that evidence to the effect that no bill had been presented by the physician for a long time would be relevant as bearing directly upon the issue involved. We refer to this point, not that we deem the refusal of the evidence offered prejudicial error, for, among other reasons, Shackelford admitted that he never made any demand of Dexter for his commission before bringing suit, and no evidence of such demand was before the jury; but, lest our silence might, in view of another trial, be taken as a sanction of this ruling of the court, it is proper at this time to express our disapproval of the same. The following, among other cases, are cited in favor of our ruling, particularly as to the first point discussed: Cross v. Kistler, 14 Colo. 571, 23 Pac. 903; Whart. Ev. § 21; Greenl. Ev. (14th Ed.) § 51 (a); Paddleford v. Cook, 74 Iowa, 433, 38 N. W. 137; Kenyon v. Kenyon, 72 Wis. 234, 39 N. W. 361; Thomp. Trials, § 386; Stevenson v. Stewart, 11 Pa. St. 307; Furnas v. Durgin, 119 Mass. 500; Houghton v. Clough, 30 Vt. 312; Bedell v. Foss, 50 Vt. 97; Luce v. Hoisington, 56 Vt. 436. When analyzed, the cases cited by appellees that this evidence is directed to an immaterial issue do not sustain the position assumed. Were it necessary, a distinction could easily be drawn between them and the case at bar. Neither is appellees' contention that this evidence is cumulative only, and hence its rejection harmless, sound. It was the only testimony of the character offered, and it was material.

The court instructed the jury that if they found for the plaintiffs, either under the express agreement or on the quantum meruit, in any amount, they should add interest thereto from the time the same became due, as to which the court told the jury there was no conflict, viz. December 31, 1889. This was error. We are unable to determine whether the jury found for the plaintiffs under the first or second cause of action. If under the second, the claim was for an unliquidated demand, and this court, under our former statute concerning interest, has held in the case of Railroad Co. v. Moynahan, 8 Colo. 56, 5 Pac. 811, that interest was not recoverable in such a case. Interest is a creature of the statute, and under our present statute relating to interest (Sess. Laws 1889, p. 206) there is nothing to change the rule laid down in the Moynahan Case, supra. Under all the authorities, even where interest is recoverable upon an unliquidated claim, it does not begin to run until the date of the demand. The beginning of the suit we do not deem equivalent to a demand in this case, and there is no pretense that demand for the commissions was made other than that alleged to be made as the result of the filing of the complaint. But, if the beginning of the suit is *equivalent to a demand*, interest should not run from the date the services were rendered, which was more than a year prior to the time of the demand. If the jury had found for the plaintiffs under the express contract, possibly the awarding of interest would not require a reversal of the case, as we might ascertain what part of the judgment was the sum found to be due for services rendered and what as interest; but considering the errors already discussed, which require a reversal of the case, we do not feel disposed to make the required calculation. For the foregoing reasons, the judgment in this case is reversed, and the cause remanded, with instructions to proceed further in accordance with this opinion. Reversed.

YOUNG v. SIMPSON.

(Supreme Court of Colorado. Oct. 21, 1895.)

ELECTIONS—BALLOTS—QUALIFICATION OF VOTERS.

1. Under a statute declaring that, when one desires to vote for all the nominees of a particular party, he may do so by placing a cross opposite the emblem of the party, but when he desires to vote a mixed ticket he shall place a cross opposite the names of the candidates for whom he elects to vote, a cross having been put opposite the emblem of a party, and one opposite the name of each of the candidates of such party, with certain exceptions, the ticket will not be counted for candidates of that party against whose names crosses are not put.

2. The statute providing merely that the voter shall place a cross opposite the names of each candidate of his choice, it is immaterial whether it is to the right or left of the name.

3. Where persons qualified by residence to vote in a certain precinct depart therefrom for the purpose merely of making proofs at a land office, they will not lose their right to vote in such precinct by detention therefrom by sickness.

4. Under a statute declaring that, if one desires to vote for all the nominees of a particular party, he may do so by placing a cross opposite the emblem of such party, in the appropriate space, it is immaterial that the cross is slightly outside and to the right of the space prepared therefor.

Appeal from Logan county court.

Proceeding by John H. Simpson against Nathaniel Young to contest an election. Judgment for plaintiff. Defendant appeals. Reversed.

At the general election in 1894, plaintiff in error, Nathaniel Young, and defendant in error, John H. Simpson, were opposing candidates for the office of county commissioner of Logan county. The canvassing board of the county found that plaintiff in error had received 477 votes for this office, and defendant in error, Simpson, 476, and declared the former duly elected by a majority of one vote. Defendant in error then instituted this contest, averring that in a certain precinct of Logan county the judges had failed to count for him two votes which were duly cast for him. In the answer of plaintiff in error, it is admitted that the two ballots referred to in the complaint were cast for defendant in error, and should have been counted for him. Plaintiff in error, however, filed a counter statement setting up several grounds of contest. This new matter

in the answer is denied by the replication. Upon these issues a trial was had before the county judge, resulting in a finding that defendant in error had received 477 votes, and plaintiff in error 476, and judgment was accordingly rendered in favor of defendant in error. From this judgment an appeal was prosecuted, under section 17, p. 198, Act 1885. In the opinion of the court, the review should be had as upon a writ of error, and the cause has been accordingly redocketed as provided by the act of 1891.

S. A. Burke and W. L. Hays, for appellant. W. E. Crissman and H. D. Hinkley, for appellee.

HAYT, C. J. (after stating the facts). The principal object of the rules of procedure prescribed by statute for conducting an election is to protect the voter in his constitutional right to vote in secret; to prevent fraud in balloting and secure a fair count. Such rules are usually held to be directory, as distinguished from mandatory; and unless the statute declares that a strict compliance is essential, in order to have the ballot counted, the courts will not undertake to disfranchise any voter by rejecting his ballot, where his choice can be gathered from the ballot when viewed in the light of the circumstances surrounding the election. Kellogg v. Hickman, 12 Colo. 256, 21 Pac. 325; Allen v. Glynn, 17 Colo. 338, 29 Pac. 670; People v. District Court, 18 Colo. 26, 31 Pac. 339; State v. Russell (Neb.) 51 N. W. 465; Paine, Elect. § 498. Our statute declares, in section 29, that "if a voter marks in ink more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the choice of any voter for any office to be filled, his ballot shall not be counted for such office." Act 1891, p. 160. Ergo, if the choice of the voter can be determined, the vote must be counted. In the light of these general principles and the statute, it is not difficult to dispose of the assignments of error in this case.

The first of these brings up for review the refusal of the county court to count for plaintiff in error, Young, a certain ballot cast in precinct No. 6, marked "Exhibit C." On this ballot the cross appears opposite the emblem of the People's party. Similar crosses are also to be found in the appropriate columns opposite the names of each individual candidate of the People's party, except that the ballot is not so marked opposite the name of plaintiff in error, Young, nor opposite the name of the candidates for precinct officers. The statute provides that, when any elector desires to vote for all the nominees of a particular party, he may do so by placing a cross opposite the emblem of such party, in the appropriate space, but when any elector desires to vote a mixed ticket, partly for the candidates of one party and partly for those of another, he should place a cross opposite the names of the candidates for whom he elects to vote. In this particular instance it will be noticed that the voter has attempted to adopt both methods. He has placed a cross opposite the emblem of the People's party, and also one opposite the names of all the individual candidates of such party, except those mentioned. If the voter had only placed a cross in the appropriate space opposite the emblem of his party, this, under the statute, would have shown conclusively an intention to vote for all the candidates of such party; but having undertaken to particularize, by putting a cross opposite the names of certain candidates upon the ticket, by a familiar principle of the law, the particular designation of the candidates for whom the voter intended to vote must be held to control the general designation. Consequently the county judge correctly decided that plaintiff in error, Young, was not entitled to this vote.

The second assignment of error has reference to ballot marked "Exhibit G." Upon this ballot there is no mark opposite any emblem, but the ballot is marked with a cross within the margin of the line to the left, and immediately before the names. The statute does not designate where the cross shall be placed,—whether to the right or to the left of the candidate's name. It only provides that the voter shall prepare his ballot by placing a cross opposite the names of each candidate of his choice. Undoubtedly the more appropriate place on the form before us is to the right of the names of the candidates, and this is the customary and usual practice in such cases. We think, however, that the intention of the voter to vote for the candidate of the People's party is clearly manifest by the marks upon his ticket, and it was error for the county judge to reject ballot marked "Exhibit G."

The third and fourth assignments of error relate to the reception and counting of the ballots of N. T. Fisk and his wife. These ballots were cast in precinct No. 3 of Logan county. From the evidence introduced it appears that the Fisks, husband and wife, resided on their homestead near Iliff, in precinct No. 6; that they had resided within the county and precinct prior to October 27, 1894,—more than the time required to qualify voters under the statute. On that day they made final proof of their homestead entry, going to the United States land office at Sterling for that purpose; not wishing, however, to change their residence by so doing, but intending to return to their homestead in a few days, and remain thereon until after the election. They were, however, detained in Sterling by sickness, but returned in time to vote in the precinct in which their homestead was situated. Their right to vote in such precinct, we think, is clear.

This disposes of all the assignments of error that have been argued by plaintiff in er-

ror. There are, however, two assignments of cross error on the part of defendant in error, which will be briefly considered. The first relates to the action of the trial judge in rejecting as illegal the ballot of one E. E. Beeman, and in deducting this vote from the number cast for John H. Simpson. There is no error in this ruling. The vote shows conclusively that Beeman had not maintained a residence in Logan county for a sufficient length of time to become a legal voter under the statute.

The second assignment of cross error has reference to the action of the trial court in counting the ballot marked "Exhibit F." On this ballot the voter has designated his choice by placing a cross, not in the space prepared for that purpose but $^{15}/_{16}$ of an inch to the right of the square opposite the Cottage Home, the emblem of the People's party. We think the intent of the voter is clearly manifest from the manner in which this ticket is marked, and that the county court, in counting this ballot, committed no error.

The only error intervening at the trial was in rejecting the ballot marked "Exhibit G," hereinbefore discussed. This ballot should have been counted for defendant in error, thereby increasing his total vote by 1, making the result 477, instead of 476. Correcting this error, and we find that neither candidate received a majority of the legal ballots cast. There being a tie vote, the right to the office must be settled in the manner provided by statute. The judgment of the county court is reversed, and the cause remanded. Reversed.

SHERER v. BROWN.

(Supreme Court of Colorado. Nov. 6, 1895.)

WILL—REVOCATION BY MARRIAGE.

The marriage of a testator revokes his will. 38 Pac. 427, affirmed.

Appeal from court of appeals.

Contest of will between Alexander V. Sherer, proponent, and Catherine M. Brown, contestant. From a judgment of the court of appeals (38 Pac. 427) reversing a judgment admitting the will to probate, proponent appeals. Affirmed.

I. E. Barnum and V. A. Elliott, for appellant. E. P. Harmon and T. M. Patterson, for appellee.

PER CURIAM. This cause comes here by appeal from a judgment of the court of appeals. In the opinion of that court, as prepared by Judge Bissell, the decision of the cause is based upon the conclusion that the marriage of a testator operates to revoke any antecedent will. See Brown v. Sherer, 38 Pac. 427, 5 Colo. App. ——. We regard the opinion of the learned judge as unanswerable, and for the reasons therein given the judgment is affirmed. Affirmed.

CALLIOPE MIN. CO. v. HERZINGER.

(Supreme Court of Colorado. Nov. 6, 1895.)

WRITTEN CONTRACT—DISCHARGE—PAROL EVIDENCE.

It may be shown by parol that a written contract was discharged by a new, additional, or substituted agreement.

Error to district court, Pueblo county.

Action by Agnes G. Herzinger, administratrix of the estate of Adam G. Herzinger, deceased, against the Calliope Mining Company. From a judgment for plaintiff, defendant brings error. Reversed.

The defendant in error, as administratrix of the estate of Adam G. Herzinger, deceased, instituted this action to recover the sum of $8,750, alleged to have accrued to her intestate during his lifetime as dividends declared by said plaintiff in error upon 125,000 shares of its capital stock, belonging to him, from the month of September, 1889, to the month of March, 1890, inclusive. To this demand defendant answered—First, by a general denial; and, second, that said Herzinger, on October 9, 1889, agreed to sell, and did sell, to Otto Mears, the said 125,000 shares of stock, as evidenced by the following contract: "Memorandum of agreement, made and entered into this 9th day of October, 1889, by and between Adam G. Herzinger, of the county of Ouray, and state of Colorado, party of the first part, and Otto Mears, of the city of Denver, in said state, party of the second part, witnesseth, that the said party of the first part hereby agrees to sell, and does sell, to the party of the second part, 125,000 shares of stock in the Calliope Mining Company, for which said party of the second part hereby agrees to pay to the said party of the first part at the agreed price of 30 cents per share, in payments as follows, to wit: Ten thousand dollars on or before the 1st day of March, 1890, $10,000 on or before the 1st day of April, 1890, $10,000 on or before the 1st day of May, 1890, and the remainder, $7,500, on or before the 1st day of June, 1890. And it is agreed and understood that upon the payment by said party of the second part to said party of the first part of each installment as herein provided, the secretary of said company shall issue and deliver to said party of the second part stock equivalent therefor at said agreed price of 30 cents per share; and it is further agreed that if the party of the second part shall at any time before the 1st day of June, 1890, wish to pay the whole of said sum of $37,500, and does so pay the same to the party of the first part, then said secretary is hereby authorized to issue to the party of the second part all of said 125,000 shares; and it is further agreed that any failure of the party of the second part to make any one of said payments within ten days after the date fixed therefor, as herein provided, shall work a forfeiture of this contract, and all stock not paid for shall then become the property of the party of the first part as though this agreement had not been made; and it is