party of the second part his rights, privileges, and benefits which he * * * now holds" constitutes the only conveyance contemplated. If Brier had any rights, benefits, or privileges at the time, it was only the personal permission of Day to use the unpatented process, and an agreement to assign an interest in the patent in the event of its issue, covering the state of Colorado. If this language be said to refer to a government patent, then the assignment, to be valid, must be made and recorded as provided by the statute. The contract to sell, in question, clearly required a valid conveyance, and a *valid* conveyance in such case must necessarily be in writing. There can be no valid existing conveyance until it is recorded in the patent office. It is therefore the clear duty, and in this case a necessary prerequisite to the bringing of the suit, if the action might otherwise be maintained, that the plaintiff should have tendered such a conveyance.

[3] The defendant cannot be required to perform his part, and the plaintiff be permitted to perform or not, at his own will. In Gilpin v. Watts, 1 Colo. 479, it was said (pages 482, 483): "It is true that the bill contains an offer to produce, subject to the order of the court, the conveyance which, it is averred, complainant had before tendered to the defendant; but there is nothing to show that such conveyance was, in fact, ever brought into court or delivered to any officer of court; and, the original cause being determined by the final decree, it appears to us doubtful whether the defendant has any remedy to compel its production. The decree ought to be a final determination of the whole controversy, so far as the case-made warrants. The purchaser ought not to be required to pay the purchase money, and then resort to his motion or bill of review, or other process, if there be any effectual to this end, to secure a conveyance."

[4] But the contract at best is a mere option. It contains no express or implied agreement on the part of Strauss to buy, nor to pay for, the patent right.

[5] To make a contract of sale enforceable, there must be mutual obligations, and in such a case the covenant to convey and the covenant to pay are dependent obligations; each is a condition precedent to the other. Hoagland v. Murray, 53 Colo. 50, 123 Pac. 664.

In this case, and for these reasons, the plaintiff is not entitled to recover under the agreement as originally made or as amended. The record discloses no equities in favor of the defendant in error. Indeed, the transaction upon his part may well be characterized in harsher terms. The judgment upon the two items under the second and third causes of action was upon different and independent transactions.

The judgment is reversed, with instructions to enter a judgment in favor of the plaintiff below in the sum of $63, the amount found to be due for merchandise and rent, and to tax the costs of the proceeding to the plaintiff.

MUSSER, C. J., and GARRIGUES, J., concurring.

BROMLEY v. HALLOCK.

(Supreme Court of Colorado. April 6, 1914.)

ELECTIONS (§ 180*)—BALLOTS—EXPRESSION OF CHOICE.

Under Rev. St. 1908, § 2236, providing that when the name of a party is written in the blank space at the head of a ballot, in the form "I hereby vote a straight * * * ticket, except where I have marked opposite the name of some other candidate," it shall be counted for all the nominees on said ticket, except for any office where a mark has been made opposite the name of a candidate of another party therefor, there being on the ballot the tickets of the "Democratic," "Republican," "Progressive," "Roosevelt," and "Bull Moose" parties, a ballot, on which in said blank space is written either "Progressive, Bull Moose," "Progressive, Roosevelt, Bull Moose," "Progressive, Roosevelt," or "Roosevelt, Progressive," is to be counted for a candidate on the "Progressive" ticket for an office for which there is no candidate on the "Roosevelt" or "Bull Moose" tickets; there being no mark against the name of any other candidate for the office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151–155, 157; Dec. Dig. § 180.*]

En Banc. Error to Chaffee County Court; Joseph Newitt, Judge.

Election contest by J. W. Hallock against Frederick A. Bromley. Judgment for contestant, and contestee brings error. Reversed and remanded, with instructions.

Gilbert A. Walker, of Buena Vista, and George D. Williams, of Salida, for plaintiff in error. Wallace Schoolfield, of Salida, for defendant in error.

HILL, J. At the November, 1912, election, the parties to this action were rival candidates for the office of county clerk and recorder of Chaffee county. Mr. Hallock was the regular Democratic nominee. Mr. Bromley was the regular nominee of the Republican party, also of the Progressive party. On the face of the returns Mr. Bromley was elected by a majority of 13. Mr. Hallock instituted this contest. Issues were joined, and upon final trial a decree was entered awarding the office to Mr. Hallock. The court, on recount, declared his majority to be 26. Mr. Bromley prosecutes this writ of error.

In addition to the Democratic, Republican, and Progressive parties, who had candidates for presidential electors, United States senators, congressmen, state, district and local county offices, except the Progressive party had no candidate for representative for Chaffee county, or for county treasurer, county judge, or county surveyor, the ballots disclose that there were also thereon the nom-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

inees of what was called the Roosevelt and the Bull Moose parties, each of which had candidates for presidential electors, United States senators, congressmen, and state offices, but which parties had no district or local county candidates upon the ballot, also that the Bull Moose had no candidate for Congress for the second district. Otherwise, the candidates of the Bull Moose party, as well as those upon the Roosevelt ticket for United States senator, congressmen, and state offices, were identical with the candidates for those offices on the Progressive ticket, so that in so far as the Roosevelt and Bull Moose parties had candidates for any office, they were identical with each other, and were also identical with the candidates of the Progressive party for such offices. Stated differently, every candidate for any office upon the Bull Moose ticket was also a candidate for the same office on the Roosevelt and Progressive party tickets, and every Roosevelt party candidate on the ticket was also a candidate for the same office on the Bull Moose and Progressive tickets, excepting only that one McLain was the nominee of the Progressive and Roosevelt party for congressman from the second district, but was not the nominee of the Bull Moose party for such office; it having no candidate for Congress for the second district.

Upon recount the court found, which finding is sustained by the evidence, that in the blank space provided for the writing in of the name of a political party, there were 9 ballots which had the words written in this space "Progressive, Bull Moose," 15 with the words "Progressive, Roosevelt, Bull Moose," 7 "Progressive, Roosevelt," and 2 "Roosevelt, Progressive," and that none of these ballots had any cross mark, defective or otherwise, opposite or near the name of any candidate for the office of county clerk and recorder. Upon this finding the court held that these ballots did not disclose any intendment by either or any of the electors casting them to vote for the contestee, and declined to count them for him. In this the trial court erred.

Mr. Bromley was the candidate upon the Progressive ticket. Wherever there were any candidates upon the Bull Moose or Roosevelt tickets for any office, they were the same as on the Progressive; the only difference being that while the Progressive party had candidates for all national and state, and nearly all district and local county offices, the other two did not have any candidates for district or local county offices, or the Bull Moose a candidate for congressman in the second district.

Section 2236, Revised Statutes 1908, in part reads: "That across the head of the ballot, and just above the lists of nominations, shall be printed the words: 'I hereby vote a straight * * * ticket, except where I have marked opposite the name of some other candidate,' and any voter desiring to vote a straight ticket may write within the blank space above provided for, the name of the party whose ticket he may wish to vote, and any ballot so cast shall be counted for all the nominees upon said ticket, except when the voter has marked opposite the name or names of any individual candidate of some other party, which individual marks opposite such individual candidate shall count for them, and shall not be counted for the candidates for the same office upon the ticket whose party name the voter has so filled in the blank at the head of the ticket."

Section 2265 in part reads: "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. Provided, however, a defective or an incomplete cross marked on any ballot in ink, in a proper place, shall be counted if there be no other mark or cross in ink on such ballot indicating an intention to vote for some person or persons or set of nominations, other than those indicated by the first mentioned defective cross or mark, and 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."

Section 2266 following reads: "If an imperfect cross or mark be found near the name of a candidate in ink, which mark appears to have been made with intent to designate the candidate so marked as the one voted for, such ballot shall not be rejected, if the intent of the voter to designate the person for whom he intended to vote can be reasonably gathered therefrom; provided, that if marks placed opposite the names of individual candidates shall work to a complete exclusion of the candidates of the party, the designation of which has been written in at the top of the ballot, and the intention of the voter is clear, it shall not be necessary to strike out the names of the candidates against whom it is desired to vote."

These sections were all in force at the time of this election and contain the only express provisions in our election laws as to what constitutes a defective ballot so that the same shall not be counted. They do not include one like those under consideration. 'Tis true that an elector, in order to properly express his choice, must do so substantially in the manner provided by statute. Young v. Simpson, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254; Heiskell v. Landrum, 23 Colo. 65, 46 Pac. 120; Rhode v. Steinmetz, 25 Colo. 308, 55 Pac. 814; Wiley v. McDowell, 133 Pac. 757; Whittam v. Zahorik, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317; Vallier v. Brakke, 7 S. D. 343, 64 N. W. 180. It appears to us that this requirement was complied with by the electors casting these ballots. The plaintiff in error was the candidate upon

the Progressive ticket; he was also upon the Republican ticket. When these voters wrote in the word "Progressive," they indicated their intention to vote for all the candidates upon that ticket, unless they performed some act otherwise which tended to defeat or neutralize such intention. The way provided by statute to have annulled this expressed intention, as against any candidate for whom they did not desire to vote, was to make a cross mark opposite the name of his opponent, and if two or more were running for offices of the same name, to run a line through the name of the party for whom they did not desire to vote; neither was done. Other methods which might have this effect need not be considered; they are not involved. The fact that the electors in some instances followed and in others preceded Mr. Bromley's party name with the insertion of the words "Bull Moose" or "Roosevelt," or either or both of them, did not, under the circumstances above disclosed, in any manner tend to contradict or neutralize the intention of the voter in voting for Mr. Bromley. This is readily apparent for the reason, among others, that if these ballots were counted for all the candidates whose party names were written in at the top, it would not disclose any intention to vote for any one not on the Progressive ticket, as there was no one on either of the other tickets who was not on the Progressive. The voter having substantially complied with the law, and his intention thus given not being in conflict with any other expression to be gathered from the ballot, it must be given effect as expressed; and, when thus applied, Mr. Bromley is entitled to these votes, as he was the only candidate for this office on any of these tickets, and the only one for whom they could have been intended.

In Nicholls v. Barrick, 27 Colo. 432, 62 Pac. 202, Mr. Nicholls was the candidate of the Republican party for sheriff, and Mr. Barrick was the candidate of the People's, Silver Republican, Teller Silver Republican, Democratic, and Populist parties. It was shown that these last-named several political parties had united upon the same ticket, each filling the ticket under its distinctive party name; that the ticket was generally spoken of by newspapers and the people as the fusion ticket, and that the only opposition ticket was the Republican. On 43 ballots each voter had written in the blank space provided the word "Fusion." When thus filled out they read, "I hereby vote a straight Fusion ticket." It was held that these ballots clearly showed the intent of the voter, and should be counted for the candidate on the combined tickets of these several parties; that they were substantially marked as the law requires sufficient to justify their being counted. The principles there announced are specially applicable to the facts here. The electors casting these ballots come much nearer in complying literally with the statute than those whose ballots were under consideration in the former case, and their intention, not having been neutralized in any respect, when applied to this office, must be given effect as expressed.

The case of Wiley v. McDowell, supra, does not support the position of the defendant in error; to the contrary, its record discloses that McDowell was the candidate upon the Republican and Progressive tickets only, and that he was given the benefit of all ballots which had either of these party names written in at the head. He also contended that there should be counted for him the ballots which had the words "Bull Moose" or "Roosevelt" only written in at the head of the ticket, although he was not on either of such tickets, but relied solely upon evidence aliunde to establish that they were intended for him. This court refused to adopt his theory for the reasons stated in the opinion.

When those 33 ballots are added to Mr. Bromley's total, it gives him a majority, even though all other contentions were decided against him; this makes it unnecessary to consider them.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action at the costs of the defendant in error.

Reversed, with instructions.

SCOTT, J., not participating.

ERBAUGH v. PEOPLE.

(Supreme Court of Colorado. April 6, 1914.)

1. CRIMINAL LAW (§ 1150*) — APPEAL — REVIEW — REFUSAL OF CHANGE OF VENUE — PREJUDICE OF INHABITANTS.

The question of prejudice of the inhabitants, on which change of venue is asked, being triable to the court, and resting in its discretion, its denial will not be disturbed, except for abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044; Dec. Dig. § 1150.*]

2. CRIMINAL LAW (§ 137*)—CHANGE OF VENUE — PREJUDICE OF JUDGE — HEARING AND DETERMINATION.

The questions of law, on application of a defendant in a criminal case for change of venue for prejudice of the judge, going to the sufficiency of the complaint against the judge and the affidavits in support thereof, in form and substance, the judge has jurisdiction to hear and determine; but, these being sufficient, he cannot try the question of fact, of his prejudice, but has jurisdiction only to grant the change; Rev. St. 1908, §§ 6963, 6964, relative thereto, being mandatory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 137.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTION—WAIVER OF OBJECTIONS.

Objections that the petition for change of venue was not filed till the morning of the trial, and that the district attorney was not served with notice, will be presumed waived; the record, showing that he appeared and participated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes