. 730,[1]) the judgment was reversed, and the cause remanded for such further action in the district court as might be proper.

When here before, the court held in distinct terms that the action was *assumpsit*, and that in such form of action the lien claimed could not be enforced. After the mandate had been filed in the court below, and against the objection of the plaintiff in error, the case proceeded as a suit in equity, without the slightest change by way of amendment. A personal judgment might have been rendered against such of the defendants as were liable; but it was in plain violation of the judgment of this court to enforce, or attempt to enforce, the lien claimed in an action at law. The court below appointed a master in chancery, and entered a final decree on his report, condemning the premises on which the lien was claimed to sale, in satisfaction of the amount found due defendant in error.

The judgment of this court in this case at the last term is conclusive upon us, and leaves nothing open for our consideration. The cause is reversed and remanded.

LONG, C. J., and BRINKER, J., concur.

[1] Same case, *ante*, 261.

DOLD v. ROBERTSON.

Filed January 15, 1886.

1. APPEAL—FAILURE TO PROSECUTE—JUDGMENT.
   Under Comp. Laws N. M. § 2189, upon failure to assign errors on or before the first day of the term to which the cause is returnable, judgment against appellant, or plaintiff in error, may be affirmed, in the absence of good cause shown.
2. SAME—DAMAGES.
   Under section 2191, Id., on such affirmation of judgment, damages not exceeding 10 per cent. of the judgment may be awarded against appellant, or plaintiff in error, for vexatiously delaying the final process of the court.
3. SAME—ERROR—JUDGMENT AGAINST SURETIES.
   Section 2206, Id., providing that, on appeal in civil suits, judgment against appellant shall be against him and his sureties on the appeal-bond, applies equally to judgments on writs of error, against plaintiff in error.

O'Bryan & Pierce, for defendant in error.

LONG, C. J. Herein an action in *assumpsit* was commenced in the district court of the First judicial district, sitting in the county of San Miguel, by Richard P. Robertson, the defendant here in error, against John Dold, the plaintiff in error. Said Dold appeared in said action, and judgment *nil dicit* was therein rendered against him for $3,407.03. Soon after, upon his application, a writ of error issued, and further proceedings in the cause below were stayed upon the proper bond being filed. The plaintiff in error failed to take any further action, or to file in this court any transcript of the record below. On the second day of the present term of this court, the cause was regularly called in its order for trial. Plaintiff in error on such call failed to appear. Thereupon the defendant in error, by Pierce & O'Bryan, his attorneys, did appear, produced a transcript of the proceedings below, and in writing moved the court "to enter judgment against the appellant and his sureties for the amount of the judgment rendered in the court below, with interest on the same, and 10 per cent. on the same as damages, together with costs in both courts." The defendant in error did not favor the court with a brief, but cited rule 10 on page 6 of the rules of the supreme court, and certain sections of the Compiled Laws of this territory, in support of his motion. Rule 10 is as follows:

"When there is no appearance for the plaintiff in error or appellant when the cause is called for trial, the defendant may have the plaintiff in error or appellant called, and dismiss the writ of error or appeal, or may open the record, and pray for an affirmance."

The following is that part of section 2189 of the Compiled Laws pertinent to the question here:

"The appellant shall file in the office of the clerk of the supreme court, at least ten days before the first day of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the case. If he fail to do so, the appellee may produce in court such transcript, and if it appear thereby that an appeal has been allowed in the cause, the court shall affirm the judgment, unless good cause can be shown to the contrary. On appeals and writs of error, the appellant and plaintiff in error shall assign errors on or before the first day of the term to which the cause is returnable.

In default of such assignment of errors, the appeal or writ of error may be dismissed, and the judgment affirmed, unless good cause for such failure be shown."

"Sec. 2191. Upon the affirmation of any judgment or decision, the supreme court may award to the appellee or defendant in error such damages, not exceeding 10 per cent. on the amount of the judgment complained of, as may be just."

"Sec. 2206. In case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal-bond."

In support of that part of his motion asking for judgment in this court against the securities upon the bond, defendant in error relies upon section 2206. Under the rule quoted and the foregoing sections, it is clear judgment may be affirmed against Dold. He abandoned all further action after procuring stay of proceedings. The effect thereof was vexatious delay; therefore, under section 2191, damages should be assessed against him. A party should not stay proceedings, and delay the final process of the court, unless he intends in good faith to prosecute his error or appeal; and if he does so, should respond in damages. A more difficult question, and one of importance in practice, arises on that part of the motion for judgment against the securities. If section 2206 applies to cases brought to this court by writ of error, then it is settled that judgment may here be rendered against the securities upon the bond. In the case of *Beall* v. *New Mexico*, 16 Wall. 535, the supreme court of the United States considers the question. The supreme court of the territory of New Mexico, in a cause on appeal from the district court, affirmed the action of the tribunal below, and rendered judgment against the securities upon the appeal-bond. The case was taken to the supreme court of the United States, this action approved, and the judgment held to be correct. On the authority of that case the rule is, where an appeal is taken to the supreme court, an appeal-bond given, and the case affirmed, "if the judgment be against the appellant it shall be rendered against him and his sureties." The case cited was clearly one of appeal. It was not determined what the rule should be in a cause taken from the district court to the supreme court on writ of error. That question is involved in the motion here.

A careful consideration of the phraseology of section 2206 renders it to some extent uncertain whether the remedy therein given should be extended against securities in causes in this court on writ of error. If the language alone is to be considered, the words "appeal-bond" and "appeal," used in the section, would indicate an intention to limit the remedy to causes here strictly on appeal. To aid in ascertaining the intent, we may consider the evil intended to be cured by this section. It was evidently intended to relieve the party holding such a bond from the expense and delay incident to an action therein, and to give him a cheaper and more speedy remedy. No reason can be given why such relief should be provided by the legislature in

cases strictly on appeal, and denied in those in the appellate court by writ of error. Webster defines the word "appeal" as follows: "To refer to a superior judge or court for the decision of a cause depending, or the revision of a cause decided in a lower court." Bouv. Law Dict. 120, defines "appeal" as "the removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial."

Considering the relief intended to be given, it may be fairly concluded the legislature did not use the word "appeal" as applied to the mode of removing causes to the supreme court, but rather to the removal as consummated, and intended to give that word a broad and general, rather than a restricted and technical, meaning. We so construe it, and hold section 2206 to apply to causes in this court on writ of error.

The judgment of the court below is affirmed, and herein entered against the appellant and the securities upon his bond for the amount of the judgment below, interest thereon from the date of rendition to the present time, with 5 per cent. damages, and costs in both courts.

BRINKER and HENDERSON, JJ., concur.

RODEY *v.* TRAVELERS' INS. CO.

Filed January 15, 1886.

1. INSURANCE—ACCIDENT POLICY—VIOLENT EXTERNAL CAUSES.
Where plaintiff in an action on an accident policy testified that he dived from a plank into water six or seven feet deep, and that the "tympanum of the ear was ruptured by external violence in diving," the jury were justified in finding that the injury resulted from "violent external causes," and a verdict for plaintiff will not be disturbed.[1]

2. SAME—INSTRUCTION—HARMLESS ERROR.
In such a case, where the court has fairly submitted to the jury the issue as to whether the injury was caused by "external, violent, and accidental means," an instruction that the contract, being made by the defendant itself, must be more strictly construed against it, even if error, will not justify a reversal.

Stone & Stone, for appellee.

Childers & Ferguson, for appellant.

LONG, C. J. Bernard Rodey commenced an action against the Travelers' Insurance Company, appellant in this cause, before a justice of the peace in Bernalillo county, and therein recovered a judgment, from which the appellant herein appealed to the district court. A judgment was there rendered against the defendant, from which an appeal is taken to this court. The appellant relies on two alleged errors for a reversal of the case, stated in the brief as follows:

"(1) The first ground relied upon by the appellant is that the testimony for the plaintiff failed to make out his case. (2) The court gave a misleading and erroneous instruction."

Of these, in the order stated, appellant contends the law of the case to be, "the accident, to justify recovery, must result from violent, external, visible means of injury; and argues that the evidence given in the cause forbids the conclusion that the injury complained of so occurred. The theory of the plaintiff is that he went in bathing at the Terrace bath while on a trip to California; that from external violence while so bathing the tympanum of his ear was broken or injured, causing him severe sickness, injury, and damage. The defendant maintains the injury did not so occur, but resulted from coughing, or, at most, only from contact with water, by diving in the usual and ordinary course of common bathers. The rule is well established that the supreme court will not enter into an analysis of the evidence and reverse, even if the verdict is against the weight of it. It need not decide on the question of preponderence. It must be assumed that the trial court gave careful consideration to the evidence, and so the verdict will be sustained if there is any evidence to reasonably support the verdict.

The plaintiff was a witness on his own behalf. He testified in substance that he went into the bath as other bathers did, but was milder in exercise than most of them. From this alone the jury might con-

[1] For valuable cases on accident insurance, see Association v. Barry, 9 Sup. Ct. Rep. 755; Cotten v. Casualty Co., 41 Fed. Rep. 506; Eggenberger v. Association, Id. 172; Paul v. Insurance Co., (N. Y.) 20 N. E. Rep. 347; Cronkhite v. Insurance Co., (Wis.) 43 N. W. Rep. 731.

clude fairly the injury was not the result of any unusual strain upon the person or of overexertion. He further testified:

"I took an ordinary dive from a plank into water six or seven feet deep. I believe the accident was done in the water. If I made an effort to cough after leaving the water, the rupture of the ear could have occurred there from the cough that instant, or the instant the ear got above the water; or it may have occurred when I dived, and the water suddenly collapsed against the ear, or when I came out of the water. I know as matter of fact that the tympanum of my ear was ruptured by the external violence of the water in diving. I sat down there treating my ear for nearly an hour. I was trying to get some ease. Was perfectly well before I went in to bathe."

He further stated he grew worse, went to his room, and suffered intense agony, all immediately following the bath. It is beyond doubt, from this, the jury might have found the verdict returned in this case, on the ground that the injury was the result of "violent external causes." The weight of the evidence is clearly that way. The witness states in positive terms: "My ear was ruptured by the external violence of the water in diving." From the evidence, the conclusion reasonably follows that he leaped from a plank, for the purpose of diving into the deep water. A slight accidental turn of the body while descending into the sea might very easily bring his ear in contact with the water in such manner that the force of his passage through it would create the injury. If there is evidence reasonably tending to support the verdict, on appeal, after the trial court had opportunity to consider its weight, the supreme court will not interfere. This rule is well settled. *McPheeters* v. *Hannibal & St. J. R. Co.*, 45 Mo. 22; *French* v. *Millard*, 2 Ohio St. 44; *Randolph* v. *Carlton*, 8 Ala. 606; *Smith* v. *Houston*, Id. 736; *Canal-boat* v. *Simmons*, 11 Ohio, 459.

Giving instructions *per se* wrong, which, as applied to the evidence, have not done an injury, is a harmless error. *Hayden* v. *Souger*, 56 Ind. 42, 47; *Stipp* v. *Spring Mill G. R. Co.*, 54 Ind. 16. Erroneous instructions will not cause a reversal if the verdict is clearly right on the evidence. *Lafayette & I. R. Co.* v. *Adams*, 26 Ind. 76. The court need not, however, invoke the aid of that rule here to support the verdict, as it is the only one under the evidence which the jury could have properly found.

The second alleged error stated in appellant's brief is: "The court erred in giving to the jury a misleading and erroneous instruction." This objection cannot be fairly considered alone, upon the particular instruction objected to. They must be considered as a whole, and are as follows:

"And thereupon the court gave to the jury, on behalf of the plaintiff, the following instructions, to-wit: (1) The court instructs the jury that if they find from the evidence that said plaintiff was wholly disabled, and prevented from the prosecution of any and all kinds of business, for the space of three weeks, by reason of bodily injuries, as testified to by him, and that said injury was caused by external, violent, and accidental means, they will further find that said plaintiff is entitled, under each policy, to the sum of $15 a week for the space of three weeks, or $90 in all. (2) The court instructs the jury

that if they believe from the evidence in this case that the plaintiff received the injury to his ear at the time and place testified to by him, and that the said injury was caused through external, violent, and accidental means, then they will find for the plaintiff. (3) The court further instructs the jury that the contract incorporated in the body of this policy of insurance, being a contract made by the defendant itself, it should on that account be the more strictly construed against it, the defendant."

Instructions on behalf of defendant:

"(1) The defendant asks the court to instruct the jury that if they believe from the evidence that there was no visible and external sign of the injury, although it may have been caused by the water when he went in bathing, nevertheless the plaintiff would not be entitled to recover, and the jury should find for the defendant. (2) Defendant asks the court to instruct the jury that if they believe from the evidence that the plaintiff went in bathing, and that while in bathing no unusual circumstance happened to occasion the injury,—that is, that no interference or obstruction took place while under the water,—then the fact that when the plaintiff came up out of the water he felt pain in his ear, will not alone justify them in finding for the plaintiff. (3) Defendant asks the court to instruct the jury that if they believe from the evidence that the injury to plaintiff's ear occurred by means of coughing after he came up out of the water for the purpose of expelling water from his throat, lungs, or head, or all of them, such an accident would not be an accident caused by violent, external means, within the meaning of the contract between plaintiff and defendant, and they should find for the defendant. (4) The court instructs the jury that unless they believe the injury was the proximate and sole cause of the disability, they will find for the defendant."

We are asked to reverse by reason of instruction 3. If defendant's objections were well taken to that particular instruction,—a point we need not decide,—then should the cause be reversed? Appellant relies mainly upon *Beaver* v. *Taylor*, 1 Wall. 637, to sustain this point. The court in that case says, with reference to an instruction given by the court below:

"The law as to instructions outside the facts of the case, or involving abstract propositions, is well settled. If they may have misled the jury to the injury of the party against whom their verdict is given, the error is fatal."

That case was an action of ejectment. The defendant, for his defense, relied on the first and second sections of the statute of limitations in the state of Illinois, where the case originated. The supreme court, in the ruling made, reviewed the facts pertinent to the instruction, and under such facts held "the defense rested wholly upon the first section" of the Illinois statute. As the court below in that case instructed the jury, the supreme court says:

"They [the jury] may not have been satisfied as to the requisite possession under the first section, and have found for the defendant on the second section."

The court says explicitly the plaintiff was entitled to recover, on the second section of the statute of limitations, "and the court [below] should have so instructed the jury;" but instead of doing so the trial court gave such an erroneous instruction as that the jury might have found for the defendant on the second section, as it evidently did, against the facts, being thus clearly misled by the instruction. For this a reversal occurred.

It is evident that case stands on different ground from the one here. In this one a series of instructions were given, all except one conceded by appellant to be correct. They must be taken together. If, so considered, the case was left, under the evidence, fairly to the jury, the judgment below should be sustained. As was said by this court in *Crabtree* v. *Segrist*, 6 Pac. Rep. 206:[1] "The whole tone and purport of the charge is certainly as favorable to the defendant as could be asked." The real point of contention in the lower court before the jury was whether the injury complained of "was caused through external, violent, and accidental means," or otherwise. We think the law on that subject was so clearly placed before the jury by the instructions that injury could not possibly have resulted from the third instruction.

The case below was decided right on its merits, under the evidence, so the court cannot sustain appellant's first objection here. The jury, considering the instructions as a whole, could not have been misled to appellant's injury. Hence the second objection cannot avail. We find no error.

The judgment below is affirmed, with costs against appellant.

HENDERSON, J., concurs.

ATCHISON, T. & S. F. R. CO. *v.* WALTON.

Filed January 14, 1886.

RAILROAD COMPANY—INJURY TO ANIMALS—PRESUMPTION AS TO NEGLIGENCE—BURDEN OF PROOF.

The mere fact of an animal being killed by a train raises no presumption of negligence upon the part of the railroad company or its servants, but the burden of proof is on the plaintiff to show negligence.

Error to district court, San Miguel county.

H. L. Waldo and *Frank Springer*, for plaintiff in error.

Lea & Fort, for defendant in error.

HENDERSON, J. This is an action brought by the defendant in error in the county of San Miguel against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for the alleged negligent striking and killing a mule by the railroad company's engine. The action is trespass on the case, in the usual form, founded on the alleged negligence of the servants of the company in running and operating its train of cars. Plaintiff in error filed two pleas: one the general issue, the other setting up some special matter to avoid double damages under the statute. Issue having been joined on these pleas, a jury was called and a trial had. Judgment for the plaintiff below. Motion for a new trial filed and overruled. Bill of exceptions taken, and the cause brought here on error.

The errors assigned are as follows:

"(1) The court below erred in denying the motion of plaintiff in error for a new trial. (2) The court below erred in giving judgment upon the verdict of the jury."

[1] Same case, *ante*, 282.

In order to determine the questions presented in the first assignment, it will be necessary to look into the instructions of the court and the evidence adduced on the hearing.

The instructions are as follows:

"And thereupon the court instructed the jury as follows: (1) This is an action to recover the value of a mule killed by the engine of the company. You are to consider this case exactly as if it were between private individuals. The engine had a right upon the track; the mule had no business there. If the engineer drove his engine at the usual rate of speed, and did not willfully or carelessly, or by negligence of his duties, kill the mule, then the railroad company is not liable for it. Unless you believe, therefore, from the evidence, that the engineer intentionally or negligently killed the mule, your verdict will be not guilty. If, on the other hand, you believe that the engineer could have avoided killing the mule, but, through a reckless disregard of the property of another, intentionally or negligently ran against the mule, and caused its death, you will find the defendant company guilty, and assess the damages at $250. (2) If the plaintiff allowed his mules to run loose within the city of Las Vegas in the night-time, in the neighborhood of the railroad, where trains were in the habit of passing, so that they could stray upon the track of the railroad, he assumed the risk of their loss or injury from accident, and was himself guilty of such negligence that he cannot recover for such loss, unless it was caused by the willful misconduct or gross negligence of the persons in charge of the engine. (3) If the jury believe, from the evidence, that the plaintiff's mule went upon the railroad track in the night-time, and was struck by a passing engine, and that the engineer could not see the mule in time to stop his engine and avoid the accident, the plaintiff cannot recover, and your verdict must be not guilty."

The facts in evidence, as shown by the bill of exceptions, are few, and no conflict in the proof worthy of consideration. The plaintiff below, on the day laid in the declaration, came to the town of Las Vegas with a wagon and team of mules, and went into camp for the night at a point near the railroad track, and within the limits of the town. The mules were turned loose to graze, and during the evening or night wandered some distance down the track of defendant's road, and, coming upon it, one of them was struck by a passing engine. The proof shows that the approach to the track from the side where the dead mule was found next morning was easy, there being no obstruction whatever. No witness on the part of plaintiff saw the act of killing. No evidence of any kind was offered proving or tending to prove negligence on the part of the defendant's servants or employes in charge of the train. The animal was killed some 12 to 18 feet north of the bridge over the Gallinas river, about one mile from the town. The engine seems to have struck the mule with considerable force, from the statements of the witness who saw the body next morning. It was, in substance, on this evidence the case went to the jury on the part of the plaintiff. The defendant introduced two witnesses. The first was Thomas Murphy, who testified as follows:

"What is your name? Thomas Murphy. Where do you live? Las Vegas. What is your business? Railroad engineer. In whose employ are you? The Atchison, Topeka & Santa Fe. Were you in the employ of the Atchison, Topeka & Santa Fe Railroad in July, 1884? I was. Do you remember the

occasion of the striking of the mule of Mr. Walton's as testified to here? I remember of striking a mule, but didn't know whose mule it was. What date was this? The fifteenth of July, 1884. At what place? At the south end of the Las Vegas yard. Just state to the jury all of the circumstances. What where you doing? Running an engine? Yes, sir. State to the jury all the circumstances connected with it. I was coming into Las Vegas on the fifteenth of July. It was in the night, about 2 o'clock in the morning, with a light engine; had no train, nothing but a light engine. We were coming in at the rate of about six miles an hour; got into the yard, and the mule came upon the left-hand side of the track, and I didn't see it until it was struck. I went on up to the switch, and went onto the siding, and made out a report the next morning about striking the mule. That's all there was about it. Well, what kind of a night was it, as to being light or dark? Very dark night. Could you see anything on either side of the track in front of you? Yes; I could see some on the right-hand side of the track. Why could you see on the right side? Because the boiler prevented me from seeing on the left side. As you approached the station, what kind of a lookout were you keeping? A very sharp lookout. How far ahead on the track could you see? I could see 150 feet. Where was this mule when you first saw him? I didn't see him until after I struck him. The first you saw of him was when the engine struck him? Yes, sir. On which side of the track did he go off? On the right; the east side of the track. If the mule had been standing on the track as you approached there, could you have seen him or not? Oh, yes; I could have seen him. When you speak of the right and left side of the track, which direction is it? The right side of the track is the east side coming into Las Vegas. That is the right side as you come in from the south? Yes, sir. After you saw that mule first, was it possible for you to stop your engine and avoid striking him? I didn't see him until he was struck. State whether or not it was possible for you to avoid striking the mule, from the knowledge you had of his being there. No, sir; I could not. If I had seen him at all, I could have stopped. Are there any switches near where the mule was hit? There is a switch near the lower end of the yard. Is that the switch you expected to go on the side track with? No; the switch where I expected to go onto the side track was 300 or 400 feet above that. Did you have any conversation with Mr. Walton, the plaintiff in this case, in regard to the striking of his mule? Nothing; only that he told me that a mule of his was killed, and he wanted to know if I knew who killed it, and I told him that I had struck a mule near the lower end of the yard. Did you, in that conversation, tell him the speed at which you were running? No; I don't know as I did. He asked me how fast I was running, and I told him five or six miles an hour, I think."

Cross-examination by Mr. Fort:

"You say you were looking out for the station as you came in? Yes, sir. Could you see the lights, then, at the station? Yes, sir. Was there a switch for you to run in upon? Were you looking for a switch, or did you run in on the main track? Run in on the main track. Then your attention was directed to the light at the depot? Well, I was looking in front. Which side of the engine were you on? On the right-hand side. Was that a down grade or an up? About on a level. What rate were you running? About six miles an hour."

S. A. Hardy, being duly sworn, is examined by Mr. Springer on behalf of defendant, and testified as follows:

"Where do you live? Las Vegas. What is your business? Conductor. Were you a conductor in the employ of the Atchison, Topeka & Santa Fe Railroad in July, 1884? Yes, sir. Do you remember the occasion of the

striking of the mule at the Las Vegas yard on the night of the fifteenth of July of that year. Yes, sir. What were you doing that night? I was sitting on the left-hand side of the engine. On the engine that struck the mule? Yes, sir. State to the jury the circumstances of that transaction. On the morning of the fifteenth of July, 1884, we entered the yards coming from the south. We struck a mule just after we crossed over the bridge going into the yards, and at the time I saw the mule he was evidently crossing over the track from the left. I just caught a glance of it. My attention was turned ahead. I was watching the switch lights to see that they were all set for the main line. That is about the circumstances connected with the killing. You say you were sitting on the left-hand side of the engine? Yes, sir, Were you looking out ahead on the track? Yes, sir. Well, how long before this mule was struck did you see him? Well, it was, to the best of my knowledge,—he wasn't ten feet from the engine, as I didn't have a chance to speak. I just saw his hind parts. He seemed to be passing over the track from the left to the right. I should judge he was half way over the track before I saw him. If the mule had been standing on the track ahead of the engine, could you have seen it? Yes, sir. After you first discovered the mule, was it possible to stop the engine in time to prevent striking him? No, sir."

The defendant in error contends that although no evidence was offered to prove the fact of negligence by the servants of the defendant in charge of the engine, it is sufficient, *prima facie*, to show that the animal was killed by the defendant's engine, when the burden of proof shifts to that of the defendant to show that the killing did not occur through negligence or want of care. In support of this contention we are cited to the following authorities: 1 Add. Torts, § 586; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Co.* v. *Pollard*, 22 Wall. 341; *McCoy* v. *California Pac. R. Co.*, 40 Cal. 534; *Piggot* v. *Eastern C. R. Co.*, 54 E. C. L. 233; *Danner* v. *South Carolina R. Co.*, 4 Rich. 329.

The case of *Stokes* v. *Saltonstall* was an action against the owner of a stage-coach, used for carrying passengers, for an injury sustained by one of the passengers by the upsetting of the coach, in which it was held that the owner was not liable unless the injury of which the plaintiff complained was occasioned by the negligence or want of proper skill or care in the driver of the carriage. But the facts that the carriage was upset and the party injured were *prima facie* evidence that there was carelessness, negligence, or want of skill on the part of the driver, and threw the burden of proof on the defendant to show that the accident was not occasioned by the carelessness or want of skill of the driver.

Railroad Co. v. *Pollard*, 22 Wall. 341, applied the rule announced in *Stokes* v. *Saltonstall*, *supra*, to that of an injury sustained by a passenger in a railroad car.

McCoy v. *California P. R. Co.*, 40 Cal. 534, was an action to recover damages for killing cattle by a railroad train. WALLACE, J., said:

"The line of the road was not fenced where it ran through the field occupied by the plaintiff. The live-stock of the latter, running in this field, strayed onto the road, and were killed by the train. These facts, unex-

plained, made a *prima facie* case of negligence against the defendant. The neglect of the defendant to build the fence certainly did not operate to dispossess the plaintiff of his entire field, or, what was the same thing, prevent him from making lawful use of it."

Danner v. *South Carolina R. Co.*, 4 Rich. 329, the leading case in that state, held that in an action against a railroad company, where the plaintiff proves that his cattle, pasturing on his own land, were killed by the company's train in its passage along the road, and the value of the cattle, he makes out a *prima facie* case of negligence which entitles him to recover, unless the company, by proof of the particular manner or circumstances under which the cattle were killed, rebut the presumption of negligence.

The text of Addison simply states the broad proposition, to the effect that "proof of the commission, by the defendant or his servants, of an injury of which the plaintiff complains, very generally carries with it *prima facie* proof of negligence, and it is for the defendant to show that the injury was the result of inevitable accident, or that it was occasioned by the negligence or misconduct of the plaintiff himself, or by circumstances over which he had no control." Add. Torts, § 586. The rule stated in this section is illustrated by the author by a reference to a variety of cases arising out of torts, but none like the one before us.

In several of the states, statutes have been enacted making the fact of killing or injuring *prima facie* evidence of negligence, and shifting to the defendant the burden of showing by positive evidence that due diligence and care were used to prevent the injury. In this territory no such statute exists. What is sufficient evidence to charge a railroad company with negligence for killing stock is a question upon which the courts are divided in opinion. In many cases it has been held that the simple fact of injury to the animals by the trains of the company, unaccompanied by anything which tends to show positive negligence or misconduct of the agents of the railroad, is insufficient to charge the company. This is the rule in those states where the company is not bound to fence its track, and where the stock is permitted to run at large upon uninclosed lands, without thereby subjecting the owner to liability as a trespasser. *Bethje* v. *Houston R. Co.*, 26 Tex. 604; *Pittsburgh, C. & St. L. R. Co.* v. *McMillan*, 37 Ohio St. 554; S. C. 7 Amer. & Eng. R. Cas. 588; *McKissock* v. *St. Louis, K. C. & N. Ry. Co.*, 73 Mo. 456; *Mobile, etc., R. Co.* v. *Hudson*, 50 Miss. 572. The mere fact of killing or injury does not constitute any presumption of negligence. The specific negligent act complained of must be proved by the plaintiff. *Lyndsay* v. *Connecticut R. Co.*, 27 Vt. 643; *Chicago R. Co.* v. *Patchin*, 16 Ill. 198; *Great Western R. Co.* v. *Morthland*, 30 Ill. 451; *Schneir* v. *Chicago, etc., R. Co.*, 40 Iowa, 337; *Indianapolis, etc., R. Co.* v. *Means*, 14 Ind. 30; *New Orleans R. Co.* v. *Enochs*, 42 Miss. 603; *Mobile, etc., R. Co.* v. *Hudson*, 50 Miss. 572; *Grand Rapids R. Co.* v. *Judson*, 34 Mich.

507; *Brown* v. *Hannibal R. Co.*, 33 Mo. 309; *Scott* v. *Wilmington R. Co.*, 4 Jones, 432; *Walsh* v. *Virginia & T. R. Co.*, 8 Nev. 111; *Flattes* v. *Railroad Co.*, 35 Iowa, 191; *Kentucky R. Co.* v. *Talbot*, 78 Ky. 621; *Whittier* v. *Chicago, M. & St. P. R. Co.*, 26 Minn. 484; S. C. 5 N. W. Rep. 372; *Railroad Co.* v. *Henson*, 39 Ark. 413; *Railroad Co.* v. *Holland*, 40 Ark. 336.

We approve the rule stated in the cases above cited, and think it accords with the prevailing and general rule in common-law cases. No negligence was shown on the trial. There was no question of fact presented, under the issues joined in this case, for the decision and determination of the jury. The court gave three instructions, the first and second of which we disapprove as stating the law too strongly and favorably for the company; but, as no exceptions were saved, we do not consider them except for the purpose of determining to what extent the jury disregarded such as were correct.

We think the third instruction a correct statement of the law, but the jury disregarded it. The motion for a new trial presented that question to the court below. Did it err in refusing to grant it? We think so. Without some proof showing negligence, or some fact from which such negligence might be legally inferred, the cause ought not to have been submitted to the jury unless under proper instructions from the court.

Our conclusions on the first assignment of error render it needless to consider the second.

For the error of the court in refusing to set aside the verdict, the cause is reversed, and remanded, with instructions to grant a new trial, and for further proceedings therein according to law; and it is so ordered.

LONG, C. J., and BRINKER, J., concur.

WILLIAMS *v.* THOMAS.

Filed January 15, 1886.

APPEAL—OBJECTIONS NOT RAISED BELOW.

Comp. Laws N. M. 1884, § 2197, providing that "in equity causes no exception shall be required," extends to exceptions only, and does not affect the rule of chancery practice that if seasonable objections are not made before the examiner, or in the court below, they will not be considered on appeal.

Error to district court, Colfax county.

E. A. Fiske, for plaintiff in error.

Frank Springer, for defendant in error.

BRINKER, J. This was a contest in the district court, under chapter 3, tit. 12, of the Compiled Laws of 1884, for the office of justice of the peace of precinct No. 6 in Colfax county. The record shows the notice of contest, the answer of contestee, the replication of contestant, the appointment of an examiner to take the proofs, and his re-

port, the trial, and judgment for contestee, Thomas. To review this judgment the contestant sued out this writ of error. There was a mass of testimony taken by contestant to show that a number of the persons who voted for the contestee were not legally qualified voters; but, with the exception of one McMichaels, who testified that he voted for contestee before he (McMichaels) was of age, there was nothing that the court could consider. It was the merest hearsay, consisting of statements to the witnesses made by the alleged illegal voters as to their qualifications, or rather lack of qualifications, as voters. During the taking of the proofs the contestant asked for, and the examiner allowed, an adjournment to enable the contestant to procure other witnesses, and the contestee announced, presumably in the presence of contestant, that he, the contestee, did not desire to offer any testimony until that of contestant was all in. Afterwards, on the night of the day of the adjournment, and in the absence of contestant and his solicitor, the examiner permitted the contestee to take part of his testimony, and to complete it the next day. The record shows the absence of contestant and counsel on this night, but is silent as to their presence during the taking of the testimony on the day following. The action of the examiner in the particular stated was in plain violation of equity rule No. 70. The contestant, being absent during the taking of the testimony for contestee, could not make objections before the examiner, but he could have moved the court on the trial to strike that testimony out, or disregard it. This he failed to do; but makes the objection to its competency, and the manner in which it was taken, for the first time in this court, and cites us to section 2197, Comp. Laws 1884, to sustain his position. That section is as follows:

"Exception to the decision of the court upon any matter of law arising during the progress of the cause * * * must be taken at the time of such decision. In equity causes no exception shall be required."

This, although a statutory proceeding, is, by the terms of the statute, to be considered as partaking of the nature of a suit in chancery, (sections 1239, 1240, 1242,) and of course should be conducted in accordance with the rules governing such causes, except in such particulars as the statutes may have otherwise provided. The universal rule in chancery practice is that if no objections are made to the evidence before the master or examiner, nor to the court below during the progress of the cause, the party complaining cannot raise objections in the appellate court, (*Webb* v. *Insurance Co.*, 10 Ill. 223; *Moshier* v. *Knox College*, 32 Ill. 155;) but such objections are deemed waived. *Williamson* v. *Johnson*, 5 N. J. Eq. 621. When a party, present at a return of a commissioner's report, might object to it, but does not, he will be considered as having waived his objections. *Patrick* v. *McClure*, 1 Bibb, 52. A motion to suppress testimony must be made before the chancellor. *Van Namee* v. *Groot*, 40 Vt. 74. To the same effect are the cases of *Gunn* v. *Brantley*, 21 Ala. 644; *Adkins* v. *Holmes*,

2 Ind. 203; *Evans* v. *Hettich*, 7 Wheat. 453; *Brown* v. *Tarkington*, 3 Wall. 377; *York* v. *Railroad Co.*, Id. 113.

Now, does section 2197, *supra*, change this rule? This court has never passed upon this section, and we must construe it by an analysis of its own provisions. If a doubt arise as to the proper construction to be given to a particular clause of a statute, resort must be had to the entire section or statute upon the subject of which the clause in question forms a part. Sedg. 237. Looking to the portion of the section of the statute which precedes the clause under consideration, we find that it requires the party complaining to take his exceptions to the action of the court on all matters occurring during the trial at the time of the decision. This statute announces no new rule in actions at law. It is well settled that a party desiring to review in an appellate court the action of a court of law must call the attention of the trial court, by seasonable objections, to the proceeding complained of, and, upon an adverse decision, except to the action of the court at the time. All the steps necessary to this result, save the exception, existed in chancery proceedings as well as at law. The statute does not abrogate this practice in chancery, which has always obtained, but rather perpetuates it in the section above quoted. This being true, the plaintiff in error should have asked the district court to strike out the objectionable testimony; but, having failed to do so, he must be held to have waived all objections to it.

The record shows that there was one ballot cast for "Tomas," which was counted for contestee. This was wrong; it should have been rejected. *People* v. *Stevens*, 5 Hill, 616. There were two ballots cast for "Williams, Justice of the Peace." These the judges refused to count, and properly. *People* v. *Stevens*, *supra*. There were four ballots cast for contestant which were rejected by the court on the trial, under the testimony which we have shown to have been considered without objection. For the reasons above given we cannot review this action of the court.

As the rejection of the Tomas ballot, and the one cast by McMichaels, counted below for contestee, will not change the result, and finding no error in the record of which we can take notice, the judgment should be affirmed; and it is so ordered.

LONG, C. J., and HENDERSON, J., concur.

MILLIGAN and others v. CROMWELL.

Filed January 18, 1886.

1. REPEAL—USURY—EFFECT ON CONTRACTS.

The act of 1866, (Gen. Laws, 421,) declaring usurious contracts illegal and criminal, was repealed by the act of 1872, (Gen. Laws, 414.) making all contracts for interest legal and binding. This in turn was repealed by the act of March 2, 1882, (Acts 1882, p. 43,) establishing 12 per cent. as the legal rate of interest, and making usurious contracts void as to the excess beyond that rate. *Held*, that the repeal of the act of 1872 did not operate a revival of the act of 1866, and that usurious contracts are not invalid, except as to the excess beyond the legal rate.

2. MORTGAGE—DEFECTIVE POWER OF SALE—FORECLOSURE.

A mortgage which by its terms is expressly intended to secure payment of a note, but is defective, in the power of sale, in providing only for payment of costs of the trust and interest, without making any provision for the principal, will be foreclosed by a court of equity without waiting for the instrument to be reformed.

Error to district court, San Miguel county.

O'Bryan & Pierce, for plaintiffs in error.

Lee & Fort, for defendant in error.

BRINKER, J. This is a suit in chancery, commenced in the court below to foreclose the following mortgage:

"This indenture, made this sixteenth day of September, A. D. 1882, between Madison M. Milligan, unmarried, and James C. Milligan and Flora E. Milligan, his wife, of the first part, and Charles T. Cromwell, of Rye, New York, of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of ($2,000) two thousand dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, and for the further consideration of the debt hereunder mentioned and created, have granted, bargained, sold, demised, conveyed, released, and confirmed, and by these presents do grant, bargain, sell, remise, convey, release, and confirm unto the said party of the second part, his heirs and assigns, forever, all the following described lot or parcel of land and real estate situate, lying, and being in the county of San Miguel and territory of New Mexico, and better described as follows, to-wit:

"That certain lot on the northerly side of Center street, being the second house and lot easterly from the corner of Grand avenue, being parts of lots 18, 19, and 20, of block No. 8, in East Las Vegas, beginning at a point 25 feet easterly from the S. W. corner of lot 18, in said block; thence easterly along Center street 25 feet; thence northerly along said lots 18, 19, and 20, 75 feet; thence westerly along the line of lot 20, 25 feet; thence southerly 75 feet across lots 18, 19, and 20, to the place of beginning,—being part of the Las Vegas grant, made in 1835, and confirmed by congress in June, 1860; together with all and singular the lands, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereon, and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part, either in law or in equity, of, in, and to the above bargained and described premises, with the hereditaments and appurtenances, to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever: provided, however, and these presents are upon the condition, whereas, the said parties of the first part are justly indebted unto the said party of the second part in the sum of $2,000, as evidenced by a promissory note bearing even date herewith, which said note is in the words and figures as follows, to-wit:

"'LAS VEGAS, N. M., September 16, 1882.

"'Two years after date, for value received, we, jointly and severally, promise to pay to Charles T. Cromwell, or order, without defalcation, $2,000, with interest at the rate of 15 per cent. per annum, payable for the first year half yearly, after that quarter yearly; both principal and interest to be paid, with exchange on New York, at the San Miguel National Bank, of Las Vegas, New Mexico, with interest at said rate on each payment for six days from the date of each payment unto said bank, and remittance.'

"And the said parties of the first part being anxious to secure the payment of said sum of money in said promissory note mentioned when the same shall become due and payable, together with all interest that may accrue thereon: now, therefore, if the said parties of the first part, their heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid, to the party of the second part, or to his order, the said sum of money in said promissory note specified, when the same shall become due and payable, together with all interest that may have accrued thereon, then, and in that case, this indenture shall be null and of no effect, and absolutely void.

"But in case of the failure of the payment by the said parties of the first part, their heirs and executors, administrators, and assigns, of the said principal or interest sums of money in said promissory note specified, when the same severally shall become due and payable, together with all interest that may have accrued thereon, then, and in that case, the said party of the second part, or his agent or attorney, is hereby authorized and empowered to take possession of said granted house and real estate and premises; and, after having given notice of the time and place of sale by four hand-bills posted at public places in the county of San Miguel at least twenty days prior to the sale, or by notices published in some newspaper printed in the county of San Miguel at least twenty days prior to the time of sale, expose at public auction, at the south steps of the court-house, in Las Vegas, to the highest bidder, for cash, the said granted premises, house, and real estate, and to execute and deliver to the purchaser or purchasers thereof a good and sufficient deed therefor, and to apply the proceeds arising from said sale to the payment of the costs and expenses of the foreclosure. And the parties of the first part agree to insure, and keep insured, the buildings on said———to their insurable value, and assign the policy to the said Cromwell as further collateral security, such insurance to be in a company to be approved by said Cromwell; and said premises may be bid off by and conveyed to a trustee to be appointed by said Cromwell. Out of the said proceeds shall be paid the interest which shall have accrued, having first paid out of said proceeds the cost of such sale, and the residue, if any should remain, to pay over to the parties of the first part."

The bill was in the usual form.

The defendants Madison M. Milligan and James C. Milligan filed their separate answer, in which they admitted the execution of the mortgage, the receipt of the money the repayment of which the mortgage was given to secure; but allege that they agreed to pay to plaintiff for the use of said money interest in excess of the legal rate, namely, 15 per cent. per annum; that thereby said mortgage became and was illegal and void, and that defendants were under no obligations to pay the debt secured therein; that said mortgage operated as a cloud upon their title; and they pray that it be canceled. There was no appearance or answer by defendant Flora E. Milligan.

At the hearing a decree was rendered for the plaintiff for the principal of the debt, with interest thereon at the rate of 12 per cent.

per annum up to that time; that the mortgage be foreclosed; and the premises sold to satisfy said debt and interest. To review this decree defendants sued out this writ of error, and assign as error the following:

(1) The court erred in rendering a decree in favor of complainant, and in not dismissing the action on the ground that the contract upon which this action was brought was void and illegal for usury expressed upon its face. (2) The court erred in directing a sale of the mortgaged premises.

1. To sustain the first assignment of error, the plaintiffs in error (defendants below) rely upon the act of 1866. Gen. Laws, 421. Sections 1 and 2 of this act provide for licensing pawnbrokers, and limiting the sums to be charged by them for loans of money. Section 3 provides that if any person shall loan money at a greater rate of interest than that established by law, the contract shall be illegal, and the person so offending shall be punished as for obtaining money by false pretenses. In 1872 (Gen. Laws, 414) an act was passed abolishing the plea of usury, and providing that all contracts concerning the payments of money should be legal and binding, according to their intent and meaning. It was conceded on the argument that this act repealed the act of 1866, *supra*. On March 2, 1882, (Acts 1882, p. 43,) an act was passed the first section of which repealed the act of 1872 in so many words. The second section prescribed the maximum rate of interest to be charged upon open accounts and written contracts, and provided that nothing in excess of such maximum could be recovered. Plaintiffs in error contend that the act of 1882, by reason of the repeal of the act of 1872, revived the act of 1866, and that the latter act was in force when the mortgage in suit was executed; that the rate of interest specified in the note secured by the mortgage being in excess of 12 per cent. per annum, brought the entire contract within the provisions of section 3, Acts 1866, and thus rendered it void.

Defendant in error concedes that this would be true at common law, if the act of 1882 was an unqualified repeal of the act of 1872; that is, if it simply repealed the act of 1872, and made no provision on the subject treated of in the repealed statutes of 1866 inconsistent therewith. "By the repeal of a repealing statute (the new law containing nothing in it that manifests the intention of the legislature that the former act shall continue repealed) the original statute is revived." Potter's Dwar. 159.

An examination of the acts of 1866 and 1882, in the light of the rule in Dwarris, will enable us to determine whether the law is as contended for by the plaintiffs in error. Both acts treat of interest upon money loaned. The act of 1866, while allowing interest upon written contracts for the payment of money up to 12 per cent. per annum, declares emphatically that, if more than 12 per cent. be provided for, the contract shall be illegal and the lender indicted and punished as for obtaining money by false pretenses. Thus, in addition to de-

priving the lender of an action upon the contract, it subjects him to punishment and disgrace. The act of 1882 fixes the maximum of interest that may be recovered on such contracts at 12 per cent. per annum, but does not provide a punishment for charges in excess thereof, except the implied forfeiture of such excess. "In written contracts for the payment of money it shall not be legal to recover more than 12 cent. interest per annum," is the language of the act of 1882. If it shall not be legal to recover more than 12 per cent. interest per annum upon written contracts, the converse of that proposition would seem to follow, as a necessary consequence: that it shall be lawful to recover on such contracts 12 per cent. interest per annum. From this it will be seen that the act of 1882 is clearly inconsistent with section 3 of the act of 1866, and "manifests the intention of the legislature that the former act (section 3, Acts 1866) shall continue repealed." Potter's Dwar., *supra*.

We are of opinion, therefore, that the act of 1882, repealing the act of 1872, was not such an unqualified repeal of that act (1872) as to revive the act of 1866, and that the principal of the debt, with interest thereon at 12 per cent. per annum, is valid. The first assignment of error cannot be sustained.

2. In support of the second assignment of error our attention is called to that portion of the mortgage containing the power of sale and distribution of the proceeds, which, after providing for the advertisement and sale, proceeds as follows:

"* * * and to apply the proceeds arising from said sale to the payment of the costs and expenses of the foreclosure. And the parties of the first part agree to insure, and keep insured, the buildings on said ——— to their insurable value, and assign the policy to the said Cromwell as further collateral security, such insurance to be in a company to be approved by said Cromwell; and said premises may be bid off by and conveyed to a trustee to be appointed by said Cromwell. Out of the said proceeds shall be paid the interest which shall have accrued, having first paid out of said proceeds the costs of such sale, and the residue, if any should remain, to pay over to the parties of the first part."

Plaintiffs in error say that the court was not authorized to decree the sale of the premises and the payment of the debt out of the proceeds of such sale, because that portion of the mortgage just quoted does not provide for any such disposition of said proceeds; that, on the contrary, it clearly and distinctly requires that such proceeds shall be applied to the payment of the costs and expenses of the foreclosure, the accrued interest, and the residue paid to the plaintiffs in error. It is insisted with great earnestness that, although the intention of the parties to the mortgage may have been to provide for the payment of the principal of the debt out of the proceeds of the sale of the mortgaged property, as well as the interest, and that such provision was omitted by mistake of the person who wrote the instrument, yet, before such intention can be carried out, the instrument must be reformed. A large number of cases have been cited in support of this position. While agreeing fully with the principles enun-

ciated by these authorities, we fail to see their application here. If the mortgagee had attempted to execute the power of sale, and had after the sale undertaken to pay the principal of the debt out of the proceeds, a court of equity would, in all probability, have enjoined such payment until the instrument could be reformed to express the intention of the parties.

But no such question arises here. From an inspection of the mortgage, the mortgagee, it may be assumed, discovered the defect in the power of sale, and elected to abandon the power, and proceed in a court of equity for a foreclosure in the first instance. This he clearly had the right to do; and, after the court became possessed of the cause for the purpose of foreclosure, it had the power, and it was its duty, to go on and determine fully the rights of all the parties, and distribute the proceeds of the sale decreed in accordance therewith. This the court did, and, as we think, properly. It follows that this assignment of error is untenable, and the judgment should be affirmed. It is so ordered.

LONG, C. J., and HENDERSON, J., concur.

ORMAN v. HAGER.

Filed January 20, 1886.

1. SALE OF GOODS—STATUTE OF FRAUDS—MANUFACTURED FOR SPECIAL PURPOSE.
   Plaintiff agreed to cut, saw, and deliver to defendant, a railroad contractor, along the line of the railroad, certain lumber of special sizes and kinds, used in the construction of narrow gauge railroads, which are not usually kept and sold by lumber merchants. The lumber was to be made from timber on government land, and defendant was to secure permission to use it. *Held*, that this was a contract for work and labor, and not a sale of goods, within the statute of frauds.
2. BREACH OF CONTRACT—DAMAGES—EXPENSES INCURRED.
   Expenses incurred by plaintiff in moving his machinery and force of men to the vicinity of the timber, and while awaiting orders from the defendant, are properly an element of damages for the breach of such a contract.
3. SAME—NOVATION.
   Upon breach of such a contract by defendant, plaintiff entered into a less advantageous contract directly with the railroad company to furnish a much smaller quantity of lumber, requiring less machinery and fewer men than had been prepared and collected for operations under the contract with defendant. *Held*, such new arrangement cannot be considered a novation of the contract on which action was brought.

Error to district court, Santa Fe county.

P. L. Vanderveer and *John H. Knaebel*, for plaintiff in error.

Fiske & Warren, for defendant in error.

BRINKER, J. This is an action of *assumpsit* commenced in the court below to recover of defendant $1,050. The declaration alleges that on August 23, 1882, plaintiff and defendant entered into an agreement, whereby plaintiff agreed to cut, saw, and deliver to defendant, upon the line of the Texas, Santa Fe & Northern Railroad, in Santa Fe and Rio Arriba counties, 1,000,000 feet of sawed rail-

road lumber of sizes suitable for use on said railroad, the contract to be completed on or before December 1, 1882; that defendant agreed to accept and receive from the plaintiff all of said lumber as fast as the same could be delivered to him, and to pay therefor $19.50 per thousand feet, payable on the twentieth day of each month, except 15 per cent. of the amount, which was to be retained by defendant until the completion of the contract, when it should also be paid. That on said day plaintiff entered upon the performance of said contract, and commenced work thereunder by procuring saw-mills and all necessary labor for carrying out the same, and furnished to defendant ——— feet of lumber, as required by said contract, and has always been ready and willing to complete said contract, of which defendant had notice, but that defendant, contriving to injure the plaintiff, did not nor would not perform his part of the agreement, but discharged the plaintiff, whereby plaintiff has lost the profits he would have derived from a completion of the work; that plaintiff was put to great expense in transporting, moving and erecting and taking away a saw-mill to and from the place selected by defendant for the sawing of said lumber, and in wages paid and board furnished divers persons, teams, and wagons employed in and about the cutting and sawing of said lumber, of which defendant had due notice, to plaintiff's damage in the sum of $1,050, and concluded with the common counts. Plaintiff filed a bill of particulars of the items of his demand, among which was the following: Expenses from August 10 to August 22, 1882, waiting orders from Orman to set in canon near San Ildefonso, $438. The plea was the general issue. There was a trial before the court, without the intervention of a jury.

Plaintiff appeared as a witness in his own behalf, and testified as follows:

"On or about July 23, 1882, at the request of the defendant, Orman, who then had a contract with the T., S. F. & N. R. R. Co. to build its road from Santa Fe, N. M., to Espanola, N. M., I made a bid by which I agreed to cut and deliver to him on the line of said road 1,000,000 feet of lumber of the special kinds used in the building of narrow-gauge railroads, said lumber to be all delivered before the first day of November, 1882, and for the price of $19.50 for each thousand feet of lumber so delivered. As soon as I had made that bid, defendant, Orman, and I had a talk together as to my ability to manufacture and deliver the lumber as agreed upon, in which talk defendant agreed to furnish me with a permit to cut said lumber on government land near said road, and I then told him I had two portable saw-mills on sets near Glorieta, N. M., and that with both of them I could supply the lumber according to my bid. Thereafter, within an hour, defendant accepted my bid verbally, and concluded the contract, and I immediately started to Glorieta, where I had my saw-mills in use, and upon reaching there immediately started one of my saw-mills towards the timber tract near the line of said railroad company, and a few days after the first mill was so started I started the other and second mill for the same place. I set my first mill in this timber in Santa Clara canon, near said railroad line, and commenced sawing lumber on my contract with said defendant about the fourth or fifth of August, 1882. I had sawed on that contract about 45,000 feet of lumber with my first saw-

mill; and the second mill, the moving of which was in charge of a man by the name of Watkins, had arrived at and was then in the same timber, and near my first mill at a place called 'San Ildefonso Canon,' and was ready to set and go to work, when defendant came out to my mill in the Santa Clara canon, and informed me that he had turned over the lumber part of his contract with said railroad to said railroad company, and therefore would not accept or receive from me any lumber on my contract with him. I then applied direct to said railroad company for a contract for furnishing such lumber to it, and obtained a contract with it, but the only contract the company would give me was to furnish said company with two hundred thousand feet of lumber per month, which I could and did furnish with one saw-mill,—my first mill. The second mill was a necessity to enable me to furnish the lumber in the time and quantities specified in my contract with Mr. Orman, but was wholly useless and unnecessary to furnish the 200,000 feet per month necessary to be furnished under my contract with the railroad company. When said Orman notified me of his refusal to carry out his contract with me as aforesaid, I protested against his action, and shortly afterwards I saw him again, and told him of the best I could do in the way of a contract with the railroad, and requested him to pay the expenses of moving my second mill from and back to Glorieta, and he then agreed to do so, and, we being then at Espanola, he agreed to come over the next day to see me at the place where my first mill was, and go with me to San Ildefonso canon, where my second mill was in charge of Watkins, and make arrangements to have the second mill taken back to Glorieta at his expense, where alone it was then useful to me. I waited four or five days at my first mill for defendant to come, as he had agreed to, and as he did not come then, I got anxious about the matter, and went over to Espanola to find him and see what was the matter. When I reached that place I found that defendant had gone to the state of Colorado without leaving any word for me. I then immediately went to San Ildefonso canon, and told Watkins what had taken place, and made arrangements with him to take the second mill back to the place from which I had brought it, Glorieta. The actual expense of moving this second mill from Glorieta to San Ildefonso canon and back to Glorieta, to which it was taken, was $1,050, which I paid. This amount was the actual amount the said moving cost. Such expense was wholly incurred for the purpose of enabling me to carry out my contract with defendant, as above stated. This second mill was of no use to me whatever away from Glorieta at the time mentioned. None of the lumber agreed to be furnished by me under the contract with Orman, as aforesaid, was manufactured at the date of that contract, but it was all to be manufactured thereafter, and none of such lumber was the class of lumber dealt in by lumber merchants, but it was all of the special kind and class needed and used in the building of narrow-gauge railroads."

This was all the testimony offered in the cause, except a written contract between plaintiff and the railroad company, which appears in the record, but whether it was offered in evidence, and if so, by whom, we are unable to say, as the record is silent concerning it.

Upon the conclusion of the testimony the defendant moved the court to dismiss the cause, for the reasons that the contract on which the action was brought was void under the statute of frauds; that all evidence introduced by plaintiff was illegal, improper, and irrelevant. This motion was overruled, and defendant excepted. There was a finding and judgment for plaintiff in the sum of $1,050. In due time defendant filed a motion for a new trial, covering sub-

stantially the same ground as the motion mentioned above. This motion was also overruled.

Defendant brings the case here on writ of error, and asks this court to reverse the judgment below, for the following reasons: The court held the agreement to be without the statute of frauds. The court found the agreement not to have been abandoned or merged in the subsequent contract with the railroad company. The court held the defendant liable for expenses in removing the mill, and in keeping men and teams in waiting for orders. The court refused to grant a new trial. The court awarded excessive damages. The court disregarded the variance between the pleadings and proof. It found damages for plaintiff which were not proven.

There are but three questions seriously pressed upon our attention here.

The *first* is that there was a novation of the contract sued on, created by the contract subsequently entered into between the plaintiff and the railroad company. In disposing of this, it is sufficient to say that the position is not supported by the pleadings or proof. Wood, Fraud, § 158.

The *second* is that the contract sued on is within the seventeenth section of 29 Car. II., known as the statute of frauds. This is the main subject of controversy between the parties, and deserves careful consideration. Section seventeen provides that no contract for the sale of goods, etc., for the price of £10 or upwards shall be good, unless some part of the goods is delivered, or something paid to bind the bargain, or in part payment, or some note or memorandum of the contract made and signed by the party to be charged or his agent. Defendant says that this statute is in force in this territory as a part of the common law, and that the contract is void. On the other hand plaintiff insists that the statute is not in force in this territory; but if it is, this contract does not fall within its terms.

Without deciding whether the statute of frauds was adopted by the act of 1876, we will determine whether this contract is such an one as is by it condemned. To do this properly we must see whether this is a contract for the sale of goods, or one for work and labor. This question has never been passed upon by this court, and we are therefore without binding authority, but must seek such light as the adjudicated cases elsewhere furnish.

In England the rule deducible from the old authorities was that the statute applied to contracts for the actual sale of goods where the buyer is immediately liable, without time being given him by special agreement, and the seller to deliver the goods at once. *Towers* v. *Osborne*, 1 Str. 506; *Clayton* v. *Andrews*, 4 Burr. 2101; *Groves* v. *Buck*, 3 Maule & S. 178.

In *Groves* v. *Buck* the defendant agreed to purchase a quantity of oak pins not then in existence, but which were to be cut by plaintiff out of slabs then owned by him, and to be delivered at a future time.

There was a judgment for plaintiff, and affirmed in the king's bench. Lord ELLENBOROUGH, in deciding the case, said:

"The subject-matter of this contract did not exist *in rerum natura*. It was incapable of delivery and of part acceptance; and where that is the case, the contract has been considered as not within the statute."

The later English cases have altered this rule, and, in effect, if not directly, overruled the cases cited above; and, after varying opinions, fluctuating between the doctrine of *Towers* v. *Osborne* on one side and cases holding the other extreme, have settled upon a line of decision, which Mr. Wood has epitomized in the following language:

"If the subject-matter of the contract is such that it will result in the sale of a chattel to be afterwards delivered, then the action must be for goods sold and delivered. If, however, the subject-matter of the contract is such that when completed it will not result in anything which can properly be said to be the subject of a sale, then the action must be for work and labor done and materials furnished." Wood, Frauds, § 296.

In this country there is great conflict of opinion. To endeavor to reconcile the decisions, or extract from them a uniform rule, would be a fruitless task. We must content ourselves by selecting such as commend themselves to our judgment as being grounded upon sound reason. In New York it is held that if a person select unfinished chattels, and have them completed under his special directions, and in a particular manner, the contract is for goods sold, and is within the statute. *Flint* v. *Corbitt*, 6 Daly, 429; *Bates* v. *Coster*, 1 Hun, 400; *Cooke* v. *Millard*, 5 Lans. 243. In *Smith* v. *Railroad Co.*, a case decided in the same state, and reported in 43* N. Y. 180, a contract was entered into for the sale of a quantity of wood which was growing upon plaintiff's land. The wood was to be cut by the plaintiff. This was held to be a contract within the statute. *Downs* v. *Ross*, 23 Wend. 270. The Massachusetts courts have decided upon both sides of the question. In *Mixer* v. *Howarth*, 21 Pick. 205, defendant gave plaintiff an order to complete an unfinished carriage then belonging to plaintiff, and gave directions to have it trimmed with a certain lining selected by defendant. The carriage was to be delivered in a fortnight. This was held not to be a contract of sale within the statute. In *Clark* v. *Nichols*, 107 Mass. 547, a contract was made for the delivery of a quantity of planks, to be sawed from logs, under defendant's directions. The court here adopted the opposite rule to that laid down in *Mixer* v. *Howarth*, and held the contract to be within the statute. In *Goddard* v. *Binney*, 115 Mass. 450, the same court held, in a case where a person ordered a buggy to be built for him by the plaintiff, to be painted and lined in a particular way, and provided with a seat to be made of certain materials, and marked with defendant's initials, that the contract was for work and labor, and consequently not within the statute. In the other states there appears to be the same lack of harmony. Some hold that all executory contracts are within the statute. Wood, Frauds, § 297. Others,

that all executory contracts are not within the statute; that a contract for work and labor may be executory and still be valid. *Cason* v. *Cheely*, 6 Ga. 554, and cases cited.

The result of the doctrine declared by the greater part of the decisions seems to be that when the work and labor is to be performed upon materials belonging to the vendor, and the chattel, when completed, is to be delivered to the vendee, or when, the materials being the property of the vendor, the goods ordered are of the kind usually manufactured by him, and which he generally sold in the ordinary course of business, the contract is within the statute. But when the materials belong to the person to whom the goods are to be delivered when completed, and the other party is simply to expend his skill and labor upon them for the use of the owner, or where the goods to be made are of a special kind which the maker could not sell, unless the person ordering them should take them, the contract is without the statute. Wood, Frauds, § 298.

There are controlling facts in this case which bring it plainly within the rule last stated. The declaration alleges, and plaintiff testified, that the lumber to be sawed and delivered by him to defendant was of a special kind, suitable for use upon the Texas, Santa Fe & Northern Railroad. He also testified that the lumber was the kind used in constructing narrow gauge railroads, and was not the kind usually kept and sold by lumber merchants. He further said that the timber from which the lumber was to be made stood on government land, and that defendant was to obtain permission for plaintiff to go upon this land and procure timber to be sawed. If this be true, and we are bound to be believe it is, for it was not denied, then, surely, it cannot be seriously urged that this was a contract for the sale of goods, but is unquestionably a contract for work and labor, and not within the statute, even if it be held that the statute of frauds is in force here.

The third question is, admitting the contract to be binding, can defendant be held for the expenses mentioned in the last item of the bill of particulars quoted above? This item purports to be for expenses incurred while awaiting orders from defendant, after the contract was made, and plaintiff had moved his machinery and force to the vicinity of the timber to be cut. We think there was evidence from which the court could reasonably infer that these expenses were necessarily incurred by plaintiff in attempting to carry out his contract. Finding no error in the record, the judgment should be affirmed, and it is so ordered.

LONG, C. J., and HENDERSON, J., concur.

MURRAY v. SILVER CITY, D. & P. R. CO.

Filed January 21, 1886.

1. PLEADING AND PROOF—EVIDENCE—INSTRUCTIONS.
In an action against a railroad company for personal injuries, where the allegation of negligence in the declaration is that the defendant, "by its servants, so carelessly and improperly drove and managed its locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its servants, in that behalf, said locomotive engine and train" ran over and injured plaintiff's minor son, evidence that the injury occurred in consequence of the defective construction of defendant's station platform, which was built so near the track that the coaches projected over it a foot, is inadmissible, and an instruction submitting that issue to the jury is error.[1]

2. SAME—OBJECTION—WAIVER.
Where evidence is clearly outside the issue as made by the declaration, defendant's right to object to it is not waived by his failure to do so when it is offered, but if the objectionable testimony is of such a character that it can be easily designated and separated from the other evidence, a motion after all the testimony is in, and before the argument, to exclude it from the consideration of the jury, should be sustained.

Murat Masterson, for appellee.

H. L. Waldo and *Frank Springer*, for appellant.

LONG, C. J. This cause is an appeal from the Third judicial district court of the territory, sitting in the county of Grant. In that court John Murray filed an amended declaration, upon which issue was joined by the defendant in that court, the appellant here. There was trial by jury, and judgment of $3,280 for the appellee. The questions for our consideration are properly presented in the record. The action was for an alleged injury to a child of plaintiff, charged to have been inflicted by the defendant below in improperly driving and managing its locomotive engine and train at the time and place stated in the declaration. To a proper consideration of the points upon which the case must be decided the exact terms of the declaration are important, and here stated so far as necessary to an understanding of the issue tried below. That part of the declaration is as follows:

"For that whereas, the plaintiff, on or about the sixteenth day of February, A. D. 1884, was the parent and master of John Murray, Jr., his child and servant, a boy then under the age of 7 years, who then resided at the home of the said plaintiff, in the town of Deming, in the county of Grant and territory of New Mexico; and whereas, the defendant, on the day and year last aforesaid, at, to-wit, the county of Grant and territory aforesaid, was the owner and used and operated a certain railroad then and there extending through a part of the county aforesaid, which said railroad track then extended.

[1] See Butcher v. Railway Co., (Cal.) 5 Pac. Rep. 359; Kuhns v. Railway Co., (Iowa,) 31 N. W. Rep. 868; Railway Co. v. Brinker, (Tex.) 3 S. W. Rep. 99; Sell v. Lumber Co., (Mich.) 38 N. W. Rep. 451; Mayor v. Wilson, (Ga.) 9 S. E. Rep. 17; Robbins v. Diggins, (Iowa,) 43 N. W. Rep. 306; Railway Co. v. Tompkins, (Ga.) 10 S. E. Rep. 356; Ridenhour v. Railway Co., (Mo.) 13 S. W. Rep. 889.

into a narrow passage-way of a platform, at and near its terminus at the town of Deming, in said county of Grant; and the defendant was then and there possessed of a certain locomotive engine, with a certain train of cars, which, then and there being operated by said defendant, was then and there pushed backward, or thrown by a flying switch, into said open cut or passage-way, said locomotive engine and train being then and there under the care and management of their drivers, then servants of the defendant, who were then and there driving the same along its said railroad into the said passage-way of its said platform provided by said company to receive and discharge its passengers and baggage; and while the said John Murray, the said child and servant of the said plaintiff, with due care and diligence, was then and there upon said platform near said defendant's railroad, at, to-wit, the county of Grant and territory of New Mexico, the said defendant then and there, by its said servants, so carelessly and improperly drove and managed its locomotive engine and train that, by and through the negligence and improper conduct of the defendant, by its servants in that behalf, said locomotive engine and train then and there, at, to-wit, the county of Grant and territory aforesaid, with great force and violence ran against, struck, and threw, with force and violence, the said child and servant, John Murray, Jr., upon the track of the defendant's railroad in the passage-way of said platform, so that the wheels of the said locomotive engine then and there struck and passed upon and over the said child and servant of the said plaintiff, and did then and there break, crush, and mangle the right leg of him, the said child and servant, near the knee joint of his said leg, so that the amputation thereof was necessary and indispensable to save his life; and did otherwise greatly bruise, hurt, and wound the said child and servant, so that he was sick, sore, and maimed and disordered for a long space of time, to-wit, hitherto," etc.

The inquiry arises upon this: What was the issue tendered? That must be determined by the letter and spirit of the declaration, bearing in mind the rule that a plea is to be construed most strictly against the pleader. Apt words are used to state the particular wrongful acts complained of.

"Said defendant then and there, by its said servants, so carelessly and improperly drove and managed its locomotive engine and train that, by and through the negligence and improper conduct of the defendant, by its servants, in that behalf, said locomotive engine and train, with force, violence," etc.

It is the careless and improper manner of driving and managing the train which plaintiff charges to be the cause of the injury. That is the very point in question, without which this action as brought could not be maintained. Suppose a special verdict upon such a declaration were returned, reciting all the other material averments thereof as found for plaintiff, but finding, further, that the only cause of the injury was the improper and negligent construction of defendant's passenger platform at the place of accident, could it be at all sustained as within the issue? A careful reading of this declaration would not suggest to defendant that it was to answer for the negligence of its servants in the careless construction of a passenger platform in such close proximity to the railroad track as to be dangerous for passengers to stand upon while waiting the approach of incoming trains. It is not to be believed the engineer, conductor, and train-

men constructed the platform as a part of their duty in driving and managing the train. Other servants of the defendant must have charge of the construction of platforms.

To hold that negligence in the construction of the passenger platform could be considered under this declaration would be to maintain that negligence might be alleged against the defendant in the acts of one class of its servants, charged with one duty,—to-wit, trainmen in driving and managing the train,—and recovery be had for negligence in their work of a different set of servants, upon other duty, namely, carpenters constructing approaches to the track. What word in this declaration gives the defendant notice that it is to be held liable for the negligence of servants in constructing a passenger platform too near the track, or in such relation to incoming trains as to be dangerous to passengers standing thereon? Every defendant is entitled to have the cause of action alleged against him so specifically stated that he may know with certainty what he is to meet, and that it may bar another action for the same cause, and to have the issue thus made, and not another, tried upon the facts stated.

It is elementary that the evidence must be confined to the issue. If it were permitted to make one issue by the pleadings, and try a different one under the evidence, endless confusion would arise. An examination of the evidence will show how important it is to maintain the rule stated. On behalf of plaintiff, cross-interrogatories propounded to James B. Schultz were read. The statements contained therein defendant, in his motion to exclude from the jury, regarded as outside the issue. They are as follows:

"*Interrogatory* 2. Did not the accident occur on the platform provided by the said railroad company for passengers to get on and off its cars? *Answer.* Yes; it did. *Int.* 3. Was not the passage-way in which the boy was hurt so narrow that the cars projected over the edge of the platform about a foot on either side? *A.* Yes; it was. *Int.* 4. Is it not true that such a boy standing near the edge of that platform, ahead of the cars backing in, would be hidden from the engineer on the engine, and could he not then, in that position, be struck by the cars so backing in? *A.* Yes; he could."

John Murray, the boy injured, testified:

"I was standing on the porch, [which he afterwards explained to be the passenger platform.] The cars were backing in. I rubbed my hands against them. Something hit my foot. I grabbed hold of the hand-holt, and something turned me around, and I fell. I was about two feet from the car. I was so my hand could touch the cars. Something tripped me off and swung me around."

John M. Martin called:

"I was standing on the platform when the cars came down. I saw the little boy just before that standing close to the edge of the platform. I think it was the car-step that knocked the boy off the platform."

J. M. Wiggins:

"I think he had hold of the iron railing with one hand, and the steps struck him, and turned him around."

This evidence, given to the jury by the plaintiff, is quoted to show its bearing upon interrogatories 2, 3, and 4 answered by the witness Schultz.

According to his evidence, the car projected a foot over the platform, and the boy, if standing near the edge of the platform, would be struck by the incoming car. The witnesses quoted state that is exactly where the boy did stand, and that he was there struck by the steps of the car. The jury might very reasonably conclude from this evidence that the platform was built so near the track that the coaches projected over it a foot, as Schultz states, and that the boy, standing very near the edge, was knocked off by reason of this projection, and without any negligence in the actual driving or managing of the train; especially so, as there was evidence tending to show the train at the time of the accident was going at a slow rate of speed, and being carefully managed. Under this evidence we are impressed the jury was urged to find for the plaintiff on ground other than negligence of defendant's servants in "driving and managing the train," and are confirmed in this view by the following from appellee's brief: "We maintain the evidence shows the defendant's depot platform was improperly constructed, and dangerous to the public." An instruction of the court carried to the jury a consideration of the same question. Defendant asked the court to instruct the jury that whether the cars did project over the platform or not made no difference, and this instruction was refused. From all this, it is apparent that the manner in which the platform was constructed with reference to the track was regarded in the court below as important, as a distinct act of negligence, and was so considered, outside the issue, by the jury. We cannot perceive how the act of other servants in the construction of the platform can be legally considered as tending to prove negligence "in driving and managing the train." If the platform was constructed so near the track as to constitute a trap dangerous to life or limb, by reason of improper and unsafe approaches to the cars, that is matter which should be alleged to become admissible for the purposes for which the evidence was used on the trial of this cause.

After all the evidence in the cause was introduced, and before argument to the jury, appellant moved the court "to exclude from the jury all testimony tending to show the cut or platform where defendant moved its train to the depot and discharged its passengers was unsafe and improperly constructed, for the reason that plaintiff does not complain of anything of the kind in the declaration." The motion was overruled, and defendant excepted, and the action of the court thereon is before us. Appellee contends the question raised by the motion cannot be considered here. The record shows when this evidence was first offered and given to the jury defendant did not object. Appellee urges that thereby defendant waived its right to object at a later stage of the proceedings, and could not, after the evidence was

given to the jury, be sustained on a motion to exclude it; and cites authorities to support his contention, which are here considered.

Camden v. *Doremus*, 3 How. 515–530, is a case where, in the trial court, certain depositions were read in evidence. After each deposition was offered by the plaintiff the defendant objected to its introduction. He did not object to any specific part, nor did he state any ground of objection whatever. The supreme court ruled that the objection was so general that it could not be considered in the court below.

In *Hinde* v. *Longworth*, 11 Wheat. 199, an objection was made in the trial court to certain evidence upon specific cause then pointed out. The objection was not sustained, and the cause went to the supreme court for review. Then a new ground of objection was urged, and was not allowed, and the following stated as a correct proposition: "As a general rule, we think the party ought to be confined in examining the admissibility of evidence to the specific objection taken to it." There can be no doubt of the rule stated, but it does not apply to the question here.

Vourman v. *Voight*, 46 Cal. 397, is not in point. In that case action was brought in the lower court against Voight on a contract and Spreckles as his guarantor. It was alleged that Voight agreed to receive and pay for certain liquors. Plaintiff alleged that he had delivered the liquors as he agreed to do; that Voight received them, and paid thereon $22,000, but refused to pay the remaining $2,000 due for the goods so delivered. Spreckles was a defendant under the allegations that he had guarantied payment. Evidence was offered on the trial by plaintiff. It was objected to jointly by both defendants, on the ground stated that it was "irrelevant, immaterial, and incompetent." The evidence went to the jury over objection, and the point carried to the supreme court of California for review. It was there held the evidence offered was admissible as against Voight, and, there having been no separate objection by Spreckles, that the court below was not in error. How the ruling tends to establish that the defendant in this action, by failing to object when evidence was offered, thereby waived the right afterwards to have it, on motion, excluded from the jury, we do not perceive.

Roberts v. *Graham*, 6 Wall. 581, is cited as directly in point. A careful reading of that case shows that in the trial court certain evidence was given by plaintiff without objection. An instruction was asked by the defendant, the legal effect of which was to direct the jury to disregard such evidence. The instruction was refused. The supreme court, upon an appeal of the cause, sustains the action of the trial court, and says:

"It does not appear that the defendant objected to the admission of the evidence, that he moved to have it excluded, or that he made any allusion to the subject, until he asked the court at the conclusion of the argument to instruct the jury."

The court does not say what would have been the duty of the trial court if the defendant before argument had moved to exclude the evidence. The doctrine of the case clearly is, that where no motion to exclude or objection to the evidence is made before argument the court is not bound to instruct the jury to disregard it.

Rush v. *French*, 1 Ariz. 125, is presented as sustaining appellee. In that case it is held, where no ground whatever of objection is made in the trial court to the introduction of evidence, the supreme court will not consider the action of the court below erroneous in admitting it.

The other cases cited by appellee to sustain his contention on this point have been examined, and are clearly distinguishable on principle, from this one. They do not sustain appellee's position. We have not found a case exactly in point. *Pool* v. *Devers*, 30 Ala. 675, is on this question much like the one under consideration. That action was for slander. The court says: "Upon the trial, the plaintiff proved he was a poor man; the defendant did not, at the time when this evidence was introduced, make any objection, but afterwards moved the court to exclude it. This evidence was illegal." It was held the court below erred in refusing to exclude the evidence, and on that ground the case was reversed. The motion in that case to exclude was during the trial, after another witness had been examined. Therein it is stated as a general rule: "It is the duty of the court, at any stage of a cause, to exclude from the jury illegal proof;" and the following authorities are there cited to sustain the proposition: *Bush* v. *Jackson*, 24 Ala. 273; *McCreary* v. *Turk*, 29 Ala. 244; *Pearsall* v. *McCartney*, 28 Ala. 110.

It must be remembered the appellant here clearly stated to the trial court the ground of his motion to exclude in these words: "For the reason that the plaintiff does not complain of anything of the kind in the declaration." It was thus, in unmistakable terms, brought to the attention of the court. An opportunity was given for the exclusion or withdrawal of the evidence, or the plaintiff could have invoked the power of the court for leave to amend.

The objectionable evidence was contained in two interrogatories read by plaintiff, easily designated and separated from the other evidence. But little time was consumed in its introduction. Under the motion made by defendant, no difficulty could have arisen as to what was meant; so the court below could not have based its ruling on the ground that defendant remained silent while valuable time was being consumed, and therefore held to have waived his objection. Entertaining this view, the evidence being so clearly outside the issue, and hurtful, we cannot hold that defendant, by omitting to object when the evidence was offered, thereby waived its right, and was precluded from moving to exclude. Under the circumstances of this case, defendant did not waive its right to object, and the motion to exclude should have been sustained. What the rule should be where

a party sits by and allows a large amount of evidence to go in, and the time of the court to be occupied, without interposing against objectionable evidence, it is not necessary now to decide. The practice of waiting until the evidence is all before the court without objecting is one which we disapprove. It tends to confusion and delay. The better rule, and the one this court will require, unless in exceptional cases, is that the party shall object when improper evidence is offered, and clearly state the ground of his objection. If a motion to exclude is made, it should set out in substance the objectionable evidence, so the motion on its face will contain the portion to which exception is taken. Such a rule would impose no hardship, and tend to that certainty so important in matters of practice.

The following is an elementary rule:

"The evidence offered must correspond with the allegations, and be confined to the point in issue. This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption of the principal fact or matter in dispute; and the reason is that such evidence tends to draw away the minds of the jurors from the point in issue, to excite prejudice, and mislead them." 1 Greenl. Ev. §§ 51, 52, 448.

The evidence contained in the interrogatories herein set out was allowed to remain before the jury in violation of the foregoing rule. The court, over the objection and exception of the defendant, gave the following instruction:

"The jury are instructed that it is the duty of defendant to provide suitable approaches and passage-ways for its engine and cars to come into its public depots; and also to provide suitable platforms for the public at such depots; and also to construct such platforms so that the steps of defendant's cars shall not project over such platforms in such a way as to be dangerous to the public. And if the jury believe from the evidence that plaintiff's son was not a trespasser, and was rightfully standing upon defendant's platform at its depot in Deming, on the sixteenth day of February, 1884, as the train of defendant's came in from Silver City, and that, while so standing near defendant's train, was struck on the leg by a step of one of defendant's cars projecting over such platform, and was, by reason thereof, thrown down upon defendant's track, and the front wheel of defendant's engine passed over his leg, cutting it off,—then the jury will find for the plaintiff; unless they further believe, from the evidence, that at such time the boy was not rightfully upon such platform, and was a trespasser, and that he was injured by his own negligence and want of proper care,—then, in such case, they will find for the defendant."

This is a remarkable instruction considered with reference to the allegations of the declaration. It entirely ignores the element of negligence in driving and managing the defendant's train. The later part of it in effect tells the jury if the boy was rightfully on the platform, and was struck by the cars projecting over it, even though the projection was but an inch, that defendant was liable. That instruction attaches liability to the defendant, even if the train was moving at the rate of a half mile an hour, and the servants all on the alert, and calling upon the boy to leave the platform, with ample time for him to remove. It takes from the jury all question of negligence in the

management of the train, and assumes that the fact of running against the boy while he was rightfully on the platform was negligence as matter of law. He may have been rightfully there, and the defendant at the same time rightfully taking in its train with the utmost care and caution, and the hurt the result of an unavoidable accident, and yet, under that instruction, defendant would be liable. Besides, the first branch of the instruction is clearly outside the issues. It predicates liability on the acts of an entirely different class of servants, and upon wholly different acts from those charged in the declaration. In *Boardman* v. *Griffin*, 52 Ind. 101, the court says:

"It would be folly to require the plaintiff to state his cause of action, and the defendant to disclose his ground of defense, if on the trial either or both might abandon such grounds, and recover upon others substantially different from those alleged."

Instructions must be within the legal issues. *Terry* v. *Shively*, 64 Ind. 106; *Beebe* v. *Stutsman*, 5 Iowa, 275; *State* v. *Gibbons*, 10 Iowa, 118; *Piatt* v. *People*, 29 Ill. 72; *Seckel* v. *Scott*, 66 Ill. 107; *Chicago & A. R. Co.* v. *Mock*, 72 Ill. 142; *Patterson* v. *Doe*, 8 Blackf. 237.

The court below erred in refusing to exclude the evidence referred to in defendant's motion, and in giving to the jury, over defendant's objection, instruction 3, because both evidence and the instruction were outside the issues.

The judgment below is reversed and set aside, and the cause remanded for further proceedings. Costs in this court against appellee.

BRINKER and HENDERSON, JJ., concur.

SEEWALD and others *v.* RAYNOLDS.

Filed January 18, 1886.

USURY—EFFECT ON CONTRACT.

Following *Milligan* v. *Cromwell, ante*, 327, 9 Pac. Rep. 359.

Error to district court, San Miguel county.

O'Brien & Pierce, for plaintiff in error.

Wm. Bresden, for defendant in error.

BRINKER, J. This was an action in chancery to foreclose a mortgage. It was argued and submitted with the case of *Milligan* v. *Cromwell, ante*, 327. The facts are in all respects, except as to parties, property, and amount involved, the same as those in *Milligan* v. *Cromwell*. The principles considered therein under the first assignment of error apply to this case. For the reasons stated in that case the judgment herein should be affirmed, and it is so ordered.

LONG, C. J., and HENDERSON, J., concur.

DOUGLASS *v.* LEWIS and others.

Filed January 26, 1886.

1. STATUTES—CONSTRUCTION—AMBIGUITY.
   Where the statutory terms are of such uncertain meaning or so confused that the court cannot discern with reasonable certainty what is intended, they will be declared void.
2. SAME—SLIGHT INACCURACIES OF EXPRESSION.
   Courts will not declare an enactment void on account of slight inaccuracies of expression.
3. SAME—CARDINAL RULE OF INTERPRETATION.
   The cardinal rule in the interpretation of statutes is to ascertain, if possible, the legislative purpose or intention in the enactment of a law.
4. SAME—SECTION 2750, COMP. LAWS N. M.—WHAT COURT MAY CONSIDER.
   Section 2750, Comp. Laws N. M. 1884, having been enacted in 1852, the court in construing it may look back to that period to ascertain the surroundings of the legislature that passed the act, the language in which it was passed, the difficulties of a correct verbal translation, and other necessary circumstances.
5. SAME—CONSTRUCTION—MEANING OF PHRASES THEREIN.
   In section 2750 of Compiled Laws of New Mexico of 1884 the phrase "hereditary real estate" means "real estate of inheritance;" "possessed of an irrevocable estate in fee-simple" means "seized of an indefeasible estate in fee-simple," and "limited to the following effect" means "construed to the following effect."
6. DEED—IMPLIED COVENANTS, WHEN ENFORCED.
   The covenants raised by law from particular words in a deed will be only regarded as operative in cases where the parties themselves have omitted to insert covenants.
7. SAME—WORDS "GRANT, BARGAIN, AND SELL."
   The words "grant, bargain, and sell," had no technical significance at common law. They have never been held to imply a covenant of any kind, unless under statutory enactment, although they have been commonly used in the granting clause of conveyances.
8. SAME—WORDS CONSTRUED MOST STRONGLY AGAINST GRANTOR—EXCEPTION.
   The rule that the words employed in a deed must be construed most strongly against the grantor, ought not to be enforced in a case where the statute is in derogation of the common law, and should be construed strictly.
9. SAME—IMPLIED WARRANTIES OF SEIZIN NOT FAVORED BY COURTS.
   Implied warranties of seizin are to be discouraged as dangerous, and tending to impose upon a grantor a burden of responsibility which by the conveyance he did not intend to assume.

Appeal from district court, Bernalillo county.

Fiske & Warren and *Stone & Stone*, for appellee, Wallace Douglass.

S. M. Barnes, *John H. Knaebel*, and *Stearns & Douglas*, for appellants, Charles W. Lewis and others.

HENDERSON, J. This is an action of covenant, and was instituted in the court below by the plaintiff, Douglass, on an alleged covenant of seizin contained in a deed of conveyance made by the defendant Charles W. Lewis and Jessie A. Lewis, his wife, on the thirteenth day of May, 1882. On that day Lewis and wife executed and delivered to Douglass this deed, conveying 160 acres of land lying in Bernalillo county, and received therefor $5,333.33, and on the same day put Douglass into possession of the premises. The declaration is founded upon an alleged breach of the covenant of seizin. To the declaration a demurrer was interposed, and overruled by the court. Defendants filed pleas, to which demurrers were sustained. Addi-

tional pleas being filed, issues were joined. Appellants assign 14 alleged errors in the record. We think it unimportant in this case to consider the alleged errors committed by the court in overruling the demurrer to the declaration, or in sustaining demurrers to their first pleas.

The questions discussed in this opinion may be considered under the fourth and eighth assignments of error, which are as follows:

"*Fourth.* The court erred in overruling defendants' motion and grounds for a new trial, and in arrest of judgment." "*Eighth.* The court erred upon the said trial in directing a verdict in this case for the plaintiff, against the remonstrance of the defendants, in any amount whatever; there being no sufficient evidence to support said verdict."

The plaintiff was in possession of the land when he brought this suit, and had not in any way been disturbed in the quiet enjoyment thereof. There was no express covenant of seizin in the deed, but there was both a special and general covenant of warranty. The contention of the plaintiff is that the deed contained an implied covenant of seizin by force of the terms of a statute in force at the date of the execution of the deed, and so the court below held and directed the jury to find for him and assess his damages at the sum paid for the land. It will serve no useful purpose to state what the facts were as shown by the evidence at the trial.

The statute relied on by the plaintiff is as follows, (section 2750, Comp. Laws 1884:)

"The words 'bargained and sold,' or words to that effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: *First*, that the grantor, at the time of the execution of the conveyance, is possessed of an irrevocable possession in fee-simple to the property so conveyed. *Second*, that the said real estate at the time of the execution of said conveyance is free from all incumbrances made, or suffered to be made, by the grantor, or by any person claiming the same under him. *Third*, for the greater security of the person, his heirs and assignees, to whom the said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance."

Appellant's counsel contends that this section is so uncertain and obscure that it must be declared void. That there is some obscurity and uncertainty growing out of the use of several words and phrases in this section cannot be denied. The rule of law on this subject may be stated as follows: Where the statutory terms are of such uncertain meaning or so confused that the courts cannot discern with reasonable certainty what is intended, they will be declared void. *McConville* v. *Jersey City*, 39 N. J. Law, 38; *Cheezem* v. *State*, 2 Ind. 149; *King* v. *State*, 2 Ind. 523; *Sullivan* v. *Adams*, 3 Gray, 476; *State* v. *Liedtke*, 9 Neb. 468; S. C. 4 N. W. Rep. 61; *State* v. *Craig*, 23 Ind. 185; Bish. Writ. Law, 41. Courts will not, however, declare an enactment void on account of slight inaccuracies of expression.

Evans v. *Com.*, 3 Metc. 453; *Haynes* v. *State*, 5 Humph. 120; *State* v. *Cooper*, 5 Day, 250; *People* v. *Shepard*, 36 N. Y. 285.

The cardinal rule in the interpretation of statutes is to ascertain, if possible, the legislative purpose or intention in the enactment of a law. This rule is of such universal recognition that we will not cite authorities in its support. This statute was enacted in 1852. We are warranted in looking back to that period to ascertain the surroundings of the legislature, the language in which the act was passed, the difficulty and improbability of a verbally correct translation into English, and determine by these and other considerations what was meant by the use of the words and somewhat obscure phrases employed in the section as it now appears in the statutes of the territory.

It is conceded that the legislature undertook to pass an act, of which the section was a part, on the subject of the conveyance of real estate, and to copy a statute then in force in the state of Missouri on that subject. The statute was passed in the Spanish language, and has undergone several translations into English. It will be seen that there was an effort to translate an English statute into Spanish, and to enact it in that tongue, and again translate it into English, without any special care being taken to reproduce the statute into English exactly in terms as originally found in Missouri. We think it reasonably certain that the phrase "hereditary real estate" means "real estate of inheritance;" again, "possessed of an irrevocable possession in fee-simple" with like reasonable certainty means "seized of an indefeasible estate in fee-simple;" and that "limited to the following effect" may be read "construed to the following effect." If this be true, we have ascertained with that degree of certainty the meaning of the statute that makes it our duty to uphold and enforce it.

In *Armijo* v. *New Mexico Town Co.*, 5 Pac. Rep. 709,[1] at the last term, Chief Justice AXTELL, in delivering the opinion of the court, went outside of the question properly before it, and in a *dictum* declared this section void. There was no concurrence by any other member of the court in his views on this subject. Hence it need not be considered as in any sense binding. Having disposed of the objection to the validity of the statute, we will look into the record to ascertain whether the pleadings and proofs on the part of the plaintiff were such as to justify the court below in directing the jury to find for him.

The contention of appellant's counsel is that inasmuch as there is no express covenant of seizin in the deed, and that there is a covenant of warranty, the covenant of warranty must be construed and treated as a limitation and restriction in legal effect, in express terms, upon their liability as grantors in the deed. This view was adopted by the supreme court of Mississippi. In *Weems* v. *McCaughan*, 7 Smedes & M. 422, SHARKY, J., in delivering the opinion of the court, said:

[1] Same case, *ante*, 244.

"The covenant raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants. But when the party declares how far he will be bound to warrant, that is the extent of his covenant. The law will not hold him bound beyond it." See Cruise, Real Prop. 449; *Vanderkarr* v. *Vanderkarr*, 11 Johns. 122; *Brown* v. *Smith*, 5 How. 387.

Finley v. *Steele*, 23 Ill. 56, is also directly in point. This case approves the rule laid down in *Weems* v. *McCaughan*, *supra*, and in addition thereto states many reasons, as we think, of the highest public importance why an implied covenant ought not to exist in such cases.

It is very well known that the words "grant, bargain, and sell" at common law had no technical meaning attached to them. They have never been held to imply a covenant of any kind, unless under statutory enactment, although they have been generally used in the granting clause in conveyances. It is true that the words employed in a deed must be construed most strongly against the grantor. This rule, however, ought not to be adopted here for the reason that the statute is in derogation of the common law, and should be construed strictly. As said by the Illinois court, "there is scarcely a court before which this statute has come for construction that has not characterized it as a provision of dangerous tendency, calculated to entrap the ignorant and unwary into liability which they never intended to incur." *Findley* v. *Steele*, 23 Ill. 56. See, also, *Collier* v. *Gamble*, 10 Mo. 473.

Had Lewis written out this statutory covenant, and put it into his deed, and had also inserted the covenant of warranty, it would present a very different question, as by that act it would appear to have been his intention that both covenants should be operative. In such case, the court would enforce both, and thereby give effect to the intention of the parties.

Rawle on Covenants for Title, at page 492, in discussing the effect upon an implied or statutory covenant by the insertion of an express covenant of general warranty, says:

"The effect of this is, of course, to deny to a purchaser the benefit of the statutory covenant for seizin when he has also received an express covenant of warranty, and under such circumstances it would seem that there could never be a recovery without an eviction."

As there is no pretense in this case of an eviction, or any claim whatever of a breach of the covenant of warranty, it follows that the action cannot be maintained, and that it was error in the court below to order a verdict for the plaintiff, and in overruling the motion in arrest of judgment. For these errors the judgment is reversed, and cause dismissed, with costs of both courts to appellee.

LONG, C. J., and BRINKER, J., concur.

STAAB and others v. ATLANTIC & P. R. Co., Garnishee, etc.

Filed January 25, 1836.

1. JUDGMENT IN VACATION—JURISDICTION—STIPULATION.
   A stipulation between the parties to a garnishment proceeding, that the "garnishee may have ten days from this date to answer the garnishee summons; that the said answer may be made in vacation; and that the order or judgment of the court necessary to determine the liability of the garnishee upon its answer may be entered upon the record of said court, the same as if all the proceedings had been during the April term of said court; and that either party may take such steps to determine the liability of the garnishee in vacation the same as if the same might or could have been during the term of said court,"—will not have the effect to confer jurisdiction on a court acting thereunder; and a judgment rendered in pursuance thereof, in vacation, is *coram non judice*, and void.
2. APPEAL—FINAL ORDER.
   Such a judgment, being void, is not a final order from which an appeal will lie.

W. H. Whiteman, for appellees, A. Staab and others.

Childers & Ferguson and *W. C. Hazeldine*, for appellant, Atlantic & P. R. Co., Garnishee, etc.

HENDERSON, J. The plaintiffs, Staab & Co., brought an action of *assumpsit* by attachment, in the district court of Valencia county, against Jay Mohr, and had garnishment process served on the Atlantic & Pacific Railroad Company. Counsel for the plaintiffs and the railroad company, on the tenth day of April, 1883, entered into and filed a stipulation in the cause, the substance of which will be stated further on. On the eleventh day of April, 1883, a day of the term of the Valencia district court, judgment by default was taken against Mohr for $1,919.87. The judgment recites the stipulation and approves it. The substance of that agreement is as follows:

"That the said A. & P. Railroad Company, garnishee, may have ten days from this date to answer the garnishee summons; that the said answer may be made in vacation; and that the order or judgment of the court necessary to determine the liability of the garnishee upon its answer may be entered upon the record of said court, the same as if all the proceedings thereon had been during the April term of said court, and that either party may take such steps to determine the liability of the garnishee in vacation, the same as if the same might or could have been during the term of said court: provided, the same shall be done in time so that final order may be made in the premises on or before the fifteenth day of May, 1883, or as soon thereafter as the presiding judge will consent thereto.

[Signed] "WHITEMAN & STONE,
"Attorneys for Plaintiffs.
"WM. C. HAZELDINE,
"Attorney for Garnishee."

The garnishee answered the interrogatories propounded by plaintiffs, and thereafter, by mutual consent of the parties, the cause, as between the plaintiffs and the garnishee, was transferred to the county of Bernalillo, and docketed in the district court thereof. The amended answer of the garnishee to the interrogatories was not filed until the twelfth day of October, 1883. Exceptions to the answers were filed on the thirty-first day of that month. On the twenty-fifth

day of February, 1884, in vacation of that court, the presiding judge delivered a written opinion, and caused judgment to be entered thereon against the garnishee. It does not purport upon its face to be the judgment of a court at a term lawfully convened.

Section 2193, Comp. Laws, is as follows: "All causes, either in law or equity, finally determined in the district courts may be removed into the supreme court of the territory for review, either by appeal or writ of error." Section 2185 provides that all suits brought in the district courts, that shall have been determined in said courts, may be reviewed, on appeal in this court, upon compliance with certain terms. No question has been made here by either of the parties whether the supposed final judgment in this case is, in contemplation of law, the final judgment of a court, within the meaning of the section of the statute above quoted. This court cannot exercise appellate jurisdiction by appeal or writ of error to review any determination in an inferior tribunal, unless such determination be the final judgment of a court, as prescribed by law. "If the statute requires regular terms to be held for the trial of causes, the court in the intervals between those terms is, for the purpose of conducting trials, in the same condition as though its authority over the case were entirely withdrawn. It is no longer a court. Judicial powers cannot be conferred upon it by consent of the parties; and any judgment rendered upon a trial had in pursuance of such consent is void, and is so wanting in even the color of judicial authority that it will not be reversed upon appeal." *Garlick* v. *Dunn*, 42 Ala. 404; *Brumley* v. *State*, 20 Ark. 77; *Galusha* v. *Butterfield*, 2 Scam. 227; *Ex parte Osborn*, 24 Ark. 479; *Hernandez* v. *James*, 23 La. Ann. 483; *Wicks* v. *Ludwig*, 9 Cal. 175; *Norwood* v. *Kenfield*, 34 Cal. 333; *Doss* v. *Waggoner*, 3 Tex. 515; Freem. Judgm. § 121.

The answers of the railroad company and the exceptions thereto were filed in vacation. We have seen that the supposed final judgment was rendered and entered out of term-time. With the exception of service of process returnable to a term, this entire proceeding began and ended in vacation. The validity of the judgment rests entirely on the stipulation filed in the cause. If that be considered insufficient to confer jurisdiction, the judgment will be void. Terms of courts for the several counties have been provided by statute. These statutes limit the terms to a certain duration. No statutory power has been conferred on the judges to sit in vacation for the purpose of rendering final judgments at law. The agreement of the parties could not confer jurisdiction on the judge to hear and determine this cause in vacation. The proceedings had in the court below being void, it follows that the cause is still pending and undetermined in that court.

The case will be stricken from the docket, and it is so ordered.

LONG, C. J., and BRINKER, J., concur.

COLTER *v.* MARRIAGE.

Filed January, 1886.

PRACTICE—ORDER DURING VACATION UPON MOTION FILED DURING TERM.

An order during vacation dismissing attachment proceedings, and ordering the attached property released, upon a motion therefor filed and argued during term, is void, and the motion is thereafter still pending.

Appeal from district court, Grant county.

Elliott, Pickett & Elliott, for appellant, James H. Colter.

John D. Bail, for appellee, Edwin Marriage.

BRINKER, J. This was an action in *assumpsit*, by attachment. At the July term, 1884, defendant appeared specially and filed a motion to quash "the attachment proceedings," which was argued and submitted to the court, and by it taken under advisement. On the seventeenth day of October, 1884, in vacation, the judge delivered a lengthy opinion, sustaining the motion, and ordered the attachment proceedings dismissed, and the attached property released. From this order the plaintiff appealed. The effect of the order of the judge was to finally dispose of the cause, so far as the attachment and the property seized were concerned, and it, having been made in vacation, was a nullity. Freem. Judgm. § 121.

While section 1829, Comp. Laws 1884, permits the judge to hear and determine motions in vacation, its terms cannot be extended so as to authorize a decision in vacation, in actions at law, which amounts to a final judgment in the case or any branch of it, from which, if rendered in term, an appeal would lie, even though the parties should consent thereto. *Staab* v. *Atlantic & P. R. Co.*, *ante*, 349,[1] (decided at this term.) The action of the judge, therefore, being void, it leaves the motion still pending and undetermined in the court below.

It follows that the cause is not properly here, and must be stricken from the docket. So ordered.

LONG, C. J., and HENDERSON, J., concur.

[1] Same case, 9 Pac. Rep. 381.

BOARD OF CO. COM'RS OF VALENCIA CO. and others *v.* ATLANTIC & P. R. CO.

Filed January 28, 1886.

WRIT OF ERROR—AMENDMENT—TESTE—RETURN-DAY.

A writ of error providing and designating all the essentials of such a writ, under section 517 of the Compiled Laws and the rules issuing out of the supreme court, containing the elements stated in said section, and with return-day as provided for in rule 21, upon a *præcipe* filed therefor with the clerk who issues it in discharge of a ministerial duty, may be amended *nunc pro tunc*, as of the date of the writ, by striking out of the teste the word "associate" and writing in lieu thereof the word "chief," descriptive of the judge, and by adding the return-day in cases where it has been omitted when the writ issued.

Fiske & Warren, for plaintiffs in error.

W. C. Hazledine, for defendant in error.

LONG, C. J. On the fifteenth day of February, A. D. 1884, a bill of complaint was filed in the district court for the Second judicial district of the county of Bernalillo by the Atlantic & Pacific Railroad Company, defendant here in error, against the board of county commissioners of Valencia county and others, plaintiffs in error, to enjoin the collection of certain taxes. Such proceedings were had thereon that on the thirty-first day of October, 1884, the defendants named in said bill were by the court "enjoined and restrained from collecting, or proceeding to collect the taxes in the bill set forth." The plaintiffs seek to have the action thus taken reviewed and reversed. The case is here on what purports to be a writ of error, which is in terms as follows:

"*The Territory of New Mexico to the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, Greeting:* Because in the record and proceedings, and in the rendition of judgment in a certain suit lately pending before you, wherein the Atlantic & Pacific Railroad Company was complainant and the board of county commissioners of Valencia county, Patricinio Luna, sheriff and collector of Valencia county, N. M., and Charles C. McComas, district attorney of the Second judicial district of New Mexico, were defendants, error has intervened, as it is said, to the damage of the said defendants, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, therefore you are hereby commanded to send to the supreme court of the territory of New Mexico, attached to this writ, a copy of the record, and of all proceedings in said cause.

"Witness the Hon. WM. H. BRINKER, associate justice of the supreme court of the territory of New Mexico, and the seal of said court, this twenty-third day of November, 1885. C. M. PHILLIPS, Clerk." [Seal.]

The defendant in error does not appear generally, but enters a special appearance only, and thereon moves to quash the writ of error, dismiss the cause, and assigns the following reasons:

"*First*, because the paper purporting to be a writ of error is made returnable to the supreme court of the territory of New Mexico in general terms,

without naming any day or term at which the same is returnable; *second*, because no summons or citation has ever been served upon the defendant in error, or upon any of its officers or agents, or upon its attorneys of record, or upon any person upon whom due process of law could be had in its behalf."

The plaintiff in error interposes a motion for leave to amend the writ of error *nunc pro tunc*, as of the date of said writ, by striking out of the teste of said writ the name of "Hon. WM. H. BRINKER, associate," and inserting therein the word "chief" in lieu thereof, and by inserting in said writ after the words "to the supreme court of the territory of New Mexico" the words, "at least ten days before the first day of the next term thereof, to be held on the first Monday in January, 1886, at Santa Fe, in said territory, in pursuance of law." The affidavits submitted in support of the motion prove that citation was never served on the defendant in error in this cause. It is contended on behalf of the plaintiff here that leave should be given to amend. To determine that question the court must examine the writ and determine its legal character. If void, it cannot be amended. The following statutory provisions and rules of practice should be considered as bearing upon the matter thus before the court:

Section 1869 of the organic act provides:

"Writs of error shall be allowed in all cases * * * under such regulations as may be prescribed by law."

Section 2194, Comp. Laws:

"The clerk of the supreme court shall issue a writ of error to bring into the supreme court any cause finally adjudged or determined in any of the district courts, upon a *præcipe* therefor filed in his office by any of the parties to such cause, his solicitor or attorney, at any time within one year from the date of such judgment."

Section 517, Comp. Laws:

"All process which shall be issued from said supreme court shall bear teste in the name of the chief justice, be signed by the clerk, dated when issued, and sealed with the seal of the court. All such process shall be made returnable according to law, or such rules and orders as the court may prescribe."

Subdivision 4, rule 21, p. 10, rules:

"All writs of error allowed thirty days before the first day of the next regular term of the supreme court shall be returnable on the first day of such term; when allowed less than thirty days before the first day of the next ensuing regular term of the supreme court they shall be returnable on the first day of the next regular term of the supreme court after such first term."

Subdivision 6, rule 21, p. 10:

"The clerk of the court to which any writ of error shall be directed may make return to the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court."

Section 522, Comp. Laws:

"The said supreme and district courts in the exercise of chancery jurisdiction, arising in all cases and matters in 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."

Section 1869 of the organic act, it will be seen, provides for writs of error, "under such regulations as may be prescribed by law," but does not undertake to define such regulations; while section 2194 of the Compiled Laws makes it the duty of the clerk to issue the writ upon a *præcipe* filed therefor. In the absence of a statutory definition of the term "writ of error," as used in these sections, the words would be given such meaning as the law has fixed and attached to them. It will not, however, be necessary to invoke that rule of construction, because section 517 clearly defines by direct terms what is meant by such words. It is true the expression "writ of error" is not used in that section, but words of broader signification—"all process"—are taken, which must include writs of error. This section says: "Such process shall be made returnable according to law, or such rules and orders as the court may prescribe," leaving the return-day of the writ to be fixed by other provisions. This court, by rule 21, subd. 4, has provided when the writ shall be returned.

Thus, under section 517 and the rules, all the essentials of a writ of error are provided and clearly designated. It issues out of this court, containing the elements stated in said section, and with return-day as provided for in the foregoing rule, upon a *præcipe* filed therefor with the clerk; and in issuing it that officer acts in the discharge of ministerial duty. May the writ so provided be amended? The defendant in error maintains that it cannot, and cites several cases in support of his contention; and urges earnestly that the writ is void and cannot be given vitality by amendment; and quotes the following from *Hodge* v. *Williams*, 22 How. 87, in support of that position:

"An amendment presupposes jurisdiction of the case, and this court have no appellate power over the judgment of the court below, unless the judgment is brought here by act of congress,—that is by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court."

A brief reference to the facts of that case is necessary to properly understand the point really decided. It was a case brought by writ of error from the district court of the United States for the Eastern district of Texas. Judgment below was rendered against John A. Williams. He was dissatisfied and desired to review it. He applied for a writ of error. It was issued, but by a clerical mistake Hodge and others, who did not want a review, were in the writ named as plaintiffs in error, while Williams was named therein as defendant. As the case appeared on the face of the writ, it was brought by a party satisfied with the judgment, and who did not want a review thereof. It was in view of such facts that the above language was used.

The court further observes:

"This court have no appellate power over the judgment of the court below, unless the judgment is brought here by act of congress,—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. Here

there is no appearance for the parties who are named as plaintiffs in the writ; and if we order amendment, we should make them defendants in a suit in which they are not bound to appear in that character."

The turning point evidently was that it did not appear that Williams had sued out a writ, and to amend would be to make a new one. He was in the appellate court as a defendant, and being thus there asked the court to make him plaintiff; and so it is therein said: "The writ of error must be sued out by the party who alleges error." "If it [the writ] were amended here by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law. Upon this principle the court has uniformly refused to amend writs of error,"—not that the court had refused in all cases to amend, but in cases where the amendment made an entire change of parties, and where it appeared on the writ that the party asking the amendment had not sued out the writ of error. The case here is very different from that cited. Here the party who alleges error did file his *præcipe*, sue out the writ, and is plaintiff in error. The supreme court, in *Hodge* v. *Williams* did not intend to declare the broad doctrine "that the courts have uniformly refused to amend writs of error," because it was then matter of judicial history that many amendments of such writs in that tribunal and in others had been allowed. It was in cases where the amendments made a new writ that the court refused to permit them. The term, "upon this principle," in that case clearly indicates the rule intended to be maintained. It will be seen by cases hereafter cited that prior to 1859, the date of that decision, the court had allowed amendments, and of the very character now asked for in this cause.

Course v. *Stead*, 4 Dall. 22, was upon a writ of error to the circuit court of the United States for the district of Georgia. In the supreme court it was objected "that the writ of error was not tested as of the last day of the last term of the supreme court, nor indeed of that term at all, for the court had arisen before the day of its teste." Held by the court: "The objection is not sufficient to quash the writ of error. The teste may be amended by our own record of the duration of the term; and it is of course amendable."

In *Mossman* v. *Higinson*, 4 Dall. 12, a writ of error issued to the same court as in the above cause. The court says: "The return-day of the writ being left blank, it was moved that leave be given to fill the blank;" and leave was given to amend the writ in that particular. In the case it appears, when the writ reached the clerk of the circuit court, he indorsed on the back thereof: "Returnable to the Feb'y Term, 1789." From this it is evident no return-day whatever was named in the body of the writ, and in that particular it was like the one here.

These cases, and others which could be cited, make it apparent that expressions were used in *Hodge* v. *Williams* misleading as to the

established practice in the supreme court on the matter of amendments, unless the facts of that case are carefully observed. In *Course* v. *Stead, supra,* the court evidently regarded the teste as matter of form. The same opinion has been expressed by many courts. In *Ripley* v. *Warren,* 2 Pick. 594, it is said: "Nothing can be more precise matter of form than the teste of a writ. In practice we all know it is considered wholly insignificant." To the same effect are *Hawks* v. *Kenebec,* 7 Mass. 463; *Ferris* v. *Douglass,* 20 Wend. 626.

Upon the foregoing authorities we might with propriety permit the amendments asked, but will mention other considerations which seem to us decisive of the question. Section 522 of the Compiled Laws of New Mexico, before cited, may, as applicable to this case, to make the intent more apparent, be thus stated:

"The supreme court, in reviewing any action of the district court, while exercising its jurisdiction in matters of equity, shall conform its decisions, decrees, and procedure to the laws and usages of the supreme court of the United States."

It is the evident intent of that section, in all cases in equity, where the statutes of this territory and the rules of this court are silent, to refer for the rule of "decision and procedure" to the laws and usages of the supreme court of the United States, so far as they can be applied. We will examine the "procedure and decisions" in that tribunal to ascertain the rule which should control here. Section 1005 of the Revised Statutes of the United States is as follows:

"The supreme court may, at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: provided, the defect has not prejudiced, and the amendment will not injure, the defendant in error."

In this act congress had in view that, for want of a statute allowing liberal amendments, substance was often sacrificed to maintain mere form, and it was to obviate technicalities, and subserve thereby the ends of justice, that the court was given this additional power. The cases demonstrate that the supreme court has given the act a liberal interpretation.

In *Bondurant* v. *Watson,* 103 U. S. 278, that court, upon motion to quash a writ of error, observes:

"Had it [the writ] even colorably issued from this court, it might have been amended under section 1005 of the Revised Statutes, which is certainly very liberal."

National Bank v. *Bank of Commerce,* 99 U. S. 608. Herein "judgment below was rendered October 5, 1878. A writ of error returnable on the second Monday of October next" was issued. The plaintiff in error moved to amend the writ so as to make "the return-day

the first day or the third Monday of the present term, for the issue of a new citation to conform to the amended writ, and for leave to file the transcript and docket the cause." The court holds:

"We think the motion should be granted. Section 1005 clearly authorizes us, in our discretion, to allow the amendment of the writ, and we cannot see that the defect has prejudiced, or the amendment will injure, the defendant in error."

Atherton v. *Fowler*, 91 U. S. 144, is quite in point. On the fourteenth day of July, 1875, the plaintiffs in that case sued out a writ of error directed to the supreme court of California. It is therein said:

"The writ bears teste on the day of its issue, but contains no return-day." "The writ of error may be amended under the authority of section 1005 of the Revised Statutes by inserting the proper return-day."

In the cause before this court, a *præcipe* was filed by the plaintiff, who complains of error below. On this the writ issued, directed to the right tribunal, correctly describing the record and proceedings to be certified. It carried the date of its issue, the seal of the court. In the light of the foregoing authorities, can it reasonably be held to have no more force than a piece of blank paper,—to be nothing and void?

To our minds the contrary is apparent. The court to which it was directed treated it as valid, as returnable to this term, obeyed its command, and certified here the record, which is filed, sought to be reversed. The authorities cited establish that the teste is mere matter of form; that both before the enactment of section 1005 and after that time the supreme court of the United States permitted the teste of such writs to be amended, and allowed the return-day to be added in cases where it had been omitted when the writ issued. In the language of the court in *National Bank* v. *Bank of Commerce*, *supra:* "We cannot see that the defect has prejudiced, or the amendment will injure, the defendant in error." We therefore hold the writ of error may be amended, as asked in the plaintiff's motion, and the motion of defendant in error is overruled; that citation may issue returnable the first day of next term, and that no further action in the mean time be taken.

We concur: HENDERSON, J.; BRINKER, J.

LAMB and others *v.* SAN PEDRO & CANON DEL AGUA CO.

Filed January 30, 1886.

CORPORATE MORTGAGE—BONDHOLDERS—PLEADING.

A bill by bondholders alleging conspiracy between the president of the debtor and others with the trustees under the mortgage to deprive them of their rights by the collusive foreclosure of junior liens is not demurrable because it fails to show that plaintiffs first tried, in vain, to have the trustees act for them.

Error to district court, Santa Fe county.

Fiske & Warren, for plaintiffs in error.

Catron, Thornton & Clancy, Geo. Cuyler Preston, H. L. Waldo, and *Wm. Breeden*, for defendants in error.

HENDERSON, J. Complainants Orsamus Lamb, Joseph W. Jackson, and Frank Maduro bring this bill in their own behalf, and all other holders of certain bonds set out in the bill, against the San Pedro & Canon del Agua Company, Charles W. Pierce, and Louis Downing, trustees; William B. Childers, trustee; E. R. Chapman, William T. Thornton, George William Ballou, George W. Morse, L. Percival Gillies, William C. Gardiner, and Foster T. Dennis. The court below sustained a demurrer to the bill, and complainants electing to stand upon it, the cause was dismissed, and from the order sustaining the demurrer and dismissing the bill this appeal is prosecuted.

The only question, therefore, before us is the sufficiency of the bill. It is very lengthy, and need not be set out in full. The pertinent and essential features of the complaint may be stated as follows: The San Pedro & Canon del Agua Company is a Connecticut corporation, duly organized according to the laws of that state, and authorized to purchase, hold, and convey real estate, and especially mines and mining property of every kind; that this corporation was duly authorized and empowered, according to the laws of the territory of New Mexico, to do business in it; and that prior to the sixth day of April, 1880, the said San Pedro & Canon del Agua Company was the owner of a large mining property, embracing two patented grants lying in Santa Fe and Bernalillo counties, containing in all over 3,000 acres, valuable mainly for the mines located thereon. They allege that this company, on the sixth day of April, 1880, executed and delivered to the defendants Charles W. Pierce and Louis Downing a mortgage deed, which was thereafter duly recorded in this territory, for the purpose of securing the bonds therein mentioned in the sum of $1,000,000 covering the entire property of the company, except a one forty-eighth part thereof; which undivided one forty-eighth part was conveyed in like manner, and for the uses and upon the trusts, mentioned in the first mortgage of April 6, 1880. They allege that these mortgages constitute as to the whole of said property a prior and paramount lien. They further say that it was the object of the said company in executing the said bond and mortgage of April 6, 1880, to raise money with which to develop the mines mentioned; and that, in order to successfully operate said mines, it was necessary to have

an ample and permanent supply of water; and that the said company did, on the twenty-first day of April, 1880, enter into a contract with one Solon L. Wiley for the purpose of constructing a system of water-works or pipe-line from a point in Bernalillo county to the property of the company in Santa Fe county; that this line was so far constructed that it was used to some extent by the company in connection with the mining property. They allege that this pipe-line was a part of the company's property, and covered by the lien of the mortgage. The mortgage was attached as an exhibit and made a part of the bill.

The defendant company had repeatedly defaulted in the payment of interest due on the bonds, nor had complainants ever been furnished with a proper statement of the affairs of the corporation, or permitted to inspect its books; that the defendant George William Ballou had been the president of the company nearly all the time, and had kept the books and papers of the company in his office in New York. The mortgage permitted the trustees Pierce and Downing, upon default in the payment of interest as stipulated in the mortgage, at their discretion, to institute proceedings to foreclose. It further provided that upon default, and the written request of a majority of the holders of the bonds, they were compelled to institute such legal proceedings. The bonds were in the sum of $1,000 each, and 1,000 in all. They allege that they are together the owners of 21, for which they paid value, and received them on the seventh day of April, 1880. The bill contains a more specific detailed statement of the manner in which the alleged frauds were committed, in the following language:

"Your orators, further complaining, show unto your honor that after the execution of said mortgage, and the issue of said bonds to your orators and other holders thereof, the said defendants George William Ballou, Charles W. Pierce, and Louis Downing, trustees as aforesaid, combined and confederated together, and with the said defendants William B. Childers, L. Percival Gillies, William C. Gardiner, Forster T. Dennis, E. R. Chapman, William T. Thornton, and George W. Morse, and other persons whose names are at present unknown to your orators, but who, when known to your orators, they pray may be made defendants to this bill, with apt and proper words to charge them in this behalf, for the purpose and with the intention of defrauding your orators, and the other holders of said bonds, secured by said mortgage; and that in pursuance of said fraudulent purpose and intent on, to-wit, the eighth day of July, A. D. 1884, a certain judgment was recovered and entered in the district court of the First judicial district of the territory of New Mexico, in and for the county of Santa Fe, in favor of said George William Ballou, against the said defendant the San Pedro & Canon del Agua Company, for a large sum of money, to-wit, the sum of about $225,000, as by reference to the records of said court will more fully appear, and to which your orators beg leave to refer for a more full and detailed statement in reference thereto; and your orators are informed and believe, and so charge the fact to be, that no defense was made by said defendant company, or the officers thereof, and said judgment was obtained and entered by fraud and collusion between said defendant Ballou and the officers and agents of said company, in pursuance of said fraudulent conspiracy and combination afore-

said; and that in truth and in fact there was not, at the time of the rendition of said judgment, any moneys justly or legally due or owing from the said company to the said Ballou, or, if any money was so due, the amount of said judgment was greatly excessive, which said judgment now remains unsatisfied and in force in said district court.

"Your orators further state and charge that, in further pursuance and execution of said fraudulent confederation and conspiracy aforesaid, and without the knowledge or consent of your orators, or the other holders of said bonds, on, to-wit, the fourteenth day of July, 1882, the said defendant company executed a mortgage to one William B. Childers, of Bernalillo county, N. M., to secure the payment of a sum of money therein mentioned to divers parties therein named, which said mortgage purported to convey, incumber, and mortgage the said system of water-works hereinbefore mentioned, including the said reservoirs and pipe-line, as in and by said mortgage, which appears of record in the office of county recorder of Santa Fe county, in book C of mortgages, page 579, a copy whereof is herewith filed, marked 'Exhibit D,' and which is prayed to be taken and considered as a part of this bill.

"Your orators are informed and believe that the said last-mentioned mortgage, after the execution thereof, was assigned to one E. R. Chapman; and your orators charge the fact to be that at the time of the execution of said mortgage, and since, there was not, and is not, in fact, any indebtedness due and owing by said defendant company to said mortgagees, or either or any of them; but that if any money whatever was due and owing from said company thereunder, it was so due and owing to the defendant George William Ballou; and that the amount thereof, if any, did not in fact exceed the sum of twenty thousand dollars; and that the said mortgage was executed, devised, and contrived in pursuance of said fraudulent confederation and intent before mentioned, for the purpose of defrauding your orators and other holders of said bonds secured by said mortgage, of which Exhibit A is a copy.

"Your orators further state and charge that the said last-mentioned mortgage so executed to the said Childers, Gillies, Gardiner, and Dennis was legally and equitably junior and subject to the said mortgage so executed to the said Pierce and Downing, as trustees; and that the said last-named mortgage was and is, in law and equity, a prior and paramount lien in favor of your orators, and other holders of said bonds secured thereby, upon all of said property of said defendant corporation hereinbefore mentioned, including the said system of water-works, reservoirs, and pipe-line, tools, implements, machinery, erections, and appurtenances before mentioned, as well as upon said other property of said company.

"Your orators further state and charge that, in further pursuance and execution of said fraudulent conspiracy and confederation before mentioned, the said defendants Charles W. Pierce and Louis Downing, trustees in said first and prior mortgage before mentioned, without the knowledge or consent of your orators or the other holders of said bonds secured thereby, wrongfully and unlawfully signed, executed, and endorsed upon said mortgage to the said Childers, Gillies, Gardiner, and Dennis, before mentioned, a certain writing, in the words and figures as follows, to-wit:

" 'We, as trustees of the loan securing the payment of the bonds of the San Pedro & Canon del Agua Company, consent to the above lien upon the pipe-line so far as we may lawfully use any discretion or rights that are placed in our hands.

CHARLES W. PIERCE,
" 'LOUIS DOWNING,
" 'Trustees.'

"Your orators state and charge that, in and by virtue of the said mortgage, the said Pierce and Downing, at the time of execution of the said last-mentioned paper writing, did not in law or equity have or possess the right or

power to so release the said lien of mortgage in favor of said mortgage to the said Childers, Gillies, Gardiner, and Dennis, and said attempted release thereof was and is, as against your orators, fraudulent, illegal, and void.

"Your orators further state and charge that, in further pursuance and execution of said fraudulent combination and intent before mentioned, although in fact, as hereinbefore stated, said company had not during the years 1882, 1883, and 1884 earned or received any profits from the operation of said mining properties applicable to the payment of the interest or the sinking fund, in accordance with the terms and provisions of said mortgage, of which Exhibit A is a copy, the said defendant Ballou, being the president of said company, and others officers of said defendant corporation fraudulently acting in collusion with him and said other defendants, failed and neglected to furnish any account to the said trustees at the times and in the manner stated and provided in said mortgage deed to said trustees Pierce and Downing, and so failed and neglected to furnish such account for a period of and exceeding three months.

"And your orators, further complaining, state and charge that, in further execution of said fraudulent combination, confederation, and intent above mentioned, on, to-wit, August 5, 1884, the said Charles W. Pierce and Louis Downing, trustees as aforesaid, exhibited and filed in this honorable court their bill of complaint against the said defendant the San Pedro & Canon del Agua Company as defendant therein, the same being cause numbered 1,870 upon the docket of this court, for the purpose of obtaining a decree of foreclosure of said mortgage so executed to them as trustees aforesaid, which said bill remains among the files of said court, and which your orators refer to and pray to be taken and considered in connection with and as a part of this, your orators' bill of complaint; in and by which said bill of complaint said complainants therein pray for a foreclosure of said mortgage and sale of the equity of redemption of said defendant company only as against the said lands of said company hereinbefore mentioned, and not as against the said reservoirs and pipe-line and other property of said company legally and equitably subject to the lien of said mortgage as hereinbefore stated and set forth; and that the said defendant the San Pedro & Canon del Agua Company, by its attorney, fraudulently caused the appearance of the said company to be entered in said suit, and waived any defense thereto, on the seventh day of August, 1884; and afterwards such proceedings were had in said court that by consent of the defendant corporation a decree of foreclosure and sale of the real estate, respectively called and known as the 'Canon del Agua Grant' and the 'San Pedro Grant,' was entered by consent, on the seventh day of August, 1884; and the same now remains of record in said court in said cause, and is respectfully referred to as part of this, your orators' bill of complaint.

"Your orators further state that afterwards, to-wit, on September 13, 1884, under and in pursuance of said last mentioned decree, said real estate was offered for sale, and the same was sold by the master in chancery of this court to defendant William T. Thornton, acting for and on behalf of defendants George William Ballou and George W. Morse, for the sum of $10,500, which was then and there bid and offered for the same, and your orators state that prior to the said sale the said Thornton, Ballou, and Morse, and each of them, had full notice and knowledge of the rights and equities of your orators and others in like condition with them in respect of the premises.

"Your orators state and charge that the said property, including said reservoirs and pipe-line, secured by said mortgage to said Pierce and Downing, as trustees, together constitute a property of great value; and your orators believe and so state that the same exceeds the amount of $1,000,000 in value, and that the said last-mentioned bill filed by said trustees, and said decree thereunder rendered, were fraudulent and collusive as between the said defendants Ballou, Pierce, Downing, Thornton, Morse, and other persons

whose names are unknown, for the purpose of carrying out and executing the said fraudulent conspiracy, intent, and purpose of obtaining possession of the said property, and depriving the said company and your orators and other holders of bonds of the same; and to that end it was and is the purpose, intention, and design of said defendants to obtain title to said lands by virtue of said sale under said decree; and to organize a company of said defendants before named, and other persons whose names are unknown, in collusion with them, and convey said property to a company of which they are to be or become members, and issue one million dollars of preferred stock of said company, and one million dollars of common stock thereof; to pay to your orators, and other bondholders in the San Pedro & Canon del Agua Company, the defendant herein, fifty cents on the dollar for their stock in preferred stock of the said intended corporation; to issue and deliver to defendant Ballou two hundred thousand dollars of preferred stock of said intended company in satisfaction of his fraudulent judgment against said company before mentioned; and to release the said system of water-works, including the said reservoirs and pipe-line before mentioned, to the holders of the said mortgage hereinbefore mentioned, executed to the said Childers, Gillies, Gardiner, and Dennis, who, your orators state and charge, are in fact the said defendant Ballou, his confederates and associates, who are to your orators unknown; by means of which said fraudulent, corrupt scheme, purpose, and intention, your orators state and charge, it is by said defendant proposed and intended to deprive your orators and other holders of bonds secured by said first mortgage of their prior and paramount lien as against the said fraudulent judgment in favor of said Ballou upon said mortgaged property, and also to defraud and deprive them of their prior and paramount lien upon the said system of water-works, reservoir, and pipe-lines, as against said mortgage to said Childers, Gillies, Gardiner, and Dennis, and thereby to enable the said Ballou and his confederates to obtain possession and control of said reservoirs and pipe-line and water supply.

"Your orators state that the said property of said company is perfectly valueless without the said water supply, and that it is proposed and intended, by means of said fraudulent acts before mentioned, to make the said corporation, or its successors in interest, wholly depend upon the said system of water-works for the supply of water which is necessary and essential to the operation and use of the said mining property; and thus compel the said company or its successors to purchase said pipe-line and water supply, or rent water therefrom, from the said defendants, their associates and confederates, at great and exorbitant expense.

"Your orators show unto your honor that for the reasons aforesaid the decree of foreclosure and sale made thereunder to said Thornton, for said Ballou and Morse, and others, their associates and confederates, to your orators unknown, was not in the interests or for the benefit of your orators or the holders of any of the bonds issued on said first mortgage, of which Exhibit A is a copy, except such persons as are confederated and associated together with said George William Ballou, Charles W. Pierce, Louis Downing, and George W. Morse, in the said fraudulent combination and conspiracy before mentioned; and that the said decree of foreclosure and sale thereunder were and are, as against your orators and others in like condition with them, fraudulent, inequitable, and void.

"Your orators further state that under and by virtue of said sale the defendants Ballou and Morse claim to be the owners of said mortgaged property, excepting said reservoirs and pipe-line, and that by virtue of said mortgage, dated July 11, 1882, of which Exhibit D is a copy, the said Childers, Gillies, Gardiner, and Dennis claim some right and interest, prior and paramount to the interests of your orators, in and to said system of water-works, reservoirs, and pipe-line hereinbefore mentioned; and the said Charles

W. Pierce, Louis Downing, and William T. Thornton have or claim some right or interest in and to said mortgaged property, the precise nature and extent of which are to your orators unknown; but your orators state and charge that the different interests the said defendants, or either or any of them, may have in and to said mortgaged property is junior and subject to the prior rights, equities, and liens of your orators, as holders of said bonds under and by virtue of said mortgage, of which Exhibit A is a copy.

"All of which acting and doings are contrary to equity and good conscience."

The bill concluded with a prayer that the mortgage be foreclosed and an account taken and stated of the profits of the company for the years 1882, 1883, and 1884; that a receiver be appointed to take possession of the said property; and that an injunction be granted to restrain the defendants from further interference with the mortgaged estate.

On behalf of appellees it is urged that the demurrer was properly sustained, for the reason that the complainants, as bondholders, could not sue until they had exhausted every possible means at their command to induce Pierce and Downing, as trustees under the mortgage, to act in their behalf. In support of this contention the case of *Hawes* v. *Oakland*, 104 U. S. 450, is cited. That case is not in point. The bondholders in this case do not stand upon the same legal footing as to their right to bring this bill that the stockholders did in that. The bill charges that a fraudulent combination had been formed between the trustees Pierce and Downing and other persons, the purpose of which was and is to defeat them of their rights in the mortgaged property. They charge a state of facts which, if true, put the trustees in a direct attitude of hostility to their interests. They go further, and ask the court to amend and set aside certain acts already committed by the trustees to their injury. We apprehend that a court of equity would entertain no bill filed, even by a stockholder, on the showing made here by the bondholders. Fraud and oppression by the trustees in the most injurious and destructive manner to their legal rights were set out, and a request upon them to bring this suit would have been an idle act, and wholly unavailing.

It is further insisted that inasmuch as complainants do not offer to return the purchase price bid at the sale, or any portion of it, they cannot maintain this bill. It does not appear from the record in this case that complainants ever received any portion of the purchase money, or any benefit from it in any way. The objection that the charges of fraud contained in the bill are too general cannot be sustained.

The bill sets out with reasonable certainty and particularity the facts and acts of the parties relied upon as constituting a fraud upon the complainants' rights. The bill is a proper one, both in form and substance. *Pacific R. Co. of Mo.* v. *Missouri Pac. Ry. Co.*, 111 U. S. 505; S. C. 4 Sup. Ct. Rep. 583; *Terry* v. *Commercial Bank of Ala-*

bama, 92 U. S. 454; *Drury* v. *Cross*, 7 Wall. 299; *Lester* v. *Matthew*, 58 Ga. 403; Story, Eq. Pl. §§ 426–428; *Bornadith* v. *Saxton*, 2 Tenn. Ch. 699; *Jackson* v. *Ludeling*, 21 Wall. 616; *Wardell* v. *Union Pac. R. Co.*, 103 U. S. 651.

For the errors of the court below in sustaining the demurrer and dismissing the bill the judgment is reversed, and the cause remanded, with instructions to that court to overrule the demurrer and to proceed with said cause; and it is so ordered.

We concur: LONG, C. J.; BRINKER, J.

TEXAS, S. F. & N. R. CO. *v.* ORMAN and another.

Filed January 30, 1886.

1. MECHANIC'S LIEN—BILL TO ENFORCE—PLEADING.
   A bill to enforce a mechanic's lien on railroad property, referring to the notices filed, as prescribed by statute, and setting out in detail the work and labor performed and materials furnished, is sufficient, though it does not specifically set out the particular items stated in the notice.
2. SAME—CLAIM AND NOTICE OF LIEN.
   No lien can be allowed for labor and materials not embraced in the claim and notice of lien, and such an item will be stricken from the decree in complainant's favor.

Error to district court, Santa Fe county.

Gildersleeve & Preston, and *Catron, Thornton & Clancy*, for plaintiff in error.

H. L. Waldo, Wm. Breeden, and *John H. Knaebel*, for defendants in error.

HENDERSON, J. Two writs of error were sued out, but embrace in legal effect only one final decree in the court below, as appears from the transcripts of the record returned into this court in obedience to the writs.

In No. 199 a motion was filed in this cause to quash the writ of error. In overruling that motion at this term Mr. Justice BRINKER, in delivering the opinion of the court, entered into a full statement of the facts, and we deem it useless to repeat what was then stated.[1] The two cases will be considered together. This suit was brought in equity by Orman and Crook to enforce a mechanic's lien on defendant's line of railroad, running from Espanola, in the county of Rio Arriba, to Santa Fe, in Santa Fe county. The bill was filed in November, 1883, and a final decree entered in favor of complainants on the thirteenth day of June, 1884, for $29,657.04, and the same declared a lien on the entire property of the defendant company between the points named. Many errors are assigned for our consideration, but we will only look into a few.

Plaintiffs filed in the two counties, in the manner prescribed by law, notice of the lien claimed, and thereafter filed a bill to enforce their demand, referring to the notices as filed, but did not specifically set out the particular items as stated in the notice. The plaintiffs were contractors, in charge of the construction of the division of the road from Espanola to Santa Fe. They set out in detail the work and labor performed and materials furnished in the construction of that part of the line of railroad. The defendant filed a demurrer to the bill, which was overruled, and he assigns the overruling of that demurrer as error. The bill was not drawn, perhaps, with that degree of care and particularity that the nature of the remedy sought to be enforced required, under the decisions of many courts, but this court, at the last term, held that the statute conferring liens of this kind should be liberally construed. All of the substantial requirements of

[1] *Ante*, 308, 9 Pac. Rep. 253.

the statute were complied with, so far as the pleader attempted to follow up the lien embraced in the claim and notice filed before that time. The contracts under which the work was done were dated in May, July, and August, 1882. The notice of lien did not refer to the July contract. The bill seeks to enforce a lien for $10,302.57, the value of bonds in that nominal sum to be issued by the county of Santa Fe, which the defendant company agreed to deliver to plaintiffs in part payment of their work of construction.

This agreement was made on the seventeenth day of July, 1882. No claim of lien arising under the July contract was embraced in the claim and notice of lien of complainants. The action of the master in admitting proof of this item was objected to by the defendant, and the action of the court in approving the report of the master in the allowance of that sum is assigned as error. This objection is well taken. The notice and claim of lien were prerequisites to the creation and enforcement of any lien whatever. The bill, therefore, could not embrace matter not within the claim as filed. By failing to claim any rights springing out of the July contract the lien under that contract, at least, was lost. The proceeding being purely statutory, the courts will not go beyond its terms, true intent, and meaning. The court found that there never had been a full and complete settlement between complainants and the defendant company from the beginning of the work in May until its completion. The answer of the company admits an indebtedness to complainants in the sum of $19,354.57, and that this sum was for work and labor and materials furnished since the first day of September, 1882. It will be seen, by deducting from the decree below the $10,302.57, that the amount admitted in the answer to be due is within a small sum of the amount found by the master and decreed by the court. The record recites notice to the solicitor of the company of the filing of the master's report, and that no exceptions were filed by him.

It appears that at the July term of the district court, on the second day of August, 1884, a stipulation was entered into between the defendants in error and several other lienholders against said company, and an order was entered in pursuance thereof to consolidate the said several causes and to submit to the court their respective claims for priority of lien under the decrees theretofore entered against said company. We think the court below erred in allowing the item of $10,302.57, on account of the alleged failure of the company to deliver the bonds of Santa Fe county under the July contract, but subject to the power of the court below, under the order of consolidation, to determine the rank and priority of liens as between the several lienholders.

The original decree will be affirmed, with directions to that court to modify said decree by striking out the sum of $10,302.57, and to proceed with said cause.

LONG, C. J., and BRINKER, J., concur.

UNITED STATES *v.* FULLER.

Filed January 30, 1886.

CRIMINAL LAW—LARCENY—INFAMOUS CRIME—INFORMATION.

The crime of larceny is an infamous one, for which a person cannot be prosecuted merely upon an information.

Thomas Smith, U. S. Atty., for appellee.

J. Morris Young and *Catron, Thornton & Clancy,* for appellant.

LONG, C. J. This cause is here on appeal from Dona Ana county. In the district court for the Third judicial district, sitting in said county, the United States attorney, on the seventeenth day of March, A. D. 1885, filed a criminal information charging therein by proper legal allegations that the appellant, June L. Fuller, on the ninth day of October, 1884, had committed the crime of larceny, in the manner and form in said information stated. The defendant in the court below appeared to said cause, and moved to quash the information, which was overruled, and to the action of the court therein he excepted. An issue was made upon the allegations of the information, and upon this issue the defendant was tried, found guilty, and sentenced to imprisonment in the southern Illinois penitentiary for a term of three years. From the proceedings below defendant appeals. He assigns for error the action of the court in denying his motion to quash the information, and in support thereof contends that the crime with which he was charged was one which authorized the court upon a finding of guilty to assess an infamous punishment, and therefore that the offense charged against him could be prosecuted only by indictment, and not by information. The objection thus made was properly saved in the record, so it is before this court for determination. We believe the position assumed by appellant to be correct; that the crime charged is an infamous one, which cannot be prosecuted by information. The principle contended for by appellant is clearly settled in the case of *Ex parte Wilson,* 114 U. S. 417; S. C. 5 Sup. Ct. Rep. 935. The crime charged cannot be prosecuted by information. The motion to quash should have been sustained.

The judgment of the court below is reversed, with instructions to that court to sustain the motion to quash the information, and the cause remanded for further proceedings.

HENDERSON and BRINKER, JJ., concur.

TERRITORY *v.* REMUZON.

Filed January 30, 1886.

1. PERJURY—INDICTMENT—SUFFICIENCY.
   It is not sufficient to charge generally that a certain question, upon which the alleged false testimony was given, was or became material, but the indictment must set forth facts showing how it became material.
2. SAME—EVIDENCE—CORROBORATION.
   The old rule that a charge of perjury must be proved by more than one witness has been somewhat relaxed; but the testimony of a single witness must be supported by corroborating evidence or circumstances.

Appeal from district court, Santa Fe county.

William Breeden, Atty. Gen., for appellee.

John H. Knaebel and *Victory & Read*, for appellant.

BRINKER, J. The defendant was indicted for the crime of perjury, alleged to have been committed on the trial of the case of *Zenaida Gutierrez* v. *Defendant*, at the July term of the district court of Santa Fe county for the year 1884. Defendant was tried upon this indictment, convicted, and sentenced to imprisonment in the penitentiary for two years. From the judgment of conviction he has appealed to this court. The indictment charges that "upon the trial of said issue so joined between the parties aforesaid [it] did then and there become and was a material question whether said Lucien J. Remuzon had been at the house of Jose Gutierrez, [meaning the house of the said plaintiff,] between the years 1875 and 1882." There were no facts alleged showing or tending to show how the question as to whether the defendant had been at the house of Jose Gutierrez between those years could be material to the issue then on trial. It is not sufficient to charge generally that a certain question was or became material, but the indictment must set forth facts showing how it becomes material. The omission of these essential averments in this indictment is fatal. *State* v. *Keel*, 54 Mo. 182; 2 Bish. Crim. Proc. § 855; *State* v. *Bailey*, 34 Mo. 350.

The principal witness for the prosecution, Zenaida Gutierrez, testified that defendant had been at the house of Jose Gutierrez several times during the years 1880 and 1881, but she was not corroborated by another witness in the case, nor by a single circumstance. Formerly it required the testimony of two witnesses to prove the falsity of the statements on which perjury was assigned in order to convict. 1 Starkie, Ev. 443; Hawk. P. C. *c.* 46; 4 Bl. Comm. 358. This rule has been in later years relaxed to some extent, but it is still necessary to prove the falsity of defendant's sworn statements beyond a reasonable doubt. This may be done by the testimony of one witness, supported by corroborating evidence or circumstances. But the corroboration must go beyond slight or indifferent particulars; it must strongly support the accusing witness. Whart. Crim. Ev. § 387; *Regina* v. *Baldry*, 2 Ben. & H. Lead. Crim. Cas. 494, and cases cited in note 1; Greenl. Ev. § 257.

The indictment being insufficient, and there being no evidence to support the verdict, the judgment is reversed and the cause remanded.

LONG, C. J., and HENDERSON, J., concur.

TERRITORY *v.* KINNEY.

Filed January 30, 1886

1. APPEALS IN CRIMINAL CASES—CONTINUANCE OF MOTION FOR REARGUMENT.
   Where, after a judgment of conviction is affirmed on appeal, a motion for rehearing is filed, but is not heard at that term, and is argued and taken under advisement at the term following, but is again continued until the next succeeding term, it is still before the court for determination.
2. CRIMINAL LAW—CONTINUANCE—APPLICATION.
   Under Comp. Laws N. M. 1884, § 2050, on an application which is legally sufficient, a continuance must be granted, unless the opposing party will admit that the witness, if present, would testify to the facts stated in the application. The provision of section 2052, Id., allowing the opposite party to file written objections, does not entitle him to deny the allegations of fact in the application, but only to question its legal sufficiency.

Appeal from district court, Dona Ana county.

Wm. Breeden, Atty. Gen., for appellee.

W. T. Thornton, for appellant.

BRINKER, J. The defendant was convicted in the court below of the crime of grand larceny. From the judgment of conviction he appealed to this court. At the January term, 1884, the judgment was affirmed. Thereupon defendant filed a motion for a rehearing. This motion was not disposed of at that term. At the January term, 1885, the motion was argued, submitted, and taken under advisement, but before it was determined there was a general order of continuance made, and court adjourned. The attorney general now insists that this court cannot consider the motion, because, as he claims, it should have been decided at the January term, 1884, and not having been then decided it has lost its vitality, and we cannot now open the judgment for the purpose of considering it. This position is untenable. The necessary steps to open the judgment were taken by defendant at the term when it was rendered, by the filing of the motion. It is therefore still before us for determination. *Bronson* v. *Schulten*, 104 U. S. 410. The cause was reargued with the motion for rehearing. Defendent was indicted at the March term, 1883, and at the same term he filed a motion and affidavit for a continuance upon the ground of the absence of material witnesses. This motion and affidavit were in strict compliance with the requirements of the statute concerning continuances. Section 2049, Comp. Laws 1884. Section 2050, Comp. Laws 1884, provides that if the application for a continuance be insufficient it must be overruled, otherwise the cause shall be continued, unless the opposite party will admit that the witness, if present, would testify to the facts stated in

the application. If this admission is made the cause shall proceed; if not, then the continuance goes as of course. Section 2052 permits the party opposing the continuance to file written objections to the application, setting forth wherein he thinks it is insufficient.

Upon the filing of the application for continuance by defendant the court permitted the district attorney to file objections to it, denying in a large measure the truth of the facts stated, and also allowed to be filed the affidavit of Albert J. Fountain in support of the objections. The defendant objected to the filing of this affidavit. His objection was overruled, and he excepted. The defendant was then arraigned, and the trial proceeded, resulting in his conviction.

The evident intent of the statute is not to allow the party opposing the continuance to deny the truth of the matters alleged in the application. He can only object to their legal sufficiency. Were it otherwise, why require him to admit that the witness, if present, would testify to the facts stated, in order to prevent a postponement of the trial? If it was not proper to permit the denial of the truth of the affidavit it was error to allow the filing of counter-affidavits over the objections of defendant. The record shows that defendant had been apprehended but a short time before his trial, and had been in jail constantly since his arrest; that as soon as he was informed of his indictment he made every preparation for trial, by giving to his counsel a list of his witnesses, and causing process to be issued for them and placed in the hands of the sheriff for service. This was all he could be required to do. If those witnesses, or others by whom he could prove the same facts, were not present when the cause was called for trial, then, upon his making the proper application therefor, as was done here, he was entitled to a continuance. The statute is mandatory, and there is no room for the exercise of discretion by the court.

The motion for a rehearing is sustained, and for the errors committed by the court below the judgment is reversed and the cause remanded.

LONG, C. J., and HENDERSON, J., concur.

BROWNING v. Estate of BROWNING, Deceased.

Filed February 18, 1886.

1. LIMITATIONS—PROMISSORY NOTES—MEXICAN LAW.
The provision of the act of congress organizing the territory of New Mexico, § 10, that "the supreme and district courts respectively shall possess chancery as well as common-law jurisdiction," applies to procedure only, and did not substitute for the Mexican and Spanish jurisprudence the rules of the common law regulating property. The limitation of actions on notes, as fixed by the Mexican laws at 10 years, remained unchanged.

2. SAME—COMMON LAW—ACT 21 JAC. I.
By act of January 7, 1876, (Comp. Laws N. M. 1884, § 1823,) providing that "in all courts of this territory the common law, as recognized in the United States of America, shall be the rule of practice and decision," the common law was substituted for the Mexican and Spanish system, and the statute of limitations, (21 Jac. I.,) by which actions on promissory notes are limited to six years, went into effect.

3. SAME—EXTENSION OF PERIOD.
The act of January 23, 1880, (Comp. Laws N. M. 1884, § 1870,) provided that suits on all causes of action then existing might be commenced within two years from the passage of that act. By act of January 21, 1882, (Comp. Laws N. M. 1884, § 1871,) this period was extended for two years longer. *Held*, that action on a promissory note, due Nov. 2, 1872, and presented for payment to the administrator of the maker in July, 1883, was not barred.

4. CLAIMS AGAINST DECEDENT'S ESTATE.
Where the law prescribes no form of presentment of a claim against the estate of a decedent, the fact that it was sent to the probate clerk and by him presented to the administrator for settlement is a sufficient presentment, if done within one year after decedent's death, as required by section 2225, Id.

Appeal from district court, San Miguel county.

T. B. Catron and *John D. W. Veeder*, for appellant.

O'Bryan & Pierce, for appellee.

BRINKER, J. On November 1, 1872, C. R. Browning executed and delivered to M. E. Browning his promissory note for $1,000, due one day after date, with interest from date at the rate of 10 per cent. per annum, payable annually, and, if not so paid, to become a part of the principal, and bear the same rate of interest. On November 14, 1882, C. R. Browning died. This proceeding was commenced in the probate court of San Miguel county, where the note was allowed against the estate of decedent on July 10, 1884, from which Emma T. Browning, administratrix, appealed to the district court. The record shows that in 1883 one C. A. Rathbun acted as administrator, and that afterwards, and in 1884, Emma T. Browning acted as administratrix of the estate; but it nowhere shows the date of the letters of administration of either, and if those of Rathbun were revoked, such revocation does not appear.

In the district court, the note, with an indorsement of the payment of $100 on April 26, 1882, was introduced in evidence by plaintiff, over defendant's objection. To the note was attached an affidavit of plaintiff showing that he was the owner of the note, and the amount due upon it after allowing all just credits. This affidavit was offered in evidence by plaintiff, but rejected by the court. To this action of the court plaintiff saved an exception. Plaintiff then produced as a witness Jesus Maria Tafoya, who was duly sworn, and testified as follows:

"I am and have been for years clerk of the probate court of San Miguel county. [Here envelope, claim, and affidavit shown witness.] I know these. I received them, I think, by mail, through the post-office in Las Vegas, from the plaintiff's attorneys. They were not sent to me in my official capacity, but in my private capacity. Accompanying them was a letter from her attorneys, which I have now lost, and cannot find, which said that they had heard of me, and wanted me to put the claim in the hands of some good lawyer for collection against the estate. I think they came to me in my private capacity, and not officially, and that they came to me through the post-office. It came in this envelope. The claim was never marked filed. It was presented by John D. W. Veeder for approval in July, 1884."

On the following day, said witness came voluntarily into court, and, after stating that he had more fully considered the matter and examined his correspondence, asked to correct his testimony as before given. He then testified as follows:

"I received this claim, and the affidavit attached to it, in this envelope, on or about the eighteenth day of May, 1883. I know this from correspondence from the attorneys, who sent it of that date, referring to this claim, and asking what had been done with it. The claim came by Wells, Fargo & Co.'s express. As I recollect, Jack Churchill, who was then my deputy-clerk, receipted for it to the express company, and handed it to me. I tore off the outside envelope, which I think was directed the same as this. I then, without opening it, placed it in my safe, in the office of the probate clerk and county judge, where it remained until the next regular term of the probate court, when I took it out, and gave it to the judge of probate court, while court was in session. The judge opened it, and found this claim and affidavit, and directed me to present it to C. A. Rathbun, then administrator of the estate of C. R. Browning, deceased, for approval. A few days afterward Rathbun came into the probate clerk's office, and I presented this claim and affidavit to him. Rathbun told me he would look at his books, and see if the claim was correct. I heard nothing more of it until July, 1884, when J. D. W. Veeder, as attorney for Mrs. M. E. Browning, made application to the probate judge to have the administratrix summoned to show cause why the claim should not be approved. The letter directing me to place the claim in the hands of some good attorney was received some time after the claim. The attorneys who sent the claim to me were dissatisfied by the delay, and then instructed me to place it in the hands of an attorney. I made no file-marks on any of these papers, nor is there any entry upon the records of my office showing when I received them. It is not customary in this office to put file-marks upon claims left there for presentation to the court, nor is it customary to make any record of them until some action is taken by the court."

Plaintiff then offered a letter from C. A. Rathbun dated June 2, 1883, addressed to plaintiff's counsel in Pueblo, Colorado, in which he states, in substance, that he had received a letter from said counsel concerning plaintiff's claim against the estate; that decedent had, in his will, directed its payment; that he would approve the claim at the July term of court; that there was no necessity for incurring expense, as he would take pleasure in paying it as soon as he could in justice to the estate. This letter was rejected by the court, and plaintiff again excepted. The cause was submitted to the court without the intervention of a jury, and judgment was rendered for the estate. From this judgment M. E. Browning appealed to this court.

To sustain the action of the court below, defendant contends that the note was barred by the general statute of limitations, but, if not, then it was barred by the special statute of limitations, because, as she claims, it was not presented to the administrator for settlement within one year from the death of the maker. In support of the first proposition, counsel insist that the organic act of 1850 introduced here the common law of England, and that the statute of 21 Jac. I., limiting actions upon promissory notes to six years, thereby became the statute of limitations of this territory. Section 10 of the organic act is as follows: "The supreme court and the district courts, respectively, shall possess chancery as well as common-law jurisdiction."

Did this section of the organic act bring into this territory the common law, in its broadest sense, or did it simply establish a system of procedure according to the course of the common law? In other words, did it bring into full operation the body of the common law, which creates, defines, limits, and extends the rights of persons and property? or did it merely give us a method by which rights already existing, defined, and limited by some other law should be enforced in courts created by that act?

Strange as it may appear, this question has never been decided by this court, although the judges have at various times let fall expressions which to the superficial reader would seem to indicate an opinion on the part of the court that the common law in its widest scope was in force here by virtue of the provisions of section 10, *supra;* but a careful examination of the decisions will show that the judges did not intend to be so understood.

Leitensdorfer v. *Webb*, 1 N. M. 34, was a case in which the rights adjudicated arose prior to the passage of the organic act, but the suit was commenced afterwards. In that case the court say:

> "By the tenth section of the organic law it is provided that the supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction. Jurisdiction is properly the power to hear and determine causes. The common law, then, at least so far as to control and regulate the proceedings of the district court in the hearing and determining of causes, has been extended over this territory by act of congress, and that court, when it proceeds to hear and determine, must observe the course of proceeding prescribed by the common law, although the rights and liabilities of parties are to be determined according to the Mexican laws in force, and the acts of congress, and of the legislative assembly, applicable to the subject."

In *Pueblo of Laguna* v. *Pueblo of Acoma*, 1 N. M. 220, it was contended that the action was barred by the statute of limitations. The court say: "If defendant intends to insist upon the statute of limitations, he should plead it." But whether the court had in mind the statute of James I. or the Mexican law of prescription is left to conjecture. In *Arellano* v. *Chacon*, 1 N. M. 269, it was held that the district courts might try issues by juries, set aside verdicts, and grant new trials; that these high powers were expressly conferred as a

part of the common-law jurisdiction established by the organic act. In *Territory* v. *Maxwell*, 2 N. M. 250, the court, in deciding a criminal case founded upon a territorial statute, declined to follow the rule laid down in England concerning the description of property in an indictment for embezzlement.

Thus it will be seen that this court, at the most, has only recognized the common-law procedure regulating issues, jury trials, setting aside verdicts, and granting new trials. We apprehend that in suits at law, involving more than $20, a jury could have been demanded, from the time of the Conquest, without regard to the organic act. The seventh amendment to the constitution expressly declares that in such cases the trial by jury shall be preserved. This provision is self-enforcing, and established the right to jury trials, independent of any action by congress or the legislature. So the fact that such trials have been had, adds no weight to the argument. Precisely what is meant by the term "common law," as used in the section under consideration, seems never to have been accurately and clearly defined.

In *Parsons* v. *Bedford*, 3 Pet. 433, Judge STORY, in discussing the seventh amendment to the constitution, says:

"The phrase 'common law,' found in this clause, is used in contradistinction to 'equity' and 'admiralty' and 'maritime jurisprudence.' * * * When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the constitution denominates, in the third article, 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized. Probably there were few, if any, states in the Union in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition and of foreign and domestic attachments might be cited as examples, variously adapted and modified. In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they assume, to settle legal rights."

The organic act is the constitution of this territory, (*Ferris* v. *Higley*, 20 Wall. 375,) and the legislature cannot make laws in conflict with it, nor in conflict with laws adopted by it. Now, if section 10 of that act imported the common law in all its parts, all acts of the legislature in conflict with the common law—such as allowing persons to testify, in civil causes, when their rights were to be determined therein; allowing defendants to be witnesses in their own behalf, in criminal cases; and various other statutory provisions which were unknown to and in the very face of the common law—would be invalid. But we know that such statutes have been passed here, and in other territories, having precisely similar provisions in

their organic acts, and they have never been questioned. On the contrary, they have been accepted and obeyed by the people, and uniformly enforced by the courts; and, indeed, their validity has been expressly recognized by the supreme court of the United States.

In *Parish* v. *Ellis;* 16 Pet. 451, (appealed from the territory of Florida,) TANEY, C. J., says:

"* * * In many of the states and territories, the ancient common-law remedy for the purpose of obtaining an allotment of dower, as well as the remedies for other mere legal rights, has been changed for others more convenient and suitable to our habits. Yet they are regarded as cases at law, although they are not carried on according to the forms of the common law."

In the leading case of *Hornbuckle* v. *Toombs*, 18 Wall. 648, BRADLEY, J., discussing the ninth section of the organic act of Montana, which is in the same language as section 10 of the organic act of this territory, said:

"Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been invested with the enactment of the entire system of municipal law, subject also to the right of congress to revise, alter, and revoke at its discretion. * * * From a review of the entire past legislation of congress on the subject under consideration, our conclusion is, that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as aforesaid, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative assemblies, and to the regulations which might be adopted by the courts themselves."

The court in this case overruled several former decisions, and held the "practice act" of Montana, which provided that there should be but one form of civil action, to be within the power of the legislature to enact, and consequently valid.

From what has been said, it would seem clear, both upon principle and authority, that congress did not intend, by the use of the words "common law" in the organic act, to speak into existence here the common law of England in all its fullness. This view is strengthened by the reflection that, when this territory was acquired, it was inhabited by an enlightened, civilized people, possessed of a full and complete system of municipal laws, creating, defining, limiting, and extending their rights of persons and of property. It cannot be reasonably held that the purpose of congress was to strike down and destroy this system of laws, under whose influence these people had always lived, and impose upon them, by these equivocal words, laws in a language foreign to them, and of which they had no knowledge,—laws whose terms, conditions, penalties, extent, and limitation bore

little, if any, resemblance to those by which they had always been governed. *U. S.* v. *Percheman*, 7 Pet. 51.

The just interpretation of the section under review is that it created courts of general jurisdiction in which all rights of persons and things, whether arising under the civil law as it obtained in Mexico prior to the treaty of cession, or under the common law, the acts of congress, or the statutes of the territory, should be protected and enforced. *Ferris* v. *Higley, supra; Territory* v. *Flowers*, 2 Mont. 531; Kearney, Code, C. L. 1865, p. 512.

The limitation of actions on promissory notes, at the time the note in question was executed, was fixed by the Mexican laws at 10 years after the cause of action accrued. Schmidt's Laws of Spain and Mexico, 293, art. 1386, Leyes de Toro, 63d. Thus the law of limitation stood until January 7, 1876, when the legislature enacted that "in all courts of this territory, the common law, as recognized in the United States of America, shall be the rule of practice and decision." Section 1823, C. L. 1884.

To properly determine what is meant by this section, and what parts of the common law, or whether the whole, the legislature intended to establish as the rule of practice and decision, is exceedingly difficult. This difficulty arises mainly from the use of the words "as recognized in the United States of America." There can be no common law of the United States as a unit. The general government is composed of a number of independent sovereign states, each of which has its local customs, usages, and common law. *Wheaton* v. *Peters*, 8 Pet. 658. What is common law in one state is not necessarily so in another. Id. In the various states, the common law "as recognized," is by no means uniform. This want of uniformity springs from the fact that in many of them the legislatures have adopted the common law and certain English statutes passed by parliament prior to a particular date fixed in the act of adoption. In most of those states which were a part of the original 13 colonies, and which have not adopted the common law and the British statutes by legislative enactment, the courts have defined the common law to be the *lex non scripta* and such statutes of Great Britain of a general nature, in amendment of the common law, not locally inapplicable, nor in conflict with the constitution of the United States, the acts of congress, or the constitution and laws of the particular states, and which are suitable to the condition of their inhabitants, in force at the time of the emigration of our ancestors. *Patterson* v. *Winn*, 5 Pet. 233; *Wheaton* v. *Peters*, 8 Pet. 658; Cooley, Const. Lim. § 23, *et seq.*

Judge Cooley says, (Const. Lim. § 25:)

"The colonies had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted—*First*,

of the common law of England, so far as they had tacitly adopted it as suited to their condition; *second*, of the statutes of England or of Great Britain amendatory of the common law, which they had in like manner adopted; and, *third*, of the colonial statutes. The first and second constituted the American common law."

Again the same author says:

"The acts of parliament passed after the settlement of a colony were not in force therein unless made so by express words or by adoption. Those amendatory of the common law, if suited to the condition of things in America, were generally adopted by tacit consent." Id. § 24, note 2.

From this it seems that the common law, and such British statutes as were suited to their condition, became the heritage of our early ancestors until they had formed governments of their own, called "colonial;" but afterwards such statutes as were passed by parliament did not become law in the colonies, unless so expressed in the statute, or unless they were adopted expressly or tacitly. The reason for this appears to be that they had legislatures competent to pass laws for their own government. But is this true as to territory acquired subsequently, and which formed no part of the original colonies?

"The evidence of the common law consisted in part of the declaratory statutes we have mentioned, * * * but mainly in the decisions of the courts. * * * While colonization continued, that is to say, until the war of the Revolution actually commenced, these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also, if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided." Cooley, Const. Lim. § 25.

Another eminent authority, in tracing the sources of the common law in this country, says:

"* * * So we shall find that at the Revolution of 1776, by the constitutions of most, if not all, the states, the great body of the common law, and such of the English statutes as were not repugnant to our system, were preserved and adopted as binding upon us. But the common law of England is perpetually fluctuating; and it would have been altogether inconsistent with proper notions of national independence to give to the law of a foreign country any permanent control over our tribunals or our people. It was therefore necessary to fix a time after which any changes in the law of the mother country would have no effect here. And that period is the Revolution. That epoch is the era of our independence, legal as well as political, and we recognize no foreign law posterior to that period binding upon us as authority." Sedg. St. & Const. Law, 10. "The great body of the common law of England, and of the statutes of that country as they existed in 1776, are then, so far as applicable to our condition, the basis of our jurisprudence." Id. 14.

From the authorities cited it is clear that there are three classes of "common law as recognized in the United States of America:" *First*, in those states which were a part of the original colonies, and which have not by legislation adopted statutes passed prior to a par-

ticular date, the unwritten law, and such general British statutes, applicable to their condition, as were in force at the time of the formation of the colonial governments, and such as were afterwards adopted, expressly or tacitly, constituted the common law; *second*, in those states which have adopted the common law, and the British statutes passed and in force prior to the date fixed in the act of adoption, and were of a general nature, and suitable to their situation, such common law and statutes constitute their common law; and, *third*, in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and condition of the people, are the common law of such states and territories.

This territory belongs to the last class. It was not a part of the original colonies, but was acquired in 1848. The legislature has not in terms adopted any British statutes, nor has it undertaken to define what is embraced in the words "common law" used in section 1823, *supra*. We are therefore of opinion that the legislature intended, by the language used in that section, to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country.

The statute of limitations (21 Jac. I.) falls within this category, and became the law of limitations here in 1876, abrogating the Mexican law of prescription. By this statute (21 Jac. I.) actions on promissory notes were limited to six years, and the statute continued in force until January 23, 1880, when the legislature passed an act (section 1870, C. L. 1884) by which it was provided that suits upon all causes of action then existing might be commenced within two years from the passage of that act. On January 21, 1882, just two days before the time limited in the act of 1880 had expired, section 1870, *supra*, was amended so as to extend the time for commencing actions upon existing causes for two years longer. Section 1871, C. L. 1884. This proceeding was commenced in the probate court, before the expiration of the time limited in section 1871, and could not have been barred by the general statute of limitations. *Sohn* v. *Waterson*, 17 Wall. 596.

It has been pressed upon us with much earnestness that these statutes only apply to suits commenced in the district court by bill or declaration, and have no application to proceedings in the probate courts. In this counsel are in error. Section 1870 says: "Any

person having or being entitled to a cause of action * * * may commence suit therefor," etc.; and section 1871 says: "Any person who has or was entitled to a cause of action * * * may commence suit therefor," etc. There is nothing in either of these sections so restrictive as to sustain counsel's contention. These statutes, in the absence of words showing a contrary intent, will apply to proceedings in any court of the territory, unless there is some other provision in conflict with them. We have been unable to find such other provision.

The evidence shows that this claim was sent to the probate clerk in May, 1883, and by him presented to the administrator for settlement at the next term of probate court thereafter, which was in July, 1883. The administrator said he would examine his books to see if it was correct.

The law prescribes no form of presentment, and, in the absence of an objection by the administrator as to the manner of presentment for approval or settlement, we think this was sufficient. This was done within one year after decedent's death, as required by section 2225, C. L. 1884. We see no error in the action of the court in rejecting the affidavit. We are aware of no statute making such an affidavit competent evidence, nor was there error in rejecting the letter from Rathbun. It did not purport to refer to the note, but to some claim against the estate provided for in the will. But even if it did refer to this note, the letter to which it was an answer evidently was not a presentation of the claim for settlement, but was simply an inquiry, or at most a demand.

For the errors committed by the court in holding the note barred by the general statute of limitations and the statute concerning the settlement of demands in one year from the death of the deceased, the judgment is reversed, and the cause remanded.

HENDERSON, J., and LONG, C. J., concur.

BOARD OF CO. COM'RS OF VALENCIA CO. and others *v.* ATCHISON, T. & S. F. R. CO.

Filed March 29, 1886.

1. TAXATION—LEASED PROPERTY—ASSESSMENT.
   Under Comp. Laws N. M. § 1812, providing that property under a lease shall be taxed to the lessor unless listed by the lessee, property under a railroad lease cannot be properly assessed to lessee company operating the road under the lessor's charter.[1]
2. SAME—FAILURE TO RETURN—LISTED BY ASSESSOR.
   Comp. Laws N. M. 1884, §§ 2822-2824, require the assessor to exact from each taxable inhabitant of the county a list and description in detail of all his property, real and personal. Id. § 2825, provides that, upon the failure of any person to return such list, the assessor shall make it out according to the best information he can obtain. *Held* that, while the law does not require such list by the assessor to be strictly accurate, or the valuations to be correct, yet it is essential to the validity of the tax that some description or list be made. The assessment of the property of a railroad company, real and personal, for one year in a single item as $1,000, and in other years in two items, real and personal property, each at $250,000, is void.
3. SAME—SUIT TO ENJOIN COLLECTION—TENDER.
   In a suit to enjoin the collection of taxes, when the original assessment was void, there is no necessity for a tender of such sum as might be equitably due on account of such taxes.[1]

Error to district court, Bernalillo county.

E. A. Fiske and *H. L. Warren*, for plaintiff in error.

H. L. Waldo and *James Hagerman*, for defendants in error.

HENDERSON, J. The Atchison, Topeka & Santa Fe Railroad Company filed a bill in the district court of Valencia county against the board of commissioners of that county, Patrocino Luna, sheriff and collector of taxes, and C. C. McComas, district attorney of the Second district. The object of the bill was to enjoin the collection of certain alleged illegal taxes levied against it. The bill states that the Atchison, Topeka & Santa Fe Railroad Company is a Kansas railroad corporation, duly authorized to do business in this territory; that the New Mexico & Southern Pacific Railroad Company is a New Mexico company, organized and existing under its laws; that the New Mexico & Southern Pacific Railroad Company, under its charter, constructed a railroad, beginning at a point in the Raton Pass in the northern portion of the territory, extending south through Valencia county to San Marcial, in Socorro county, completing its line to San Marcial in the year 1880. The bill further avers that by reason of the construction of said line of road the company became and was, as to all its property, exempt from taxation for the period of six years from 1880, the year of its completion, under an act of the legislature passed in 1878. It is further alleged that the complainant company, soon after the completion of this line of road, entered into a contract of lease with the New Mexico & Southern Pacific Company, by the terms and conditions of which all the property of the latter company was turned over to the possession of the former; and that the complainant had ever since been in the possession of said line of road, and

[1] See note at end of case.

all its property, operating it as a common carrier under the charter of the lessor company, and discharging fully and faithfully its obligations and duty to the public as a railroad corporation; that all the property embraced in the several pretended tax assessments belong to the New Mexico & Southern Pacific, and not to the Santa Fe Company, except articles mentioned in an exhibit attached to the bill, of the value of $183.12, of which the assessors had made no list or description whatever in their return to the county board. It is further alleged that the assessments for the years 1881, 1882, and 1883 are each and all void for two reasons: *First*, because the property attempted to be assessed consisted of lands which were in no manner described, and personal property of various kinds, and different values, while the assessments contained no list or description of it whatever; *second*, because the persons assuming to make them had no authority to do so. It averred exemption from taxation by the complainant under and by virtue of the same legislation asserted on behalf of the New Mexico & Southern Pacific Company.

All of the defendants joined in a demurrer to the bill, which was overruled, and a decree entered as prayed, enjoining the collection of the taxes. Defendants brought error.

It will be seen from the allegations of the bill that the equities relied upon as grounds for an injunction and relief as prayed rested upon three propositions: *First*, that the property sought to be subjected to the tax was exempt, whether in the hands or possession of the Atchison, Topeka & Sante Fe, or in that of the New Mexico & Southern Pacific Company; *second*, that even admitting the legal validity of the tax attempted to be imposed upon the property, it should have been listed by, and taxed to, the New Mexico & Southern Pacific Company, the owner and lessor, and not to the Atchison, Topeka & Santa Fe Company, the lessees in possession; *third*, that the assessments were not only irregular, but void.

In view of the fact that this court, in what appears to have been a well-considered opinion, has held that the exemption set up and relied upon here on behalf of the New Mexico & Southern Pacific Company was valid, (*Board of Co. Com'rs of Santa Fe Co.* v. *New Mexico & S. P. R. Co.*, 2 Pac. Rep. 376,[1]) and the further fact that the New Mexico & Southern Pacific Company is not before us in this case, we are not disposed to enter into any discussion or consideration of the question of exemption, as applied to that company, until an issue shall be made on a regular assessment of the property claimed to be exempt.

The second proposition, as indicated above, is apparently without serious difficulty in its determination. To avoid the force of the statute on the subject of the taxation of property under lease, counsel for plaintiff in error press upon our attention the fact that the bill does not disclose the terms or conditions of the lease, and that, as a legal consequence, it must be construed most strongly against the

[1] Same case, *ante*, 116.

pleader, and that thus construed the lease will be considered one for a long term, and the conditions favorable to the lessee; that the legal effect of it is and was to convey the unexpired term of the lessor's corporate existence under its charter, or at least the substantial beneficial estate in the leasehold property. In other words, they contend that the lease must be treated, for the purposes of this suit, as a deed, and that, in legal effect, the transfer was a sale, and as such the immunity from taxation, if any ever existed in the lessor company, did not pass to the lessee. There would be strong grounds for this position if the bill could be treated in other respects as silent on the subject of ownership of the property. It, however, in most distinct and emphatic terms, declares that the Atchison, Topeka & Santa Fe Company does not own any portion of the property against which the tax was levied, except the small amount stated. We cannot, by construction, impute title or beneficial estate in the sense for which counsel for plaintiff in error contend, in the face of admitted averments, such as are made here.

Section 1812, Comp. Laws, defines in what way and to what persons property subject to taxation shall be listed and assessed, and concludes as follows: "Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee." There is no claim made that the Atchison, Topeka & Santa Fe Company listed this property for taxation, and then became subject to the tax. The demurrer admits the lease and the ownership of the property by the New Mexico & Southern Pacific Company. With these facts conceded, we cannot hold the complainant company bound by the assessments, unless the legislature clearly intended to impose a double tax,—one to the lessor and one to the lessee. We find nothing in the statutes to warrant us in so declaring. The rule on this subject is well stated by Judge Cooley, as follows:

> "It has very properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute, or by necessary implication. It is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly, and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes it has been held to follow as a legal conclusion that the legislature could not have intended the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time. This is a sound and just rule of construction, and it has been applied in many cases where, at first reading of the law, a double taxation might seem to have been intended." Cooley, Tax'n, 165.

The legislature having declared that property under lease should be "listed by and taxed to the lessor," it follows that it could not be "taxed to" any other person or corporation, within the meaning of the statute, unless voluntarily listed by the lessee.

Were the assessments void? They were returned as follows:

For 1881, A., T. & S. F. R. R. Co.	
Valuation of property sworn to, - - - -	$1,000,000 00
For 1882, A., T. & S. F. R. R. Co.	
Assessed value of property, - - - -	500,000 00
Total value of real estate, - - - - -	250,000 00
Total value of personal property, - - -	250,000 00
For 1883, A., T. & S. F. R. R. Co.	
Assessed value of property, - - - - -	500,000 00
Total value of real estate, - - - -	250,000 00
Total value of personal property - - - -	250,000 00

The bill charges that the persons making these assessments willfully, oppressively, and illegally attempted to assess, as against the complainant, property it did not own, to-wit, real estate in the county of Valencia; and did willfully, arbitrarily, illegally, and fraudulently attempt to assess personal property in said county, owned by complainant, greatly in excess of, and out of proportion to, the rate at which all other property was valued for the purposes of taxation in said county, to-wit, 500 per cent. above.

Section 2822, Comp. Laws, requires the assessor of the county, between the first day in March and the first day in May, in each year, to ascertain the names of all taxable inhabitants, and all property in the county subject to taxation. To this end he is to visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately: (1) All property belonging to, claimed by, or in the possession or under the control or management of, such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier, or managing agent. (2) The county in which such property is situated, or in which it is liable to taxation. (3) A description of it by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person, and a detailed statement of his personal property, including average value of merchandise for the year ending March 1, number of horses and mules, sheep, cattle, swine, and other animals, etc. Section 2823 provides that the list thus made must be sworn to. Section 2824 makes it the duty of the assessor to furnish the taxable inhabitant with a blank for such list, which is required to be filled out and delivered to the assessor on or before the last Monday in April. Then follows section 2825, in the following language:

"If any person liable to taxation shall fail to render a true list of his property, as required by the three preceding sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain. And such person shall be liable, in addition to the tax so assessed, to a penalty of twenty-five per cent. thereof, which shall be assessed and collected as a part of the tax of such person."

While it is true that the courts will not be nicely or overscrupulously technical in passing upon questions of mere formality and reg-

ularity in the methods adopted by a class of subordinate officials in the performance of their duties, it is not, however, their duty to consider as done in the manner required by law that which should have been done in so important a matter as the assessment of property for taxation. The legislature is charged with the duty of raising revenue for the support of the government, and it is its peculiar function to lay taxes and provide the means for its collection. To that end it may and has prescribed the initial step in order to subject property to the burdens of taxation, and that step is assessment. A description or list of the property, with a valuation attached, is a necessary act, without which a levy cannot be made and enforced. On this subject Judge COOLEY says:

"Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment they have no support, and are mere nullities. It is therefore not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity. * * * As the course unquestionably is prescribed in order that it may be followed, as without it the citizen is substantially without any protection against unequal and unjust demands, the necessity for a strict compliance with all important requirements is manifest." Cooley, Tax'n, 259, 260.

It does not follow, however, that in the assessments of the property of persons who fail to render or return a list that the description or lists made by the assessor, according to his best information, must be strictly accurate, or the valuations correct, but it is essential to the validity of the tax that *some* description or list be made. In this case the assessment for 1881 consisted of a single item, valued at $1,000,000. For 1882 and 1883 the assessor divides the gross sum into two classes,—real and personal,—giving to each a value of $250,000. Construing these assessments in the most favorable and liberal way, can they be treated as valid? The statute requires real estate to be listed by subdivisions, or some other way sufficient to identify it. It also requires, as we have seen, that a list or description of personal property, as well as its value, must be given. There can be no sort of doubt about the insufficiency of the attempted assessment of the real estate. No deed could be given if sold at delinquent tax sale. No possession could be taken under such a description. There is a value attached to the personal property for the years 1882 and 1883, but there is no effort at description. It is possible to conceive a single piece of railroad property to be worth $250,000, but the owner is certainly entitled to know what piece it is, so that he might, if valued too high, seek his remedy for relief before some proper tribunal or body. Again, the statute makes it the duty of the assessor to ascertain the names of all taxable inhabitants of his county, and *all the property in his county subject to taxation.* This is not an impossibility, so far as taxable inhabitants and tangible property are con-

cerned. This assessment does not purport to be founded upon mere credit. It is founded, as we understand it, upon tangible estate. From no point of view can these assessments be treated as legal and binding upon either railroad company.

It is urged that in any event the judgment below is erroneous because complainant admitted the ownership of property of the value of $183.12, and did not tender any sum before the institution of the suit, nor in its bill. This is not the rule where assessments are void. In a suit to enjoin the collection of taxes, where the original assessment was void, there is no necessity for a tender of such sum as might be equitably due on account of such taxes. The cases in which a tender has been required were those where there was an excessive, as distinguished from a void, assessment. *Albany Nat. Bank* v. *Maher*, 20 Blatchf. 341–343; S. C. 9 Fed. Rep. 884.

The judgment is affirmed.

LONG, C. J., and BRINKER, J., concurred.

NOTE.

RAILROAD COMPANIES—CONSTRUCTION OF STATUTE. The acts of New Mexico of February 2, 12, and 15, 1878, placed on the same footing, as regards exemption from taxation, all railroad corporations then existing, or thereafter to be organized, under the laws of the territory, for the purpose of building railways in the territory. Those acts were in the nature of a bid for railways to enter the territory, and the offer might have been withdrawn before acceptance; but the actual construction of a line constituted an acceptance, and completed a binding contract between the state and the company. The date of the construction, and not the date of the company's organization, is the date of the contract. For the purposes of taxation "all the property" of a railway corporation, and "all the capital stock" of the same company, are convertible terms, and the exemption of one from taxation is the exemption of the other. Santa Fe Co. v. Railroad Co., (N. M.) 2 Pac. Rep. 376.

INJUNCTION AGAINST THE LEVY AND COLLECTION OF TAXES. Upon grounds of public policy the courts are extremely reluctant to interfere with the assessment or collection of taxes, by means of injunction against the taxing officers, as such a course tends to deprive the government of funds, and cripple its action in all departments. By act of 1885, the legislature of *Michigan* provided that "no injunction shall issue to stay the proceedings for assessment or collection of taxes under this act;" but that the tax might be paid under and recovered by subsequent action, if illegal. And in Eddy v. Township of Lee, 40 N. W. Rep. 792, the act was held constitutional. Under a similar statute in *North Carolina*, which, however, excepts taxes levied for an illegal purpose, it was held that, although certain railroad property had been declared exempt from taxation by the supreme court of the United States, and by the state supreme court, yet an injunction would not issue to restrain the collection of a tax levied thereon, and the only remedy was to recover it back after payment. Railroad Co. v. Lewis, 5 S. E. Rep. 82. So it is said by the supreme court of the United States that, where boards of revision or equalization have been established, the citizen must apply to them for relief against all merely irregular or excessive taxation. Their action is judicial in its nature, and if he does not avail himself of this remedy he is precluded. Stanley v. Albany Co., 7 Sup. Ct. Rep. 1234. In accordance with the view here expressed it is held under the *Wisconsin* statutes that a bill for injunction, because of illegal and fraudulent assessment at too high a rate, could not be maintained, unless it averred that objection thereto and offer of proof had been made to the board of equalization. Bratton v. Town of Johnson, 45 N. W. Rep. 412; Boorman v. Juneau Co., Id. 675. See, also, Duck v. Peeler, (Tex.) 11 S. W. Rep. 1111; Breeze v. Haley, (Colo.) 13 Pac. Rep. 913; Investment Co. v. Charlton, 32 Fed. Rep. 192; County of Noxubee v. Ames, (Miss.) 3 South. Rep. 37. And, where a state board of equalization has made an assessment of a valid tax upon railroad property, a court of equity will not enjoin its collection because it is excessive, since the functions of the board are judicial in their nature. Railroad Co. v. Donoghue, (Ill.) 18 N. E. Rep. 827. In *Pennsylvania*, however, an injunction will be granted when it appears that an assessment for city purposes is greatly in excess of the triennial assessments for state and county pur-

poses, although, in all other respects, the assessment was properly and legally made. Kemble's Appeal, 19 Atl. Rep. 946. And in Stanley v. Albany Co., supra, it is said by the supreme court of the United States that "when the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the excess, upon payment or tender of what is admitted to be due." The assessment complained of in that case was not, however, found to fall within this rule.

ILLEGAL AND VOID TAXES. But where the grievance complained of is not merely an excessive, erroneous, or irregular assessment, but an assessment that is wholly illegal, courts of equity will enjoin the collection, when not restrained by statute, as in *Michigan* and *North Carolina*. Thus it is held in Laughlin v. Santa Fe Co., 3 N. M. 264, 5 Pac. Rep. 817, upon the authority of Crampton v. Zabrinskie, 101 U. S. 601, that an individual tax-payer can maintain a suit in his own name to enjoin an illegal issue of county bonds, or to restrain the levy and collection of illegal taxes by which his property might be imperiled. The function of the board of equalization is merely to correct errors in taxes legally assessed; and therefore injunction is the proper remedy to prevent the collection of a wholly illegal tax, and the plaintiff, in such a case, need not show that he has applied to the board. Davis v. Burnett, (Tex.) 13 S. W. Rep. 613. To the same effect are Railway Co. v. Epperson, (Mo.) 10 S. W. Rep. 478, and Baldwin v. Shine, (Ky.) 2 S. W. Rep. 164.

In *Oregon*, it is said, however, that an injunction will not be granted to restrain the collection of an illegal tax when there is no fraud, and it is not shown that plaintiff will be without redress; but in the same case it is held that where the sheriff is about to collect an illegal tax upon personal property in the hands of an assignee for the benefit of creditors, by seizure and sale thereof, this would be such an interference with the assignee's trust as would justify an injunction. Dawson v. Croisan, 23 Pac. Rep. 257. And in *Michigan*, where a tax (not levied under the statute above referred to as prohibiting injunction under any circumstances) is assessed against personal property of a bank, which property is not liable to taxation at all, and the levy is made in such a way as to interfere directly with the bank's business, an injunction will issue. Bank v. City of Adrian, 33 N. W. Rep. 304.

MULTIPLICITY OF SUITS. Where a tax has been illegally and fraudulently assessed, and its recovery, if paid, would lead to multiplicity of suits, equity will enjoin its collection. Clee v. Sanders, (Mich.) 42 N. W. Rep. 155. Where a bank is required by statute to pay the tax assessed on all its shares, and reimburse itself from the shareholders, it may sue to enjoin the collection of taxes illegally assessed, since it stands in the relation of a trustee to its shareholders, and may protect its *cestui que trust*, and since it is apparent, too, that injunction will prevent multiplicity of actions. Bank v. Parker, 41 Fed. Rep. 402. Multiplicity of suits is a good ground for enjoining the collection of a tax. Railroad Co. v. Neary, (Del.) 8 Atl. Rep. 363.

NECESSITY OF TENDERING TAX LEGALLY DUE. One cannot have relief in equity against illegal taxation without tendering the taxes shown to be legally due. City of Logansport v. McConnell, (Ind.) 23 N. E. Rep. 264; Town of Kissimmee v. Drought, (Fla.) 7 South. Rep. 525. Where the validity of an ordinance imposing a tax was not questioned, and there was no tender of any part of the amount assessed thereunder, it was no abuse of discretion to refuse an injunction to restrain its collection. Augusta Factory v. City Council, (Ga.) 10 S. E. Rep. 359. Where a tax was properly assessed by the assessor, but was illegally raised by others, an injunction will issue to restrain the collection of the illegal part; and where the bill avers that tender has been made of the legal part, the tender need not be repeated in the bill. City of Meridian v. George, (Miss.) 6 South Rep. 619.

But where, because of the illegal method pursued, no valid charge was ever fixed upon the land by an assessment, it is not necessary, in a bill to enjoin collection, to aver or make tender of the amounts equitably due from the lands. Ball v. City of Meridian, (Miss.) 6 South Rep. 645.

In *Kansas*, injunction against the collection of an illegal tax is expressly authorized by statute; but it was held that where a city was about to issue bonds which, in the course of several months, would lead to an alleged illegal assessment, but no steps had yet been taken to make it, an action to enjoin such assessment was premature. Challiss v. City of Atchison, 18 Pac. Rep. 195.

INDEX.

NOTE. A star (*) indicates that the case referred to is annotated.

ABATEMENT AND REVIVAL.

Another action pending.
Where it appears, in a bill to establish the right of infant claimants to an undivided interest in land to which all the parties interested are made parties, that another proceeding in equity, brought by some of the defendants only to terminate and extinguish the claim of complainants is still pending, a demurrer on the ground of another suit pending will be overruled, for it is apparent that the rights of complainants cannot be fully adjudicated in that cause for the lack of parties. —Bent v. Maxwell Land Grant & Ry. Co., 158.

Accident Insurance.

See *Insurance.*

Accomplices.

Evidence of, see *Criminal Law*, 6.

Acknowledgment.

Necessity, see *Deed*, 4.

Actions.

Abatement of, see *Abatement and Revival.*
Against corporations, see *Corporations*, 3.
—— garnishee, by principal defendant, see *Garnishment.*
—— surety, see *Principal and Surety.*
By and against infants, see *Infancy*, 1, 2.
By corporation, see *Religious Societies.*
For price, see *Sale*, 1.
On forthcoming bond, see *Attachment*, 4, 5.
negotiable instruments, see *Negotiable Instruments*, 4–9.
Particular forms, see *Assumpsit; Creditors' Bill; Ejectment; Forcible Entry and Detainer.*
Right of tax-payer to obtain relief against threatened taxation, see *Taxation*, 6.
To set aside decree, see *Equity*, 4–8.

Administration.

See *Executors and Administrators.*

ADVERSE POSSESSION.

What constitutes.

In an action of ejectment, where the defense is the statute of limitations, evidence that the defendant went upon the land for the purpose of raising one or two crops, together with vague testimony that he claimed the land, there being no evidence of residence, improvement, inclosure, customary cultivation, or other use showing continued actual appropriation, is insufficient to establish the character of his possession as adverse, especially where his own testimony indicates that in going upon the land he merely mistook his boundary.—Probst v. Trustees of Board of Domestic Missions, 237.

Affidavit.

For continuance, see *Continuance.*

Amendment.

Of creditors' bill, see *Creditors' Bill.*
record in attachment proceedings, see *Attachment,* 4.
writ of error, see *Error, Writ of,* 1.

APPEAL.

See, also, *Certiorari; Error, Writ of; Exceptions, Bill of.*
Dismissal, see *Forcible Entry and Detainer,* 3.
In criminal cases, see *Criminal Law,* 13.

Appealable orders.

1. After a decree establishing a lien on railroad property, and directing a sale to satisfy it, a second decree consolidating the cause with others like it, and directing a sale as before ordered, but providing that the proceeds shall be paid into court pending an investigation into the priorities of the liens, does not affect the appealable character of the first decree as a final order.—Texas, S. F. & N. R. Co. v. Orman, 308.

2. A judgment, void because rendered without jurisdiction, is not a final order from which an appeal will lie.—Staab v. Atlantic & P. R. Co., 349.

Requisites—Service of proposed record.

3. Under rule 24 of the rules of court of the supreme court of New Mexico, the appellant must, within the proper time after judgment rendered, present, along with his bill of exceptions, a proposed record, containing the pleadings and proceedings in the case, to the trial judge, and the opposing party or his attorney; otherwise the case cannot be entertained above.—Gonzales v. Atchison, T. & S. F. R. Co., 302.

Appeal from probate court.

4. The probate court being a court of limited jurisdiction, jurisdiction must affirmatively appear on its record. Therefore, where, on appeal from the disallowance of a claim against an estate, the record fails to show the appearance of the administrator, or that he was cited to appear, the probate court was without jurisdiction, and the district court could only acquire the case for the purpose of dismissing the proceeding.—Chaves v. Perea, 71.

5. Under Comp. Laws N. M. p. 122, § 4, (Prince, St. p. 76, § 4,) providing that "appeals from the judgment of the probate judge shall be allowed to the district court in the same manner, and subject to the same restriction, as in case of appeals from the district to the supreme court," and also Comp. Laws N. M. p. 184,

§ 5, providing that "appeals from the probate courts shall be taken hereafter in the same manner as from justices of the peace at the term when the order or judgment appealed from shall have been rendered, and the bond shall be approved by the probate judge," it is essential to the validity of an appeal from the probate court to comply with the requisites of both kinds of appeals.—Chaves v. Perea, 71.

Review—Joinder of issue.

6. When, upon an appeal from the judgment of the trial court, it is assigned as error that no issue was joined by the parties, and the record, on its face, affirmatively shows that issue was joined, the record imports absolute verity, and, whether an issue appears from the language of the pleadings or not, the error complained of cannot be sustained.—Waldez v. Archuleta, 195.

7. Where a cause is tried in a lower court without any plea having been filed or issue joined, as required by law, and no objection or exception is made thereto, the verdict of the jury will not be disturbed, and the judgment will be sustained. —Waldez v. Archuleta, 195.

8. After having participated in a trial upon the merits, a party cannot be heard to object that there was no issue joined.—Herlow v. Orman, 291.

—— Presumption.

9. When there is nothing in the record and no evidence *aliunde* to show that the court instructed the jury orally instead of in writing, as required by the statute, the presumption is in favor of the court's observance of the law.—Kent v. Favor, 218.

—— Sufficiency and weight of evidence.

10. Where there is a substantial conflict in evidence, the verdict of a jury will not be disturbed unless error in law occurred on the trial.—Corkins v. Prichard, 184.

—— Objections not made below.

11. A question not raised in the trial below cannot be considered on appeal by the higher court. Prince's Laws, § 5, pp. 68, 69.—Crabtree v. Segrist, 278.

12. Comp. Laws N. M. 1884, § 2197, providing that "in equity causes no exception shall be required," extends to exceptions only, and does not affect the rule of chancery practice that if seasonable objections are not made before the examiner, or in the court below, they will not be considered on appeal.—Williams v. Thomas, 324.

Decision—Affirmance.

13. Under Comp. Laws N. M. § 2189, upon failure to assign errors on or before the first day of the term to which the cause is returnable, judgment against appellant, or plaintiff in error, may be affirmed, in the absence of good cause shown.—Dold v. Robertson, 313.

—— Damages for vexatious appeal.

14. Under section 2191, Id., on such affirmation of judgment, damages not exceeding 10 per cent. of the judgment may be awarded against appellant, or plaintiff in error, for vexatiously delaying the final process of the court.—Dold v. Robertson, 313.

—— Effect of former decision.

15. The supreme court having held that a mechanic's lien cannot be enforced by an action of *assumpsit*, and the lien having been thereupon sought to be enforced through a suit in equity, with the identical pleadings as before, the supreme court has respect for its former decision, and reverses and remands the cause.—Rupe v. New Mexico Lumber Ass'n, 312.

Liability on appeal-bond.

16. Where the substantial ground of the appeal is that there is no evidence to sustain a judgment in any amount whatever, and the decision of this court is that the appellees file a *remittitur* of the excess of interest awarded them in the court below, and have the judgment affirmed as to the residue, or else submit to a reversal and a trial *de novo*, this does not amount to such a reversal of the judgment as will release the appellant's sureties on the appeal-bond.—Orr v. Hopkins, 142.*

Appearance.

Effect, see *Attachment*, 5.

Assessment.

Of taxes, see *Taxation*, 4.

ASSIGNMENT.

Of notes, see *Negotiable Instruments*, 2, 3.

Right of assignor to rescind.

Plaintiff assigned an account against defendant to a third party, and executed a receipt therefor, in consideration of a diamond pin, and a sum of money. Upon the discovery that the diamond was worthless, he tacitly acquiesced in the proposal of the third person to furnish another. *Held*, that he cannot afterwards rescind the contract and recover the amount from defendant, who has meanwhile innocently paid it to the third party on faith of the receipt.—Baca v. Fulton, 215.

Associations.

See *Corporations; Religious Societies.*

ASSUMPSIT.

Pleading.

Where a declaration on a note contains one count only, in special *assumpsit*, and defendant pleads *non est factum* and *non assumpsit*, and the plaintiffs subsequently amend, adding a count for goods sold and delivered and a count on account stated, and the defendant's pleas remain unchanged, plaintiffs cannot, by withdrawing the common counts of their declaration, confine the defendant to his single plea of *non est factum*. The pleas of *non assumpsit* and *non est factum* are not so inconsistent that they cannot both be left on the record.—Staab v. Jaramillo, 33.

ATTACHMENT.

See, also, *Garnishment.*

Publication of notice to non-resident.

1. The provision of the statute regulating attachments (Prince, St. p. 138, § 11) that published notice to a non-resident defendant shall inform him that his property has been attached, and that, unless he appears, judgment will be rendered against him and the property sold to satisfy it, is not modified or repealed by the act of 1862, (Id. p. 143, § 36,) which merely changed the law as to the persons authorized to make publication; nor by the act of 1874, (Id. p. 133,) which, in addition to the previous law of attachments, provided for the citation of non-residents by publication in ordinary actions at law and suits in chancery, and a notice published in an action of *assumpsit*, which omits these requisites, will not give jurisdiction in attachment.—Smith v. Montoya, 39.

Demands not due.

2. Attachment proceedings auxiliary to an action of *assumpsit*, but each characterized by separate pleadings and a distinct practice, may be commenced together for the same demand. But, where it appears that the demand is not yet due, it is error to render judgment for plaintiff thereon in the action of *assumpsit*, although the attachment may be sustained upon the trial of that issue, the effect of which is only to create an attachment lien in advance of an action on the claim itself when it becomes due.—Staab v. Hersch, 153.*

Mistrial—Failure to try issue made by affidavit.
3. Upon the trial of issues as to the grounds of attachment, the affidavit itself was mislaid, the counsel had never seen it, and the case was tried, both by the court and counsel, upon the theory that but one ground of attachment was laid in the affidavit, viz., that defendant fraudulently disposed of his property, when in fact it contained the further ground that the debt was fraudulently contracted. *Held* a mistrial, and that a new trial should be ordered.—Talbott v. Randall, 230.

Action on forthcoming bond.
4. An order in an attachment suit that the property shall be "forthwith delivered to the sheriff of S. county" sufficiently designates both the time and place of delivery, and a defendant, in an action on the forthcoming bond, is not prejudiced by an irregular amendment of the record making the order more specific in that respect.—Wagner v. Romero, 131.

—— Waiver of defective writ.
5. Appearance and judgment waive objection to a writ of attachment as being issued by the clerk of the probate court, rather than by the clerk of the district court, and it is too late to raise the question in an action on the forthcoming bond. —Wagner v. Romero, 131.

Attorney General.

Officer *de facto*, see *Office and Officer*.

Bailment.

See *Carriers; Innkeepers*.

Best and Secondary Evidence.

See *Evidence*, 1–3.

Bills and Notes.

See *Negotiable Instruments*.

Board.

County board, see *Counties*.

Bonds.

See *Principal and Surety*.
Action on forthcoming bond, see *Attachment*, 4, 5.
On appeal, judgment against sureties, see *Error, Writ of*, 2.
—— release of surety, see *Appeal*, 16.
Parties in action on forthcoming bond, see *Parties*.

Books of Account.

See *Evidence*, 4.

CARRIERS.

See, also, *Railroad Companies*.

Carriage of goods—Contract.
1. A common carrier who, upon notice from the owner of goods to stop them *in transitu* and hold them for such owner, complies, does not become party to a

new contract of carriage by the subsequent order of the owner to ship them to another person and place.—MacVeagh v. Atchison, T. & S. F. R. Co., 205.

Liability for loss of goods.

2. A common carrier is only liable where the injurious act complained of is the proximate and not the remote cause of the loss.—MacVeagh v. Atchison, T. & S. F. R. Co., 205.

—— Seizure of goods under legal process.

3. Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment.—MacVeagh v. Atchison, T. & S. F. R. Co., 205.

4. It is not the duty of a common carrier to remove goods committed to him, in order to prevent their being subjected to an attachment levy.—MacVeagh v. Atchison, T. & S. F. R. Co., 205.

5. If property in the hands of a common carrier is seized under legal process, and the owner has timely knowledge thereof, the carrier has a right to presume that such owner will take the proper steps in the premises without formal notice from him. In such a case the negligence and laches of the owner, if it does not occasion the loss, so far contributes towards it that he must bear the burden of it, and he cannot be heard to attribute the fault to another.—MacVeagh v. Atchison, T. & S. F. R. Co., 205.

CERTIORARI.

Review of evidence—Record.

The common-law writ of *certiorari* to review a summary conviction under a penal statute brings up not only questions affecting the jurisdiction of the magistrate, but whether there was sufficient evidence to warrant a conviction of the party accused; and in such case the evidence must appear on the face of the record, or the conviction will be quashed.—Armijo v. Board of County Com'rs, 297.

Challenge.

To juror, see *Jury*.

CHATTEL MORTGAGES.

Possession and right of sale by mortgagor.

A chattel mortgage executed by a merchant to his brother-in-law upon his stock in trade, according to the terms of which instrument the mortgagor is to retain possession of the goods, and go on with his business just as before it was given, is fraudulent, and as to creditors void.—Speigelberg v. Hersch, 185.

Chinaman.

Competency as witness, see *Witness*, 1.

Commissioners.

County, see *Counties*.

Conditional Sale.

See *Sale*, 2, 3.

Consideration.

Presumption, see *Specific Performance*, 2.

CONSTITUTIONAL LAW.

Vested rights, see *Ejectment*, 6.

Exemption from taxation—Special privileges.
By the New Mexico railroad incorporation act of February 2, 1878, § 3, it is provided that, to aid and encourage the construction of railroads, all the property of every kind and description of every corporation formed under that act shall be exempt from taxation until the expiration of six years from the completion of its road. By act of February 12, 1878, this exemption was extended to all corporations organized under the laws of the territory for the purpose of constructing railroads. By act of February 15, 1878, the words "six years from the completion of its road" are defined, and the exemption limited to a period of 12 years from the commencement of its construction. *Held*, that the granting of this exemption from taxation to corporations not organized under the act of February 2, 1878, is not in contravention of Act Cong. March 2, 1867, § 1, forbidding the legislative assemblies of the territories from granting private charters or special privileges. —Board of County Com'rs v. New Mexico & S. P. R. Co., 116.

CONTINUANCE.

In criminal cases, see *Criminal Law*, 2, 3.

Affidavit.
In order to force the continuance of a cause, the affidavit upon which the application is founded must state all the facts required in the statute to be stated.—Kent v. Favor, 218.

CONTRACTS.

See, also, *Assignment; Carriers; Chattel Mortgages; Deed; Frauds, Statute of; Fraudulent Conveyances; Insurance; Interest; Mortgages; Negotiable Instruments; Novation; Principal and Surety; Sale; Specific Performance; Usury.*

Interpretation—Dependent contracts.
A railroad contractor having made a general contract with another person to perform a portion of the work, undertaken according to the original contract with the railroad company, the two contracts are so connected, and the one so dependent on the other, that they form one contract; and the subcontractor is entitled to the same benefits, as well as bound by the same conditions, as affected the first contractor under the original contract.—Price v. Garland, 285.

Conveyances.

See *Chattel Mortgages; Deed; Fraudulent Conveyances; Mortgages; Sale.*

CORPORATIONS.

See, also, *Railroad Companies; Religious Societies.*

Possession of land through agent—Presumption of agency.
1. The fact that a Presbyterian clergyman, recognized as such, claimed to hold certain specific property in Santa Fe for a religious corporation in New York;

that said corporation could not, on account of its distance, occupy its lands except by means of servants, agents, tenants, or other representatives; the statements of such clergyman, and his position in Santa Fe,—raise a strong presumption that he was acting for the plaintiff corporation, and that his possession was the possession of the corporation.—Probst v. Trustees of Board of Domestic Missions, 237.

Liability for torts of agent.

2. Where defendant railroad company, by means of a strong body of armed employes, took forcible possession of the railroad and property of another company, and plaintiff, an employe of the latter company, while on a hand-car in the discharge of his duty, was fired upon and wounded by defendant's employes, defendant is liable for the injury, and cannot plead that the trespass was the individual act of its servants, and *ultra vires.*—Denver & R. G. Ry. Co. v. Harris, 109.*

Actions against—Right of mortgagee to sue.

3. A bill by bondholders alleging conspiracy between the president of the debtor and others with the trustees under the mortgage to deprive them of their rights by the collusive foreclosure of junior liens is not demurrable, because it fails to show that plaintiffs first tried, in vain, to have the trustees act for them. —Lamb v. San Pedro & Canon del Agua Co., 358.

Counter-Claim.

See *Set-off and Counter-Claim.*

COUNTIES.

Aid to railroads, see *Railroad Companies,* 1, 2.

County board—Proceedings to declare office vacant.

1. A board of county commissioners, in considering the case of a defaulting sheriff, with a view to declaring his office vacant in case the default is proved, act in a *quasi* judicial capacity. They are a board of special and inferior jurisdiction, and there is no presumption arising in their favor as to the regularity of their proceedings. Their jurisdiction, therefore, must be made to appear upon the record of said proceedings, and evidence of it cannot be sought *aliunde.*—Armijo v. Board of County Com'rs, 297.

2. In such proceedings, under Act. N. M. March 1, 1882, § 3, a certificate of the default, by the county clerk or territorial auditor, is essential to jurisdiction, and the commissioners cannot proceed without it.—Armijo v. Board of County Com'rs, 297.

COURTS.

Jurisdiction of offense committed by Indian, see *Indians.*
Validity of order entered during vacation, see *Practice in Civil Cases.*

Presumption of jurisdiction.

1. The jurisdiction of a court of general jurisdiction will be presumed from the record of a judgment in evidence, but this presumption may be rebutted by the record of the entire case disclosing a want of jurisdiction.—Smith v. Montoya, 39.

Federal courts—Homicide on Indian reservation.

2. Under Rev. St. U. S. § 2145, extending the criminal jurisdiction of the United States to offenses committed in "Indian country," the district court in a territory will take jurisdiction of a homicide on an Indian reservation, within the territory, on the United States side of the court, as a federal court, to the exclusion

of territorial jurisdiction, and the prosecution is properly conducted in the name of the United States.—United States v. Monte, 126.

Covenants.

See *Deed*, 5-8.

CREDITORS' BILL.

Who may maintain—Amendment.

Where a husband, being insolvent, conveys real estate to his wife, who continues to hold the same after his death, a single creditor of the husband, who has obtained a judgment in the probate court against the estate, cannot by a bill in equity have the conveyance declared a trust for his benefit, and have a receiver turn the widow out during the pendency of the suit. It is, however, reversible error for the court, in sustaining a demurrer to such a bill, to dismiss the suit absolutely. An equity appearing from the allegations of the bill to have the conveyances set aside, on behalf of all the creditors, and the property applied to the payment of the debts, the complainant should have had leave to amend.—Perea v. De Gallegos, 151.

CRIMINAL LAW.

Particular crimes, see *Larceny; Perjury.*
Robbery from mail, see *Post-Office.*

Change of venue.

1. The ruling of the trial court refusing a change of venue because of local prejudice will not be disturbed where the trial judge was himself a resident of that county, and personally cognizant of the feeling of the community, and where the jury was drawn from the body of the whole district, and not alone from the county in question.—Territory v. Kinney, 97.

Continuance.

2. Under Comp. Laws N. M. 1884, § 2050, on an application which is legally sufficient, a continuance must be granted, unless the opposing party will admit that the witness, if present, would testify to the facts stated in the application. The provision of section 2052, Id., allowing the opposite party to file written objections, does not entitle him to deny the allegations of fact in the application, but only to question its legal sufficiency.—Territory v. Kinney, 369.

3. Where the defendant, indicted for larceny, was charged with the purchase of cattle, knowing them to have been stolen, the refusal of a continuance on account of the absence of witnesses who could prove an *alibi*, and also would testify from whom defendant had bought the cattle, will not be disturbed as an abuse of discretion, where it appears that subsequently, at the trial, defendant himself failed to take the stand and testify as to these facts in his own behalf.—Territory v. Kinney, 97.

Presence of defendant—Instructions.

4. It is error for the court, on trial for felony, after the jury have retired, to receive them again, in the absence of the defendant and his attorney, and give them further instructions verbally as to the law of the case.—Territory v. Lopez, 104.

—— Motion for new trial.

5. While it would be error in a case of felony to proceed with the trial in the absence of the accused, yet, after verdict and before sentence, it is now the universal rule that the prisoner need not be present at the hearing of a motion for a new trial.—Territory v. Chenowith, 225.

Evidence—Accomplice testimony.

6. Though the testimony of an accomplice is not corroborated by evidence that defendant was present at the scene of the crime charged the evening before its

commission, such evidence becomes material and pertinent by its contradiction of witnesses to establish an *alibi* showing that defendant was at that time in another town, many miles distant.—Territory v. Kinney, 97.

Instructions.
7. The court must submit to the jury the consideration of every degree of the crime charged which the evidence tends to prove, and the exclusion of any such grade is error, whether asked for by counsel or not, and warrants a reversal of the judgment.—Territory v. Nichols, 76.

—— Reasonable doubt.
8. In a criminal case, it is error to instruct the jury that they must determine a fact "according to the evidence, and just as they would determine any fact in their own private affairs." The jury must be satisfied, to the exclusion of every reasonable doubt, that such fact has been established by the evidence.—Territory v. Lopez, 104.

—— Accomplice testimony.
9. Though the uncorroborated evidence of an accomplice should be received with great caution, it is not error for the court to refuse to instruct that such evidence is insufficient to warrant a conviction.—Territory v. Kinney, 97.

Separation of jury.
10. Even in cases of capital felony it is in the sound discretion of the court as to whether the jury may be permitted to separate, during the trial, before the case has been given in charge to them.—Territory v. Chenowith, 225.

—— After verdict.
11. The unauthorized separation of the jury in a capital case, after a verdict has been reached, written out, signed by each juror, and sealed up, though gravely reprehensible, will not avoid the verdict, where there was no actual abuse, and the defendant was not prejudiced.—Territory v. Nichols, 76.*

Verdict—Return on Sunday.
12. A verdict is not vitiated by the fact that it was returned on Sunday.—Territory v. Nichols, 76.

Appeal—Rehearing.
13. Where, after a judgment of conviction is affirmed on appeal, a motion for rehearing is filed, but is not heard at that term, and is argued and taken under advisement at the term following, but is again continued until the next succeeding term, it is still before the court for determination.—Territory v. Kinney, 369.

DAMAGES.

For breach of contract.
1. Where plaintiff agreed to manufacture for defendant lumber of special sizes and kinds out of certain timber, expenses incurred by plaintiff in moving his machinery and force of men to the vicinity of the timber, and while awaiting orders from the defendant, are properly an element of damages for the breach of such a contract.—Orman v. Hager, 331.
2. In an action by a contractor against a subcontractor to recover the amount lost by the plaintiff through the defendant's failure to perform the work agreed to be performed, the plaintiff must prove, not only that the work did cost the amount claimed, but also that it was the reasonable and necessary cost.—Price v. Garland, 285.

Deaf Mute.

Competency as witness, see *Witness*, 2.

DEED.

See, also, *Fraudulent Conveyances.*

Proof of execution.

1. A deed to one party, alleged to antedate a deed to another, yet not on record at the time of the execution and delivery of the latter deed, and bearing no evidence of having been executed or acknowledged, the proof being that the grantee under it had never assumed possession of the premises it concerned, may properly be excluded from evidence.—Armijo v. New Mexico Town Co., 244.

Description.

2. If the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, it is sufficient to sustain the conveyance, and a deed containing such a description may properly be admitted in evidence.—Armijo v. New Mexico Town Co., 244.

—— Parol evidence.

3. In a deed, that is sufficiently certain which can be made certain by competent evidence. Parol evidence is therefore admissible to identify the premises in dispute with the description in the deed.—Armijo v. New Mexico Town Co., 244.

Acknowledgment—Necessity.

4. The statute of New Mexico (Prince's Laws, 239) cures defective acknowledgments, but does not supply the want or obviate the necessity of an acknowledgment.—Armijo v. New Mexico Town Co., 244.

Construction.

5. In section 2750 of Compiled Laws of New Mexico of 1884, relating to the construction of the words, "bargained and sold" in conveyances of hereditary real estate, the phrase "hereditary real estate" means "real estate of inheritance;" "possessed of an irrevocable estate in fee-simple" means "seized of an indefeasible estate in fee-simple;" and "limited to the following effect" means "construed to the following effect."—Douglass v. Lewis, 345.

6. The words "bargained and sold," contained in a deed, do not, according to the strict construction of the statute of New Mexico referring thereto, amount to a covenant on the part of the grantor that he was possessed of a valid fee simple title to the premises conveyed; and it is proper that that statute be strictly construed.—Armijo v. New Mexico Town Co., 244.

7. The covenants raised by law from particular words in a deed will be only regarded as operative in cases where the parties themselves have omitted to insert covenants.—Douglass v. Lewis, 345.

8. The rule that the words employed in a deed must be construed most strongly against the grantor ought not to be enforced in a case where the statute is in derogation of the common law, and should be construed strictly.—Douglass v. Lewis, 345.

Demurrer.

Effect of sustaining, see *Pleading.*

Deposition.

Proof of contents, see *Evidence,* 3.

Description.

In deed, see *Deed,* 2, 3.

EJECTMENT.

Defenses, see *Adverse Possession.*

Title to support.

1. A regularly derived paper title is not necessary for recovery against a defendant who, without title, has intruded upon a prior possession.—Probst v. Trustees of Board of Domestic Missions, 237.

Pleading.

2. The very foundation of the right to maintain an action in ejectment, both at common law and under the statute of the territory, is the plaintiff's right to the possession of the premises. Unless it contains an averment to that effect, a declaration in ejectment cannot be sustained.—Osborne v. United States, 213.

3. The averment that the defendant "unjustly withholds" the premises is not equivalent to the allegation that he "unlawfully withholds" them, as required by the statute.—Osborne v. United States, 213.

Evidence.

4. In ejectment, where the issue is whether the premises sued for lie within a certain grant, the title of which is conceded to be in plaintiff, and, the location of the premises sued for being known, the sole question is as to the location of the grant; and where the evidence on this question, viz., the description in the original petition for the grant, and that contained in the act of juridical possession, and the testimony of witnesses familiar with the locality, are vague and indefinite, —a verdict of "not guilty" will not be disturbed.—Pinkerton v. Ledoux, 252.

Instructions.

5. In ejectment, where the issue is whether the premises sued for lie within a certain grant, and the descriptions contained in the original petition for the grant and in the "writ of possession," both of which are in evidence, differ materially in their entire detail, instructions that if in finding the monuments called for as the boundary the jury could find the monuments called for in the original petition, those should have preference in the location of the grant, are not erroneous.—Pinkerton v. Ledoux, 252.

Improvements.

6. Where an action of ejectment is brought to recover the possession of land, and the defendant, under section 3 of the act of 1878, (Prince's St. 486,) claims the value of improvements which he had erected thereon prior to the passage of the act, the owner, by vested right, is entitled to recover the improvements as well as the land, and the statute, so far as it attempts to divest that right, is void.—Newton v. Thornton, 189.*

EQUITY.

See, also, *Creditors' Bill; Specific Performance.*

Effect of decision of court of law, see *Judgment,* 4.
Injunction against conveyance, see *Fraudulent Conveyances.*
Jurisdiction of proceedings to enforce lien, see *Mechanics' Liens,* 4, 5.
Reformation of mortgage, see *Mortgages.*

Jurisdiction.

1. There is concurrent jurisdiction in law and equity on the subject of liens.—Hobbs v. Spiegelberg, 222; Post v. Same, Id,

2. A court of chancery has jurisdiction to interfere by injunction with a person who is endeavoring to usurp the office of sheriff.—Armijo v. Baca, 294.

Pleading—Amendment.

3. Upon the amendment of a bill, the defendant is entitled to file an amended answer making, if he wishes, an entirely new defense; and this right is not affected by an order of the supreme court reversing a former decree in the case,

with leave to plaintiffs to amend their bill, and allowing defendants to answer any new matter introduced therein.—Thompson v. Maxwell Land Grant & Ry. Co., 269.

Decree—Bill to set aside.

4. A bill to impeach a consent decree, on the ground that it was fraudulently obtained, is not a bill of review where the parties to it necessarily differ from the parties to the proceeding in which the decree sought to be annulled was rendered.—Bent v. Maxwell Land Grant & Ry. Co., 158.

5. On bill to enforce a decree, defendants must be permitted to attack it, and the court will look into the case for the purpose of seeing whether it was equitable and just.—Thompson v. Maxwell Land Grant & Ry. Co., 269.

6. A bill to annul a consent decree, on the ground that it was fraudulently obtained, where the effect will be to re-establish a prior decree in the same cause, is not demurrable because it fails to show that the decree which is to be so re-established was a proper one. That issue is not before the court.—Bent v. Maxwell Land Grant & Ry. Co., 158.

7. A bill to annul a decree is not demurrable because it appears that the decree was entered by consent, where it is charged that the complainants were infants, and the consent, if any, was obtained by fraud and imposition.—Bent v. Maxwell Land Grant & Ry. Co., 158.*

8. A bill to set aside a decree, entered by consent against minor defendants, divesting them of an undivided interest in a large Mexican grant, and authorizing its conveyance by their guardian *ad litem*, in pursuance of a compromise, for a sum less than its real value, which charges that there was no consent in fact; that if it was given it was obtained by fraud, imposition, and false representations practiced upon their guardian *ad litem*, a Mexican woman, ignorant of the English language, unfamiliar with business or the proceedings of courts, unacquainted with the rights of complainants, with her duties as guardian, and with the land itself, its extent and value, and ignorant of the fact that congress had confirmed the grant, and that the court had, by decree, established the rights of complainants' ancestor, and of the share or right claimed by the latter in his life-time; and further setting out in detail the fraudulent devices by which she was convinced that complainants would be excluded from all enjoyment of the grant by the other owners thereof, and was persuaded to consent to the decree and execute the conveyance in pursuance of it,—is not demurrable for want of equity.—Bent v. Maxwell Land Grant & Ry. Co., 158.

ERROR, WRIT OF.

See, also, *Appeal; Certiorari; Exceptions, Bill of.*

Amendment.

1. A writ of error, issued upon a *præcipe* filed therefor with the clerk, directed to the proper court, correctly describing the proceedings to be certified, and carrying the date of its issue and the seal of the court as required by Comp. Laws N. M. § 517, may be amended *nunc pro tunc*, as of the date of the writ, by striking out of the teste the word "associate," and writing in lieu thereof the word "chief," descriptive of the judge, and by adding the return-day.—Board of County Com'rs v. Atlantic & P. R. Co., 352.

Judgment against sureties.

2. Comp. Laws N. M. § 2206, providing that, on appeal in civil suits, judgment against appellant shall be against him and his sureties on the appeal-bond, applies equally to judgments on writs of error, against plaintiff in error.—Dold v. Robertson, 313.

Estoppel.

Res adjudicata, see *Judgment,* 4.

EVIDENCE.

See, also, *Witness.*

In criminal cases, see *Perjury*, 2.
—— accomplice testimony, see *Criminal Law*, 6.
Objections, see *Trial.*
Parol, see *Deed*, 3; *Negotiable Instruments*, 8.

Best and secondary evidence.

1. In a case of disputed title, one of the litigants being a religious corporation, proof should be obtained directly from the corporate office, in which the corporate papers are usually kept, before admitting secondary evidence of documents presumed by law to be in the corporate custody.—Probst v. Trustees of Board of Domestic Missions, 237.

2. Where a forthcoming bond given in attachment proceedings was properly filed in the clerk's office of the lower court, and a copy of it was preserved among the papers of the plaintiff, but in an action upon the bond the original could not be found, after diligent search, the copy was properly admitted in evidence.—Wagner v. Romero, 131.

3. Where it is sought to prove, not the contents of certain depositions, but simply the fact that they were properly taken and used in a previous suit between the same parties touching the same subject-matter, this may be done by parol evidence, and the record of the former suit need not be introduced.—Ayers v. Chisum, 52.

Books of account.

4. Ledgers and books of account are not admissible in evidence unless it is first shown that the person in whose handwriting they are cannot be produced in court.—Price v. Garland, 285.

Examination.

Of witness, see *Witness*, 3.

EXCEPTIONS, BILL OF.

See, also, *Appeal; Certiorari; Error, Writ of.*

Settlement and signing.

A bill of exceptions, not settled and signed by the presiding judge below within the time required by law, is not properly before the appellate court.—Texas, S. F. & N. R. Co. v. Saxton, 282.

Execution.

See *Attachment; Garnishment.*

EXECUTORS AND ADMINISTRATORS.

Presentment of claims.

Where the law prescribes no form of presentment of a claim against the estate of a decedent, the fact that it was sent to the probate clerk and by him presented to the administrator for settlement is a sufficient presentment, if done within one year after decedent's death, as required by Comp. Laws N. M. § 2225.—Browning v. Browning's Estate, 371.

Exemption.

From taxation, see *Taxation*, 2, 3.

Federal Courts.

See *Courts*, 2.

FORCIBLE ENTRY AND DETAINER.

When action lies.

1. An unlawful entry, unaccompanied by actual force, is not a constructive forcible entry sufficient to sustain a judgment in an action of forcible entry and detainer under the New Mexico statute.—Romero v. Gonzales, 35.*

Pleading.

2. In an action of forcible entry and detainer, a complaint alleging that plaintiffs are entitled to and possessed of the "entrances and exits" of a certain tract of land, and that the defendant illegally and by force entered upon the land, and withholds the same, makes no claim to the property, and will not sustain a judgment.—Roberts v. Trujillo, 50.

Appeal.

3. In an action of forcible entry and detainer, tried before a justice of the peace, there was no allegation in the complaint that the plaintiff was possessed or entitled to the possession of the property, nor did it set forth any of the statutory grounds on which the action could be brought. The justice rendered a judgment in favor of the plaintiff, from which defendant appealed to the district court, at the next term of which he failed to appear. The plaintiff then docketed the case, and moved to dismiss the appeal, at the same time asking that the judgment of the justice be affirmed, and a new judgment rendered against defendant and his sureties. The district court thereupon dismissed the appeal and affirmed the judgment. *Held*, that this was error.—Gonzales v. Boren, 204.

Foreclosure.

Of mortgage, see *Mortgages*.

Forthcoming Bond.

See *Attachment*, 4, 5.

Fraud.

See *Fraudulent Conveyances*.

FRAUDS, STATUTE OF.

Sale of goods.

Plaintiff agreed to cut, saw, and deliver to defendant, a railroad contractor, along the line of the railroad, certain lumber of special sizes and kinds, used in the construction of narrow gauge railroads, which are not usually kept and sold by lumber merchants. The lumber was to be made from timber on government land, and defendant was to secure permission to use it. *Held*, that this was a contract for work and labor, and not a sale of goods within the statute of frauds.—Orman v. Hager, 331.

FRAUDULENT CONVEYANCES.

See, also, *Creditors' Bill.*

Possession and right of sale by mortgagor, see *Chattel Mortgages.*

Injunction against.

Equity will enjoin any transfer of a debtor's property, made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors a preference over others. But such power in the court can only be invoked in behalf of creditors who have established their claims in a court of law, and will not be exercised on behalf of mere contract creditors at large, whose claims are not reduced to judgment.—Talbott v. Randall, 226.

GARNISHMEMT.

Action against garnishee by principal defendant.

While a garnishee may plead judgment, he cannot plead in bar the pendency of garnishment proceedings against him in defense of a suit brought by his immediate creditor.—Herlow v. Orman, 291.

HOMICIDE.

Instructions.

1. Where the evidence justifies a verdict of murder in the first degree, an instruction as to murder in the second degree, if erroneous at all, is harmless error. —Territory v. Salazar, 210.

Province of court.

2. It is a question of law for the court to say, upon the evidence, whether the time which elapsed between the provocation in any given case and the stroke was sufficient for the heat of passion to subside.—Territory v. Salazar, 210.

Improvements.

See *Ejectment*, 6.

INDIANS.

Jurisdiction of offense committed on Indian reservation, see *Courts*, 2.

Homicide by Indian on reservation—Jurisdiction.

The murder of a white man, committed on an Indian reservation by an uncivilized Mescalero Apache Indian, does not fall within any of the exceptions to the jurisdiction of the United States contained in Rev. St. U. S. § 2146, nor is there any provision in the treaty with the Apaches, of July 1, 1852, (10 U. S. St. 979,) putting such an offense within the tribal jurisdiction of the Indians.—United States v. Monte, 126.

Indictment and Information.

See *Perjury*, 1.

Prosecution for larceny by information, see *Larceny.*

Indorsement.

See *Negotiable Instruments*, 2, 3.

INFANCY.

Setting aside decree against infants, see *Equity*, 7, 8.

Actions.

1. An infant defendant, having become of age, is entitled to his day in court, and may file his separate answer, making, if he choose, an entirely new defense. —Thompson v. Maxwell Land Grant & Ry. Co., 269.

2. Where a bill is brought on behalf of infant complainants by their "next friend," it will be presumed that the "next friend" was duly appointed by the court, and leave given to file the bill. A demurrer for failure to show these facts on the face of the bill will be overruled.—Bent v. Maxwell Land Grant & Ry. Co., 158.

Control of infant's real estate.

3. Complainants' ancestor, in a proceeding to establish an equitable right to an undivided interest in land, recovered judgment, and a partition was ordered, but before the decree could be executed he died. *Held*, that his equitable right had become converted into a legal title, and so descending to complainants, his infant heirs, vested in them as a legal estate in land, which a court of equity is without jurisdiction to divest, in the absence of statutory authority, even for the purpose of nurture and maintenance, much less in pursuance of a compromise by their guardian *ad litem*, and this notwithstanding an equitable proceeding was still necessary to determine and separate their interest in the property.—Bent v. Maxwell Land Grant & Ry. Co., 158.

Information.

See *Indictment and Information.*

Injunction.

Against collection of tax, see *Taxation*, 7.
—— usurpation of office, see *Equity*, 2.
Restraining transfer of debtor's property, see *Fraudulent Conveyances.*

INNKEEPERS.

Who are guests.

An employe of a railroad company, making his regular trips and stopping over at the end of his route at the hotel, where he rents a room by the month, is not a guest, in the legal sense, which fixes the liability of the innkeeper as an insurer of his property, and cannot maintain an action for damages against the innkeeper for the loss of the same.—Horner v. Harvey, 197.

Instructions.

See *Criminal Law*, 7–9; *Trial*, 4–10.

INSURANCE.

Accident insurance.

1. Where plaintiff in an action on an accident policy testified that he dived from a plank into water six or seven feet deep, and that the "tympanum of the ear was ruptured by external violence in diving," the jury were justified in finding that the injury resulted from "violent external causes," and a verdict for plaintiff will not be disturbed.—Rodey v. Travelers' Ins. Co., 316.*

2. In such a case, where the court has fairly submitted to the jury the issue as to whether the injury was caused by "external, violent, and accidental means," an instruction that the contract, being made by the defendant itself, must be more strictly construed against it, even if error, will not justify a reversal.—Rodey v. Travelers' Ins. Co., 316.

INTEREST.

Rate—Recovery on common counts.

In an action on a note, interest at the legal rate only can be recovered on the common counts, though the note bear a higher rate by its terms.—Orr v. Hopkins, 45.

Interpretation.

Of contract, see *Contracts.*

JUDGMENT.

Appealable judgments, see *Appeal,* 1, 2.

Rendition and entry.

1. Where on the trial of an issue raised by a plea in abatement the verdict is against the plea, the proper judgment is *quod recuperet,* and the defendant cannot be allowed to plead over to the merits. A judgment, however, for the amount of unliquidated damages claimed, without an inquest to determine the damages actually sustained, is reversible error.—Texas, S. F. & N. R. Co. v. Saxton, 282.

2. When, in an action at law, a joint liability is charged, judgment cannot be entered separately against one of the parties.—Rupe v. New Mexico Lumber Ass'n, 261.

Entry of judgment in vacation.

3. A stipulation between the parties to a garnishment proceeding, that the "garnishee may have ten days from this date to answer the garnishee summons; that the said answer may be made in vacation; and that the order or judgment of the court necessary to determine the liability of the garnishee upon its answer may be entered upon the record of said court, the same as if all the proceedings had been during the April term of said court; and that either party may take such steps to determine the liability of the garnishee in vacation the same as if the same might or could have been during the term of said court,"—will not have the effect to confer jurisdiction on a court acting thereunder, and a judgment rendered in pursuance thereof, in vacation, is *coram non judice,* and void.—Staab v. Atlantic & P. R. Co., 349.

Res adjudicata.

4. A court of equity will not consider a cause pending between parties who, upon a matter substantially the same, have already had their controversy adjudicated in a court of law.—Robbins v. Collier, 231.

Jurisdiction.

See *Courts; Equity,* 1, 2.

Of county board, see *Counties.*

JURY.

Separation, see *Criminal Law*, 10, 11.

Challenges.
Technically, upon the trial of a juror for general or absolute disqualification under the statute, and expressly for bias, the challenge should be first interposed and the evidence introduced afterwards; but where, upon a *voir dire*, it appears that the juror is not the head of a family, a challenge therefor may be disposed of upon the evidence already received.—Territory v. Lopez, 104.

Killing Stock.

See *Railroad Companies*, 3.

Landlord and Tenant.

To whom property taxed, see *Taxation*, 1.

LARCENY.

Continuance, see *Criminal Law*, 3.
From mail, see *Post-Office*.

Prosecution by information.
The crime of larceny is an infamous one, for which a person cannot be prosecuted merely upon an information.—United States v. Fuller, 367.

Liens.

See *Mechanics' Liens*.
For advancements to develop mining property, see *Mines and Mining*, 2.
Jurisdiction, see *Equity*, 1.

LIMITATION OF ACTIONS.

See, also, *Adverse Possession*.

When statute applicable.
1. The provision of the act of congress organizing the territory of New Mexico, § 10, that "the supreme and district courts respectively shall possess chancery as well as common-law jurisdiction," applies to procedure only, and did not substitute for the Mexican and Spanish jurisprudence the rules of the common law regulating property. The limitation of actions on notes, as fixed by the Mexican laws at 10 years, remained unchanged.—Browning v. Browning's Estate, 371.
2. By act of January 7, 1876, (Comp. Laws N. M. 1884, § 1823,) providing that "in all courts of this territory the common law, as recognized in the United States of America, shall be the rule of practice and decision," the common law was substituted for the Mexican and Spanish system, and the statute of limitations, (21 Jac. I.,) by which actions on promissory notes are limited to six years, went into effect.—Browning v. Browning's Estate, 371.
3. The act of January 23, 1880, (Comp. Laws N. M. 1884, § 1870,) provided that

suits on all causes of action then existing might be commenced within two years from the passage of that act. By act of January 21, 1882, (Comp. Laws N. M. 1884, § 1871,) this period was extended for two years longer. *Held*, that action on a promissory note, due November 2, 1872, and presented for payment to the administrator of the maker in July, 1883, was not barred.—Browning v. Browning's Estate, 371.

Location.

Of mining claim, see *Mines and Mining*, 1.

MASTER AND SERVANT.

Injuries to servant—Contributory negligence.

In an action for personal injuries, where it appeared that plaintiff, the foreman of a mine, before he entered the service of the defendant mining company, was cognizant of a defect in the hoisting machinery, by means of which he was subsequently injured, and brought it to the attention of the superintendent, but undertook the employment notwithstanding, without any promise that it should be remedied, the court properly held him guilty of contributory negligence, and directed a verdict for defendant.—Alexander v. Tennessee & Los Cerrillos Gold & Silver Min. Co., 173.*

Measure of Damages.

See *Damages*.

MECHANICS' LIENS.

Who may claim.

1. Under the statute of New Mexico the property is affected by the lien of a subcontractor as well as the head contractor. The object of a lien is to protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged. The statute has enlarged the operation of liens, not introduced any new principles. It is not in derogation of the common law, and therefore not necessarily to be subjected to a strict construction.—Hobbs v. Spiegelberg, 222; Post v. Same, Id.

Proceedings to perfect—Statement of claim.

2. The purpose of the statute is accomplished when a person claiming a lien files within the prescribed time, for record in the proper office, a sworn statement of the amount due him, together with the other facts required to be stated in section 6 of the act of 1880. All these facts may be stated in ordinary language, and sworn to before an officer authorized to administer an oath.—Hobbs v. Spiegelberg, 222; Post v. Same, Id.

—— Verification of claim.

3. By strict construction of the laws of the territory, (Prince's Laws, p. 409, par. 6,)—and mechanic's lien laws should be strictly construed,—a claim for a mechanic's lien, when filed, should have been verified; and it should appear upon its face to have been verified, before it can be made the basis of a proceeding to enforce the claim based upon it.—Finane v. Las Vegas Hotel & Imp. Co., 256; Houghton v. Same, 260.

Enforcement—At law or in equity.

4. In the absence of a plain statutory provision making it an action at law, the proceeding to enforce a mechanic's lien must be taken upon the equity side of the court.—Finane v. Las Vegas Hotel & Imp. Co., 256; Houghton v. Same, 260; Straus v. Finane, Id.

5. In an action in *assumpsit* a judgment to enforce a mechanic's lien cannot be entered.—Rupe v. New Mexico Lumber Ass'n, 261.

Enforcement—Parties.
6. In an attempt to enforce a mechanic's lien by an action of *assumpsit*, the purchaser of the property to be charged, if not a party to the contract, as set out in the declaration, is improperly made a defendant, and cannot be included in the judgment.—Straus v. Finane, 260.

—— Pleading.
7. A bill to enforce a mechanic's lien on railroad property, referring to the notices filed, as prescribed by statute, and setting out in detail the work and labor performed and materials furnished, is sufficient, though it does not specifically set out the particular items stated in the notice.—Texas, S. F. & N. R. Co. v. Orman, 365.

Allowance for items not included in claim.
8. No lien can be allowed for labor and materials not embraced in the claim and notice of lien, and such an item will be stricken from the decree in complainant's favor.—Texas, S. F. & N. R. Co. v. Orman, 365.

Memoranda.

To refresh memory, see *Witness*, 3.

Mexican Grant.

See *Public Lands*.

MINES AND MINING.

Location—Notice.
1. A notice of the location of a mining claim, under the laws of the United States and the territory of New Mexico, which does not describe the limits of the claim by reference to natural objects or permanent monuments, is not sufficient, although it describes the claim as bounded by certain other claims.—Baxter Mountain Gold Min. Co. v. Patterson, 179.*

Lien for advancements.
2. Parties accepting a fourth interest in a mine in consideration of "one dollar," and the understanding that they will furnish the money and do the work necessary to develop the property, and who, in doing so, have the work entirely in their own hands, and can stop whenever they see fit, cannot, when the development has advanced to a certain stage, and the indications are good, shut down the mine, refuse to work it themselves, or allow their co-owners to work it, demand instant payment of all the money expended, and establish a lien on the whole property therefor.—Brunswick v. Winters' Heirs, 241.

Minors.

See *Infancy*.

Mistake.

Reformation of mortgage, see *Mortgages*.

MORTGAGES.

See, also, *Chattel Mortgages*.
Right of mortgagee, action against corporation, see *Corporations*, 3.

Mistake—Foreclosure without reformation.
A mortgage which by its terms is expressly intended to secure payment of a note, but is defective, in the power of sale, in providing only for payment of costs of the trust and interest, without making any provision for the principal, will be foreclosed by a court of equity without waiting for the instrument to be reformed.—Milligan v. Cromwell, 327; Seewald v. Raynolds, 344.

Municipal Corporations.

See *Counties.*
Aid to railroad, see *Railroad Companies,* 1, 2.

NEGLIGENCE.

Contributory, see *Master and Servant.*
Killing stock, see *Railroad Companies,* 3.
Loss of goods, see *Carriers,* 2–5; *Innkeepers.*

Pleading—Proof.
In an action against a railroad company for personal injuries, where the allegation of negligence in the declaration is that the defendant, "by its servants, so carelessly and improperly drove and managed its locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its servants, in that behalf, said locomotive engine and train" ran over and injured plaintiff's minor son, evidence that the injury occurred in consequence of the defective construction of the defendant's station platform, which was built so near the track that the coaches projected over it a foot, is inadmissible, and an instruction submitting that issue to the jury is error.—Murray v. Silver City, D. & P. R. Co., 337.*

NEGOTIABLE INSTRUMENTS.

Acceptance of note, see *Payment.*
Actions on, interest recoverable, see *Interest.*

Negotiability.
1. The words "with exchange," inserted in a promissory note, by its terms made payable at a certain place, are mere surplusage, without significance, and do not affect the character of the instrument as a note.—Orr v. Hopkins, 45.*

Indorsement—Effect.
2. An indorsement has as a legal effect the making of the note indorsed negotiable.—Herlow v. Orman, 291.

—— Delivery after indorsement.
3. After indorsement by the payee, simple delivery of the notes has the effect of transferring the notes and the money secured thereby to the person to whom they were delivered.—Herlow v. Orman, 291.

Actions on—Pleading.
4. In *assumpsit* on a bill of exchange, the proper plea is *non assumpsit,* a denial under oath of the signature. Prince, Gen. Laws, p. 119, § 30. The plea under oath of *non est factum,* as required by section 31, Id., is only applicable to instruments under seal.—Luna v. Mohr, 56.

—— Pleading and proof.
5. The admission in evidence of a note of a different date and amount from the note in suit, and payable on its face before the alleged cause of action arose, is error.—Staab v. Jaramillo, 33.

6. In a suit on a promissory note, a partial failure of consideration may be proved under the general issue, and is a good defense *pro tanto*.—Staab v. Garcia y Ortiz, 53.

7. Though the note in evidence is fatally variant from the note declared on in the special count, it will be received in support of a count for an account stated. —Orr v. Hopkins, 45.

—— Evidence.

8. In *assumpsit* against defendant personally, a drawer of a bill of exchange, which is made neither in his name nor in that of the firm of which he is a member, but is signed by a third person as "agent," and is drawn on defendant's firm, it is not competent to show by parol evidence that the drawer is defendant's agent, and that defendant is the real maker of the draft.—Luna v. Mohr, 56.*

—— Defective verification—Effect.

9. In *assumpsit* against defendant personally, where special counts of the declaration seek to charge the defendant as drawer, through his agent or partner, of a bill of exchange upon his firm, the defective verification of defendant's plea, denying his signature under oath, as required by Prince, Gen. Laws, p. 119, § 30, will not be taken as an admission of the truth of the special counts. It is essential to establish his connection with the instrument by competent proof.—Luna v. Mohr, 56.

New Trial.

Presence of parties on argument of motion for, see *Criminal Law*, 5.

Notice.

Of location of mining claim, see *Mines and Mining*, 1.
To non-resident defendant in attachment proceedings, see *Attachment*, 1.

NOVATION.

What constitutes.

Plaintiff agreed to manufacture for defendant, a railroad contractor, lumber of special sizes and kinds to be used in the construction of a railroad. Upon breach of the contract by defendant, plaintiff entered into a less advantageous contract directly with the railroad company to furnish a much smaller quantity of lumber, requiring less machinery and fewer men than had been prepared and collected for operations under the contract with defendant. *Held*, such new arrangement cannot be considered a novation of the contract on which action was brought.—Orman v. Hager, 331.

OFFICE AND OFFICER.

Injunction against usurpation of office, see *Equity*, 2.
Proceeding to declare office vacant, see *Counties*.

Attorney general de facto—Presumption.

In an informal proceeding to determine the right to the office of attorney general between two parties, one of whom claims under an appointment by the present governor, and the other under an appointment previously made for a term not yet expired, according to a commission exhibited in court, the court presumes, from the presence of the latter party, that he is not dead, and from his acts and declarations that he has not resigned, and decides, accordingly, that he is *de facto* attorney general; the question as to who is so *de jure* being reserved for deter-

mination until such time as a proper case shall have been formally submitted and heard.—In re Attorney General, 304.

PARTIES.

In action to enforce lien, see *Mechanics' Liens*, 7.

In action on forthcoming bond.
Under the New Mexico practice act of 1880, § 2, providing that a party in whose name a contract is made for the benefit of another may sue on it in his own name, the sheriff is the proper party plaintiff, in an action on a forthcoming bond.—Wagner v. Romero, 131.

PAYMENT.

Acceptance of note.
The giving and acceptance of a note is *prima facie* evidence of a settlement between the parties of the difference between them growing out of the transactions with which it is connected.—Crabtree v. Segrist, 278.

PERJURY.

Indictment.
1. It is not sufficient to charge generally that a certain question, upon which the alleged false testimony was given, was or became material, but the indictment must set forth facts showing how it became material.—Territory v. Remuzon, 368.

Evidence.
2. The old rule that a charge of perjury must be proved by more than one witness has been somewhat relaxed; but the testimony of a single witness must be supported by corroborating evidence or circumstances.—Territory v. Remuzon, 368.

PLEADING.

See, also, *Assumpsit; Ejectment*, 2, 3; *Forcible Entry and Detainer*, 2.
Allegations as to negligence, see *Negligence*.
Amendment, see *Equity*, 3.
In action for specific performance, see *Specific Performance*, 2.
—— on note or bill of exchange, see *Negotiable Instruments*, 4.
—— to enforce lien, see *Mechanics' Liens*, 8.
Objections to for variance, see *Trial*, 3.
Pleading and proof, see *Negotiable Instruments*, 5–7.

Demurrer—Effect of sustaining.
Where a demurrer has been sustained to one of the counts in the declaration, it is error to permit such count to be read to the jury, or to receive evidence thereupon.—Luna v. Mohr, 56.

Poll-Tax.

Application, see *Taxation*, 5.

POST-OFFICE.

Robbery of mail.
1. When in the trial of an indictment the evidence proves that the accused took by force, from the possession of the postmaster, a package directed to another

person, which was a part of the United States mail, although such package was not in the post-office, and had been removed to some other place, and although the postmaster may have intended to appropriate the same for a private debt due to himself, the accused is guilty of robbing the mail, within the meaning of section 5472 of the Revised Statutes of the United States.—United States v. Bowman, 201.

—— Punishment—Under what law.

2. Where a person is found guilty of robbing the mail, it is the province of the court, under the law of the United States, to assess his punishment. The statute of the territorial legislature has no application to this class of cases.—United States v. Bowman, 201.

PRACTICE IN CIVIL CASES.

See, also, *Appeal; Certiorari; Error, Writ of; Exceptions, Bill of; Judgment; Jury; Parties; Pleading; Trial; Venue in Civil Cases.*

Order during vacation.

An order during vacation dismissing attachment proceedings, and ordering the attached property released, upon a motion therefor filed and argued during term, is void, and the motion is thereafter still pending.—Colter v. Marriage, 351.

Presumption.

Determination of right to office, see *Office and Officer.*
Of agency, see *Corporations,* 1.
consideration, see *Specific Performance,* 2.
jurisdiction, see *Courts,* 1.
negligence, see *Railroad Companies,* 3.
On appeal, see *Appeal,* 9.

Price.

Action for, see *Sale,* 1.

Principal and Agent.

Liability for tort of agent, see *Corporations,* 2.
Presumption of agency, see *Corporations,* 1.

PRINCIPAL AND SURETY.

Action against surety—Exhaustion of remedy against principal.

Under Act 1878, c. 4, § 56, (Prince, St. p. 122,) providing that "all contracts which by common law are joint only shall be held and construed to be joint and several," an action may be maintained against the sureties on a forthcoming bond, without joining the principal or showing that judgment has been obtained and the remedy exhausted against him.—Wagner v. Romero, 131.

Promissory Notes.

See *Negotiable Instruments.*

Publication.

Of notice to non-resident defendant in attachment proceedings, see *Attachment*, 1.

PUBLIC LANDS.

Mexican grant.

Under Act Cong. July 22, 1854, directing the surveyor general of New Mexico to ascertain and report to congress on all claims to lands under the laws, usages, and customs of Spain and Mexico, and reserving lands so claimed "from sale or other disposal by the government" until final action by congress, a report by the surveyor general that a certain Mexican grant has not been surveyed, but is "reported" to contain a certain number of acres; that the grant is valid and the title perfect in representatives of the grantee,—has the effect to segregate the land from the public domain of the United States, and a homestead entry thereon is void as against the claimants under the Mexican grant.—Whitney v. McAfee, 37.

Punishment.

For robbing mail, see *Post-Office*, 2.

RAILROAD COMPANIES.

See, also, *Carriers*.

Action for negligence, pleading, see *Negligence*.
Exemption from taxation, see *Constitutional Law; Taxation*, 2, 3.
Liability of lessee for taxes, see *Taxation*, 1.

Municipal aid.

1. The New Mexico revenue law of 1882, c. 62, was intended as a codification and amendment of the pre-existing revenue laws. It did not contemplate other sources of public income than revenues and licenses of the classes enumerated in its several sections, and did not repeal Laws 1872, c. 3, authorizing county aid to railroad corporations, and the levy of a special tax for such purpose.—Laughlin v. Board of County Com'rs, 264.

2. The provision of the sixth section for an annual levy, for territorial revenue, of one half of 1 per cent., for ordinary county revenue, of one-fourth of 1 per cent., and for the public schools, of one-fourth of 1 per cent., though a restriction of the power of taxation as to those purposes, has no reference to extraordinary taxation for special purposes under particular statutes.—Laughlin v. Board of County Com'rs, 264.

Stock-killing cases—Presumption of negligence.

3. The mere fact of an animal being killed by a train raises no presumption of negligence upon the part of the railroad company or its servants, but the burden of proof is on the plaintiff to show negligence.—Atchison, T. & S. F. R. Co. v. Walton, 319.

Reasonable Doubt.

Instructions, see *Criminal Law*, 8.

Reconvention.

See *Set-Off and Counter-Claim*.

Reformation.

Of mortgage, see *Mortgages.*

Release and Discharge.

See *Payment.*

RELIGIOUS SOCIETIES.

Power to sue—Failure to file corporation papers.
The fact that a religious corporation had not, previously to the commencement of a suit, caused the papers and certificates required by chapter 3 of the Laws of 1880 to be filed in the office of the secretary of the territory, does not debar it from access to the courts in protecting its previously vested estate in the territory.—Probst v. Trustees of Board of Domestic Missions, 237.

Res Adjudicata.

See *Judgment,* 4.

Rescission.

Of assignment, see *Assignment.*

Review.

On appeal, see *Appeal,* 6–12.

Robbery.

From mail, see *Post-Office.*

RULES OF COURT.

Abrogation.
Rule 21 of the rules of the supreme court of New Mexico, requiring the plaintiff in error or his agent to file the affidavit therein prescribed, was made under the authority of the practice act of 1874, which act was superseded by the practice act of 1880; and this rule, therefore, is abrogated.—Texas, S. F. & N. R. Co. v. Saxton, 282.

SALE.

What constitutes, see *Frauds, Statute of.*

Action for price.
1. Where it is clear from the evidence that certain goods were not to be paid for until a receipt or voucher had been issued by a certain person, no action can be maintained for such goods without proof of its issuance.—Staab v. Garcia y Ortiz, 53.

Conditional sale.
2. A party, having sold cattle and taken the purchaser's notes for them, upon the condition that the title is to remain in him until the notes are paid, cannot, while holding the notes, seize or sell the cattle in order to make the debt good.—Crabtree v. Segrist, 278.

3. Whether a transaction in which the seller delivered a bill of sale of the goods to the purchaser and accepted the latter's notes for payment was a conditional or an absolute sale, is a question that the jury may properly decide from the evidence.—Crabtree v. Segrist, 278.

School Fund.

Disposition of poll-tax, see *Taxation*, 5.

Schools and School-Districts.

Application of poll-tax to school fund, see *Taxation*, 5.

Seal.

Presumption of consideration from use of, see *Specific Performance*, 2.

SET-OFF AND COUNTER-CLAIM.

When allowable.

1. Under the New Mexico practice act of 1880, (Prince, St. p. 124, § 11, subd. 3,) new matter constituting a cause of action in favor of defendant is available as a set-off, even in an action on a note given in final settlement of account between the parties.—Staab v. Garcia y Ortiz, 53.

2. Under a statute limiting the right of set-off to causes of action "in favor of defendant arising out of the contracts or transactions set forth in the declaration, or connected with the subject of the action," the defendant in *assumpsit* for goods sold and delivered cannot plead damages for an unsuccessful attachment for the same debt six months after the sale was consummated.—Leyser v. Rindskopf, 233.*

Pleading and evidence.

3. Where an action is brought upon a promissory note, and the defendant, besides pleading the general issue, files a special plea of set-off, to which the plaintiff replies that the matters of set-off were barred by the statute of limitations, and the defendant, on the trial, introduced evidence of subsequent promises, which, he claimed, took them out of the statute, an instruction by the court to the jury that defendant had failed to sustain his plea of set-off, and that they must find a verdict for the plaintiff, was error, for which the defendant was entitled to a new trial.—Chaves v. Chaves, 199.

Settlement.

See *Payment*.

Sheriffs and Constables.

Proper plaintiff in action on forthcoming bond, see *Parties*.

Societies.

See *Religious Societies*.

SPECIFIC PERFORMANCE.

Contracts enforceable—Mutuality.

1. A bond to convey a mine, upon the payment of a certain sum of money, will be specifically enforced notwithstanding it is unilateral, and signed only by the party to be charged.—Borel v. Mead, 84.*

Pleading.

2. A contract under seal is presumed to be for good consideration, and a bill for specific performance of it is not demurrable because it does not show what the consideration was.—Borel v. Mead, 84.

STATUTES.

Construction.

1. The cardinal rule in the interpretation of statutes is to ascertain, if possible, the legislative purpose or intention in the enactment of a law.—Douglass v. Lewis, 345.
2. Courts will not declare an enactment void on account of slight inaccuracies of expression.—Douglass v. Lewis, 345.
3. Where the statutory terms are of such uncertain meaning or so confused that the court cannot discern with reasonable certainty what is intended, they will be declared void.—Douglass v. Lewis, 345.
4. Section 2750, Comp. Laws N. M. 1884, having been enacted in 1852, the court in construing it may look back to that period to ascertain the surroundings of the legislature that passed the act, the language in which it was passed, the difficulties of a correct verbal translation, and other necessary circumstances.—Douglass v. Lewis, 345.

STATUTES CITED AND CONSTRUED.

UNITED STATES.

Revised Statutes.

§ 711. Federal courts—Criminal jurisdiction, 127
§ 1005. Writ of error—Amendment, 356, 357
§ 1889. Sioux Indian reservation, 127
§§ 1907-1910. Territorial courts—Jurisdiction, 127
§ 2079. Indians — Prohibition to contract treaties with, 130
§ 2145. Crimes in Indian country—Jurisdiction, 126-129
§ 2146. Crimes among Indians—Jurisdiction, 126, 129
§ 2324. Mining claims—Notice of location, 182
§ 5339. Murder—Jurisdiction, 127
§ 5472. Robbery of mails, 201, 202

Statutes at Large.

Act June 30, 1834. Indian country—What is, 128, 129
Act 1850, § 10. Organization of New Mexico—Jurisdiction of courts, 371, 373
Act Feb. 27, 1851. Indians — Intercourse with, 129
Act July 22, 1854, § 8. Public lands—Spanish and Mexican grants, 37, 38
Act March 2, 1867, § 1. Territorial organic act—Special privileges, 116, 118
Act March 3, 1871. Indians — Prohibition to contract treaties with, 130
Act June 10, 1872. Corporations in territories—Organization, 118
Act Jan. 6, 1883. Indian Territory—Courts, 128
9 St. 587. Indians—Intercourse with, 129
10 St. 309. Public lands—Spanish and Mexican grants, 38
10 St. 979, arts. 1, 4, 6. Treaty with Apache Indians, 126, 129, 130
14 St. p. 426, § 1. Territorial organic act—Special privileges, 118
15 St. 635, art. 11. Sioux Indian reservation—Boundaries, 127
15 St. 667. Treaty with Navajo Indians, 130
17 St. 390. Corporations in territories—Organization, 118
22 St. 400. Indian Territory—Courts, 128

NEW MEXICO.

Compiled Laws.

Page 106, §§ 3, 4, 6. Appeal—From district court, 74
Page 122, § 4. Appeal — From probate court, 71, 74
Page 162, §§ 81-83. Appeals—From justices' courts, 75
Page 172, § 114. Appeals — From justices' courts, 75
Page 184, § 5. Appeal—From probate courts, 71, 74
Page 206, § 14. Appeals from inferior courts—Trial *de novo*, 74
Page 742. Revised Statutes — Law of territory, 75
§ 517. Process from supreme court—Teste, 352-354
§ 522. Equity jurisdiction—Procedure, 353, 356
§ 1812. Taxation—Leased property, 380, 382
§ 2185. Appeal—When lies, 350
§ 2189. Appeal—Assignment of errors, 313
§ 2191. Affirmance on appeal — Damages, 313, 314
§ 2193. Appeal—When lies, 350
§ 2194. Writs of error, 353, 354
§ 2206. Appeal-bonds—Judgments on, 313-315

Compiled Laws 1865.

Page 502. Challenge of juror—How tried, 105, 106.

Compiled Laws 1884.

Ch. 3, tit. 12, §§ 1239, 1240, 1242. Officers—Contest, 324, 325
§ 1823. Common law, 371, 376
§ 1829. Judges—Powers in vacation, 351
§ 1870. Limitation of actions, 371, 378
§ 1871. Limitation of actions — Extension, 371, 378, 379
§§ 2049, 2050, 2052. Continuance — Application, 369, 370
§ 2197. Appeals in equity cases — Exceptions, 324-326
§ 2225. Claims against decedents—Presentment, 371, 379
§ 2750. Deeds of bargain and sale—Construction, 345, 346
§§ 2822-2825. Assessment—List of property, 380, 383

General Laws.

Page 414, (Act 1872.) Interest, 327, 329, 330
Page 421, (Act 1866.) Usury—Effect, 327, 329, 330

Prince's General Laws.

Page 68, §§ 3, 4, 6. Appeal—From district court, 74
Page 68, § 4. Appeal-bonds, 143
Pages 68, 69, § 5. Appeal — Objections not raised below, 143, 278, 279
Page 69, § 7. Appeal—Decision, 144
Page 76, § 4. Appeal — From probate court, 71, 74
Page 119, § 30. Action on written contract—Denial of signature, 56, 59, 60
Page 119, § 31. Sealed instruments — Plea of *non est factum*, 56, 59
Page 122. Joint contracts—Actions on, 131, 133
Page 124, § 11, subd. 3. Set-off and counter-claim—What may be pleaded, 53, 54
Page 127, § 24. Instructions — How to be modified, 116
Page 130. Real actions—Venue, 159, 172
Page 133. Attachment — Non-resident defendants, 40, 42
Page 138. Forthcoming bonds, 132
Page 138, § 11. Attachment—Notice to non-resident defendant, 39, 43
Page 138, § 12. Attachment — Non-resident defendants, 44
Page 139, § 16. Attachment—Affidavit, 155
Page 143, § 36. Attachment—Non-resident defendants, 39, 43
Page 143, § 37, subd. 3. Attachment—Demand not due, 155
Page 143, § 38. Attachment—Effect of dismissal, 155
Page 152. Ejectment—Petition, 214
Page 153. Ejectment—Improvements, 189
Page 166, § 14. Appeals from inferior courts—Trial *de novo*, 74
Page 239. Defective acknowledgments —Cure, 245
Page 242, § 5. Appeal — Judgment against appellant, 143
Page 409, par. 6. Mechanics' liens — Verification of claim, 256, 259
Page 414. Interest—Rate, 48
Page 485. Persons under disability—Judicial sale of land, 172
Page 486. Ejectment—Improvements, 189, 190
Page 513, §§ 6, 7. School taxes, 146, 147
Page 515, § 5. School taxes — Collection, 146, 147
Page 524, § 11. Poll-tax—Amount. 147
Page 688, § 6. Property tax—Distribution, 147
Page 698, § 56. Tax collector—Duties, 148
Page 707, § 96. License taxes — Distribution, 148
Page 712, § 113. Poll-tax—Amount, 148
Page 712, § 118. Tax collector—Sheriff, 146, 147

NEW MEXICO—Continued.

LAWS.

Act Dec. 1847, §§ 1, 4. Ejectment—Petition, 214
Act Jan. 24, 1865. Revised Statutes—Law of territory, 75
Act Dec. 27, 1867, § 1. Corporations—Organization, 118, 119
Acts 1872, ch. 16. Persons under disability—Judicial sale of land, 172
Laws 1872, ch. 22, § 6. Taxation—Rate, 267
Act Jan. 30, 1872. Railroads—Powers, 119
Act Feb. 1, 1872, ch. 30, § 4. Railroad companies—County aid, 264, 265, 267, 268
Acts 1874. Practice act, 282, 284
Acts 1876, ch. 1, § 7. Counties—Debts, 266, 267
Acts 1876, ch. 2, § 1. Real actions—Venue, 159, 172
Act Jan. 5, 1876. Corporations—Organization, 119
Act Jan. 7, 1876. Common law, 371, 376
Act 1878, ch. 4, § 56. Joint contracts—Actions on, 131, 133
Act Feb. 2, 1878, ch. 9, § 3. Taxation—Exemption of railroads, 116, 119, 120, 121, 123
Act Feb. 12, 1878. Taxation—Exemption of railroads, 116, 119, 120
Act Feb. 15, 1878. Taxation—Exemption of railroads, 116, 119, 120
Acts 1880. Practice—Writs of error, 282, 284
Laws 1880, ch. 3. Corporations—Filing certificate, 237
Act 1880, §§ 1, 2, 6, 12. Mechanics' liens, 222–224
Act 1880, § 2. Practice—Trustee of express trust, 131, 133
Act Jan. 23, 1880. Limitation of actions, 371, 378
Acts 1882, ch. 62, § 6. Taxes—Distribution, 264–267
Act Jan. 21, 1882. Limitation of actions—Extension, 371, 378
Act March 1, 1882. Taxation—Corporations, 117, 125
Act March 1, 1882, § 3. County collector—Removal, 297, 299, 300, 301
Acts 1882, p. 43. Usury—Effect, 327, 329, 330

Stock.

Killed by locomotive, see *Railroad Companies*, 3.

Sunday.

Return of verdict on, see *Criminal Law*, 12.

TAXATION.

Exemption from, see *Constitutional Law*.
Repeal of law authorizing aid to railroads, see *Railroad Companies*, 1, 2.

Leased property.

1. Under Comp. Laws N. M. § 1812, providing that property under a lease shall be taxed to the lessor unless listed by the lessee, property under a railroad lease cannot be properly assessed to lessee company operating the road under the lessor's charter.—Board of County Com'rs v. Atchison, T. & S. F. R. Co., 380.*

Exemption.

2. The offer, by Acts N. M. Feb. 2, 1878, and Feb. 12, 1878, of exemption from taxation to corporations organized under the laws of the territory for the purpose of constructing railroads, was not a mere gratuity and without consideration, but upon its acceptance, by complying with its conditions by constructing and operating a railroad, it became a binding contract, from which the territory cannot recede.—Board of County Com'rs v. New Mexico & S. P. R. Co., 116.

3. Under Acts N. M. Feb. 2, 1878, and Feb. 12, 1878, exempting from taxation "all the property of every kind and description" of corporations organized for the construction of railroads, the capital stock of a railroad company is exempt,

and when the conditions are complied with it cannot be taxed during the period specified.—Board of County Com'rs v. New Mexico & S. P. R. Co., 116.

Assessment

4. Comp. Laws N. M. 1884, §§ 2822-2824, require the assessor to exact from each taxable inhabitant of the county a list and description in detail of all his property, real and personal. Id. § 2825, provides that, upon the failure of any person to return such list, the assessor shall make it out according to the best information he can obtain. *Held* that, while the law does not require such list by the assessor to be strictly accurate, or the valuations to be correct, yet it is essential to the validity of the tax that some description or list be made. The assessment of the property of a railroad company, real and personal, for one year in a single item as $1,000, and in other years in two items, real and personal property, each at $250,000, is void.—Board of County Com'rs v. Atchison, T. & S. F. R. Co., 380.

Disposition of poll-tax—Application to school fund.

5. The revenue act of 1872 (Prince, St. p. 513, §§ 6, 7,) provides for a poll-tax to be "applied to school purposes exclusively." The act of 1874, (Id. p. 515, § 5,) provides for its collection by the constable of each precinct, who shall turn it over to the county treasurer. The revenue act of 1882, (Prince, St. 1882, p. 712, § 118,) which embraces all the subjects of taxation, makes the sheriff *ex officio* collector of all taxes, and provides for the distribution of other taxes, but is silent as to the disposition of the poll-tax. The repealing clause repeals all conflicting laws, and further provides that "all laws or part of laws heretofore in force, regarding the raising of revenue from taxation or from licenses, are by this act hereby repealed." *Held*, that it was not the legislative intent in the act of 1882 to change the disposition of the poll-tax, and that the provision of the act of 1872 devoting it to school purposes is still in force, and that the money should properly be turned over to the county treasurer for the school fund.—Territory v. Luna, 146.

Erroneous taxation—Remedies.

6. The decision of the United States supreme court in the case of Crampton v. Zabriskie, 101 U. S. 601, establishes the right of an individual tax-payer to obtain relief by a direct suit in his own name against a theatened *devastavit* of public funds in which he has a tax-payer's interest, or against threatened illegal taxation by which his property might be imperiled.—Laughlin v. Board of County Com'rs, 264.

—— Injunction—Tender.

7. In a suit to enjoin the collection of taxes, when the original assessment was void, there is no necessity for a tender of such sum as might be equitably due on account of such taxes.—Board of County Com'rs v. Atchison, T. & S. F. R. Co., 380.*

Tender.

Of taxes, see *Taxation*, 7.

Territories.

Punishment for robbing mail, see *Post-Office*, 2.

Torts.

See *Forcible Entry and Detainer; Negligence.*
Liability of corporation, see *Corporations*, 2.

Trespass.

Liability of corporation, see *Corporations*, 2.

TRIAL.

See, also, *Appeal; Certiorari; Error, Writ of; Exceptions, Bill of; Judgment; Jury; Pleading; Practice in Civil Cases; Witness.*

Appearance of parties in person—Presumption.

1. When, in the trial of an action at law, the parties appear in person, and undertake its management, each for himself, without the aid of counsel, the law presumes them to have full knowledge of the situation of their case.—Waldez v. Archuleta, 195.

Submission of question of law to jury.

2. The submission to a jury of the validity of a mortgage set up as against attaching creditors, without submitting the facts on which its validity must be determined, is error.—Smith v. Montoya, 39.

Objections to evidence.

3. Where evidence is clearly outside the issue as made by the declaration, defendant's right to object to it is not waived by his failure to do so when it is offered, but if the objectionable testimony is of such a character that it can be easily designated and separated from the other evidence, a motion after all the testimony is in, and before the argument, to exclude it from the consideration of the jury, should be sustained.—Murray v. Silver City, D. & P. R. Co., 337.

Instructions.

4. Although the assignments of error must point out specific errors in the instructions, still, where the charge as a whole fairly presents the case to the jury, the judgment will not be reversed, because of incidental errors, and isolated sentences open to criticism, which are contained in it.—Pinkerton v. Ledoux, 252.

5. The refusal of an unnecessary instruction, or the giving of one not in prejudice of the interest of the complaining party, will not sustain an assignment of error.—Pinkerton v. Ledoux, 252.

6. The statute providing that modifications of instructions asked must not be by interlineation or erasure is merely directory, and an erasure not prejudicial to the party objecting thereto is not ground for reversal of the judgment.—Denver & R. G. Ry. Co. v. Harris, 109.

7. In case of conflicting testimony it is eminently proper for the court to tell the jury to decide which witness has told the truth.—Kent v. Favor, 218.

—— Directing verdict.

8. It is proper for the court to direct a verdict in all cases when there is no disputed question of fact to be submitted to the jury.—Armijo v. New Mexico Town Co., 244.

9. In any case where there is no evidence to warrant an adverse verdict, and where the court would feel bound to set aside such verdict if rendered, it is proper for the court to direct a verdict for the party entitled thereto.—Armijo v. New Mexico Town Co., 244.

10. Although a court of the United States has no authority to enter a peremptory nonsuit, it has authority to direct a jury to find a verdict for a defendant, and it should always do so when it will not permit a verdict for the plaintiff to stand.—Alexander v. Tennessee & Los Cerrillos Gold & Silver Min. Co., 173.

Trustee Process.

See *Garnishment.*

USURY.

Effect on contract.

The act of 1866, (Gen. Laws, 421,) declaring usurious contracts illegal and criminal, was repealed by the act of 1872, (Gen. Laws, 414,) making all contracts for interest legal and binding. This in turn was repealed by the act of March 2, 1882, (Acts 1882, p. 43,) establishing 12 per cent. as the legal rate of interest, and mak

ing usurious contracts void as to the excess beyond that rate. *Held*, that the repeal of the act of 1872 did not operate a revival of the act of 1866, and that usurious contracts are not invalid, except as to the excess beyond the legal rate.—Milligan v. Cromwell, 327; Seewald v. Raynolds, 344.

Vacation.

Of decree, see *Equity*, 4-8.

Variance.

Objections for, see *Trial*, 3.

Vendor and Vendee.

See *Deed; Fraudulent Conveyances; Sale; Specific Performance.*

VENUE IN CIVIL CASES.

Suit involving land—Division of county.
Where land was originally in one county, but by a new division it became located in another county, a suit, of which an interest in the land is the subject-matter, is properly brought in the county in which the land lies at the time the suit is brought, under chapter 2, Act 1876, § 1, (Prince's Laws, p. 130.)—Bent v. Maxwell Land Grant & Ry. Co., 158.

Venue in Criminal Cases.

See *Criminal Law*, 1.

Verdict.

See *Criminal Law*, 12.
Directing, see *Trial*, 8-10.

Verification.

Of claim for mechanic's lien, see *Mechanics' Liens*, 3.

WITNESS.

See, also, *Evidence.*

Competency—Religious belief.
1. A Chinaman, who believes in the Chinese religion, but takes the ordinary form of oath, without objection, and testifies that he regards it as binding, is, as far as concerns religious belief, a competent witness.—Territory v. Yee Shun, 82.*

—— Deaf mute.
2. A deaf and dumb child, who has never been educated in the deaf and dumb language, who cannot be made to understand anything of the nature of an oath, and who can do nothing more than give an account by signs of what he saw, without affording any means of examination or cross-examination, is not a competent witness, especially in a capital case.—Territory v. Duran, 134.

Examination—Refreshing memory.
3. Books or writings in the nature of memoranda can be referred to in order to refresh the memory only by the person in whose handwriting they are.—Price v. Garland, 285.

Writs.

See *Attachment; Certiorari; Error, Writ of; Garnishment.*

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

Dec. 1, 1911.
Pages 1 to 25 reprinted

2438 116