Action by Lawrence B. Langley against John H. Simpson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Baxter & Fillins, for appellant. Clay B. Whitford and H. A. Lindsley, for appellee.

PER CURIAM. This suit was instituted by appellee, Lawrence B. Langley, against appellant, John H. Simpson, upon a promissory note executed by the latter to the former, under date of November 16, 1892, and payable 90 days thereafter. The note is for the sum of $2,500, with interest at 8 per cent. per annum. It is alleged that both principal and interest are due and unpaid. The defendant, in his answer, avers that the note was given in settlement of a commission for the sale of real estate, earned by plaintiff and defendant jointly; that, as a part of the consideration, the purchaser had executed to the defendant a note for $9,000, payable one year after date; that this amount represented the balance due upon the commission, out of which plaintiff was to receive $2,500; that, although the larger note was not, by its terms, to become due until one year after date, the maker verbally agreed with plaintiff and defendant to pay the same in a short time; and that the $2,500 note was executed and delivered with the understanding that it was only to be paid out of the proceeds of the $9,000 note. It is further averred that no part of the $9,000 note has been paid. A motion was interposed by plaintiff to strike out this answer for the following, among other, reasons: "Because the same is sham, frivolous, and filed for the purpose of delay only." In support of this motion, the affidavits of plaintiff and another were filed. After argument, the court sustained the motion, ordered the answer stricken from the files, and rendered judgment for plaintiff. To reverse this judgment, the cause is brought here by appeal.

The affidavits filed in support of the motion purport to set forth in detail the entire transaction between the plaintiff and defendant, which culminated in the execution of the $2,500 note in suit. These affidavits show an absolute liability upon the defendant to pay such note. In the one made by plaintiff, it is stated that the promissory note for $9,000 was then past due, and that, notwithstanding this fact, no attempt had been made to present the same for payment, but that the defendant had received satisfaction therefor, and had agreed to surrender up and deliver the note to the maker. The affidavits further show that, after the $2,500 note fell due, appellant confessed his liability thereon, and also that appellee, shortly before bringing suit, presented this note to the defendant for payment, and he then said, in the presence of a witness, that he had no defense, and promised to pay the note as soon as he could raise the money with which to do so. These affidavits certainly make a prima facie case against the truth of the answer, and are sufficient to call for some explanation on the part of the defendant. The defendant having failed to make any showing in support of the answer, the trial court was justified in sustaining the motion to strike out the plea as sham, and in rendering judgment for plaintiff. Patrick v. McManus, 14 Colo. 65, 23 Pac. 90; Dobson v. Hallowell (Minn.) 54 N. W. 939; Seidman v. Gelb (Com. Pl.) 11 N. Y. Supp. 705. The judgment of the district court will be affirmed. Affirmed.

(23 Colo. 65)

HEISKELL v. LANDRUM.

(Supreme Court of Colorado. June 29, 1896.)

ELECTIONS—BALLOTS—MARKINGS.

Under Australian Ballot Law 1891, p. 143, providing that when a cross is marked in ink against a party device, indicating a vote for the entire set of candidates, and also another cross in ink against one or more named in another list, such ballot shall only be invalid as to any officer so doubly marked, a ballot so marked cannot be counted for either candidate for the office so doubly marked.

Appeal from Morgan county court.

Election contest instituted by Tyler D. Heiskell against Thomas J. Landrum for the office of clerk and recorder of Morgan county. Judgment for defendant. Plaintiff appeals. Affirmed.

J. E. Garrigues and W. A. Hill, for appellant. A. C. Patton and D. J. Davies, for appellee.

HAYT, C. J. The election was held under what is commonly known as the "Australian Ballot Law" (Sess. Laws 1891, p. 143). There were three candidates for the office of clerk and recorder at this election, whose names were printed upon the official ballots, namely, Heiskell, Democrat; Landrum, People's party; and Richardson, Republican,—the rooster being the emblem of the Democratic party, the cottage home the emblem of the People's party, and the eagle the emblem of the Republican party. The official canvass gave Landrum a plurality of seven votes over Heiskell, these candidates being the two highest upon the list. Upon the canvass, Landrum was given a certificate of election, whereupon Heiskell instituted this contest. As a result of the trial in the court below, the plurality of Landrum was reduced by five; but, as the general result was not thereby changed, the court refused to cancel his certificate. So far as the assignments of error by appellant are concerned, there are but six votes in dispute upon this appeal. Of these, four are ballots marked, respectively, Exhibits 7, 8, 12, and 15. These ballots were not counted by the lower court, but ballots marked 11, 13, and 14 were counted for appellant, although the

same objection exists to the entire seven ballots. The counting of ballots marked Exhibits 11, 13, and 14, in favor of appellant, is assigned as cross error. The objection to all these ballots arises out of the following facts: Each of these ballots is marked by a cross in ink placed by the voter in the square opposite the Republican party's emblem, while in the list of the candidates following a cross is also placed upon each ballot opposite the name of Heiskell, the Democratic candidate for county clerk and recorder. Under our statute, a cross marked in ink against the device of an emblem of a party indicates a vote for the entire set of candidates for that party, while a cross opposite the name of an individual candidate indicates an intention to vote for that individual; so that the cross opposite the eagle upon the seven ballots under consideration indicates an intention on the part of the voters to vote the entire list of Republican nominees printed on the official ticket, while the cross opposite the name of Heiskell, the Democratic candidate, would, if standing alone, indicate an intention on the part of the voter to vote for that individual for the office of county clerk and recorder. Counsel agree that the principle governing these seven ballots is the same, and that all should be received, or all rejected. The claim of appellant is that there are two distinct methods of voting,—one general, and the other particular; the general method being by placing a cross opposite the emblem of the party of the voter's choice, and the particular method being by making a cross opposite the name of the favored candidates only. It is further contended that, if a voter has been so thoughtless or ignorant as to adopt both these methods, the particular should govern the general, and his ballot should be counted accordingly. Appellee contends that, where both methods of marking the vote are resorted to, one neutralizes the other. In other words, it is said that the voter, by placing a cross opposite the eagle, thereby signified an intention to vote for Richardson, the Republican candidate for clerk and recorder, while by placing a cross opposite the name of Heiskell he also voted for the nominee of the Democratic party for that office; hence it is argued that, the two votes being contradictory, one nullifies the other, and neither should be counted.

The statute provides, "Where a cross is marked in ink against a device indicating a vote for the entire set of candidates, and also another cross in ink against one or more names in another list, such ballot shall only be held invalid as to any office so doubly marked." It is true, as stated by appellant, that this court has held in a number of cases that where the intention of the voter can be ascertained the vote should be counted, but this intention can never be given effect against the positive provisions of the statute. As has been heretofore said by this court, the principal object of the rules for voting prescribed by the statute is to protect the voter, prevent fraud, and secure a fair count; but where the statute prescribes a form, and declares a compliance therewith essential in order to have the ballot counted, the statute must govern. The act says the ballot shall only be held invalid as to any office so doubly marked, but this is equivalent to a legislative declaration that as to any office so doubly marked the ballot shall not be counted. The language admits of no other construction. This particular provision of the statute did not apply in the case of Young v. Simpson, 21 Colo. 460, 42 Pac. 666, for the reason that no person on another list was there voted for; the double marking in that case consisting of a cross opposite the emblem of the People's party, and crosses opposite the names of certain candidates of that party. Ballots marked 7, 8, 12, and 15 were properly rejected, and the court should have likewise rejected ballots marked 11, 13, and 14. By counting the latter, appellant's vote was erroneously increased by three. It follows that three votes must be deducted from the number counted for him, thereby increasing appellee's plurality from two to five. There are only two other votes challenged by appellant's assignments of error, and, should both of these assignments be sustained, appellant would still be short of a plurality. As no possible disposition of the remaining assignments of error can overthrow the judgment of the county court, it will be affirmed without further comment. Affirmed.

(23 Colo. 60)

HASKELL v. DENVER TRAMWAY CO. et al.

(Supreme Court of Colorado. May 18, 1896.)

STREET RAILROADS—INJUNCTION AGAINST LAYING TRACKS—NUISANCE.

Street-railway companies own two lots in a city block, which front on the streets on opposite sides of the block, and are separated at the rear by an alley extending across the block at right angles to them. By an ordinance the companies were granted permission to build and operate double tracks through the block, over their lots and the streets bounding the block, so as to form a loop for their lines. *Held*, that the owner of a lot and hotel adjoining one of the companies' lots cannot maintain an action to enjoin the companies from constructing the tracks, on the ground that they will create an obstruction of his right of ingress to and egress from his hotel by way of the alley, street, and sidewalk crossed by such tracks, his remedy at law being adequate. Railroad Co. v. Domke, 17 Pac. 777, 11 Colo. 247, followed.

On Rehearing.

(June 20, 1896.)

The construction by a street-railway company, under municipal authority, of tracks on its own land, or the operation of a railway thereover under such authority, it is not per se a nuisance which will be enjoined at the instance of an adjoining property owner.

Error to district court, Arapahoe county.