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110

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO

FROM FEBRUARY 4, 1888, TO JULY 24, 1891.

CHARLES H. GILDERSLEEVE
REPORTER

VOLUME V

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JUDGES AND OFFICERS OF THE SUPREME AND DISTRICT COURTS OF THE TERRITORY OF NEW MEXICO.

FROM 1846 TO 1895, BOTH INCLUSIVE

COMPILED BY
JAMES H. PURDY
OF THE SANTA FE BAR.

CHIEF JUSTICES.

By the organic act, 1851, the supreme court was constituted of a chief justice and two associate justices. In 1887 a third associate justice was added; and in 1889 was added a fourth associate justice.

APPOINTED.	APPOINTED.
Joab Houghton..... 1846	Henry L. Waldo..... 1876
by Gen. S. W. Kearney. Died	Resigned.
January 31, 1876.	Chas. McCandless..... 1878
Grafton Baker..... 1851	Resigned.
J. J. Davenport..... 1853	L. Bradford Prince..... 1879
Kirby Benedict..... 1858	Samuel B. Axtell..... 1882
Died at Santa Fe, New Mexico,	Died at Morristown, New Jersey,
1875.	1893.
John P. Slough..... 1866	William A. Vincent..... 1885
Died at Santa Fe, New Mexico,	Elisha V. Long..... 1885
December 17, 1867.	James O'Brien..... 1889
John S. Watts..... 1868	Thomas Smith..... 1893
Died in Indiana, in 1873.	
Joseph G. Palen..... 1869	
Died at Santa Fe, New Mexico,	
December, 1875.	

JUDGES OF THE FIRST DISTRICT.

Headquarters' at Santa Fe.

The First District, from 1846 to 1860, included the counties of Santa Fe, Santa Ana, and San Miguel. In 1860, the counties of Mora, Colfax, Taos, and Rio Arriba, were added. In 1887, the First District was made to include the counties of Santa Fe, San Juan, Rio Arriba, and Taos.

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

* Chief Justice.
** Associate Justice

ASSOCIATE JUSTICES, SECOND DISTRICT.

Headquarters at Albuquerque.

The Second District, from 1846 to 1860, was composed of the counties of Bernalillo, Valencia, and (soon as organized) Socorro, Dona Ana, and Arizona. In 1860, the District was constituted of the counties of Bernalillo, Valencia, and Socorro. In 1889, Socorro county was transferred to the Fifth District.

APPOINTED.		APPOINTED.	
Antonio J. Otero.....	1846	John I. Reddick... ..	1876
from New Mexico.		from Nebraska.	
John S. Watts.....	1851	Samuel B. McLin... ..	1877
from Indiana. Died, 1873.		from Florida. Died in Florida.	
Perry E. Broechus... ..	1857	Samuel C. Parks.	1878
from Maryland. Died.		from Illinois.	
W. F. Boon.....	1859	Joseph Bell.....	1882
Sydney A. Hubbell	1861	from New York. Died in Cali-	
from New Mexico. Died at Las		fornia, 1887.	
Vegas, 1880.		William H. Brinker.....	1885
Perry E. Broechus.....	1867	from Missouri.	
from Maryland. Died at Balti-		William D. Lee.....	1889
more.		from New Mexico.	
Hezekiah S. Johnson.. ..	1870	Needham C. Collier	1893
from New Mexico. Died at Albu-		from Georgia.	
querque, 1873.			

ASSOCIATE JUSTICES, THIRD DISTRICT.

Headquarters at Taos, 1846-1860.

The Third District, from 1846 to 1860, consisted of the counties of Taos and Rio Arriba. In 1860, those counties became part of the First District, organized of Dona Ana county. In 1887, the Third District was reorganized of Dona Ana and Grant counties, with headquarters at Las Cruces. In 189-, Sierra county was added, and in 1895, Silver City was designated as headquarters.

APPOINTED.		APPOINTED.	
Chas. Beaubien.....	1846	Daniel B. Johnson.....	1871
from New Mexico. Died at Taos,		from Minnesota.	
New Mexico, January, 1846.		Warren Bristol.....	1872
Horace Mower.....	1851	from Minnesota. Died, Deming,	
Kirby Benedict	1853	New Mexico.	
from Illinois. Died at Santa Fe,		Stephen F. Wilson.....	1884
New Mexico.		from Pennsylvania.	
Wm. G. Blackwood.....	1858	Wm. F. Henderson... ..	1885
from South Carolina. Died in		from Arkansas. Died, Washing-	
New Mexico.		ton, D. C., 1890.	
Joseph G. Knapp	1861	John R. McFie	1889
Joab Houghton.....	1865	from New Mexico.	
from New Mexico. Died January		Albert B. Fall.....	1893
31, 1876.		from New Mexico. Resigned.	
Abraham Berger... ..	1869	Gideon D. Bantz.	1895
from Minnesota.		from New Mexico.	
Benjamin J. Waters.....	1870		
from Missouri.			

JUDGES AND OFFICERS.

V

ASSOCIATE JUSTICES, FOURTH DISTRICT.

Headquarters at Las Vegas.

This District was organized in 1887, of the counties of San Miguel, Colfax, Mora, and Lincoln. In 1889, Lincoln county became part of the Fifth District, and, in 1891, Guadalupe county was added, and, in 1893, Union county.

APPOINTED.		APPOINTED.	
Elisha V. Long.....	1889	Thomas Smith.....	1893
James O'Brien.....	1890	from Virginia.	
from Minnesota.			

ASSOCIATE JUSTICES, FIFTH DISTRICT.

Headquarters at Socorro:

This District was organized in 1889, of the counties of Socorro, Lincoln, with Chavez and Eddy counties when organized.

	APPOINTED.		APPOINTED.
Alfred A. Freeman.....	1890	Humphrey B. Hamilton	1895
from Washington, D. C.		from New Mexico.	

CLERKS OF THE SUPREME COURT.

Appointed by the Court.

APPOINTED.		APPOINTED.	
James M. Giddings.	1852	Rufus J. Palen.....	1873
of Missouri. Died, Fort Sumner, 1897.		of New York.	
Louis D. Sheets.....	1854	John H. Thompson.....	1877
of Missouri.		of Missouri.	
Augustine de Marle....	1856	Frank W. Clancy.....	1880
Died, Santa Fe, New Mexico.		of New Hampshire.	
Samuel Ellison.	1859	Charles M Phillips.....	1883
of Kentucky. Died, Santa Fe, July 20, 1889.		of New Jersey.	
Wm. M. Gwynne.....	1866	Ruel M. Johnson.....	1886
of Ohio.		of Indiana.	
Peter Connelly	1867	Robert M. Foree.....	1887
of New Mexico.		of Kentucky.	
Samuel Ellison	1868	Summers Burkhart.....	1889
of Kentucky. Died, Santa Fe, 1889.		of West Virginia.	
William Breeden.....	1869	Harry S. Clancy.....	1891
of Kentucky.		of New Hampshire.	
Marshall A. Breeden.....	1872	Page B. Otero.....	1893
of Kentucky.		of New Mexico.	
		George L. Wyllys... ..	1894
		of Virginia.	

UNITED STATES ATTORNEYS.

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

JUDGES AND OFFICERS.

ATTORNEYS-GENERAL.

Appointed by the Governor, and confirmed by the Legislative Assembly.

APPOINTED.		APPOINTED.	
Hugh N. Smith.....	1846	Charles P. Cleaver... .	1862
of Missouri.		of Germany.	
Elias P. West.....	1848	Stephen B. Elkins.....	1866
Henry C. Johnson... .	1852	of Missouri.	
of Pennsylvania.		Charles P. Cleaver.....	1867
Merrill Ashurst.....	1852	of Germany. Died May 30, 1874.	
of Alabama. Died, Santa Fe,		Merrill Ashurst.....	1867
1869.		of Alabama.	
Theodore D. Wheaton....	1854	Thomas B. Catron.....	1869
of Missouri. Died, Ocate, New		of Missouri.	
Mexico, 1876.		Thomas F. Conway.....	1872
Richard H. Tompkins.....	1858	of Missouri.	
of Kentucky. Died.		Wm. Breeden.....	1873
Hugh N. Smith.....	1859	of Kentucky.	
of Missouri. Died, Santa Fe.		Henry C. Waldo.. . . .	1878
Spruce M. Baird.....	1860	of Missouri.	
of Texas. Died at Cimarron,		Wm. Breeden.... .	1878
New Mexico, 1873.		of Kentucky.	
Richard H. Tompkins.....	1860	Edward L. Bartlett	1889
of Kentucky. Died at Santa Fe,		of Kansas. Solicitor General.	
1888.		John P. Victory	1895
		of New York. Solicitor General.	

UNITED STATES MARSHALS.

APPOINTED.		APPOINTED.	
Richard Dallum	1846	John Pratt.....	1866
John G. Jones.....	1851	from Kansas.	
Charles L. Rumley.....	1853	John Sherman, Jr	1876
Charles H. Merritt.....	1854	from Ohio. Died, Washington,	
Charles Blumner.... .	1856	D. C.	
from New Mexico. Died, Santa		A. L. Morrison.....	1881
Fe, 1872.		from Illinois.	
Charles P. Cleaver.	1858	Romulo Martinez... . .	1885
from New Mexico. Died, Tome,		from New Mexico.	
New Mexico, 1874.		Trinidad Romero.....	1889
Abram Cutler.....	1861	from New Mexico.	
from Kansas.		Edward L. Hall.	1893
		from New Mexico.	

LIST OF ATTORNEYS

Practicing in the Supreme Court of New Mexico between 1846 and 1892.

Allen, Samuel T.	Frazer, John R.	Ritch, Wm. G.
Ashurst, Merrill	Gary, Joseph E.	Rodey, Bernard.
Atkinson, H. M.	Gildersleeve, Chas. H.	Russell, D. C.
Axtell, S. B.	Green, T. A.	Rynerson, Wm. L.
Bail, John D.	Gwin, John M.	Salazar, Miguel
Bantz, Gideon D.	Goodwin, Jesse C.	Sena, Jose D.
Barbor, Geo. B.	Graves, Wm. C.	Shaw, James M.
Barnes, Sidney M.	Harlee, A. H.	Shield, David P.
Barr, A. J.	Hazledine, Wm. C.	Skinner, Wm. C.
Bartlett, Edward L.	Hewitt, W. Y.	Sloan, Andrew
Bell, Chas. G.	Houghton, Joab	Sloan, Wm. B.
Bell, John J.	Hoyt, Abram G.	Smith, Hugh N.
Bell, Joseph	Hubbell, Sydney A.	Smith, Thomas
Berger, Wm. M.	Jackson, C. L.	Sniffen, John S.
Bonham, Joseph F.	Johnson, Henry C.	Stearns, DeWitt C.
Bowman, W. C.	Knaebel, G. W.	Springer, Frank
Breeden, Marshall A.	Knaebel, John H.	Stevens, Benjamin
Breeden, William	Koogler, John H.	Stone, W. S.
Bristol, Warren	Laughlin, N. B.	Sulzbacher, Louis
Bryan, D. J.	Lee, Wm. D.	Terrill, Wm. C.
Burns, Harrison.	Lemon, George	Thompson, F. A.
Catron, Thomas B.	Leonard, Ira E.	Thornton, Wm. T.
Caypless, Edgar	Masterson, Murat	Tiffany, I. S.
Chaves, J. Francisco	McComas, Chas. C.	Tompkins, Richard H.
Childers, W. B.	McComas, H. L.	Trimble, L. S.
Clancy, Frank W.	McFie, John R.	Tuley, Murray F.
Clarke, Fred W.	Mills, Melvin W.	Van der Veer, P. L.
Collier, N. C.	Newcomb, S. B.	Veeder, John D. W.
Conway, Thomas F.	O'Bryan, J. D.	Victory, John P.
Crane, William F.	Pickett, H. L.	Vincent, Wm. A.
Davis, Wm. W. H.	Pierce, W. L.	Waitman, Hanson
Douglass, Thomas G.	Pilliams, Palmer J.	Waldo, Henry L.
Downs, Francis	Posey, G. Gordon	Warner, Milton J.
Dunne, Edmund F.	Preston, George C.	Warren, Henry L.
Fall, A. B.	Price, Edward V.	Watson, W.
Elliott, A. B.	Prichard, George W.	West, Elias B.
Fergusson, H. V.	Prince, L. Bradford	Wheaton, Theodore
Field, Neill B.	Purdy, James H.	Whiteman, Wm. H.
Fielder, Idus L.	Quinn, James H.	Woodward, Jesse B.
Fiske, Eugene A.	Read, Benj. M.	Yeaman, Caldwell
Fort, L. C.	Reynolds, James R.	Young, J. Morris
Fountain, A. J.	Riley, Chilion	
Fox, George W.	Risque, John B.	

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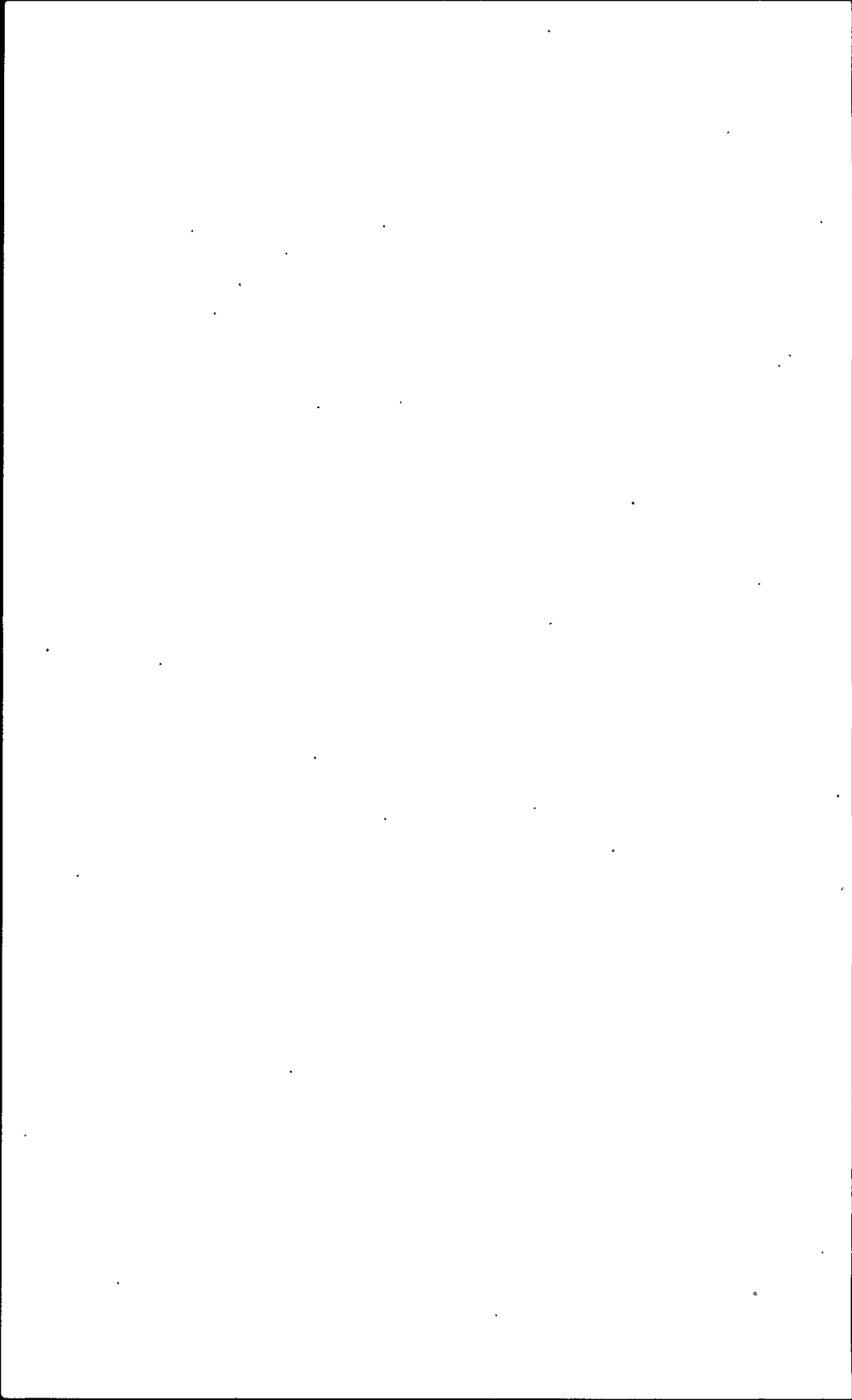
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REPORT OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF NEW MEXICO.

[No. 312. February 4, 1888.]

TERRITORY OF NEW MEXICO EX REL. CHAS. W.
LEWIS, APPELLEE, v. BOARD OF COUNTY
COMMISSIONERS, BERNALILLO COUNTY,
ETC., APPELLANTS.

ELECTIONS—MANDAMUS TO COMPEL COUNTY COMMISSIONERS TO CANVASS RETURNS—EVIDENCE—WAIVER.—In a proceeding by mandamus to compel the board of county commissioners of a county to canvass the election returns of a certain precinct, where the respondents ask the court to inspect the evidence offered with their answer, and bring into court all the returns, certificates, poll books and ballot box, and invoke its judgment as to the legal sufficiency to justify the action of the board, such action on their part is a submission to the court, and they will not be heard to insist on the right to a jury to try the issues of fact, even if a jury could be impaneled—a point not before the court, and on which it does not pass. Nor will they be heard, in view of these facts, to object that there is no evidence, upon the issue of facts raised by their answer, to support the judgment of the court below in awarding a peremptory writ.

ID.—PEREMPTORY WRIT OF MANDAMUS WILL LIE TO COMPEL PERFORMANCE OF MINISTERIAL ACT, WHEN.—In such case, where it appears the board of canvassers have failed to count votes which ought to be counted, and where, if such votes are counted, the relator will be elected, the court may, by peremptory writ of mandamus, direct the board of canvassers to count such votes, and to issue to relator a certificate of election.

Id.—BALLOT BOXES, POWER OF BOARD OF CANVASSERS TO OPEN.—Where, in such case, a ballot box containing the election returns has been forwarded by the proper legal authority and placed in the proper legal custody, the returns in the box are, in legal contemplation, before the board of canvassers, constituted as such by law, and they have the power and authority to open the box, and take therefrom the returns for examination, as an incident to the power to canvass the returns, under section 1188, Compiled Laws of New Mexico.

APPEAL, from a judgment in favor of relator, awarding a peremptory writ of mandamus ordering that the returns be canvassed by defendant on the certificate delivered, from the Second Judicial District Court, Bernalillo county. Judgment affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for appellant.

It is made the duty of the judges and clerks of election in each precinct to make out, sign and return to the clerk of the board of county commissioners a certificate showing the total number of votes cast for each office, and the number of votes received by each candidate; these alone constitute the returns, which as a board of canvassers it is made the duty of the county commissioners to canvass, and from which they declare the result. Comp. Laws, N. M. 1884, sections 1137, 1138, 1142.

It is also made the duty of the judges of election to send a copy of the certificate so made by them to the justice of the peace for their precinct, and to give certified copies, not exceeding four, to the parties interested. Id., section 1196.

It is also provided that the copies shall be as valid as the originals for all purposes. Id., section 1197.

A heavy penalty is denounced against giving fraudulent certificates, or maliciously throwing out returns. Id., section 1190.

A court can not, by writ of mandamus, usurp the functions of a board of canvassers; it was therefore error for the court to order the respondents to reject the returns from precincts 1, 8 and 12. High's Ex. Legal Rem., section 56; *Arberry v. Beavers*, 6 Tex. 457; *People v. Stevens*, 5 Hill, 616; *McCrary on Elec.*, sections 81, 82; *People v. Head*, 25 Ill. 328. See, also, *State v. Steers*, *Brightly's Lead. Cas. on Elec.* 305, 306.

It was also error for the court to proceed to dispose of the issues of fact raised by the answer without evidence and without the intervention of a jury. *Comp. Laws, N. M. 1884*, sections 1998, 1999, 2000.

For definition of modern writ of mandamus see High's Ex. Legal Rem., section 1.

"It is regarded in the nature of an action by the person in whose favor the writ is granted, for the enforcement of a right in cases where the law affords him no other adequate means of redress, and a judgment in a mandamus proceeding, as in the case of an ordinary action at law, is subject to review by a writ of error or appeal upon like conditions as other cases." *Id.*, section 4; *Martin v. Greenhow*, 102 U. S. 672.

The courts will, in administering relief by mandamus, under such statutes as ours, be governed by the same conditions and limitations which prevail at common law. *Kimball v. Union Water Co.*, 44 Cal. 173; High's Ex. Legal Rem. 30.

The statute of 9 Anne authorizes the plaintiff to plead to, or traverse, the return to the writ, and the issues thus found were ordinarily tried by a jury. The right to trial by jury in this territory, in an ordinary common law action, is secured both by the constitution of the United States and the bill of rights in this territory, and should have been awarded to the respondents here.

W. B. CHILDERS for appellee.

The former practice was to demur to the return, or move to quash. Under our statute the court passes on the sufficiency of the return as a matter of law. Comp. Laws, sections 1993, 1999, 2000; High on Ex. Legal Rem. [2 Ed.], sections 474-488-492-497.

The answer in this case is in itself no more than a demurrer, and raises no question of fact, and left nothing for the court to do but to pass on the questions of law. High's Ex. Legal Rem. 1, section 492; People v. Solomon, 46 Ill. 334; Beckel v. Union Town, 9 Ohio St. 599; State v. The Justices, 48 Mo. 475; Moses v. Kearney, 31 Ark. 261.

The court, no issue of fact being raised by the alternative writ and answer, passed upon the questions of law, and properly awarded the writ. No trial by jury was necessary. See Wade v. Ashenfelter, filed at the present term of the court.

It is the duty of the court in mandamus proceedings to pass upon the validity of returns, and command the respondents to perform the exact duty required of them by law, and to issue a certificate of election to the person having the highest number of votes. High on Ex. Legal Rem. [2 Ed.], sections 56, 57, and cases cited; State v. Garesche, 65 Mo. 480.

The court has the power to direct a ministerial officer to not only proceed to do his duty, but it may also indicate what his specific duty is. Id., 65 Mo. 489.

That was all the court did in this case. To have done less would have been to render such proceedings wholly nugatory. High on Ex. Legal Rem., sections 56 a and 60; Kisler v. Cameron, 39 Ind. 488.

As to the contention of appellants that the functions of the board of canvassers as to the returns are judicial, and not subject to control by mandamus, see

Bull v. Southwick, 2 N. M. 351, where this court held that "the returns showing in an intelligible manner the number of votes, it becomes the ministerial duty of the canvassing board to count all such, and declare the result from such returns alone."

LONG, C. J.—The relator, Charles W. Lewis, commenced in the court below a proceeding by mandamus against the above named board of county commissioners. Section 1994, relating to mandamus, provides as follows: "The writ shall issue on the information of the party beneficially interested." Under this section an information was filed as the basis of the proceeding. Later an amended information was filed, and upon that issued the amended writ of mandamus. As this writ and the answer thereto constitute the pleadings in the case, and are necessary to a proper understanding thereof, they are herein set out, and are as follows:

"ALTERNATIVE WRIT ISSUED ON AMENDED INFORMATION.

"TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

"The territory of New Mexico to Marcos C. de Baca, Mariano S. Otero and Cristobal Armijo, members of the board of county commissioners of the county of Bernalillo, in said territory, and to said board of county commissioners, ex-officio the board of canvassers of said county of Bernalillo, greeting:

"Whereas, it has been suggested to us by the affidavit and information of Charles W. Lewis, that the said Marcos C. de Baca, Mariano S. Otero and Cristobal Armijo are the county commissioners of Bernalillo county, and territory of New Mexico, and as such county commissioners are ex officio the board of canvassers of the said county of Bernalillo, and as such are charged by law with the duty of canvassing the returns and certificates of the judges and clerks of the election held in the several precincts of the said county

on the Tuesday next after the first Monday of November A. D. 1886, for the election of the several county officers, voted for on said day, including the office of assessor of the said county of Bernalillo, and whereas, it has further been made to appear to us that the relator, Charles W. Lewis, was a candidate for the office of assessor of the said county of Bernalillo at the said election, and, as shown by the returns and certificates of the judges and clerks of the election held in the several precincts of said county on said day, received the greatest number of votes cast for said office on said day, and as shown by the certificates and returns of the said judges and clerks of election, as well as by the ballots returned by said judges and clerks of election, was duly elected to said office at said election. And whereas, it appears from the poll books, certificates, and returns, from all the precincts in said county, duly signed and certified by said judges and clerks of said election for said several precincts as required by law, except the returns and certificates of the judges and clerks of the election for precincts numbered one (1), two (2), eight (8), ten (10), and twelve (12), that said relator received thirteen hundred and forty (1,340) votes for said office of assessor of said county of Bernalillo, which number of votes for said office was the greatest number of votes shown by said certificates, returns, and poll books to have been cast for any person for said office at said election, it appearing that one J. M. Montoya, who received the next greatest number of votes for said office upon the face of said returns, certificates, and poll books, received eleven hundred and sixty-four (1,164) votes for said office, and no more. And whereas, it further appears by the information of the said relator, that the certified copies of the returns and certificates of the judges and clerks of said election for said precincts numbered one (1), two (2), eight (8), and twelve (12), that no votes were cast for any person

for said office of assessor at said election. And whereas, it further appears that the poll books used in said last mentioned precincts, on said day at said election, do not show that any votes were cast or polled for any person for said office at said election. And whereas, it further appears from the said information of the said relator, that the said relator did actually receive at said election for said office, on said day, in said precinct number one (1), twelve (12) votes; and in said precinct number two (2), ten (10) votes; and in said precinct number eight (8), seventy-one (71) votes; and in said precinct number twelve (12), one hundred and twenty-eight (128) votes; making the total number of votes by said relator at said election for said office, except the votes received by him in said precinct number ten, fifteen hundred and sixty-one, and that the said Montoya received at said election, at all the precincts of said county, including the votes actually cast for him for said office in said precincts numbers one, two, eight and twelve, and excluding those cast for him in said precinct number ten, only fifteen hundred and fifty-one votes, and no more for said office. And whereas, it further appears from the information of the said relator, that the said relator, received in said precinct number ten, at said election on said day, for said office, ninety-one (91) votes, and the said Montoya twenty-one (21) votes, and no more, and that the judges and clerks of said election for said precinct number ten, so certified and returned as required by law, which certificates and return so made by said judges and clerks of the election for said precinct were inclosed in the ballot box used by said judges and clerks at said election, together with the poll books then and there used, and the ballots then and there cast at said election; and that said ballot box, together with its said contents, was, after said election, delivered by said judges and clerks of election

to the clerk of the said board of county commissioners, ex officio the board of canvassers, and, together with the returns and certificates and ballot boxes from the other precincts in said county, and hereinbefore referred to, are under the control and in the custody of the said board of county commissioners, ex officio board of canvassers. And whereas, it appears that the said relator, including the votes cast for him in said precinct number ten, received in all the precincts of said county for said office, sixteen hundred and fifty-two (1,652) votes, and the said Montoya received for said office at said election, fifteen hundred and seventy-two (1,572) votes, and no more, and that said relator received the greatest number of votes cast for any person for said office. And whereas, it further appears from said information that the said board of commissioners met in session as a board of canvassers for said county on the 6th, 7th, and 8th days of November, A. D. 1886, but that said board refused to open said ballot box used in said precinct No. 10 at said election, and take therefrom the poll books and the certificates and returns, and canvass the vote thereby shown to have been cast in said precinct at said election for said office of assessor, and refused to canvass the votes as shown by the certificates and returns of the judges and clerks of said election for the other precincts of said office, and to issue a certificate of election to the relator, he being the person who, upon the face of the returns from the several precincts of said county, is entitled by law to receive a certificate of election to said office of assessor. And whereas, it appears that said board insist upon counting votes cast in said precincts numbered one (1) and two (2), although the returns and certificates from said precincts do not show that any votes were cast in said precincts at said election for said office. And whereas, it appears from said information that the said relator is beneficially interested herein, and that there is not a

plain, speedy, and adequate remedy in the ordinary course of law:

"Therefore, we command you that immediately after the receipt of this writ you do convene as such board of county commissioners and examine all the votes shown by the certificates and returns of the judges and clerks of the election held on said day, in the several precincts of said county, including said precinct No. 10, and for that purpose you do open the ballot box used in said precinct at said election, and now under your control, and take therefrom the poll books and returns and certificates of the judges and clerks of said election of said precinct No. 10, and that you do not count any votes for the said office of assessor, as having been cast at said election in the said precincts numbers one (1), two (2), eight (8) and twelve (12), but that you do take the votes as shown by the face of the certificates and returns of the judges and clerks of the election held on said day, and issue a certificate of election in accordance with the result as thereby shown, to the said relator, Charles W. Lewis, of his election to said office of assessor of the county of Bernalillo, as required by law, or that you show cause forthwith before this court, at the courthouse of the county of Socorro, why you have not done so.

"Witness the honorable WILLIAM H. BRINKER, associate justice of the supreme court of the territory of New Mexico, and judge of the Second judicial district court thereof, and the seal of said district court, this 16th day of November, A. D. 1886.

[SEAL]

"LORION MILLER, Clerk."

"ANSWER TO AMENDED WRIT.

"TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

"Before Hon. WILLIAM H. BRINKER, associate justice of the supreme court of the territory of New Mex-

ico, and judge of the Second judicial district court, at chambers:

“THE TERRITORY ex rel. CHARLES W. LEWIS,
v.
“THE BOARD OF COUNTY COMMISSIONERS OF
BERNALILLO COUNTY, ETC. }

“These respondents, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit and exception which can or may be had or taken to many uncertainties and imperfections in the said information and writ contained, for answer and return thereto, or to so much, and such parts thereof, as these respondents are advised it is or are necessary for them to make answer and return unto, these respondents answering and returning, say: It is true that among the duties imposed by law upon these respondents was the duty of canvassing the returns of the election held in the county of Bernalillo, as set forth in the said writ of mandamus; but these respondents say that the returns of said election, within the meaning of the statute in such case made and provided, consist solely of the poll books used at the said election in the several precincts of the said county, together with the certificates of the judges and clerks of the said election made and entered in the said poll books and returned by the said judges and clerks to the clerk of the probate court, and ex officio recorder of the said county of Bernalillo.

“These respondents, further answering and returning, say that the several judges and clerks of election in the said several precincts of the said county of Bernalillo, for the election held in the said county on the Tuesday after the first Monday in November, 1886, except the said judges and clerks at, in, and for precinct number ten of the said county of Bernalillo, did return to the said probate clerk and ex officio recorder of said county, one of the poll books used at each and every of said precincts in the said county, except the

poll book used at, in, and for the said precinct number ten, and these respondents further say that they now here bring into court, and make part of this answer and return, true copies of each and every of the said certificates so returned by the said several judges and clerks of election. These respondents, further answering, say that it will appear from an inspection of the said certificates, that many of them are informal, but it sufficiently appears from the said certificates, and from the poll books in which the said certificates are contained, that in the several precincts of said county, exclusive of the said precinct number ten, that the said relator received no more than 1,362 votes, and that the said Jose Manuel Montoya received 1,459 votes; and the said Jose Manuel Montoya, upon the face of the returns, and upon a canvass of all the legal votes cast at said election in the said county of Bernalillo, received the greatest number of votes cast for the said office of assessor, and was elected thereto. These respondents further say that they have never seen any return, if any was ever made, from the said precinct number ten of the said county of Bernalillo, and that they have no knowledge or information sufficient to form a belief as to whether the same judges and clerks of the said election held at and in the said precinct number ten returned the said poll books used at the said election in the said precinct number ten, inside of the ballot box used at the said precinct number ten on said day; nor have these respondents any knowledge or information sufficient to form a belief as to what said poll books, or any certificate contained therein, would show upon an inspection, but these respondents aver the fact to be that the said ballot box used at the said election on the said day, at and in the said precinct number ten, of the said county of Bernalillo, was returned to the said clerk of the probate court and ex officio recorder, closed, locked, and sealed, as required by law, and has ever since been in the custody

and possession of the said clerk, and has remained so closed, locked, and sealed, and these respondents do not know, and have no means of knowing, what, if anything, is contained in the said ballot box. These respondents further say that no contest has been instituted by any person who was a candidate for any office voted for at said election in the said county of Bernalillo on the said day; nor has the said clerk been called upon by any person, after such contest had begun, to supply the tickets so returned to him in the ballot boxes used at said election in the said several precincts of the said county, or any of them, for examination; nor has the said probate clerk given to the opposing candidate of such person five, or any other number of days' notice of any such application; nor have the parties to any such contest ever assembled before your respondents for the purpose of having any examination of the ballots contained in the said ballot boxes, or any of them, examined in pursuance of law, and therefore these respondents say that it is and would be unlawful and a violation of the statute in such case made and provided for these respondents to open the ballot boxes returned by the said judges and clerks of the said precinct No. 10 of the said county of Bernalillo, for the purpose of taking therefrom the poll books, if any be contained therein; and these respondents aver and charge the fact to be that if they are compelled by this honorable court to open the said ballot box for the purpose of taking therefrom the said poll books, that then, and in that case, they may be unable to count the votes so cast at the said election in the said precinct No. 10 because of the informality of the certificate contained therein, and of the insufficiency of the return; and these respondents say that they have no knowledge or information sufficient to form a belief as to whether or not the said poll books used at said election, at, in, and for said precinct No. 10 (if they were so returned in-

side the ballot box as alleged in the information and writ herein) contain any sufficient return as to the number of votes herein; and they therefore deny that any such sufficient return was made by the said judges and clerks of the election held on the said day, at, in, and for the said precinct No. 10, whether inside the ballot box or otherwise; and they therefore deny that the relator was in any wise injured or prejudiced by their failure so to open the said ballot box. These respondents say that as to the votes cast for the relator and the said Jose Manuel Montoya in the said precinct No. 1, of the said county of Bernalillo, it sufficiently appears from the said poll books that the said Jose Manuel Montoya received 187 votes, and the said Charles W. Lewis received 12 votes. These respondents further say that, as to the votes cast for the relator and the said Jose Manuel Montoya in the said precinct No. 10 of the county of Bernalillo, it sufficiently appears from the said poll books that the said Jose Manuel Montoya received 111 votes, and the said Charles W. Lewis received 10 votes. These respondents say that, as to the votes cast for the relator and the said Jose Manuel Montoya in the said precinct No. 12 of the county of Bernalillo, it sufficiently appears from the said poll books that the said Jose Manuel Montoya received 83 votes, and the said Charles W. Lewis received 128 votes. These respondents say that, as to the votes cast for the relator and the said Jose Manuel Montoya in the said precinct No. 8 of the said county of Bernalillo, it does not sufficiently appear for whom said votes were cast, and it is impossible to be ascertained from the face of the return; that is to say, the face of the return fails to show how many votes were cast in the said precinct for the said relator and how many for the said Jose Manuel Montoya, and so these respondents say that the vote of the said precinct was not counted. These respondents now here make proffer to the court

of all original returns furnished to them by the probate clerk and ex officio recorder of the said county of Bernalillo, in the territory of New Mexico, on the occasion of their meeting as a board of canvassers for the purpose of canvassing the election returns, and also bring into court here the ballot box returned to the said clerk of the probate court by the judges and clerks of the election of precinct No. 10, and submit themselves to the order and direction of this honorable court, protesting that they have fairly and honestly discharged the duty imposed on them by law, in canvassing the returns of the said election and declaring the result thereof. And these respondents ask the court to inspect the evidence so offered with this answer, and that upon such inspection the said alternative writ of mandamus may be dismissed; and, having fully answered, these respondents pray to be hence dismissed with their costs in this behalf most wrongfully sustained.

“NEILL B. FIELD,

“Attorney for Respondents.”

The amended alternative writ which issued on the amended information followed it in substance, and whatever issue arose was upon this amended writ and the answer thereto. The case was tried upon the amended alternative writ, the answer, and such documentary and other evidence as was tendered to the court by and with the answer. The record, folio 103, says: “And thereupon, on motion of counsel for the relator, the said cause was heard upon the amended alternative writ and the respondents’ answer thereto.” Succeeding such record is the following: “Now come the respondents by their counsel, and file their answer to the amended alternative writ heretofore issued in this cause, together with all the original returns and poll books in the possession of the clerk of the said respondents, together with the ballot box of precinct number 10 of the said county of Bernalillo, as exhibited to their said answer.”

In the answer the respondents say: "They now, here, make proffer to the court of all original returns furnished to them by the probate court * * * and also bring in the ballot box of precinct number 10, and submit themselves" to the judgment of the court. The court found against the defendant, and that the returns on their face established that a majority of the votes cast in the county, as appeared from the returns before the court, were cast for the relator, and that he was therefore legally entitled to the certificate of election, and that it was the duty of the defendant, acting as a board of canvassers, to deliver it to him. The court by its writ ordered that the returns be canvassed by defendant on the certificate delivered. The following in this court is assigned as error.

(1) In awarding a peremptory mandamus against the respondent, without any evidence upon the issue of facts raised by the answer.

(2) The command of the peremptory writ to count all the votes shown by the returns, certificates, and poll books returned by the judges and clerks of said election for all the several precincts of the said county, including the returns, certificates, and poll books of precinct number 10 of said county, and excepting the returns, certificates, and poll books of said precincts numbers 1, 8, and 12, and that "you do declare the result of said election as to the office of assessor, and issue a certificate of election to the relator, Charles W. Lewis."

First, as to the objection "that the court failed to impanel a jury to try the issue of fact." It may be observed, if it is a proper construction of section 2000 of the compiled laws, that a jury is to be impaneled as in ordinary law cases, then it also follows that all subsequent proceedings are to be taken in the same way. Section 2000: "No other pleading or allegation is allowed than the writ and answer. They shall be con-

strued and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried and further proceedings had in the same manner as in a civil action." The same argument which requires that a jury shall be impaneled also requires that the succeeding steps be in accordance with the practice in civil cases at law, and, in that event, section 2197 would apply. "Exceptions to the decisions of the court upon any matter of law arising during the progress of the cause must be taken at the time of the decision." We have not found in the record that any request was made by the respondent to have the questions involved submitted to the jury, or of any objection made at the time to their consideration by the court. A court should have opportunity, in cases of law at least, to consider the very question presented in the supreme court. It often occurs that a point may be passed upon inadvertently when if the attention of the trial court is at the time of the ruling called to it the decision will be otherwise. It is very doubtful if the construction which appellant contends for is correct as to the right to a jury trial, if that question is before us. It is clear, however, that in passing upon the question the court below was acting upon the appellant's request. "And these respondents ask the court to inspect the evidence so offered with this answer, and that upon such inspection the said alternative writ of mandamus may be dismissed." It was an express submission to the court. The respondents, as they show, brought into the court all the returns, the certificates, poll books, ballot box, and placed them before the judge, and invoked his judgment as to the legal sufficiency to justify the action of the board. They say, "Here is all the original evidence which was before us and upon which we acted. We submit ourselves to the order and direction of this honorable court." After such a submission, without the most

remote suggestion even that it was desirable that a jury should be called, we think it should be held, even if a jury could be impaneled—a point not here decided—that such action was a waiver of the jury. In any event it is difficult to perceive what duty there was for a jury to perform. Appellant is not in a position to complain that there was no submission to a jury. There is nothing in the record to indicate that the conclusion reached by the court below, as to the effect of the evidence placed before it by respondent is incorrect. Aside from what purports to be the poll books from precinct number 10, there is none of the original evidence in the record, and, in the absence of a contrary showing, the presumption is in favor of the action of the court below.

It can not be said, in view of the record, that the court did award a peremptory mandamus without any evidence upon the issue of fact raised by the answer. The respondent, along with the answer, carried into court that very evidence and placed it before the court, not as a mere exhibit, but as proof on the matter submitted, and said, following the language of the answer: "And these respondents ask the court to inspect the evidence so offered with this answer," and ask to be dismissed. When asked by the respondents to inspect the evidence thus placed before the court and to judge of its legal sufficiency, was the court to turn away from the request, refuse to inspect and refuse to determine? The court received the proof thus placed before it, and did as the respondents asked, but because the court reached a different conclusion as to its effect from the conclusion asked by respondents they can not now complain of the action of the court in following the request made, so it is apparent this objection is not well taken. In the court below the peremptory writ commanded, among other things, that the respondent "declare the result of said election as to the office of assessor of said

county accordingly, and that you do issue a certificate to the said office of assessor to the said relator, Charles W. Lewis." It is objected by appellant that the court could not legally direct by name, through the command in the writ, the person to whom the certificate should issue; but, as we understand his contention, that the court could at furthest only direct a canvass, and that the board of canvassers should deliver the certificate to whomsoever might have the majority of the votes shown on the returns. State ex rel. Metcalf v. Garesche, 65 Mo. 483, is directly in point. In that case it was a question as to how the returns for precinct number 57 should be counted, whether as 270 votes for R. Graham Frost, or as 290 votes for him. The circuit judge who tried the issue on the mandamus found from the evidence that the figures on the poll book of precinct number 57, represented and showed, as returned to the judges, that Frost received 270 votes in that precinct, but that afterward the figure 7 was changed to 9, making it after the change to appear that 290 votes were cast for Frost; and so the peremptory writ commanded that the returns should be counted, not as they appeared on the face of the returns at the time of the hearing, but as they stood at the time of the filing of the poll book, and directed not only that the returns be counted, but as well how they should be counted. The supreme court of Missouri approved of this action of the lower court, using the following language: "Having ascertained which was the true return, and that the canvassing officers had failed or refused to count it, thus leaving their legal duty unfulfilled, the peremptory writ commanded its performance. It will thus be seen that the right to determine the specific legal duty of ministerial officers, such as the defendants are, necessarily results from the very nature of the proceedings by mandamus. The writ of mandamus does lie to compel the perform-

ance of a particular ministerial act. It not only requires the ministerial officer to do his duty, but also indicates what that duty is. A peremptory writ of mandamus to count the votes certified by the judges and clerks, without ascertaining which was the vote so certified, would be a mere *brutum fulmen*, as it could never be determined from a certificate of obedience whether the writ had in fact been obeyed." The case cited supports the action of the court below as to the point now under consideration. "Not only will mandamus lie to compel action by a board of canvassers, but the court will direct what returns shall be canvassed, and, when the law makes it their duty to do so, will compel the issue of a certificate of election to the person apparently entitled thereto." 4 Wait, Act. & Def. 369; *Kisler v. Cameron*, 39 Ind. 488; *People v. Hilliard*, 29 Ill. 419; *In re Strong*, 20 Pick. 484; High, Extr. Rem., secs. 60, 61. The authorities are conclusive as to the right of the court to give the particular direction named in this writ. The law is quite well settled that such officers act only ministerially, and not judicially, and the power of the court to compel ministerial officers to act is without doubt. To this effect are the following authorities: "The doctrine that election and canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial power, is settled in nearly or quite all the states." McCrary, Election Laws, sec. 84, where the following authorities are cited in support of that principle: *Dishorn v. Smith*, 20 Iowa, 212; *State v. Cavers*, 22 Iowa, 343; *Attorney General v. Barstow*, 4 Wis. 749; *People v. VanCleve*, 1 Mich. 362; *Thompson v. Circuit Judge*, 9 Ala. 338; *Mayo v. Freeland*, 10 Mo. 629; *State v. Harrison*, 38 Mo. 540; *State v. Rodman*, 43 Mo. 266; *State v. Steers*, 44 Mo. 228, 229; *Bacon v. York Co.*, 26 Me. 491; *Taylor v. Taylor*, 10 Minn. 107; *O'Ferrall v. Colby*, 2 Minn. 180; *Marshall v. Kerns*, 2

Swan (Tenn.), 180. In *Bull v. Southwick*, 2 N. M. 321, upon statutes substantially the same in legal effect as those now in force on this subject, the supreme court of this territory held to the same rule. Associate Justice BRISTOL, whose opinions are always able, in delivering the opinion of the court in that case made some observations worthy to be quoted and considered. In commenting on the history of the case then before him he said: "As such board of canvassers they assumed judicial power to pass upon the illegality of, and reject votes, without any other ceremony than because partisan bystanders challenged them as illegal. In this way hundreds of votes were thrown out, and the result of the election arbitrarily changed. This is but another illustration of what experience has long since demonstrated, which is, that if such judicial power should be conferred upon mere canvassing boards, to be exercised at the close of a hotly contested election, in the absence of real parties interested, and almost always with the partisan advisers of such boards in the background, their sitting would be marked by the exercise of arbitrary power that would be more aggressive and odious than that of the ancient court of star chamber." While there are no such flagrant abuses of power in this case as there referred to by the learned justice whose opinion has been quoted, yet the reasons given have been sufficient to the legislative department to prevent it from extending to canvassing boards in this territory a power beyond judicial control and which might lead to unjust results.

It is proper to consider an additional question. It appears that the poll books from precinct number 10 were locked up in the ballot box, and it seems to have been a question as to the power of the board to open the box and take therefrom such returns. To hold that the board of canvassers are precluded from unlocking the ballot box to procure therefrom the returns

would be to establish a rule which would enable the election judges to absolutely control the issuing of certificates of election. It would often occur, as in this case, that by thus locking up in the box the returns of a single precinct the voters of the precinct would be disfranchised, the will of the majority defeated and the will of the minority substituted in its place. No such ruling should be made, unless compelled by the statute law in express words. If, in section 1188, the words "examine the votes" are construed to mean examine the returns, clear authority exists for opening the box. It is, however, plain that no such authority in words is needed. The power to open the ballot box and take out the returns and again lock up the box, without disturbing the votes, all done in a public manner, is incident to the duty to canvass the returns. The ballot box seems to have been sent forward by the proper legal authority and to have been placed in the proper legal custody. The returns, being in the box, were, in legal contemplation, before the board of canvassers, and they had the power and authority, as an incident to the legal duty upon them to canvass the returns, to open the box and extract therefrom the returns. To do this required no interference or tampering with the ballots inside the ballot box. A board which the law would intrust to canvass the returns and certify the result could also be intrusted, especially as the act might be an open one, while in public session, to unlock the box and take out the returns. This the board should have done in the first instance, without awaiting the command of the court.

We find no error in the record. The judgment of the court below is affirmed.

HENDERSON and REEVES, J. J., concur.

[No. 345. February 16, 1888.]

CITY NATIONAL BANK, DEFENDANT IN ERROR, v.
GEORGE W. HICKOX, PLAINTIFF IN ERROR.

PROMISSORY NOTE—BONA FIDE PURCHASER WITHOUT NOTICE—ASSUMPSIT—FRAUD—EVIDENCE—INSTRUCTIONS.—In an action of assumpsit upon a negotiable promissory note, by plaintiff, as indorsee for value before maturity, where the defendant pleaded non assumpsit, and set-off in the form of the common counts, to the first of which plaintiff added a similiter and to the second filed a replication, and the evidence was that defendant had purchased for \$2,300, a certain lot of ground in Santa Fe, where he resided and carried on the business of a jeweler, giving in part payment therefor a set of diamonds at \$750, which had cost defendant between \$400, and \$500, assuming the payment of a balance of \$950, on a mortgage of \$1,000 on the lot, and giving his note for the remainder at thirty days with the understanding that the grantor would hold it himself, and not part with it; that the purchase was made upon the representations of the grantor that he had bought the property cheap for \$2,000, and that it was worth \$2,300; and there was evidence tending to show that the lot was worth but \$1,000, also evidence tending to show that it was worth \$2,300, and the deed to the grantor recited a consideration of \$2,000, but the party from whom the grantor purchased testified that he had sold the property to the grantor for \$1,000, and the defendant testified that he had not paid the mortgage.—Held, that the evidence was not sufficient to constitute such fraud in the inception of the note as to put upon plaintiff the burden of proving that plaintiff had paid value for it, and the court did not, therefore, err in so instructing the jury; the doctrine that, if there is a particle of evidence tending to support the cause of action or defense, it must be left to the jury, never having obtained in this territory.

ERROR, from a judgment in favor of plaintiff, to the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

JOHN H. KNAEBEL for plaintiff in error.

The statute requires an affidavit only when the mere execution of a paper is denied. It does not require

a negative affidavit when the legal effect of the paper is denied. *Craig v. Missouri*, 4 Pet. 410.

This was a suit brought by the state of Missouri, on a promissory note, and the only plea was non assumpsit. Chief Justice MARSHALL, in delivering the opinion of the court, said: "Neither can it be doubted that the plea of non assumpsit allowed the defendants to draw in question at the trial the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated." *Mason v. Eldred*, 6 Wall. 234; 7 Cranch, 565; 2 Hill, 480; 21 Wend. 317; 25 Wend. 373; 11 Id. 467; 7 Cow. 278; 8 S. M. & M. 332; 15 Johns. 230; 9 How. 230; *Van Epps v. Harrison*, 5 Hill, 65, 66.

No statute or rule of court has ever been adopted in this territory requiring a notice in aid of the general issue in assumpsit, or as a condition precedent to the introduction of the proofs which the common law permits to be introduced under that plea. Compiled Laws, sec. 1907, enacted in 1878; *id.*, 1920, refers only to causes of action existing against the plaintiff. Against the bank only a defense existed. The court properly received the evidence of W. C. Bishop by means of which he procured the note. The case in this respect is even stronger than that of *Ferguson v. Oliver*, 8 Smede & Marshall, 332, 337, and cases cited.

It is doubtful whether the law of commercial paper has been extended to promissory notes by the legislation of this territory. Compiled Laws, sections 1725, 1919.

The plaintiff was competent as a witness to impeach the note. Act, 1880 (secs. 2076, 2077, 2078, Comp. Laws.)

Any rule which formerly existed disqualifying an interested witness, either generally or specially, was abrogated by this statute. It was an absurd rule in its origin in England and it has long been rejected in the the English courts as well as generally in the courts of the several states. 2 Daniels Neg. Inst., p. 227, sec. 1217.

Bishop was guilty of gross fraud in the procurement of the instrument. The following authorities treat false representation of value, when made under such circumstances, as fraudulent. *Veazie v. Williams*, 8 How. 134, 154; *Sanford v. Handy*, 3 Wend. 260, 269; *Van Epps v. Harrison*, 5 Hill, 63, 70; *Hepburn v. Dunlop*, 1 Wheat. 188.

It is a well settled rule that, when even concededly negotiable paper is shown to be infected with fraud in its origin or to lack consideration, a plaintiff, claiming the immunities of a bona fide holder without notice and for value, is called upon to show affirmatively the circumstances under which he acquired the paper. The burden of proof shifts in such cases. *First National Bank v. Green*, 43 N. Y. 298, 301; *McClintock v. Cummings*, 2 McLean, 98; *Bailey v. Bidwell*, 13 M. & W. 73; *Munroe v. Cooper*, 5 Pick. 412; *Smith v. Sac County*, 11 Wall. 139; *Stewart v. Lansing*, 104 U. S. 509.

EUGENE A. FISKE for defendant in error.

The facts and representations relied on by defendant below, though knowingly and falsely made, are no defense, such representations as to value not being actionable, especially in this case where the land sold was easily accessible to defendant below, and he could, had he desired, have readily examined the land for himself. *Wilder v. Decou*, 18 Minn. 470; *Griffin v. Farrier*, 32 id. 474; *Busterned v. Farrington* (Minn.), 31 N. W. Rep. 36; *Reynolds v. Palmer*, 21 Fed. Rep.

433, 434, 435; *Kimball v. Bangs* (Mass.), 11 N. E. Rep. 113, 114, and cases cited; *Williams v. McFadden* (Fla.), 1 Southern Rep. 618, 622, and cases cited in note; *Hemmer v. Cooper*, 8 Allen (Mass.) 334; *Medbury v. Watson*, 6 Metc. (Mass.) 259, 260; *Curtis v. Hurd*, 30 Fed. Rep. 733; authorities in 2 Am. Dec. 80, 81, and note; *Holbrook v. Connor*, 60 Me. 578; *Banta v. Palmer*, 47 Ill. 99; *Tuck v. Downing*, 76 Ill. 71, 80; *Kennedy v. Richardson*, 70 Ind. 532, 534; *Saunders v. Hatterman*, 37 Am. Dec. 696; *Slaughter v. Gerson*, 13 Wall. 379; *Parker v. Moulton*, 114 Mass. 99, 100; *Blease v. Garlington*, 2 Otto, 1, 9.

The testimony nowhere shows or tends to show that the land sold was not well worth the price paid by Hickox, nor that he was in any manner damaged by the transaction, yet false representations even when amounting to fraud are not actionable unless they result in injury to the party relying upon them, and such damages must be shown with certainty. "Remote, contingent, and conjectural losses will not be taken into consideration." South. Dam. 594; 2 Am. Dec. note p. 80; *Munroe v. Gardner*, 5 Am. Dec. 532; *Williams v. Hicks*, 19 Am. Dec. 696; *Ming v. Wolfork*, 116 U. S. 599, 602, 603.

The testimony of the defendant below was incompetent, and introduced over the objection of the plaintiff below. Disregarding this testimony, there is no testimony whatever that Bishop made any representations whatever, fraudulent or otherwise. 2 Daniel, Neg. Inst., section 1217, and cases cited in notes 1, 2, 4, 5; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Bank of Metropolis v. Jones*, 8 id. 12; *U. S. v. Liffler*, 11 id. 86; *Scott v. Lloyd*, 12 id. 145; *Henderson v. Anderson*, 3 How. 73; *Saltmarsh v. Tuttle*, 13 id. 229; *Davis v. Brown*, 94 U. S. 426, 427.

The defendant below will not be allowed to retain the property and protect himself against the payment

of the purchase money. *Hyson v. Dunn*, 41 Am. Dec. 101; *Bartlett v. Palmer*, 47 Ill. 99.

The defendant below by failing to plead specially under oath in this case that the note in question was not genuine and not duly executed, has, under our laws, admitted the genuineness and due execution of the note, and no evidence was, therefore, admissible in the case tending to show that the note was not duly executed because of fraud at its inception or want of consideration or other defect in its execution. Sec. 1922, Comp. Laws, N. M. 1884; *Smeltzer v. White*, 2 Otto, 390, 392; *Gray v. Fox*, 1 Sax. N. J. 266.

Not only do the statutes of this territory require a special plea in such cases, but that is the law regardless of statutory provisions. *Hyson v. Dunn*, 41 Am. Dec. 101; *Huston v. Williams*, 25 id. 86, and cases cited in note, page 96; *Kerr v. Steman*, 33 N. W. Rep. (Iowa) 655; *Darnell v. Roland*, 30 Ind. 346; *Specht v. Allen*, 6 Pac. Rep. 496, 497; *Ross v. Braden*, 26 Am. Dec. 445; *Williams v. McFadden*, 1 Southern Rep. 619; *Abraham v. Gray*, 14 Ark. 301, 304; *Moss v. Riddle*, 5 Cranch, 351; 3 Meyers' Fed. Dec., pp. 941, 957, 944; *Bank of British N. A. v. Ellis*, 6 Saw. C. C. 98, 99; *Estep v. Armstrong*, 11 Pac. Rep. 132, 719; *Williams v. Hicks*, 19 Am. Dec. 695; *Davis v. Hooper*, 24 Am. Dec. 752, 758, and note p. 753.

And want of consideration as between indorsee and maker cannot be pleaded, there being no privity. *Etheridge v. Gallaghen*, 55 Miss. 464; 1 Daniel, Neg. Inst., section 174; 3 Meyers' Fed. Dec. pp. 941, 943; 6 Sawyer C. C. 98, 99.

At most, the case presented by the record, as interpreted by plaintiff in error, is inadequacy, not failure of consideration, and that is in itself no consideration. *Staab v. Garcia*, 1 Pac. Rep. (N. M.) 858.

"Actual possession of a negotiable instrument payable to bearer, or indorsed in blank, is plenary evidence

of title in the holder, * * * but if to an action on the same the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, the illegality being proved, the onus is cast upon the plaintiff to prove that he gave value." *Collins v. Gilbert*, 4 Otto, 753, 760, 761.

The uniform and well settled measure of damages in cases of deceit, such as this is claimed to be, is "the difference between the actual cash value" of the land "and its value if the alleged facts regarding it had been true." It would certainly puzzle the learned counsel for the plaintiff in error, and much more a jury, to determine what the difference was between the actual cash value of the land for which the note in question was part payment, and the value of the same land if it were true Bishop had paid \$2,000 for it, instead of \$1,000. *Williams v. McFadden*, 1. Southern Rep. (Fla.) 621, and cases cited; *Morse v. Hutching*, 102 Mass. 440, and cases cited.

There is a distinction made by the authorities between evidence offered under the general issue in assumpsit to show fraud and deceit, and evidence so offered under that issue to show failure of consideration for other causes than fraud. *Moss v. Biddle*, 5 Cranch, 351, and cases cited, ante.

BRINKER, J.—This was an action of assumpsit upon a negotiable promissory note, due thirty days after date, by the plaintiff, as indorsee for value before maturity, against the defendant as maker. The declaration alleged these facts, together with demand of payment, and a refusal by defendant. The defendant filed two pleas; the first was non assumpsit, the second set-off in the form of the common counts. To the first plea plaintiff added a similitur, and to the second filed a general replication. Upon these issues the cause was tried.

Upon the trial the plaintiff introduced in evidence the note sued on with its indorsements and the record of its protest, and also proved defendant's signature, and rested. Defendant then testified, over the objection of plaintiff, as follows: That he resided in Santa Fe, and carried on the business of jeweler on the plaza; he was acquainted with W. C. Bishop, and had been for two years; that during Bishop's residence in Santa Fe he made defendant's store his headquarters. On the evening of the eighth of June, Bishop went into defendant's store, and, in the presence of a workman and the partner of defendant, he told defendant that he had purchased a piece of property from Dr. Longwill, for which he had paid \$2,000, and exhibited to defendant a deed, and told defendant that he was liable to be called away that night, or in a day or two, but very probably that night, and he wished to sell the property he had purchased very cheap; that he would sell it to defendant for \$300 over his bargain. Defendant replied that he did not know anything about the property; that he had never seen it, and did not like to invest in anything he knew nothing about. Bishop assured him that the property was worth the value; that the title was good; and he would only transfer it to the defendant on the condition that it was taken at once; that the deed must be made that night, or there would be no trade. Defendant attempted to argue the matter with Bishop, and finally turned away with the statement that he did not want to buy anything that he did not know anything about. This was about 8 o'clock, or after, in the evening. Bishop said it was a good bargain, and that he would sell it at that price for the reason that he had to go away. "He then stated that as an object to influence me to make a trade he would take in trade a set of diamonds that he had admired so much, for \$750. They were marked \$775." Defendant then told Bishop that he didn't have the

money to pay for the balance. Bishop answered that it did not take so much money, as he had given a mortgage on it for \$1,000, on which he had paid \$50, leaving a balance of \$950 due on a reasonable length of time, making payments easy. Defendant said that there was yet \$600 difference, and he had no money to pay for it, and he did not want to buy property without seeing it. Bishop said he would take defendant's note on thirty days. Defendant said he objected to giving his note, on general principles, for the reason that he did not want his paper offered for sale on the street. Bishop, as a further inducement, promised that if defendant gave his note, he (Bishop) would keep it himself, and positively agreed not to part with it. On this condition defendant told him he would make the trade. Defendant says: "I made another objection, and I told him I would not buy the property until I had seen it, and asked him to wait until next morning to see it, and he answered, 'No, Mr. Hickox; this must be a trade now. I will not give you time until morning;' consequently it was a matter to decide at once. Mr. Bishop asked me to wait for twenty minutes (it was then 8:30), and he would bring the deed. He went out and remained three-quarters of an hour—until 9:30. He brought the deed, and we made the exchange. I gave him the note and delivered him the diamonds. I would not have sold the diamonds for \$750." Defendant further stated that he had no knowledge concerning the property, except that derived from Bishop; that Bishop remained in town several days after the trade; that defendant published a notice in the paper two days after the trade, and continued it for thirty days, concerning the note, but does not state what that notice was. On cross-examination defendant stated that the diamonds cost him between \$400 and \$500 in New York. He also stated that he had not paid the mortgage to Dr. Longwill.

There was evidence tending to show that the property was worth but \$1,000; there was also evidence tending to show that it was worth \$2,300. Dr. Longwill testified that he sold it to Bishop for \$1,000. The deed, offered in evidence, from Longwill to Bishop, recited the consideration as \$2,000. It was admitted on the trial that the conveyance from Bishop to the defendant recited a consideration of \$2,300, and that such conveyance was made, by its terms, subject to a mortgage of \$1,000, held by Longwill. This admission was made subject to the objection that the facts embraced were incompetent and immaterial on the trial. At the close of the testimony plaintiff asked the court to instruct the jury to find for the plaintiff. The defendant asked that the cause be submitted to the jury upon the evidence. The court instructed the jury that the evidence offered for the defendant was not sufficient to require the plaintiff to show that value was paid for the note by the plaintiff, and that they should return a verdict for the amount of the note, with interest at six per cent per annum from maturity, and with fees of protest. To this instruction defendant excepted. There was a verdict and judgment in accordance with the instruction; a motion for new trial made and overruled, and the defendant brings the case here by a writ of error.

The propriety of this instruction is the only matter presented for review. Defendant contends that the evidence shows that the note was obtained by fraud and imposition, and therefore the burden was on the plaintiff to show that it paid value for the note before maturity. In the case of *Collins v. Gilbert*, 94 U. S. 753, it is said: "Transferees of a negotiable instrument, such as a bill of exchange, or promissory note payable subsequent to its date, hold the instrument clothed with the presumption that it was negotiated for value, in the usual course of business, at the time of

its execution, and without notice of any equities between the prior parties to the instrument. Possession of such an instrument payable to bearer or indorsed in blank, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, not even gross negligence, is, unattended with *mala fides*, sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by the presumption. Apply that rule in a suit in the name of the transferee against the maker, and it is clear he has nothing to do in the opening of his case except to prove the signatures to the instrument, and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value, at its date, in the usual course of business, without notice of anything to impeach his title. Clothed as the instrument is with those presumptions, the plaintiff is not bound to introduce any evidence to show that he gave value for the same, until the other party has clearly proved that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder." A large number of authorities are cited in support of this position. While it is true that the evidence of defendant tends to show that Bishop uttered a falsehood as to what the property cost him, the evidence wholly fails to show that defendant relied upon this statement solely, and was induced thereby to purchase the property. He says the inducement was that Bishop would take as part payment diamonds at the price of \$750, which cost between \$400 and \$500, and also retain the note himself. In the case of *Collins v. Gilbert*, *supra*, the defendant had given to Collins & Company, the transferrers, an acceptance which they agreed to hold as security, but which they, in violation of their agreement, transferred to the plaintiff. The defendant, under a plea of the general issue, sought

to show this agreement, which was denied him, and on appeal the judgment was affirmed. So far as the agreement on the part of Bishop to hold the note is concerned, the ruling in the case cited is conclusive that it did not constitute fraud in the inception of this note. The only other inducement upon which defendant relied in the transaction was that by the sale of the diamonds he was enabled to make a profit of several hundred dollars. This certainly was not fraud to his prejudice. Fraud sufficient to put the holder of negotiable paper, before maturity and without notice, to the proof that he paid value for it, must be clearly proved, and must consist of such representations of fact as were calculated to and did mislead the maker to his injury, and concerning the truth of which the maker had no knowledge nor means of knowledge, and upon which he implicitly relied, and which constituted the inducement to the transaction. Such misrepresentations must be of such a character as would authorize a court of equity to annul the instrument in a direct proceeding for that purpose. In the case of *Slaughter v. Gerson*, 13 Wall. 379, the court say: "The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge, and it must be a representation upon which he relied, and by which he was actually misled, to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness."

The evidence shows that defendant was unwilling to rely upon the statements of Bishop as to the value of the property, and insisted upon being allowed time in which to examine it for himself. The fair deduction from his testimony is that he yielded to Bishop's solici-

tations merely because Bishop informed him that if he did not take the property then, he could not get it at all, and the further fact that Bishop would take the diamonds. The property was situated in Santa Fe, both parties lived in Santa Fe, and from all that appears in evidence Bishop's grantor, to whom he claimed to have paid \$2,000 for the property, was easily accessible; and, if defendant had exercised the prudence and caution necessary to relieve him from the imputation of negligence, he could have ascertained the fact without difficulty. This being true, he stands in no position to impeach the validity of negotiable paper which he has voluntarily put in circulation, and which has gone into the hands of a bona fide purchaser without notice. From this it is clear that there was not such fraud in the inception of the note as to cast the burden of showing that plaintiff had paid value for it upon plaintiff, and does not bring this case within the principle announced in *Stewart v. Lansing*, 104 U. S. 505, cited by plaintiff in error.

The doctrine that if there is a scintilla of evidence tending to support the cause of action or defense it must be left to the jury, has never obtained in this territory. Our courts have uniformly followed the rule of the federal courts, that, if the court is satisfied that, conceding all the facts to be true, which the jury might reasonably infer from the evidence, they would not warrant a particular verdict, the court may instruct the jury to that effect. *Pleasants v. Fant*, 22 Wall. 116; *Railroad Co. v. Fraloff*, 100 U. S. 24. As we have seen, the testimony in this case would not have justified the jury in finding that the note was procured by Bishop from defendant under such circumstances as constitute fraud. Therefore the instruction given was proper.

Finding no error in the record, the judgment should be affirmed, and it is so ordered.

LONG, C. J., and HENDERSON, J., concur.

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[No. 352. February 23, 1888.]

TERRITORY V. FEWEL.

CRIMINAL LAW—HOMICIDE—MURDER—INSTRUCTIONS—SECTION 699, COMPILED LAWS, 1884—CONSTRUCTION OF STATUTES.—On a trial on indictment for murder in the first degree, where the defendant was convicted of murder in the third degree, under section 699, Compiled Laws, 1884, and the evidence was that deceased violently assaulted defendant, who then and there drew his pistol and fired two shots at deceased, killing him instantly, such killing was not cruel within the meaning of the statutes, nor unusual as held by this court in *Territory v. Pridemore*. The question for the jury was not whether defendant intended to kill deceased, such intent might be inferred from the circumstances attending the homicide, but whether or not there was lawful excuse for the killing; and it was error in the court to lead the jury away from the issue, and instruct them to convict defendant of murder in the third degree, when there was no evidence to sustain it. Such instruction was prejudicial to defendant, in depriving him of the reasonable hope of acquittal had the mind of the jury been confined to the legal effect of the facts proved.

APPEAL from a judgment of the First Judicial District Court, Rio Arriba County, convicting defendant of murder in the third degree, and sentencing him to imprisonment in the penitentiary for ten years. Judgment reversed and new trial ordered.

The facts are stated in the opinion of the court.

N. B. LAUGHLIN for appellant.

The charge in the indictment that the "full given name is to the grand jurors unknown," meaning the full given name of the appellant, is a material averment, and should have been proved. *Bishop*, Directions and Forms, sec. 77; 1 *Bish. Crim. Proc.*, secs. 459, 495, 552, 676, 678, 680; *Blodgett v. State*, 3 *Ind.* 403; *Stone v. State*, 30 *id.* 115; 65 *id.* 213; *Reed v.*

State, 16 Ark. 499; State v. Wilson, 30 Conn. 500; Comp. Laws, 1884, sec. 2484.

The court erred in excluding the testimony of the witness, Frank Kalalia, as to threats made by the deceased against appellant on the twelfth or thirteenth day of July, prior to the fatal difficulty on the eighteenth of the succeeding month; it was a part of the *res gestae*, and should have been admitted. 2 Bish. Crim. Proc., sec. 232; Sloan's case, 1 Horr. & Thomp. 528; Stokes' case, *id.* 928; Pridgen's case, *id.* 421. It tended to characterize in the mind of the accused the assault first made by the deceased on the fatal occasion. Wiggins' case, 93 U. S. 465-467.

The court erred in excluding the evidence of Jack Barringer, given at a prior examination of the same facts in the case before Judge Long, as a committing magistrate. 1 Bish. Crim. Proc., sec. 1195; State v. Harman, 27 Mo. 120, Vide. Trans. of Record, pp. 110-121.

The court erred in giving instruction number 7. The first paragraph of the instruction is misleading as to the degree attempted to be charged. The second paragraph is not a correct statement of the law applicable to the evidence given in the case. Comp. Laws, 1884, sec. 688; 2 Bish. Crim. Proc., secs. 602, 604, 606; Sloan's case, 1 Horr. & Thomp. 519; Stokes' case, *id.* 928, 935.

The court erred in not fully and clearly instructing the jury as to a reasonable doubt in favor of appellant. 1 Bish. Crim. Proc., sec. 980; Lopez's case, 2 Pac. Rep. 368.

The court erred in charging the jury as to murder in the third degree, in admitting the words "but in a cruel and unusual manner." When a court charges in any degree the jury should be instructed fully as to the law applicable to that degree. Comp. Laws, 1884, sec.

699; Lopez's case, 2 Pac. Rep. 368; Nicholls' case, id. 81; Perea's case, 1 N. M. 627; 1 Bish. Crim. Proc. 980.

The court erred in instructing the jury on the law of murder in the fourth degree. If the appellant was guilty in any degree the evidence is applicable to the fourth degree, and the court should have charged in that degree. Comp. Laws, 1884, sec. 700; Nicholls' case, 2 Pac. Rep. 81.

The following propositions are submitted on the evidence: First. That appellant had reasonable ground to apprehend a design on the part of deceased to do him some great personal injury, and that there was imminent danger of such design being accomplished. Second. The homicide was justifiable. Third. The evidence shows that appellant acted in self-defense. Comp. Laws, 1884, second clause, sec. 692; Selfridge's case, 1 Horr & Thomp. 13; Pridgen's case, id. (31 Tex. 420) 420, 424; Sloan's case, id. (47 Mo. 604) 519; Bohannon's case, id. (8 Bush. Ky. 481) 399; Keen's case, id. note (30 Mo. 357) 531; Tweedy's case, id. (5 Iowa, 433) 906; Stokes' case, id. (53 N. Y.) 928, 935; Phillips' case, id. (2 Duvall, 328) 386, 387.

WILLIAM BREEDEN, attorney general, and W. B. SLOAN, special counsel, for the territory.

The defendant can not except or assign for error in this court any exception not made in the court below. Territory v. O'Donnell, 12 Pac. Rep. 748; Kennedy v. People, 40 Ill. 488; Sedgwick v. Phillips, 22 id. 184; Leigh v. Hedges, 3 Scam. 15; Hill v. Ward, 2 Gilman, 285; State v. Miller, 23 Minn. 352; Comm. v. Child, 10 Pick. 252; State v. Haskell, 6 N. Clents, 65 Ind. 12; Griffin v. Pate, 63 id. 273; Wood v. Weimer, 104 U. S. 786.

The first exception in appellant's brief comes within the first proposition above stated. Territory v. O'Donnell, 12 Pac. Rep. 748.

The first assignment of error of appellant is "that the indictment does not disclose the Christian name of the defendant." It was not claimed in the court below, and comes too late in this court. If defendant once pleads the general issue of "not guilty," he is thereby precluded from taking advantage of error in his name. 2 Whar. on Homicide, p. 786, and cases cited.

There was not the slightest evidence of murder in any degree other than the first, and if the court instructed the jury to defendant's advantage he ought not to complain. *Territory v. Salazar*, 5 Pac. Rep. 462. See, also, 2 Pac. Rep. 82; 1 Bish. Crim. Proc., sec. 980; *People v. Ah Kong*, 49 Cal. 6; *State v. Murray*, 5 Pac. Rep. 55.

BRINKER, J.—The defendant was charged in the indictment with the crime of murder in the first degree, and upon the trial was convicted of murder in the third degree, and sentenced to imprisonment in the penitentiary for ten years. There was a motion for a new trial filed and overruled, and the case was brought here by appeal.

The evidence, as preserved in the record, discloses the following facts: About ten or twelve days before the homicide, the deceased, Edward Norman Bachelidor, was sitting in a saloon in the town of Espanola, when the defendant came in and sat down. Some conversation was had, when the deceased said: "Somebody swore down in court that we were notified of a certain sale." Defendant said: "I guess I am the man who testified to that." Deceased replied: "The man who swore it, swore a damned lie." Then ensued a quarrel between deceased and defendant, which resulted in their going out into the street, and engaging in a fight, during the progress of which defendant threw deceased to the ground and gave him a severe whipping. Deceased asked defendant to let

him up, which the defendant did. Thereupon deceased renewed the attack, and defendant fled. Deceased pursued him, and in the pursuit secured a piece of plank, with which he endeavored to strike defendant. Defendant escaped, however, unhurt. From that time on, bad blood existed between the combatants and both went armed. On the eighteenth day of August, 1886, about dark, deceased was in a saloon, engaged in playing a game of cards with several other persons, among whom was the proprietor of the saloon. Defendant came into the saloon, stepped up to the bar, and calling the proprietor told him he wanted to pay an account which he owed. The proprietor went behind the counter, and defendant handed him a \$5 bill. The proprietor took the bill and laid the change in coin upon the counter, and at that moment deceased, who had arisen from the card table, approached defendant, and said, "We will settle that thing now," or something to that effect, and at once struck the defendant on the head, whether with his fist or open hand does not clearly appear, as the witnesses differ on this point. The force of the blow was such as to stagger defendant, and throw him towards the door, or he retreated to the door, and, some of the witnesses say, out of the room. Defendant, immediately after getting to the door, or, as some say, outside the door, fired in rapid succession two shots at deceased, both of which took effect, and one of them causing his death in a very short time. After the shooting defendant left and went to the rear of a boarding house in the vicinity, where he was found shortly afterward by the keeper of the house, who told him to go to his room and stay there until the authorities should arrest him. This he did. There was evidence of threats made by deceased against defendant at the time of the first difficulty, and by defendant against the deceased afterward and before the shooting. When deceased was taken up from where

he had fallen a large revolver was found on his person. Among other instructions given upon the trial was the following: "The court further instructs the jury that if they believe from the evidence that the defendant is not guilty of murder in the first or second degree, but find that defendant killed Bacheldor in a heat of passion from a provocation given at the time of the killing, which was not justifiable or excusable, and not from a premeditated design to effect death, they might then decide from the evidence whether the defendant was guilty of murder in the third degree; and if the jury should find that he was guilty of murder in the third degree, they will assess his punishment at imprisonment in the territorial penitentiary for a period not less than three years nor more than ten years. On this you will decide from the evidence." To the giving of this instruction defendant at the time excepted, and made it one of the grounds of his motion for new trial, and now insists that it constituted error sufficient to justify a reversal of the judgment. There are many exceptions in the record based upon alleged errors occurring during the trial; but as a determination of this one must result in sending the cause back for a new trial, I have deemed it unnecessary to discuss the others.

The statute defining murder in the third degree is as follows: "The killing of a human being without design to effect death, in heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute justifiable or excusable homicide, shall be deemed murder in the third degree." Section 699, Comp. Laws, 1884. The punishment prescribed is imprisonment not less than three nor more than ten years. Section 703, *id.* This statute is almost a verbatim copy of the Missouri statute defining manslaughter in the second degree, and was evidently taken from that state. The only difference

in the two statutes is that in Missouri the words "cruel" and "unusual manner" are joined with a disjunctive "or," while in section 699, *supra*, they are connected with the conjunctive "and," and the offense is called in the former "manslaughter in the second degree," and in the latter "murder in the third degree." R. S. Mo. 1845, p. 345, sec. 11; Wag. St. Mo. 1870, p. 447, sec. 11. The essential elements of the offense are the same in both statutes, except that in Missouri, it seems, an unintentional killing in heat of passion would be manslaughter, if committed in either a cruel or unusual manner, while here it must be done in both a cruel and unusual manner. Is there anything in the evidence that would justify the giving of the instruction complained of? Bishop, in his work on criminal procedure, thus states the rule: "The charge should state the law in its application to the facts. * * * 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." Section 980.

In the case of *State v. Alexander*, 66 Mo. 148, the court, in discussing the action of the trial court in giving an instruction based upon section 11 of the statute of the state, above cited, say: "In the sixteenth instruction the court declared that if defendant, without a design to effect death in a heat of passion, did kill Norrick in a cruel and unusual manner by shooting him with a shotgun, they should find him guilty of manslaughter in the second degree. Frank Cook, a witness for the state, testified that defendant shot twice with a double-barreled shotgun; that defendant raised his gun and shot, and that deceased was about two feet from Alexander (defendant). Eldridge Kyler, for the state, testified that defendant raised up his gun, deliberately took aim, and fired. On that point there was no contradictory evidence. In his written opinion, on

the application of defendant to be admitted to bail, the judge who tried the cause correctly stated the law as follows: A man is taken to intend that which he does, or which is the immediate or necessary consequence of his act. To illustrate, if a man within shooting distance of another raises his gun, takes aim, and fires, and the ball inflicts a mortal wound, from which death ensues, the fair presumption is that he intended to kill his victim, and, if so, the act is certainly murder, unless done in self-defense. The case supposed by him to illustrate the principle is the very case here, and it is a little remarkable that the court, having so clear a view of the law, should have given the sixteenth instruction. That the defendant intended to kill Norrick is beyond a doubt. In the case of the State v. Phillips, 24 Mo. 475, SCOTT, J., delivering the opinion of the court, said: 'It follows, then, that this was no case for an instruction as to the law of manslaughter in the second degree; for there can be no doubt, unless we stultify ourselves and refuse to permit our judgment to be influenced by considerations which govern all the rest of mankind, that Sullivan Phillips intended to kill Watson.' Those remarks are equally applicable to this case, and it was error to give the sixteenth instruction. And here it may be observed that defendant was found guilty of manslaughter in the second degree, the very degree in regard to which the improper instruction was given; of which crime there was not a particle of evidence to warrant his conviction. He was either guilty of murder in one of the degrees of which an intention to kill is an element, or the killing was justifiable." This court said in effect that, where an offense consisted of different degrees, to instruct upon a degree of the offense not shown by the evidence to have been committed was error.

PRINCE, C. J., says: "In a case of murder by an ordinary pistol shot, to include in the charge the sections

as to the killing in a cruel and unusual manner would simply confuse and mislead." Territory v. Young, 2 N. M. 105. This, it is true, was said by way of argument and illustration, but it nevertheless states the law in harmony with the rule quoted from Bishop, *supra*.

In Territory v. Pridemore, 13 Pac. Rep. 96, HENDERSON, J., in delivering the opinion of this court, after stating the elements of murder in the second degree, said: "In the third, however, we think there must have been both the absence of the intention to kill and the presence of the motive to inflict bodily or mental suffering from the effect of which the injured person died. Again, killing a human being by means of a shot or shots from a Colt's revolver is not, as the history of criminal trials shows, an unusual manner of effecting death."

The facts in Alexander's case were very similar to those in this case. In Young's case the facts are not stated. In Pridemore's case the facts show that deceased was killed by a pistol shot fired by one of two persons engaged in shooting at each other, but with whose quarrel deceased had nothing to do. In all of these the principle is clearly recognized that it takes something more than a killing with a pistol shot fired during a difficulty to authorize the court to charge the jury as to murder in the third degree.

The evidence shows that deceased assaulted defendant, and that defendant then and there, or in so short a time afterwards as to be almost inappreciable, drew his pistol, and fired two shots at deceased, killing him almost instantly. There was certainly nothing cruel in this within the meaning of the statute, unless all killings may be considered cruel, and there was nothing unusual in it, as Judge HENDERSON says, "as the history of criminal trials shows." That the legislature recognized the fact that there might be killings which are not to be deemed cruel, as contemplated by this

section, is shown by reference to the other sections of the statute.

The definition of the words "cruel and unusual," quoted from Pridemore's case, is certainly clear and satisfactory, and I adopt it here. That defendant intended to kill the deceased is shown beyond any question by the circumstances attending the homicide, and there is no pretense on the trial to the contrary. Then where do we find a basis for the assumption that defendant acted "without design to effect death?" Heat of passion was present, and the killing of a human being; but these were the sole ingredients of murder in the third degree developed on the trial. A glance at the statute will show how far they fall short of its requirements. The defendant was convicted of the very degree to sustain which there was not a particle of evidence. As said by Judge HENRY in Alexander's case, *supra*: "He was either guilty of murder in one of the degrees of which an intention to kill is an element, or the killing was justifiable,"—and the attention of the jury should have been confined to that issue.

The attorney general contends that even if this instruction be held erroneous it was an error committed in defendant's favor, and he can not complain. This may or may not be true. If it could be said from a consideration of the whole case, and in any view of it, that the defendant would have been convicted of a higher degree if this instruction had not been given, then the position might be sound. But if, from a fair and impartial examination of the evidence, the jury might have returned a verdict of not guilty, had their attention been confined by the instructions to an intentional killing constituting crime, or an intentional killing justified by law, then the defendant was prejudiced by the failure of the court to confine the attention of the jury to this issue. From a careful

consideration of this evidence, in view of the rule that the jury is the sole judge of its weight, and the credibility of the witnesses from whom it is elicited, it can not be said that the jury was bound to find defendant guilty of an intentional killing without lawful excuse. This being true, an instruction which leads them away from the real issue is erroneous. The instruction complained of was calculated to, and, as shown by the verdict, did, lead the jury to a conclusion wholly unsupported by the evidence, and was, therefore, improperly given. This error was prejudicial to the defendant, as we have seen, for it deprived him of the reasonable hope of a possible acquittal if the mind of the jury had been confined to the legal effect of the facts proved. *State v. Phillips*, 24 Mo. 475; *State v. Alexander*, supra; *State v. Sloan*, 47 Mo. 604.

From these considerations it is clear that the judgment should be reversed, and the cause remanded, with directions to award a new trial, and it is so ordered.

LONG, C. J., and HENDERSON, J., concur.

REEVES, J.—I concur in granting the new trial.

[No. 306. January 7, 1889.]

CHARLES SEIDLER, APPELLANT, V. AMWOOD
LAFAYE, APPELLEE.

MINES AND MINING—EJECTMENT—LOCATION NOTICE, SUFFICIENCY OF, ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN—SECTION 2324, REVISED STATUTES, UNITED STATES—CONSTRUCTION OF STATUTES.—In an action of ejectment to recover possession of a mining claim, where the location notice refers to certain natural objects and monuments with sufficient certainty to identify the claim, but it does not appear from the notice whether such objects and monuments are of a permanent nature, the notice is sufficient, and it was error to exclude it; and parol evidence is admissible to show that the natural objects and monuments referred to in the notice are in fact perma-

ment, within the meaning of section 2324, Revised Statutes, United States, requiring that the location notice of a mining claim shall contain such description of the claim located, by reference to some natural object or permanent monument, as will identify the claim, and the court below also erred in refusing to admit it. Overruling *Baxter Mountain G. M. Company v. Patterson et al.*, 3 Gil. (N. M.) 269.

APPEAL, from a judgment in favor of defendant, from the Third Judicial District Court, Sierra County. Judgment reversed.

The facts are stated in the opinion of the court.

ELLIOTT, PICKETT & ELLIOTT for appellant.

For requirements as to description of location claims, see Revised Statutes, United States, section 2324.

In the case of *Baxter Mountain G. M. Company v. Patterson et al.*, 3 W. C. Rep. 77, relied on by appellee, no reference was made in the location notice to "corners" or to "monuments." It refers to no claim whatever "on the east," and hence the claim was not described by reference to mining claims on all sides of it, and could not be brought within the rule, so as to make it a sufficient location notice, laid down in *Southern Cross Company v. Europa Company*, 15 Nev. 385.

The notice is sufficiently definite as to the locus of the claim. *Quimby v. Boyd*, 6 W. C. Rep. 175.

In refusing to submit the sufficiency of the location notice to the jury, the court below erred. *North Noonday Company v. Orient Company*, 9 Morrison Rep. pp. 540, 541.

MASTERSON & WOODWARD for appellee.

Cited the following authorities: *Baxter Mountain Gold Mining Company v. Patterson et al.*, 3 W. C.

Rep. p. 77; Land Owner, Vol. 8, p. 60; sec. 2320, R. S., U. S.; sec. 1566, Comp. Laws, N. M.

BRINKER, J.—This was an action of ejectment to recover the possession of a certain mining claim known as the "Miner's Dream." On the trial, the plaintiff offered in evidence the location notice, which is in these words:

"NOTICE.

"Nov. 10, 1880.

"We, the undersigned, have this day located and claim fifteen hundred feet along this lead, and three hundred feet on each side of the center. This claim commences at the northeast corner of the Iron King mine, and extends along the eastern boundary of the Iron King claim, in a southerly direction to the southeast corner of the Iron King mine; thence six hundred feet, in an easterly direction, to a monument of stone; thence fifteen hundred feet, in a northerly direction, to a monument of stone; thence six hundred feet, in a westerly direction, to the point of beginning.

"This notice is placed in a monument of stones, built at the point of discovery, about four hundred feet south from the north end center monument of the claim. This claim is situated on the eastern slope of the Black range, about twelve miles west of Hillsborough, on a branch of the Las Puercas river. It joins the Iron King on the east, and the Mountain Chief on the south, district unnamed, county supposed to be Grant, territory of New Mexico. This claim shall be known as the 'Miner's Dream.'

"Locaters: { E. L. DOHENY.
D. S. MILLER.
THOMAS GRADY.
TIMOTHY CORCORAN.
JAMES DELANY."

"Territory of New Mexico, County of Grant—ss.:
Filed for record in my office, November 23, 1880, at

1 o'clock P. M., recorded in Book 3, Mining Locations, pages 245 and 246.

"R. V. NEWSHAM, Probate Clerk.

"By E. COSGROVE, Deputy."

To its introduction the defendant objected, for the following reasons: "First, because it is void for insufficiency as a location, and that it fails to properly describe a mining claim; second, because it is not made in accordance with section 2320 of the Revised Statutes of the United States; third, because said location notice fails to designate either natural objects or permanent monuments, so that the location claim can be accurately determined and located; fourth, because said location is not made in accordance with section 1566 of the Compiled Laws of New Mexico, in this: that it fails to distinctly mark the location of said mining claim on the ground, so that its boundaries may be readily traced by reference to some natural object or permanent monument that will identify the property attempted to be located in said notice."

The court sustained the objection, and excluded the notice, and the plaintiff excepted.

The plaintiff then offered to prove in connection with the notice, by parol testimony, that the northeast and southeast corners of the Iron King mine, referred to in the notice, were monumented when the Miner's Dream was located, and the notice posted on the claim. To this the defendant objected, for the reason that the location notice should stand on its own merits, and could not be modified or changed by parol testimony. The objection was sustained, and the plaintiff excepted.

No further testimony being offered, the court directed a verdict for the defendant. A verdict was accordingly returned, and judgment rendered for defendant. A motion for a new trial was made and denied, and the case comes here by appeal.

The only question for our determination is the propriety of the rulings of the court in excluding the location notice, and the parol testimony offered, in connection with it, to show that the corners of the Iron King mine, referred to in the notice, were monuments when this claim was located. The notice offered in evidence in this case is called in the United States statutes a record. In order to make a valid record under the statute, it is necessary that it contain the name or names of the locator or locators; the date of the location; and such description of the claim located, by reference to some natural object or permanent monument, as will identify the claim. R. S., U. S., section 2324. *North Noonday Min. Co. v. Orient Min. Co.*, 6 Sawy. 311; *Jupiter Min. Co. v. Bodie Con. Min. Co.*, 7 Sawy. 96. A natural object is well understood, and includes trees, prominent buttes or hills, the confluence of streams, the point of intersection of well-known gulches, roads, and ravines. *Wade*, Am. Min. Laws, 113; *Quimby v. Boyd*, 6 W. C. Rep. 171. But what will be sufficient to meet the statutory requisite of a permanent monument, in all cases, has not been definitely settled. This question has been considered in the following cases:

In *North Noonday Company v. Orient Company*, 6 Sawyer, 311, it was said that the monument need not be on the claim, although it might be, and it might consist of a prominent post or stake firmly planted in the ground or of a shaft sunk in the ground. This was reiterated in *Jupiter Min. Co. v. Bodie Con. Min. Co.*, 7 Sawy. 96. In *Quimby v. Boyd*, supra, it is said that natural objects and permanent monuments are general terms, susceptible of different shades of meaning, depending largely upon their application. The reference in the notice in that case was to a tree, and the court held it good, as a natural object, and declined to follow a decision of the commissioner of the general office that a tree was not sufficient.

In *Southern Cross Company v. Europa Company*, 15 Nev. 383, the notice called for stone monuments at each corner of the claim, and described it as bounded by four other claims. This was held sufficient in itself. Whether the monuments mentioned in the notice were designated in it as "permanent" monuments does not appear from the decision.

In *Faxon v. Barnard*, 1 Colorado, 145, the notice contained no reference whatever to a natural object or permanent monument, and it was held insufficient.

In *Baxter Mountain, etc., Company v. Patterson*, 3 West Coast, 77 (decided by this court in 1884), the description in the notice was: "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." The court held this notice insufficient, and sustained the court below in excluding evidence offered to show that the claims referred to in the notice had upon their boundary lines lasting and permanent monuments.

The statute requires a reference in the record to a permanent monument, but it does not indicate what that monument shall be, nor where it shall be located, whether on or off the claim, nor whether at the point of beginning in the description, or any intermediate point. The only essentials are, that it be a monument permanent in its character, and referred to in such manner as will identify the claim; that is, the monument must be of such character as to permanence, and the reference to it in the notice must be so definitely made, that a prospector, or other person looking for mineral deposits, could, with the aid of the notice, find the monument, and from it and the description in the notice trace out the extent of the claim. In this case, the initial point in the description is the northeast corner of the Iron King mine. The southeast corner of the Iron King mine is given as another point, and two

monuments of stone are given as the other points, fifteen hundred feet apart, and six hundred feet distant, respectively, from the given corners of the Iron King mine. On the trial there was no pretense that the two monuments of stone were permanent, but it was proposed to show that the given corners of the Iron King mine were monumented. If the reference had been, "beginning at a permanent monument, to wit, the northeast corner of the Iron King mine," it is not contended that this would be bad. In such case, the reference in the notice would be *prima facie* true. It would not, however, be conclusive. Parol evidence could be introduced to show that the monument called for had, in fact, no existence, or that it was of a temporary character. If this be true, the converse of it, that a call for a point not stated in the notice to be a permanent monument, but which was in fact such, could be shown to be a permanent monument, would seem to be equally true.

It is objected that the call or reference is to a corner; and not what may be erected on the corner as a monument, and that a corner is but the point of intersection, at right angles, of two imaginary lines. This is but begging the question. If the reference be to a corner upon which there is no monument, then the notice would be bad; but if to a corner upon which there was a monument of a durable character, the reference would be sufficient, and the location notice in this respect good. The reference in the notice, therefore, contains a latent ambiguity, and parol proof is always admissible to explain it.

In the North Noonday and Jupiter cases, cited *supra*, the court, after telling the jury by way of illustration what would be a permanent monument within the purview of the statute, left them to determine, as a question of fact, whether the notice in that and other respects was sufficient.

In the case of Southern Cross Company v. Europa Company supra, the court say, "that, if it were necessary to support the finding of the court below in sustaining the notice, it would presume that the other claims, referred to as boundaries were well known and defined by permanent monuments." This is going further than the facts of the present case demand. Plaintiff asked no presumption in his favor, but simply sought to prove by parol evidence the facts as he claimed them to exist, in order to give him the benefit of his discovery.

In Mount Diablo Company v. Callison, 5 Sawyer, 439, it is said: "The object of any notice being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this, fairly and reasonably, should be held a good notice. Great injustice would follow if, years after a miner had located a claim, and taken possession and worked upon it in good faith, his notice of location should be subjected to any very nice criticism. The locator should make his location so certain that the miners who follow him may know the extent of his claim, and be able to locate the unoccupied ground without fear of entering upon appropriated territory. But *id certum est, quod certum reddi potest*. When the miner has stated, as the rules require, the number of feet he claims along the lode on which he has set his stake, and has referred all whom it may concern to the laws of the district, by claiming all the privileges granted by the laws of the district, and those laws in express terms entitle each locator to a certain number of feet, then the length and breadth of his claim are fixed with reasonable certainty; because, by reading the laws of the district with the notice referring to them, the subsequent locator can make certain the exact thing claimed." *Gleeson v. Martin White Co.*, 13 Nev. 442.

The proposition of defendant, carried to its logical

conclusion, would result in holding that the notice must show on its face, by its express terms, that the monument referred to is a tangible, visible thing, conveying with it, in its very name, *prima facie*, at least, the idea of permanency. This is certainly within the letter of the statute, but is it the true interpretation of it?

In construing a statute the court will look beyond its language, and to matters not strictly within its letter, but which fall within its spirit. *U. S. v. Falkenhainer*, 21 Fed. Rep. 624. This statute is intended to encourage the development of the hidden mineral wealth of our country, beneficial alike to the government and the citizen, and should be liberally construed. The object of the record is not to specifically describe the claim with absolute precision, but only to the extent that it may be identified. The maxim that "that is certain which may be rendered certain" strongly supports this notice.

In the case in 5 Sawyer, *supra*, the court held a notice sufficient which directed all concerned to the laws of the district for information as to the extent of the claim. If this be sound, then this notice is certainly sufficient, aided by the testimony offered. Within the principle of the maxim, if the notice so far refers to an object which can readily be resorted to and found by anyone interested in knowing whether or not the particular piece of ground has been appropriated, and, when found, taking it in connection with the notice, he can ascertain the existence, extent, and situs of the claim, it would be valid.

The value of the cases cited as guides to a satisfactory solution of this question is much diminished by the fact that they are limited to the circumstances of each particular case. No rule of universal application, giving to the statute a broad and liberal interpretation, is distinctly announced by them. But this principle may be gleaned from them: That the object

of the notice is to advise the public with reasonable certainty of the location and extent of the claim, and, if it possesses within its terms information from which the location and boundaries may be found and identified, by reference to some natural object or monument which is in fact permanent, it is sufficient, although it fails to designate the natural object or permanent monument as such, in the precise language of the statute. That the question whether such object referred to amounts to a natural object or permanent monument, within the meaning of the statute, is a question for the jury; and, therefore, in order to enable the jury to determine this question, parol testimony is admissible to show the existence and character of such object or monument referred to. Opposed to this view, the case of Baxter Mountain Company v. Patterson, *supra*, so far as my research has extended, in effect stands alone.

The court below very properly considered it as binding authority. That case has been much criticised, and the principles announced by it have never been satisfactory to the bar. It was decided by a divided court, the chief justice dissenting. While the facts of that case are not exactly parallel with the facts in this, the decision is broad enough, and the doctrine sufficiently comprehensive, to cover this case, if we regard it as authority. In that case, as in this, the court excluded the location notice, and refused to permit parol evidence to be introduced to show that the location was made in accordance with the statute. The proceedings in the court below are not fully stated in the majority opinion, but they appear to be in the dissenting opinion of Chief Justice AXTELL. From his statements of the history of the trial, I am persuaded that the decision of the court held the requirements for a valid location notice and the mode of proving a valid location to a strictness not contemplated by the framer

of the statute, and in opposition to the current of judicial opinion upon this question. It should, therefore, be overruled.

There is but one other matter to be noticed. Among defendant's objections was one that the notice did not comply with section 1566 of the Compiled Laws, in this: That it did not distinctly mark the location on the ground, so that its boundaries could be readily traced. It is sufficient to say that this question did not arise in the court below, because the action of the court in excluding the location notice rendered any testimony as to the marking of the boundaries upon the ground wholly immaterial. It might be added, in order to avoid misapprehension, that it would appear to be a rather difficult thing for the location notice to show how the boundaries were marked upon the ground. It might, however, have contained a description of such marking, but this would be unnecessary in the notice. It follows that, for the errors committed in excluding the notice and testimony offered, the judgment should be reversed, and the cause remanded, and it is so ordered.

LONG, C. J., and REEVES, J., concur.

[No. 313. January 9, 1889.]

TERRITORY OF NEW MEXICO, APPELLEE, v. W.
C. HEACOCK, APPELLANT.

CRIMINAL LAW—EMBEZZLEMENT—INDICTMENT, SUFFICIENCY OF—SECTION 750, COMP. LAWS, N. M. 1884—CONSTRUCTION OF STATUTES.—On a prosecution against a justice of the peace for embezzlement of a fine imposed, an indictment founded on section 750, Compiled Laws, 1884, is not sufficient. That section applies only to property received by one person to be carried and delivered to another person. The proper indictment would have been under section 752, which provides for the embezzlement of public money. The indictment was also fatally defective, in failing to state specifically the facts constituting the offense charged.

APPEAL from a judgment of the Second Judicial District Court, Bernalillo county, convicting the defendant of embezzlement. Judgment reversed and cause remanded, with instruction to sustain the motion in arrest of judgment.

The facts are stated in the opinion of the court.

FISKE & WARREN and STONE & STONE for appellant.

The count for embezzlement, in the indictment, is verbatim the Wisconsin statute, with the exception of the mere verbal substitution in our statute of the word "bulk" instead of "the mass." R. S., Wis. (2 Tay. Stats. 1884), ch. 165, sec. 28. The supreme court of Wisconsin holds that their statute applies only to common carriers and others in like capacity carrying property for them, and persons who may be intrusted with such property by the carrier, to its destination. *State v. Peacock*, 20 Wis. 246, and cases cited; *Commonwealth v. Brown*, 4 Mass. 580; *Roscoe's Crim. Ev.* 438; *Nichols v. People*, 17 N. Y. 115; *Barb. Crim. Law*, 141; *Rex v. Nettleton*, R. & M. 259.

The record shows that the money charged to have been embezzled by appellant was received by him as justice of the peace in payment of a fine; and is clearly not within the statute, even if it be admitted the justice was authorized to receive the amount of the fine.

WM. BREEDEN, attorney general, for the territory.

LONG, C. J.—This case is here on appeal by William C. Heacock, the defendant in the court below. There he was presented by indictment on a charge of embezzlement. The indictment reads as follows:

"TERRITORY OF NEW MEXICO, } ss.
"County of Bernalillo.

"In the district court, at the May term, A. D. 1886.

"The grand jurors of the territory of New Mexico, taken from the good and lawful men of the county of Bernalillo, of the territory of New Mexico aforesaid, duly elected, impaneled, sworn, and charged, at the term aforesaid, to inquire in and for the county of Bernalillo aforesaid, upon their oaths do present, that William C. Heacock, late of the county of Bernalillo, territory of New Mexico, on the first day of April, in the year of our Lord one thousand, eight hundred and eighty-five, at and in the county of Bernalillo aforesaid, became and was intrusted with two gold coins of the current gold coins of the United States, each of the denomination of five dollars, and each of the value of five dollars, one gold coin of the current gold coin of the United States of the denomination of ten dollars, and of the value of ten dollars; one United States treasury note, commonly called 'greenback,' of the denomination of five dollars, and of the value of five dollars; one United States national bank note, current as money, of the denomination of five dollars, and of the value of five dollars, and four dollars in silver coin of the current silver coin of the United States, of the value of four dollars—a more particular description of which said gold and silver coins and notes is to the grand jurors unknown—of the money and property of the county of Bernalillo, in the territory of New Mexico; and being so intrusted therewith he, the said William C. Heacock, the said gold and silver coins, United States treasury note, and United States national bank note, unlawfully, knowingly, willfully, and fraudulently did embezzle and convert to his own use, and before delivery of the same to the said county of Bernalillo, to which they were to be delivered; and so the said William C. Heacock, the said gold and silver coins and notes, in manner and form

aforesaid, unlawfully, knowingly, willfully, and fraudulently did steal, take, and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of New Mexico; and the grand jurors aforesaid, for the territory of New Mexico, taken from the good and lawful men of the county of Bernalillo, of the territory of New Mexico aforesaid, duly elected, impaneled, sworn, and charged at the term aforesaid, to inquire in and for the county of Bernalillo aforesaid, upon their oaths do further present that William C. Heacock, late of the county of Bernalillo, territory of New Mexico, on the first day of April, in the year of our Lord one thousand, eight hundred and eighty-five, at and in the county of Bernalillo aforesaid, two gold coins of the current gold coins of the United States, each of the denomination of five dollars, and each of the value of five dollars; one gold coin, of the current gold coin of the United States, of the denomination of ten dollars, and of the value of ten dollars; one United States treasury note, commonly called 'greenback,' of the denomination of five dollars, and of the value of five dollars; one United States national bank note, current as money, of the denomination of five dollars, and of the value of five dollars; and four dollars in silver coin of the current silver coin of the United States, of the value of four dollars—a more particular description of which said gold and silver coins and notes is to the grand jurors unknown—of the money and property of the county of Bernalillo, in the territory of New Mexico, unlawfully and knowingly did steal, take, and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of New Mexico.

HARVEY B. FERGUSON,
"District Attorney for the Second District of New Mexico."

The defendant, by his attorneys Stone & Stone and Fiske & Warren, in the court below filed a demurrer to the indictment, which was overruled, and the defendant excepted. The cause was submitted to a jury for trial. The defendant was found guilty, whereupon a motion was filed by him, and presented, asking for a new trial. This motion was overruled, and the defendant excepted. He then moved in arrest of judgment, and, the ruling of the court being against him, the defendant by exceptions saved the points made on the motion, and now presents them in this court for its action.

The sole question which need be considered is as to the sufficiency of the indictment, and that is the only one argued. The indictment is founded on section 750 of the Compiled Laws of 1884, which reads as follows: "If any carrier or other person to whom any money, goods, or other property which may be the subject of larceny shall have been delivered to be carried for hire, or if any other person who shall be intrusted with such property, shall embezzle or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, any money, goods, or property, either in bulk as the same were delivered, or otherwise, and before delivery of such money, goods, or property, at the places or to the persons to whom they were to be delivered, he shall be deemed, by so doing, to have committed the crime of larceny."

The appellant contends that this section applies only to common carriers and others in like capacity, carrying property for hire, and to persons who may be by such carrier intrusted with such property to take the same to its destination; and as there is no averment that the property described in the indictment was intrusted to the defendant as a carrier, or to be carried, it is contended by appellant that the indictment is bad, and that the demurrer thereto should have been sustained.

A case decided at the March term, in 1855, in the supreme court of Massachusetts (*Com. v. Williams*, 3 Gray, 461), is exactly in point. In that case the statute of Massachusetts is set out in full, and it is in precise terms identical with section 750 of the Compiled Laws of the territory. In that case the defendant, Williams, was charged under this section, and it did not appear that he had received the property charged to have been embezzled as a carrier, nor that he was a carrier. In applying the statute to the facts, the court said: "This, being a penal statute, is to be construed strictly, although in the more natural grammatical construction the words 'such property,' in the clause relating to 'any other person who shall be intrusted with such property,' refer only to the words, 'money, goods, or other property, which may be the subject of larceny,' yet the words at the end of the section, 'before delivery of such money, goods, or property at the place at which, or to whom, they were to be delivered,' limit the words, 'such property,' still further, and, taken in connection with the words, 'carrier or other person,' at the beginning of the section, confine its application to the embezzlement of property received by the defendant to be carried and delivered to another person."

In Wisconsin (*White v. State*, 20 Wis. 247), a like statute has received even a more strict construction. It will be observed in Massachusetts the statute is limited in its application to carriers, while in the Wisconsin case it is limited to common carriers for hire. The Wisconsin court says: "The indictment was evidently drawn under section 28, chapter 165, Revised Statutes. But it is clear that section does not apply to the case. It only applies to embezzlement by common carriers, and others in like capacity, carrying property for hire, and persons who may be intrusted with such property by the carrier to its destination. This is the construction placed upon a similar statute in Massachusetts,

and we think it is the correct one." The court then refers as authority for the foregoing construction to *Com. v. Williams*, 3 Gray, 461.

The construction of the statute thus given in the courts of Massachusetts and Wisconsin should be followed here. This view of the construction which should be given to the statute is strengthened by reference to the facts which appear in the record of this case. It is there shown that the defendant, Heacock, in April, 1885, was a justice of the peace, and as such had collected a fine imposed, which he held as such justice, and for which he never accounted. It was this failure to account for money held by him as a public officer for which the indictment was brought under section 750.

The following section amply provides for that class of offenses: "Sec. 752. If any person having in his possession any money belonging to this territory, or any county, precinct, or city, or in which this territory, or any collector or treasurer of any precinct or county, or the treasurer or disbursing officer of this territory, or any other person holding an office under the laws of this territory, to whom is intrusted by virtue of his office, or shall hereafter be intrusted with the collection, safekeeping, receipt, disbursement, or the transfer of any tax, revenue, fine, or other money, shall convert to his own use, in any way or manner whatever, any part of said money, or shall loan, with or without interest, any part of the money intrusted to his care as aforesaid, or willfully neglect or refuse to pay over said money, or any part thereof, according to the provisions of law, so that he shall not be able to meet the demands of any person lawfully demanding the same, whether such demand be made before or after the expiration of his office, he shall be deemed and adjudged to be guilty of an embezzlement."

The indictment is insufficient on another ground—one disclosed in the case of *Com. v. Smart*, 6 Gray, 15.

In that case the indictment charged that the defendant, on the thirteenth of July, 1855, at Boston, "was intrusted by one Henry Scott with certain property, the same being the subject of larceny, to wit, two gold coins," etc.—the property being fully described of a value stated—"the property of said Scott, and to deliver the same to Scott on demand," and afterward, on the same day, at Boston, "refused to deliver the said property and moneys described as aforesaid to said Scott, so delivered to him the said Smart as aforesaid, and feloniously did embezzle and fraudulently convert to his own use; the same then and there being demanded of said Smart by said Scott; whereby," etc. The court say: "It is among the first and most familiar of the rules of criminal pleading that, in an accusation against a party charged with the commission of an offense, all the facts and circumstances of which it is constituted ought to be specifically stated and set forth. Tried by that rule, the indictment against the defendant is manifestly defective and insufficient," etc. "The indictment contains no description of the act complained of. * * * The general allegation that the defendant was intrusted with certain enumerated articles, the property of Scott, is too loose and indefinite, since such an averment is equally applicable to a common carrier, and to any other person to whom chattels were delivered, either to be carried for hire, or to be kept, or used, or appropriated to any particular object or service in the manner which may have been directed by the owners."

For all that appears in this indictment, defendant may have been intrusted with this money to be used by himself. What was he to do with it, and what did he do that was unlawful? It may be answered, he appropriated the property to his own use unlawfully. If so, the facts which constitute the unlawful appropriation should in any event be averred. The same case says:

"The general charge of embezzlement and felonious appropriation to his own use, by a party, of property intrusted to him, is insufficient to constitute a legal and effectual accusation." These authorities, no doubt, were not cited at the trial below, and the point now made evidently was not argued to the court below, but yet it is in the record, and our duty to pass upon it; but they seem conclusive on the point made by the demurrer, and in the motion in arrest of judgment the latter should have been sustained. Accordingly the ruling of the court below will be reversed, and the cause remanded, with instruction to sustain the motion in arrest of judgment.

HENDERSON and REEVES, JJ., concur.

[No. 338. January 12, 1889.]

HENRY D. BATES AND GEORGE W. COOKE,
PLAINTIFFS IN ERROR, v. WILLIAM B. CHIL-
DERS AND THOMAS F. CONWAY, DEFENDANTS
IN ERROR.

VENDOR'S LIEN—EQUITY—REMEDY AT LAW—JURISDICTION.—In a proceeding, by bill in equity, for the enforcement of a vendor's lien, against an assignee of the property, purchasing with knowledge of the lien, an objection that the plaintiff has an adequate remedy at law on the contract with the original vendee, is not well founded, where it appears the latter is insolvent. A court of equity will remit a party to his remedy at law only when an equally efficient remedy exists there. A judgment which can not be collected at law can not be said to be equally as efficient a remedy as a decree establishing a lien upon property sufficient to satisfy the amount of the judgment.

ID.—EXPRESS RESERVATION, NOT NECESSARY TO CREATE LIEN—PRESUMPTION.—In such a proceeding, it is not necessary to show an express reservation by the seller to create the vendor's lien; it will be presumed, by a court of equity, as an incident to the transaction, in the absence of any facts showing an intention to exclude it. Jones on Liens, sec. 1064.

Id.—CONTRACT OF SALE—CONSTRUCTION OF CONTRACT.—Where it is stipulated in a contract for the sale of an undivided interest in a mine, that the unpaid balance of purchase money shall be paid when the mine is sold, out of the proceeds of sale, the vendee to reimburse himself for any money necessarily expended by him for assessment purposes, out of the first money realized from the sale, the residue to go to the vendor until he shall receive the amount due him, the balance to be paid is a sum certain, for which a vendor's lien will exist.

Id.—ENFORCEMENT OF LIEN BY ASSIGNEE—PERSONAL JUDGMENT.—The lien of a vendor for purchase money may be enforced, in equity; by his assignee for value, either as against the original vendee, or against one who purchases from him with notice that the purchase money has not been paid. But it is error in such case to render a personal judgment against the assignee, where there is nothing in the bill or evidence to support such a judgment.

ERROR, from a judgment in favor of plaintiffs, to the Second Judicial District Court, Socorro County. Judgment affirmed with the modification that so much of the judgment be stricken out as provided for execution against defendant Bates.

The facts are stated in the opinion of the court.

WARREN & FERGUSON for plaintiffs in error.

The court erred in overruling the demurrer to the bill. No lien existed in favor of Smith, as vendor of the mine, upon the facts shown. It distinctly appears from the agreement of Cooke, accepted by Smith, that the latter accepted it as a substitute for and in novation of the balance of the unpaid purchase money, and not as security therefor. If Smith had brought suit against Cooke for the balance, the special agreement would have been a sufficient defense; and this is held to be the sure criterion as to the question of existence of a vendor's lien. 1 Eq. Lead Cas. [4 Am. Ed.] 466, 470; 3 Pom. Eq. Jur., sec. 1252, and cases cited; Dixon v. Cafere, 20 Beav. 118; Keith v. Wolf, 5 Bush. 646; Thames v. Caldwell, 60 Ala. 644; 3 Hilliard on Mort. 696.

The balance was not a sum certain, but such amount as might remain of the proceeds of a future sale by Cooke, after deducting his expenses for assessments, not exceeding \$750. If the proceeds of sale were not sufficient to pay the \$750, Smith would only be entitled to the amount received from Cooke. A vendor's lien does not exist in favor of an uncertain or contingent demand. *Harris v. Hanie*, 37 Ark. 348; *De Forest v. Holum*, 38 Wis. 516; *Patterson v. Edwards*, 29 Miss. 67; 3 Pom. Eq. Jur., sec. 1251; 3 Wash. Real Prop. p. 90, et seq.; *Selby v. Stanley*, 4 Minn. 65; *Daughaday v. Paine*, 6 id. 450; *Walker's Am. Law*, 315.

The common law "as recognized in the United States" is adopted in this territory. The vendor's lien is not recognized as existing in a majority of the states, and may be regarded as not adopted here. 3 Pom. Eq. Jur., sec. 1349, and notes; 3 Wash. Real Prop., p. 93, and note.

The lien of a vendor is personal to himself, and can not be assigned. While under our law the complainants could sue as assignees of the contract, they are not entitled to the lien. *Cordova v. Hood*, 17 Wall. 8; 3 Pom. Eq. Jur., sec. 1254, and cases cited; 2 Wash. Real Prop., p. 92, sec. 3, chap. 16; *Wing v. Goodman*, 75 Ill. 159; *Richards v. Leaming*, 27 Ill. 431.

Complainants have an adequate remedy at law. *Hayward v. Andrews*, 106 U. S. 672; *Litchfield v. Ballou*, 114 id. 190.

The decree is fatally erroneous in rendering a personal and general judgment against defendant Bates.

The relief given by a court of equity in case of a vendor's lien is similar in all respects to that for foreclosure of a mortgage. *Markoe v. Andras*, 67 Ill. 34; *Gaston v. White*, 46 Mo. 486; *King v. Y. M. Ass'n*, 1 Woods, 386.

Judgment could only be entered for a deficiency of proceeds of sale. Eq. Rules, New Mexico, rule 16.

C. L. JACKSON and W. B. CHILDERS for defendants in error.

The answer waived the demurrer, and it ceased to be a part of the record. *Young v. Martin*, 8 Wall. 354; *Adams v. Howard*, 9 Fed. Rep. 347; *Basey v. Gallagher*, 20 Wall. 670; *Marshall v. Vicksburg*, 15 Wall. 146.

The defendant can not avail himself of the plea, unless he stood on its sufficiency. The answer was general and overruled the plea. *Taylor v. Luther*, 2 Sumner, 228; *Stearns v. Page*, 1 Story, 204.

An agreement by which the maker incurs an obligation, and pledges the produce of land, or the land itself as security, gives a lien. 3 Pom. Eq. Jur., secs. 1233-1237, and notes; *Chase v. Pick*, 21 N. Y. 581; *Spofford v. Kirk*, 97 U. S. 487.

"Every executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified a security for a debt * * * creates an equitable lien upon the property so indicated, which is enforceable against the property, in the hands, not only of the original contractor, but of * * * his purchasers or incumbrancers with notice." 3 Pom. Eq. Jur., sec. 1235; *Daggett v. Rankin*, 31 Cal. 321; *Wright v. Ellison*, 1 Wall. 16; *Exchange Bank v. McClown*, 73 Me. 498 (40 Am. Rep. 388); *Wright v. Bircher*, 72 Mo. 179.

The assignment of a fund to come into existence in future is an equitable assignment. *U. S. v. Carlisle*, 4 Am. L., U. S. Cts. 231 (6 circuit, Mich.); *Knapp v. Alvord*, 10 Paige, 205; *Field v. Mayor* (N. Y.), 57 Am. Dec. 435, and notes; *Trull v. Eastman*, 37 Am. Dec. 128, and notes; *East Lewisburg Co. v. Marsh*, 91 Pa. St. 99.

An assignment of part of the purchase money to come into existence when a sale was made, of which

the purchaser was notified, and to which he assented, is good in the hands of the assignee. 31 Cal. 321; *Barnard v. Norwich R'y Co.*, 4 Clifford, 351; *Peugh v. Porter*, 112 U. S. 737.

Where there is no controlling, settled local rule of property, the federal courts will apply the rule that a lien for purchase money passes by assignment of the debt. *Ober v. Gallagher*, 93 U. S. 199.

The enforcement of an equitable lien is an appropriate head of equity jurisdiction. *Vallette v. White-water Valley Canal Co.*, 4 McLean, 192.

As to such liens, see: 3 Pom. Eq. Jur., secs. 1255, 1258, and notes; *Markal v. Andrews*, 67 Ill. 34; *Ober v. Gallagher*, 93 U. S. 208.

The court had jurisdiction of the parties and the subject-matter. Bates did not answer. Cooke filed no exceptions to the master's report. Neither can be heard now. Equity Rules, 16, 17, p. 31; *id.* 85-87, p. 31; 2 Danl. Ch. Pr. 1303, et seq.

To prevent a resort to equity the remedy at law must be equally as efficient. *Wylie v. Cox*, 15 How. 415; *Watson v. Sutherland*, 5 Wall. 75.

Equity once acquiring jurisdiction retains it to give entire relief within the equities to be enforced. *Ober v. Gallagher*, 93 U. S. 199; *Kennedy v. Creswell*, 101 *id.* 641; *Tayloe v. Ins. Co.*, 9 How. 370.

No exceptions were filed before the master, and no exceptions to his report filed in the district court. The decree was in accordance with the report, and can not be reviewed here. Danl. Ch. Pr. and Pl., 1303-1319; *Copeland v. Cram*, 9 Pick. 73; *Byington v. Wood*, 1 Paige, 45; *Story v. Livingston*, 13 Pet. 359; *Hudgins v. Kemp*, 20 How. 45; *New Orleans v. Gaines*, 15 Wall. 625.

If the decree is erroneous in awarding a general execution as to Bates, the court will amend it here.

LONG, C. J.—This cause is here on writ of error sued out by Henry D. Bates and George W. Cooke, who are plaintiffs in error. The action was commenced in the court below by William B. Childers and Thomas F. Conway as complainants, making the plaintiffs in error in this court defendants to the bill of complaint in the court below. The bill of complaint is as follows:

“TERRITORY OF NEW MEXICO, SECOND JUDICIAL DISTRICT. COUNTY OF SOCORRO—SS.

“In the district court of Socorro county, New Mexico, in the Second judicial district.

“To the Honorable WILLIAM H. BRINKER, associate justice of the supreme court of New Mexico and judge of the Second judicial district of said territory of New Mexico: William B. Childers, of Bernalillo county, and Thomas F. Conway, of Grant county, in the territory of New Mexico, bring this bill against Henry D. Bates and George W. Cooke, both of Socorro county, New Mexico, and thereupon humbly complaining, your orators, William B. Childers, of Bernalillo county, and Thomas F. Conway, of Grant county, territory of New Mexico, respectfully represent unto your honor that on or about the twentieth day of April, 1883, one John D. Smyth was the owner and possessed of a certain mine known as the Imperial mine, located and situated in the Magdalena mountains in Socorro county, New Mexico; that afterwards, on the——day of——, 1883, said John D. Smyth sold and conveyed an undivided one fourth interest in said Imperial mine to defendant George W. Cooke, of Socorro county, New Mexico; that by the term of said sale from said Smyth to said Cooke that said Cooke was to pay said Smyth the sum of \$500 cash in hand; and the further sum of \$750 was to be paid said Smyth when the said Imperial mine should be

sold out of the proceeds of such sale, provided that said Cooke was to be compensated for all money necessarily laid out by him for assessment purposes, and then all of the balance of the money received for the above-mentioned one fourth interest to go to said Smyth, until he should receive the said sum of \$750; that said Smyth was entitled to and at said time of said sale reserved a vendor's lien upon said mine to secure the payment of said sum of \$750 unpaid purchase money; that a memorandum of said contract of sale was reduced to writing, and signed by said Cooke, and by him delivered to said Smyth, and the same was duly filed for record in the office of the probate clerk and ex-officio recorder in and for said Socorro county, New Mexico, on the second day of May, 1883, and was duly recorded in Book 8, page 218, in the records of said office, and the original of which said memorandum is herewith filed, and made a part of this bill and marked 'Exhibit A;' that the said John D. Smyth, being at that time and afterwards indebted to complainants, in payment of said indebtedness, on the twenty-fifth day of March, 1884, in writing on the back of said memorandum, assigned to complainants the right, title and interest of him, the said Smyth, in and to said contract, and also assigned the complainants the balance of the purchase money due on account of said fourth interest in said Imperial mine, and the said vendor's lien upon said mine, and authorized the payment of said balance to said complainants; and that on said twenty-fifth day of March, 1884, said memorandum of said contract of said sale, with the said indorsement on the back thereof, was again filed for record in the office of the probate clerk and ex-officio recorder in and for said Socorro county, and was duly recorded in Book 10, page 623, of the records of said office, all of which will appear from said 'Exhibit A;' that one John M. Shaw, now deceased, at one time was possessed of and the owner

of the other undivided three fourths interest in said Imperial mine, but before his decease sold and conveyed the said undivided three fourths interest in said Imperial mine to defendant Henry D. Bates.

“The defendant Cook on the — day of August, 1886, sold and conveyed the above mentioned undivided one fourth interest in said Imperial mine, which he had bought as aforesaid from said John D. Smyth, to defendant Henry D. Bates for a large sum of money, more than sufficient to compensate defendant Cooke for all money necessarily laid out by him for assessment purposes, and to satisfy the aforesaid claim of seven hundred and fifty dollars unpaid purchase money, now due complainants, and interest thereon; that said defendant Henry D. Bates is now the legal owner and in possession of said Imperial mine; that prior to the said purchase of said Imperial mine by said defendant Henry D. Bates from defendant George W. Cooke and from said John M. Shaw, deceased, and prior to said defendant Henry D. Bates acquiring any right or title in said Imperial mine, said defendant Henry D. Bates had full knowledge of the fact of the above mentioned seven hundred and fifty dollars being unpaid purchase money on said Imperial mine, and that it was to be paid to complainants; that since said conveyance of said one fourth interest in said Imperial mine from defendant Cooke to defendant Bates, both said defendants Cooke and Bates have promised to carry out said contract of sale as witnessed by the said Exhibit A, and have agreed that said defendant Bates should pay to complainants the said sum of seven hundred and fifty dollars unpaid purchase money, as aforesaid, and satisfy claimants’ just demand and lien therefor, but said defendant Bates has failed, and still fails, to pay the same, though it has long since been due and payable; that defendant Henry D. Bates has paid part of the money he agreed to pay for said one fourth interest

in said Imperial mine to defendant George W. Cooke, instead of paying the same to your complainants, after recompensing said defendant Cooke for the money said Cooke necessarily laid out for assessment purposes; that the amount of the money so paid to said defendant Cooke by said defendant Bates was more than enough to recompense said defendant Cooke for money necessarily laid out by him for assessment purposes, and to satisfy the said claim for unpaid purchase money now due complainants, and that there is still due from said Bates on account of the aforesaid purchase of said one fourth undivided interest in said mine from said Cooke by said Bates a sum of money more than sufficient to pay and satisfy said sum of seven hundred and fifty dollars and interest thereon, being unpaid purchase money on said one fourth interest in said mine as aforesaid; and that said defendant Cook is insolvent.

“Forasmuch, therefore, as your complainants are without remedy in the premises, except in a court of equity, and to the end that the said Henry D. Bates and George W. Cooke, who are made parties defendants to this bill, be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and more specially they may answer and set forth—First, the consideration for the said sale of the aforesaid one fourth interest in said Imperial mine from defendant Cooke to defendant Bates; second, the amount of money necessarily laid out by defendant Cooke for assessment purposes on the aforesaid one fourth interest in said Imperial mine; third, the amount of money paid by said defendant Bates to or on account of said defendant Cooke, as a part of the consideration from defendant Bates to defendant Cook, for said one fourth interest in said Imperial mine; fourth, the amount of money now due from said Bates on account of the purchase by him as aforesaid

from said Cooke of the undivided one fourth interest in said mine. And to the further end that an account may be taken in this behalf under the directions of the court, that your complainants may be decreed to be entitled to a lien upon the said premises for the amount due your complainants as unpaid purchase money as aforesaid, and interest thereon; and that the said defendant Henry D. Bates may be decreed to pay your complainants the amount so found to be due, by a short day to be fixed by the court, and that in default of such payment the said premises may be sold as the court shall direct to satisfy said amount and costs; and that your complainants may have such other and further relief in the premises as equity may require and to your honor shall seem meet.

"May it please your honor to grant the writ of subpoena in chancery directed to the sheriff of said county of Socorro, commanding him that he summon the defendants Henry D. Bates and George W. Cooke to appear before the said court on the first day of the next November term thereof, to be held at the couthouse in Socorro, in the county of Socorro aforesaid, and then and there to answer this bill. C. L. JACKSON,

"Solicitor for Complainants."

The defendant Henry D. Bates was duly served with process, but, failing to file answer, the bill was taken as against him as confessed for want of such answer. George W. Cooke, however, appearing in said court, filed a demurrer to the bill of complaint. The court overruled the demurrer, and that action is assigned for error here.

It is contended by plaintiff in error, in argument, that there is no equity in the bill, because the plaintiffs have a clear and adequate remedy at law on the contract executed by Cooke to Smyth at the time of the purchase of the mine, and because complainants are assignees of the contract, and not the vendors of the

mine, and for the further reason that no vendor's lien was reserved by the seller at the time he sold the mine. It is averred in the bill that Cooke is insolvent, so as a personal judgment against him would be fruitless, and equity would not remit a complainant to a fruitless suit at law to procure a judgment, where it is admitted that such a proceeding would be barren of results. It is only when the party has an equally efficient remedy at law that equity will require him to go there for his relief in the first instance. It can not be said that a judgment which can not be collected would be equally as efficient a remedy as a decree establishing a lien upon a piece of property amply sufficient to make the amount of the judgment.

The contention, that no "vendor's lien was reserved by Smyth upon the mine at the time of the sale," raises the question whether any such a reservation is necessary. If so, then the vendor's lien is not one which arises out of the transaction, but only becomes such when reserved. 2 Story, Equity Jurisdiction, section 1218, defines the true character of the vendor's lien: "This lien of the vendor of real estate for the purchase money is wholly independent of any possession on his part; and it attaches to the estate as a trust, equally whether it be actually conveyed or only be contracted to be conveyed. It has often been contended that the creation of such a trust by courts of equity is in contravention of the policy of the statute of frauds, but, whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts. Courts of equity have proceeded upon the ground that the trust being raised by implications, is not within the purview of that statute; but is excepted out of it. * * * The principle upon which courts of equity have proceeded in establishing this lien in the nature of a trust is that a person who has gotten the estate of another ought not in con-

science, to be allowed to keep it, and not to pay the full consideration money." Jones, Liens, section 1064, states the rule thus: "The lien is presumed to exist in all cases, unless an intention be clearly manifest that it shall not exist. * * * Being an incident of the transaction, it is excluded only by facts which show an intention to exclude it. Want of knowledge on the part of the vendor that the law gives a lien, or a secret intention on his part not to claim it, does not affect the right." The true character of this lien is thus shown by authority not to be one created by express contract, requiring for its creation words of reservation, but one raised up as a matter of conscience, as an implication out of the transaction. The lien grows out of the sale, and the duty of the buyer to pay the purchase money. "Where a vendor delivers possession of an estate to a purchaser without receiving the purchase money, equity, whether the estate be or be not conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien on the land for the money." 2 Sugd. Vend. 324. These authorities make it clear there was no need of reservation by the seller to create the vendor's lien.

Plaintiffs in error urge the further objection: "The balance due was not a sum certain, but such amount as might remain of the proceeds of a future sale by Cooke after deducting Cooke's expenses for assessment work, not exceeding seven hundred and fifty dollars." This contention is not well sustained when the terms of the written promise to pay are considered. The instrument of sale contained the promise to pay as follows:

"This is to certify that, whereas, John D. Smyth, of Socorro county, New Mexico, has this day sold and conveyed to me one fourth interest in the Imperial mine, located in the Magdalena mountains, in the county of Socorro, for the sum and price of twelve

hundred and fifty dollars, five hundred dollars of which I have paid cash in hand, the remaining seven hundred and fifty dollars to be paid when the mine is sold, out of the proceeds of the sale; that is to say, I am to do the necessary work on said one fourth interest to keep up the assessment until patent is obtained, or the mine sold, and out of the first money realized from sale I am to repay myself the money necessarily laid out for assessment purposes, and then all the balance of the money received for this one fourth interest to go to said John D. Smyth until he shall receive the seven hundred and fifty dollars then due him.

“GEORGE W. COOKE.”

In this contract \$1,250 is the price named for which the one fourth interest was sold. That represents the purchase money, and is a sum certain. Of that amount \$500 was paid in cash, leaving a balance of \$750 yet to be paid, which sum, it is recited in the closing part of the contract, is to be paid to Smyth. The sum to be paid is certain, but the time of payment may be indefinite. The sum to be paid is \$750, the unpaid balance of the \$1,250 purchase price; the time of payment is after a sale of the mine, and a reimbursement to Cooke of his expenditures for made assessments.

The remaining question is whether the written promise to pay is assignable, so as to vest in the assignee the right to sue in a court of equity to enforce the vendor's lien existing originally in favor of the seller. A reference to the bill shows that the complainants therein averred that in payment of an indebtedness due from Smyth to Childers and Conway, Smyth, by writing indorsed on the back of the contract, assigned to them, not only all his right, title, and interest in the contract, or promise to pay, but also the vendor's lien on the mine, and authorized Cooke to pay the assignees the amount due to Smyth. In 2 Story, Equity Jurisdic-

tion, section 1039, the doctrine of assignments at law is discussed. In the next section it is said: "But courts of equity have long since totally disregarded this nicety. They accordingly give effect to assignments of trusts and contingent interests, and expectancies, whether they are in real or in personal estate, as well as to assignments of choses in action. Every such assignment is considered, in equity, as in its nature a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property to possession. * * * Courts of equity will support assignments, not only of choses in action and of contingent interests, but also of things which have no present actual or potential existence, but rest in mere possibility. * * * [Id., sec. 1044]; for instance, if A., having a debt due to him from B., should order it paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. * * * In such case a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." Section 1047: "To constitute an assignment of a debt or other chose in action in equity, no particular form is necessary. Indorsing a bond or delivering to an assignee, amounts to an assignment. Indeed, any order, writing, or act which amounts to an appropriation of the fund amounts to an equitable assignment of the fund. The assignee is generally entitled to all the remedies of the assignor. In case of assignments of a debt, where the assignor has collateral security therefor, the assignee will be entitled to the full benefit of such security, unless it is otherwise agreed between the parties."

There can be no doubt that the averments of the bill disclose at least such an assignment of the written contract, or promise to pay, as would carry to the

complainants an equity therein sufficient to give them standing in a court of equity; especially if upon further examination it be determined that in addition to the equitable right to the debt due from Cooke to Smyth the transaction also carried to them the right which vested in Smyth to his vendor's lien. That is a question upon which the courts are divided, and which has not been decided in this territory. In a note to section 1092, Jones on Liens, the result of the English authorities is thus stated: "By the English authorities, the lien seems to be assignable, though the cases are not decisive." The author, in the same section, states: "Whether the vendor's lien is assignable with the debt which it secures is a question upon which the authorities are not agreed." In a note to the same section the author gives a list of cases which, he states, hold the vendor's lien to be assignable by indorsement of the note given for purchase money. The cases cited are not at hand, and therefore we are unable to verify the author's conclusions as to their effect, but nevertheless state the cases so cited. Alabama: Wells v. Morrow, 8 Ala. 125; White v. Stover, 10 Ala. 441; Roper v. McCook, 7 Ala. 318; Lang v. Wilkinson, 57 Ala. 259; Buford v. McCormick, Id. 428; Wilkinson v. May, 69 Ala. 33. Indiana: Nichols v. Glover, 41 Ind. 24; Kern v. Hazlerigg, 11 Ind. 443; Wiseman v. Hutchinson, 20 Ind. 40; Fisher v. Johnson, 5 Ind. 492. Kentucky: Honore v. Bakewell, 6 B. Mon. 67; Ripperdon v. Cozine, 8 B. Mon. 465; Eubank v. Poston, 5 Mon. 285, 286; Johnston v. Gwathmey, 4 Lit. 317; Broadwell v. King, 3 B. Mon. 449. Mississippi: Code, 1880, section 1124; Louisiana National Bank v. Knapp, 61 Miss. 485. Missouri: Sloan v. Campbell, 71 Mo. 387. South Carolina: 36 A. M. R. 493. Texas: Cannon v. McDaniel, 46 Tex. 303; White v. Downs, 40 Tex. 225; Watt v. White, 33 Tex. 421; Moore v. Raymond, 15 Tex. 554; Brooks v. Young, 60 Tex. 32.

The greater number of states have held to the contrary of this doctrine, but it is for this court to determine as an original question in this territory which view is founded in the better reason, and is most calculated to secure the ends of justice. A consideration of the nature of the lien conduces with great force to the conclusion that its assignability should be upheld. "There is a natural equity, it is said, that the land shall stand charged with so much of the purchase money as is not paid at the time of the conveyance." Jones, Liens, section 1061. "It has become one of the best-established principles of natural equity that estates are to be regarded as unconscientiously obtained, when the consideration is not paid." *Id.*, note.

It seems to us a hardship on the purchaser that he shall hold an equitable security on land sold for the payment of a purchase money note, but be deprived of the means of realizing the value of such security by negotiating the note. In his hands, the note may be worth its face, by reason of the equitable lien, but worth nothing aside from the lien, by reason of the inability of the maker to pay, and we can see no good reason why the holder of such a security should not be given its full value by holding power to assign the same to a purchaser as an incident to the debt. The negotiable character of a promissory note is one of the qualities which adds to its value, and often in the vicissitudes of business it becomes important for the holder of the note to realize upon it before maturity, by its use as a collateral security, or by sale and assignment. To hold that such holder could not carry by assignment the equitable lien, constituting in many cases the chief value of a purchase money note, would be to deprive him of the benefit of his lien in many instances. If it is a natural equity that the vendor have such lien, a like equity would require that he have the full benefit of it as against the purchaser and as against

a purchaser with notice of the equity from the first vendee. One who buys with full knowledge that there is unpaid purchase money owing by his vendor, has in his own hands full power of protection, and to require, when such act in no way harms him, that he pay the unpaid purchase money in his hands owing to his vendee to the discharge of the original vendor's lien, is but working out to a practical and just end the natural equitable lien attached as a matter of conscience to the estate in his hands. We hold, therefore, in this territory, the lien of the vendor for unpaid purchase money should be upheld, both in the hands of the vendor and the hands of his assignee for value against the original vendee, and also against a purchaser from him, who buys with full notice or knowledge that the purchase money has not been paid. It thus appears that the bill of complaint is not subject to demurrer, and no error was committed by the court in its action thereon. The answer raises the same questions, only in a different form, as the demurrer to the bill, so it is not necessary to consider in detail the action of the court in sustaining a demurrer to the answer.

Most of the questions raised in the record are disposed of by what has thus been determined. The evidence in the case fully proves the allegations of the bill, and supports the findings of the master. It is clearly proven that the mine was sold and conveyed by Cooke to Bates, and he was placed in possession thereof. Bates testified that he bought of Cooke the one fourth interest in the mine sold by Smyth to the latter, and agreed with Cooke to pay him therefor \$5,000, and had already actually paid him \$3,000. It appears that this last sum more than reimbursed Cooke for all money paid out for the assessment work. Bates also swears that he actually owed Cooke at the time of the examination over \$1,000 on the purchase

price agreed to be paid for the mine by Bates to Cooke; that at the time of the purchase, and before the conveyance to him, he knew that Cooke was owing as purchase money the debt sought to be recovered. He thus stands with the purchase money due to Cooke from him on the sale of the latter to Bates in his hands, ready to pay the same wherever it should be equitably applied, and also with knowledge, when he bought, of the purchase money indebtedness. Bates can in no way be harmed. All parties are before the court, and if Bates is decreed to pay to Childers and Conway as the assignees of Smyth, instead of being permitted to pay to Cooke, such payment by Bates will operate to the extent of the amount paid to discharge his debt to Cooke. In its practical effect the contention is between Cooke and the assignees of Smyth, and they stand, or did so at the time of the trial, in the attitude stated.

It does not appear that any of the objections urged here are well taken, unless it be one stated in the fourth assignment of error. The objection there taken is to the form of the judgment. The court below rendered, not a general decree fixing the lien on the mine for the unpaid purchase money, but also a personal judgment against Bates, upon which execution might issue, to collect the judgment as a personal debt. There is nothing either in the bill or evidence to support a personal judgment against Bates. As the parties and the whole record are here, this court has power to modify the judgment, and it will be accordingly ordered in this court that the judgment of the court below be so far modified as to strike out the provision therein for execution as against Bates, and that said judgment shall stand modified, so far as it fixes a personal liability against Bates, and so as to stand only as a decree for the payment of the purchase money and order to sell the one fourth interest in the mine on

default of such judgment. With this modification in the form of the judgment the action of the court below is affirmed.

HENDERSON and REEVES, JJ., concur.

[No. 301. Remanded from January Term, 1886. Filed January Term, 1889].

UNITED STATES OF AMERICA, APPELLEES, V.
JUNE L. FULLER, APPELLANT.

CRIMINAL LAW—EMBEZZLEMENT OF REGISTERED PACKET FROM U. S. MAIL—INDICTMENT, SUFFICIENCY OF—SEC. 5467, REV. STAT. U. S.—CONSTRUCTION OF STATUTES. On a prosecution, on indictment, for the embezzlement of a registered packet by the defendant while in the employ of the postoffice department of the United States, as postmaster, under section 5467, Revised Statutes, United States, prescribing the punishment for any person employed in any department of the postal service embezzling any packet intended to be conveyed by mail, containing certain enumerated articles "or any other article of value," an averment of the indictment that a certain registered packet, containing "eight hundred dollars," intended to be conveyed by mail, came into the possession of the defendant as such postmaster, and was by him, by "force and arms," "feloniously embezzled," etc., was sufficient to sustain the indictment, without setting out the kind of dollars, or their value.

ID.—STATUTE PROVISIO—INDICTMENT—PLEADING. In such case, it is not necessary in the indictment to negative a proviso of the statute, as that "provided the same shall not have been delivered to the party to whom it is directed," where the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without reference to the exception.

ID.—INDICTMENT—EVIDENCE—VARIANCE. Where the allegation of the indictment was that "a certain registered packet then lately before sent by one M. W. Flourney, of Albuquerque, N. M., and intended to be conveyed by post to one V. Wallace, at Kingston, N. M.," etc., and the evidence was substantially, that one M. W. Flourney, as teller of the Central Bank of Albuquerque, put \$800 in an envelope, and addressed it to one Vincent Wallace, cashier of a bank at Kingston, and mailed it, there was no variance between the allegation and the proof. No attempt was made to describe the packet in the indictment; it simply states the attendant facts, as an inducement to the material facts, that the packet with its contents was in the mail, and afterward abstracted therefrom and embezzled by the defendant. It was immaterial to whom it was addressed, or who mailed it.

ID.—EMBEZZLEMENT BY EMPLOYEE OF POSTOFFICE DEPARTMENT—EVIDENCE, SUFFICIENCY OF TO PROVE FACT OF EMPLOYMENT. Where, in such case, it appeared from the evidence an indorsement was made by defendant, and signed by him as postmaster, at "Hillsboro," upon a "tracer" sent out in search of the missing packet, that the packet had been received at his office, and forwarded through the mail to the postmaster at "Kingston," and that he had never received from the postmaster a receipt for it; these facts were sufficient to prove that the defendant was employed by the postoffice department, and the jury could not properly have done otherwise than so find.

ID.—WITNESS, IMPEACHMENT OF BY TESTIMONY GIVEN AT FORMER TRIAL. An objection, to an attempted impeachment of witnesses, by reading to them their testimony in writing, given at a former trial, that the testimony should have been read to the witnesses at the time of their interrogation, as a foundation for their impeachment, and not afterward, was properly sustained.

APPEAL from a judgment of the Third Judicial District Court, convicting defendant of embezzlement. Judgment affirmed.

The facts are stated in the opinion of the court.

CATRON, THORNTON & CLANCY, and J. MORRIS YOUNG for appellant.

This indictment was bad, because it did not follow the words of the statute, in this, that the statute provided "that anyone who should steal and embezzle any letter, package," etc., containing certain enumerated articles set out in the statute; the taking of any article not mentioned in the statute would not constitute a crime under it. The indictment charges the defendant with taking "eight hundred dollars," nothing more or less; it does not state that it was \$800 in lawful money of the United States, or what kind of dollars, or their value. U. S. v. Commonwealth, 92 U. S. 558; U. S. v. Ormand, 1 Dev. and Bat. 119; Maskill v. State, 8 Blackf. 299; Martin v. State, 9 Mo. 283; U. S. v. Crookshank, 92 U. S. 558; U. S. v. Simmons, 96 U. S. 362.

Where the statute defining an offense contains a proviso, which is so incorporated with the language defining the offense that the ingredients of the offense can not be accurately and clearly described, if the proviso or exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. Bish. Crim. Law, secs. 256, 361; U. S. v. Cook, 17 Wall. 168; 2 Lead. Crim. Cases [2 Ed.], 12; Vavasour v. Oromorod, 9 Dowling & Rylan, 599; Spears v. Parker, 1 Term Rep. 141; Comm. v. Bean, 14 Grav. 53; 1 Stark. Cr. Pl. 246; Rex v. Mason, 2 Term Rep. 581; Arch. Crim. Pl. [15 Ed.] 54; Comm. v. Tucker, 20 Pick. 361; State v. Barker, 18 Ver. 195; Commonwealth v. Keys, 2 Gratt. 629.

Neither of the three counts of the indictment contain any allegation of value. This was material and its omission is fatal. U. S. v. Nott, 1 McLean, 504.

There was a total variance in the description of the letter charged to be embezzled and the proof. This variance is fatal. U. S. v. Kean, 1 McLean; see, also, U. S. v. Lancaster, 2 McLean, 431; U. S. v. Brown, 3 McLean, 233.

To convict a person of stealing a letter, etc., who is employed in the postoffice department, such employment must be distinctly alleged and proven. U. S. v. Nott, 1 McLean, 499.

THOMAS SMITH, United States district attorney, for appellee.

When the charge is for embezzlement of a letter, it is not necessary to aver the value or ownership of the contents thereof. U. S. v. Baugh, 1 Fed. Rep. 784; U. S. v. Falkenhamer, 21 Fed. Rep. 624; U. S. v. Patterson, 6 McLean, 466; U. S. v. Brown, 3 id. 233; 12 Meyer's Fed. Dec. secs. 2443, 2470, 2473, 2504.

In indictments for stealing mail, or stealing a let-

ter, no value need be alleged. U. S. v. Burroughs, 3 McLean, 405; U. S. v. Fisher, 5 McLean, 23; 12 Meyer's Fed. Dec., secs. 2490, 2492.

It is objected that initials only are used in describing the sender and the person to whom the letter was addressed. This is immaterial in cases of this kind. U. S. v. Burroughs, 3 McLean, 405; 12 Meyer's Fed. Dec., secs. 2065, 2070, 2127; U. S. v. Jenther, 13 Blatchf. 335.

When the charge is for embezzling a letter it is not necessary to allege in the indictment that the letter has not been delivered to the person to whom it was addressed. U. S. v. Jenther, 13 Blatchf. 335; 12 Meyer's Fed. Dec., sec. 2498.

Where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso." U. S. v. Cook, 17 Wall. 177.

It is objected that the evidence shows that the letter was addressed to Vincent Wallace, cashier, etc., instead of V. Wallace. These variances are not material. U. S. v. Howard, 3 Sumner, 12; U. S. v. Burroughs, 3 McLean, 405; U. S. v. Jenther, 13 Blatchf. 335; 12 Meyer's Fed. Dec., secs. 2065, 2070, 2127.

BRINKER, J.—The defendant was charged in the court below with embezzlement. The indictment was based upon section 5467, Revised Statutes of United States, and contained six counts. The first three charged him with embezzling a packet from the mails, and the last three charged him with stealing the contents of such packet. The essential part of the first count is in these words: "The grand jurors," etc., "do present that June L. Fuller, late," etc., "on the ninth day of October, 1884,

at," etc., "was a person employed in one of the departments of the postoffice establishment of the said United States, to wit, a postmaster at Hillsboro, in the district aforesaid; and that on the ninth day of October. 1884, in the postoffice at Hillsboro aforesaid, a certain registered packet, then lately before sent by one M. W. Flourney, of Albuquerque, New Mexico, and intended to be conveyed by post to one V. Wallace, at Kingston, New Mexico, and which said registered packet contained the sum of eight hundred dollars, and came into the possession of him, the said June L. Fuller, so then and there being employed as a postmaster at Hillsboro, in the district aforesaid, and the said packet then and there containing the sum of eight hundred dollars, having so as aforesaid come into the possession of him, the said June L. Fuller, he, the said June L. Fuller, did then and there, with force and arms, on the ninth day of October, 1884, in the district aforesaid, feloniously secrete the said packet so then and there containing the said sum of eight hundred dollars, contrary," etc.

There was a motion to quash the indictment filed, assigning various reasons therefor; the principal one being that the indictment did not charge any offense against the laws of the United States. This motion was overruled, and the defendant excepted. A trial was had, and the defendant convicted. Afterward motions for a new trial and in arrest of judgment were filed and denied, and the cause brought here upon appeal. To reverse the judgment the defendant insists that the court erred in denying his motion to quash the indictment, and in denying his motions for a new trial and in arrest of judgment, and for refusing to allow certain testimony offered by him to go to the jury. These will be considered in their order.

The statute upon which this indictment is framed is in these words: "Any person employed in any department of the postal service who shall secrete, em-

bezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any postoffice or branch postoffice established by authority of the postmaster general, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock, or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank note, bank post bill, bill of exchange, or note of assignment of stock in the funds, any letter of attorney for receiving annuities or dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter, or thing; any receipt, release, acquittance, or discharge of or from any debt, covenant, or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery, or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same—any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters, which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year, nor more than five years.”

There was no evidence offered under the fourth, fifth, and sixth counts of the indictment, which charged the defendant with the larceny of the contents of the packet, and they need not be further noticed. The second and third counts were substantially like the first set out above. This statute does not make it an offense to secrete or embezzle from the mails a packet simply, but a packet containing one or more of the things enumerated, or some other article of value. There is no pretense that any of the articles specifically mentioned were contained in the packet, but that it did contain some other articles of value, viz., \$800. Defendant contends that this is not a sufficient description of such articles, but that the indictment should have set out the kind of dollars, whether coin or currency, and whether they were of the coinage or issue of the United States or some other country, and their value. The statutes of the United States make the dollar the unit of value. Sections 3511, 3585, R. S., and 20 St. at Large, 25. These statutes are public acts. The rule is elementary that the court will take judicial notice of all public statutes, and that it is not necessary to plead or to prove them. 2 Phil. Ev. 106; Peake, Ev. 30; 1 Bl. Comm. 85.

Now, if the dollar is the legal unit of value, then the indictment alleged that the packet contained eight hundred units of value. These units are called in the statute "dollars," and are so designated in the indictment. It is immaterial what the extent or amount of the value is. If the packet contained an article of any value, however small, it is sufficient. The law says the dollar is the basis upon which all values are to be computed. The indictment charges that the packet contained \$800; that is, eight hundred measures of value. But it is said that the pleader should have alleged that these dollars possessed value; that he should have put it in the ordinary form laid down in the books—thus:

"Eight hundred dollars, of the value of eight hundred dollars;" or, "Lawful money of the United States, to wit, eight hundred dollars, of the value of eight hundred dollars." If the packet had contained any other article to which the law fixes no certain value, then this would undoubtedly be true; for instance, a piece of jewelry. The law places no value on such an article. Its value, if any, is regulated entirely by the usage of trade, and the law of supply and demand, and such value should be laid in the indictment, in the current money of the country, made by law the standard or unit of value. To charge that \$800, would add no force or weight to the indictment. It would not make the charge stronger, nor would it give the defendant any more information of the nature and cause of the accusation against him than is contained in this indictment. This view finds support by analogy in the principle laid down in the following cases: *Mathews v. Rucker*, 41 Tex. 636; *Short v. Abernathy*, 42 Tex. 94; *Thorington v. Smith*, 8 Wall. 1; *Stoughton v. Hill*, 3 Woods. C. C. 404; *Confederate Note Case*, 19 Wall. 548; 5 Am. & Eng. Encyclopedia of Law, 854; *U. S. v. Lancaster*, 2 McLean, 431.

As a further objection to the indictment, defendant relies upon its failure to negative this clause of the section of the statute: "And provided the same shall not have been delivered to the party to whom it is directed." In *U. S. v. Cook*, 17 Wall. 168, the court say: "Where a statute defining an offense contains an exception in the enacting clause of the statute which is so incorporated with the language defining the offense that the ingredients of the offense can not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but, if the language of the section defining the offense is so entirely separa-

ble from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense, and must be shown by the accused." If the exception is in another clause of the section separate from the clause defining the offense, it need not be noticed. 1 Bish. Crim. Proc., section 632, et seq. The statute creates two offenses. U. S. v. Pelletreau, 14 Blatchf. 127. The portion of the statute creating the second offense falls between that portion creating the offense here charged and the proviso. In defining the ingredients of the first offense, the proviso may be ignored, and still a complete crime will be charged. The ingredients of this offense are that the accused must be employed in the service of the postoffice department. The packet must have been put in the mails for transmission, or must have been delivered to the defendant for that purpose. It must contain one of the articles enumerated or some other article of value, and have been secreted or embezzled by him. This makes the offense complete, and an indictment charging these things accurately and clearly describes all of the ingredients of the offense, without negating the exceptions or proviso. If the packet had been taken out of the mail, and delivered to some one, not an employee of the department, other than the person to whom it was directed, for the purpose of delivery to such person, and should then be secreted by him, I apprehend no offense would be committed under the first part of the section, although it had not been delivered to the person to whom it was directed, because the person secreting, etc., would not sustain the relation of employee to the postoffice department. But if it had been thus taken out of the mails by an employee of the department, and its contents stolen, then, in order to consti-

tute an offense under the latter part of the section, such stealing must have been done before delivery to the person to whom the packet was directed. In such case the exception should be negatived; for, if the larceny was committed after the delivery of the package to the person to whom it was directed, no offense would be committed under the federal statute, but it would fall under the territorial statute, as in ordinary cases of larceny. So, in order to make the offense larceny under this statute, the taking the contents of the packet must have been done before the government had fully completed the duty it had undertaken, by delivering the packet to the person to whom it was directed. It is clear from this that a complete offense in all its particulars under the first clause can be set out in the indictment, without reference, in any manner, to the exception or proviso.

The next point made by the defendant is that there was a variance between the allegation in the indictment and the proof, as to the description of the packet charged to have been embezzled. The portion of the indictment on this point is: "A certain registered packet then lately before sent by one M. W. Flourney, of Albuquerque, New Mexico, and intended to be conveyed by post to one V. Wallace, at Kingston, New Mexico." The evidence was substantially that M. W. Flourney, as teller of the Central Bank of Albuquerque, put \$800 in an envelope, and addressed it to Vincent Wallace, cashier of a bank at Kingston. Mr. Flourney is positive as to this. He states in one place that he sent this packet, but in another that he does not remember whether he put in the postoffice or not, but the tenor of his testimony is that he did. He says that whatever he did was done as the representative of the Central Bank. The books of the postoffice show that the packet was sent by the Central Bank to Vincent Wallace, but there is nothing to show, beyond the testi-

mony of Mr. Flourney, who actually carried the packet to the postoffice and delivered it to the person then in charge. It is unnecessary to say that the bank could only have delivered it there by the hand of some agent. While the testimony is meager, there is enough to justify the jury in finding that Mr. Flourney posted the packet.

There appears to be no force in the objection that there was a variance between the allegation and proof upon this point. There was no attempt made to describe the packet in the indictment, but simply the statement of the attendant facts, as inducement to the material fact, that the letter was in the mail. Who put it there, or to whom was it addressed, were otherwise immaterial. The material facts in this case are that a letter or packet, with certain contents, was in the mail, and afterward abstracted and embezzled by defendant. The cases cited by defendant from the McLean reports tend rather to support than to overthrow this position.

In *U. S. v. Keen*, 1 McLean, 429, the second and fourth counts of the indictment charged the defendant with stealing a letter containing a draft, and described the draft particularly as having been drawn by "Joseph Johnson," and to support this a draft signed by "Jos. Johnson" was offered in evidence. The court with great hesitation held the draft inadmissible under those counts, upon the ground that, since the prosecutor had undertaken to particularly describe the draft in the indictment, the proof should conform to the allegation. In the third and fifth counts the allegation was, "a draft on the Bank of the United States," and the court held it admissible under those counts. The implication is strong from the reasoning in this case that if the name of the sender had been used as a statement of the fact merely, and not as descriptive of the draft, the variance would have been

immaterial. The court quotes with approval from the case of *King v. Ellins*, Russ. & R. 188, the following: "Where the letter embezzled was described as containing several notes, it is sufficient to prove that it contained any one of them; the allegation not being descriptive of the letter but of the offense."

In the case of *U. S. v. Lancaster*, 2 McLean, 431, a conviction was sustained upon an indictment which charged the defendant with embezzling a letter from the mails containing divers bank notes, without any allegation as to who sent the letter, or to whom it was directed. This supports the position we have taken, that those allegations are mere statements of collateral or attendant facts, and not descriptive averments, and therefore immaterial. If it be shown that a letter or packet was actually put in the mail, and the same letter or packet afterward secreted or embezzled by the accused, a variance in the name of the sender or the person to whom it was to be delivered would be immaterial.

The case of *U. S. v. Brown*, 3 McLean, 233, decides that where unnecessary matter of description is stated in the indictment such matter must be proved as laid.

During the trial defendant's counsel interrogated certain witnesses for the government as to their testimony upon a former trial of the cause, for the purpose of impeaching them by showing that they had made statements in contradiction of their testimony given upon the trial then in progress. Some of the witnesses denied having made such statements; others stated that they did not remember what they had said on the former trial. The defendant afterward offered to prove what those witnesses had testified to on the former trial, upon the points embraced in the questions propounded to them, by reading to the jury the record of the testimony given by these witnesses on such trial.

To this offer the government objected, upon the ground that the foundation for the admission of such testimony had not been properly laid. The court sustained the objection, and the defendant excepted. There was no error in this ruling. The offer of the defendant shows that the testimony given by these witnesses on the former trial was in writing, and in such case the foundation for its introduction as impeaching testimony could only be laid by either showing the written testimony to the witness, or reading it to him at the time he was interrogated. Section 2084, Comp. Laws, 1884, is conclusive on this point.

The next contention is that there was no evidence to show that at the time of the alleged embezzlement the defendant was employed in the postoffice department. This position is not sustained by the record. Vincent Wallace testified that, upon the failure of the packet to reach him at Kingston within a reasonable time he went to Hillsboro, and called upon defendant as postmaster, and inquired for the packet; that defendant first looked through his papers for a receipt for the packet from the postmaster at Kingston, and failed to find one; he showed Wallace his books, in which he had entered the fact of its having been forwarded to Kingston; that he also searched through the postoffice for the packet, but failed to find it. The postoffice inspectors testified that they received a letter from the defendant informing them of the loss of the packet; that they went to see defendant, and demanded that he should deliver the packet, or the money which it had contained, to them. This the defendant corroborates in his testimony, and it is also sustained by the testimony of defendant's father: L. W. Lenoir, postmaster at Lake Valley, testified that the packet in question passed through his hands as such postmaster, and was by him forwarded to Hillsboro, and that the defendant sent him a receipt for it. The defendant

testified that the postoffice inspector demanded his resignation as postmaster. There was abundance of evidence of like import. But stronger than this was the indorsement made by the defendant, and signed by him as postmaster at Hillsboro, upon a tracer or letter sent out in search of the missing packet; that the packet had been received at his office, and forwarded through the mail to the postmaster at Kingston, and that he had never received a receipt from such postmaster for it. Upon this testimony the jury could do nothing less than find that the defendant was employed in the postoffice department.

Finding no error in the record, the judgment is affirmed.

LONG, C. J., and REEVES, J., concur.

[No. 291. January Term, 1889.]

THE TERRITORY OF NEW MEXICO EX REL.
SIMON LEYSER, APPELLEE, V. RINDSKOPF
BROS. & COMPANY ET AL., APPELLANTS.

DAMAGES—SUIT ON ATTACHMENT BOND—ATTORNEY'S FEES.—In a suit on an attachment bond, reasonable attorney's fees, paid in defending the attachment suit, are recoverable as a part of the damages.

APPEAL, from a judgment in favor of plaintiffs, from the Second Judicial District Court, Socorro County. Affirmed.

The facts are stated in the opinion of the court.

JOSEPH BELL, T. B. CATRON, and JOHN H. KNAEBEL
for appellants.

Counsel fees are not recoverable upon an attachment bond. It is well settled they are not recoverable upon an injunction bond. Oelrichs v. Spain, 15 Wall.

211. The same principle applies to the attachment bond.

FISKE & WARREN for appellee.

The amount of attorney's fees paid was part of the actual damages recovered. *Rose v. Post*, 56 N. Y. 603; *Desbrow v. Garcia*, 52 N. Y. 654; *Holmes v. Weaver*, 52 Ala. 516; *Alexander v. Jacoby*, 23 Ohio, 358; *Noble v. Arnold*, Id. 264; *Wilson v. Root*, 43 Ind. 486; *Hayden v. Sample*, 10 Mo. 215; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Force v. Phillips*, 37 Iowa, 428; *Drake on Att.* [5 Ed.], sec. 176.

In *Oelrichs v. Spain*, the item of damages disallowed upon the bond was \$1,000 for "counsel fees in the adverse litigation," not confining the allowance to the counsel fees in relation to the injunction. *Oelrichs v. Spain*, 15 Wall. 227.

The overwhelming weight of authority sustains recovery of reasonable and necessary attorney's fees in actions upon attachment bonds on condition for payment of damages. 1 Sedg. Dam., p. 179, note; *Suth. Dam.*, pp. 141, 142, notes 1, 4; *Drake, Att.*, sec. 176; *Wap. Att.*, pp. 452-454.

The question is whether upon our statutory attachment bond, counsel fees in defense of the attachment, as distinguished from the defense of the suit, are included in the condition to pay damages. The overwhelming weight of authority is in favor of such recovery in the state courts. The territorial district courts are not federal courts, but if they were, there is not federal decision binding them to a different rule. *Bein v. Heath*, 12 How. 176; *Oelrichs v. Spain*, 15 Wall. 227; *Browning v. Porter*, 2 McCrary, 582. These authorities simply hold that attorney's fees paid in defense of the suit are not taxable in injunction cases, but recognize the principle in actions at law upon the

bond, that the condition of the bond must govern; and they are not in conflict with the state decisions, cited in note 4, page 141, Sutherland on Damages, so far as attachment bonds are concerned.

As to counsel fees in injunction cases, see 2 High, Inj. [2 Ed.], p. 1061.

As to counsel fees in suits on attachment bonds, see Drake on Att. [6 Ed.], sec. 176, et seq.; Wap. on Att., p. 452, et seq., and cases cited.

HENDERSON, J.—This is a suit on attachment bond. The plaintiff recovered judgment for \$500 damages. The principal question discussed by counsel for appellants is the action of the court in permitting the plaintiff to prove, and the jury to assess, as a portion of the plaintiff's damages, the sum paid attorneys for defending the attachment suit. In addition to this, in connection with the proofs so offered, they insist that the sum of \$500 paid counsel is not reasonable in amount, and that, even if counsel fees may be included in making up an estimate of plaintiff's damages, only a reasonable sum can be allowed. It is quite clear that, in any event, only necessary services, and a reasonable amount paid, can be permitted. This, however, was a disputed question of fact, fairly submitted to the jury, and we can not say that the verdict is unsupported, or even against the weight of the evidence.

On the question of allowing attorney's fees as an element of the plaintiff's actual damages sustained in the attachment suit, appellants cite and rely upon *Oelrichs v. Spain*, 15 Wall.

SUIT on attachment
bond: damages: at-
torney's fees.

211. That was an action upon an injunction bond on the equity side of the court. The covenants in the injunction bond were in many respects similar to those contained in the attachment bond here, and, as the court sustained an exception to the decree below in that case allowing solicitor's fees, it is contended

that the analogy is close, and the case at least of strong persuasive force, if not of controlling and binding authority, in this court, as a territorial tribunal. Justice SWAYNE, in delivering the opinion, said: "The point here in question has never been expressly decided by this court, but it is clearly within the meaning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So, in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause."

Some of the reasons given in the foregoing opinion for respecting the item of expense covering amount paid counsel in that case do not apply in a suit at law and trial by jury. An issue is made and the facts determined in an attachment suit whether the services of counsel were necessary, and the amount paid reasonable, and the expenditure confined to the defense of the single issue made under the attachment writ. Gross injustice could not be done the plaintiff in the attachment suit. In an attachment suit, after the levy of the writ the custody of the property changes.

This remedy is aggressive, and ordinarily more directly injurious and damaging than the defensive process of injunction. In attachment proceedings, where the writ is levied upon the personal and movable property of the defendant, he is put in a great peril of injury, and a necessity at once arises for prompt action and professional aid to prevent threatened ruin. In a proceeding by injunction, except in a rare case, where the writ is mandatory in character, the possession of the property does not change from the person in possession to the opposite party, or to that of the law, while in the hands of the officer. Again, ordinarily, the writ, if injunction, is sought and obtained only in aid of some equity for relief contained in the bill. While it is true that the attachment writ serves in some measure relatively the same office to a suit at law a writ of injunction does to a suit in equity, both being auxiliary writs, the same reason does not apply with equal force to confer a right to reimbursement, for the reason above stated. Whether or not the reasons here given do or should mark a substantial legal distinction in the two classes of cases, *Oelrichs v. Spain* is not a case at law, nor is it founded upon an attachment bond, or on exactly the same covenants.

The action of the court below is supported by both the principal text writers and courts of this country, as the following authorities will show. "The right to recover for reasonable attorney's fees paid or incurred in obtaining a discharge of the attachment rests upon the same principle as other costs and expenses incurred for the same purpose." 2 *Suth. Dam.* 62; *Bass v. Smith*, 49 *Ala.* 293; *Northrup v. Garrett*, 17 *Hun.* 497; *Seay v. Greenwood*, 21 *Ala.* 491; *Swift v. Plessner*, 39 *Mich.* 178; *Ah Thaie v. Quan Wan*, 3 *Cal.* 216; *Prader v. Grim*, 13 *Cal.* 585; *Higgins v. Mansfield*, 62 *Ala.* 267; *Rose v. Post*, 56 *N. Y.* 603; *Alexander v. Jacoby*, 23 *Ohio*, 358; *Wilson v. Root*, 43 *Ind.* 486;

Hayden v. Sample, 10 Mo. 215; Kansas City Hotel Co. v. Sauer, 65 Mo. 279; Force v. Phillips, 37 Iowa, 428; Drake, Att. [6 Ed.], sec. 176, et seq.; Wap. Att. 452.

Our attachment law was copied from that of Missouri. The conditions of the attachment bond having been construed there as sufficient to embrace attorney's fees, carries with it the probable intention on the part of the legislature to adopt the construction placed on the bond there as a statutory obligation. The other exceptions taken on the trial relate to the admission and rejection of evidence. These exceptions are not urged here further than to call our attention to them, and upon inspection we are of the opinion that no error to the prejudice of appellant's rights was committed.

Finding no error, the judgment of the court below will be affirmed; and it is so ordered.

LONG, C. J., and REEVES, J., concur.

[No. 218. Remanded from May Term, 1885. Heard on Motion to retax costs, January Term, 1889.]

J. R. PRICE ET AL., APPELLEES, v. WILLIAM
GARLAND, APPELLANT.

COSTS ON APPEAL, TAXATION OF.—While rule 23 of the supreme court requires that the record be printed, in certain cases, it does not give authority to tax as costs the expense of printing it. Nor is there any statutory authority for allowing such expense, or the expense of appellant's brief, or a stenographer's fee, to be taxed as costs on appeal; and, in the absence of such authority, such items can not be properly charged as part of the costs awarded appellant on a reversal of the judgment.

MOTION to retax costs. Motion sustained.

The facts are stated in the opinion of the court.

HENDERSON, J.—This case was decided at a former term, and the judgment below reversed, and the cause remanded for further proceedings. The clerk taxed the costs against the appellee, as directed in general terms by the judgment of reversal, but in so doing he embraced in the bill of costs several large items of expense by appellant in perfecting and docketing his appeal in this court. The items sought by the motion to be stricken out of the taxed cost bill are: First, the cost of printing the record; second, the cost of printing appellant's brief; third, the amount paid the stenographer for transcribing his notes of the evidence.

In support of the motion, it is contended that no disbursement made by appellant, however necessary, can be taxed as costs in this court, unless the statutes of the territory, or a rule of the court having the form of a statute, can be found, authorizing the clerk to tax it. It may be assumed as an undisputed fact, shown by the affidavit filed in pursuance of a stipulation entered in the cause, that the expenditures by appellant were necessary, and the amounts actually paid reasonable; and that the items entered in the tax bill correctly represent the amounts paid, and on what account. The motion and proofs submitted present the naked question of the liability of the appellee to reimburse appellant for amounts necessarily expended by him, in order to review a judgment in the district court. Chapters 16, 17, Compiled Laws, New Mexico, contain all the statutes on this subject pertinent to the question submitted. There is no express authority to be found in the laws of the territory that will warrant the taxation of these items. But it is contended by counsel opposing the motion that the rules of the court made it a condition to his right of appeal and review that the record and brief be printed. Rule 23 does require, in cases of this kind and amount, that the record be printed, but it does not confer the power to tax as costs the sum

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on appeal.

so paid. Whether or not the items mentioned ought to be included as a part of the taxable costs must depend upon the general rule or principle of the law of costs in England and in this country. The power to tax a sum expended by a successful party as costs, with which to reimburse him for expenditures made against the losing party, has its origin in statutes, and not in the common law.

At first, by the common law, no costs were awarded to either party *eo nomine*. If the plaintiff failed to recover, he was amerced *pro falso clamore*; if he recovered judgment, the defendant was in *misericordia* for his unjust detention of the plaintiff's debt, and was not, therefore, punished with the *expensa litis* under that title. But, this being considered a great hardship, the statute of Gloucester (6 Edw. 1, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of *cost de incremento*; for, when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the case. "Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is specially so in this country, that the legal taxed costs are far below the real expenses incurred by the litigant. Yet it is all the law allows as *expensa litis*." Justice GRIER in *Day v. Woodworth*, 13 How. 363. See, also, *Kneass v. Bank*, 4 Wash. C. C. R. 238.

The courts have no power to award costs simply because they have power or jurisdiction over the subject-matter of the suit, or the parties to it. Costs are purely the subject of legislative appointment. *Coggill v. Lawrence*, 2 Blatchf. 304. Nor can courts go beyond the provisions of the statute to allow costs. *Dedekam*

v. Vose, 3 Blatchf. 153. A copy of the record is not a part of the taxable costs of a suit to be recovered by one party against another. *Caldwell v. Jackson*, 7 Cranch, 277. Nor can the costs of printing a brief be taxed. *Jennings v. The Perseverance*, 3 Dall. 336; *Ex parte Hughes*, 114 U. S. 548. The cost of printing the record is now taxed, but this is so by reason of an act of congress. 96 U. S. 594.

The only case I have found which is directly in point, holding a contrary view, is that of *Dennis v. Eddy*, 12 Blatchf. 195. The costs incurred in that case were in obedience to a rule of court, but without any statutory or other express authority, under the rule, to have the amount expended taxed. While the amount of the allowance in that case was not supported by any direct authority, the court was of opinion that, inasmuch as the expenditures were made in order to obey the directions of the court, it was legally taxable as costs. No case was cited in support of this ruling, and, in my opinion, is opposed by the almost universal rule announced by the courts of this country and England.

It is certainly a very great hardship that a litigant who has been illegally and unjustly adjudged to pay a sum of money, or suffer otherwise from a failure of justice in an inferior court, that he can not be reimbursed absolutely necessary expenditures, in the way of transcript and printing fees paid out by him; but, as the source of all costs is statutory, the remedy for the evil must be by statute.

Cost is a pecuniary allowance made by positive law to the successful party in a suit, or a distinct proceeding within a suit, in consideration of and to reimburse his probable expenses. *Abb. Law. Dict.* The word "costs" is a word of well-known legal significance. It signifies, when used in relation to the expenses of legal proceedings, the sums prescribed by law, as charges for the services enumerated in the "fee bill." *Apperson v.*

Mutual Benefit L. I. Co., 38 N. J. Law, 272; Am. & Eng. Encyclopædia, Law, tit. "Costs."

The motion will be sustained, and the costs retaxed as herein directed.

LONG, C. J., and REEVES and BRINKER, JJ.,
concur.

[No. 271. January 12, 1889.]

JESUS MARIA PEREA ET AL., ADMINISTRATORS,
ETC., APPELLANTS, v. CANDELARIA MONTOYA
DE GALLEGOS, APPELLEE.

PRACTICE—BILL IN EQUITY—AMENDMENT—PLEADING.—In a proceeding, by bill in equity, where the bill was framed upon misinformation as to the real facts, which were not disclosed till the trial, complainants were entitled to leave to amend their bill on the final hearing to conform to the evidence, upon such terms as the court might deem proper (Compiled Laws, N. M., sec. 1911; Beall v. Territory, 1 N. M. 507); and it was error in the court below to refuse to grant leave to amend under such circumstances.

APPEAL, from a decree in favor of defendant, from the First Judicial District Court, Santa Fe County. Decree reversed, and cause remanded with instructions to allow complainants to amend.

The facts are stated in the opinion of the court.

CATRON, THORNTON & CLANCY for appellants.

The court erred in sustaining the demurrer to that part of the bill charging appellee as trustee and praying for an account of the rents and profits received by her. She is as much bound to repay the rents and profits, as to return the property wrongfully received. 2 Pom. Eq., secs. 1057, 1058; Barnes v. Taylor, 30 N. J. Eq. 7; Greenwood's Appeal, 92 Pa. St. 181.

The court erred in refusing to permit complainants to amend their bill on the final hearing to conform to the evidence. *Comp. Laws*, sec. 1911; 1 *Danl. Chan.* 418; *School District No. 3 v. MacCloon*, 4 *Wis.* 79; *Harding v. Boyd et al.*, 113 *U. S.* 756; *Neal v. Neal*, 9 *Wall.* 1, 8; *Tremolo Patent*, 23 *Wall.* 518; *Burgess v. Graffam*, 10 *Fed. Rep.* 216, 219; *Battle v. Mut. Life Ins. Co.*, 10 *Blatch.* 417; *Ogden v. Thornton*, 30 *N. J. Eq.* 569, 573; *McConnell v. McConnell*, 11 *Vt.* 291; *Connelly v. Peck et al.*, 3 *Cal.* 75.

Where such amendment should be allowed, it is error to refuse. *Connelly v. Peck et al.*, 3 *Cal.* 75; *Ogden v. Thornton*, 30 *N. J. Eq.* 569, 573; *Kuhl v. Martin*, 2 *Stuo.* 586; *Walker v. Armstrong*, 8 *Deb.*, *M. & J.*, 534; *Lewis v. Darling*, 16 *How.* 6; *Lewis v. Winn*, 4 *Des.* 66; *Groffman et al. v. Burgess*, 117 *U. S.* 181, 195; *Neal v. Neal*, 9 *Wall.* 1; *Harding v. Boyd et al.*, 113 *U. S.* 756-764.

Where the amendment has been wrongfully refused, the appellate court has power to order the amendment, and render such judgment as justice demands. 1 *Danl. Chan.* 418, note 9; *Ogden v. Thornton*, 30 *N. J. Eq.* 576; *Story, Eq. Pl.*, sec. 905.

The motion to dismiss was not discretionary; it was a matter of right given by law. *Comp. Laws*, *N. M.*, sec. 1859.

H. L. WALDO and WILLIAM BREEDEN for appellee.

REEVES, J.—This is an appeal from the decree of the district court for the defendant and against the complainants in the district court, and appellants in this court. The appellee in her statement of the case, as appears from the brief of her solicitors, admits that the allegations and purpose of the bill were as stated by the appellants, as were also the proceedings down to the time of the reference to the master. The appel-

lants in the statement of the case alleged in their bill of complaint that Jose L. Perea, in his lifetime, filed his bill of equity therein, charging the defendant as a trustee in a resulting trust; alleging, among other things, that one Jose M. Gallegos, in his lifetime, had borrowed of the complainant, Jose L. Perea, a large sum of money, amounting to about \$10,000, and that he died insolvent in 1875, without having paid the same; that the appellee was his wife; and that during his lifetime, and while he was largely indebted to other parties, and after the accruing of about \$3,500 of the indebtedness due to Jose L. Perea, deceased, Jose M. Gallegos, without any consideration, and for the fraudulent purpose of hindering and delaying his creditors, conveyed certain real estate described in the bill to his wife, the appellee; and praying that said transfer be declared fraudulent and void as to creditors, and that the appellee be declared a trustee of an implied trust for their benefit, that the property be sold to pay complainant's debt, and that an account be taken of the portion of the property sold by the appellee, and of the rents and profits received by her, and for general relief.

After the filing of the original bill, Jose L. Perea died, when the complainants were appointed administrators of his estate, and the suit revived in their names, and the amended bill of July 7, 1884, set out in the transcript, filed. To this amended bill the appellee filed a demurrer and an answer. The demurrer was sustained as to part of the bill. Respondent in her answer denied the insolvency of Jose M. Gallegos. She admitted his liabilities as one of the sureties on the bond of Beall as administrator, and the settlement and discharge of such liability as stated in complainant's bill. She admitted that Jose M. Gallegos conveyed to her the real estate mentioned and described in the bill of complaint, but denied that it was for the fraudulent pur-

pose of covering up his property so as to hinder and delay his creditors. She denied that conveyance was without consideration, but averred that it was made to satisfy her for an indebtedness due her by Jose M. Gallegos; that she accepted the conveyance in satisfaction of such indebtedness and also, as a further consideration, she risked her own individual and unincumbered real estate. The complainants filed a replication to the answer, and the cause was referred to G. W. Ritch, as a special master, with direction to take proofs as to the truth of the material allegations contained in the pleadings, and report the same to the court, with his findings thereon.

The charges that Jose Manuel Gallegos was insolvent, that his conveyance to the respondent was without consideration, and made to defraud his creditors, were the material allegations in the complainant's bill. The denial of these allegations by the respondent, and the averment that the conveyance to her was made to satisfy Jose Manuel Gallegos' indebtedness to her, and that she so accepted it, were the material allegations of her answer.

Abraham Staab, a witness for the complainants, testified that Jose Manuel Gallegos, with others, were sureties upon an administration bond, upon which bond a judgment was obtained against the bondsmen in the sum of about \$60,000. That the judgment was compromised at about \$22,000, of which sum Gallegos was to pay \$4,000, as agreed among the sureties. Gallegos, not being able to pay the amount at the time, gave his note for the \$4,000, with Probst and Kirchner as sureties, and, in consideration of their indorsement, he agreed to give them a mortgage upon his residence property in Santa Fe. When it was discovered that the title to the south portion of the property was vested in the respondent, and the title to the north portion of the property was vested in Jose Manuel Gallegos,

Probst and Kirchner declined to become sureties on the note. That the witness and one of the sureties called on Mr. Gallegos to arrange the matter in order for him to pay his portion of the judgment. Mr. Gallegos then, in presence of witnesses, Sigmund Seligman, William Rosenthal, and the respondent, agreed to convey his portion of the property to the respondent, with the understanding that she would join in the mortgage to secure Probst and Kirchner, his indorsers on the note.

Henry L. Waldo, a witness for complainants, testified that he was called upon by Probst and Kirchner to draw some papers, and guard their interest in a transaction they were about to have with Jose Manuel Gallegos, growing out of a settlement or compromise of a debt by the Beall sureties, of whom Mr. Gallegos was one. Gallegos not being able to pay his share, it was agreed to take his note for about \$4,000, with good sureties. Probst and Kirchner had agreed to become such sureties, provided they were properly secured, and Gallegos had agreed to give a mortgage for such surety upon his residence property in Sante Fe, which surety was acceptable to Probst and Kirchner. At that time Gallegos lived on the inside of the plaza, in the northern part of the house, occupying rooms also on the eastern side of the plaza. At the time witness supposed that the title to the whole of the property was in Mr. Gallegos, and witness drew a mortgage covering all of what was known as the "Gallegos House," including other property adjacent to it, which he considered belonged to the same property; and he went to Mr. Gallegos for the purpose of getting him and his wife, the respondent, to execute the mortgage. When the respondent came into the room, witness explained the nature of the transaction to her, when he discovered from her statements that the south part of the the property was in her name, and she refused to exe-

cute the mortgage unless Mr. Gallegos would convey to her that part of the property which was in his name to secure or indemnify her against loss by reason of subjecting her portion of the property to the mortgage. The witness explained to Probst and Kirchner this difficulty about the title, and informed them that the respondent refused to sign the mortgage. Probst and Kirchner insisted upon having the whole of the title included in the mortgage. When witness again saw Mr. and Mrs. Gallegos it was agreed that Mr. Gallegos should convey to Mrs. Gallegos his part of the property to induce her to sign the mortgage. Witness thinks the deed and the mortgage were executed on the same day.

The complainants offered in evidence a copy of the deed from Jose Manuel Gallegos to the respondent, bearing date March 16, 1874; also the mortgage to Probst and Kirchner, dated March 16, 1874; also, the promissory note executed by Jose Manuel Gallegos, with Probst and Kirchner as sureties, for \$4,000, dated March 16, 1874.

The respondent testified, in her own behalf, that Jose Manuel Gallegos gave her the deed in consideration of the \$4,000 which he owed her. The \$4,000 was on account of five hundred sheep, forty cows, the rent of her house, which he collected, and for board which he received from boarders. After the evidence was taken the complainants filed an affidavit of surprise, and moved the court for leave to amend their bill so as to make it conform to the facts proven.

The affidavit is as follows:

"W. T. Thornton, having been first duly sworn, upon oath states that he is a member of the firm of Catron, Thornton & Clancy, and that he has had special charge of the above entitled cause, and prepared the bill and amended bill in said cause, and that he prepared the above motion for leave to amend said amended bill. Af-

fiant further states that from information derived from his client, Jose Leandro Perea, who is now deceased, and who was a Mexican, and did not speak the English language, affiant was led to believe that the conveyance made from the said Jose Manuel Gallegos to the said defendant, Candelaria Montoya de Gallegos, was made with a fraudulent intent of hindering and delaying the creditors of the said Jose Manuel in collecting their debts, and that under said impression he framed the original and amended bill, and that he did not receive any information of the actual circumstances of the making of the said conveyance by the said Jose Manuel Gallegos to the said respondent until, upon the taking of the testimony, he was informed of the real facts; and that the said original deed, in place of having been intended as a gift to the said respondent, and made with a view of covering up and defrauding his creditors, was intended as a mortgage to secure respondent from loss occasioned by said respondent joining the said Jose Manuel in the execution of a mortgage which should cover the separate property of the said respondent; that, since the information came to his knowledge, he prepared the within amended bill, so that the same might conform to the actual facts as proven by the witnesses. Affiant states that said motion is not made for vexation or delay, but that the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill; that the principal witness from whom said affiant obtained said information was one of the solicitors for respondent; and that affiant had no knowledge of what he would swear to, or of the kind of testimony he would give, until the day he was examined, nor did he believe in fact that he would be a witness in the case.

(Signed)

“W. T. THORNTON.

“Subscribed and sworn to before me this 13th day of February, 1885.

(Signed) “S. B. AXTELL, Judge of First District.”

The motion was overruled by the court, at the costs of the complainants.

The proposed amended bill is set out in the transcript. It alleges that the conveyance from Jose M. Gallegos to the respondent, though absolute on its face, was in fact intended as a mortgage for the purpose of securing her and her property from any liability which might accrue to her by reason of the execution of the mortgage to Probst and Kirchner, and praying that the conveyance to the respondent be declared to have been a mortgage made to her in trust to secure her from liability, and further praying substantially as in the former amended bill. The motion to amend was denied, and overruled, at the costs of the complainant.

Afterward, on the hearing of the cause, the exceptions to the master's report were overruled, and his findings and report confirmed, and the conveyance by Jose Manuel Gallegos to the respondent was adjudged and decreed by the court not fraudulent or in fraud of creditors, but made in good faith, upon a good and sufficient consideration. It was further decreed by the court that the complainants have nothing by their bill, and that it be dismissed, at their costs.

It appears that the note for \$4,000, signed by Probst and Kirchner as sureties, is dated March 16, 1874. The mortgage given them by Gallegos and wife, and the deed by Gallegos to his wife, bear the same date,—all of which indicates with clearness that the giving of the note and mortgage and deed was one transaction, done at the same time. Waldo and Staad both agree that the deed was to be made to enable a mortgage on the whole property to be given, and neither of them say a word about any other consideration or indebtedness being mentioned.

In the case of Connelley v. Peck and others, the court said: "Where the proof does not sustain the

allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits, and whenever this is not done, it is error. 3 Cal. Rep. 75. Where the matter has not been put in issue with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill, for the purpose of making the necessary alteration." 1 Danl. Chan. Pr. 418; Lewis v. Darling, 16 How. 1.

"Each party, by leave of the court, shall have leave to amend, upon such terms as the court may think proper, at any time before verdict, judgment, or decree." Comp. Laws, N. M., sec. 1911; Beall v. Territory, 1 N. M. 507; Rule 40, p. 40, Dis't Courts, Equity.

The proposed amendment comes within the principle laid down in the cases cited above, and comes within the statute and rules of practice in equity. The decree is reversed, and the cause remanded, with instructions to the district court to reopen the case, and allow the complainants amendment on such terms, as to the payment of the costs, as the court may impose, and for further proceedings in the cause. Reversed and remanded.

LONG, C. J., and BRINKER and HENDERSON, JJ., concur.

[No. 354. January 14, 1889.]

SOLON L. WILEY, APPELLANT, v. THE SAN
PEDRO & CANON DEL AGUA COMPANY
ET AL., APPELLEES.

CONTRACT—SUIT TO ENFORCE MECHANICS' LIEN—PROPOSAL—DEMURRER—

PLEADING.—In a suit on a contract to enforce a mechanic's lien, a paper filed in the cause, purporting to be a contract of extension of the original contract, signed by the defendant and marked "accepted," but not signed by plaintiff, is not a contract, but a mere proposal; and will not, on demurrer, support an averment of a contract, unless an acceptance is pleaded.

APPEAL, from a judgment in favor of defendants, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

H. L. WARREN for appellant.

A mechanics' claim for lien against property lying partly in one county, and partly in another, may be filed for record in either county, and a verification by the attorney of the claimant is sufficient under the statute. Sec. 1524, Comp. Laws, N. M.; Phill. on Mech. Liens, sec. 366; Grey v. Vorlies, 15 N. Y. 612; Williams v. Webb, 2 Disney (Ohio), 430; Taswell v. Presbyterian Church, 46 Mo. 279; Whitenack v. Noe, 3 Stock. (N.J.) 321; Donaldson v. Wood, 22 Wend. 395; Donahoe v. Scott, 12 Pa. St. 45; Irew v. Gaskill, 10 Ind. 265, 266; State v. Ellison, 14 Id. 380. See, also, Elridge v. Steamboat, 27 Mo. 590; Thomas v. Henderson, 10 Ohio St. 152.

The claim of lien was filed in time. The express stipulation that appellant should resume the work under the contract "at once upon the expiration of

three months after being notified by the company so to do," implied the duty on the part of the company to notify appellant to resume the work, and no time being specified for such notification, the law implies a reasonable time. Add. on Con., secs. 320, 326.

The bill alleges, and the demurrer admits, that appellant, after July 14, 1892, the date of the stipulation, was at all times able and ready to resume and complete the work in accordance with the original contract, and that the company not only failed and refused to notify him to resume, but also to permit him to do so. By such failure and refusal on the part of the company to comply with its contract, appellant was legally empowered to terminate the contract after a reasonable time had elapsed. *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Cutter v. Powell*, 2 Smith's Lead. Cas. 42; *M. & M. Savings Bank v. Dashiell*, 25 Gratt. 625; *Bushfield v. Wheeler*, 14 Allen (Mass.) 139; *Smith v. Norris*, 120 Mass. 58; *Canal Co. v. Gordon*, 6 Wall. 561; *Denniston v. McAlister*, 4 E. D. Smith (N. Y.) 729; *Foley v. Gough*, Id. 724.

The agreement being for appellant's benefit, even if his formal signature were held to be of the essence of the agreement, the law will presume it was affixed. *Higham v. Stewart*, 38 Mich. 513; *Treat v. Treat*, 35 Conn. 210.

If it be admitted that appellant's recorded claims of lien contains items for which no lien is given, such fact does not vitiate the lien as to the other items, no fraudulent intent being shown. *Phill. Mech. Liens*, secs. 355, 356; *Bank v. Curtis*, 18 Conn. 342; *Smith v. Norris*, 120 Mass. 63; *Allen v. Frumat M. Co.*, 73 Mo. 688; *Mason v. Germaine*, 1 Mon. 263; *Barber v. Reynolds*, 44 Cal. 533; *Whitney v. Joslin*, 108 Mass. 103; *Marston v. Kenyon*, 44 Conn. 349.

The remedy is in equity. *Hobbs v. Spiegelberg*, 5 Pac. Rep. 529; *Rupe v. N. M. Lumber Ass'n*, 9 Id.

301; Finane et al. v. Las Vegas Hotel & Impt. Co., 5 id. 725.

The bill is not multifarious; the claim of interest in the property by the defendants other than the defendant company, makes them proper parties. 1 Danl. Ch. Pl. and Pr., sec. 190.

CHILDERS & FERGUSON and CATRON, THORNTON & CLANCY for appellees.

BRIEF OF MR. CHILDERS.

The demurrer to the bill of complaint was sustained, and the cause dismissed upon complainant's declining to amend. 1 Danl. Ch. Pl. and Pr., sec. 545.

The demurrer admits facts only that are well pleaded, and not conclusions of law.

The lien filed in Bernalillo county differs in the description of the Canon del Agua grant from that filed in Santa Fe county, and neither describes the land to be affected by the lien. Phill. on Mech. Liens, sec. 370.

The claim of lien is verified by the attorney, and states that affiant "verily believes it to be true." This is not sufficient. The claim should be verified by some one having a personal knowledge of the facts. Comp. Laws, sec. 1524; Arata et al. v. Tellurium Gold & Silver Mining Co., 4 Pac. Rep. 195; 65 Cal. 340; Elridge v. Steamboat, etc., 27 Mo. 590; Hamilton v. Steamboat Iron-ton, 19 Id. 523; Bridgeford v. Steamboat, 6 Mo. 357; Ex Parte Bank of Monroe, 7 Hill, 177; Dorman v. Crozier, 14 Kan. 227; Childs v. Bostwick, How. Pr. N. Y., cited in 14 U. S. Dig. U. S., p. 516, sec. 13.

The lien was filed before the completion of the contract, and more than ninety days after the last work was done, and is, therefore, void. Perry v. Brainard, 8 Pac. Rep. 882; Kinney v. Sherman, 28 Ill. 520; Phill. Mech. Liens, 132, 133, 137.

Appellant never completed his contract, and the extension of the time for its completion, having never been executed by him, was wholly inoperative. *Ambler v. Whipple*, 20 Wall. 546; *Wood v. Edwards*, 19 Johns. 206.

The contract being an entirety, no right to file a lien accrued until the completion of the contract. *Harmon v. Ashmead*, 60 Cal. 439; *Cox v. W. P. R'y Co.*, 44 Id. 28.

Appellant's claim of lien does not contain a statement of his demands after deducting all just credits and offsets. The only credit shown is one item, and the charges are alike unitemized. *Phill. Mech. Liens*, sec. 350, and cases cited; *Phelps v. M. C. C. H. Co.*, 49 Cal. 339; *Wheeler v. Port Blakely Mill Co.*, 3 Pac. Rep. 635; *Hoffman v. Wolt*, 36 Mo. 613.

The claim of lien was filed prematurely. *Denniston v. McAlister*, 4 E. D. Smith, N. Y. 729; *Freto v. Houghton*, 55 N. H. 100; *Phill. on Mech. Liens*, secs. 322, 322a, 323, 323a, 328, 330; *Kinney v. Sherman*, 28 Ill. 520; *Cox v. W. P. R'y Co.*, 44 Cal. 28.

Premature performance of an act required to be done within a given time after the happening of a prior event is nugatory. *Comp. Laws*, sec. 1524; *Landale v. Daniels*, 100 U. S. 113. See, also, *Canal Co. v. Gerdon*, 6 Wall. 361.

The lien does not separate the work on the San Pedro Co. grant from that on the Canon del Agua, and is, therefore, bad. *Davis v. Alvord*, 94 U. S. 545.

The contracts set up in the bill are as much a part of the bill as if fully set out therein in *hoc verba*; and if the bill erroneously alleges the legal effect of these contracts, the demurrer does not admit such an allegation, but only what is well pleaded. *Dillon v. Barnard*, 21 Wall. 430.

The pretended contract marked exhibit "B" provides that it shall not be operative until evidenced by

the signature of appellant, not that he might act upon it. He never having signed, it was not binding upon either party. *Ambler v. Whipple*, 20 Wall. 546; *Wood v. Edwards*, 19 Johns. 206.

The statutes require the notice of lien to state "the conditions of the contract," and for this failure the lien is fatally defective. *Comp. Laws, N. M.* 1524.

LONG, C. J.—Solon L. Wiley, the appellant in this court, filed in the court below his bill in chancery for an enforcement of an alleged mechanics' lien upon the property described in the bill for work done and materials furnished, amounting, as alleged, to \$127,522.61. To this bill a demurrer was interposed, the same was sustained, and the cause dismissed. The action of the court in sustaining the demurrer is the only point necessary to be considered. The bill alleged that the defendant company entered into a contract in writing, dated April 21, 1880, a copy of which is made a part of the bill, whereby, among other things, it was agreed that plaintiff should construct for the company a system of waterworks, which should include two reservoirs on the Sandia mountains, in New Mexico, with a line of wrought-iron pipes from the reservoir to the company's works. The complainant avers that for this work, which is more fully described in the bill, he was to receive \$400,000, to be paid in installments. Complainant avers that under such contract he entered upon its completion, performed, labored, and furnished materials, in all worth over \$127,000, and that the work was discontinued on the twenty-fourth day of July, A. D. 1882. He avers, further, that no work was done after that date; and that on the twenty-second day of September, 1883, complainant filed for record, both with the county recorder of Santa Fe and also of Bernalillo county, a claim, which is fully described in the bill, to establish a mechanic's lien on the defend-

ant's real estate. Other averments are also made, but it is not necessary to give them, as the case must be determined upon a question which such averments in no way affect, except as they are further stated.

It will be observed that over one year intervened between the date when the last work was done under the contract and the date when the lien was filed. Section 1524 of the Compiled Laws requires that the claim and statement which constitute the lien shall be filed "within 60 days after the completion of the contract." So, if the contract either was completed at the date when the work was discontinued, or never was completed, in either case there could be no lien, because of the delay in filing the statement required by that section. The complainant in his bill seeks to obviate this objection to the validity of his lien upon the theory that a contract in writing was entered into by the plaintiff and the company, whereby the work was discontinued by such agreement, but was to be again resumed by the plaintiff after the expiration of ninety days from notice that the company desired him to renew the work; and by the averment that he never was so notified, though always ready, able, and willing to perform; and that after waiting a reasonable time for such notice he elected to treat the contract as performed, and filed his lien. The appellee contends, on the contrary, that the bill of complaint fails entirely to show that there ever was any contract whatever between the complainant and the company for such extension of time or for a suspension of the work. An examination of the averments of the bill on this point is necessary.

All the averments which relate to this point are as follows: "Your orator further states that by the terms of said contract said reservoir and waterworks were to be completed within six months from the date of said contract; and your orator entered upon said work,

and was then and there ready, willing, and able to perform and complete the same, in the time and manner required and specified in the said contract; and that, to wit, on July 14, A. D. 1882, your orator had completed a large portion of said work, and furnished a large part of the material required therefor, in pursuance of said contract, and was then and there ready, able, and willing to fully perform and complete the same; and that on said date said defendant company made, executed, and delivered to your orator a written agreement, a copy of which, marked 'B,' is filed herewith, and prayed to be considered as a part hereof, and thereby said company stipulated and agreed that your orator might and should postpone the completion of said contract; and that your orator should be, and thereby was, released from any right of action which might accrue to said company, and any damages by reason of such part postponement of said work under said contract; and it was thereby agreed that your orator should and would again enter upon the completion of said contract at once, upon the expiration of three months after being notified so to do; and your orator states that in pursuance of said last mentioned agreement, to wit, July 24, 1882, he did discontinue work upon and postponed the completion of said contract, and that from that time hitherto your orator has been at all times ready and willing to fully complete the said contract; but your orator avers the said defendant has wholly failed and neglected to notify or permit your orator to enter upon or complete said contract; and your orator further avers that on September 22, 1883, in consequence of the premises, and by reason of the said failure, neglect, and refusal on the part of the said defendant company to notify or permit your orator to enter upon and complete the portion of said work under said contract which remained unperformed, on said July 24, 1882, and a reasonable and sufficient time

therefor having then and there elapsed, your orator elected and determined to declare said contract ended and terminated, as he lawfully might; and your orator, September 22, 1883, and within 90 days after the completion of said contract on his part, did file for record," etc.

The writing to which reference is made in the foregoing averments is as follows:

"GREENFIELD, MASS., July 14, 1882.

"*S. L. Wiley, Esq.*:—The San Pedro and Canon del Agua Company consent to your postponing the present completion of its contract with you as to dams in the Sandia mountains, and pipe line from same to the company's placers, provided you agree that you will again enter upon the completion of the same at once, upon the expiration of three months after being notified by the company to do so. You are also released, provided this extension is entered into, from all rights of action which the company may obtain against you for any damage that may during any such discontinuance accrue to the said pipe line and dams by reason of your discontinuing work and care thereon and thereof; the rights of both the company and yourself being and remaining, to all intents and purposes, as though no discontinuance had been agreed upon. Your agreement hereto being evidenced by your signature. This agreement being in full force and effect from the date when said Burham was authorized to enter into such an extension.

(Signed)

"SAN PEDRO AND CANON DEL AGUA COMPANY,

"By WALTER BURHAM, Vice President.

"Accepted."

Although the word "accepted" is written on the paper called in the bill of complaint an "agreement,"

neither such word nor the paper is signed by Solon Wiley. His name does not anywhere appear on the paper, except as it is addressed to him. It is not averred in the bill that he in fact did accept it, or that the defendant company ever had the slightest knowledge or notice that he accepted the contract, or regarded himself in any mode under obligation to respect its provisions. It is fair to presume the defendant company, as it is alleged to be a corporation, was managed by a board of directors or trustees. It would appear, also, from the words, "This agreement being in full force and effect from the date when said Burham was authorized to enter into such extension," that such body had authorized the vice president to enter into a contract for extension; and, when accepted by Solon L. Wiley, that the beginning of the extension of time for completion was to relate back to the time when Burham was empowered to act. It would appear, also, that Wiley had asked an extension of time; as the paper says, "The company consent to your postponing," or, in effect, consent that you postpone the completion of the contract. This is not an absolute, unconditioned consent to the extension of time, but one made on an expressed condition, written on the face of the paper, in these words: "Provided that you agree that you will again enter upon the completion of the same," etc. There is no averment that Wiley did so agree. There is nothing on the face of the paper to bind Wiley to any such act. As the extension was only on the condition of such an agreement on the part of Wiley, the paper should show such an agreement, or it should be averred that he did so agree. If Wiley had signed his name below the word "accepted," then the face of the paper would have been evidence of his acceptance of the condition, and of his agreement to perform, and would be a contract on the face of it. Suppose Wiley had been noti-

CONTRACT: bill to
enforce: propos-
al: pleading.

fied to commence work, had declined to do so, and damage had resulted to the company, for which it had brought action, would this paper on its face have proven an obligation on Wiley to commence work? Certainly not, for the plain reason that Wiley's name is not signed to the contract, and so he does not bind himself to resume work. In such an action, to authorize a recovery, evidence outside the paper would be necessary to establish an agreement by Wiley to resume work on notice.

The averments treat this paper as on its face a contract mutually binding both parties, whereas it is only a proposition by the company, on its face not accepted by Wiley, and without acceptance averred in the bill. It is clear this paper was sent to Wiley, in answer to some proposition of his; that it was prepared ready for him to sign under the word "accepted." If he did so it does not appear in the exhibit, and it is not so pleaded in the bill, and for that reason the contract lacks mutuality, has but one party, and does not bind anyone on the face of the paper. When every line and word on the paper is inspected, it fails on its face to disclose that Solon Wiley is in any way bound by its terms. It may be that the complainant did in fact accept the conditions imposed, and did agree, upon being notified, to resume the performance of the original contract, but if so the paper does not bear evidence of either such acceptance or agreement; and that he did so agree should have been averred in the bill of complaint.

The complainant makes the paper a part of his bill, and assumes by his averments that it is on its face an agreement between the parties. He avers: "On said date said defendant company made, executed, and delivered to your orator a written agreement, a copy of which is filed," etc. Turning to the paper, it is found to be signed by one party only; that it recites a

condition nowhere appearing or alleged to be accepted or agreed to; and an agreement to perform the condition by Wiley is necessary, before the right of extension can become operative against the company.

A further recital in the paper renders the complainant's contention untenable. It is the following: "Your agreement hereto being evidenced by your signature." This signature is wanting. The company had the right to require that Wiley should sign the contract before it should become operative. Such signature is usual, and would, in case of contention or trouble, relieve the company of the necessity of proving, by other evidence, that Wiley had accepted the terms of the contract, and had agreed to renew the work on notice. The question here turning on the construction of a contract—the effect to be given to its words—it seems not necessary to cite authority. It is elementary that there must be mutuality, a meeting of the minds of the contracting parties, upon the terms of the agreement. There must be more than one joining to complete the contract. "Every contract is founded upon the mutual agreement of the parties." 1 Story, Cont., section 11. "In order to create a contract, it is essential that there should be a reciprocal assent to a certain and definite proposition. A mere offer, not assented to, constitutes no contract; for there must be not only a proposal, but an acceptance thereof. So long as a proposal is not acceded to it is binding upon neither party, and may be retracted." *Id.*, sec. 378.

In this case there is no presumption against the defendant that it did accept. It was optional with the defendant company to do so or not. If the word "accepted," appearing at the bottom of the paper, was written by Wiley as an evidence that he did so accept, then his signature should be there also, or he should aver that he did accept. The mere appearance of the word on a paper, bearing the signature of the

defendant company only, does not convey the idea that it was placed there by Wiley as an act to bind him to the terms; especially when it is considered that the other contracting party says, in effect: "Your agreement is to be evidenced by your signature," apparently inserted as a precaution against doubt on that point.

In *McDonald v. Bewick*, 51 Mich. 79, the following contract was under consideration: "We agree to sell one million feet of Norway, in town 28 N., 8 E., on our lands, and will make a contract with him giving him the right to go on said lands, and cut and remove said timber on payment. The price of said Norway to be \$1.50 per M., board measure." That court say that it is no "contract. There was no mutuality. It was the act alone of the defendants, and it was not supported by any duty or obligation of the plaintiff, and there was no averment of acceptance."

"The acceptance of an offer must be absolute and unqualified, for until there is such an acceptance the negotiations of the parties amount to nothing more than proposals and counter-proposals." 3 Am. and Eng. Encyclopedia of Law, 852. The paper addressed to Wiley is in the nature of a proposal to him, consenting to a postponement of the work on the condition and terms stated. He might be satisfied with the terms proposed, and willing to accept. He might desire longer notice; or to impose other terms, and, so long as the written offer is in that uncertain condition, we do not think it could amount to a contract, unless aided by averments which upon careful examination are not found in the bill of complaint. The judgment below is affirmed.

HENDERSON and REEVES, J.J., concur.

[No. 259. January 15, 1889.]

SOUTHERN PACIFIC RAILWAY COMPANY OF
NEW MEXICO, APPELLANT, v. TEOFILLO
ESQUIBEL, APPELLEE.

CORPORATIONS—RAILROAD—LAND GRANT WITH RESERVATIONS AND CONDITIONS—CONSTRUCTION OF GRANT.—A grant of public lands by congress to a railroad company, with certain reservations and on certain conditions, is a grant in praesenti only in the sense that it takes effect by relation as of the date of the act of congress, on performance of the conditions imposed.

ID.—LAND GRANT TO RAILROAD—POWER TO MORTGAGE, PURCHASE, AND CONSOLIDATE WITH ANOTHER COMPANY—LIMITATION OF POWERS.—A railroad company incorporated under an act of congress, granting it certain lands, with power to mortgage, in aid of the construction and operation of its road, and authorizing it to purchase the land grant and franchises of and consolidate with any other road along its route, provided the rights, franchises, and property of every description, of such other road shall vest in, and become the property of, said railroad, is not authorized thereby to transfer its own land grant and franchises to another company, and retain merely an easement over the right of way. Nor can a power to sell its lands be implied from the power to mortgage them for means to construct and operate its road.

ID.—LIMITATION OF GRANT—FORFEITURE.—Where, in such act, it is further provided, that the lands granted such company, which shall not be sold or otherwise disposed of within three years after the completion of its road, shall be subject to settlement and preemption like other public lands, such proviso is a limitation on the power of the company to hold the lands beyond that time; and a failure of the company to comply with the conditions prescribed operates as a forfeiture of the grant; and a plaintiff claiming under the defaulting company will not be heard to complain, that the forfeiture, subjecting the land to the control of congress, was not a proper measure to secure the completion of the road.

APPEAL, from a judgment in favor of defendant, from the Third Judicial District Court, Dona Ana county. Judgment affirmed.

The facts are stated in the opinion of the court.

CATRON, THORNTON & CLANCY, and S. B. AXTELL
for appellant.

The grant of the land in question to the Texas & Pacific Railway Company was a grant in praesenti, and had the effect to convey the land to said company. *Schulenburg v. Harriman*, 21 Wall. 44; *Tucker v. Ferguson*, 22 Id. 527; *U. S. v. Leavenworth R'y Co.*, 92 U. S. 745; *Grinnell v. R'y Co.*, 103 U. S. 739; Opinion of Att'y Gen. Brewster, June 13, 1882; *Rutherford v. Green's Heirs*, 2 Whea. 196; *M., K. & T. R'y Co. v. K. P. R'y Co.*, 97 U. S. 491; *L., L. & G. R'y Co. v. U. S.*, 92 U. S. 733; *Northern Pac. R'y Co. v. Majors*, 5 Mon. 121.

A grant of land may be made by law as well as by patent issued pursuant to law, and such grant vests an indefeasible title. *Fletcher v. Peck*, 6 Cranch, 87; *Strother v. Lucas*, 12 Pet. 454; *Wilkinson v. Leland*, 2 Id. 627 (8 Curtis Ed. 238); 3 Wash. Real Prop. [4 Ed.], 193, 194; *Grignon's Lessee v. Astor*, 2 How. 319, 9 Cranch, 43.

If the land can be identified, the grant conveys such title as will support ejectment. *N. P. R'y Co. v. Majors*, 5 Mon. 121; *Chouteau v. Eckhart*, 2 How. 344.

The grant is in praesenti to said railway company, "its successors and assigns," and is capable of transfer, subject, possibly, to the reserved rights of congress in case of a failure to complete the road in ten years from May 2, 1872, "to adopt such measures as it may deem necessary and proper to secure its speedy completion." 7 Wash. Real Prop., chap. 14, p. 24; *Taylor v. Sutton*, 15 Ga. 103; *Shattuck v. Hastings*, 99 Mass.; *Williams on Real Prop.* 145.

The power to mortgage includes the power to sell, subject, possibly, to the right of congress to adopt

measures to secure the completion of the road, on a failure to complete by the company or purchaser within ten years. *Kennedy v. S. P. & P. R'y Co.*, 2 Dill. 448; *Grinnell v. R'y Co.*, 103 U. S. 739.

It is not declared in the act of incorporation of the Texas & Pacific Railway Company, as in many others, that the grant is made upon condition, or that it can be forfeited, or that the lands shall revert in case of non-performance of certain conditions. *M., K. & T. R'y Co. v. Kansas Pac. R'y Co.*, 97 U. S. 497.

If there is any condition in this grant, it is a condition subsequent, and such conditions are construed more favorably to the grantee, and are not favored. 4 Kent Com. 129; *Davis v. Gray*, 16 Wall. 230; *Woodworth v. Payne*, 74 N. Y. 199; *Emerson v. Simpson*, 43 N. H. 477; *Laberer v. Carleton*, 53 Me. 212; *Hooper v. Cummings*, 45 Id. 365; *Thompson v. Thompson*, 9 Ind. 323; *P., W. & B. R'y Co. v. Howard*, 13 How. 340; *Craig v. Weelo*, 13 N. Y. 320; *Inhabitants of Hadley v. Hadley Mfg. Co.*, 4 Gray, 145; *Southard v. C. P. Co.*, 2 Dutch. 20.

Such conditions may be performed by any one interested. *People of Vermont v. Society, Etc.*, 2 Paine; *Bacon's Abr.*, tit. Conditions, p. 1; *Simonds v. Simonds*, 3 Mete. (Mass.) 558; 2 Wash. Real Prop., chap. 14, p. 12; *Shep. Touch.* 140, 142; *Wilson v. Wilson*, 38 Me. 18; *L. & C. R'y Co. v. Carrington*, 2 Bush. 526; *Joslyn v. Barlin*, 54 Vt. 670.

The road in New Mexico having been completed before the expiration of the ten years, there can be no forfeiture, such completion being practically a compliance with the terms of the act. *Thompson v. The People*, 23 Wend. 537, 579, 585; *Woodworth v. Payne*, 74 N. Y. 196; *Mead v. Bullard*, 7 Wall. 290; *Wilson v. Galt*, 18 Ill. 431.

Supplemental brief of S. B. AXTELL, and CATRON, THORNTON & CLANCY for appellant.

If the grant be a conveyance, which it certainly was, a patent was not essential, although it would be a great convenience as a conclusive and unimpeachable evidence of the title. In addition to the authorities cited in our first brief on this point, special attention is called to the two late cases of *VanWyck v. Knevals*, 106 U. S. 364, and *Southern Pacific R'y Co. v. Dull*, 10 Sawy. 507.

The power to amalgamate carries the power to sell the road and franchises. *Branch v. Jesup*, 106 U. S. 468.

The courts are more liberal now than formerly in construing the powers of railroad corporations, to accomplish the general scope and objects of their creation. *Dumpfelf v. O. & M. R'y Co.*, 9 Bis. 127. See, also, *Sinking Fund Cases*, 99 U. S. 720; *Shields v. Ohio*, 95 U. S. 324.

RYNERSON & WADE for appellee.

The intent of congress should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private persons. The rules of the common law must yield to the legislative will. *M., K. & T. R'y Co. v. K. P. R'y Co.*, 7 Otto, 496.

All public grants are to be construed strictly in favor of the public, and nothing passes by a grant but what is granted in clear and explicit terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 544; *Rice v. Railroad Co.*, 1 Black, 380; *Mills et al. v. St. Clair County*, 8 How. 581; *Richmond R'y v. R. R.*, 13 Id. 81; *Comm. v. Erie & C. R'y Co.*, 27 Pa. St. 339; *Dubuque & C. R'y. v. Litchfield*, 23 How. 66-68; *U. S. v. Arredondo*, 6 Pet. 691.

All acts and parts of acts in *pari materia* must be construed together to correctly determine the legislative will. 1 Kent Com. 462; *Rice v. Railroad*, 1 Black, 379. The present case comes clearly within the decision of the supreme court of the United States in the last mentioned case.

A patent is the instrument by which the government passes its fee, and when a patent is provided for, as in this case, it is clear that congress did not intend the title to pass by any words of present grant in the act.

The government may legislate so as to make the issuing of a patent necessary to convey the title in full. *Boatner v. Ventress*, 8 Martin (U. S.) 644; 20 Am. Dec. 270; *Roads v. Symmens*, 1 Ohio, 281; 13 Am. Dec. 621.

That section 9 makes the grant to the Texas & Pacific Railroad Company "its successors and assigns" makes no difference. These words simply designate the estate which the grantee would acquire upon compliance with the conditions of the grant. 13 Opinions of Att'y's Gen.; *U. S. v. Childers*, 8 Sawy. 174.

A court of equity might relieve in a proper proceeding, from the consequences of a merely technical and insubstantial breach of condition. But such relief can not be had in a common law action. Wash. Real Prop. 20; *Warner v. Bennet*, 31 Conn. 478; 4 Kent, 131.

A vicarious performance is not sufficient in the case of a grant of this kind. The terms of the act clearly contemplate that the road should be built by a competitive line. See Prohibition, sec. 4, Original Act; 13 Opinions Att'y's Gen., *supra*.

Where the condition of a grant is express there is no need of reserving a right of entry for a breach thereof to enable the grantor to avail himself of it. 2 Wash. Real Prop. 16; *Jackson v. Allen*, 3 Cow. 220;

Gray v. Blanchard, 8 Pick. 284; Osgood v. Abbott, 58 Me. 73-79; Wegg v. Wegg, 1 Atk. 383.

In the case of a public grant, the mode of asserting or resuming the forfeited grant is subject to the legislative authority of the government. *U. S. v. Repentigny*, 5 Wall. 211-268; *Finch v. Risely*, Popham, 53; *Schulemburg v. Harriman*, 21 Wall. 44; *Fairfax v. Hunter*, 7 Cranch, 603, et seq.; *Smith v. Maryland*, 6 Id. 286.

An action of ejectment will not lie until patents are obtained. *Hooper v. Schumer*, 23 How. 235; *Singleton v. Touchard*, 1 Black, 342; *Fern v. Holms*, 21 How. 482; *Carpenter v. Montgomery*, 13 Wall. 480; *Polk v. Wendall*, 5 Whea. 293; *Stoddard v. Chambers*, 2 How. 281; *Patterson v. Winn*, 11 Whea. 380; *Gilmer v. Pointdexter*, 10 How. 257.

If there has been a compliance with the terms and conditions of the grant, as the plaintiffs claim, and they are entitled to the benefit of the grant, they should, before undertaking to eject the defendant, secure from the government patents to the land. *Marbury v. Madison*, 1 Cranch; *Ellis v. Day*, 4 Conn. 95.

It is a well settled principle that, in the absence of express legislative authority, a corporation organized for the public service can not turn over to another the means by which such service is to be effected. *Comm'rs. v. Smith*, 10 Allen, 448; *East Boston v. Hubbard*, 10 Id. 459; *Richardson v. Sibley*, 11 Id. 65; *Middlesex, Etc. v. Boston*, 115 Mass. 347; *Pierce v. Emery*, 32 N. H. 504; *Goe v. Columbus, Etc.*, 10 Ohio St. 372; 2 Redf. R'ys, Vol. 1, p. 480, sec. 235; *Steiner's Appeal*, 27 Pa. St. 314; *Hall v. Trustees, Etc.*, 2 Redf. R'ys, 465, and notes; *Susq. C. Company v. Buchanan*, 9 W. & S. 28; *York, Etc., R'y Co. v. Winans*, 17 How. 38.

Public powers, franchises, and duties, like those resting on the Texas & Pacific Railroad Company by

its charter, are inalienable. *Thomas v. R'y Co.*, 101 U. S. 71; *York, Etc., R'y Co. v. Winans*, 17 How. 30.

It has been held by the circuit court of the United States that any attempt on the part of a railroad company to lease, transfer, assign, or abdicate its duties is ultra vires and void. *W. U. Tel. Co. v. U. P. R'y Co.*, 3 Fed. Rep. 1.

REEVES, J.—Upon the trial of the above entitled cause it was stipulated by the parties that the facts relating thereto were as follows:

First. The Southern Pacific Railway Company of New Mexico is a corporation organized under the laws of the territory of New Mexico in the year 1880.

Second. The Texas & Pacific Railroad Company is a corporation organized under an act of congress entitled, "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and an act of said congress entitled, "An act supplementary to an act entitled, 'An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,'" approved March 3, 1871,—this last mentioned act having been approved May 2, 1872,—which said two acts are hereby made a part of the stipulation, copies hereof being attached hereto, marked "Exhibits."

Third. The Texas & Pacific Railroad Company accepted said charter of incorporation, and within the time therein provided was organized thereunder.

Fourth. Within two years after the passage of said act of March 3, 1871, and in accordance with said two acts, the said Texas & Pacific Railroad Company did designate the general route of the said road as near as might be, and did file a map of the same in the department of the interior at Washington, which said general route so designated corresponded with the line

of road constructed as hereinafter stated by the Southern Pacific Railroad Company of New Mexico.

Fifth. Immediately after the filing of said map the secretary of the interior caused the lands within forty miles on each side of said designated route within the territories of New Mexico and Arizona, and twenty miles within the state of California, to be withdrawn from preemption, private entry, and sale.

Sixth. That thereafter the said Texas & Pacific Railroad Company did commence the construction of its said road at the eastern terminus thereof, at or near Marshall, in the state of Texas, as described in said act, and did prosecute the same, and have the same completed at or near El Paso, designated as a point on said road by said acts of congress, on or before the second day of May, 1882.

Seventh. That the Southern Pacific Railroad Company of New Mexico, in the years 1880 and 1881, after the organization, constructed a railroad of the character, kind, and description required by said two acts of congress, from the western boundary line of the territory of New Mexico, through the territory of New Mexico, on the said line of the general route of said Texas & Pacific Railroad Company, as designated in and by the said map filed in the department of the interior as aforesaid, to the state line of Texas, on the Rio Grande river, near El Paso, Texas, and connected the same with the said Texas & Pacific Railroad, constructed as aforesaid, at or near El Paso, as aforesaid.

Eighth. After the completion of the Southern Pacific Railroad to El Paso, the Texas & Pacific Railroad Company claimed and insisted that the same was built upon its right of way under said acts of incorporation, and that the said road thereby became the property of said Texas & Pacific Railroad Company, and thereupon in May, 1881, commenced a suit in the Third judicial district court of the territory of New

Mexico against the Southern Pacific Railroad Company of New Mexico, to have said road so constructed by the said Southern Pacific Railroad Company of New Mexico decreed to be the property of said Texas & Pacific Railroad Company; a copy of the bill of complaint in said cause being hereto attached and made a part of this agreement, as also is a copy of the order made by Hon. WARREN BRISTOL, as judge of said district court, on the filing of said bill of complaint.

Ninth. That during the pendency of said suit the said Texas & Pacific Railroad Company definitely fixed the line of its proposed road, under said acts of congress, across the territory of New Mexico, at the center of the roadbed of the said road constructed as aforesaid by the Southern Pacific Railroad Company of New Mexico, in the manner as required by law.

Tenth. Owing to doubts and uncertainties as to the result of said legislation, and for reasons therein stated, an agreement to compromise the same was entered into by and between the said Texas & Pacific Railroad Company and the Southern Pacific Railroad Company of New Mexico, a copy of which said agreement is filed herewith, and made a part of this stipulation, as evidence in this cause, and that in accordance with said agreement a decree was entered in said cause, a copy of which is filed herewith, and made a part of this stipulation, as evidence in this cause, and also two deeds of conveyance were made and executed by the said Texas & Pacific Railroad Company to the said Southern Pacific Railroad Company of New Mexico, by one of which was conveyed all the right, title, interest, claim, and demand of said Texas & Pacific Railroad Company in and to the right of way, two hundred feet wide, from the Arizona line across New Mexico, at or near El Paso, on the line of the road of the Southern Pacific Railroad Company of New Mexico, a copy of which said deed is hereto attached,

and made a part of the stipulation, as evidence in said cause,—the other deed of conveyance being an assignment and conveyance to the Southern Pacific Railroad Company of New Mexico by the Texas & Pacific Railroad Company of the right of way to take materials from the public lands; also grounds for station buildings, workshops, wharves, switches, side tracks, and depot grounds; also the right of franchise of the Texas & Pacific Railroad Company to lay out, locate, construct, finish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, from a point on the Rio Grande near El Paso, westward, on the most direct and eligible route near the thirty-second parallel of north latitude, granted to said Texas & Pacific Railroad Company by said acts of congress; and also all the lands granted to said Texas & Pacific Railroad Company by the ninth section of said act of congress approved March 3, 1871, to aid in the construction of the railroad and telegraph line described in the first section of said act; a copy of which said conveyance is attached hereto, and made a part of this stipulation, as evidence in this cause.

Eleventh. That the said railroad to be constructed under and in accordance with the said two acts of March 3, 1871, and May 2, 1872, has not been completed in that portion of the state of California between the Colorado river and San Diego.

Twelfth. That the said defendant, since the said Texas & Pacific Railroad Company designated its general route and filed a map thereof as aforesaid, and after it had definitely fixed the line of said road across the territory of New Mexico, and after the making of said agreement with the Southern Pacific Railroad Company of New Mexico, and entering the said decree, and making, executing, and delivering the said two deeds of conveyance, the said defendant entered upon the land in question, which is a part of one of the odd

sections within forty miles of the line of said road as fixed and designated by the Texas & Pacific Railroad Company as aforesaid, said land in question being situated in the county of Dona Ana, and said defendant occupied and held possession of same, at the time of the commencement of this suit, adverse to plaintiff.

Thirteenth. That on February 28, 1885, an act of congress in the following words was passed and approved:

"That all lands granted to the Texas & Pacific Railroad Company under the act of congress entitled 'An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3, 1871, and acts amendatory thereof or supplemental thereto, be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain, and made subject to the disposal under the general laws of the United States as though said grant had never been made; provided, that the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

"Sec. 2. That the act of March 3, 1875, entitled 'An act for the relief of settlers within railroad limits,' is hereby repealed." Approved February 28, 1885.

Fourteenth. That said defendant, on the twenty-seventh day of March, A. D. 1885, filed his homestead entry on the land in question with the register of the United States land office at Las Cruces, New Mexico, paid the lawful fees for the same, and received the usual certificate therefor.

After the evidence was closed the plaintiff moved the court to instruct the jury that under the evidence they should find the defendant guilty, but the court refused the instruction, and to this decision and ruling of the court the plaintiff excepted. Whereupon the court, upon the motion of the defendant, instructed

the jury as follows, to wit: "The court instructs the jury, under the facts stipulated and read in evidence in the case, the plaintiff has not made out such a case as entitles it to recover a verdict against the defendant. The jury will, therefore, find the defendant not guilty;" to which the plaintiff excepted. Whereupon the jury returned a verdict as follows, to wit: "We, the jury in the above entitled cause, do find the defendant not guilty." And thereupon the plaintiff, by its counsel, moved the court for a new trial, for the reason that the verdict was against the law and the evidence in the cause, which the court overruled, and dismissed the suit at the plaintiff's costs; and thereupon the plaintiff excepted, and moves the court to grant it an appeal from the judgment to the supreme court of the territory; which motion was granted, and the plaintiff brings the case into the supreme court by appeal, and assigns for error: (1) The court erred in directing the jury to find the defendant not guilty; (2) the court erred in refusing to give the instructions prayed for by plaintiff to find the defendant guilty; (3) said judgment was rendered in favor of defendant, when it should have been rendered in favor of the plaintiff.

It is contended for the appellant that the grant of the land in question to the Texas & Pacific Railroad Company was a grant in praesenti, and had the effect to convey the land to said railroad company; referring to the ninth section of the act of March 3, 1871. This

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grant, construc-
tion of.

section provides "that, for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas & Pacific Railroad Company, its successor and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be

adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed. * * *

The sections designated as granted were incapable of identification until the line of the road should be "definitely fixed." "When the route is established the grant takes effect upon the sections by relation as of the date of the act of congress. In that sense the grant is one in praesenti. * * *" Van Wyck v. Knevals, 106 U. S. 365, 366.

The act intended that the location of the road should be followed by its construction. Missouri, Kansas and Texas Railroad Co. v. Kansas Pacific Railway Co., 97 U. S. R. 498, and section 13 of the act of congress. This section provided that the president of the company should annually make a report, and file it with the secretary of the interior, which report should be under oath, exhibiting, among other things, the number of miles of road constructed each year, and a description of the lines of road surveyed and fixed upon for construction. Section 12 provided that whenever the company should complete the first and each succeeding section of twenty consecutive miles of railroad, and put it in running order as a first-class road in all its appointments, it should be the duty of the secretary of the interior to cause patents to be issued conveying to the company the number of sections of land opposite to and coterminous with the completed road to which the company should be entitled for each section so completed. Section 18: That the president of the United States, upon the completion of the first section of twenty miles, should appoint one commissioner,

whose duty it should be to examine the various sections of twenty miles as they should be completed, and report thereon to him in writing; and if, from said report, he was satisfied that said company had fully completed each section of its road, as in the act provided, he should direct the secretary of the interior to issue patents to said company for the lands it was entitled to under the act, as fast as each section of the road was completed.

The company, within two years after the passage of the act of March 3, 1871, designated the general route of its road and file a map of the route in the department of the interior. The secretary of the interior then caused the land within forty miles on each side of the designated route within the territory of New Mexico and Arizona, and twenty miles within the state of California, to be withdrawn from pre-emption, private entry, and sale. The map did not show the definite and fixed location of the road, but it was a map showing only the general route of the road. See Bill of Complaint of the Texas and Pacific Railway Company and The Southern Pacific Railroad Company of New Mexico, and others, tr. pages 40-59, and arts. 4, 5 and 8, agreed statement of facts, tr. 10-11.

At this point a statement of the case will be necessary to an understanding of the questions in controversy. The Southern Pacific Railroad Company of the territory of New Mexico was organized under the laws of the territory in 1880. In the years of 1880 and 1881 this company constructed a railroad across the territory of New Mexico on the line of the road claimed by the Texas & Pacific Railroad Company as its right of way. In its suit brought in 1881 the Texas & Pacific Railway Company sought a decree divesting all the title which the Southern Pacific Railroad Company of New Mexico might have or claim in said road, with its fixtures, etc., and vesting it in the Texas & Pacific Railway Company,

upon such terms as the court might deem right. During the pendency of the suit, the Texas & Pacific Railway Company definitely fixed the line of the proposed road across the territory at the center of the roadbed of the road constructed by the Southern Pacific Railroad Company of New Mexico. It is not claimed by the Texas & Pacific Railway Company that the line of its road in the territory of New Mexico was definitely fixed before the Southern Pacific Railroad Company of New Mexico had constructed its road across the territory. The suit was originally between the Texas & Pacific Railway Company and the Southern Pacific Railroad Company of New Mexico. Other companies were made parties in the decree of the court, namely, the Southern Pacific Railroad Company of Arizona, Southern Pacific Railroad of California, the Los Angeles & San Diego Railroad Company, and the Central Pacific Railroad Company. Still other companies that owned or controlled connecting lines of road were also parties in the agreement and compromise, viz., the Missouri Pacific Railway Company, the Missouri, Kansas & Texas Railway Company, and the St. Louis, Iron Mountain & Southern Railway Company. The suit was compromised on the terms set out in the agreement of the parties and the decree of the court. By the terms of the agreement the Texas & Pacific Railway Company transferred to the Southern Pacific Railroad Company of New Mexico its land grant and franchise to construct a railroad and telegraph line and other rights within the boundaries of the territory of New Mexico; a like transfer to the Southern Pacific Railroad Company of the territory of Arizona of the land grant and franchises included within the boundaries of Arizona; a like transfer to the Los Angeles & San Diego Railroad Company of the land grant and franchises, etc., included within the boundaries of the state of California.

The consideration to the Texas & Pacific Railway

Company for the transfer was the agreement of the Southern Pacific Railway companies that the road of the Texas & Pacific Railway Company and the roads of three Southern Pacific Railroad Companies and their connections should be operated and used for all purposes of communication, travel, and transportation, so far as the public and government were concerned, as one continuous through line; the gross earnings to be divided between them in the proportion agreed upon.

The decree of the court contains, among other provisions, the following, viz.: “* * * It is expressly considered, ordered, and adjudged that, except as to the rights, privileges, and easements aforesaid, the said Texas & Pacific Railway Company has no right, title, estate, claim, or demand, at law or in equity, in or to the way, right of way, and railroad, with its appurtenances, constructed by the Southern Pacific Railroad Company of New Mexico, in the territory of New Mexico, or in or to the way, right of way, and railroad, with its appurtenances, constructed by the Southern Pacific Railroad Company of Arizona in the territory of Arizona.”

The Texas & Pacific Railway Company had no right to entangle its affairs in these unauthorized transactions upon any assumption that they would be ratified by congress. *Com. v. Smith*, 10 Allen, 455; *Matthews v. Skinker*, 62 Mo. 329; *Boone, Corp.*, sec. 243.

The act of congress contemplated a road for postal, military, and other governmental services, to be under one management and control, and not an easement and dependency in a system of railways owned and controlled by other and different corporations, as provided by the terms of the agreement and decree of the court. The government was not bound by these proceedings, in which it was not a party; and, although it was stipulated by the parties that the road constructed by the Southern Pacific Railroad Company of New

Mexico was a road of the character, kind, and description required by the two acts of congress, it did not appear that the president of the United States, or the secretary of the interior, approved it as being completed in accordance with the requirements of those acts. The Texas & Pacific Railway Company had no right to make the transfer by virtue of the power conferred on the company by the fifth section of the act, to make running arrangements with other railroad companies, nor the power to transfer its own land grant, road, and franchises by authority of the fourth section of the act empowering the company to purchase the land grant and franchise of, and to consolidate with, any railroad company chartered on the route of the Texas & Pacific Railway Company, that such transfer was contrary to the sixth section of the act, to the effect that the rights, franchises, and property of every description belonging to each of the consolidated or purchased companies should vest in and become absolutely the property of the Texas & Pacific Railroad Company.

It was argued for the appellant that, if the land could be mortgaged for the means to construct, equip, and operate the road, it could be assigned, in the first place, for the same object. It has been held that a power to purchase includes a power to take a mortgage.

LAND grant to railroad: limitation of powers. The proposition that a power to mortgage includes a power to sell is not supported by authority of law. A corporation must exercise its powers in the mode prescribed by its charter. The power to procure means to construct the road in question was not a general power; it was a particular power, to be exercised for a specific object. The Texas & Pacific Railway Company was authorized to issue construction and land bonds, and to execute mortgages to secure the bonds on its land grant and other lands the company might acquire; the proceeds of the sale of

the bonds to be applied to the construction, operation, and equipment of the road, and for the purchase construction, completion, equipment, and operating of other roads as contemplated and specified in the acts of congress. The acts require that the bonds and mortgages should contain an extract from the law authorizing them to be issued, and that the mortgages should be filed and recorded in the department of the interior. The appellant was not a mortgagee, nor a purchaser under a mortgage. No mortgage bond was given in aid of the construction of the road. Sections 11, 14, act March 3, 1871, and sections 2, 3, supp. act May 2, 1872.

It is further contended for the appellant that the proviso in the ninth section of the act implied the right to sell or otherwise dispose of the lands. The proviso is to the effect that the lands granted to the company by the ninth section of the act, which should not be sold or otherwise disposed of within three years after the completion of the road, should be subject to settlement and preemption like other lands. The LIMITATION of grant: forfeiture. proviso was a limitation on the power of the company to hold the lands beyond the period of three years after the completion of the road. How the lands were to be acquired, and to be sold or otherwise disposed of, must be determined from the provisions of the act viewed as a whole. The Texas & Pacific Railroad Company was required by the act of congress to commence the construction of its road at a point at or near Marshall, in the state of Texas, and at San Diego, in the state of California, and to complete specified portions of the road in the stated times, and to complete the whole line from the point at or near Marshall to the bay of San Diego within ten years after the passage of the act of March 3, 1871, extended to ten years after the passage of the supplementary act of May 2, 1872. Upon compliance with the terms of the act in

relation to the times fixed for the completion of the road, it was provided that the land grant should "duly inure" to the company. Section 17, act March 3, 1871; section 5, supp. act May 2, 1872; *Id.*, section 2. It was admitted in evidence on the trial that the Texas & Pacific Railway Company commenced the construction of its road at the eastern terminus, near Marshall, and had it completed to El Paso, on or before the second day of May, 1882. This portion of the road was not in controversy in the suit. It was further admitted that the road had not been completed in that portion of the state of California between the Colorado river and San Diego.

It is further contended for the appellant that there can be no forfeiture of the lands granted to the Texas and Pacific Railroad Company, because congress had reserved a right not to forfeit, but to adopt such measures as it might deem necessary and proper to secure the speedy completion of the road upon the failure of the company to complete it. The appellant, claiming under the defaulting railroad company, will not be heard to complain that the forfeiture of the land grant, thereby subjecting the land to the control of congress, was not a proper measure to secure the completion of the road. The proviso was intended for the protection of the government, and not for the benefit of the railroad company. Time was of the essence of the contract. The Texas and Pacific Railroad Company had incurred the forfeiture of its land grant by its failure to complete the road as required by the act of congress. The forfeiture may be asserted by the United States, through the action of congress, or by judicial proceedings. *Schulenburg v. Harriman*, 21 Wall. 44; *Railroad Land Co. v. Courtright*, *Id.* 311; *Van Wyck v. Knevals*, 106 U. S. 368, 369. The appellant had no standing in court. The judgment is affirmed.

LONG, C. J., and BRINKER, J., concur.

[No. 285. January 17, 1889.]

BENIGNO ROMERO, DEFENDANT IN ERROR, v. FRED-
ERICK DESMARAIS, PLAINTIFF IN ERROR.

CONTRACT—ASSUMPSIT FOR MONEY LENT—EVIDENCE, WEIGHT AND SUFFICIENCY OF.—In an action of assumpsit on a contract for money lent and advanced, tried by the court, sitting as a jury, the court is the sole judge of the weight of the evidence and the credibility of the witnesses; and when there is a direct conflict of evidence its finding will not be disturbed.

ID.—NEW TRIAL—SURPRISE—ERRORS IN RULINGS NOT PREJUDICIAL—EVIDENCE.—A new trial will not be granted on the ground of surprise, unless the occurrence claimed as a surprise be made known at the time, and a continuance demanded on that ground. Nor will a new trial be granted for errors of the court in its rulings upon the admission or rejection of evidence, where such rulings are not prejudicial to the applicant, and the finding and judgment of the court is right upon the whole case.

ID.—VERBAL CONTRACT—INTEREST—LEGAL RATE.—Under section 1734, Compiled Laws, 1884, the rate of interest, in the absence of a written contract fixing a different rate, is six per cent per annum on money due by contract; and it is error, in such case, to allow a greater rate, for which a reversal will be granted, unless the appellee or defendant in error shall remit the excess, within such time as the court may order.

ERROR, from a judgment in favor of plaintiff, to the First Judicial District Court, San Miguel County. Judgment reversed, unless the defendant in error shall, within ten days, remit the excess of interest, adjudged to have been erroneously allowed by the court below.

The facts are stated in the opinion of the court.

CATRON, THORNTON & CLANCY for plaintiff in error.

There was error in admitting in evidence the bond, purporting on its face to be executed by certain parties, when it was in fact signed by five of them only, and

two of those signing it having signed it on condition that all seven would sign it. *Dair v. U. S.*, 16 Wall. 6.

The defendant in error could not recover any greater sum than he proved had been paid out on account of plaintiff in error; and in order to establish that he had paid anything on that account, it was necessary for him to prove to whom it was paid; that the claim so paid was an amount due to the person to whom paid, and for which the plaintiff in error was in some way liable; and such facts must be definite and certain. *Merrit v. Seaman*, 6 N. Y. 168; *Morrison v. Berkley*, 7 Serg. & Rawle (Pa.) 246, margin.

Before defendant in error could recover, it was necessary for him to prove a promise, either express or implied, to reimburse him an aliquot part of the amount he may have paid out. *Beach v. Vandenburg*, 10 Johns. (N. Y.) 360; *Bancroft v. Abbott*, 3 Allen (Mass.), 524.

Before the defendant in error can recover, he must prove an actual payment, and such payment must be strictly within his authority to pay, and must be to the use or benefit of the plaintiff in error, or in accordance with his instructions and directions, expressed or implied. 2 Greenleaf, sec. 113.

Before the defendant in error could maintain his action there should have been a demand on plaintiff in error to pay the same, with notice to plaintiff in error as to what particular amount and what particular claims defendant in error may have paid. *Carpenter v. Kelley*, 9 Ohio, 106; *Sikes v. Ruick*, 7 Jones (N. C.), 19.

As far as the record shows, any payment made by the defendant in error was a mere voluntary payment, for which the plaintiff in error could not be held liable, nor for which could Wooton, the hotel contractor, be held liable. *Edge v. Kountz*, 3 Pa. St. 109.

BREEDEN & VINCENT for defendant in error.

BRINKER, J.—This was an action of assumpsit brought by the defendant in error against the plaintiff in error for money lent and advanced to, paid, laid out, and expended for, the plaintiff in error on an account stated.

The plea was non assumpsit. The cause was tried by the court, a jury having been waived by stipulation. The court found the issues for the defendant in error, and rendered judgment in his favor for the amount of his claim, with seven per cent interest. There was a motion for a new trial filed, heard, and denied, and the cause comes here by writ of error.

The undisputed facts are that one John Wooton was desirous of securing a contract for the erection of an hotel in Las Vegas; that the company which was about to begin the erection of the hotel required him to give a bond for the faithful performance of his contract, and to keep the lot and building free from liens; that the plaintiff in error and defendant in error and four others signed an agreement that they would become securities on this bond; that plaintiff in error and defendant in error and two of the other signers of the agreement signed the bond as such sureties, but the other two failed to do so.

The evidence for the defendant in error shows that Wooton was awarded the contract, and commenced work under it; that some time afterward certain subcontractors threatened to file liens upon the property; that thereupon the plaintiff in error, and the defendant in error, the contractor Wooton, and two others who had signed the bond, held one or more meetings in which they discussed the threatened action of the subcontractors, and their liability on the bond, and finally agreed that, in order to avoid litigation, the sureties would raise the amount of money necessary to pay the subcontractors, and thus

avoid the filing of liens; that the other sureties authorized the defendant in error to borrow the necessary amount of money from the bank for that purpose, and promised that they would all sign a note to the bank for it; that defendant in error did borrow the money from the bank and left it in the hands of the president of the bank, who was also treasurer of the hotel company, with the understanding that he should use it to pay the claims of the subcontractors. The testimony tends to show that the money was applied as directed, although the evidence is not entirely satisfactory upon this point; that defendant in error then endeavored to get the plaintiff in error and the other sureties on the bond, who had authorized the borrowing of the money, to sign the note to the bank, but failed; that defendant in error afterward repaid the whole amount to the bank with seven per cent interest. The testimony introduced by the plaintiff in error, except as to meetings having been held, was, in effect, exactly the reverse of the testimony for the defendant in error. For the defendant in error the witnesses to the alleged agreement were himself, a boy in his employ, and another one of the signers of the bond; for the plaintiff in error on this point were the plaintiff in error and another signer of the bond. The court heard and considered the evidence of these witnesses, and found the issues for the defendant in error.

The plaintiff in error has assigned twenty-three errors as having been committed on the trial. In the view we take of this case it will not be necessary to consider these errors separately.

There was a direct conflict in the evidence. The evidence for the defendant in error, if believed, was sufficient to sustain the finding. The court, sitting as a jury, was the sole judge of the weight of the evidence and of the credibility of the witnesses, and its find-

EVIDENCE, weight
and sufficiency
of.

ing from the evidence is not reviewable here. Zahn v. Stover, 2 N. M. 29; Crolot v. Maloy, Id. 198; Bond v. Brown, 12 How. 254; Vasquez v. Spiegelberg, 1 N. M. 464; City of Richmond v. Smith, 15 Wall. 429. Nor can such findings be examined in this court, even if against the preponderance of the evidence. Waldo v. Beckwith, 1 N. M. 97; Archibeque v. Miera, Id. 160; Ruhe v. Abren, Id. 247.

Plaintiff in error says that he was surprised at the testimony given for the defendant in error concerning the alleged agreement to borrow the money, and that if he had known what that testimony would have been he could have proved by the contractor, Wooton, who was absent at the time of the trial, but who was present at the meeting in which the witnesses for defendant in error say the agreement was made, that no such agreement was made, and no such authority given, as testified to by those witnesses.

There was no effort made before the trial to secure the attendance or testimony of this witness at the trial, nor any excuse offered for failing to do so, nor was there any application for a continuance of the cause on account of his absence. The plaintiff in error evinced no surprise at the time the testimony now complained of was given, nor did he ask for any delay on that account. In fact the record fails to show any request for delay whatever. Under such circumstances the motion for a new trial on that ground was properly denied.

The rule is almost without exception that a new trial will not be granted upon the ground of surprise, unless such surprise is made known at the time of the occurrence claimed to operate as a surprise, and delay be demanded for that reason. If a party who is surprised at the trial allows it to proceed without making his surprise known, and applying for delay upon that ground, and the finding be against him, he can not

New trial: surprise.

have a new trial by reason of such surprise. *Vasquez v. Spiegelberg*, supra, per PALEN, C. J.; *Hill*, New Trials, 99; *Delmas v. Martin*, 39 Cal. 555. In the last case cited, the motion was granted under the peculiar circumstances of that case, but the court recognized the general rule as stated above.

Complaint is made that the court erred in its rulings upon the admission and rejection of evidence.

ERROR in rulings not prejudicial, no ground for new trial. A careful examination of the record in this particular fails to show that the plaintiff in error was in any manner prejudiced by

these rulings. In such case, if error has intervened in the course of the trial, the motion should not be granted if the finding and judgment is right upon the whole case. *North Noonday Co. v. Orient Min. Co.*, 6 Sawy. 503; *Rodey v. Insurance Co.*, decided by this court at January term, 1886; *Goldstein v. Nunan*, 6 W. C. Rep. 132.

The court computed interest against the plaintiff in error at the rate of seven per cent per annum. This was erroneous. The rate of interest, in the absence of a written contract fixing a different rate, is six per cent per annum on money due by contract. Section 1734, Comp. Laws, 1884. The contract found to have been made in this case was not a written one, and the rate of interest should have been calculated at six per cent per annum from the time the contract was made. For this error the judgment will be reversed, and the cause remanded, unless the defendant in error shall, within ten days, remit the excess of interest. If such remittitur is entered the judgment will be affirmed, but the costs of the appeal must be taxed against the defendant in error; and it is so ordered.

REEVES and HENDERSON, JJ., concur.

[No. 342. January 17, 1889.]

TORLINA, PLAINTIFF IN ERROR, v. TRORLICHT &
HOHNSTRATER, DEFENDANTS IN ERROR.

ATTACHMENT, AFFIDAVIT FOR, UNDER SUBDIVISION 4, SEC. 1923, COMP. LAWS, N. M.—CONSTRUCTION OF STATUTES—ASSUMPSIT.—On an affidavit for attachment, in assumpsit, under subdivision 4, section 1923, Compiled Laws, providing that an attachment may issue “when the debtor is about fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder, delay, or defraud his creditors,” it is no sufficient ground that the debtor is about to make an assignment of property, the effect of which will be to delay creditors. Mere delay, which is a necessary incident to the conversion of property into cash to pay debts is not per se fraudulent; the language of the statute “about fraudulently to convey” clearly implies that there may be a conveyance or assignment which will merely delay creditors, as an incident to the transaction, without being fraudulent. But the delay must be so unreasonable as unduly to embarrass or hinder the creditor; and what constitutes such unreasonable delay must depend upon the particular circumstances of each transaction. Where there has been no such delay, the law will not impute fraud, especially not if it appear that the debtor acted in good faith, with the honest intent to apply his property to the just payment of his debts. *Meyer v. Black*, 4 N. M. 352.

ID.—ERROR—EVIDENCE, WEIGHT OF—VERDICT—FINDING.—On error in such case, from the finding of the court, sitting as a jury, the appellate court is not required to examine into the finding to determine whether it should not have been for the opposite party on the weight of the evidence. It is a well settled rule that the supreme court will not disturb the verdict of a jury, where there is any substantial evidence to sustain it; and this rule applies as well to the findings of a court as to the verdict of a jury.

ERROR, from a judgment in favor of defendants on the issue under the affidavit in attachment, and the refusal of the court below to declare the law as requested by plaintiff, to the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiff in error.

W. B. CHILDERS for defendants in error.

LONG, C. J.—The plaintiff in error was the plaintiff in the court below. There, in the district court of the county of Bernalillo, the plaintiff filed in the office of the clerk of said court his declaration in assumpsit and an affidavit for attachment. No question arises as to the sufficiency of the affidavit. Among other averments it contains the following: "The said affiant has good reason to believe, and does believe, that the said August Trorlicht and J. Henry Hohnstrater, partners in trade under the firm name of Trorlicht & Hohnstrater, are about fraudulently to convey, assign, conceal, and dispose of their property and effects, so as to hinder, delay, and defraud their creditors." Upon the affidavit issue was taken, the parties stipulated to waive a jury, and the cause was, on such stipulation, submitted to and tried by the court. After the close of the evidence the plaintiff asked the court to declare the law to be as follows: "First. If it appear from the evidence that, at the time of the suing out of the writ of attachment in this cause, the defendants were about to sell, assign, convey, or dispose of their property or effects, so as to hinder, delay, or defraud their creditors, the truth of the allegations of the affidavit for attachment is sustained. Second. The law presumes that every person intends that the reasonable and probable consequences of an act shall follow its commission, and, if it appears from the evidence that at the time of suing out the writ of attachment in this cause the defendants were about to make an assignment of all their property, and that the result of such assignment would be to hinder, delay, or defraud their creditors, then the law conclusively presumes that such assignment was about to be made with intent to

hinder, delay, or defraud the creditors of the defendants, and the finding should be for the plaintiff. Fifth. Any assignment contemplated by the defendants, the reasonable and probable result of which was to hinder their creditors in the collection of their debts, is sufficient to sustain the attachment in this cause. Sixth. Any assignment contemplated by the defendants, the reasonable and probable result of which was to delay the creditors in the collection of their debts, is sufficient to sustain the attachment in this cause." The court declined to declare the law to be as stated in said requests, and found for the defendants on the attachment proceeding, and rendered judgment on such finding, and also rendered a personal judgment for the sum of \$1,650.30 in favor of the plaintiff, and against the defendants, on the averments of the declaration. It is the finding for the defendants on the issue under the affidavit in attachment and the refusal to declare the law as asked that is assigned for error.

The defendant in error contends the court can not review these questions. That contention is not sustained. The proposition of law which plaintiff asked the court to declare we conceive to be in effect, that any assignment, contemplated or about to be made by a debtor, the effect or result of which is to hinder or delay his creditors, is, under the statute of this territory relating to attachments, fraudulent as matter of law. We are aware that there is much respectable authority which gives strong support to the plaintiff's contention on this question, but believe the better reason is with the authorities which limit the proposition. The court below was not asked to declare that every assignment having the effect to create an unreasonable delay to the creditor should be held fraudulent, but to so declare if the assignment resulted in delay merely, however short the time might be, or however beneficially

ATTACHMENT:
fraudulent conveyance: Sec.
1923, Comp.
Laws construed.

it might result to the creditor. In the nature of things, every assignment must, to some extent, delay the creditor; but is the mere delay which is a necessary incident to the conversion of property into cash to pay debts to be held *per se* fraudulent? Suppose such a transaction to be made, as matter of fact, with the honest intention by the debtor, to enable him thereby, with all reasonable speed, to make early sale of the property and pay all his debts. Shall it be held fraudulent because some delay or hindrance shall occur to the creditor as a necessary incident to the honest application of the property to the payment of debts? We think not. Mr. Burrill, in his work on Assignments (section 335), says: "The term 'delay' has an obvious reference to time, and 'hindrance' to the interposition of obstacles in the way of a creditor; but, to a certain extent, the one involves and includes the other. In point of fact and as actually applied by the courts, they are always taken together. The following are prominent instances in which assignments have been declared void on the ground of hindrance and delay; where the time of sale, or collection by the assignee, or of finally closing the trust, has been, by the terms of the assignment, unreasonably or indefinitely postponed."

Here is to be found, at least under the fourth subdivision of section 1923 of our Compiled Laws, the true distinction and the real test to which every assignment, conveyance, or disposition of property should be brought. The test should be, not does the conveyance or assignment result in delay merely to the creditor, but does it involve unreasonable delay; and what would, or would not, be unreasonable delay must be determined by the particular facts of each transaction. If the delay was manifestly beneficial to the creditor, or one which in its probable result would be so to the creditor, it would not be unreasonable. While the fail-

ing debtor should be required to act in the utmost good faith toward his creditors, he should not be tied up with arbitrary inferences, unreasonable in kind, which would prevent him from realizing for his creditor, either by sale or assignment, the highest possible value for his property, while intending to apply the same to the payment of his debts, so long as he acts therein in good faith, and so as not to create an unreasonable delay in the conversion of the property. The phraseology and spirit of the statute are both in harmony with this view of the question.

It is provided in section 1923, Compiled Laws, that creditors may sue their debtors in the district court by attachment in certain cases, among which are the following: "Fourth. When the debtor is about fraudulently to convey or assign, conceal or dispose of, his property or effects, so as to hinder, delay, or defraud his creditors." The language of the statute must be regarded in giving it construction, as well as its spirit. It does not make the ground of attachment to be that the debtor is about to convey or assign his property so as to hinder or delay his creditors," but the words, "convey" and "assign" are qualified and limited by the adverb "fraudulently;" so that the phrase should be read, in effect, "is about to fraudulently convey" or "fraudulently assign." This language clearly implies that there may be a conveyance or an assignment which will merely delay creditors, as an incident to the transaction, and yet not be fraudulent. An intent to use language with that import by the legislative department would be well founded in reason, and such construction of the law of attachments would be more advantageous both to the debtor and creditor, as it enables the debtor to sell his property, so long as he acts therein in good faith, without involving unreasonable delay, and to apply the proceeds to the payment of his debts, and yet gives to the creditor his right to

attach, if the debtor acts in bad faith, or by means of a transaction creating an unreasonable postponement of payment. Such a rule brings the transaction attached to this test, is the delay so unreasonable in time and character as unduly to embarrass or hinder the creditor. If so, fraud may be imputed. But if there is delay merely, not unreasonable under all the circumstances, fraud will not, as matter of law, be imputed to the transaction, especially if it appear that the debtor is acting with an honest intent in fact to apply his property to the just payment of his debts. In the case of *Meyer v. Black*, 16 Pac. Rep. 620, this court considered substantially the same question, the same arising upon a written assignment, and applied to the facts of that case the rule here stated. The conclusions then reached are not only strengthened by the reasons before stated in this case, but also by some additional authority. In Minnesota (see *Drake*, Att. 670) the statute is: "The writ of attachment is issued whenever it appears by affidavit of the plaintiff * * * that the defendant is about to assign, secrete, or dispose of his property with intent to delay or defraud his creditors." This seems broader than the New Mexico statute, at least in terms, for it gives authority to the creditor to attach when the debtor is "about to assign his property with intent to delay his creditors;" and on such a statute, when the word "fraudulently" before the word "assign" is not used, it might be urged with much force that the intent to delay would be inferred from the fact that such would be the probable result of the act of selling, and, therefore, a sale creating any delay would be within the statute. But the court in Minnesota hold otherwise. The author just quoted, at section 77, cites the case of *Eaton v. Wells*, 18 Minn. 410 (Gil. 369), as a judicial construction in that state of the Minnesota statute, and says: "In Minnesota, an affidavit alleging that the defendant is

about to dispose of his property with intent to hinder, delay, and defraud his creditors was considered not to be sustained by showing that the defendant, who was insolvent, was about to sell for a fair price his property, consisting of an exempt homestead and other real estate, with the purpose and intent to apply all the proceeds, less a part of the price received for the homestead, to pay his just debts owing to a portion of his creditors. The court held that those facts afforded no just grounds for inferring that he was about to dispose of the property with the intent to defraud other creditors, and that the delay in paying the plaintiff, which might result from the defendant's paying the other creditors, was not such a delay as the statute contemplated."

The statute of the state of Missouri is identical with our own, and ours is adopted from that state. In Drake, Att. [5 Ed.] 672, the Missouri statute is set out in full, and, so far as it relates to the point under consideration, is as follows: "The plaintiff in any civil action may have an attachment against the property of the defendant in any of the following cases: '* * * (9) When the defendant is about fraudulently to convey or assign his property or effects, so as to hinder or delay his creditors.'" In the same work (section 74) the case of *Spencer v. Deagle*, 34 Mo. 455, is cited, as giving construction in Missouri to the statute relating to attachments. The author says: "In a subsequent case it was decided that, in making such a conveyance, the fraudulent intent must be shown to have existed in order to sustain the attachment, and that it was not sufficient merely to show that the effect of the conveyance was to hinder and delay creditors." An examination of that case discloses that it fully supports the interpretation given to it by the learned author above cited. In that case the proceeding was by attachment. The averment in the affidavit was

“that the defendant had fraudulently conveyed or assigned his property so as to hinder or delay his creditors.” To support the averment, evidence was given in the trial court that the defendant made a deed of trust of personal property, to secure a note of \$2,500, and the defendant gave testimony tending to prove he did not owe the whole \$2,500, but only a part of it, but that the note was given in part to cover goods which he expected to receive from the payee. In the very nature of the transaction, this trust deed somewhat delayed the plaintiff in that case. That one differs from the one here only in that the Missouri case alleged a completed act, while this one alleges the same act was about to be done, and both are predicated on statutes identical with each other. The principal involved is exactly the same. In the Missouri case, in the court below, the defendant asked the following instruction, which was refused: “The jury are instructed that, to render the deed of trust fraudulent as to Deagle’s creditors, it must appear from the evidence, and you must be satisfied, that the deed was executed for that purpose. It is not enough that the effect of the deed is such as to delay creditors of the defendant. He must have executed it with that purpose and intent.” For the refusal of the court, judgment having gone against defendant, he appealed. The supreme court say the instruction as asked should have been given, and because it was not given, reverse the action of the court below. The Missouri case seems exactly in point, and decisive of the question raised in the record of this case, as to the refusal of the court below to declare the law as asked. The following is also held in Missouri: “The fact that the sale may, or does, have the effect to hinder or delay the creditors is not sufficient to avoid it.” *Murray v. Cason*, 15 Mo. 379; *Gates v. Labeaume*, 19 Mo. 17. The right to dispose of one’s property for honest purposes is not terminated by indebtedness or

insolvency, although such a disposition may, or does, have the effect of hindering or delaying creditors." Dougherty v. Cooper, 77 Mo. 529. Identical as our statute seems to be with that of Missouri on this point, and adopted from that state, and the interpretation there given being founded in good reason, it should be followed here.

Another consideration shows the insufficiency of the legal propositions asked to be declared below. Suppose the affidavit in attachment in this case had been so drawn as to embrace only the proposition declared. Would it have been sufficient to require a writ to issue thereon? An affidavit that the defendants were about to convey or assign their property so as to hinder and delay their creditors, although it had contained all other necessary averments, would clearly not have been sufficient without the addition of the word "fraudulently," or some other equivalent word.

The other assignments of error, in different forms, present for consideration here the action of the court below in its finding on the evidence. Those assignments are as follows: "The plaintiff in error assigns for error in the above entitled cause—Second, the finding of the district court in favor of the defendants on the issue raised by the traverse of the allegations of the affidavit for attachment; third, the judgment of the district court in favor of the defendants on said finding; fourth, the overruling of the motion of plaintiff in error for a new trial on said issue."

The evidence in the court below is all in the record, and has been carefully examined and considered. If

 this court were required to weigh the evidence, and determine whether the finding below was in accordance with the weight of the evidence, then it would be well to consider the testimony of each witness separately on all material points, and to set out the evidence at consider-

FINDING: weight
of evidence on
appeal.

able length in this opinion, but, as the rule is to the contrary, no good purpose will be accomplished by such recital. It is apparent from this evidence that the defendants were men of limited means, and known to be so by the plaintiff. They had his confidence to such an extent that, according to his own evidence, the plaintiff permitted them to select at their own will out of his stock such goods as they desired, and themselves to fix the price. Such confidence is not usually reposed in men unless they have a good record for honesty and fair dealing. Starting in business entirely on credit, which was known to plaintiff, it could not be expected that within three months they would be full-handed. If, under such circumstances, at the expiration of three months, they were not somewhat pressed for ready money it would be unusual. The defendant Trorlicht swears that every dollar received out of the sale of goods, after board bills and necessary running expenses were paid, was applied to the payment of debts, and there is nothing in the evidence to dispute his statement. Even if they had not exhibited good business judgment, so long as they did the best they could, and acted honestly, an intention to defraud would not be thereby proven. The evidence proves that they became pressed for present money; that in such emergency they consulted a lawyer, and wrote to the plaintiff offering to assign to him. This letter bears date May 2d. The affidavit in attachment bears date two days later, to wit, May 4th. The plaintiff, as he swears, after receiving this written offer to assign to him, caused the affidavit and necessary papers to be filed in the attachment proceeding, and then went to see the defendants. He says: "I looked over the business of the house, and saw the way the thing was running, and I left the house with the impression I would not make an attachment; went home with that intention." It would seem from this that the examination

was satisfactory to him. He went there, carrying with him the defendants' written offer to assign to him. It is but reasonable to conclude that at this conference the whole subject of their indebtedness and ability to pay was talked over. As a result of plaintiff's examination into their affairs, he left their place of business satisfied, and to that time evidently had made no direction to attach. Mr. Trorlicht testifies that the plaintiff came to the store, examined the books, and seemed perfectly satisfied. Says Trorlicht: "He told us to come to Albuquerque, and buy more goods if we wanted to. Torlina said: 'Boys, there is no use of your making an assignment.''" Plaintiff does not deny that all this occurred. Even if defendants were thinking on the second day of May of making an assignment, they communicated that fact to plaintiff,—if not their only creditor, by far the largest one. Several days must have intervened, and it would seem that the idea of an assignment was abandoned after the conference, and while the plaintiff yet held control of the writ, and before its levy. In the talk at the store, before the plaintiff ordered a levy made, he said to them there was no need that they should make an assignment. To this defendant assented, and says he had no further intention at all to assign. The plaintiff was paid in cash \$90, and some goods, and left for his home, having abandoned the intention of making the attachment. What induced him to change his mind and perfect the attachment by a levy on the goods? Plaintiff answers that question in his own evidence. He says: "I left the house with the impression I would not make the attachment,—went home with that intention; but I found another party that was going to make another attachment,—jump in ahead,—and the condition of their stock was of such a nature that they could not pay a hundred cents on the dollar at the best, if they would, and I concluded I had better serve the attachment,

which I did the next day following. * * * I concluded, if any other creditor might step in, I would not be left, and would secure myself if I could."

In this state of the evidence, it would not be a strained or unreasonable conclusion that it was the fear that some other creditor would, by a prior attachment, secure a first lien on the goods, which induced the plaintiff to make his attachment. In the conference between the parties before the levy, there is not the slightest evidence that defendants concealed any fact, made any misrepresentation, or were in any way unwilling to turn over voluntarily to plaintiff the whole stock of goods in payment of their debt, or that they were asked to do anything and refused. They had promptly informed plaintiff of their embarrassment, and tendered to him an assignment. There is strong ground to believe they were acting in the best of faith, and much evidence in the record tending to support the finding of the court. This court is not required to examine into the finding to determine whether it should not have been for the other party on the weight of the evidence. The rule here is otherwise. The supreme court of this territory in *Zanz v. Stover*, 2 N. M. 29, said: "The court having acted in this case as a jury, so far as its decision on questions of fact is concerned, its verdict should not be set aside, nor the judgment thereon reversed, in a case where there is any evidence whatever on which it could be based." In this case, the finding of the court should be held to occupy the same place as would the verdict of a jury, and the same rule which in the supreme court would be applied in reviewing there the verdict of a jury should be applied to the finding of the court where a jury is waived by stipulation, and the court determines the case below on the weight of the evidence while sitting in the place of a jury. The rule is well settled that the supreme court will not disturb the verdict of a jury,

where there is any substantial evidence to support it. To that effect are the following cases: *Crolot v. Maloy*, 2 N. M. 198; *Vasquez v. Spiegelberg*, 1 N. M. 464; *City of Richmond v. Smith*, 15 Wall. 429; *Bond v. Brown*, 12 How. 254; *Waldo v. Beckwith*, 1 N. M. 97; *Archibeque v. Miera*, Id. 160; *Ruhe v. Abren*, Id. 247.

When the foregoing rule is applied, and it is further considered that when the charge is fraud it must be clearly and fully proven in the trial court, the duty here would seem to be a plain one. *Kerr, Fraud & M.* 382-384, says: "A man who alleges fraud must clearly and distinctly prove the fraud he alleges. * * * If the fraud is not strictly and clearly proven, as it is alleged, relief can not be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. * * * The law in no case presumes fraud. The presumption is always in favor of innocence, and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting it must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud." In weighing the evidence, the trial court, no doubt, had in mind the foregoing principles, and the effect of the finding there is that the conclusion of fraud does not clearly follow from the evidence. It is not the duty of this court to disturb the finding. No error is found in the record, and the judgment below is affirmed.

HENDERSON and REEVES, J. J., concur.

[No. 355. January 21, 1889.]

FRANCISCO X. VIGIL, APPELLEE, v. GEORGE
H. PRADT, APPELLANT.

ELECTIONS—SERVICE OF ANSWER BY POSTING, MOTION TO STRIKE OUT—
MOTION FOR LEAVE FOR PERSONAL SERVICE ON CONTESTANT AFTER
EXPIRATION OF STATUTORY LIMIT, POWER OF COURT TO GRANT.—In
an election contest for the office of county assessor, where the answer
of the respondent was attempted to be served, under specification
4, of section 1898, Compiled Laws, by posting it on a house previ-
ously occupied by the contestant, but vacated before the posting, and
fifty miles distant from his actual place of residence, a motion to
strike out the answer, on the ground, among others, that no copy of
said answer was ever served on the contestant as required by law,
was properly sustained; and a motion, by the contestee, for leave to
serve on contestant a copy of his answer to contestant's notice of
contest, was properly denied, the twenty days allowed, under section
1235, Compiled Laws, for serving a copy of the answer to the notice
of contest, having expired, and the court no discretionary power to
extend the time. Following Bull v. Southwick, 2 N. M. 323.

APPEAL, from a judgment in favor of contestant,
from the Second Judicial District Court, Valencia
County. Judgment affirmed.

The facts are stated in the opinion of the court.

H. L. WARREN and J. FRANCISCO CHAVES for
appellant.

It was error to deny leave to contestee to serve a
copy of his answer upon contestant. A statutory elec-
tion contest is analogous to and governed by rules of
practice in equity proceedings, and the court had
power, after acquiring jurisdiction of the cause, to con-
trol proceedings before it in furtherance of justice, and
in the exercise of a sound discretion. Comp. Laws,
secs. 1239, 1240, 1242; Dale v. Irwin, 78 Ill. 175;
Whisor v. Kidder, 43 Cal. 237; In re Duffy, 4 Brew.

(Pa.) 531; Williams v. Fire Ins. Co., 50 Iowa, 562; Fish v. Redington, 31 Cal. 185; Fish v. Bligtel, 2 Cranch, 386; Brightley on Elec. 527; Dwarris on Stats. 175; 9 Bac. Ab., p. 234; McCrary on Elec., p. 330, Soper v. Soper.

Where the court has power to allow amendments, refusal on the ground of want of power, is error. Russell v. Conn, 20 N. Y. (6 Smith) 81, and cases cited; Packer v. French, Hill & Denio, 103.

The contestee had filed a sufficient answer to the notice of contest in the office of the clerk of the district court within the time prescribed by section 1235, Compiled Laws, New Mexico; and there is nothing in our statute, nothing in the general principles of law or equity, and nothing in Bull v. Southwick, 2 N. M. 321, et seq., which requires that the incumbent of an elective office shall be summarily ousted, and his opponent seated, for the sole reason that a copy of his answer is not served within twenty days.

NEILL B. FIELD and NEEDHAM C. COLLIER for appellee.

As to the first assignment of error, no exception was taken by the contestee to the action of the court below in refusing him leave to serve the contestant with a copy of his answer to contestee's notice of contest, and it should not be considered here. Hunnicut v. Peyton, 102 U. S. 333; Stanton v. Embrey, 93 U. S. 548; U. S. v. Breitling, 20 How. 252; Peterson v. Gresham, 25 Ark. 380; Jemison v. State, 45 Mo. 332; Miller v. Hershey, 59 Pa. St. 64; Cocker v. State, 31 Tex. 498.

The ruling of the court was in strict accordance with the statute and the rule laid down in Bull v. Southwick. Section 1235, Compiled Laws, N. M.; 2 N. M. 321, et seq.

An election contest is not an equity proceeding.

The service is as in an action at law, the testimony taken as in suits in equity, and everything else is specifically provided by statute. Secs. 1238, 1240, Comp. Laws, N. M.

LONG, C. J.—Francisco X. Vigil, a resident of the county of Valencia, and George H. Pradt, who is the appellant in this court, were opposing candidates for the office of county assessor. The board of canvassers of said county delivered to the said Pradt a certificate of election, whereupon Vigil proceeded to contest the right of Pradt to hold the office, and within the time, and in the form required, filed his notice of contest in the office of the clerk of the district court of Valencia county, and said notice was served on the contestee as required by law. The respondent, Pradt, filed his answer in the office of said clerk within twenty days after service upon him of said notice of contest, and caused a copy of such answer to be posted at a certain dwelling house in the precinct of Los Chavez, in said county. On the seventh day of February, 1887, the contestant filed in the office of said clerk a motion to strike out the said answer, among other reasons, for that no copy of said answer was ever served on the contestant in the manner and within the time prescribed by law, and with such motion the contestant also filed his own affidavit, relating to his place of residence, at the date when the said copy of answer was posted on said dwelling in Los Chavez. On the twentieth day of April, A. D. 1887, by agreement of parties, evidence was heard by the court in support of the averment of the motion as to the place of contestant's residence at the date of the posting of such copy of the answer. On the twenty-fifth day of April, 1887, the contestee filed in the court, a written motion, asking leave to serve upon the contestant a copy of the contestee's answer to the contestant's notice. On the

twenty-eighth day of April, the court overruled the contestee's motion for leave to serve a copy of answer to the notice of contest on contestant, and this action of the court is now sought to be reversed by the contestee, and is one of the grounds of error, and assigned in this court. On the fourth day of May, 1887, the court found that the answer to the notice of contest had not been served on the contestant as required by law, sustained the motion of contestant to strike out the same, and on the averments of the notice of contest found and decreed in favor of contestant, giving him thereby the possession of said office, and this action of the court is also assigned for error.

It is stipulated by the parties that the averments of the notice, if taken as true, are sufficient to require the court below to give the judgment rendered, and also stipulated that the answer in its averments was sufficient, in both form and substance, to constitute a good answer to the notice of contest. The questions to be decided here are: First, whether the leave asked to serve a copy of the answer should have been granted; second, whether the court was right in striking out the answer to the contestant's notice; and the determination of both these questions depends upon the construction given to the statutes of this territory relating to contest of elections. On the motion to strike out, the evidence proved, and the court evidently found, that Vigil, the contestant, from July, 1886, was and resided at a place known and called "La Ojo de la Ternera," and about fifty miles distant from the precinct of Los Chavez, where the copy of the answer was posted. The notice of contest was filed December 7, 1886, and presumably served in twenty days; so that, both at the time of the commencement of the contest, the service of the notice thereof, and when the copy of the answer was posted, the contestant lived about fifty miles distant from the place of posting, and within

ELECTION CON-
TEST: service
of answer by
posting.

Valencia county. Compiled Laws, section 1235, of this territory, is as follows: "The respondent shall file his answer to the notice of contest, and serve a copy thereof on the contestant within twenty days from and after the service of such notice of contest on him, exclusive of the day of such service; and any material fact alleged in the notice of contest, not specifically denied by the answer, within the time aforesaid, shall be taken and considered as true." Section 1238: "A copy of the notice of contest, answer, and reply shall be served, respectively, in the same manner as process is now by law required to be served in an action at law." Section 1236: "The respondent now alleges in his answer any new matter, material to the issue, showing that the contestant is not legally entitled to the office in controversy; and, if he claims that illegal votes have been cast or counted for the contestant, he must specify in his answer the name of each person whose vote was so illegally cast or counted, the precinct where he voted, and the facts showing such illegality." The great importance to the contestant of the answer is at once perceived, upon a consideration of the foregoing last quoted section. The answer may allege new matter, and is in some sense an affirmative statutory pleading, upon which the contestee may himself take the affirmative; and so it would become of the utmost moment that the contestant should at an early day understand fully the issue to be tried, that he might prepare himself with the necessary evidence with which to meet it.

To determine the manner in which the answer must be served, it becomes necessary to refer to the mode provided by law for the service of process in an action at law. This is provided for in section 1898, which is as follows: "Sec. 1898. All original process from any of the courts in this territory shall be executed by the proper officer, as follows: First, by read-

ing the original process to the defendant, and delivering a copy thereof, if required; second, by delivering a copy of the original process to the defendant; third, if the defendant be absent, by delivering a copy of the original process to some person residing at the usual place of abode of the defendant, over fifteen years of age; fourth, if no such person be found willing to accept a copy of the process as above provided for, then by posting the same in the most public part of the defendant's premises."

It is apparent that the contestee attempted to make service of his answer under the fourth specification of section 1898. Two valid reasons exist why this could not be good service. The first is that so long as the contestant resided publicly and openly in Valencia county, where he could, upon proper inquiry, be found, and his place of residence ascertained, service could not be made by posting a copy upon his premises elsewhere than where he resided. The second is that there is no evidence whatever that the place of posting was at the time of posting or afterward the defendant's premises, but, to the contrary, the proof is that the posting was at a place long before the time of the posting vacated by him. So long as the contestant was living publicly in Valencia county, he could not be legally served by posting a copy of the answer on a house once occupied by him, but vacated before the posting, and then fifty miles distant from his actual place of residence. This proposition is too plain to need argument to enforce it. The court did right in striking out the answer, unless it be held that no service of the same was necessary.

The plain language of the statute (section 1235) is: "The respondent shall file his answer to the notice of contest, and serve a copy thereof on the contestant within twenty days," etc. There is no ambiguity about this phraseology. It requires, not the filing alone, but

PERSONAL service
after expiration
of statutory
limit, power of
court to grant.

both the filing and service by copy. Should the court have permitted service, asked at a later day, the plain words of the statute are that service shall be made in twenty days,—not twenty days, or as soon as can be thereafter, or at some other time, but within twenty days. If this were an original and open question, to be now decided by this court for the first time, the argument maintaining the statute to be mandatory would be considered as of great force. The pleadings and practice are fully provided for in the statute, and the same in all particulars specified, so that the proceeding is a special one, and complete within itself. The remarks made by Mr. McCrary, in his work on Elections (section 392), are applicable here: "Promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly or in great part expired."

The whole proceeding provided clearly indicates that the legislature intended to provide a speedy remedy for the determination of such questions. This purpose is especially emphasized in section 1239: "All issues of law and of fact, in any such case of contested election, shall be tried before the district judge at such time and place, within the judicial district in which the case arose, as shall be designated by his order; and judgment rendered by him, either in vacation or in term, as shall be most convenient, and in furtherance of a speedy trial and determination of the case." The notice, answer, reply, and service all show a purpose to speed the determination. Court, for the purpose of this proceeding, is always in session. This case is, however, fully decided in *Bull v. Southwick*, 2 N. M. 323. In that case the respondents, deeming it material, in the trial court asked leave to file a supplemental answer, which leave was refused. The opinion of the trial judge seems to have been adopted by the

supreme court, and contains the following forcible observations (page 363): "It is also my opinion that the very object of the statute in regard to pleadings and practice in contested election cases is to afford, and at the same time compel, the observance of a speedy mode for conducting and determining such cases. Its language is plain and free from all ambiguity. There is no room for mistaking its purport and meaning, and I can not conceive of any reasonable excuse for not following its provisions by either party. These statutory provisions as to the time of filing and serving the notice of contest, answer, and reply are, in effect, statutes of limitation, taking from the judge all discretion as to extending the time. Experience has demonstrated that, without some compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might and would be successfully resorted to, so that a final determination could not be reached before the term of office would expire. This statutory proceeding between rival candidates alone is a special proceeding, complete in itself, conferring a special jurisdiction on the district court, and to which the general rules and law of the court as to the time of the pleading, and the discretion of the district judge in extending the time, do not apply." Justice PARKS, in delivering the opinion of the court, said: "Nearly a year since, in a contested election case in my own district, I was obliged to examine and construe the statute which is in question in this. I then held that the law was mandatory, and have not found any reason in the argument or examination of this case to change my opinion." Mr. Justice PARKS concludes, after speaking of certain authorities cited: "It is the duty of the court to avail itself of all such lights, but to use its own judgment in construing this statute, and not permit it to be practically repealed by a construction, not only too liberal

to be wise, but too loose to be safe." Unless the foregoing case is overruled, the court below must be sustained in this cause. Believing the construction given to the statute in *Bull v. Southwick* to be founded in sound principles, it is our duty to follow it. Finding no error in the record, the judgment below is affirmed.

HENDERSON and REEVES, JJ., concur.

[No. 293. January 21, 1889.]

IN RE EDWARD C. HENRIQUES, EX PARTE.

ADMINISTRATORS—REVOCATION OF LETTERS OF ADMINISTRATION—JURISDICTION OF PROBATE COURT.—By section 562, Compiled Laws, New Mexico, the probate judges have exclusive original jurisdiction in the granting and revoking of letters testamentary and of administration.

ID.—ADMINISTRATOR DE BONIS NON, REVOCATION OF LETTERS OF ADMINISTRATION OF—APPEAL FROM PROBATE COURT TO DISTRICT COURT—CERTIORARI TO REVIEW ACTION OF PROBATE COURT REQUIRING BOND—MOTION TO QUASH PROPERLY SUSTAINED, WHEN.—On an appeal to the district court, by an administrator de bonis non, from an order of the probate court revoking his letters of administration, where the administrator was required to give bond, a motion to quash a writ of certiorari to review the action of the probate court in requiring the bond, was properly sustained. A distinction is made between those cases where a party sues as administrator, or executor, and where he sues personally or in his own right. In the former case no bond is required, but in the latter it must be given. By an appeal, the record and proceedings of the probate court are brought into the district court as fully as by certiorari; and there is no reason why this writ should be allowed. The writ of certiorari, at common law, is not a writ of right, but issues in the discretion of the court, for good cause shown; and, if improvidently issued, may be quashed.

ID.—CERTIORARI, JUDGMENT OF PROBATE COURT NOT REVIEWABLE UPON, WHEN.—In such case the probate court is the judge of the weight of the evidence, and its decision on any issue of fact is not reviewable upon certiorari, on appeal, where there is any competent evidence to support it.

APPEAL from a judgment of the Second Judicial District Court, Valencia County, quashing the writ of certiorari and dismissing the case. Judgment affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for appellant.

By section 531, Compiled Laws, New Mexico, 1884, the district courts have appellate jurisdiction from the judgments and orders of the probate judges and justices of the peace in all cases not prohibited by law, and possess a superintending control over them.

By section 563, appeals from the judgments of the probate court are allowed to the district court in the same manner as in case of appeals from the district to the supreme court.

Appeals from the district court to the supreme court are regulated by sections 2185, 2186, 2187; and by section 2187 upon an appeal being made, the district court is required to make an order allowing the same, and it is provided that such allowance shall stay the execution where the appellant is an executor or administrator, and the action is by, or against, him as such.

It is insisted that the appellant in this case is an administrator, and that the proceeding to remove is against him as such, and that he is entitled to an appeal, and a stay of execution without giving any bond. *In re Pierson*, 13 Iowa, 449; *Roberts v. Wheeler*, 1 Wright (Ohio), 697; *Ulery v. Ulery*, Id. 631; *Maule v. Shaffer*, 2 Pa. St. 404; 1 Williams' Ex'rs, 589, note 1; *Gaine v. Henderson*, 5 Yerg. (Tenn.) 197; *Daniels v. Gregg*, 13 Tex. 384. See, also, *Territory v. Valdez*, 1 N. M. 553; *State ex rel. Talmadge v. Flint*, County Judge, 19 Wis. 655; 2 Tidd's Practice, 1153.

FISKE & WARREN and J. FRANCISCO CHAVES for respondent.

The statute regulating the appeal provides that the execution shall be stayed without bond only where the

appellant is an executor or administrator, and the action is by, or against, him as such. Comp. Laws, N. M. 1884, sec. 2187.

A distinction is made between cases where the action is by or against executors and administrators in their official capacity, and where they sue or are sued personally, such as an order for removal, for cause shown. *Wade v. Colonization Soc.*, 4 *Smede & Marshall* (Miss.), 670; *Mullanphy v. County Court*, 6 Mo. 563; *Harney v. Scott*, 28 Mo. 333; *McCauley v. Griffin*, 4 *Gratt.* 9; *Pugh v. Jones*, 6 *Leigh* (Va.), 299; *Irving v. Melton*, 27 *Ga.* 330; *Commonwealth v. Orphans Court*, 10 *Pa. St.* 37; *Trustees v. Davenport*, 7 *Iowa*, 214; *Pierson's Ex'rs*, 13 *Id.* 450.

It has been held elsewhere that an appeal does not lie from an order removing an administrator. 15 *Ohio St.* 404. But, conceding that our statute gives an appeal in such case, it is expressly subject to the restrictions before mentioned. Comp. Laws, 1884, secs. 563, 2187.

It may be doubted whether our statute, regulating appeals, permits supersedeas, upon entering into recognizance, in any other than money judgments. *Ex parte Floyd*, 40 *Ala.* 116.

A liberal construction has, however, sanctioned such practice. But where the statute does not prescribe the amount of the bond, it is in the discretion of the court, granting the appeal, to fix the amount. *Commonwealth v. Orphans Court*, 10 *Pa. St.* 37.

This court has held that a bond on appeal from the probate court is as necessary as a condition precedent to supersedeas as in cases appealed from the district court to the supreme court. *Chaves v. Perea*, 3 *Gil. (N. M.)* 89.

Upon a certiorari only errors of law will be reviewed. The probate court is established by the organic act. Comp. Laws, 1884, sec. 1907, p. 70. The

administration of estates of decedents is within the well established scope of its jurisdiction and powers. *Ferris v. Higley*, 20 Wall. 375.

It has, by statute, exclusive original jurisdiction in all cases relative to the granting of letters testamentary and of administration, and the power to revoke the same. *Comp. Laws*, 1884, secs. 562, 1366.

The probate court had full jurisdiction of the person and the subject-matter in question in this case, and the order of removal complained of was in all respects regular, and is only subject to review on appeal, and not on certiorari. *Edgar v. Greer*, 14 Iowa, 211; *Matter of Buckner*, 9 Ark. 73; *Swan v. Mayor*, 8 Gill. (Md.) 150; *Chicago, Etc., R'y Co. v. Whipple*, 22 Ill. 105; *Stone v. Mayor, Etc.*, 20 Wend. 104; *Duggan v. McGruder*, 12 Am. Dec. 527, and appended cases; 2 *Chitty's Pr.* 375, et seq.; *Field's Lawyers' Brief*, p. 599, sec. 731; *Tidd's Pr.* 397; *O'Hara v. Hempstead*, 21 Iowa, 33; *Smith v. Parker*, 25 Ark. 518; *Farmington, Etc., Co. v. Commissioners*, 112 Mass. 206.

In *Territory v. Valdez*, 1 N. M. 533, the probate court had no jurisdiction of the person of the removed administratrix by citation or appearance.

REEVES, J.—This is an appeal from the action of the district court of Valencia county in quashing the writ of certiorari and dismissing the case at the costs of the appellant. It appears from the petition of the appellant that he was appointed administrator de bonis non of the estate of Manuel A. Otero, deceased, by the probate court of Valencia county, on the tenth day of September, 1883. Afterward, on the twenty-first day of October, 1885, the probate court revoked and canceled his letters of administration. From this action of the probate court Henriques prayed an appeal to the district court, which was granted. The probate court fixed the amount of the bond to be given by Henriques to stay

the proceedings upon the order of the court revoking his letters at \$150,000. Appellant alleges in his petition for a writ of certiorari that the evidence before the probate court was insufficient to justify the action of the court in revoking his letters. He claims that his appeal operated to stay the proceedings of the court, or, in any event, he was entitled to a stay of such proceedings upon the filing of such a bond as would reasonably be sufficient to secure all damages and costs which might accrue to the estate of the intestate, Manuel A. Otero. He charges that the order fixing the amount of the bond at \$150,000 was made for the purpose of depriving him of his office of administrator, by making it impossible for him to furnish a bond in that amount; that he was able and willing to give such bond as should reasonably be required of him to stay the proceedings. He denies the jurisdiction of the court to require a bond of \$150,000. He states that the total cash value of the personal assets of the estate did not exceed \$25,000; that he was under a good and sufficient bond in the sum of \$100,000 for the safe custody and disposition of the estate, and prays for a writ of certiorari to remove the cause from the probate court into the district court. Afterward, on the twenty-fifth day of November, 1885, the writ of certiorari was issued according to the prayer of the petition, and bond given by the petitioner in the sum of \$25,000 to obtain a stay of the proceedings upon the order of removal, and conditioned to prosecute the writ without delay, and with effect, and to pay all costs and damages which might be adjudged against him by reason of the stay of such proceedings. Thereafter, at a regular term of the district court, on the twelfth day of April, 1886, the writ of certiorari was quashed by the court, and the cause dismissed. From this judgment of the district court the appellant prayed and obtained an appeal to the supreme court, and, having filed his affidavit and bond, the judgment was stayed

until the cause should be decided by the supreme court.

The appellant assigns as errors to his prejudice in this cause the action of the district court in sustaining the motion to quash the writ of certiorari; and dismissing the cause. First, that the writ of certiorari was properly granted, and was the appropriate remedy to reach and review the wrongful action of the probate court, and the judge thereof; second, that the persons who made this motion were not parties to the record, and had no standing in court which entitled them to be heard on such a motion; third, that if the motion was properly made, it amounted in law to a demurrer to the petition, and admitted the truth of all the allegations of the petition for certiorari; fourth, that the allegations of the petition for certiorari, if true, entitled the petitioner to the relief demanded; fifth, the order of the probate judge, requiring petitioner to give any bond to stay the execution of the order removing him, was and is without jurisdiction, and void; sixth, the action of the probate judge in requiring the petitioner to give a bond in the sum of \$150,000 to stay the execution of an order removing him, was an abuse of discretion, which the appellant was entitled to have reviewed in the district court by certiorari. The authorities relied on to sustain the foregoing propositions are the following. By the statute of this territory (Comp. Laws, 1884, sec. 531) it is provided: "The district courts, in the several counties in which they may be held, shall have power and jurisdiction as follows: * * * Third. Appellate jurisdiction from the judgments and orders of the probate judges and justices of the peace in all cases not prohibited by law, and shall possess a superintending control over them." And by section 563 it is provided: "Appeals from the judgments of the probate court 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." Appeals from the district court to the supreme court are regulated by sections 2185-2187; and by section 2187 it is provided: "Upon the appeal being made, the district 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 by, or against, him as such." It is insisted that the appellant in this case is an administrator, and that the proceeding to remove was against him as such, and that he, on the facts stated in the petition, was entitled to an appeal and a stay of execution without the execution of any bond.

In the case of *Wade v. Colonization Society*, 4 *Smedes & M. (Miss.)* 670, the distinction in the cases

ADMINISTRATOR:
bond on appeal.

where a party sues as administrator, or executor, or personally, is clearly shown. The court said: "An executor is entitled to an appeal without surety when the judgment or decree is to affect only the assets of the deceased in the hands of the executor. It is otherwise where a personal judgment can be rendered against him, in which he may be responsible out of his own estate." The case of *Daniels, Administrator, v. Gregg*, 13 *Tex.* 384, was an appeal by the administrator from an order of the county court for a partition of the estate of the deceased, and it was held by the court that the administrator was not required to give an appeal bond. In the case of *Battle, Adm'r, v. Howard*, 13 *Tex.* 345, the court said: "Where an administrator is personally aggrieved by a judgment or decree of the county or district court, and desires to appeal in his own right, he must give bond. The statute dispenses with appeal on the part of executors and administrators in suits brought against the estate for money or property." In the case of *State ex rel. Talmadge v. Flint*, County Judge, 19 *Wis.* 655, the court said: "That on an application of a party desir-

ing to appeal from an order of the county judge the circuit court might make an order directing the county judge to fix the penalty of the appeal bond, or to approve the bond if he improperly refused, or might itself fix the penalty and approve the bond, so that the right of appeal shall not be lost." The applicant for appeal from the judgment of the county court had prepared an appeal bond, and requested the county judge to approve it and to allow the appeal, which he refused to do, and declared that he would not approve the bond in a sum less than the value of the property, stating the value. This was an application for the writ of mandamus, and not a certiorari. Reference is also made to the case of *Mullanphy v. St. Louis County Court*, 6 Mo. 564.

One of the grounds of the motion to quash the writ of certiorari was that the appeal taken and allowed from the order revoking Henriques' letters of administration was pending in the district court. An appeal brings the record and proceedings of the probate court into the district court as fully as could be done by the writ of certiorari, and the trial in the district court is on both the law and the facts of the case. Where redress can be obtained by appeal pending in the court at the time, there is no apparent reason why the certiorari should be allowed. *Petty v. Jones*, 1 Ired. 408; *Savage v. Gulliver*, 4 Mass. 178; *Harwood v. French*, 4 Cow. 501; *Smith v. Parker*, 25 Ark. 518, 12 Am. Dec. 527, and notes. The writ of certiorari at common law is not a writ of right, but it issues in the discretion of the court for good cause shown, or, if improvidently issued, it may be quashed. 1 *Tidd, Pr.*, c. 16, p. 397, etc., and notes; *Munro v. Baker*, 6 Cow. 396; *Flournoy v. Payne*, 28 Ark. 87; *Kegs v. Marin Co.*, 42 Cal. 252; *People v. Supervisors*, 15 Wend. 198; *Knapp v. Heller*, 32 Wis. 467; *Freeman v. Oldham*, 4 Mon. 420; 6 Mass. 72; *Duggen v. McGruder*, 12 Am. Dec. 527, and notes. The appellant alleges in his petition that the evidence

produced before the probate court, and upon which was based the action removing him as administrator, was wholly insufficient in fact and in law to justify such action. The probate court was the judge of the weight of the evidence, and his decision of an issue of fact

JUDGMENT of probate court not reviewable upon certiorari, when.

can not be reviewed upon certiorari, if there was any competent evidence to support it. The error to be reviewed on this writ must be error of law. The evidence is not set forth in the petition. *Starr v. Trustees*, 6 Wend. 564; *Ex parte Hayward*, 10 Pick. 358; *Baldwin v. Calkins*, 10 Wend. 167; *Frankfort v. County Commissioners*, 40 Me. 389; *Overseers v. Brown*, 13 Pa. St. 389; *Overseers v. Overseers*, 7 Watts, 527; *Chicago Railroad Co. v. Whipple*, 22 Ill. 381, 12 Am. Dec. 527, and notes. The supreme court of this territory has decided that the district courts of the territory have jurisdiction to issue this writ to the probate courts in the exercise of their superintending control over them, by virtue of their chancery and common law jurisdiction. *Territory v. Valdez, Probate Judge, et al.*, 1 N. M. R. 533. In this case the court said: "The failure to take an appeal does not preclude a party from the benefit of the writ of certiorari in a case where the probate court had no jurisdiction of such party by appearance or service of process." In the present case it is shown that the appellant, in the probate court, appeared in person and by counsel at the time the order revoking his letters of administration was made by the court.

By section 562, Compiled Laws, New Mexico, it is provided, among other things, that the probate judges

JURISDICTION of probate judges in granting letters testamentary and of administration.

shall have exclusive original jurisdiction in the granting of letters testamentary and of administration, and the repealing of the same. It appears that the probate court had jurisdiction of the person of appellant, and

of the subject-matter before it. The appellant was entitled to an appeal to the district court, but he was not entitled to a stay of the proceedings of the probate court, without bond. The revoking of his letters of administration affected him personally, and he was not exempted by the statute from giving an appeal bond, if he desired to stay the proceedings. The judgment of the district court is affirmed.

LONG, C. J., and HENDERSON, J., concur.

[No. 365. January 21, 1889.]

UNITED STATES OF AMERICA, APPELLANT, v.
NATHAN HALL, APPELLEE.

CRIMINAL LAW—PERJURY, FALSE AFFIDAVIT TO PREEMPTION CLAIM BEFORE PROBATE CLERK, SUFFICIENCY OF TO SUSTAIN INDICTMENT FOR, UNDER SEC. 5392, REV. STAT. U. S.—ACT CONGRESS, JUNE 9, 1880—CONSTRUCTION OF STATUTES.—By an act of congress of June 9, 1880, it is provided "that the affidavit required to be made by the section 2262 and 2301 of the Revised Statutes of the United States may be made before the clerk of the county court, or of any court of record of the county and state or district and territory in which the lands are situated." There is no "county court" in this territory, within the meaning of the statutes of the several states and territories of the United States where such courts exist and are known by that name; nor is the probate court a "county court," or "court of record" within the meaning of the act supra; and an oath to a preemption claim, administered before the clerk of the probate court in taking final proof under said act, was unauthorized, and insufficient to support an indictment for perjury based thereon.

APPEAL from a judgment of the Second Judicial District Court, acquitting defendant of the charge of perjury. Judgment affirmed, LONG, C. J., dissenting, and REEVES, J., concurring; but only on the ground that it was not averred in the indictment that the clerk was the clerk of the probate court, or any other court of record, of Socorro county, expressing the opinion

that the clerks of the probate court and their deputies are authorized to administer oaths for the purpose mentioned in the act of congress.

The facts are stated in the opinion of the court.

THOMAS SMITH, United States district attorney,
for the United States.

W. B. CHILDERS for appellee.

A false affidavit made before an officer not authorized to administer that particular oath, although authorized to administer other kinds of oaths, will not sustain an indictment for perjury either at common law or under the statutes of the United States. *United States v. Curtis*, 107 U. S. 671.

By an act of congress of June 9, 1880, the affidavit required to be made by sections 2262, 2301, Revised Statutes of the United States, must "be made before the clerk of the county court, or any court of record," etc. Supp. to 1 Rev. Stat. U. S., p. 542.

The probate court is not a "county court." Under the English law the county court is of limited jurisdiction, incident to the jurisdiction of the sheriff, with other characteristics, none of which conform to our probate court. *Bouv. Law Dict.*, title "County Court;" 3 *Black. Comm.* 83.

A probate court in American law is a court having jurisdiction of the probate of wills, the regulation and control of decedents estates, and a more or less extensive control of the estates of minors and other persons under the special protection of the law. *Bouv. Law Dict.*, title "Court of Probate;" *Ferris v. Higley*, 20 *Wall.* 381.

The probate court is not a "court of record." Wherein a statute use is made of a technical term, which has a well defined meaning at common law,

resort must be had to the common law definition to ascertain the intention of the legislature. *U. S. v. Magill*, 1 Wash. 465; *U. S. v. Jones*, 3 Id. 215; *U. S. v. McGill*, 4 Dall. 429; *McCool v. Smith*, 1 Black, 459; see, also, 1 *Tomlin's Law Dict.* 470, title "Court of Record;" 1 *Bouv. Law Dict.*, title "Court of Record."

The essential characteristic of a court of record is that it proceeds "according to the course of the common law." *Ex parte Thistleton*, 52 Cal. 224; *Thayer v. Commonwealth*, 12 Mete. 11.

Our probate courts do not proceed "according to the course of the common law," but are of special, peculiar, inferior, and limited jurisdiction. *Arellano v. Chacon*, 1 N. M. 271; *Moore v. Koubly*, 1 Idaho, 61; *Ferris v. Higley*, 20 Wall. 381, 382; *Adams v. Lewis*, 5 Sawyer, 230, et seq.; *Hart v. Gray*, 3 Sumner, 341; *Seaverns v. Gerkey*, 3 Saw. 364; *Matthewson v. Sprague*, 1 Curtis, 461; *Meyers' Fed. Dec.*, vol. 7, sec. 2047.

Being courts of inferior, limited jurisdiction, neither they, nor their judges, nor clerks, can have any powers except such as are necessary to the exercise of their special, peculiar, limited jurisdiction, unless expressly conferred by statute. *Wells on Jurisdiction*, sec. 43; *Peoria v. People*, 20 Ill. 530.

No statute of New Mexico or the United States confers on our probate courts, or on their judges or clerks, any power to administer oaths; and any oath taken before them, unless in a proceeding necessary to the exercise of their special jurisdiction, is a nullity. Sec. 5392, Rev. Stat. U. S.; *Haiglet v. Morris Aqueduct*, 4 Wash. 603, 604, and 606; *Hunt v. Langstrath*, 9 N. J. L. 280; *Stanton v. Ellis*, 16 Barb. 323, 324; *Christman v. Floyd*, 9 Wend. 343, 344; *People v. Tioga*, 7 Wend. 516.

Notaries public, justices of the peace, and the secretary of the territory, are the only officers authorized to administer oaths in New Mexico. No statute of

that character applies to the probate clerk. Comp. Laws, secs. 1742, 2446.

HENDERSON, J.—It is contended on behalf of the appellant that the probate court clerks in this territory have power to administer oaths to witnesses in the class of cases mentioned in the indictment, and in support of this contention the act of congress of June 9, 1880, is cited. The act is as follows: "That the affidavit required to be made by the section twenty-two hundred and sixty-two and twenty-three hundred and one of the Revised Statutes of the United States may be made before the clerk of the county court, or of any court of record of the county and state or district and territory in which the lands are situated." The argument is that the clerk of the probate court of Socorro county was either a county court clerk or a clerk of a court of record, and that, if either, he was competent under the act of congress to administer the oath. The statement

POWER of probate clerk to administer oaths: act congress, June 9, 1880.

in the indictment is that the person administering the oath was a deputy of the probate clerk in Socorro county, in this territory. It was doubtless the intention of the pleader to charge that E. V. Chavez was clerk of the probate court of Socorro county. Waiving any discussion of this mere matter of form, we will look into the intention of congress in the passage of the act of June 9, 1880, and ascertain, if possible, the real purpose had in view. A clerk of a county court is authorized in express terms to administer the oath. The clerk in this case was the clerk of the probate court. There is no county court in New Mexico, within the meaning of the statutes of the different states and territories of the United States, where courts of that kind exist and are known by that name. These courts are not modeled after the system of county courts at one time prevailing in England. In that country county courts are of very great antiquity. See Bouv. Law Dict. "County

Courts;" 3 Bl. Comm. 83. In the United States, county courts are usually of limited jurisdiction, and confined to the fiscal and other local concerns of the county. Courts of probate are usually invested with a wholly different jurisdiction, such as the probate of wills, granting letters testamentary and of administration, the administration of the estates of deceased persons, guardianships, and subjects of a kindred nature. Probate courts in America more nearly resemble the ecclesiastical courts of England than the county courts of that country. We can not think it was the intention of congress, in using the phrase "county courts," to have intended the probate courts of the county, when there is nothing in the act that points in any way to that construction.

In a criminal case the pleader must bring the defendant clearly within the intention of the law, and within the words of the statute, if the offense be founded upon the statute alone. *U. S. v. Cruikshank*, et al., 92 U. S. 542. Is the probate court a court of record? We think not. Bouvier defines a "court of record" in the following terms: "A judicial, organized tribunal, having attributes, and exercising functions, independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law." *Law Dict.*, tit. "Courts of Record." The essential characteristic of a court of record is that it proceeds "according to the course of the common law." *Ex parte Thistleton*, 52 Cal. 224; *Thayer, v. Com.*, 12 Metc. 11. The probate courts do not proceed according to the course of the common law, but are of special, peculiar, and limited jurisdiction. *Arellano v. Chacon*, 1 N. M. 271; *Moore v. Koubly*, 1 Idaho, 61; *Ferris v. Higley*, 20 Wall. 381, 382; *Adams v. Lewis*, 5 Sawy. 230; *Hart v. Gray*, 3 Sum. 341; *Mathewson v. Sprague*, 1 Curt. 461. Being courts of limited jurisdiction, they have no powers except such

as are necessary to the exercise of their special, peculiar, and limited jurisdiction. *Peoria v. People*, 20 Ill. 530. The case of *Fowler et al. v. Merrill*, 11 How. 375, cited by appellant, is not opposed to anything here cited. That was an exception to a deposition in a civil case, and the construction given the statute there, if the case be in any way in point, can not be regarded as authority in a criminal case, where a strict, rather than a liberal, construction must prevail. The interpretation given by the officers of the interior department at Washington in allowing proofs to be made before clerks of the probate courts can have no influence upon the courts in a criminal case, where the language used in a statute of the United States must be construed according to its real meaning, and according to well-known canons of interpretation applicable to the case before the court. Affirmed.

LONG, C. J., dissents.

REEVES, J.—I believe that the clerks of the probate court and their deputies are authorized to administer oaths for the purpose mentioned in the act of congress. I concur in affirming the judgment of the district court because it is not averred in the indictment that Chavez was the clerk of the probate court, or any other court of record, of the county of Socorro.

[No. 261. January 23, 1889.]

CHAVEZ, APPELLANT, v. LUNA, COLLECTOR, ET AL.,
APPELLEES.

TAXATION—BILL TO ENJOIN LEVY AND COLLECTION OF TAXES—JURISDICTION OF THE COURTS TO REVIEW ACTION OF THE LEGISLATURE IN THE ELECTION, QUALIFICATION, AND RETURN OF ITS MEMBERS—VALIDITY OF ACTS OF SESSION OF 1884.—On a bill in equity by a taxpayer, to enjoin the levy and collection of a tax to pay the interest on bonds issued to provide for the erection of a capitol building at Santa Fe, the building of a penitentiary, and for creating and providing for

the office of county assessor, under the acts of March 29, 1884, March 14, 1884, and April 3, 1884, respectively, on the ground of their invalidity, the legislature not being a lawfully constituted body, and having no power to pass said acts; to which a demurrer was interposed—Held: The general superintending control possessed by the supreme and district courts of this territory over the inferior courts does not extend to the judicial action of the houses of the legislative assembly, where it has been deemed necessary to confer upon them such powers to enable them to perfect their organization and perform their duties as such. But no such powers have been delegated by congress to the territorial legislature in express terms, as usually done by the constitutions of the states, so that the rules of decision there have no application here. By section 7 of the organic act, it is provided that all laws passed by the legislature and approved by the governor shall be submitted to congress for its approval, and if disapproved, shall be null and void. Whether congress intended to confer such powers upon the legislature to finally determine the election, qualifications, and return of its members, the court does not decide. But the court will presume that the acts in question, and all other acts passed at the session of 1884, were submitted to congress in obedience to the fundamental law of the territory; and that they received the tacit approval of congress, in the absence of anything to show its disapproval. Congress having thus full power over the subject, and given its assent, there is no ground for the jurisdiction of the courts.

APPEAL, from a decree in favor of defendants, from the Second Judicial District Court, Valencia County. Decree affirmed.

The facts are stated in the opinion of the court.

H. L. WARREN for appellant.

WM. BREEDEN, attorney general, for appellees.

HENDERSON, J.—The complainant, and appellant here, filed in the district court of Valencia county a bill to enjoin the collector, assessor, and board of county commissioners from levying and collecting from him any taxes on account of interest accruing on certain bonds. It is charged that a tax levy had been made, and that the defendant, as sheriff and collector of the county, was about to seize and sell his property unless the taxes levied to pay interest on the

bonds were paid. He charges that the bonds are void, because the pretended acts under which they were issued were never passed by the legislative assembly of this territory, and therefore of no legal validity. The acts assailed as void are entitled as follows: "An act to provide for the erection of a capitol building in the city of Santa Fe," approved March 29, 1884; and "An act authorizing the building of a penitentiary in the territory of New Mexico; and regulating its management," approved March 14, 1884; and a certain other act, entitled, "An act to create the office of county assessor, and to provide for the election and qualification of such officer," approved April 3, 1884. A demurrer was interposed to the bill, and sustained, and, the complainant electing to stand upon his bill, it was dismissed, and the case brought here by appeal.

The bill is, in substance, the following: Complainant is a citizen and taxpayer of Valencia county, and the defendants are the sheriff and collector, county assessor, and county board, of commissioners. The defendant Luna, as collector of taxes, had a warrant in his hands for the collection of the territorial and county taxes, including the taxes levied to pay the interest accruing on the bonds issued under the first two of the acts herein set forth, and was about to seize and sell complainant's property, and would do so unless the taxes were paid or the officer restrained by injunction from so doing. The bill further recites that by virtue of an act of congress approved February 14, 1884, a session of the legislative assembly of New Mexico was held, commencing on the third Monday in February, 1884; that according to an act of congress approved June 19, 1878, the council of said legislative assembly was composed of twelve members; that by the act of February 14, above referred to, the "members elect to the legislative assembly of the territory in November, 1882, and all vacancies legally filled since that time,

if any, were declared to be legal members of the legislative assembly thereby authorized, subject to all legal contests; that on the day appointed for the convening of the said legislative assembly under the act aforesaid, only five members appeared and took the oath of office; that after the oath of office had been administered by the secretary of the territory to the said five members of the council, on motion of one of the five, one Thomas B. Catron was declared to be entitled to a seat in the body, who was thereupon admitted, and took the oath of office; that after the admission of Thomas B. Catron, on motion and without contest, Charles C. McComas and J. M. Montoya were declared by the vote of the six members, including Mr. Catron, entitled to seats in the body, who, thereupon, appeared and took the oath of office, and were admitted as members of the council; that said council was constituted or composed of the five persons first mentioned, as legally entitled to seats in the body, and Thomas B. Catron and Charles C. McComas and J. M. Montoya, until about the twenty-sixth day of March, 1884, when William H. Keller, one of the original five, absented himself, and never again participated in the proceedings of the body; that on the twenty-sixth day of March one Jose Inocencio Valdez, of Colfax county, who had been elected to the council, appeared for the first time and took the oath of office, and thereafter participated in the proceedings of the body. It is further stated in the bill that eight persons alone composed the body at the several dates when the acts sought to be declared invalid were passed. The journal record kept by the council is referred to as evidence of the truth of the charges contained in the bill.

The position assumed in argument on behalf of the appellant is this: In order to give the pretended acts set forth in the bill the force and effect of valid laws, they must have been lawfully enacted by a legally con-

stituted legislative assembly of this territory. It is contended that the full membership of the council consisted of twelve duly chosen councilmen, and that a less number than seven was not a quorum to do business for any purpose, or to determine any question concerning or affecting the organization of that branch of the legislative assembly. It is urged that five persons, not being a majority of the body, could not organize or pass upon the election and qualifications of other persons asserting claims to membership in the body; that the action taken by the five in seating Mr. Catron was void for want of power in them to do any valid act, and that for the same reason the action taken by the six, including Catron, in admitting McComas and Montoya, was for the like reason also void; that these steps taken in order to get a quorum were illegal, arbitrary, and void. It is further argued that executive recognition could not give to the action of a minority any validity whatever, as the act of congress of March 14, 1884, was, and was by congress intended to be, a limitation on the powers of the legislative assembly in the matter of determining the membership of the body; that the only power left to the council under the act of congress above referred to was the determination of valid contests pending before the body; and that the journal shows that there was neither a contest pending nor a quorum voting when the three last named persons were admitted. Appellant cites a long list of cases in support of the jurisdiction of the court to entertain the bill and grant the relief prayed.

There is no doubt whatever about the power of the court to inquire into the facts attending the passage of a bill by the legislature of a state, where the constitution of the state prescribes the mode to be observed by the legislature in passing bills. Where the constitution has been violated, the acts are void. In *Spangler v. Jacoby*, 14

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ture.

Ill. 297, the court said: "It is competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thereby defeat its operation altogether." To the same effect, see *State v. McBride*, 4 Mo. 303; *Purdy v. People*, 4. Hill, 384; *Green v. Weller*, 32 Miss. 651; *Hensoldt v. Petersburg*, 65 Ill. 157; *Town of South Ottawa v. Perkins*, 94 U. S. 267; *Post v. Supervisors*, 105 U. S. 668.

The rule of law, however, declared in the foregoing class of cases does not apply to the state of facts presented by this bill. The question here is not one of mere mode of passage of the acts assailed. There was a quorum present and voting for the several bills at the date of their passage through the council. The only question, therefore, is one of organization of the body. Can the courts entertain a bill to review the action of the legislature in the manner of its organization or the election and qualifications of its members? In the case of *People v. Mahaney*, 13 Mich. 481, COOLEY, J., said: "As the courts are bound judicially to take notice of what the law is, we have no doubt it is our right as well as our duty to take notice, of the printed statute books, also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with. But, although the courts must take judicial notice of legislative action so far as it affects the validity of statutes, they have no such power as respects the facts attending the election of the several members; and it remains to be seen whether we can notice those facts, even after they have been spread upon the legislative journals, and make them the basis of judgments, the retrospective effect of which would be to unseat members of a body long since adjourned, and to annul its action by declaring the votes of such members illegal and invalid." And further on in the same opinion,

it is said: "It is a sufficient answer to this argument that, while the constitution has conferred the general judicial power of the state upon the courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers, and among them is the power to judge of the qualifications, elections, and returns of members of the legislature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this or any other court to review their action."

General superintending control over "inferior courts" possessed by the district and supreme courts in this territory does not extend to the judicial action of the legislative houses in the case where it has been deemed necessary to confer such powers upon them with a view to enable them to perfect their organization and perform their legislative duties. It may, however, be said that no such judicial power has been delegated by congress to the territorial legislature in express terms, as is done usually by the constitutions of the states, and that, therefore, the rules of decision in the states do not apply here. Section 7 of the organic act of this territory is as follows: "That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. But no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect."

Whether in these general terms it was intended by

congress to confer legislative powers upon the legislative assembly of New Mexico, with the usual and ordinary incidental judicial power to determine finally the election, qualification, and return of the members, we do not decide. It is sufficient to say that by the very terms of the organic act above quoted "all of the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect." We

VALIDITY of session acts of 1884. must presume that in obedience to the fundamental law of the territory these acts, together with all others passed at the session of 1884, were submitted to congress; and, there being nothing to show that they were disapproved, they have received the passive assent of congress, and have been in that way approved. Congress has plenary power over the subject, and, being approved by it, there is nothing upon which to ground the jurisdiction of the courts over the subject sought to be reviewed.

LONG, C. J., and REEVES, J., concur.

[No. 343. January 23, 1889.]

BOARD OF COUNTY COMMISSIONERS OF SIERRA COUNTY, PLAINTIFF IN ERROR, V. BOARD OF COUNTY COMMISSIONERS OF DONA ANA COUNTY, DEFENDANT IN ERROR.

COUNTIES—ACT APRIL 3, 1884, CREATING COUNTY OF SIERRA, CONSTRUCTION OF.—The term "indebtedness" in section 8 of the act of April 3, 1884, creating the county of Sierra out of parts of the counties of Dona Ana, Grant, and Socorro, and providing that the indebtedness of Dona Ana county, existing at the date of its approval, shall be apportioned between that county and Sierra, on the basis of the last assessment of property for taxation in Dona Ana county, as it stood at the date and prior to the approval of the act, in proportion to the amount of the taxable property of the county, must be understood as having been used by the legislature in its ordinary sense, which would include debts of every kind and description.

Id.—ASSESSMENT ROLL, EXCEPTIONS TO MUST BE TAKEN, WHEN—NEW TRIAL—EVIDENCE.—Exceptions to the admission in evidence of an assessment roll, not taken at the time, will not be heard on appeal. Where a jury is waived, and the cause is tried by the court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate court, must move for a new trial below, and, if refused, embody the evidence in a bill of exceptions. *Spiegelberg v. Mink*, 1 N. M. 308.

ERROR, from a judgment in favor of plaintiff, to the Third Judicial District Court, Grant County. Judgment affirmed.

The facts are stated in the opinion of the court.

ELLIOTT & PICKETT for plaintiff in error.

Where a statute is of doubtful meaning, resort must be had to the intention of the legislature that framed it. *Maynard v. Johnson*, 2 Nev. Rep. 27; 1 Id. 271; Id. 409; 6 Id. 68; 7 Id. 15.

Where a cause of doubt exists, the whole statute is to be taken together, and so examined and construed as to ascertain, if possible, the legislative intent. 2 Nev. Rep. 27; 10 Id. 125.

In the interpretation of statutes, a maxim was never more applicable than "expressio unius est exclusio alterius." Broom's Legal Maxims, 663, and cases cited in note 4.

The expression or mention of one thing, person, kind, class, or way, is in law an exclusion of all other things, persons, kinds, classes, or ways. *Virginia & Tucker Railroad Co. v. Elliott*, 5 Nev. Rep. 358; *State ex rel. Leake v. Blasdel*, 6 Id. 40; *Sedg. Stat. & Const. Law*, 31, note a.

The legislature not having expressed itself in reference to the payment of the bonded indebtedness of Dona Ana county, nor subjected the property separated therefrom by the act of April 3, 1884, to taxation for the payment of said indebtedness or any

part thereof, and having done so in the case of Socorro county, the presumption of law is, that the legislature did not intend to require Sierra county to pay any part of said bonded indebtedness. It is the presumption that, when one person or thing is expressly mentioned in a statute, all other persons or things are excluded. See cases cited supra; also, Parsons on Contract [3 Ed.], p. 28; Potter's Dwarrris, 175, 178.

As to the second and third assignments of error, see sections 2836, 2839, Compiled Laws, New Mexico, 1884.

RYNERSON & WADE for defendant in error.

The requirement of section 2836 is merely directory, and the roll can not be attacked collaterally, as is here attempted to be done, for irregularities of the kind complained of. Burroughs on Taxation, 200; Krutz et al. v. Chandler, 5 Pac. Rep. (Kan.) 170.

The record fails to show that there was any motion made by the plaintiff in error to set aside the finding of the court and to obtain a new trial; nor does it show any motion in arrest of judgment. Spiegelberg v. Mink, 1 N. M. 309.

The phrase, "bonded indebtedness," in the first section of the act, and the word, "indebtedness," in the eighth section, correctly describe the nature of the county liability in each case, and leave no room for judicial construction.

REEVES, J.—The board of county commissioners of the county of Dona Ana, for and in behalf of the county of Dona Ana, brought this suit in which it complains of the board of county commissioners of Sierra county, acting for and in behalf of the county of Sierra, in an action of assumpsit. The plaintiff in its declaration alleges that on the third day of April, 1884, the legislative assembly of this territory passed "An

act creating and organizing the county of Sierra," and thereby cut off and deprived the county of Dona Ana of a large portion of its territory, and made it a portion of the county of Sierra, and therein providing that the indebtedness of Dona Ana county, existing at the date of the approval of the act, should be apportioned between the county of Dona Ana and the county of Sierra, on the basis of the last assessment of the property made for purposes of taxation in the county of Dona Ana, as the same stood at the date of and prior to the passage of the act, and in proportion to the amount of taxable property taken from the county of Dona Ana. The plaintiff claimed the sum of \$14,410.50 as the proportion of indebtedness due from the county of Sierra to the county of Dona Ana by reason of the apportionment, and prayed for \$15,000 as damages, together with interest and costs. The plea of the general issue was filed for the defendant. A jury was waived, and the cause was submitted to the court, and, the court having heard the evidence and the argument of counsel found the county of Sierra was indebted to the county of Dona Ana in the sum of \$14,065.95, and rendered judgment for Dona Ana county, and against the county of Sierra, for that sum, with interest at the rate of six per cent per annum from the date of the judgment until paid, and costs of suit. The plaintiff in error has brought the case into this court by a writ of error, and assigns as error: First. The court erred in holding that the plaintiff in error was liable or indebted to the defendant in error for any part or portion or proportion of the courthouse bonds issued by the defendant in error, amounting to or being for \$29,500. Second. The court erred in holding that the alleged assessment roll offered in evidence by the defendant in error was the assessment roll of said Dona Ana county for the year A. D. 1883. Third. The court erred in admitting in evidence said alleged

assessment roll offered in evidence by said defendant in error as the assessment roll of said Dona Ana county for the year A. D. 1883. And prays that the judgment may be reversed, annulled, and held for nothing, and that the plaintiff in error be restored to all things it has lost by reason thereof.

It is contended for the plaintiff in error that a doubt exists as to the meaning of the first and eighth sections of the act of the legislative assembly creating and organizing the county of Sierra. By this act it seems that parts of Dona Ana, Socorro, and Grant counties were taken from each of these counties to form and constitute the new county of Sierra. The first section of the act defines the boundaries and limits of the new county, and provides "that the property thus separated from the county of Socorro shall not be exempt from its share of taxation to pay the outstanding bonded indebtedness of Socorro county." Section 8 provides that "the indebtedness of the counties of Grant and Dona Ana shall be apportioned on the basis of the last assessment with said county of Sierra, in proportion to the amount of taxable property taken from each of said counties." The word "indebtedness," as used in the eighth section of the act, is broad enough to include debts of every description and kind. It is defined as "the state of being indebted," and "indebted" as "being in debt," "having incurred a debt." Webst. Dict. By the expression "indebtedness" of the counties of Grant and Dona Ana, the legislature must have intended what that expression means in common parlance. Comp. Laws, N. M., section 1851. In support of the second and third assignments of error counsel for the plaintiff in error cites sections 2836, 2839, Compiled Laws, New Mexico. The first prescribes the form of oath to be taken by the assessor, and which is required to be attached to

CONSTRUCTION of
act April 3, 1884,
creating Sierra
county.

the assessment book; the other section requires the board of county commissioners to make an order approving the assessment roll as revised and corrected by the board. It appears that the assessor did not subscribe an oath attached to the assessment roll for 1883, as required by the section above cited, though the justice of the peace recites that the certificate to the assessment roll was sworn and subscribed to before him, and to which he signs his own official signature. Nor is there any evidence attached to the assessment roll of Dona Ana county for 1883 that it was approved by the board of county commissioners of that county. These objections are urged in the brief of counsel for the plaintiff in error as grounds for the reversal of the judgment. It appears from the record that the assessment roll of Dona Ana county was admitted in evidence on the

ASSESSMENT roll:
exceptions on ap-
peal: new trial:
evidence.

trial in the district court by the stipulation and agreement of parties without objection. There was no objection and no exception to any portion of the evidence introduced in the trial in the district court. The statute, in express terms, provides that "no exception shall be taken in an appeal to any proceedings in the district court, except such as shall have been expressly decided in that court." Comp. Laws, N. M., section 2188. By section 2197, Compiled Laws, "exceptions to the decision of the court upon any matter of law arising during the progress of the cause, or to the giving or refusing of instructions, must be taken at the time of such decision." There was no motion for a new trial in the district court. In the case of Spiegelberg v. Mink, 1 N. M. 308, the court said: "Where a cause is by consent tried by the judge, without the intervention of a jury, the losing party, to entitle himself to a revision of the facts by the supreme court, should move for a new trial, and, if refused, should embody the evidence in a bill of exceptions." Where this require-

ment has not been complied with this court will not revise the proceedings in the district court on questions of fact. We are referred by counsel for the plaintiff in error to the decision of the supreme court the United States in the case of Hopkins v. Orr, 124 of U. S. 510, 515, in which the court construes section 2190 of the Compiled Laws of New Mexico. In this case, the court said: "The manifest object of the statute is not merely to restrain the appellate court from going outside of the record, but to enable it to render such a judgment as, upon a consideration of the whole record, justice may appear to require." Reference is also made to an act of the territorial legislature entitled, "An act with reference to practice in the supreme court, and for other purposes." The act is not before the writer, but, quoting from the brief of counsel, provides: "In all cases now pending in the supreme court * * * in which a jury may have been waived and the cause tried by the court, or the judge thereof, it shall be the duty of the supreme court to look into all the rulings and decisions of the court below, and grant a new trial, or render such other judgment as may be right and just, and in accordance with law," approved January 5, 1889. Our opinion is in harmony with the statute and the decision of the court in Hopkins v. Orr. It does not appear that the district court made any rulings and decisions during the progress of the trial on questions of evidence or otherwise. Finding no error in the judgment of the district court, it is affirmed.

LONG, C. J., concurs.

BRINKER, J.—I concur in the result. The judgment should be affirmed because the record fails to show that any objection was made or exceptions taken during the trial. No motion for a new trial was made

or determined in the court below—no bill of exceptions filed. An examination of the record before us shows that a cause of action was stated in the declaration; that the court heard evidence, made its findings upon the evidence, and rendered its judgment. There is nothing left for us to do but to affirm the judgment. Section 2190, Comp. Laws, 1884.

[No. 356. January 25, 1889.]

CHARLES SEIDLER, APPELLANT, v. A. J.
MAXFIELD AND J. P. SPARKS,
APPELLEES.

THE QUESTIONS presented in this case, upon which the court passed, were the same as those presented in *Seidler v. La Fave* (decided at this present term) by the action of the court below in excluding the notice of November 10, 1880, and the parol testimony offered in connection with it. The property in controversy in that case was a part of the mining claim located under the notice of November 10, 1880, and the property in controversy here is the remainder of it. The court held in that case that the court below erred in excluding the notice, and testimony offered with it, and the judgment was reversed. The judgment here is reversed for the same reasons stated there.

APPEAL, from a judgment in favor of defendants, from the Third Judicial District Court, Sierra County. Judgment reversed for same reasons stated in *Seidler v. La Fave*, ante, page 44.

The facts are stated in the opinion of the court.

ELLIOTT & PICKETT for appellant.

The theory of the court below seemed to be that the burden rested on appellant to prove that the assessment work as required by law, had been done on the claim each year since its location down to the day of trial. This is not the law. Sec. 2324, Rev. Stat. U. S.

If appellant proved the performance of the assessment on the claim for 1885, it defeated appellee's right to relocate the claim in 1886, on the ground that it was

open to relocation for nonperformance of the annual assessment work. *McGinnis v. Egbert*, 5 Pac. Rep. 655; *North Noonday M. Co. v. Orient M. Co.*, 6 Sawy. 309-313; *Jupiter M. Co. v. Bodie M. Co.*, 7 Sawy. 114; *Faxon v. Barnard*, 2 McCrary, 44; *Zollars v. Evans*, Id. 39, 43; S. C., 1 Fed. Rep. 522; S. C., 11 Id. 666; S. C., 4 Id. 702; S. C., 5 Id. 172.

The affidavit of appellant that he was a citizen was sufficient, and the court erred in excluding it. Rev. Stat. U. S., sec. 2321; *North Noonday M. Co. v. Orient M. Co.*, number 2, 6 Sawy. 503-508; *J. J. Reilly et al. v. J. W. Campbell et al.*, 116 U. S. Rep. 418-423.

The location notice was in compliance with the statute, and sufficient. Rev. Stat. U. S., sec. 2324; *Quimbly v. Boyd*, 6 W. C. Rep. 175; *Southern Cross Co. v. Europa Co.*, 15 Nev. 385. See, also, *Eilers v. Boatman*, M. W. S. Rep. 356, 357.

Parol evidence has been held admissible to prove what was meant by the word "North" as used in the description. *Jenny Lind Co. v. Bower & Co.*, 11 Cal. 194-199. See, also, 32 Cal. 11, where it was held parol proof might be introduced to identify the claim by reference to the monuments mentioned in the description.

The court erred in refusing to submit to the jury the original and amendatory location notices. *North Noonday Co. v. Orient Co.*, 6 Sawy. 312, 331; *Eilers v. Boatman*, 111 U. S. Rep. 356, 357.

Actual possession, admitted and proved, makes out a prima facie case for the plaintiff, and puts upon defendant the burden of proving a superior right in himself. *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 321; *North Noonday Co. v. Orient Co.*, 6 Sawy. 503; *Meyers v. Spooner*, 9 Morrison Rep. 519.

The possession will constructively extend to the limits of the claim when they are so defined. *Crossman v. Pendry*, 1 Cal. L. R. 496; *Hicks v. Bell*, 3 Cal. 219;

Weimer v. Lowery, 11 Id. 104; English v. Johnson, 17 Id. 107; Patterson v. Keystone M. Co., 23 Id. 575; Hawxshurst v. Lander, 28 Id. 331.

A party in actual possession of a mining claim, claiming title under a deed, up to the extreme boundary as staked off, before defendant entered, is entitled to the same irrespective of mining laws. North Noonday Co. v. Orient Co., 6 Sawy. 506, 507, and case cited.

Ejectment may be maintained for an entire claim by a purchaser on the strength of his continued and recognized possession to the boundaries described in a defective certificate of location, referred to in his deed. Harris v. Equator Co., 3 McCrary, 14; Green v. Bates, 6 Cal. 263; Rose v. Davis, 11 Id. 133; Baldwin v. Simpson, 12 Id. 560; Keane v. Carsenovan, 21 Id. 291; Kile v. Tubbs, 23 Id. 431; Hicks v. Coleman, 25 Id. 122; McKee v. Greene, 31 Id. 418; Ayers v. Bensley, 32 Id. 620; Walsh v. Hill, 38 Id. 481.

Possession and use for a long time with general recognition of the claim as located have been held to cure defects in the location. Kinney v. Con. Va. M. Co., 4 Sawy. 382; Harris v. Equator Co., 3 McCrary, 60.

In this character of action each party is required to make out his own claim to the premises in dispute, and the better claim must prevail. Golden Fleece Co. v. Cable Con. Co., 12 Nev. 321; Strépy v. Stark, 5 Pac. Rep. 116; Lebanon Mining Co. v. Con. Rep. M. Co., 6 Col. 371.

JOHN J. BELL and CHARLES G. BELL for appellees.

Citizenship, or proof of intention to become a naturalized citizen, is absolutely requisite to acquire a valid location to public mineral lands. U. S. Rev. Stat., sec. 2319; Golden Fleece G. & S. M. Co. v. Cable Consolidated G. & S. M. Co., 1 Morrison Rep. 120.

The affidavit of citizenship was taken *ex parte*, without proper notice to the opposite party, and a non-

compliance with our statutes pointing out the manner of taking testimony of witnesses abroad. Comp. Laws, secs. 2111, 2129. It was not properly authenticated. *Scull v. Thompson*, 16 N. J. L. Rep. 147; Comp. Laws, sec. 1793; 65 Am. Dec. 628. See, also, as to proof of signature and official capacity of a notary public of a foreign state, *Schneider v. Cochraine*, 9 La. Ann. Rep. 235; *Rosine v. Bonnatel*, 5 Rob. La. 164; *Campbell v. Hoyt*, 23 Barb. N. Y. 555; *Bowser v. Warren*, 4 Blackf. (Ind.) 522; *Meullis v. Cavius*, 5 Id. 77, 78; *Catlin v. Ware*, 9 Mass. 218.

A good rule to test the efficacy of the alleged affidavit is, could perjury be assigned on it, in case the oath was false? The defendant under these circumstances could not be indicted. 3 Whar.'s Am. Crim. Law, secs. 2236-2241; 2 Bish. Crim. Law, sec. 984.

There was such a variance between appellant's pleading and proposed proof as to amended location, that the evidence would not be permissible under our system of practice. *Green v. Covillard*, 10 Cal. 317. See, also, *Spangler v. Pugh*, 21 Ill. 85; *Stephen on Pl.* [Tyler's Ed.] 119, 199, 200; 67 Am. Dec. and cases there cited.

"The right to possession of a mining claim is derived only from a valid location, and if there be no location there can be no possession under it." *Garfield M. & M. Co. v. Hammer*, 6 Mon. 53.

The notice of location was void. *Baxter Mountain Gold Mining Co. v. Patterson*, 3 Pac. Rep. 741-744. See, also, *Hanswith v. Butcher*, 4 Mon. 299.

"Location does not follow from possession, but possession from location." *Silver Bow M. & M. Co. v. Clark*, 5 Mon. 414; *Hanswald v. Wilkinson*, 2 Id. 422; *North Noonday M. Co. v. Orient M. Co.*, 1 Fed. Rep. 524.

The appellant is estopped from prosecuting this action. The original certificate of location having been

declared void by a former judgment of the district court, which judgment is in full force and unreversed, in an action wherein this same plaintiff was the plaintiff, and said certificate of location being the foundation of the action. The matter is *res adjudicata*. Wells on *Res Adjudicata*, 169, 179, 189, et seq.; Spencer v. Death, 43 Vt. 105; Hallister v. Abbott, 11 Fos. 448; Dutton v. Woodman, 9 Cush. 261, 348; Gardner v. Buckner, 3 Cow. 127; 29 Ohio St. 604; Lord v. Chadburne, 66 Am. Dec. 295, 760, 68 Id. 160.

BRINKER, J.—This was an action of ejectment to recover the possession of a mining claim known as the "Miner's Dream." On the trial it appeared in evidence that Doheny, Miller, and others, located the Miner's Dream claim on the tenth day of November, 1880; that it passed by mesne conveyances from them to the plaintiff; that one La Fave had some time prior to November 12, 1886, obtained possession of a portion of the original claim, and that plaintiff had sued him in ejectment for its recovery; that about the date last mentioned the case against La Fave was decided in the district court against the plaintiff; that, immediately upon such decision being announced, one Wolf proceeded to the property in dispute here, and made what he called an amendatory location of the Miner's Dream mine, in the name of and for the plaintiff; that the defendant Sparks assisted Wolf in making this amendatory location, by setting up stakes, blazing trees, and building monuments upon its corners and end lines, and that defendant Maxfield also assisted Wolf in that matter to some extent; that, while Wolf and Sparks were engaged in setting the stakes and building the monuments on the boundaries, the defendant Maxfield planted a stake at the mouth of the tunnel, and posted a notice on it claiming the mine for himself and Sparks; that upon Wolf being apprised of what Maxfield had done, he asked Maxfield if he intended to claim the

mine, and Maxfield replied that he did; that afterward Maxfield offered, through Sparks, to waive his claim in plaintiff's favor for \$1,000. This Wolf refused to pay. Plaintiff then offered in evidence the original location notice of November 10, 1880, and the amendatory notice of November 12, 1886, to which defendants objected. The objection was sustained, and plaintiff excepted. Plaintiff then offered to prove, by parol, that the northeast and southeast corners of the Iron King mine, referred to in the location notice of November 10, 1880, were monumented at the time the Miner's Dream was first located. To this defendants objected. The objection was sustained and plaintiff excepted. There was other evidence offered and excluded, which need not now be noticed. The court directed a verdict for defendants, which was returned, and judgment rendered accordingly. A motion for a new trial was made, denied, exceptions saved, and the case brought here by appeal.

In the case of *Seidler v. La Fave* (decided at this term) we were called upon to determine the same questions presented here by the action of the court in excluding this notice of November 10, 1880, and the parol testimony offered with it. The property in controversy in that case was a part of the mining claim located under the notice of November 10, 1880, and the property here is the remainder of it. *Seidler v. La Fave*, p. 44, ante, followed. We held in that case that the court erred in excluding the notice, and the testimony offered in connection with it, and reversed the judgment. We are entirely satisfied with the doctrine then announced, and can imagine no good reason for further discussion of the question here. That case upon this point is decisive of this. We are convinced that the learned judge in the court below did not exclude the original notice, for the reason that it was offered in connection with the amendatory notice. The

judge who presided in the La Fave case presided in this. In the case of La Fave he excluded the notice because, under the rule laid down in Baxter Mountain Min. Co. v. Patterson, it was fatally defective. At the time of the trial of the case now under consideration the doctrine of the Baxter Mountain case had not been questioned, and it was properly considered to be binding authority upon the district court.

As the case must be tried anew, we deem it unadvisable to pass upon the other points made by counsel.

The judgment is reversed, and the cause remanded.

LONG, C. J., and REEVES, J., concur.

[No. 351. January 25, 1889.]

THOMAS B. CATRON, PLAINTIFF IN ERROR, v.
BOARD OF COUNTY COMMISSIONERS OF
SANTE FE COUNTY ET AL., DEFENDANTS IN
ERROR.

TAXATION—BILL TO RESTRAIN LEVY AND COLLECTION OF TAXES—DEMURRER—FRAUD—EQUITY.—On a bill in equity, brought by complainant, a taxpayer and resident of Sante Fe county, charging that the county commissioners of said county issued and sold fifty warrants, with interest coupons attached, after the passage of the act of congress of July 30, 1886, limiting the amount of indebtedness which may be contracted by any county in a territory, and antedated them, that it might appear they had been issued on the first day of July, 1886; that, at the time of the actual issue of said warrants, said county was indebted in a sum exceeding in amount four per cent of the value of the taxable property of the county; and that the commissioners threatened to issue more warrants; that the complainant was threatened with a sale of his property to pay taxes to meet the interest on said warrants; and praying for an injunction to restrain defendants from levying a tax for such purpose; to which defendants filed a general demurrer, which was sustained. Held: The facts charged in the bill, which are admitted by the demurrer, clearly show fraud, entitling complainant to equitable relief, although there may be some legal remedy provided; and the demurrer should have been overruled.

ERROR, from a judgment in favor of defendants, to the First Judicial District Court, Santa Fe County. Judgment reversed.

The facts are stated in the opinion of the court.

CATRON, KNAEBEL & CLANCY for plaintiff in error.

The so-called warrants were void. The law under which they were sought to be issued (Session Laws, 1874, chap. 4) provides for the issue of interest-bearing warrants only to pay for the completion of a courthouse, while these were issued and sold to raise funds for the original construction of a courthouse.

The law conferred no authority whatever on the county commissioners. It is wrongfully compiled in section 186 of the Compiled Laws of 1884. The compiler had no authority to revise. The authority conferred by it on the probate judge has never been transferred to any one else either in direct terms or by implication. It was a special act, and not to be considered as affected by any subsequent general statute, unless it was repealed by the act of 1876, section 345, Compiled Laws.

No municipal corporation can, without special statutory or charter authority, issue and sell at a discount, negotiable securities, to raise money for any purpose. *Mayor v. Ray*, 19 Wall. 475.

They were in fraud of the act of congress of July 30, 1886 (Statute, 1st Sess. 49 Cong. 171), as the county was already indebted to an amount greatly exceeding the limit fixed by that act, and they were issued in August, 1886, and fraudulently antedated July 1, 1886. They could not fall within the exceptions of that statute, as the indebtedness did not exist on the thirtieth day of July, 1886, nor were the so-called warrants, "obligations contracted" or "bonds

already contracted for." See Compiled Laws, secs. 375, 345, 351, 352, 356, 360, 362.

The county board had no power to delegate its discretionary functions, if it had any, to the chairman. *Coquard v. Chariton County*, 14 Fed. Rep. 203.

The demurrer is not well founded. The complainant has no adequate and complete remedy at law. *Ranney v. Bader*, 67 Mo. 476; *Erschine v. Holmbach*, 14 Wall. 613; *O'Shaughnessy v. Baxter*, 121 Mass. 515; *Orr v. Box*, 22 Minn. 485; *People v. Warren*, 5 Hill, 440.

If the complainant sue the county for the recovery of the money which has gone into the hands of public officers, and been paid out, or even misappropriated by them, he may get a judgment for the payment of which a tax must be levied upon himself as well as other taxpayers. *Wright v. Dunham*, 13 Mich. 414; *Withington v. Howard*, 8 Cush. 66; *Moore v. School Directors*, 59 Pa. St. 232. See, also, *Balfour v. Portland*, 28 Fed. Rep. 740.

If the defendants desire to defend against the application on the ground that taxes really due have not been paid or tendered, then the burden is on them to show the fact by plea or answer and affidavits; and that fact shown, the court should then, not dismiss the bill, but require payment as a condition precedent to granting the injunction. *Parmly v. R. R. Companies*, 3 Dillon, 34, 35. See, also, *State Railroad Tax Cases*, 92 U. S. 617; *Palmer v. Napoleon*, 16 Mich. 177; *Hersey v. Milwaukee*, 16 Wis. 186; *Frazer v. Seibern*, 16 Ohio St. 614.

EUGENE A. FISKE for board of county commissioners.

Chapter 4, Session Laws, 1874, New Mexico, is not correctly quoted in plaintiff in error's brief. The material parts of that law, as it originally passed, provided that,

when, "There shall not be sufficient funds in the treasury of any county to complete the erection of any courthouse or jail in said county, and it shall become necessary to issue the warrants of said county or the whole thereof, the probate judge issuing the same may authorize said warrants to draw interest at any rate not exceeding ten per cent per annum," etc. Session Laws, pp. 23, 24.

We disagree with plaintiff in error in his contention that section 186, Compiled Laws, New Mexico, was wrongfully compiled, and that the law is not as stated in that section. Section 4, chapter 56, Session Laws, 1884, p. 181, the act under which this compilation was made, provides that after the compilation was made and had been examined by the attorney general, and published by the governor of the territory in the manner mentioned in the act the laws so compiled "shall be received by all the courts and officers of this territory, and shall in all respects be valid and binding as original enrolled acts approved and filed in the office of the secretary of the territory, as now provided by law."

All the facts necessary to be stated in this or any bill of complaint to authorize the issue of an injunction must be alleged positively, and an injunction can not properly issue in any case upon statements in a bill made upon information and belief only, and without any statement of any sources of such information and belief. High on Inj., secs. 34, 35.

By the laws of this territory the board may establish rules and regulations to govern the transaction of their business, and the chairman of the board alone has the right, under our statute, to sign warrants upon the treasurer. Comp. Laws, N. M., secs. 347, 349.

And the power of the county commissioners to build a courthouse and to issue interest-bearing warrants to pay therefor, is found in sections 186, 345, 349, Compiled Laws, New Mexico, 1884.

Under sections 2863, 2865, Compiled Laws, the county commissioners may upon the application of any party interested refund any tax "found to be erroneous or illegal, whether the same be due to erroneous or improper assessment or improper or irregular levying of the tax," and the judgment of the board upon such matters is by law declared to be final. Having failed to pursue that remedy complainant waived his right to relief in a court of equity. Compiled Laws, N. M. 1887, secs. 2863, 2865, 2841, 345; High on Injunctions, secs. 491, 493, and authorities cited; Session Laws, N. M. 1887, pp. 232, 233, 234; Merrell v. Gorham, 6 Cal. 41, 43; Peoria v. Kidder, 26 Ill. 351, 357, 358; Rio Grande R. R. v. Scanlon, 44 Tex. 649, 661.

The bill was properly dismissed because plaintiff in error did not pay, or tender, to the collector of taxes any part of the taxes admitted in his bill to be due. High on Injunctions, sec. 497; State Railroad Tax Cases, 2 Otto, 575; Hersey v. B. of S. Milwaukee, 16 Wis. 185, 194, 195; Mills v. Johnson, 47 Wis. 598, 603; Bond v. City of Kenosha, 17 Id. 284, 288, 289; Palmer v. Township of Napoleon, 16 Mich. 176; Rio Grande Railroad v. Scanlon, 44 Tex. 651.

Plaintiff in error may refuse to pay the tax, and, if the property be sold for such tax, defend his title at law against the purchaser. Porter et al. v. R., R. I. & S. R'y Co., 76 Ill. 596; High on Inj., secs. 491, 493; Western R'y Co. v. Nolan, 48 N. Y. 519; Hannevinkle v. Georgetown, 15 Wall. 548; Dows v. Chicago, 11 Wall. 108, 112; Van Doren v. Mayor of N. Y., 9 Paige, 390; Robinson v. Gaar, 6 Cal. 275; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 655; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 566; Tuttle v. Everett, 51 Miss. 27, 24 Am. Rep. 623; City of Louisville v. Anderson, 79 Ky. 334; 42 Am. Rep. 220, 223, 224, 225, 226; Douglass v. Harrisville, 9 West Va. 162, 27 Am. Rep. 551; Delphi v. Bowen, 61 Ind. 29.

In such cases equity will never enjoin simply because the levy is void, but only where the bill shows that the complainant is entitled to relief under some one of the established and recognized grounds of equity jurisdiction in addition to the levy being wholly void. *Kilbourne v. St. John*, 59 N. Y. 21, 17 Am. Rep. 391-395; *Haywood v. Buffalo*, 14 N. Y. 534; *Susquehanna Bank v. Brown*, 25 Id. 312, 314, and cases *supra*.

Statutes like ours, where the deed issuing upon a tax sale is not conclusive evidence of right in the purchaser, are not to be confounded with such statutes as that of New York, considered in 39 N. Y. 386, 390, where the deed was made by law conclusive evidence of title, and properly held to be a cloud. *Cooley on Taxation*, 542; *Detroit v. Martin*, 34 Mich. 170; *Hannewinkle v. Georgetown*, 15 Wall. 548; *Van Rensselaer v. Kidder*, 4 Barb. 17, 19; *Bouton v. Brooklyn*, 15 Barb. 395.

As to multiplicity of suits as a ground for equity cognizance, see *Sheldon v. Center School District*, 25 Conn. 224; *Youngblood v. Sexton*, 32 Mich. 406; *Dows v. Chicago*, 11 Wall. 112; *Bouton v. City of Brooklyn*, 15 Barb. 390, 395.

The bill must be construed most strongly against the pleader, and if necessary averments are not found therein they can not be presumed. *High on Inj.*, sec. 491; *Green v. Coveland*, 10 Cal. 317; *Dows v. Chicago*, 11 Wall. 112.

N. B. LAUGHLIN for Santa Fe county.

The Laws of the Twenty-second Session of the Legislative Assembly, pages 18 to 29, and sections 332 to 378 inclusive, Compiled Laws, 1884, taken together and construed in *pari materia*, as they must be, there is little, if any, doubt as to the powers of the county commissioners to build and provide proper and suitable courthouse and county buildings; but, as a matter of

abundant caution, the commissioners and probate judge acted together in the matter, and it does seem that element of good faith is shown in the issue of these warrants.

The board did not exceed its powers in authorizing the chairman to procure suitable blanks for the warrants and coupons; and if any irregularity or want of power existed in the board's authorizing him to negotiate the warrants for cash, and apply the proceeds to the purpose named, it was not such as to warrant an injunction, unless fraud appear clearly and plainly on the face of the bill. *Kinsey v. Pulaski County*, 2 Dillon, 454; *Whitewell v. Pulaski County*, Id. 249; *Britton v. Platte City*, Id. 1; *Stinson v. Carter County*, 23 Fed. Rep. 537.

Should the threatened sale occur, and the collector pass a deed for the real estate of complainant, he has his remedy to defend his title in ejectment, or as against the officer in trespass. *Tyler on Eject.*, 685; *Gaines v. Stites*, 14 Peters, 322.

Complainant is not entitled to the relief sought until he pays, or makes, a legal tender of the taxes due from him to the county, and about which there is no dispute. "Being able, ready, and willing, and offering to pay," does not constitute such a tender as will entitle the complainant to the relief prayed for. *High on Inj.*, secs. 490, 494, 497.

Before a party can maintain a suit to enjoin the collection of a tax he must first pay what is conceded to be due on the face of the bill, which has not been done in this case. *Dundee Mortgage Trust Investment Company v. Parish*, 24 Fed. Rep. 197; *National Bank v. Kimball*, 103 U. S. 723; *Huntington v. Palmer*, 7 Sawyer, 355; *State Railroad Tax Cases*, 92 U. S. 617; *Parmly v. Railroad Companies*, 3 Dillon, 34.

If the law under which warrants were issued is void, rendering the warrants void, as alleged in the bill,

or if the warrants were issued contrary to the act of congress of July 30, 1886, rendering the warrants void in that event, as is also alleged in the bill, and as complainant is seeking relief against a threatened trespass, which may create a cloud on his title, the respondent would be liable in damages in an action at law to the amount of the injury caused by the trespass, and a court of chancery will not interfere by injunction to restrain only a threatened trespass. High on Inj., sec. 496; Mechanics National Bank v. Debolte, 1 Ohio St. 591.

The bill is based on general allegations, which are not sufficient to warrant the relief sought, and the complainant will be left to his remedy at law. High on Inj., sec. 485; Dows v. Chicago, 11 Wall. 108; Cook County v. Railroad, 35 Ill. 465; Bank of Utica v. Utica, 4 Paige, 399; Kilborne v. St. John, 59 N. Y. 21; 17 Am. Rep. 291; 27 Am. Rep. 548; Blackwell on Tax Title, p. 187; 14 Am. Rep. 565.

The complainant failed to pursue his remedy under the statute of the territory, sections 2841, 2863, 2865.

Courts, as a general rule, will not restrain on the bill of only one complainant. Vandever et al. v. Davis et al, 27 Ga. 354; Rules Sup. Ct. N. M., rule 56, p. 43, Equity; Rules of Practice in U. S. Sup. Ct., rule 48, p. 41; Manderville v. Riggs, 2 Pet. 482; 5 Blatch., U. S. Cir. Ct., 525; Campbell v. Railroad Co., 1 Woods, 377; Coann v. Atlanta Cotton Factory Co., 14 Fed. Rep. 4; 2 Woods, 447.

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Sec. 3224, U. S. Rev. Stat., approved May 27, 1872; Comp. Laws, 1884, sec. 522; Kidder v. Bennett, 2 N. M. 37.

The district courts of this territory must conform in their chancery powers to the circuit and district courts of the United States, and the court has no juris-

diction in a case of this kind. U. S. v. Pacific Railroad, 4 Dillon, 66, and authorities cited supra.

BRINKER, J.—On the third day of November, 1887, the plaintiff in error, as complainant, filed in the court below the following bill against the defendants in error:

“To the Hon. Reuben A. Reeves, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the First Judicial District Court thereof: Your orator, Thomas B. Catron, a resident of the county of Santa Fe, in the territory of New Mexico, in his own behalf, as well as in behalf of all other taxpayers, owners of property situate in said county, interested in obtaining the relief herein sought, who shall contribute to the expense of this suit, brings this, his bill of complaint, against the board of county commissioners of the county of Santa Fe, Francisco Chavez, sheriff, and ex officio collector of said county, and Nicholas Garcia, treasurer of the said county, all residents of the said county. And thereupon your orator complains and shows that your orator is, and for upwards of ten years last past he has been, a resident and taxpayer of the said county of Santa Fe; that he owns at least as much property subject to taxation in said county as any other individual taxpayer of the said county whatever; that among the property subject to taxation owned by your orator in the said county is all that certain tract or parcel of land, with the improvements thereon, situate in the city of Santa Fe, on the corner formed by the intersection of the easterly side of the plaza of Santa Fe with the southerly side of Palace avenue, and extending upward of one hundred feet along the easterly side of the said plaza, and upward of one hundred feet on the southerly side of Palace avenue, and containing a superficial area exceeding one hundred thousand square feet; that your orator has

always been ready and willing to pay whatever taxes have heretofore been lawfully levied or assessed against his property in the said county, including the tract of land above described, and has always hitherto paid all taxes thereon which he was lawfully bound to pay; and he is now ready and willing to pay whatever taxes may be lawfully leviable and collectible against him or his said property.

“And your orator further shows that heretofore, to wit, on the twentieth day of July, A. D. 1887, the board of county commissioners of the said county levied the taxes for the year 1887 upon the taxable property situate and taxable in the said county, and fixed the rate of taxation upon such levy as follows: For the county fund, twenty-five cents on each one hundred dollars of the assessed valuation of such taxable property; for the territorial fund, fifty cents for each one hundred dollars aforesaid; for the school fund, thirty cents for each one hundred dollars aforesaid; for the interest on funded county bonds, seventeen cents for each one hundred dollars aforesaid; for the interest on county bonds voted and issued in aid of the Texas, Santa Fe & Northern Railroad Company, thirty cents for each one hundred dollars aforesaid; for the interest on county bonds voted and issued in aid of the New Mexico & Southern Pacific Railroad Company, thirty cents for each one hundred dollars aforesaid; for the interest on the courthouse warrants, hereinafter more particularly described, thirteen cents on each one hundred dollars aforesaid; for the interest on capitol building bonds, five cents for each one hundred dollars aforesaid; for the interest on penitentiary bonds, five cents for each one hundred dollars aforesaid; for the interest on capitol contingent bonds, one cent for each one hundred dollars aforesaid—which levy, your orator avers, upon his information and belief, includes the levy for county purposes of the said county of a tax in

excess of one fourth of one per cent on the assessed value of the taxable property taxable in the said county, over and above so much of the said total levy as was so levied as or by the general taxation.

"And your orator further shows that on the said twentieth day of July, A. D. 1887, the existing indebtedness of the said county of Santa Fe greatly exceeded in amount five per cent of the assessed value of the property assessable and taxable within the said county, as found and ascertained by the last assessment for territorial and county taxes made in the said county, being the assessment upon which the said levy was based.

"And your orator further shows that during the year 1886, and in each and every part of the said year, the said county of Santa Fe was indebted in an amount largely exceeding five per cent of the assessed value of all property assessable and taxable within the said county, as found and ascertained by the assessment for territorial and county taxes made in the said county in the year 1885, as well as the said year 1886; and the said county ever since has been, and still is, indebted in an amount greatly exceeding five per cent of the property assessable and taxable therein; and that the said county indebtedness so existing throughout the year 1886, and ever since, in excess of five per cent of the value of the taxable property within the said county, is, and during all and every part of the said period has been, in excess of five per cent aforesaid, without regarding, calculating, or including the indebtedness or any part of the indebtedness assumed to be created, as hereinafter stated, for or in respect of the erection or completion of the courthouse hereinafter mentioned.

"And your orator further shows that the said board of county commissioners, at a meeting thereof held in the county of Santa Fe on the seventh day of June, A. D. 1886, approved and adopted a resolution in the

words and figures following, to wit: 'Whereas, in the opinion of the county commissioners of Santa Fe county, it appears necessary that the United States and territorial district courts be provided with more suitable and comfortable quarters than those now used for that purpose; and, whereas, the counties of San Miguel and Colfax have more commodious and comfortable quarters; and, whereas, it might appear in the opinion of the judges that, owing to the foregoing facts, the United States and district courts and headquarters of the district judge be removed to Las Vegas or Springer. Therefore, be it resolved, that the chairman of the board of county commissioners of Santa Fe county be and is hereby authorized to advertise for plans for a courthouse to be erected in the city and county of Santa Fe; said building to cost not exceeding \$50,000; and plan to be filed at a date not later than July 1, 1886, at the office of the board of county commissioners. And at the said meeting the said board ordered advertisement to be made for plans and specifications for such contemplated building.'

"And your orator further shows that thereafter, on the twenty-ninth day of June, A. D. 1886, the said board of county commissioners, at another meeting by them held in the county aforesaid, adopted a certain preamble and resolutions, by which preamble the said board, pretending to recite the said proceedings had as aforesaid, at the said meeting of June 7, 1886, falsely made it to appear that at the said meeting of June 7, 1886, it was deemed necessary that the said board of county commissioners of Santa Fe county advertise for and receive, in the usual manner, bids and proposals for the erection at the county seat of Santa Fe county, and at such location as should be designated by the said board, of a courthouse to be built according to the plans and specifications therefor which should thereafter be selected and adopted by the said board, the

cost of construction, completion, and furnishing thereof not to exceed the sum of \$75,000, and by which preamble it was declared that there were not sufficient funds in the treasury of the said county to complete the erection of the said courthouse in said county, and it had become necessary to issue warrants of the said county for the said sum of \$75,000, and by which resolution, so adopted at the said meeting of June 29, 1886, it was resolved that the sum of \$50,000 be and was thereby appropriated by the board of county commissioners of Santa Fe county, N. M. for the purpose of building, completing, and furnishing as near as possible, a courthouse for said county; and it was then and there further resolved, in the words and figures following, to wit: 'That county warrants of said county of the denomination of ———, bearing date the ——— day of ———, A. D. 1886, and running with interest coupons attached, and bearing interest at the rate of eight per cent per annum, be issued by this board for the purpose above set forth to the amount of \$50,000,' which resolution was incomplete, and blank on its face; in the particulars so appearing in the foregoing quotation thereof.

"And your orator further shows that at a further meeting of the said board of county commissioners held on the twentieth day of July, A. D. 1886, in the said county, the said resolutions so adopted by the said board as aforesaid on the twenty-ninth day of June, A. D. 1886, were rescinded, and the said board, acting then and there jointly with the probate judge of the said county of Santa Fe, who was then and there present, participating with the said board in its proceedings in that behalf, adopted a certain preamble and resolutions in the words and figures following, to wit: 'Whereas, at a special meeting of the board of county commissioners of Santa Fe county, N. M., held at the county seat of said county, and at the office of the

clerk of said county, on the seventh day of June A. D. 1886, the said board of county commissioners of Santa Fe county deemed it necessary and expedient to provide more suitable rooms for county purposes than those heretofore in use; and whereas, at said meeting, it was also deemed necessary, under and by virtue of the powers in them vested by law, to provide for and build, at the county seat of said county, a county courthouse sufficient and adequate to meet all the requirements and business of said county; and whereas, in order to carry out the purpose set forth in the above recitals, it was deemed necessary that the said board of county commissioners of Santa Fe county advertise for and receive in the usual manner bids and proposals for the erection at the county seat of Santa Fe county, and at such location as shall be designated by the said board, of a court house to be built according to the plans and specifications therefor, which shall hereafter be selected and adopted by the said board, the cost of construction, completion, and furnishing thereof not to exceed the sum of \$75,000. Therefore it is ordered and resolved by the said board of county commissioners and the probate judge of the county of Santa Fe, who is present, participating with said board in these proceedings, and concurring in this action, order, and resolution, that, for the purpose of obtaining sufficient funds for the purpose aforesaid, warrants of the said county of Santa Fe be issued in due form of law for the amount necessary for the purpose aforesaid, not exceeding the sum of \$75,000; that said warrants be made and issued in and for the sum of — dollars each, bearing interest at the rate of eight per cent per annum from date until paid. Said interest to be payable on the first day of January and the first day of July of each year; and eight per cent is hereby fixed as the rate of interest on said warrants. And it is further ordered that proper coupons therefor be attached to and issued with such

warrants, and that said warrants be made payable and to become due in twenty years from July 1, 1886, and that they be dated July 1, 1886. And it is further ordered and resolved that the chairman of this board procure the printing of suitable blanks for said warrants and coupons, upon the best obtainable terms, and that said warrants and coupons, respectively, when ready for issue and delivery, be signed by the chairman of this board, and duly attested by the clerk and seal of this board. And it is further ordered and resolved that the chairman of this board be and is hereby authorized and empowered to negotiate and dispose of said warrants for cash, upon the best terms and for the highest price which he can obtain, and to apply the proceeds to the purpose aforesaid,'—which resolutions contain the blank appearing in the foregoing quotation thereof.

“And your orator further shows upon his information and belief that the said board of county commissioners and the said probate judge, or either thereof, had no lawful authority to provide for the erection of a courthouse in manner and form aforesaid, or to create the indebtedness contemplated by the aforesaid resolutions, or to issue, negotiate, or dispose of, or cause to be issued, negotiated, or disposed of, any warrants, obligations, engagements, instruments, or evidences of debt, of the nature, terms, purport, or effect of the warrants or instruments described and specified in the said resolutions, or to delegate to the chairman of the said board of county commissioners the power or authority to negotiate and dispose of such warrants or instruments assumed by the said resolutions to be delegated to and vested in the said chairman.

“And your orator further shows that thereafter, and in the month of August, A. D. 1886, Bernard Seligman, then and still the chairman of the said board of county commissioners, acting under color of the said

resolutions, and the power and authority thereby purporting to be conferred on him in that behalf, caused fifty so-called warrants of the said county of Santa Fe to be printed, with interest coupons thereto attached, each of which instrument so printed bore date, Santa Fe, N. M., July 1, 1886, and provided in terms that the treasurer of the county of Santa Fe was thereby directed to pay to the bearer one thousand dollars in the gold coin of the United States, for value received, with interest at the rate of eight per cent per annum, payable semiannually on the 1st days of January and July of each year, according to the coupon interest warrants thereto attached; and further provided, that the said interest coupons, or so-called coupon interest warrants, must be surrendered for cancellation upon payment thereof, such payment to be made at the American Exchange National Bank, New York; and further declared upon its face as follows, to wit: 'This warrant is issued to pay for the completion of the erection of a courthouse for Santa Fe county, under the provisions of the laws of the territory of New Mexico relating thereto, and providing for the payment thereof, and is payable twenty years after the date hereof, the county of Santa Fe reserving the option to pay and take up the same at any time after ten years from the date hereof;' and further purporting to bear the seal of the board of county commissioners of the county of Santa Fe, N. M., and the signature of the chairman of the said board, and purporting to be attested by the probate clerk and ex officio clerk of said board of county commissioners, the said so-called warrants being numbered seriatim from one to fifty, both inclusive; and each of the said attached coupons or so-called 'interest warrants' purporting to promise that the treasurer of the county of Santa Fe, N. M., would pay to the bearer thereof forty dollars for interest due on warrant No. — (meaning the instrument to which such coupon was originally

attached), issued on account of the completion of the erection of a courthouse for the county of Santa Fe; and purporting to be signed by the chairman of the said board of county commissioners, and attested by the said clerk, and each coupon bearing also the date of its maturity; a fac simile in blank of which instrument is herewith filed.

“And your orator further shows that the said Bernard Seligman, as such chairman, and under color of his assumed power and authority in that behalf, subscribed each and every one of said instruments, to wit, the said fifty so-called ‘warrants,’ and the coupons thereto attached, and caused the same to be attested by the probate clerk and ex officio clerk of the board of county commissioners aforesaid, and caused the seal of the said board to be impressed on each of the said principal obligations or so-called ‘warrants;’ and thereafter, on the sixth day of August, A. D. 1886, delivered all and singular the said fifty so-called ‘warrants,’ with the said attached coupons, to Luther M. Meily, as agent of the Southern Trust Company, a foreign corporation, upon the declaration and promise of the said Meily, as such agent, that the said Southern Trust Company, upon receipt of the said instruments, would place to the credit of the said Bernard Seligman, as such chairman, the sum of forty-two thousand and five hundred dollars, and interest at eight per cent per annum from July 1, 1886, to date of payment, for the said so-called ‘warrants,’ and that the said sum should be deposited with the First National Bank of New York.

“And your orator further shows upon his information and belief, that the said Luther M. Meily and the said the Southern Trust Company were employed by the said Bernard Seligman as his agents or instrumentalities in negotiating and disposing of the said so-called ‘warrants’ and coupons; that the same were not, nor was any part thereof, contracted for, sold, issued,

delivered, or disposed of until some time (to your orator unknown) in the month of August, A. D. 1886, although your orator believes that such time was the 15th day of August, A. D. 1886; that on the said 15th day of August, A. D. 1886, the said the Southern Trust Company, having received the said instruments from the said Bernard Seligman, through the instrumentality of the said Luther M. Meily, delivered the same to some person or persons, to your orator unknown, in consideration of some purchase price, to your orator unknown, paid to the said the Southern Trust Company in that behalf, or to some other person or persons, corporation or corporations, to your orator unknown, but which purchase price, your orator believes, exceeded ninety per cent of the face of the so-called 'warrants;' that, whatever may have been the real price so paid by the purchaser of the said instruments, the said Bernard Seligman pretends that the said purchase price was only the sum of forty-two thousand, nine hundred and eighty-eight dollars and eighty-eight cents, being eighty-five per cent of the face value of the said so-called 'warrants,' with interest at eight per cent per annum on the said face value, from July 1, A. D. 1886, the date of the said so-called 'warrants,' to August 15, A. D. 1886, the time when, as your orator believes, the said purchase money was paid as aforesaid; that the said the Southern Trust Company, or some other person or persons, corporation or corporations, to your orator unknown, held the said sum of forty-two thousand, nine hundred and eighty-eight dollars and eighty-eight cents, proceeds, or part of the proceeds, of the negotiation of the said instruments, to the credit of the said Bernard Seligman, as chairman of the said board of county commissioners, from the 15th day of August, A. D. 1886, until the 23d day of August, A. D. 1886, on which last mentioned day the said the Southern Trust Company, by L. M. Schwan, its secretary and treasurer, deposited the said

sum of forty-two thousand, nine hundred and eighty-eight dollars and eighty-eight cents with J. & W. Seligman & Company, bankers, of the city of New York, to the credit of Bernard Seligman, chairman of the board of county commissioners; that thereafter the said Bernard Seligman, acting under color of his said assumed power and authority in that behalf, transferred the said amount of the said deposit, or a great part thereof, from the said J. & W. Seligman & Company to some depository, to your orator unknown, in the state of California; and thereafter, or at some other time, he transferred a part of the same amount to the Second National Bank of New Mexico, at Santa Fe; and at all times, ever since the said 23d day of August, A. D. 1886, the said Bernard Seligman, under the color of the said assumed power and authority held and retained, dealt with and disbursed, according to his own pleasure, the said sum of forty-two thousand, nine hundred and eighty-eight dollars and eighty-eight cents, as chairman aforesaid, without any further or other power or authority from any source derived or in him vested, and utterly refused and neglected to pay the said sum of money, or any part whatever thereof, to the treasurer of the said county, or into the treasury thereof.

“And your orator further shows that the said board of county commissioners and the said probate judge, or either thereof, had no authority to issue or negotiate negotiable paper of the said county, or to bind the said county by negotiable instruments of any character or in any form not authorized by statute; that the so-called ‘warrants’ specified, described, and intended in and by the said resolution were not negotiable instruments, nor were they even, as so specified, described, and intended, warrants of the nature, character, form, tenor, or purport lawfully authorized; that the said Bernard Seligman, under color of his assumed power and authority, but without the direction,

command, knowledge, or consent of the said county of Santa Fe, or of the said board of county commissioners, and without any pretense of authority except the said resolutions, contrived and executed the said instruments in the form of negotiable securities or contracts, payable to bearer, with intent to sell and dispose of the same as obligations in the nature of commercial paper; that although, by the said proceedings and resolutions, the said board of county commissioners and probate judge intended to provide for the erection of a courthouse, and every part thereof, from the first and inceptive building thereof until the full completion thereof, yet the said Bernard Seligman, under color aforesaid, so contrived and framed the said instruments as though they were designed and intended to raise funds in behalf of the said county, not for the original construction of a courthouse, but only for the completion of the erection of an incomplete courthouse, whose construction had been commenced and substantially continued before the issue or contrivance of the said instruments.

“And your orator further shows that, according to the purport and apparent tenor and effect of the said so-called ‘warrants,’ and the said attached interest coupons, the first of the said coupons, for the payment of six months’ interest from July 1, A. D. 1886, to January 1, 1887, became, by the terms of the said coupons and of the said so-called ‘warrants,’ due and payable on the 1st day of January, A. D. 1887; and the second of the said coupons for the payment of six months’ interest on the said principal from January 1, 1887, to July 1, 1887, became due and payable on July 1, 1887; and the said item in the said tax levy of thirteen cents on each one hundred dollars of taxable property within the said county was so levied and intended to pay the said interest accrued up to July 1, 1887, or some part thereof, and for no other purpose whatever.

“And your orator further shows that, after the said levy for territorial and county taxes so made as aforesaid by the said board of county commissioners in the month of July, A. D. 1887, a warrant for the collection of the amount of taxes so levied out of the taxable and assessed property within the said county was issued in apparent due form of law to the said defendant Francisco Chavez, sheriff of the said county, as ex officio collector of taxes therein, commanding him to collect from the several taxpayers of the said county, and out of the taxable property assessed within the said county, according to the respective assessments thereof made upon and against the said taxpayers and their property severally and respectively, including your orator, and his assessed property within the said county; and by virtue of the said warrant, and under color of the said tax levy, and of the several resolutions aforesaid of the said board of county commissioners and probate judge, the said defendant Francisco Chavez, as such collector, is now demanding from your orator and the other taxpayers of the said county payment of all and singular the said taxes, including the said item so levied, for the payment of the said interest on the said so-called ‘warrants,’ and he is threatening your orator and the said other taxpayers with distraint and seizure of their said taxable property, and with a sale and conveyance thereof under his authority as such collector, unless your orator and the said other taxpayers will pay to him, as such collector, the whole amount so assessed and levied against them, respectively, as taxes, including the said item so levied for payment of the said interest.

“And your orator further shows that the said item of thirteen cents on each one hundred dollars of the said taxable property within the said county is easily ascertainable by itself, and separable and distinguishable from the other items of the said tax levy.

"And your orator further shows upon his information and belief that the said defendant the board of county commissioners of the county of Santa Fe now threaten to cause to be made, executed, negotiated, issued, and sold, in open market, other like instruments or so-called 'warrants,' with attached interest coupons, in the amount of twenty-five thousand dollars principal, being the said seventy-five thousand dollars, less the said fifty thousand dollars; and this, under color of the said resolution purporting, as aforesaid, to authorize an indebtedness of seventy-five thousand dollars principal, against the said county for the erection and furnishing of a courthouse.

"And your orator further shows that the said defendant, the board of county commissioners of the county of Santa Fe, not only gives out and threatens that it will create the said additional pretended indebtedness of twenty-five thousand dollars principal, with interest at eight per cent per annum, to be paid thereon semiannually during the period of twenty years from the 1st day of July, A. D. 1886, but also, that it will, every year, for the next twenty years aforesaid, cause to be levied upon and out of the taxable property within the said county enough money to cover and pay the said interest, apparently accruing, as aforesaid, semiannually, on the said pretended indebtedness.

"And your orator further shows that according to the last assessment made in the said county for the purpose of taxation, the taxable property of your orator situate therein was assessed in an amount exceeding sixty thousand dollars, of which the sum of fifteen thousand dollars was so assessed on the tract of land and premises hereinbefore particularly described; and, according to the said tax levy so made in the year 1887, the said board of county commissioners has by means thereof created an apparent lien upon your orator's said assessed property to the amount of thirteen cents

on every one hundred dollars of the value thereof so assessed; and the said collector, by virtue of the said tax levy and the said warrant, threatens to enforce the said apparent lien as against your orator's said property unless your orator shall pay to him, not only the lawful taxes levied upon your orator's said property, which lawful taxes your orator is able, ready, and willing, and offers, to pay, but also the said item of thirteen cents on every hundred dollars aforesaid.

"And your orator further shows that the said so-called 'warrants' and coupons already issued, and the said pretended indebtedness so assumed, to be created for the erection of a courthouse, and the furnishing thereof, are fraudulent and void, and beyond the powers of the said board of county commissioners and probate judge, or either thereof, to create the same; that in fraud of the act of congress approved July 30, 1886, entitled, 'An act to prohibit the passage of local or special laws in the territories of the United States, to limit territorial indebtedness, and for other purposes,' as well as in fraud of the laws of the said territory of New Mexico, the said board of county commissioners and probate judge, by the means aforesaid, attempted to create and contract an indebtedness of the said county after the 30th day of July, A. D. 1886, although, at the time of such attempt, and before the creation and contraction of any pretended indebtedness of the said county thereunder, the indebtedness of the said county existing, outstanding, far exceeded four per centum of the value of the taxable property within such county, as ascertained by the last assessment in the said county for territorial and county taxes, previous to the said attempt, and previous to the incurring of such pretended indebtedness thereunder; and, with like intent, the said board of county commissioners and probate judge fraudulently caused the said so-called 'warrants,' to the aggregate amount

of fifty thousand dollars principal aforesaid, to be antedated so as to appear on their face to have been issued on the 1st day of July, 1886, prior to the passage of the said act of congress, and inserted, or caused to be inserted, in the said so-called 'warrants,' a recital or declaration that the same were authorized and issued for the completion of the erection of a courthouse, in order falsely and fraudulently thereby to make it appear that the said so-called 'warrants' were not authorized or issued in anticipation, for the purpose, of providing funds for the commencement and original erection of a courthouse, but for the mere completion of a courthouse already begun.

"And your orator further shows that there is not, and there never has been, in existence any special statute applicable to the said county of Santa Fe or other law of the said territory general or special, authorizing the counties of said territory or the said county of Santa Fe, or the said board of county commissioners and probate judge, or either thereof, to issue or sell or dispose of, in the open market, or by private bargain, for money loaned or advanced, or at a discount, any instruments, obligations, or contracts of the form or nature of the said so-called 'warrants' and coupons, or any other negotiable instruments whatsoever, either for the purpose of the erection of a courthouse, or for the purpose of the completion of the erection of a courthouse, or for the furnishing of a courthouse; and that the only warrants or other like obligations which, prior to the said act of congress, the said county of Santa Fe, or any official authority thereof, was authorized by law to execute or issue for any such or like purpose, were nonnegotiable instruments, merely importing on their face an order on the treasurer of the said county to pay to the payee therein named the amount of an existing indebtedness of the said county to the said payee, and the same were merely

of the nature of orders on the treasurer of the said county to pay such prior and existing indebtedness out of appropriate county funds; and such warrants, when authorized by law, have never been the lawful subject of negotiation or sale by or under the authority of the said county, and have never been and are not issuable at any discount whatever.

"And your orator further shows that, unless restrained by the process of this court, the said collector, by virtue of the said tax levy and warrant, will proceed to advertise and offer for sale the taxable real estate within the said county belonging to your orator and the other taxpayers of the said county, upon their refusal to pay the said item of thirteen cents on each one hundred dollars so levied as aforesaid, and pursuant to the provisions of the revenue law of the said territory, the said collector, after such advertisement, will proceed to sell, at public auction, the said real estate, including the aforesaid tract of land of your orator, and, in conformity with the said provisions, will execute and deliver to the purchaser or purchasers at such sale deeds of conveyance of such real estate, importing upon their face, by virtue of the said provisions, the presumption and prima facie evidence in all courts in the said territory in all controversies and suits in relation to the right of such purchasers, their heirs and assigns, to the land thereby conveyed, of the following facts, to wit: (1) That the real estate conveyed was subject to taxation for the year or years stated in the deed; (2) that the taxes were not paid at any time before the sale; (3) that the real estate conveyed had not been redeemed from the sale at the date of the deed; (4) that the property had been listed and assessed at the time and in the manner required by law; (5) that the taxes were levied according to law; (6) that the property was advertised for sale in the manner and for the time required by law; (7) that

the property was sold for taxes as stated in the deed; (8) that the grantee named in the deed was the purchaser, or the heir at law, or the assignee of the purchaser; and (9) that the sale was conducted in the manner provided by law.

“And your orator further avers that by means of the premises, and of such apprehended proceedings, sales, and conveyances on the part of said collector, a cloud will be created on the title of your orator's said tract of land, as well as on the title of other taxable real estate in the said county.

“And your orator further shows that there is no adequate remedy at law in the premises; that, unless this court will interpose therein by virtue of its equitable jurisdiction, a multiplicity of suits will arise, as your orator is advised, between your orator and the said other taxpayers and the said collector and the said board of county commissioners, and great expense and unnecessary annoyance and litigation will ensue, not only to your orator and other taxpayers concerned, but also to the said county, and to the officers engaged in the administration of its financial affairs; whereas, if this honorable court, the premises considered, shall declare the invalidity of the said tax levy and warrant, and of the said resolutions, and other proceedings antecedent thereto, so far as respects the said pretended indebtedness and the said unlawful item of the said tax levy, and shall eliminate the said unlawful item from the said tax levy and the said warrants, and shall prevent the inclusion by the said board of county commissioners in its future levy of taxes in the said county of all items intended for the payment of the said pretended indebtedness, or of any interest accrued or to accrue thereon, the collection of taxes in the said county will be relieved of the embarrassment and fraud herein complained of, and of the delay and litigation occasioned thereby, and the remainder and lawful part of

the said taxes will be more readily paid to the public convenience. In tender consideration of the premises, and inasmuch as your orator is without remedy therein at and by the strict rules of the common law, he refers all these matters and grounds of complaint to your honor's court in chancery, wherein the same are properly cognizable and relievable, and prays that the said board of county commissioners of the county of Santa Fe, Francisco Chavez, sheriff and ex officio collector of the said county, and Nicolas Garcia, treasurer of the said county, be made defendants to this bill of complaint, with the proper process to bring them before the court; that they be required to answer all and singular the charges, allegations, and statements of this bill without oath, an answer under oath being hereby expressly waived; that, by the decree of the said court herein to be pronounced, it may be declared and decreed that the said fifty instruments or obligations, or so-called 'warrants,' and all coupons, or so-called 'interest warrants,' at any time thereto attached, and the pretended indebtedness of the said county thereby evidenced, and all the resolutions and proceedings of the said the board of county commissioners of the county of Santa Fe, and the said probate judge of the said county, or either thereof, purporting to create or authorize the said indebtedness, or any other indebtedness for the erection of a courthouse in the said county, or for the furnishing thereof, are all and singular fraudulent, void, and of no effect, as against the said county or the taxpayers thereof, or the taxable property within the said county; that the said tax levy so made in the year 1886 is void as to the said item contained therein of thirteen cents for each one hundred dollars of said assessed property, purporting to be levied for the payment of interest, evidenced by the said so-called 'warrants' and 'coupons;' that the said warrants, and all proceedings by the said collector for the enforce-

ment and collection thereof, are void in respect of so much thereof as relates to the said item of tax; that the said tax of thirteen cents on every hundred dollars aforesaid is fraudulent and void, and a cloud on the taxable real estate within the said county, and specially is a cloud on the title of your orator's above described tract of land, and, further, that, by the said decree, the said board of county commissioners may be perpetually restrained and enjoined from making, issuing, delivering negotiating, selling or disposing of any further obligations, instruments, contracts, warrants, bonds, or other evidence of debt in the sum of twenty-five thousand dollars, or in any sum whatever, whereby the said county may be, or may be made to appear to be, chargeable or responsible for the payment of any sum of money for the erection of a courthouse, or for the completion of the erection of a courthouse, or for the furnishing of a courthouse, under the assumed authority or by virtue of any resolution or proceedings hereinbefore mentioned or referred to, or by reason of any resolution or other proceedings whatever which may be taken, approved, adopted, or sanctioned by the said board of county commissioners or probate judge, or either thereof, at any time now or hereafter, when or while the lawful existing indebtedness of the said county does or shall exceed four per centum on the value of the taxable property within such county, as ascertained by the last assessment for territorial or county taxes next previous to any action, past or future, in the premises, by the said county authorities, or any thereof; and, further, that the said defendant Nicolas Garcia, as treasurer of the said county, may be perpetually restrained and enjoined in like manner from paying out of any funds in his hands as such treasurer the said so-called 'warrants' and 'coupons,' or any part thereof, or any other like instruments or evidences of debt; and, further, that the said defendant Francisco

Chavez, collector of the said county, may be perpetually restrained and enjoined in like manner from enforcing or collecting as against the taxpayers of the said county, and the taxable property therein situate, and especially against your orator and his property, so much of the said tax levy as relates to and attempts to impose the said fraudulent and unlawful item, to wit, the said thirteen cents on every one hundred dollars of the assessed value of his said property; and, further, that your orator and such taxpayers as may come into this suit, and contribute to the expense thereof, may have, not only the relief above prayed, but such further and other relief as may be just and equitable in the premises, together with their costs in this behalf; and also that, pending this suit, the said defendants; and each of them, may, by writ of injunction to be issued herein, under the seal of the said court be restrained and enjoined in the several respects wherein a perpetual injunction is hereinbefore prayed. May it please your honor to grant unto your orator the writ of subpoena to be directed to the board of county commissioners of the county of Santa Fe, Francisco Chavez, sheriff and ex officio collector of the county of Santa Fe, and Nicolas Garcia, treasurer of the county of Santa Fe, thereby commanding them, and every one of them, at a certain day, and under a certain penalty, therein to be specified, personally to be and appear before your honor in this honorable court; and then and there to answer all and singular the premises aforesaid, and to stand to perform and abide such order, direction, and decree therein as to your honor shall seem meet; and your orator will ever pray," etc.

On the ninth day of November, 1887, the defendants in error appeared and filed a demurer to the bill, as follows: "The demurrer of the board of county commissioners of Santa Fe county, Francisco Chavez, sheriff of Santa Fe county, and Nicolas Garcia, treas-

urer of Santa Fe county, defendants, to the bill of complaint of Thomas B. Catron, complainant. These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth, do demur thereto, and for cause of demurrer show that the said complainant has not in and by his said bill stated or shown such a case as does or ought to entitle him to any such discovery or relief as is thereby sought or prayed for against or from the said defendants, or either of them. And for special cause of demurrer the defendants further say and show (1) that said complainant has a complete and adequate remedy at law; (2) that said bill does not disclose that said complainant has paid or tendered the taxes admitted by said bill to be due from said complainant to said county; (3) that said bill does not disclose any facts upon which it appears that said complainant will be irreparably injured, or that his title will be clouded, or that his remedy at law is not complete and adequate, or that the said bill and suit will prevent a multiplicity of suits; (4) that the complainant has not by his said bill shown such a case as entitles him to such relief as is thereby prayed, inasmuch as it does not thereby appear that there is or would be any impediment to an action at law being brought by the said complainant to ascertain the right relative to the said tax in the said bill particularly mentioned, or that any trial or action, verdict or judgment, has been hitherto obtained by the said complainant for that purpose, or that there were previously to, or at the time the said bill was filed, or now is, any authentic record of such right; (5) that the said bill does not show that complainant has pursued such remedy in this behalf as he had before the board of county commissioners of the county of Santa Fe, or by appeal from said commissioners. Whereof, and for

divers other errors and imperfections in said bill contained, these defendants demand the judgment of this court whether they shall be compelled to make any further or other answer to the the said bill, or any of the matters and things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf sustained." On the twelfth day of the same month a hearing was had upon the demurrer, and it was sustained. The complainant refusing to amend, and failing to proceed further in the cause, the bill was dismissed. Thereupon complainant sued out a writ of error, and the cause was removed into this court.

There are many interesting and important questions presented in this record, and they have been ably and exhaustively discussed by the solicitors upon each side in their oral arguments and in their briefs; but we do not deem it necessary, at this time, to consider them in detail or at length. The demurrer is general, and goes to the whole bill, and the various grounds assigned amount to no more than the general statement that the bill contains no equity. The effect of the ruling below in sustaining the demurrer is that there is no equity in the bill. We are satisfied, however, from an examination of the opinion of the learned district judge, which is before us, that this aspect of the case was not pressed upon him, nor considered by him in arriving at his conclusion. If the bill contains any equity, a demurrer to the whole bill upon that ground is too broad, and should be overruled. Story, Eq. Pl., sec. 443. The bill charges that the board of county commissioners, by and through their chairman, issued and sold fifty warrants, with interest coupons attached, after the act of congress of July 30, 1886, had been passed, and antedated them, so that they should appear to have been issued upon the first day of July, 1886, and that at the time of the actual issue the county of

TAXATION: bill to
restrain levy:
demurrer:
fraud; equity.

Santa Fe was indebted in an amount exceeding four per cent of the value of the taxable property of the county. This, if true (and it is admitted by the demurrer) was a clear evasion of the act of congress, and a fraud upon the law. Fraud is recognized as one of the grounds upon which a court of equity will interfere to prevent a wrong, although there may be some legal remedy provided. *Hannewinkle v. Georgetown*, 15 Wall. 548. The bill further charges that the board of commissioners threaten and give out that they will issue and negotiate the remaining \$25,000 of warrants. If, at the time of the first issue of warrants, and at the time the bill was filed, the county was indebted in an amount equal to or exceeding the limit fixed in the act of congress, and if the board of commissioners was about to create a further indebtedness by the issue and sale of the remaining warrants authorized by the resolution of July 20, 1886, then clearly such contemplated action would be illegal, and a fraud upon complainant as a resident taxpayer of the county, and he could, by injunction, prevent its accomplishment. *Crampton v. Zabriskie*, 101 U. S. 601. Before such action was held and the warrants issued, there would be no adequate legal remedy open to him. The judgment must be reversed, and the cause remanded.

LONG, C. J., and HENDERSON, J., concur.

[No. 374. January Term, 1889.]

EDWARD T. FARISH ET AL., PLAINTIFFS IN
ERROR, v. NEW MEXICO MINING COMPANY
ET. AL., DEFENDANTS IN ERROR.

ERROR, WRIT OF, WILL LIE TO REVIEW DECREE IN CHANCERY.—Under section 2193, Compiled Laws, 1884, abrogating the rule announced in *Kidder v. Bennett*, 2 N. M. 37, a writ of error will lie from the district courts to the supreme court to review a decree in equity as well as a judgment at law.

ID.—RULE REQUIRING FOLIOS OF TRANSCRIPT TO BE NUMBERED, ETC.—

The rule of court, requiring the folios of a transcript to be numbered, and the pages and margins of the size required, is directory, and a writ of error will not be dismissed, or a cause stricken from the docket for failure to comply therewith, as held in *Mora v. Schiek*, 4 N. M. (Gil.) 301, in considering a similar provision, no penalty being prescribed for violating the rule.

ID.—SECTION 522, COMPILED LAWS, N. M., 1884—RULE 24.—Nor will a writ of error from the district court to the supreme court, to review a decree in chancery, be dismissed or the cause stricken from the docket, for a failure to comply with rule 24 of this court, section 522, Compiled Laws, 1884, which is a limitation upon the power conferred upon the courts by section 521, to adopt rules of procedure, so far as it affects proceedings in chancery, requires the supreme and district courts, in the exercise of chancery jurisdiction, to conform their decisions, decrees, and proceedings to the laws and usages peculiar to that jurisdiction in this territory, and in the United States courts; and it was not the intention of the court, by the language used in rule 24, to violate said section 522.

ERROR to the First Judicial District Court, Santa Fe county. Motion to dismiss writ of error, and strike the record from the files. Motion overruled.

The facts are stated in the opinion of the court.

FRANCIS DOWNS for plaintiffs in error.

W. T. THORNTON and E. L. BARTLETT for defendants in error.

BRINKER, J.—This is a motion to dismiss the writ of error, and strike the record from the files, for the reasons: First. Because a writ of error does not lie to review a decree in chancery; second, because the folios of the transcript are not numbered, nor the pages and margins the size required by the rules; third, because the plaintiff in error failed to deliver to the solicitor for defendant in error copies of the printed record; fourth, because the record shows that a proposed record and bill of exceptions was not settled

and signed by the judge of the court below, as required by rule 24. This court held in accordance with the practice of the federal courts, that a writ of error would not lie in a cause in chancery. *Kidder v. Bennett*, 2 N. M. 37.

WRIT of error to review decree in equity.

The decision was rendered January 24, 1880. On January 26, 1880, the legislature passed an act, the first section of which is in these words: "All cases, either in law or equity, finally adjudged or determined in the district courts, may be removed into the supreme court of the territory for review, either by appeal or writ of error." This section is in the Compiled Laws, 1884, section 2193. The enactment of this section so soon after the decision in *Kidder v. Bennett*, supra, shows conclusively that the legislature intended to abrogate the rule announced in that case. As to the second point

RULE requiring folios of transcript to be numbered, construed.

we think the requirement of the rule as to numbering the folios of the transcript is directory, and the record should not be stricken out for a failure to comply with it. We held in *Mora v. Schick*, 13 Pac. Rep. 341, in considering a similar provision, that as no penalty was prescribed for violating the rule we would not strike out the record. In *Miller v. Presten*, 4 N. M. (Gil.) 396, we held that the section of the statute requiring instructions to be numbered was directory, and would not be strictly enforced unless prejudicial error resulted. The third point was waived upon the argument. We will say, however, that it was not well taken. The motion was not filed on the second day of the term, nor supported by affidavit, and twenty-four hours' notice of the intention to file it was not given as required by rule 23. *Mora v. Schick*, 4 N. M. (Gil.) 301. We do not think the fourth ground of the motion tenable. Rule 24

RULE 24: Sec. 522, Comp. Laws.

provides: "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 desires to present exceptions not appearing on the record, shall be prepared by the appellant," etc. This rule is certainly broad enough to cover chancery as well as law cases. Section 522, Compiled Laws, 1884, requires the supreme and district courts in the exercise of chancery jurisdiction to conform their decisions, decrees, and proceedings to the laws and usages peculiar to that jurisdiction in this territory, and in the United States courts. This section is a limitation upon the power conferred upon the courts by section 521, Compiled Laws, 1884, to adopt rules of procedure, so far as it affects proceedings in chancery. It is well known that no bill of exceptions is necessary in a case in equity (section 2197, Comp. Laws, 1884; *Williams v. Thomas*, 4 N. M. (Gil.) 553; and the record in such cases consists of the pleadings, report of the master, all papers and exhibits filed, all depositions and other evidence reduced to writing and filed, all exceptions filed, and the decree. *Freem. Judgm.*, sec. 88; *Ferris v. McClure*, 40 Ill. 99; *Smith v. Newland*, *Id.* 100; *Putnam v. Day*, 22 Wall. 60. The case last cited was upon a bill of review, but the definition of a record there given is applicable here. We can not think that the court, by the language used in this rule 24, intended to violate section 522, *supra*. The above observations will apply to and govern the other motions argued and submitted with this. The motion is denied.

LONG, C. J., and HENDERSON and REEVES, JJ.,
concur.

[No. 359. January 30, 1889.]

JAMES Q. WILLS ET AL., APPELLEES, v. JAMES
P. BLAIN ET AL., APPELLANTS.

MINES AND MINING—NOTICE OF RELOCATION, LEGAL EFFECT OF.—The recitals in a notice of relocation of a mining claim may be construed as solemnly admitting the validity of an original location.

ID.—SUIT IN EJECTMENT FOR RECOVERY OF POSSESSION—INSTRUCTIONS. In an action of ejectment to recover the possession of a certain mine, on the ground of an alleged prior location, made under an act of Congress of May 10, 1872, where the defendants claimed under a notice of relocation, and the only question was as to the performance by the plaintiffs of the annual labor required by the statute, an instruction to the jury that before the plaintiffs could recover they must prove some title and right to possession, by a preponderance of the evidence, and that such right must be superior to that of defendants, was a proper instruction.

APPEAL, from a judgment in favor of plaintiffs, from the Third Judicial District Court, Sierra County. Judgment affirmed.

The facts are stated in the opinion of the court.

WARREN & FERGUSON for appellants.

The "Dread Naught" location notice and record were insufficient under the laws in force to vest right of possession in appellees, whether the record be considered upon its face or in connection with the evidence; and no amount of labor or improvements could confer a valid possessory title. *Hauswirth v. Butcher*, 4 Mon. 299; *Russell v. Chumasero*, Id. 309; *Belk v. Meagher*, 3 Id. 65; *Same v. Same*, 104 U. S. 279.

By reference to the evidence on the question of the validity of appellees' location, outside of the face of their notice, it will be seen that such evidence wholly

fails to show the existence of any permanent monuments or natural objects, situated as called for by the recorded notice, and so as to identify the claim. Thus is absent an essential prerequisite to a valid possessory title. *Pollard v. Shively*, 5 Col. 309; *Golden Fleece Co. v. Cable Con. C. Co.*, 12 Nev. 312; *Funk v. Sterrett*, 59 Cal. 615; *Baxter Mt. M. Co. v. Patterson*, 3 W. C. Rep. (N. M.) 77; *Gleason v. Martin White M. Co.*, 13 Nev. 442; *Faxon v. Barnard*, 9 Morrison M. Rep. (U. S.) 515; *Began v. O'Reilly*, 32 Cal. 11.

W. B. CHILDERS and W. T. THORNTON for appellees.

Plaintiffs' location notice should have been admitted in evidence when first offered. It contained such a description of the claim by reference to some natural object or permanent monument as identified it, and was a valid location notice in itself. *Wade's Am. Mining Law*, sec. 28, p. 51; *Southern Cross, etc., Co. v. Europa Co.*, 15 Nev. 383; *Jupiter M. Co. v. Bodie Co.*, 7 Sawy. 96 (4 Mor. M. Rep. 411); *North Noonday Co. v. Orient Co.*, 6 Sawy. 299 (9 Mor. M. Rep. 540); *Quinby v. Boyd*, 6 Pac. Rep. 466; *Russell v. Chumasero*, 1 Pac. Rep. (Montana) 713; *Duprat v. James*, 65 Cal. 558.

The object of recording is to hold the claim for a reasonable length of time, until the vein can be so developed as to admit of an intelligent marking of the surface boundaries. *Gleason v. Martin White M. Co.*, 13 Nev. 464 (9 Mor. M. Rep. 137).

A defective record will be cured, if the stakes or monuments on the ground identify the claim. *Russell v. Chumasero*, 1 Pac. Rep. 713.

Courses and distances yield to monuments in mining law as well as in real estate law. *Culacott v. Cash G. & S. M. Co.*, 6 Pac. Rep. (Col.) 211.

The effect given to mining claims can not be

greater than that which is given to the registration laws of the states, and they have never been held to exclude parol proof of actual possession, and the extent of that possession as prima facie proof of title. *Campbell v. Rankin*, 99 U. S. 261.

If the plaintiffs were in actual possession at the time defendants entered to locate, they could acquire no rights by such entry. *Campbell v. Rankin*, 99 U. S. 261; *Attwood v. Fricott*, 17 Cal. 17; *English v. Johnson*, Id. 107; *Funk v. Sterrett*, 59 Cal. 613; *Golden Fleece Co. v. Cable Co.*, 12 Nev. 312 (1 Mor. M. Rep. 120); *North Noonday Co. v. Orient Co.*, 6 Sawy. 503 (9 Mor. M. Rep. 524); *Weise v. Barker*, 2 Pac. Rep. (Col.) 919; *Strepy v. Stark*, 5 Pac. Rep. (Col.) 111.

As to what constitutes actual possession of a mining claim, and the extent of that possession see: *Attwood v. Fricott*, 17 Cal. 37; *Faxon v. Barnard*, 2 McCrary, 44 (9 Mor. M. Rep. 515); *Table Mountain Co. v. Stranahan*, 20 Cal. 209; *Hess v. Winder*, 30 Cal. 355; *Rogers v. Cooney*, 7 Nev. 219; *Hicks v. Coleman*, 25 Cal. 122, and case cited; *Moore v. Thompson*, 60 N. C. 120 (1 M. M. R. 221).

It is in evidence that prior to defendants' entry plaintiffs were in possession, actually working their claim, and claiming ownership up to the boundaries marked out on the ground. *Faxon v. Barnard*, 2 McCrary, 44; 1 Greenlf. Ev., sec. 41.

Plaintiff Wills claimed under a recorded deed, and his possession followed the deed. *Abb. Tr. Ev.*, 635; *Harris v. Equator Co.*, 3 McCrary, 14.

Obliteration of monuments does not divest locator's right. *Jupiter Co. v. Bodie Con. Co.*, 7 Sawy. 96.

Plaintiffs under the strictest construction were in possession of their shaft. *Faxon v. Barnard*, 2 McCrary, 44; *Erhardt v. Boaro*, 113 U. S. 528.

It was necessary that defendants should make a

lawful discovery. This could not be done by an unlawful entry into plaintiffs' shaft. *Jupiter Co. v. Bodie Co.*, 7 Sawy. 96; *Overman M. Co. v. Cocoran*, 15 Nev. 417; *North Noonday Co. v. Orient Co.*, 6 Sawy. 299; *Faxon v. Barnard*, 2 McCrary, 44; *Zollers v. Evans*, Id. 39; *Golden Terra Co. v. Mohler*, 4 Mor. M. Rep. 390; *Belk v. Meagher*, 104 U. S. 284; *Gwillim v. Donnellan*, 115 U. S. 46. See, also, *Crossman v. Penderly*, 8 Fed. Rep. 693.

A failure to record does not work a forfeiture of the locator's rights, unless the local law expressly so declares. *Jupiter Co. v. Bodie Co.*, 7 Sawy. 96; *Johnson v. McLaughlin*, 4 Pac. Rep. 132. See, also, *Mt. Diablo M. & M. Co. v. Callison*, 5 Sawy. 439; *Ruch v. Rock Island*, 97 U. S. 693; *Schulenberg v. Harmian*, 21 Wall. 44.

As to amendment to declaration, see *Sedg. & Wait's Tr. Title to Land*, sec. 464. Also *Barelay v. Howell*, 6 Pet. 498; *Beard v. Federy*, 3 Wall. 478; *Blackwell v. Patton*, 7 Cranch, 471.

The instructions were proper. *Wade's Am. M. Law*, 23, 231; *Harris v. Equator M. Co.*, 3 McCrary, 14; *Richardson v. McNulty*, 24 Cal. 340; *Bay Silver Mining Co. v. Brown*, 10 Sawy. 243. See, also, *Schools v. Risely*, 10 Wall. 91; *Indianapolis R'y Co. v. Horst*, 93 U. S. 291.

The assignment of error on the instructions is wholly insufficient. *Lucas v. Brooks*, 18 Wall. 436; *Supt. Ct. Rule No. 25*.

LONG, C. J.—James Q. Wills, William H. Beery, and others, on the sixteenth day of August, 1887, filed a declaration in ejectment in the court below making parties defendant thereto James P. Blain and Frank B. Pitcher, who are the appellants in this court. The action was brought to recover from defendants Blain and Pitcher a certain parcel and tract of land, a mining

claim, known as the "Dead Naught Mine," situated in the county of Sierra. The defendants appeared, and pleaded not guilty. The cause was submitted for trial to a jury. The issue involved was found by the jury for the plaintiff, and judgment on the verdict of the jury was rendered in favor of the plaintiff below, Wills and others, for the possession of the mining claim. The defendants below appealed to this court, and have properly saved in the record the questions asked to be reviewed here.

The plaintiffs below, Wills and others, claimed the right to possession of the mining claim sued for, by reason of an alleged prior location under the following notice:

"Territory of New Mexico, County of Socorro—ss.: Know all men by these presents that the undersigned, under the provisions of the act of congress entitled, 'An act to promote the development of the mining resources of the United States,' approved May 10, 1872, have located fifteen hundred (1,500) feet (linear and horizontal measurement) in length on this lode, vein, or deposit of gold, silver, copper-bearing ore, or other rock in place, with three hundred (300) feet on each side, for mining purposes. This claim is situated in ——— mining district, in said county, and shall be known as the 'Dread Naught Mine,' the location and bounds being marked and described as follows, to wit: From this initial monument on north-end center of claim; thence west three hundred feet, to a monument of stone; thence south 1,500 feet, to a monument of stone; thence east three hundred (300) feet, to a monument of stone, it being south-end center of claim; thence east three hundred feet, to a monument of stone; thence north 1,500 feet, to a monument of stone; thence west 300 feet, to the place of beginning. This mine is on the eastern slope of the Black range on Mineral creek, a tributary of the Cuchilla Negra creek,

about three miles from the mines of the Cuchilla Negra mountains.

"Dated on this ground this fourth day of October, A. D. 1880.

"Attest:

"C. F. McCONKEY,

"M. F. KILGORE.

W. H. BEERY,

J. M. SMITH,

J. MILLER,

"Locators."

It was contended by the plaintiffs below that each and every step and act required by law to be taken to make and perfect a valid and subsisting mining claim under this location notice had been done, and that plaintiffs succeeded to all the rights of the original locators.

The defendants claim under a location notice bearing date May 13, 1887, which notice is as follows:

"Notice is hereby given that we, the undersigned, citizens of the United States, have this thirteenth day of May, 1887, claimed by right of discovery and location, and do hereby claim by virtue of such right, fifteen hundred (1,500) feet linear, and three hundred (300) feet in width on each side of the middle of the vein on this lode, vein, or deposit of mineral, along the course of the vein, with all its dips, spurs, angles, and variations, together with the amount of surface allowed by law, and all veins, lodes, or deposits of mineral whose top or apex are within said lines extended vertically downward. The said vein, lode, ledge, or deposit of mineral hereby located and claimed, as aforesaid, shall be called the 'Dictator,' and is situated in the Apache mining district, in the county of Sierra, and territory of New Mexico, in a northwest direction from the town of Chloride, in said county and territory, distance about five and one half miles from said town of Chloride, and about one quarter of a mile northwest from the village of Roundyville, situated on Mineral creek; the location or discovery shaft of this location being about one

quarter of a mile from the junction of the valley of said mineral creek with what is known as 'Dread Naught Gulch,' and on the west side of said gulch, and within about fifteen feet of a living tree standing up the hill, and west from said shaft, and marked by a big 'D' cut through the bark of said tree. The said Dictator mining claim hereby located, as aforesaid, lies partly on the same hill with, and easterly from, the patent mining claim known as the 'John A. Logan.' The said Dictator mining claim is marked and bounded as follows: Beginning at a stake and stone monument at the side of the said location or discovery shaft; thence in a northerly direction five hundred (500) feet, to a stake and stone monument marked 'North-End Center Dictator Lode;' thence westerly three hundred (300) feet, to a stake and stone monument marked 'North-West Corner Dictator Lode;' thence in a southerly direction fifteen hundred (1,500) feet, to a stake and stone monument marked 'South-West Corner of Dictator Lode;' thence three hundred (300) feet easterly to a stake and stone monument marked 'South-End Center of Dictator Lode;' thence easterly three hundred (300) feet, to a stake and stone monument marked 'South-East Corner of Dictator Lode;' thence northerly fifteen hundred (1,500) feet, to a stake and stone monument marked 'North-East Corner Dictator Lode;' thence westerly three hundred (300) feet, to a stake and stone monument, being the same as already marked, 'North-End Center of Dictator Lode.' This is a relocation of the claim known as the 'Dread Naught.'

"Witness our signatures to this location notice of the Dictator mining claim this thirteenth day of May, 1887.

"JAS. P. BLAIN,

"F. B. PITCHER,

"Witness, DON CAMERON. Locators."

It appears in evidence that Blain and Pitcher, believing that the annual labor required by law was

not done in 1886 under the Dread Naught Claim, undertook themselves to relocate the claim; and the principal question for determination is the legal effect of their location notice above set out. The court below, in its rulings, narrowed the question to the point whether or not the plaintiffs had each and every year after the attempted location under the Dread Naught notice performed the annual labor of the value of \$100, as required by the laws of the United States. The instructions of the court on this point are as follows:

“The court instructs the jury that the defendants’ location certificate offered in evidence does not purport to be, and is not, an original location of a mining claim, but is a relocation of the claim known as the ‘Dread Naught,’ the right to the possession of which the plaintiffs claim, and, as they set up title only as the relocators of the original lode claim, they impliedly admitted the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.” To the giving of which instruction defendants then and there excepted.

The court instructed the jury that if they believe from the evidence that the defendants’ location was a relocation of the Dread Naught, and that plaintiffs were owners of said Dread Naught claim, then defendants’ relocation admits the validity of plaintiffs’ location; and if the jury should further find from the evidence that plaintiffs had done, or expended, at least \$100 in labor and improvements on said claim during the calendar year 1886, and that the defendants entered upon said claim, and attempted to relocate the same, after the performance of said labor and improvements, then they should find for the plaintiffs. To the giving of which instruction defendants then and there excepted.

On the one part the appellees cite the case of Belk

v. Meagher, 104 U. S. 284, in support of the principle enumerated in the instructions given, and on the other it is contended that the expressions in that decision which seem to support the contention of the appellees are mere chance words, and not intended as announcement of any rule. The facts in *Belk v. Meagher* are substantially these.

MINING claim:
notice of reloca-
tion, legal effect
of.

Humphreys and Allison were originally locators of a mining claim on mineral land of the United States. On the nineteenth day of December, 1876, Belk, the plaintiff, regarding the location of Humphreys and Allison as forfeited by reason of an alleged failure on their part to perform the annual labor of \$100 required by law, attempted himself to acquire a right to the claim; and on that day made a location notice, and performed the other acts necessary to constitute a valid relocation of the Humphreys and Allison mine. In the location notice Belk described his claim as a relocation of the original Humphreys and Allison lode. On the twenty-first day of February, A. D. 1887, Meagher attempted to acquire a right to the same mining claim, and he posted up his notice, and performed all the acts required by law to constitute a valid location. Thus the parties stood. One claimed under the location of December, 1876; the other under that of February, 1877. Belk brought an action of ejectment against Meagher to recover possession of the mining claim, and the latter asserted that when Belk made his location the claim had not then been forfeited by Humphreys and Allison, but that, to the contrary, they had until the thirty-first day of December, 1876, including that day, in which to perform the annual work required for that year, and therefore that in December, 1876, the claim was not opened to relocation. In this position of the parties in that case it was evidently important for Meagher, the affirmative of the issue being on Belk, to show that the claim of Humphreys and Allison

was originally a valid claim, and that it continued so during the whole of the year 1876. So the validity of the location of Humphreys and Allison was directly in issue; because if there was a valid location, and if the ground was not open to further location during that year, the claim of Belk must fail. The mind of the court must have been directed to the validity of the original location, and the legal effect of the recital that Belk was a relocater, contained in his notice.

The court says: "Mining claims are not open to relocation until the rights of former locators have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he can not do until the discoverer has in law abandoned his claim, and left the property for another to take it up." At this point of that decision the court is considering the relative rights of an original locator and a relocater of a mining claim. Later in the opinion the court turned away from a consideration of these relative rights and considered a question of evidence, and in that consideration is involved a determination of the legal effect of the recitals in Belk's relocation notice.

The court say: "It remains to consider the various exceptions taken to the admission and rejection of evidence. * * * As to the admission of the books from the office of the recorder of Deer Lodge county to prove the record of the location of the original lode claim by Humphreys and Allison, as Belk sets up title only as a relocater of part of the original lode claim, he impliedly admits the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property. It is nowhere disputed that Humphreys and Allison were the locators of and owners of the claim originally. The proof of the record was

therefore probably unnecessary; but, if not, it seems to us the book was sufficiently authenticated."

It is not quite clear who offered in evidence in the trial court the books from the office of the recorder of Deer Lodge; but the supreme court say the purpose of the offer was "to prove the location of the original lode claim by Humphreys and Allison." There could be only one reason why it became important to make such proof, and that was to invalidate Belk's relocation, on the ground that in December, 1876, the mining claim was, in legal contemplation, in the possession of Humphreys and Allison, and not subject to relocation. It is quite apparent the court intended to pass upon the legal effect of the recitals in Belk's notice, and did not, by inadvertence, use mere chance words, conveying the idea of a rule to which the court did not intend to commit itself. It would seem the court intended to distinguish between a locator and a relocater; classing the former as an original discoverer of mineral before unknown, and the latter as the mere appropriator of mineral discovered by another, and forfeited by reason of his failure to perform the annual work of \$100 required by law.

The statute relating to the relocation of mining claims seems to indicate, by the phraseology used, that a relocater stands in an attitude different from that of an original locator. It says: "On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * Upon a failure to comply with the foregoing conditions [of annual expenditure] the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made." The original locator is a discoverer, and holds

only on condition that he makes the annual expenditure required by law.

The relocater, when he so describes himself in the notice, solemnly admits, in an instrument which is made a matter of record, that he is not a discoverer of mineral, but an appropriator thereof, on the ground that the original discoverer had forfeited his right. The notice becomes in some sense an instrument of title—a record. It is the equivalent of an admission of record to the original locator, that the relocater claims a forfeiture by reason of a failure on the part of the first locator to make his annual expenditure. This we believe to be the doctrine of *Belk v. Meagher*, supra, and on that authority sustain the instruction of the court below on that point.

The appellant also complains of the following instruction given by the court below: "The court instructs the jury that this is a possessory action, to recover an unpatented mining claim, and that the question involved in the case is whether the plaintiffs or defendants have the better right to the possession of the mining claim in question; and they should find for the party who has this better right, as determined by them from the evidence before them, under the law as declared in the instructions of the court."

Standing alone, we would hesitate to hold that this instruction contains a full statement of the law, so as to enable the jury fully to grasp the legal question necessary for its consideration; but the court gave an additional instruction, which should be construed and taken with the one to which the objection is urged. This later instruction is as follows: "As stated in the instruction already given, the plaintiff can recover alone by showing a better title and better right to the immediate possession of those premises than the defendants have shown. In other words, they must have a preponder-

NOTICE of relocation: annual labor: title: instructions.

ance of proof in their favor." The nature of the evidence to which this instruction was applicable should be borne in mind, in passing upon its sufficiency. The defendants, by the recitals of their relocation notice, had conclusively, as we think, admitted the validity of the plaintiffs' original location; so there was but the single issue of fact before the jury, and that was as to the performance by the plaintiffs of the annual labor each year as required by law. There was no question whether some outstanding title in another was not higher and better than that of the plaintiffs; but the single question whether the annual work has been done as required by law. As applied to that state of the evidence, we think the jury might have fairly construed the instruction to mean that the plaintiffs must, by a preponderance of the evidence, prove in themselves, before they could recover, some title and a right of possession, and that the title and right so proved must be better than that of the defendants. It will be remembered that the statute of the United States does not confer title on the locator, in the technical legal sense of that term, considered strictly; but rather, in the language of that statute, only "the exclusive right of possession and enjoyment," leaving the technical legal title in the United States, to be afterward conveyed by patent to whomsoever may be entitled thereto on proper application.

The peculiar right which the holder of a valid location of mineral lands has is thus defined in *Gwillim v. Donnellan*, 115 U. S. 49. "A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statute of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

It may very well be, where one claiming to be the owner of a mining claim files in the proper land office

his application for a patent, and an adverse claim is filed thereto, and an action is instituted between such contending parties, that the plaintiff in such action should be required, to entitle him to recover, to show a clearer and stronger right and title than where it is a contention about possession only for present mining purposes, because in the former case a patent may issue on the record there made; and in such case the court may well be required to make the instructions clear and full. But in this case, where the contention is only as to the performance of annual work, it seems to us sufficient to instruct the jury that the plaintiff must prove some title and right to the possession of the claim by a preponderance of the evidence, and that such right must be better than that of the defendant; and that is the effect, as we construe it, of the instruction below. We do not find the instructions of the court below to be erroneous.

This disposes of all the questions seriously pressed upon our consideration.

The judgment below is affirmed.

BRINKER and REEVES, JJ., concur.

[No. 353. February 22, 1889.]

FRANK RUBY, APPELLANT, v. WILLIAM E. TAL-
BOTT ET AL., APPELLEES.

PROMISSORY NOTE, ALTERATION OF BY MISTAKE—BILL TO RESTORE TO ITS ORIGINAL FORM—LIABILITY OF INDORSER—EQUITY.—In a proceeding by bill in equity on a certain negotiable promissory note, executed to another in trust for complainant, against the indorser and makers, to restore the note to its original form, where it was alleged that complainant, dissatisfied with the form of the note, returned it to the firm of which the trustee was a member, directing him to procure another and different form of note, without stating what form; and that, while the note was in the possession of said firm, one of the makers and another altered it, by changing the amount, date, and rate of interest, without the knowledge or consent of complainant, but innocently

and in good faith, supposing they were complying with his wishes, of which the indorser pretended he had no knowledge, and that by reason thereof he would be released from all liability to complainant on said note; that the makers of said note had become nonresidents and insolvent, so that an action or judgment at law against them would be unavailing; to which the indorser demurred for want of equity, which was sustained; and it appeared that the altered note was in the possession of complainant, and bore in its original form an unlawful rate of interest—Held: The alteration of the note was material, and having been made by one of the makers and another, or one of them, without the consent of the indorser, he was thereby discharged from all liability thereon, and the demurrer was properly sustained, dismissing the bill as to such indorser.

APPEAL, from a judgment in favor of the defendant indorser, from the the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

H. L. WARREN and STONE & STONE for appellant.

Defendant Talbott was a joint maker of the note, and the defendant Randall was his agent to fill up and deliver the note. *Goodman v. Simonds*, 20 How. 462; *Bank v. Neal*, Id. 351; *Good v. Martin*, 95 N. S. 95; *Samson v. Thornton*, 37 Am. Dec. 135; *Stony v. Beaubeau*, 39 Id. 128.

The alteration having been made innocently and by mistake, equity has jurisdiction, under the admitted circumstances, to restore the instrument to its original form. *Chadwick v. Eastman*, 53 Me. 16; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Vogel v. Ripper*, 34 Ill. 106; *Langenberger v. Kreiger*, 48 Cal. 147; *Bucklen v. Huff*, 53 Ind. 474; *Union N. B. v. Roberts*, 45 Wis. 373.

If Borrodaile and Randall are held to have acted for appellant, and not as strangers, then the bill shows that they were acting under a mistake, and without fraudulent purpose; and appellant, as an innocent party, is entitled in equity to the correction, which

can not impose any burden upon Talbott other than that which he confessedly assumed by signing the note, upon faith of which appellant advanced the money. 1 Story Eq. Jur., sec. 138; *Bank v. Emerson*, 10 Paige, 359; *Evarts v. Strode*, 11 Ohio, 480; *Naughten v. Partridge*, Id. 223; *Larkins v. Biddle*, 21 Ala. 252; *State v. Paup*, 8 Eng. (Ark.) 129; *Newell v. Stiles*, 21 Ga. 118.

Equity has jurisdiction to correct a mistake of law as well as of fact, which a court of law has not, and hence there is no adequate remedy at law.

NEILL B. FIELD for appellee.

The bill alleges that the alteration of the note was made by one of the makers and the agent of the appellant. It operates then to discharge the appellee from his liability on the note. *Wood v. Stubb*, 6 Wall. 80; *Draper v. Wood*, 112 Mass. 315; S. C., 17 Am. Rep. 92, and note.

When the appellee becomes thus discharged a court of equity has no jurisdiction to revive his liability. *Burk v. Murphy*, 27 Miss. 168.

A court of equity can not break through or override the law. *Snell's Prin. Eq.*, 18

Equity will not relieve against any defect, imperfection, or abuse of the law, but only against the unconscionable claims and abuses of the parties. *Smith's Man. Eq.*, pp. 2, 3, and note.

Courts of equity compel parties to execute their agreements, but have no power to make agreements for them. *Hunt v. Rousomaniere*, 1 Pet. 1.

A mistake arising from ignorance of the law is not ground for reforming an instrument. *Id.*

REEVES, J.—On the twenty-sixth day of September, 1885, Frank Ruby brought his bill of complaint against William E. Talbott, and John William Randall

and Teresa M. Randall, defendants. The bill alleges that the complainant loaned to John William Randall the sum of \$1,500, and in consideration of the loan, and as evidence of the indebtedness, the defendant executed and delivered to one Mariano Armijo, in trust for the complainant his promissory note hereinafter described. Prior to the execution and delivery of the note the defendant William E. Talbott, indorsed his signature and name upon the back of the note, and delivered the same in blank to the defendant, John William Randall, and afterward the same was signed by said Randall, and by Teresa Randall, also one of the defendants, and delivered to one Mariano Armijo, in trust for the complainant. When the note was delivered to Mariano Armijo, the same was in words and figures as follows, to wit:

“\$1,500. ALBUQUERQUE, N. M., April 17, 1883.

“One year after date, we promise to pay to the order of Mariano Armijo, in trust for Frank Ruby, fifteen hundred no hundredths dollars, at the Central Bank here, at eighteen per cent per annum from date, value received.

“JOHN WILLIAM RANDALL.

“TERESA M. RANDALL.”

On the same day the note was indorsed by Mariano Armijo as follows:

“Pay to Frank Ruby or order.

“MARIANO ARMJO.”

The note was then transmitted by Mariano Armijo to and received by the complainant. The complainant stated that at the time he received the note he was absent from the territory of New Mexico, and that after receiving the same, being dissatisfied with the form thereof, and being desirous of obtaining from the makers, William E. Talbott, John William Randall, and Teresa M. Randall, another and different note as evidence of said indebtedness, instead and in lieu of the

note above set forth, for that purpose he sent and transmitted the note to the partnership firm of Armijo Bros. & Borrodaile, doing business in Bernalillo county, and composed of Mariano Armijo and others, and requested and directed them to procure and obtain the execution and delivery of a different note, as before mentioned. The complainant states, on information and belief, that Armijo Bros. & Borrodaile neglected to obtain any other or different note in lieu of the above mentioned note, and that the said John William Randall and John Borrodaile, while the note was in the possession of the firm, changed and altered it without the knowledge or consent of complainant, in such manner that the same became and was in form, words, and figures following, to wit:

“\$1,590. 00-100.

“ALBUQUERQUE, N. M., April 27, 1883.

“One year after date we promise to pay to the order of Mariano Armijo, in trust for Frank Ruby, fifteen hundred and ninety no hundredths dollars, at the Central Bank here, at twelve per cent per annum from date, value received.

“JOHN WILLIAM RANDALL,

“TERESA M. RANDALL.”

And signed upon the back as hereinbefore stated.

The complainant further stated that the alteration was so made, without any authority or direction from him, by Randall and Borrodaile, or one of them, in good faith, inadvertently and innocently, for the purpose and with the intent on their part to execute and carry out the wishes and direction of the complainant in regard to the procurement of another and different note, and in lieu or instead of the first mentioned note, and by mistake and inadvertence on their part, and in the mistaken belief that by the means of such alteration the wishes and directions of complainant could and would be as well, effectually, and legally accomplished and executed as by the execution by the makers of an-

other and different note in lieu thereof, and without any fraudulent or wrongful intent on their part, or that of complainant, or of any other person; that Talbott pretends and gives out that the alteration was made without his knowledge or consent, and that by reason thereof he became, was, and is released and discharged from all liability to complainant by reason of the note and loan; alleges that John William Randall and Teresa M. Randall have become and now are non-residents of this territory, and insolvent, so that an action or judgment at law against them would be useless and unavailing; and that, unless the note be restored to its original proper form, complainant will sustain irreparable injury; and prays that this may be done, and for further relief in the premises as equity may require. All the defendants entered their appearance.

The defendant Talbott demurred to the bill for want of equity, the court sustained the demurrer, and, the complainant refusing to plead further, the court dismissed the bill as to the defendant Talbott, at the complainant's costs, and the complainant brings the case into this court by appeal, and assigns as errors: "(1) The district court erred in sustaining the demurrer of appellee William E. Talbott, one of the defendants below, to the the amended bill of complaint of appellant, the complainant below, and in dismissing said bill, for the reason that the same is sufficient in form and substance to entitle said complainant to the relief therein prayed. And said complainant prays that the judgment aforesaid may be reversed and annulled, and that he may be restored to all things which he has lost by occasion of said judgment."

Counsel for appellant relies upon the following propositions as grounds for the reversal of the judgment in this case: (1) Defendant Talbott was a joint maker of the note, and defendant Randall was his

agent to fill up and deliver the same. (2) The alteration having been innocently and mistakenly made, under the admitted circumstances, equity has jurisdiction to restore the instrument to its proper form. (3) If Borrodaile and Randall held to have acted for appellants and not as strangers, then the bill shows that they were acting under mistake, and without fraudulent purpose, and appellant, as an innocent party, is entitled in equity to the correction, which can not impose any burden upon Talbott different from that which he confessedly assumed by signing the note upon the faith of which appellant advanced the money. Equity has jurisdiction to correct a mistake of law as well as of fact, which a court of law has not.

1. The authorities cited under the first proposition present the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee, and before it is delivered; the question being whether the party is to be deemed an original promisor, guarantor, or indorser. This question was fully examined by the supreme court of the United States in the case of *Good v. Martin*, 95 U. S. 90. It is not necessary to give this question a separate consideration in the present case, as the rights and liabilities of the parties will be shown in the examination of the other propositions.

2. In *Lubbering v. Kohlbrecher*, 22 Mo. 596, the court held that, "where material alteration is made in a promissory note by one unauthorized by and without the knowledge or consent of the owner of such note, the note is not thereby avoided as against such owner."

PROMISSORY note:
alteration by
mistake: liability
of indorser:
bill of reform.

The words "with interest from date," were added to the note after its execution. In *Evants v. Adm'r and Heirs of Strode*, 11 Ohio R. (Stanton) 480, the court said: "Where an instrument, by a mistake of the

parties as to the legal effect of the terms used, fails to carry out their intention, relief may be afforded in equity;" and that "a mistake of law may be corrected in equity." In *Langenberger v. Kreiger*, 48 Cal. 147, the court held: "If a person without authority to do so, and who is not the agent for the payee for that purpose, writes across the face of a draft payable generally in money the words 'payable in United States gold coin,' it is not such an alteration of the draft as vitiates it." So, in the case of *Bank v. Emerson*, 10 Paige, 359, it was held that "the court of chancery is authorized to correct the errors and to supply the omissions of its registers, clerks, and other officers, when it can be done without detriment to the rights of third persons, and where substantial justice requires it to be done." These citations will suffice, as presenting the views of counsel for the appellant on his side of the case.

Counsel for Talbott, the appellee, contends that as the alteration of the note was made by one of the makers and the agent of the appellant, without the knowledge or consent of the appellee, it operated to discharge him from liability on the note. Authorities are cited by counsel in support of the proposition. The case of *Wood v. Steele*, 6 Wall. 80, was an action upon a promissory note made by Steele and Newson, bearing date October 11, 1858, payable to their own order, one year from date, and indorsed by them to Wood, the plaintiff. It appeared on the face of the note that "September" had been stricken out, and "October 11th" substituted as the date. The circuit court instructed the jury "that, if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The jury found for the defendant, and the plaintiff prosecuted a writ of error to reverse the judgment to the supreme court of the United States. The court said:

“It was a rule of the common law, as far back as the reign of Edward III, that a rasure in the deed avoids it. The effect of alterations in deeds was considered in Pigot’s case, and most of the authorities upon the subject down to that time were referred to. In *Master v. Miller*, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled in both English and American jurisprudence that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. * * * The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, can not affect the result. He had no authority to change the date. The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed. Another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. * * * To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged. * * * The rule, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must suffer the loss. * * * The defendant could no more have prevented the alteration than he could have prevented a complete fabrication, and he had as little reason to anticipate one as the other. The law regards the security after it is altered as an entire forgery with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly.”

—referring to the following cases: *Goodman v. Eastman*, 4 N. H. 456; *Waterman v. Vose*, 43 Me. 504; *Outhwaite v. Luntley*, 4 Camp. 180; *United States v. Boone*, 391; *Mitchell v. Ringgold*, 3 Har. & J. 159; *Stephens v. Graham*, 1 Serg. & R. 509; *Miller v. Gilleland*, 19 Pa. St. 119; *Heffner v. Wenrich*, 32 Pa. St. 423; *Stout v. Cloud*, 5 Litt. 207; *Lisle v. Rogers*, 18 B. Mon. 529. Story, in his *Equity Jurisprudence* (volume 1, sec. 138), says: "It is a matter of regret that, in the present state of the law, it is not practicable to present in any more definite form the doctrine respecting the effect of mistakes of law, or to clear the subject from some obscurities and uncertainties which still surround it. But it may be safely affirmed upon the highest authority, as well as established doctrine, that a mere naked mistake of law, unattended with any special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions." *Id.*, secs. 110, 111; *Story Cont.*, sec. 407.

Though it may be difficult to reconcile these conflicting decisions, it is believed, on the weight of authority, that the alteration of the note was material; and being done by one of the makers and by John Borrodaile, or one of them, without the consent of Talbott, he was thereby discharged from liability on the note. It is not alleged in the petition why Ruby was dissatisfied with the original note, except as to its form, nor what was the form he desired, only that it should be another and different note from the makers, Talbott and John William Randall and Teresa Randall, as evidence of the debt. Ruby appears to be in possession of the altered note, which he asks may be restored to its original form, and which bore an unlawful and usurious rate of interest. The sum for which the note was given and its date and the rate of

interest, were altered, and a different sum and date and rate of interest substituted. It would be a useless proceeding to restore the note to its original form, unless it was intended that Talbott should be liable as indorser or one of the makers. The demurrer was properly sustained, and the bill of complaint dismissed as to Talbott. Judgment affirmed.

HENDERSON, J., concurs.

LONG, C. J.—With due deference and respect to the opinion of the majority of the court, I prefer to place the affirmance of the judgment below on the grounds herein stated, and am not willing to hold that the alterations of the note complained of in the bill avoided it entirely. The right of the holder of a contract, erased and interlined without his authority or consent, to enforce such instrument, is an important one, and I am not willing to hold a principle which might deprive the holder of such paper from enforcing it. The complainant's bill tersely states the theory of his case, and is as follows:

"Your orator, Frank Ruby, a citizen and resident of the State of Colorado, brings this, his bill of complaint, against William E. Talbott, a citizen and resident of the county of Bernalillo and territory of New Mexico, and John William Randall and Teresa M. Randall, citizens and residents of the state of New York, defendants herein, and thereupon your orator complains and says: That heretofore, to wit, on the 17th day of April, A. D. 1883, at said county of Bernalillo, at the request of said defendants herein, your orator loaned to John William Randall the sum of fifteen hundred dollars in lawful money of the United States, and in consideration thereof the said defendants, as evidence of said indebtedness, made, executed, and delivered to one Mariano Armijo, in trust for your orator, their certain promissory note hereinafter specially mentioned and

described. Your orator states that, prior to the execution and delivery of said note, the defendant William E. Talbott, by the name and signature of W. E. Talbott, wrote and indorsed his signature and name upon the back of said note, and delivered the same in blank to the defendant John William Randall, and that thereafter the same was, by and under the direction of said John William Randall, subscribed and signed by the said John William Randall, and Teresa M. Randall, and afterward, to wit, on the same day, was delivered to one Mariano Armijo in trust for your orator. That when the said note was so delivered to Mariano Armijo in trust for your orator, as aforesaid, the same was in words and figures as follows, to wit:

“ \$1,500.00.

“ ‘ALBUQUERQUE, N. M., April 17, 1883.

“ ‘One year after date we promise to pay to the order of Mariano Armijo, in trust for Frank Ruby, fifteen hundred no hundredths dollars, at the Central Bank here, at eighteen per cent per annum from date, value received.

“ ‘JOHN WILLIAM RANDALL.

“ ‘TERESA M. RANDALL.’

“ ‘And that thereafter, to wit, on the same day, the said note was indorsed by the said Mariano Armijo, as follows:

“ ‘Pay to Frank Ruby or order.

“ ‘[Signed] MARIANO ARMIGO.’

“ ‘And the same was then by the said Mariano Armijo transmitted to and received by your orator. Your orator states that at the time said note was so received by him he was absent from said territory of New Mexico, and that after receiving the same, being dissatisfied with the form thereof, and being desirous of obtaining from the said makers, William E. Talbott, John William Randall, and Teresa M. Randall, another and different note, as evidence of said indebtedness,

instead and in lieu of the said note above set forth, for that purpose sent and transmitted said note to the partnership firm doing business under the name and style of 'Armijo Bros. & Borrodaile,' at said county of Bernalillo, and composed of Mariano Armijo, Elias Armijo, and John Borrodaile, and requested and directed them to procure and obtain the execution and delivery of such other and different note before mentioned and as evidence of said loan hereinbefore mentioned.

"Your orator further states that he is informed and believes that the said Armijo Bros. & Borrodaile neglected and failed to obtain the execution and delivery of any other or different note to your orator in lieu of said above mentioned note, and that the said John William Randall and John Borrodaile, while said note was so in possession of said firm, Armijo Bros. & Borrodaile, for the purpose aforesaid, changed and altered the said note, without the knowledge or consent of your orator, in such manner that the same became and was in form, words, and figures following, to wit:

" '\$1,590.00-100.

" 'ALBUQUERQUE, N. M., April 27, 1883.

" "One year after date we promise to pay to the order of Mariano Armijo, in trust for Frank Ruby, fifteen hundred and ninety no hundredths dollars, at the Central Bank here, at twelve per cent per annum from date, value received.

" 'JOHN WILLIAM RANDALL.

" 'TERESA M. RANDALL.'

"And signed upon the back thereof as hereinbefore stated.

"Your orator further states that the said alteration was so made without any authority or direction from your orator by the said Randall and Borrodaile, or one of them, in good faith, inadvertently and innocently,

for the purpose and with the intent on their part to effectuate and carry out the wishes and direction of your orator in regard to the procurement of another and different note in lieu and instead of said note as first hereinbefore set forth; and by mistake and inadvertence on their part, and in the mistaken belief that by means of such alterations the wishes and directions aforesaid of your orator could and would be as well, effectually; and legally accomplished and executed as by the execution by said makers of another and different note in lieu thereof, and without any fraudulent or wrongful intent on their part or that of your orator, or of any other person. But your orator states that said Talbott pretends and gives out that said alteration was made without his knowledge or consent, and that by reason thereof he became, was, and is released and discharged from all liability to your orator by reason of said note or said loan hereinbefore mentioned. Your orator is advised by counsel and believes that on account and by reason of said alteration he is, by the strict rules of the common law, barred and deprived of the right of recovery against said Talbott upon said note in its said altered form, and your orator is informed and believes, and so states, that since the alteration of the said note, and since the same became due and payable according to the terms thereof, the said John William Randall and Teresa M. Randall have become and are now nonresidents of this territory, and wholly insolvent, so that an action or judgment at law against them, or either of them, would be wholly useless and unavailing, and that, unless said note be restored to its original and proper form, your orator will sustain irreparable injury. Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, and to the end that the said William E. Talbott, John William Randall, and Teresa M. Randall, who are made parties defendant to this bill,

may be required to make full, true, and perfect answer to the same, but not under oath (the answer under oath being hereby expressly waived), and that the said promissory note may be restored by the said defendants to the original and proper form thereof, before the same was altered as aforesaid, or in default of such restoration by them by the master in chancery of this court, or in some other manner under the direction of this court, and that your orator may have such other and further relief in the premises as equity may require and to your honor shall seem meet."

To this bill a demurrer was sustained by the court below, and that action is complained of here.

It will be observed this is not an action at law to recover on the note either on its original or in its new form after the change, but is an appeal to the equity jurisdiction of the court, under the particular facts pleaded, to restore the note by decree to its original form; the bill shows a very strong case for relief in some way. The alteration complainant did not authorize, nor does it anywhere appear that he ratified or approved or consented to the act whereby the form of the note in substantial particulars was changed, nor was he in any way negligent, nor did he impose any hardship upon the accommodation maker, Talbott; yet it is contended, by the operation of some rule of law, that he can not recover on the note as originally made, or as altered, and that equity will not decree a restoration. If so, complainant is made the victim of an act done without his authority or consent, never approved or ratified by him, and which he was powerless to prevent. I do not believe the law imposes such a hardship on an innocent person. To do so would be to punish when there is no offense; to inflict a penalty where there is no wrong. The original transaction, as appears by the averments in the bill, was this: Mariano Armijo was the trustee of Ruby. The Randalls pro-

cured from Ruby a loan of \$1,500, on the faith of their signature to the note as originally made, and the signature as an accommodation maker of Talbott, who may in some sense be called a "surety." The name of Talbott on the paper was probably the inducement for Ruby to part with his \$1,500. When the note was executed and delivered to Armijo, and the money paid to the Randalls, the transaction was completed and the legal liability of Talbott fixed. The promise being made to Armijo, in trust for Ruby, no assignment to him was necessary. The position of the appellee is that, without payment by the maker, in the absence of negligence on the part of Ruby, the holder, with no fraud or improper or wrongful act imputed to him, yet the maker is discharged of liability, and all remedy for Ruby is gone. The position is that he can not recover on the note in its new form, because it is not the note of Talbott; that he can not recover on it in the original form, because the unauthorized interlineation in the the note, and addition thereto, has destroyed its validity, and that equity is powerless to relieve. If that is a correct position, then there may be a wrong and no remedy. I do not believe an honest obligation to pay money can be discharged or wiped out in that way; but, to the contrary, hold that the complainant Ruby has an ample legal remedy, by an action at law on the note in its original form, with averments like those in the bill of complaint, showing that the interlineations and changes were made without the holder's consent or authority or knowledge. Proof of such averments would relieve the holder of all responsibility for the alteration, and require the court to disregard them. The averments of the bill are clearly to the effect that Armijo Bros. & Borrodaile were by Ruby created his particular agents to do one single act, and not his general agents. On this point the bill avers: "Your orator states that at the time said note was received by

him he was absent from the territory of New Mexico, and after receiving the same, being dissatisfied with the form thereof, and being desirous of obtaining from the makers, Wm. E. Talbott, John W. Randall, and Teresa M. Randall, another and different note as evidence of said indebtedness, instead and in lieu of the note above set forth, for that purpose sent and transmitted said note to the partnership firm doing business under the name and style of 'Armijo Bros. & Borrodaile,' at said county of Bernalillo, * * * and requested and directed them to procure and obtain the execution and delivery of such other and different note, before mentioned, and as evidence of said loan before mentioned."

A general agent is one authorized to transact all his principal's business, or all of his business of some particular kind. A particular agent is one authorized to do one or two particular things. * * * "If a particular or special agent exceeds his authority, the principal is not bound." 1 Pars. Cont. 40. The averments just quoted from the bill show clearly that Ruby created the firm as his special agent only to take a new note and thereupon surrender the old one. The firm was not constituted his general agent to erase, interline, add to, or alter the old note. On the contrary, the authority was carefully guarded and expressly limited to the taking of a new note in lieu of the old one. The firm exceeded its authority, and, instead of requiring a new note, as its instructions provided, went outside of its authority, and, without either the knowledge or consent of Ruby, changed by alteration the old note in important particulars, as will be seen by the bill. This act, outside of the authority of the agent, should not bind Ruby, while he repudiates the act. The question here is between the holder and Talbott, the original accommodation maker, it being averred in the bill that the Randalls are both non-residents of the territory, and also insolvent. If it be

held that this unauthorized act does not discharge Talbott, such a holding does not enlarge his liability, but only compels him to perform his original promise. There is nothing in the case in the nature of an estoppel, as Ruby has done nothing apparent from the averments to work an estoppel. The original note should not be avoided against Ruby as a penalty for tampering with it, because the averments show he has not done so. Talbott, by the act complained of, can in no way be made to pay more than he agreed. The case of *Wood v. Steele*, 6 Wall. 81, is not conclusive of this one. In that case the alteration in the instrument was by one of the makers, and before its delivery to the payee, and the action was not on the original note, but on the instrument in its changed form. The court properly held the new note was not the note the surety signed, and he was, therefore, not liable. Of course, as to him, the new note was a forgery, because he never signed it, and the alteration made it in effect a new note. What the court say in that case about the effect of the alteration in the note as originally signed is entirely outside the issue then before the court, and may properly be regarded as obiter dictum, and not binding on this court.

In *Lubbering v. Kohlbrecher*, 22 Mo. 596, the effect of an unauthorized alteration in a note was passed upon. That case was a suit on a note for \$100. The defendants proved that the words "with interest from date" were added to the note after its execution. The court below in that case declared the law to be as follows: "First. The plaintiff is not affected by any alteration or erasure or spoliation made on the note sued on, unless the same was done by her or by her knowledge or consent. Second. An agent has no implied authority to do an unlawful act, so as to bind his principal, unless such act is done by the knowledge or consent of the principal." The supreme court hold

the law as declared to be correct, and say: "In this case the addition of the words and the subsequent erasure of them was not brought home to the plaintiff. She is not bound by the illegal and unauthorized conduct of those who were her agents, nor should she be affected by any act wrong in law, and not within the scope of the agent's authority or business, unless the act be sanctioned, or subsequently affirmed, by her."

In *U. S. v. Spalding*, 2 Mason, 478, Justice STORY very strongly condemned the old doctrine, that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed. He considered the old rule as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, or the wrongful acts of others.

To the same effect is *Langenberger v. Kreiger*, 48 Cal. 148. In that case the defendant, residing at Anaheim, made and delivered to one Smith, for the plaintiffs, a draft on Leopold Kahn of San Francisco, for \$622, payable to the order of the plaintiffs, but specified no particular kind of money in which it was to be paid. On receiving the draft, Smith, without the authority of the defendant, and, so far as the evidence shows, without the knowledge or authority of the plaintiffs, wrote across it, in red ink, the words, "payable in United States gold coin." Notwithstanding this alteration, a judgment was rendered on the draft, which was upheld in the supreme court. The court say: "There was no evidence as to the nature or extent of Smith's agency, and, in the absence of all proof on that point, it can not be inferred that Smith was acting in the scope of his agency in writing these words across the draft, and the plaintiffs are not bound by or responsible for his unauthorized act, unless they subsequently adopted and ratified it with knowledge of the facts. * * * It was, therefore, the unau-

thorized act of a stranger having no interest in the transaction, and did not vitiate the draft."

That case is in point. The firm of Armijo Bros. & Borrodaile stood in the same relation to the note that Smith did to the draft. Each was a holder of the paper for a particular purpose, as the agent of its owner, and neither had right to add to or take from the paper. Each acted outside of authority, and if in the California case the holder of the draft should not in law be defeated of his right by the unauthorized act of an agent, in this case the plaintiff should, in an action at law on the original note, have relief against the unauthorized act of his agent; especially where it would not make the indorser's liability greater by a single nickel than that which he originally assumed. "A distinction is to be observed between the alteration and the spoliation of an instrument as to the legal consequences. An alteration is an act done upon the instrument by which its meaning or language is changed. The term is, at this day, usually applied to the act of the party entitled under the deed or instrument, and imports some fraud or improper design on his part to change its effect. But the act of a stranger, without the participation of the party interested, is a mere spoliation, not changing its legal operation, so long as the original writing remains legible. If, by the unlawful act of a stranger, the instrument is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as an accidental destruction of primary evidence." 1 Greenl. Ev., sec. 566. In *Union and Nat'l Bank v. Roberts*, 45 Wis. 377, it is held, where one made an alteration in a note not having authority to do so, that as to such act he was a mere trespasser, and the note was not thereby to be held void. "When the spoliation be done by an agent of one of the parties, it will not avoid the contract, if the agent had no express or implied authority

to do it." Am. and Eng. Cyclopedia of Law, 505. To support the text the author cites the following authorities. *Brent v. Eoff*, 35 Barb. (N. Y.) 50; *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 35 N. J. Law, 227, 10 Am. Rep. 232; *Bigelow v. Stilphen*, 35 Vt. 521, 67 Am. Dec. 459. "An alteration, when made by a stranger to a contract, can not invalidate it." 1 Am. and Eng. Cyclopedia of Law, 505.

Mr. Parsons, in his work on Contracts (volume 2, p. 716, note m), fully discusses the effect of an alteration upon written instruments. He says: "In this country it is clearly settled that a material alteration by a stranger will not render an instrument void, if it can be shown by evidence what the instrument was before it was altered." The following authorities are cited by the learned author, whose accuracy of statement as to the result of decided cases is always received as correct, in support of his views. *Nichols v. Johnson*, 10 Conn. 192; *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payn*, 8 Cow. 71; *Medlin v. Platte Co.*, 8 Mo. 235; *Davis v. Carlisle*, 6 Ala. 707; *Waring v. Smyth*, 2 Barb. Ch. 119; *Smith v. McGowan*, 3 Barb. 404; *Jackson v. Malin*, 15 Johns. 293; *City of Boston v. Benson*, 12 Cush. 61; *Worrall v. Green*, 39 Pa. St. 388. "If the alteration be not fraudulent, although it cancels the instrument, it will not cancel the debt of which the instrument is evidence." 2 Pars. Cont. 720; *Vogle v. Ripper*, 34 Ill. 100.

In *Hunt v. Gray*, 35 N. J. Law, 227, also quoted in 10 Am. Rep. 232, in addition to the discussion of that question in the opinion, the following authorities are cited in a note, in support of the doctrine "that the alteration of an instrument by a stranger to it will not avoid the instrument:" *Ford v. Ford*, 17 Pick. 418; *Piersol v. Grimes*, 30 Ind. 129; *Crockett v. Thomason*, 5 Sneed, 342; *Fulmer v. Seitz*, 9 Am. Rep. 172, and notes. It has been impossible to examine

the authorities thus cited by the note to the New Jersey case, to verify the correctness of the citation, but they are given here in the belief that they will be found to support the principle to which they are cited.

Hunt v. Gray, *supra*, contains to my mind such a forcible and irresistible argument in support of the position that a liability exists at law on the original note in this case described, that full extracts from the opinion of that court are here given. The facts of that case, as disclosed by the record, are these: The suit was upon a note of which the defendant was maker, one John E. Hunt being the payee. The consideration of the note was a horse sold and delivered. This horse was the property of George Hunt, the plaintiff, for whom said John E. Hunt was acting as agent in the sale of the horse. This agency was not disclosed to defendant. Upon receipt of the note the agent showed it to his principal, the plaintiff, and took it to the bank to have it discounted for his use. The bank refused to cash the note, as it was drawn without "defalcation" merely. The agent, without knowledge of the plaintiff, thereupon inserted into the note the words "or discount." The bank then took the note, and the proceeds passed to the plaintiff. The note not being paid at maturity, the plaintiff took it up, and brought suit upon it in the action then before the supreme court. That court say: "The alteration was a material one, and it is alleged it was made by the agent of the plaintiff. The question, then, is presented as to the effect of such an alteration of a written contract. I have no doubt any legal instrument is, as a means of evidence, annulled by such an act. This is the doctrine as extracted from Year Books, expounded in Pigot's Case, 11 Rep. 27. The law, as resolved in this celebrated decision, was that when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be

it by interlineation, addition, raising, or by drawing a pen through a line, or through the midst of any material word, that the deed thereby becomes void; and in the recent case of *Davidson v. Cooper*, 11 Mees. & W. 778; s. c., 13 Mees. & W. 343, Lord ABINGER, in delivering the judgment of the court of exchequer, said: 'There is no doubt but that, in case of a deed, any material alteration, whether made by a party holding it, or by a stranger, renders the instrument altogether void from the time when such alteration is made.' In *Master v. Miller*, 4 Term R. 320, this doctrine was held to be applicable to promissory notes and all written contracts. To the extent that a legal instrument will be avoided by an alteration made, either directly or indirectly, by the party claiming an interest under it, this doctrine has been repeatedly recognized by this court, and as a principle in our legal system is not to be questioned. * * *

"The reasons for this rule are obvious, and of the most solid character. In its absence, the inducement to fraud would be strong, and public policy requires, in the language of Lord KENYON: 'No man shall be permitted to take the chances of committing a fraud without running any risk of losing by the event that it is detected.' * * * If the instrument has been altered by the mistake of the party holding it, relief must be sought in a court of equity. Within this limit, I do not find that the legal principle has been seriously called in question. * * * The alteration of the note in this case destroyed it, if such alteration, in legal intendment, is to be ascribed to the plaintiff. But here, I think, intervenes one of the infirmities of the defense. The alteration of this note was not the act of the plaintiff, because the person who made it was not his agent for that purpose. These were the facts: John E. Hunt was the agent who sold the plaintiff's horse for time. In that transaction he took the note in dispute, and carried it to the plaintiff. He then took it to the bank.

and had it discounted, the proceeds going to the plaintiff. From these circumstances an authority to alter this note can not be inferred. It could not have been within the contemplation of either the principal or the agent at the time of the creation of the agency. Consequently the act must be regarded as done by a stranger, without the concurrence, express or implied, of the plaintiff. The question is, will an alteration made by a stranger vitiate the note? It will be observed that the rule as stated by Lord COKE in the case cited from his reports, answers this inquiry in the affirmative, and that seems to be, after some fluctuation of sentiment, the present prevailing opinion in the English courts. But the doctrine rests, I think, rather on ancient dicta than on actual ancient decisions, and the American rule, and with much better reason, appears to be entirely the other way. Prof. Parsons treats the rule as completely settled in this country that a material alteration by a stranger will not render an instrument void, if it can be shown by evidence what the language was as it originally stood. 2 Pars. Cont. 233, note 9, where the cases on the subject will be found collected. As the common law, in its ancient form can not be said to have been so settled on this point as to be imperative on this court, we are at liberty to follow either the modern English or American rule, and I have already said the latter seems preferable. The only ground I have found suggested in support of the new stringent rule is this: that a paper can not be altered by a stranger without laches on the part of the holder of it. But this is an assumption which has no foundation in fact. A man is not always remiss who trusts his paper with another. Many of them, every one knows, must be constantly passing from hand to hand. Under such circumstances, the imputation of laches is utterly misplaced. Nor does there appear any necessity, arising from considerations of public policy,

for the enforcement of so severe a rule. Strangers having no interest in an instrument are under no great temptation to corrupt it, and it is therefore an evil which will not often occur, while the injustice of concealing a written contract, without fault in the party holding it, is so flagrant that it should require the strongest reasons for the law to imply it. Adopting, then, the rule recognized by the courts in this country, and applying it to this case, the result is that this verdict founded on the note in question must stand, as the note was not altered by the plaintiff, nor with his consent, and as the act of a stranger could not deprive it of its legal force."

The case which has been so fully quoted is to my mind absolutely conclusive on the rights of the plaintiff, Frank Ruby, in this case. It is pertinent to inquire, what has Ruby done that his right of action on the original note should be taken from him? *Wood v. Steele*, 6 Wall. 80, was an action on a note which had been changed without the consent of the surety in its changed and new form. As so changed without surety's consent, it was not, as sued upon, his promise, and of course recovery thereon could not be had at law. So here, if Talbott is sued on the note as changed in its new form, if he did not consent to it, was no party to it, it would not in such form be his promise, and he would defeat a recovery; so he has not been injured. Shall it be said this original note in the case under consideration must be treated as destroyed, satisfied, as having no force or effect in law or equity, to prevent other persons from changing other notes, as a matter of public policy? If so, the answer is clear. The establishment of such a rule will rather encourage the destruction of written instruments by interlineation or erasure than the contrary. Such a principle would stand as a constant inducement to such changes. Persons would be thereby tempted surreptitiously in many

ways to procure the alteration of the paper as the easiest mode of discharge therefrom. Was the plaintiff negligent, because, being absent, he intrusted the original note to an agent, to surrender it, and to receive a new note in its place? The employment of agents and attorneys to take, renew, negotiate, and collect notes is one of the most common affairs of business. I am not willing to establish the principle in this territory, that one who intrusts a note with another, to be collected, negotiated, delivered up on receipt of a new and satisfactory obligation, shall lose all remedy if the agent, either by mistake or of his wrong, exceeds his authority, and without the owner's knowledge or consent or ratification interlines or erases the paper, so as to materially change it. The rule, in my judgment, is that the holder may be made to lose his right if he himself alters the note, or procures it to be done, or in any way authorizes the act, but not if it is without his knowledge or authority. In *Angle v. Northwestern Life Insurance Co.*, 92 U. S. 556, Mr. Justice CLIFFORD, in delivering the opinion of the court, said: "Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority. Pursuant to that settled rule of law, it is settled that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling the blanks, * * * but he may not make a new instrument by erasing what is written or printed, nor by filling the blanks with a stipulation repugnant to the plainly expressed intention of the same, as shown by its printed terms." It seems to me, if the act is wrongful, outside of authority, it clearly should not bind or in any way affect the parties to the note. It certainly is a harsh rule to hold that a mere custodian of paper may, without right, against his

instructions, without the payment of a dollar by the surety, without imposing on him a new obligation or hardship, release a maker from liability, by running the pencil or pen through a material word or line in the instrument. If that is the state of the law, it is an easy way to pay debts.

It may, however, be contended that the original note was avoided because of the averments showing the act of one of the makers with respect to the change. A reference to the bill discloses that it is charged that Randall and Borrodaile, or one of them, while the note was so in the possession of Armijo Bros. & Borrodaile, without authority, made the changes described in the bill. It nowhere appears that Randall had possession or custody of the note by Ruby's direction or consent. The contract was completed and liability fixed when the note was delivered to Ruby. After that Randall had no right to its custody, except on payment by him. It was then a completed transaction. He had made delivery. Suppose, after that, he had requested of Ruby a moment's inspection of the note, and while having it so in his custody Randall had stricken out or written in material words, without the knowledge or consent of Ruby, would such an act release Talbott, the other maker? If so, all an accommodation maker need do, to pay his obligation or to discharge his debt, is to procure the maker to ask of the holder an examination of the paper, which, in the trust usually pertaining to business transactions, would be granted, and then, while making such examination, to strike out any material word, or write in one, and in a moment thereby the obligation, "in the twinkling of an eye," is paid, discharged, gone. The mere statement of such a proposition would seem to carry its own refutation. How, under the allegations of the bill, does Randall stand differently toward the note? What right has he to the possession of the note? Ruby did not intrust it

to him. He did not instruct or authorize Armijo Bros. or Borrodaile to do so, or to even allow Randall the custody of or inspection of it, but only to surrender it to the custody of Randall, on condition that a new obligation in different form should be made. If this note were in Randall's hands, pending the payment of the money, before the completion of the transaction for delivery to Talbott on payment of the money, and while so in his hands Randall altered the same, it may be a different rule would apply; but after the transaction was complete, the note delivered to Tabott, and the liability of all parties to it fixed, under the averments of the bill, I believe that Randall should be regarded as a stranger, and that neither his alteration of the note, nor the unauthorized change in its terms, could destroy the plaintiff's right of action on the original instrument. The complainant was careful not to aver he did not have a right of action on the note in its original form, but he did aver that upon advice of his counsel he believed he had no right of action on the note in its new and altered form. That he did not have such right of action is apparent, but I believe he has a right of action on the original note, if the averments of the bill are true, and he did not afterward ratify the act which he imputes to Borrodaile or Randall in changing the note, notwithstanding the alteration, and for that reason he has an adequate remedy at law, and did not need the aid of a court of equity to restore the note. On that ground the action of the court below in sustaining the demurrer, it seems to me, should be sustained.

[No. 374. March 2, 1889.]

EDWARD T. FARISH ET AL., PLAINTIFFS IN ERROR,
v. NEW MEXICO MINING COMPANY ET AL.,
DEFENDANTS IN ERROR.

MEXICAN GRANT—BILL TO ESTABLISH TITLE—PLEAS, RES ADJUDICATA, STATUTE OF LIMITATIONS.—In 1865 the complainants filed a bill in equity under oath to establish title to a Mexican grant. To this bill the defendants filed an answer under oath, responsive to the allegations of the bill. The cause was referred to a master, and depositions were taken by defendants sustaining their title. No reply was made by complainants, and defendants, after the time had expired for filing a reply and taking proof before the master, moved to dismiss the cause for want of prosecution, which motion was granted in 1868, upon argument by both sides, and the court being fully advised. On a bill filed by the same complainants in 1883, based on the same legal title and substantially the same facts, where the defendants pleaded the former adjudication, and the statute of limitations of ten years, in bar of the action—Held: The dismissal was a decision on the merits of the controversy, presented by the pleadings and proof, and fully sustained defendants' plea of res adjudicata. If there were any doubt on this point, complainants' claim would still be barred by the statute of limitations of ten years.

ERROR, from a decree in favor of defendants, to the First Judicial District Court, Santa Fe County. Decree affirmed.

E. T. FARISH, JOHN D. POPE, and FRANCIS DOWNS
for plaintiffs in error.

"A former judgment or decree, in order to conclude the question when raised again, must have been rendered upon the hearing of the parties upon the merits of the case." 2 Madd. 311; 14 Ves. 232; Coop. Eq. Pl. 270; 1 Atk. 571; Story Conflict Laws, 506; 3 Story Const. 178; 3 Cranch, 283; 6 Whea. 109; 2 Gall. 328; 1 Brown Appx. 1.

Where the record shows the case was dismissed "for want of jurisdiction," or "for failure to prosecute,"

or "without prejudice," there is no estoppel. *Footte v. Gibbs*, 1 Gray, 412, 413; *Story Eq. Pl.*, sec. 783a.

A decree, dismissing a bill for matters not involving the merits, is no bar to a subsequent suit. *Hughes v. U. S.*, 4 Wall. 232; *Durant v. Essex County*, 7 Wall. 107.

The dismissal of a libel in one of the United States for want of prosecution, is not a bar to subsequent proceedings for the same cause of action in another state. *East Dist. of Pa.*, *Sarchet v. Davis*, *Crabbe*, 185; *Homer v. Brown*, 16 How. (U. S.) 354; *Union Bank v. Vaiden*, 18 Id. 503.

The dismissal of a suit for want of jurisdiction, on account of any omission from the pleadings of the jurisdictional fact which really exists, is no bar to a second suit on the same cause of action. *Smith v. McNeal*, 109 U. S. 426.

A judgment is no bar where there was no final judgment on the merits. *Block v. Dorman*, 51 Mo. 31; *Atlantic & Pacific R'y Co. v. St. Louis*, 3 Mo. App. 315.

A nonsuit, voluntary or enforced, does not estop the plaintiff from bringing a new action. *National Waterworks v. School District*, 23 Mo. App. 227.

W. T. THORNTON and E. L. BARTLETT for defendants in error.

The dismissal of a bill in chancery will be presumed to be final and conclusive adjudication on the merits, whether they were, or were not, heard determined; unless the contrary is apparent on the face of the pleadings, or in the decree of the court, and such decree is a good plea in bar. *Freeman on Judgments*, sec. 270; *Borrowscale v. Tuttle*, 5 Allen, 377; 1 Bar. Chan. Pr., pp. 323, 331; *Witford's Pl.* 194.

To prevent such decree being a bar to another suit between the same parties, or their privies for the

same cause of action, it must be expressed in the decree that it is "without prejudice," or "without prejudice to an action at law," or other words indicating a right or privilege to take further legal proceedings on the subject. 2 Story Eq. Juris., sec. 1523; Story Eq. Pl., sec. 793; *Durant v. Essex*, 7 Wall. (U. S.) 107; *Perine v. Dunn*, 4 Johns. Chan. 141; *Crocier v. Acer*, 7 Paige (N. Y.), 144; *Ogsborg v. Lea Forge*, 2 Comstock (N. Y.), 114; *Foote v. Gibbs*, 1 Gray, 412; *Heirs of French v. French et al.*, 8 Ohio, 214; *Coop. Eq. Pl.* 270; *Bigelow v. Winsor*, 1 Gray, 301.

Answers under oath are to be treated as evidence, and will prevail unless overcome by the testimony of two witnesses, or of one witness, with strongly corroborating circumstances. Story Eq. Pl., secs. 849a, 875a; Story Eq. Juris., sec. 1528; *Borrowscale v. Tuttle*, 5 Allen, 377.

The presumption of law is that the whole case was passed upon by the chancellor. Though as a matter of fact "the merits" of this case were fully set out in the bill and answered, and the answer was supported by the testimony of two witnesses, which was not necessary. Where no reply is filed, when required, the answer is taken as true, and the defendant needs no proof, and the complainant can not offer any. 1 Bar. Chan. Pr., p. 254.

Whatever might have been fairly within the scope of the pleadings in the former suit must be held as concluded by the judgment. *Aurora City v. West*, 7 Wall. (U. S.) 102.

Section 2190, Compiled Laws, is but declaratory of the general law that "material and incurable defects in pleadings, though not noticed in the bill of exceptions, or by counsel, may be reviewed." *Garland v. Davis*, 4 How. 13; *Blanchard v. Putnam*, 8 Wall. 420; *Langdean v. Haines*, 21 Wall. 521.

There is no rule of court or principle of law which

prevents a party from assuming a ground in this court which was not suggested below. *Watts v. Waddle*, 6 Pet. 389.

The entire transcript of the record is before the court for examination. *Scott v. Lanford*, 19 How. 393.

If a tract confirmed by congress has clearly defined boundaries or is capable of identification, the confirmation perfects the claimant's title. *Morrow v. Whitney*, 95 U. S. 551; *Whitney v. Morrow*, 112 U. S. 693; *Langdean v. Haines*, 21 Wall. 521; *U. S. Land and F. Co. v. Tameling*, 3 Otto.

Patents for lands which have been previously granted, reserved from sale, or appropriated, are void. *Morton v. Nebraska*, 21 Wall. 660; *Polk v. Wendall*, 9 Cranch, 87; *Same v. Same*, 5 Wheat. 293; *Patterson v. Winn*, 11 Id. 380; *Stoddard v. Chambers*, 2 How. 284; *Minter v. Crommelin*, 18 How. 87; *Rice v. Minnesota & N. W. R'y Co.*, 1 Black. 358; *Stone v. U. S.*, 2 Wall. 525; *Richart v. Phelps*, 6 Wall. 160; *Riley v. Wells*, 19 U. S. Cor. Add. 648.

HENDERSON, J.—Plaintiffs in error filed in the court below a bill, the object and purpose of which was to establish in them through purchase and by descent an equitable title to a half interest in a mine called "Santa Rosalia," and four square leagues of land, measuring two leagues from Santa Rosalia mine to all the cardinal points of the compass, two leagues to the north, two leagues to the south, two leagues to the east, and two leagues to the west from the orifice of the mine. The bill alleges that a grant was made by the Mexican government in the year 1833 to Jose Francisco Ortiz and Ignacio Cano of a mine called "Santa Rosalia," with a right of possession for wood, water, and grazing privileges upon four square leagues of land described as above. Possession by Ortiz and

Cano as tenants in common is alleged until the death of Cano about the year 1836, and possession by Ortiz for himself and the heirs of Cano until the death of Ortiz, in the year 1848. That the grant was presented to the surveyor general for approval, and by him approved and recommended for confirmation on the twenty-fourth of November, 1860. That in the month of March, 1861, the grant was confirmed by congress as recommended by the surveyor general, but that the confirmation should only be construed as a quitclaim or relinquishment on the part of the United States, and should not affect the adverse rights of any other person. The grant was surveyed and approved in the year 1875, and patented to the New Mexico Mining Company in 1876. The bill alleges fraud on the part of the New Mexico Mining Company in procuring the patent to be issued to it. It sets out a conveyance from the New Mexico Mining Company to defendants Elkins, Chaffee, Donnell, and Anderson, and charges notice to them when they purchased. It is further charged that defendants are in possession, and are taking large profits out of the mine. The bill prays that defendants be declared trustees as to a half interest, for an account of rents and profits, and for general relief.

Defendants filed a joint and several answer, in which they admit the original grant of the mine, but neither admitted nor denied the grant of the four leagues of land. They deny that Ortiz and Cano acquired title to any mines within the four leagues, except the Santa Rosalia. They admit the joint possession and ownership of Ortiz and Cano in 1833, but set up a purchase by Ortiz from Cano. They deny that Cano at the date of his death had any interest in the mine or lands, or that his heirs from that date until the date of Ortiz' death, in 1848, claimed any interest or asserted any title or were in possession of the mine or lands. That Ortiz, being sole owner, died leaving a will in due

form by which he devised the lands to his widow, from whom the defendants, through mesne conveyances, have acquired title to the entire property. The answer denies possession by the heirs of Cano or their grantees at any time since Cano's conveyance to Ortiz. It denies all fraud on the part of the New Mexico Mining Company in procuring the patent to be issued to it. Admits the approval by the surveyor general, confirmation by congress, survey and patent, of the dates as stated in the bill. The defendants set out and pleaded a former adjudication in bar of this action. They also plead the statute of limitation of ten years. It further appears from the bill, answer, and exhibits, taken together, that A. Rencher, Elisha Whittlesey, Ferdinand W. Risque, Andrew S. O'Bannon, Charles W. Sherman, and W. M. Miller filed their petition for the approval of the grant by the surveyor general, and that they were found to be the owners of it by him. That afterward the New Mexico Mining Company, in the year 1865, filed an amended petition, setting forth that by virtue of an act of the legislative assembly of New Mexico, approved February 1, 1858, the original petitioners for approval had been made and constituted a corporation and body politic, and prayed that the patent issue to the company, which was accordingly done. That the New Mexico Mining Company has been in the exclusive possession of the mine and property from the date of its incorporation, in 1858, is certain from all that appears in the record. This bill was dismissed for want of equity, but the ground stated by the court below was confined to the plea of *res adjudicata* and proofs in support thereof.

These complainants, or some of them, representing the title derived through Ignacio Cano, deceased, in the year 1865, filed a bill in the district court of Santa Fe county, based on the same legal title and sub-

stantially the same facts as this, in which they sought to have their title as heirs of Cano established, and the mine and grant partitioned, one half to the representatives of Cano and one half to the representatives of Ortiz. The bill was under oath, and called for an answer to its allegations under oath. The answer was under oath, and contained substantially, down to that date, the facts stated in the answer filed here, as to the history of the grant, the sale by Cano to Ortiz, and the title acquired by the New Mexico Company, and the other facts vital to the claim made by the bill. The answer in that suit was responsive to the allegations contained in the bill. The cause was referred to a master to take proof. Two depositions were taken by the defendants, sustaining the title of the defendants, or tending to do so, by proving a deed from Cano to Ortiz as claimed. No replication was filed by complainants. After the time had expired to file a reply and take proof before the master, defendants moved to dismiss the cause for want of prosecution. The order of the court is as follows: "On this day [February 24, 1868] came the said parties by their solicitors, and the said defendants by their solicitor, and move the court to dismiss this cause for want of prosecution; and the same having been argued by counsel upon both sides, and the court having been fully advised in the premises, it is considered that the same be, and is hereby, sustained. It is, therefore, considered by the court that the said defendants recover their costs of the said complainants in this behalf expended, to be taxed, and that execution issue therefor."

On this proposition it is contended on behalf of plaintiffs in error that the recitals in the record show affirmatively that the dismissal of the bill in 1868 was not upon the merits of the controversy, but simply because complainants had not been diligent in the prose-

cution of the suit, and that in such case the judgment is not a bar. It is conceded that the suit is between the same parties or their privies, upon the same state of facts, founded upon the same original right, and that, if the judgment hereinbefore recited can be construed to have been upon the merits of the controversy raised by the bill and answer, it will be a bar to the present action. It is true that only final judgments upon the merits between the same parties or their privies, upon the same subject-matter, can be treated as a bar. The courts speak through their records only, and when these records are inspected by other courts they will give them such effect as the rules of law applicable to their construction will allow. Defendants in error insist that the cause had progressed to answer and depositions and a reference to a master to report the merits of the cause as shown by the evidence, and that, therefore, the court must have looked into the whole case made at that stage of the suit, and entered the order of dismissal, not strictly because the suit had not been prosecuted, but because the issue presented was found in favor of the defendants; and that, whether this was so or not, solicitors for complainants were present, and that the plea of *res adjudicata* not only embraces all matters actually litigated, but all matters that might or could have been litigated by the parties at the time. While the court refused to enlarge the time for taking further proofs, complainants could have had the cause set down for final hearing on the bill, answer, and proofs taken, and not having done so, and no saving in favor of a new bill, or without prejudice to a fresh action, or words of any kind appearing to prevent the dismissal from becoming absolute and conclusive upon the merits, the merits are presumed to have been passed upon, and the rights of the parties concluded thereby. Upon looking upon the record presented as a former adjudication, we

MEXICAN grant:
res adjudicata:
limitation.

think it proper to conclude that the court, in passing upon the motion to dismiss, examined into the state of the pleadings, and into each and every step taken in the cause, in order to determine the question raised, and by so doing the evidence contained in the answer and depositions was considered, and influenced the action of the court in dismissing the cause. Had it been true that the cause was dismissed simply because the suit had not been prosecuted with diligence, and the court refused to permit it to be dismissed with a qualification such as without prejudice, or other words limiting the effect of the dismissal, this court upon appeal would have reversed the decree. See *Durant v. Essex*, 7 Wall. 107. No effort, as appears from the record, was made to prevent the decree being made absolute. The defendants were entitled to a decree in their favor upon the pleadings and proofs as they stood when the order or decree of dismissal was entered. To give the decree less force and effect now, after the lapse of twenty-one years, and, as stated in the answer, after hundreds of thousands of dollars have been paid out by the company in improvements, and as against purchasers for value, would be inequitable and contrary to what we conceive the correct rule of law to be. To prevent a decree becoming a bar between the same parties or privies, for the same cause of action, it must be expressed in the decree that it is without prejudice, or other language employed indicating a right or privilege to take further legal proceedings on the subject. 2 Story, Eq. Jur., sec. 1523; Story, Eq. Pl., sec. 793; *Durant v. Essex*, 7 Wall. 107; *Foote v. Gibbs*, 1 Gray, 412; *Coop. Eq. Pl.* 270; *Freem. Judgm.*, sec. 270; *Borrowdale v. Tuttle*, 5 Allen, 377. This would not be the case where the bill was dismissed for want of jurisdiction or want of prosecution, where no steps had been taken to bring the cause to issue and determination on proofs. In the case of *Hume v. Beale's Ex'x*, 17 Wall.

347, DAVIS, J., in delivering the opinion of the court where a former adjudication and lapse of time were pleaded and relied upon, said: "While it is not necessary for the purposes of this case to decide whether this decree can be treated as a former adjudication of the matters in controversy, yet it is quite clear that forty years ago a Maryland court of equity, sitting on the spot where the transactions occurred, while they were fresh in the memory of men, did not believe Beale guilty of the breach of trust with which he was charged, and that the near kindred of the complainant acquiesced in the result of that suit." The court treated the demand in that case as stale, and, following the equity doctrine, without the aid of any statute of limitation, repudiated the claim. That case has application to this by analogy. Here Cano, from and through whom complainants claim title, died in 1836. No suit was brought until 1865. That suit had been pending for three years when it was dismissed, in 1868. This action was not brought until 1883. Nothing is alleged in the bill by way of justification or legal excuse for this long delay. The legal title vested by the act of congress approving the grant in 1861. No legal impediment has been shown to an action at law during all this long period. Had we any doubt of the correctness of the ruling of the court below on the sufficiency of the plea and proofs to sustain the defense of a former adjudication, it is plain upon the face of the pleadings and facts therein admitted that the claim of complainants is barred by the New Mexico statute of limitations of ten years, and that the decree below, upon the whole record, is right, and should be affirmed, and it is so ordered.

LONG, C. J., and BRINKER, J., concur.

[No. 377. March 2, 1889.]

CHARLES W. LEWIS, APPELLEE, v. LUCIANO
BACA AND RAMON PADILLA, ADMINISTRATORS
OF THE ESTATE OF JOSEPH LACKEY, DECEASED,
APPELLANTS.

CONTRACT—APPEAL—INSTRUCTIONS GIVEN ACCORDING TO STATEMENT OF TRIAL COURT IN BILL OF EXCEPTIONS, NOT APPEARING OF RECORD—PRESUMPTION.—Where, on appeal, it is stated by the court below in the bill of exceptions filed that a certain instruction was given which does not appear of record, it will be presumed that the court properly declared the law on the subject. For a like reason, a charge set out as having been given by the court of its own motion, will not be inquired into, where the judge certifying the bill and record states that the general charge of the court embraced matters not appearing in the record.

ID.—MATTERS DEHORS THE RECORD—CONFLICT OF MEMORY BETWEEN TRIAL COURT AND COUNSEL AS TO "SUBSTANCE OF WHAT OCCURRED" AT TRIAL—APPEAL.—But the appellate court will not, on appeal, receive extrinsic evidence of matters that occurred at the trial dehors the record, to aid in the construction of the bill. For that purpose the bill itself must be followed in connection with the record. Nor will the court undertake to settle a conflict of memory between the court below and counsel, leaving the whole record in doubt as to which was correct in presenting the "substance of what occurred" at the trial, but will disregard every matter of fact contained in the bill not arising out of the record proper.

ID.—CLAIM AGAINST ESTATE OF DECEASED PERSON IN PROBATE COURT—INFORMALITY OF ITS PROCEEDINGS, AND POWER TO ENTERTAIN, WHETHER LEGAL OR EQUITABLE—PROPER PROCEEDING ON TRIAL DE NOVO IN DISTRICT COURT, ON APPEAL.—A claim against the estate of a deceased person based on a contract for the price or value of sheep and wool is not of an equitable nature, though the dealings between the parties were loose and irregular; and an action de novo on such a claim, on appeal to the district court from a judgment of the probate court disallowing the claim, would not have been properly brought on the chancery side of the court. In the probate court the proceeding is informal as to matters of pleading, and the plaintiff was not bound to the same degree of accuracy of statement required in a superior court of record. Claims, established by proper evidence, and within the jurisdiction of the court, may be asserted in that court against the estates of deceased persons, whether legal or equitable.

Id.—APPEAL FROM PROBATE COURT TO DISTRICT COURT—TRIAL DE NOVO
—ISSUE OF FACT, RIGHT TO TRIAL OF BY JURY IN DISTRICT COURT.—
On appeal, in such case, from the probate court to the district court,
where the issue is one of fact, and the amount involved over \$20, the
plaintiff is entitled to a trial by a jury, as he would have been in an
original suit in that court on the facts disclosed in the record, which
would have justified an action in assumpsit; and the fact that he
elects to sue in the probate court in the first instance can not deprive
him of that right, which is secured by both the constitution of the
United States and the statutes of this territory.

APPEAL, from a judgment in favor of plaintiff,
from the First Judicial District Court, Santa Fe County.
Judgment affirmed.

The facts are stated in the opinion of the court.

GILDERSLEEVE & PRESTON for appellants.

The action being one relating to the settlement of
the estate of a deceased person, belonged to the chan-
cery side of the court, and should have been tried as a
cause in equity. It is true that in chancery causes
issues of fact may be framed and such special issues
submitted to a jury. But it was not done in this case.
2 Story, Eq. Jur., secs. 1479, 1479a; 2 Daniel's Chy.
Pl. & Pr., p. 1071, et seq., and p. 1110; Franklin v.
Greene, 84 Mass. (2 Allen) 519; Dunphy v. Klein-
smith, 11 Wall. 610.

The defendants requested the court to instruct the
jury that if the plaintiff proved a contract different
from the one set forth in his claim that would not
entitle him to recover, which was refused. It is well
settled that a party must recover, if at all, upon the
averments in his pleadings. Murphy v. Wilson, 44
Mo. 313; Harrison v. Nixon, 9 Pet. 483; Boone v.
Chiles, 10 Pet. 177; 2 Greenleaf Ev., sec. 51.

The fourth instruction requested by defendants,
which was also refused, presents a correct rule of law,
applicable to the testimony of a witness, and should

have been given. *Mercer v. Wright*, 3 Wis. 568; *Crabtree v. Hadenbaugh*, 79 Am. Dec. 327.

The fifth instruction offered by defendants, requesting that the jury be instructed as to the evidence necessary to entitle plaintiff to recover, was according to the rule of evidence prescribed in such cases. *Comp. Laws*, sec. 2082.

Where there is any evidence to prove the issue the question is for the jury. *Otis v. Watkins*, 9 Cranch. 338; *Schuchart v. Allens*, 1 Wall. 359; *Crane v. Morris*, 6 Pet. 598.

It is error for the court to instruct the jury as to the sufficiency of the evidence. *Chesapeake, etc., Co. v. Knapp*, 9 Pet. 541; *Mutual, etc., Ins. Co. v. Snyder*, 93 U. S. 393.

Courts can not assume in instructions to juries that material facts are established, unless they are admitted, or the evidence respecting them is uncontroverted. *Bank of Leavenworth v. Hunt*, 11 Wall. 391.

If the plaintiff delivered to Lackey two thousand ewes upon the condition that Lackey should deliver to him each year one half of the wool derived from them, or a certain amount of wool in pounds, each year, and no time or place was fixed for the delivery of the wool, no action could be maintained by plaintiff on account of the nondelivery of the wool until after a demand made and refusal to deliver. *Martin v. Chuvin*, 7 Mo. 277; *Bradley v. Farrington*, 4 Ark. 532; *Frazee v. McCord*, 1 Ind. 224; *Decker v. Bishop*, 1 Morr. (Iowa) 62; *Bolles v. Stearnes*, 11 Cush. (Mass.) 320.

If plaintiff delivered to Lackey two thousand ewes under an agreement that Lackey should deliver to him each year a certain amount of wool, and on the termination of the contract Lackey was to return to him the same, or a like number of ewes, and no time was specified for the termination of the contract, plaintiff could not maintain an action against Lackey or his

representatives for the value of ewes until after demand for their return and a failure to comply with the demand. 2 Greenleaf Ev., sec. 644; Bolles v. Stearnes, 11 Cush. (Mass.) 320.

Verdicts should be in conformity with the issues formed. Patterson v. United States, 2 Wheat. 221.

CATRON, KNAEBEL & CLANCY for appellee.

HENDERSON, J.—This suit was begun in the probate court of Santa Fe county by appellee, Lewis, to recover from the estate of Joseph Lackey the sum of \$10,202.20. The claim is stated in the following form:

“The estate of Joseph Lackey, deceased, to Charles W. Lewis, Dr.

“For 2,500 improved ewes, delivered to said Lackey by said Lewis in April, 1882, on the condition that said Lackey was to pay therefor one half of the increase and one half of the wool from said ewes, there being now due on said contract the following amounts, viz.:

3,868 merino ewes.....	\$5,802 00
870 yearling ewes.....	870 00
1,336 wethers.....	1,336 00
18,285 pounds of wool.....	2,194 20

\$10,202 20’

After taking proof in the probate court, the whole demand was rejected. Lewis thereupon appealed to the district court. He there recovered judgment for \$5,250. The verdict of the jury contained the items on which the damages were assessed. The administrators of Lackey appealed.

The record before us is in such condition as to render it impossible to determine what was, or what was not, done in the court below, in the way of giving or refusing instructions. After the trial and before the record was filed in this court many of the papers in the case were accidentally destroyed by fire. No effort was made to

CONTRACT: instructions: statement of trial judge not of record: presumption.

substitute them in the court below as lost records. Counsel seem to have agreed that the substance of the contents of these lost papers is embraced in the record. Exceptions were taken, as stated in the supposed record, to the refusal of the court to give a series of instructions moved by the defendants, but the record also shows that the court, according to the memory of the presiding judge, actually gave the first instruction moved, and the substance of the other rejected instructions, or embodied them in the general charge by the court of its own motion. The trial judge makes the following statement in the bill of exceptions and record: "My best impression is that the defendant's first instruction was given or included in the general charge; that the second instruction was given or included in the general charge, and not repeated; that the defendant's third and fifth instructions were marked 'Refused,' because substantially included in the general charge, and not repeated; that the fourth instruction was refused. The court charged the jury to judge of the credibility of the witnesses and of the weight of the evidence. My impression is that the second instruction was more definite as to the time when limitation would begin to run, or when the cause of action accrued, or, if not, it was qualified by fixing the time. So long after the trial, I can only give the impressions I have at this time." Again, the trial judge says in the record:

"Though not deemed regular to sign bills of exception in this class of cases, I have done so at the request of counsel in this case.

(Signed)

"R. A. REEVES,

"Judge First Judicial District."

The only instruction conceded to have been asked and refused, unless the substance of it was embraced in the general charge by the court, was the fourth, which is as follows: "If the jury believe that Lewis and Alderete, or any other witness on this trial, has

testified to an untruth on any material point, you may then disregard the entire testimony of any such witness." The court below says in the bill of exceptions that the jury was instructed as to the credibility of the witnesses and the weight of the evidence. If any instruction whatever was given to the jury on this point, and not appearing in the record, we will presume it to have properly declared the law on the subject, and for that reason the refusal to charge as in the fourth instruction can not be regarded as erroneous. The charge set out as having been given by the court of its own motion, for a like reason, can not be inquired into, because the judge certifying the bill and record says the general charge of the court embraced matters not appearing in this record. This court on appeal will not receive any extrinsic evidence of matters that

MATTERS de hors
the record: con-
flict of memory
between court
and counsel.

transpired at the trial de hors the record, to aid in the construction of the bill of exceptions. The only guide for this purpose is the bill itself, in connection with the record; which must be considered as presenting a distinct, substantive case, which, if defective in any material point, can not be supplied by intendment of the court. *Dunlop v. Moore*, 7 Cranch; *Spaulding v. Alford*, 1 Pick. 37; *Pow. App. Proc.* 240.

After the seal of the judge has been affixed to the bill, the truth of the statements therein contained can never thereafter be doubted. *Saund. Pl. & Practice*, vol. 1, p. 318. A bill of exceptions is founded on matter of law, or on a point of law arising out of a matter of fact not denied. 2 Bl. Comm. 372; 1 *Saund Pl. & Prac.*, pp. 316, 317. Every matter of fact arising upon exceptions on the subject of instructions is, to say the least, made doubtful by the manner in which the record comes before us. Appellants' counsel, by consent of opposing counsel, presented to the court below what they termed a "bill of exceptions," and that

portion of the record deemed essential to a correct review of the case here, but the court made amendments the effect of which was to leave the whole record in doubt as to whether the memory of the court was correct or that of counsel in presenting the "substance of what occurred" at the trial. We will not undertake to settle the conflict, but will disregard every matter of fact contained in the bill, and not arising out of the record proper.

This leaves for our consideration two questions:

First, whether the cause could or should have been tried as a case in chancery, as upon a bill filed in the usual course of practice. The proceeding in the

CLAIMS against
estate of
deceased person:
jurisdiction of
probate court.

probate court is informal as to matters of pleading, and therefore the plaintiff was not bound to that degree of accuracy of statement required in a superior court of record. Claims, whether legal or equitable, so they can be established by proper evidence, and within the jurisdictional power of the probate court to entertain, may be asserted in that tribunal against the estates of deceased persons. This claim was based on a contract for the price or value of sheep and wool. Nothing is said, except that the amount claimed was due and unpaid. The facts would have justified an action in assumpsit in the district court, as the amount exceeded \$100. We do not see any necessity for applying to a court of chancery for relief, on the facts disclosed in this record. It was a share, or, as called in this record, "a partido contract" to accept a number of ewes, and pay a pound and a half of wool per annum for each sheep, and at the end of the "partido" to return a like number of ewes to the owner. The evidence shows that two thousand ewes were delivered on this contract in 1882, and were worth at that time and at the date of the death of Lackey \$1.50 per head. The lowest price of wool in any of the years between 1882 and 1886 was

twelve and one half cents per pound. The business dealings between Lewis and Lackey were conducted in a very loose and irregular manner. This may be explained upon the theory that Lewis believed Lackey intended to make his son Jesse his heir by executing a will. It seems he thought the declaration by Lackey of his intention to constitute his son his heir operated as a will to that effect. Lackey was an old man and made his home at the house of Lewis for many years. This may explain many things that otherwise would operate strongly against the bona fides and legal validity of the claim as asserted, and, as we think, proven, not only by Lewis himself, but at least in part by two other witnesses.

The second and only remaining question before us is whether the case should not have been tried by the court, not because it was essentially an equity proceeding, founded upon equitable elements, demanding the application of a chancery remedy, but because it was an appeal from the probate court, and, although triable de novo in the district court, the presiding judge should have heard the case as the probate judge did, and found the facts and made his declaration of law thereon. A

APPEAL to district
court: trial de
novo; trial by
jury.

trial de novo, as we take it, means a trial anew in the appellate tribunal, according to the usual or prescribed mode of procedure in other cases involving similar questions, whether of law or fact. It was a simple question of fact whether Lackey in his lifetime received sheep upon a "partido," upon the terms claimed by the plaintiff. These facts were triable by a jury on an original suit in that court. Did his election to sue in the probate court in the first instance deprive him, when compelled to appeal to that court, of a right secured by law, had he sued in that tribunal? We think not. A right to a trial by jury in all cases at law, when the amount is above \$20, is secured by the constitution of the United

States and by the local statutes of New Mexico. This was a suit at law. There is no error arising upon this record, and the judgment below is affirmed.

LONG, C. J., and BRINKER, J., concur.

[No. 376. March 20, 1889.]

UNITED STATES OF AMERICA, PLAINTIFFS IN
ERROR, v. THE MAXWELL LAND GRANT
COMPANY, DEFENDANT IN ERROR.

PUBLIC LANDS—PATENT, BILL TO SET ASIDE IN TERRITORIAL DISTRICT COURT—PLEA, FORMER ADJUDICATION COVERING SAME LANDS ON SIMILAR BILL IN U. S. CIRCUIT COURT FOR DISTRICT OF COLORADO—JURISDICTION.—A proceeding by bill in chancery by the United States, in the territorial district court, to set aside a patent and survey made of lands embraced in the patent situated in New Mexico, founded on alleged frauds by the claimant and others, is barred by a former adjudication covering the same lands on a similar bill brought by the United States in the circuit court of the United States for the district of Colorado, that court having acquired jurisdiction of the subject-matter by personal service on the defendant. The jurisdiction of a court of chancery is sustainable, in case of fraud, wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree. *Massie v. Watts*, 6 Cranch, 148.

ERROR, from a decree in favor of defendant, to the First Judicial District Court. Decree affirmed.

The facts are stated in the opinion of the court.

THOMAS SMITH, United States district attorney, for the United States.

It is only where the same matters are directly and distinctly in issue that a decree or judgment becomes a bar in a subsequent suit. *Richardson v. City of*

Boston, 19 How. 782; *Russell v. Place*, 94 U. S. 606; Note to *Lea v. Lea*, 96 Am. Dec. 779, and cases cited.

A decree in chancery must be construed in reference to the issue made in the prayer for relief, and other pleadings, and which these show it was meant to decide. *Graham v. Railroad Co.*, 3 Wall. 704.

Circuit courts sit for the districts in which the court is held, and are bounded by their local limits. *Toland v. Sprague*, 12 Pet. 300.

Where the subject-matter is local, and lies beyond the limits of the district, the circuit court sitting in the district has no jurisdiction. *Northern Ind. Railroad Co. v. Michigan Central Railroad Co.*, 15 How. 233.

A decree of a court of equity made in one state can not transfer the title to lands lying in another state. *Davis v. Headley*, 22 N. J. Eq. 115; *Carrington v. Brents*, 1 McLean, 167; *Massie v. Watts*, 6 Cranch, 148; *Hawley v. James*, 7 Paige Ch. 213 (32 Am. Dec. 623); *Proctor v. Ferebee*, 2 Ired. Eq. 146; *Shepherd v. Ross Co.*, 7 Ohio, 271; *Burnley v. Stephenson*, 24 Ohio St. 474.

FRANK SPRINGER for defendant in error.

Where simultaneous actions are pending on the same cause of action between the same parties in different states, a judgment in either will bar the further prosecution of the other. *Freeman on Judgments*, sec. 221; *Wells on Res Adjudicata*, secs. 292, 530; *The Tubal Cain*, 9 Fed. Rep. 834 (20 Meyer's Fed. Dec. 468); *McGilvery v. Avery*, 30 Ver. 538; *Rogers v. Odell*, 39 N. H. 452; *Bank v. Wheeler*, 28 Conn. 433; *Child v. Eureka Co.*, 45 N. H. 547; *Duffy v. Lytle*, 5 Watts, 130; *Caseboom v. Mowry*, 55 Pa. St. 422.

The same rule applies to judgments in the federal courts. *Freeman on Judgments*.

The identities as to parties, subject-matter, and

cause of action, are required to sustain the plea of res adjudicata. Freeman on Judgments, secs. 248-260; Aurora v. West, 7 Wall. 82; 1 Dan. Chy. Pr. 659.

A decree dismissing a bill in chancery is a final determination, and constitutes a bar to further litigation of the same subject between the same parties. Durant v. Essex Co., 7 Wall. 107; 1 Dan. Chy. 606-659; Freeman on Judgments, sec. 248.

A fact which has been tried and decided by a court of competent jurisdiction, can not again be contested between the same parties, in the same or any other court. Hopkins v. Lee, 6 Wheat. 109; The Tubal Cane, 9 Fed. Rep. 834 (20 Fed. Dec. 468), and cases cited; Flanigan v. Thompson, 7 Fed. Rep. 177 (20 Fed. Dec. 464); Danscher v. Prentiss, 22 Wis. 316; Freeman on Judgments, sec. 249; Wells on Res Adjudicata, secs. 6, 9, 12; Beloit v. Morgan, 7 Wall. 619.

A judgment on the same cause of action is conclusive between the same parties, not only as to every matter actually in issue, but as to every other admissible matter which might have been offered, or was necessarily involved. Wells on Res Adjudicata, sec. 248, et seq. 251, 424; Freeman on Judgments, sec. 249; Cromwell v. Sac. Co., 94 U. S. 351; Smith v. Ontario, 18 Blatchford, 454 (20 Fed. Dec. 508); Gould v. R. R. Co., 91 U. S. 526; Radford v. Folsom, 3 Fed. Rep. 199; Bates v. Spinner, 45 Ind. 493; Covington v. Sargent, 27 Ohio St. 237; Tate v. Hunter, 3 Stroob. Eq. (S. C.) 139; Lea v. Lea, and note, 96 Am. Dec. 775, et seq.

A party can not try his action in parts. The judgment is conclusive, not only of the matters contested, but as to every other thing within the knowledge of complainant which might have been made a ground for relief in the first suit. Freeman on Judgments, sec. 272, p. 296.

The discovery of new evidence forms no exception to the foregoing rules. Freeman on Judgments, sec. 249; Kilheffer v. Kerr, 17 Serg. & Rawle, 319; Wells on Res Adjudicata, sec. 369.

Where the parties are before the court, by process or appearance, a court of equity has jurisdiction to make decrees concerning the title to land in another state, as to enforce a sale, compel parties to convey, and to enforce specific performance, to operate on the holder of a legal title acquired by any species of malafides, etc. Wells on Res Adjudicata, secs. 523, 524; Wells on Juris., sec. 116; Watts v. Waddle, 6 Pet. 397; Low v. Massey, 41 Vt. 393; McGregor v. McGregor, 9 Iowa, 78; Story's Conflict of Laws, 543; Massie v. Watts, 6 Cranch, 148, 160; R. R. Co. v. R. R. Co., 15 How. 233.

Where a question of jurisdiction in a case must have been considered, it should be treated as res adjudicata between the same parties in every other but an appellate forum. Moch v. Ins. Co., 4 Hughes, 61 (11 Fed. Dec. 197).

Where the merits of a case have been passed upon by the supreme court, it is too late to raise the question of jurisdiction. Whatever was before the supreme court, and was disposed of, must be considered as finally settled. Skillern v. May, 6 Cranch, 267; Sibbald v. U. S., 12 Pet. 492; Wells on Juris., sec. 194.

HENDERSON, J.—On the twelfth day of January, 1886, the plaintiff in error filed a bill in chancery in the First district, the object of which was to obtain a decree vacating and setting aside the patent issued by the United States on the nineteenth day of May, 1879, to Charles Beaubien and Guadalupe Miranda, and to set aside and vacate a survey made of the lands embraced in the patent situated in New Mexico, and to reinvest in the United States the title to the lands so

covered by the survey and patent. The bill is founded upon alleged frauds committed by the claimant and others in making the survey, whereby the officers of the government were deceived and induced to issue the patent to the claimants. On May 12, 1888, by leave of the court, an amendment to the bill was filed. On the fifteenth day of February, 1886, the Maxwell Land Grant Company, the principal defendant, filed its answer to the bill. On the same day the Atchison, Topeka & Santa Fe Railroad Company filed its answer. Afterward, on the twenty-seventh day of August, 1887, the Maxwell Land Grant Company, by leave of the court, filed a plea in bar of the action, setting forth certain proceedings had in the circuit court for the Eighth judicial circuit of the United States, sitting within the district of Colorado, in which it is alleged that the subject-matter and the parties are identical with the subject-matters and parties involved in this suit, and that by the consideration, judgment, and decree of that court the right claimed under the bill was adjudged and finally determined against the plaintiff, and in favor of the Maxwell Land Grant Company. The plea was accompanied by a large number of exhibits in proof of the facts set up in it. On the twelfth day of May, 1888, plaintiff in error filed a motion to strike out and set aside the plea filed by the Maxwell Land Grant Company, on the ground of insufficiency. On the same day this motion came on to be heard, and was overruled by the court, and thereupon the issue joined on the plea of former adjudication was heard and found to be sufficient in law and true in fact. The United States brought error.

Plaintiffs assign three grounds of error, as follows: (1) Error committed by the court in overruling complainant's motion to strike out defendant's plea in bar; (2) error of the court in sustaining the plea as sufficient in law to bar the further prosecution of the

suit; (3) error of the court in finding as true the facts alleged in the plea.

On these assignments of error counsel have argued but one proposition, divided into two grounds: (1)

PUBLIC lands:
patent, bill to
set aside: res
adjudicata.

Does the plea show the subject-matter of the Colorado suit to be the same as that stated in complainant's bill? And, if so, does the record of the final judgment pleaded show that the circuit court of the United States for the district of Colorado obtained or could have obtained jurisdiction over that portion of the grant lands covered by the patent lying within the limits of the territory of New Mexico? The plea alleges, and the proofs offered show, that in the month of August, 1882, the United States brought a suit in chancery in the United States circuit court for the district of Colorado, to set aside and annul the patent issued to Beaubien and Miranda for the lands now known as the "Maxwell Land Grant." The lands embraced in the patent are situate partly in Colorado and partly in New Mexico. The principal defendant, the Maxwell Land Grant Company, held the legal title to the land, and was a corporation doing business both in Colorado and New Mexico. Being duly served with process, it appeared and answered the bill. Various amendments were made to the bill from time to time, until finally the cause was determined on its merits, upon a bill which prayed that the patent be canceled upon the following grounds: (1) Want of authority to issue it; (2) inadvertence and mistake; (3) fraud and misrepresentation, by which the United States officers were deceived. The bill was dismissed in the circuit court, and on appeal to the supreme court of the United States the cause was finally decided there in March, 1887. The judgment of the court below was affirmed. Maxwell Land Grant Case, 121 U. S. 325; Same Case, on rehearing, 122 U. S. 365. From an inspection of the opinion

of the court it will be seen that the case was vigorously litigated and thoroughly considered by the courts. In the opinion on the rehearing the court said: "We are entirely satisfied that the grant, as confirmed by the action of congress, is a valid grant; that the survey and the patent issued upon it, as well as the original grant by Armijo, are entirely free from any fraud on the part of the grantees, or those claiming under them; and that the decision could be no other than that which the learned judge of the circuit court below made, and which this court affirmed." 122 U. S. 365. The bill in this case is almost word for word a copy of the bill in the Colorado court on which the cause was finally decided. In both suits the court was asked to decree the invalidity of the patent as an entirety. The stating and charging portions of the bills are identical in substance, and so is the prayer, so far as the court had power to grant relief. The allegations contained in the Colorado bill were sufficiently broad to meet the proofs offered, and covered every cause of action on which relief could be granted, and it would be difficult to see how an amendment could be made the effect of which would be to change the issue presented by the bill and amendment upon which the cause was finally decided. After the filing of the plea in this cause the plaintiff, by leave of the court, filed an amendment to the bill. The substance of this amendment is a more specific statement of the means employed by Elkins, Marmon, and Maxwell in procuring the lines of the grant to be extended beyond the original boundary lines as fixed by the Mexican authorities when possession was delivered to its grantees, and the arts practiced by them upon the officers of the government in causing the survey to be approved and patent issued covering a large body or tract of land not originally or rightfully covered by the grant from Mexico. By stipulation the matter embraced in the amendment was

answered by the plea already filed. That the subject-matter and parties to this suit are identical with the subject-matter and parties to the suit in Colorado in all essential respects can not be denied. We, however, have more difficulty in reaching a satisfactory conclusion on the other question discussed, viz., whether the circuit court of the United States for the district of Colorado had jurisdiction to render a decree affecting the title to lands lying in New Mexico. Appellant's counsel insists that the Colorado decree pleaded here is not a bar to this action, for the reason that a portion of the lands covered by the patent are situate in New Mexico, and the decree must be regarded as a nullity, so far as it seeks to affect the title to lands not within the jurisdiction of the court.

The following cases are relied upon to support this proposition. Toland v. Sprague, 12 Pet. 300; Northern Ind. Railroad Co. v. Mich. Central Railroad Co., 15 How. 233; Carrington v. Brènts, 1 McLean, 167; Massie v. Watts, 6 Cranch, 148. The last cited case is a very instructive one, and we think in point here. Chief Justice MARSHALL, delivering the opinion, said: "This suit having been originally instituted in the court of Kentucky for the purpose of obtaining a conveyance of lands lying in the state of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree was rendered. Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia, against a person claiming under a senior patent, considering it as a substitute for a caveat introduced by the peculiar circumstances attending those titles, this court is of opinion that there is much reason for considering it as a local action, and for confining it to the court sitting within the state in which the lands lie. Was this

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cause, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell—the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential points on which the case depends, does not seem sufficient to arrest that jurisdiction. In the celebrated case of *Penn v. Lord Baltimore*, the chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court in that case, as reported by Vesey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council.” Still quoting from the opinion of the lord chancellor, he says: “The strict primary decree of a court of equity is, he says, in *personam*, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person against whom the decree was prayed be found in England.” Reference is made to the cases of *Earl of Kildare v. Sir Maurice Eustace Fitzgerald*, 1 Vern. 419, and *Toller v. Carteret*, 2 Vern. 494. Subsequently to these decisions was the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, in which the performance of a contract for lands lying in North America was decreed in England. Continuing, the chief justice said: “Upon the authority of these cases, and of

others which are to be found in the books, as well as upon general principles, this court is of opinion that in a case of fraud of a trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree." *Massie v. Watts*, 6 Cranch, 148. The United States brought suit in the circuit court of the United States for the district of Colorado, to set aside, vacate, and cancel the patent assailed here. The bill in that case is grounded upon allegations of fraud, committed by the patentees and others holding through or under them, by means of which the officers of the plaintiff were deceived into issuing and delivering the patent. Fraud in various ways was charged against the grantees under the patent, and the patent, as an entirety, was involved in the issue raised, heard, and finally determined in the circuit and supreme courts of the United States. It is quite clear that, had the United States succeeded in that suit, the decree would have affected the title to the lands embraced in the patent lying in New Mexico. Personal service was had upon the Maxwell Land Grant Company in that suit, and an appearance duly entered, and the suit, after long delays, finally decided, declaring the patent valid for the lands covered by it, wherever situated. The final judgment in that suit was intended to be, and we think was, conclusive upon the United States and all persons claiming through or under it, whether the lands covered by the patent were located in Colorado or New Mexico. The suit was instituted and contested through the courts to a final decision in the court of last resort, solely, or mainly, at least, upon the ground that such frauds had been committed by the original grantees and those claiming under them in locating the lands, and extending the true boundaries thereof in such manner as to deceive the officers of the United States, and thereby

cause them to issue the patent, that a court of equity would annul the patent. The court found that there was no fraud proven in the case, and that the patent was legal and valid, and free from the taint of fraud. The issue directly involved in the controversy was that of fraud practiced upon the United States through its officers. The determination was against the truth of the facts alleged, and the United States, like any other suitor in a court of justice, is bound by the final judgment of courts of competent jurisdiction, when it elects to litigate any question of fact in the courts. There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties, or their privies, whenever the existence of that fact is again in issue between them. *Duchess of Kingston's Case*, 11 State Trials, 261; *Crandon v. Leonard*, 4 Cranch, 436; *Peay v. Duncan*, 20 Ark. 85; *Lore v. Truman*, 10 Ohio St. 45; *Freem. Judgm.*, sec. 249; *Wales v. Lyon*, 2 Mich. 276. The supreme court of the United States affirmed in distinct terms that there was no fraud committed in procuring the patent to be issued by the patentees, or those claiming under them; that the patent was legal and is the evidence of the legal ownership of all the lands embraced in it, or covered by it. It directly affirmed the nonexistence of fraud; and, having done so, in a proper case, the courts of the country will not permit the plaintiff in another suit to controvert this judicially established fact, where the issue is between the same parties, or their privies. The United States having exhausted its power in a fruitless effort to cancel this patent, it becomes the duty of the courts and the people to abide the final judgment of the highest tribunals to which a controversy can be appealed, and to seek redress for meritorious grievances, if any exist, at the hands of a just and generous government. The judgment of the court below is affirmed.

LONG, C. J., and BRINKER, J., concur.

[No. 378. March 21, 1889.]

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR, v. ROBERT H. LONG-
WILL, DEFENDANT IN ERROR.

CORPORATIONS—TELEGRAPH COMPANY—TRESPASS ON THE CASE—SUFFICIENCY OF DECLARATION AFTER VERDICT AND JUDGMENT—PLEADING.

In an action of trespass on the case against a telegraph company, a declaration, though general and uncertain in its terms, will be deemed sufficient, after verdict and judgment, when unchallenged by demurrer, and the uncertainty and insufficiency is supplied by proof admitted without objection.

ID.—NATURE OF EMPLOYMENT AND LIABILITY OF TELEGRAPH COMPANIES—

CONTRACT WITH CONDITIONS ANNEXED FOR EXEMPTION FROM LIABILITY.—A telegraph company is a carrier of news for hire, and, though not an insurer of the safe delivery of messages, its obligations, like those of common carriers, spring from the public nature of its employment, and the contract under which the particular duty is assumed. In that relation it owes to both the sender and receiver of messages the duty of care and good faith, and will be held for want of proper care, by itself and its servants and agents, in the performance of that duty, from which it can not escape by any attempted exemption from such liability by conditions annexed to its contracts. Though it may make reasonable regulations for the proper and safe conduct of its business, and has the power to contract with the sender of a message, so as to relieve it from liabilities for inadvertencies, it will not be relieved for gross negligence, or bad faith.

ID.—TELEGRAPH COMPANY, SUIT AGAINST OF TRESPASS ON THE CASE—NEG-

LIGENCE—MEASURE OF DAMAGES.—In an action of trespass on the case, by a physician and surgeon, against a telegraph company for damages laid in the declaration at \$1,000, for negligence in not delivering a message, summoning him to make a professional visit, until it was too late, and the call had been countermanded, where a judgment was rendered for \$500 damages, the jury having found that sum a reasonable compensation for the services to have been rendered, and the evidence was that the sender of the message was solvent, and that plaintiff was engaged in active practice and had cases under his charge, from which he earned fees during the time it would have taken him to make the prevented visit, but it did not appear what those earnings were—Held: The proper measure of damages was the difference between the sum allowed and what plaintiff earned during the time he would have been absent on such visit.

ERROR, from a judgment in favor of plaintiff, to the First Judicial District Court, Santa Fe County. Judgment affirmed conditionally on defendant in error remitting \$100, and paying the costs of the court; otherwise judgment to be reversed and new trial ordered.

The facts are stated in the opinion of the court.

CATRON, THORNTON & CLANCY for plaintiff in error.

The English courts have uniformly held that the receiver of a message has no right of action against a telegraph company. 8 Am. and Eng. Corp. Case, 65, note; 8 Suth. on Damages, 314; 14 Fed. Rep. 723.

In this country the opposite doctrine is held, so far as decisions have been made. But it can scarcely be said that the question is conclusively settled as to which doctrine will finally be adopted. It is clear there can be no privity of contract between the telegraph company and the receiver of a message, although in one case in South Carolina the court held otherwise. *Aiken v. Telegraph Co.*, 5 Rich. 358.

Special damage must be pleaded specially and circumstantially, and this the declaration fails to do. 1 Chitty Pl., p. 395, et seq.; Sedg. on Damages, 575, et seq.; Thompson on Neg. 1250.

The evidence fails to show any legal damages. *Clay v. Telegraph Co.*, 6 Southeastern Rep. 813; *Smith v. Telegraph Co.*, 83 Ky. 104.

Plaintiff can not recover, having made no claim in writing within sixty days. Such a regulation is reasonable and valid. *Western U. Tel. Co. v. Jones*, 95 Ind. 228; *Southern Express Co. v. Caperton*, 44 Ala. 101; *Herman v. Western Union Tel. Co.*, 57 Wis. 562; *Southern Express Co. v. Caldwell*, 21 Wall. 265; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; *Young v. Same*, 65 N. Y. 163; *Lewis v. R'y Co.*, 5 H. & N.

867; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93. And it is binding on the receiver of a telegram. *Ellis v. Telegraph Co.*, 13 Allen, 237, 238; *Telegraph Co. v. Neill*, 57 Tex. 283; *Aiken v. Telegraph Co.*, 5 Rich. 370-372.

That a party has not read the regulations makes no difference. *Ellis v. Tel. Co.*, 13 Allen, 237, 238; *Breeze v. Tel. Co.*, 48 N. Y. 139-142; *Cole v. Tel. Co.*, 8 Am. and Eng. Corp. Cases, 45; *Grinnell v. Tel. Co.*, 113 Mass. 299; *Telegraph Co. v. Edsall*, 63 Tex. 675.

In actions *ex contractu*, to recover damages from an employer for preventing his employee from carrying out the contract, the plaintiff must prove, not only what he would have received under the contract, but also what he did receive from any other employment he may have been able to secure, the difference between the two being the measure of damages. *Hunt v. Crane*, 33 Miss. 669; *Fowler v. Waller*, 25 Tex. 701, 702; *Whitaker v. Sandifer*, 1 Duval (Ky.), 262; *Chamberlain v. McAlister*, 6 Dana. (Ky.) 352.

In cases *ex delicto*, all that can be recovered is compensation for the actual injury. 2 Sedg. on Damages, [7 Ed.] 314, et seq.

W. B. SLOAN for defendant in error.

The burden was on the defendant to show it was unable to deliver the message in time. *Western Union Tel. Co. v. Ganger*, 84 Ind. 176; *Pope v. Western Union Tel. Co.*, 9 Ill. App. 283.

The defendant having failed to deliver the message the burden of proof was on it to show that the failure arose from a cause for which it was not legally responsible to answer. *Baldwin v. N. Y. Tel. Co.*, 45 N. Y. 744; 30 How. Pr. 413; *D'Rute v. N. Y. Tel. Co.*, 1 Daily, 547; *Turm v. Honepey Tel. Co.*, 41 Iowa, 458; *Bartlette v. Western Union Tel. Co.*, 62 Me. 209; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Taylor v.*

W. Tel. Co., 74 Ill. 168; 60 Ill. 421; 26 Iowa, 423; 29 Md. 232.

The defendant is liable to the receiver of a message for the damages he has sustained by reason of its negligence in the transmission and delivery of the message. N. Y. Tel. Co. v. Dryburg, 35 Pa. St. 298; Wharton on Neg., sec. 758; 78 Am. Dec. 341.

A regulation to protect the company from responsibility for gross negligence or fraud is void. 33 Fed. Rep. 362; Candee v. Western Union Tel. Co., 34 Wis. 471; 71 Am. Dec. 473; Telegraph Co. v. Fenton, 52 Ind.

The company is liable for such damages as naturally result from its failure to deliver the message with reasonable diligence. Truce v. International Tel. Co., 60 Me. 27, 11 Am. Rep. 169; Mauvel v. W. U. Tel. Co., 37 Iowa, 218; 13 Cal. 422 (73 Am. Dec. 589); Tyler v. W. U. Tel. Co., 60 Ill. 427; Western Union Tel. Co. v. Buchmen, 35 Ind. 440, 52 Am. Rep. 409; Wharton on Neg., sec. 758.

Telegraph companies are common carriers, and are subject to the same rules. 73 Am. Dec. 589. As such they may limit their common law liability by special contract, provided such special contract does not attempt to cover losses by negligence or misconduct. York v. Central R. R., 3 Wall. 107; R. R. Co. v. Lockwood, 17 Wall. 357.

The English doctrine that a telegraph company is not liable to the receiver of a message for nondelivery (Dickson v. Tel. Co., 2 C. P. Div. 62; Playford v. Tel. Co. L. R., 42 B. 707) is nowhere followed in this country. The American judges and writers hold to the contrary. Gray on Telegraph, sec. 65; Wharton on Neg., sec. 758; Suth. on Damages, 314; Shear. & R. on Neg., sec. 560; Thompson on Neg., p. 847, sec. 11.

The same reasons which make void the contracts of a common carrier for exemption from the consequences of its own negligence, or that of its agents or

servants, apply with equal force to similar agreements, rules, or notices, by which a telegraph company seeks immunity from all responsibility for its negligence. *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 432; *Telegraph v. Griswold*, 37 Ohio St. 313; *Mauvel v. Tel. Co.*, 37 Iowa, 214; *Graham v. Tel. Co.*, 1 Cal. 230; *Blouchard v. Tel. Co.*, 68 Ga. 299; *Tyler v. Tel. Co.*, 60 Ill. 421; 74 Ill. 168; *U. S. Tel. Co. v. Wenge*, 55 Pa. St. 262; *True v. Tel. Co.*, 78 Pa. St. 288; *Candee v. Telegraph Co.*, 34 Wis. 471; *Gray on Telegraphic Co's*, secs. 50, 51, 52; *Telegraph Co. v. Cohen*, 73 Ga.; *Dryburg v. Telegraph Co.*, 35 Pa. St. 298; *Telegraph v. Brown*, 58 Tex. 170; *Bartlett v. Tel. Co.*, 62 Me. 209; *Telegraph Co. v. Fountain*, 58 Ga. 433; *Hibbard v. Tel. Co.*, 33 Wis. 558; *Parks v. Alta Tel. Co.*, 13 Cal. 432; see, also, *Styles' Assignee v. Western Union Tel. Co.*, 15 Ark (No. 12, Pacific Rep.); *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Western Union Tel. Co. v. McKibben*, 14 Ind. (Northeastern Rep.) 894; *Johnson v. Western Union Tel. Co.*, 33 Fed. Rep. 362; *Western Union Tel. Co. v. Cobb*, 47 Ark. 344; *Hart v. Western Union Tel. Co.*, 66 Cal. 579.

It can not contract against its own negligence. *Tel. Co. v. Griswold*, 37 Ohio St. 301, 313.

A telegraph company is the agent of the receiver of a message. 35 Pa. St. 299; 78 Am. Dec. 338.

The receiver of a message is unaffected by any stipulation or contract between the company and the sender. 33 Fed. Rep. 362; 55 Am. Rep. 497; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *McCall v. W. U. Tel. Co.*, 44 N. Y. Sup. 487.

Where two parties make a contract expressly for the benefit of a third party, such third party may sue upon it. *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Steman v. Harrison*, 42 Pa. St. 49; *Shear. & Redf. on Negligence*, sec. 560; 33 Fed. Rep. 365.

A telegraph company is responsible to the receiver

of a message for any misfeasance by which he is injured. *N. Y. & Wash. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 331; *Sailor v. W. U. Tel. Co.*, 3 Am. Law Rep. 777; *Green's Brice's Ultra Vires*, p. 269; *Wadsworth v. W. U. Tel. Co.*, Sup. Ct. App. (1888), *Southwestern Rep.*, vol. 8, 574.

As to the rule of damages between the receiver of a message and the company sending it, see *Western Union Tel. Co. (Ind.)*, vol. 14, no. 10, *Northwestern Rep.*, p. 894, which is in point. See, also, *Hadley v. W. U. Tel. Co.*, *Northwestern Rep.* vol. 15, no. 10, p. 894; 30 Ohio St. 555; 16 Nev. 223; 45 N. Y. 744; 29 Md. 232; 21 Minn. 154; 9 Exch. 341; 34 Wis. 471.

The damages recovered in the case at bar are neither remote nor speculative, but within the line of decisions already cited, viz.: *Shearman & Redfield on Neg.*, sec. 605, p. 692; *Relle v. W. U. Tel. Co.*, 55 Tex. 303; 40 Am. Rep. 805; *Stuart v. Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; *Levee Case*, 59 Tex. 542; 46 Am. Rep. 269. Also the following cases sustaining the court below. 1 Cal. 230; 69 Me. 9; 33 Wis. 558; 34 Id. 471; 55 Tex. 308; 58 Id. 394; 73 Am. Dec. 589; *Shear. & Redf. on Neg.*, secs. 600, 601; 54 Barber (S. C.), 505; 52 Ind. 1.

Finely printed matter does not enter into or form a contract between the parties (R. R. tickets) nor raise a presumption that the holder is aware of the limitations or condtions. *Slosson, Respondent, v. Dodd, President Dodd's Express*, 4 Hand. (N. Y.) 254; *Butler v. Heans*, 2 Comb. 415; *Davis v. Miller*, 2 Stark, 279; *Hallerter v. Newlin*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; 2 Greenlf. Ev., sec. 215.

After a passenger has purchased a ticket which contains a notice to which his attention was not called at the time of purchase, his rights are not affected by his reading such notice after he purchased the ticket and entered upon his journey. 49 N. Y. 263; *Pouch v. N. Y. Central R. R. Co.*, 3 Tm. Rep. 525.

HENDERSON, J.—This is an action of trespass on the case, brought by the defendant in error against the Western Union Telegraph Company, to recover damages on account of alleged negligence in not delivering a telegram sent to him from Springer, New Mexico, on the evening of the fourteenth of January, 1884. Plaintiff resided at Santa Fe, where the message was addressed, and was a physician and surgeon. The purpose of the telegram was to summon him from Santa Fe to Springer to attend a person suffering from a gunshot wound. The message was not delivered until after 9 o'clock in the forenoon of the fifteenth. The telegram requested the presence of the plaintiff below that night. Two trains—one at 9 o'clock that night and one at 9 o'clock the next morning—had departed after the sending and receipt of the message at Santa Fe, and before the delivery to plaintiff. The telegraph office was in an adjoining building to the drug store, where he kept his office, and was usually found, and within one hundred and fifty or two hundred yards of his residence. He was a well known resident of the city, and at home at the time the message should have been delivered. The declaration is in the usual form, except that it does not state with much fullness of detail the special circumstances of his legal injury. The defendant pleaded the general issue, and a special plea setting up the fact that the message was transmitted upon certain conditions, which are set out in the message put in evidence. One condition was that the company would not be held liable for unrepeatd messages. The other was that unless the person injured should within sixty days present a claim in writing, demanding damages from the company, it would be exonerated from all liability. The message was unrepeatd. No demand in writing, claiming damages, was filed with the company within sixty days.

Plaintiff testified that he would have made the visit

to Springer, but was prevented by the negligence of the company in not delivering the message until after train time, and that during the day of the fifteenth he was advised by another telegram from the same parties not to come, as it was too late. The injured man died on the fifteenth. He also testified that he would have charged \$500 for the trip and professional services, and that such sum would have been a reasonable charge. His testimony was supported by another physician as to the reasonableness of the charge and the value of the proposed services. It also appeared in evidence that it would have required four or five days, including traveling time, to have completed the trip and treatment of the patient. During this time plaintiff admits that he was regularly engaged in the practice of his profession at Santa Fe, and had several patients in charge, but he says he would have made more by going to Springer, as that would have been a consultation fee.

The senders of the telegram were solvent. The damages claimed in the declaration were \$1,000. The judgment recovered was for \$500. At the conclusion of the evidence the defendant moved the court to instruct the jury to find for the defendant, and suggested reasons therefor. The court refused, and an exception was taken and saved. Exceptions were taken to the refusal of the court to charge the jury as requested in instructions numbered 3 and 4 moved by defendant, and for giving an instruction by the court of its own motion. Fourteen errors are assigned. The principal propositions discussed, however, may be ranged under the first, to the effect that the declaration and record do not disclose any legal cause of action against the defendant below; third, that the verdict is not supported by the evidence of the amount of damage sustained by the plaintiff, if any; fourth, that the plaintiff did not within sixty days present his claim in

writing for the damages sued for; seventh, that the court erred in instructing the jury of its own motion as appears in the record.

Upon the first assignment, we think it sufficient to say that there appears to have been no demurrer, either general or special, to the declaration. Nor was there any objection made to the introduction of evidence, because there was no averment in the declaration under which evidence of plaintiff's damages could be received. While the statement in the declaration is in very general terms, it will be deemed good after verdict and judgment, when left unchallenged by the ordinary modes of reaching a formal insufficiency or uncertainty. The proof offered supplied the want of accuracy of allegation, and was admitted without objection. The appellant company is a corporation engaged in the business of transmitting news for hire. It owes a duty to the public. Want of proper care and diligence in the performance of this duty to the defendant in error is the gravamen of his action. The defendant company sustained, strictly speaking, no contractual relations with the plaintiff, but it owed a duty to him by reason of its public character to perform its obligations, not only to the sender of the message, with whom it did have contractual relations, but to the plaintiff as well. The injury sustained by the plaintiff was caused directly and immediately by the negligence of the defendant's agents and servants in not delivering the message within a reasonable time. It is urged on behalf of the plaintiff in error that no action can or ought to be maintained by the plaintiff for the reason that he was only the receiver, and not the sender, of the message, and that the action would only lie, if at all, by the sender of the message, on the contract entered into and embodied in the message or blank forming part of it. This is the rule in England. *Playford v. United King-*

TRESPASS on case:
sufficiency of
declaration after
verdict and judgment:
liability
of telegraph
companies.

dom Telegraph Co., L. R. 4 G. B. 706; Dickson v. Renter Telegraph Co., 2 C. P. Div. 62; Feaver v. Montreal Telegraph Co., 23 U. C. C. P. 150. Mr. Sutherland, in his work on Damages, states the rule to be different in this country, and uses the following language: "In this country a different doctrine prevails. The company's employment is of a public character, and it owes the duty of care and good faith to both the sender and receiver." And, further continuing the subject, referring to the case of New York Telegraph Co. v. Dryburg, 35 Pa. St. 298, says: "It was ruled that, though not insurers of the safe delivery of what is intrusted to them, their obligations, like those of common carriers, sprang from the public nature of their employment, and the contract under which the particular duty is assumed." 3 Suth. Dam. 314. That this is the American doctrine needs no further citation of authorities.

It is contended on behalf of the plaintiff in error that the condition annexed to the message imparted notice to the plaintiff below that the company would not be liable for any damages unless a claim in writing should be filed with the company within sixty days from the date of its receipt by him. That, it is urged, is not a contract for entire immunity from legal liability on account of the negligence or want of care of defendant's servants and employees, but it is a reasonable regulation, made necessary by the nature and character of its business, and does not violate any principle of public policy. "Telegraph companies may make reasonable regulations for the safe and proper conduct of their business, and have power to contract with the sender of the message, so as to relieve themselves from liability for inadvertencies, but not for gross negligence, misconduct, or bad faith." 3 Suth. Dam. 296; Western Union Telegraph Co. v. Carew, 15 Mich.

CONTRACT:
exemption from
liability: negli-
gence.

525; United States Telegraph Co. v. Gildersleve; 29 Md. 248; Western Union Telegraph Co. v. Graham, 1 Col. 230; Western Union Telegraph Co. v. Fontaine, 58 Ga. 433; True v. International Telegraph Co., 60 Me. 9; Western Union Telegraph Co. v. Buchanan, 35 Ind. 429; Western Union Telegraph Co. v. Fenton, 52 Ind. 1; Candee v. Western Union Telegraph Co., 34 Wis. 471; Sweatland v. Illinois Telegraph Co., 27 Iowa, 433; Breese v. U. S. Telegraph Co., 48 N. Y. 132; Grinnell v. Western Union Telegraph Co., 113 Mass. 299; Passmore v. Western Union Telegraph Co., 78 Pa. St. 238. The instruction given by the court of its own motion, which is made a ground of error, is in line with the doctrine announced in the foregoing cases. Counsel for defendant, however, insists that the charge is not applicable to the defense based on the sixty-day condition constituting part of the contract of transmission and delivery of the message, and was misleading and erroneous. If the sender of a telegraphic message can not enter into a contract with a telegraph company so as to enable the company to relieve itself from all liability, not only from inadvertencies, but for gross negligence, misconduct, or bad faith, we do not see why the same rule, founded upon public policy, would not preclude the public carrier from contracting for a conditional liability on account of the negligence of its employees. This is not a regulation in any degree essential to the proper discharge of its business. Whether a liability has been incurred or not is the business of the company to know. Telegraph companies are bound to employ competent and faithful agents, who will perform their duties with a degree of care and diligence proportioned to their delicacy and importance.

In *Railroad Co. v. Lockwood*, 17 Wall. 357, Mr. Justice BRADLEY, after an exhaustive discussion of the

question of the power of the common carrier to stipulate for exemption from liability on account of negligence, or want of proper care on the part of the carrier or its agents, sums up the conclusions of the court as follows: "(1) That a common carrier can not stipulate for exemption from responsibility, when such exemption is not just or reasonable in the eye of the law; (2) that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." While the weight of authority is perhaps against classing a telegraph company as a common carrier, still the same reason that makes void the contracts of common carriers for exemption from responsibility for the negligence of the carrier or its employees, makes void the same kind of contracts of telegraph companies. *Telegraph Co. v. Blanchard*, 68 Ga. 299; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Telegraph Co. v. Cohen*, 73 Ga. 522; *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Telegraph Co. v. Brown*, 58 Tex. 170. While telegraph companies are not charged with all the duties and responsibilities of common carriers, they can not contract for restriction of liability for injuries occasioned by culpable negligence or gross carelessness, or willful misconduct of their employees. *White v. Telegraph Co.*, 14 Fed. Rep. 710.

The courts are divided in opinion as to whether a stipulation between the sender of a message and the company, providing that a claim for damages shall be presented within a day named, or within a reasonable time, can be entered into and upheld as a contract. Instead of being a reasonable business regulation, we think the condition named and annexed to the message was an effort on the part of the company to restrict its legal liability to sixty days. It would introduce into the local jurisprudence of every state, territory, or

country in which it is sued a species of private statute of limitation, or nonclaim. It would avoid the policy of the state or territory in the matter of the time in which actions both in tort and contract should be brought. But aside from this we think there can be no sound reason for holding that in cases where no contract for total immunity from legal responsibility can be made none can be made for a conditional release or discharge, because public policy alike denies the power to contract on the subject in either instance. In support of this view, in addition to the cases herein referred to, we cite the following: Johnston v. Western Union Telegraph Co., 33 Fed. Rep. 362; Western Union Telegraph Co. v. Cobb, 47 Ark. 344; Western Union Telegraph Co. v. McKibben, vol. 10, N. E. Rep. 894. In the last cited case the supreme court of Indiana held the condition to be void as against the plaintiff, the receiver of the message. The defendant in error was the receiver of the message here and sues in tort for the injury sustained by him. He sustained an injury caused by the confessed negligence of the defendant's agents in not delivering the message in a reasonable time. Whether the duty to transmit and deliver sprang out of the contract with the sender in whole or in part, the company nevertheless accepted the duty, and did not discharge its obligations. We think there was no error in giving the instruction complained of by the court on its own motion. It correctly stated the law on this subject, although it did not in terms declare that the condition annexed was void. That was the effect of the charge.

It is further contended that the damages recovered are excessive. In Griffin v. Colver, 16 N. Y. 489, Justice SELDEN, defining the measure of damages in this class of cases, said: "The party injured is entitled to recover all damages, including gains prevented as well as losses sustained."

MEASURE of
damages.

And this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature, and in respect to the cause from which they proceed. The gain prevented here was a reasonable fee or reward to the plaintiff, Longwill, for his professional visit to Springer. This prevented gain was such as might naturally be expected to follow the failure to deliver the message in due season. Reasonable compensation to the plaintiff was fairly within the contemplation of the parties when the message was sent. It is proven that the persons sending the telegram were solvent, and the amount to be paid, although not agreed upon, was certain to the extent of reasonable compensation. That amount, as shown by the record, was \$500. The cause from which the injury proceeded is equally certain. The particular facts upon which it is insisted the recovery is shown to be too large are stated in the testimony of the plaintiff. He testified that during the time he would have been absent from his home and away from his usual line of practice in Santa Fe he was engaged in practice, and had cases under his charge. He says he would have made more by going than by attending to his patients in Santa Fe. The damages claimed by plaintiff on account of his injury in being deprived of going to see the patient at Springer was only \$500. No other claim was made in the evidence, hence the finding of the jury was upon this item alone. The measure of plaintiff's damages was correctly stated in the charge. There was no evidence of the amount earned by plaintiff during the four or five days he says it would have taken him to make the visit, attend to his patient, and return. It was not the fault of the jury that the amount earned

was not taken from the amount he would have made except for the negligence of the defendant. The difference between what he would have made, had he gone, and what he made at home during the time, was the measure of his damages. The evidence, we think, clearly shows that he received something. This fact was developed on cross-examination, and either party might have shown the amount so received. Plaintiff was content to show that he might have made \$500. The defendant was content to show that plaintiff had other professional employments during the period required to make the trip to Springer; and that such employments were less remunerative than the prevented trip. As the burden was on the plaintiff to show his actual loss and injury, and there being nothing in the facts proven to justify the assessment of a higher grade than actual or compensatory damages, we are of the opinion that the duty of showing what his loss was, fell upon him. It follows that the amount recovered was in excess of the plaintiff's own estimate of his damages when computed by deducting his gains at home for the period complained of. As there will be little gained by sending the case back for retrial, the plaintiff, if he so elects, may enter a remittitur here of \$100, and pay the costs of this court, and the judgment below will be affirmed; otherwise the judgment of the court below will be reversed, and the case remanded for a new trial.

LONG, C. J., and BRINKER, J., concur.

[No. 393. March 29, 1889.]

GILES L. CLARK, APPELLEE, v. CARLISLE GOLD
MINING COMPANY, LIMITED, APPELLANT.

CONTRACT—ASSUMPSIT—TRIAL—INSTRUCTIONS.—In an action of assumpsit on a contract, where the instructions asked for by the defendant were the converse of those given, and the instructions given were applicable to the facts proven, and fairly presented to the jury the issues to be determined by them—Held: While the usual and preferable way in giving instructions is to give the same propositions of law from the standpoint of each party, it is not error to refuse to do so, where the instructions given clearly point out to the jury the questions to be determined by them, and plainly lay down the rule to be followed in reaching a conclusion. If the jury are instructed that if they believe certain facts to exist they must find in a certain way, such instruction carries with it the charge that if they do not believe such facts to exist they shall find to the contrary.

APPEAL, from a judgment in favor of plaintiff,
from the Third Judicial District Court, Grant County.
Judgment affirmed.

The facts as stated in the opinion of the court.

CONWAY, POSEY & HAWKINS for appellants.

GIDEON D. BANTZ and CHARLES G. BELL for appellee.

The record proper consists of the declaration and subsequent pleadings, the verdict and judgment. The motion for new trial is not of the record proper. *Richardson v. George*, 34 Mo. 104; and note. The mere fact that the clerk copies it in the transcript of the record does not make it a part of the record proper. *Jefferson City v. Opel*, 67 Mo. 394; *State v. Shine*, 25 Mo. 565; *R. R. v. Wagner*, 19 Kan; *Lockhart v. Chicago*, etc., *R'y Co.*, and note, 21 Cent. Law Jour.

BRINKER, J.—This was an action of assumpsit to recover from the defendant \$590.62½ for work and labor performed by plaintiff for defendant at its special instance and request. There was filed with the declaration a sworn account, showing an indebtedness of defendant to plaintiff for hauling three hundred and thirty-seven and a half cords of wood at \$1.75 per cord. The plea was non assumpsit. The cause was tried by a jury, and a verdict rendered for plaintiff. Defendant filed a motion for a new trial, which was denied, and judgment rendered for plaintiff upon the verdict. The case comes here by appeal.

The errors assigned are: That the verdict is against the law and the evidence; that the court erred in refusing instructions asked by defendant; that the court erred in giving the instructions asked by plaintiff, and in giving instructions numbered 1, 2, and 3 of its own motion; that the judgment was for plaintiff, when it should have been for defendant. The evidence is conflicting. It appeared that plaintiff and one Huntly, as the general manager of the old Carlisle company, entered into a contract in writing, the plaintiff for himself and Huntly for the company, in which plaintiff agreed to haul fifteen hundred cords of wood for the company, within four months from January 14, 1887; five hundred cords of which was to be delivered at a place called a "flat," about nine miles from the company's mill. Where the remaining one thousand cords were to be delivered by plaintiff is not clear from the contract, the recital on this point being: "But it is understood between the parties that this wood—that is, the last one thousand cords—is not to be paid for until it is received at Carlisle, and it is also understood that this last one thousand cords is not to be measured at the flat place, but is to be measured and received at Carlisle." The parties seem to have treated this clause of the contract as requiring plaintiff to deliver the last one

thousand cords at Carlisle. It further appeared that before the wood was all delivered the company making this contract was succeeded by a new company of the same name and that the new company adopted the contract made by its predecessor. It appeared in the testimony for the plaintiff that by a subsequent arrangement the strict fulfillment of the contract, so far as the delivery at Carlisle of the last one thousand cords was concerned, was waived by the defendant, and the whole fifteen hundred cords was delivered at the flat agreed upon as the place of delivery of the first five hundred cords, and such delivery was accepted by defendant as a compliance with the contract. Upon this point the testimony for defendant was in direct conflict with the testimony for the plaintiff. The jury were the sole judges of its weight, and their finding will not be reviewed here, unless it should appear that there was no evidence to support the verdict, or that the verdict was so clearly against the weight of the evidence as to suggest prejudice on the part of the jury. *Romero v. Desmarais* (decided at this term); *Railroad Co. v. Ohle*, 117 U. S. 123, 6 Sup. Ct. Rep. 632. The evidence for plaintiff, if believed, was sufficient to justify the finding in his favor.

In the instruction given at the instance of the plaintiff the court told the jury that if the plaintiff
CONTRACT: trial:
instructions. hauled the wood to the flat place mentioned by the witnesses, and if he hauled fifteen hundred and thirty-seven and one half cords of wood to such place, and if the defendant, by its agent, accepted the wood at such place as a fulfillment of the contract with plaintiff, then the plaintiff was entitled to recover on the basis of the wood so hauled, and that the amount of wood which actually arrived at Carlisle was of no consequence. Upon its own motion, the court instructed the jury that in order to find for the plaintiff they must be satisfied from a preponderance

of the evidence that the amount claimed, or some amount, was due him, and that their verdict must be in accordance with the proofs as they should find them upon all the evidence in the case, and that if they should find that the old Carlisle Gold Mining Company had entered into a written contract with the plaintiff to deliver wood at a certain place or places, and that the new company, upon succeeding to the title and estate of the old company, adopted and ratified the agreement, it would be bound by it; and if they should further find that by the terms of the original contract one thousand cords of wood were to be delivered at the company's yard at Carlisle, but before the completion of the contract the general agent or manager of the company agreed with the plaintiff to accept the wood at another place, and that the wood was delivered by plaintiff to defendant by mutual consent at such other place, then the plaintiff was not bound by the terms of the written contract, and if they should further find that an agent of the defendant, with power to act for the defendant, either actually measured the wood at such place, or accepted the amount hauled upon an estimate, as a full compliance with the contract to deliver one thousand, five hundred cords, and if they should find that the wood was taken and consumed by defendant, without giving plaintiff a fair opportunity of seeing the wood measured, either at the place of delivery or at the defendant's yard at Carlisle, they were at liberty to find for the plaintiff for the balance of the wood so hauled or delivered by him under the contract, and for so much over the total amount agreed to be hauled as the agent of the defendant received, and was used by defendant and hauled by plaintiff. But if they should find that plaintiff did not deliver the amount of wood he had agreed to deliver, at the place agreed upon, then he was not entitled to recover, if they should find he had been paid for all

which he had actually delivered. These instructions fairly presented to the jury the issue they were to determine, and were applicable to the facts proven. The instructions asked by defendant were but the converse of those given, and while it is usual, and perhaps preferable, to give the same propositions of law from the standpoint of each side, we do not think it is error to refuse to do so, when the instructions given clearly and unmistakably point out to the jury the questions to be determined, and plainly lay down the rule to be followed by them in reaching a determination. They are told that if they believe certain facts to exist they shall find in a certain way. This carries with it the direction that if they do not believe those facts to exist they must find to the contrary. We are of opinion that the instructions given were applicable to the case proven, that the evidence fully sustains the verdict, and upon the whole case the judgment is for the right party. Affirmed.

LONG, C. J., concurs.

[No. 279. April 2, 1889.]

THOMAS LYONS ET AL., APPELLANTS, v. JAMES B. WOODS, SHERIFF, ET AL., APPELLEES.

THIS CASE is similar to that of Chavez v. Luna, Collector, et al., decided at the January term, 1889, ante, page 183. The facts are similar, the same questions arose, and this case was affirmed for the same reasons stated in that case.

APPEAL, from a decree in favor of defendants, from the Third Judicial District Court, Grant County. Decree affirmed on the authority of Chavez v. Luna, Collector, et al.; BRINKER, J., dissenting.

The facts are similar to those stated in Chavez v. Luna, Collector, et al., ante, page 183.

WM. B. CHILDERS for appellants.

WM. BREEDEN, attorney general, for appellees.

LONG, C. J.—On the authority of *Chavez v. Luna* (decided at the January term, 1889) the judgment of the court below in this cause is affirmed.

BRINKER, J. (dissenting).—On the twenty-seventh day of August, 1885, the complainants filed in the court below their bill of complaint against the defendants, as follows: "Your orators, Thomas Lyons and Angus Campbell, partners, doing business under the firm name and style of Lyons & Campbell, Cornelius Bennett, Martin W. Bremen, and Joseph F. Bennett, all residents and citizens of the town of Silver City, in the county of Grant, and territory of New Mexico, and William J. Betterton, Charles L. Betterton, and Calvin Castlin, partners doing business at the town of Deming, in said county and territory, under the firm name and style of Betterton, Son & Co., in behalf of themselves, and all other taxpayers of said Grant county who shall come in and contribute to the expenses of this suit, do bring this their bill of complaint against James B. Woods, sheriff and ex officio collector of taxes within and for said county, and Richard Hudson, assessor of said county of Grant, and Angus Campbell, John Classen and Granville N. Wood, constituting the board of county commissioners of the said county of Grant. Your orators represent that the defendant James B. Woods is sheriff and ex officio collector of taxes; that the defendant Richard Hudson is assessor; and defendants Angus Campbell, and John Classen and Granville N. Wood are county commissioners, and constitute the board of county commissioners of the county of Grant, in the territory of New Mexico; and that all of said officers are residents and citizens of said county of

Grant. And thereupon your orators complain and say that each of your orators is a taxpayer within said county, and whose property is referred to and described in a certain list and assessment roll now in the hands of said defendant James B. Woods, prepared from assessments claimed to have been regularly made by the assessor of said Grant county, compiled under the direction of the board of county commissioners of said county, approved by said board, July 10, 1885, and received by said James B. Woods, sheriff and collector as aforesaid, on the thirteenth day of August, 1885, which said list, under the laws of the territory of New Mexico, is the warrant and evidence of authority under and by virtue of which he, the said sheriff and ex officio collector, is about to collect and is collecting the various sums of money making up the several items of taxation as therein set forth. That among the items of taxation in said tax list and assessment roll (being for this present year, 1885) set forth, and upon which each of your orators is therein noted as being taxed, are the two items respectively described in said list as 'Penitentiary Bonds,' and 'Capitol Building Bonds,' and that the sums of money set opposite the names of each of your orators, and in the columns headed, respectively, 'Penitentiary Bonds,' and 'Capitol Building Bonds,' and levied as taxation upon your orators and each of them for purposes partially described by said column headings, and that the several assessments of property of your orators respectively, and the amounts severally taxed thereon for said partially described purposes, are as follows, to wit: Lyons & Campbell, total assessable property, \$158,310—penitentiary tax, \$79.15; capitol building tax, \$126.64. Martin W. Bremen, total assessable property, \$19,120—penitentiary tax, \$9.41; capitol building tax, \$15.06. Cornelius Bennett, total assessable property, \$6,900—penitentiary tax, \$3.30; capitol building tax, \$5.28. Joseph F. Bennett,

total assessable property, \$7,490—penitentiary tax, \$3.60; capitol building tax, \$7.75. Betterton, Son & Co., total assessable property, \$11,285—penitentiary tax, \$5.64; capitol building tax, \$9.03.

“Your orators further show that these items go to make up the sums total which the said sheriff and ex officio collector is about to collect from your orators, respectively, as the amount of taxation due from each for various purposes pretended to be warranted by law, and pretended to be due and payable for and during the year 1885; that the amounts of money thus in said list pretended to be due and payable upon account of penitentiary bonds, and upon account of capitol building bonds, and as taxation so levied for and on account of said items, are so claimed and levied and included in said list by virtue and under authority of pretended acts of the legislative assembly of said territory pretended to have been approved by the governor of said territory, which said pretended acts so pretended to have been approved are entitled and described, respectively, as follows: ‘An act authorizing the building of a penitentiary in the territory of New Mexico, and regulating its management,’ approved March 14, 1884, and, ‘An act to provide for the erection of a capitol building in the city of Santa Fe,’ approved March 29, 1884. Your orators further represent that said pretended taxes, under the pretended acts of the said legislative assembly aforesaid, and by the terms thereof, are to be assessed and levied in the same manner as other territorial taxes are levied and collected. Your orators further represent that the said pretended special taxes provided for under said pretended acts of the legislative assembly have been assessed by the tax assessor of the said county of Grant, passed upon by the board of county commissioners of said county sitting as a board of equalization as required by law, and are now on the tax lists in the hands of the said defend-

ant Woods, as collector of the county of Grant, which said tax lists in the hands of the said collector have attached to them the warrant provided by law requiring said collector to collect the taxes by said lists or rolls shown to have been levied, and that copies of said lists or rolls are now on file in the probate clerk's office of said county of Grant, and that all the steps required by law for the proper levy of taxes, with reference thereto, have been taken, so that the said lists and rolls in the hands of said defendant, the collector as aforesaid, of said county of Grant, and the copies thereof in the said probate clerk's office, on their face and by virtue of said pretended acts of the said legislative assembly aforesaid, and the general revenue law of the territory, are a lien upon the real and personal property of your orators in the said county of Grant, and are a cloud upon the title of your orators to their property, and that said taxation pretended to have been assessed under invalid and pretended laws of said territory, as hereinafter alleged, has the force and effect of personal judgments against your orators, and are liens upon their property as aforesaid, and said lists or rolls are by law given the effect of executions against the property of your orators so assessed. Your orators further represent that said pretended acts of the legislative assembly entitled as aforesaid, 'An act authorizing the building of a penitentiary in the territory of New Mexico and regulating the management,' approved March 14, 1884, and, 'An act to provide for the erection of a capitol building in the city of Santa Fe,' approved March 29, 1884, under which said assessment of taxation is made, and by virtue of which said pretended liens against your orators' property are asserted, and by virtue of which said pretended assessment rolls are claimed to have the effect of executions in the hands of the defendant as sheriff and ex officio collector of said county of Grant, are not, and never have become,

valid laws of said territory of New Mexico, for the reason that the same never were introduced and passed through the council of said legislative assembly when a legal quorum of said council was present and participating in the proceedings thereof, and for the reason that a majority of a legal quorum of said council never voted in favor of said pretended laws, so as to legally pass the same through said body; and your orators charge the facts to be that an act of congress of the United States of America was passed and approved on the fourteenth day of February, 1884, and thereby became a law, which said act of congress, among other things, provided that a session of the legislative assembly of said territory should be held, and said assembly convene, on the third Monday of February, A. D. 1884, and said act of congress declared that the members elected to the territorial legislature of said territory in November, 1882, and all vacancies legally filled since that time, if any, should be the legal members of the legislature by said act authorized, subject to all valid contests. Your orators further state that, in accordance with the said act of congress, a pretended session of said legislative assembly was held, commencing on the third Monday of February, A. D. 1884.

“Your orators further state the fact to be and that the same so appears by the published journal of the proceedings of said pretended session of the council of said legislative assembly that, upon the convening of said council on the said third Monday in February, A. D. 1884, only five members appeared who had regularly received certificates of election, and were so shown to be elected by the election returns of said election held in November, A. D. 1882, to have been elected members of said council, to wit: Jose Armijo y Vigil, of Socorro county; Pablo Gallegos, of Rio Arriba county; W. H. Kellar and Andres Sena, of San Miguel county; and John A. Miller, of Dona Ana, Lincoln, and Grant

counties; and that thereupon the said five persons qualified as members of said council by taking the oath of office required by law, and signing the roll of members. Your orators further allege that by law the said council is composed of twelve members, and that seven thereof are necessary to constitute a legal quorum for the transaction of business. Your orators further allege that, after said five members had been sworn in as aforesaid, a motion was unanimously adopted by the vote of said five members only, and no more, that Thomas B. Catron, of Santa Fe county, be declared entitled *prima facie* to the seat from Santa Fe county, and that thereupon the said Thomas B. Catron took the oath of office as a member of said council, signed its roll, and thereafter acted as a member thereof; and your orators further allege that said Catron's seat was claimed by Henry L. Warren, of Santa Fe county, and that said Warren held a certificate of election as a member of said council from Santa Fe county, which said certificate was the first certificate of election issued by the county commissioners as evidence of the election of the member of said council from said county at said election held in said month of November, A. D. 1882, but that afterward said county commissioners, acting under protest, and compelled by an order of the district court in the said county of Santa Fe, issued a certificate of election to said Thomas B. Catron. Your orators further allege that they are not informed as to whom the election returns on file in the office of the secretary of the territory show to have been elected as a member of said council from said county of Santa Fe at said election. Your orators further allege that afterward, while said council was composed of the said five persons as aforesaid and the said Thomas B. Catron, and no others, a motion was therein introduced by the said John A. Miller, to the effect that Charles C. McComas and Jose Manuel Montoya be declared enti-

tled prima facie to the seats from Bernalillo county, subject to the right of contest, and that said motion was unanimously adopted by the vote of the said six members, and no more, who were then acting as aforesaid as members of said council.

“Your orators further allege that said Charles C. McComas and Jose M. Montoya held no certificates of election whatever as members of said body, but, on the contrary, Charles Montaldo and Francisco Perea held the certificates of election to the seats therein of the members from said county of Bernalillo, and that all the election returns of the election held in said month of November, A. D. 1882, both in the office of the county commissioners and in that of the secretary of said territory, showed, and still show, that said Charles Montaldo and Francisco Perea received a majority of the votes cast in said county at said election for members of the council from said county, and that said Charles C. McComas and Jose M. Montoya did not receive a majority of said votes so cast, and were not duly elected members of said council. Your orators further allege that the said Charles C. McComas, after the said election in November, A. D. 1882, had commenced proceedings as a contestant for the seat of said Charles Montaldo as a member in said council from Bernalillo county, and served his notice of contest on said Montaldo, and taken testimony under said notice of contest; and that said Jose M. Montoya had so commenced contest proceedings against the said Francisco Perea for the other seat of the member from said county of Bernalillo, and that said notice of contest so served and testimony so taken were duly filed with the secretary of the territory, and by him were transmitted and delivered to the said pretended council so organized as aforesaid; and at the time of the proceedings aforesaid the said papers relating to said contest were in the possession of the said secretary, and that long after-

ward, to wit, on the third day of April, A. D. 1884, the committee on elections of said pretended council reported to said body that the said contested election cases had been referred to them, and that they found that said McComas and Montoya were entitled to the seats then held by them in said body, which said reports are stated by the journal published by said body to have been on said day adopted.

“Your orators further allege that the said six persons aforesaid and the said McComas and Montoya constituted said council until on or about the 25th day of March, A. D. 1884, when the said W. H. Kellar absented himself from said body, and never afterward participated in its proceedings. And your orators further allege that, after the said Kellar had ceased to act with said body, J. Inocente Valdez, who was elected a member of the council from Colfax and Mora counties, took the oath of office, and participated in the proceedings. But your orators allege that at no time during the pretended session of said body did more than six persons, including the said Thomas B. Catron, take part in its proceedings, except the said Charles C. McComas and J. M. Montoya, unlawfully and arbitrarily seated as aforesaid. And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled, ‘An act authorizing the building of a penitentiary in the territory of New Mexico, and regulating its management,’ was introduced and passed through its several readings in said body; that said last mentioned bill by the journal of said pretended council is alleged to have passed under a suspension of the rules of said council, on the 14th day of March, A. D. 1884, and which said journal shows that there were present on said day the said Jose Armijo y Vigil, T. B. Catron, Pablo Gallegos, W. H. Kellar, and McComas, Miller,

Montoya, and Sena, and no more; and that said journal does not show that said last mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum, or by any other way, except by the illegal and arbitrary action of the six persons aforesaid, that said McComas and Montoya were entitled to said seats in said body. And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled, 'An act to provide for the erection of a capitol building in the city of Santa Fe,' was introduced and passed through its several readings in said body; that said last mentioned bill by the journal of said body is alleged to have passed under a suspension of the rules on the 26th day of March, A. D. 1884, and which said journal shows there were present on said day the said Jose Armijo y Vigil, T. B. Catron, and McComas, Montoya, Gallegos, Sena, and Miller, and Valdez, and that of these Messrs. Catron, McComas, Montoya, Gallegos, Sena, and Armijo y Vigil voted in favor of the passage of said last mentioned bill, while Messrs. Miller and Valdez voted against the passage of the same; and that said journal does not show that said last mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum, or by any other way, except by the illegal and arbitrary action of the six persons aforesaid, that said McComas and Montoya were lawfully entitled to seats in said body.

"Your orators further represent that said pretended acts of the legislative assembly, aforesaid, having been approved by the governor's signature attached thereto, and filed in the office of the secretary of the territory, and certified by said secretary as valid laws, legally passed by the legislative assembly of the territory, and that said acts have been incorporated and published in volumes of the laws of the territory, so that on their face

they seem to be valid laws, so as to give apparent validity to the assessment of said taxation, and to the lien on the property of your orators aforesaid, when in truth and in fact the said pretended acts of the said legislative assembly were never legally passed by said legislative assembly, and are absolutely null and void, and that by reason of the premises the said defendant, collector as aforesaid, has acquired, and can acquire, no authority in law whatever for exacting and collecting the said pretended taxes from your orators, either by virtue of said pretended acts of the legislative assembly, or on the steps taken as aforesaid thereunder. But your orators further allege that, nevertheless, the said assessments and said rolls constitute upon their face a lien, as aforesaid, upon the property of your orators in said county of Grant, and are a cloud upon the title of your orators to their said property. And your orators further represent that, if the said sums of money so demanded by the said defendant by virtue of said illegal assessments as aforesaid are paid by your orators, the same will be entirely lost to your orators, for the reason that said sums of money will pass into the hands of the treasurer of the territory of New Mexico, and be expended by virtue of the said pretended acts of the legislative assembly in the erection of the building provided for by the said pretended acts, or in payment of indebtedness incurred in erecting the same, and your orators will thereupon have no recourse upon the territory of New Mexico for the recovery of the same. Your orators further represent that, should they recover judgments against the territory therefor, the said judgments would not be available to your orators, for the reason that the warrants issued by the territory against funds in the hands of the treasurer are in excess of the amount of funds to meet the same, and are constantly so in excess, and your orators could not, therefore, recover the full amount so paid by them,

and your orators could not recover the same, for the reason that the warrants of the territory of New Mexico will not bring on the market their face value; and your orators further allege that any judgments they might obtain for the sums demanded of them, if paid by them, would be paid to them in warrants of the territory, depreciated as aforesaid.

“Your orators further allege that by the terms and provisions of said pretended acts of the legislative assembly assessments thereunder will be made against the property of your orators, and the payment of taxes thereunder be demanded each and every year during the official term of the defendant, and thereafter by his successors in office, for a period of twenty years, for the purpose of providing for the payment of the bonds and interest thereon by said pretended acts authorized to be issued, unless the invalidity of said pretended acts of the legislative assembly should in some manner be determined by some competent court, and the assessment and collection of said taxes be in some way restrained, and your orators be thereby subjected to a multiplicity of suits, and harassing and annoying litigation, to free their said property from said apparent liens, and the clouds thereby created on their titles to their property aforesaid.

“And your orators further allege that under the terms of the territorial revenue law, which by said pretended acts of the legislative assembly are made applicable to the assessment and collection of said tax so illegally exacted as aforesaid, the said defendant, as such collector, is empowered to sell your orators’ real estate, and issue to the purchaser thereof a certificate of sale; and thereafter, before the making and delivery of a deed to such purchaser or assignee, your orators, in order to redeem the same, would be compelled to pay the sums shown to have been paid by the person to whom such certificate was issued, together with all taxes subsequently paid

by said purchaser, with interest thereon at the rate of three per cent per month. Your orators further allege that after the lapse of three years the collector then in office, upon request of the holder of such certificate, would be compelled to execute a deed for the property by such certificate shown to have been sold, and said deed, when so executed and delivered, would be prima facie evidence of all the facts necessary to convey to the grantee named therein a valid title to the property thereby conveyed. Your orators further allege that, should they permit their property to be sold under said illegal assessment, they would have to redeem the same within said period of three years, or the deed so authorized would on its face convey the title to said property. All of which your orators allege will more fully appear from an inspection of said revenue law of the territory, and the aforesaid pretended acts of the legislative assembly under which said illegal assessment is alleged to have been made, and reference thereto is hereby expressly made, and the same asked to be read as a part of this bill.

“Your orators further represent that the said defendant James B. Woods, as such sheriff and ex officio collector, is now demanding the payment of the said taxes so illegally assessed against your orators and their property, and is threatening, unless your orators pay the said taxes, to sell your orators’ property, and thereby cast a cloud upon your orators’ title. And so threatening to sell the property of all other taxpayers in said county of Grant, unless said taxpayers pay the said taxes assessed under said pretended acts of the legislative assembly against their property. And your orators further allege that the said defendant Richard Hudson, the assessor of said county of Grant, and the said defendant, the board of county commissioners of said county of Grant, will unlawfully assess and levy taxes against your orators and their property in said

county of Grant, for the ensuing year, A. D. 1886, under color of authority derived from said pretended acts of the legislative assembly, and they or their successors in office will continue to so illegally assess and levy said pretended tax from year to year unless restrained from so doing by some competent court, and will thereby certainly subject your orators and other taxpayers of said county to the payment of the taxes so illegally levied, or create clouds upon the titles of your orators and said taxpayers to their property in said county. Your orators further allege that the damages suffered by them by reason of the premises is irreparable, and will involve your orators in a multiplicity of suits.

“Wherefore, and inasmuch as your orators are remediless in a court of law, they bring this, their bill of complaint, in your honor’s court of chancery, and pray that your honor will cause to issue, under the seal of this honorable court, a writ of injunction restraining and enjoining the said James B. Woods, sheriff and ex officio collector as aforesaid, and any of his deputies, his agents and employees, from in any manner further proceeding to collect, and from taking any steps to further the collection of, the said tax, and the items of said taxation so in the aforementioned list described as, and placed under, the headings of ‘Penitentiary Bonds’ and ‘Capitol Building Bonds’ for the year 1885; and that the said defendant Richard Hudson, assessor, and Angus Campbell, and John Classen, and Granville N. Wood, the board of county commissioners of said county of Grant, be restrained and enjoined by said writ of injunction from ever hereafter assessing any taxes against the property of your orators, and other taxpayers in whose behalf this suit is brought, for the purposes and under the authority of said pretended acts of the legislative assembly aforesaid, to wit, the act approved March 14, 1884, and entitled, ‘An act author-

izing the building of a penitentiary in the territory of New Mexico and regulating its management,' and the act approved March 29, 1884, entitled, 'An act to provide for the erection of a capitol building in the city of Santa Fe;' that said injunction be made perpetual; and that such other and further relief be granted in the premises as to your honor may seem meet and just.

"May it please your honor to grant unto your orators the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said James B. Woods, sheriff, etc., and to the said Richard Hudson, assessor of Grant county, and to the said Angus Campbell and John Classen and Granville N. Wood, commissioners as aforesaid of said Grant county, and their successors in office, commanding them, and each of them, on a day to be therein named, and under a penalty to be therein inserted, to be and appear before this honorable court, and then and there full, true, and perfect answer make to the matters and things contained herein; answer of said defendants under oath being hereby expressly waived. Your orators further pray that your honor will cause to be issued forthwith, under the seal of this honorable court, a preliminary writ, enjoining and restraining the said defendant James B. Woods, sheriff and ex officio collector, and any of his deputies, his agents and employees, from further proceeding to collect, and from taking any steps to further the collection of, the said tax, and the items of said taxation so in the aforementioned list described as and placed under the headings of 'Penitentiary Bonds' and 'Capitol Building Bonds' for the year 1885, until the further order of the court in the premises; and that the said defendant Richard Hudson, assessor, and Angus Campbell and John Classen and Granville N. Wood, commissioners of said county of Grant, be forthwith restrained and enjoined by said writ of injunction last mentioned from hereaf-

ter assessing any taxes against the property of your orators, and other taxpayers in whose behalf this suit is brought, for the purposes and under the authority of said pretended acts of the legislative assembly aforesaid, approved March 14, 1884, and entitled, 'An act authorizing the building of a penitentiary in the territory of New Mexico and regulating its management,' and the act approved March 29, 1884, entitled, 'An act to provide for the erection of a capitol building in the city of Santa Fe,' until the hearing of this cause, or until the further orders of this court herein."

Afterward, on the thirtieth day of November, 1885, the defendants appeared, and filed the following demurrer: "These defendants say that they are advised that there is good ground of demurrer to said bill, and they do demur accordingly, and for cause of demurrer say that the said bill of complaint contains no matter of equity whereon the court can ground any decree, or give complainants any relief, as against these defendants; that the matters and things alleged in said bill of complaint, whereon complainants base their prayer for relief, are matters into which this court can not inquire, and upon which it has no jurisdiction to grant relief or render a decree against these defendants. Whereupon these defendants do demur thereunto, and pray judgment of the court whether they shall make answer to said bill otherwise than as aforesaid, and they pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained."

The demurrer was sustained pro forma, and a final decree passed dismissing the bill. From this decree complainants appealed.

The only question in this case presented for determination is the validity of the acts of the legislature mentioned in the bill. This question has been decided at this term in the case of *Chavez v. Luna*, ante, 183, by a majority of the court, adversely to the complain-

ants, and, unless the views of the court as expressed in the opinion delivered by Mr. Justice HENDERSON have undergone a change, the judgment in that case will be decisive of this, and the ruling and judgment of the court below be affirmed.

I assume in the outset that the court is of the same mind now as when that determination was reached, and shall discuss this case upon that assumption. If I could agree with my associates in their decision, there would be no necessity for saying more than that this case should follow and be determined by the judgment in that; but, with the greatest respect for their opinion, I am impelled, by what appear to me to be the soundest principles of law, to a different conclusion. It may be said that I should have recorded my dissent in that case. A sufficient answer to the suggestion is that I did not sit in that case in this court, and, of course, was not in a position to take part in the deliberations or judgment of the court.

It is admitted that the laws assailed were passed by a so-called "legislative assembly," one branch of which was organized by a less number than a majority of all the legal members elected and authorized by the act of congress providing for the holding of that session, and that this minority upon a mere motion admitted as members three other persons, who held no certificates of election from the proper authority, and in fact no certificates whatever, at the time of their admission, but were present in the attitude of contestants for the seats of three persons who held certificates showing, *prima facie*, their right to be seated and recognized as members of the council; that the contests so instituted were referred to a committee, but before such committee had reported on them the acts complained of were introduced and passed, and that the three persons so illegally seated by the minority voted upon the question of their passage; that

subsequent thereto the committee reported on the contests favorably to the persons holding the contested seats. The persons holding certificates, and who organized the council, and assumed to admit the three persons not holding certificates, were five in number. By section 5 of the act of congress of September 9, 1850 (9 St. at Large, p. 448, section 5), it is provided that the council of this territory shall consist of thirteen members. The act of June 19, 1878 (20 St. at Large, 193), limits the number to twelve and directs the legislative assembly at its next session to divide the territory into representative and council districts. The act of June 27, 1879 (21 St. at Large, 35), provides that the provisions of the act of June 19, 1878, supra, shall not be so construed as to impair or shorten the terms of office of any member of the legislative assembly until the territory shall have been redistricted as in that act provided, "nor until, at the next regular election thereafter, the twelve members of the council * * * shall have been elected, and their term of office begun." 1 Supp. Rev. Stat. U. S. 495.

On December 21, 1881, congress passed an act declaring the election held for members of the legislature on the second day of November, 1880, to be valid, although the election was not in accordance with the act of June 19, 1878, and validating all the acts of the legislature the members of which were chosen at that election, and requiring such legislature to proceed at once upon its assembling to apportion the representative and council districts provided for in the act of June 19, 1878, according to the census of 1880. This act further provided that, if such legislature should fail to make such apportionment, then it should be made in accordance with the provisions of the act providing for the reapportionment of the members of the legislature of Montana, Idaho, and Wyoming, approved June 3, 1880, which latter act is by this act made

applicable to New Mexico. It then requires the members of the board of apportionment to assemble at the capital, and complete their work on or before the first Monday of September then next ensuing. 22 St. at Large, 1. The act of June 3, 1880, referred to and adopted as a part of the act last cited, provides that the governor, the speaker of the house of representatives, and the president of the council, during the last session of the legislatures in Montana, Idaho, and Wyoming, are authorized and empowered to act as a board of apportionment of their respective territories, and requires them, or a majority of them, when assembled at the capital, to reapportion the members of the council and house of representatives in their respective territories upon the basis of population shown by the census of 1880. That they shall forthwith certify such reapportionment, and file it in the office of the secretary of their respective territories, and within ten days thereafter the governor shall issue a proclamation for an election of members of the legislature according to such apportionment. 21 St. at Large, 154. The act of February 14, 1884, provides that the members elected to the legislature in the year 1882, and persons selected legally to fill vacancies, shall be the legal members of the legislature for the year 1884, subject to all valid contests, and directs the legislature to convene on the third Monday of February, 1884. 23 St. at Large, 3.

I am not advised whether the directions of congress as to redistricting the territory have ever been complied with by the legislature, or by the officers specially empowered to perform that duty. In the session of 1880 there were thirteen members of the council (Acts, N. M. 1880, p. 11), and the same number in the session of 1882 (Acts, N. M. 1882, p. 7). The bill alleges that by law the council was composed of twelve members, and that seven constituted a

quorum. This is admitted by the demurrer to be true. From this it may be fairly presumed that either the legislature, or the governor, speaker of the house, and the president of the council, made the apportionment required by the acts of congress at some time before the session of 1884 was to convene. The evidence of such action has not been called to my attention, however, beyond the allegations of the bill. Whether the council consisted of thirteen members under the act of September 9, 1850, or of twelve as provided in the later acts, *supra*, seven would be a majority of all the members elected. None of the acts of congress relating to the organization of the territories prescribe what number of either house of the legislature shall constitute a quorum for the purpose of organization, or for the transaction of business, nor does the act of any previous legislature do so. In this state of the case, resort must be had to well settled principles applicable to all legislative and deliberative bodies.

It will not be pretended that any valid legislation could be enacted unless there was in existence and acting a legislature legal in both branches. The following proposition seems to be well established, namely: That a council could not admit persons to seats in its body, as members, unless there was then in existence, and acting, a legal council fully equipped and competent to legally discharge all of the duties contemplated by the law of its creation. In other words, the council must have an actual, potential, legal existence, before it could do any act as a council, such as passing upon the right of claimants to seats in its body, or discharging any other function, except, perhaps, to adjourn from time to time, and enforce the attendance of absent members. Such a body can only exist when there are present all, or a legal quorum of, persons *prima facie* entitled to seats. This does not conflict with the rule that each house is the judge of the elec-

tion returns and qualifications of its own members. That rule is subordinate to the primary rule that there must first be a legally constituted house, composed of persons *prima facie* entitled to seats, amounting in numbers to all, or a legal quorum of, the members elected. Until such a house exists, the principle does not apply, for there is no body competent to judge.

By section 1921, Revised Statutes United States, 1878, the secretary of the territory is charged with the duty of administering the oath to all members elect of both houses of the legislative assembly. This section impliedly gives the secretary the power, in the first instance, to determine who are entitled to seats in either house for the purpose of organization, and to the extent, at least, of securing a quorum. So, under its provisions, there could be no valid excuse for any number of members of the council less than a majority attempting to proceed with the organization, unless the secretary should be absent.

The constitution of the United States (article 1, sec. 5) provides that a majority of each house of congress shall constitute a quorum. This is but the declaration of a general principle of parliamentary law, recognized and enforced in all deliberative assemblies, in the absence of some other specific rule on the subject, as is shown by the following authorities. In Hatsell's House of Commons Precedents, a work covering the period from the year A. D. 1290 to the year 1818, and cited by Mr. Jefferson frequently in his Manual, it is said (volume 2, p. 125): "In general, the chair is not to be taken till a quorum for business is present, unless, after due waiting, such a quorum be despaired of, when the chair may be taken, and the house adjourned; and, whenever during business it is observed that a quorum is not present, any member may call for the house to be counted, and, being found deficient, business is suspended." Jeff., Man., sec. 6.

Roberts says: "A quorum of an assembly is such a number as is competent to transact its business. Unless there is a special rule on the subject, the quorum of every assembly is a majority of all the members of the assembly." Rules of Order, 113. Fland. Const. 82, 83: "In all councils and other collective bodies of the same kind, it is necessary that a certain number, called a 'quorum of the members,' should be present in order to the transaction of business. This regulation has been essential to secure fairness of proceeding. The number necessary to constitute a quorum of any assembly may be fixed by law, as is the case with most of our legislative assemblies; or by usage, as in the English house of commons; or it may be by the assembly itself; but, if no rule is established on the subject in any of these ways, a majority of the members composing the assembly is the requisite number. No business can regularly be entered upon until a quorum is present, nor can any business be regularly proceeded with when it appears that the members present are reduced below that number." Cush. Man., secs. 17-19. Mr. Wapples states the rule thus: "A quorum is a majority of the members. It is never less, under the common law of parliamentary procedure. Unless more than half of the members of the body are present, the body is not present. When more than half are present, the body is complete, and is as though all the members were present. If less than half could do business, it would be possible for deliberative bodies to be divided into two or more assemblies, each capable of doing business, and each liable to adopt measures contrary to those adopted by some other section." Parl. Prac. 158. "Legislative bodies in this country do not modify the common law requirement." Id. 228. See, also, 1 Story, Const., secs. 831-834; *Cline v. Trustees*, 20 Ohio St. 288; *Southworth v. Railway Co.*, 2 Mich. 287, and cases

cited in note. In the last case, *supra*, the word "house" is held to mean a majority of all its members. Appellants cite The Executive Session, 12 Fla. 659, to the point now being discussed. The report is not accessible, and the case has not been examined. Appellees have filed no brief. After a very careful examination of the books at hand, I have been unable to find anything in conflict with the foregoing authorities. The principles stated in them are so well settled and familiar that I fear I may be open to the criticism of having laboriously argued upon "hornbook law." If so, my apology is that the occasion seemed to demand it.

These authorities settle the point that there must be a legal quorum before there can be a legal body, and that, in the absence of a special rule on the subject, a quorum must consist of at least a majority of all the legally elected members. If the council must consist of twelve or thirteen members, and if a majority of its members is necessary to constitute a quorum, and if but five members were sworn in by the secretary of the territory, and if these five, and no more, took it upon themselves to effect an organization of the council, and admit other persons not entitled *prima facie* to membership, then no legal council ever convened. To hold otherwise would be to countenance the most flagrant usurpation, and encourage a course of proceeding that would inevitably result in revolution. If five members of the council could determine who were entitled to seats, then three members might do so, or any other number less than a legal quorum. The history of the legislature of 1884 presents just such a state of affairs as Mr. Wapples predicts would result if less than a quorum were permitted to act for and in the name of the body. There were two so-called "councils" during that session. The one whose acts are now under review, although illegal, as I think I

have shown, secured the recognition of the house of representatives and of the executive. The other, although considered illegal by the executive and the house or representatives, held its meetings in the council chamber, while the recognized council held its meetings elsewhere; both bodies claiming to be the council, and causing endless confusion and uneasiness in the minds of the citizens of the territory.

In disposing of this part of the case, the court in *Chavez v. Luna* cite with evident approval the case of *People v. Mahaney*, 13 Mich. 481, and quote extensively from the opinion of Judge COOLEY in that case. With due deference, I must be permitted to say that, in my opinion, the reasoning of the learned judge, and the principles there announced, have no application to this case. In order to properly estimate the value of a decision as a precedent, it may be stated as a rule that the facts upon which such decision is based should be attended to and carefully examined, and, if there be a substantial difference between those facts and the facts of the case to which the decision is sought to be applied as a precedent, then such decision ought not to be considered an authority. It has been ruled: "The language of a court must always be construed with reference to and in connection with the facts before it." *Bell v. Railway Co.*, 4 Smedes & M. 549. Again: "The language of a decision is seldom, if ever, to be taken in a general sense, however general in the form of the expression, not mentioning exceptions and limitations. It should rather be understood as spoken in reference to the facts under consideration, and limited in meaning by those facts." *Ram. Judgm.* 251, and citations. In *Brooks v. Marbury*, 11 Wheat. 91, MARSHALL, C. J., says: "An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different." See, also, *Quin v. Lloyd*, 41 N. Y. 353. With

this rule in mind, the case of *People v. Mahaney*, when examined, will be easily distinguished from this, and shown not to be in point. In that case there was no question made as to the organization of the house of representatives, or that a legal quorum existed. The act assailed was one which, in order to have effect immediately upon its passage, the constitution required should receive the assent of two thirds of the members elected to each house. The plea set up a state of facts "which it is claimed shows that in the house of representatives the two thirds vote of sixty-seven members included several who had not been elected by a majority of legal votes, but who, it is also claimed by the pleas, were notwithstanding retained in their seats by an adjudication of the house in their favor." 13 Mich. 491. Upon this state of facts the remarks quoted in *Chavez v. Luna* from Judge COOLEY'S opinion are based. What was necessary to make a legal house, or what was the requisite number of members to constitute a lawful quorum, is not even suggested by the plea, nor hinted at in the opinion of the court. How many members of the house charged not to have been elected are embraced in the word "several" can not even be conjectured. If there was "an adjudication by the house" seating the persons who are charged in the plea not to have been elected, then there must have been a legal quorum of the house present participating in such adjudication, composed of at least a majority of the members required by the constitution to make a full house (*Southworth v. Railway Co.*, supra); and, if so, then such quorum was competent to make the adjudication. Its action in that behalf was conclusive, and the courts could not inquire into the facts upon which it based its judgment.

There is nothing, I insist, in the case cited in conflict with the principle quoted above, that until there is a legal quorum of the house present the house is not present,

and, not being present, it could not adjudicate. The reluctance of the courts to investigate the acts of a legislative body, and the evils that would flow from a too close scrutiny of the details of their proceedings, as stated by Judge COOLEY, ought to have little weight, where there is an entire nonexistence of the body itself. Great evils would result were the acts of less than a legal quorum held to be beyond judicial inquiry. When once it is established that two or three or five or any number of persons, legally elected though they may be, but falling short of a majority or other legal quorum, can meet, and at their own sweet will say who shall and who shall not be admitted to take part in the passage of laws affecting alike the lives, liberties, and property of the citizens, without reference to whether the persons so admitted shall have at least a *prima facie* right to membership, then will the boasted security of constitutional government become a mockery.

This court quotes the seventh section of the organic act, to the effect that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and that all laws passed by the legislature shall be submitted to congress, and, if disapproved, shall be of no effect (sections 1850, 1851, Rev. Stat. U. S.), and concludes: "Whether in these general terms it was intended by congress to confer legislative powers upon the legislative assembly of New Mexico, with the usual and ordinary incidental judicial power to determine finally the election, qualification, and return of the members, we do not decide. It is sufficient to say that by the very terms of the organic act above quoted 'all of the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect.' We must presume that, in obedience to the

fundamental law of the territory, these acts, together with all others passed at the session of 1884, were submitted to congress; and, there being nothing to show that they were disapproved, they have received the passive assent of congress, and have been in that way approved. Congress had plenary power over the subject, and, being approved by it, there is nothing upon which to ground the jurisdiction of the courts over the subject sought to be reviewed." Upon this conclusion the judgment rests. That this conclusion is not a necessary one, I think is capable of demonstration. While it is true, as intimated, but not decided, that congress has vested the territorial legislature and each house of it, by necessary implication, with the ordinary incidental judicial power to determine finally the election, qualifications, and returns of its members, and while it is also true that congress has plenary power to annul all acts passed by the assembly, and has reserved that power expressly in the organic act, I contend that the mere fact that congress has failed to exercise such power should not be construed as an implied assent to the acts of the legislature submitted to it.

An examination of the legislation of congress from September 9, 1850 (the date of our organic act), down to the present time, will show that but three laws passed by the legislature of this territory have ever been disapproved (16 St. at Large, 44, 278; 20 St. at Large, 280); and the disapproval was not because of any illegality in the organization of the legislature, nor in the regularity of the proceedings attending their passage, but solely because the policy of the laws was not such as to commend them to congress, or because they contravened the organic act. So far as anything to the contrary appears, the legislature in each instance was legally organized, and every step necessary to the legal passage of the laws in regular form was taken,

from the introduction of the bills to their final passage. The only instances in which congress has been called upon to pass judgment upon matters occurring here, because of irregularity, so far as I have been able to examine the question, were on March 26, 1867, when it passed an act violating the laws passed by the legislature in 1866, and which had been signed by the acting secretary instead of by the governor, as required by section 1842 of the organic act (15 St. at Large, 23), and on December 21, 1881, when it passed an act approving and making legal the election of members of the legislature in the year 1880 (22 St. at Large, 1). This action by congress tends strongly to prove that congress did not consider a mere failure to disapprove an invalid law an approval of it. In this case there is nothing to show that congress had any knowledge of the manner in which the council was organized. The organic act requires the secretary of the territory to transmit to the president one copy of the laws and journals, and to the president of the senate and speaker of the house two copies of the laws, for the use of congress. Sections 1844, 1850, Rev. Stat. U. S. Congress, having before it the laws under consideration, may have been satisfied with their policy, and may have deemed them proper and beneficial to the inhabitants of the territory, being ignorant of the constitution of the bodies by which they were passed; whereas, if it had been informed of the methods resorted to in organizing the council, it might and probably would have disapproved them, on the ground that the action of the organizers of that body was revolutionary, and calculated to provoke discord and dissatisfaction among the people. That the mere nonaction by congress is not to be taken as an approval of the acts of the legislature, so as to preclude judicial investigation, has been expressly held by the supreme court of the United States in a very recent case. In *Stoutenburgh*

v. Hennick, 9 Sup. Ct. Rep. 256, it appeared that certain acts of the legislative assembly of the District of Columbia had been submitted to congress, and portions of them repealed and disapproved. In the acts of congress disapproving such portions, nothing was said about the portions not disapproved. It was contended on the argument that, as congress had expressly disapproved a part of those acts, it thereby impliedly approved the remainder of them. In passing upon this point Mr. Chief Justice FULLER says: "Although by several acts congress repealed or modified parts of this particular by-law, these parts were separably operative, and such as were within the scope of municipal action, so that this congressional legislation can not be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not originally have been authorized." Here is a case of the entire law being before congress. It repeals a part, which it was competent for the legislative assembly to enact, and leaves unrepealed a part, which the legislature could not lawfully enact, and which congress could not empower it to enact; yet the court says, independent of the power of congress to ratify the portions of the act not noticed in the repealing law, its mere nonaction can not be held or presumed to be a ratification. This case is conclusive of this point. It is but just to the learned justice who wrote the opinion of the court, and to the other justices who concurred in the case of Chavez v. Luna, to say that the case of Stoutenburgh v. Hennick, supra, was not before this court when the judgment was rendered, and that none of us was aware of the ruling in it. Upon the whole case, I am of the opinion that the case of Chavez v. Luna should now be overruled, and that the judgment of the court below in this case should be reversed.

[No. 273. January 18, 1890.]

SIMON LEYSER, APPELLEE, v. NEILL B. FIELD,
APPELLANT.

MALICIOUS ATTACHMENT—LIABILITY OF ATTORNEY—INSTRUCTIONS.—In an action in case against an attorney for an alleged malicious suing out of an attachment, the court erred in refusing to instruct the jury that "the mere termination of the attachment suit in favor of plaintiff does not raise the presumption of want of probable cause for suing out the writ, nor can the jury presume that the defendant Field acted maliciously from this fact alone." The court also erred in refusing to instruct the jury that "defendant had a right to act on facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true, and if such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act on them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by said defendant to be true, will constitute probable cause." The courts have held, in every case of an action for malicious prosecution, it must be averred and proved that the proceeding against the plaintiff has failed. But its failure has never been held to be evidence of malice or probable cause.

APPEAL, from a judgment in favor of plaintiff, from the Second Judicial District Court, Bernalillo County. Judgment reversed and new trial ordered.

The facts are stated in the opinion of the court.

JOSEPH BELL, T. B. CATRON, and JOHN H. KNAEBEL
for appellant.

The plaintiff was bound to prove want of probable cause as one of the conditions precedent to a recovery. *Alexander v. Harrison*, 38 Mo. 258; *Cloon v. Gerry*, 79 Mass. 202 (13 Gray, 201); *McManus v. Ellis*, 52 Tex. 546.

Plaintiff failed to show the termination of the litigation favorable to himself, either by direct adjudica-

tion or the creditor's abandonment, proof of which was a condition precedent to recovery. *Stewart v. Sonneborn*, 98 U. S. 187.

An agent may, sometimes, defend against a claim for malicious prosecution, even though on the facts of the case he might be liable in trespass. *Ford v. Williams*, 3 Kern. 584, 585.

But an attorney at law is exempt from many responsibilities of an ordinary agent. *Bicknell v. Dorion*, 16 Pick. 478; *Dawson v. Buford*, 30 N. W. Rep. 35; 13 N. Y. 584, 586; 15 Ill. 155; 42 N. J. Law, 33; 38 Iowa, 498; 13 Ill. 538; 23 Mich. 511; 8 Iowa, 81.

What constitutes malice is a question of law for the court. The proper way is to instruct the jury what facts, if found by them, will warrant the inference. *Sharp v. Johnston*, 76 Mo. 660, 673; *Stewart v. Sonneborn*, 98 U. S. 194.

The court erred in not permitting evidence of the telegram. It was relevant and material on the question of malice, and even, as to this defendant, on the question of probable cause. *Wood v. Meir*, 5 B. Mon. (Ky.) 546.

It was error to refuse to permit the witness Field to answer whether or not it was his intention to injure or damage the plaintiff. *Brooks v. Jones*, 11 Iredell, L. (N. C.) 260.

The only record suggested by the proofs shows that the claim made was satisfied. *Savage v. Brewer*, 16 Pick. 453.

The record in the original suit (if it is proved) is necessarily a mutual estoppel. It shows that the attachment was acquiesced in, and that the payment by Leyser was judicially declared to be, not an involuntary payment, subject to repudiation, but a free and full satisfaction of the debt. *Sartwell v. Parker*, 141 Mass. 405.

The demand in the attachment suit not being due,

its payment must be deemed a confession of the attachment. *Staab v. Hersch*, 2 West Coast Rep. 425.

If, in any view, the prior litigation could be deemed terminated favorably to Leyser, yet such a termination did not ipso facto prove either want of probable cause or the existence of malice. *Adams v. Lisher*, 3 Blackf. (Ind.) 445.

Probable cause is a question of law for the court, and although the jury are to judge of the existence of the facts alleged, and in finding probable cause have to meet a question of mixed law and fact, yet it is the duty of the court to show the jury clearly what facts claimed to be proved amount to probable cause. *Barron v. Mason*, 31 Vt. 124; *Driggs v. Burton*, 44 Vt. 124; 98 U. S. 198; *McCormick v. Sisson*, 7 Cowen, 717; *Gorton v. De Angelis*, 6 Wend. 420; *Crescent Co. v. Butchers Union*, 120 U. S. 148, 149; 2 Wendell, 426; 1 Id. 352.

The statute requires the judge to instruct as to the law of the case. Comp. Laws, N. M., sec. 2055. And this the judge should do of his own motion, especially when expressly requested. *Stewart v. Sonneborn*, 98 U. S. 187.

Even the principal—the creditor, is authorized to proceed on “good reasons to believe.” All such circumstances as create a reasonable suspicion, as commercial reports, pending suits, and general hearsay, are “good reasons to believe,” and may be shown in an action for malicious prosecution to elucidate motives. They tend to show probable cause, and to disprove malice. *Stone v. Swift*, 4 Pick. 393; *Chandler v. McPherson*, 11 Ala. 916.

There was uncontradicted proof of probable cause, and disproof of malice. *Barron v. Mason*, 31 Vt. 189.

FISKE & WARREN for appellee.

Upon the main question involved, which is the liability of appellant in an action upon the case for

maliciously suing out the attachment, the court is referred to the case of *Stewart v. Sonneborn*, 98 U. S. 187, et seq. See, also, *Sharp v. Johnson*, 59 Mo. 557; 76 Mo. 662.

It is admitted that an attorney at law, in the proper discharge of his duties, is entitled to all the protection the court can give. But a person making affidavits for arrest, or for attachment, and executing bonds, is not acting in the capacity of an attorney at law, but as an ordinary agent, and is as liable for his torts and wrongs as any other person or agent. *Weeks on Att'ys*, 239. See, also, section 133, and cases cited.

It is practically conceded that reasonable and necessary counsel fees in defending against a wrongful attachment proceeding are properly recoverable, and may be assessed by the jury. *Gregory v. Chambers*, 78 Mo. 294, 296.

LEE, J.—This is an action of trespass on the case, brought by Simon Leyser against Louis Lieberman, Joseph C. Mannheimer, Neill B. Field, Henry C. Lewis, and S. E. Ulman, in which the plaintiff charges in his declaration that the said defendants, on the first day of May, 1883, at the county of Socorro, and territory of New Mexico, not having good and reasonable or probable cause to believe that the said plaintiff had fraudulently disposed of his property so as to defraud and hinder his creditors, or was about to dispose of his property with such intent, but wrongfully, maliciously, and unlawfully contriving and intending to injure, harass, and oppress, did wrongfully, falsely, and maliciously procure or cause to be issued out of the district court of the second judicial district in and for the county of Socorro a certain writ of attachment, at the suit of Lieberman & Mannheimer, whereby the sheriff was commanded to attach the goods, lands, and tenements of the plaintiff in a suit in said district court by the said Lieberman & Mannheimer for the recovery of a

demand against the said Simon Leyser for the sum of \$728; that said defendant Field caused said sheriff to levy said attachment upon a stock of goods and merchandise of the said plaintiff; that the plaintiff, in order to procure a release of said goods, was obliged to and did pay off said demand, though said debt was not yet due; that he was injured in his business; and that he had to pay out the sum of \$1,000 in and about the premises for getting his property released; wherefore he demanded judgment against the defendants for \$5,000. The defendants Lieberman & Mannheimer were not served with process, and did not appear. The other defendants pleaded not guilty to said declaration. A jury trial was had upon the issue thus formed, with the result of a verdict of not guilty as to all of said defendants who appeared except Neill B. Field, against whom a verdict was returned for the sum of \$400. After a motion for a new trial had been overruled by the court below, judgment was entered upon said verdict against defendant Field, from which he appealed to this court.

The evidence is set out in the bill of exceptions. The following is a brief statement of the evidence of Leyser and Field: Leyser testified that he was engaged in the mercantile business; that he was responsible; he denies that he was about to dispose of his property with intent to hinder, delay, or defraud his creditors; that a day or two before the bringing of the attachment proceedings the defendant Field, as one of the attorneys of Lieberman & Mannheimer, came to him, and presented a bill for payment, in favor of said firm, for the sum of \$728; that the claim was on an open account; that he refused to pay it for the reason that it was not due; that a day or two afterward suit was commenced by attachment; that the sheriff came with a writ, and levied upon his goods; that he paid off said claim in order to have his property released. The defendant

Field testified that he was an attorney at law; that he received the claim for collection from Lieberman & Mannheimer; that he presented the same to the said Leyser, and demanded payment; that said Leyser refused, claiming that the account was not due; that he was informed that Leyser had been reported by the commercial agency as about to make a fraudulent assignment; that an attachment had already been commenced by one Staab, and that other claims were in the hands of other attorneys for collection; that he commenced attachment proceedings by direction of his clients; that he acted in good faith in the premises; that he had no ill will against said Leyser, and did not desire to harass or oppress him. The appellant assigns some twenty-four grounds of error, but we do not deem it necessary to decide other than such points as we think decisive of the case.

The errors to which we will direct our attention arise in the charge given by the court to the jury, and in certain instructions asked by the defendant and refused. The court below, in its charge to the jury, submitted to them alike the questions of malice and probable cause as matters of fact to be determined by them, and did not instruct them as to what facts or circumstances would or would not constitute probable cause, though the defendant asked instructions to that effect, two of which are as follows: “(2) The court instructs the jury that the mere termination of the attachment suit in favor of plaintiff does not raise the presumption of want of probable cause for suing out the writ, nor can the jury presume that the defendant Field acted maliciously from this fact alone.” “(10) The court instructs the jury that the defendant Field had a right to act upon facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true; and if

MALICIOUS attachment: termination of attachment favorable to plaintiff: liability of attorney: presumption.

such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act upon them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by said Field to be true, will constitute probable cause." The court refused to give these instructions, to which the defendant excepted, and thus raises the question upon which we think the case must be decided. The supreme court of the United States, in the case of *Stewart v. Sonneborn*, 98 U. S. 187, quite clearly sets forth the law in a case very similar to the one under consideration. In that case they refer to the ancient case of *Farmer v. Darling*, 4 Burrows (1791), where Lord MANSFIELD instructed the jury that, "the foundation of the action was malice, and that malice, either expressed or implied, and the want of probable cause, must both concur." And, says the supreme court, "from 1766 to the present day, such has been the law both of England and this country, and the existence of malice is always a question for the jury." Malice, it is admitted, may be inferred by the jury from the want of probable cause. But the want of probable cause can not be inferred from any degree of even expressed malice, but what amounts to probable cause is a question of law, in a very important sense. In the celebrated case of *Sutton v. Johnson*, the rule was thus laid down: "The question of probable cause is a question of law and fact. Whether the circumstances alleged to show probable cause are true, and exist, is a matter of fact; but supposing them to be, whether they amount to probable cause, is a question of law." This doctrine is generally adopted. *McCormick v. Sisson*, 7 Cow. 715; *Besson v. Sutherland*, 10 N. Y. 236; *Barron v. Mason*, 31 Vt. 189; *Driggs v. Burton*, 44 Vt. 124; *Stewart v. Sonneborn*, 98 U. S. 194. "It is," says the supreme court in the last case cited, "the duty of the court,

when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to probable cause, or it does not." What facts or circumstances will when proven, authorize the court to instruct the jury, if they find such facts and circumstances to be true, what will constitute probable cause, must, in the nature of things, vary with every different case; but there are some general principles that underlie all cases, and frequently, when applied, will settle the case in question. For instance, in this case the conduct of the defendant is to be weighed in view of what appeared to him when he filed the proceedings in attachment; not what the facts proved to be afterward, but had he reasonable cause for his action when he took it. Not what the actual fact was, but what he had reason to believe it was. *Faris v. Starke*, 3 B. Mon. 4; *Raulston v. Jackson*, 1 Sneed, 128. If the defendant acted in good faith, with an honest purpose to collect a just claim for his clients, the mere wrongful resort to legal process affords no ground of action. It is *damnum absque injuria*. And further than the cost, which is the legal penalty for bringing a groundless suit, there could be no other damages. *McKellar v. Cranch*, 34 Ala. 336. The misuse of legal process in a civil proceeding must have been wrongful, corrupt, and malicious; for if the defendant had an honest and reasonable conviction that Leyser was justly indebted to his clients for the claim he held for collection against him, and it was reported, and he believed the report to be true, that plaintiff was about to make a fraudulent assignment of his property, he had a right to act upon facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true; and if such facts and circumstances were of such character, and came from such sources, that law-

yers generally, of ordinary care, prudence, and discretion, would act upon them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by Field to be true, would be probable cause for instituting the attachment proceedings, and if such facts were found by the jury to be true his defense would have been complete. And we think the court erred in not giving instruction number 10 asked for by defendant, which is hereinbefore set forth.

The defendant also asked the court to instruct the jury that the mere termination of the attachment proceedings in favor of the plaintiff does not raise the presumption of want of probable cause. The supreme court, in the case before referred to, holds, in every case of an action for malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed; but its failure has never been held to be evidence of either malice or probable cause. The same is held in Cloon v. Gerry, 13 Gray, 201; Adams v. Lisher, 3 Blackf. Rep. 445. The instruction was a fair and clear expression of the law material to the defendant, and it should have been given; and it was error to refuse it.

Having come to the conclusion that this case must be reversed, we do not give any opinion upon the other points raised. The judgment will be reversed, and the cause remanded for a new trial.

LONG, C. J., and McFIE and WHITEMAN, JJ.,
concur.

[No. 379. January 19, 1890.]

AUGUST KIRCHNER, APPELLEE, v. SARON M.
LAUGHLIN, APPELLANT.

ASSUMPSIT FOR BREACH OF CONTRACT—TESTIMONY AS TO TESTIMONY OF WITNESS ON FORMER TRIAL—EVIDENCE.—The testimony of a witness to prove the testimony of a witness on a former trial, between the same parties and about the same subject-matter, is inadmissible, except in the case of the death or insanity of the witness, or when it appears at the time of the trial he is unable to be examined by reason of some physical disability, and that his deposition could not, by the exercise of due diligence, have been taken, or where the witness is beyond the seas, or is absent from the territory, and his whereabouts can not, by due diligence, be ascertained, or where the witness absents himself from the jurisdiction of the court, by procurement of the opposite party, after having been duly summoned to appear at the trial.

ID.—TESTIMONY OF STENOGRAPHER FROM HIS NOTES—EVIDENCE.—In such case the testimony of a stenographer, made from his notes, taken at a former trial, to refreshen his memory, can be regarded only as hearsay, the statute (Comp. Laws, 1884, sec. 548) having failed to declare their legal value.

ID.—INADMISSIBILITY OF DECLARATION OF AGENT WITHOUT PROOF OF FACT OF AGENCY—EVIDENCE.—The declarations of an alleged agent are only admissible when there is proof of the fact of the agency.

APPEAL, from a judgment for plaintiff, from the First Judicial District Court, Santa Fe County. Judgment reversed, and new trial ordered.

The facts are stated in the opinion of the court.

GILDERSLEEVE & PRESTON for appellant.

CATRON, KNAEBEL & CLANCY, and THOMAS SMITH for appellee.

BRIEF ON MOTION FOR REARGUMENT.

As to the availability of the objection to the admissibility of proof of the former testimony of an absent witness, see Danforth's U. S. Digest, 440.

Lord Tenterden admitted the testimony of a deceased witness given on a former trial of the same issue (a feigned issue out of chancery) although there was extant a deposition of the same witness taken for use on a later trial. *Tod v. Earl of Winchelsea*, 3 Carr. & Payne, 387. See, also, 1 Greenlf. Ev., sec. 163; 1 Whart. Ev., secs. 137, 178, 179, 180.

As to the evidence of agency, this court on the former hearing expressly ruled it to be sufficient to go to the jury. 17 Pac. Rep. 134. The court also said "no sufficient reason has been shown why it was withdrawn from the jury. *Ib.*

WHITEMAN, J.—This is an action in assumpsit brought by August Kirchner, appellee, to recover damages for the breach of a contract alleged to have been made by the plaintiff with the appellant, Saron N. Laughlin, and Joseph H. Wiley, on the ninth day of August, A. D. 1879, the contract having been signed and sealed by Wiley for himself and as the agent of Laughlin. Under this contract, Kirchner delivered to Wiley two thousand ewes, which Laughlin and Wiley were to care for for the the period of five years, and to pay and deliver to Kirchner annually, for the use of the same, five hundred wethers and five hundred fleeces of wool, and at the end of five years Laughlin and Wiley were to deliver to Kirchner two thousand ewes of like age, quality, and condition as those which should be delivered to them. Some time later, five hundred additional ewes and twenty-three rams were delivered by Kirchner upon an unsealed written agreement, dated September 14, A. D. 1881, which was signed in the name of Laughlin by Wiley as agent, and also for himself. This agreement provides, in effect, that the original contract should be enlarged so as to include the additional ewes and rams, under the same terms and conditions as were specified in the original

contract. The plaintiff prayed damages for the sum of \$3,500, with interest and cost of suit. The defendant, Laughlin, interposed the pleas of non assumpsit and non est factum to the declaration, denying his signature to the instrument in writing sued on, and the authority of any one to execute it for him. The case was tried at the July term, A. D. 1885, of the district court of Santa Fe county, at which trial the court instructed the jury to return a verdict for the defendant, Laughlin. The plaintiff then carried the case by writ of error to the supreme court, which court, at the January term, 1888, reversed the judgment of the district court, and directed a new trial, which was had at the August term, A. D. 1888, and the plaintiff recovered a judgment in the sum of \$3,200, and the defendant brings the case upon appeal to this court.

The appellant insists that the district court erred in permitting Harry S. Clancy, a witness in behalf of the appellee, to testify as to what William Breeden had testified to upon the former trial of the cause. The witness Clancy was the official stenographer of the court, and, upon being sworn as a witness, testified that he acted as stenographer upon the former trial; that upon that trial William Breeden was sworn and examined as a witness in behalf of plaintiff; and, upon being further interrogated, the witness Clancy testified as follows: "Question. Where is William Breeden? Answer. I am informed — I have seen a letter written by Mr. Breeden within the last two weeks from the state of Ohio. Q. State whether or not, on the former trial of this case, the paper I now hold in my hand was identified by Col. Breeden under oath. A. From my memorandum made on that paper it appears that it was introduced in evidence upon the former trial of this cause as an exhibit. Q. State whether or not the memorandum in pencil, 'A. H. S. C.,' is an original

BREACH of contract: testimony of official stenographer from notes taken on former trial: evidence.

note made by you as stenographer on this exhibit, when introduced in evidence. A. It is. Q. Are you acquainted with the handwriting of William Breeden? A. I am. Q. State, if you know, in whose handwriting the body of this instrument is written. A. It is in the handwriting of Col. William Breeden. Q. Do you recollect, in substance, what Col. Breeden testified to as to the signatures to this paper? A. I am able to testify on that point, after refreshing my memory by referring to the original shorthand notes. Q. Have you looked at those notes? A. Yes, sir. Q. State, in substance, what Col. Breeden testified then on that subject. A. Col. Breeden testified that this paper was in his handwriting, and that it was executed by Joseph Wiley, for himself and for Saron N. Laughlin, and also that the additional agreement on the last page was signed by Mr. Wiley for himself and for Mr. Laughlin."

The testimony of the witness Clancy was permitted to go to the jury, notwithstanding the objection of the defendant Laughlin. It was shown upon the trial by the testimony of M. A. Breeden, who is the brother of the absent witness, William Breeden, that he, William Breeden, his wife and family, resided in the town of Santa Fe, New Mexico; that he left the territory of New Mexico in July, and that the witness believed him to be in the state of Ohio at that time; that he had received a letter from him within a week or ten days previous to that time; that he could not state positively whether his brother was on the road or in the territory, but that his understanding was that he was in the state of Ohio, and he did not know when he was expected to return. In the decisions of the courts of the several states that have passed upon the question of the admissibility of the evidence of a witness given upon a former trial of a case, there is great lack of uniformity, and the law is far from being settled. Several courts have held that,

where a witness is beyond the jurisdiction of the court, evidence is admissible of his testimony given at a former trial between the same parties, with reference to the same subject-matter. *Magill v. Kauffman*, 4 Serg. & R. 317; *Clinton v. Estes*, 20 Ark. 235; *Schearer v. Harber*, 36 Ind. 536; *Long v. Davis*, 18 Ala. 801; *Wilder v. St. Paul*, 12 Minn. 192; *People v. Devine*, 46 Cal. 45; 1 Greenl. Ev., sec. 163. It is held, on the contrary, that where the residence of the witness is known, his deposition should be taken, unless it be shown that the circumstances of the case are such as to prevent the taking of his deposition. *Wilbur v. Selden*, 6 Con. 164; *Gerhauser v. N. Brit. & Mer. Insurance Co.*, 7 Nev. 174; *Berney v. Mitchell*, 34 N. J. Law, 341; *Le Baron v. Crombie*, 14 Mass. 234; 17 Ill. 427. There would seem to be less force in the position maintained in the cases first cited, at the present time, than there may have been a quarter of a century ago. The imperfect mail facilities and slow methods of travel which existed then made the taking of a deposition of a witness residing or being in another state difficult and uncertain of accomplishment, and consumed a great deal of time; whereas, under the fast mail system and rapid railroad communication with all parts of the country maintained at the present day, the taking of a deposition of a witness in another jurisdiction is accomplished with comparatively little expenditure of time, trouble, or money. In *Burton v. Driggs*, 20 Wall. 133, cited by the appellee, the court held that, a deposition taken in the case having been lost, a copy of the deposition taken under the direction of the clerk, and by him compared and certified to be a true copy, might be read in evidence in place of the original (the witness being out of the jurisdiction of the court.) The objection was made that "the copy was not the original." "This, as a fact," the court say, "was self-evident, but, as a ground of objection, it was wholly

indefinite." There was no suggestion made "that the place of the lost deposition could only be supplied by another one of the same witness, retaken, and that secondary evidence was inadmissible to prove the contents of the former;" and the case, for that reason, was decided upon the ground that the contents of any written instrument, judicial records, and all other documents of a kindred character, lost or destroyed, may be proved by competent evidence; that there was nothing in the objection made to the introduction of the copy to take the case out of the general rule; and the decision seems to intimate that, if a proper objection had been made, the case would have been decided differently. The requirements of the statute of New Mexico (Comp. Laws 1884, sec. 548) are that the stenographer of the court shall take an oath faithfully to discharge his duty as such, and that the shorthand notes taken by him shall, at the end of each term of court, be deposited in the office of the clerk of the court, but the statute does not declare the legal value of such notes as evidence. The testimony of the witness Clancy, as to what the witness William Breeden had testified to upon the former trial, therefore, was but hearsay evidence, his memory being refreshed by a reference to his shorthand notes of the former trial; which notes may have possessed a measure of value, as evidence somewhat higher than hearsay evidence, by reason of their having been taken by a sworn officer of the court, and the notes having been in the custody of the clerk of the court during the interval between the first and second trial, but were lacking in value as evidence of a high degree, because of the failure of the statute to declare their legal value. The record of this case does not suggest any reason why the deposition of the witness William Breeden could not have been taken. We are of the opinion that neither legal principle nor sound policy will justify the admission of the evidence given on a

former trial, between the same parties and about the same subject-matter, except in case of the death or insanity of the witness, or where it appears at the time of the trial that, by reason of physical disability of a permanent character, he is unable to be examined, and that, by the exercise of due diligence, his deposition could not have been taken, or where the witness is beyond the seas, or where the witness is absent from the territory, and his whereabouts can not, by due diligence, be ascertained, or where, by the procurement of the opposite party, the witness absents himself from the jurisdiction of the court, after having been duly summoned to the trial.

Upon the trial of the case, the appellee, August Kirchner, was permitted to testify in his own behalf, as to what Col. Breeden stated to the appellee and Joseph H. Wiley, in the absence of appellant, viz., that a certain

DECLARATIONS of
agent without
proof of fact of
agency: evi-
dence.

letter, which was the subject of a conversation between the persons named, was in the handwriting of appellant, and also as to the contents of the letter, and the admission of this testimony is assigned by the appellant as error. The testimony of the appellee upon this point was as follows: "The first year I received my 'partido' complete. The second year comes Mr. Wiley, and says: 'Chiquito, I received a letter from Mr. Laughlin. We are having a bad year this year, and now I want you to do something for me.' I said: 'All right; you come to Col. Breeden's office.' We went there, and he took out his letter from Mr. Laughlin. Col. Breeden read it, and said: 'Chiquito, that is Mr. Laughlin's handwriting. He says he want you to release him from the partido for this year.' I said: 'I will do so.' I told Mr. Breeden, 'I will do so, because it is a bad year.' " The appellant objected to the testimony. The objection was overruled. The court, in passing upon the objection, stated that any-

thing that was said between Kirchner, Col. Breeden, and Wiley was competent.

The evidence would be competent only in the view that Breeden and Wiley were the agents of Laughlin, and were at that time acting within the scope of their authority. If they were not his agents, then any statement they may have made concerning the letter would not be competent. The case was prosecuted upon the theory that Wiley was the agent of Laughlin, and the purpose of this evidence was to show that Laughlin, by asking to be released from paying the partido for that year, admitted his liability under the contract made by Wiley in his name. Laughlin testified that Wiley was not his agent; that he never authorized him to make such a contract, or to sign his name; and that he did not know until the year 1883 that such a contract had been made in his name, and that, when informed of it, he immediately repudiated the contract, and went to Kirchner and demanded that his name be taken off. Wiley testified that "Laughlin was never in any way interested in the contract, and never gave me at any time permission or authority to sign his name to the Kirchner sheep contract, or to enter into any contract for him with Mr. Kirchner in regard to sheep, and Mr. Laughlin never at any time or place ratified the contract with Kirchner sued on in this cause." His testimony is entirely silent upon the point as to whether he did or did not sign Laughlin's name to the contract, and in this connection the testimony of the witness M. A. Breeden may have some significance. This witness testified that the name of Saron N. Laughlin, on the last page of the contract was in the handwriting of William Breeden. We think the evidence of the appellee, Kirchner, as to the declarations of Breeden and Wiley concerning the letter claimed to have been written by Laughlin, was improperly admitted, for the reason that the evidence in the case does not satisfactorily

establish that either Breeden or Wiley was, at the time, an agent of Laughlin. The declarations of an agent are only admitted when the agency is proved. To permit the proving of an agency by proving the declarations of the agent would be assuming it without that which is a prerequisite to the admissibility of the declarations. It would be without reason or logic to say that an agent's declarations were admitted because he was an agent, and that he was an agent because his declarations were admissible. "Hence the rule is settled that such declarations can not be received unless there be proof of the agency aliunde." Whart. Ev., sec. 1183; Breckenridge et al. v. McAfee, 54 Ind. 144; Jordan v. Stewart, 23 Pa. St. 244; Williams v. Davis, 69 Pa. St. 21.

Other errors are assigned by the appellant, but, believing that the determination of the questions already considered in favor of the appellant will entitle him to a new trial, we will not stop to consider the other questions presented by the record. The judgment of the district court will be reversed, and the cause remanded for a new trial.

LONG, C. J., and LEE and McFIE, JJ., concur.

[No. 375. January 21, 1890.]

JOHN B. LAMY, JR., AND MERCEDES CHAVES
DE LAMY, PLAINTIFFS IN ERROR, v. THOMAS
B. CATRON AND WILLIAM T. THORNTON,
DEFENDANTS IN ERROR.

DIVORCE—ALIMONY PENDENTE LITE—SEPARATE ESTATE OF WIFE—ATTORNEY'S FEES—JURISDICTION OF DISTRICT COURT.—Held: The district court, which is a court of equity as well as of common law, may, as an incident to the power to decree divorces, grant to the wife, upon a proper showing, pendente lite, temporary maintenance and allowance, and enforce payment of the same, against the husband, or his property, in the absence of a sufficient separate estate of the wife,

or under such circumstances, may charge such maintenance and allowance for attorney's fees against any common property of the husband and wife, whether such property be under the control of the husband or wife.

2. Where the wife has an ample separate estate of her own, she may charge such estate with necessary attorney's fees to enable her to prosecute or defend a divorce suit to which she is a party; and when she has done so, in the employment of her attorney, the court has the power, as an incident to the divorce proceeding, to decree such necessary fees against her separate estate as an allowance to her attorney, so far as such fees are actually necessary, and limited to the fair value of the services rendered; and a compromise of the suit between the husband and wife, to which her attorney was not a party, can not deprive him of the right to his fee.

ERROR, from a decree in favor of defendants, to the First Judicial District Court, Santa Fe county. Decree affirmed.

The facts are stated in the opinion of the court.

GILDERSLEEVE & PRESTON for plaintiffs in error.

In proceedings to review a judgment or decree, the court in which the proceedings are pending sits as a court to examine and review errors of law only. Story's Eq. Pl. [6 Ed.] secs. 403-407; 2 Dan. Ch. Pr., p. 1576, and notes; Brewer v. Bowman, 20 Am. Dec. 158, and note p. 164, with cases there cited; Barton's Eq., p. 163.

Questions of fact are not open to discussion on review. Evans v. Clement, 14 Ill. 206; Garrett v. Moss, 22 Ill. 363; Beard v. Butts, 95 U. S. 434, 436.

Facts set up in the answer, and not shown by the record, should be disregarded. Edmundson v. Marshall's Heirs, 6 J. J. Marshall (Ky.), 449; Barton's Eq. 165.

Evidence taken upon the former trial is no part of the record, and can not be considered in this proceeding for any purpose. Turner v. Berry, 8 Ill. (3 Gilm.) 541; Whiting et al. v. U. S. Bank, 13 Pet. 6, 14.

The only questions that can be considered are errors of law apparent upon the face of the proceedings.

The husband is not liable at common law to the legal adviser of the wife in prosecuting and defending a divorce suit. *Morrison v. Hall*, 42 N. H. 478. (80 Am. Dec. 120); *Pay v. Adam*, 50 Id. 82 (9 Am. Rep. 175); *Williams v. Moore*, 18 B. Mon. (Ky.) 514; *Shelton v. Pendleton*, 18 Conn. 417; *Johnson v. Williams*, 3 Iowa, 97; *Coffin v. Durnham*, 8 Cush. (Mass.) 404; 2 Bish. Marriage and Divorce, 391; note to *Cunningham v. Irvine*, 10 Am. Dec. 463.

The wife is not liable on her contract for counsel fees made during coverture even though she gains the suit. *Wilson v. Brown*, 25 Wend. 386; *Viser v. Bertrand*, 14 Ark. 267.

Under the civil law the community property is not liable for the wife's counsel fees in a divorce suit. *Tucker v. Carlin*, 14 La. Ann. 744.

Before counsel fees can be made a charge upon the wife's separate estate it must appear that the services rendered were for the benefit of the estate. 1 Bish. on Married Women, 875; *Yale v. Dederer*, 22 N. Y. 451; *Viser v. Bertrand*, 14 Ark. 267; *Cook v. Walton*, 38 Ind. 228; *Putnam v. Tennyson*, 50 Ind. 456; *Pierce v. Osman*, 79 Id. 259.

After the parties have settled their differences and returned to the connubial state it is too late to apply for counsel fees. *McCulloch v. Murphy*, 45 Ill. 255; *Kirby v. Kirby*, 1 Paige (N. Y.), 565.

Liens are given to attorneys only upon papers in their hands, or on funds or property secured or recovered by their services. *Weeks on Attorneys at Law*, 605-619.

Parties to suits may make bona fide settlements, and defeat the liens of attorneys. *Weeks on Attorneys at Law*, 629; *Platt v. Jerome*, 19 How. 384.

CATRON, THORNTON & CLANCY for defendants in error.

An allowance for fees may be made directly to solicitors themselves without any further application by their immediate client. *Central R'y Co. v. Peters*, 113 U. S. 124; *Wright v. Wright*, 1 Edw. Ch. 62, 63; *North v. North*, 1 Barb. Ch. 246; *Gillis v. Holly*, 19 Ala. 664.

For services to a married woman it is proper to charge her separate estate. *Yale v. Dederer*, 18 N. Y. 281; *Id.*, 22 N. Y. 459; *Owen v. Cawley*, 36 N. Y. 603, 605; *Maxon v. Scott*, 55 N. Y. 250, 251.

The husband is liable for attorney's fees and compelled to advance them. *Shepherd v. MacKoul*, 3 Camp. 326; *Belcher v. Belcher*, 6 Eng. Ec. 372; *D'Aguilar v. D'Aguilar*, 3 Eng. Ec. 338; *Collins v. Collins*, 2 Paige, 10; *Dumond v. Magee*, 4 Johns Ch. 310.

Attorneys will be paid up to final decree, even when woman defendant fails. *Standford v. Standford*, 1 Edw. Ch. 317; *Daily v. Daily*, *Wright*, 518; *Weaver v. Weaver*, 33 Ga. 172.

When the bill was dismissed an order allowing temporary alimony to end of suit, and expenses, was made. *Bishop v. Bishop*, 17 Mich. 218; *Cooper v. Cooper*, 18 Id. 205.

Allowed where there was a decree against plaintiff and an appeal. *Goldsmith v. Goldsmith*, 6 Mich. 286.

Allowance of alimony and counsel fee is incidental to the right to decree a divorce. *Ricketts v. Ricketts*, 4 Gill. (Md.) 109, 110; *Denton v. Denton*, 1 John Ch. 364; *Mix v. Mix*, Id. Ch. 108; *Collins v. Collins*, 2 Paige Ch. 10; *McGee v. McGee*, 10 Ga. 489; *Story v. Story*, Walk. Ch. 442; *Chaires v. Chaires*, 10 Fla. 317.

The court may grant alimony after final decree. *Shotwell v. Shotwell*, 1 S. & M. Ch. 51; *Richardson*

v. Nelson, 8 Yerg. 67; Miller v. Miller, 6 John. Ch. 51; Forrest v. Forrest, 25 N. Y. 505; Kinnier v. Kinnier, 45 N. Y. 535; Burgess v. Burgess, 1 Duv. 287.

Attorney and counsel fees are allowed as a matter of course. Wright v. Wright, 1 Edw. Ch. 62; Hammond v. Hammond, Clark, 155; Longfellow v. Longfellow, Id. 344, marg.; Monroy v. Monroy, 1 Edw. Ch. 382; Smith v. Smith, Id. 255; Story v. Story, Walk. Ch. 421; Goldsmith v. Goldsmith, 6 Mich. 286; Amos v. Amos, 3 Green Ch. (N. J.) 172; Patterson v. Patterson, 1 Halst. Ch. 390.

It is not necessary that the complainant should show an absolute right to a divorce before being allowed alimony and suit money. Mix v. Mix, 1 John Ch. 365; D'Aguilar v. D'Aguilar, 3 Eng. Ec. 338; Collins v. Collins, 2 Paige.

LONG, C. J.—John B. Lamy and Mercedes Chaves de Lamy, plaintiffs in error in this court, filed in the district court of Santa Fe county their bill of complaint to review and set aside a decree rendered in said court on the first day of August, 1885, in a cause wherein Mercedes Chaves de Lamy was complainant, seeking a divorce, and John B. Lamy was defendant. Upon hearing the bill filed below by the plaintiffs in error here, who were complainants in the bill of review, the court dismissed the same. The plaintiffs in error contend that the court below should have sustained the bill of review, and bring this cause here to correct the error which it is alleged the court below committed in dismissing the bill of review.

It will be necessary to a proper understanding of the objections urged to state with some detail the various steps taken in the original proceeding for divorce of Mercedes Chaves de Lamy v. John B. Lamy. The bill of complaint in that case was filed in the district court, and in December, 1879, an amended bill was filed, Thomas B. Catron appearing therein, by appoint-

ment of the court, as next friend. It was charged in the bill of complaint, among other things, that at the time of the marriage of the complainant Mercedes Chaves de Lamy with John B. Lamy she was possessed of the sum of \$16,800 in money and property, which she inherited from her father, and that after her marriage she inherited and received from her mother the sum of \$27,000 in money and property, including a large amount of valuable real estate in Santa Fe. She further averred that, against her will, and over her remonstrance and objection, the defendant in said action, her husband, had reduced to his possession, and taken and converted, the whole of the said property, and the rents, profits, and issues of said real estate; that he had changed the form of much of the property, and was then claiming the whole of it absolutely as his own, and denying that she had any interest in the same; that he refused to give her possession or control of the whole or any part of the property, and had so managed the same as to materially lessen it in value; that at the time of his marriage, and at the time of bringing the action, he had no property of his own whatever, and that he had incumbered by liens a part of her property. For relief she asked to be decreed an absolute divorce; that the property be decreed free from said liens; that she be decreed to be the owner of the whole of the property; and that the same be restored to her. She also prayed that John B. Lamy should be required by decree to pay into court a sufficient sum of money to pay her solicitors, Messrs. Catron & Thornton, for their services, as such, in instituting and conducting the divorce suit and to pay costs. John B. Lamy appeared to the action, and on the twentieth day of April, by his solicitors, Messrs. R. H. Tompkins and C. H. Gildersleeve, filed answer, to which a replication was filed by complainants, and thus issue was joined. July 26, 1880, the cause was

referred by the court to a master, with directions to take evidence and report. February 9, 1882, the master filed his report, showing therein that neither party had presented any witnesses for examination, and that he had not taken any evidence. Two days before this report by the master, John B. Lamy, then appearing by C. H. Gildersleeve, his solicitor, moved to dismiss the action for want of prosecution. It may be observed that at this state of the record the cause was pending in court on the bill, answer, and replication, with the motion of John B. Lamy to dismiss not yet acted upon, with Catron and Thornton yet appearing for the complainant, and C. H. Gildersleeve for the defendant. On the twenty-first day of February, 1882, the record recites: Catron & Thornton, solicitors for said complainant, filed their petition of interpleader. In it they allege their employment by Mrs. Lamy as her solicitors; they show the services rendered for her; charged that she agreed to pay them the sum of \$5,000 out of her separate property, at the time in the control of her husband, in trust for her benefit; that such property was worth \$40,000; that Mrs. Lamy and her husband settled their controversy, and that it was agreed that her husband should hold her property as her trustee on such settlement, and pay out of the same the said \$5,000; that the services were of that value to her, and not paid. They ask that the cause be continued on the docket, a master be appointed to take proofs, and that their fees be decreed in the action. No further action was taken for nearly five months, when, on July 10, the court ruled Mercedes Chaves de Lamy and John B. Lamy "to plead, answer, or demur to the petition of interpleader of said Catron and Thornton, on file herein, at or before the incoming of court on next Monday morning." For designation only, as a matter of brevity in statement, the paper filed by Catron & Thornton, will hereafter, in this

opinion, be referred to as an interpleader, following in that respect, for designation, the name given by the court below to that paper. Two days after this rule was entered of record, July 12, Catron & Thornton served C. H. Gildersleeve, as solicitor for defendant, with a copy of the interpleader. July 26, neither John B. Lamy nor his wife appearing to the interpleader, and failing to respond to the rule "to plead, answer, or demur" thereto, it was decreed that the same be taken as confessed. On the thirty-first day of July, for the first time after the filing of the interpleader, John B. Lamy appeared, and then, by C. H. Gildersleeve, his solicitor, moved to set aside the decree pro confesso, the order of reference to a master made thereon, and to strike from the files the interpleader. Thus the cause remained, without any action whatever, either by the court or parties, until the twentieth day of July, 1884, a period of over two years. The interpleader was filed during a term of court, and presumably in open court; yet John B. Lamy, with full opportunity to examine the record and files, permitted one hundred and forty days—nearly five months—to elapse without taking a single step to defend against the claim for solicitor's fees. He permitted nineteen days to pass after the actual delivery of a copy of the interpleader to his solicitor, and court in session, before he took any step with respect to the interpleader. He did not then make to the court any complaint that he was not aware that the interpleader had been filed, or that he was ignorant of the fact that a rule to plead had been entered against him, or for want of service of a copy of the interpleader in time. The record does not disclose that any objection on the ground of irregularities of that character was made. Had objection on that ground been made at that time in the court below, the ruling there might have been different; but, as no such objection was presented for the consideration of

the court below, it can not be considered for the first time here, but must be held to be waived.

The ground of the motion to set aside the decree pro confesso, filed by John B. Lamy, is because "the court has no jurisdiction to entertain the consideration of the matters contained in said interpleader, nor grant any decree, order, or relief on the matters and facts therein stated and contained." He did not object on the ground of irregularity, but attacked the power and jurisdiction of the court, as an incident to and a part of the cause, to ascertain and decree solicitors' fees for services rendered the wife in a divorce proceeding. The discussion of this point will appear more appropriately later on in this opinion. Two years passed after the motion by John B. Lamy to set aside the decree pro confesso was made, when, on the twenty-eighth day of July, 1884, the complainant in the divorce action filed in court her own affidavit as follows:

"Affidavit of Complainant. Mercedes Chaves de Lamy v. John B. Lamy, Chancery. In the district court, Santa Fe county, territory of New Mexico. Mercedes Chaves de Lamy, being duly sworn, on her oath states that she is the complainant in the above entitled cause, and at present residing in the city of Santa Fe, territory of New Mexico. That all matters of difference existing between herself and defendant, her husband, at the time of filing said bill of complaint, have been for the past three years fully settled and adjusted. That a reconciliation between herself and her husband has taken place, and she is now living with him again. That over two years ago she directed her attorneys in the above cause to dismiss said bill of complaint, and is greatly surprised to learn that her directions in the premises have been disregarded by them. Affiant states that she employed T. B. Catron as one of her counsel at the time said suit was brought, but made no arrangements with him then nor since

whereby she was to pay or promised him any compensation for services rendered, or to be rendered, or that he was to receive from her any greater compensation than her other counsel, which was five hundred dollars, which she paid each to Wm. Breeden and T. F. Conway. That she desired Mr. Catron, at the time she retained him, to name the amount of his fee, but that he assured her that it was unnecessary, as his charges would be very reasonable. That in fact Mr. Catron performed for her but very little service, Mr. Conway being the attorney who did most of her business, and with whom she most always consulted. Affiant further states that it is her desire said suit be dismissed, and she respectfully requests the court to so order.

“MERCEDES CHAVES DE LAMY.

“Subscribed and sworn to by the said Mercedes Chaves de Lamy this 4th day of February, 1884, before me, GEORGE CUYLER PRESTON, Notary Public, Santa Fe County, N. M.”

On the same date, John B. Lamy filed a denial under oath that he had ever promised, obligated himself, or undertaken to pay the solicitors' fees of Catron & Thornton. There was pending at that date in the court below the motion of John B. Lamy, before mentioned, and the application of Mrs. Lamy to dismiss her action for divorce. The motion of John B. Lamy was denied, and C. M. Phillips appointed master to take testimony as to the allowance of solicitors' fees, and to report to the court.

The face of the affidavit and application to dismiss filed by Mrs. Lamy proves that she had personal knowledge as early as February 4, 1884, of the pendency of the interpleader, and of the claim by Catron & Thornton to have, in the divorce proceeding, a decree for their solicitors' fees. This was six months before the court ruled upon the motion of her husband. During this time they had become reconciled. She never asked

the court to set aside the decree pro confesso as to her, or for any relief whatever, except to dismiss the action. There is absolutely not a line of the record to indicate that she objected to the action of the court in proceeding to ascertain and fix solicitors' fees, except what may appear in her application to dismiss the case. In that application there is no intimation that she denies the power of the court to decree solicitors' fees against her. She objects to the amount, concedes that she agreed to pay \$500 to Catron, and is silent as to the action of the court taken before that time. The prayer of her bill of complaint is "that the defendant [John B. Lamy] be required to pay into court a sufficient sum of money to pay the solicitors of your oratrix for their services in instituting and conducting the suit." While she does not designate the fund or estate out of which her husband is to pay into court such fees, she does show in her bill that the only property John B. Lamy held belonged to her, and the order of court could only be effective in the first instance by payment out of her property. That she expected at the commencement of the cause to charge that property with solicitors' fees is apparent from the averments of the bill. Mrs. Lamy was in court as a complainant, praying the allowance of solicitors' fees. She was in court with her sworn affidavit, asking to dismiss the bill, and also in court with her sworn affidavit with allegations relating to solicitors' fees. The record is silent as to whether she filed this application in person or by solicitor. It is immaterial which way she did that act. In three days after she filed her application to dismiss the cause, Mr. Gildersleeve appeared as her solicitor before the master. He was, from July 31, 1882, forward, also the solicitor for her husband. At the time she filed the application to dismiss, and for six months prior thereto, she was living with him. It is impossible to resist the conclusion from the record that Mr. Gilder-

sleeve, or some other solicitor adverse to Catron & Thornton, represented her in court in the application to dismiss. While the motion of John B. Lamy to set aside the decree was denied, no action is disclosed by the record on his wife's application to dismiss the cause. The matter of solicitors' fees was referred to the master, and, although denying the motion to set aside the decree pro confesso, the court seems to have accorded both to Mr. and Mrs. Lamy as full right and opportunity to make defense as if the motion had been sustained. On the thirty-first day of July the evidence of T. B. Catron was taken before the master, and the record recites: "Present, C. H. Gildersleeve, attorney for complainant." On behalf of Mrs. Lamy, Mr. Gildersleeve, as her solicitor, cross-examined Mr. Catron. Six months more intervened, and neither party moved in the action. Then, January 18, 1885, Louis Sulzbacher was examined as a witness, and again the record recites: "Present, Charles H. Gildersleeve, solicitor for complainant." Mr. Barnes at the same time testified as a witness, and the solicitor of Mrs. Lamy cross-examined both witnesses. Again, on the twenty-fourth of January, Mrs. Lamy, by her solicitor, Mr. Gildersleeve, again appeared before the master during the taking of evidence, and examined the witness. February 28, 1885, she appeared before the master, and was herself sworn, and testified in her own behalf as a witness, and introduced other evidence for herself, all on the question of solicitors' fees, Mr. Gildersleeve appearing at the time as her solicitor. It was nearly seven months from the date of the reference to the master till the conclusion of the evidence. During this time she was represented by an able solicitor. She had the benefit of her husband's aid and advice, and the most ample opportunity to disclose to the court every fact in existence relating to solicitors' fees, or likely to reduce the amount of allowance. No evidence was offered and

refused; no witness presented who was not examined. What better opportunity could have been given her, if the court had set aside the decree, and permitted a formal appearance? In her affidavit she swears Mr. Catron should have received \$500. In good conscience, she could not expect, if the court had jurisdiction to decree at all, that it would fix the amount at less than that sum. The question of the value of the services is not before this court.

It is also apparent from the face of the record that both Mr. and Mrs. Lamy had ample opportunity given them, by the court, to prove before the master every fact within their power relating to the fees claimed. Neither can complain if such opportunity was neglected. What prevented either party from examining other witnesses? Nothing. The examination was not hastened. The door was not closed against investigation. If full opportunity was offered to make defense, and such opportunity was neglected or refused, such neglect or refusal should estop the party from complaining. This case is not one where the party complaining shows that he was denied the right to defend. Suppose the record does show some irregularity in the mode of procedure, is it such as to invade any substantial right of plaintiffs in error? If the court had refused to allow them altogether to be heard on the question of solicitors' fees, the case would be different. The record discloses that they were allowed to be, and in fact were, heard, and did produce evidence,—all they desired. Under such circumstances, even if it should appear that such hearing was by reason of the interpleader, rather than under the averments of the bill, how could that affect substantial rights? It is to be remembered this is one of the errors complained of. The interpleader, as it is called, only gave Mr. and Mrs. Lamy fuller notice of the exact character of the claim for solicitors' fees, and thus the better enabled them to meet the claim by evi-

dence. If the court, as an incident to the divorce proceeding then pending, had jurisdiction and power to refer to the master the matter of solicitors' fees that evidence might be taken to inform the court as to value, what possible difference could it make to Mr. and Mrs. Lamy whether the reference recited that it was upon the interpleader or bill or issues, so long as they were allowed to be heard? The thing to be considered and reported upon by the master was the claim for solicitors' fees. It was that claim upon which he was to take proof. The form of the order which gave the master this power was a mere incident,—a matter of form. To reverse the case on that ground alone would be to sacrifice substantial rights to immaterial form. In this reference, if there was any error at all, it was of form and not of substance, and in no way deprived the plaintiff in error of any substantial right. "Error in matter of form only, although apparent on the face of a decree, seems not to have been considered as a sufficient ground for reversing the decree." Story, Eq. Pl., sec. 411; Barb. Ch. Pr. 92. In the case before this court the plaintiffs in error had their day in court, their opportunity to present and examine witnesses, to be heard on the allowance and amount of solicitors' fees, as fully as if the court had set aside the decree *pro confesso* entered as to the interpleader. The irregularity is one that is harmless. "A judgment will not be reversed for an error which does not affect the substantial rights of the party complaining." *Morse v. Morse*, 25 Ind. 156; *Louden v. Dickerson*, 19 Ind. 387; *Bowen v. Pollard*, 71 Ind. 177. In *Holcraft v. King*, 25 Ind. 352, the court say: "Where a correct result is reached in the court below, error in the mode of reaching it is harmless." The authorities to this effect are numerous.

Other questions are pressed upon the attention of the court by the plaintiffs in error. They insist that

the court had no right to permit the interpleader to be filed. This objection is substantially the same as that relating to reference. If the court had full power to make the reference without the interpleader, or if the interpleader was treated, or can be properly regarded, in its legal effect, as a motion in the cause; as it well may be, to refer the claim of the solicitors to a master to take proofs, its allowance by the court was harmless. There are three propositions made by the plaintiffs in error, which may be considered together:

DIVORCE: alimony
pendente lite:
separate estate
of wife: attor-
ney's fees: juris-
diction of dis-
trict court.

"First. That the husband is not liable at common law to the legal adviser of his wife, in prosecuting or defending a divorce suit. Second. That the wife is not liable on her contracts for counsel fees, made during coverture, even though she joins the suit." If these two propositions are correct, and followed by a third: "That the wife's separate property can not be charged by her, or by a court of equity, for the fees of her solicitor in prosecuting a just cause for divorce,"—then, indeed, is a married woman in this territory at the mercy of her husband, as all means whereby she may protect herself from unjust accusation in court is cut off. We can not hold with plaintiffs in error on the first proposition. It is held in many cases, where the wife has no means to prosecute her action, that the husband is liable for her necessary solicitors' fees, and that they may be recovered either in an action at law or allowed and enforced in the divorce proceeding. *Preston v. Johnson*, 21 N. W. Rep. 606; *Porter v. Briggs*, 38 Iowa, 166. Other cases to the same effect are more fully set out later in this opinion. The plaintiffs in error further say: "Before counsel fees can be made a charge upon the separate estate of the wife, it must appear that the service rendered was for the benefit of the estate." The plaintiffs, here, imperfectly, at least, admit that in a case where the court finds that the solicitors' fees are for the

benefit of the wife's separate property, they may be charged against it. This court elsewhere construes the decree complained of to be a charge against the separate estate of the wife, and against the husband only for so much as can not be thus made; so, if the court found, as a matter of fact, the services to be beneficial to her estate, it had the legal right to decree the value thereof to be paid out of the same. Assuming, for the present, a point hereafter considered, that the court had jurisdiction, it certainly might lawfully consider the evidence to determine whether such services were or were not beneficial to the wife's separate estate. The court below had the right to draw such conclusion of fact from the evidence as was, in its judgment, proper, and such conclusion could not be reviewed in this proceeding. "A bill of review * * * can not be sustained upon the ground that the court has decided wrong upon a question of fact. Nor can it be brought for wrong inferences of the court on matters of evidence, nor upon the ground that the former decree was not supported by evidence." Barb. Ch. Pr. 91; *Webb v. Pell*, 3 Paige, 368. In the latter case it is said by the court: "It is well settled that a bill of review for error apparent on the decree must be for an error in point of law, arising out of facts admitted by the pleadings, or recited in the decree itself, as settled, declared, or allowed by the court." As pertinent to this rule, where, it may be asked, is it settled in the record that the property charged in the bill of complaint to be the separate property of Mrs. Lamy was not so? If it was her separate estate, and the service rendered for her by the solicitors was beneficial thereto, then, according to the admission of the plaintiffs in error, the fees might have been charged against such estate by the court, if it had jurisdiction. Such we believe to be the law. Whether that property was her separate estate, or was her husband's, is not a question of law, but of fact.

Whether the solicitors' services were beneficial to the estate, or were not so, was also a question of fact. Both these questions the court had a right to pass upon, without being subject to review upon a bill for that purpose.

If the court below, upon the original hearing, found that the property in the hands of John B. Lamy was the separate estate of his wife, Mrs. Lamy, and also found that the services rendered were beneficial to her estate, it would have the right, upon that state of the evidence, to charge the services in a proper proceeding against her estate. The following authorities are to that effect. *Owen v. Cawley*, 36 N. Y. 604; *Yale v. Dederer*, 18 N. Y. 276, 22 N. Y. 451; *Viser v. Bertrand*, 14 Ark. 267; *Cook v. Walton*, 38 Ind. 228; *Putnam v. Tennyson*, 50 Ind. 456. This court can not presume that the court below did not determine those to be facts. It is nowhere in the record shown, declared, or admitted that the court found to the contrary. In the absence of anything to the contrary, this court will presume the court below found all the facts proven or established necessary to constitute a foundation for the decree. Did the court decree the solicitors' fees to be a charge upon the wife's separate estate? The decree allows Catron & Thornton \$4,000 as solicitors' fees. There is no question before this court as to the amount of the decree. It orders that the defendant, John B. Lamy, pay over that sum, and recites as follows: "Said respondent [John B. Lamy] is hereby allowed to charge to and against the said property of said complainant, which he may have recieved into his power, possession, or control, as well as against any acquest property he may have received of said marriage community, and that execution do issue for the same, to be levied of the goods, chattels, property, effects, and real estate of said complainant, and of the acquest property which may be found in

the hands, possession or control of the respondent." The sum is here charged directly against the wife's property in the hands of the husband. Its seizure and sale is provided for to make the debt. To reach this result, the court, no doubt, upon the pleadings and proofs, determined the fact to be that the wife employed and agreed to compensate her solicitors; that under such promise they performed services for her in the divorce proceeding, worth \$4,000; that she had a separate estate of her own, in the hands of her husband; that he held the estate as her trustee, and that the services were beneficial to the estate. The court had the legal right to so find, if, in its judgment, that was the proper conclusion of fact to draw. If it did so find, then it had the right to predicate the decree made on such conclusion of facts. The ruling of the court on the facts can not be attacked by bill of review. This court can not hold that it is error of law, if the court below found the facts contrary to the right of the case or contrary to the evidence. In addition to the averments of the bill, there is much evidence indicating that she intended originally to charge her separate estate with solicitors' fees, and that she promised to do so. This court has nothing to do with the matter of fact, whether the services were or were not beneficial to the estate, or whether the amount allowed was less or greater than the proper amount which should have been allowed. These questions are not before the court.

Plaintiffs in error contend that it is too late to apply for solicitors' fees after the parties have settled their differences, and returned to the conjugal state. Authority is cited in support of that proposition. If the solicitor performs services in a divorce cause for a wife, so as to create a present right of allowance, which a court of equity is bound to respect, and decree

COMPROMISE of
divorce suit:
liability for
attorneys' fees
not affected
thereby.

during the litigation, while the parties are carrying on their controversy, it is difficult to perceive how the compromise of the husband and wife, to which the solicitor is not a party, can take away such established right. The case of *Sprayberry v. Merk*, 30 Ga. 81, declares the correct doctrine on that point, and also is to the effect that the wife may charge the common estate of both in her husband's hands for the fees of her solicitors. In that case *Sprayberry* had performed services as solicitor for the wife in prosecuting an action for divorce against her husband. The husband and wife compromised their suit, and began again to live together. It seems the husband held common property of both in his hands, and the court holds that such property may be charged with her solicitor's fees. The court there say: "As to this one matter of a suit for divorce the wife is *sui juris*, having a clear right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her, if she can command no means of paying the agents who are necessary to the conduct of the suit; therefore, it is that, *quoad hoc*, she may charge the common funds of herself and husband in his hands. But this power on her part is founded on the necessity of the case, so its extent does not exceed the demands of the necessity; and, therefore, she can charge the common funds, or her husband, which is the same thing in effect, only with the real value of such services as she may procure. * * *

It is worthy of remark that her counsel fees are allowed as a part of her necessary maintenance, and are allowed before it is ascertained whether she has valid ground for divorce or not. They are allowed as a necessary means of testing that question,—a question which every wife has a right to test whenever she pleases." The court continue: "As to the settlement which took place in this case between the husband and wife after

she had got the services of her counsel, it is scarcely necessary to remark that the counsel, after having acquired a right to compensation for his services by rendering them, at the request of the wife, could not be settled out of that right by arrangement to which he was no party." That case is somewhat analogous to the one here, and the principle a wholesome one. The authority is directly in point as to the proposition that attorneys' fees may be allowed after the parties to the divorce suit have become reconciled, and resumed their marital relations. If the husband and wife could not so settle their case as to deprive the solicitor of his right to recover in an action at law his fees, then such settlement could not deprive him of his right to have the same ascertained and decreed in the divorce proceeding while it was pending, even though the husband and wife had resumed their relations: provided such allowance could properly be made in such case as an incident thereto. In the case of *Weaver v. Weaver*, 33 Ga. 173, the facts are as follows: Virginia Weaver instituted a divorce suit against her husband. During the pendency of the action, upon her motion, and upon a showing, the court ordered that defendant pay into court a certain sum of money to compensate the solicitor of the wife for bringing and prosecuting the action. Subsequently, and before this money had been paid in, but after the solicitor had performed some service, Mrs. Weaver discontinued the suit. A motion was made in the case to rescind the order for the payment in of counsel fees. The court below declined to rescind the order, and the case was taken to the supreme court on that point, among others. The supreme court affirms the action on that point of the court below, and says: "Shall counsel be driven to his action at law to recover his fees, or shall the order already passed by the court for that purpose be enforced? We see no reason for compelling counsel to

resort to an independent action, when his fees have been already adjudged by the proper court."

It will be observed that the supreme court of Georgia in this case not only hold that the court wherein the divorce action is pending is the proper court, but also that such a case is one in which it is proper to adjudge counsel fees, and enforce their payment, and also that the compromise between the husband and wife does not operate to divest the attorney of his right to compensation. In *Burgess v. Burgess*, 1 Duv. 288, the supreme court holds: "Although the unfortunate difficulties which existed between the husband and wife, and which had resulted in a divorce suit, had been happily terminated by a reconciliation, after the suit had been prepared for trial, yet it was right to make a proper allowance against the husband * * * to pay the attorneys who conducted the suit for the wife." This case is under a statute which somewhat weakens the same as authority here. A very interesting discussion, highly illustrative of the question here, may be found in *North v. North*, 1 Barb. Ch. 243. The case was decided as early as 1845, and seems to have been considered and decided by the court independently of statutory provision. Chancellor WALWORTH there says: "By referring to the reviser's note, * * * it will be seen that the allowance does not depend wholly upon the statute, but upon the practice of the court, as it previously existed." The chancellor observes: "The counsel for the complainant is under a mistake in supposing that the allowance for ad interim alimony, and for the expenses of defending the suit, is confined to cases in which both parties admit the original marriage to have been legal." The question there seems to have been as to the legality of the marriage. Counsel appear there to have admitted, where the marriage was legal, and the divorce was sought for acts occurring

subsequently, that counsel fees could be allowed in the divorce action, but contended that such a rule did not apply where the legality of the marriage was denied. In discussing the question thus raised, the learned chancellor establishes that it was the practice to allow solicitors' fees, when asked, in divorce cases generally, both where the marriage was admitted, and in cases where that fact was controverted; and this, independently of statutory enactments. So the case becomes especially pertinent to the contention before this court. After a citation from Ayliffe and Poynter, and other authorities, the opinion continues: "The precise question now under consideration came before Sir GEORGE LEE, in the arches court of Canterbury as early as 1753, in the case of *Bird v. Bird*, 1 Lee, Ecc. 209, and was decided in favor of the wife. In that case the husband brought a suit against the wife to annul the marriage, on the ground that she had another husband living at the time of her marriage with the plaintiff. The fact being denied by the wife, she applied for an allowance to enable her to defend the suit. It was granted to her accordingly, although the plaintiff insisted she was not his lawful wife, and that he was not bound to bear the expenses of her defense."

The cases thus cited, and they could be multiplied, certainly must dispose of the contention made by John B. Lamy on his construction of the legal effect of the decree as against him. By the terms of the decree, he can only be reached after the separate property of his wife is exhausted, and the authorities quoted establish beyond doubt the power of the court to charge him in that event, at least. There is one more case on this point so clear and strong in its reasoning, so directly in point, and satisfactory, that we can not omit to cite it. Preliminary to a consideration of that cause, it may be observed that in New Mexico jurisdiction to decree a divorce is conferred by statute. Sections 998, 2282,

Comp. Laws. No provision is made by statute, either for alimony or for an allowance to the wife to prosecute a cause for divorce against her husband, or for allowance to enable her to defend against such an action when prosecuted by him. Unless there is power outside of the statute to charge the husband in such cases with solicitors' fees for the wife, and for necessary expenses connected with such suits, in cases where she has no separate property of her own, then the wife is powerless to protect herself, and is at her husband's mercy.

This court should consider carefully before maintaining a rule of law having such effect. If the wife, having a separate estate of her own, may charge it, or the court may do so, with legitimate, necessary, and proper expenses for solicitors' fees to enable her to protect herself in such cases, and in cases where she has no property, if the court may allow against the husband, and compel him to pay, such necessary expenses, then the wife is clothed with a proper power for her own defense. The supreme court of Georgia, as long ago as 1851, was confronted with conditions exactly similar, and in *McGee v. McGee*, 10 Ga. 478, delivered an opinion which, to this court, appears both exhaustive and conclusive. It is unanswerable, and sustains the right of the wife to temporary alimony in a proper case, and allowance for her necessary expense, when she has no estate, out of the property of the husband. The statute of Georgia at that time provided that, in all cases where the court determined in favor of a divorce to the wife, it could make provision out of the property of the husband for alimony. But the statute of Georgia, like our own, was silent as to temporary alimony or expenses preceding such determination. The court in that cause stated the proposition to be considered in this way: "The first proposition denies altogether the right of a wife, pending a libel for

divorce, to a temporary allowance out of the estate of the husband for her support and maintenance, and to defray the expenses of the litigation; the counsel insisting that, according to the laws in force in this state, no power is conferred upon the courts, either of law or chancery, to grant any alimony until after a divorce is decreed. * * * The power which he (the judge below) exercised * * * is that of allowing the wife temporary alimony. It is conceded to the plaintiff in error that this power is not expressly conferred by statute, whilst it is also to be claimed against him that it is not prohibited." Such is also the state of the law to-day in New Mexico. The court proceeds: "We look out of the statute book for its source; that is, out of the express provisions of the statute. First, then, I say it is incidental to the power to grant divorces. The superior court being clothed with jurisdiction over divorces, from that jurisdiction springs the authority, pending the cause, to provide, by summary order, for the maintenance of the wife. It is thus that the ecclesiastical courts in England acquired the power to grant alimony. That power is not an original jurisdiction; it is derivative and incidental. Indeed, it may be stated as a true general proposition that no court has an original authority to decree a separate maintenance while the marriage contract subsists; and, when such power is exercised, it is incidental to some other conceded power. Thus, a court of chancery, as an original power can not decree a separate maintenance for the wife; but, having jurisdiction over agreements, when there is a separation, and an agreement for a separate maintenance, it will specifically enforce that agreement. * * * In this way, I apprehend, originated the power in the ecclesiastical courts to provide alimony. Having jurisdiction over divorces, as incidental to that they acquire the power, where the divorce was decreed, to provide permanently for the wife, and the lesser power

of providing temporarily for her whilst the litigation is pending. Both powers they have immemorially exercised. In *Ball v. Montgomery*, 2 Ves. Jr. 195, the lord chancellor said: "I take it to be now established law that no court, not even the ecclesiastical court, has any original jurisdiction to give the wife separate maintenance. It is always incidental to some other matter."

* * * I see no reason why the superior courts of this state have not acquired jurisdiction over temporary alimony incidentally, as the ecclesiastical courts acquired jurisdiction over alimony, both temporary and permanent. It is founded in the most manifest justice and sternest necessity. * * * It is not, therefore, unreasonable to say that the legislature, in clothing a tribunal with power to decree a divorce, intended thereby, as necessarily incident to it, to invest the same tribunal with power to make provision for the wife. This justice and necessity is equally as stern, and the inference therefore equally as clear, in regard to temporary as permanent alimony. * * * Alimony *pendente lite* is a common law right. It was an established right in England when we adopted the common law. It is no less a common law right because it grew up under the usages of the ecclesiastical courts. What becomes of that right in Georgia? The common law which guaranties it has not been repealed. It is suited to our condition, and in harmony with our institutions." This court has now quoted extensively from *McGee v. McGee*, because the conditions in Georgia at the time when that opinion was delivered were exactly the same on the question involved with that of New Mexico when the decree sought in this case to be reviewed was entered, and for the further reason that the historical statement of that opinion is correct, and the conclusions deduced therefrom indisputable and convincing. This court is unwilling to hold that in New Mexico the courts in divorce proceedings are powerless

to place the wife, as to means for her defense and protection, on an equality with her husband. In *McGee v. McGee* it is further said (page 487 of the opinion): "In a recent case in Pennsylvania, under statutes conferring jurisdiction over divorces very much indeed like ours, but conferring no power to make an allowance to the wife for the expenses of her suit, a motion was made for an order upon the husband for the expenses. The court allowed it, upon the ground that 'it was an incidental authority to the power given to the court to decree divorces.' See *Melizet v. Melizet*, 1 Pars. Eq. Cas. 78. The expenses of the suit and the expenses of maintenance stand upon the same ground. The expenses allowed were not the court costs simply. See, also, the following cases: *Yeo v. Yeo*, 2 Dick. 498; *Wilson v. Wilson*, 2 Hagg. Const. Rep. 203; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773; *Soilleux v. Soilleux*, 1 Hagg. Const. Rep. 378; *Poynt. Mar. & Div.* 263; *Monroy v. Monroy*, 1 Edw. Ch. 382; *Wright v. Wright*, Id. 62; *Denton v. Denton*, 1 Johns. Ch. 365; *Mix v. Mix*, Id. 110; *Wood v. Wood*, 8 Wend. 364; *Wood v. Wood*, 2 Paige, 115; *Lawrence v. Lawrence*, 3 Paige, 267; *Germond v. Germond*, 4 Paige, 543."

The reason and authority cited is to the mind of this court satisfactory and conclusive as to the jurisdiction and power of the court below to render the decree sought to be reviewed and set aside. It may be well, also, to refer to a more recent case, decided by the supreme court of Iowa (*Porter v. Briggs*, 38 Iowa, 170). In that case the husband brought an action of divorce against the wife, charging her with adultery. Porter & Moir, at her request, rendered legal services as her attorneys in defending her in the action against such charges. The husband contended that he was not liable, and that if he was his liability should have been found and decreed in the action for divorce. The

court say: "The ecclesiastical courts in England and the courts of chancery of this country have almost uniformly in a divorce proceeding required the husband to pay the wife's counsel. * * * This right is usually enforced in the courts which take cognizance of the divorce proceeding. It is eminently proper that that court should have jurisdiction of all the incidents of the divorce, and be able to grant complete relief, thus avoiding further litigation. Oftentimes that court can grant more complete relief than a court of law; as by suspending the action of the husband until he advances or secures the sum ordered." The court then further considers the claim being urged before it that an action at law would not lie to recover for such services, and adds: "It is claimed that to sustain this jurisdiction will give rise to a multiplicity of suits, which it is the policy of the law to avoid. We concede this would be a good ground for asking a court of chancery, having once assumed jurisdiction of the case, to determine the entire matter, with all its incidents, and not turn the parties over to an action at law. But it is not, as we conceive, a reason for denying the jurisdiction of a law court, when that of a court of equity has not been invoked." In the case before us the jurisdiction of the equity court was invoked and exercised, and it is the exercise of such jurisdiction that is complained of. We hold that the district court on the trial of the original cause had jurisdiction and power, as an incident to the power to decree divorces, to grant to the wife, *pendente lite*, upon a proper showing, temporary maintenance and allowance for solicitors' fees, and to enforce payment of the same against the husband, or his property, in the absence of a sufficient separate estate belonging to the wife, or, under such circumstances, to charge such maintenance and allowance for solicitors' fees against any common property belonging to both husband and wife, whether such property was

in the control of the husband or wife. We further hold that, where the wife has an ample estate of her own, she may charge such estate with necessary solicitors' fees to enable her either to prosecute or defend a divorce action to which she is a party; and where she has done so, in the employment of her solicitor, that the court has power in the divorce proceeding, as an incident thereto, to decree such necessary fees against her separate estate as an allowance to the solicitor, so far as such fees are actually necessary, and being limited to the fair value of the service rendered. It follows that the court below in the original action did not exceed its jurisdiction, and committed in that respect no error. Inasmuch as the court had power and jurisdiction in the original case to enter the decree complained of, the irregularities of practice shown in the record are harmless, and do not constitute reversible error, and, therefore, the decree of the court below is approved, and the cause affirmed.

WHITEMAN, McFIE, and LEE, JJ., concur.

[No. 387. January 23, 1890.]

VICENTE SANCHEZ Y CONTRERAS, APPELLANT, v.
JESUS CANDELARIA, APPELLEE.

FORCIBLE ENTRY AND DETAINER, MAY BE BROUGHT BEFORE JUSTICE OF THE PEACE OF ADJOINING PRECINCT, WHEN—SEC. 2425, COMP. LAWS, N. M. 1884—JURISDICTION.—Under section 2425, Compiled Laws, 1884, when there is no justice of the peace in the precinct where the premises are situated, able or qualified by law to act, an action of forcible entry and detainer may be brought before a justice of the peace in any adjoining precinct.

ID.—APPEAL FROM JUSTICE OF THE PEACE TO DISTRICT COURT—APPLICATION FOR LEAVE TO AMEND SHOWING JURISDICTIONAL FACTS, POWER OF THE COURT TO GRANT.—On a trial de novo, in such case, on appeal to the district court, where the fact was that there was no justice of the peace in the precinct where the premises were situated, able or qualified by law to act, but the complaint failed to state

this fact, and plaintiff asked leave to amend, to remedy the defect, the court had the power to grant the application, and erred in its refusal to do so. While the rule is that applications for leave to amend are addressed to the sound discretion of the court, and the refusal of a court to permit amendments is ordinarily not open to review on appeal; yet, when a court has the discretion to allow an amendment of a pleading, and refuses to exercise its discretion on the ground of a want of power, such refusal is error, and a substantial ground for appeal.

APPEAL, from a judgment in favor of defendant, from the Second Judicial District Court, Valencia County. Judgment reversed, and cause remanded, with directions to permit the amendment asked for by plaintiff.

The facts are stated in the opinion of the court.

NEILL B. FIELD for appellant.

All appeals from inferior tribunals, such as justices of the peace to the district courts, are triable anew in said courts on their merits, as if no trial had been had below. Comp. Laws, N. M., 1884, sec. 1848.

No want of form is sufficient cause for abating any matter pleaded, provided the court can see in it sufficient matter upon which to base a decree or judgment; and when legal exceptions are sustained the opposite party is entitled to leave to amend. Id., sec. 1910.

Each party, by leave of court, may amend, upon such terms as the court may think proper, at any time before verdict, judgment, or decree. Id., sec. 1911.

If the amended complaint offered to be filed stated the facts, the justice of the peace had jurisdiction. Id., sec. 2425.

Upon appeal in such action, the district court shall proceed to try the cause de novo. Id., sec. 2434.

It is made the imperative duty of the court, by the statute, to permit amendments in cases of this character, in furtherance of justice. Id., sec. 2443.

These propositions have all been recognized by this court. *Sanchez v. Luna*, 1 N. M. 388.

While it is true that applications for leave to amend are addressed to the sound discretion of the court, and the refusal of the trial court to permit amendments is ordinarily not open to review on appeal, it is well settled that where a judge at circuit has a discretion to allow an amendment to the complaint, and refuses to exercise it on the ground of wants of power, such refusal is error of law, and ground for appeal. *Russell v. Kohn*, 20 N. Y. 81.

WHITEMAN, J.—This was an action for forcible entry and detainer, commenced by the appellant, Vicente Sanchez y Contreas, against the appellee, Jesus Candelaria, before Pablo Chaves, justice of the peace of precinct number 13, in the county of Valencia. The plaintiff, in his complaint, charges, in substance, that on the third day of January, A. D. 1888, in the county of Valencia, he was legally possessed of a certain piece of land or tenancy known and described as follows: "Said land is composed of one hundred and sixty acres of land, deeded in favor of this plaintiff, and situated in a place called 'La Cienega,' in said Valencia county"—and being thus possessed, was legally entitled to the possession of said land, and that on the twentieth day of September, 1887, the defendant, Jesus Candelaria, illegally and by force entered upon said tract of land and dispossessed the plaintiff, and detained, and still detains, the possession of said land, etc. The defendant, Jesus Candelaria, appeared and defended the action; and upon the trial thereof, had on the thirteenth day of February, 1888, a judgment was rendered in favor of the plaintiff, whereupon the defendant sued out a writ of certiorari, and thereby carried the case by appeal to the district court of Valencia county. In the district court the defendant, on

the twelfth day of April, A. D. 1888, filed a motion to dismiss the cause upon the ground that the justice of the peace before whom the same was tried was without jurisdiction of the subject-matter, or of the parties. The plaintiff, on the eighteenth day of April, A. D. 1888, moved the court for permission to file an amended complaint. The amended complaint tendered by the plaintiff set out a proper description of the land in dispute, and averred that the land was situated in precinct number 16, in the county of Valencia, and that, while the plaintiff was possessed of the land, the defendant, Jesus Candelaria, by force, intimidation, and fraud, entered upon the land, and detains and withholds the possession thereof from the plaintiff. It also contained an averment that at the time of the forcible entry complained of there was not, and had not been since, a justice of the peace in the precinct where the lands were situated able or qualified by law to act in the premises, and that for that reason the action was instituted in precinct number 13 of said county of Valencia, and that said precinct number 13 adjoins the precinct wherein the lands are situated. The court denied and overruled the motion to permit the plaintiff to file the amended complaint, and the cause was then heard upon the defendant's motion to dismiss the cause, which motion was sustained; and the cause was accordingly dismissed. The record also discloses the fact that the court refused to permit the plaintiff to file the amended complaint offered, solely upon the ground that the court had no power or jurisdiction to permit the said amendment. The appellee, Jesus Candelaria, has not appeared in this court, and no brief has been filed by him.

But one question is presented for our consideration in this cause, viz., whether the district court had power and jurisdiction to permit an amendment of a complaint made in an action of forcible entry and detainer

before a justice of the peace, where the original complaint failed to show affirmatively that the justice of the peace had jurisdiction of the subject-matter of the suit, and if, having such power, and having refused to exercise it, this court will review the action of the district court in respect thereto. We understand the

FORCIBLE entry
and detainer:
jurisdiction of
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ing district.

rule to be that applications for leave to amend are addressed to the sound discretion of the court, and the refusal of a court to permit amendments is ordinarily not open to review upon appeal; but where a court has a discretion to allow an amendment of a pleading, and refuses to exercise such discretion upon the ground of a want of power, such refusal is error, and good ground for an appeal. *Russell v. Conn*, 20 N. Y. 81.

The defect in the original complaint consisted in this, that the lands which were the subject of the controversy were situated in precinct number 16, and the action was commenced before the justice of the peace of precinct number 13, in Valencia county. That the original complaint was defective will not be questioned, but it was within the power of the plaintiff to have recited facts in the complaint which would, if true, have conferred jurisdiction upon the justice to hear the cause. "If there be no justice of the peace in the precinct where the premises are situated, able or qualified by law to act, suit may be brought before some justice of the peace in any adjoining precinct." *Comp. Laws*, N. M. 1884, sec. 2425.

Under the provisions of the sections of the statutes just quoted, all that was necessary to have given the justice of the peace of precinct number 13 jurisdiction to act was to recite in the complaint that there was no justice of the peace in precinct number 16 able or qualified by law to act. The complaint made before the justice of the peace did not recite this jurisdictional fact. But after the case had been appealed by the de-

fendant to the district court, and before the district court had considered and determined the defendant's motion to dismiss the cause, the plaintiff asked the court for permission to amend the complaint by reciting facts which would have given the court jurisdiction, which application to amend was refused. We think

APPEAL: power of
district court to
amend.

that, if the application to amend had been made while the case was pending before the justice of the peace, it would have been the duty of such justice to have permitted the amendment to be made, and that the plaintiff's right to amend was not lost by the case having been appealed to the district court. "The district court, on the trial of an appeal, shall proceed *de novo*." *Id.*, sec. 2434. "All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below." *Id.*, sec. 1848. By this we understand that the cause shall be tried upon its merits, as if it was a new action in the court.

The court is to be in nowise trammelled in its mode of proceeding by the irregular, untechnical acts of the justice of the peace. It would indeed be a very hard rule to deny the court its power and discretion, in allowing amendments, to place a cause appealed from the justice in such a manner before the court as to be triable, when the whole trial is to be *de novo*. To forbid the courts this power to amend in this class of cases, when the power is so general and broad in all other civil suits, would, in this country, amount to almost a denial of justice through the means of appeals. The justices of the peace are, for the most part, unskilled, if not uninstructed, in legal forms and technical proceedings. The records in appealed causes in the courts manifest how defective and inartificial the business in the precinct tribunals is transacted. The dockets are rare that can exhibit strict regularity. If,

where a litigant presents himself before the district court with his appeal in hand, the court is powerless in granting to the parties the privilege to correct and perfect what unskillfulness or ignorance has defectively done, the result must be that suitors will be turned from the court with heavy bills of costs, and confidence in legal justice be destroyed. *Sanchez v. Luna*, 1 N. M. 238.

The statute requires that a cause appealed to the district court shall be tried anew in said court, upon its merits, as if no trial had been below. The appeal vests the district court with power to try the cause, and the proceedings upon the trial in that court are to be controlled by the enlarged rules of practice and decisions that pertain to the district courts; and if the justice of the peace was vested by law with jurisdiction to try such a cause, and the steps taken to invoke the jurisdiction were defective, such defect may be cured by an amendment made in the district court. But if the subject-matter involved in the cause was such that a justice of the peace would, under no circumstances, have jurisdiction to hear and determine, then the appeal would not vest in the district court the power to hear and determine the cause. The action originated before the justice of the peace, and the character or form of the action could not be changed upon appeal to the district court. Neither could the action be enlarged upon appeal so as to have given the plaintiff greater or more extended relief than the justice of the peace might lawfully have given on the case made below. But, to the extent that jurisdiction existed in the justice of the peace, to the same extent was the district court vested with jurisdiction by the appeal, not for the purpose of reviewing or correcting such errors in law as may have appeared by the transcript to have been committed by the justice of the peace, because the district court did not sit as a court

exercising appellate powers to correct errors in law, but to try the case *de novo*, upon its merits. A reference to the several sections of the Compiled Laws of this territory, upon the subject of amendments generally, clearly shows a liberal legislative intention with respect thereto, viz.: "No want of form shall be sufficient cause for abating any matter pleaded, providing the court can see in it sufficient matter upon which to base a decree or judgment; and when legal exceptions are sustained the opposite party shall have leave to amend." Comp. Laws, N. M. 1884, sec. 1910.

"Each party, by leave of the court, shall have leave to amend, upon such terms as the court may think proper, at any time before verdict, judgment, or decree." Id., sec. 1911.

Section 2443, Id., which relates particularly to the practice in trials of actions of forcible entry and detainer, reads: "All causes removed into the district court in pursuance to the foregoing sections shall be tried *de novo*, and the court shall allow all amendments which may be necessary, in furtherance of justice, in all cases appealed by petition or certiorari, or in the ordinary mode." Here we have an express legislative declaration upon the subject of amendments of this particular class of actions. The purpose of the statute is to promote the attainment of substantial justice between the parties. Technical objections are to be disregarded, and the case tried upon its merits. We are not disposed to establish a rule which would have the effect to dwarf or limit the wise and liberal spirit and intent manifested in these legislative enactments. To do so would be to subvert the legislative power and authority, and would be an unwise and unjust usurpation by the court of powers that belong exclusively to the legislative authority.

We are of the opinion that the justice of the peace possessed jurisdiction to try this case; that the steps

originally taken by the plaintiff to invoke such jurisdiction were defective; but that the district court had the power to permit the appellant to correct such defect by an amendment of the complaint, and it was error for the court to refuse him permission so to do. The judgment of the lower court will be reversed, and this cause remanded to that court, with directions to permit the amendment asked for by plaintiff; and it is so ordered.

LONG, C. J., LEE, and McFIE, JJ., concur.

[No. 370. January 23, 1890.]

WILLIAM BENT, PLAINTIFF IN ERROR, v. GUAD-
ALUPE THOMPSON ET AL, DEFENDANTS IN
ERROR.

WILLS—SEC. 1823, COMPILED LAWS, N. M. 1884—COMMON LAW—STATUTES
RELATING TO PROBATE COURTS, AND PROBATE OF WILLS—ACT, 1889.—

By section 1823, Compiled Laws, 1884, adopting the common law in 1876, as the basis of jurisprudence for the territory, it was not intended thereby to repeal the statute laws, but only to adopt so much of the common law as did not conflict therewith. *Browning v. Est. of Browning*, 3 N. M. (Gil.) 675. The statute laws in relation to probate courts, and defining the manner in which wills should be probated in this territory, remained in force until modified by the act of 1889, and were the basis and authority of our probate courts.

ID.—PROBATE OF—CIVIL LAW, SCHMIDT'S LAWS OF SPAIN AND MEXICO, ART. 1019—KEARNEY CODE, SEC. 1365, COMPILED LAWS, N. M.—By the civil law, which was in force prior to the conquest, and which in many respects remained in force for many years after the treaty of cession, and also by chapter 15 of the laws by Pedro Murillo Velarde, relating to the probate of wills, which were also in force before the cession, and which were continued in force by the Kearney Code, section 1365, Compiled Laws, no provision is made for notice, by publication, or otherwise, to heirs, or other interested parties, to be present at the probating of a will. Only the witnesses to the will are to be summoned, and any person having possession of the will may present it for probate. Only one form of probate is prescribed to render it valid.

Id.—RE-PROBATE OF—LIMITATION OF ACTIONS AS TO INFANTS—SECS. 1869, 1881, COMPILED LAWS, N. M. 1884.—The statutes of the territory have fixed a time within which an infant must assert his rights after attaining his majority and unless he does so within the prescribed period he will be deemed to have waived them. The time prescribed is one year, except when real estate is involved, in which case the period is extended to three years. A proceeding by an infant heir to re-probate a will, commenced four years after his becoming of age is, therefore, barred. Compiled Laws, 1884, secs. 1869, 1881.

ERROR, from a judgment in favor of defendants, to the First Judicial Court, Taos County. Judgment affirmed.

The facts are stated in the opinion of the court.

CALDWELL YEAMAN, WELLS, MCNEAL & TAYLOR
for plaintiff in error.

The probate court had jurisdiction to entertain and allow the petition.

By the laws of New Mexico in force at the time of the death of Alfred Bent, the petitioner and his infant brothers were the direct heirs of the ancestor, and succeeded to all his property rights. Comp. Laws, chap. 4, secs. 1, 2, p. 44.

At common law two forms for the probate of wills were recognized: The first, known as the probate in common form, where the executor presents the will before the judge or ordinary, and in the absence of parties interested, and without citing them, produces witnesses to establish the will (1 Wms. Ex'rs. [6 Am. Ed.] 325), and the second, in solemn form or per testes, where the widow and next of kin are cited to be present at the probate of the will and to examine the witnesses and those propounding the same. Id. 333.

Where the probate was made in the common form, the heirs or any person having an interest were entitled at any time within thirty years to cite the executor to make proof of the will in solemn form. Id. 334.

And this right of the next kin was so highly regarded that it was held to be a matter of common right. Id. 336.

In the American states the probate of the will of a decedent is generally regulated by statute. In those states where probate in common form is permitted, the provision of the common law requiring a subsequent probate in solemn form, on petition of the heir, is recognized. *Noyes v. Barber*, 4 N. H. 412; *George v. George*, 47 Id. 44; *Brown v. Gibson*, 1 Nott. & McC. 326; *Randolph v. Hughes*, 89 N. C. 429, citing the words of Sir John Nichols in *Bell v. Armstrong*, 2 Eccl. Rep. 139. Also *Ralston v. Telfair*, 1 Dev. and Bat. 482; *Ethridge v. Corprew*, 3 Jones, 14; *Hamberlin v. Terry*, 7 How. (Miss.) 143; *Wall v. Wall*, 30 Miss. 96; *Cowden v. Dobyns*, 5 Sm. & M. 82; *Garner v. Lansford*, 12 Id. 558; *Hubbard v. Hubbard*, 7 Oregon, 44; *Sowell v. Sowell*, 40 Ala. 243, citing *Roy v. Seigrist*, 19 Id. 810; *Stapleton v. Stapleton*, 21 Id. 587, *Bradley v. Andress*, 27 Id. 596; *Lovett v. Chisholm*, 30 Id. 88; *Roby v. Hannon*, 6 Gill. 463; *Claggett v. Hawkins*, 11 Md. 386. See, also, *Walker v. Perryman*, 23 Ga. 317; *Lively v. Harwell*, 29 Id. 508; *Rogers v. Winton*, 2 Humph. (Tenn.) 178; *Gibson v. Lane*, 9 Yerg. 475, citing *Satterwhite v. Satterwhite*, 1 Eng. Con. Ecc. 151, 425; *Burrow v. Ragland*, 6 Humph. 481; *Lomax on Wills*; 3 Redf. on Wills, chap. 1, sec. 3; *Schouler on Ex'rs*, secs. 67-70.

"It is laid down by Godolphin that the probate of a will in common form may be reexamined at any time within thirty years after such probate." *Noyes v. Barber*, 4 N. H. 412. See, also, *Brown v. Gibson*, 1 Nott. & McC. C. 326; *Claggett v. Hawkins*, 11 Md. 387.

It appears that the petitioner in this case had come to his majority less than three months prior to the initiation of his petition. But if he had been of full age at the time of the probate, if he had accepted a legacy thereunder, this still would have been no bar. 1 Wms. Ex'rs, 336.

The proceeding by petition and citation to the ex-

ecutor and terre-tenants was the proper proceeding. Equity has no jurisdiction either to allow or revoke the probate of a will. In *re Broderick's Will*, 21 Wall. 503.

The only process open to the heirs was by petition in the probate court. This was the form of proceeding adopted in every one of the American cases cited, and it was the form prevailing in the English courts. *Cowden v. Dobyns*, 5 Smedes & M. 90; and also countenanced in the supreme court of the United States. *McArthur v. Scott*, 5 Sup. Ct. Rep. 670; Sup. Ct.; 113, U. S. 340.

FRANK SPRINGER, CATRON, KNAEBEL & CLANCY for defendants in error.

The probate court has no jurisdiction to entertain the petition. All the cases cited by plaintiff in error to sustain the jurisdiction are common law authorities, and have no application to this case. *Comp. Laws, N. M.* 1865, chap. 2.

Section 1823 of Compiled Laws, 1884, was enacted in 1876, and this court has held that the common law was not in force prior to that time. *Browning v. Browning*, 9 Pac. Rep. 677. However, it does repeal the special statutes as to testaments, which reappear in title 20, Compiled Laws, 1884.

Chapter 15 of the laws by Pedro Murillo Velarde, which treats of the validation of wills, provides that any person having an interest in the estate may ask to have a will approved, but contains no provision requiring the citation of heirs, nor for the re-probate of a will, and our statutes are equally silent.

Section 17, chapter 3, Compiled Laws, 1865, shows what our laws require, and the record made by the probate court in this case, more than twenty years before the petition was filed, shows that the law was complied with. *Comp. Laws, 1884, sec. 1393.*

The petition in this case is barred by the statute of limitations. Comp. Laws, 1884, secs. 1863, 1869.

The statement in the brief of counsel for plaintiff in error that "the petitioner had come to his majority less than three months before the initiation of his petition" is erroneous. Counsel were doubtless misled by a mistake of the printer in substituting "1887" for "1883." Reference to the original transcript on file will show the error.

The judgment of the probate court is beyond its jurisdiction. Comp. Laws, 1865, chap. 6, sec. 9; Comp. Laws, 1884, sec. 1446.

McFIE, J.—This is an action originating in the probate court of Taos county, wherein William Bent seeks a re-probate of a will probated in the year 1867 as the will of Alfred Bent, his father. In his petition, which was filed in said court on the twelfth day of August, A. D. 1887, William Bent alleges, in substance, that his father, Alfred Bent, died December 9, 1865, leaving as his sole heirs at law his widow, Guadalupe Bent, now the wife of one George W. Thompson, Charles Bent, William Bent, also known as Julian Bent, and Alberto Silas Bent, all of said children being infants; that letters of administration were granted to said Guadalupe Bent upon said estate, April 12, 1866; that on the sixth day of March, 1867, his mother, Guadalupe Bent, presented to the probate judge of said county, and had probated, a will, alleging it to be the will of Alfred Bent, and that neither he nor his brothers were notified, or were present, when said will was probated. The petitioner further alleges, on information and belief, that the will probated was not the will of his father, but says that, if it was, the testator was of unsound mind when it was executed; that the witnesses named were not present at the making of the will, nor were they examined when said will was pro-

bated. He alleges that the Maxwell Land Grant Company and the Maxwell Land Grant & Railway Company have or claim some right or interest in the premises, and prays that citation may issue requiring said Guadalupe Bent, now Thompson, to appear and make solemn proof of said will, and that Charles Bent, Alberto Silas Bent, and the above named companies, be cited to be present and hear said proofs. A copy of the will is attached, and is as follows:

"In the name of God, Amen. I, Alfred Bent, being of sound mind and memory, and knowing the uncertainty of life and the certainty of death, do hereby devise and decree as my last will and testament, in presence of the subscribing witnesses, as follows, to wit: First. I give and bequeath unto my wife, Guadalupe Long Bent, for the maintenance of her and my three children, Charles, William, and Silas Bent, all of my real and personal property, money, goods, and effects, after my just debts have been paid, which are as follows, to wit: To North & Scott, of St. Louis, the sum of five hundred and sixty-nine dollars, with interest; to Mrs. S. Beuthner and L. B. Maxwell, sixty dollars; to David Webster, the sum of four dollars—which debts I desire shall be paid. I desire that my said wife shall be my executor, and may join with her, if necessary, any person who may desire for her benefit, and that of my children, heirs as aforesaid. In testimony whereof I have this sixth day of December, A. D. 1865, subscribed my name, in the presence of subscribing witnesses. Codicil. The debt due North & Scott, of the city of St. Louis, is jointly due by myself and Horatio Long, of Colorado territory.

"ALBERT BENT.

"Witnesses: FERNANDO MAXWELL,

"W. A. KITTRIDGE,

"JAS. S. HURST,

"CHARLES HART."

Citation issued August 12, 1887, returnable September 5, 1887.

On the opening of court on the fifth day of September, 1887, T. B. Catron, attorney of defendant companies, appeared in behalf of said companies, and filed a written protest and motion to dismiss the cause for numerous reasons, in substance, that the will had been probated more than twenty years in the same court, and could not be re-probated; that the court had no jurisdiction; that the proceeding was barred by limitation; that there was no law authorizing the re-probate of the will; and that the proceeding was barred by reason of laches and unreasonable delay. The court overruled the motion, and, after hearing testimony, entered judgment declaring the former probate of the will illegal, and annulling the record of same, on September 7, 1887. From said judgment an appeal was taken by defendant companies to the district court for Taos county, where, at the November, 1887, term thereof, the following motion was made and allowed, dismissing the cause, and declaring said proceedings of the probate court at the September term, 1887, in regard to the probate of the will of Alfred Bent, null and of no effect. The motion was as follows:

“Now comes the Maxwell Land Grant Company, and the Maxwell Land Grant and Railway Company, and move the court to declare null and of no effect all of the proceedings contained in the record had by the judge of the probate court of the county of Taos at the September term of said court, with reference to the reprobate of the will of Alfred Bent, and especially the part of said record declaring said will not to be the last will of Alfred Bent. (1) Because the same were not had in conformity with the provisions of an act of the legislative assembly of the territory of New Mexico approved January 26, 1861, entitled ‘An act amenda-

tory of the law of testaments,' and being sections 1446, 1447, 1448, and 1449 of the Compiled Laws of 1884. (2) Because said probate judge and court rejected and in effect declared said will of Alfred Bent null and contrary to law. (3) Said probate court and probate judge declared said will of Alfred Bent null and void, under the pretext of want of solemnities prescribed by law for making wills. (4) Because said probate judge did not return said will to the person who may have applied for the approval thereof, either said William Bent or Guadalupe Thompson or any other person, nor did he note at the foot of said document the positive reasons on which he founded any opinion why he refused to approve said will. (5) Said will has not been presented to the district court by any person to whom the same has been returned, nor has the same been returned to any one whoever. (6) Because neither the probate court nor the probate judge had jurisdiction to entertain the said petition, or grant the prayers thereof. (7) Because neither said probate court nor said probate judge could inquire into the validity of the acts of the probate court or the probate judge, done at a regular term of the probate court, more than twenty years prior to the filing of said petition of William Bent. (8) Because neither said probate court nor said probate judge had any authority or right to review the action of his predecessor, or of the probate court done in regular term, over twenty years before the application. (9) Because said will was made and executed and approved before the common law came in force in this territory, and there was no law in force at the time of making, executing, and probating of said will allowing a re-probate thereof. (10) Because the laws in force at the time of the making and execution of said will and the death of the testator did not provide for or permit any re-probate. (11)

Because said petitioner has been guilty of laches, and has not made his application in due and lawful time. (12) Because said proceedings are illegal and void, and unauthorized by law. (13) Because the proceedings declaring said will not to be the will of Alfred Bent, deceased, are illegal and contrary to law, and not in the jurisdiction of the probate judge or probate court, and these respondents especially pray the court to declare the same null and void. (14) The record shows that neither the probate court nor the probate judge made any investigation as to the validity of said will, although it appears the witnesses, or some of them, had been before him at the same term in the matter of said petition. (15) Because said record is in other respects vague, uncertain, and insufficient, and not in accordance with law.

“CATRON, KNAEBEL & CLANCY,
“Attorneys for said Companies.”

To reverse this judgment the cause is brought to this court.

It is insisted by defendants in error that there is an error on the first page of the printed record, in that the date when William Bent arrived at his majority is stated to have been “May 31, A. D. 1887.” They insist that it should have been “May 31, A. D. 1883.” The plaintiff in error assumes the correctness of the record by basing an argument upon its correctness, and it becomes important for the court to know which is the correct date. An inspection of this record discloses the fact, to our satisfaction, that the date “1887” is an error, and should be “1883.” It will be observed that on page 10 of the record, where the petition is again set out in full, the date is given as “1883,” and the ages agree with the order in which the names are given in the will. These considerations, it is true, may not be conclusive; but when added to these is the

admission in the petition that plaintiff in error's father died December 9, 1865, all doubt is removed, as petitioner makes the further admission that he was living when his father died, thereby showing that "1887" can not be the correct date. From this it will be seen that the petitioner had arrived at his majority more than four years prior to the commencement of this suit in the probate court. The certified record shows the conclusion above to be correct.

Plaintiff in error cites numerous authorities to the effect that under the English common law two forms of probating a will were recognized, namely, the common and solemn forms. The common form required no notice to the heirs or interested parties, while the solemn form required such parties to be cited to appear; and, where a will had been probated in common form, any interested party could appear, and have the will re-probated in solemn form, at any time within thirty years. Such was the practice in the ecclesiastical courts, which were in fact the probate courts of England. Plaintiff in error also refers to several of the state courts' maintaining the double form of probating a will, but an examination of these authorities shows that the courts of those states were either governed by the common law, or by special statute regulating the practice. Plaintiff in error assumes that the rules of the common law govern this case, as it will be observed that the petition demands a re-probate of the will in solemn form, and authorities cited are all in support of that view; while the defendants in error contend that the probate of a will in this territory is a purely statutory proceeding, and that the laws of this territory do not recognize the double form of probating wills prescribed by the common law, nor require notice to heirs or legatees. Let us therefore examine this subject with a view to determine what law governs this case.

The civil law was undoubtedly in force prior to conquest and the treaty of peace between the republic of Mexico and the United States; and in many respects remained in force for many years afterward. The Laws of Pedro Murillo Velarde, in relation to the execution and proving (or probating) of wills, and administration of estates of decedents, dating back to 1790, were also in force, and were continued in force by specific provision of the Kearney Code in 1846. Comp. Laws, N. M. 1865. Under the civil law, the only provisions made for proving a will (which is equivalent to probating) are as follows: "In order that an open testament, made before witnesses without a notary, can have effect, it must be declared valid by the judge. For the purpose of obtaining his sanction, anyone having an interest in its disposition may apply to the judge, who must summon the witnesses present at the execution of the testament; and, upon his finding that it has been truly made, he shall declare it a valid testament, and order it to be inscribed in the registers of some notary." Schmidt, Laws Spain and Mexico, pp. 214, 215, art. 1015.

In regard to a close or sealed will, the provision is as follows: "When the testator is dead, the person believing himself heir or legatee must apply to the judge to have it opened. Thereupon the judge must order the person who has possession of the testament to bring it before him, and, having summoned the witnesses, exhibit it to them for the acknowledgment of their signatures. When such acknowledgment has been made by all the witnesses, or at least four of them, if the others can not be had, he shall proceed to open the testament." Partidas, lib. 3, tit. 2, p. 6; Schmidt, Laws Spain and Mexico, art. 1019. These laws, it will be observed, do not provide for notice, by publication or otherwise, to heirs or interested parties to be present

at the probating of the will; only the witnesses to the will are to be summoned. Any interested party or person having possession of the will might present the same for probate; and there is but one form of probate recognized, so far as we have been able to discover. The Laws of Pedro Murillo Velarde are almost identical, and provide: "Chapter 15.—Of the Sealed Testament, and the Proving of the Nuncupative Testament not Made Before a Notary.—The testator who has executed a sealed testament being dead, the heir named, the legatee, and the executor may ask that it be opened, with the intention that such disposition be declared valid, or the child omitted, or unjustly disinherited, and the heirs ab intestato, with the intention that it be declared void; wherefore, anyone who may be interested may ask it, swearing that he does not do so in bad faith, but under the presumption that he has, that he is interested. This petition should be made to the regular secular judge, and in it be expressed that the testator died under this disposition, and the judge shall direct that it be brought immediately, in order that it be opened; and, it being in another place, he will set a time for him who may have it, in order that he may present it; and if he be contumacious, he shall pay to him who shall demand it the legacy which may be left to him in the testament, and the damage that his contumacy may cause him. Before proceeding to the opening, the judge shall require that the instrumental witnesses identify in his presence their signatures, that of the testator, and the sealed envelope which may inclose the testament, and that they depose as to the decease of the testator, because they may have heard of it or seen it; and, not knowing it, the notary shall certify to it, because he has seen it, giving certificate of identity, or because he was told of it in his house or neighborhood; because, before the death be proved the opening can not be proceeded with. If the witnesses

are dead, or are absent without their whereabouts being known, information shall be given of it, that at the time of the execution they lived and were at the place, and that they were persons who could testify; and the same as to the legality of the notary before whom it was executed, if he should be dead; and, if there should be anyone who may know their signatures, he shall identify them, or they shall be proved. But if the witnesses are alive, and can not all be had, it will be sufficient that the majority of them appear; and if this can not be done, and the judge should understand that to omit the opening there might result damage to the parties in interest, he may call responsible men, and before them open the testament, have it copied and read, and, the responsible men signing it, have it closed and preserved, in order that, when the instrumental witnesses present themselves, they may recognize it in the prescribed form. If it should not be opened before the notary who witnessed its execution, he should acknowledge his signature and signet. The identification being made by the witnesses, and the envelope not being torn or erased, nor being suspicious by reason of any other cause, the judge shall have it opened in the presence of the notary and witnesses, and reading it first to himself in case the testator should direct that any part should not be read or published until a certain time, in which he should accede to his wishes, he will have it read and published in the presence of all; directing that it be made a public document, to which end it shall be filed in the records of the notary before whom it is opened, and to the rest (a copy) of the clause which relates to them, with the beginning and end of the testament. If the testamentary disposition should be written on common paper, but before the competent number of witnesses, the heir or executor shall apply to the judge presenting it to him; stating (the name of) the person who wrote it, that which

passed at that time, the reason why it was made so, and without the presence of a notary, and that the testator died under it; and asking that, after taking the declaration of the witnesses and the acknowledgment of their signatures, that that disposition be declared a nuncupative testament, that there be given the proper copies to the parties in interest, and that it be filed in the record of the notary. The judge shall direct that the information be received, and, it being done, he shall proceed accordingly. If the testator manifested his will by word alone before the legal number of witnesses, the same proceedings shall be had, omitting, of course, the presentation of the common paper, which does not exist, and asking that the depositions of the witnesses may be declared to be the testament of the deceased."

Under these laws, any person interested could have a will probated without notice to the heirs, or other interested parties. Only witnesses were required to be summoned, only one form of probate was prescribed, and yet the will would be declared valid. By the Kearney Code, the Velarde Laws in relation to wills and estates were continued in force. "The laws heretofore in force concerning descents, distributions, wills, and testaments, as contained in the treatises on these subjects, written by Pedro Murillo de Lorde (Velarde), shall remain in force so far as they are in conformity with the constitution of the United States, and the state laws in force for the time being." Comp. Laws, N. M., sec. 1365. The probate courts were given exclusive jurisdiction over the probate of wills, and the contesting thereof. Appeals were allowed from the probate to the district courts in the same manner as from the district to the supreme courts. Appeals from the district to the supreme court were allowed, if taken during the same term at which judgment or decision was rendered, if during the same term appellant or his

agent should file an affidavit of merit, and bond. By section 17 of the act of January 12, 1852 (Comp. Laws N. M., sec. 1393); it was provided that "probate judges in their respective counties are authorized to qualify wills, by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the investigation of the validity thereof." The word "quality" is equivalent to the word "probate" in the above section, and is intended to convey the same meaning. By the act of January 26, 1861 (Compiled Laws, secs. 1446-1449), it was provided: "No judge of probate shall have the power to declare any will, codicil, or any other testamentary disposition to be null and void, under the pretext of the want of the solemnities prescribed by the laws of this territory by the testator making such disposition." Then follow three sections of the same act, which provide, in substance, that when a will is presented for probate, if the probate judge has any doubt as to whether he should approve the will or not, or "if, in the judgment of such judge, the will offered for probate does not merit his approval," he shall return the will immediately to the person who presented it for probate, noting on the foot of the will his reasons for refusing approval. The third section of the act then provides that it shall be the duty of the person to whom the will is returned to present the same at the next regular term of the district court of the county, and it is made the duty of the district court to examine into the matter, declare by its decision whether it is valid or null and void, and then return the will to the party. There is a proviso in the last section of this act which reads as follows: "That any proceedings had by said judges of probate, not in conformity with the provisions of this act, shall be declared null and of no effect by the district court, and all at the cost of the said probate judges."

This was the state of the law of this territory at the time the will in this case was executed and probated, and at the time of the death of the testator, Alfred Bent. This court has decided that the common law was not introduced into this territory by the organic act, except in a very limited degree. *Browning v. Browning*, 3 N. M. (Gil.) 659. And even in 1876, when the common law was formally adopted as the basis of our jurisprudence, it was the common law "as recognized in the United States" that was adopted. For the reason that the common law of one state is not necessarily common law in another, as each state adopts such parts as are suitable and desirable, this court, in the case of *Browning v. Browning*, supra, took occasion to declare the scope of the common law as adopted in 1876, as follows: "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." By the adoption of the common law in 1876, it was not intended thereby to repeal our own statute laws; only such portions were adopted as did not conflict with our laws. Our statute laws governing probate courts, and defining the manner in which wills shall be probated in this territory, remained in force, until modified by the act of 1889, and were the basis of the jurisdiction and authority of our probate courts. The probate of a will in the manner prescribed by the statute is conclusive, and must be recognized and admitted in all courts as valid so long as such probate stands. The courts of California have so held in

COMMON law: act
1889, relating to
probate courts.

numerous cases. A leading case from that state on the subject is that of *State v. McGlynn*, 20 Cal. 233.

The will in this case, as shown by the record, was probated as required by law by petitioner's mother, who was an interested party, more than twenty years prior to the filing of the petition in the probate court in this case; and the record also shows that the petitioner delayed more than four years after attaining his majority before he filed his petition. The record of the proceedings of the probate court on March 6, 1867, in reference to the probating of the will, is as follows:

RE-PROBATE of
will: limitation
as to infants on
attaining ma-
jority.

"DON FERNANDO DE TAOS, N. M.

"Wednesday, the sixth day of March, 1867, at ten o'clock in the forenoon the court met. Present: The Hon. Pedro Sanches, judge of probate; Leandro Martinez, clerk, and Pablo Martinez, deputy sheriff. The order of business is as follows: The administrators of the estate of Alfred Bent, deceased, presented the will of said deceased for approval. The court examined said will, and the witnesses in it mentioned, and, finding it correct according to law, approved it, and ordered that it be recorded in this office."

The will, being probated and recorded, became the foundation of title to both real and personal property, and became admissible in evidence in all courts in support of such title. *Castro v. Richardson*, 18 Cal. 478. The probate courts of this territory are courts of record, so far as the probating of wills is concerned, and their jurisdiction is original and exclusive in the first instance. Here, then, we have a case in which the record discloses a valid judgment of a court of record, standing without appeal and unreversed, for the period of more than twenty years. The petitioner now seeks to have this judgment set aside and declared void, for such would be the effect of sustaining this proceeding. To avoid the effect of his failure to proceed through

his next friend to have this judgment set aside, he sets up his minority as a justification. This is a substantial plea, but it does not last always. Courts of law are, and should be, anxious to settle titles, rather than disturb and unsettle them; and a failure to fix a time when an infant, after arriving at his majority, shall be held to have waived his rights, if he fails to assert them, would result in destroying confidence in the titles to our property, and injuriously affecting substantial rights. Therefore a majority of the states and territories in this country have by statute fixed a time within which an infant must assert his rights, or be deemed to have waived them. In almost every instance is allowed one year after the removal of his disabilities, and such is the period fixed by our statute, except as to real estate, in which case the period is extended to three years. Comp. Laws, 1884, secs. 1869, 1881.

The petitioner proceeds upon the theory that he has thirty years under the common law to have this will re-probated in solemn form; such seems to be the contention of plaintiff in error in his brief. We are unable to agree with him in this respect, but, on the contrary, hold that this case is governed by the statute law of the territory. In this case, therefore, petitioner did not commence his action within the time allowed by law, even if it is admitted that the action related to the title to real estate. More than four years were allowed to elapse, and, in view of the statute, any legal right that he might have asserted within the proper time must be held to have been waived, and it follows that petitioner had no standing in court at the time he brought this proceeding. The probate court entertained the petition, overruled the motion to dismiss, and recorded a judgment annulling its former judgment. This record of the probate court was brought by appeal before the court below. The motion to dismiss and annul the proceedings of the probate court was based on jurisdic-

tional grounds, which the record discloses. It was, in substance, that, by reason of laches and unreasonable delay disclosed by the record, and in the absence of statutory authority, the court had no power or jurisdiction to act. Laches did not exist within the time fixed by the statute, but after that time there were both laches and unreasonable delay, in law, such as would render it improper for the court to attempt to set aside its former judgment, or grant the petitioner any relief whatever. We are of the opinion that, at the time this proceeding was brought in the probate court, the former judgment of that court had become conclusive, so far as this petitioner was concerned, and could not be reopened or annulled by that court. This court has held in the case of *Browning v. Browning*, above cited, that the act of 1880, relating to the limitation of actions, in force at the time of the commencement of this proceeding, is applicable to the probate courts of this territory, and it is applicable, therefore, to this case. Comp. Laws, N. M., secs. 1869, 1881. The only errors assigned are that the court erred in dismissing the proceeding, and entering judgment as shown by the record; but we are of the opinion that the court had the power to do so, and exercised it properly in the action taken. Therefore, the judgment will be affirmed, with costs.

LONG, C. J., and WHITEMAN and LEE, JJ., concur.

[No. 388. January 24, 1890.]

EXCHANGE BANK OF DALLAS, APPELLEE, v. W. W.
TUTTLE ET AL., APPELLANTS.

PROMISSORY NOTE—STIPULATION FOR ATTORNEY'S FEE—ASSUMPSIT—PLEA, NON ASSUMPSIT.—In an action of assumpsit on a promissory note stipulating for the payment of "ten per cent for attorney's fees in case this note is placed in the hands of any attorney for collection, or collected by suit," where the plea was non assumpsit, and no evidence was offered in support of the plea—Held: The court is not called upon in this case to pass upon the question as to the construction of the provision for the payment of attorney's fees in the note sued on, that question is not properly raised. But the court is asked to declare that a clause in a promissory note providing for attorney's fees of a fixed and definite amount, in the event the note is "collected by suit," is void as against public policy. This the court can not do, the validity of such a clause in a promissory note by contract of the parties being sustained by the weight of authority. The provision for the payment of attorney's fees in the note sued on is undoubtedly a questionable one, and susceptible of being used in an oppressive and collusive manner; but the court can not presume that such will be the result. The courts have held many provisions for attorney's fees in notes and contracts void, where the amount was uncertain, exorbitant, or oppressive, and the facts were clearly proven. But in this case the services of the attorney were rendered. It does not appear that the fee contracted for was unreasonable, nor that the contract was not a voluntary one, made by the parties with a full knowledge of all the facts. As to the objection that the court allowed attorney's fees without requiring proof of their value, if the note sued on had provided for a "reasonable attorney's fee," such proof would have been necessary, the amount being uncertain; but in this case the amount is fixed by contract, and the court must presume that the fee fixed was the reasonable value of the services rendered, in the absence of any evidence to the contrary.

APPEAL, from a judgment in favor of plaintiff, from the Second Judicial District Court, Socorro County. Judgment affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for appellant.

ISAAC S. TIFFANY for appellee.

The stipulation is not against public policy, and not, therefore, void. 1 Story, Eq. Juris., sec. 259; Sedgwick v. Stanton, 14 N. Y. 289; First National Bank v. Breese, 49 Iowa, 640; Garvin v. Pointias, 66 Ind. 191; Miner v. Exchange Bank, 53 Tex. 599; Seaton v. Scoville, 18 Kan. 435; Overton v. Mathews, 35 Ark. 147; Parkham v. Pulliam, 5 Col. (Tenn.) 407; Imler v. Imler, 95 Pa. St. 372; Clawson v. Munson, 55 Ill. 395; Payser v. Cole, 4 Pac. Rep. (Ore.); Farmers National Bank v. Salem, 1 Dak. 60; Schlessinger v. Arline et al., 31 Fed. Rep. 649; Bank of British North America v. Ellis, 2 Fed. Rep. 44; Adams et al. v. Addington, 16 Fed. Rep. 89; Wilson Sewing Machine Co. v. Moreno, 7 Id. 806; Howenstine v. Barnes, U. S. Cir. Ct., 9 Cent. Law Jour. 48; Randolph on Commercial Paper, sec. 205; 1 Dan. Neg. Insts., sec. 62, p. 72; Smith v. Silvers, 32 Ind. 321.

McFIE, J.—This suit was brought in the district court for Socorro county upon the following promissory note:

“\$3,500.

DALLAS, TEXAS, Oct. 23d, 1885.

“On December 1, '85, after date, without grace, we or either of us promise to pay to the order of Exchange Bank, Dallas, thirty-five hundred dollars, for value received, at the Exchange Bank of Dallas, with interest from maturity at the rate of twelve per cent per annum, with ten per cent for attorney's fees in case this note is placed in hands of an attorney for collection, or collected by suit.

L. B. COLLINS,

“C. E. ODEM,

“W. W. TUTTLE.”

The declaration, in addition to the usual demand for debt, interest, and costs, asked judgment for attorney's fees, as provided by the terms of the note. Col-

lins and Odem were not served with process, but W. W. Tuttle entered his appearance, and filed one plea, that of non assumpsit. The defendant, Tuttle, waived a jury, also written finding of facts, and consented to trial by the court, which was had, and the following judgment was rendered by the court at the November term, A. D. 1888: "At this day, this cause having been heretofore submitted to the court, and the court being now sufficiently advised, doth find the issues for the plaintiff, and assess its damages against defendant Tuttle, at the sum of four thousand, seven hundred thirty and 00-100 dollars, and also the sum of three hundred and fifty dollars as attorney's fees; wherefore it is ordered and adjudged that plaintiff recover of defendant W. W. Tuttle, the sum of four thousand, seven hundred thirty and 00-100 dollars damages, with 12 per cent interest from this day until paid, and also the sum of three hundred and fifty dollars as attorney's fees, together with its costs in this behalf laid out and expended, to be taxed herein, and that execution issue therefor." To reverse this judgment, the case is brought to this court by appeal.

Appellant seeks a reversal solely upon the ground that the court gave judgment for attorney's fees, and assigns the following errors: (1) That the district court erred in its finding that the appellant was liable for attorney's fees on the contract sued on; (2) that the district court erred in giving judgment against the appellant for \$350 attorney's fees, when there was no evidence of the value of the attorney's fees before the court; (3) that the judgment of the district court against this appellant is wholly without evidence to support it.

The note was the only evidence offered by the plaintiff, and, although the entire cause of action was put in issue by defendant's plea, no evidence was offered in support of the plea. The introduction of the

note in evidence was sufficient to warrant a judgment for plaintiff for the amount of the note, interest, and costs. We are now called upon to say whether or not the court erred in allowing attorney's fees as specified in the note.

Let us consider the first assignment of error: "That the district court erred in its finding that the appellant was liable for attorney's fees on the contract sued on." This question of the allowance, or disallowance, of attorney's fees provided for in promissory notes and written contracts has been before the courts for many years in this country, and many learned opinions of able judges and courts have been rendered on both sides of the question. An examination of the authorities will show, however, that the fruitful cause of this contrariety of opinion is due mainly to the varied forms in which the question is presented to the courts. One instrument sued on differs in its provision, upon that subject, from that of another. Therefore the phraseology of a decision, apparently applicable, may be, and often is, found to be inapplicable when examined in the light of the facts before the court. Take the case of *Oelrichs v. Spain*, 15 Wall. 231, cited by appellant. The case is sometimes cited as showing that the supreme court of the United States is opposed to the allowance of attorney's fees in any case, whether provided for in the instrument or not; but an examination of that case shows that it was a suit on an injunction bond, with no provision in the instrument for attorney's fees, and the question in that case was whether attorney's fees should be allowed as part of plaintiff's damages, which is a very different proposition. The case of *Bullock v. Taylor*, 39 Mich. 137, cited by appellant, is not in point in this case. The notes in that case provided that "the undersigned agreed to pay \$15 attorney's fee, over and above all taxable costs," each, on

SUIT on promissory note: stipulation for attorney's fees.

six small notes, two of them for \$41.50 each. The surety did not sign the notes, but signed a bond as surety for the makers. The court says, among other things: "The surety insists that such notes are not within the terms of his undertaking. * * * (2) Because they provide for the payment of an attorney's fee, to which he has never consented." Again the court says: "In this state, the attorney's fees which the successful party is permitted to recover in courts of record are prescribed by statute or by rule of court. In justice's courts, none are given except in a few special cases. The policy of our law is to limit such recovery to a very moderate sum in every case where it is permitted at all; * * * and it is a question of very grave importance whether the policy which thus limits attorney's fees, and also limits the rates of interest, can be set aside by provisions like that under review." It is very apparent that this case was decided mainly upon the ground that such fees as were contracted were prohibited by the statute law or rules of court of Michigan; the contract, therefore, was in violation of law, and the court would not enforce it. In this territory we have no statute upon the subject. In *Stoneman v. Pyle*, 35 Ind. 104, the note provided for attorney's fees in case suit was brought, and it was sustained, the court saying: "On the maturity of the note, the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. * * * The stipulation for the payment of attorney's fees could have no force, except upon a violation of his contract by the defendant," etc. In *Churchman v. Martin*, 54 Ind. 388, the court held void a note providing for "10 per cent attorney's fees, if suit be instituted." It might be said, without examination, that these two decisions are contradictory; but they are not so, for the reason that between the two decisions a statute had been passed in that state, as follows: "That any and all agree-

ments to pay attorney's fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void." Act of March 10, 1875. The provision was held to be void under the statute, because upon "condition," and not because it was against public policy.

It may be admitted, however, that some of our ablest courts hold opposite views on some of the points arising out of this question. Our own federal courts are somewhat divided in opinion; Judges DEADY, PARDEE, and SPEER sustaining the validity of contracts for attorney's fees, while Judges CALDWELL and McCRARY take the opposite view. The early cases upon this subject were disposed to hold against the validity and also negotiability of such contracts, a leading case being that of *Woods v. North*, 84 Pa. St. 407, placing it upon the ground of uncertainty; but in later decisions a different view is taken, and there is now a large preponderance of decisions that where the amount provided for in a promissory note, at maturity, is fixed and certain, it is negotiable. Applying that test to the note sued on in this case, we are of the opinion that it is negotiable. The weight of authority is to the effect, also, that where a promissory note provides for a fixed and reasonable amount for attorney's fees, if the note is collected by suit, it is valid, and will be sustained by the courts. Illinois, Iowa, Louisiana, Kansas, Kentucky, Indiana, Arkansas, Texas, Colorado, California, and the federal courts in Oregon, Kansas, and Georgia, sustain the validity of such notes. Pennsylvania, Minnesota, Wisconsin, Missouri, and the federal court in Arkansas are not disposed to enforce such provisions.

This case is brought within very limited bounds by the record. We are not called upon to construe the

clause of the note sued on, which provides for "ten per cent attorney's fees in case this note is placed in hands of an attorney for collection," because it is not properly raised. The provision just quoted is certainly a questionable one. It is susceptible of being used in a very oppressive and collusive manner. Therefore, if this record showed that the defendant, Tuttle, paid, or tendered payment, of the debt and interest at maturity, or before suit was brought, and the payment tendered refused for the reason that the note was placed in the hands of an attorney, who demanded ten per cent more for attorney's fees, a very different case would be presented; but in this case there was neither payment nor tender of any part of the note, so far as the record discloses. On the contrary, suit was actually brought for the collection of the note, and the defendant, by pleading non assumpsit, denied the entire indebtedness, in law, and put the plaintiff upon proof of the entire amount; and while the judgment, except as to the amount of attorney's fees, is in fact admitted, still the entire amount is suspended, and the plaintiff is deprived of the benefit of judgment for the debt and interest. If to declare the clause as to attorney's fees invalid would void the entire note, there would be some justification for the practice; but it will not be contended that such would be the effect, and hence this court can not, by reversing the judgment of the court below, approve a practice which practically deprives the plaintiff of his legal rights, when, by payment or tender of amount due and admitted, such results would be avoided without depriving the defendant of any legal right. To reverse this case, the court must declare that a provision in a promissory note for attorney's fees of a fixed and definite amount, in case the note is "collected by suit," is contrary to public policy, and therefore void. This we can not do, as we are satisfied that the weight of

authority sustains the validity of such a provision in a promissory note by contract of the parties. We are aware of the force of the argument "that to sustain such contracts, because they are the contracts of the parties, would admit of oppression of the debtor by the grasping creditor," but we can not presume that such will be the result; and, besides, it does not follow; and this court does not hold, that the courts will not interfere to prevent oppression and collusion, where the facts are brought before the court in the proper manner. The courts have held void many of the provisions for attorney's fees in notes and contracts, where they are uncertain, excessive, or oppressive. Even where a fixed sum has been agreed upon by the parties, the courts have interfered to afford relief, where the amount was clearly exorbitant or oppressive, and the facts were shown to the court. In this case, services of the attorney were rendered. It is not shown that the amount contracted for was excessive, nor that the contract was not a voluntary one, with a full knowledge of all the facts. The note was sufficient evidence to warrant the court in giving judgment for attorney's fees, and in doing so there was no error.

The second assignment of error is, in substance, that the court allowed attorney's fees without requiring proof of their value. If the note sued on provided for a "reasonable attorney fee," the amount not being fixed, such proof should be required; but in this case the amount has been fixed by the contract, and we must presume that the amount fixed was the reasonable value of the services rendered, until the contrary appears. The amount being fixed, and value reasonable, the court below committed no error in giving judgment for the amount provided for in the note.

The third assignment of error is not well taken. There was sufficient evidence to warrant the court below

ATTORNEY'S fees:
proof of value of
services rendered

in giving judgment for attorney's fees upon the note; in fact, the note was the best evidence of the fact, and proved itself. Finding no error in the record, the judgment of the court below is affirmed, with costs.

LONG, C. J., and LEE and WHITEMAN, JJ., concur.

[No. 371. January 28, 1890.]

WILLIAM H. NEWCOMB ET AL., PLAINTIFFS IN
ERROR, v. GEORGE A. WHITE ET AL.,
DEFENDANTS IN ERROR.

MECHANICS' LIEN—BILL IN CHANCERY TO FORECLOSE—RULINGS OF CHANCELLOR ON MATTERS OF FACT—APPEAL.—In a proceeding by bill in chancery to foreclose a mechanic's lien, the rulings of the chancellor on matters of fact, like the finding of a court of law on issues of fact, have the force and effect of the verdict of a jury, and will not be disturbed on appeal, unless some gross mistake has been made, or flagrant injustice done.

ID.—MASTER'S REPORT—EXCEPTIONS, HOW TO BE TAKEN—APPEAL.—In such case, where the master's report involves matters of account, exceptions only to particular items, or classes of items, will be considered on appeal.

ID.—VERBAL CONTRACT, CONSTRUCTION OF BY CHANCELLOR—PRESUMPTION.—Where no exceptions are taken to a verbal contract introduced in evidence before a master in chancery, and construed by the chancellor, the appellate court will presume that the construction given was correct. The court will not examine the evidence, where there is any conflict of testimony, to determine whether the court below or jury was justifiable in its finding or verdict.

ID.—DISMISSAL OF SUIT IN VACATION—SEC. 1857, COMPILED LAWS, N. M.—CONSTRUCTION OF STATUTES.—Section 1857, Compiled Laws of New Mexico, giving the plaintiff the right, in any suit in the district court, to dismiss the same at any time during the vacation of the court, by filing in the clerk's office a written dismissal of the suit, applies only to common law causes. In a chancery proceeding, where other parties have been brought in, whose equitable rights and interests are involved, a dismissal can be obtained only by leave of court, upon such terms as it may require.

ID.—REHEARING—EXCEPTIONS IN EQUITY CASES—SEC. 2197, COMPILED LAWS, N. M.—CONSTRUCTION OF STATUTES.—Section 2197, Compiled Laws of New Mexico, providing that exceptions to the decision of the court upon any matters of law arising during the trial of a cause, or to the giving or refusing of instructions, shall be taken at the time of such decision, and that no exception shall be required in equity causes, applies to bills of exception in common law cases, and not to exceptions to a master's report in equity proceedings.

ERROR, from a decree in favor of complainants, to the Third Judicial District Court, Grant County.
Decree affirmed.

The facts are stated in the opinion of the court.

ELLIOTT & PICKETT for plaintiffs in error.

GIDEON D. BANTZ for defendants in error.

LEE, J.—This is a petition, filed in chancery, to foreclose four mechanics' liens, upon a certain frame building situated on the southeast quarter of section 3, in township 18 south, of range 14 west, of principal meridian of New Mexico, near the boundary line of the town site of the town of Silver City, in Grant county, New Mexico, and commonly known as "Newcomb's Mill," for work and labor performed on said mill building by the defendants in error, George A. White and others. To this petition the plaintiffs in error filed a demurrer to so much of said petition as attempted to set up a lien and enforce the same in favor of one of the original complainants, namely, Charles C. Harris. Upon the demurrer as to White there was no action of the court below. Plaintiffs in error then filed their answer to said petition, denying the material allegations of the same. The defendants in error then filed a general replication to said answer; and thereupon the cause was referred to A. H. Harlee, as special master in chancery, to take the proofs and report the equities of the cause to the court. The

master proceeded to take the proofs, and reported to the court that the defendant in error Milton Barnes was entitled to the sum of \$115, with interest at six per centum per annum from the second day of January, 1886; John Hastings was entitled to the sum of \$532, with interest from the same date; and that the said defendants in error were entitled to a lien on the property described in the original petition. To this report of the master, the plaintiffs in error filed objections and exceptions, which were overruled by the court below, and the master's report confirmed. The plaintiffs in error appeal to this court.

The plaintiffs in error assign four errors, the first of which is that the property is not sufficiently described in the bill of complaint, or notice of lien attached thereto. We do not think this objection well taken, in point of fact. The description of the property which is set forth in the foregoing statement of facts shows the property to have been fully and minutely described; and, as counsel for the appellants stated in their argument of the cause that they did not insist upon this point, we need not consider it further.

The plaintiffs in error, in their second assignment of error insist that William H. Newcomb, one of the appellants, should have been allowed his claim of set-off of \$500 against the claim of Robert Black, one of the defendants in error. This was a question for the court trying the cause to determine from the preponderance of the evidence adduced; and the finding of that court on matters of fact has the same force and effect as the verdict of a jury, and this court will not disturb it, without there was some gross mistake, or flagrant injustice done. *Blanvelt v. Woodworth*, 31 N. Y. 285. Where an issue of fact is made, and evidence is offered for and against the same, this court has no authority to review the evidence, and determine that the weight

MECHANICS' lien:
rulings of
chancellor on
matters of fact.

of it was other than as found by the court or jury trying the case below. We can only reexamine the law as the judge has pronounced it, upon the state of facts as presented to him. *Hyde v. Booraem*, 16 Pet. (U. S.) 169; *Bond v. Brown*, 12 How. (U. S.) 254.

If the master's report involves matters of account exceptions should be taken to the particular items, or class of items objected to. (*Ransom v. Davis*, 18 How. (U. S.) 295); and, to make the exception available, it must appear that there was a ruling by the court upon it in some way affecting the decision appealed from (*Railroad Co. v. Smith*, 21 Wall. (U. S.) 255). The record before us shows that there was no exception taken by the plaintiffs in error to any item of account contained in the master's report, and therefore there is no question under this assignment of error which this court can consider.

The third assignment of error is as follows: "The master erred, in his report, in finding that Hastings and Black should receive four dollars per day for wages of the men who worked on said property, while said Hastings and Black paid said men but three dollars per day." This assignment attempts to bring in review by this court the construction given by the court below to a verbal contract introduced in evidence before the master, and construed by the chancellor; but, as the record shows that no exceptions were taken at the time, we must presume that the construction given to this verbal contract by the chancellor was correct. This court will not examine evidence to ascertain whether the lower court or jury was justifiable in finding as it has done. *Gregg v. Moss*, 14 Wall. (U. S.) 564; *Express Co. v. Ward*, 20 Wall. (U. S.) 548.

The fourth assignment of error is as follows: "The master erred in making any report in reference

MASTER'S re-
port: excep-
tions.

CONSTRUCTION
of verbal con-
tract: presump-
tion.

to the claim of complainant White, one of the defendants in error, for the reason that he (the master) had no jurisdiction over White's claim; the said White having dismissed the same, and filed his dismissal with the clerk of the court, as required by law. White's dismissal was before the master." This could hardly be regarded effective, in the face of White's proceeding in the cause at a period subsequent to the one mentioned in this assignment. On page 146 of the record we find the following:

DISMISSAL of suit
in vacation; jur-
isdiction of
master.

"And now comes the complainant George A. White, and excepts and objects to that portion of the report of the special master in the above cause wherein the said master fails to find in favor of said complainant in his report of the amount of his said claim, and also of the lien thereof, who prays the master to allow the same, and sustain these exceptions.

"ASHENFELTER and BANTZ,
"Solicitors for Plaintiff."

The following statute is relied upon to support this exception: "The plaintiff, in any suit pending in the district court, may, at any time in the vacation of said court, file in the clerk's office of said court a written dismissal of his suit; and said cause from that date shall be considered as dismissed at the cost of said plaintiff, and judgment shall be entered accordingly at the ensuing term of the district court." Compiled Laws, New Mexico, section 1857. This section applies only to common law causes. In a proceeding, where a complainant has brought in other parties, whose equitable rights and interests have become involved in the cause, it becomes a question for the court to determine, whether he will be allowed to dismiss his case, and, if so, on what terms. Even if the statute applied to equity causes, as the record in this cause shows this party in the active prosecution of his case to the end,

the presumption necessarily follows that he waived his application to dismiss. From the record before us, it appears that there were no exceptions taken to any of the rulings of the court below. In such a state of the record, it must be apparent that there is no question before this court for review. The judgment of the court below is affirmed, with costs.

LONG, C. J., and McFIE and WHITEMAN, JJ.,
concur.

ON A MOTION FOR A REHEARING.

LEE, J.—The appellant in this cause files a motion for a rehearing, upon the ground that this court gave too much weight to the findings of the master on issues of fact, in saying such conclusions would be presumed by this court to be correct. We did not state in the opinion, or intend to be understood, that we would not look into all the evidence to ascertain if the equities as set forth in the bill have been sustained. But, in questions of fact, to be determined from conflicting testimony, the master, who saw the witnesses,—observed their manner; is better able to determine the weight their testimony is entitled to; he being in the better position of applying intelligently the aphorism of the Roman tribunal, that “witnesses should be weighed, not counted.” In support of the proposition, we referred to the case of *Blanvelt v. Woodworth*, 31 N. Y. 285. It is objected that it was not a chancery case. It was a suit to foreclose a mechanic’s lien. It was on the equity side of the court. It was referred to a referee or master, to take proofs and make findings. One question was whether the contract price of the work in question had been paid, and the court in that case said: “As we have no authority to disregard the findings, they are conclusive against the claim that the defendant has paid the debt.” The

same rule has always been recognized and applied in this territory. In *Huntington v. Moore et al.*, 1 N. M. 503, the court said: "This report is based upon the finding of the facts before him, and this court will not review the report of the master as to his finding of the facts only for error of law appearing in the report." We think this court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower court committed an error, and that a wrong has been done to the appellant. We can not say as to either point that the court below clearly committed an error, or that such a proposition is sustained by a preponderance of the evidence.

It is also contended that, this being a chancery suit, it is not necessary to take exceptions to the rulings under the statute; and we are referred to section 2197 of the Compiled Laws in support of the position.

REHEARING:
exceptions in
equity cases.

That section reads as follows: "Exception to the decision of the court upon any matter of law arising during the progress of the cause, or to the giving or refusing of instructions, must be taken at the time of such decision. In equity causes, no exception shall be required." The exceptions referred to in this section, when taken at the time as provided, and afterward made out, settled, and signed by the judge trying the case, constitute the bill of exceptions. Such a bill is not required in equity cases, and never was. "A bill of exceptions is altogether unknown in chancery practice." *Ex parte Story*, 12 Pet. (U. S.) 340. It could serve no purpose in an equity suit, where the proceedings and evidence all appear in the record. In chancery proceedings objections are made to the rulings and decisions of the masters. They are brought to the attention of the chancellor by exceptions to the master's report. Rule number 86 provides that no excep-

tions to the master's report shall be entertained by the court unless based upon objections filed with the master. Rules Sup. Ct., p. 50. Exceptions to the master's report should specify, article by article, the points excepted to, and should distinctly point out the rulings or conclusions which it seeks to reverse. They should be specific, and not general. Exceptions that merely express dissatisfaction with the findings of the master are too general, and may be disregarded by the court. See *Story v. Livingston*, 13 Pet. (U. S.) 359.

And again the same court says: "The findings of the master are *prima facie* correct. Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party." *Medsker v. Bonebrake*, 108 U. S. 72. It was a part of the duties of the master to ascertain the amounts due from one party to the other in this case. Accounts referred to the master are not investigated by the court. See *Harding v. Handy*, 11 Wheat. (U. S.) 103. For the reasons above indicated the motion for a rehearing will be overruled.

WHITEMAN, J., concurs.

[No. 369, January 29, 1890.]

ALVAH E. WOLCOTT AND FRANK J. WRIGHT,
PLAINTIFFS IN ERROR, v. S. M. ASHENFELTER
AND NETTIE A. ASHENFELTER, DEFENDANTS
IN ERROR.

LIEN, OF LANDLORD, UNDER SEC. 1537, COMP. LAWS, N. M. 1884, WAIVER OF—CONSTRUCTION OF STATUTES.—By section 1537, Compiled Laws, it is provided that, "Landlords shall have a lien on the property of their tenants, which remains in the house rented, for the rent due; and said property may not be removed from said house, without the landlord's consent." Under this section of the statute the lien expressly attaches against the property of the tenant which remains

in the house, and not against the property which is removed from the house with the landlord's consent. The tenant has no right to remove the property from the house until the rent is paid. This it is the right of the landlord to insist upon, but, if he consents to the removal, he thereby waives his lien on the property. Where the building rented consists of several apartments, rented to different tenants, each apartment is a "house rented" within the meaning of the statute; and the removal of the property of a tenant from one apartment of the building to another apartment of the same building is a removal from "said house."

1D.—EFFECT OF WAIVER OF—SUBSEQUENT MORTGAGE LIEN, PRIORITY OF OVER LIEN FOR RENT PREVIOUSLY ACCRUED.—Where, in such case, the landlord waives his lien for rent previously accrued, he thereby becomes a general creditor as to such rent, and can have no claim for the same over a subsequent mortgagee, who files the affidavit required by statute (Secs. 1589, 1590, Comp. Laws) before such claim is reduced to judgment or the landlord has obtained any lien for the same on the mortgaged property.

ERROR, from a decree in favor of complainants, to the Third Judicial District Court, Grant County. Decree affirmed.

The facts are stated in the opinion of the court.

ELLIOTT & PICKETT for plaintiffs in error

The chattel mortgage is void as against the plaintiffs in error, because it was not renewed by filing the affidavit stating the amount due, etc., within the time required by statute. Prince's Rev. Ed. Laws, N. M. 64. See, also, Wait's Acts and Defs., vol. 2, p. 199, sec. 18; Newell v. Warren, 44 N. Y. 244; Paine v. Mason, 7 Ohio St. 198; Edson v. Newell, 14 Minn. 228; National Bank of Metropolis v. Sprague, 20 N. J. 13; Seamon v. Eayer, 16 Ohio St. 209; Griffin v. Forrest (Mich. 1882), N. W. Rep. 603.

The filing of the affidavit of renewal must be within the time prescribed by statute. Jones on Chattel Mortgages, p. 262, sec. 287, and cases cited; Newell v. Warren, 44 Barb. (N. Y.) 258; National Bank of Metropolis v. Sprague, 20 N. J. 13.

The claim of the plaintiff in error, Alvah E. Wolcott, for landlord's lien for \$1,300 is prior to the chattel mortgage of the defendant in error, Nettie A. Ashenfelter, having commenced to attach to the property on the first of October, 1883, when it was first put into his building, and continued down until the hearing of this cause below, the property never having been removed from the building, and being in the building at the time the chattel mortgage to Nettie A. Ashenfelter was executed. Acts, N. M., 1884, p. 48, sec. 5; Prince's Rev. Stat. N. M., p. 407, sec. 14; Beall v. White, 94 U. S. 382; Fowler v. Ropley, 15 Wall. 338; Webb v. Sharp, 13 Wall. 14; Holden v. Sumner, 15 Id. 600; Longsheet v. Rennock, 20 Id. 575.

As to class of creditors who may take advantage of a chattel mortgage, which has not been renewed according to the statutes, see Prince's Rev. Stat. N. M., pp. 63, 64; 2 Jones on Chattel Mortgages, p. 265, sec. 292; Newman v. Tymeson, 12 Wis. 498; National Bank v. Sprague, 21 N. J. Eq. 530.

GIDEON D. BANTZ for defendants in error.

"Landlords shall have a lien on the property of their tenants, which remains in the house rented, for the rent due." Sec. 1537, Comp. Laws, 1884.

The words "house rented" are used in the sense of premises rented. Therefore, where the premises rented consist, as in this case, of a part of the house, the lien is lost by the landlord if he consents to the tenant's removal of his chattels from the rented premises; and the fact that the chattels are removed to other rooms in the same building is of no importance. By such removal a new and distinct tenancy was created between the landlord and tenant in respect to different premises, to which the tenant had the exclusive right of entry, and to which he removed the chattels. Bouv. Law Dict., tit. "House," citing 6 Mod.

214; Woodf. Land. & Ten. 178; King v. North, Biddeck, 5 Ad. & Ell. 261; Henrette v. Booth, 15 C. B. N. S. 500; Finn v. Grafton, 2 Bing N. C. 617, and cases cited; 7 Taylor Land. & Ten., sec. 66.

The lien conferred by the statute arises out of the common law doctrine of distraint. The landlord could only distrain during the continuance of the term. Under statute 8 Anne, the landlord can not follow tenants chattels after the expiration of six months from removal from one apartment in a house to another. Taylor Land. & Ten., sec. 572.

At common law distress must be made upon some part of the demised premises, out of which the rent issued. *Id.*, sec. 573.

By statute of 2 Geo. II, the landlord might pursue chattels if removed secretly and fraudulently.

Mrs. Ashenfelter had a valid mortgage as against Wright, even though it had never been recorded, and after her bill for foreclosure was filed, her lien was perfected as against a mere general creditor of Wright. The rent of the premises on the north side of the hall, previously occupied, was no more than an ordinary debt, for which Wolcott, having no lien or a judgment, can not attack the validity of the mortgage. Boone Mortgages, sec. 251; Jones Chattel Mortgages, sec. 245; Bump. Fraud. Convey. [Ed. 1872], sec. 453.

LONG, C. J.—This cause is in this court on writ of error to the district court of Grant county. There Singleton M. Ashenfelter and Nettie A. Ashenfelter, his wife, brought their action to foreclose a chattel mortgage, and made parties thereto Frank J. Wright and Alvah E. Wolcott, who are the plaintiffs in error in this court. As against Wright, it is alleged in the bill of complaint that on the twenty-fourth day of February, 1886, Frank J. Wright made and delivered to Nettie A. Ashenfelter, wife of S. M. Ashenfelter, his promissory

note in the sum of \$250, and at the same time that he also made, executed, and delivered to her to secure said note a chattel mortgage on a library situated in Silver City, said county; that the mortgage was duly acknowledged, and also properly recorded in time in the said county of Grant. It is also averred that the debt was, at the commencement of the action, unpaid and past due. It is further alleged that the other defendant in the action, Wolcott, also claimed to hold a lien on the same library for \$1,300, but that his lien, if any existed, was for a much smaller sum, and was subsequent to that claimed by the complainants. Wolcott was made a party, that he might be required to set up and establish his lien, so that the court could ascertain and discover the amount thereof, and decree as to priorities. The complainants made the usual prayer for judgment, decree fixing their priority, and for sale of the mortgaged property. Wolcott filed demurrer to the complaint, which was overruled by the court. Both Wolcott and Wright then answered the bill, and upon the answers issue was joined, and the cause referred to a master.

It is assigned here for error that the demurrer should have been sustained, but as no reason for such contention is shown in the oral argument or brief, and as we are unable to perceive any defect in the bill of complaint, we hold that assignment to be not well taken. The master made a very careful and elaborate report. He found, and so reported to the court, that in 1883 Alvah E. Wolcott owned a building in the town of Silver City, and on the first day of October made a written lease to his codefendant, Frank J. Wright, of two certain rooms in said building, said rooms to be used by Wright for a law office, and the lease to run for two years, at \$45 per month, payable monthly; that Wright occupied the two rooms until the first of February, 1886, under said lease; and at

that date, on account of the nonpayment of rent for the two rooms during his occupancy under the written lease, owed Wolcott the sum of \$945, as rent due and unpaid for said rooms to that date. The master further found that Wolcott, at that date, desired to make other arrangements respecting said two rooms, and so he rented them then to another tenant, who took possession of them. Wright, at that date, with Wolcott's consent moved out of the two rooms the library, which, before that date, had been in them, and altogether ceased to occupy them as a tenant. Through the building in which the two rooms are situated is a central hall. The two rooms occupied by Wright as aforesaid are in the building on the north side of the hall, and entered from it. Wright, when he moved his library out of the two rooms, moved into and occupied a single room on the south side of the central hall, by and with the consent of Wolcott. Possession was taken by Wright February 1, 1886, of the single room. At that time it was verbally agreed between Wright and Wolcott that the former should pay, as rent for the single room, \$20 per month, nothing being said as to the time of payment. Wright, after he moved into the single room, paid as one month's rent therefor, in February, \$20. He paid no further rent, but continued to occupy the room south of the hall to the rendition of the decree in the court below, and at that date, for rent of the single room, was indebted to Wolcott in the sum of \$420, being the rental for said room to December 1, 1887. The note and mortgage given by Wright to Mrs. Ashenfelter were executed on the twenty-fourth day of February, 1886, and the mortgage was duly recorded the next day. At that time the library described in the mortgage was situated in the single room south of the central hall, and had been there at least twenty-three days. There was then due and unpaid, as rent for the two rooms on the north

side of the hall by Wright the sum of \$945. All these facts are found by the master, and reported to the court. The master found and the court decreed the priorities, as between the two lienholders, Wolcott and Mrs. Ashenfelter, to be as follows: That Wolcott held, to the extent of \$420, the prior and first lien over Mrs. Ashenfelter; that Mrs. Ashenfelter, to the amount of her mortgage, held the next and second lien. It seems to have been apparent to the court that, after payment of costs and expenses and the liens thus decreed, there would be nothing left; so nothing is decreed as to any residue. Wright does not assign any separate error on his own behalf separately, but joins in the assignment by Wolcott. These do not relate to any matter affecting Wright separately, but only refer to priorities.

The first question to consider is whether the court erred in refusing to decree the \$945 as a lien on the library prior in time to the mortgage lien. The court held, and in effect so decreed, that this lien was lost on the library when Wright removed, by the
LANDLORD'S lien:
waiver. landlord's consent, out of the two rooms, and into the single room. If this ruling is correct, then, as to that sum, Wolcott would be only a general creditor, or, as it is sometimes expressed, "a creditor at large," without any specific lien for the rent thus accrued on the library. The two rooms first occupied by the tenant and the single room last occupied are entirely separate and distinct apartments, but plaintiffs in error contend, inasmuch as they are all under one roof, in the same building, that the rent which had accrued for the occupancy of the two rooms, and which had attached as a lien on the library there situated, followed the library to the other room, and continued there, also, as a lien. The defendants in error contend that the term "house" in the statute applies to the separate apartments in the same building, where

these are rented separately; that where there are several rooms in one building, and each room is occupied by a separate tenant, as between the landlord and the several tenants, each apartment so occupied is a "house," within the meaning of the statute; and that when the landlord consents to a removal of a tenant's property from the separate room so occupied it is, in legal contemplation, a removal from the house, and the lien is lost. This question arises on the following section of the Compiled Laws: "Section 1537. Landlords shall have a lien on the property of their tenants, which remains in the house rented, for the rent due; and said property may not be removed from said house, without the consent of the landlord, until the rent is paid or secured." The lien is upon the property of the tenant which remains in the house, not upon the property which, with the landlord's consent, is removed from the house. The tenant may not remove the property from the house until the rent is paid. This is a right which the landlord may insist upon, but, if he voluntarily consents to the removal, he waives his lien. This statute is a substitute for the old remedy of distress for rent, a right exercised by the landlord during an early period. Says Mr. Taylor: "The common law of England, and most of her statutory provisions regulating a distress for rent, have been generally adopted in the United States." "In order to sustain a distress, the relation of landlord and tenant must be actually completed and exist between the parties. * * * It will, however, only continue so long as that relation subsists." Taylor, sections 558, 563. The rule of the common law is well stated in *Williams v. Terboss*, 2 Wend. 151, as follows: "At the common law, the landlord could only distrain property which was actually on the demised premises when he came for that purpose. His right to distrain must also have been exercised during the term. If the tenant fraudulently

removed his property and effects from the demised premises, either before or after the rent became due, the landlord could not follow and seize them for rent, unless they were removed by the tenant after the landlord had actually come to distrain, and had view of the goods on the premises." Our statute is an outgrowth of this principle of common law of distress for rent, and, if the landlord voluntarily consents to a removal of the goods from the demised house, his lien is lost, because the statute expressly provides the lien attaches against the goods which remain in the house. The right is itself an incident of a particular tenancy, and arises out of it. This statute contemplates there must be, to create the lien, a landlord, a tenant, a house rented, and goods in that particular house. In case of a building, erected with many rooms, for the purpose of letting separate apartments to different tenants, no occupant is a tenant of the whole building, but only of a particular apartment, which apartment is the tenant's house. Over that he has full control. One entering there without his consent is a trespasser. It is his house. The lien grows out of the tenancy as to a house rented. Wright did not occupy the whole building, and he had no house rented, if the word "house" can apply only to the whole building. This question, however, is settled on authority.

PREREQUISITES
of lien; section
1537, construed.

Taylor, in his work on Landlord and Tenant, page 187, quotes from the case of Winslow v. Henry, 5 Hill, 481, with approval: "As rent can not issue out of a mere easement or incorporeal hereditament, upon the demise of a room, with a right of common passage along an entry leading from such room into the public street, it was held that the landlord could not seize goods of the tenant kept in such common passageway." Bukup v. Valentine, 19 Wend. 554, is exactly in point. The facts of that case are as follows: The defendant,

Valentine, demised to the plaintiff, for a term which ended May 1, 1835, the lower part of a house in Mulberry street, New York, consisting of all the lower story, the two front joint bedrooms, the front basement kitchen, with half the cellar and privilege in the yard. Valentine, at the same time, rented to one Merit the upper part of the same house, consisting of certain rooms, and also the back basement kitchen and half the cellar. May 1, 1835, Merit left that part of the house he had previously occupied; and the plaintiff, under a lease from Valentine for one year, removed into those apartments vacated by Merit. At the same time one Marshall became tenant of the apartments which Valentine had at first occupied. The plaintiff had failed to pay his rent for the lower part of the house which he first occupied, and for rent due for those apartments Valentine distrained the plaintiff's goods located in the upper part of the building, in the apartments he last occupied. The plaintiff brought replevin for the goods, and failed in the court below. He appealed to the supreme court, and it was contended there by Valentine that plaintiff had not removed from the demised premises. The court held otherwise, and reversed the case. The court say: "It is now said that the removal to another part of the same building was not a removal from the demised premises. I can not yield to this argument. Both before and after the rent fell due there were two tenants in the house, each having the exclusive enjoyment of a different part of the building. On the first of May, the plaintiff gave up the rooms he had previously occupied, and removed into other apartments. He ceased to be a tenant of the rooms he had occupied in 1834, as fully as though he had removed into an adjoining building owned by the same or another landlord." So this court say with respect to Wright. The case is exactly in point, correct, as we think, in principle, and

we are content to follow it, and therefore hold the rent accrued for the two rooms did not follow as a lien on the library to the single room across the hall. As to the \$945 rent due Wolcott for the two rooms occupied

GENERAL creditor: subsequent mortgagee: priority of mortgage lien.

by Wright, the former, having waived his landlord's lien by consenting to the removal of the property, at least as between himself and a subsequent mortgagee, it is a question whether in the court below Wolcott, being only a general creditor, was in a position to attack the mortgage of Mrs. Ashenfelter, on the ground that she had not complied with the statute requiring an affidavit to be filed within thirty days next preceding the expiration of one year from the filing of the chattel mortgage. Mrs. Ashenfelter had filed her affidavit, but not within the thirty days. She filed it several days too early, as at the time of such filing the thirty days specified in the statute had not yet commenced to run. If the affidavit is filed or exhibited too soon, or before the thirty days begin to run, such filing is nugatory, and of no effect. The following authorities are to that effect. Jones Chat. Mortg., sec. 287; Boone Mortg., sec. 250; Nat'l Bank v. Shroyer, 20 N. J. Eq. 13; Newell v. Warner, 44 Barb. 258.

The chattel mortgage must be regarded as if the affidavit had not been filed. Our statute provides as follows: "Section 1589. Every mortgage so filed, shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and, if said mortgage is to secure the payment of

money, the amount yet due and unpaid; such affidavit shall be attached to and filed with the instrument or copy on file to which it relates." The record in the case before us discloses that Mrs. Ashenfelter had not taken possession of the mortgaged property, so at the commencement of the action, in the absence of the statutory affidavit, and without possession having been taken by the mortgagee, her mortgage under the statute would be of no effect as to such creditors of Wright as were in situation to assert its invalidity. The authorities before cited give construction to a statute like our own, and under them it is clear, as against creditors who are in a position to raise the question, the chattel mortgage is void. Was Wolcott in that position in the court below? He had not reduced his claim to judgment. He had no specific lien on the library in any form. At best, he had only the right to sue his debtor. In the meantime, Mrs. Ashenfelter had the right, if she could peaceably obtain possession, to do so, or to proceed and foreclose her mortgage. Is there any rule which would require that she should be restrained of her right to foreclose, and wait the movements of the general creditors, so long as the mortgage remained valid as between her and the debtor? The mortgage contained a provision that, upon default in payment, she might take actual possession of the property wherever she could find it. Default was made, and her rights as against Wright to possession was perfect. If she had taken actual possession, her right under the mortgage would have been as complete as if she had filed the affidavit required by statute. Controversy arose as to possession between Mrs. Ashenfelter and Wolcott, so she procured a receiver to be appointed to hold the property, and the court decreed a sale thereof. As to the \$945, Wolcott had not then procured either a judgment or lien by attachment. In this state of

things, if Wright had turned over to the mortgagee, possession, notwithstanding her failure to comply with the statute, she would have been preferred to the general debt of Wolcott; not so as to the specific landlord's lien, for the single room. That, however, is decreed to be prior to Mrs. Ashenfelter's, and is out of the case. If, then, she could have received possession, and thus have perfected her right, which had become suspended by failure to file the statutory affidavit, we can see no reason why she might not have properly invoked the aid of the court to reduce the property to cash, and apply it to the discharge of her specific lien as against Wright, unless some lienholder, with a right to question the legality of her mortgage, interposed. If Wolcott could attack the chattel mortgage, then any general creditor could do so. It would, to say the least, be illegal to hold that a creditor, without any lien upon a chattel, or right thereto, in the absence of a judgment which might by execution be enforced against such chattels, could call upon a court of equity to remove even a void lien from the property, constituting an apparent cloud upon it. Without a specific lien on the chattel, what benefit could such a creditor derive? He could not sell the chattel without judgment and execution. A consideration of some of the cases will indicate the construction which should be placed upon the words of the statute, "shall be void against creditors." In *Van Heusen v. Radcliff*, 17 N. Y. 580, the court say: "When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts." Mr. Bump, in his work of *Fraudulent Conveyances*, page 453, gives a clear elucidation of this subject: "It is commonly said that a fraudulent conveyance is void against creditors, but this must be taken in a limited sense. The law provides a mode for determining the rights of

all parties, and does not permit even a creditor to act as judge in his own case. A fraudulent conveyance, moreover, does not confer any additional rights upon creditors. They can not seize the property of their debtor without any legal process, and appropriate it of their own accord to the satisfaction of their demands.

* * * They may cause it to be appropriated to the payment of their debts, but can only do so in the mode which the law prescribes. * * * Consequently the expression that a fraudulent transfer is void against creditors simply means that the rights of creditors as such are not, with respect to the property, affected by such transfer, but that they may, notwithstanding the transfer, avail themselves of all the remedies for collecting their debts out of the property, or its avails, which the law has provided in favor of creditors, and that in pursuing those remedies they may treat the property as though the transfer had not been made; that is, as the property of the debtor. The transfer is ineffectual to shield the property in the hands of the grantee from the just claims of the creditors of the grantor, when those claims are prosecuted against it in the manner pointed out by the law. His title, however, is good against even creditors, unless they protect themselves against him by pursuing that prescribed course by which alone the property can be made available for the satisfaction of debts. A 'creditor at large,' as it is termed, can not impeach the conveyance, but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of his debt. * * * Before a creditor can impeach the transfer, he must have an execution, attachment, or some other legal process which authorizes the seizure of the property. This process may be a warrant of distress or an attachment, as well as on execution." Although unable to

examine all the cases cited by Mr. Bump in support of this position, one which we believe to be well established, we append them for reference. *Andrews v. Durant*, 18 N. Y. 496; *Rinchey v. Stryker*, 26 How. Pr. 75; *Schlüssel v. Willett*, 32 Barb. 615; 12 Abb. Pr. 397; 22 How. Pr. 15; *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

In *Owen v. Dixon*, 17 Conn. 496, a well considered opinion is given, from which the following quotation is made: "It is a familiar principle that a fraudulent conveyance of property is void as to the creditors of the vendor. By this is meant that the rights of a creditor as such are not, with respect to the property, affected by such conveyance. * * * A 'creditor at large,' as it is termed, can not impeach the conveyance, but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable" * * * for the debt. We think the same rule of construction established with respect to conveyances fraudulent as to creditors should be applied to the term "void as against creditors," used in our statute. There is authority, however, more directly in point, giving that construction to statutes to the same effect as the one quoted. In New York the statute on the subject under consideration is much like our own. In *Thompson v. Van Vechten*, 27 N. Y. 582, in considering who might attack a chattel mortgage for want of the statutory affidavit, the court say: "It is true the mortgage can not be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his [the debtor's] property; for creditors can not interfere with the property of their debtors without process." It seems to us clear that until Wolcott had by some legal means procured a lien on the property, being only a general creditor, or, as some books express it, a "creditor at large," he could not appeal to a court of equity to

remove by its decree a mortgage good against the debtor. The conclusion reached on this point is much strengthened by the terms of section 1590 of the Compiled Laws. This section and section 1589 must be construed together, as they clearly relate to the same subject. "Sec. 1590. If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided." This must remove all substantial doubt. If the affidavit provided for in section 1589 is not filed within the thirty days required, then the mortgage is void as to creditors; but if such a creditor omits to take such action as to obtain a lien thereon before the affidavit is thereafter filed, and the mortgagee files his affidavit as required by section 1589, it operates to revive the mortgage against all creditors who have not in the meantime obtained liens. Failure to file the affidavit required within the thirty days suspends the operation of the mortgage as against general creditors, and if they reduce their debts to judgment against the mortgagor, and levy on the property of the mortgagor, while the mortgage is suspended for want of the statutory affidavit, they secure priority, or, if they levy attachments, the same result is reached; but, if they omit to take some such action, the mortgage lien may be revived. This latter section gives construction to the term "creditors," as used in the preceding one, and limits that term to such as may, by some legal means, secure a lien on the mortgaged property. As to the \$945, Wolcott, being only a general creditor, without specific lien on the library, and being without judgment upon which execution might issue, could not attack the mortgage of Mrs. Ashenfelter, the same being good and valid against the mortgagor. We find no error in

the record of the court below, and accordingly the judgment and decree there entered are affirmed.

WHITEMAN, LEE, and McFIE, JJ., concur.

[No. 395. February 12, 1890.]

GAUDALUPE S. DE GARCIA Y PEREA, APPELLEE,
v. MARIANO BARELA, APPELLANT.

WILL—BILL IN EQUITY TO SET ASIDE SETTLEMENT OF EXECUTOR, ETC.—
CONSTITUTIONALITY OF SECTION 562, COMPILED LAWS, NEW MEXICO,
1884—JURISDICTION OF SUPREME AND DISTRICT COURTS.—By section
1868 of the organic act, providing that "the supreme and the district
courts, respectively, of any territory, shall possess chancery as well
as common law jurisdiction," general jurisdiction is conferred on
those courts over cases of administration, and section 562, Compiled
Laws, 1884, in so far as it attempts to vest the probate courts with
exclusive original jurisdiction in such cases, is in plain contravention
of that act and void.

ID.—BEQUEST OF PERSONAL PROPERTY, CONSTRUCTION OF.—A clause in a
will bequeathing to the wife of the testator "all articles of goods in
my house, personal furniture, household furniture, and all that exists
therein," includes a sum of money contained in an iron box and safe
in the house, known to be there only by the testator himself, and not
mentioned in the will.

ID.—EXECUTOR, FINAL SETTLEMENT OF—FRAUD.—Where the executor of
an estate fails to account in his inventory for any money or property
in his possession belonging to the estate, and obtains a final settle-
ment, by presenting to the court a receipt in full from the legatee of
all claims against the estate, procured by improper influences, such
receipt and settlement are void and may be set aside for fraud.

ID.—CODICIL, ATTESTATION OF.—Section 1380, Compiled Laws, 1884,
requires that a will shall be attested by three or more witnesses. A
like number is required to constitute a valid attestation of the
codicil. *Jar. Wills*, sec. 93.

APPEAL, from a decree in favor of complainant,
from the Third Judicial District Court, Dona Ana
County. Decree affirmed.

The facts are stated in the opinion of the court.

WADE & RYNERSON and CATRON, KNAEBEL &
CLANCY for appellants.

S. B. NEWCOMB for appellee.

WHITEMAN, J.—This is a suit in equity, commenced in the district court of Dona Ana county, by Guadalupe S. de Garcia y Perea, widow of Pedro Garcia y Perea, who died February 25, 1887. The decedent left a will written in the Spanish language, of which the following, it is admitted in the record, is a correct translation:

“Last will of Pedro Garcia y Perea. Know all men by these presents, that I, Pedro Garcia y Perea, on this twenty-ninth day of January, A. D. one thousand, eight hundred and eighty-six, write my last will as my voluntary act under the following rules. (1) I declare that my nephew, Mariano Barela, is the administrator of all my estate, of real estate and personal property. (2) I declare that the house, and now my residence, composed of all the square bounded on the east with the second public street, and on the west bounded with Water street, I grant to my wife, Guadalupe Perea. (3) I also grant to my wife, Guadalupe y Perea, the land and property near the railroad depot, and generally known as ‘Juan Bautista Armijo and Manuel Lopez,’ as it appears in the deed. (4) I also grant to my wife, already referred to, all articles of goods in my house, personal furniture, household furniture, and all therein exists. (5) I also grant her ten cows picked from my property. (6) I grant in favor of the Las Cruces Church, five hundred ewes. (7) My administrator is instructed to pay \$50 in money for masses for my deceased wife, Romaldita, in case of her death. (8) All notes that may be due me, accounts, claims of whatever nature they may be, my administrator is authorized to collect; and whatever he does shall be sustained. (9) I grant to Cruz Garcia one house, formerly Mariano Molinar’s, situated near the Protestants’, as it appears by the deeds. I also

grant to Cruz Garcia one bay mare that Conception Martinez has, and ten cows, two asses, burros o' burras (male or female), as they may be. (10) I grant to Adilaida Flore one hundred ewes. (11) I grant to Gandelaria Garcia one hundred ewes. (12) I grant to Clemente Garcia one hundred and fifty ewes. (13) I grant to Martin Garcia five cows. (14) I grant to Julian Albillar one hundred ewes. (15) I leave to Guadalupe, my wife, one small wagon and two mules. (16) To Jose Angel Sisneros, I leave one hundred ewes. (17) To Clemente Garcia, I leave two asses. (18) \$200 in money that Jose Maria Padilla owes me, I grant to my niece, Juanita Barela. (19) To Teresa Chave, I leave fifty ewes. (20) All the other property that is not here specified, I grant to my sister, Rafaela Barela, and to my nephew, Mariano Barela. In witness whereof, I sign this myself, in the presence of witnesses, in the town of Las Cruces, this 29th day of January, A. D. 188—.

(Signed) "PEDRO GARCIA ^{his}X Y PEREA.
_{mark}

"In presence of

"JACINTO ARMIJO,

"NESTOR ARMIJO,

"GEORGE BUTSCHOFKY,

"PEDRO LASSAIGNE.

"At the reading of the will, the testator directs that his administrator do sell five hundred ewes, and that they be distributed amongst honest and needy persons, at the will of the administrator.

(Signed) "PEDRO GARCIA Y PEREA.

"In presence of the same witnesses:

"JACINTO ARMIJO,

"NESTOR ARMIJO,

"GEORGE BUTSCHOFKY,

"PEDRO LASSAIGNE."

"Territory of New Mexico, county of Dona Ana. On this twenty-ninth day of January, A. D. 1886, personally appeared before me the undersigned, having

been duly commissioned, qualified, and acting notary public, Pedro Garcia y Perea, whom I personally know to be the same person who signed the foregoing testament and last will in the presence of the witnesses mentioned, and that he signed it in my presence and declared that he did it voluntarily for the uses and purposes therein stated.

"In witness whereof I sign this in the town of Las Cruces, the month and year aforesaid.

[SEAL]

"JACINTO ARMIJO,

"Notary public within and for Dona Ana county, New Mexico.

"Instructions to the administrator, Mariano Barela: I further declare that my sister, Rafaelita Barela, and my nephew, Mariano Barela, are heirs; and I grant them the following properties: Certain real estate situated in La Mesilla, called a Terreno; the property bought from the Perez, as it appears by the deeds; the properties known as my ranch, as it appears by the deed of purchase, and in the U. S. office; the balance of the stock and animals after paying the donations this day made; all the notes and properties, as it appears by the deeds and my books, except the donations made. I declare that the following witnesses be subpoenaed in the United States office: Mauricio Gamboa, Jose A. Sisneros, Jose Ma Domingues, and Manuel Trujillo,—to prove the right in the U. S. office in the application made by Julian Albillar.

"PEDRO GARCIA Y PEREA.

"In presence of JACINTO ARMIJO, GEORGE BUTSCHOFKY.

"I declare that there is due me:

S. B. Newcomb.....	\$500 00
Eugenio Moreno paid part.....	20 00
Padre Tenorio.....	75 00
Barbaro Lucero.....	250 00
(The debts of Jacinto Armijo, J. J. Preciado, J. N. Montes, are forgiven.)	
D. Woods.....	80 00

"PEDRO GARCIA Y PEREA.

"Jan. 29, 1886.

"In presence of JACINTO ARMIJO, GEORGE BUTSCHOFKY."

The will, after providing for a number of legacies, made Rafaela Barela and Mariano Barela, sister and nephew of the testator, respectively, residuary legatees. The complainant's claims, involved in this case, all arise under the second, third, and fourth paragraphs of the will. On the twenty-eighth of February, 1887, the will was probated, and defendant Mariano Barela appointed executor. On the twenty-first of September, 1887, while the administration of the estate was still pending in the probate court, the complainant filed her original bill of complaint against Mariano Barela as executor, and individually, Rafaela Barela, William H. H. Llewellyn, and Thomas Brannigan. Subsequently the case was dismissed as to Llewellyn and Brannigan, and an amended bill was filed on October 12, 1887, against the other defendants. A reamended bill was filed November 2, 1887, which also made Demetrio Chavez, the probate judge, a defendant. At the time of the filing of the reamended bill the administration of the estate had been closed up, and an order made by the probate court discharging the executor from any further liability as such, and also discharging the sureties upon the bond of the executor.

The reamended bill sets up complainant's marriage with the decedent, his death, the execution of the will aforesaid, its admission to probate, and the appointment of Mariano Barela as executor. It also avers that two codicils to the will were approved at the same time as the will, which, she avers, were never executed by the decedent, and are void because not properly executed; that she had no knowledge of the existence of such codicils, and no notice of the attempt to have the same probated until long after the time when she might or could have availed herself of the right and benefit of an appeal from the action of the probate court in the premises; that at the time of the death of the testator, he was entirely free from debt,

and that the estate came into the hands of Mariano Barela, executor, unincumbered; and that the said executor failed and refused to file in the probate court any schedule or inventory of the property coming into his hands as such executor. She further avers that by the terms of said will the testator devised to her a certain house and lot situated in the town of Las Cruces, and particularly described in the will, together with everything contained in said house and upon said premises, and also certain other real estate situated in Dona Ana county, near the Las Cruces depot of the Atchison, Topeka & Santa Fe Railroad, known as the "Juan Bautista Armijo and Manuel Lopez properties," as described in the deeds to said property, and also ten cows, two mules, and a wagon; that the real estate mentioned in the first codicil to said will as the real estate bought of Perez is a part of the Juan Bautista Armijo tract, which was devised to her by the decedent, and that under the said first codicil the said Mariano Barela claims said land; and that Demetrio Chavez is the probate judge of Dona Ana county, who admitted the said codicil to probate. She further avers that, at the date of the death of her husband, there were, among other things, in the house and lot devised and bequeathed to her, an iron box and an iron safe which belonged to the testator, and which, together with their contents, became her property under the terms of said will, and also that there were on and contained in said premises so devised to her a buggy and two horses, which became her property by the terms of said will; that shortly after the death of her husband, and while she was still suffering and prostrated by reason of his death, and ignorant of her rights under the will, the defendant Mariano Barela came to her house, and, under pretext of obtaining documents and papers belonging to the testator, opened said iron box and said iron safe, and without her consent took therefrom and

carried away a large sum of money which belonged to her, the amount of which she could not state, but believed it amounted to the sum of \$25,000; that the defendant Mariano Barela counted said money, and gave to complainant \$500 of her money taken as aforesaid, and presented each of three servant girls in the house with \$10, and took and carried away the balance of said money, and also took and carried away the horses and buggy aforesaid; that, at the time of the occurrence last mentioned, she was totally ignorant of her rights under the will; that she is uneducated, and unable to read or write, easily deceived, and that she at that time reposed implicit confidence in the good faith and integrity of the defendant Mariano Barela, and therefore did not remonstrate against his said actions, but permitted him to take away the said horses and buggy and said money without giving a receipt for the same, and without her knowing the amount of money so taken; that, after she became informed of her rights under the will, she requested the defendant Mariano Barela to inform her of the amount of money so taken from her, and also requested him to pay and return the same to her, together with the two horses and buggy; that the said defendant refused to comply with her request, and sent his agents, Nestor Armijo, Jacinto Armijo, and Pedro Lassaigne, the parish priest and spiritual adviser of complainant, to dissuade and discourage her from asserting and demanding her rights in the premises, and to represent to her that she was not entitled to the money or to anything else which the said Mariano Barela had taken away from said house and lot, and to represent to her that the title to said house and lot was defective, and that, unless she would accept the two horses and buggy, and a deed which the said Mariano Barela represented to her conveyed to her all the lands formerly known as the "Juan Bautista Armijo and Manuel Lopez properties," and said house

and lot, in full satisfaction of all demands against him as such executor, he would cause the title to said house and lot to be investigated, and the complainant to lose, and be turned out of said house; that she, being deceived by the false and fraudulent representations of Barela, and being intimidated and coerced by his threats and menaces, and being ignorant of her rights, agreed to accept said proposition and accede to said demand, and thereupon the said Mariano Barela executed and delivered to her a deed which he represented conveyed to her all the lands known as the "Juan Bautista Armijo and Manuel Lopez properties," and also the house and lot in Las Cruces, and returned to her the said two horses and buggy which he had wrongfully taken away, and thereupon she executed and delivered to the said Mariano Barela the receipt which he demanded of her; that said release and receipt so executed and delivered by her was wholly without consideration, and gave to her only a part of what she was entitled to under the will, and is a fraud upon her rights, and would, if permitted to remain in force and effect, deprive her of property of great value, viz., the value of \$25,000, without any recompense or consideration. The bill also avers that said Mariano Barela and Rafaela Barela are the residuary legatees under the will, and as such claim the money and property wrongfully taken from complainant by the said Mariano Barela, executor, etc., and that on the twenty-fourth day of October, 1887, while complainant had pending in the district court a bill of complaint against Mariano Barela, executor, and Rafaela Barela, which bill, among other things, prayed for the cancellation of the said receipt and release, the said Mariano Barela, in order to make a final statement of his accounts as executor, went before the defendant Demetrio Chavez, probate judge, and proffered and used said false and

fraudulent receipt and release for the purpose of obtaining a final release and discharge from his liabilities as such executor, notwithstanding the fact that there never had been filed in the probate court any schedule showing the kind and value of the property and assets which had gone into the hands of the executor, and that the complainant had no notice of such settlement and discharge until some five or six days after the same had been made and granted.

The prayer of the bill is that the said codicils to the will, and the alleged and pretended discharge of the said Mariano Barela as executor, and the proceedings in reference to admitting said codicils to probate, and in granting the discharge of the executor, be declared null and void, and for a full and perfect discovery of all sums of money, valuable papers, and property of every description and kind obtained by him, received, or taken from the house and lot, and everything contained therein, devised to complainant; that the will of the late Pedro Garcia y Perea, so far as the same relates to the rights of complainant, be construed, and her rights thereunder be enforced by a decree of the court; that said pretended receipt or release be surrendered and cancelled, and said transaction be declared null and void; and that an account, etc., be taken, under the direction of the court, of all the dealings and transactions between the defendant Mariano Barela and complainant, etc.

The defendant Mariano Barela, in his answer, admits the will, the probate thereof, and of the codicils, his own appointment as executor, and that the codicils were not properly executed, because signed by only two witnesses, but he says that at no time has there ever been any objection or contest made in the probate court as to those codicils, and that he derives no benefit from the codicils, and renounces all benefit therefrom, but whether they are valid or not in no manner

affects complainant's rights under the will; that no objection or exception has ever been made in the probate court to any proceedings therein relative to the estate; that complainant's receipt is only evidence of her having received her distributive share of the estate; and that he disclaims all title to the Armijo and Lopez properties devised to complainant by the will. The answers of the other defendants are unimportant on this appeal, and space will not be taken up in stating their contents. A general replication was filed to the answer of the defendant Mariano Barela by the complainant.

The special master in chancery, to whom the cause was referred, found in favor of the complainant upon all the material allegations of the bill; that the money found in the iron box and iron safe, and carried away by the defendant Mariano Barela, passed to the complainant, under the devise to her of the house and lot in Las Cruces, articles of goods, personal furniture, household furniture, and all that was therein contained; and that the amount of said money was \$6,138; and the report of the master recommended a decree in favor of the complainant for that amount, less the \$500 the defendant paid to her. The defendant filed exceptions to the master's report, which were, on the eighth day of October, 1888, considered by the court and overruled. The court then made a decree confirming the report of the master in all things except as to the time from which the amount found in favor of complainant should bear interest. The decree also held the first codicil to the will, and the action of the probate court in admitting the same to probate, null and void, and directed the executor to execute the will as construed by the master and confirmed by the court. It declared null and void the so-called final settlement made by the executor in the probate court, as to the complainant, and decreed that the complainant have

and recover of the defendant Mariano Barela as executor of the said estate, and of the said Mariano Barela, in person, the sum of \$5,638, with interest from the date of the decree at the rate of six per cent per annum, and for costs, etc.

The first question presented for the consideration of the court is raised by the appellants' first and third assignments of error, viz., "that the court erred in not dismissing the bill for want of jurisdiction, and in overruling defendants' exception numbered eight, as to the jurisdiction of the court." The ap-

WILL: bill to set aside executor's settlement: jurisdiction of supreme and district courts: power of legislature to pass act 1884, section 562, Comp. Laws.

pellant contends that section 562, Compiled Laws, 1884, conferred exclusive original jurisdiction upon the probate court of Dona Ana county to hear and determine all questions relative to the probate of the will, and any controversy respecting the will, involved in the case, the conduct of the administration of the estate, and the settlement of the estate by the executor; that the appellee should have presented the questions arising in this case to the probate court, and, if unsuccessful there, could have then appealed to the district court; and that the district court did not possess original jurisdiction to hear the case, and could only acquire jurisdiction by appeal taken from the probate court. Section 562, Compiled Laws, 1884, is as follows: "The several probate judges shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, and the repealing the same; the appointing and displacing guardians of orphans and persons of unsound mind; to binding out apprentices; to settlement and allowance of the accounts of executors, administrators and guardians; to hear and determine all controversies respecting wills, the right of executorship, administration, or guardianship, respecting the

duties or accounts of executors, administrators or guardians, and all controversies between masters and those bound to them; to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate of their testator or intestate; provided that, when any such demand shall exceed one hundred dollars, the claimant may sue either before the probate court or in the district court, in the first place." This section of the statutes is certainly broad in its provisions; and it may be, as contended by the appellant, that it was the intention of the legislature to vest in the probate courts "exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; * * * to hear and determine all controversies respecting wills; * * * to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate of their testator or intestate." But the appellee insists that, if the statute is susceptible of the construction claimed for it by the appellant, the legislature had no power to take from the district court a part of the jurisdiction conferred upon such courts by the organic act of New Mexico, and vest such power in the probate courts; and this question we will proceed to consider first. Section 1868 of the organic act provides: "The supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common law jurisdiction." The chancery and common law jurisdiction here conferred upon the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. It includes, and has always included, a very general jurisdiction over cases of administration, from the fact that common law courts and probate courts do not have powers adequate

to give relief. The jurisdiction is founded upon the principle that it is the duty of the court to enforce the execution of trusts, and the "necessity of taking accounts, and compelling a discovery," etc. 3 Williams, Ex'rs, 2117. The organic act provides that "the jurisdiction of the probate court shall be as limited by law." There can be no doubt that by the organic act a part of the judicial power of the territory was vested in the probate courts; but this power was limited to such subjects as have from an early day, both in this country and in England, pertained to these courts, such as the probating of wills, the appointment of executors and administrators, the allowance of claims against estates, the settlement of accounts of executors and administrators, the appointment of guardians, and the control of infants' estates, etc. Such courts are not, in their mode of proceeding, governed by the rules of the common law. They are without juries, and have no special system of pleading; and hence their powers are inadequate to the complete exercise of original and exclusive chancery jurisdiction. In *Ferris v. Higley*, 20 Wall. 375, the supreme court of the United States, we think, fairly and accurately interpreted the meaning of the phrase "as limited by law," as used in the organic act, with reference to the jurisdiction of the probate courts. In that case the legislature of Utah territory had passed an act as follows: "The several probate courts in their respective counties have power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment; and they shall be governed in all respects by the same general rules and regulations as regards practice as the district courts." In construing this statute, that court said: "The argument is that the words 'shall be as limited by law' refer to laws to be thereafter made by the territorial legislature, and that,

as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase 'as limited by law,' we are wholly to exclude laws made by the legislature of the territory. There may be cases when that legislature, conferring new rights or new remedies, or establishing anomalous rules of proceeding within their legislative powers, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation. But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these territorial courts. The general history of our jurisprudence, and the organic act itself, are also to be considered; and any act of the territorial legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the territory, and in the distribution of judicial power amongst them; inconsistent with the nature and purpose of a probate court as authorized by that act; and inconsistent with the clause which confers upon the supreme court and district courts general jurisdiction in chancery as well as at common law." It is true that the Utah statute is much broader in its scope than our own, but the difference is in degree only. The principle involved is as to the power of the territorial legislature to take from the district courts jurisdiction of matters which have belonged to such courts from time immemorial, and which is specially conferred by the organic act, and to confer upon the probate courts

jurisdiction of matters far beyond that granted by the organic act, and which in the history of our jurisprudence, has never been considered as inherently belonging to such courts. We are of the opinion that section 562, Compiled Laws, 1884, so far as it attempts to invest the probate courts with exclusive original jurisdiction in controversies of the character of the case at bar, is void. The case presented by the bill and made out by the evidence involves a trust fraudulently executed, and necessitates a discovery and an accounting. The existence of these is all that is necessary to invoke the equitable jurisdiction of the court.

We now proceed to consider the main point involved in the case, viz., whether, under the fourth clause of the will, the money contained in the iron box and iron safe passed by the devise to complainant, or to the residuary legatees under the last clause. Some discussion has occurred as to whether the translation made of the will from the Spanish to English is correct; but the record discloses an admission of both sides that the copy of the will heretofore set out in this opinion is the sworn translation of the will made by Pinito Pino, and as such was introduced in evidence without objection. We therefore adopt that translation as the proper one.

BEQUEST of personal property; construction of will.

The fourth clause of the will reads: "I also grant to my wife, already referred to, all articles of goods in my house, personal furniture, household furniture, and all that therein exists." The house contained, among other things, an iron box and an iron safe; and in these were found the money which is the subject of this controversy. The will was evidently written by some person who was entirely ignorant of legal forms, and of all rules relative to the construction of wills, but, however lacking in legal precision of expression the will may be, the testator had some meaning in the language used to convey his wishes with respect to the

disposition of his property, and the meaning must be ascertained from the instrument itself.

The clause of the will under consideration contains a devise of certain particular things which are enumerated; and the appellant contends that the words "all that therein exists," which follow the enumeration of particular things, did not extend the devise, but limited it to the particular things enumerated. The rule invoked is a familiar one. But little assistance is derived from general rules in the construction of a will. The intent of the testator is to be sought in the instrument itself. In making it, he does not often have in mind any particular rules of construction applied to other wills. He uses those expressions which he supposes convey his own thoughts and wishes. In *Given v. Hilton*, 95 U. S. 598, it is held that in the construction of wills, as well as of statutes where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things ejusdem generis with the particular things mentioned. This is because it is presumed the testator had only things of that class in mind; but this rule of construction rests on a mere presumption, easily rebutted by anything that shows the larger subject was in fact in the testator's view. The language used in the fourth clause was certainly sufficient to make a good devise to complainant of all the things that were enumerated, without the use of the words "and all that therein exists." Why were these words added, unless the testator had in mind something besides the particular things mentioned? The second clause of the will devised to the wife the testator's residence, which is described. The fourth clause devised to her the articles of goods, personal furniture, household furniture in the house, "and all that therein exists." Exists where? Not in the house, but in the personal and

household furniture. We think there can be no doubt but the iron box and iron safe passed to the wife under the enumeration of "articles of goods, personal furniture and household furniture." But there was something more in the articles enumerated to be disposed of. Therefore the testator adds: "And all that therein exists." These words had a meaning to the testator, because he alone knew that the money was there. Taking the language used in the will in connection with the testator's esoteric knowledge of the existence of a large sum of money in the iron box and iron safe, we hardly see how a man ignorant of the rules of the construction of wills could have expressed his thoughts and intentions more clearly than the same were expressed in this will. The purpose of the testator was to dispose of all his property; and, if the contention of appellant be correct, the will gave to the wife the residence of the testator, and a piece of land near the depot in Las Cruces, known as the "Juan Bautista Armijo and Lopez" land, the household furniture in the residence, ten cows, one small wagon, and two mules. It made specific bequests to various other persons of one thousand, six hundred head of sheep, a house, cows, asses, money, etc., and the remainder of the property to the defendants, and although possessed of a large amount of money, the wife was left without a dollar, except as she might raise it by a sale of the property devised to her. The complainant was the wife of the testator. They had no children. There is nothing in the record to suggest that the testator did not entertain for his wife that complete affection that all good men should have for good wives. No reason existed to indicate that the testator had any cause to deprive his wife of that maintenance and support from his property to which she was entitled. It is held in *Smith v. Bell*, 6 Pet. 74, that "in the construction of ambiguous expressions the situation of the parties may

very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them." The residuary legatees were, respectively, the sister and nephew of the testator. But the testator was under no legal or moral obligation to make provision in his will for their support. Had he ignored them entirely, no one could question his right to do so. But to the wife he was bound by legal and moral ties that could not be disregarded. We must presume that the testator had in his mind these obligations when he made his will, and that his intentions in respect thereto were in accordance with the dictates of humanity and morality. From these considerations, we think it was the intention of the testator to leave the money to the complainant, and that such intention is clearly expressed in the will.

The court below set aside the receipt executed by complainant to the defendant Mariano Barela of all claims against the estate of her deceased husband, and this is assigned by the appellant as error. It appears from the record that, a few days after the death of Pedro Garcia y Perea, the defendant, Mariano Barela, in company with one Nestor Armijo and others, went to the residence of the deceased, and opened and read the will, and obtained from the wife the combination of the safe and the key to the iron box, and took therefrom money which was then and there counted, and which amounted to \$6,138. The defendant gave to the complainant the sum of \$500, and other small sums to household servants, and carried the remainder away with him. At the same

FINAL settlement of
executor: fraud.

time he took away a carriage and two horses, which were found in a corral on the same premises. The wife at the time made no objection. She was advised at the time by Nestor Armijo that, in his opinion, the money belonged to the defendant Barela. Afterward a controversy arose on account of the executor having taken away the horses and carriage, and the deeds to the property devised to the wife. Up to this time there seems to have been no dispute as to the ownership of the money. The complainant is an ignorant woman, and seems to have accepted implicitly the statements of others that the money belonged to defendant. Nestor Armijo, who had so advised her, had been requested by her husband, before his death, in her presence, to look after her interests after his death; and therefore his advice, naturally, had great weight with her. Armijo and one Pedro Lassaigne, parish priest and spiritual adviser of complainant, undertook to settle the dispute. They went to the house of complainant, and persuaded her to give the defendant a receipt in full of all claims against the estate in consideration of his returning the horses and carriage and the deeds to her property. The complainant at first refused to give a receipt in full, but Armijo insisted on having a receipt to cover all her demands against the estate. During the conversation, Armijo told the complainant that defendant had written a letter to certain relatives of the deceased to come on and contest complainant's right to the property. In this way they preyed upon her fears, and prevailed upon her to settle with defendant, in order that she might get a perfect title to the property that had been left to her; the defendant promising, at his own expense, to defend any suits that might be brought against her. Under these circumstances, complainant signed and delivered to the defendant a receipt in the following words:

"TERRITORY OF NEW MEXICO, }
County of Dona Ana. } ss.

"Guadalupe Sisneros Garcia, widow of the late Pedro Garcia y Perea, late of the said above county and territory, hereby receipts in full of all claims against said estate of said Pedro Garcia y Perea, in consideration of two horses and one buggy, and in full of all moneys, notes, debts, credits, choses in action, and all claims whatsoever due said estate, and does hereby relinquish all claims against said estate, and does hereby release Mariano Barela, executor of the last will and testament of the said late Pedro Garcia y Perea, from all claims of the undersigned widow of the said Pedro Garcia y Perea, deceased.

"GUADALUPE S. Y GARCIA,

"NESTOR ARMIJO,

"PEDRO LASSAIGNE."

We think the court did not err in sustaining the master's finding that the receipt given by complainant was obtained by improper influences, by working upon her fears, and imposing upon her confidence and ignorance, and that the procuring of it was a fraud upon her. It does not matter whether the motives of the priest and Nestor Armijo in persuading complainant to execute the receipt were honest or sinister,—whether they acted as the agents of defendant or as the mutual friends of both parties. They held such relations to her as to give them the utmost influence over her conduct. She was ignorant of her rights, and they took no pains to inform her. Professedly her friends, they, whether purposely or not, insinuated in her mind the belief that only by acting on their advice could she preserve the property which she understood had been left to her by the will. At this time no thought of the money found in the safe was in her mind; but evidently the defendant's purpose, by obtaining the receipt, was

to estop her thereafter setting up any claim to the money. *Wheeler v. Smith*, 9 How. 82. The law imposes upon an executor the utmost good faith in the discharge of his duties to the estate and to the legatees. He will not be permitted to derive a benefit from the administration of such trust.

The order of the court below setting aside the final settlement made by the executor in the probate court, we think, was entirely proper. At the time the settlement was made the executor had in his hands a large amount of money that belonged to complainant under the will. He took no account of this money in his inventory of the property belonging to the estate. He accounted for it in no manner whatever. And a final settlement of his accounts as executor, under such circumstances, was a fraud upon the rights of the complainant, and was very properly held to be null and void.

The appellant contends that there was error in sustaining the finding of the master that the testimony showed that the testator in the fourth clause of the will, intended to give to his wife the money in question. The record shows that parol testimony to prove the intentions of the testator with respect to the money was first offered by the appellant, and was permitted to be given over the objection of the appellee, not because the master regarded the evidence as competent, but, as he says in his report, "he could find no rule of law authorizing a master to exclude testimony of any kind, which counsel might deem proper to offer." The report shows, further, that the master did not consider the parol evidence competent, and did not consider it in making up his findings.

The master says in his report: "I am of the opinion that there is no ambiguity in the language of the fourth clause of the will such as will relax the rule, and admit the parol testimony to ascertain testator's inten-

tion." This conclusion of the master was sustained by the court below, and we can see no error in that ruling. On the contrary, we think the court below declared a correct principle of law upon the subject, and applicable to this cause.

The second codicil of the will was attested by but two witnesses. Section 1380, Compiled Laws, New Mexico, requires that a will shall be attested
ATTESTATION OF
codicil. by three or more witnesses. To constitute a valid attestation of the codicil would require no less number. Jar. Wills, sec. 93.

The court below committed no error in setting aside the action of the probate court approving said codicil.

A number of errors have been assigned by the appellants besides those already noticed, but they all depend more or less upon the questions already noticed in this opinion. We do not think it necessary to enter into a discussion of them. The case was properly decided below upon the merits. We see no substantial errors in the record, and the judgment will be affirmed.

LONG, C. J., and LEE, J., concur.

[No. 385. February 12, 1890.]

DAVID ABRAHAMS, APPELLEE, v. THE CALIFORNIA POWDER WORKS, APPELLANT.

TRESPASS ON CASE—NEGLIGENCE—DAMAGES—RESPONDEAT SUPERIOR.—

Where gunpowder is consigned to be sold on commission, the relation between consignor and consignee is not that of master and servant, but simply of consignor and factor or consignee for the purpose of selling the goods; and where such factor or consignee has the exclusive management and control of the storage of the goods as such, of which the consignor has no knowledge, and with which has nothing to do, the doctrine of respondeat superior does not apply; and the consignor is not liable, in an action of trespass on the case, for damages, resulting from an explosion of the gun powder so consigned and stored.

APPEAL, from a judgment in favor of plaintiff, from the Third Judicial District Court, Grant County. Judgment reversed, and cause remanded for new trial.

The facts are stated in the opinion of the court.

CATRON, KNAEBEL & CLANCY for appellants.

If it had been proved that both defendants below had joint ownership or possession of the magazine, under such circumstances as to make them liable for the consequences of the explosion, that liability would have been a joint liability, and not a joint and several liability, as in ordinary cases of trespass by two or more wrongdoers, and the action might have been abated by plea, had it been brought against one of the parties only. On the same principle a verdict in this case in favor of one of the defendants made necessary a like verdict in favor of the other. Dacey on Parties, p. 439.

It is now well settled that the doctrine of respondeat superior has no application in cases of this kind, the bailee in possession of the property being held exclusively responsible for its keeping and management, without recourse by injured third parties to the employer or bailor. 23 Wall. (U. S.) 329, 330; 16 Id. 576; 5 N. Y. 48, 60, et seq.; 10 Id. 216.

The court erred in its instructions to the jury, given at the instance of plaintiff. Hug v. Licht, 80 N. Y. 579, 581, 585. See, also, 1 John. 78; 6 Hill. 292; 80 N. Y. 579.

It was error to admit in evidence the pretended municipal ordinance. 30 Iowa, 291; 19 Mo. 551, 555; 42 Id. 210, 214; 61 Cal. 509; 22 N. Y. 191.

GIDEON D. BANTZ and A. H. HARLLEE for appellee.

The storing of large quantities of powder in the midst of a thickly populated community, where injury to persons and property will surely result from an explosion, is wrongful, and the owner of such powder is bound at his peril to keep it secure. Addison on Torts, 358, margin; Fletcher v. Rylands, L. R. 1 Exch. 265; 3 Eng. & Ir. App. 330.

The negligence and wrong consist in keeping the explosive in the locality, and the right to recover damages arises as soon as the injury is done. Until then it is a nuisance of which the public may compel abatement. Lord HOLT in 12 Mod. 343. See, also, Hug v. Licht, 80 N. Y. 581; Addison on Torts, 297.

LEE, J.—This is an action of trespass on the case, by the plaintiff, David Abrahams against the defendant the California Powder Works, and also the Safety Nitro-Powder Company, corporations organized under the laws of California, to recover damages for an alleged injury to a brick hotel building situated in the town of Silver City, in the county of Grant, from an explosion of a certain lot of powder stored in a powder house in said town of Silver City, which powder house, it is alleged, was erected, kept, and maintained, and which powder was stored in said house, by the defendants. The defendants plead not guilty. There was a trial by jury, verdict for \$300 against defendant the California Powder Works, and, by direction of the court, not guilty as to the Safety Nitro-Powder Company. The California Powder Works brings the case to this court by an appeal.

The evidence on the part of the plaintiff tended to show that there were eighty kegs of powder in the house, at the time of the explosion, belonging to de-

fendant the California Powder Works, which was consigned to Neff & Stevens for sale on commission. Evidence was introduced on the part of the defendant tending to show that the powder in question, the eighty kegs, was not a consignment, but an absolute sale, to Neff & Stevens. We will consider the case as if the position of the plaintiff was the correct one, in this respect.

As to the ownership and control of the powder house, the evidence on the part of the plaintiff is indefinite and uncertain. The witness Neff testifies that Higbee and Cohn told him it belonged to the defendant the California Powder Works, but says he does not know of any connection Cohn had with the defendant company; that his understanding is that Higbee had been an agent of the company, and that he built the house. The nature and character of the agency of Higbee, if one existed, is not shown; nor does it appear what authority either Higbee or Cohn had for giving him the information, or what source of knowledge they possessed on the subject. Neither does it appear that Gould had any authority to make any statement as to ownership. The building of the magazine took place many years before the explosion occurred. There appears to have been several transfers of the business with which it was connected before reaching Neff & Stevens. It does not appear in the evidence that these defendant companies agreed to, or were consulted in regard to, the transfers. No attempt was made to prove that the defendants authorized, or assented to, or had any knowledge of, the storage of any powder in the building in question; but, on the part of defendant the California Powder works, it was shown that it not only never authorized nor assented to such storage, but that it had no knowledge whatever of the manner in which Neff & Stevens kept the powder; that they never owned the building, or had any interest in it. Taking the facts as shown on the part of the plaintiff

to be true, the defendants if liable for the damages resulting from the explosion of the powder in question, such liability must attach to them from the fact that they were owners of the powder which was consigned to Neff & Stevens, to be sold by them on commission.

The vital question—that upon which the case hinges—is whether, upon such a state of facts, the defendant companies stood in relation to Neff & Stevens, the parties who stored the powder in the house, and appears to have had full control of it, so that the maxim, respondeat superior, will apply. The rule is adopted by Wharton, in his Law of Negligence, section 176, in which he quotes as follows: “The principle to be extracted from the cases is said to be that a person, natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them, and that when an injury is done by a person exercising an independent employment the person employing him is not responsible to the person injured.” Again, in section 183, the same author says: “We strike, when pursuing the distinctions which have been taken by the courts in this relation, on the fundamental principle, elsewhere fully discussed, that, wherever there is liberty to act, there, to the party thus free, liability for a tort committed by him is imputable. If the master is at liberty to act in a particular matter, then the tort is imputable to the master. If the servant is at liberty to act, then, if this liberty be one of entire emancipation in the particular relation of the master’s control, the tort is imputable, not to the master, but to the servant.” In a very able review of this question in the case of *De Forrest v. Wright et al.*, 2 Mich. 368, the court says: “This greatly vexed question, as an eminent judge has pronounced it, has been very much discussed, not only in the English courts, but in our

NEGLIGENCE:
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own. The difficulty is in deciding what facts and circumstances legally constitute the relation of master and servant, or under what circumstances one person will be held liable for injuries occasioned by the negligence or unskillfulness of another, employed in his behalf. To hold that every person, under all circumstances, would be responsible for injuries committed by another person while employed in his behalf, involves an absurdity no one would countenance. It would create a penalty from which few could escape; for every man is, or ought to be, directly or indirectly, nearly or remotely, engaged in the service, or on behalf, of his fellow-men. But, from an examination and comparison of the adjudged cases, the rule now seems very clearly to be this: that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former." So, in the case of *Gulzoni v. Tyler*, in 64 Cal. 334, which was a suit for damages against the owners of a steamboat, it was proven on the trial that the owners did not have control and management of the boat at the time the damages occurred. The court says: "The rule as stated by *Shear. & R. Neg.*, section 501, is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management, and control of the boat, its officers and men, was alone responsible for its mismanagement; and, whether rightfully or wrongfully in such possession, the liability would rest on them alone. Under the rule, respondeat superior, this must be so." The act of the servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subse-

quently adopts it. *Parsons v. Winchell*, 5 Cush. 592.

In order to clearly understand the application of the foregoing principle to this case, it may be well to refer more particularly to the evidence as to the relationship as proven. Gould, an agent of the California Powder Works, in 1884 called upon Neff & Stevens, requesting them to take the agency of the company, which they declined, for the reason that they had a large amount of powder of the other company on hand. They desired a certain amount of black powder, which they were short of, which he agreed to have sent to them; and it was sent, and billed as follows:

“TUCSON, ARIZONA, November 11, 1884.

“Messrs. Neff & Stevens, Silver City:

“Bot. of the California Works, 30 California Street. Consigned, 80 kegs blasting, 4.00, \$320.00.”

It is contended on the part of the plaintiff that this powder was sent as a consignment, to be sold on commission, as other powder belonging to the defendant that had been turned over to them by Cohn, assignee of Crawford. The defendant claims that these eighty kegs was an absolute sale. There was also a letter from one William A. Scott, agent at Tucson, Arizona, dated March 13, 1885, which is as follows:

“Messrs. Neff & Stevens, Silver City, N. M.

“GENTLEMEN: Your favor of the tenth inst. is at hand. Please to send account sales at \$4.00 per keg, and send draft on me for 10 per cent of the amount of the same, as if the draft was cash, for so I will count it. The account sales must be at \$4.00 per keg, and I need your receipt for the commission of 10 per cent. You are duly credited with account for \$16.85.

“Respectfully,

“WM. A. SCOTT, Agent.”

The above bill and letter, together with the oral evidence introduced on the trial, clearly show that Neff & Stevens were handling this powder as factors, commission merchants, or consignees. There is no evidence in any way limiting their power as such, or directing the manner of handling it. As factors, under the law, they would have full possession of the goods, with a special property therein. Story Ag., sec. 97.

The court instructed the jury: "If they should find that said black powder was kept and maintained by the defendant or their agents at the time, etc." * * * The word "agent," in the instruction, must be understood in the sense in which it appears from the evidence; and, if instruction number 6, which was asked by the defendant, and refused by the court, had been given, the issues would have been fairly presented to the jury; which instruction was: "If you believe from the evidence that the defendant corporations each owned a portion of the powder stored in the powder house at the time of the explosion, but that such powder and powder house was under exclusive control of Neff & Stevens, as consignees of said corporations, respectively, at the time of the explosion, then, in that case, unless you further believe from the evidence that such explosion was caused by some willful and malicious act of defendant the California Powder Works, you will find the defendant not guilty." The first part of this instruction would have brought the case under the rule laid down by the authorities we have referred to, and which is unquestionably the correct law, as applicable to this case. The evidence does not show anything upon which the doctrine of respondeat superior could be based. So far as the evidence shows, the relationship of Neff & Stevens to the defendant was that of an independent employment, free of action. There is a total lack of all the elements of master and

servant, which must exist to constitute responsibility on the part of the defendant. They were simply factors or consignees for the purpose of selling the goods, and if as such consignees or factors they had the exclusive management and control of the storage of the powder and powder house in question, and the defendants had nothing to do with the storage of the powder in said house, or knowledge that it was so stored, there would be a lacking of every element of responsibility on the part of the defendant. We think the court should have given the first part of this instruction, or instructed the jury in accordance with the views herein expressed. The case will be reversed, and remanded for a new trial.

WHITEMAN and McFIE, JJ., concur.

[No. 298. January Term, 1891.]

GEORGE LYNCH ET AL., APPELLEES, v. G. W.
GRAYSON ET AL., APPELLANTS.

DAMAGES—WAIVER OF JURY—FINDING—APPEAL.—In this territory, the finding of the court, when a trial by jury is waived, is, in effect, the same as the verdict of a jury; and only such rulings of the court, made during the progress of the trial, are reviewable on appeal, as are duly presented by the bill of exceptions.

ID.—ADMISSIBILITY OF EXPERT TESTIMONY—DISCRETIONARY POWER OF COURT.—Where expert testimony is offered, it is discretionary with the trial court whether it shall be received or excluded, and the appellate court will not reverse its rulings unless manifestly erroneous.

ID.—TEXAS FEVER—TRESPASS ON CASE—EVIDENCE.—In an action of trespass on the case for damages for transporting cattle infected with "Texas fever," and communicating the disease to plaintiffs' cattle, where expert witnesses for plaintiffs testified that cattle from an infected district may carry a contagion with them, and disseminate and communicate it, without being visibly affected by it, and one of the defendants testified that before he brought his cattle from Texas he had heard of the disease, but never believed in it, and another

defendant testified that he had heard of the disease, and that plaintiffs protested against the unloading of the cattle lest their cattle might contract some disease from them, defendants must be held to have been fully informed and warned of the danger of communicating the disease, and it devolved upon them to take every precaution against it.

Id.—23 U. S. STAT., SEC. 6, 1884.—To render defendants liable under the act of congress of May 29, 1884, prohibiting the transportation from one state or territory to another of live stock infected with a contagion, it was not necessary for plaintiffs to show defendants had actual knowledge that their cattle, when shipped, were carrying disease germs with them; it was sufficient if the locality from which they were shipped was known to have been infected. Nor is it material under this act where the contagion was communicated, whether on the public road, on the public commons, or on the lands of the plaintiffs.

Id.—TRIAL BY COURT—ADMISSION OF INCOMPETENT EVIDENCE—PRESUMPTION.—On the trial of a cause by the court, the rule is that the admission of incompetent evidence is no cause for reversal, if it could not have prejudiced the other party; and where it does not appear that the court relied on such evidence, the presumption is, if any was admitted, it was not considered by the court in its finding.

APPEAL, from a judgment in favor of plaintiffs, from the Third Judicial District Court, Dona Ana County. Judgment affirmed.

CATRON, THORNTON & CLANCY and ELLIOTT, PICKETT & ELLIOTT for appellants.

The books admitted in evidence were incompetent. Rev. Stat. U. S., secs. 906, 882.

A receipt of the receiver of the land office neither gives right to the possession of lands nor to a patent. It is not final, and is incompetent and insufficient to prove such facts. *McFarland v. Culbertson*, 2 Nev. 284.

The disease must be proved as laid. *Lindsay v. Davis*, 30 Mo. 406.

In laying the foundation for expert testimony it was necessary to have first shown by the witness that he was possessed of such knowledge, experience, and

skill in the diagnosis and treatment of diseases of cattle, and particularly the so-called "Texas cattle fever," as would have entitled his opinion to pass for scientific truth. *Lawson's Expt. Ev.*; *Carr v. Northern Liberties*, 35 Pa. St. 324.

An expert can not give an opinion on a hypothetical statement which is not supported by the facts in evidence. *Lawson's Expt. Ev.* 152; *Hurst v. Chicago R. R. Co.*, 49 Iowa, 76; *Vandusen v. Newcomer*, 40 Mich. 90; *Grand Rapids R. R. Co. v. Huntley*, 38 Mich. 537; *Hitchcock v. Burgett*, 38 Mich. 506, 507, 508. See, also, *Lawson's Expt. Ev.* 142, 149, 150.

The facts are assumed for the purpose of the question, and for no other purpose. *Fieler v. N. Y. R. R. Co.*, 49 N. Y. 42; *Lawson's Expt. Ev.* 153.

If the facts stated in the hypothetical case are not proven, the opinion goes for nothing. *Lawson's Expt. Ev.* 153; *Hovey v. Chase*, 52 Me. 304.

Plaintiffs can not recover unless it appears that defendants have been guilty of culpable negligence and willfulness in the the care, custody, and handling of their cattle, and that as a result of such negligence and willfulness, plaintiffs' cattle contracted the disease and died therefrom, and it must appear in addition that the plaintiffs have not been guilty of any culpable negligence or willfulness or contributory negligence in caring for and handling their cattle. *Shear. & Redf. on Neg.*, sec. 5; *Campbell v. Bear River & A. W. M. Co.*, 35 Cal. 682, 683; *Walker v. Herron*, 22 Tex. 60; *Wolf v. St. Louis I. W. Co.*, 10 Cal. 544; *Hoffmans v. Tuolumne Water Co.*, Id. 413; 1 *Hilliard on Torts*, 67; 2 *B. & H. Blackstone*, 197; *Big. Lead. Cas. on Torts*, 197; *Shear. & Redf. on Neg.*, sec. 12; 2 *Sedg. on Dam.* [7 Ed.] 362, note B, and cases cited.

The common law in regard to keeping of cattle on one's own premises is not the law in this country, and never was applicable to the condition of things here,

especially not in this territory. *Morris v. Fracker*, 5 Col. 425; *Logan v. Gedney*, 38 Cal. 581; *R. R. Co. v. Finley*, 37 Ark. 562; *Delaney v. Erickson*, 10 Neb. 492; *Seeley v. Peters*, 5 Gil. (Ill.) 41; *Studwell v. Ritch*, 14 Conn. 292; *Macon R. R. Co. v. Lester*, 30 Ga. 540; *Headen v. Rust*, 39 Ill. 186; *Wagner v. Bessell*, 3 Iowa, 396; *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 250, and cases cited.

If it appears that the plaintiffs were guilty of culpable negligence, or that their negligence contributed to the injury, they can not recover, whatever may have been the degree of their negligence, and notwithstanding defendants may have been guilty of negligence. *Bush v. Brainerd*, 1 Cow. 78; *Telfor v. Northern R. R. Co.*, 3 Am. Law Reg. N. S. 665; *O'Brien v. Phila. R. R. Co.*, 6 Id. O. S. 361; *Wilds v. Frairie*, 2 Id. N. S. 242; *Jacobs v. Duke*, 3 Id. O. S. 443; *Penn. Canal Co. v. Bently*, 10 Id. N. S. 746; *Zoebisch v. Tarbell*, 5 Id. N. S. 572; *Waters v. Wing*, 8 Id. N. S. 738; *Freer v. Cameron*, 55 Am. Dec. 670, and note; 6 *Wait's Act. and Dam.* 583, and cases cited; 2 *Sedg. on Dam.* [7 Ed.] 347-349, note 1; Id. 349, 350, 358, note a; 1 Id. 164, 165, note a; *Strauss v. The R. R. Co.*, 75 Mo. 190, 192; *Walker v. Herron*, 22 Tex. 59, 60.

If it appears that the injury resulted from the negligence of both, though it could not certainly be known whether it was caused at one time or another, or in what particular manner it was occasioned, plaintiffs can not recover; nor can they recover if the fault was mutual. *Walker v. Herron*, 22 Tex. 61; *Bronell v. Flagler*, 5 Hill, 283, and cases cited; 2 *Greenlf. Ev.* [10 Ed.] 473, and cases cited; 2 *Rob. Prac.* 659, et seq., and cases cited; 6 *Am. Law Reg. O. S.* 565.

As to what constitutes negligence, see *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 246; *Richardson v. Kier*, 34 Cal. 75; *Blythe v. Waterworks*, 4 Am. Law Reg. O. S. 572.

If an injury is done on the highway, or in any other place where a party has the right to be, the party complaining of such injury must protect his property. *Tillett v. Ward*, 22 Am. Law. Reg. N. S. 245, 247, and note; *Griffin v. Martin*, 7 Barb. 56; *White v. Scott*, 4 Barb. 56; 1 *Thomp. on Neg.* 31.

Defendants being lawfully in the highway, or on the public domain, in driving their cattle, would be no more legally liable for their cattle communicating a disease to other cattle, than a person in his own house would be liable for communicating smallpox to his neighbor. *Fisher v. Clark*, 41 Barb. 239; *Broom v. Utica*, 2 Barb. 104; *Mills v. N. Y. & H. R. R. Co.*, 2 Robt. 333.

S. B. NEWCOMB and E. C. WADE for appellees.

STATEMENT.

This is an action of trespass on the case, brought by plaintiffs and appellees against the defendants and appellants in the district court in and for the county of Dona Ana, to recover damages occasioned to plaintiffs' herd of cattle by the communication to them, as alleged, of a certain contagious disease alleged to be commonly called "Texas cattle fever," by defendants' cattle, whereby it is claimed that a large number of cattle died, and a large number of the remainder thereof became sick and were deteriorated in value, and the plaintiffs were compelled to lay out and expend large sums of money for medicines and for nursing and caring for their said cattle, for all of which they claim damage in the sum of \$20,000. There are two counts in the declaration—one alleging that the disease was communicated to plaintiffs' cattle in the county of Dona Ana; the other, that the disease was communicated to plaintiffs' cattle in the county of Sierra. In every other respect the two counts are exactly alike. The

declaration, in substance, alleges that at the time of the grievances complained of the plaintiffs were in the lawful, quiet, and peaceable possession of certain lands and premises in the county of Sierra, to wit, a cattle ranch, range, and pasture lands, with certain watering places thereon, suitable for pasturing, grazing, watering, and raising neat cattle and stock, and which were then and there free from any contagion or infection, dangerous, noxious, or fatal to neat cattle or stock; and that they then had, kept, pastured, and grazed on said lands and premises a large number of neat cattle, which were entirely healthy, and free from any contagion or infection, dangerous, noxious, or fatal to neat cattle; and that said cattle were especially free from a certain contagious, noxious, dangerous, infectious, and fatal disease, commonly known as the "Texas cattle fever," all of which the said defendants then and there knew. That the said defendants, while the plaintiffs were in peaceable possession of, and keeping, pasturing, and grazing their cattle upon said lands and premises, wrongfully, negligently, carelessly, and willfully, contriving to injure plaintiffs, against the wishes, protests, and remonstrances of the plaintiffs, turned in upon, drove, watered, herded, pastured, and kept on said lands and premises, and among and with the said neat cattle of plaintiffs thereon pastured, kept, and grazed, a large number of other neat cattle to wit; one thousand neat cattle, sick, diseased, and then and there infected with a noxious, dangerous, contagious, and fatal disease commonly known as the "Texas cattle fever." That said defendants well knew that said neat cattle so turned in upon, driven, watered, herded, pastured, and kept upon said lands and premises had shortly before then been imported and introduced by defendants into said county from a certain place or district in the state of Texas infected with said contagious disease known as the "Texas cattle fever." That said defend-

ants then and there well knew that said cattle were then and there infected with said Texas cattle fever, and had shortly before then been exposed to the infection of Texas cattle fever. That said defendants well knew that said cattle were liable to communicate the said contagious disease to the cattle of the plaintiffs; by reason whereof, and through the carelessness and negligence and willfulness of defendants in the premises, said contagious disease was by the cattle of said defendants communicated to the cattle of said plaintiffs, so that five hundred head of plaintiffs' cattle, of the value of \$15,000, became infected, sick, and disordered with said contagious disease; and that four hundred thereof, of the value of \$12,000, died thereby; and the rest thereof, to wit, one hundred head, of the value of \$3,000, were rendered worthless to plaintiffs in consequence of said disease so communicated to them; and that plaintiffs wholly lost the use and benefit and profit thereof, and were compelled to pay out large sums of money, to wit, \$5,000, for medicine, nursing, and care of said cattle so sick and diseased. Wherefore they pray judgment, etc. To which said declaration said defendants pleaded (1) not guilty; (2) a plea traversing all the allegations in the said declaration, upon both of which said pleas issue was joined by said plaintiffs. Said case was tried by the court, a jury being waived by an agreement in writing, at the March term, A. D. 1886, of the district court for the county of Dona Ana. The court found for the plaintiffs generally on the second count of the declaration, refusing to make any special findings, or any findings whatever other than the general finding for plaintiffs on said count, and assessed their damages at \$5,200.

OPINION.

LEE, J.—The defendants, in their supplementary brief, submit for our consideration the question: Has this

court authority to review on bill of exceptions questions as to the improper admission or rejection of evidence, or the ruling of the court below on matters of law, where the case was submitted to the court for trial without the intervention of a jury? And in their brief cite the case of *Martinton v. Fairbanks*, 112 U. S. 675, 5 Sup. Ct. Rep. 321, in which the court say that prior to the passage of the act of congress of March 3, 1865, "when the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee, by consent of the parties, and no bill of exceptions will lie to his reception or rejection of evidence, nor to his judgment on the law;" citing *Weems v. George*, 13 How. 190, as fully sustaining the proposition. The statute of the territory of New Mexico, in force at the time of the trial, was as follows: "Trial by jury may be waived by the several parties to any issue of fact in the following cases: (1) By suffering default or by failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk. Comp. Laws, N. M., section 2060. By section 4 of act of congress of March 3, 1865, it is provided that parties may submit the issues of fact in civil cases to be tried and determined by the court without the intervention of a jury. The act continues: "The finding of the court upon the facts, which finding shall be general or special, shall have the same effect as the verdict of the jury. The rulings of the court in the progress of the trial, when excepted to at the time, may be reviewed by the supreme court of the United States upon a writ of error or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the sufficiency of the facts found to support the judgment." Though the act of congress is much more specific and clear as to intent than that of the legislature of this territory, yet, in order to give force and

WAIVER of jury:
finding: appeal.

effect to the act of the legislature, we think the court may clearly imply the intent of the legislature to the full extent of the provisions of the act of congress; and in fact we might have come to the same conclusion if that act of congress had not been passed, as was held in *Insurance Co. v. Folsom*, 18 Wall. 249: "That none of these rules are new, as they were established by numerous decisions of this court long before the act of congress in question was enacted." In this view of the question, we have but to consider the act of the legislature, in the light of the decisions of the supreme court of the United States in construing the act of congress referred to, and to apply their rulings under it to this case. At the time this case was tried below, the statutes of New Mexico did not require the judge in cases tried before him to make special findings. He could make either special or general findings, and in this respect it would be in accord with the provisions of the act of congress. Under that act the supreme court held in *Insurance Co. v. Folsom*, supra: "Where a jury is waived, and the issues of fact submitted to the court, the findings could be either special or general, as in cases where issues of fact are tried by a jury; but where the finding is general the parties are concluded by the determination of the court, except where exceptions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even if the findings are general; but the findings of the court of the facts can not be reviewed in this court on a bill of exceptions, or in any other manner, for the seventh amendment to the constitution of the United States declares that 'no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.' " The only methods known to the common law for the reexamination of the facts found by a jury are either by a

new trial granted by the court in which the issues had been tried or by the award of a *venire facias de novo* by the appellate court for some error of law.' And, having decided to give effect to the act of the legislature before referred to, we must hold the finding of the court, where the jury is waived, to be, in effect, the same as the verdict of a jury. Nothing, therefore, is open to reexamination in this case except such of the rulings of the court, made during the progress of the trial, as are duly presented by the bill of exceptions. The weight of evidence and the inferences of fact must be drawn by the court below, as it was the judge of that court, and not the supreme court, that was substituted, by the agreement of the parties, in the stead of the jury; and where a jury is waived, and the case tried by the court, the bill of exceptions brings up nothing for revision but what it would have brought had there been a jury trial. Tested by the considerations already given, and from the fact of the absence of any then existing statute or rule of law requiring the court to make special findings, it is clear that the exceptions of the defendants to the rulings of the court refusing to make special findings, as requested by their counsel, must be overruled. This ruling is directly sustained in *Clark v. Fredericks*, 105 U. S. 4, where, as here, it was assigned as one of the errors, and the court said: "The findings are conclusive as to the facts, and they cover all the issues. Whether the distinct facts set forth in the requests for findings presented by the plaintiffs in error were proven or not we need not inquire. As the court declined to find them, we must presume they were not established by the evidence." To the same effect, see, also, *Tioga R'y Co. v. Blossburg & C. R'y Co.*, 20 Wall. 143.

This brings us to the consideration of the bill of exceptions as to exceptions taken to the rulings of the court, during the progress of the trial, and the errors

assigned thereon. In the motion for a new trial the defendants below set up that the judgment is contrary to, and not sustained by, the evidence in the following particular statement of facts: (1) It is not proven that the plaintiffs' cattle died from a contagious or infectious disease, called "Texas cattle fever," or from any infectious or contagious disease whatever. (2) It is not proven that Texas cattle fever exists, and, if it does exist, that it is a contagious and infectious disease. (3) That if the defendants' cattle, at the time of introducing them into New Mexico, and driving them over the road across the land where plaintiffs' cattle ranged, were possessed of or infected with the Texas cattle fever, or any germ thereof. (The evidence clearly shows that the defendants, prior to and at the time of bringing their Texas cattle through the plaintiffs' and onto their own range, had no knowledge whatever that said cattle were infected with any contagious or infectious disease known as "Texas cattle fever," or with any disease.) (4) It is not proven that the defendants had any knowledge whatever that the district or section of country from which they drove their cattle in Texas was infected with the Texas cattle fever, or any germ or principle thereof. (5) It is not proven that the district or section of country in Texas where the defendants' cattle were brought from, or any other district or section of country in Texas that may be claimed to be infected with Texas cattle fever, was so infected, and that said cattle were brought from such section or district of country in Texas within a period in which they might directly or indirectly communicate such disease to other cattle. (6) It is proven that the defendants drove their cattle along the public highway, across the land where the plaintiffs were pasturing, and in so doing handled and managed said cattle in as careful, cautious, and prudent a manner as a prudent man would have done in reference to his own

property. (7) It is proven that the defendants, in driving said cattle along said highway, across the land where plaintiffs' cattle ranged, prevented plaintiffs' cattle from mixing or mingling with them, so far as it was possible to do. (8) It is proven that the defendants kept their cattle on their own range, so far as it was possible so to do, using reasonable and ordinary care and caution in so doing. (9) It is proven that the defendants used as much or more care and caution in handling their cattle on their range and keeping them there as it was the custom of the country to use in such cases. (10) It is proven that if the defendants had any knowledge that their cattle were infected with any contagious disease the plaintiffs had equal knowledge of that fact. (11) It is proven that the plaintiffs permitted large bodies of their cattle to range on the range of the defendants after the defendants' cattle were brought there in July, 1884, which cattle went back and forth from plaintiffs' range to defendants' range, and carried with them onto the plaintiffs' range portions of defendants' cattle. (12) It is proven that if defendants' cattle communicated any disease to plaintiffs' cattle it was done either from the road which passed over plaintiffs' range or on defendants' range to plaintiffs' cattle, which grazed upon defendants' range, or by defendants' cattle that drifted down into plaintiffs' range; but it is not possible to determine in which manner it was done, if done at all. (13) It is proven that the road over which the defendants drove their cattle through the plaintiffs' range passes over public land, and the defendants, in driving said cattle, did not pass over any land owned, possessed, or claimed by the plaintiffs. (14) It is proven that the defendants, in driving their said cattle, kept them on the public highway, and did not permit them to scatter any more than was absolutely necessary to do in driving such cattle. (15) That there is no proof that the plaintiffs owned

or possessed or had the right to the possession of any land further than the immediate spots on which their houses and corrals are situated. (16) That there is no legal proof of any title, or claim of title, legal or equitable, or possession, actual or constructive, on the part of the said plaintiffs, of, in, and to any land where the defendants' cattle passed or grazed. (17) That the proofs are indefinite and uncertain as to where the plaintiffs' cattle contracted their disease. (18) That the proofs are indefinite and uncertain as to the disease from which the plaintiffs' cattle died. (19) It is proven that the plaintiffs did not exercise due care and prudence in managing their own cattle, and in permitting said cattle to range on defendants' land.

It appears to have been the theory of the plaintiffs in error that the general findings in the case include both questions of law and of fact, and that by excepting to the general findings they excepted to such conclusions of law as the general findings imply; but we have given to the findings of the court the full effect of a general verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may have been saved by some exception which may have been taken to the ruling of the court upon some question of law. *Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. Rep. 321. It is not the intention or policy of the law in the United States that an appellate court should reverse a case for an error of fact; and the congress of the United States, by a direct provision in the twenty-second section of the judiciary act (1 St. at Large, 85), positively prohibits the supreme court of the United States from reversing any case "for error in fact." And, say the supreme court of the United States in *Martinton v. Fairbanks*, *supra*: "Upon the issues of fact raised by the pleadings in this case there was a general finding for the plaintiff. The defendant con-

tends that the evidence submitted to the court did not justify this general finding; but, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011, Revised Statutes. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff he should have presented that question by a request for a definite ruling upon that point." We think, taking all the grounds set forth in the motion for a new trial, that the attention of the court was called to the sufficiency of the evidence in such a manner as to be a direct request for a definite ruling thereon; and this necessitates an examination of the evidence in order to determine whether it is sufficient to support the findings for the plaintiff, which testimony must be considered in connection with an act of congress which, at the time of the alleged shipment of the cattle from the state of Texas to the territory of New Mexico, was enforced, an extract of which is as follows: "Sec. 6. * * * Nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot and transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the district into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease and especially the disease known as 'pleuro-pneumonia:' provided that the so-called 'splenetic' or 'Texas fever' shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six, and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded

only to be fed and watered in lots on the way thereto." 23 U. S. Stat. at Large, 32, approved May 29, 1884. The penalty for the violation of the above provision is a fine of not less than \$100 nor more than \$5,000, or by imprisonment for more than one year, or by both fine and imprisonment. There is no pretension that the said cattle were being transported for slaughter, or that they were unloaded only to be fed. If the cattle were affected with any contagious, infectious, or communicable disease, and the defendants were aware of that fact at or during the time of the shipment, then such transportation was in violation of the statute. Congress, by the above act, fully recognizes the existence of a disease called "splenetic" or "Texas" fever, a disease of a contagious, infectious, or communicable character, to which cattle are subject; and in legal effect the act conveys direct information to the defendants of the existence of the so-called disease. And whether the cattle shipped by the said defendant from San Antonio, Texas, to Hatch Station, in New Mexico, and driven across the plaintiffs' range to that of the defendants, in said territory, during the month of July, 1884, were infected with a contagious, infectious, or communicable disease, and, if so infected, whether the defendants knew, or had any reason to know of such infection, must be determined from all the evidence and circumstances in the case.

As is usually the case, the testimony is conflicting where experts are examined as to matters of professional opinion; and while such testimony is admissible, it is not always satisfactory. It is frequently based upon a theory which is incorrect in its premises, and which, therefore, must fall when it comes in contact with more enlightened investigation. For that reason that which may have been regarded as an established fact one day may be overthrown and regarded as preposterous at another. For instance, some creditable historian com-

putes the number of persons executed as witches during the Christian epoch at nine millions; and throughout the middle ages it is doubted if one person could be found who doubted the reality of witchcraft. Though the delusion continued in strong force down to the beginning of the present century, yet to-day a belief in it would be admitted on the question of a person's sanity. Dr. Donalson, an expert witness in the celebrated trial of Mrs. Elizabeth Wharton for the murder, by poisoning, of Gen. W. S. Ketchum, tried at Annapolis, Maryland, in 1872, said: "The medical science is progressive, and we have no security that all the theories now in vogue will not be upset in thirty years." Pamphlet of Trial, p. 58. Yet the uncertainty that may attach to the theories of experts can not impair or do away with the necessity of that class of testimony on questions of science, skill, trade, and the like. Persons conversant with the subject-matter, termed "experts," are permitted to give their opinion in evidence whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. Persons that have devoted their lives to the scientific investigation of the subject are better prepared to give an opinion than those persons who have given the subject no investigation; and thus experts are allowed to give an opinion, not on the case in question, unless they have heard all the evidence, but on the state of facts hypothetically stated, and such opinions must of necessity be received as evidence, and it is about the only way facts of a scientific character can be proved. It would not be easy to overrate the value of evidence given in many difficult and delicate inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade. But it is impossible to measure the integrity of every witness, or to deter-

mine the exact amount of skill which a person following a particular science, art, or trade may possess. The court is under the necessity of listening to the testimony of all such persons, and it is sometimes very difficult for the court to determine whether their opinions should be admitted as evidence. Perhaps the rule as established in France would be the better. There experts are officially delegated by the court to inquire into facts and report upon them, and they stand on much higher footing than do either ordinary or scientific witnesses with us."

Objections were made in this case to portions of the testimony of certain witnesses for the reason that proper predicate had not been shown as to their skill as experts. What standard of skill they claim should be shown is not set forth, and the standards to be gathered from the adjudicated cases are almost as varied as the cases themselves; and no definite rule, that we can find, is, or, as we think, can be, laid down. Thus it is said in *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 151: "An 'expert' as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question asked. While undoubtedly it must appear that the witness has enjoyed some means of special knowledge or experience, yet no rule can be laid down, in the nature of things, as to the extent of it." The same court, in *Sorg v. First German, etc., Congregation*, Id. 161, held: "The preliminary question of fact as to whether a witness is an expert qualified to pronounce an opinion must, in a great measure, be confided to the discretion of the court below trying the case, and we will not reverse either on account of the admission or rejection of such evidence, unless in a clear and strong case." In *State v. Wood*, 53 N. H. 484, it was held that a physician may testify

EXPERT testimony: discretionary power of court.

as an expert to his opinion formed by reading and study alone. Also the same court, in an action for communicating foot-rot to sheep, permitted the editor of a stock journal, who had read extensively on the subject, to testify as an expert. *Dole v. Johnson*, 50 N. H. 452: "An expert may testify to general facts which are the result of general knowledge or scientific skill." In *Emerson v. Gaslight Company*, 6 Allen, 148, and in *Morse v. Crawford*, 17 Vt. 499, it was held that a witness, not a professional man, may give his opinion in evidence in connection with facts upon which it is founded, and as derived from them. The supreme court of the United States has extended the rule far beyond a point that we would be willing to have gone, had not a court of such eminent authority so ruled. In the case of *Spring Co. v. Edgar*, 99 U. S. 645,—a suit for damages for injuries inflicted on a party from an attack by a pet deer in a park,—a witness for the plaintiff, introduced as an expert, testified that he was a dentist, and resided in Albany; that he was to some extent acquainted with the habits and nature of the deer, and had hunted them; that in his opinion the buck deer are not generally considered as dangerous, but that in the fall they are more dangerous than at other seasons. Another expert testified that he was a taxidermist, and had made natural history a study, and had read the standard authors in regard to the general characteristics of deer; that from his reading he was of opinion that the male deer, after they had attained their growth and become matured, are dangerous; and that during the rutting season, from the middle of September to the middle of December, the buck deer are generally vicious. The defendant objected to all of the testimony of the experts, on the ground that the witnesses had not shown themselves competent as experts, and that it was improper, immaterial, and incompetent; but the court overruled the objection, and the defendant

excepted. The supreme court, sustaining the ruling, say: "Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined, in the first place, by the court; and the rule is that, if the court admits the testimony, then it is for the jury to decide whether any, and, if any, what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous;" and cites in support thereof *Towboat Company v. Starrs*, 69 Pa. St. 36; *Page v. Parker*, 40 N. H. 48; *Tucker v. Railroad Company*, 118 Mass. 546.

The substantial portion of the experts' testimony objected to is, first, that of Prof. Salmon, professor of veterinary medicine, and for years chief of the United States bureau of animal industry, who testified: "Healthy cattle can not disseminate a contagion of which they are not infected or possessed of; but they may be infected of a contagion, and disseminate and communicate it, though they themselves are insusceptible to its effects, and show no symptoms of the disease; in other words, they may carry contagion without being visibly affected by it. To illustrate this: A person who has been vaccinated may go into a smallpox hospital without contracting the disease, and, coming away, he might carry the contagion, and infect nonvaccinated persons." And also that of Prof. Detmar, a veterinary surgeon, for many years in the employment of the United States in capacity of veterinarian in connection with the agricultural department, whose testimony fully corroborates that of Prof. Salmon. They refer, in illustration of their testimony, to the reports of investigations made by them to the bureau of animal industry while under the employment of the government; and, briefly, their testimony tends to establish the following

facts: (1) That a disease called "splenetic" or "Texas" fever does exist. (2) That it is caused from a diseased germ of a parasite of fungus nature, growing or attached to grasses in tide-water sections of the southern states. (3) Where these germs grow, or are reproduced from year to year, are called the "infected districts." (4) While cattle raised in the permanently infected districts become inured to the disease, and are not thereby violently attacked by it themselves, they nevertheless carry the disease germs in their systems, and deposit them with their excrement, and thus infect the trails and pastures over which they pass; and that this is the only way they communicate or impart the disease. (5) That cattle from noninfected districts, sick with the fever, do not impart the disease to other stock, nor do they infect the lands over which they graze. (6) Cattle from the infected districts expel the disease germs in a certain length of time, varying from seventy to ninety days, after leaving the infected districts; and after that they are incapable of infecting the roads, pastures, or lands over which they pass. (7) Frost destroys the disease germ, and puts a stop to its infection. (8) That the greater part of Texas, including the southern part (from which the defendant's cattle were shipped), is in the infected district. (9) The diagnosis of the disease called "splenetic" or "Texas" fever by the experts would appear to be the same and identical with that detailed by the witnesses that attended to and doctored the plaintiffs' sick cattle. If the showing on the part of the witnesses in the deer case, above referred to, is all that is required, the question is not so much as to who will be allowed to testify and give their opinions as experts, but rather who will not be; at any rate, there can be no question of the correctness of the admission of the testimony of Profs. Salmon, Detmar, and other experts in the case.

It is contended by the defendants that, even if

such a disease exists, and if the said cattle were infected with it, yet there is no evidence that the defendants had any knowledge of the infection, and there-

TEXAS fever:
evidence.

fore are not liable. One of the defendants, William Hopewell, testified: "I heard of Texas cattle fever. I heard before we brought these cattle from Texas. Heard of a large number of cattle dying on the Memberas river. Heard that Texas cattle fever came from the southern country,"—but added: "I don't believe there is any such thing as Texas cattle fever." There does not appear to have been any lack of knowledge on his part, but he appears to have relied on his disbelief of the existence of such a disease. His opinion in that respect, was immaterial. The statute had recognized the existence of a so-called disease as an infectious and communicable disease, and he was bound to take notice of it, and observe it. Nathan Grayson, another defendant, testified that he had heard of Texas cattle fever; and also that he had a talk with George Lynch, one of the plaintiffs, before the cattle were brought, and that Lynch protested against his unloading his cattle at Hatch Station, for the reason that their (Lynch's) cattle might contract some disease from them. Considering this testimony with that on the part of the plaintiffs in the same connection, this defendant must be regarded as having been fully informed and warned as to the danger of communi-

LIABILITY of de-
fendant under
23 U. S. Stat.
sec. 6, 1884.

cating said disease. It would not be required, on the part of the plaintiffs, to prove that the defendants knew as an absolute fact, that their cattle, when being shipped, were carrying the disease germs with them; but, if they were shipping from a locality known to be infected and liable to communicate the disease, they would come under the provisions of the statute before referred to, and it would devolve upon them to take such precautionary steps as would prevent their cattle from communicat-

ing any infectious or communicable disease to other cattle and in such case it would be immaterial where such disease was communicated, whether it was on the public commons or the public roads, or on the lands of the plaintiffs. Taking this view of the case disposes of the principal grounds set forth in the defendants' motion for a new trial, and makes it possible for this court to find that the evidence in the case sustains the general findings of the court below.

The defendant took exceptions to some fifty different rulings of the court in the progress of the trial of the case on the admission in evidence by the court of certain statements or testimony of witnesses, and to the admission in evidence of certain written documents on the ground that they were improper, incompetent, and immaterial. The rule in cases where

TRIAL by court:
admission of
incompetent
evidence.

the trial is by the court is entirely different from that where the trial is by a jury.

Cases are often reversed where improper or incompetent evidence has been admitted before a jury, for the reason that they may have been misled by it, but such a reason does not exist where the trial was by the court. And in a trial by a court "the admission of incompetent evidence at a trial below is no cause for reversal, if it could not possibly have prejudiced the other party." *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. Rep. 990. Thus it has been held: The fact that incompetent testimony has been admitted is not sufficient ground for reversing the judgment where the cause has been tried by the court without a jury. "In such case the appellate court will give no weight to such testimony in the determination of the appeal, but will not reverse the judgment because it was admitted." *Frisk v. Reigelman*, 43 N. W. Rep. (Wis.) 1119. Also in the supreme court of California, (*White v. White*): "When the court tries the case this court never reverses for the admission of irrelevant

evidence, unless it appears that the court in making the decision relied on such irrelevant evidence." 23 Pac. Rep. 284. "A finding of fact in a case at law tried without a jury is conclusive where there is any evidence to found it on, even though the evidence is conflicting. *Hathaway v. Bank*, 134 U. S. 494, 10 Sup. Ct. Rep. 608; *Zanz v. Stover*, 2 N. M. 29; *Kundinger v. Railway Co.*, 51 Mich. 185, 16 N. W. Rep. 330. The principle as expressed in the preceding cases is fully recognized and authoritatively established as the law by the supreme court of the United States. In *Field v. United States*, 9 Pet. 182, it was held that in a cause where the trial by jury had been waived the objection to the admission of evidence was not properly the subject of a bill of exceptions, and the reason given is that, if the evidence was improperly admitted, the court would reject it and proceed to decide the cause as if it were not in the record. And it has been recognized in several subsequent cases. In *Arthurs v. Hart*, 17 How. 12, speaking of the rule, the court says: "It certainly is so as far as the evidence improperly admitted bears upon a question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision can not be reviewed on a writ of error. The error in this aspect would be unimportant, because not the subject of an exception, the question involved being one of fact. If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and a proper subject of a writ of error." In this case it does not appear that the court relied on such evidence, and the presumptions are, if any was admitted, it was not considered by the court in making its findings. A different rule would apply where the exceptions were to the rejection of competent and proper testimony; but the exceptions in this case, in

every instance, are to the reception of evidence over objection, and therefore come directly under the rule laid down in the case cited above. Therefore the further examination of these exceptions becomes immaterial. Finding no substantial error sufficient to reverse the case, the judgment of the lower court will be affirmed.

O'BRIEN, SEEDS, and McFIE, JJ., concur.

[No. 380. January Term, 1891.]

TERRITORY OF NEW MEXICO, APPELLEE, v. JOE
KEE, APPELLANT.

CRIMINAL LAW—EMBEZZLEMENT—TRIAL BY JURY—VERDICT, POWER OF COURT TO DIRECT.—On a prosecution, on indictment for embezzlement, where the jury returned a verdict of guilty under the directions of the court, and the defendant moved in arrest of judgment, which motion was overruled—Held:

1. Under that provision of the constitution guaranteeing to persons accused of crime the right to trial by jury, the accused, in every case, where he has pleaded "not guilty," has the right to have the question of his innocence or guilt submitted to a jury, and the court has no power, in such cases, to deprive him of that right, by directing the jury to return a verdict of guilty, however strong, clear, and unimpeached the evidence may be for the prosecution. U. S. v. Taylor, and cases cited, 11 Fed. Rep. 470; U. S. v. Gilbert, 2 Sum. 19.
2. The court erred in overruling the motion in arrest of judgment.

APPEAL from a judgment of the Second Judicial District Court, Bernalillo County, convicting defendant of embezzlement. Judgment reversed.

The facts are stated in the stipulation hereinafter set out, constituting the entire record in the case, and filed in place thereof.

BERNARD S. RODEY for appellant.

M. A. BREEDEN, assistant attorney general, and CLIFFORD L. JACKSON, district attorney, for territory.

The counsel for defendant, in the court below, did not resort to the proper remedy, a motion for new trial, but filed a motion in arrest of judgment, and for a discharge of defendant, and thereby waived a motion for new trial. 2 Tidd's Prac., p. 913; Hall v. Ness, 27 Ill. 411.

The matters relied on, in the motion in arrest of judgment and for discharge of defendant, can not be raised by such motion, and the district court did not ere in overruling the same. Gildersleeve v. Water & Imp. Co., 3 N. M. 321; Bond v. Dusten, 112 Sup. Ct. Rep. 604.

STIPULATION.

"In this cause it is stipulated by and between the respective counsel that the defendant, Joe Kee, a Chinaman, was indicted and tried upon a good and sufficient indictment, duly returned by a regularly organized grand jury of Bernalillo county, New Mexico, for the crime of embezzlement at said term; that the defendant, by a good and sufficient plea, when arraigned on said indictment, pleaded 'not guilty;' that during said trial all the witnesses introduced on the part of the territory were Lizzie McGrath (who was the principal or prosecuting witness); James H. Smith, the policeman who made the arrest, and R. B. Myers, the justice who bound the defendant over, and all of whose evidence tended to prove that in about September, 1887, the defendant, at the request of Lizzie McGrath, entered her employ as cook and general servant at Albuquerque, in said county, at a salary of ten dollars a week; that during the course of his employment the defendant, at the request of said Lizzie, several times carried her bank book and cash to the First National

Bank of said Albuquerque, and deposited the cash to her credit; that on the 15th day of September, 1887, again at her request, the defendant took her bank book and one hundred and sixty dollars in gold and silver coins of the coinage of the United States, and in currency, issued under the laws of the United States, and went out to go to the bank as usual, but instead of going to the First National Bank, went to Hope's corner faro bank, in said Albuquerque, and there proceeded to gamble the aforesaid money against the game and bank until he had but twenty-five dollars of it left, at which time he was arrested; that said sum of twenty-five dollars, together with twenty dollars the said Lizzie owed him for two weeks' wages, left the defendant 'short in his accounts' to the said Lizzie in the sum of one hundred and fifteen dollars, and that said above named witnesses also testified that the defendant at different times admitted to each of them the above state of facts; that the only defense made was the giving in of the defendant's plea of 'not guilty,' and the following testimony by the defendant himself: Joe Kee, the defendant, being duly sworn, testified as follows: 'Question. Will you tell the truth if you talk to the jury now? Answer. No, sir. Q. Will you speak the facts if you talk to the jury now, as they occurred? A. Yes, sir; I talk some. Q. Will you tell right? A. Yes, sir. Q. You won't tell any lie? A. No. Q. Do you know Lizzie McGrath? A. Yes, sir. Q. Where were you during last September? Were you in her house last September, the same as she told here on the stand? A. Yes, sir. Q. What were you doing there in that house? A. Cooking. Q. What kind of a house is that? A. Whorehouse. Q. How much did she give you a week for cooking? A. Ten dollars a week. Q. Where have you been for the last seven months? (Objected to by the territory as immaterial. Sustained.)' And this was all the testimony produced,

or offered, or introduced in said cause on the part of either party. And thereupon the defendant, by counsel, moved the court to instruct the jury to find him not guilty, for the reasons—First, because the evidence shows that the money was received from the defendant's principal, and not from any other person, in accordance with the words of the statute; second, because there is no evidence in the case showing, or tending to show, that the money given to the defendant was the property of Lizzie McGrath; and, third, because there is no evidence in the case to show that the defendant appropriated the money to his own use,—which motion was denied by the court, to which action of the court the defendant, by counsel, then and there duly excepted, and still excepts; whereupon the defendant's counsel then asked permission of the court to argue the case to the jury on the testimony, but the court denied him such permission, to which action of the court the defendant then and there excepted and still excepts; whereupon the court, of its own motion, instructed the jury as follows: 'Gentlemen of the jury: There is no conflict in the evidence in this case. Therefore you are instructed to find the defendant guilty as charged, and assess his punishment at a fine not exceeding five thousand dollars, or to imprisonment in the county jail, or the territorial penitentiary, not more than two years, nor less than three months.' And thereupon the jury, by direction of the court, found the defendant guilty as charged in the indictment, and assessed his punishment at imprisonment in the territorial penitentiary for the term of two years, to which action of the court in so instructing the jury to find him guilty the defendant then and there duly excepted and still excepts. That thereafter, in proper time, the defendant, by counsel, filed his motion in arrest of judgment and for the discharge of the defendant from custody, which motion the court over-

ruled; that the grounds of such motion was the action of the court in so refusing to permit counsel for defendant to argue the case to the jury in his behalf, and the action of the court in so instructing the jury to find the defendant guilty, to which action of the court in so overruling the said motion the defendant at the time duly excepted and still excepts; that thereafter, upon the last day of said term, the court sentenced said defendant to the term of two years' penal servitude in the territorial penitentiary; that on said last day of the term the defendant filed his proper affidavit, and prayed an appeal of said cause to the supreme court of the territory of New Mexico, which was duly granted, and the time for settling and filing a bill of exceptions in the cause was then set, and thereafter, from time to time, before such time had expired, duly extended to the 1st day of September, A. D. 1888. And now, the respective counsel having agreed upon the foregoing as a bill of exceptions herein, they respectfully ask the court that the same be signed and sealed, and made of record herein. In evidence of which agreement the said counsel hereunder sign.

"CLIFFORD L. JACKSON,

"District Att'y, representing the Territory.

"BERNARD S. RODEY,

"Att'y for Defendant.

"Which is hereby done this 21st day of August, 1888.

[SEAL]

"WM. H. BRINKER,

"Presiding Judge."

OPINION.

LEE, J.—Several questions are raised by the record, but only one we think it necessary to consider, as, in our opinion, in criminal cases it is not in the province or power of the court trying the case to direct a verdict of guilty, no matter how strong, clear, and unimpeached the evi-

EMBEZZLEMENT:
trial by jury:
verdict: power
of court to di-
rect.

dence may be on the part of the prosecution. Under the constitutional provision which guaranties to persons accused of crime the right of trial by jury, an accused person has in every case where he has pleaded "not guilty" the absolute right to have the question of his innocence or guilt submitted to the jury, no matter what the state of the evidence may be. The right thus granted has been so fully recognized and carefully guarded by the courts that it has been frequently held that it can not be waived by the prisoner, and that a trial before the court without a jury is erroneous, even where it takes place with the prisoner's consent. The only case of respectable American authority holding the contrary proposition is the ruling of Justice HUNT, in the circuit court of the United States, on the trial of Susan B. Anthony for illegal voting at a federal election. *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200. And the learned judge in that case seems to have come to doubt the correctness of his ruling on the question, as subsequently, when the officers of the election, who were indicted together with Miss Anthony for the same offense, and in which substantially the same testimony was introduced on the trial, he submitted the case to the jury. In the case of *U. S. v. Taylor*, 11 Fed. Rep. 470, Judge McCrARY carefully reviews the rulings of Justice HUNT in the Anthony case, and holds the contrary doctrine. In concluding his opinion, he says: "It is now well settled in the federal courts that in civil cases, where the facts are undisputed, and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law, but the authorities which settle this rule have no application to criminal cases. In a civil case the court can set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to

set it aside. It would be a useless form for a court to submit a civil case, involving only questions of law, to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal can not be set aside, and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly. By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. This is so, notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution. In this condition of the testimony it was the right of the jury to pass upon the credibility of the witness, even if unimpeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused statement, prejudice, and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. And even in civil cases, so far as I know, no judge has ever gone farther than to say, when the case was at all dependent upon oral testimony, that if the jury believed all the testimony they should find for the plaintiff or defendant. The present case, in itself considered, is of little consequence, but the question involved is of far-reaching importance; for if the power to direct a verdict of guilty exists in this case, it exists and may be exercised in any criminal case, however important, and even if the punishment be death. In view of this, and especially in view of the opinion above cited of Mr. Justice HUNT, for whose judgment I entertain the highest re-

spect, I have considered the case with great care. I have also consulted Mr. Justice MILLER, who authorizes me to say that he concurs in the conclusion which I have reached." The rule as stated by Justice McCrary is sustained in *U. S. v. Gilbert*, 2 Sum. 19, as it is there held that as soon as it judicially appears of record that the party has pleaded not guilty, an issue has arisen which courts are bound to direct to be tried by a jury. While it is a very old, sound, and valuable maxim in law that the court answer to questions of law, and the jury to facts, yet every day's experience evinces that in criminal cases juries assume to be judges of the law as well as of the facts. And while it is the law and the theory that the court will instruct the jury as to the law in the case, and that it is the duty of the jury to receive the law from the court, yet it has never to our knowledge been claimed that if the jury disregarded the law as laid down by the court, and returned a general verdict of not guilty, the court can set it aside; and as said by McCrary, *supra*: "If this can not be done by an order after verdict, how could the court do substantially the same thing by an instruction before verdict?" The action of the court is the same in either case; it is a decision by the court upon the law and facts that the accused is guilty. The court must determine both the law and the facts, whether it directs a verdict of guilty or sets aside a verdict of not guilty. McCrary cites in support of the doctrine laid down by him, and which, we think, is the correct one, the following authorities, some of which go to the full extent, that the jury are exclusive judges of the law and the facts in criminal cases. Several of them are exactly in point, holding that a direction to the jury to convict is erroneous, notwithstanding overwhelming evidence of guilt. *U. S. v. Battiste*, 2 Sum. 243; *Com. v. Porter*, 10 Metc. (Mass.) 263; *Com. v. Van Tuyl*, 1 Metc. (Ky.) 1; *U. S. v. Stockwell*, 4

Cranch, C. C. 671; Stettinius v. U. S., 5 Cranch, C. C. 573; Montee v. Com., 3 J. J. Marsh. 132; Sims v. State, 43 Ala. 33; U. S. v. Hodges, 2 Wheeler, Crim. Cas. 477; U. S. v. Wilson, Baldw. 78; U. S. v. Fenwick, 5 Cranch, C. C. 562; U. S. v. Greathouse, 2 Abb. (U. S.) 364; 4 Bl. Comm. 361; Tucker v. State, 57 Ga. 503; Huffman v. State, 29 Ala. 40; Perkins v. State, 50 Ala. 154. This court, believing the law to

JUDGMENT, error
in overruling
motion in arrest
of.

be expressed in the authorities referred to and cited, holds that the court below erred in instructing the jury to find the defendant guilty, and in overruling the motion in arrest of judgment. The judgment is therefore reversed, and the cause remanded for such action as may be properly taken in accordance with the views herein expressed.

O'BRIEN, C. J., and McFIE, SEEDS, and FREEMAN, JJ., concur.

[No. 381. January Term, 1891.]

TOWN OF ALBUQUERQUE, PLAINTIFF IN ERROR,
v. ZEIGER, DEFENDANT IN ERROR.

ERROR, WRIT OF—PARTIES—DISMISSAL.—In a proceeding by a taxpayer against a town, and the sheriff, to enjoin the collection of a tax assessed against him for the improvement of a street, the sheriff having no substantial interest in the result, his failure to join in a writ of error sued out by the town from a decree in favor of the taxpayer, is no ground for a dismissal of the writ.

ID.—FILING OF RECORD.—On writ of error, a record filed ten days before the first day of the term, including either the day of the filing, or "the first day of the term," is a substantial compliance with the rule, and meets the requirement of the statute.

ERROR, from a decree in favor of complainant, to the Second Judicial District Court, Bernalillo County. Motion to dismiss writ of error. Motion denied.

The facts are stated in the opinion of the court.

N. C. COLLIER for plaintiff in error.

NEILL B. FIELD for defendant in error.

FREEMAN, J.—The defendant in error filed his bill in the court below against the plaintiff in error, and one Jose L. Perea, sheriff of Bernalillo county, to enjoin the collection of certain taxes assessed against him for the improvement of a street in said town of Albuquerque. The defendants below demurred, and the demurrer was overruled. Electing to stand on their demurrer, the injunction was made perpetual, to which ruling of the court they prayed and obtained an appeal. The appeal, however, was not prosecuted, and the case was afterward brought to this court by writ of error sued out by the town of Albuquerque only; its codefendant, the sheriff, declining to prosecute the writ. The defendant in error now moves to dismiss the writ of error for the reason, among others, that both of the defendants in the lower court do not join in the writ.

It is apparent that there are but two parties who have any substantial interest in the present litigation, viz., the town of Albuquerque, the plaintiff in error, and Zeiger, the defendant in error. To the sheriff, the other defendant below, it is a matter of trifling concern. Beyond the matter of commission on the tax enjoined, he has no interest, whatever, in the result. He was a necessary party defendant, because, as sheriff, he was proceeding, or was about to proceed, to enforce the collection of the supposed illegal assessment. It is insisted by the defendant in error that he is also a necessary party to this proceeding, for the reason that as he stands enjoined by a decree of the court, which he does not seek to disturb, a dissolution of the injunction as to his codefendant below will not have the effect of dissolving the injunction as to him, and that therefore the town would

PARTIES in interest: dismissal.

take nothing by such judgment here; that a judgment dissolving the injunction as to the town, and leaving it in force as to the officer, would be barren of any practical result. We do not so regard the law. If it should appear to this court that the injunction was improvidently granted, and that the plaintiff in error is entitled to collect the tax, it would seem to be a hardship to deprive it of the power to enforce the collection on account of the indifference of the officer. "Where the officers of a corporation are joined with it as codefendants in a bill for discovery, and for an injunction against an action brought by the corporation, the injunction may be dissolved upon the coming in of the answer of the corporation, although its officers have not answered. So, when an injunction is obtained against several defendants, restraining them from prosecuting a joint action at law, some of whom answer and obtain a dissolution as to themselves, and the others afterward file their answer, but neglect to move to dissolve, those who have already procured the dissolution as to themselves may have the injunction dissolved as to their codefendants." High Inj., sec. 1534. A similar doctrine is laid down in the case of *Basket v. Hassell*, 107 U. S. 608, where it is said "that the omitted parties have no legal interest either in maintaining or reversing the decree, and consequently are not necessary parties to the appeal." The case of *Germain v. Mason*, 12 Wall. 259, was an action brought by Mason against Germain to enforce a mechanic's lien. Twenty other parties were made defendants to the petition on the ground that they had, or pretended to have, liens against the same building. A decree was had affirming the right of the petitioner to priority of satisfaction of his lien, and a judgment in personam rendered against Germain. From this judgment, Germain alone sued out a writ of error. A

motion to dismiss for nonjoinder of the other defendants was overruled. The supreme court, speaking by Justice MILLER, said: "The lien creditors, codefendants with Germain, have not sought to reverse the judgment; but Germain, who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right, we think, to prosecute a writ of error in his own name without joining them." A motion similar to that we are considering was made in the case of *Cox v. Dick*, 6 Pet. (U.S.) 172. The argument made in the case, which was sustained by the court, is as follows: "It must be obvious that in many cases all the parties will join in the appeal. Sometimes they are satisfied with the judgment. Often they have no interest in reversing it.

* * * The party interested in reversing the judgment only will sue out a writ of error. The court can not compel the other party to join, and justice could not be done if either party could defeat the other of their legal rights. The aggrieved party must be allowed to bring up the case, and, if necessary, to comply with obsolete forms, the court must decree a severance." The motion to dismiss was therefore overruled by the court. The sheriff is not a party to any substantial interest involved. He is merely a part of the official machinery invoked by the corporation to enforce the collection of the tax. His functions are suspended by the writ; and if, upon the hearing, the court should be of the opinion that the injunction ought to be dissolved, it will remand the cause to the court below, with directions to that court to dissolve it as to all the parties to the suit; and this view of the case, we think, disposes of the question as to whether the sheriff is a necessary party to the appeal or writ of error.

Another reason assigned in support of the motion to dismiss is that the record was not filed "at least ten

days before the 1st day of the January term, A. D. 1889, of said supreme court." The record was filed on the twenty-seventh day of December, 1889, and the court convened on the sixth day of January, 1890. We think this is a substantial compliance with the rule. If we include either the day of filing or the day on which the court convened, we have the period of ten days, which meets the requirement of the statute. Let the motion be denied.

O'BRIEN, C. J., and MCFIE, LEE, and SEEDS, J. J.,
concur.

[No. 382. January Term, 1891.]

TRINIDAD ALARID, AUDITOR, ETC., PLAINTIFF IN
ERROR, v. EUGENIO ROMERO, DEFEND-
ANT IN ERROR.

MANDAMUS—ERROR—SUPERSEDEAS.—On appeal by writ of error, by the auditor of public accounts, from a peremptory writ of mandamus issued against him, commanding him to audit and allow certain claims of the sheriff of San Miguel county against the territory—Held: The court erred in granting the peremptory writ of mandamus. The appeal does not operate as a supersedeas; and the auditor having, in obedience to the mandate of the court, audited and allowed the claims, the writ will be dismissed at the cost of the sheriff, without inquiry as to the particular items allowed as charges against the territory.

ERROR, from a judgment for plaintiff, to the Fourth Judicial District Court, San Miguel County. Judgment reversed.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT, solicitor general, for the plaintiff in error.

Only the charges of holding and maintaining the district court are to be paid by the territory. Comp. Laws, sec. 540.

The expense of providing a place for the holding of the court, and for the officers and jurors is to be borne by the county in which the court is held. Comp. Laws, secs. 345, 546, 186.

The duties of the auditor are not ministerial, but quasi judicial. He is authorized to subpoena witnesses, administer oaths, and take evidence touching any claim "in the same manner as courts of law may do." Comp. Laws, 1884, sec. 1762.

A mandamus can not control judicial discretion. Comp. Laws, 1884, sec. 1993. Nor direct what a judicial officer shall do. The extent to which the mandamus can go is to order him to act. *Territory v. Ortiz*, 1 N. M. 5-16; *Life and Fire Ins. Co. v. Adams*, 9 Pet. 573; *State ex rel. State Journal Co. v. McGrath*, secretary of state, S. W. Rep. (Mo.) 846; *People v. Chapin*, 10 N. E. Rep. (N. Y.) 141; *State v. Deane*, 1 Southern Rep. (Fla.) 698; *Reeside v. Walker*, 11 How. (U. S.) 290, and cases cited.

The auditor is prohibited from auditing, and the treasurer from paying, any accounts for which an appropriation has not been made by the legislature. Comp. Laws, secs. 1767, 1768.

Any violation of these statutes is punishable by fine and removal from office. Comp. Laws, sec. 1772.

The writ of mandamus may issue "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, and station." The acts sought to be compelled here are not "specially enjoined as a duty," but so far from that are specially prohibited. Comp. Laws, secs. 1767, 1768.

G. W. PRICHARD for defendant in error.

FREEMAN, J.—This was an action of mandamus instituted by the defendant in error against the plaintiff in error. The alternative writ of mandamus allowed by the lower court was as follows:

“The territory of New Mexico, to Trinidad Alarid, auditor of public accounts, territory of New Mexico: Whereas, Eugenio Romero, sheriff of San Miguel county, in said territory, has this day presented to the judge of the Fourth judicial district court of said territory, at chambers, his petition, in which it is recited that, as such sheriff, he holds certain certificates of allowance made by the court against the territory, and by the court of the First judicial district of said territory, for fees and money laid out and expended in and about his office as such sheriff in said county as required by law, said certificates bearing upon their face the following numbers and amounts, to wit: No. —, Santa Fe county, \$76.25; No. 25, San Miguel county, \$12; No. 22, San Miguel county, \$81; No. 20, San Miguel county, \$76; No. 8, Lincoln county, \$83; No. 2, Lincoln county, \$400.75, and that you, as the auditor of public accounts for said territory, have refused at divers times, and still refuse, to audit said allowances, as shown by said certificates, and issue warrants therefor, in the name of the territory and against the treasurer thereof, as required by law, and for further information as to the recitals of said petition, reference is had to a copy of the same, attached thereto, and made a part hereof. Now, therefore, we, being willing that speedy justice be done in this behalf to him, the said Eugenio Romero, sheriff as aforesaid, held by the said Eugenio Romero, sheriff as aforesaid, and that you do take up said certificates of allowances, and that you do issue therefor the territory’s warrant as auditor of public accounts against the treasurer of said territory for the full amount thereof of each and every of the same, or to show cause to the contrary before the court on the fourteenth day of May, 1888, at the courthouse in the said county of San Miguel, and how you shall have executed this, our writ, make known at the time and place aforesaid, and have you also then and

there this writ. Witness the Hon. Elisha V. Long, chief justice of the supreme court of the territory of New Mexico, and judge of the Fourth judicial district court thereof.

[SEAL]

“R. M. JOHNSON, Clerk.”

To which said writ was attached the following petition:

“Territory of New Mexico, county of San Miguel. In the district court for the Fourth judicial district of the territory of New Mexico, sitting in and for the county of San Miguel, for the trial of causes arising under the laws of said territory. To the Hon. Elisha V. Long, chief justice of the supreme court of the territory of New Mexico, and judge of the Fourth judicial district thereof: Your petitioner, Eugenio Romero, the duly commissioned and acting sheriff, and a resident of the county of San Miguel, in said territory, complaining of Trinidad Alarid, the auditor of public accounts of said territory, and a resident of the county of Santa Fe, therein, humbly shows unto your honor that your petitioner, as such sheriff for said county, in and about the business of the district court in and for the same, has been compelled by virtue of his office to lay out and expend large sums of money, and has performed the hereinafter mentioned services, for which your petitioner at divers times made the following charges against the said territory, to wit:

“For fees and expenses in taking one William Green, a prisoner, from Las Vegas to Santa Fe, New Mexico, and return, by order of the court in the month of August, A. D. 1887, the amount allowed by law, and duly approved by the court, being seventy-six dollars and twenty-five cents; for fees and allowances for opening jury lists at the September, October, and November terms of the Colfax, Mora, and San Miguel district courts for the year 1887, the amount allowed by law, and approved by the court, being twelve dollars; for

amount paid to janitor at Las Vegas as a necessary court expense for services in and about the court in the year of 1887, the amount allowed by law, and approved by the court, eighty-one dollars; for horse hire and pay of extra deputy during the November term, 1887, of the San Miguel county district court as extra and necessary court expenses, the amount allowed by law, and approved by the court, being five hundred and seventy-six dollars; for furniture and painting furnished by your petitioner for the Fourth judicial district court for said last named county, the same being necessary and by order of the court, the amount allowed and approved by the court in the year 1887, being four hundred and eighty dollars and twenty-five cents.

“Your petitioner hereto attaches a true copy of the foregoing orders of allowances by the court of the said charges. Your petitioner shows that each and every of the above charges were for money laid out and expended for services rendered by your petitioner and his deputies, as required by law; and that thereafter each and every of said charges were duly presented in open court for allowance, and approved; and that, after the same were carefully inquired into and investigated by the court, the same were duly approved and ordered to be paid; and that the clerk of the said district court in and for the county of San Miguel and territory aforesaid was ordered to make a certificate or certificates to your petitioner bearing the following numbers and amounts: Certificate No. 25, \$12; certificate No. 22, \$81; certificate No. 20, \$576; certificate Nos. 8, 9, \$83.50 and \$400.07; certificate No. —, from Santa Fe county, \$76.25, showing upon the face thereof that each of said charges had been allowed as aforesaid. And your petitioner further shows that the defendant herein named is the auditor of public accounts in and for said territory, and as such the law of said territory enjoins upon him the duty of auditing

the charges allowed as aforesaid, and, in the name of the territory, to issue his warrants therein against the treasurer of said territory. That your petitioner, after the allowances of his said claims by the court aforesaid, to wit, on the — day of January, A. D. 1888, and on divers days thereafter, presented, and caused to be presented, to the said auditor at his office said certificates of allowance, and demanded, and caused to be demanded, of said auditor the issuance of the proper warrants for the same. That it has now been something over four (4) months since he first made said demand. That he has frequently appeared in person before said auditor with said certificates; has sent his agent; and has also written and otherwise requested the issuance of the warrants due him as aforesaid as the law requires; yet the said Trinidad Alarid then and there wholly refused, and still refuses, to receive said certificates of allowances, or any of them, or to issue to your petitioner warrants therefor, or to otherwise perform the official duty enjoined upon him as the auditor of public accounts, by means whereof your petitioner has been prevented, and is still prevented, from receiving the warrants due him, and from receiving the money due for money laid out and expended for services rendered as aforesaid, to all of which he is justly and lawfully entitled. Wherefore your petitioner prays a writ of mandamus directed to the said Trinidad Alarid, as auditor of public accounts for said territory, commanding him to forthwith receive each and every of said certificates so held by your petitioner, and to audit the same, and to issue thereon the territory's warrants against the treasurer of said territory for the full amounts thereof as required by law, and that said defendant be required to make due return to the writ of mandamus that may issue out of this court at such time and place as the court may order, and that, upon the final hearing hereof, said writ be made peremp-

tory, and that your petitioner be granted such other and further relief as he is entitled to, and as justice may require.

“G. W. PRICHARD,
“L. C. FORT,
“Attorneys for Plaintiff.”

To the said alternative writ and petition, the plaintiff in error filed the following answer:—

“In the District Court, County of San Miguel, May Term, 1888.

“Eugenio Romero, sheriff of the county of San Miguel, v. Trinidad Alarid, auditor of Public Accounts of the territory of New Mexico.

“Now comes the said defendant by the attorney general of the territory of New Mexico, and for answer to the said writ, and to the petition and exhibits thereto attached, says that he admits that said plaintiff holds certain certificates of allowances made by the court of the First judicial district against said territory, and that such certificates bear upon their faces the number and amounts stated in said writ, but he denies that he has ever refused to audit said allowances, and states the fact to be that he has audited the claims of said plaintiff, and, with one exception, has disallowed the claims referred to in said writ, and has refused, and still refuses, to issue warrants therefor against the treasurer of said territory. He further says that the exception referred to above is as to the item of \$12, which in said petition is stated to be for fee allowances for opening jury lists, while in the copy of the certificate of allowance attached to said petition it appears to be for summoning extra talesmen for petit jury and commissioners for selecting juries. Defendant is therefore unable to know which of these allowances is brought in question, but states that he has allowed both of them, and has issued, or is ready to issue, warrants therefor. Defendant further says that he has

disallowed the claim of said plaintiff for fees and expenses in taking one William Green, a prisoner, from Las Vegas to Santa Fe, New Mexico, and return, by order of the court, in the month of August, 1887, because it is not a proper charge against said territory, but, by express statutory provision, is a charge to be paid by the county whence said prisoner was sent. Defendant further states that he has disallowed the claim of the plaintiff for the amount allowed by the court to one Cristobal Beltran for janitor, because it appears from the certificate of allowance that said person was employed in and about offices situate in the courthouse (being a county building) and the courthouse for the county of San Miguel, the expense of caring for which is properly chargeable to said county of San Miguel only, and not to the territory of New Mexico. Defendant further says that he has disallowed the claim of plaintiff for the sum of five hundred and seventy-six dollars for bailiffs and horse hire at the November term of 1887 of this court, because he has already audited and allowed the claims of four bailiffs for services at said term of court, and drawn warrants therefor on the territorial treasurer, the statute of the territory prohibiting the appointment of more than four such officers, and also because the horses whose hiring and use are implied were used only for the purpose of enabling the sheriff, by himself or by his deputies, to serve process of this court in different parts of the county, for which service said sheriff is allowed and authorized by law to charge the usual amounts for fees and mileage, and to pay him for his horse hire would allow him to receive double for such services. Defendant further says that he has disallowed the claim of said plaintiff for four hundred and eighty-four dollars and twenty-five cents for furniture and painting, because it appeared from the itemized bill presented to

the defendant for four hundred dollars and seventy-five cents of said amount, and from the certificate for the remainder thereof, that said claim was for expenses which should have been made, if proper at all, either by the clerk of this court and by the statute of the territory, paid by the counties of this judicial district, or should have been made and paid by the county of San Miguel, and because said claim, if proper at all, should have been made by the court for the county of San Miguel, where said amount is claimed to have been originated, and not by the court for Lincoln county; and defendant further says that said claim is extraordinarily extravagant. Defendant denies that the said charges so by him disallowed, or any thereof, were for money laid out or expended, or for services rendered, as required by law; and he denies that the same, or any thereof, were carefully inquired into and investigated by the court; and he avers that said claims and all of them were passed without investigation by the court, and as a matter of course, and that the attention of the court was in no manner called or directed to the impropriety and illegality of the same. Wherefore defendant prays for judgment of the court that the said claims of the said plaintiff set out in said writ, petition and exhibits, with the exception of the said item of \$12, are not proper legal charges against the said territory of New Mexico, and ought not to be allowed by the defendant as auditor of public accounts, and that he may be hence dismissed, with his costs.

“M. A. BREEDEN, A. A. G., for auditor.”

Upon the issues thus presented, the court caused to be entered the following judgment:

“Eugenio Romero v. Trinidad Alarid, auditor. Mandamus. No. 3116.

“On reading and filling the answer of the defendant in this cause to the alternative writ of mandamus heretofore issued in this cause, and also the motion of

the plaintiff herein to quash and strike out said answer, and for the issue of a preemptory writ of mandamus in this cause, for the purposes and in the manner as prayed in the petition of the said plaintiff, and the counsel for the said plaintiff, as well as for the said defendant, having been heard, and the court, being now sufficiently advised in the premises, doth grant said motion as to the quashing of the said answer, and the issuing of the said preemptory writ of mandamus concerning the following items, to wit: No. 4, county of Santa Fe, \$76.25; No. 25, San Miguel county, \$12.00; No. 22, San Miguel county, \$81.00; No. 20, San Miguel county, \$288.00; No. 8, Lincoln county, \$83.50; No. 2, Lincoln county, \$400.75,—and as to the issuing of said mandamus concerning the said item of horse hire embraced in No. 20, San Miguel county, amounting to \$288.00, is disallowed, and doth deny said motion. It is therefore ordered and adjudged that the said answer be, and the same hereby is declared quashed and stricken out, and that a preemptory writ of mandamus be allowed in this cause, and that the same issue forthwith against the said defendant, commanding him forthwith, as auditor of public accounts of the territory of New Mexico, to receive each and every certificate of allowance in said alternative writ of mandamus mentioned and held by said plaintiff, except the sum of \$288.00 out of certificate No. 20, San Miguel county, being the allowance for horse hire to said plaintiff, and to take up said certificates of allowance, and issue therefor, as said auditor of public accounts of said territory, and said territory's warrants against the treasurer of said territory for the full amount of each and every one of said certificates of allowance except the sum of \$288.00 out of certificate No. 20, San Miguel county, as aforesaid. It is further ordered and adjudged that service of said preemptory writ of mandamus be made forthwith by A. D. Clarke,

of the county of San Miguel, by delivering a true copy thereof to said defendant in person, or, if said defendant shall not be found in said county of Santa Fe, then by delivering a true copy of said writ to some person over the age of fifteen years at the usual place of business or abode of said defendant in the county of Santa Fe, territory of New Mexico. It is further ordered and adjudged that the said defendant make return of this writ, and due obedience to its commands, before this court on the 30th day of July, 1888, at 10 o'clock A. M. of said day at the court house at Las Vegas, New Mexico, for the district court of the county of San Miguel, territory aforesaid.

“ELISHA V. LONG, Chief Justice.”

In this, we think, there was error. In view of the fact, however, that the appeal did not operate as a
MANDAMUS: error: supersedeas. supersedeas, and that therefore the mandate of the court was obeyed, and the several certificates audited and allowed, it is immaterial now to inquire minutely into the several matters of controversy, in order to ascertain and point out the particular items which were improperly allowed as charges against the territory. The judgment must be reversed, and the writ dismissed at the cost of the defendant in error, and it is so ordered.

O'BRIEN, C. J., and McFIE, LEE, and SEEDS, JJ., concur.

[No. 392. January Term, 1891.]

PERFECTO ARMIJO, EXECUTOR, ETC., ET AL.,
APPELLANTS, V. LORENZO ABEYTIA
ET AL., APPELLEES.

PRACTICE ON APPEAL—MOTION TO DISMISS AND FOR AFFIRMANCE OF JUDGMENT, UNDER SECTION 2189, COMPILED LAWS, AND RULE 23, SUPREME COURT.—Where, on appeal, the appellant files a transcript of the record, but not, as required by section 2189, Compiled Laws, “at least ten days before the first day of the term to which the appeal is returnable,” a motion to dismiss the appeal and for affirmance of judgment, on that ground, not made until after such filing, will be denied.

2. Nor will such motion be sustained on the ground of appellant's failure to deliver to the attorney of appellee, “at least ten days before the first day of the term, two printed copies of the transcript of record,” as required by rule 23 of the supreme court, where it appears from the affidavit of appellant's counsel that appellant is a poor man, and was not able to obtain the necessary money to procure a transcript of the record until after the time for filing had expired, and the record shows that the transcript was filed five days before the first day of the term. In view of these facts, and of section 2189, supra, which further provides that “the court shall affirm the judgment unless good cause shall be shown to the contrary,” it will be presumed that diligent effort was made by appellant to comply with the rule, which the court holds to be “good cause shown” within the meaning of the statute.
3. CONTRACT UNDER SEAL—COVENANT—SUBSTITUTION OF NEW PAROL AGREEMENT—ACCORD AND SATISFACTION.—In an action of covenant on a contract under seal for the value of certain sheep, rented by plaintiffs' testator to defendants, for a time determinable at the pleasure of either, not returned, where the plea was, among others, a new parol agreement in satisfaction of the original contract sued on, to which plaintiffs demurred on the ground of no consideration shown, which was sustained,—Held: The demurrer was properly sustained. In order to make a good satisfaction for a contract to be set aside, the new contract attempted to be substituted must contain an executed consideration of value to the obligee.
4. ID.—PLEAS—ATTACHMENT—REPLEVIN AND DISMISSAL BY PLAINTIFF—SALE—INEVITABLE ACCIDENT.—In such action, where the defendants pleaded further that the sheep in question were seized by the sheriff under a writ of attachment against one of the defendants; that

plaintiffs replevied them, but afterward dismissed their suit, and allowed them to be sold under the attachment; and that such sale constituted "inevitable accident,"—Held, on demurrer: These facts constitute no defense to plaintiffs suit for the value of the sheep not returned. The loss of the property by sale under the attachment was not accident within the terms of the contract.

5. ID.—LIABILITY FOR RENT AFTER BREACH—MEASURE OF DAMAGES.—In such case, where the contract sued on provides that "the said property is to be considered the same as money received," the right of action arises immediately upon a breach, and the measure of damages is the value of the property at that time with legal interest for the use of the money. Plaintiff can not recover rent for the time after such breach.

APPEAL, from a judgment in favor of plaintiffs, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

WILLIAM B. CHILDERS for appellants.

To establish a parol contract in discharge of a previous contract under seal, requires no other or different evidence than would establish any contract not within the statute of frauds. *Canal Co. v. Ray*, 101 U.S. 527; *Dearborn v. Cross*, 7 Cowen (N.Y.), 48; *LaFevre v. LaFevre*, 4 S. & R. 241; *Fleming v. Gilbert*, 3 Johnson, 527.

The court erred in sustaining the demurrer to defendants' second additional plea. *Dearborn v. Cross*, 7 Cowen, 48; *Lattimore v. Horsen*, 14 Johns. 330; *Cooke v. Murphy*, 70 Ill. 97; *Reed v. McGrew*, 5 Ohio, 376; *McGrann v. North & R. R. Co.*, 26 Pa. St. 82; *Lowell v. Roder*, 2 Grant (Pa.) Cases, 426.

This is rather an abandonment or rescission than modification. *Green v. Wells*, 2 Cal. 584.

The mutual agreements furnished sufficient consideration. *Low v. Forbes*, 18 Ill. 568.

The measure of damages is to be applied to the conditions at the time of the breach, not at the date of bringing the suit. *Fosdick v. Green*, 27 Ohio St. 284; *Wintermute v. Cooke*, 73 N. Y. 107; *Angier v. Taunton Paper Mfg. Co.*, 1 Gray, 621; note to *Baker v. Wheeler*, 24 Am. Dec. 71; 2 Sedg. on Measure of Damages, 151; *Id.* 392, and cases cited.

NEILL B. FIELD for appellees.

The plea of the substitution of an unexecuted parol agreement in discharge of a contract under seal is bad, and evidence in support of it inadmissible. *Sorrell v. Craig*, 8 Ala. 566; *Cabe v. Jamison*, 10 Ired. 193; 1 Chitty Pl. 488; 1 East, 630; 3 Term Rep. 596.

Such plea amounts to a plea of accord without satisfaction. 2 Par. Con., and cases cited.

The measure of damages for the value of the sheep at \$1.50 per head with rent to the date of the commencement of the action was right. *Robison v. Varnell*, 16 Tex. 390; *Snydam v. Jenkins*, 3 Sandf. 614.

The injured party was entitled to be put in the same condition, as far as money could do it, in which he would have been if the contract had been fulfilled, or the tort not committed, or the loss had been instantly repaired when compensation was due. 1 *Sutherland on Damages*, 174.

There was no error to the prejudice of defendants, but if the court shall think otherwise it may modify the judgment. Section 2190, Compiled Laws, 1884; *Hopkins v. Orr*, 124 U. S.

SEEDS, J.—The abstract of the record in this case was filed in the supreme court upon January —, 1889, being only — days before the first day of the January term of that year. The appellants failed to deliver to the attorney of the appellees two copies of the tran-

script ten days before the first day of the term, as required by rule 23 of the rules of the supreme court. The first day of the 1889 term fell upon January 7. Upon the fifth day of January, 1889, the appellees gave notice to the appellants that they would upon January 8, being the second day of the term, move the court to strike the case from the docket, and affirm the judgment of the district court. They filed their affidavit and motion, in accordance with that notice, upon January 8, 1889. The motion of the appellees was predicated upon two grounds, viz.: (1) "Because you did not, at least ten days before the first day of the January term, 1889, of said supreme court, file in the office of the clerk of said court a complete transcript of the record and proceedings in said cause." (2) "Because you did not, at least ten days before the first day of the said term of said supreme court, deliver to Neill B. Field, the attorney for the appellees, two printed copies of the transcript of the record in said cause." Counsel for appellees strenuously contends for the rights of his clients under this motion; and as the questions therein raised, if now decided, may definitely settle a matter of procedure, the motion will be considered with some thoroughness.

The two grounds of the motion involve the construction of a section of the Compiled Laws of New Mexico of 1884 (section 2189), and also of a rule of the supreme court (number 23).

Section 2189 provides substantially as follows: The appellant shall file in 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 fails to do so, the appellee may produce in court such transcript, and, if it appears thereby that an appeal has been allowed in the cause, the court shall affirm the judgment, unless good cause shall be

MOTION for affirm-
ance of judgment
under sec. 2189,
Comp. Laws.

shown to the contrary. The facts show that the record was not filed as herein contemplated, but it was filed some ——— days before the first day of the term, and before the appellee filed his motion to affirm the judgment. Is the motion upon this ground well taken?

1. The object of the statute is, undoubtedly, to assure promptness in obtaining the decision of the appellate court, in order that the successful litigant in the *nisi prius* court, if rightfully entitled to his judgment or decree, may not, by negligence or willful dereliction on the part of the appellant, be deprived of his rights. However, it is evident that the enforcement of the appellee's rights under this statute, in the first instance, depends upon his own action. The appellant is *prima facie* negligent, and loses his right to prosecute his appeal, when less than ten days remain before the first day of the term, and the transcript is not filed. Then is the time for the appellee to move; for immediately, in contemplation of law, his rights are infringed. He then has a duty to perform,—a duty just as imperative as the previous duty of the appellant,—and that is to produce in court the transcript, and move to affirm the judgment. If he fails to do so, but allows the appellant to file the transcript, the presumption certainly arises that, as he has not moved before, he does not consider his rights interfered with. The appellee contends that it would be a useless and vain thing for him, after the appellant had filed the transcript, to also file a transcript, and then move to affirm the judgment; that the appellant's is sufficient. True it would be useless and vain, but the error of the learned counsel is in assuming that, immediately upon the closing of the ten days without appellant's filing the record, that he has an absolute right to have the judgment affirmed. If he fails to act with promptness, he may in effect extend the day of grace to his adversary, who may take advantage of it, as in this case. While such statutes should not be so interpreted as to render

them easy of evasion, and of no practical value, at the same time they should have some flexibility, so that they may not be oppressive. This holding is not without the support of respectable authorities. Rule 9 of the supreme court of the United States is essentially the same as the statute under consideration; and that court has held that it does not consider the rule as applying where the transcript has been filed by the appellant before the motion to dismiss. 7 Cranch, 99; 10 Pet. 24; 3 Wall. 103; *Evans v. Bank*, 134 U. S. 330.

2. The second ground of the appellee's motion is based upon a portion of rule 23 of the rules of the supreme court, which reads as follows: And he [the appellant] shall also deliver to the attorney of the adverse party, at least ten days before the first day of the term, two printed copies of said transcript of record. In case the appellant or plaintiff in error neglects to furnish to the adverse party the said number of copies of the transcript of record, that latter shall be entitled to move, on affidavit and twenty-four hours' notice of motion, on the second day of the term, that the cause be stricken from the docket, and the judgment appealed from be affirmed, or the appeal dismissed." It will be noticed that, as to this rule, the day upon which the motion can be filed is fixed,—the second; that it is based upon affidavit and notice of the motion to the appellant twenty-four hours before its being filed. While the rule contemplates that these copies should be delivered ten days before the first day, yet it would seem the delay would not be fatal, if delivered before the filing of the motion; for the rule says, "in case the appellant neglects," etc., not "neglects to furnish ten days before," etc. But in this case the appellants have neglected to furnish the copies in accordance with the rule, and the appellees have in every particular complied with the requirements as to filing their motion for dismissal. While

MOTION for dismissal and affirmation under rule 23.

there is no direct adjudication in the reported cases of the territory upon this rule, yet there are negative expressions in a number of cases which plainly indicate the opinion of the supreme court upon it. In *Evans v. Baggs*, 4 N. M. (Gil.) 67, the court says: "When it is desired to strike out records under this rule, all the requirements of the rule must be complied with. The motion must be filed upon the second day of the term, supported by affidavit; and notice must be served upon appellant or his counsel, twenty-four hours previous to the filing of the motion, that it will be filed, and upon what ground it is based." See, also, *Mora v. Schick*, 4 N. M. (Gil.) 301.

The motion under consideration, as to its second ground, fully complied with the rule as interpreted by this court in the above citation. It would seem, therefore, that the motion as to the second ground was well taken, and should be sustained. However, there is another phase of this motion which requires attention. The statute (section 2189) says, among other things, that "the court shall affirm the judgment unless good cause shall be shown to the contrary." The appellant's counsel filed an affidavit in this court alleging that his client was a poor man, and was not able to obtain the money with which to procure a transcript of record of the case until after the time for filing it in the clerk's office had expired. Was this such good cause shown as to take the case out of the statutes? It is not the duty of the attorney to furnish the "sinews of war" for his client. The fact that a man is poor is not, as a general rule, a reason why he should be shown any more leniency than a prosperous person. At the same time, where a man is poor, and makes a laudable effort to protect his rights, and is temporarily embarrassed, he should not be denied the merciful provisions of the law, when by granting it the adversary is in no worse position than he would have been if the unfortunate

litigant had been able to do certain acts a few days earlier. It is true that the affiant has not said that his client used due diligence, commensurate with his circumstances, to procure the needed money; but, as the record shows that the transcript was filed five days before the first of the term, the presumption here would certainly be that he had made diligent effort. Of course, as his transcript was in time anyway, under the construction heretofore given to the statute, the question is only material upon the second ground. Are we justified in making any exceptions to rule 23? It is conceivable that, if we are not, that the righteousness of the statute in its desire to save the rights of those who have failed to file the transcript, but could not do so, in time, though for "a good cause," would be nullified. Suppose a transcript was procured, but before it was filed, through no fault whatever of the appellant, it was burned or stolen; that with all possible celerity it would be impossible to obtain a new one and file it before the third day of the term. Now, clearly, this would be "a good cause," under the statute, to interfere in behalf of the appellant; but, if the court has no power to relax the rigor of rule 23, all the appellee would have to do would be to file his notice, affidavit, and motion on the second day, and absolutely deprive the court of its undoubted right under the statute. It does not seem to us that the rule contemplates any such suicidal procedure; but, rather, that while rule 23 is to be sustained in its rigor in all cases where the transcript is in existence in time for a proper filing, yet when the failure to file copies with the adverse attorney in accordance with the rule is because of a failure to file the transcript with the clerk in time, and for that failure there is "a good cause" under the statute, then the same cause will apply to the failure under the rule, and justify this court in refusing to enforce its provisions. It will be borne in mind,

however, that we lay down no general rule by which rule 23 can be dispensed with. Each case depends solely upon its own peculiar facts. The affidavit filed in this case, "showing a good cause to the contrary" why the penalties of the statute should not be enforced, and it being evident that the failure in this particular case, under rule 23, is dependent upon the failure under the statute, we believe that the motion of the appellee should be overruled.

This is a case in covenant, upon a contract under seal. The declaration substantially alleges that the plaintiffs' testator rented to the defendants four thousand and eighty-seven ewes for a time determinable at the pleasure of either party; that the defendants were

CONTRACT under
seal: covenant:
substitution of
new parol
agreement.

to pay a rental of twenty-five cents per ewe each year, in advance, upon the twenty-fifth of August; that if, by reason of accident, the defendants could not redeliver any of said ewes, then they were to be paid for at the rate of \$1.25 each, but, if they were disposed of by said defendants "in any other manner," then they were to be paid for at the rate of \$1.50 each; that the rental was not paid, and, though often requested, the defendants refused to deliver said ewes. To this declaration the defendants filed sundry pleas, alleging (1) a partial delivery; (2) that there was a new agreement between the plaintiffs and one of these defendants which was a "complete satisfaction of the contract" sued upon; and (3) that the ewes were taken from the defendant Abeytia's possession by the sheriff of Santa Fe county on a writ of attachment upon the suit of one Barela against the said defendant Abeytia; that the plaintiffs herein replevied said property, and returned it to the defendant Abeytia, but afterward dismissed his suit, whereupon the ewes were returned to the sheriff, who sold them upon the attachment and judgment against the said Abeytia; and that such disposal of the ewes constituted "inevitable accident,"

whereby it was impossible for the defendants to return said ewes. The plaintiffs demurred to the second and third pleas upon the following grounds: As to the second plea, because (1) it attempts to set up a substituted, unexecuted parol agreement in discharge of the covenant sued on; (2) attempts to set up by way of defense an accord without satisfaction; (3) there was no consideration for the agreement set up in discharge thereof. As to the third plea, because the institution and commencement of the action of replevin, and the dismissal thereof, was, and is, in law, no defense to defendants' breach of covenant set forth in the declaration. The demurrers to these pleas were sustained, to which ruling the defendants excepted. The case was then tried by the court on the issues joined, and judgment given for the plaintiffs. The court found that there had been a partial performance by delivering one thousand, three hundred and sixty-seven ewes, and the payment of rental up to June 5, 1885, except the sum of \$244.80; that the balance of the contract was unperformed; and the plaintiffs were entitled to recover the value of two thousand, seven hundred and twenty ewes at \$1.50 a head, with rent for two thousand, seven hundred and twenty sheep from June 5, 1885, to the date of the commencement of this action, on August 17, 1886. The defendant filed a motion for a new trial, which was overruled, whereupon he took an appeal, and makes fourteen assignments of error. These assignments are interdependent, and in our view of the case a consideration of three or four disposes of all.

The first, and most material, one is that there was error in sustaining plaintiffs' demurrer to defendants' second plea. It will be necessary to set out the material portions of that plea in order that it may fully appear whether or no there was error. After pleading full payment of rent, a partial delivery of the sheep,

and a meeting for the purpose of delivering and receiving the balance of the sheep, the plea continues: "And the defendants further aver that then and there the said defendant Lorenzo A. Abeytia entered into a new contract and agreement with the said plaintiffs, by which he (the said Lorenzo A. Abeytia) agreed to hold the balance of said ewes under a new contract between the said L. A. Abeytia alone and the said plaintiffs, and in accordance with the terms of which he (the said L. A. Abeytia) was to pay twenty cents per head annual rental for the said ewes, and that the said new contract was then and there executed by the said defendant continuing to hold the said ewes thereunder; and that it was then and there agreed by and between the said defendant L. A. Abeytia and the said plaintiffs, in consideration of the said defendant L. A. Abeytia agreeing to hold and continuing to hold the said ewes under said new contract, that the said new contract and agreement should be substituted for the old contract; and the said plaintiffs then and there entered into the said new contract, and agreed that in consideration of the making of said new contract by the said defendant L. A. Abeytia, and the holding of the ewes thereunder as aforesaid, that the same should be a full and complete satisfaction of the contract mentioned in plaintiffs' declaration upon which this suit is brought." It will be noticed that there is no allegation that the balance of the sheep were ever delivered or tendered according to the terms of the original contract. The inference, therefore, is that the defendants failed so to do, and that there was a breach of the contract. This inference is corroborated by the allegations of the plea, which says that the new contract was "a full and complete satisfaction" of the original contract. If there had been a delivery, there would have been no need of a satisfaction; the delivery would have been a satisfaction. If there was no delivery, then

there certainly was a breach. As, then, this new agreement is pleaded as a satisfaction for the original contract, it is certain that it is done so as an accord and satisfaction. Has it set out a good accord and satisfaction?

The appellant argues that the facts alleged in the plea make out a case of performance and satisfaction, or, rather, an abandonment or rescission, not a modification, of the original contract. That it was not a modification seems plain, for the contract pleaded had as one of the parties only one of the defendants, and there is nothing said as to terms except as to holding the sheep, and paying twenty cents per head instead of twenty-five cents, and there is nothing showing an intention to modify the original contract. Neither is it an abandonment or rescission, as held in the cited case of *Green v. Wells*, 2 Cal. 584. In that case the plaintiffs informed the defendant that they were unable to fulfill their contract, and that they would forfeit the money due them if the defendants would consent to the abandonment of the contract. This the defendants agreed to do. In the case before us a different state of facts exists. The defendants here could have fulfilled their contract. There was nothing due from plaintiffs to these defendants upon which to predicate a consideration for abandoning the original contract. It seems to have been entirely one-sided, and that entirely for this defendant. That the plea makes out a performance and satisfaction is true, if by that is meant an accord and satisfaction. If any other is intended, it is so finely drawn that the writer is unable to grasp it. The early cases upon accord and satisfaction held to the doctrine that a contract made under seal could not be satisfied by a parol contract. This has, in a measure, been modified by the later cases where the new agreement was executed. In *Smith's Leading Cases*, in the valuable notes to the

case of *Cumber v. Wane*, 1 Strange, 426, upon page 647 of volume 1 [8 Ed.], it is laid down "that a parol accord and satisfaction can not discharge the instrument or obligation, but may discharge the money due upon it." If this had been a suit for the rental simply, the plea may have been good; but it would seem that it could not be good in attempting to discharge the instrument itself. There is another serious objection to this plea, and that is that it attempts to discharge a larger obligation by a smaller, without in any way placing the plaintiffs in a better position. The relation would seem to be the same as to the plaintiffs, except that they were to have only twenty cents per head for the sheep instead of twenty-five cents, and only one bound to pay it instead of three, and with no other terms as to the contract except the agreement to hold the sheep and pay for their use, but when, where or how is not stated. Upon page 648, volume 1, Smith, Leading Cases, we have the result of the cases summarized in the following language: "It seems to be reasonably well settled by the American cases that the giving and accepting of a smaller sum of money in payment or satisfaction of a larger one due is not a valid discharge, and can not be pleaded either as payment or as accord and satisfaction." See cases there cited. We think that this new contract was not executed.

The plaintiffs plead it as executed by the defendant Abeytia "continuing to hold the said ewes thereunder;" but there is no allegation that the plaintiffs have ever received anything for said sheep under the new contract, nor that the plaintiffs ever had the sheep in their hands, and passed them into the control of the defendants under the new contract. In order to make a good satisfaction for a contract to be set aside, the new contract should have in it an executed consideration of value to the obligee. There is none whatever

in this plea shown. There is only a promise to pay twenty cents per head. The obligor has done nothing new; has not changed his position at all; he still holds the sheep. While the manner in which the plea is drawn might at first blush seem to set forth a good defense, yet upon a careful analysis it is apparent that it is fatally defective, and that the ruling sustaining the demurrer was correct.

The second error assigned was that the court erred in sustaining the demurrer to the defendants' plea that the sheep were taken from the defendant Abeytia upon an attachment against him; and that after the plaintiffs had replevied them, and returned them to the defendants, he afterward dismissed the replevin suit, and allowed them to be sold by the sheriff. We are unable to see any error herein. Possibly, the plaintiffs may have at first thought that he would save his property in the sheep by asserting his prior right to them, and afterward concluded that, as the defendants held them under a contract, they might protect his right, and that he would look to them for satisfaction, as he had a perfect right to do. It can not be urged that the contract was at an end by the taking under the replevin, for the plaintiffs immediately passed them into the hands of the defendants, and there was never any agreement that the contract should be terminated by such delivery as contemplated by the contract. Then, too, the evidence conclusively shows that the said replevin suit was instituted for and at the request of the defendants. The sheriff sold said ewes under the attachment and judgment against the defendant Abeytia. The court therefore found that the value of the sheep, under the contract, was \$1.50 per head. To this finding the defendants except and urge that this is "accident," under the terms of the contract, and their value should be \$1.25 per head. It seems to us that "accident" is any casualty which could not be

ATTACHMENT:
replevin: sale:
inevitable acci-
dent.

prevented by ordinary care and diligence. It can not be presumed that parties will enter into contracts, and place property in another's possession, with a price thereon varying as to contingency, and intend that the lesser sum is to cover the obligor's own fault. The smaller sum was to protect him against accidents over which he practically had no control; as, for instance, disease. The larger sum was to protect the plaintiffs against the carelessness or fraud of the defendant. He could have saved the sheep by paying his debts. Instead, he saw fit to pay his debts with another person's property. This was clearly disposing of them in "any other manner" than by accident. The court's finding was correct.

The last error which we think material to consider is the eleventh, in which the court refused to declare, as a matter of law, that if a breach of the contract occurred on September 25, 1895, thereafter plaintiffs were not entitled to recover the rent contracted for, but only six per cent interest upon the money due at that time. That the rule here contended for is correct under certain circumstances is undoubtedly true, but whether or not it is applicable here depends upon the terms of the contract, if there are any, governing it. It appears that a value was placed upon the sheep, and the contract specifies that "the said property is to be considered the same as money received." When, then, a breach of the contract occurred, immediately a cause of action arose, and then plaintiffs could have sued thereon, and recovered either the ewes or their value in money. At the time of the breach the plaintiffs could have had the ewes, for they were in the possession of the defendants; or, if they failed to deliver them, then their value, at \$1.50 per head. It rested entirely with the plaintiffs as to when they should begin their suit. Can it be contended that the plaintiffs may speculate upon their right of action? And yet, if

LIABILITY for
rent after
breach: measure
of damages.

the contention of the counsel is correct, they may refuse to institute suit for years, and then recover the value of the sheep, and the rent agreed upon for those years; while, if suit was instituted at once, the damages would be the value of the sheep. The contract was at an end at its breach; the value of the contract then was a moneyed value; the damages for the use of money would be the legal rate of interest. We think, therefore, that the court erred in refusing to declare the law in this respect as asked by the defendant. Judgment will therefore be given for \$5,229.42 with interest at six per cent, from October 5, 1888. There was an error of \$502.35 in the judgment.

O'BRIEN, C. J., and FREEMAN, McFIE, and LEE, JJ., concur.

[No. 410. January Term, 1891.]

MIGUEL SALAZAR, PLAINTIFF IN ERROR, v.
ROBERT H. LONGWILL, DEFENDANT
IN ERROR.

EJECTMENT—ANCIENT DOCUMENTS—EVIDENCE.—In an action of ejectment for the recovery of certain land, and for damages for its detention, where two ancient documents purporting to be conveyances of the land in controversy, but not executed according to the law of Spain, then in force in New Mexico as a province of Spain, and admitted by plaintiff not to be deeds conveying fee simple title, were offered in evidence by plaintiff as the foundation of his title, they were inadmissible to show color of title in the plaintiff, who claimed under the person mentioned as the grantee in said documents, in the absence of evidence that such person ever had or claimed possession of the land, or that his son entered or took possession as a tenant in common with the other heirs. So far as the evidence goes, his possession was adverse to them, and his entry was an ouster of them, for his assumption of ownership was in himself; and if any title inured to any person by virtue of his possession, it would be to him, his heirs, or persons holding under him, and not to the heirs of the person mentioned as grantee in said documents.

ID.—QUITCLAIM DEED—EVIDENCE.—A quitclaim deed offered in evidence in such case, purporting to convey no other title to the land in question than that derived through the pretended conveyances mentioned supra, was also inadmissible in evidence and properly excluded.

ID.—EXCLUSION OF EVIDENCE IMMATERIAL.—The plaintiff having failed to show any title in the person mentioned as grantee in the pretended conveyances, the exclusion of evidence as to who were the heirs of such person, if error, is immaterial, and can have no effect here.

ID.—EVIDENCE—VERDICT.—The papers offered in evidence being excluded, there was no evidence to support a verdict, and the court properly directed the jury to find for defendant.

ERROR, from a judgment for defendant, to the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT for plaintiff in error.

Where the documents are not, perhaps, technically deeds to real estate, they were competent evidence to go to the jury, as showing the color of title under which Tomas Sena claimed in regard to the possession of the land. 1 Greenl. Ev., secs. 21, 141, 142; Abb. Tr. Ev., p. 708.

If they had not been competent when first offered, they ought at this time to have been admitted, after the testimony of Timoteo Sena and Joseph D. Sena in regard to the possession of the land. Tyler on Eject., p. 483; Stoddard v. Chambers, 2 How. (U. S.) 316.

The declarations of members of a family, and the general reputation in the family, and even tradition, and the statements of others not members, but intimate with the family, are accepted as evidence of pedigree. Tyler on Eject., p. 491; Jackson v. Cooley, 8 Johns. Rep. 128.

It is immaterial whether Jose D. Sena had the right to put a tenant upon the land for the heirs of Miguel Sena y Quintana, so long as the tenant Trancosa went

upon it as such tenant in 1876 or 1877. Even if he did not enter as tenant of Sena y Quintana, his possession could not be adverse without color of title from some other source. Tyler on Eject., pp. 91, 108; Jackson v. Thomas, 16 Johns. 293, 301; Jackson v. Newton, 18 Johns. 355; Joy v. Stump, 12 Pac. Rep. 929.

A prior possession is sufficient to entitle a party to recover against a mere intruder, or wrongdoer, or person subsequently entering without lawful right; and where no legal title is shown the party showing prior possession will be held to have the better right. Tyler on Eject., p. 72, and cases cited; Hubbard v. Barry, 21 Cal. 321; Hutchinson v. Perley, 4 Id. 33; Shultz v. Arnot, 33 Mo. 172; Wilson v. Palmer, 18 Tex. 592; Shumway v. Phillips, 22 Pa. St. 151; Tappscott v. Cobbs, 11 Gratt. 172-180; Jones v. Nunn, 12 Ga. 469; Smith v. Leorillard, 10 Johns. 339-354.

CATRON, KNAEBEL & CLANCY for defendant in error.

The first document is not signed by Vicente Martin, personally, nor by him as agent, nor by Maria Casadas in person, or by her agent. There is no evidence in it that he was her agent, nor if he was such agent that he had authority to convey the land of her deceased husband.

The second, which purports on its face to be a conveyance of Vicente Apodaca and Vicente Martin to Tomas de Sena, is not signed by either of them, nor by any one for them.

Under the Spanish law a sale of real estate must be made before a notary public in public writing "en escritura publica." Escriche, pp. 1529, 1530.

As to definition of "escritura publica," or public writing, see Id., p. 637.

As to how the public writing or instrument shall be made and authenticated, see Law 1, title 23, book 10, Novissima Recopilacion; Escriche, pp. 886, 888.

As to character of the "procuracion" or power of attorney required under the Spanish law, see Escriche, p. 1197; *Id.*, p. 1353.

The pretended deed of the heirs of Tomas Sena, as the record shows, was made while defendant was in possession, claiming adversely. It is, therefore, champertous.

LEE, J.—This is an action of ejectment, brought by Miguel Salazar, the plaintiff in error, against the defendant in error, Robert H. Longwill, to recover possession of certain real estate situated in precinct number 4 in the county of Santa Fe, known as the "Ranchito Largo," and for damages for the detention of the same. The action being under the statute, the defendant's plea of not guilty put in issue the right of the plaintiff to possession, and all other questions raised, and matters charged in the plaintiff's declaration. The issues being thus joined, they proceeded to trial. The plaintiff introduced his evidence, whereupon the defendant's counsel moved the court to instruct the jury to return a verdict for the defendant, which motion was sustained for the reason that the evidence failed to suit the case, and the jury, by direction of the court, returned a verdict for the defendant. The plaintiff moved for a new trial, which was overruled, and by a writ of error brings the case to this court, and assigns the following grounds of error: (1) That the court erred in excluding from the jury the first document offered in evidence by the plaintiff below; it purporting to be a certificate of conveyance from Maria Casadas, widow of Vicente Apodaca, to Tomas Sena, of a portion of the lands in dispute, and executed on the thirtieth day of July, A. D. 1821. (2) That the court erred in excluding from the jury the second document offered in evidence by the plaintiff below; it purporting to be a conveyance from Vicente Apodaca and Vicente Martin to Tomas

Sena, of a portion of the lands in dispute, and purporting to have been executed by an alcalde on the twelfth day of September, 1807. (3) That the court erred, because at a later stage of the trial, and after evidence had been given tending to show possession of the lands in dispute in the ancestors of plaintiff in error's grantors, the court again refused to allow plaintiff in error to give the above described documents in evidence to the jury, but excluded the same again from the jury. (4) That the court erred in refusing to allow any testimony as to who were the heirs of Tomas Sena, except from absolute personal knowledge, and excluded from the jury testimony as to the general reputation in the family of the descendants of Tomas Sena as to who were his heirs, and refused to allow plaintiff in error to show that certain persons were recognized and treated in the family as such heirs, and excluded such testimony from the jury. (5) That the court erred in refusing to allow testimony to be given to the jury as to the actual occupancy of the land in dispute by permission of Jose D. Sena, after the death of Miguel Sena y Quintana in 1875, and in excluding such testimony from the jury. (6) That the court erred in excluding from the jury the deed offered in evidence, executed July 4, 1887, and recorded July 15, 1887, from persons reciting in said deed that they were the heirs of Tomas Sena to the plaintiff in error, conveying the land in controversy. (7) That the court erred in excluding from the jury other relevant, material, and competent testimony offered by plaintiff in error on the trial in the court below in support of his case, and which should have been allowed in evidence. (8) That the court erred in giving its instructions to the jury to return a verdict for the defendant below over the objections of the plaintiff in error, and in refusing to allow the jury to consider the evidence which it had before it.

The principal question for review arises upon the exclusion of certain documents offered in evidence by the plaintiff as the foundation of, or in support of, his title. We will consider this ruling more fully than any of the other points made, for we think it is decisive of the case. The documents were ancient documents, and therefore to be considered with the presumptions that come to the support of imperfect instruments of more than thirty years old. The documents thus offered in evidence in this case were evidently attempts to make conveyances under the laws of Spain, in force here at the time. The first one offered was dated in the year 1821, and executed by Don Diego Montoya, a constitutional alcalde. The grantors did not sign the same, for the reason, as the alcalde certifies, that they did not know how. The other document was dated in the year 1807, before Don Jose Miguel Tafoya, acting alcalde for the town of Santa Fe. The party making the deed was not present, but, as recited in the document, was at home, sick in bed; and the instrument was not signed by the grantor, or by anyone for her. Nor was there any authority in writing or power of attorney exhibited or offered in evidence, whereby the alcalde was authorized to execute the document. They were in the Spanish language, and, when translated into the English language, read as follows:

“Document No. 8. At the city of Santa Fe, New Mexico, on the thirtieth day of the month of July, and current year of one thousand, eight hundred and twenty-one, before me, Don Diego Montoya, constitutional alcalde of said city, personally appeared Vicente Martin and Don Tomas Sena, both residents of this city, and the former stated that whereas his aunt, Maria Casadas, is sick in bed, and it is impossible for her to come to witness the execution of the present instrument, she has requested him, in the presence of

EJECTMENT: ancient documents: evidence.

two witnesses, of this same place, to state in her name that her husband, Don Vicente Apodaca, deceased, sold to the said Don Tomas Sena, in the month of April of last year, 1820, a piece of land known as the 'Ranchito Largo,' which is situate in this city, and it consists of one hundred and seventy-seven and a half varas from north to south, and from east to west on the north side of eighty-one and a half varas, and on the south of sixty-three and a half varas; the boundaries of the said land being, on the north, the main road that turns off from the Tenorio's house, which goes by the Martinez house; on the south, the arroyo called 'Los Garambullos,' on the east, lands of the said purchaser; and on the west, lands of Senor Mateo Garcia, —for which land no instrument has been executed to him; and in consideration of the fact that she knows that the said bargain was made, and that in virtue thereof she has received, to her perfect satisfaction and contentment, twenty-one dollars and three reales in cash, desiring to remedy the said defect in the name of her deceased husband, and, on account of her present inability, delegating for that purpose her authority to her said nephew, Vicente Martin, it is her will that it be stated that the bargain made of said land, being true and legal as it is, it is also true that she was contented and satisfied with the said sum, and in virtue thereof, if the said land is or may be worth more, of the excess she makes to him a gift and donation, pure, simple, perfect, and irrevocable, which the law calls 'inter vivos,' and that she gives it to him free of any annuity, rent, mortgage, or other incumbrance, in order that he may freely use it in the manner that he may choose, without anyone interfering with him, neither she, her children, heirs, nor successors; and in case anyone should oppose it, she requests the justice of his majesty that they be not heard either in or out of court, binding her children, on the contrary, to this

guaranty until they place him in quiet and peaceable possession, concerning which she renounces any and all laws which may operate in her favor, submitting herself to the fulfillment of this instrument as if it were by definite sentence pronounced by a competent judge, acquiesced in and not appealed from; and, as she knows it is an act of justice, she desires this to be complied with, and that it be considered as the said sale, without alleging the defect that up to this date the proper instrument had not been executed; to that end, and in order that the present may have the necessary force and validity, requesting the present constitutional alcalde to sanction it by his authority and judicial decree; and I, the said constitutional alcalde, stated that I sanctioned and did sanction it in so far as I am authorized by law. I certify that Maria Casadas is dangerously ill, and that for that reason, with full knowledge, it has been her will that her nephew, Vicente Martin, should appear her name, who, comparing all that he has stated, and which is here set forth, with that which in the presence of the two witnesses recently and for the sake of due formality the said Casadas has finally stated, it has all been found to be certain and true. In testimony whereof, and in order that the present instrument be entitled to the same credit as if it had been executed by order of the deceased Don Vicente Apodaca, I signed it with the same witnesses, who made a cross, not knowing how to write. The secretary of the municipality of this city signing this document of security, it being noted that use has been made of the present common paper on account of there being none of any stamp in this province. To all of which I certify.

“DIEGO MONTOYA. [Scroll.]

“Witness: VICENTE X GARCIA.

“Witness: JOSE MIGUEL TENORIO.

“Before me, FRANCISCO PEREZ SERRANO [Scroll.],

“Secretary of the Municipality.”

“Document No. 3. At the town of Santa Fe, on the twelfth day of the month of September, one thousand, eight hundred and seven, before me, Don Jose Miguel Tafoya, acting alcalde of this said town, appeared Vicente Apodaca, Vicente Martin, and Tomas de Sena, all three residents of this aforesaid town, whom I certify I know, and the two Vicentes stated that they gave, and in effect they did give, to the said Tomas de Sena, in legal sale, a piece of cultivated land which is at the Ranchito Largo, and [of] this land that which Vicente Apodaca sold consists of fifty varas, and that which Vicente Martin sold consists of one hundred and thirty-eight varas, both pieces comprising one tract; and its boundaries are, on the north, an arroyo; on the south, the Arroyo de los Garambullos; on the east, the lands of the said Vicente Martin; and on the west, the land of the said Vicente Apodaca,—which lands both vendors sold to him for the price and sum of one hundred and thirty-eight dollars in the currency of the country, which said vendors acknowledge having received from the hand of Tomas de Sena, to their satisfaction and contentment, with which they declare that they are satisfied, and paid for the value of said land; and, if it is or may be worth more, of the excess and greater value they make to him a gift and donation, pure, simple, perfect, and irrevocable, which the law calls [two words are here erased in the original; they were doubtless the words “inter vivos”]; and that they cede and convey to the said purchaser the right of action and seigniority which they had in said land, in order that as his own he may use it, selling or alienating it, without any suit or claim being brought against him either by them, their children, heirs, successors, either now or at any time; and, in case they should bring it, may they not be heard either in or out of court; and that they will appear in his defense until they leave him in quiet and peaceable possession; to which

guaranty they bind their present and future property, real and personal, that they annul [waive] any and all laws that may operate in their favor, and they will not avail themselves thereof, either now or at any time; and they both submit themselves to the royal justices of his majesty, and particularly to those of this town, in order that to the fullest extent they may urge and compel them to the fulfillment of this instrument as if it were by the definitive sentence pronounced by a competent judge, acquiesced in, and not appealed from. All of which they executed before me, and they requested me, for the greater force and validity of this instrument, to sanction it by my authority and judicial decree; and I, said alcalde, state that I did and do sanction it in so far as I am authorized by law. I certify that I know the grantors, who did not sign, as they did not know how. I signed it with those attending me acting by special authority for lack of a public or royal notary, of which there is none of any kind in this province. To all of which I certify.

“JOSE MIGUEL TAFOYA. [Scroll.]

“Attending: ANTONIO TAFOYA. [Scroll.]

“Attending: FRANCISCO BACA. [Scroll.]”

These instruments were attempted to be executed under the laws of Spain, then in force in this territory as a province of Mexico, and under the Spanish law a sale of real estate was made before a notary public by what was termed a “public writing” (*en escritura publica*). A “public writing” is thus defined: “‘Public writing,’ is that which is made by a notary public in the presence of the parties who execute it, with the assistance of two witnesses; the parties in interest signing it, or, at their request, either of the witnesses, with the said notary.” *Escriche*, p. 637. “Public Instrument. In general, it is every writing authorized by a public functionary in matters pertaining to his office or position, as has been already indicated in the two preceding

articles, but more particularly by public instrument or writing, is meant the writing in which is contained a disposition or agreement executed before a notary public in accordance with the law, is understood, and of this kind of instruments we will treat in this article."

"(1) In order that the public instrument be held as authentic, and in accordance with the law, the following conditions are required: * * * (7) That the writing being made, it be read by the notary to the parties and the witnesses, and, the former agreeing to its tenor, they shall sign with their names and surnames; 'and if they should not know how to sign, either of the witnesses, or any other person who may know how to write, may sign for him,' the notary making mention at the end 'that the witness signed for the party who did not know how to write.'" Law 1, tit. 23, bk. 10, Novissima Recopilacion. Escriche, pp. 886, 888. The civil law in regard to the requirements of a power of attorney is essentially the same as that of the common law, and it would hardly be contended that under the common law a person without a properly executed power could make a valid conveyance of another person's land. Yet these documents might very properly have been admitted in evidence as ancient documents, tending to show color of title, if they were offered alone for that purpose, with an understanding that they were to be followed up with proofs that the grantees took possession thereunder, and maintained the same under claim of title, until ouster by the defendant; and this proposition would have to be sustained by the evidence, as it is an elementary rule in the action of ejectment that the party claiming the right to lands must recover, if at all, on the strength of his own title. The possession of the defendant gives him a right against every person who can not establish a title. This is a general rule, to which there is no exception, and has been established by a world of

authorities. See Taylor, Eject., p. 72, and cases cited. The plaintiff in error does not claim that the documents offered in evidence by him were legal deeds, but invokes for them the ruling of the supreme court of the United States in the case of Stoddard v. Chambers, 2 How. 119. In that case the deed was executed in 1804. It was attested by two witnesses, and purported to have been acknowledged in the presence of a syndie.

The deed had been executed forty years at the date of that decision, and from the time of its execution to the time of the decision the grantees were asserting their claim under it. It was presented to the commissioners in 1811, having been filed with the recorder of land titles in the year 1808; and again it was brought before the commissioners in 1835, having remained on the file until that time. Possession under the deed was for a time held by Stoddard himself, and became so notorious that an elevation on the land was called "Stoddard's Mound." It was held that such a deed, under such a state of facts, was properly admitted in evidence. In this case there is no evidence that Tomas Sena, the grantee, ever had possession of any part of the land, or by any act of his ever asserted or pretended to assert any claim of title to any part of it, unless it is included in a general bequest to his heirs by his first wife, which will was executed in 1835. The will, however, was only offered in evidence to show who the heirs of Tomas Sena were, and not for the purpose of showing that the land was included in his will, or thereby intended to be conveyed to any person or persons. The documents were not recorded during the lifetime of Tomas Sena, or during the lifetime of Miguel Sena y Quintana, his son, who died in the year 1875, he being the party who, it is claimed by the plaintiff, in the year 1866 or 1867 set up some claim of right to the property. Whether this right was under or by virtue of the documents in question it does not appear. So far as the

evidence shows, his claim to the property was that of his own. These documents, together with the will of his father, were found, after his death, in a box which had belonged to him. It does not appear in evidence that before that time any of the other heirs of Tomas Sena knew of their existence. His acts of ownership were to visit the land a few times, have it measured with a rope, to try and sell it, and put it in charge of Maj. Jose D. Sena, to take charge of it for him. Maj. Sena let different persons cultivate different parts of the lands. Some years some parts of the land were cultivated, some years others, and some years it remained idle. There are no buildings of any kind on the land, or other evidences of exclusive possession, except a wire fence around a small part of the land. The evidence does not show when that was constructed or by whom. There is no pretention that it was erected by Miguel Sena y Quintana. In fact the evidence shows the contrary, as Maj. Sena states in his testimony that he does not know who put the fence there, nor does he show that it was there while he had charge of the premises. Then, what was the character or effect of the acts of ownership exercised by Miguel Sena y Quintana to the locus in quo? It is admitted by the plaintiff in error that the documents in question are not deeds conveying fee simple title. Then, in order to give them any legal effect, it would have to be shown that Tomas Sena, the person mentioned in the documents as the grantee, or persons holding under him, had entered under them and occupied the same by claim of right, until such possession ripened into title by prescription. There is no evidence that Tomas Sena ever had or claimed possession of the land, nor is there any evidence that Miguel Sena y Quintana entered or took possession as a tenant in common with the other heirs of Tomas Sena, deceased; but, so far as the evidence goes, his possession was adverse to

them. An ouster by a tenant in common by his cotenants does not differ in its nature from any other ouster. His entry was an ouster of them, and his possession was adverse to them, for his assumption of ownership was in himself, and clearly adverse to them, as well as the rest of the world; and, if any title inured to any person by virtue of his possession, it would be to him, his heirs, or persons holding under him, and not to the heirs of Tomas Sena, deceased.

And this brings us to consider a deed offered in evidence, executed by some forty persons on the fourth day of July, 1887, in which it is cited that

QUITCLAIM deed:
evidence. they are the heirs of Tomas Sena, deceased, and in consideration of one dollar and other good considerations quitclaim whatever right or title they may have inherited as heirs of Tomas Sena, deceased; it being thus set forth in the deed: "The property herein conveyed is the same property that the said parties of the first part obtained and inherited from Tomas Sena, deceased, who purchased the said real estate from Vicente Apodaca and Vicente Martin by deeds dated September 12, 1807, and July 30, 1821," etc. And this deed does not purport to convey any other title than that which they may have inherited as heirs of Tomas Sena, deceased, through the attempted conveyances before set out and considered. It is very clear that those documents did not convey to Tomas Sena any title, and therefore his heirs, whoever they may have been, could not convey a title through inheritance from the said Tomas Sena as derived by him through those documents. The court was therefore right in excluding this deed as evidence from the jury.

There are errors assigned upon the rulings of the court in excluding certain testimony from the jury, which was claimed tended to show who the heirs of

Tomas Sena were. This testimony could only become material after they had established a title in Tomas Sena, which, according to the view we have taken of the case, the plaintiffs failed to do. Therefore the testimony in that regard was immaterial, and errors, if any were omitted, in relation thereto, would be regarded immaterial, and can not have any effect here.

It is also claimed that the court erred in directing a verdict for defendant. This was practically settled in sustaining the ruling of the court below in excluding from the jury as evidence the title papers offered by the plaintiff in error. Those papers being excluded there was no evidence to support a verdict, and the court very properly instructed the jury to return a verdict for the defendant, for the reason that the law presumes a person in possession of real estate has a valid title thereto, and this presumption can only be overcome by proving the title out of such party. Finding no substantial error, the judgment will be affirmed.

O'BRIEN, C. J., and McFIE, FREEMAN, and SEEDS, JJ., concur.

[No. 412. January Term, 1891.]

BACHELDER BROTHERS, PLAINTIFFS IN ERROR,
v. FRANCISCO CHAVES, DEFENDANT IN
ERROR.

SHERIFF—EXECUTION, VARIANCE BETWEEN AND JUDGMENT, AMENDMENT OF—LIABILITY OF SHERIFF FOR REFUSAL TO ENFORCE.—In an action on the case against a sheriff for refusal to enforce the levy of an execution in his hands, where it appears there is a variance between the amount of the execution and the amount of the judgment on which it was issued, such variance does not render the execution void, but only voidable. It may be amended at any time, even on the return day, or after its return, so as to conform in amount to the judgment; and such variance is no defense to such action.

Id.—REFUSAL TO ENFORCE EXECUTION AGAINST PERSONAL PROPERTY IN POSSESSION OF JUDGMENT DEBTOR—BURDEN OF PROOF.—Nor will the mere disclaimer of the judgment debtor of the ownership of personal property in his possession, nor the claim of another to such property, excuse the sheriff for refusal to execute a process in his hands against such property. Possession of personal property is *prima facie* evidence of ownership; and it is the duty of the sheriff, under such circumstances, to enforce the execution, unless he knows that the ownership of the property, though apparently in the execution debtor, is really in another; and if, without such knowledge, he fails or refuses to do so, the burden of proof is upon him to show that the property was not subject to execution.

Id.—EXCESSIVE LEVY—INDEMNIFYING BOND.—A sheriff who levies an execution on the property of the judgment debtor, exceeding in value the amount of the judgment, has no right to demand of the execution plaintiff an indemnifying bond to cover such excess; and the refusal of the plaintiff to comply with such demand will not relieve the sheriff from liability for refusal to sell such property to satisfy the process, where the plaintiff tenders him an indemnifying bond in double the amount of the judgment; except where such officer finds but one item of property, largely in excess in value of the process to be satisfied, when he would be entitled to indemnity commensurate with the value of the property to be levied upon.

ERROR, from a judgment in favor of defendant, to the First Judicial District Court, Santa Fe County. Judgment reversed, and cause remanded with directions to permit plaintiffs in error to so amend the execution as to make it conform to the judgment on which it was issued.

The facts are stated in the opinion of the court.

W. B. SLOAN for plaintiffs in error.

THOMAS SMITH for defendant in error.

When a sheriff levies an execution upon property in which the defendant has no interest, it is his duty to stop all further proceedings under the levy as soon as he ascertains the fact, and he is not liable on his bond for failure to sell the property. *State v. Swigart*, 22 Ark. 528.

It is well settled that where there is a substantial variance from the judgment the execution issued thereon is void. Herman on Execution, sec. 64; 6 Johns. 282; 15 N. H. 337; 4 Ired. 381; 2 Conn. 462; 8 Cush. 388; 15 B. Monroe (Ky.), 476; 10 Cal. 411; 11 Ala. 618; 88 Am. Dec. 780; 36 Ill. 116.

A void execution is one not supported by the judgment. Herman on Executions, sec. 89.

An execution absolutely void can not be amended, whether it be a *fifa* or *venditioni exponas*; if illegally issued it is a nullity, and no title passes under a sale through it. 3 Am. Rep. 699; 6 Id. 533; 5 Id. 836; 4 Rand. 427. See, also, Herman on Executions, sec. 69.

FREEMAN, J.—This was an action on the case instituted by plaintiffs in error against the defendant in error in the district court of the county of Santa Fe. The plaintiffs in error filed their declaration against the defendant in error, at the August term, 1887, alleging that at the July term, 1884, of said court, they obtained a decree against the Texas, Santa Fe & Northern Railroad Company, for \$1,346.37, with \$100 attorneys' fees, and \$89.75 costs; that afterward, to wit, at the February term, 1887, of said court, "by the consideration of said court, the decree entered at the July term, 1884, was duly docketed, as provided by law, for the sum of sixteen hundred and forty-six dollars and sixty cents, and costs, eighty-nine dollars and seventy-five cents." That afterward, on the fourteenth day of March, 1887, an execution was issued on said judgment, directed to the defendant in error, as sheriff of Santa Fe county. That defendant in error levied said execution on the property of the defendant company, amounting in value to \$3,000. That said defendant in error, disregarding his duty as such sheriff, failed to sell the property so levied upon, and returned said writ after it had expired, unsatisfied. That afterward, to wit, on the sixth of June, 1887, the

plaintiffs in error caused the venditioni exponas to be issued to the defendant in error, commanding him to sell said property so levied upon; and that said defendant in error refused to execute this writ, to their damage, etc. The defendant filed two pleas to this declaration, the first, a general plea of not guilty; in a second plea, he undertakes to justify his refusal to obey the mandate of the court. It is, in effect, a plea of confession and avoidance, and sets up substantially the following defense: He admits that he was, at the time charged, sheriff of Santa Fe county. That he received into his hands the execution set out in the declaration. That he levied the same upon certain goods and chattels, which he was informed and believed belonged to the defendant company, but was notified by said company that it did not own, claim, or have any interest in said property; and for that reason the property was not sold. That said execution was returned, and thereupon a venditioni exponas was issued by the clerk, and the property which had been formerly levied upon advertised to be sold. That upon the day appointed for the sale he was notified by the president of the defendant company that said goods were not the property of the said company, and was also notified by the Southern Trust Company, of New York, that said goods belonged to the said trust company, which forbade the sale thereof. That thereupon he gave notice to the attorney of the plaintiff, that, unless an indemnifying bond "in double the value of the property was executed to this defendant, that such property would not be sold." That the plaintiffs in error refused to execute such bond, and thereupon he adjourned the sale. To this plea plaintiffs filed their replication denying that the property levied upon belonged to the trust company, and averring that the property belonged to the railroad company; and, further, that they, the plaintiffs in error, tended to the defendant in error a

good and sufficient indemnifying bond in double the amount of the judgment. On this state of the pleadings the parties went to trial. On the trial of the cause the plaintiffs in error offered to read as evidence to the jury the execution issued upon the original judgment. To this the defendant in error objected, on the ground that the execution offered in evidence did not agree in amount with the original judgment. This objection being sustained by the court, they moved for leave to correct the execution, so as to make it conform in amount to the judgment. This motion was also denied. They also offered in evidence the original and last or "docketed" decree of the court, the judgment docket, etc., all of which, except the original judgment, was, on the objection of the defendant, excluded. The court thereupon instructed the jury to return a verdict for the defendant, which was accordingly done.

In this we think there was error. It is admitted that the execution differed in amount from the judgment on which it was issued. It is insisted by the defendant in error that this variance rendered the process void, and some authorities are cited which seem to support this view. We think, however, that the weight of authorities is to the contrary. In Herman on Executions, section 65, under the head of "Void Executions," the author mentions, among other defects that render the process void, "a misrecital as to date and amount," citing *Albee v. Ward*, 8 Mass. 19. The same author, however, in section 66, declares: "Whenever an execution varies from the judgment on which it issued, it may be amended by the judgment so as to conform to it; and, where there is an error as to the amount to be collected, it may be amended at any time, even on the return day, or after its return." It is claimed by the defendant in error, that while such a writ, as between

EXECUTION: judgment: variance: amendment.

the judgment creditor and debtor, may be amended, yet it can not be so amended as to charge the officer refusing to execute it in its defective form. In our opinion, however, the officer's liability depends, not so much upon the regularity, as upon the validity, of the process. The true rule is stated as follows: "When a writ from a court of competent jurisdiction is placed in an officer's hands, he is bound to execute it according to the exigency of the writ, without inquiry into the regularity of the proceedings upon which it was grounded. Nor can he refuse because in his opinion it is irregular, or that the sum varies from the amount for which the judgment was rendered." *Id.*, section 146; *Parmelee v. Hitchcock*, 12 Wend. 96. "The cases recognize and affirm a distinction between process which is void, and that which is merely voidable, and it is repeatedly stated that, when a process is void, the sheriff is not bound to execute it, nor liable for any neglect, partial or total. But otherwise, if the process is voidable only; because, if the defendant in the execution does not seek to avoid the process, and where the court might, if applied to, allow an amendment, the sheriff can not avail himself of the defect in the process." *Freem. Ex'ns*, sec. 103.

Having determined that the process, though irregular, was not void, and that it was the duty of the sheriff to have executed it, we proceed next to inquire if the justification set out in his second plea is sufficient

to protect the defendant in error. Omitting the details, the substance of this defense is that the defendant corporation

LIABILITY of sheriff for refusal to enforce execution: burden of proof.

disclaimed the ownership of the property, and that the same was claimed by a foreign corporation. This was not sufficient. The property levied on was in the possession of the defendant corporation; the defendant recites in his return of the original writ that he believed it to belong to the defendant

company. "When an officer sues a defendant against whom he holds an execution in possession of property, it is his duty to make a levy, unless he knows that the apparent is different from the real ownership." *Id.*, sec. 252.

Possession of personal property being prima facie evidence of ownership, whenever it is shown that the sheriff had knowledge that the defendant in execution was possessed of personal property, and he fails to levy upon it, the burden of proof is upon him to show that the property was not subject to execution." *Taylor v. Wimer*, 30 Mo. 129.

The plaintiffs in error, however, tendered the officer a good and sufficient indemnifying bond in a sum equal to double the amount of the judgment. This the officer declined to accept, because it was not in amount sufficient to cover the value of the property levied upon. In this, we think, the officer was in error. The law authorized him to levy upon only so much property as would be sufficient to satisfy the execution. If he had made an excessive levy, his demand upon the plaintiffs in error was, in effect, that they should not only indemnify him against the consequences of a mistaken ownership of the property, but against his own wrong in having made an excessive levy. A case might occur in which an officer finding but one item of property, and that largely in excess in value of the process to be satisfied, would be entitled to indemnity commensurate with the value of the property levied upon. The extraordinary schedule of property levied on in this case, however, shows that the demand of the defendant in error was unreasonable. The following schedule shows the character and items of property levied upon to satisfy the execution, amounting to \$1,733.97, to wit: "Two locomotives, one designated as 'No. 5,' the other by name as 'General Meily;' one baggage and

EXCESSIVE levy:
indemnifying
bond.

express car, numbered 15; two passenger coaches, numbered respectively, 10 and 12; eight freight covered cars, numbered * * * ; nine flat cars, numbered * * * ; three coal cars, numbered * * * ; 40,000 feet of manufactured lumber and bridge timber; eighty-five large piles; 7,000 ties; 2,300 splices; one barrel of bolts for splices; forty-seven kegs of railroad spikes; 301 long T rails, and fifty-eight common rails; also all the roadbed and right of way from the southern end of the track of said company's road at Santa Fe to the northern line of Santa Fe county; also the ties and rails in place in said roadbed within the county of Santa Fe." The judgment must be reversed and the cause remanded to the lower court, with directions to permit the plaintiffs in error to make such amendments of the execution as will make it conform to the judgment upon which it was issued.

[No. 414. January Term, 1891.]

THE UNITED STATES OF AMERICA, APPELLEES,
v. FRANK SAUCIER AND JOHN SAUCIER,
APPELLANTS.

PUBLIC LAND—TROVER FOR CUTTING AND CONVERSION OF TIMBER—WHO MAY MAINTAIN—EVIDENCE—PRESUMPTION.—An action of trover by the United States against trespassers on the public land, for the cutting and conversion of timber thereon, can not be maintained, where it appears from the testimony of the register of the United States land office that the preemptor has paid for the land as required by law, the presumption being that he has made final proof and that the final certificate has been issued to him, thereby vesting in him the equitable title to the land, who alone can maintain the action, under section 1882, Compiled Laws, requiring that every action shall be brought in the name of the real party in interest; and the fact that a contest for the land was heard in the land office in the year preceding the cutting of the timber does not alter it, since, under rule 5 of practice in contest cases in the local land office, a contest may be instituted as well after, as before, the final certificate issues.

ID.—ENTRY—ADMISSIBILITY OF EVIDENCE TO SHOW CHARACTER OF LAND ENTERED.—Nor will the fact that the preemptor has entered the land at the land office as agricultural land preclude inquiry as to its mineral character. Such entries are *ex parte*, and can not affect the defendants in such case; and the question as to the mineral character of the land is a material issue, and one of fact for the jury; and it is error to exclude evidence of such fact.

APPEAL, from a judgment for plaintiff, from the Third Judicial District Court. Judgment reversed, and new trial ordered.

The facts are stated in the opinion of the court.

EUGENE A. FISKE and GEORGE C. PRESTON for appellees.

If the defendants in this case have lawfully cut the timber from the lands of the United States, they should show it as a matter of defense, bringing themselves clearly within the license of the act of June 3, 1878, and the regulations of August 5, 1866. 15 Opinions of Attorneys General, 191; Gould's Notes on Rev. Stats. U. S., sec. 3456; 103 U. S. 697; 12 Pac. Rep. 851.

McFIE, J.—In this action the United States sued Frank and John Saucier in the district court of the Third judicial district, in an action of trover. The declaration was filed March 7, 1888, and contains two counts, the first charging that on the——day of——A. D. 1887, the defendants cut and appropriated to their own use five hundred trees of the value of \$500; the second charging the appropriation of ten thousand feet of lumber of the value of \$250 from the public lands of the United States. October 1, 1888, defendants filed a demurrer to the declaration, assigning the following causes of demurrer: (1) That the first count joins two separate causes of action—trespass and trover—and does not allege the date when committed; (2) the second count does not allege the date of the

wrong or injury complained of; (3) that the declaration does not allege that the lands were nonmineral from which timber was taken. The cause was continued by consent until March term, 1889, and on the eleventh day of March, 1889, the court overruled the demurrer. The defendants filed two pleas: (1) not guilty; and (2) that if any timber was converted by defendants it was taken from mineral lands; that they were bona fide residents of the territory of New Mexico; that no trees were cut more than eight inches in diameter, and that the lumber was sold to bona fide residents, for building, agricultural, mining, and other domestic purposes. Plaintiff joined issue on first plea, and filed two replications to second plea denying that the land was mineral in character. Trial was had upon issues thus formed, by jury, and resulted in a verdict for plaintiff for \$375. Motions for new trial and in arrest of judgment were overruled, and judgment was entered on the verdict. The defendants, to review this judgment, brought the case to this court by appeal.

The declaration alleges, and the proof shows, that the land from which the timber is alleged to have been taken, was sections 21 and 22, in township 11 south, of range 9 west, and situated in Sierra county, and in the Third judicial district of New Mexico. All of this land, with the exception of one forty acre tract (the S. E. of S. E. of sec. 21), is included in two preemption claims made at the Las Cruces land office by Mr. Austin Crawford and Mr. W. H. James. In fact the only attempt to locate the land from which the timber was alleged to have been taken was by witnesses testifying that the timber cut was upon these claims. There is no proof that there was any timber cut on the forty acre tract in section 21, not embraced in these preemption claims. A large number of errors are assigned, chiefly as to the admissibility of evidence, but there are two important questions presented by this record:

(1) Did the court err in giving to the jury its seventh instruction? (2) Did the court err in excluding evidence offered by defendants as to the mineral character of the land? During the progress of the

PUBLIC land: tro-
ver for conver-
sion of timber;
evidence: pre-
sumption.

trial Mr. E. G. Shields, at that time register of the United States land office for the Las Cruces, New Mexico, district, and custodian of the records of said office, was called as a witness for the plaintiff. The records of the office were identified by him, and were competent evidence in the case. *Bly v. U. S.*, 4 Dill. 465. Mr. Shields was recalled by the plaintiff, and testified as follows, as to whether the preemptors Crawford and James had paid the United States for the lands embraced in their preemption claims: Question. "State whether Mr. James and Crawford have paid for this land in pursuance of the requirements of law. Answer. Yes, sir." The record is silent as to final proof or the issuance of final receipt. In 1884 the commissioner of the general land office, in his instructions to registers and receivers, said: "There is no authority for receiving proofs in advance of action in allowing or rejecting an entry, and you have no authority to act upon entry applications until the party is prepared to consummate entry by making proof and payment. In other words, proof and payment must be made at the same time." 3 Land Office Decisions, p. 188. We must presume, therefore, in the absence of proof to the contrary, that the officers of the government did their duty, and that final proof, showing full compliance with the law by the settlers, was made when payment was made. In fact, the register was asked, and answered "that payment was made in pursuance of the requirements of law." If that be true, then the settlers had done all that the law required of them, and the further presumption must then be indulged that final receipt was issued to these settlers for the land from which the

timber, if any, was taken. Mr. Shields was asked, on page 56 of the record, when payment was made, and answered: "I have forgotten the date now. I think it was in June, 1886, I said yesterday." The declaration alleges that the timber was appropriated "on the ——day of——, 1887." No date being fixed, it is limited to the year 1887. The preemptors had purchased and paid for the land prior to the alleged injury. The settlers having done all they could, and paid the government for the land, they, and not the United States, were the real parties in interest, and had a right to the damage, if the injury complained of had been done. If they had paid the government for the land, and received their final certificate, they had a right to sell the land, or mortgage the land; and it follows that they have the right to punish a trespasser upon their possessions. If the law has been fully complied with by the preemptor, and he has paid for the land, and received his final certificate, the certificate is as good as a patent; and until the patent issues, while the government had the naked legal title, it holds in trust for the settler, who is the real owner for all beneficial purposes. After compliance with the law, payment, and the issue of final certificate of entry, the land becomes segregated from the public domain. The secretary of the interior, on the nineteenth day of February, A. D. 1885, in case of timber trespass upon a homestead entry, which also segregates the land from the public domain, says: "But if it be conceded that Landrum has entered, and is holding the land in good faith, the tract covered by the entry is to be considered as being to all intents and purposes Landrum's land; and, if the McCombs have removed the timber therefrom without warrant the question is one between them and Landrum. The local courts have jurisdiction in such cases, and Landrum can apply to them for protection, or for reparation of any injury that may have

been done him." 3 vol. p. Decisions Secretary of Interior, p. 421; 4 Id. 467, p. 467. Same as to preemption. While these decisions may not bind this court, they are very persuasive, coming as they do from the head of the land department of the government. In *Carroll v. Safford*, 3 How. 460, Mr. Justice McLEAN said: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee." *Myers v. Croft*, 13 Wall. 290; *Smith v. Ewing*, 23 Fed. Rep. 745. The court below erred, therefore, in giving to the jury the following instruction: "(7) I charge you that the title to these lands, for the purposes of this suit, is in the United States." The fact that contests have been heard in the land office in August, 1886, does not alter the situation, for the reason that it is not shown when and how the contests were instituted; and, under rule 5 of practice in contest cases in the local land office, a contest may be instituted after the final certificate issues, as well as before; the only difference being that in that case the affidavit in contest must be forwarded to the commissioner of the general land office, who directs a hearing. From what has been said it follows that the lands from which the timber is alleged to have been taken were not public lands, and the plaintiff was not the real party in interest, as required by section 1882, Compiled Laws, which is as follows: "Every action must be prosecuted in the name of the real party in interest."

If it was conceded that the lands belonged to the United States, there is still a reversible error disclosed

by this record, in that the court refused to permit the defendants to prove that the lands were mineral lands, and compliance with the act of congress of June 3, 1878, under defendants' second plea. While it may be

ENTRY: evidence to show character of land. objected that the plea did not state all of the facts necessary to a complete defense,

there was no demurrer to the plea, but issue was joined as to whether or not the lands in question were mineral lands. The court, in excluding the testimony as to the mineral character of the lands, practically excluded all of the defense, for, if the plea had been technically correct, it would have been unavailing for the defendants to have proven compliance with every other requirement of the law of June 3, 1878. The court permitted evidence to go to the jury as to the mineral character of lands outside the entries of Crawford and James, but not of the lands within the entries, holding, as the court is informed, that the fact of their being entered at the land office as agricultural lands precluded inquiry as to their mineral character. The entries at the land office were ex parte, and could not affect the defendants in this case. Whether the lands were mineral in character or not was a material issue, and a question for the jury. The court erred, therefore, in excluding the testimony. In view of the fact that we have indulged some presumptions that plaintiff may be able to rebut with testimony on another hearing in the lower court, the judgment of the lower court will be reversed, and cause remanded, with instruction to the lower court to sustain the motion for a new trial, and such further proceedings as may be deemed proper.

O'BRIEN, C. J., and SEEDS, LEE, and FREEMAN, JJ., concur.

[No. 419. January Term, 1891.]

WILLIAM B. CHILDERS, TRUSTEE, APPELLANT, v.
JOHN A. LEE, EXECUTOR, APPELLEE.

LANDLORD AND TENANT—ORAL AGREEMENT FOR LEASE FOR ONE YEAR—TENANT AT WILL.—A tenant who enters upon the demised premises under a verbal agreement for a lease, to be made for a term of one year at a monthly rental of \$60 conditionally on the landlord's obtaining a renewal of the lease of the land upon which the premises are located, is not a tenant from year to year, but a tenant at will, and may vacate the premises without giving six months' notice of his intention to do so.

ID.—ORAL LEASE FOR LESS THAN THREE YEARS—STATUTE OF FRAUDS.—The proper construction of the statute of frauds (29 Chas. 2, chap. 3, sec. 2) declaring oral leases to be void, if for a term not exceeding three years where the rent reserved "shall amount to two thirds part at least of the thing demised," is that the rent reserved shall be two thirds of the rental value of the demised premises, and not two thirds of the value of the fee.

APPEAL, from a judgment in favor of defendant, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

N. C. COLLIER and WILLIAM B. CHILDERS for appellant.

The oral letting, being for a lease not exceeding the term of three years from the making thereof, as shown by the evidence, and the rent reserved to the landlord during the term amounting to two thirds at least of the full improved value of the demised premises, comes within the exception in the second section of the statute of frauds, and is good under the statute. Childers v. Talbott, 4 N. M. (Gil.) 336; Brown on Statute of Frauds, 39, chap. 3, et seq.; Wood

on Frauds, secs. 1, 2; 1 Wash. Real Prop., 298, 391; Taylor Landlord & Tenant, secs. 27, 30; 6 Jacobs Fisher's Dig., 8139, citing English cases; Crosby v. Wadsworth, 6 East, 602, etc.; Huffman v. Starkes, 31 Ind. 474; Union Bank v. Gettings, 45 Id. 180; Birkhead v. Cummings, 33 N. J. 44; Shepherd v. Cummings, 1 Caldwell (Tenn.), 254; Gano v. Vandever, 34 N. J. Law, 293; McDougal v. Banks, 13 Ga.; Cody v. Quittenam, 12 Id. 386.

Although the agreement may be void under the statute of frauds, yet when a party enters upon the premises under an agreement for a lease for years he becomes, by the payment of rent, a tenant from year to year.

Wood on Frauds, sec. 19, p. 47; see, also, sec. 21, et seq., p. 55; Browne on Statute of Frauds, sec. 38, p. 46; Taylor's Land. & Ten., sec. 11, p. 44, chap. 11; 4 Kent's Comm. 114; 1 Wash. Real Prop. 391; Stedman v. McIntosh, 4 Ired. 291 (42 Am. Dec. 121, and note, p. 132); Kline v. Rickert, 8 Cowen, 225; Schuyler v. Liggett, 2 Cowen, 660; Jackson v. Wesley, 9 Johns. 267; Scully v. Murray, 34 Mo. 420; Hammond v. Douglas, 50 Id. 420; Kerr v. Clark, 19 Id. 132; Lounsberry v. Snyder, 75 N. Y. 514; Laughran v. Smith, 75 N. Y. 205; Coffin v. Lunt Rich v. Bolton, 14 Am. Dec. 616 (46 Vt. 84); Lockwood v. Lockwood, 22 Conn. 425; Cone v. Mole, 39 Mich. 454; Koplitz v. Gustavus, 48 Wis. 48; Williams v. Ackerman, 8 Oregon, 405; Waring v. L. & N. R. R. Co., 19 Fed. Rep. 863; Lynn v. Cunningham, 136 Mass. 540.

An agreement for a lease, under which the lessee enters upon possession and pays rent, will be construed to be a present demise. Taylor Land. & Ten., secs. 41, 43, 44; Stedman v. McIntosh, 42 Am. Dec. 133, and note; Wood on Frauds, sec. 19, p. 47; Cushing

v. Mills, 6 M. & G. 173; Jenkins v. Eldredge, 3 Story, U. S. Cir. Rep. 325; Mason v. Clifford, 4 Fed. Rep. 180.

Nor would the failure of the lessor to tender a written lease justify the lessee in repudiating the contract. He should demand the lease. Fuller v. Hubbard, 6 Cowen, 1; Taylor Land. & Ten. 41, and note; Goodfellow v. Noble, 25 Mo. 60.

Although an oral lease, or agreement for a lease be void under the statute of frauds, yet if the lessee enters under it the contract will be enforced. Grant v. Ramsey, 7 Ohio St. 165; Jones v. Peterman, 3 S. & R. 543.

The tenant can not abandon the premises, after taking possession and paying rent, without notice. 4 Kent's Comm. [12 Ed.], 113, 114, 115; Taylor's Land. & Ten., sec. 59, p. 48; 1 Wash. Real Prop. 39; Lyon v. Cunningham, 136 Mass. 532; Emmons v. Scudder, 115 Mass. 367.

The claim that the door was closed up is no defense. An act of trespass does not amount to an eviction. Lounsberry v. Snyder, 31 N. Y. 514; Taylor Land. & Ten., secs. 379, 380.

NEILL B. FIELD for appellee.

SEEDS, J.—This is the second time that this case has been in this court. It is reported in 4 N. M. 168 as Childers v. Talbott. The defendant, Talbott, having died since the first hearing, his executor, John A. Lee, was substituted in his place upon the record. There was a retrial before a jury, and, upon motion of the defendant, the court instructed the jury to find for him. It is an action in assumpsit against the executor, Lee, for an alleged balance due upon a parol lease. The appellee contends (1) that the lease was void, as being within the statute of frauds, in that it was not to be performed within a year of its agree-

ment; (2) that it did not come under the exception mentioned in section 2 of said statute, which provides, "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two thirds part at the least of the thing demised," because the amount in value reserved as rent herein means two thirds of the value of the fee, not the rental value; and (3) that the contract testified to was a mere executory agreement for a lease in writing upon certain conditions, which were never fulfilled, and that, notwithstanding the entry and payment of rent, it was never anything more than an agreement for a future lease, and the occupancy was simply a tenancy at will. The appellant contends, upon the other hand, (1) that the oral lease is good under the second section of the statute of frauds; (2) that, even if it were not, when a party enters under an agreement for a lease for years, he becomes, by the payment of rent, a tenant from year to year; (3) an agreement for a lease, under which the lessee goes into possession and pays rent, will be construed to be a present demise; (4) a failure of the lessor to tender a written lease will not justify the lessee in repudiating the contract;—he should demand the lease; (5) though a parol lease, or an agreement for a lease, be void under the statute of frauds, yet, if the lessee enters under it, the contract will be enforced. He assigns as error, therefore, (1) the directing of a verdict for defendant; (2) in overruling the plaintiff's motion for a new trial; (3) in giving judgment for defendant.

As to the first two contentions of the defendant, there is not now room for argument, for while the contract was not to be performed within a year, yet it was a lease for less than three years, upon which the rent reserved was at least two thirds part of the thing demised; and it is now held in this territory, and

LANDLORD and
tenant: oral
agreement for
lease for one
year: statute of
frauds.

is the general holding of the courts of the country, that this means two thirds part of the rental value of the demised premises. Childers v. Talbott, 4 N. M. (Gil.) 336. Whether or no the contention of the appellant is correct depends entirely upon the nature of the holding by Talbott. Was he holding under the oral lease which was to be afterward simply put in writing? All the testimony was introduced by the plaintiff. The testimony of the defendant, Talbott, taken upon the previous hearing, was introduced by the plaintiff. The evidence was practically unanimous that Mr. Talbott was to have the lease of the room for one year at a monthly rental of \$60, from April 1, 1883, provided that the plaintiff could secure a renewal of the ground lease, which terminated about June 1, 1883; that Talbott went into possession April 1, 1883; that no lease in writing was ever tendered the defendant; that he objected to the closing of a certain door between his room and an adjoining one used as an opera house; that upon the failure of the plaintiff to open said door he returned the keys to the plaintiff's cestui que trust, and tendered the balance of rent up to time of leaving, which was declined, though the keys were retained. Whether or not this oral agreement between Childers and Talbott was a lease, or only an agreement for a lease, depends upon the terms thereof, and the action of the parties under it. If there is a condition attached to the granting of the lease, and it is to be subsequently executed, it operates only as an agreement for a lease. Tayl. Land. & Ten. [8 Ed.], sec. 39. "Whenever, therefore, the instrument makes the demise dependent on a condition or stipulation yet to be performed, it operates as an agreement only." Id., sec. 40. It is quite certain, then, that the agreement testified to was an agreement for a lease, and until Talbott obtained a written lease, or was entitled to one under this contract, that his holding, whatever

its character and consequences, depended entirely upon the oral agreement for a lease. He entered under that. It is contended, therefore, that, as the agreement was for a year, the law contemplates the taking possession and paying the rent as a present demise, and that the tenancy is from year to year. To this proposition

ORAL agreement
for lease for one
year: tenant at
will.

the appellant cites an array of authorities, which, if in point, would be absolutely decisive of the question. The cases of *Kerr v. Clark*, 19 Mo. 132; *Laughran v. Smith*, 75 N. Y. 205, and *Koplitz v. Gustavus*, 48 Wis. 48, are typical of the doctrine contended for, yet in each case the contract was an oral agreement for a term of years, upon which term the tenant had entered and occupied over a year. It was held in these cases that the terms of the agreement and the acts of the parties conclusively showed that it was an agreement for a lease from year to year. In all these cases where there was any agreement for a lease, and an entry under that agreement, and the courts have held the tenancy to be in accordance with the oral contract, it was possible for the tenant at any time to demand the written lease and for the landlord to give it. In the case at bar that rule would not hold. At any time before the renewal of the ground lease by the plaintiff it would have been impossible for the landlord to have given a written lease which would have then and there invested the tenant with a term for a year. Yet the contention is that what the landlord could not do the law by implication will do; for the argument is that, when the tenant entered under the oral agreement, he at once entered upon a tenancy from year to year; not when the ground lease was obtained, but upon April 1. All the rights of such a tenancy then attached as against the tenant, and, as the rights of the landlord and tenant are reciprocal, against the landlord. Put the position to the test. If, now, the plaintiff had failed to obtain the ground lease, could Talbott have sued Childers for

damage for a failure to protect him in his yearly tenancy? Clearly not, under the lease agreed for, for that was a conditional lease; but if, in spite of that condition, he was in for a year under the oral agreement, then the landlord could have been held for damages for a failure to make the term good. This was not contemplated by either the terms of the agreement or acts of the parties. It is quite evident that, under the facts in this case, the tenancy here was not from year to year, but at most at will.

If the tenant had taken the written lease which had been agreed upon, when the plaintiff was in a position to give it, or if it had been tendered him, and without a legal reason he had refused it, there would then have been no question but that the term would have been changed into one from year to year. But there is no evidence whatever that a written lease was ever tendered him; such lease was to be given when the plaintiff obtained a renewal of the ground lease. The presentation of such a lease may reasonably have been considered notice that the plaintiff had received the renewal lease. The fact that the plaintiff did receive the renewal lease did not raise any obligation upon the part of Talbott to demand that the plaintiff should do what he agreed to do. If the plaintiff sought to hold Talbott upon a contract which was to be in writing, and he was to place it in that form, it was his duty to do so, not Talbott's. The cases cited by the plaintiff, being *Fuller v. Hubbard*, 6 Cow. 1, and *Goodfellow v. Noble*, 25 Mo. 60, do not sustain the principle contended for. The fatal error upon which the plaintiff bases his whole case is in assuming that the agreement for a written lease upon conditions, and an entry thereunder, is the creation of a tenancy from year to year absolute in its character, which binds the defendant to pay a year's rent, unless six months' notice of intention to vacate is given. The acts of Talbott in objecting to the closing of the door, and leaving because of the

failure upon the part of the plaintiff to remedy it, must be considered in reference to the tenancy which he then had,—that at will. It was that tenancy which he terminated because of the alleged wrong of the plaintiff. If he had been tendered the lease agreed upon, and accepted it, or without legal reason had refused it, then possibly the reason given for abandoning the tenancy would have been fruitless. The plaintiff declared upon a contract which was only an executory agreement, and, failing to prove himself entitled to rent thereunder, the rulings of the court were proper, and the judgment is affirmed.

O'BRIEN, C. J., and LEE, FREEMAN, and McFIE, JJ., concur.

[No. 430. January Term, 1891.]

JOHN F. LACEY, APPELLEE, v. JAMES C. WOODWARD ET AL., APPELLANTS.

MINES AND MINING—EJECTMENT—EVIDENCE—ERROR.—In an action of ejectment for the recovery of possession of a mine and for damages for its detention an error of the trial court in permitting the plaintiff to state his opinion as to the damages he sustained in consequence of the defendants taking possession of the mine, where the court finally ruled that the witness might testify as to what was embraced in the name of "rents and profits," but that the question as to the assessment of damages was to be determined by the statute, to which ruling there was no objection, nothing was left for the defendants to complain of, in their assignment of error on that ground.

ID.—TRIAL—ADMISSIBILITY OF TESTIMONY AFTER CLOSE OF CASE.—Whether the trial court can permit a witness for plaintiff to be recalled, after the close of defendants' case, to answer a question overlooked on the direct examination, is a matter resting in the sound discretion of the court, and can not be assigned as error.

ID.—LOCATION CLAIM—ANNUAL LABOR—FORFEITURE.—A mining claim is not forfeited by the failure of the locator for one year to perform the annual labor required by the act of congress of May 10, 1872, where he resumes the work in good faith before a valid location is made by others.

ID.—CONFLICT OF EVIDENCE.—Where there is a substantial conflict of evidence the verdict of a jury will not be disturbed, unless errors of law occur at the trial, as this court has held again and again.

APPEAL, from a judgment in favor of plaintiff, from the Third Judicial District Court, Sierra County. Judgment affirmed.

The facts are stated in the opinion of the court.

ELLIOTT & PICKETT for appellants.

This case should be reversed, because the verdict is against the evidence, and the preponderance of the evidence is in favor of the defendants on every issue. 1 Graham & Waterman on New Trials, p. 367, sec. 2190, Comp. Laws, N. M.; Hopkins v. Orr, 124 U. S. 510.

If the original locator fails to do the annual assessment work on a claim, but resumes work upon the claim before anyone attempts to relocate the same, he must continue his resumption of work until he performs the full annual assessment, or the claim is open to relocation. Du Prat v. James et al., 65 Cal. 555.

BELL & WRIGHT and BAIL & AUCHETA for appellee.

It was perfectly competent for plaintiff to show the value of his ores, that he was prevented by defendants from prosecuting his claim on the mine and shipping its product, and those acts had occasioned "loss of time which had value to him." Wade v. Leroy et al., 20 How. (U. S.) 34.

In an action for damages evidence showing the business in which the plaintiff was engaged, its extent, and consequent loss arising to him from his inability to prosecute it, is relevant and pertinent as enabling the jury to fix with some certainty, the direct and necessary damage resulting. Nebraska City v. Campbell, 2

Blackf. (U. S.) 590; Comp. Laws, N. M., secs. 2258, 2268.

As to the measure and rule of damages, see 2 Sedg. Meas. Dam. [7 Ed.], 499, et seq.; 2 Greenl. Ev., sec. 253.

The measure of damages is the value of the ore taken from the mine. *Meay v. Yapper et al.*, 23 Cal. 306.

Damages are recoverable up to the rendition of the verdict. Comp. Laws, sec. 2265.

It is not true that the assessment work was not done in 1887 or 1888. But if it were not done by plaintiff, if he resumed work upon his claim in 1888, and before any adverse claim was made by defendants, under the law, he could hold the property. *Belk v. Meagher*, 104 U. S. 282; *Pharis v. Muldoon*, 75 Cal. 284; *Belcher v. Deferrari et al.*, 62 Id. 160; 1 Fed. Rep. 522; Rev. Stat. U. S., sec. 2324.

LEE, J.—This is an action of ejectment, brought originally by plaintiff against the defendants in the district court of Grant county, to recover the possession of the "Star of the West" mine, and damages for the unlawful detention of the same. The venue was afterward changed to the district court of Sierra county, where, at the November term, 1889, a jury trial was had, which resulted in a verdict of guilty against defendants, and plaintiff's damages were assessed at \$500. A motion for a new trial, made by the defendants, was overruled by the court, and judgment entered in accordance with the verdict, from which judgment the defendants took an appeal to this court.

The first error assigned, and perhaps the principal one in the case, arises upon the following question, asked plaintiff by his counsel, he having been introduced as a witness in his own behalf: "State, Mr. Lacey, to the jury, what you

MINES: ejectment:
evidence: error.

regard as the damages you have suffered in consequence of these defendants taking from you the possession of that mine on the fifth day of November, 1888." The question was objected to for the reason that it called for the opinion of the witness as to the damages he might have sustained. The question was clearly open to the objection made, as well as to others that might be suggested. But whether the ruling of the court in admitting it constitutes error in the case must be taken into consideration with other rulings of the court upon the same question. In answering it the witness said: "Five thousand dollars. I base it on the fact of having a contract of at least two car loads per day, with the understanding that it could be increased right along to three or four car loads. In a short time after, I commenced shipping iron, and putting it down to the lowest figure, at fifty cents a ton, for the royalty, you, gentlemen, can figure the thing for yourselves for eleven months, even at two car loads per day." The counsel for the defendants asked that this testimony be stricken out, as being entirely too remote. The court ruled upon this motion as follows: "I will have to instruct this jury upon the measure of damages. I will not pass finally upon this question now. I will reserve my opinion until a future stage of the case." This witness was recalled later in the case, and was asked practically the same question, as follows: "Mr. Lacey, state to the jury whether or not you have sustained any damages in consequence of the defendants taking possession of this mining property, and, if so, state the nature of the damages, in what manner you were damaged or injured, and the extent of the injury, commencing from the time of the commencement of this suit, up to the present month." This question was objected to for the reason that the rule, as fixed by statute, reads, "rents and profits of such premises," etc. At this time the court ruled as follows: "I think

our statute controls on the subject, and it seems to direct what can be recovered. The question of what is embraced in the name of 'rents and profits' is a matter upon which you may give testimony, but I think we have to be governed by the statute in regard to assessing damages." The question was finally asked by the counsel for plaintiff in the following form: "Mr. Lacey, state to the jury what would be the reasonable value of the rents and profits, if any, of the 'Star of the West' mine now in controversy, from the time you commenced this action to the present time." To this question there was no objection, and, the ruling having finally been in favor of the appellants, and correct in point of law, it leaves the defendant nothing to complain of in this assignment of error.

The fourth error assigned is as follows: "John F. Lacey, the plaintiff, called in rebuttal after the defendants had introduced all their testimony, and closed their case in chief, was asked: 'Mr. Lacey, are you a citizen of the United States, and, if so, how long have you been a citizen?'"—to the admission of which defendants excepted. The record shows that the plaintiff, on motion and by leave of the court, asked the question as a question that had been overlooked on direct examination. The permission was a matter resting in the sound discretion of the court, and, as such can not be assigned as error. The rule is thus laid down by the supreme court of the United States in the *Philadelphia & Trenton Railroad Co. v. James Stimpson*, 14 Pet. 448: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are matters properly belonging to the practice of circuit courts, with which the supreme court ought not to interfere." The district courts possess this discretion as fully as other judicial tribunals.

ADMISSIBILITY of
evidence at close
of case.

Exception was taken to the ruling of the court in refusing an instruction asked by the defendants on

LOCATION claim: the trial, which was as follows: "If you
annual labor: find from the evidence that the plaintiff
forfeiture. did not perform one hundred dollars' worth of work
on the 'Star of the West' mining claim, located by him
in the year 1883, in the year 1887, and that, if he
resumed work on the said claim in 1888, and did not
perform work thereon to the value of one hundred dol-
lars before the defendants made their location in
November of that year, you will find for the defend-
ants, and return your verdict accordingly." If the law
was correctly presented to the jury by the court in an
instruction which was given on his motion, and which
was also excepted to by the defendants, then the above
instruction was erroneous and properly refused. The
instruction given was as follows: "If you believe from
the evidence that the plaintiff made a valid location of
the 'Star of the West' mining claim on the first day of
January, 1883, and that he had performed the necessary
labor upon said claim, or that if the assessment work
was not done for one year, but work upon said claim
was resumed in good faith by the plaintiff prior to the
making of a valid location of part or all of said claim
by the defendants or other parties up to and including
the fifth day of November, 1888; and if you further
believe that the defendants, or some of them, unlaw-
fully took possession of said mining claim, or a part
thereof, and unlawfully withheld from the plaintiff all
or a part of said mining claim,—you should find for
the plaintiff." We think the law correctly stated in
this instruction. It is fully sustained by the supreme
court of the United States. In *Belk v. Meagher*, 104
U. S. 282, in an opinion rendered by Chief Justice
WAITE, that court says: "For all purposes of this
case the law stands as it would have stood had the
original act of 1872 provided that the first annual ex-

penditure on claims then in existence might be made at any time before January 1, 1875, and annually thereafter until patent issued. If it was not made by that time, the claim would be open for relocation, provided work was not resumed upon it by the original locator, or those claiming under him, before a new location was made. Such being the law, it seems to us clear that, if work is resumed upon a claim after it has once been open to relocation, but before a relocation has been made, the rights of the original owners stand as they would if there had been no failure to comply with the conditions of the act. The argument on the part of the plaintiff in error is that if no work is done before January 1, 1875, all rights under the original claim are gone but that is not, in our opinion, the fair meaning of the language that congress has employed to express its will, as we think the exclusive possessory rights of the original locator and his assigns were continued without any work at all until January 1, 1875, and afterward, if before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred." In this case the evidence tends to show that the plaintiff located this mine January 1, 1883. He performed his annual labor for the years 1884 and 1885. In 1886 he did not perform the labor required. In 1887 he resumed work on the mine, and did the assessment work for that year, continuing in possession, and working from November, 1887, to and through February, 1888, performing his annual work for that year. He was ousted by the defendants in the fall of that year. This statement of the facts clearly brings the plaintiff within the provision as laid down by the supreme court of the United States, which is in full accord with the instruction given by the court.

It is argued by the appellants that this court ought to review the evidence, and find that a preponderance of evidence was other than as found by the jury.

This would be contrary to the whole policy of our government. The law-making power regards juries as better able to determine questions of fact correctly than judges, or it would do away with the system altogether, and submit all questions of fact, as well as of law, to the courts. Under the law as it exists this court has decided time and again that where there is a substantial conflict in evidence the verdict of a jury will not be disturbed, unless errors of law occurred upon the trial. *Corkins v. Prichard*, 3 N. M. 278.

The judgment of the lower court will be affirmed, and it is so ordered.

O'BRIEN, C. J., and McFIE, SEEDS, and FREEMAN, JJ., concur.

[No. 461. January Term, 1891.]

IN THE MATTER OF JOHN H. SLOAN AND TEODORO MARTINEZ.

HABEAS CORPUS—MANDAMUS—INJUNCTION—JURISDICTION OF DISTRICT COURT.—On an application for a writ of habeas corpus, by certain members of the board of county commissioners of Santa Fe county, for release from commitment, for refusal to pay fines assessed against them for contempt of court in refusing to obey a writ of injunction, issued in a certain mandamus proceeding, restraining them from issuing certificates of election to any other persons than those mentioned in the writ, and from making any record of the result of their canvass of election returns, on the ground of want of jurisdiction of the court over the subject-matter of the proceeding—Held: Under section 13, chapter 135, Laws, 1889, prescribing the duties of the board of county commissioners, sitting as a canvassing board, and providing that, in case of their failure or refusal to perform those duties, the district judge shall, on the petition of any qualified voter, issue a writ of mandamus to compel a performance, the district court had jurisdiction of the subject-matter of the mandamus proceeding, and the power to issue a writ of injunction therein in aid thereof.

If there were any doubt as to this power in the district court, that doubt would be removed by section 1, chapter 117, Laws, 1889, providing that suits in equity may be begun, injunctions granted * * * in aid of any suit at law * * * which took effect on the same day as did the statute supra. The term "suit at law" is used in its broadest sense, and was intended to authorize the aid of equity in any pending legal proceeding whenever necessary to give a more complete and effectual remedy.

ED.—CONTEMPT—FINES—IRREGULARITY IN ASSESSMENT OF.—The fact that the court, in the proceedings for contempt against the petitioners, for refusal to obey the writ of injunction in the mandamus proceedings, assessed several different fines for several distinct offenses in the same proceeding, would not make void the entire punishment. It was a mere irregularity, curable in the court in which the proceeding was had, or by appeal, and not on habeas corpus.

ED.—CONTEMPT—JURISDICTION IN VACATION.—The objection of want of jurisdiction in the court in vacation is not tenable. Under section 1829, Compiled Laws, the courts of the territory are always open, and their jurisdiction is broad enough to include proceedings for contempt.

PETITION for writ of habeas corpus. Writ denied, O'BRIEN, C. J., dissenting.

The facts are stated in the opinion of the court.

FRANCIS DOWNS, N. B. LAUGHLIN, THOMAS SMITH, and HARRISON BURNS for petitioners.

EDWARD L. BARTLETT, solicitor general, and JOHN H. KNAEBEL for the territory.

McFIE, J.—On the twelfth day of January, A. D. 1891, on petition of John H. Sloan and Teodoro Martinez, alleging, in substance, that petitioners were unlawfully confined and restrained of their liberty by the sheriff of Santa Fe county, a writ of habeas corpus issued out of this court, directing Francisco Chavez, sheriff of Santa Fe county, to bring the petitioners before this court, to show cause why petitioners should not be discharged. The record discloses all of the proceedings had before Edward P. Seeds, associate justice

of the supreme court of the territory of New Mexico, and judge of the First Judicial District court thereof, of which the county of Santa Fe forms a part, sitting in chambers in the city of Santa Fe, in said county, in a certain mandamus proceeding, number 2808, filed November 12, 1890, entitled "The Territory of New Mexico ex rel. Benjamin M. Read v. John H. Sloan, George L. Wyllys, and Teodoro Martinez, board of county commissioners of Santa Fe county," and a certain proceeding by injunction, number 2809, filed November 12, 1890, entitled "Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron v. John H. Sloan, George L. Wyllys, and Teodoro Martinez." Upon the hearing, January 23, A. D. 1891, no technical objections were raised to the formality of the proceedings, but, on the contrary, counsel for petitioners denied the jurisdiction of the court over the subject-matter, and the power of the court to issue the process by which petitioners were held, and contended that the same was void. The facts out of which this controversy grows are pretty fully stated in the application for injunction, which is as follows:

"Territory of New Mexico, county of Santa Fe. In the district court for the said county of Santa Fe, sitting for the trial of causes arising under the laws of said territory.

"To the Hon. Edward P. Seeds, associate justice of the supreme court of said territory, and judge of said district court.

"Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, residents of said county, bring this, their bill of complaint, against John H. Sloan, George L. Wyllys, and Teodoro Martinez, also residents of said county, and show unto your honor: Complainants were candidates at the election held in said county on the fourth day of November, 1890, said Read and Mayo for the offices of members of the house of representa-

tives of the legislative assembly of New Mexico, and said Catron for the office of member of the council of said legislative assembly, and, as such candidates, were voted for by voters of said county, and, as shown by the election returns, received majorities of the votes cast for said offices, respectively. Defendants are the county commissioners of said county, and, as such, are required by law, within six days after an election, to publicly examine and count the votes polled for each candidate, and to forward to the persons who have received the greatest number of votes polled at any election held for members of the house of representatives the corresponding certificate of election. That defendants have assembled at the courthouse in the county of Santa Fe for the purpose aforesaid, but have failed, neglected, and refused to count a portion of the votes polled at said election for these complainants, such portion being the votes cast for complainants in the precincts of said county numbered 1, 2, 8, 11, and 16; the returns of election from said precincts being before said defendants, and in regular and perfect condition. The failure and refusal of defendants to count said votes as shown by said returns will materially affect the result of said count so as to make it appear that persons other than complainants have been elected to said offices, although such is not really the fact; and defendants give out and threaten that they will make and deliver, or cause to be made and delivered, to such other persons, certificates showing their election to the offices aforesaid, and complainants believe that they will certainly do so unless restrained by an order of this court. If such certificates are so made and issued to such other persons, great and irreparable damage may, and probably will, result to complainants, and to each of them, and to the public generally, and the existence of such certificates may, and probably will, be the cause of numerous suits and vexatious and

expensive litigation, as has heretofore been the case in this territory under similar circumstances. As soon as the said count by defendants is completed, complainants will institute, or cause to be instituted, in accordance with the statute, proceedings in mandamus to compel defendants to canvass all of the returns of said election in said county; but before such proceedings can be made effective, and before the complete canvass can be made, defendants will issue, or cause to be issued, such improper and fraudulent certificates of election as hereinbefore described. Complainants therefore pray that defendants be restrained and enjoined by an injunction of this court from making and delivering, or ordering or causing to be made or delivered, any certificate of election to either of the offices hereinbefore mentioned to any person or persons other than these complainants, and from making, or causing to be made, any record of the result of their canvass of said election returns, until the further order of the court in the premises. May it please your honor to grant unto complainants the written subpoena, under the seal of this honorable court, directed to defendants, John H. Sloan, George L. Wyllys, and Teodoro Martinez, commanding them, and each of them, to appear before this court on a day and under a penalty to be therein fixed, then and there to answer unto the premises as fully as if the same were here repeated, and they particularly interrogated thereto, but not under oath, an answer under oath being hereby expressly waived, and to abide the order or decree of the court in the premises.

BENJAMIN M. READ."

"Territory of New Mexico, county of Santa Fe.

"On this twelfth day of November, A. D. 1890, personally appeared before me Benjamin M. Read, and made oath that he had read the foregoing bill by him subscribed, and knew the contents thereof, and that the same is true, except as to matters therein alleged

upon information and belief, and as to those matters he believes it to be true.

"Witness my hand and the seal of the district court of the First Judicial District of the territory of New Mexico, the day and year last above written.

[SEAL] "A. E. WALKER, Clerk District Court."

The writ of injunction is as follows:

"The territory of New Mexico to John H. Sloan, George L. Wyllys, and Teodoro Martinez, greeting:

"Whereas, Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron have filed in the district court for Santa Fe county their bill of complaint against you, praying to be relieved touching the matters therein set forth, now, therefore, you, the said John H. Sloan, George L. Wyllys, and Teodoro Martinez, both individually and as members of the board of county commissioners of Santa Fe county, your agents, servants, employees, and advisers, are hereby restrained and enjoined from making or delivering, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of New Mexico, and of member of the council of said legislative assembly, to any person or persons other than said Benjamin M. Reid, Joseph B. Mayo, and Thomas B. Catron, and from making or causing to be made any record of the result of your canvass of the election returns of the election held in said county of Santa Fe on the fourth day of November, 1890, until the further order of said district court in the premises. Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the territory of New Mexico, and judge of the First Judicial District Court thereof, and the seal of said district court, this twelfth day of November, 1890.

[SEAL]

"A. E. WALKER, Clerk."

The injunction not having been dissolved, but remaining in force, two affidavits were filed in the cause setting forth the disobedience of the writ of injunction by two of the said county commissioners, John H. Sloan and Teodoro Martinez. Thomas B. Catron, one of the complainants, filed his petition setting forth the violation of the injunction by two of the commissioners, Sloan and Martinez, and prayed that they should be punished for contempt. The court ordered Sloan and Martinez brought before the court by attachment, and upon hearing they were each fined in the sum of \$200, and costs, and ordered to be imprisoned in the county jail until fine and costs were paid. The petitioners refused to pay the fine and costs assessed against each of them, and were put in jail by the sheriff. To avoid payment of the fines assessed, and costs, and be discharged from imprisonment, petitioners have sued out this writ of habeas corpus. The law governing the mandamus proceedings in this case is section 13, chapter 135, Laws, 1889, and took effect February 28, 1889. In compliance with that section, Mr. Read filed his sworn petition on the twelfth day of November, 1890, alleging the refusal of John H. Sloan, Teodoro Martinez, and George L. Wyllys, as such canvassing board, to count the returns from certain precincts named; and the court granted an alternative writ of mandamus requiring the canvassing board to proceed to either canvass the returns from the precincts named, and declare the result, or to appear in person forthwith before said district court, and bring with them all of such returns, and all of the returns or papers purporting to be returns. The board, accompanied by counsel, appeared before the court on the following day, and filed an answer stating in full their reasons for declining to canvass the returns, and declare the result, as directed by the court. and asked to be discharged. On application of counsel for the relator a peremptory writ of mandamus, as to

the canvassing of precincts 1, 2, 16, and 8, was issued November 18, 1890, returnable November 19, 1890, but the record shows no further proceedings, nor compliance with said peremptory writ. A bill of exceptions was filed by the respondents on December 5, 1890, and the cause is now in this court.

Having thus fully stated the record, we will now consider the law applicable to this cause. It is insisted on behalf of the petitioners that the court had no jurisdiction of the subject-matter, and, therefore, the writ of injunction was void; and being void, admitting that the petitioners had disobeyed the writ, there could be no contempt. It may be admitted that, if the court had no jurisdiction of the subject-matter—that is, an absolute lack of power—then there could be no contempt in disobeying the order of the court, because the order and process of the court was void. The authorities are abundant in support of this proposition. It is contended on behalf of the officer that the court had complete jurisdiction in the premises; that the petitioners are not illegally restrained, and should be remanded. A large number of authorities have been cited, and an examination of them emphasizes the necessity of keeping in mind the distinction between the entire want of power conferred by jurisdiction and the erroneous exercise of or the propriety of exercising, the power conferred. Courts of equity have very large discretionary powers, and in the exercise of that discretion they have declined to exercise a jurisdiction and power which would have been exercised had a proper case been presented. No positive and inflexible rule can be laid down regulating the jurisdiction of courts of equity, or whether jurisdiction shall be exercised or declined, inasmuch as the circumstances of each case must be taken into consideration in determining these questions. Nor can the authorities of one state be relied upon as settling these

HABEAS corpus:
mandamus: in-
junction: juris-
diction.

questions for another, for the reason that there may be constitutional or statutory limitations or enlargements of jurisdiction not common to all; thereby necessitating a careful examination of the law as applied to the facts of each case.

In this case it is insisted that the court had no jurisdiction, because the petitioners were acting as a board of canvassers of an election; that they had discretionary powers; that they constituted an independent political power, and were free from the interference of the judicial power. The case of *Dickey et al. v. Reed et al.*, 78 Ill. 261, is relied upon as conclusive in this case. In that case an election had been held to determine whether the city of Chicago should become incorporated under the general incorporation act, or remain under its charter; or, as the court says, the election was to determine "which of two forms of government it should have." A bill in chancery was filed, alleging fraud and irregularity in the election, not in the returns, and prayed an injunction restraining the canvassing board from canvassing the returns of the election then in their possession. This was properly denominated a "bill to contest the election," which courts of chancery usually decline to entertain; but the injunction sought to restrain the board from doing a legal duty which the statute of Illinois imposed upon it,—to canvass the returns. The lower court granted the injunction, but the supreme court held that the court had no jurisdiction of the case. There is a marked distinction between the proceedings in that case and the case here, namely: That was a bill in chancery to contest an election; this was not. The injunction in that case was to prevent the board from performing a legal act and duty; the injunction in this case sought to prevent the board from doing an illegal and fraudulent act. There is also a material difference between the law then in force in Illinois and the laws of this

territory, in that in this territory the statute expressly makes it the duty of the courts, when the county commissioners, sitting as a canvassing board, fail or refuse to canvass all of the returns, on its being brought to the attention of the court, to compel the board to canvass all the returns. Section 13 of chapter 135 of the Laws of 1889 is as follows: "That the board of county commissioners, sitting as a canvassing board for the purpose of canvassing the returns of any election hereafter held in this territory, shall not adjourn or become functus officio as a canvassing board until such board of commissioners shall have canvassed each and every return of election before them, and shall have declared the result from the face of such returns; and if any board of county commissioners, sitting as a canvassing board, shall fail, neglect, or refuse to canvass any return of any election before said board under any pretense that such return is irregular, or for any other pretense, it shall be lawful for any qualified voter to present his petition under oath to the judge of the district court having jurisdiction, at his chambers, briefly setting forth the facts and circumstances, and praying that such board of commissioners shall be required by writ of mandamus issuing out of said court to count and certify such returns. And, therefore, it shall be the duty of the district judge to immediately issue, or cause to be issued, his alternative writ of mandamus requiring said commissioners either to canvass such return or returns and to declare the result, or to appear in person forthwith before said court, and bring with them all of such returns; and, if such commissioners shall decline to canvass such return or returns, they shall appear before said court in obedience to such writ, and take with them all of the returns or papers purporting to be returns before them, and thereupon the court shall forthwith proceed to examine said returns, and upon such examination may

issue his peremptory writ commanding said board of commissioners to immediately canvass any or all of such returns, and to declare the result."

Evidently, the legislature of this territory, profiting by experience, intended to place it within the power of one voter of a county to invoke the aid of the courts to compel canvassing boards, when canvassing election returns, to do their duty, if they either fail, neglect, or refuse to do it. The object of the law is to ascertain the will of all the people as expressed by them by their ballots, even from an unscrupulous or unwilling board of canvassers, and to preserve the rights of the people, individually and collectively, as well as prevent fraud and injury. Canvassing boards may fail, neglect, or refuse through ignorance; and, upon proper application, the court is required to direct them. Boards of canvassers have a ministerial duty to perform under this law, and that is to canvass "each and every return of election before them, and shall have declared the result from the face of such returns." This law gives the courts power to see that this duty is performed, and the undoubted right to issue the necessary writs of mandamus compelling its performance. The record shows that it became necessary to invoke the remedy provided by this law, but that it was unavailing.

The power of the courts to compel boards of canvassers to do their ministerial duty by canvassing the returns and declaring the results in election cases is sustained by numerous authorities without the aid of such an explicit law as the law of this territory. In the case of *State ex rel. Metcalf v. Garesche*, 65 Mo. 480, the court says: "Having ascertained what was the true return, and that the canvassing officers had failed or refused to count it, thus leaving their legal duty unfulfilled, the peremptory writ commanded its performance. It will thus be seen that the right to deter-

mine the specific legal duty of ministerial officers, such as defendants are, necessarily results from the very nature of the proceeding by mandamus. It simply requires the judicial officer to proceed to do his duty. It not only requires the ministerial officer to proceed to do his duty, but it also indicates what his specific duty is. To assert that the writ of mandamus can not require the performance by a ministerial officer of any act which he does not, with the lights before him, conceive it his duty to perform, is to destroy the efficacy of the writ, and to substitute the conscience of the officer for the command of the law." The supreme court of Wisconsin has decided that a board of canvassers can be compelled to determine, in accordance with law, which one of the candidates at an election in that state for the office of representative in the congress of the United States is entitled to the certificate of election, and that this does not contravene the constitutional power of the house to determine its member's right to the office; the court merely deciding whether the returns made by such board of votes cast in a county should be included in their canvass and statement. *State v. Board of Canvassers*, 36 Wis. 498. Mr. McCrary, in his work on Elections (section 350), says: "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature when by the constitution each house is made the judge of the election and qualifications of its own members; but a court may, by mandamus, compel the proper certifying officers to discharge their duties, and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal. And inasmuch as canvassing and returning officers act ministerially, and have no power to go behind the returns, or inquire into the legality of votes cast and returned, a court will, by mandamus, compel them to declare and certify

the result as shown by the returns, because that is a plain duty; but the award of a certificate of election under such mandate will not conclude the legislative body in determining the election." *O'Ferrall v. Colby*, 2 Minn. 180.

These authorities, and many others that might be cited, make clear the duties of these canvassing boards, and the power of the courts to compel them by mandamus to do their duty, and the further fact is shown that such proceeding is not an election contest, nor does it try the title to an office. It simply compels a canvass of the returns, and a declaration of the result as shown by the face of the returns, regardless of who is elected or defeated. The numerous authorities in Illinois and elsewhere to the effect that the courts of equity have no jurisdiction in a case of contested election, and that injunction will not restrain the holding of an election, or try the title to an office, are not applicable here, and will be better understood if the above distinctions are kept in mind. As stated in the case in 78 Ill., there are certain political powers pertaining to the co-ordinate departments of government that are independent of judicial power, and therefore can not be controlled by the courts, which proposition excludes all courts; but the power of the courts may be invoked in aid of political administration to compel the performance of specific legal duties. Wherever, therefore, the door is open to judicial supervision, then all of the power of the courts necessary to make the remedy effectual is available. If equity is necessary to uphold the common law, it has a clear right to act by reason of the ancillary character of its functions. Under the statute of the territory above referred to, there can be no doubt of the power and jurisdiction of the court in the mandamus proceeding, nor can there be any reasonable doubt as to the fact that the legislature, in passing that act, intended to compel county

commissioners, when sitting as a canvassing board, to declare the true result of an election from the face of all the returns, and that the judge of the proper district court, if called upon as provided by the law, should compel it to be done in case of failure, neglect, or refusal. It is clear, also, that such board is prohibited from canvassing less than all of the returns, and that they are forbidden to certify to false results, based upon a canvass of part of the returns. Therefore, if the law is obeyed by canvassers, all parties will secure the rights to which they were entitled by the result of any such election.

It was urged in argument on behalf of the petitioners that the court had no power to control the discretion of petitioners when they were acting as canvassers of election returns; but an examination of the statute shows that they had no discretionary powers. The statute commanded them to canvass all of the returns, and declare the result from the face of the returns; therefore the argument fails to point out a want of power in the court in this respect. Counsel for petitioners also contend that petitioners are answerable alone to their consciences and their constituents for failure or refusal to properly discharge their duties as such canvassing officers; but this contention is conclusively answered by the statute on the subject, and need not be further noticed. Sadly defective, indeed, would be a law which placed the rights and interests of the people of a county in the hands of (it might be) an irresponsible and unscrupulous board of canvassers, who were accountable only to their consciences and constituents. Fortunately, the law of this territory is not thus defective. Jurisdiction in regard to election matters having been specifically conferred upon the courts of this territory, it is difficult to see how the case of *Dickey et al. v. Reed et al.* 78 Ill., becomes authority in this case; for in that case it was held that

jurisdiction had not been conferred, and therefore the process was void. The failure to exercise the power conferred does not destroy the power. That is clearly shown by the case of *Neiser v. Thomas et al.*, 12 S. W. Rep. 725, in which the court refuse to take jurisdiction, but say that they do not wish it to be understood that they would not exercise jurisdiction, even in an election case, upon the presentation of a proper case. That was an injunction case, but was really an attempt to contest an election, and sought to have Mr. Thomas' right to the office of city marshal of St. Louis set aside on the ground that he was disqualified. To determine this question, evidence must be heard; and hence it was simply an attempt to try a contested election case in an equity court, and jurisdiction was properly declined. If we accept the view of the Illinois case contended for by counsel for petitioners,—that canvassing boards, in election matters, are an independent and co-ordinate political power, absolutely free from the jurisdiction of the courts,—what means this array of decisions of able courts, both of law and equity, in which they have taken and exercised jurisdiction in election cases, and especially as to canvassing boards? It seems to us that the contention is erroneous and that the Illinois court declined jurisdiction under the law of that particular state as applied to the case presented to the court. The fact that some courts exercise jurisdiction in election cases, while others do not, serves to prove that the courts await the presentation of a proper case before attempting to exercise an existing power; and, further, that while there are election cases of which the courts of equity will refuse to take jurisdiction, owing to the particular phase of the case presented, still there are very many phases of election cases of which courts both of law and equity will take and exercise jurisdiction. Numerous cases are reported showing the power of the courts over canvassing

boards, and our statute gives the courts comprehensive jurisdiction over them.

This brings us to the consideration of the injunction proceeding in the light of what has been said. The bill alleged, in substance, that at the election held in Santa Fe county, November 4, A. D. 1890, Benjamin M. Read and Joseph B. Mayo were each candidates for the office of member of the house of representatives of the legislative assembly of New Mexico, and that Thomas B. Catron was a candidate for member of the council of said legislative assembly; that they were voted for at said election, and that the returns showed that they had received a majority of the votes cast at said election for such offices; that petitioners and one George L. Wyllys were the commissioners of Santa Fe county, and were by law required to canvass the returns of said election within six days after the election, declare the result, and forward certificates of election to those having received a majority of the votes cast; that the said board had assembled, but that they had failed, neglected, and refused to count the returns from precincts 1, 2, 8, 11, and 16 of said county, although the returns from these precincts were before the board in regular and perfect condition; that the failure of the board to count the returns from those precincts would materially affect the result by showing that other persons than complainants were elected, when, in fact, complainants had received a majority of the votes cast; that said commissioners had threatened to declare the result from a partial canvass, and issue certificates to others than complainants for said offices; that, if such certificates were issued, great and irreparable damage will be the result to complainants and the public generally; that it may, and probably will, result in causing numerous suits and expensive and vexatious litigation; that complainants will institute mandamus proceedings

to compel the board to canvass all of the returns, but that before such proceedings can be made effective the board will issue, or cause to be issued, such fraudulent certificates. Upon this bill a writ of injunction issued, as above set out. This bill brought to the court's attention a case where a board of canvassers had refused to obey the law, and not only that, but that they were about to do a plainly illegal act, and perpetrate a fraud, liable to cause a multiplicity of suits and great injury, which could still be prevented by the prompt action of the court. The court was bound to know the law, and that the act about to be committed was plainly illegal and fraudulent. The bill alleged that the canvassers had refused to canvass the returns from five precincts, although the returns were before them in "regular and perfect condition;" and the court was bound to know that the law commanded this board to canvass all of the returns, and declare the result from a canvass of all the returns, and that it was an illegal act to issue certificates of a result declared from a canvass of part of the returns. While county commissioners have large discretionary powers, this canvassing board had no discretion whatever, under the law as to that particular matter. They had a specific duty to perform. They had refused to perform it, and were about to declare a false result, and issue certificates, the legal effect of which the court was bound to know. Referring to the law of this territory on this subject, we can not refrain from commending the wisdom of the legislature in enacting it. It strikes directly at the cause of the vexatious litigation and disorder,—the discretionary powers of canvassing boards. This law provides that the county commissioners, when sitting as a canvassing board for the purpose of canvassing the returns of any election held in this territory, shall not adjourn or become functus officio as a canvassing board until they "shall have canvassed each and

every return of election before them, and shall have declared the result from the face of such returns." The will of all the voters as shown by the returns must be declared by the canvassing board. In case of a candidate for office, he has a legal right to this declaration; and if, by this declaration, a candidate has received a majority of the votes, the certificate must be issued to him, and it is an illegal act to deprive him of this evidence of his title to office. As was said in *O'Ferrall v. Colby*, 2 Minn. 180: "But a court may, by mandamus, compel the proper certifying officers to discharge their duties, and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunals." This does not necessarily give the candidate the office—indeed, he may never obtain it; but he has a right to have what the law gives him from the canvassing board. The record shows that the mandamus proceeding was before the court at the time this bill for injunction was presented, as it bears an earlier number upon the docket; hence the court was informed that it might become the duty of the court to compel the board to declare a different result from that upon which the board was about to issue certificates, so that the court, by refusing to restrain the issuance of illegal certificates, would practically become a party to the transaction. It was the plain duty of the court, and it had full power to prevent certificates from being issued until such time as, by the remedy pointed out by the statute, it could be definitely ascertained what the result of the election was, and to whom certificates should be issued by the board. The bill in this case sought to restrain the doing of a fraudulent act. It sought to prevent vexatious and expensive litigation, and it pointed out the necessity for prompt relief. But it is urged that there is want of jurisdiction, because there was a remedy at

law. That there is a remedy at law is not sufficient. It must be an adequate remedy. Under the law of this territory, the remedy at law was not an adequate remedy in this case. If this had been a bill to contest an election, or try the title to an office, there would be force in the contention; but it is not a case of that kind. The law of this territory clothes the courts expressly with full power, when properly called upon by a taxpayer of the proper county, to grant the writ of mandamus, both alternative and peremptory, to compel canvassing boards to do their duty, if they fail, neglect, or refuse to do it. That duty is to canvass each and every return before them, declare the result from the face of the returns, and, under section 1193, they must issue certificates to the persons having the greatest number of votes for the particular office. In other words, the canvassing board must give to the person receiving the greatest number of votes (at an election for officers), after they have ascertained from an honest canvass of all the returns, the certificate which is *prima facie* evidence of his title to the office, and it also secures to the people an honest expression of their will. Any other canvass, or the issuing of any other certificate, would be a gross fraud upon both the person voted for and the people. But for the intervention of equity in such a case as this, *prima facie* evidence of title to the same office may be given to more than one person by unscrupulous officials, and if so the very purpose of the law would be defeated. As the law applies equally to all election returns, it follows that the rights acquired by a candidate for election to office at an election in this territory are to be preserved from their inception, and the right of a person elected to office in this territory is to have the legal evidence of that right which the canvassing board are required by law to give him, and, further, that such legal evidence of right to the office shall not be given to

another. The policy of the law is to deprive canvassing boards of their power to do harm, such as the bill shows was about to be done. The court in South Carolina, in the case of *Grier v. Shackelford*, 3 Brev. 491, speaking of the duty of election managers: "It is not to be believed that the legislature intended to hang the most important rights of the citizen on the arbitrary decision of such a tribunal. If they are to range through all the vagaries of their capricious fancies, the elective franchise will become an idle mockery."

Is it an adequate remedy for a candidate, having received the greatest number of votes, to be compelled to contest before the legislature a defeated candidate, having *prima facie* evidence of title to the office given him in violation of law? Plainly, it is not. The law commands the board, and, if they refuse, the court must compel the board, to give the successful candidate *prima facie* evidence of his right to the office, and it is for the defeated candidate to resort to *quo warranto* or contest, as the case may be. These remedies may be adequate for the defeated candidate, but they are not for the successful candidate. The legislature of a territory is limited in its sessions to sixty days, and compensation is paid to the sitting member. Suppose a board of canvassers gives a certificate of election to a defeated candidate; he presents it, and takes his seat; contest is brought by a successful candidate, but by delay it is not decided prior to adjournment. Where is the remedy for the candidate who was actually elected? Evidently, such is not an adequate remedy. If the board of canvassers do their duty, the successful candidate will receive *prima facie* evidence of his right to the office. If the unsuccessful candidate desires to question the result, he may resort to the appropriate remedy, go behind the returns, and then the case has reached what is regarded in law as a "contested election case." "Except in cases of special injunction

to stay waste or prevent other irreparable injury, the bill should generally show some primary equity in aid of which the injunction is asked, and the relief is granted as ancillary to or in support of the primary equity whose enforcement is thus sought." *Patterson v. Miller*, 4 Jones Eq. 451; *Washington v. Emery*, Id. 29. "And it is incumbent upon the party seeking relief by interlocutory injunction to show some fair legal or equitable rights, and a well grounded apprehension of immediate injury to those rights." *High Inj.*, sec. 7. "Where, however, the parties are at issue upon a question of legal right, and it is necessary to preserve their rights in statu quo until the determination of the controversy, an interlocutory injunction may properly be allowed." *Harman v. Jones*, *Craig & P.* 299. In such cases courts of equity do not assume jurisdiction to dispose of the legal rights in the controversy, but confine themselves to protecting those rights as they are, pending an adjudication upon the legal questions involved. In *Kerr et al. v. Trego et al.*, 47 Pa. St. 292, involving elections and offices in the city of Philadelphia, the supreme court granted an injunction, and said: "The remedy by injunction extends to all acts that are contrary to law, and prejudicial to the interests of the community, and for which there is no adequate remedy at law." The supreme court of Illinois, which decided the case of *Dickey et al. v. Reed et al.* has frequently granted injunctions in county seat election cases, holding that, while they had no statutory authority, the authority was implied by the constitution.

If there could still be any doubt of the power of the court of equity over the subject-matter of this injunction proceeding, we think it is at rest by virtue of another statute of this territory, which took effect on the same day the former statute referred to took effect. Section 1, chapter 117, Laws, 1889, is as follows:

"That suits in equity may be begun, injunctions granted, or receivers appointed in aid of any suit at law, whether the same has been prosecuted to a judgment or not; provided, that such suit at law has been begun at the time any such equitable relief is sought." It is objected that the mandamus proceeding was not a suit at law; but, while in a strict sense it is not an action at law, we are of the opinion that the term "suit at law" is used in its broadest sense, and that it was intended to authorize the aid of equity whenever it was necessary in order to give a more complete and effectual remedy in any pending legal proceeding. The word "suit" is a very comprehensive term. As used in the judiciary act, 1789, section 25, it was construed to mean "any proceeding in a court of justice in which the plaintiff pursues to such court the remedy which the law affords him." "An application for a prohibition is a suit." 2 Pet. 449. "In its most extended sense, the word 'suit' includes not only a civil action, but also a criminal action." Story. Const., section 1719; 1 Chit. Pl. 399. "'Suit' applies to proceedings in chancery, as well as law" (1 Smith Ch. Pr.); "and is, therefore, more general than 'action,' which is almost exclusively applied to actions at law" (Didier v. Davison, 20 Paige, 516). The term as used in the statute is to be construed in its comprehensive sense, and comprehends proceedings ancillary to the remedy by mandamus, as authorized by section 13, chapter 133, Laws, 1889. The injunction proceeding is in aid of the mandamus, as shown by the record, and, indeed, each refers to the other, and the nature of the remedy sought shows the ancillary character of the proceedings. Can it be contended that a court possessing enlarged jurisdiction, both at law and in equity, will decline to stay an illegal act, and preserve the statu quo until equal and exact justice can be

done? We think not, and therefore hold that upon the case presented the court had complete jurisdiction of the subject-matter and of the person, and properly granted the temporary injunction prayed for. That the command of the writ was disobeyed by the petitioners is not denied by them, and the record also shows the violation of the injunction by setting out in full the certificates which the court had restrained them from issuing. If the court had jurisdiction of the person and subject-matter—which we have already answered in the affirmative—it follows that the action of the petitioners in disobeying the order of the court was contempt, for which they were liable to punishment. They were properly brought before the court by attachment and punished by fine, and committed to the county jail until the fine and costs were paid.

It is objected by counsel for petitioners that the court exceeded its authority in the matter of punishment, inasmuch, as four different fines were assessed of \$50 each for four distinct offenses in one proceeding. The record shows that these fines were assessed separately, and there being no doubt of the inherent power of the court to punish, as well as by virtue of the statute, there can be no doubt of the legality of the first fine of \$50. But the fact that more fines were assessed would not make the entire punishment void. The petitioners are liable to be held for the valid fine. It is a mere irregularity, that does not warrant discharge on habeas corpus. Errors or irregularities are curable in the court from which the process issued, or by appeal; not on habeas corpus. *Church Hab. Corp.*, sections 344, 363, and cases cited. The supreme court of the District of Columbia, in a case where three sentences had been imposed, says: "The relator appears to be

CONTEMPT: irregularity in assessment of fines.

imprisoned for three several terms of one hundred and eighty days each, without any specification as to the time of beginning or ending of the last two terms of imprisonment. The sentences pronounced by the court do not provide that the periods of imprisonment under these convictions are to commence at any future period, or after the expiration of the period mentioned in the former judgment. This omission is fatal to any imprisonment which exceeds that of a single sentence." There is nothing before this court to show that either of the petitioners moved the court to remit the fines, or that payment of either of the fines has been made; hence the punishment is not a matter for our consideration. The petitioners were committed to jail until the fine was paid, and properly so. The commitment is not a separate punishment; it is simply an incident to it. In the case of *Fischer v. Hayes*, 6 Fed. Rep. 63, the court said: "It is in this view that it has always been held that where the statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of court or for a defined offense, it is lawful for the court inflicting the fine to direct that the parties stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction." It is not necessary in this case, nor does the court intend, to construe section 665, Compiled Laws, with a view of determining the power of the legislature to limit the courts in assessing a fine for contempt, nor whether the fine provided for would be the extent of punishment. The court observed the limit of the statute in assessing the fine for each contempt; and, while assessing fines in the same action for four distinct contempts may be irregular except as to the first, as the fines were separate it can not avail the petitioners prior to the payment of the valid fine and costs.

The objection of want of jurisdiction in vacation is not well taken. By section 1829, Compiled Laws, JURISDICTION in the courts of this territory are always open, vacation. and their jurisdiction is comprehensive enough to include proceedings in contempt. The prayer of the writ of habeas corpus will be denied, and the petitioners will be remanded to the custody of the officer.

FREEMAN and LEE, JJ., concur.

FREEMAN, J.—I concur in the conclusions reached in this cause by a majority of the court, and, in the main, with the reasons assigned. In view, however, of the importance attached to the questions involved, I have thought it not improper to place on file my own views.

This is an application on the part of the relators to be discharged from what they allege to be an unlawful restraint on their liberty. They incorporate as a part of their petition a part of the record of the proceedings in the district court, which culminated in the commitment from which they seek to be discharged. The other part of the record has been filed by the counsel for the territory. The record as thus made up exhibits, substantially, the following state of facts: The relators, who were on and preceding the fourth day of November, 1890, county commissioners for the county of Santa Fe, territory of New Mexico, were charged by law with the performance of certain duties. They are required to give notice of elections; to appoint for each precinct three persons of "discretion and good character" to act as judges; within six days after the election, public notice having been given, they are required to examine and count the votes polled for each candidate. I shall have occasion hereafter to note the extent of the power conferred by the term "examine and count the vote." They are also required

to supply each precinct with a ballot box, with lock and key; to forward within ten days to the secretary of the territory a "true extract of the votes polled." The failure through "culpable neglect" to have poll books forwarded to the election precincts, or a failure to count the votes at a proper time, subjects them to a fine of not more than \$25, nor less than \$10. If they shall give false or fraudulent certificates, or maliciously throw out any returns sufficiently legal, "or shall substitute false returns for true ones, or prevent the popular vote being had. or shall be guilty of such frauds," they shall pay a fine of not exceeding \$500, nor less than \$200. They are to give to the person receiving the greatest number of votes a certificate of election. "Every commissioner who shall knowingly, ignorantly, or maliciously fail to comply with the duties imposed upon him by law and the provisions of this act, and who shall fail to count the votes at the time and place designated by law, or in any manner misrepresent the popular vote, or shall prevent or order the judges of election not to certify, or refuse to keep open a poll book for the information of the public, at the courthouse, from the time the said poll book shall be delivered to them until the day of examination of the same, and for the counting of the votes, or in any other manner shall prevent the obtaining of the legal vote of the people, or shall refuse to allow any candidate or citizen to examine the said poll book so placed for inspection, or shall give any false or fraudulent certificate, shall on conviction be fined in any sum not less than five hundred dollars, nor more than one thousand dollars, and shall be imprisoned in the county jail for not less than six months, nor more than one year, and, further, he shall be forever disqualified from holding any office of profit or honor in this territory." Compiled Laws, 1884, section 1205. It is also provided that the district judge may, on the presentation

of any one who may desire to do so, make a summary investigation of the charge of misconduct on the part of the commissioner, and, if he shall find him guilty, he shall suspend him from office until final decision at the next term of the district court. Section 1206, Compiled Laws.

Were it not for the disclosure made by the record in this cause, I should deem it unnecessary to say that the sole purpose of the legislature in the enactment of the statutes to which I have adverted was to secure a free, fair, and honest expression of the people at the polls. And aside from the discussion which has grown out of this case, and confining ourselves alone to the provisions of the law, it seems to me that the sole purpose of the legislature in providing for a board of canvassers was to secure that end. Whatever is honestly and intelligently done by a commissioner under the law to secure a free, fair, honest, and full expression of the popular will is done in the line of his duty. Whatever is done either "knowingly, ignorantly, or maliciously," to prevent that end, is a willful, ignorant, or malicious violation of the law, and merits the condemnation of all good citizens, and the punishment prescribed by law. The absolute necessity for the preservation of the freedom of elections and the purity of the ballot is so apparent as to admit of no discussion. It would be an idle waste of time to undertake to demonstrate that, in a government like ours, the line that marks the distinction between law and lawlessness, government and anarchy, is drawn at the ballot box; and he who undertakes to obstruct a free expression of public sentiment at the polls is an enemy to society and a public criminal. Nor does it palliate the offense that the obstruction is interposed under the color of authority. The desperate revolutionist who by force of arms undertakes to prevent the expression of popular will through the ballot box may be a bolder man

but he is none the more a criminal, than the man who under color of office seeks to do the same act. There is another point equally well settled, though possibly not so well understood, and that is that in the discharge of the duty imposed upon the commissioners to "examine and count the votes" they act in a purely ministerial capacity.

Whatever judicial function or discretion they may possess is exhausted in the selection of "discreet and honest judges of election." The vote having been cast, they have nothing to do but to examine and count it. When the examination reaches the point of disclosing the fact that the vote under consideration was actually cast, it must be counted. Mr. Associate Justice BRISTOL, in the case of *Bull v. Southwick*, 2 N. M. 353, said: "As such board of canvassers, they assumed judicial power to pass upon the illegality of, and reject, votes, without any other ceremony than because parties and bystanders challenge them as illegal. In this way hundreds of votes were thrown out, and the result of the election thereby arbitrarily changed. This is but another illustration of what experience has long since demonstrated, which is that if such judicial powers should be conferred upon mere canvassing boards, to be exercised at the close of a hotly contested election, in the absence of the real parties interested, and almost always with the partisan advisers of such boards in the background, their sittings would be marked by the exercise of arbitrary power that would be more aggressive and odious than that of the ancient court of Star Chamber." This case was heard and decided in 1882. It thus appears that, even prior to the passage of the act of the legislature to which I am about to refer, the doctrine that the county commissioners sitting as a board of canvassers were mere ministerial officers, clothed with no judicial discretion, was firmly settled by judicial construction in this ter-

ritory. In order, however, to remove any doubt that might exist, and to put at rest any and all vexatious questions that might arise before such boards of canvassers, the legislature, at its twenty-eighth session, passed an act, the thirteenth section of which is as follows: "Sec. 13. That the board of county commissioners, sitting as a canvassing board for the purpose of canvassing the returns of any election hereafter held in this territory, shall not adjourn or become functus officio as a canvassing board until such board of commissioners shall have canvassed each and every return of election before them, and shall have declared the result from the face of such returns; and if any board of county commissioners, sitting as a canvassing board, shall fail, neglect, or refuse to canvass any return of any election before said board under any pretense that such return is irregular, or for any other pretense, it shall be lawful for any qualified voter to present his petition under oath to the judge of the district court having jurisdiction, at his chambers, briefly setting forth the facts and circumstances, and praying that such board of commissioners shall be required by a writ of mandamus, issuing out of such court, to count and certify such returns; and therefore it shall be the duty of the district judge to immediately issue, or cause to be issued, his alternative writ of mandamus, requiring such commissioners either to canvass such return, or returns, and to declare the result, or to appear in person forthwith before such court, and bring with them all of such returns; and, if such commissioners shall decline to canvass such return, or returns, they shall appear before said court in obedience to such writ, and take with them all of the returns, or papers purporting to be returns, before them; and thereupon the court shall forthwith proceed to examine said returns, and upon such examination may issue his peremptory writ commanding said board of commissioners to

immediately canvass any or all of such returns, and to declare the result." Sess. Laws, 1889, p. 321. This law went into effect February 28, 1889. The section of the statute which I have quoted seems to me to be too plain to admit of construction. Let us analyze it, for a moment, in order to see if it contains any provision that can, by any possibility, be misunderstood. First. The board shall not adjourn until it has canvassed each and every return before it, and shall have declared the result. Second. If it shall fail, neglect, or refuse to canvass any return under any pretense that such return is irregular, or for any other pretense, any qualified voter may present his petition to the district judge, praying that such board may be required by writ of mandamus to count and certify such returns. What returns? Why, the returns that said board, under some pretense, have failed or refused to canvass. Third. The district judge is then required immediately to issue his alternative writ, requiring the board to either canvass such returns and declare the result, or to appear before him in person forthwith, and bring with them all such returns. The judge is to issue his mandamus immediately, and the commissioners are to appear forthwith. No provision is made for waiting for the regular term of the court. Fourth. If the commissioners decline to canvass such returns, they shall, in obedience to the writ, i. e., forthwith, appear before the judge, and bring with them—what? Bring with them what they, in their judgment, regard as the proper, legal, and regular returns? No. This is not what they are to be ordered to do, but to bring with them all the returns, "or papers purporting to be returns." Fifth. Having done this—having, in obedience to the writ, appeared in person before the judge, and having produced, not only all the returns, but each and every paper purporting to be a return,—their power, authority, and responsibility practically cease. For, sixth,

immediately on the production of such papers, the judge himself shall proceed to examine them; and his judgment, so far as the commissioners are concerned, is absolutely conclusive. For, seventh, the judge is required, as a result of his examination, to issue a peremptory writ commanding said board to canvass any or all of such returns, and declare the result. That is to say, the judge is required to examine all of the papers and to declare what are and what are not proper returns, and to direct the board to declare the result.

The express provision of this statute makes the judge *quo ad hoc* a revisory canvassing board, and nothing is left for the commissioners except to obey his mandate. Hence I repeat that whatever discretion, ministerial, judicial, or otherwise, vested in the commissioners as a board of canvassers ceases the moment they appear before the judge in response to the alternative writ. They are not merely his subordinates. They no longer constitute any part of the board, so far as relates to any question growing out of the validity or invalidity of the papers filed with them as returns, or as papers purporting to be returns. Any effort on their part thereafter to impress their views upon the result is not merely contempt of court, but a plain and culpable usurpation of authority. It is no answer to say that a mandate of a judge directing the board to canvass certain returns, thereby declaring the election of a particular candidate, is an unwarranted invasion of the legislative by the judicial branch of the government. This is not true in fact, and for three reasons. In the first place, the legislature is the sole judge of the election, qualification, and return of its own members. It may seat a member with or without a certificate of election. If it should appear to that body that a member having a certificate issued to him by the board of canvassers, as a result either of their own examination or that of the judge, was not in fact

elected, it would be its duty to deny him the privileges of a member. In the second place, the relation of county commissioners is as foreign to the legislature as that of the judge. The district judge belongs to the judiciary, and the county commissioners to the executive, or administrative, branch of the government. Each, to a certain extent, is independent of the other, and the legislative branch is absolutely independent of both. In the third place, the legislative branch of the government, being independent of both the judiciary and administrative branches, has a perfect right to vest the power of canvassing the returns of an election in any officer it may choose, either executive or judicial, or to create an office especially clothed with that power. As we have seen, it has clothed certain administrative officers, to wit, county commissioners, with this power to be exercised in the first instance, and, following the usual line of remedial jurisdiction in other matters, it has vested in the judiciary a supervising or controlling power. Such being the law as I understand it, I shall endeavor to apply it to the facts in this case.

On the twelfth day of November, 1890, there was issued out of the district court, of the county of Santa Fe, a writ of mandamus, directed to the county commissioners, the relators in this case. This alternative writ, after reciting that it was issued on the petition of Benjamin M. Read, "a resident and qualified voter of said county," proceeds to set out the charges, which are substantially as follows: That the board of commissioners had failed, neglected, and refused to canvass the returns from precincts numbered 1, 2, 16, and 8, and also that they had refused to canvass four votes cast for petitioner at precinct number 11. The writ concluded as follows: "Now, therefore, you are hereby required either to canvass such returns, including said certificate from precinct number 8, of said county, and also to canvass and count the said four votes polled

in precinct number 11 of said county, which are marked 'Not registered' upon the poll books of said precinct, and declare the result, or to appear in person forthwith before said district court, and bring with you all of said returns, and all of the returns, or papers purporting to be returns, before you." On the thirteenth day of the same month the respondents appeared and filed their answer, which, after setting out in detail the alleged irregularities which, in the opinion of the board, required them to reject and to refuse to canvass certain returns therein described, concludes as follows: "Your respondents, therefore, in obedience to the requirements of said alternative writ of mandamus, appear before your honor in person, as well as by their attorneys, N. B. Laughlin and Francis Downs, Esquires, and they present before your honor all such returns, or papers purporting to be returns, before you." It is not pretended that the proceedings thus far were not in strict accord with the act of the legislature already quoted. On the issue thus joined, the cause was heard by the district judge, and a peremptory writ of mandamus awarded. To this ruling of the court respondents tendered a bill of exceptions, which was duly signed and sealed. On the same day that the alternative writ of mandamus was issued a petition was filed on the equity side of said court, by the said Benjamin M. Read, and by Joseph B. Mayo, and Thomas B. Catron, against the said commissioners, averring, substantially, that complainants were, at the election held on the fourth of said month, candidates for seats in the legislative assembly of said territory; that defendants constituted the board of canvassers, whose duty it was to canvass the votes polled at said election, in said county of Santa Fe; that said commissioners had assembled at the courthouse in said county, "but have failed, neglected, and refused to count a portion of the votes polled at said election for these complainants,"

etc.; that said refusal would materially affect the result of said election, and would make it appear that persons other than complainants had been elected; that said commissioners were threatening to give certificates of election to other parties, etc. They asked that an injunction issue, restraining the commissioners from issuing certificates of election to others than complainants. An injunction was issued in accordance with the prayer of the bill. On the fifth of December, 1890, defendants answered. They admit that complainants were candidates at said election, but deny that they received a majority of the votes cast. They then set out what they deemed various irregularities in the returns of precincts 1, 2, 8, 11, and 16; that these returns were not in regular and perfect condition, etc.; that they met, and proceeded to canvass the returns; that, while so doing, "the complainants, well knowing the irregularities, fraud, and deceit appearing in some precincts, and the illegal and insufficient manner and condition of the pretended and alleged returns before said defendants as such canvassing board, and that the said pretended and alleged returns were so irregular and insufficient that the said board could not receive and count them, they (the complainants), in anticipation of their decision as such board of canvassers, filed a bill in chancery, and obtained an injunction, issued out of this honorable court, by which they were restrained and enjoined from making and completing the count and canvass of all the votes cast in said election, according to the returns made to them as such board. And these defendants deny that the pretended returns made to them as a canvassing board of precincts in said county numbered 1, 2, 8, 11, and 16, were in regular and perfect condition, but they aver and state to the court here that the alleged returns before them from precincts 1, 2, and 16 were irregular, and contrary to law, and the statutes in such case made and

provided; and that the face of the returns from precinct 11 was regular, and was so counted, when reached by the board in the regular order. But there was never at any time any poll book, ballot box, or returns of any kind before these defendants, as a canvassing board or otherwise, from said precinct numbered 8 in said county; that there was not at any time evidence before them that an election had been held at precinct number eight on the 4th day of November, 1890," etc. They deny that they had failed to count any votes "properly returned;" deny that they threaten to give certificates to persons "who did not receive the greatest number of votes," etc. They admit that "a certain paper purporting to be a certificate of election returns signed by four persons, two of whom signed as judges of election, and two as secretaries or clerks of election, in precinct numbered 8 in said county, was presented to the defendants while sitting as a board of canvassers by one of the complainants, Benjamin M. Read, who was a candidate as aforesaid, and an interested party in the result of the canvass and count, and who was not authorized by law to act as messenger or custodian of the election returns; and they aver that the said purported certificate or paper is irregular in form, insufficient in law, does not contain a true and correct statement of the votes cast and polled at said precinct No. 8 on the 4th day of November, 1890, and that said alleged certificate, if canvassed and counted, would change the elections returns, and would have the effect of giving majorities to persons who were not elected by a majority of the votes cast at said election; that said alleged certificate gives majorities from four to eleven greater than the actual vote as it was cast, polled, and counted, and certified by the judges of election, as these defendants are informed and believe." They then allege on information and belief that said certificate was made at Santa Fe, and

under the supervision of interested parties, etc., and by parties who never saw the original certificate made out and signed by the judges of election, if any such original certificate was ever so made out and signed. "That one of the persons who signed said paper as an election judge did so at the request of some person who came from Santa Fe, with the paper already filled out to be signed, and seven days after his official position as judge of election had expired." The contradictory statements contained in this answer, of themselves convict the board of an attempt to suppress the popular vote and defeat the will of the people; for while, in one part of the answer, they charge that there was not at any time evidence before them of any election at precinct number 8, they nevertheless admit in another portion of the answer that a paper purporting to be a return from said precinct, signed by two judges of election and two clerks, had been filed with them; but they allege that said "purported certificate" did not contain a true and correct statement of the votes polled at said precinct. How did they know that "purported certificate" did not contain a true statement of the votes polled, if they had never had before them any evidence that any such election had been had? Having answered, they demurred to the bill, setting out six causes of demurrer, substantially as follows: First, the court has no jurisdiction of the parties; second, because the court has no jurisdiction of the subject-matter in controversy; third, because the court has no jurisdiction of the subject-matters and the persons; fourth, the bill does not state facts sufficient upon which to base an action; fifth, complainants have no common interest; sixth, that the bill is multifarious. This answer, in the nature of a demurrer, was filed on December 5, and on the same day a motion was filed to dissolve the injunction. On the seventeenth day of January, 1891, one of the complainants filed in the

cause an affidavit reciting that defendants, in violation of the injunction, had on the fifth day of December, 1890, issued certificates, etc.; and thereupon a writ of attachment was issued. The parties were arrested, and on January 19 appeared and filed a motion to quash the attachment. The grounds of this motion were substantially as follows: First, the judge had no power in vacation to issue the attachment; second, because the judge had no power, jurisdiction, nor authority to institute proceedings for contempt; third, the judge had no power to issue an injunction to prevent the board of canvassers from issuing certificates; fourth, the judge had no power to issue an injunction, which was therefore void; fifth, because no order to show cause had preceded the writ of attachment; sixth, because the rules and regulations of the chancery court were not observed in the issuance of the writ of attachment. On the twentieth of January, an order was entered by the district judge reciting that upon a hearing of the parties, and upon the full consideration of the cause, he had found the parties guilty of four several acts of contempt, and imposing a fine of \$50 upon them for each of the alleged acts of contempt. They were adjudged guilty of contempt, and an order of commitment was entered against them in the event that the fines were not promptly paid.

That we may have a proper conception of the relation sustained to each other by the two proceedings of mandamus and injunction, it may not be improper to note the order in which the several steps were taken. Both writs were applied for and issued on the same day, to wit, November 12, 1890. On the thirteenth of the same month defendants answered the alternative writ of mandamus, and on the eighteenth a preemptory writ was issued. On the fifth of December defendants filed their answer to the bill for injunction, and also moved to dissolve the same, and on the same day they

proceeded, in direct violation of its terms, to issue certificates of election.

I shall not consume time in discussing the question as to the jurisdiction of the court to issue the writ of mandamus. The act of February 28, 1889, confers the power in express terms. Not only so, but the facts in this case, in their minutest detail, bring it within the express terms of the statute. Every requirement of the statute, save one, was met. The complaint was made; the alternative writ was issued; the respondents appeared and produced the returns; the judge examined them; the peremptory writ was issued. At this point, however, obedience to law was abandoned. The respondents, the relators here, thinking, no doubt honestly, that they were better qualified to take care of the public interests than the legislature, determined to defy the law. It is trifling with the occasion to treat the conduct of these relators as a contempt of court. It was a contempt of law. It would be an unwarrantable reflection upon their intelligence to say that they did not understand their duty in the premises. It was not a matter of mistake. It would be a reflection on the voters of the county to suggest that three men too ignorant to understand the thirteenth section of the act of February 28, 1889, could be elected to the office of county commissioner. But, conceding the jurisdiction to issue the mandamus, it is insisted that the court had no authority to issue the injunction; that the act of 1889, imposing on the judge the duty of issuing the mandamus, is an implied denial of his authority to proceed by any other method; and the familiar doctrine that *expressio unius est exclusio alterius* is invoked to sustain this view. Opposed to this, however, is the equally familiar doctrine that, when power is conferred on a court to do any particular thing, there is, in the absence of express provision to the contrary, an implied grant of power to issue such process as may

be necessary to carry into execution the power conferred. This is especially true of courts of common law and chancery jurisdiction; and section 1868 of the organic act provides that "the supreme court and district courts, respectively, of every territory, shall possess chancery, as well as common law, jurisdiction."

But there is another reason that, to my mind, is conclusive of this question. It is well settled that the two processes, mandamus and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by mandamus to compel the performance of a duty, it will exercise its restraining power to prevent a corresponding violation of duty. The supreme court of the United States has declared: "But it has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who has sustained personal injury by such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which an adequate compensation can not be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other." *Board of Liquidation et al v. McComb*, 92 U. S. 541; *High Extr. Rem.*, sec. 6. Even under the common law as it existed in England at a time when the writ of mandamus issued only as a prerogative writ, and before it became what it now is,—a writ of right, issuing *ex debito justitiae*,—it exercised a restraining, as well as a coercive, power. 5 Pet. 192. The injunction was purely ancillary to the mandamus. The relation which the former writ sustained to the latter was precisely that of an attachment sued out in aid of a common law action of debt. The purpose, and only purpose, was to preserve the *statu quo* pending the

determination of the question raised by the proceeding by mandamus. There was, in fact, but one cause of action, and, in law, practically but one suit. If the petitioners were not entitled to an injunction, they were unquestionably not entitled to mandamus. The purpose of the mandamus was to compel the commissioners to do that which could be done only as a prerequisite to the issuance of a certificate of election. Under the law, they were first to canvass the vote and declare the result, and afterward to issue a certificate of election. To say that, while they might be compelled by mandamus to canvass the return, they could not be restrained from issuing a certificate, predicated upon a result reached in defiance of the mandamus, is to announce a solecism. In the view that I have taken of the matter, the proceeding by injunction was unnecessary. Pending the proceeding by mandamus, the board had no authority to issue a certificate of election. A peremptory writ of mandamus commanding the commissioners to canvass the votes cast at an election is, *ex vi termini*, a command to them to do nothing that will defeat the purposes of the writ. It was the duty of the board to obey the writ, not alone in its substance, but in its spirit. High Extr. Rem., sec. 566. Hence it follows that the issuance of the certificate pending the operation of the writ of mandamus was a violation of its terms, and warranted the imposition of a fine for contempt. Granting, however, that an injunction was unnecessary, it does not rest with the relators in this proceeding to say that the court was unnecessarily specific in its directions to them. If, in good faith, they had obeyed the mandamus, I am inclined to the opinion that they would have been entitled to their costs as to the injunction; but the effort to escape the penalty incurred by gross and willful violation of law, by showing that the proceedings of the court were irregular, or that its processes were unneces-

sarily specific, does not commend itself to the favorable consideration of the court.

It is further insisted, however, that the whole proceeding before the district judge was void for the reasons—First, that the rival candidates for the legislature should have been remitted to their right of contest; and, second, because the interposition of the court was unwarranted interference on the part of the judicial with the legislative branch of the government. This proposition has been urged with commendable zeal, and with great ability. The learned counsel for the relators have exhibited great research in the production of authorities to sustain their views. They have insisted that, if the courts can interpose by mandamus or injunction to control elections, they may curtail, if not destroy, the powers vested in the other branches of the government; and numerous authorities have been cited to sustain this view. The case of relators does not raise this question. So far from being enjoined against the discharge of their duty, they were required by the mandamus to perform their duty. So far from the action of the judge being an infringement on the prerogatives of the legislature, he was himself acting under the mandate of an act of the legislature. I should not deem it necessary or proper, in view of the act of the legislature I have already quoted, to discuss the question as to the authority of the court to interpose its mandamus, but for the earnestness with which the counsel for the relators have insisted that the action of the judge was a usurpation, and, therefore, void. I shall briefly review some of the authorities cited as sustaining the position of relators' counsel.

In the case of *Western Railroad Co. v. De Graff*, 27 Minn. 1, it was sought to enjoin the governor of the state from the performance of certain duties imposed upon him by the legislature. It was held that this could not be done. It is true that the judge, in

rendering the opinion of the court, states very broadly that under the constitution of that state the courts are powerless to interfere with the operations of any officer of the executive department, whether the action sought to be controlled was ministerial merely, or one involving the exercise of "discretion and judgment alone." Whether the general principle stated be correct or otherwise, the facts in the case warranted the conclusion reached. No such authority was sought to be exercised in the case at bar. In the case of *Walton v. Develing*, 61 Ill. 201, the syllabus is as follows: "Where the law authorizes an election to be called in a township, to determine whether a majority are in favor of subscribing to the stock of a railroad company, when the election is called in pursuance of the requirements of the law, a court of equity has no power to restrain the officers from holding, or the people from voting at, such election. A writ of injunction issued in such case is void, and the officers and people are not bound to obey it, as the court has no jurisdiction." In the case of *Harris v. Schryock*, 82 Ill. 119, it was said: "But, according to repeated decisions of this court, the power to hold an election is political, and not judicial; hence a court of equity has no power to restrain officers from the exercise of such powers." In the same state, in the case of *Dickey v. Reed*, 78 Ill. 271, the court repeats the same doctrine, declaring that "elections belong to the political branch of the government, and are beyond the control of the judicial power. * * * And the political power of the state may organize municipal bodies, and put them into operation, by force of enactment, or by election of the people to be thus governed, and they can provide the modes of reviewing the returns of election to ascertain whether they are in accordance with the expressed will of the people, and, until the courts are empowered by the constitution or

legislative enactment, they must refrain from interference."

I have thus referred to what seemed to the counsel for relators as the most direct authorities in support of their position for the purpose of showing that they are not either directly or by implication assailed by the views that I have advanced. In the case at bar, the election had been held, the vote had been cast, and the alleged interference on the part of the judge was in the exercise of a duty imposed on him by the very authority that created the board of commissioners. In the language of the decision last quoted, he was empowered to act by "legislative enactment." It was not, therefore, a case of interference on the part of the judiciary with the right of election, but of open and avowed revolt on the part of the commissioners against the organized government of the territory. The true doctrine, under our form of government, is this: Every qualified voter has the right to cast his vote and have it counted. When the legislative power has appointed an election, and provided the proper officers for holding it and declaring the result, the courts have no power to interpose by way of preventing the exercise of such function. But no such officer has authority, under color of his office, to defeat the will of the people as expressed at the polls, and, if he undertakes to do so, it is the duty of the courts, on proper application, and within the rules prescribed by the legislature, to interfere by such remedial process as may be necessary to attain the proper remedy. In respect of their purely ministerial duties, election officers are not beyond the control of the courts. *Cooley Const. Lim.* 621; *High Extr. Rem.*, sec. 56.

A question was raised in the argument as to the right of the judge to enter the judgment complained of at chambers. The authority to do so is conferred in such specific terms by section 1829 of the Compiled

Laws that the mere reference to that section is regarded as sufficient answer to this objection. It was also insisted on the argument that under the provisions of section 665 of the Compiled Laws the judge had no authority to impose a fine in excess of \$50 without a trial by jury. The several acts and omissions on the part of the relators constituted, in my opinion, but one offense. I think the mode adopted in fixing the amount of the fine was irregular, but it is an irregularity that can not be taken advantage of in this proceeding. But I do not agree with the learned counsel for the relators that the section referred to was intended to operate as a limitation upon the right of a judge to impose a fine for a contempt of court committed in a refusal to obey one of its mandates. On the contrary, I am satisfied that this statute relates alone to the preservation of order and decorum in the presence of the court.

I must say that, in the view I take of this cause, the discussion has taken a much wider range than was pertinent to what I conceive to be the only issue involved. Section 13 of the act of February 28, 1889, unquestionably gives the district judge jurisdiction of the controversy out of which the proceedings for contempt arose. Section 2027 of the Compiled Laws of 1884 requires this court to forthwith remand the relators, if it should appear that they are detained in custody for any contempt, specially and plainly charged in the commitment, by some court, officer, or body having the authority to commit for the contempt so charged. All of this appears on the face of the petition, and I think, therefore, that the motion to dismiss the writ, and remand the relators, is well taken, and should be allowed.

O'BRIEN, C. J. (dissenting).—To my mind, it is clear that two errors, at least, fatal to the validity of

the commitment of the relators, appear upon the record of these proceedings. First, that the court had no jurisdiction, in the first instance, to issue the writ of injunction; second, that the judgment upon the hearing, touching the violation of the injunctional order, imposing a fine of \$200 on each of the relators, and ordering their imprisonment until such fine be paid, is illegal and of no binding validity. For the purpose of a proper understanding of the case, the bill of complaint, the writ of injunction, judgment on attachment, and commitment are set out in extenso:

“In the district court of Santa Fe county. Bill for injunction. Territory of New Mexico, county of Santa Fe—ss.: In the district court for the said county of Santa Fe, sitting for the trial of causes arising under the laws of said territory.

“To the Honorable Edward P. Seeds, associate justice of the supreme court of said territory, and judge of the said district court:

“Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, residents of said county, bring this, their bill of complaint against John H. Sloan, George L. Wyllys, and Teodoro Martinez, also residents of said county, and show unto your honor: Complainants were candidates at the election held in said county on the fourth day of November, 1890, said Read and Mayo for the offices of members of the house of representatives of the legislative assembly of New Mexico, and said Catron for the office of member of the council of said legislative assembly, and, as such candidates, were voted for by voters of said county, and, as shown by the election returns, received majorities of the votes cast for said offices, respectively. Defendants are the county commissioners of said county, and, as such, are required by law, within six days after an election, to publicly examine and count the votes polled for each candidate, and to forward to the persons who

have received the greatest number of votes polled at any election held for members of the house of representatives, the corresponding certificate of election. That defendants have assembled in the courthouse in the county of Santa Fe for the purpose aforesaid, but have failed, neglected, and refused to count a portion of the votes polled at said election for these complainants, such portion being the votes cast for complainants in the precincts of said county numbered 1, 2, 8, 11, and 16; the returns of election from said precincts being before said defendants, and in regular and perfect condition. The failure and refusal of defendants to count said votes as shown by said returns will materially affect the result of said count so as to make it appear that persons other than complainants have been elected to said offices, although such is not really the fact; and defendants give out and threaten that they will make and deliver, or cause to be made and delivered, to such other persons, certificates showing their election to the offices aforesaid, and complainants believe that they will certainly do so, unless restrained by an order of the court. If such certificates are so made and issued to such other persons, great and irreparable damage may and probably will result to complainants, and each of them, and to the public generally; and the existence of such certificates may and probably will be the cause of numerous suits, and vexatious and expensive litigation, as has heretofore been the case in this territory under similar circumstances. As soon as the said count by the said defendants is completed, complainants will institute, or cause to be instituted, in accordance with the statute, proceedings in mandamus to compel defendants to canvass all of the returns of said election in said county; but before such proceedings can be made effective, and before a complete canvass can be made, defendants will issue, or cause to be issued, such im-

proper and fraudulent certificates of election as hereinbefore described. Complainants therefore pray that defendants be restrained and enjoined by an injunction of this court from making and delivering, or ordering or causing to be made or delivered, any certificate of election to either of the offices hereinbefore mentioned to any person or persons other than these complainants, and from making, or causing to be made, any record of the result of their canvass of said election returns until the further order of the court in the premises. May it please your honor to grant unto complainants the writ of subpoena, under the seal of this honorable court, directed to defendants, John H. Sloan, George L. Wyllys, and Teodoro Martinez, commanding them, and each of them, to appear before this court on a day and under a penalty to be therein fixed, then and there to answer unto the premises as fully as if the same were here repeated, and they particularly interrogated thereunto, but not under oath, an answer under oath being hereby expressly waived, and to abide the order or decree of the court in the premises.

“BENJAMIN M. READ.”

“Territory of New Mexico, county of Santa Fe.

“On this 12th day of November, 1890, personally appeared before me Benjamin M. Read, and made oath that he had read the foregoing bill by him subscribed, and knew the contents thereof, and that the same is true, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true. Witness my hand, and the seal of the district court of the first judicial district of the territory of New Mexico, the day and year last above written.

“A. E. WALKER, [SEAL]

“Clerk of the District Court.”

"Territory of New Mexico to John H. Sloan, George L. Wyllys, and Teodoro Martinez, greeting:

"Whereas, Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron have filed in the district court for Santa Fe county their bill of complaint against you, praying to be relieved touching the matters therein set forth, now, therefore, you, the said John H. Sloan, George L. Wyllys, and Teodoro Martinez, both individually and as members of the board of county commissioners of Santa Fe county, your agents, servants, employees, and advisers, are hereby restrained and enjoined from making and delivering, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of New Mexico, and of member of the council of said legislative assembly, to any person or persons, other than said Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, and from making, or causing to be made, any record of the result of your canvass of the election returns of the election held in said county of Santa Fe on the 4th day of November, 1890, until the further order of the said district court in the premises. Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the territory of New Mexico, and judge of the First judicial district court thereof, and the seal of said district court, this 12th day of November, 1890.

"A. E. WALKER, Clerk. [SEAL]"

"The territory of New Mexico to the sheriff of Santa Fe county, greeting:

"You are hereby commanded to arrest and take the body of John H. Sloan, and him safely keep, so that you have his body before the district court within and for the county of Santa Fe, sitting at chambers at the federal building in said county, on Monday, January 19, 1891, at nine o'clock, A. M., then and there to

answer for a charge of contempt. Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the territory of New Mexico, and judge of the First judicial district court thereof, and the seal of said district court, this 17th day of January, 1891.

"A. E. WALKER, Clerk. [SEAL]

The attachment of Teodoro Martinez is in the same words.

"The territory of New Mexico to Francisco Chavez, sheriff of the county of Santa Fe, greeting:

"Whereas, on the 12th day of November, 1890, an injunction was issued out of the district court of Santa Fe county enjoining and restraining John H. Sloan, George L. Wyllys, and Teodoro Martinez, both individually and as members of the board of county commissioners of said Santa Fe county, their agents, servants, employees, and advisers, from making or delivering, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of New Mexico, and of member of the council of said legislative assembly, to any person or persons other than Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, and from making, or causing to be made, any record of the result of their canvass of the election returns of the election held in said county of Santa Fe on the 4th day of November, 1890, until the further order of said district court in the premises. And whereas, on the 17th day of January, 1891, there was filed in the office of the clerk of said court the petition of the said Thomas B. Catron, setting forth that the said John H. Sloan and Teodoro Martinez, two of the defendants in said injunction proceeding, wholly disregarding the injunction so issued as aforesaid, did, on the 5th day of December, 1890, sitting as a board of canvassers of said county, canvass the returns of the general election held in said county on

the 4th day of November, 1890, and did on said 5th day of December, 1890, make, order, and deliver a certificate of election to the offices of members of the house of representatives of the legislative assembly to persons other than the said Benjamin M. Read, the said Joseph B. Mayo, and the said Thomas B. Catron, to wit, to one Charles F. Easley, to one Thomas P. Gable, and to one Romulo Martinez; the said Easley and the said Gable receiving certificates of election to the office of member of the house of representatives of the legislative assembly, and the said Romulo Martinez receiving a certificate to the office of member of the council of said legislative assembly; and praying that that court cause attachments to issue for the arrest of the said John H. Sloan and Teodoro Martinez for contempt. Whereupon such proceedings were had by the said court that on January 20, 1891, after attachments had been issued by said court against the said John H. Sloan and Teodoro Martinez, and after the bodies of the said Sloan and the said Martinez had been presented before the said court by you, the said sheriff, they being accompanied by counsel, and after a full hearing of counsel, the said John H. Sloan and Teodoro Martinez were adjudged guilty of contempt of this court in issuing and delivering a certificate of election to Charles F. Easley, in issuing and delivering a certificate of election to Romulo Martinez, and in making, or causing to be made, a record of the result of their canvass of the returns of the election held in said county of Santa Fe on the 4th day of November, 1890, and the punishment of each of said defendants was assessed to a fine of fifty dollars for each of the said several contempts, making a total of two hundred dollars against each of said defendants: Now, therefore, you, the said sheriff of Santa Fe county, are hereby commanded that of the lands and tenements, goods and chattels, of John H. Sloan, in your

county, you cause to be made the sum of two hundred dollars fine, and seventeen dollars and forty-five cents costs of suit, which, by the said judgment of the said district court on the 20th day of January, 1891, the territory recovered against the said John H. Sloan, and in default of the prompt payment of the said sum by the said John H. Sloan that you confine the body of the said John H. Sloan in the common jail of said county until said fine and costs are fully paid and satisfied, and due return made of this writ, with your proceedings thereon. Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the territory of New Mexico, and judge of the first judicial district court thereof, and the seal of said district court, this 20th day of January, 1891.

“A. E. WALKER, Clerk. [SEAL]”

It appears, then, that the writ was granted at the suit of T. B. Catron, who claimed to be elected member of the council, and Benjamin M. Read and J. B. Mayo, who claimed to be elected members of the house, in the present general assembly of this territory. They filed their bill before the completion of the official canvass of the votes by the board of county commissioners. Irregularities in returns from some of the precincts may have occurred, or the petitioners may have had reasons to suspect that the board of county commissioners would not make a full and impartial canvass of the votes returned. It may not be amiss to remark, in passing, that the three petitioners, Catron, Read, and Mayo, are, or claim to be, republicans, and that two of the three county commissioners are democrats. Partisan zeal may be at the bottom of the trouble. The important question to determine is, had petitioners a right to invoke the aid of a court of chancery to protect them by writ of injunction against the consequences of the possible, probable, or actual dishonesty of the county commissioners in making the official

canvass and issuing certificates of election? Plainly, no such right existed if the law intrusted to another tribunal power to apply the proper remedy and offered complete relief. Each house of the legislative assembly is the exclusive judge of the election and qualification of its members. No decree, interlocutory or final, of a court of chancery can affect or impair this power. The judgment or discretion of the legislature can not be controlled by such decree. Its action in the premises is independent, final, and unassailable. Before it all contests must be decided. We cite the appropriate sections of the Compiled Laws of 1884, as amended by Laws of 1889: "Sec. 1172 (as amended Session Laws, 1889, p. 318). If any candidate from any county or district in this territory contest the seat of any representative or member of the council, said person shall give written notice to the contestee within thirty days after the returns of the election are received by the secretary of the territory. Said notice of contest shall specify as nearly as may be the grounds upon which the contestant relies, and it shall also give the name of some justice of the peace or notary public before whom it is proposed to take proofs in support of the grounds alleged and set forth in such notice, and also the time and place of the taking thereof. Sec. 1173 (as amended Session Laws, 1889, p. 318). The contestees, at the time and place of taking such proofs, may select another justice of the peace or notary public to assist in taking of such proof as he desires; but a failure to do so shall not affect the right of contestant to proceed with his testimony under his notice. Sec. 1174. To reject any illegal votes that may be polled at any election in this territory, it shall not be necessary to contest or question them at the polls, but they may be rejected by the authorities authorized by law to determine the validity of said elections, on being proved, after due notice is given by the party contesting said

election to the opposing party. Said notice in any county election shall not be less than eight days, and shall in all cases be within thirty days thereafter. Sec. 1175. If the person whose seat is contested in either branch of the assembly intends to question the illegality of any votes given to the contesting candidates, he shall, within eight days after said contest, give equal notice to the onposite party in the manner prescribed in section 1172. Secs. 1176, 1177, 1178 (as amended Session Laws, 1889, p. 318). If the justice or justices of the peace, notary or notaries, appointed, or any of them, should fail, on account of sickness or other just cause, to be present at the taking of the testimony in such contests, another justice of the peace or justices, notary or notaries, may be chosen by the contestant parties, and the taking of such testimony shall commence within thirty days after the election, and the said justice or justices of the peace, or notary or notaries, shall issue subpoena (s) to all persons required by either party to appear and testify. Said justice or justices of the peace, notary or notaries, shall hear all the testimony, and certify the same to the president of the council, if the seat contested shall be that of a councilman, and to the speaker of the house of representatives, if it be that of a representative, on or before the first day of the session of the legislative assembly. Sec. 1179. No testimony shall be received by the justices, or either branch of the territorial legislature, from either the contesting or opposing parties, unless it refers to the points specified in the notice. The justices of the peace shall forward to the general assembly a certificate, together with the depositions taken by them, and no others, and the legislative assembly shall not receive any other testimony than that already specified."

The foregoing sections are unmistakably intended to furnish legislative candidates with adequate means to protect their rights and prevent injustice.

The forum therein recognized as adequate to grant complete relief, to detect mistakes and frauds in all stages of the election, from the opening of the polls to the issuing of the certificates, is either house of the general assembly. Why should a court of chancery assume jurisdiction in a proceeding wherein it would be powerless to enforce obedience to its decrees? It has no right to decide who is or who is not elected. The legislature alone has the exclusive power to determine that fact. But, it may be said, it may regulate the intermediate procedure. Why should it? Does not the written law amply provide for the redress of any wrong that may be committed in the course of such procedure? Who has constituted the chancellor's court a more reliable or less partisan tribunal than the council or the house of the general assembly for the rectification and settlement of the frauds or errors incident to popular elections? Once concede to the courts the right to interfere in such proceedings, and who can define the limits of such assumption? In the present case, each of the three petitioners received a certificate of election in accordance with the will of the chancellor, as expressed in the preliminary writ of injunction; but the two members of the house, upon contest had before that body, within a few days after their admission, were expelled, and their seats awarded to other parties. If wrong, can any order or decree entered or to be entered by the chancellor afford a remedy? Will courts take jurisdiction of causes wherein they are powerless to enforce their judgments? It may be said, in answer to this, that the present suit by injunction was simultaneous with and ancillary to mandamus proceedings instituted to compel the county commissioners to receive and canvass the election returns. How does that relieve the matter of its objectionable features, as long as each house of the general assembly has legal power to ignore the adjudications in either

case, and to approve or disapprove the alleged misconduct of the commissioners, by awarding seats to the candidates who, in its opinion, were elected and qualified, regardless of the orders and judgments of the court? Are the judicial and legislative departments of the territorial government to be thus encouraged to wage war upon each other's dignity, and bring odium and discredit upon both? Case law, so called, may be found in support of almost any proposition that the vagaries of counsel may advance or invent. But I doubt if the history of legal proceedings furnishes any precedent at all similar to the one under consideration. Some of the facts found in, and many of the legal principles applied to, an authoritative case in Illinois (Dickey et al. v. Reed, 78 Ill. 261), ought, in my opinion, to have a controlling influence in the decision in this case. All of the wrongful acts charged to the county commissioners in the bill are properly reviewable in a statutory contest before the council or the house of the general assembly. The law presumes that the decision rendered therein will be just, and hence has made it conclusive. "When the law furnishes," says the supreme court of Illinois in the case cited, "a mode for contesting any election, that mode must be followed." Again: "Courts of equity have no inherent power to try contested elections, and they have never exercised such power except in cases where it has been conferred by express enactment or necessary implication." And: "Injunctions, when issued by a court not having power, need not be obeyed." It is useless to urge that this suit was not instituted to contest an election. The bare perusal of the bill shows that such was its main object, and that the complainants were unwilling to take the requisite statutory steps, and submit their claims to the arbitrament of the only tribunal authorized by law to hear, try, and determine the same. It follows, in my judgment, that

the proceedings were *coram non judice* and void, and that the relators may not be punished for contempt in disobeying the injunctional order.

The commitment of the relators appears to me to be illegal also, because the court had no power to inflict as punishment for disobedience of the writ a fine in excess of that prescribed by the statute. Section 665 of the Compiled Laws of New Mexico of 1884 reads as follows: "No judge of the district court shall fine any person for contempt for a want of respect for the court in a sum exceeding fifty dollars, without a trial by jury." There is no pretense of a jury trial in this case, and still each of the relators was fined \$200 for the violation of this injunction, and ordered to prison until the payment thereof. The trial judge, recognizing the binding force of the statute, discovered that there were four distinct mandates in the writ, and multiplying the \$50 by four—the number of the acts covered by the restraining aegis of the injunction—he pronounced the multiplied sentence as the judgment of the law. Plainly this was error. The writ must be regarded as a single, indivisible, judicial act, and punishment for its violation ought not to exceed the maximum amount fixed by the statute. Had the judgment ended in the fine alone, perhaps it would be void for the excess only; but, when it consigned the alleged transgressors to the county jail until such fine was fully paid, it deprived the citizen of his liberty, because, perhaps, unable to pay an illegal exaction, and thereby became oppressive and void in toto. The relators might have been able and willing to pay the statutory amount, but unable, though ever so willing, to pay the excessive ransom.

The foregoing remarks embody my views as to the merits of this painful controversy. It follows, in my judgment, as the injunction proceedings were void *ab initio*, and as the judgment pronounced upon relators

in the attachment proceedings to punish them for contempt in violating the commands of the writ was equally void, because rendered in violation of the plain provision of the statute, that the relators are unlawfully restrained of their liberty, and should be unconditionally discharged from imprisonment.

[No. 462. January Term, 1891.]

PEDRO DELGADO, PETITIONER, v. FRANCISCO CHAVEZ, SHERIFF, RESPONDENT.

HABEAS CORPUS—MANDAMUS—CONTEMPT—JURISDICTION.—On an application for writ of habeas corpus, by the probate clerk of Santa Fe county and ex officio clerk of the board of county commissioners, to be discharged from commitment for contempt of court, in refusing to obey a peremptory writ of mandamus commanding him, in his official capacity, to recognize one of two rival sets of claimants for the office of county commissioner, and to refuse to recognize the other, on the ground that the writ of mandamus could not be invoked as a means of contesting the right of the rival claimants to the office—Held: The court had jurisdiction of the subject-matter and of the parties to the mandamus proceeding, and the writ was not void because it involved incidentally, if not directly, the title set up by the rival claimants. The objection interposed was no justification for refusal to obey the mandate of the court, and the application must be denied.

PETITION for writ of habeas corpus. Petition denied, O'BRIEN, C. J., dissenting.

The facts are stated in the opinion of the court.

FREEMAN, J.—This is an application for writ of habeas corpus to be discharged from the custody of the sheriff of Santa Fe county, New Mexico. The petition is very voluminous, and sets out in full a certain proceeding in mandamus instituted against the relator by Abraham Staab, Juan Garcia, and William H. Nesbitt, on the thirteenth day of January, 1891, seeking to compel the relator, as probate clerk of the county of

Santa Fe and ex officio clerk of the board of county commissioners, to perform certain official duties. This is one of the unfortunate proceedings that grew out of the closely contested election held in the county of Santa Fe on the fourth of November, 1890. Rival sets of county commissioners claim to have been elected. Candidates of both parties held what they claimed to be valid and proper certificates of election. An alternative writ of mandamus was issued against the relator, commanding him to recognize the petitioners to that writ as the legally elected board. In his answer to the writ the relator admitted that he had declined to recognize the petitioners, and sets out at length his views as to who were entitled to exercise the functions of county commissioners. The cause having been heard by the district judge, a peremptory writ was issued. The relator refusing to obey the writ, an attachment was issued, and on the hearing he was committed to jail until he should purge himself of the contempt.

In the case of John H. Sloan and Teodoro Martinez (heard and determined at the present term of this court), we have discussed at some length the power of the district judge to issue the writs of mandamus and injunction, and to punish for contempts. Much of what has been said in that case finds appropriate application to this. The case at bar, however, differs from the case of Sloan and Martinez in this: that the latter case involved the right of the district judge to direct the canvassers to canvass the votes cast at the election, while in the present case the question involved is as to the jurisdiction of the court to issue the writ to the probate clerk, directing him which of the two rival boards he should recognize as the lawful body. We have no doubt but that the judge had jurisdiction of the subject-matter and of the parties; and this conclusion settles, as we think, the whole question raised by this proceeding.

HABEAS corpus:
mandamus; con-
tempt: jurisdic-
tion.

The writ of mandamus long since ceased to be a prerogative writ. It is no longer an extraordinary proceeding, except in the sense that an injunction, attachment, or other like process is extraordinary. "It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ." *Com. of Ky. v. Dennison*, 24 How. 97. It would be a vain and useless exhibition of research to undertake to point out the almost innumerable instances in which this writ has been successfully invoked. The following instances will serve to illustrate the general purposes for which the writ will lie: To compel the allowance of an appeal, *Ex parte Cutting*, 4 Otto, 14; to allow a pension, *Decatur v. Paulding*, 14 Pet. 497; to compel district judge to issue execution, *Postmaster Gen. v. Trigg*, 11 Pet. 173; to compel railroad company to deliver rolling stock, *Ex parte Milwaukee R. Co.*, 5 Wall. 825; to compel counties to pay judgments, *Supervisors v. U. S.*, 4 Wall. 435; to enforce mandates, *U. S. v. Fossatt*, 21 How. 445; to reinstate cause, *Ex parte Bradstreet*, 6 Pet. 774; to compel levy of tax to pay judgment, *U. S. v. Council of Keokuk*, 6 Wall. 514; to compel court to enter judgment, *Insurance Co. v. Adams*, 9 Pet. 573; to compel court to sign bill of exceptions, *Ex parte Crane*, 5 Pet. 190; to compel postmaster general to perform ministerial duty, *Kendall v. U. S.*, 12 Pet. 524; to compel register of land office to enter application for land, *McCluney v. Silliman*, 2 Wheat. 369; to compel court of claims to entertain motion for new trial, *Ex parte Russell*, 13 Wall. 664; to restore an attorney disbarred by court having no jurisdiction, *Ex parte Bradley*, 7 Wall. 364; to compel town officers to audit charges against the town, *Lower v. U. S.*, 91 U. S. 536. In Ohio, Alabama, California, Maryland, North Carolina, Indiana, and Montana the writ will lie to compel the governor of the state to perform

a merely ministerial duty. High Extr. Rem., sec. 119. It has been also successfully invoked to compel an old officer to deliver records which concern justice to the new one; to compel the clerk of a company to deliver up books, etc.; or the steward of a borough to attend with the books at the next corporate assembly, etc., 5 Com. Dig. 34. In the case of *Railway Frog Co. v. Haven et al.*, 101 Mass. 403, it was said: "It is well settled that it can be granted, for instance, to compel a town clerk or clerk of the public corporation, whose office has expired, to deliver over to his successor his common seal, books," etc. In the case of *Conlin v. Aldrich*, 98 Mass. 557, the following facts appeared. The town meeting had been held at which Conlin was chosen as a member of the school committee for the term of three years; but the polls were open and the election was made after sunset. This election was treated as invalid, and another meeting called, at which Burditt was elected to the same office. The town clerk gave to Conlin a certificate of his election, but Aldrich and Start, who were the two other members of the committee, refused to recognize him as their associate, or to permit him to act as such; they recognizing Burditt as properly elected. The application of Conlin for a writ of mandamus was allowed; HOAR, J., declaring: "It is not very strongly contested by the respondents that the appropriate remedy for the petitioner, if he is entitled to any relief, is the writ of mandamus. That point is substantially settled by the case of *In re Strong*, 20 Pick. 484."

This case, like the one at bar, presents the condition of rival claimants for the same position. So, also, of the case just cited from 101 Mass., where it was said: "The respondents insist, however, that inasmuch as they are actually in possession of the offices in question under a claim of right, and exercising the functions annexed to them, the only mode of contro-

verting their title is by writ of quo warranto. The fact that the offices are de facto filled and occupied by rival claimants is by no means decisive, and not very material upon this point. It has been so decided in the case of conflicting claims to the office of county commissioner (*In re Strong*, 20 Pick. 484), also in the case of members of a school committee (*Conlin v. Aldrich*, 98 Mass. 557).” In the case of *Jennings v. Fisher et al.*, 61 Mass. 239, it was said: “This writ, no doubt, is more freely and frequently granted at the present time than it was formerly. It lies to a former town clerk or clerk of a company to deliver to his successor the common seal, books, papers, and records of the corporation, which belong to his custody. Indeed, it lies to any person who happens to have the books of a corporation in his possession, and refuses to deliver them up. In the case of *Kimball v. Lamprey*, 19 N. H. 220, GILCHRIST, C. J., said: “There are numerous authorities tending to show in what case a writ of mandamus is the appropriate remedy. In the case of *Com. v. Athearn*, 3 Mass. 285, it is estimated by PARSONS, C. J., that the proper mode is for the successor of the town clerk to take the oath of office, and to demand of the former clerk the records, and, if they are refused, then to move for a mandamus to command him to deliver over the records. It was alleged in that case that the defendant was in possession of the office, but was not so legally. In the *First Parish in Sudbury v. Stearns*, 21 Pick. 148, trover was brought against the defendant for the book of record of the parish. His defense was that he was the clerk, and, as such, had a right to the possession of the records. MORTON, J., says: ‘A mandamus would doubtless be a more appropriate and effectual remedy to compel the delivery of the records to the legal officer;’ and he cites the case of *Com. v. Athearn*. The rights of persons acting *colore officii* can be tried only in an information in the nature

of a quo warranto or on a writ of mandamus." To the same effect is the doctrine laid down by the supreme court of Vermont in the case of *Allen Stone et al. v. Small et al.*, the syllabus of which is as follows: "(1) Mandamus is the proper remedy to compel the old trustees of an incorporated village, attempting to hold over, to deliver to the new board the books, papers, and articles of personal property in their possession belonging to the village, and to prevent their interfering with the new trustees in the exercise of their office. (2) When an act incorporating a village imperatively declares that its trustees shall be annually elected on a certain day, the majority of a meeting called for the purpose of electing such officers has no power to adjourn the meeting without day, in fraud of the law and the minority; and if a legal minority, immediately following such adjournment, reorganizes the meeting and elects trustees, they are entitled to hold their office.

These authorities, we think, demonstrate the fact that although the proceeding by mandamus against the relator involved incidentally, if not directly, the title set up by the rival set of commissioners, the mandamus was not for that reason void. It was resisted, however, by the relator on the ground that it could not be used as a means of contesting the right of the rival claimants to the office. There might be much force in the reasons assigned in support of this doctrine if alleged against the propriety of the proceedings by mandamus; but the mistake of the relator lay in supposing that this objection could be successfully interposed as a justification for a refusal to obey the mandate of the court. There is a marked difference between the utter want of jurisdiction and an erroneous exercise thereof. The former may be pleaded as a justification for a refusal to obey the order of the court, but the latter can not. *Cohen v. Jones*, 5 Cal. 495;

Church Hab. Corp., sec. 317. In the case of *People ex rel. Garbrett v. R. & S. L. Railroad Co.*, 76 N. Y. 298, it was said: "The question of the propriety of that order is not now before us; the present appeal being only from the order adjudging the appellants guilty of contempt in not having obeyed the writ." "It is insisted, however, that the mandamus was void for the reason that it was vague and uncertain in its command; that it required the relator, not only to recognize certain parties as entitled to exercise the functions of the office, but that he was also commanded, among other impracticable things, to enter all of the past, as well as the future, orders of said board; that the writ, in effect, commanded him to do what was not then, and might never become, this duty." This writ did not, as we understand it, seek to impose on the relator any impracticable or difficult duty. It simply required him to perform his usual and ordinary duties as ex officio clerk to the board. Whatever this board had already done that had not been recorded was to be recorded, and he was to attend from time to time, in the future, to perform his usual functions in the usual way. It is not pretended that it was not in his power to obey the leading and all-important command laid upon him. It is not possible that he could have misapprehended the principal purpose of the writ, which was to direct him to recognize in his official capacity one of the rival sets of claimants, and to refuse to recognize the other. He seems to have misapprehended entirely the functions of his office. He was not authorized by law to determine who were, and who were not, the legally elected commissioners. That question had already been determined, so far, at least, as to bring his ministerial duties within the jurisdiction of the court. It does not follow, because the court ordered him to do that which in part he could not do, that, therefore, the writ was void. In the case of *U. S. ex*

rel. v. Labette Co., 2 McCrary, 27, a writ of mandamus was issued to compel the supervisors to levy, collect, and pay over certain taxes. The respondents levied the tax, but returned that they had no power, process, or authority by which they could collect it. A writ of attachment having been issued, they were discharged for the reason that, having done all in their power to obey the writ, they were not guilty of contempt. This question was discussed at some length in *People ex rel. v. Nostrand*, 46 N. Y. 378. In that case it was said: "It was also urged upon the argument that the order should be reversed because the precise amount is not specified in the peremptory writ. This position is not tenable. All that is necessary is that the thing to be done should be described with reasonable certainty—with such certainty that the defendant will know what is required of him. This rule is peculiarly applicable to public officers who are commanded to perform a public duty, and especially where the facts constituting the act are within their personal knowledge." After citing many authorities in support of this view, the court proceeds to say: "These and other authorities establish that it is sufficient to inform public officers in a general way what their duty is, and to command its performance, unless they can justify or excuse the neglect. They can not shield themselves behind technical objections to the descriptive part of the act to be done."

Numerous other authorities might be cited in support of the general proposition that on an application for writ of habeas corpus to be discharged from commitment for contempt, it can not be shown that the proceedings out of which the action for contempt proceeded were irregular. *Cooley Const. Lim.* 348, and cases cited. And in support of the proposition that a proceeding by mandamus is not void by reason of mere irregularity, but that it may be good as to part, and bad as to part, we cite: *Ex parte Parks*, 93 U. S. 18;

Ex parte Rowland, 104 U. S. 604; Ex parte Clark, 100 U. S. 399; and Ex parte Diebold, 100 U. S. 37. Assuming, however, for the purpose of the argument, that the relator did not properly comprehend the terms of the mandate addressed to him; assuming that, in the presence of rival claimants for the office, he was at a loss to know how he should proceed; assuming that he honestly believed that the petitioners in the mandamus proceeding had not been elected, and were not, therefore, entitled to exercise the functions of the office—what, then, was his plain and unmistakable duty? Was it his province to make an issue with a court of competent jurisdiction, and, after having the questions thus presented decided against him, to defy the power of the court? Can he escape now the rightful consequences of his contumacy by pretending that he did not understand what was required of him? On this point the case already referred to in 46 N. Y. is instructive. It was there said (page 378): “If he desired in good faith to comply with the writ, but was unable to do so from the uncertainty of the mandate, the court would doubtless relieve him. But in this case there was no room for doubt. The act to be performed was specifically described, and there is no pretense that the appellant did not know what was required, or that he was unable to perform it.” In view of these considerations, and in view of the opinion of this court already expressed in the case referred to of Sloan and Martinez, we are of the opinion that the writ must be dismissed, and the relator remanded to the custody of the sheriff to be confined in the county jail until he purges himself of the contempt for which he was committed; and it is so ordered.

LEE and McFIE, JJ., concur.

O'BRIEN, C. J. (dissenting).—I regret my inability to agree with the disposition made of this case as

announced in the foregoing opinion. It would serve no useful purpose to repeat the facts in the brief statement of the reasons that compel me to dissent. In the alternative writ the relator is required to act as follows: "Now, therefore, you, the said Pedro Delgado, probate clerk of the county of Santa Fe, and ex officio clerk of the board of county commissioners of said county, are hereby commanded that, immediately after the receipt of this writ, you produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fe county, and to record therein the records of the meetings of said board and the proceedings thereof held on the second day of January, 1891, and record in said record of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so you act as the ex officio clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fe, and that you make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that you record the vote of each commissioner on any question submitted to the board, if required by any member; that you sign all orders issued by the said board for the payment of money, and record in a book printed for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that you do and perform all acts required of you by law as ex officio clerk of the board of county commissioners of Santa Fe county, in connection with said Abraham Staab, Juan Garcia,

and William H. Nesbitt, as the proper and only persons composing the board of county commissioners of Santa Fe county, and that you do recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fe county, and as composing the only lawful board of county commissioners of said county, and that you do furnish to said board all the books, records, files, and papers of your said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that you do not furnish them to any other person or persons except as the law may require you to do for the inspection and information of private individuals, or that you show cause, before the First judicial district court of the territory of New Mexico in and for the county of Santa Fe, at chambers, in the federal building in the city of Santa Fe, N. M., on Wednesday, January 14, 1891, at 9 o'clock A. M., why you have not done so," etc.

On the return day of the writ, the relator, Delgado, appeared and filed his answer thereto, as follows:

"Territory of New Mexico, county of Santa Fe. In the district court of Santa Fe county. The territory of New Mexico, on the relation of Abraham Staab and others v. Pedro Delgado. Mandamus. No. 2838.

"The above named defendant, Pedro Delgado, now and at all times hereafter reserving unto himself all manner of objections and exceptions to the many uncertainties, imperfections, and insufficiencies in the alternative writ of mandamus issued in the above named cause, for answer thereto, or so much thereof as he is informed and advised that is necessary for him to make answer unto, answers and says that he admits that at the general election held in the said county of Santa Fe on the 4th day of November, 1890, he, the said defendant,

was duly elected clerk of the probate court of the said county, and that on the first day of January, 1891, he having duly qualified as such clerk, and entered upon the discharge of the duties of such office, and that he has continuously since said last mentioned date been in the possession of such office, and has been ex officio clerk of the board of county commissioners of said county, and has had and held possession of the records and books, which by law he is made the custodian of. Said defendant admits that in the month of November, 1890, and for a long time prior thereto, and until the 1st day of January, 1891, George L. Wyllys, Teodoro Martinez, and John H. Sloan were the legally elected and lawfully acting members of the board of county commissioners of the county of Santa Fe, in said territory; but he denies that the said Wyllys and Martinez, or either of them, were ever removed from their said offices, or that the office held by either of said persons became vacant prior to the expiration of their terms, to wit, on the 1st day of January, 1891; and he denies that either of the said persons abandoned their said offices, or that they, or either of them, refused to perform the duties and functions thereof; and he denies that George W. North and Frederic Grace, or any other persons were ever legally appointed by the acting governor of the territory of New Mexico, or any other person, as members of the board of county commissioners of said county; and he denies that said George W. North and Frederic Grace, or either of them, were ever members of the board of county commissioners of said county, or that they, or either of them, ever had any power or authority to perform the duties or exercise the functions of said offices. And this defendant avers the fact to be that on the fourth day of November, 1890, and for many months prior thereto, and continuously until the first day of January, 1891, John H. Sloan, George L. Wyllys, and Teodoro Martinez were

the duly elected and qualified members of the board of county commissioners in and for the county of Santa Fe, in said territory, and that they, each and all of them, continued to hold such office, and were in the actual possession thereof, and performing all the duties and functions of such offices, during all of the year 1890, and up until the first day of January, 1891. This defendant denies that at the election held in the county of Santa Fe on the fourth day of November, 1890, Abraham Staab, Juan Garcia, and William H. Nesbitt, or either of them, were elected as members of the board of county commissioners of said Santa Fe county; and he denies that the said Staab, Garcia, and Nesbitt ever obtained, or that they now have or hold, any certificates showing that they, or either of them, was at said election elected as members of the board of commissioners of said county; and said defendant also denies that the said Abraham Staab, Juan Garcia, and William H. Nesbitt, or either of them, have ever qualified as members of said board of commissioners; and he denies that the said Staab, Garcia, and Nesbitt, or either of them, have, by virtue of any such election, had or held possession of the office of a member of the board of county commissioners of said county, or that they, or either of them, have held any session as members of said board of county commissioners by virtue of such election, nor have they, or either of them, by virtue of such election performed any of the duties pertaining to such office; but he alleges the fact to be that at the general election held in and for said county of Santa Fe, in said territory, on the fourth day of November, 1890, George L. Wyllys, Charles M. Creamer, and Eugenio Martinez were each duly elected as members of the board of commissioners in and for the county of Santa Fe, and territory of New Mexico, the said Wyllys, Creamer, and Martinez receiving at said election the greatest number of legal votes cast at said

election in said county for said offices of county commissioners for said county, and after said election returns thereof were made as required by law, and the board of county commissioners then in office for said county, met as a canvassing board of election for said county, and duly counted and canvassed all the votes cast in the several precincts in said county at said election, returns of which were before said board, and after counting and canvassing said votes and returns, the said board of commissioners, as such canvassing board, ascertained that the said George L. Wyllys, Charles M. Creamer, and Eugenio Martinez had been and were duly elected as members of the board of county commissioners for said county of Santa Fe at said election, all of which was duly entered of record; and thereupon said board of commissioners, as such canvassing board, issued under their hands and the seal of said board certificates to said Wyllys, Creamer, and Martinez, setting forth that they had been duly elected at said election as members of the board of county commissioners of said county of Santa Fe, which said certificates were duly attested by the probate clerk of said county; and afterward, to wit, on the first day of January, 1891, the said Charles M. Creamer and Eugenio Martinez, each having duly qualified as members of the board of county commissioners of said county of Santa Fe, they entered into possession of, and assumed the duties of, their said offices, and met together in the courthouse of said county, in the city of Santa Fe, as the board of county commissioners of said county, and proceeded to transact business as such, and the said Creamer and Martinez have continuously from said first day of January, 1891, had and held possession of said offices, and at the present time, and at the date of issuing of the alternative writ of mandamus in this action, the said Creamer and Martinez were and are holding and are in the possession of said

offices, and are now, and have at all times since the first day of January, 1891, been, the legal, acting members of the board for the said county of Santa Fe, and have during all of said time been transacting the public business of said county as such commissioners. Said defendant states that he is not informed as to what acts or proceedings were done or had by one Frederic Grace and one George W. North, pretending to act as members of the board of county commissioners in reference to the counting and canvassing the returns of election of the general election held in said county on the fourth day of November, 1890, but he states whatever they may have done in that respect was wholly illegal, and of no effect, for said Grace and North were not, at the time of their said pretended action and the counting and canvassing of said votes, members of the board of commissioners of said county of Santa Fe. Said defendant admits that he has refused to recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as members of the board of commissioners of said Santa Fe county, for the reason that they have never been elected and qualified as such officers, and because they have not been in the possession of said offices, and have never acted as members of such board and denies that said Staab, Garcia, and Nesbitt have ever met as such board, or held any session as such, as set forth in the alternative writ of mandamus herein, but he says that since the first day of January, 1891, Charles M. Creamer and Eugenio Martinez have been the legal and acting board of commissioners of said county. As to all the allegations and statements set forth in said alternative writ, not herein expressly admitted or denied, the said defendant states that he has not sufficient information upon which to form a belief, and he therefore denies all of said allegations.

“PEDRO DELGADO.”

"Pedro Delgado, being duly sworn, on his oath states that the facts set forth in the foregoing answer are true to his best knowledge, information, and belief.

"PEDRO DELGADO.

"Subscribed and sworn to before me this 15th day of January, 1891.

"N. B. LAUGHLIN, Notary Public."

Thereupon, on the motion of Staab, Garcia, and Nesbitt, the three alleged county commissioners before mentioned, without further hearing or proceedings, the alternative writ was made peremptory; and thereafter, on the affidavit of said William H. Nesbitt, filed January 19, 1891, the following order was entered:

"It being shown to the court by the petition and affidavit of William H. Nesbitt, filed this 19th day of January, 1891, in the cause lately pending in said district court, in which Abraham Staab, Juan Garcia, and William H. Nesbitt were relators, and Pedro Delgado was respondent, that the said defendant, Pedro Delgado, has refused, and still does refuse, to obey the peremptory writ of mandamus issued out of this court in said mandamus proceeding on the 15th day of January, 1891, it is ordered by the court that an attachment for contempt, returnable at five o'clock this afternoon, issue for the arrest of said defendant, Pedro Delgado.

"EDWARD P. SEEDS,

"Associate Justice, &c.

"Santa Fe, New Mexico, January 19, 1891."

Thereafter, on January 20, 1891, the following final judgment was entered:

"It is considered and adjudged by the court that said defendant, Pedro Delgado, is guilty of contempt of this court in refusing to obey and in disobeying the command of said writ of mandamus; and it is further adjudged by the court that said Pedro Delgado stand committed to the common jail of Santa Fe county until

he purge himself of such contempt, and that a warrant of commitment issue against him.

“EDWARD P. SEEDS,

“Associate Justice, &c.

“Santa Fe, New Mexico, January 20, 1891.”

In pursuance of this judgment, a commitment issued, and Delgado was imprisoned in the county jail. To be relieved of such imprisonment, he instituted his present habeas corpus proceeding before this court.

In this connection, I cite chapter 60, Laws, 1887, section 1: “That in all cases of proceedings by mandamus in any district court of this territory, the final judgment of the court thereon shall be reviewable by appeal or writ of error, in the same manner as now provided by law in other civil cases, except that such appeal or writ of error shall not operate as a supersedeas of any judgment of the district court.” The judgment of the district court was the imprisonment of Delgado until he obeyed the commands of the peremptory writ; and, according to the provisions of the statute above cited, no appeal or writ of error could release him from such imprisonment, no matter how erroneous or illegal the judgment authorizing it might be, until the final determination of the appeal or writ of error in this court.

The gist of all the orders contained in the alternative and peremptory writs of mandamus is that Delgado recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as the only persons composing the lawful board of county commissioners of Santa Fe county. All other acts commanded are the mere incidents of this recognition. The answer of Delgado to the alternative writ showed in apt terms why he did not so recognize them. Without admitting or denying the validity of this writ, I am clearly of the opinion that Delgado's answer thereto raised a material issue of fact. The motion of the county commissioners to make the

writ peremptory, notwithstanding the answer, was in the nature of a demurrer to its sufficiency; and the judgment of the court, in granting that motion, was, in effect, an order sustaining such demurrer. This, in my judgment, was substantial error, from the consequences of which Delgado can not be relieved by appeal or writ of error. He is in jail, and has no adequate remedy against such illegal imprisonment, unless it may be afforded him in this proceeding. I do not overlook the provisions of section 2013, Compiled Laws, 1884. It must not be forgotten, however, that that section contains the following qualification: "But no order of commitment for any alleged contempt, or upon proceedings as for contempt to enforce the rights or remedies of any party, shall be deemed a judgment, conviction, or decree, within the meaning of this section; nor shall any attachment or other process issued upon any such order be deemed an execution, within the meaning of this section." I hold, then, if substantial error, prejudicial to the rights and liberty of the petitioner herein, appears upon the record of these proceedings, that the same are reviewable, although contained in the final judgment, declaring him in contempt. Believing, then, that such judgment was entered in violation of law, and that the relator is deprived of his liberty in consequence thereof, I hold that he is entitled to his discharge from this illegal imprisonment. The record in this case contains, in my opinion, other errors especially fatal to the legality of the petitioner's confinement, but it would answer no useful purpose to consider them in connection with this opinion. A labored citation of authorities from states, each having peculiar statutes regulating the procedure of the courts, and the rights of the parties seeking relief from restraint deemed illegal, might show a great deal of legal research, but would throw little or no light upon the case under consideration. I can not close this hastily written opinion more

appropriately than by citing the language of the court of appeals in the state of New York in the historic case of *People v. Liscomb*, 60 N. Y. 559: "Jurisdiction of the person of the prisoner and of the subject-matter are not alone conclusive, but the jurisdiction of the court to render a particular judgment is a proper subject of inquiry; and while the court can not, upon a return of the writ, go behind the judgment, and inquire into alleged error and irregularities preceding it, the question is presented, and must be determined, whether, upon the whole record, the judgment was warranted by law, and was within the jurisdiction of the court."

[No. 415. January 28, 1891.]

ALBUQUERQUE NATIONAL BANK, APPELLANT,
v. JOSE L. PEREA ET AL., APPELLEES.

TAXATION OF NATIONAL BANKS—LIABILITY FOR TAXES ON CAPITAL STOCK—
ERRONEOUS ASSESSMENT, INJUNCTION TO RESTRAIN COLLECTION OF
TAXES ON—EQUITY.—The shares of capital stock in a national bank are not assessable in gross to the bank, but to the respective owners thereof, according to interest. But, if the bank lists such shares for taxation as its property, it will not be heard to complain of such erroneous assessment in a proceeding in equity to restrain the collection of taxes on such assessment.

2. In such case, where it appears that the property assessed is valued too high in comparison with similar property owned by others, such inequality alone does not afford ground for equitable relief. Before equity will interfere, relief must be sought in all the tribunals established by law to grant relief in such cases.

APPEAL, from a judgment in favor of defendants, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

WILLIAM B. CHILDERS for appellants.

The states could not tax national banks as such without authority of act of congress. *People v. Weaver*,

100 U. S. 543; *McCullough v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.* Id. 738; *Weston v. City Council of Charleston*, 2 Pet. 449.

The authority to tax the shares of national banks is conferred by the national banking act. U. S. Rev. Stats., sec. 5219. As to the meaning of shares used in this statute see *Van v. The Assessor*, 3 Wall. 583; see, also, Id. 581, as to investment of capital in U. S. bonds.

An assessment on the shares in gross against the bank is illegal and unauthorized. 1 *Desty on Taxation*, 377, et seq.; *People v. Commissioners*, 4 Wall. 244; *Rosenblatt v. Johnson*, 104 U. S. 462; *Covington National Bank v. City of Covington*, 21 Fed. Rep. 485; *National Bank v. Commonwealth*, 9 Wall. 353; *First National Bank of Richmond v. City of Richmond*, 39 Fed. Rep. 369; *Collins v. Chicago*, 4 Biss. 472; *National Commercial Bank v. Mobile*, 62 Ala. 284; 19 Fed. Rep. and note, 381; *Smith v. Webb*, 11 Minn. 378; *Miller v. National Bank*, 10 N. E. Rep. 360.

In those states where it has been attempted to enforce the tax the courts have held that the provisions of the state laws were such as to make the tax leviable on the shares as distinguished from the capital. *National Bank v. Commonwealth*, 9 Wall. 358; *Covington v. City of Covington*, 21 Fed. Rep. 485; *Tappan v. Merchants National Bank*, 19 Wall. 494; *Waite v. Dowley*, 94 U. S. 527; *Adams v. Nashville*, 95 U. S. 19; *Desty on Taxation*, 389.

The New Mexico statute forbids the assessment to be made on the shares. They show conclusively that the property—the capital of the corporation, is required to be assessed, if it is doing business in the territory. Sections 2815, 2818, 2819, 2820, 2822, 2830, 2930, *Comp. Laws, N. M.*

The act of congress does not permit the capital of the bank to be taxed. If the assessment in this case

complies with the territorial law it is void because in conflict with the act of congress. If it complies with the act of congress it is void because in conflict with the law of the territory. If it attempts to comply with the territorial law, without strict compliance therewith, it is void. Cooley on Taxation, 259, 260; 2 Desty on Taxation, 642; National Bank v. Elmira, 53 N. Y. 49.

Banks may be compelled to pay taxes assessed upon their shares when the state statute authorizes it. In the absence of such legislation such tax upon the shares is collected of the shareholders in the same manner other taxes are collected from individuals. 1 Desty on Taxation, 389; Sumpter Co. v. Bank, 62 Ala. 464.

The taxation must "not be at a greater rate than upon other moneyed capital in the hands of individual citizens of the state." If this assessment can be upheld under the statutes of New Mexico, then there is a discrimination, for individuals can deduct, under the statute of the territory, from any credits they may own, any indebtedness they may owe; and if the statute authorized such an assessment as is here attempted to be upheld, both the assessment and the law would be void. Evansville Bank v. Britton, 104 U. S. 322; Supervisors v. Stanley, Id. 305; Hills v. Exchange Bank, Id. 319; Whitbeck v. Mercantile Bank, 127 U. S. 193; People v. Weaver, 100 U. S. 539.

The assessment for 1888 included the bank's surplus. Nothing but the bank's real estate can be taxed to the bank. Rosenblatt v. Johnson, 104 U. S. 462.

The assessments are void because there was no apportionment on the bank's real estate for either year. 2 Desty on Taxation, 642, and cases cited; Santa Clara Co. v. S. P. R. R. Co., 118 U. S. 394; The Pacific R. R. Cases, 127 U. S. 1.

The statute of the territory requires the assessments, if on the shares, to be made in the name of the owner thereof, and the bank is not the "owner."

Such assessments must be authorized by state law. *Stetson v. Bangor*, 56 Maine, 288; *Smith v. Webb*, 11 Minn. 378.

Injunction is the proper remedy, and the bill states a proper case. *Hills v. National Bank*, 105 U. S. 105; *Evansville Bank v. Britton*, Id. 322; *Pelton v. Bank*, 101 U. S. 143; *R. R. Co. v. Ryan*, 113 U. S. 311; *Taylor v. Secor*, 92 U. S. 575; *Boyer v. Boyer*, 113 U. S. 689; *Stanley v. Albany*, 121 U. S. 535; *Commissioners v. A., T. & S. F. R. R.*, 10 Pac. Rep. 294; 2 *Desty on Taxation*, 669-678, and cases cited.

A bank can maintain a bill for an injunction to restrain the collection of an illegal tax, on account of its fiduciary character, and to prevent a multiplicity of suits. *Cummings v. Bank*, 101 U. S. 157; *Union Pacific R. R. Co. v. Cheyenne*, 113 U. S. 526; *Allen v. B. & O. R. R. Co.*, 114 U. S. 311.

It was not necessary to tender any part of the tax, the assessments being wholly void. *Santa Clara County v. R. R. Co.*, 118 U. S. 414; 2 *Desty on Taxation*, 657.

It was not necessary to appeal either to the assessor, board of county commissioners, or territorial board of equalization, as a prerequisite to relief in equity, they having no jurisdiction to levy at all and no authority to grant relief for any claim that might have been made for a deduction of indebtedness of stockholders. *Whitbeck v. Mercantile Bank*, 127 U. S. 199. See, also, *Stanley v. Supervisors*, 121 U. S. 550; *Weller v. St. Paul*, 5 Minn. 95; 21 *Arkansas*, 40.

Neither board had any power to wholly remit this assessment, and an appeal would have been unavailing. *Acts*, 1887, pp. 232, 233; sec. 2841, *Comp. Laws*; *Whitbeck v. Bank*, 127 U. S. 199.

It has been held that the word "state" in the act of congress includes "territory." *County of Silver Bow v. Davis*, 12 Pac. Rep. 688.

EDWARD L. BARTLETT, solicitor general, for appellees.

The general offer "to pay whatever may be found to be justly and legally due" is too vague and uncertain to give equity jurisdiction. *National Bank v. Kimball*, 103 U. S. 732; *Pelton v. Comm'rs National Bank*, 101 U. S. 143; *National Bank Cases*, 277, 278; *Cummings v. Bank*, 101 U. S. 163; *Stanley v. Board*, 121 U. S. 535, vol. 3; *Williams v. Board*, 122 U. S. 154; *National Bank Cases*, 281, 282; 1 *High on Injunctions*, sec. 498; *Note to Holland v. Mayor*, 69 Am. Dec. 203, and cases cited.

Complainant having failed to exercise its right of appeal from the action of the taxing officer to the board of county commissioners, and the territorial board of equalization, and given in its list with values attached for taxation, is estopped from questioning the regularity of the proceedings, or the taxable value or character of the property. *Laws*, 1887, 232; 2 *Pom. Eq. Juris.* 804; *McMohen v. Palmer*, 102 N. Y. 176; 3 *National Bank Cases*, 645; *Commissioner Silver Bow Co. v. Davis*, 6 *Montana*, 306; 3 *National Bank Cases*, 553; *Welty on Assessments*, secs. 195-210, sec. 4, note 5; *Inhabitants of Newburyport v. Co. Comm'rs*, 12 *Metc.* 213; *Id.* 223, 224; *First National Bank of St. Jo. v. Township of St. Jo.*, 9 *N. W. Rep. (Mich.)* 839; *State ex rel. v. Cooper*, 18 *N. W. Rep. (Wis.)* 438; *Felsenthal v. Johnson*, 104 *Ill.* 24; *Stanley v. Board*, 121 U. S. 535; 3 *National Bank Cases*, 276; *State v. Kenttschnitt*, 4 *Nev.* 209; *Buttenuth v. St. Louis Bridge Co.*, 123 *Ill.* 535; note to *Holland v. Mayor*, 69 *Am. Dec.* 204, and cases cited.

This was substantially a tax against the shareholders of the capital stock of the bank, and not against the capital stock of the bank. The bank only acted as agent in paying the tax and making the list

for the convenience of its shareholders and the public. Compiled Laws, 1884, secs. 2812, 2815, 2818; National Bank v. Commonwealth, 9 Wall. (U. S.) 353, 363; Miller v. Banks, 3 National Bank Cases, 717; Cummings v. Nat. Bank, 101 U. S. 156, 157; Cooley on Taxation, 274-395, and cases cited.

All presumptions are in favor of the validity of the law, particularly in regard to taxation. If part of a law is valid and part not, the valid part will be sustained by the courts. See note to Holland v. Mayor, 69 Am. Dec. 203, and cases cited.

The claim of exemption of \$300 from taxation, allowed by our statutes, and of all bona fide debts from credits, is a personal privilege, to be claimed only by the person himself before the proper tax tribunals, and one which the bank can not urge in its favor in an equity proceeding. Supervisors v. Stanley, 105 U. S. 305-322; Whitbeck v. National Bank, 127 U. S. 193-199; McAden v. Comm'rs, 97 N. C. 355, 3 National Bank Cases, 694; Bressler v. Wayne Co., 25 Neb. 468, 3 National Bank Cases, 564; Wassen v. First Nat. Bank, 107 Ind. 206, 3 National Bank Cases, 424-433; Stanley v. Board, 121 U. S. 535, 3 National Bank Cases, 268; Williams v. Weaver, 100 U. S. 547; First National Bank of St. Joseph v. Township, 9 N. W. Rep. (Mich.) 839; Welty on Assessments, 331.

National Bank shares are taxable in the territories as in the states. Comm'rs Silver Bow Co. v. Davis, 6 Montana, 306, 3 Nat. Bank Cases, 546; Cooley on Taxation, pp. 60, 61.

Under the pleadings in this case there is no inequality, lack of uniformity, or unjust discrimination against complainant, as charged, therefore no injury, no cause of action. Adams v. Nashville, 95 U. S. 19; Mercantile Bank v. N. Y., 121 U. S. 161-163; Lionberger v. Rouse, 9 Wall. 475; Bank v. Richmond,

39 Fed. Rep. 313; First National Bank v. Douglass, 1 Central Law Jour. 585.

If the tax levy is void, the bank has its remedy at law, and suit in equity will not lie. *Howland v. Mayor*, 69 Am. Dec., and cases cited.

O'BRIEN, J.—The complainant, on the third day of November, A. D. 1888, filed his bill of complaint in the district court for the county of Bernalillo against the defendants, Jose L. Perea, sheriff and ex officio collector of taxes, and Clifford L. Jackson, district attorney, of said county, for the purpose of obtaining an injunction restraining them from enforcing the collection of certain delinquent taxes assessed to the complainant. The bill, in substance, alleges that complainant made due returns to the county assessor of all its property for taxation. That at such time it protested against the assessment of its property, to wit: its capital stock and surplus, at any higher rate of valuation than other property taxable in said county, and that it ought not to be assessed at its par value; that is, "that its stock could not be assessed at par, and its surplus at its full money value, because other property in said county and territory is not assessed at its full value." That the assessor, disregarding such protest, assessed said property at its full value; that, upon complainant's appeal from the action of the assessor to the board of county commissioners sitting as a board of equalization, the assessment on its surplus was reduced to eighty-five per cent of its par value, whilst that of its capital stock was left unchanged; that its property valuation then stood as follows: Capital stock, \$100,000; surplus, \$10,000; total, \$110,000. The bill proceeds: "That all other property in said county and territory is not assessed at nearly so high a valuation upon its actual value as said board of equalization assessed your orator's said prop-

erty. That the average valuation of other property in the hands of individuals and other corporations in said county and territory does not exceed seventy per cent, and that it is so assessed systematically and continuously by the said assessor of said county and said board of equalization, and no valuation estimated upon its actual value of at least thirty per cent." That bank stocks in a neighboring county are assessed at less than eighty-five per cent of their value; that such discrimination is inequitable, unjust, and unlawful; that the amount of taxes upon said equalized assessment is the sum of \$2,189; that such amount, if lawfully and equitably assessed, would be reduced to \$1,532.30, which sum complainant brings into court, and tenders to defendant Perea; that said defendant refused to accept the same, and threatened to levy upon complainant's property to enforce the payment of the full amount so assessed. The bill continues: "Your orator further alleges that, should it pay the sum so unlawfully demanded of it by virtue of said assessment, and bring suit at law for the recovery thereof as is illegal and unjust, such suit would be unavailing, for the reason that any judgment recovered by your orator against said county of Bernalillo or territory of New Mexico would be paid in warrants of the said county and territory, which said warrants are not worth their face value, but are sold upon the market at a discount, there being no funds in the treasury with which to pay the same, if presented." The bill then informs the court of the legal effect of a forced sale of complainant's property. Then follows the prayer for a writ of injunction, etc. On November 29, 1889, complainant, by leave of the court, filed a supplemental bill, containing additional allegations, in substance as follows: That the shares of its capital stock can only be assessed to the individual owners thereof, and are not subject to assessment and taxation as the property of the bank; that a large portion

of such capital stock is owned by nonresident heads of families; that a large portion of complainant's capital stock is invested in government bonds, etc. Defendants demurred to some and answered other portions of the bill. The parties then filed a stipulation, in accordance with which complainant struck from its original and supplemental bills all allegations that the assessor and board of equalization unjustly discriminated in the valuation and assessment of complainant's property. Defendants then withdrew their answer, and stood upon their general demurrer to the bills as amended. The demurrer was sustained, and judgment entered dismissing the bill. The cause is in this court by appeal from such judgment of dismissal.

The appellant assigns as error: First. The order of the court below sustaining defendant's demurrer to the supplemental bill. Second. The demurrer did not answer the allegations that the assessment was upon complainant's capital stock and surplus, and was in solido, and against complainant, and not against its shareholders, and was, therefore, void. Third. The demurrer did not apply to the original bill, and the court, therefore, erred in dismissing the same. Fourth. Neither of the assessments for either of the years 1888 or 1889, alleged to have been made on the capital stock, surplus, and personal property of the complainant, against the complainant, and not against the shareholders, is valid, but they are void on their face, and both the assessor and board of county commissioners sitting as a board of equalization were wholly without jurisdiction to make the same; and the pretended tax rolls referred to in complainant's bills confer no authority on the defendant collector to enforce the payment of said tax assessment. We shall consider the four assignments together. The statutes of the territory (sections 2822-2825, Comp. Laws, 1884), impose the duty upon the assessor to make a proper

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return of all taxable property in his county, and require all taxable inhabitants to furnish such assessor with a list of all their taxable property, duly verified. The complainant made and delivered to the assessor such list, embracing the property referred to in the bill, including the shares of its capital stock. A certain percentage was extended on all this property at its par value for the purpose of taxation. No complaint was ever made to the assessor or to the county board of equalization that complainant did not own the property so voluntarily listed. Its sole objection was that its property had been assessed higher than a similar property owned by other parties, and that such discrimination was illegal. The public officers had a right to assume that the bank had no other grievance to redress. It never hinted that it had been mistaken in listing the shares of its capital stock as its individual property instead of the property of its shareholders. In such case, when complainant had had ample opportunity to have its error corrected by the proper statutory tribunal, it would be unfair to the public interests to allow it for the first time in its supplemental bill in this suit to set up as the basis of a bill in equity to restrain the collection of a tax its own mistake that misled the revenue officers of the territory, and its subsequent negligence in failing to ask the proper tribunal to relieve it from the consequences thereof. Admitting that the shares of its capital stock should not be assessed in solido to it, but to the respective owners, according to interest, we hold that it can not be heard in this suit to complain of such erroneous assessment. Complainant, and not the public, should be made to suffer the consequences of such mistake.

ERRONEOUS
assessment:
equity.

In considering the other points presented by the record, to wit, that the property taxed was rated at a higher valuation than similar property owned by individuals and other

private corporations, it does not appear that such property was valued higher than its market value, but that it was valued too high in comparison with similar property owned by others. We hold that such inequality alone does not afford ground for equitable relief in the present case. It was complainant's duty to apply to all the tribunals established by the laws of the territory to grant the desired relief. See chapter 73, Laws, 1887. Failing in this, equity will not restrain the collection of the tax on account of such errors. *Meyer v. Rosenblatt*, 78 Mo. 495. If the county board refused complainant the reduction demanded, an appeal lay to the territorial board, and, having failed to take such appeal in the manner prescribed by the statute, complainant is not entitled to the relief sought. The foregoing views are, in our opinion, a sufficient answer to all the substantial grounds of error presented by the record. It follows that the judgment appealed from is AFFIRMED.

McFIE, SEEDS, and FREEMAN, JJ., concur.

[No. 381. July 24, 1891.]

TOWN OF ALBUQUERQUE, PLAINTIFF IN ERROR,
v. CHARLES ZEIGER, DEFENDANT IN ERROR.

TAXATION—INJUNCTION—COMPILED LAWS, 1884, TITLE 28, CHAPTER 2—CONSTRUCTION OF STATUTES—JURISDICTION.—In a proceeding by bill in equity to enjoin the town of Albuquerque and the sheriff from the enforcement of a special assessment against the lot of complainant within the corporate limits of the town, to raise money to pay the expenses incurred by the municipal authorities in curbing and improving the street in front of the lot, made under sections 1622, 1635, title 28, chapter 2, Compiled Laws—Held, on demurrer: It does not appear from the record, and the bill impliedly denies, that two thirds of the owners to be charged with the expense petitioned the board of trustees for the making of the improvement. For this reason, among others, section 1635 of the statute can have no application in this case. By section 1622, the city councils and boards of trustees in

towns are authorized to establish and improve the streets, etc.; also "to provide for and regulate crosswalks, and curbs, and gutters," but the conferring of such powers does not grant to a city or town, either expressly or by necessary implication, the right to levy a special assessment, to pay the expenses of curbing a street, upon the lot abutting on the street where such curbing is done, nor upon the owner of such lot.

2. The complainant clearly had the right to resort to a court of equity. Such courts, when invoked, will entertain jurisdiction in all cases where taxes have been levied without authority of law.

ERROR, from a decree in favor of complainant, to the Second Judicial District Court, Bernalillo county. Decree affirmed.

The facts are stated in the opinion of the court.

W. H. WHITEMAN for plaintiff in error.

NEILL B. FIELD for defendant in error.

O'BRIEN, C. J.—Charles Zeiger, defendant in error, owns in the town of Albuquerque, a municipal corporation organized under the general laws of this territory, a part of lot 12, in block 18, of the New Mexico Town Company's addition to Albuquerque. This lot abuts upon Railroad avenue. In 1886 the town trustees passed a resolution providing for the improvement of this avenue by the construction of a stone curbing from the west side of First street to the east side of Fourth street, assessing \$101.50 as a special tax upon the part of lot 12 owned by the defendant in error, as its proportionate share of the cost of such construction. This assessment, together with one for the general tax of that year, was placed in the hands of the sheriff, ex officio collector of taxes, to enforce payment thereof by sale of the lot in question or otherwise. Thereupon Zeiger tendered to the sheriff the full amount of the tax assessed and due for general municipal purposes, but refused to pay any part of the amount specially

assessed for the improvement of the street. The sheriff, as directed by the town, refused to accept the sum tendered, unless the special assessment was also paid, and proceeded to enforce the collection of the amount claimed by advertising for sale Zeiger's part of the lot before mentioned. To prevent this, Zeiger, on or about February 24, 1888, filed his bill in equity against the plaintiff in error and the sheriff, setting out in detail the several acts of the town in making the special assessment to pay the cost of constructing the stone curbing in front of his lot, alleging that the same was wholly unauthorized; that he had tendered to the sheriff \$191.94 claimed for general purposes, before the same became delinquent, and that the latter refused to accept the same in default of the sum assessed for the improvements made upon Railroad avenue. He then alleges that he brings into court said sum so offered to the sheriff and tenders the same to plaintiff in error in discharge of all lawful taxes assessed against him. He further alleges that the defendant sheriff, as ex officio collector, is advertising his property for sale to pay the said taxes, and the said unlawful special assessment, and that the sheriff has threatened to sell and will sell said property unless restrained from so doing by order of the court; that, in case of such sale, a cloud will be cast upon his title to the property sold; "that he will be compelled to redeem the same at great expense, and will be unable to recover back the amount so wrongfully assessed against him, and will be otherwise irreparably damaged;" etc. Then follows prayer for general relief and the issuance of a writ of injunction. The defendants, town and sheriff, filed a general demurrer to the bill, which was overruled, the injunction prayed for issued, and defendants allowed to plead over. Refusing to do this, final decree was entered in favor of plaintiff, making the injunction perpetual. An appeal from such judgment was afterward taken,

but the same was not prosecuted. The case is here on writ of error sued out by the defendant town.

We will remark, with regard to the points raised by the defendant as to the right of plaintiff in error to concurrent remedies by appeal and writ of error, as well as to failure of the defendant sheriff to join in suing out such writ, that, they having been already decided against defendant in error, the only questions presented for determination now are: (1) The legality of the special assessment; (2) the right of the defendant in error to the relief sought in his bill. The provisions of law upon which plaintiff in error relies as

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junction: Comp.
Laws, title 28,
chap. 2.

authorizing its action in the premises are found in the following sections and subsections of title 28, chapter 2, of the Compiled Laws of 1884: "Section 1635. No street or highway shall be opened, straightened, or widened, nor shall any other improvements be made, which will require proceedings to condemn private property, without the concurrence in the ordinance or resolution directing the same of two thirds of the whole number of the members elected to the council or board of delegates, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners, unless two thirds of the owners to be charged therefor shall petition in writing for the same."

"Section 1622. The city council and board of trustees in towns have the following powers: * * * Subsection 6. To contract an indebtedness on behalf of the city, and upon the credit thereof, by borrowing money or issuing the bonds of the city or town, for the following purposes, to wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of purchase or construction of waterworks for fire and domestic purposes; for the purpose of the construction or pur-

chase of a canal or canals, or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas works for manufacturing illuminating gas, or purchasing illuminating gas; and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time exceed five per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and waterworks; and no loan for any purpose shall be made, except it be by ordinance, which shall be irrevocable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be applied, and providing for the levying of a tax not exceeding in total amount for the entire indebtedness of the city and town (excepting such debt as may be incurred in supplying the city or town with waterworks) eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay the annual interest and extinguish the principal of such debt within the time limited for the debt to run, which shall not be less than ten years, nor more than thirty years, and providing that said tax, when collected, shall only be applied to the purpose in said ordinance specified, until the indebtedness shall be paid and discharged; but no such debt shall be created except for supplying the city or town with water unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors of the city or town as shall in the next preceding year have paid a property tax therein, and a majority of those voting upon the question by ballot deposited in a separate ballot box shall vote in favor of creating such debt. Seventh. (1) To lay out, establish, open, alter, widen,

extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds, and vacate the same, and to direct and regulate the planting of ornamental and shade trees in such streets, avenues, and public grounds. Id. 71. All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called 'street mains' are laid; but such vacant lots as do not take water from such 'street mains' shall not be assessed more than one half as much as may be assessed against the same amount of frontage of lots occupied by a one story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works; and if the right to build, maintain, and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works; provided, however, that said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year." Id. 75. Each municipal corporation may, by general ordinance,

prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed and determined for the purposes authorized by this act; such charge, when assessed, shall be payable by the owner or owners, at the time of the assessment, personally, and also be a lien upon the respective lots or parcels of land from the time of the assessment. Such charges may be collected, and such lien enforced, by a proceeding in law or in equity in the district court of the proper county, either in the name of such corporation or of any person to whom it shall have directed payment to be made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done and materials furnished on the particular street, alley, or highway, or for water rent or gas used. Proceedings may be instituted against all owners, or any of them, to enforce the lien against all the lots or land, on each lot or parcel, or any number of them, embraced in any one assessment; but the judgment or decree shall be separately for the amount properly chargeable to each. Any proceedings may be served in the discretion of the court for the purpose of trial, review, or appeal. The first section cited has no application, for the reason, among others, that two thirds of the owners to be charged with the expense did not petition the board of trustees for the making of such improvement; at least the record does not disclose such fact, and the bill impliedly denies it. It hardly admits of argument, that the other provisions of the statute neither expressly nor by necessary implication grant the power to levy a special tax upon the property beneficially affected, to pay the expenses incurred in curbing or otherwise improving the streets of an incorporated town. This will appear evident when the question is examined in the light of the powers conferred by subsections 71 and 75, construed in connection with stat-

utory provisions regulating the taxing power. Subsection 71 authorizes and regulates the levy and collection of special assessments for the payment of water and gas rents; the reference therein to a power "to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water and gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works," can not be construed as in any manner favoring a special assessment for the curbing and improvement of streets. But the seventy-fifth subsection appears to be the one upon which the town mainly relies for its authority to act in the premises. That only grants the power to fix by ordinance the manner "in which the charge on the respective owners of lots or lands, and on the lots and lands shall be assessed and determined for the purposes authorized by this act;" and the only question left for determination is, does the act authorize special assessments against the owners of the lots or against the lots themselves to pay the amount incurred by towns in curbing and improving of streets? No such authority, given in express words, can be found in the act. It is true that city councils and boards of trustees in towns, by the provisions of section 1622, are authorized "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds;" also "to provide for and regulate crosswalks, and curbs and gutters," but it can not be seriously claimed that the conferring of such powers, either expressly or by necessary implication, grants the right to a city or town to levy a special assessment to pay the expenses of curbing a street, upon the lot abutting on the street where such curbing is done, nor upon the owner of such lot. From a careful reading of all the statutory provisions upon the subject we are of the opinion that

no such power has been conferred. We are otherwise supported in this conviction by the fact that the legislature has in nowise restricted the several cities and towns in the exercise of the extraordinary powers claimed, and it appears unreasonable that the legislature would intrust to these various municipal bodies unlimited power to confiscate the property of the citizen to pay the expense of improvements made upon adjoining streets, without as much as intimating, in the laws purporting to confer such power, one word of information or instruction as to the manner of its legitimate exercise. Such extraordinary powers should be clearly granted. *Wright v. Chicago*, 20 Ill. 252; *Shackelton v. Guttenburg*, 39 N. J. Law, 660.

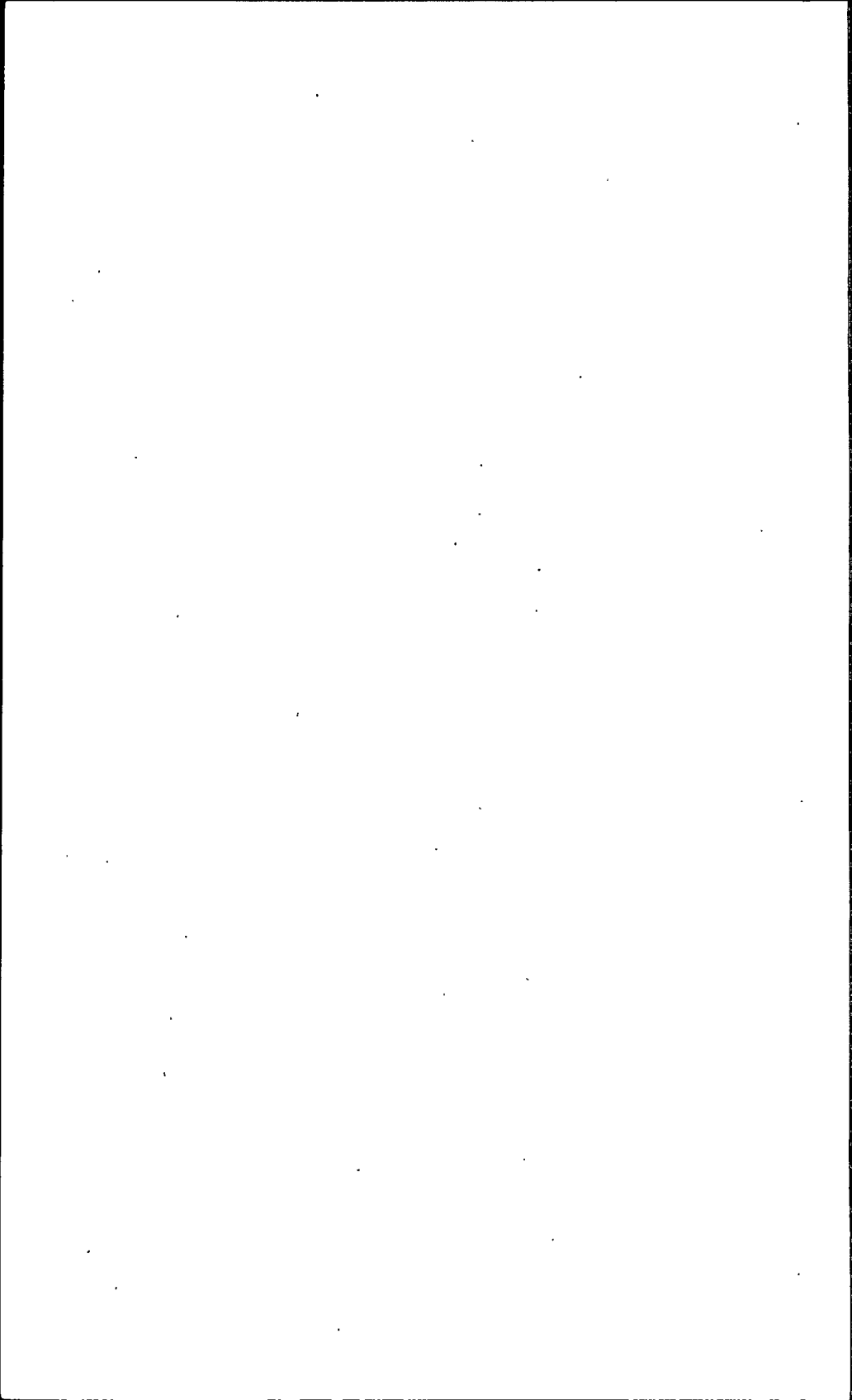
The only question remaining is, had Zeiger a right to resort to a court of equity to restrain the sale of his lot and the forced collection of the assessment? We are clearly of the opinion that he had.

The suit was not instituted to correct errors or irregularities in the special assessment proceedings, nor to restrain the collection of the tax on account of illegality in the manner of enforcing its payment, but defendant in error in his bill distinctly alleges that the town had no rightful authority to make such assessment, and that its attempted forcible collection was wholly unwarranted; that, notwithstanding this total want of power, the town was proceeding to sell the lot, and thus cast a cloud upon his title, etc. The bill states enough to bring the case within the scope of well recognized principles of equity jurisdiction. It is well settled that, where public functionaries, individuals, or corporations have power to act, and are proceeding in the execution of that trust in an irregular or unlawful manner, courts of equity will not ordinarily interfere; but if they depart from the "power which the law has vested in them," or "if they assume to themselves a power over

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property which the law does not give them," they are not considered as acting within the scope of their authority, and such unauthorized acts may be enjoined. Courts of equity will also restrain the collection of a tax levied without authority of law. *Frewin v. Lewis*, 4 Mylne & C. 254; *Union Trust Co. v. Weber*, 96 Ill. 346; *McClure v. Owens*, 21 Iowa, 133. "When invoked, equity will entertain jurisdiction in all cases where the taxes have been levied without authority." *Kimball v. Merchants S. L. & Trust Co.*, 89 Ill. 613; *Town of Lebanon et al. v. Ohio & Mississippi Railway Co.*, 77 Ill. 539. "If the illegal taxes are assessed, and are threatened to be collected, the appropriate remedy is to restrain the collection by injunction." *Toledo & Wabash Railroad Co. v. Lafayette*, 22 Ind. 262; *Foote v. Milwaukee*, 18 Wis. 270. The equitable doctrine here announced has peculiar application to such states and territories as make tax deeds prima facie evidence of the regularity of all prior proceedings, including the levy of the taxes according to law. Such is the law of this territory. Section 2893, Comp. Laws, 1884. See 1 High Inj., sections 525, 526; *Fowler v. City of St. Joseph*, 37 Mo. 228; *Jenkins v. Rock Co.*, 15 Wis. 11. It follows that the demurrer to the bill was properly overruled, and that the judgment below must be affirmed.

LEE, McFIE, and SEEDS, JJ., concur.



INDEX.

ACCIDENT INEVITABLE. See PRACTICE, 5.

ACCORD AND SATISFACTION. See PRACTICE, 4.

ACTION. See ASSUMPSIT; ATTACHMENT; DAMAGES; EJECTMENT; FORCIBLE ENTRY AND DETAINER; HABEAS CORPUS; MANDAMUS; TRESPASS ON CASE.

ADMINISTRATORS.

1. ADMINISTRATORS—REVOCATION OF LETTERS OF ADMINISTRATION—JURISDICTION OF PROBATE COURT.—By section 562, Compiled Laws, New Mexico, the probate judges have exclusive original jurisdiction in the granting and revoking of letters testamentary and of administration.
2. ID.—ADMINISTRATOR DE BONIS NON, REVOCATION OF LETTERS OF ADMINISTRATION OF—APPEAL FROM PROBATE COURT TO DISTRICT COURT—CERTIORARI TO REVIEW ACTION OF PROBATE COURT REQUIRING BOND—MOTION TO QUASH PROPERLY SUSTAINED, WHEN.—On an appeal to the district court, by an administrator de bonis non, from an order of the probate court revoking his letters of administration, where the administrator was required to give bond, a motion to quash a writ of certiorari to review the action of the probate court in requiring the bond, was properly sustained. A distinction is made between those cases where a party sues as administrator, or executor, and where he sues personally in his own right. In the former case no bond is required, but in the latter it must be given. By an appeal, the record and proceedings of the probate court are brought into the district court as fully as by certiorari; and there is no reason why this writ should be allowed. The writ of certiorari, at common law, is not a writ of right, but issues in the discretion of the court, for good cause shown; and, if improvidently issued, may be quashed.
3. ID.—CERTIORARI, JUDGMENT OF PROBATE COURT NOT REVIEWABLE UPON, WHEN.—In such case the probate court is the judge of the weight of the evidence, and its decision on any issue of fact is not reviewable upon certiorari, on appeal, where there is any competent evidence to support it.—In re Henriques, 169.

AFFIDAVIT. See ATTACHMENT, 1; CRIMINAL LAW, 8.

AGENT. See ASSUMPSIT, 3.

ALIMONY PENDENTE LITE. See DIVORCE, 1.

AMENDMENT OF PLEADING. See PRACTICE, 1; OF EXECUTION, SHERIFF, 2.

ANCIENT DOCUMENTS. See EJECTMENT, 1.

ANNUAL LABOR. See MINES AND MINING, 6.

ANSWER, SERVICE BY POSTING. See ELECTIONS, 4.

APPEAL. See ADMINISTRATORS, 2; CONTRACTS, 5, 6, 8; COSTS ON APPEAL, 1; DAMAGES, 2; FORCIBLE ENTRY AND DETAINER, 2; PRACTICE ON APPEAL, 2.

ARREST OF JUDGMENT. See CRIMINAL LAW, 11.

ASSESSMENT FOR TAXES. See COUNTIES, 2; TAXATION, 3.

ASSIGNEE. See VENDOR'S LIEN, 4.

ASSUMPSIT.

1. ASSUMPSIT FOR BREACH OF CONTRACT—TESTIMONY AS TO TESTIMONY OF WITNESS ON FORMER TRIAL—EVIDENCE.—The testimony of a witness to prove the testimony of a witness on a former trial, between the same parties and about the same subject-matter, is inadmissible, except in the case of the death or insanity of the witness, or when it appears at the time of the trial he is unable to be examined by reason of some physical disability, and that his deposition could not, by the exercise of due diligence, have been taken, or where the witness is beyond the seas, or is absent from the territory, and his whereabouts can not, by due diligence, be ascertained, or where the witness absents himself from the jurisdiction of the court, by procurement of the opposite party, after having been duly summoned to appear at the trial.
2. ID.—TESTIMONY OF STENOGRAPHER FROM HIS NOTES—EVIDENCE.—In such case the testimony of a stenographer, made from his notes, taken at a former trial, to refresh his memory, can be regarded only as hearsay, the statute (Compiled Laws, 1884, section 548) having failed to declare their legal value.
3. ID.—INADMISSIBILITY OF DECLARATION OF AGENT WITHOUT PROOF OF FACT OF AGENCY—EVIDENCE.—The declarations of an alleged agent are only admissible when there is proof of the fact of the agency.—*Kirchner v. Laughlin*, 365.

See, also, ATTACHMENT, 1; CONTRACT, 1, 9.

ATTACHMENT.

1. ATTACHMENT, AFFIDAVIT FOR, UNDER SUBDIVISION 4, SEC. 1923, COMP. LAWS, N. M.—CONSTRUCTION OF STATUTES—ASSUMPSIT.—On an affidavit for attachment, in assumpsit, under subdivision 4, section 1923, Compiled Laws, providing that an attachment may issue "when the debtor is about fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder, delay, or defraud his creditors," it is no sufficient ground that the debtor is about to make an assignment of property, the effect of which will be to delay creditors. Mere delay which is a necessary incident to the conversion of property into cash to pay debts is not per se fraudulent; the language of the statute "about fraudulently to convey" clearly implies that there may be a conveyance or assignment which will merely delay creditors, as an incident to the transaction, without being fraudulent. But the delay must be so unreasonable as unduly to embarrass or hinder the creditor; and what constitutes such unreasonable delay must depend upon the particular circumstances of each transaction. Where there has been no such delay, the law will not impute fraud, especially not if it appear that the debtor acted in good faith with the honest intent to apply his property to the just payment of his debts.—*Meyer v. Black*, 4 N. M. 352.

ATTACHMENT. Continued.

2. ID.—ERROR—EVIDENCE, WEIGHT OF—VERDICT—FINDING.—On error in such case, from the finding of the court, sitting as a jury, the appellate court is not required to examine into the finding to determine whether it should not have been for the opposite party on the weight of the evidence. It is a well settled rule that the supreme court will not disturb the verdict of a jury, where there is any substantial evidence to sustain it; and this rule applies as well to the findings of a court as to the verdict of a jury.—*Torlina v. Torlicht et al.*, 148.

ATTORNEY'S FEES. See DAMAGES, 1; DIVORCE, 1; PROMISSORY NOTE, 3.

ATTORNEYS, LIABILITY OF. See MALICIOUS ATTACHMENT, 1.

BALLOT BOXES. See ELECTIONS, 3.

BILL OF EXCEPTIONS. See CONTRACT, 5; COUNTIES, 2.

BILL IN EQUITY. See MECHANICS' LIEN, 1; MEXICAN GRANT, 1; PRACTICE, 1; PROMISSORY NOTE, TO RESTORE TO ORIGINAL FORM, 1; PUBLIC LANDS, 1; TAXATION, 1, 2, 3, 5; VENDOR'S LIEN, 1; WILLS, 4.

BONA FIDE PURCHASER. See PROMISSORY NOTE, 1.

BONDS. See DAMAGES, 1; ATTACHMENT, 1; SHERIFF, 3.

BURDEN OF PROOF. See SHERIFF, 2.

CERTIORARI. See ADMINISTRATORS, 2, 3.

CONSTITUTIONAL LAW. See WILLS, 4.

CONSTRUCTION OF STATUTES. See ATTACHMENT, 1; CRIMINAL LAW, 1, 2, 3, 8; LIEN OF LANDLORD, 1; MECHANICS' LIEN, 4, 5; MEXICAN GRANT, 1; TAXATION, 5.

CONTEMPT. See HABEAS CORPUS, 3, 4.

CONTRACT.

1. CONTRACT—ASSUMPSIT FOR MONEY LENT—EVIDENCE, WEIGHT AND SUFFICIENCY OF.—In an action of assumpsit on a contract for money lent and advanced, tried by the court, sitting as a jury, the court is the sole judge of the weight of the evidence and the credibility of the witnesses; and when there is a direct conflict of evidence its finding will not be disturbed.
2. ID.—NEW TRIAL—SURPRISE—ERRORS IN RULINGS NOT PREJUDICIAL—EVIDENCE.—A new trial will not be granted on the ground of surprise, unless the occurrence claimed as a surprise be made known at the time and a continuance demanded on that ground. Nor will a new trial be granted for errors of the court in its rulings upon the admission or rejection of evidence, where such rulings are not prejudicial to the applicant, and the finding and judgment of the court is right upon the whole case.
3. ID.—VERBAL CONTRACT—INTEREST—LEGAL RATE.—Under section 1734, Compiled Laws, 1884, the rate of interest, in the absence of a written contract fixing a different rate, is 6 per cent per annum on money due by contract; and it is error, in such case, to allow a greater rate, for which a reversal will be granted, unless the appellee or defendant in error shall remit the excess, within such time as the court may order.—*Romero v. Desmarais*, 142.

CONTRACT. Continued.

4. ID.—SUIT TO ENFORCE MECHANICS' LIEN—PROPOSAL—DEMURRER—PLEADING.—In a suit on a contract to enforce a mechanics' lien a paper filed in the cause, purporting to be a contract of extension of the original contract, signed by the defendant and marked "accepted," but not signed by plaintiff, is not a contract, but a mere proposal, and will not, on demurrer, support an averment of a contract, unless an acceptance is pleaded.—*Wiley v. San Pedro & C. D. A. Co.*, 111.
5. ID.—APPEAL—INSTRUCTIONS GIVEN ACCORDING TO STATEMENT OF TRIAL COURT IN BILL OF EXCEPTIONS, NOT APPEARING OF RECORD—PRESUMPTION.—Where, on appeal, it is stated by the court below in the bill of exceptions filed that a certain instruction was given which does not appear of record, it will be presumed that the court properly declared the law on the subject. For a like reason a charge set out as having been given by the court of its own motion, will not be inquired into where the judge certifying the bill and record states that the general charge of the court embraced matters not appearing in the record.
6. ID.—MATTERS DEHORS THE RECORD—CONFLICT OF MEMORY BETWEEN TRIAL COURT AND COUNSEL AS TO "SUBSTANCE OF WHAT OCCURRED" AT TRIAL—APPEAL.—But the appellate court will not, on appeal, receive extrinsic evidence of matters that occurred at the trial dehors the record, to aid in the construction of the bill. For that purpose the bill itself must be followed in connection with the record. Nor will the court undertake to settle a conflict of memory between the court below and counsel, leaving the whole record in doubt as to which was correct in presenting the "substance of what occurred" at the trial, but will disregard every matter of fact contained in the bill not arising out of the record proper.
7. ID.—CLAIM AGAINST ESTATE OF DECEASED PERSON IN PROBATE COURT—INFORMALITY OF ITS PROCEEDINGS, AND POWER TO ENTERTAIN, WHETHER LEGAL OR EQUITABLE—PROPER PROCEEDING ON TRIAL DE NOVO IN DISTRICT COURT, ON APPEAL.—A claim against the estate of a deceased person based on a contract for the price or value of sheep and wool is not of an equitable nature, though the dealings between the parties were loose and irregular; and an action de novo on such a claim, on appeal to the district court from a judgment of the probate court disallowing the claim, would not have been properly brought on the chancery side of the court. In the probate court the proceeding is informal as to matters of pleading, and the plaintiff was not bound to the same degree of accuracy of statement required in a superior court of record. Claims, established by proper evidence, and within the jurisdiction of the court, may be asserted in that court against the estates of deceased persons, whether legal or equitable.
8. ID.—APPEAL FROM PROBATE COURT TO DISTRICT COURT—TRIAL DE NOVO—ISSUE OF FACT, RIGHT TO TRIAL OF BY JURY IN DISTRICT COURT.—On appeal, in such case, from the probate court to the district court, where the issue is one of fact, and the amount involved over \$20, the plaintiff is entitled to a trial by a jury, as he would have been in an original suit in that court on the facts disclosed in the record, which would have justified an action in assumpsit; and the fact that he elects to sue in the probate court in the first instance can not deprive him of that right, which is secured by both the constitution of the United States and the statutes of this territory.—*Lewis v. Baca*, 289.

CONTRACT. Continued.

9. **ID.—ASSUMPSIT—TRIAL—INSTRUCTIONS.**—In an action of assumpsit on a contract, where the instructions asked for by the defendant were the converse of those given and the instructions given were applicable to the facts proven, and fairly presented to the jury the issues to be determined by them—Held: While the usual and preferable way in giving instructions is to give the same propositions of law from the standpoint of each party, it is not error to refuse to do so, where the instructions given clearly point out to the jury the questions to be determined by them, and plainly lay down the rule to be followed in reaching a conclusion. If the jury are instructed that if they believe certain facts to exist they must find in a certain way, such instruction carries with it the charge that if they do not believe such facts to exist they shall find to the contrary.—Clark v. Gold Mining Co., 323.

See, also, **MECHANICS' LIEN**, 3; **PRACTICE**, 4; **VENDOR'S LIEN**, 3.

CORPORATIONS.

1. **CORPORATIONS—RAILROAD—LAND GRANT WITH RESERVATIONS AND CONDITIONS—CONSTRUCTION OF GRANT.**—A grant of public lands by congress to a railroad company, with certain reservations and on certain conditions, is a grant in praesenti only in the sense that it takes effect by relation as of the date of the act of congress, on performance of the conditions imposed.
2. **ID.—LAND GRANT TO RAILROAD—POWER TO MORTGAGE, PURCHASE, AND CONSOLIDATE WITH ANOTHER COMPANY—LIMITATION OF POWERS.** A railroad company incorporated under an act of congress, granting it certain lands, with power to mortgage, in aid of the construction and operation of its road, and authorizing it to purchase the land grant and franchises of and consolidate with any other road along its route, provided the rights, franchises, and property of every description, of such other road shall vest in, and become the property of, said railroad, is not authorized thereby to transfer its own land grant and franchises to another company and retain merely an easement over the right of way. Nor can a power to sell its lands be implied from the power to mortgage them for means to construct and operate its road.
3. **ID.—LIMITATION OF GRANT—FORFEITURE.**—Where, in such act, it is further provided, that the lands granted such company, which shall not be sold or otherwise disposed of within three years after the completion of its road, shall be subject to settlement and preemption like other public lands, such proviso is a limitation on the power of the company to hold the lands beyond that time; and a failure of the company to comply with the conditions prescribed operates as a forfeiture of the grant; and a plaintiff claiming under the defaulting company will not be heard to complain, that the forfeiture, subjecting the land to the control of congress, was not a proper measure to secure the completion of the road.—Southern Pac. Ry Co. v. Esquibel, 123.
4. **ID.—TELEGRAPH COMPANY—TRESPASS ON THE CASE—SUFFICIENCY OF DECLARATION AFTER VERDICT AND JUDGMENT—PLEADING.**—In an action of trespass on the case against a telegraph company, a declaration, though general and uncertain in its terms, will be deemed sufficient, after verdict and judgment, when unchallenged by demurrer, and the uncertainty and insufficiency is supplied by proof admitted without objection.

CORPORATIONS. Continued.

5. **ID.—NATURE OF EMPLOYMENT AND LIABILITY OF TELEGRAPH COMPANIES—CONTRACT WITH CONDITIONS ANNEXED FOR EXEMPTION FROM LIABILITY.**—A telegraph company is a carrier of news for hire, and, though not an insurer of the safe delivery of messages, its obligations, like those of common carriers, spring from the public nature of its employment, and the contract under which the particular duty is assumed. In that relation it owes to both the sender and receiver of messages the duty of care and good faith, and will be held for want of proper care, by itself and its servants and agents, in the performance of that duty, from which it can not escape by any attempted exemption from such liability by conditions annexed to its contracts. Though it may make reasonable regulations for the proper and safe conduct of its business, and has the power to contract with the sender of a message, so as to relieve it from liabilities for inadvertencies, it will not be relieved for gross negligence or bad faith.
6. **ID.—TELEGRAPH COMPANY, SUIT AGAINST OF TRESPASS ON THE CASE—NEGLIGENCE—MEASURE OF DAMAGES.**—In an action of trespass on the case, by a physician and surgeon, against a telegraph company for damages laid in the declaration at \$1,000, for negligence in not delivering a message, summoning him to make a professional visit, until it was too late, and the call had been countermanded, where a judgment was rendered for \$500 damages, the jury having found that sum a reasonable compensation for the services to have been rendered, and the evidence was that the sender of the message was solvent, and that plaintiff was engaged in active practice and had cases under his charge, from which he earned fees during the time it would have taken him to make the prevented visit, but it did not appear what those earnings were—Held: The proper measure of damages was the difference between the sum allowed and what plaintiff earned during the time he would have been absent on such visit. *Western Union Tel. Co. v. Longwill*, 308.

COSTS ON APPEAL.

COSTS ON APPEAL, TAXATION OF.—While rule 23 of the supreme court requires that the record be printed, in certain cases, it does not give authority to tax as costs the expense of printing it. Nor is there any statutory authority for allowing such expense, or the expense of appellant's brief, or a stenographer's fee, to be taxed as costs on appeal; and, in the absence of such authority, such items can not be properly charged as part of the costs awarded appellant on a reversal of the judgment.—*Price v. Garland*, 98.

COUNTIES.

1. **COUNTIES—ACT, APRIL 3, 1884, CREATING COUNTY OF SIERRA, CONSTRUCTION OF.**—The term "indebtedness" in section 8 of the act of April 3, 1884, creating the county of Sierra out of parts of the counties of Dona Ana, Grant, and Socorro, and providing that the indebtedness of Dona Ana county, existing at the date of its approval, shall be apportioned between that county and Sierra, on the basis of the last assessment of property for taxation in Dona Ana county, as it stood at the date and prior to the approval of the act, in proportion to the amount of the taxable property of the county, must be understood as having been used by the legislature in its ordinary sense, which would include debts of every kind and description.

COUNTIES. Continued.

2. ID.—ASSESSMENT ROLL, EXCEPTIONS TO MUST BE TAKEN, WHEN—NEW TRIAL—EVIDENCE.—Exceptions to the admission in evidence of an assessment roll, not taken at the time, will not be heard on appeal. Where a jury is waived, and the cause is tried by the court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate court, must move for a new trial below, and, if refused, embody the evidence in a bill of exceptions. *Spiegelberg v. Mink*, 1 N. M. 308.—County Com'rs Sierra Co. v. County Com'rs Dona Ana Co., 190.

COURTS, JURISDICTION OF. See ADMINISTRATORS, 1; CONTRACTS, 7; DAMAGES, 3; DIVORCE, 1, 2; FORCIBLE ENTRY AND DETAINER, 1; HABEAS CORPUS, 2; PUBLIC LANDS, 1; TAXATION, 5; VENDOR'S LIEN, 1; WILLS, 4.

CRIMINAL LAW.

1. CRIMINAL LAW—HOMICIDE—MURDER—INSTRUCTIONS—SECTION 699, COMPILED LAWS, 1884—CONSTRUCTION OF STATUTES.—On a trial on indictment for murder in the first degree, where the defendant was convicted of murder in the third degree, under section 699, Compiled Laws, 1884, and the evidence was that deceased violently assaulted defendant, who then and there drew his pistol and fired two shots at deceased, killing him instantly, such killing was not cruel within the meaning of the statutes, nor unusual as held by this court in *Territory v. Pridemore*. The question for the jury was not whether defendant intended to kill deceased, such intent might be inferred from the circumstances attending the homicide, but whether or not there was lawful excuse for the killing; and it was error in the court to lead the jury away from the issue, and instruct them to convict defendant of murder in the third degree, when there was no evidence to sustain it. Such instruction was prejudicial to defendant, in depriving him of the reasonable hope of acquittal had the mind of the jury been confined to the legal effect of the facts proved.—*Territory v. Fewel*, 34.
2. ID.—EMBEZZLEMENT—INDICTMENT, SUFFICIENCY OF—SECTION 750, COMP. LAWS, N. M. 1884—CONSTRUCTION OF STATUTES.—On a prosecution against a justice of the peace for embezzlement of a fine imposed, an indictment founded on section 750, Compiled Laws, 1884, is not sufficient. That section applies only to property received by one person to be carried and delivered to another person. The proper indictment would have been under section 752, which provides for the embezzlement of public money. The indictment was also fatally defective, in failing to state specifically the facts constituting the offense charged.—*Territory v. Heacock*, 54.
3. ID.—EMBEZZLEMENT OF REGISTERED PACKET FROM U. S. MAIL—INDICTMENT, SUFFICIENCY OF—SEC. 5467, REV. STAT. U. S.—CONSTRUCTION OF STATUTES.—On a prosecution, on indictment, for the embezzlement of a registered packet by the defendant while in the employ of the postoffice department of the United States, as postmaster, under section 5467, Revised Statutes, United States, prescribing the punishment for any person employed in any department of the postal service embezzling any packet intended to be conveyed by mail, containing certain enumerated articles "or any other article of value," an averment of the indictment that a certain registered packet containing "eight hundred dollars," intended to be conveyed by mail, came into the possession of the defendant as such postmaster, and was by him, by "force and arms," "feloniously embezzled," etc., was sufficient to sustain the indictment, without setting out the kind of dollars, or their value.

CRIMINAL LAW. Continued.

4. ID.—STATUTE PROVISIO—INDICTMENT—PLEADING.—In such case, it is not necessary in the indictment to negative a proviso of the statute, as that "provided the same shall not have been delivered to the party to whom it is directed," where the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without reference to the exception.
5. ID.—INDICTMENT—EVIDENCE—VARIANCE.—Where the allegation of the indictment was that "a certain registered packet then lately before sent by one M. W. Flourney, of Albuquerque, N. M.; and intended to be conveyed by post to one V. Wallace, at Kingston, N. M.," etc., and the evidence was substantially, that one M. W. Flourney, as teller of the Central Bank of Albuquerque, put \$800 in an envelope, and addressed it to one Vincent Wallace, cashier of a bank at Kingston, and mailed it, there was no variance between the allegation and the proof. No attempt was made to describe the packet in the indictment; it simply states the attendant facts, as an inducement to the material facts, that the packet with its contents was in the mail, and afterward abstracted therefrom and embezzled by the defendant. It was immaterial to whom it was addressed or who mailed it.
6. ID.—EMBEZZLEMENT BY EMPLOYEE OF POSTOFFICE DEPARTMENT—EVIDENCE, SUFFICIENCY OF TO PROVE FACT OF EMPLOYMENT.—Where, in such case, it appeared from the evidence an indorsement was made by defendant, and signed by him as postmaster, at "Hillsboro," upon a "tracer" sent out in search of the missing packet, that the packet had been received at his office, and forwarded through the mail to the postmaster at "Kingston," and that he had never received from the postmaster a receipt for it, these facts were sufficient to prove that the defendant was employed by the postoffice department, and the jury could not properly have done otherwise than so find.
7. ID.—WITNESS, IMPEACHMENT OF BY TESTIMONY GIVEN AT FORMER TRIAL.—An objection, to an attempted impeachment of witnesses by reading to them their testimony in writing, given at a former trial, that the testimony should have been read to the witnesses at the time of their interrogations, as a foundation for their impeachment, and not afterward, was properly sustained.—United States v. Fuller, 81.
8. ID.—PERJURY, FALSE AFFIDAVIT TO PREEMPTION CLAIM BEFORE PROBATE CLERK, SUFFICIENCY OF TO SUSTAIN INDICTMENT FOR, UNDER SEC. 5392, REV. STAT. U. S.—ACT CONGRESS, JUNE 9, 1880—CONSTRUCTION OF STATUTES.—By an act of congress of June 9, 1880, it is provided "that the affidavit required to be made by the section 2262 and 2301 of the Revised Statutes of the United States may be made before the clerk of the county court, or of any court of record of the county and state or district and territory in which the lands are situated." There is no "county court" in this territory, within the meaning of the statutes of the several states and territories of the United States where such courts exist and are known by that name; nor is the probate court a "county court," or "court of record," within the meaning of the act supra; and an oath to a preemption claim, administered before the clerk of the probate court in taking final proof under said act, was unauthorized, and insufficient to support an indictment for perjury based thereon.—United States v. Hall, 78.

CRIMINAL LAW. Continued.

9. **ID.—EMBEZZLEMENT—TRIAL BY JURY—VERDICT—POWER OF COURT TO DIRECT.**—On a prosecution, on indictment for embezzlement, where the jury returned a verdict of guilty under the directions of the court, and the defendant moved in arrest of judgment, which motion was overruled.—Held:
1. Under that provision of the constitution guaranteeing to persons accused of crime the right to trial by jury, the accused, in every case where he has pleaded "not guilty," has the right to have the question of his innocence or guilt submitted to a jury, and the court has no power, in such cases, to deprive him of that right, by directing the jury to return a verdict of guilty, however strong, clear, and unimpeached the evidence may be for the prosecution. *U. S. v. Taylor*, and cases cited, 11 Fed. Rep. 470; *U. S. v. Gilbert*, 2 Sum. 19.
2. The court erred in overruling the motion in arrest of judgment. *Territory v. Kee*, 510.

DAMAGES.

1. **DAMAGES—SUIT ON ATTACHMENT BOND—ATTORNEY'S FEES.**—In a suit on an attachment bond, reasonable attorney's fees, paid in defending the attachment suit, are recoverable as a part of the damages.—*Leyser v. Rindskopf*, 93.
2. **ID.—WAIVER OF JURY—FINDING—APPEAL.**—In this territory, the finding of the court, when a trial by jury is waived, is, in effect, the same as the verdict of a jury; and only such rulings of the court, made during the progress of the trial, are reviewable on appeal, as are duly presented by the bill of exceptions.
3. **ID.—ADMISSIBILITY OF EXPERT TESTIMONY—DISCRETIONARY POWER OF COURT.**—Where expert testimony is offered, it is discretionary with the trial court whether it shall be received or excluded, and the appellate court will not reverse its rulings unless manifestly erroneous.
4. **ID.—TEXAS FEVER—TRESPASS ON CASE—EVIDENCE.**—In an action of trespass on the case for damages for transporting cattle infected with "Texas fever," and communicating the disease to plaintiffs' cattle, where expert witnesses for plaintiffs testified that cattle from an infected district may carry a contagion with them, and disseminate and communicate it, without being visibly affected by it, and one of the defendants testified that before he brought his cattle from Texas he had heard of the disease, but never believed in it, and another defendant testified that he had heard of the disease, and that plaintiffs protested against the unloading of the cattle lest their cattle might contract some disease from them, defendants must be held to have been fully informed and warned of the danger of communicating the disease, and it devolved upon them to take every precaution against it.
5. **ID.**—To render defendants liable under the act of congress of May 29, 1884, prohibiting the transportation from one state or territory to another of live stock infected with a contagion, it was not necessary for plaintiffs to show defendants had actual knowledge that their cattle, when shipped, were carrying disease germs with them; it was sufficient if the locality from which they were shipped was known to have been infected.

DAMAGES. Continued.

6. *Id.*—Nor is it material under this act where the contagion was communicated, whether on the public road, on the public commons, or on the lands of the plaintiffs.
7. *Id.*—TRIAL BY COURT—ADMISSION OF INCOMPETENT EVIDENCE—PRESUMPTION.—On the trial of a cause by the court, the rule is that the admission of incompetent evidence is no cause for reversal, if it could not have prejudiced the other party; and where it does not appear that the court relied on such evidence, the presumption is, if any was admitted, it was not considered by the court in its finding.—*Lynch v. Grayson*, 487.

DEEDS OF CONVEYANCE. See EJECTMENT, 2.

DEHORS THE RECORD MATTERS. See CONTRACTS, 6.

DEMURRER. See CONTRACTS, 4; TAXATION, 2.

DIVORCE.

1. DIVORCE—ALIMONY PENDENTE LITE—SEPARATE ESTATE OF WIFE—ATTORNEY'S FEES—JURISDICTION OF DISTRICT COURT.—Held: The district court, which is a court of equity as well as of common law, may, as an incident to the power to decree divorces, grant to the wife, upon a proper showing, pendente lite, temporary maintenance and allowance, and enforce payment of the same, against the husband, or his property, in the absence of a sufficient separate estate of the wife, or under such circumstances, may charge such maintenance and allowance for attorney's fees against any common property of the husband and wife, whether such property be under the control of the husband or wife.
2. *Id.*—Where the wife has an ample separate estate of her own, she may charge such estate with necessary attorney's fees to enable her to prosecute or defend a divorce suit to which she is a party; and when she has done so, in the employment of her attorney, the court has the power, as an incident to the divorce proceeding, to decree such necessary fees against her separate estate as an allowance to her attorney, so far as such fees are actually necessary, and limited to the fair value of the services rendered; and a compromise of the suit between the husband and wife, to which her attorney was not a party, can not deprive him of the right to his fee.—*Lamy v. Catron*, 373.

EJECTMENT.

1. EJECTMENT—ANCIENT DOCUMENTS—EVIDENCE.—In an action of ejectment for the recovery of certain land, and for damages for its detention, where two ancient documents purporting to be conveyances of the land in controversy, but not executed according to the law of Spain, then in force in New Mexico as a province of Spain, and admitted by plaintiff not to be deeds conveying fee simple title, were offered in evidence by plaintiff as the foundation of his title, they were inadmissible to show color of title in the plaintiff, who claimed under the person mentioned as the grantee in said documents, in the absence of evidence that such person ever had or claimed possession of the land, or that his son entered or took possession as a tenant in common with the other heirs. So far as the evidence goes, his possession was adverse to them, and his entry was an ouster of them, for his assumption of ownership was in himself; and if any title inured to any person by virtue of his possession, it would be to him, his heirs, or persons holding under him, and not to the heirs of the person mentioned as grantee in said documents.

EJECTMENT. Continued.

2. ID.—QUITCLAIM DEED—EVIDENCE.—A quitclaim deed offered in evidence in such case, purporting to convey no other title to the land in question than that derived through the pretended conveyances mentioned supra, was also inadmissible in evidence and properly excluded.
3. ID.—EXCLUSION OF EVIDENCE IMMATERIAL.—The plaintiff having failed to show any title in the person mentioned as grantee in the pretended conveyances, the exclusion of evidence as to who were the heirs of such person, if error, is immaterial, and can have no effect here.
4. ID.—EVIDENCE—VERDICT.—The papers offered in evidence being excluded, there was no evidence to support a verdict, and the court properly directed the jury to find for defendant. *Salazar v. Longwill*, 548.

ELECTIONS.

1. ELECTIONS—MANDAMUS TO COMPEL COUNTY COMMISSIONERS TO CANVASS RETURNS—EVIDENCE—WAIVER.—In a proceeding by mandamus to compel the board of county commissioners of a county to canvass the election returns of a certain precinct, where the respondents ask the court to inspect the evidence offered with their answer, and bring into court all the returns, certificates, poll books, and ballot box, and invoke its judgment as to the legal sufficiency to justify the action of the board, such action on their part is a submission to the court, and they will not be heard to insist on the right to a jury to try the issues of fact, even if a jury could be impaneled—a point not before the court, and on which it does not pass. Nor will they be heard, in view of these facts, to object that there is no evidence, upon the issue of facts raised by their answer, to support the judgment of the court below in awarding a peremptory writ.
2. ID.—PEREMPTORY WRIT OF MANDAMUS WILL LIE TO COMPEL PERFORMANCE OF MINISTERIAL ACT, WHEN.—In such case, where it appears the board of canvassers have failed to count votes which ought to be counted, and where, if such votes are counted, the relator will be elected, the court may, by peremptory writ of mandamus, direct the board of canvassers to count such votes, and to issue to relator a certificate of election.
3. ID.—BALLOT BOXES, POWER OF BOARD OF CANVASSERS TO OPEN. Where, in such case, a ballot box containing the election returns has been forwarded by the proper legal authority and placed in the proper legal custody, the returns in the box are, in legal contemplation, before the board of canvassers, constituted as such by law, and they have the power and authority to open the box, and take therefrom the returns for examination, as an incident to the power to canvass the returns, under section 1188, Compiled Laws of New Mexico. *Territory v. Co. Com'rs Bernalillo County*, 1.
4. ID.—SERVICE OF ANSWER BY POSTING, MOTION TO STRIKE OUT—MOTION FOR LEAVE FOR PERSONAL SERVICE ON CONTESTANT AFTER EXPIRATION OF STATUTORY LIMIT, POWER OF COURT TO GRANT.—In an election contest for the office of county assessor, where the answer of the respondent was attempted to be served, under specification 4, of section 1898, Compiled Laws, by posting it on a house previously occupied by the contestant, but vacated before the posting, and fifty miles distant from his actual place of residence, a motion to

ELECTIONS. Continued.

strike out the answer on the ground, among others, that no copy of said answer was ever served on the contestant as required by law, was properly sustained; and a motion, by the contestee, for leave to serve on contestant a copy of his answer to contestant's notice of contest, was properly denied, the twenty days allowed, under section 1235, Compiled Laws, for serving a copy of the answer to the notice of contest, having expired, and the court no discretionary power to extend the time. Following *Bull v. Southwick*, 2 N. M. 323.—*Vigil v. Pratt*, 161.

EMBEZZLEMENT. See CRIMINAL LAW, 2, 3.

EMPLOYEE OF POSTOFFICE DEPARTMENT. See CRIMINAL LAW, 6.

EQUITY. See BILL OF EQUITY; MECHANICS' LIEN, 5; PROMISSORY NOTE, 2; PRACTICE, 1; TAXATION, 2, 3; WILLS, 4.

ERRORS. See ATTACHMENT, 2; CONTRACTS, 2; MANDAMUS, 1; MINES AND MINING, 4.

ERRORS, ASSIGNMENT OF. See MINES AND MINING, 4.

ERROR, WRIT OF.

1. ERROR, WRIT OF, WILL LIE TO REVIEW DECREE IN CHANCERY.—Under section 2193, Compiled Laws, 1884, abrogating the rule announced in *Kidder v. Bennett*, 2 N. M. 37, a writ of error will lie from the district courts to the supreme court to review a decree in equity as well as a judgment at law.
2. ID.—RULE REQUIRING FOLIOS OF TRANSCRIPT TO BE NUMBERED, ETC.—The rule of court, requiring the folios of a transcript to be numbered, and the pages and margins of the size required, is directory, and a writ of error will not be dismissed, or a cause stricken from the docket, for failure to comply therewith, as held in *Mora v. Schick*, 4 N. M. (Gil.) 301, in considering a similar provision, no penalty being prescribed for violating the rule.
3. ID.—SECTION 522, COMPILED LAWS, N. M. 1884—RULE 24.—Nor will a writ of error from the district court to the supreme court, to review a decree in chancery, be dismissed or the cause stricken from the docket, for a failure to comply with rule 24 of this court, section 522, Compiled Laws, 1884, which is a limitation upon the power conferred upon the courts by section 521, to adopt rules of procedure, so far as it affects proceedings in chancery, requires the supreme and district courts, in the exercise of chancery jurisdiction, to conform their decisions, decrees, and proceedings to the laws and usages peculiar to that jurisdiction in this territory, and in the United States courts; and it was not the intention of the court, by the language used in rule 24, to violate said section 522.—*Farish v. New Mexico Mining Co.*, 234.
4. ID.—PARTIES—DISMISSAL.—In a proceeding by a taxpayer against a town, and the sheriff, to enjoin the collection of a tax assessed against him for the improvement of a street, the sheriff having no substantial interest in the result, his failure to join in a writ of error sued out by the town from a decree in favor of the taxpayer, is no ground for a dismissal of the writ.
5. ID.—FILING OF RECORD.—On writ of error, a record filed ten days before the first day of the term, including either the day of the filing, or "the first day of the term," is a substantial compliance with the rule, and meets the requirement of the statute.—*Town of Albuquerque v. Zeiger*, 518.

ESTATE OF DECEASED PERSONS. See CONTRACT, 7.

EVIDENCE. See ASSUMPSIT, 2, 3; CONTRACT, 1; COUNTIES, 2; CRIMINAL LAW, 5; DAMAGES, 4, 7; EJECTMENT, 1, 2, 4; ELECTIONS, 5; MINES AND MINING, 1, 4, 7; PROMISSORY NOTE, 1; PUBLIC LANDS, 2.

EXCEPTIONS. See BILL OF EXCEPTIONS; COUNTIES, 2; MECHANICS' LIEN, 2.

EXCESSIVE LEVY. See SHERIFF, 3.

FINES. See HABEAS CORPUS, 2.

FINDING OF COURT. See ATTACHMENT, 2; DAMAGES, 2.

FORCIBLE ENTRY AND DETAINER.

1. FORCIBLE ENTRY AND DETAINER, MAY BE BROUGHT BEFORE JUSTICE OF THE PEACE OF ADJOINING PRECINCT, WHEN—SEC. 2425, COMP. LAWS, N. M. 1884—JURISDICTION.—Under section 2425, Compiled Laws, 1884, when there is no justice of the peace in the precinct where the premises are situated, able or qualified by law to act, an action of forcible entry and detainer may be brought before a justice of the peace in any adjoining precinct.
2. ID.—APPEAL FROM JUSTICE OF THE PEACE TO DISTRICT COURT—APPLICATION FOR LEAVE TO AMEND SHOWING JURISDICTIONAL FACTS, POWER OF THE COURT TO GRANT.—On a trial de novo, in such case, on appeal to the district court, where the fact was that there was no justice of the peace in the precinct where the premises were situated, able or qualified by law to act, but the complaint failed to state this fact, and plaintiff asked leave to amend, to remedy the defect, the court had the power to grant the application, and erred in its refusal to do so. While the rule is that applications for leave to amend are addressed to the sound discretion of the court, and the refusal of a court to permit amendments is ordinarily not open to review on appeal; yet, when a court has the discretion to allow an amendment of a pleading, and refuses to exercise its discretion on the ground of a want of power, such refusal is error, and a substantial ground for appeal.—*Sanchez v. Candelaria*, 400.

FORFEITURE. See CORPORATIONS, 3; MINES AND MINING, 6.

FRAUD. See PROMISSORY NOTE, 1; WILLS, 6.

HABEAS CORPUS.

1. HABEAS CORPUS—MANDAMUS—INJUNCTION—JURISDICTION OF DISTRICT COURT.—On an application for a writ of habeas corpus, by certain members of the board of county commissioners of Santa Fe county, for release from commitment, for refusal to pay fines assessed against them for contempt of court in refusing to obey a writ of injunction, issued in a certain mandamus proceeding, restraining them from issuing certificates of election to any other persons than those mentioned in the writ, and from making any record of the result of their canvass of election returns, on the ground of want of jurisdiction of the court over the subject-matter of the proceeding—Held: Under section 13, chapter 135, Laws, 1889, prescribing the duties of the board of county commissioners, sitting as a canvassing board, and providing that, in case of their failure or refusal to perform those duties, the district judge shall, on the petition of any qualified voter, issue a writ of mandamus to compel a performance, the district court had jurisdiction of the subject-matter of the mandamus proceeding,

HABEAS CORPUS. Continued.

and the power to issue a writ of injunction therein in aid thereof. If there were any doubt as to this power in the district court, that doubt would be removed by section 1, chapter 117, Laws, 1889, providing that suits in equity may be begun, injunctions granted * * * in aid of any suit at law * * * which took effect on the same day as did the statute supra. The term "suit at law" is used in its broadest sense, and was intended to authorize the aid of equity in any pending legal proceeding whenever necessary to give a more complete and effectual remedy.

2. **ID.—CONTEMPT—FINES—IRREGULARITY IN ASSESSMENT OF.**—The fact that the court, in the proceedings for contempt against the petitioners, for refusal to obey the writ of injunction in the mandamus proceedings, assessed several different fines for several distinct offenses in the same proceeding, would not make void the entire punishment. It was a mere irregularity, curable in the court in which the proceeding was had, or by appeal, and not on habeas corpus.
3. **ID.—CONTEMPT—JURISDICTION IN VACATION.**—The objection of want of jurisdiction in the court in vacation is not tenable. Under section 1829, Compiled Laws, the courts of the territory are always open, and their jurisdiction is broad enough to include proceedings for contempt.—In re Sloan, 590.
4. **ID.—MANDAMUS—CONTEMPT—JURISDICTION.**—On an application for writ of habeas corpus, by the probate clerk of Santa Fe county and ex officio clerk of the board of county commissioners, to be discharged from commitment for contempt of court, in refusing to obey a peremptory writ of mandamus commanding him, in his official capacity, to recognize one of two rival sets of claimants for the office of county commissioner, and to refuse to recognize the other, on the ground that the writ of mandamus could not be invoked as a means of contesting the right of the rival claimants to the office—Held: The court had jurisdiction of the subject-matter and of the parties to the mandamus proceeding, and the writ was not void because it involved incidentally, if not directly, the title set up by the rival claimants. The objection interposed was no justification for refusal to obey the mandate of the court, and the application must be denied.—Delgado v. Chavez, 646.

HOMICIDE. See CRIMINAL LAW, 1.

INDICTMENT. See CRIMINAL LAW, 2, 3, 4, 5, 8.

INJUNCTION. See HABEAS CORPUS, 1; TAXATION, 5.

INSTRUCTIONS. See CONTRACTS, 5, 9; CRIMINAL LAW, 1; MALICIOUS ATTACHMENT, 1; MINES AND MINING, 3; PROMISSORY NOTE, 1.

INTEREST. See CONTRACTS, 3.

JUDGMENT. See PRACTICE, 2, 3; SHERIFF, 1; VENDOR'S LIEN, 4.

JURISDICTION. See ADMINISTRATORS, 1; CONTRACTS, 7; DIVORCE, 1, 2; HABEAS CORPUS, 3, 4; PUBLIC LANDS, 1; TAXATION, 1; VENDOR'S LIEN, 1; WILLS, 4.

JURY. See TRIAL BY, CONTRACTS, 8; CRIMINAL LAW, 9.

JUSTICES OF THE PEACE. See FORCIBLE ENTRY AND DETAINER, 1, 2.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—ORAL AGREEMENT FOR LEASE FOR ONE YEAR—TENANT AT WILL.—A tenant who enters upon the demised premises under a verbal agreement for a lease, to be made for a term of one year at a monthly rental of \$60 conditionally on the landlord's obtaining a renewal of the lease of the land upon which the premises are located, is not a tenant from year to year, but a tenant at will, and may vacate the premises without giving six months' notice of his intention to do so.
2. ID.—ORAL LEASE FOR LESS THAN THREE YEARS—STATUTE OF FRAUDS.—The proper construction of the statute of frauds (29 Chas. 2, chap. 3, sec. 2) declaring oral leases to be void, if for a term not exceeding three years where the rent reserved "shall amount to two thirds part at least of the thing demised," is that the rent reserved shall be two thirds of the rental value of the demised premises, and not two thirds of the value of the fee.—Childers v. Lee, 576.

LIEN OF LANDLORD.

1. LIEN, OF LANDLORD, UNDER SEC. 1537, COMP. LAWS, N. M. 1884, WAIVER OF—CONSTRUCTION OF STATUTES.—By section 1537, Compiled Laws, it is provided that, "Landlords shall have a lien on the property of their tenants, which remains in the house rented, for the rent due; and said property may not be removed from said house, without the landlord's consent." Under this section of the statute the lien expressly attaches against the property of the tenant which remains in the house, and not against the property which is removed from the house with the landlord's consent. The tenant has no right to remove the property from the house until the rent is paid. This it is the right of the landlord to insist upon, but, if he consents to the removal, he thereby waives his lien on the property. Where the building rented consists of several apartments, rented to different tenants, each apartment is a "house rented" within the meaning of the statute; and the removal of the property of a tenant from one apartment of the building to another apartment of the same building is a removal from "said house."
2. ID.—EFFECT OF WAIVER OF—SUBSEQUENT MORTGAGE LIEN, PRIORITY OF OVER LIEN FOR RENT PREVIOUSLY ACCRUED.—Where, in such case, the landlord waives his lien for rent previously accrued, he thereby becomes a general creditor as to such rent, and can have no claim for the same over a subsequent mortgagee, who files the affidavit required by statute (Secs. 1539, 1590, Comp. Laws) before such claim is reduced to judgment or the landlord has obtained any lien for the same on the mortgaged property.—Wolcott v. Ashenfelter, 442.

LIMITATION, STATUTE OF. See MEXICAN GRANT, 1; WILLS, 3.

MANDAMUS.

MANDAMUS—ERROR—SUPERSEDEAS.—On appeal by writ of error, by the auditor of public accounts, from a peremptory writ of mandamus issued against him, commanding him to audit and allow certain claims of the sheriff of San Miguel county against the territory.—Held: The court erred in granting the peremptory writ of mandamus. The appeal does not operate as a supersedeas; and the auditor having, in obedience to the mandate of the court, audited and allowed the claims, the writ will be dismissed at the cost of the sheriff, without inquiry as to the particular items allowed as charges, against the territory.—Alarid, Auditor, v. Romero, 522.

MALICIOUS ATTACHMENT.

MALICIOUS ATTACHMENT—LIABILITY OF ATTORNEY—INSTRUCTIONS.—In an action in case against an attorney for an alleged malicious suing out of an attachment, the court erred in refusing to instruct the jury that "the mere termination of the attachment suit in favor of plaintiff does not raise the presumption of want of probable cause for suing out the writ, nor can the jury presume that the defendant Field acted maliciously from this fact alone." The court also erred in refusing to instruct the jury that "defendant had a right to act on facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true, and if such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act on them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by said defendant to be true, will constitute probable cause." The courts have held, in every case of an action for malicious prosecution, it must be averred and proved that the proceeding against the plaintiff has failed. But its failure has never been held to be evidence of malice or probable cause.—*Leyser v. Field*, 356.

MECHANICS' LIEN.

1. **MECHANICS' LIEN—BILL IN CHANCERY TO FORECLOSE—RULINGS OF CHANCELLOR ON MATTERS OF FACT—APPEAL.**—In a proceeding by bill in chancery to foreclose a mechanic's lien, the rulings of the chancellor on matters of fact, like the finding of a court of law on issues of fact, have the force and effect of the verdict of a jury, and will not be disturbed on appeal, unless some gross mistake has been made, or flagrant injustice done.
2. **ID.—MASTER'S REPORT—EXCEPTIONS, HOW TO BE TAKEN—APPEAL.** In such case, where the master's report involves matters of account, exceptions only to particular items, or classes of items, will be considered on appeal.
3. **ID.—VERBAL CONTRACT, CONSTRUCTION OF BY CHANCELLOR—PRESUMPTION.**—Where no exceptions are taken to a verbal contract introduced in evidence before a master in chancery, and construed by the chancellor, the appellate court will presume that the construction given was correct. The court will not examine the evidence, where there is any conflict of testimony, to determine whether the court below or jury was justifiable in its finding or verdict.
4. **ID.—DISMISSAL OF SUIT IN VACATION—SEC. 1857, COMPILED LAWS, N. M.—CONSTRUCTION OF STATUTES.**—Section 1857, Compiled Laws of New Mexico, giving the plaintiff the right, in any suit in the district court, to dismiss the same at any time during the vacation of the court, by filing in the clerk's office a written dismissal of the suit, applies only to common law causes. In a chancery proceeding, where other parties have been brought in, whose equitable rights and interests are involved, a dismissal can be obtained only by leave of court, upon such terms as it may require.
5. **ID.—REHEARING—EXCEPTIONS IN EQUITY CASES—SEC. 2197, COMPILED LAWS, N. M.—CONSTRUCTION OF STATUTES.**—Section 2197, Compiled Laws of New Mexico, providing that exceptions to the decision of the court upon any matters of law arising during the trial of a cause, or to the giving or refusing of instructions, shall be taken at the time of such decision, and that no exception shall be required in equity causes, applies to bills of exception in common law cases, and not to exceptions to a master's report in equity proceedings.—*Newcomb v. White*, 435:

MEXICAN GRANT.

MEXICAN GRANT—BILL TO ESTABLISH TITLE—PLEAS, RES ADJUDICATA, STATUTE OF LIMITATIONS.—In 1865 the complainants filed a bill in equity under oath to establish title to a Mexican grant. To this bill the defendants filed an answer under oath, responsive to the allegations of the bill. The cause was referred to a master, and depositions were taken by defendants sustaining their title. No reply was made by complainants, and defendants, after the time had expired for filing a reply and taking proof before the master, moved to dismiss the cause for want of prosecution, which motion was granted in 1868, upon argument by both sides, and the court being fully advised. On a bill filed by the same complainants in 1883, based on the same legal title and substantially the same facts, where the defendants pleaded the former adjudication, and the statute of limitations of ten years, in bar of the action—Held: The dismissal was a decision on the merits of the controversy, presented by the pleadings and proof, and fully sustained defendants' plea of *res adjudicata*. If there were any doubt on this point, complainants' claim would still be barred by the statute of limitations of ten years.—*Farish v. Mining Co.*, 279.

MINES AND MINING.

1. **MINES AND MINING—EJECTMENT—LOCATION NOTICE, SUFFICIENCY OF, ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN—SECTION 2324, REVISED STATUTES, UNITED STATES—CONSTRUCTION OF STATUTES.**—In an action of ejectment to recover possession of a mining claim, where the location notice refers to certain natural objects and monuments with sufficient certainty to identify the claim, but it does not appear from the notice whether such objects and monuments are of a permanent nature, the notice is sufficient, and it was error to exclude it; and parol evidence is admissible to show that the natural objects and monuments referred to in the notice are in fact permanent, within the meaning of section 2324, Revised Statutes, United States, requiring that the location notice of a mining claim shall contain such description of the claim located, by reference to some natural object or permanent monument, as will identify the claim, and the court below also erred in refusing to admit it. Overruling *Baxter Mountain G. M. Company v. Patterson et al.*, 3 Gil (N. M.) 269.—*Seidler v. LaFave*, 44.
2. **ID.—NOTICE OF RELOCATION, LEGAL EFFECT OF.**—The recitals in a notice of relocation of a mining claim may be construed as solemnly admitting the validity of an original location.
3. **ID.—SUIT IN EJECTMENT FOR RECOVERY OF POSSESSION—INSTRUCTIONS.**—In an action of ejectment to recover the possession of a certain mine, on the ground of an alleged prior location, made under an act of congress of May 10, 1872, where the defendants claimed under a notice of relocation, and the only question was as to the performance by the plaintiffs of the annual labor required by the statute, an instruction to the jury that before the plaintiffs could recover they must prove some title and right to possession, by a preponderance of the evidence, and that such right must be superior to that of defendants, was a proper instruction.—*Wills v. Blain*, 238.
4. **ID.—EJECTMENT—EVIDENCE—ERROR.**—In an action of ejectment for the recovery of possession of a mine and for damages for its detention an error of the trial court in permitting the plaintiff to state his opinion as to the damages he sustained in consequence of the defendants taking possession of the mine, where the court finally ruled that the

MINES AND MINING. Continued.

witness might testify as to what was embraced in the name of "rents and profits," but that the question as to the assessment of damages was to be determined by the statute, to which ruling there was no objection, nothing was left for the defendants to complain of, in their assignment of error on that ground.

5. ID.—TRIAL—ADMISSIBILITY OF TESTIMONY AFTER CLOSE OF CASE.—Whether the trial court can permit a witness for plaintiff to be recalled, after the close of defendants' case, to answer a question overlooked on the direct examination, is a matter resting in the sound discretion of the court, and can not be assigned as error.
6. ID.—LOCATION CLAIM—ANNUAL LABOR—FORFEITURE.—A mining claim is not forfeited by the failure of the locator for one year to perform the annual labor required by the act of congress of May 10, 1872, where he resumes the work in good faith before a valid location is made by others.
7. ID.—CONFLICT OF EVIDENCE.—Where there is a substantial conflict of evidence the verdict of a jury will not be disturbed, unless errors of law occur at the trial, as this court has held again and again.—*Lacey v. Woodward*, 583.

MURDER. See CRIMINAL LAW, 1.

NEGLIGENCE. See CORPORATION, 6; TRESPASS ON CASE, 1.

NEW TRIAL. See CONTRACT, 2.

NOTICE OF LOCATION. See MINES AND MINING, 1, 2, 6.

PERJURY. See CRIMINAL LAW, 8.

PATENT. See PUBLIC LANDS.

PLEADING. See CONTRACT, 4; CORPORATIONS, 5; PRACTICE, 1, 5; CRIMINAL LAW, 4.

PRACTICE.

1. PRACTICE—BILL IN EQUITY—AMENDMENT—PLEADING.—In a proceeding, by a bill in equity, where the bill was framed upon misinformation as to the real facts, which were not disclosed till the trial, complainants were entitled to leave to amend their bill on the final hearing to conform to the evidence, upon such terms as the court might deem proper (*Compiled Laws, N. M., sec. 1911; Beall v. Territory*, 1 N. M. 507); and it was error in the court below to refuse to grant leave to amend under such circumstances.—*Perea v. Gallegos*, 102.
2. ID.—ON APPEAL—MOTION TO DISMISS AND FOR AFFIRMANCE OF JUDGMENT, UNDER SECTION 2189, COMPILED LAWS, AND RULE 23, SUPREME COURT.—Where, on appeal, the appellant files a transcript of the record, but not, as required by section 2189, *Compiled Laws*, "at least ten days before the first day of the term to which the appeal is returnable," a motion to dismiss the appeal and for affirmance of judgment, on that ground, not made until after such filing, will be denied.

PRACTICE. Continued.

3. Nor will such motion be sustained on the ground of appellant's failure to deliver to the attorney of appellee, "at least ten days before the first day of the term, two printed copies of the transcript of record," as required by rule 23 of the supreme court, where it appears from the affidavit of appellant's counsel that appellant is a poor man, and was not able to obtain the necessary money to procure a transcript of the record until after the time for filing had expired, and the record shows that the transcript was filed five days before the first day of the term. In view of these facts, and of section 2189, supra, which further provides that "the court shall affirm the judgment unless good cause shall be shown to the contrary," it will be presumed that diligent effort was made by appellant to comply with the rule, which the court holds to be "good cause shown" within the meaning of the statute.
4. CONTRACT UNDER SEAL—COVENANT—SUBSTITUTION OF NEW PAROL AGREEMENT—ACCORD AND SATISFACTION.—In an action of covenant on a contract under seal for the value of certain sheep, rented by plaintiffs' testator to defendants, for a time terminable at the pleasure of either, not returned, where the plea was, among others, a new parol agreement in satisfaction of the original contract sued on, to which plaintiffs demurred on the ground of no consideration shown, which was sustained—Held: The demurrer was properly sustained. In order to make a good satisfaction for a contract to be set aside, the new contract attempted to be substituted must contain an executed consideration of value to the obligee.
5. ID.—PLEAS—ATTACHMENT—REPLEVIN AND DISMISSAL BY PLAINTIFF—SALE—INEVITABLE ACCIDENT.—In such action, where the defendants pleaded further that the sheep in question were seized by the sheriff under a writ of attachment against one of the defendants; that plaintiffs replevied them, but afterward dismissed their suit, and allowed them to be sold under the attachment; and that such sale constituted "inevitable accident"—Held, on demurrer: These facts constitute no defense to plaintiffs' suit for the value of the sheep not returned. The loss of the property by sale under the attachment was not accident within the terms of the contract.—*Armijo v. Abeytia*, 533.

PRESUMPTION. See CONTRACTS, 5; DAMAGES, 7; MECHANICS' LIEN, 3; PUBLIC LAND, 2.

PROBATE COURT. See ADMINISTRATORS, 2, 3; CONTRACT, 7; WILL, 1.

PROMISSORY NOTE.

1. PROMISSORY NOTE—BONA FIDE PURCHASER WITHOUT NOTICE—ASSUMPSIT—FRAUD—EVIDENCE—INSTRUCTIONS.—In an action of assumpsit upon a negotiable promissory note, by plaintiff, as indorsee for value before maturity, where the defendant pleaded non assumpsit, and set-off in the form of the common courts, to the first of which plaintiff added a similiter and to the second filed a replication, and the evidence was that defendant had purchased for \$2,300 a certain lot of ground in Santa Fe, where he resided and carried on the business of a jeweler, giving in part payment therefor a set of diamonds at \$750, which had cost defendant between \$400, and \$500, assuming the payment of a balance of \$950, on a mortgage of \$1,000 on the lot, and giving his note for the remainder at thirty days with the understanding that the grantor would hold it himself, and not part with it; that the purchase was made upon the representations of the grantor that he had bought the property cheap for \$2,000, and that it was

PROMISSORY NOTE. Continued.

worth \$2,300; and there was evidence tending to show that the lot was worth but \$1,000, also evidence tending to show that it was worth \$2,300, and the deed to the grantor recited a consideration of \$2,000, but the party from whom the grantor purchased testified that he had sold the property to the grantor for \$1,000, and the defendant testified that he had not paid the mortgage—Held, that the evidence was not sufficient to constitute such fraud in the inception of the note as to put upon plaintiff the burden of proving that plaintiff had paid value for it, and the court did not, therefore, err in so instructing the jury; the doctrine, that if there is a particle of evidence tending to support the cause of action or defense it must be left to the jury, never having obtained in this territory.—*City Nat. Bank v. Hickox*, 22.

2. **ID.—ALTERATION OF BY MISTAKE—BILL TO RESTORE TO ITS ORIGINAL FORM—LIABILITY OF INDORSER—EQUITY.**—In a proceeding by bill in equity on a certain negotiable promissory note, executed to another in trust for complainant, against the indorser and makers, to restore the note to its original form, where it was alleged that complainant, dissatisfied with the form of the note, returned it to the firm of which the trustee was a member, directing him to procure another and different form of note, without stating what form; and that, while the note was in the possession of said firm, one of the makers and another altered it, by changing the amount, date, and rate of interest, without the knowledge or consent of complainant, but innocently and in good faith, supposing they were complying with his wishes, of which the indorser pretended he had no knowledge, and that by reason thereof he would be released from all liability to complainant on said note; that the makers of said note had become nonresidents and insolvent, so that an action or judgment at law against them would be unavailing; to which the indorser demurred for want of equity, which was sustained; and it appeared that the altered note was in the possession of complainant, and bore in its original form an unlawful rate of interest—Held: The alteration of the note was material, and having been made by one of the makers and another, or one of them, without the consent of the indorser, he was thereby discharged from all liability thereon, and the demurrer was properly sustained, dismissing the bill as to such indorser.—*Ruby v. Talbott*, 251.
3. **PROMISSORY NOTE—STIPULATION FOR ATTORNEY'S FEE—ASSUMPSIT—PLEA, NON ASSUMPSIT.**—In an action of assumpsit on a promissory note stipulating for the payment of "ten per cent for attorney's fees in case this note is placed in the hands of any attorney for collection, or collected by suit," where the plea was non assumpsit, and no evidence was offered in support of the plea—Held: The court is not called upon in this case to pass upon the question as to the construction of the provision for the payment of attorney's fees in the note sued on, that question is not properly raised. But the court is asked to declare that a clause in a promissory note providing for attorney's fees of a fixed and definite amount, in the event the note is "collected by suit," is void as against public policy. This the court can not do, the validity of such a clause in a promissory note by contract of the parties being sustained by the weight of authority. The provision for the payment of attorney's fees in the note sued on is undoubtedly a questionable one, and susceptible of being used in an oppressive and collusive manner; but the court can not presume that such will be the result. The courts have held many provisions for attorney's fees in notes and contracts void, where the amount was uncertain, exorb-

PROMISSORY NOTE. Continued.

itant, or oppressive, and the facts were clearly proven. But in this case the services of the attorney were rendered. It does not appear that the fee contracted for was unreasonable, nor that the contract was not a voluntary one, made by the parties with a full knowledge of all the facts. As to the objection that the court allowed attorney's fees without requiring proof of their value, if the note sued on had provided for a "reasonable attorney's fee," such proof would have been necessary, the amount being uncertain; but in this case the amount is fixed by contract, and the court must presume that the fee fixed was the reasonable value of the services rendered, in the absence of any evidence to the contrary.—*Exchange Bank of Dallas v. Tuttle*, 427.

PUBLIC LANDS.

1. PUBLIC LANDS—PATENT, BILL TO SET ASIDE IN TERRITORIAL DISTRICT COURT—PLEA, FORMER ADJUDICATION COVERING SAME LANDS ON SIMILAR BILL IN U. S. CIRCUIT COURT FOR DISTRICT OF COLORADO—JURISDICTION.—A proceeding by bill in chancery by the United States, in the territorial district court, to set aside a patent and survey made of lands embraced in the patent situated in New Mexico, founded on alleged frauds by the claimant and others, is barred by a former adjudication covering the same lands on a similar bill brought by the United States in the circuit court of the United States for the district of Colorado, that court having acquired jurisdiction of the subject-matter by personal service on the defendant. The jurisdiction of a court of chancery is sustainable, in case of fraud, wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree. *Massie v. Watts*, 6 Cranch, 148.—*United States v. Maxwell L. G. Co.*, 297.
2. ID—TROVER FOR CUTTING AND CONVERSION OF TIMBER—WHO MAY MAINTAIN—EVIDENCE—PRESUMPTION.—An action of trover by the United States against trespassers on the public land, for the cutting and conversion of timber thereon, can not be maintained, where it appears from the testimony of the register of the United States land office that the preemptor has paid for the land as required by law, the presumption being that he has made final proof and that the final certificate has been issued to him, thereby vesting in him the equitable title to the land, who alone can maintain the action, under section 1882, Compiled Laws, requiring that every action shall be brought in the name of the real party in interest; and the fact that a contest for the land was heard in the land office in the year preceding the cutting of the timber does not alter it, since, under rule 5 of practice in contest cases in the local land office, a contest may be instituted as well after, as before, the final certificate issues.
3. ID.—ENTRY—ADMISSIBILITY OF EVIDENCE TO SHOW CHARACTER OF LAND ENTERED.—Nor will the fact that the preemptor has entered the land at the land office as agricultural land preclude inquiry as to its mineral character. Such entries are ex parte, and can not affect the defendants in such case; and the question as to the mineral character of the land is a material issue, and one of fact for the jury; and it is error to exclude evidence of such fact.—*United States v. Saucier*, 569.

REHEARING. See MECHANICS' LIEN, 5.

REPLEVIN. See PRACTICE ON APPEAL, 5.

RES ADJUDICATA. See MEXICAN GRANT, 1.

RESPONDEAT SUPERIOR. See TRESPASS ON CASE, 1.

SEPARATE ESTATE OF WIFE. See DIVORCE, 1, 2.

SHERIFF.

1. SHERIFF—EXECUTION, VARIANCE BETWEEN AND JUDGMENT, AMENDMENT OF.—LIABILITY OF SHERIFF FOR REFUSAL TO ENFORCE.—In an action on the case against a sheriff for refusal to enforce the levy of an execution in his hands, where it appears there is a variance between the amount of the execution and the amount of the judgment on which it was issued, such variance does not render the execution void, but only voidable. It may be amended at any time, even on the return day, or after its return, so as to conform in amount to the judgment; and such variance is no defense to such action.
2. ID.—REFUSAL TO ENFORCE EXECUTION AGAINST PERSONAL PROPERTY IN POSSESSION OF JUDGMENT DEBTOR—BURDEN OF PROOF.—Nor will the mere disclaimer of the judgment debtor of the ownership of personal property in his possession, nor the claim of another to such property, excuse the sheriff for refusal to execute a process in his hands against such property. Possession of personal property is prima facie evidence of ownership; and it is the duty of the sheriff, under such circumstances, to enforce the execution, unless he knows that the ownership of the property, though apparently in the execution debtor, is really in another; and if, without such knowledge, he fails or refuses to do so, the burden of proof is upon him to show that the property was not subject to execution.
3. ID.—EXCESSIVE LEVY—INDEMNIFYING BOND.—A sheriff who levies an execution on the property of the judgment debtor, exceeding in value the amount of the judgment, has no right to demand of the execution plaintiff an indemnifying bond to cover such excess; and the refusal of the plaintiff to comply with such demand will not relieve the sheriff from liability for refusal to sell such property to satisfy the process, where the plaintiff tenders him an indemnifying bond in double the amount of the judgment; except where such officer finds but one item of property, largely in excess in value of the process to be satisfied, when he would be entitled to indemnity commensurate with the value of the property to be levied upon.—*Bachelder Bros. v. Chavez*, 563.

STATUTES, CONSTRUCTION OF. See ATTACHMENT, 1; CRIMINAL LAW, 1, 2, 3, 8; LIEN OF LANDLORD, 1; MECHANICS' LIEN, 4, 5; MEXICAN GRANT, 1; TAXATION, 5.

TAXATION.

1. TAXATION—BILL TO ENJOIN LEVY AND COLLECTION OF TAXES—JURISDICTION OF THE COURTS TO REVIEW ACTION OF THE LEGISLATURE IN THE ELECTION, QUALIFICATION, AND RETURN OF ITS MEMBERS—VALIDITY OF ACTS OF SESSION OF 1884.—On a bill in equity by a taxpayer, to enjoin the levy and collection of a tax to pay the interest on bonds issued to provide for the erection of a capitol building at Santa Fe, the building of a penitentiary, and for creating and providing for the office of county assessor, under the acts of March 29, 1884, March 14, 1884, and April 3, 1884, respectively, on the ground of their invalidity, the legislature not being a lawfully constituted body, and having no power to pass said acts; to which a demurrer was interposed. Held: The general superintending control possessed by the supreme

TAXATION. Continued.

and district courts of this territory over the inferior courts does not extend to the judicial action of the houses of the legislative assembly, where it has been deemed necessary to confer upon them such powers to enable them to perfect their organization and perform their duties as such. But no such powers have been delegated by congress to the territorial legislature in express terms, as usually done by the constitutions of the states, so that the rules of decision there have no application here. By section 7 of the organic act, it is provided that all laws passed by the legislature and approved by the governor shall be submitted to congress for its approval, and if disapproved, shall be null and void. Whether congress intended to confer such powers upon the legislature to finally determine the election, qualifications, and return of its members, the court does not decide. But the court will presume that the acts in question, and all other acts passed at the session of 1884, were submitted to congress in obedience to the fundamental law of the territory; and that they received the tacit approval of congress, in the absence of anything to show its disapproval. Congress having thus full power over the subject, and given its assent, there is no ground for the jurisdiction of the courts. *Chavez v. Luna*, 183.

2. ID.—BILL TO RESTRAIN LEVY AND COLLECTION OF TAXES—DEMURRER—FRAUD—EQUITY.—On a bill in equity, brought by complainant, a taxpayer and resident of Santa Fe county, charging that the county commissioners of said county issued and sold fifty warrants, with interest coupons attached, after the passage of the act of congress of July 30, 1886, limiting the amount of indebtedness which may be contracted by any county in a territory, and antedated them, that it might appear they had been issued on the first day of July, 1886; that, at the time of the actual issue of said warrants, said county was indebted in a sum exceeding in amount four per cent of the value of the taxable property of the county; and that the commissioners threatened to issue more warrants; that the complainant was threatened with a sale of his property to pay taxes to meet the interest on said warrants; and praying for an injunction to restrain defendants from levying a tax for such purpose; to which defendants filed a general demurrer, which was sustained.—Held: The facts charged in the bill, which are admitted by the demurrer, clearly show fraud, entitling complainant to equitable relief, although there may be some legal remedy provided; and the demurrer should have been overruled.—*Catron v. County Com'rs Santa Fe Co.*, 203.
3. ID.—OF NATIONAL BANKS—LIABILITY FOR TAXES ON CAPITAL STOCK—ERRONEOUS ASSESSMENT, INJUNCTION TO RESTRAIN COLLECTION OF TAXES ON—EQUITY.—The shares of capital stock in a national bank are not assessable in gross to the bank, but to the respective owners thereof, according to interest. But, if the bank lists such shares for taxation as its property, it will not be heard to complain of such erroneous assessment in a proceeding in equity to restrain the collection of taxes on such assessment.
4. ID.—In such case, where it appears that the property assessed is valued too high in comparison with similar property owned by others, such inequality alone does not afford ground for equitable relief. Before equity will interfere, relief must be sought in all the tribunals established by law to grant relief in such cases.—*Albuquerque Nat. Bank v. Zeiger*, 664.

TAXATION. Continued.

5. ID.—INJUNCTION—COMPILED LAWS, 1884, TITLE 28, CHAPTER 2—CONSTRUCTION OF STATUTES—JURISDICTION.—In a proceeding by bill in equity to enjoin the town of Albuquerque and the sheriff from the enforcement of a special assessment against the lot of complainant within the corporate limits of the town to raise money to pay the expenses incurred by the municipal authorities in curbing and improving the street in front of the lot, made under sections 1622, 1635, title 28, chapter 2, Compiled Laws—Held, on demurrer: It does not appear from the record, and the bill impliedly denies, that two thirds of the owners to be charged with the expense petitioned the board of trustees for the making of the improvement. For this reason, among others, section 1635 of the statute can have no application in this case. By section 1622, the city councils and boards of trustees in towns are authorized to establish and improve the streets, etc.; also "to provide for and regulate crosswalks, and curbs, and gutters," but the conferring of such powers does not grant to a city or town, either expressly or by necessary implication, the right to levy a special assessment, to pay the expenses of curbing a street, upon the lot abutting on the street where such curbing is done, nor upon the owner of such lot.
6. ID.—The complainant clearly had the right to resort to a court of equity. Such courts, when invoked, will entertain jurisdiction in all cases where taxes have been levied without authority of law.—Town of Albuquerque v. Zeiger, 674.

TEXAS CATTLE FEVER. See DAMAGES, 4.

TORTS. See CONTRACT; DAMAGES.

TRANSCRIPT. See ERROR, WRIT OF, 2.

TRESPASS ON CASE.

TRESPASS ON CASE—NEGLIGENCE—DAMAGES—RESPONDEAT SUPERIOR.

Where gunpowder is consigned to be sold on commission, the relation between consignor and consignee is not that of master and servant, but simply of consignor and factor or consignee for the purpose of selling the goods; and where such factor or consignee has the exclusive management and control of the storage of the goods as such, of which the consignor has no knowledge, and with which has nothing to do, the doctrine of respondeat superior does not apply; and the consignor is not liable, in an action of trespass on the case, for damages, resulting from an explosion of the gunpowder so consigned and stored.—Abrahams v. California Powder Works, 479.

TRIAL. See CONTRACTS, 6, 7, 8, 9; COUNTIES, 2; CRIMINAL LAW 7, 9; DAMAGES, 7; MINES AND MINING, 5.

VACATION, JURISDICTION OF COURTS IN. See HABEAS CORPUS, 3.

VARIANCE. FOR VARIANCE BETWEEN JUDGMENT AND EXECUTION, see SHERIFF, 1. FOR VARIANCE BETWEEN INDICTMENT AND EVIDENCE, see CRIMINAL LAW, 5.

VENDOR'S LIEN.

1. VENDOR'S LIEN—EQUITY—REMEDY AT LAW—JURISDICTION.—In a proceeding, by bill in equity, for the enforcement of a vendor's lien, against an assignee of the property, purchasing with knowledge of the lien, an objection that the plaintiff has an adequate remedy at

VENDOR'S LIEN. Continued.

law on the contract with the original vendee, is not well founded, where it appears the latter is insolvent. A court of equity will remit a party to his remedy at law only when an equally efficient remedy exists there. A judgment which can not be collected at law can not be said to be equally as efficient a remedy as a decree establishing a lien upon property sufficient to satisfy the amount of the judgment.

2. ID.—EXPRESS RESERVATION, NOT NECESSARY TO CREATE LIEN—PRESUMPTION.—In such a proceeding it is not necessary to show an express reservation by the seller to create the vendor's lien; it will be presumed by a court of equity, as an incident to the transaction, in the absence of any facts showing an intention to exclude it. 2 Jones on Liens, sec. 1064.
3. ID.—CONTRACT OF SALE—CONSTRUCTION OF CONTRACT.—Where it is stipulated in a contract for the sale of an undivided interest in a mine, that the unpaid balance of purchase money shall be paid when the mine is sold, out of the proceeds of sale, the vendee to reimburse himself for any money necessarily expended by him for assessment purposes, out of the first money realized from the sale, the residue to go to the vendor until he shall receive the amount due him, the balance to be paid is a sum certain, for which a vendor's lien will exist.
4. ID.—ENFORCEMENT OF LIEN BY ASSIGNEE—PERSONAL JUDGMENT.—The lien of a vendor for purchase money may be enforced, in equity, by his assignee for value, either as against the original vendee, or against one who purchases from him with notice that the purchase money has not been paid. But it is error in such case to render a personal judgment against the assignee, where there is nothing in the bill or evidence to support such a judgment.—Bates v. Childers, 62.

VERDICT. See ATTACHMENT, 2; CRIMINAL LAW, 9; EJECTMENT, 4.

WAIVER. See DAMAGES 2; ELECTIONS, 1; LIEN OF LANDLORD, 2.

WILLS.

1. WILLS—SEC. 1823, COMPILED LAWS, N. M. 1884—COMMON LAW—STATUTES RELATING TO PROBATE COURTS, AND PROBATE OF WILLS—ACT, 1889.—By section 1823, Compiled Laws, 1884, adopting the common law in 1876 as the basis of jurisprudence for the territory, it was not intended thereby to repeal the statute laws, but only to adopt so much of the common law as did not conflict therewith. *Browning v. Est. of Browning*, 3 N. M. (Gil.) 675. The statute laws in relation to probate courts, and defining the manner in which wills should be probated in this territory, remained in force until modified by the act of 1889, and were the basis and authority of our probate courts.
2. ID.—PROBATE OF—CIVIL LAW, SCHMIDT'S LAWS OF SPAIN AND MEXICO, ART. 1019—KEARNEY CODE, SEC. 1365, COMPILED LAWS, N. M.—By the civil law, which was in force prior to the conquest, and which in many respects remained in force for many years after the treaty of cession, and also by chapter 15, of the laws by Pedro Murillo Velarde, relating to the probate of wills which were also in force before the cession, and which were continued in force by the Kearney Code, section 1365, Compiled Laws, no provision is made for notice, by publication, or otherwise, to heirs, or other interested parties, to be present at the probating of a will. Only the witnesses to the will are

WILLS. Continued.

to be summoned, and any person having possession of the will may present it for probate. Only one form of probate is prescribed to render it valid.

3. ID.—RE-PROBATE OF—LIMITATION OF ACTIONS AS TO INFANTS—SECS. 1869, 1881, COMPILED LAWS, N. M. 1884.—The statutes of the territory have fixed a time within which an infant must assert his rights after attaining his majority and unless he does so within the prescribed period he will be deemed to have waived them. The time prescribed is one year, except when real estate is involved, in which case the period is extended to three years. A proceeding by an infant heir to re-probate a will commenced four years after his becoming of age is, therefore, barred. Compiled Laws, 1884, secs. 1869, 1881.—*Bent v. Thompson*.
4. ID.—BILL IN EQUITY TO SET ASIDE SETTLEMENT OF EXECUTOR, ETC.—CONSTITUTIONALITY OF SECTION 562, COMPILED LAWS, NEW MEXICO, 1884—JURISDICTION OF SUPREME AND DISTRICT COURTS.—By section 1868 of the organic act, providing that "the supreme and the district courts, respectively, of any territory, shall possess chancery as well as common law jurisdiction," general jurisdiction is conferred on those courts over cases of administration, and section 562, Compiled Laws, 1884, in so far as it attempts to vest the probate courts with exclusive original jurisdiction in such cases, is in plain contravention of that act and void.
5. ID.—BEQUEST OF PERSONAL PROPERTY, CONSTRUCTION OF.—A clause in a will bequeathing to the wife of the testator "all articles of goods in my house, personal furniture, household furniture, and all that exists therein," includes a sum of money contained in an iron box and safe in the house, known to be there only by the testator himself, and not mentioned in the will.
6. ID.—EXECUTOR, FINAL SETTLEMENT OF—FRAUD.—When the executor of an estate fails to account in his inventory for any money or property in his possession belonging to the estate, and obtains a final settlement, by presenting to the court a receipt in full from the legatee of all claims against the estate, procured by improper influences, such receipt and settlement are void and may be set aside for fraud.
7. ID.—CODICIL, ATTESTATION OF.—Section 1380, Compiled Laws, 1884, requires that a will shall be attested by three or more witnesses. A like number is required to constitute a valid attestation of the codicil. *Jar. Wills*, sec. 93.—*Perea v. Barela*, 458.

WRITS. See ATTACHMENT. FOR CERTIORARI, see ADMINISTRATORS, 2, 3; ERROR, WRIT OF; HABEAS CORPUS. FOR INJUNCTION, see HABEAS CORPUS, 1; TAXATION, 5. FOR MANDAMUS, see ELECTIONS, 1; HABEAS CORPUS, 1. FOR REPLEVIN, see PRACTICE ON APPEAL.

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