deputy district attorney be stopped or rebuked, and not until at a certain point later in his argument was objection made, whereupon the court stopped the prosecuting officer, and cautioned him, as follows: "Mr. Haines, you will please desist from any further reference to public sentiment in this case, as we are trying it upon the facts and the evidence, which alone must control the guilt or innocence of the accused. You have made one or two statements here about the defendant of which I do not approve, and I will now call your attention to them: Such statements as referring to the defendant as a 'beast,' 'brute,' or 'thing,' or using other harsh names, are improper, and, if I thought the jury would be influenced by such language, I would give them pretty strong instructions regarding it. This matter of appealing to public sentiment is often indulged in by the district attorney, and is not proper, and case after case has been reversed on these grounds, as the district attorney knows full well, and the judge permitting such argument has often been criticised by the higher courts, and new trials ordered. I therefore caution you not to use this language in the way you have been proceeding, and I desire to say to the jury that I hope this is not a matter that will sway your minds." While this rebuke and caution might have been more emphatic and pronounced, we think, in the circumstances of the case, it was sufficient to remove from the minds of the jury any improper impression which such language was calculated to produce. Moreover, counsel for defendant seems to have been satisfied with it, and made no request of the court then, or at any other time, further to instruct the jury to disregard it.

We find nowhere in the record that any specific objection was interposed to the comment said to have been made by the deputy district attorney upon defendant's failure to prove good character, and we look in vain to the affidavit and to the record to see what such comment was. In the absence of a showing to the contrary, we cannot say that it was objectionable or injurious. It might have been pertinent to the discussion in reply to something said by defendant's counsel in their addresses to the jury, or entirely harmless, or favorable, to defendant. We cannot assume that it was improper, particularly as the trial judge has said that defendant's counsel were absent from the courtroom, and his attention was not called to it at the time, or an opportunity then given to correct the statements, or rebuke counsel for making them, and that when objection was made by defendant a prompt admonition was given, and the jury warned not to be influenced by them. It must not be inferred that we believe that learned counsel for defendant purposely remained silent, and interposed no appropriate or seasonable objection to the misconduct complained of, with a view to springing the objection in case of an unfavorable verdict; but we are quite clear that he should not have contented himself merely by engaging with opposing counsel in an unequal vocal contest. He should rather have addressed himself to the court for appropriate relief, and not have remained satisfied with his unsuccessful attempt to drown the voice of the prosecutor. The court did not refuse to rule when appealed to; on the contrary, in its opinion overruling the motion for a new trial the court said that the only time objection was made the deputy district attorney was stopped in his speech, and the admonition and rebuke given to which reference has been made; and thereafter there was no repetition by him of any act of impropriety, or any further objection made by defendant's counsel.

The attorney general argues that where, as here, an examination of the record will show that no other verdict ought to have been given, it should not be set aside, though impropriety of conduct by an attorney apparently contributes thereto. Whether such a rule should be enforced depends largely upon the facts of each particular case. Had not the court, when called upon, told the jury of this impropriety, and, so far as the same was within its power, removed any unfavorable impression that such conduct naturally creates, we would set aside the judgment. Where it is apparent that the verdict is, or might have been, influenced by such misconduct of counsel, and its influence was not counteracted by appropriate action of the trial court, the verdict ought not to stand. We refuse to disturb it, not merely because the evidence shows that no other result could have been reached without misbehavior of the jury, but because we are satisfied that the trial court, in the peculiar circumstances which the record sets forth, by its caution to the jury and its rebuke of counsel, removed from the minds of the jury any prejudice or undue influence that such conduct might otherwise have produced. And if other or further action of that tribunal might well have been had, and was omitted, defendant is not in a position to complain.

The judgment should, therefore, be affirmed. Affirmed.

DOLL v. STEWART.

(Supreme Court of Colorado. Oct. 6, 1902.)

CHANGE OF VENUE—PREJUDICE OF JUDGE—PREJUDICE OF INHABITANTS—CONTINUANCE—ABSENCE OF WITNESSES—DISCRETION—ABUSE—REVIEW—PUBLIC LANDS—SALE—VALIDITY—PURCHASER WITH NOTICE—EVIDENCE.

1. An application for a change of venue is within the discretion of the trial judge, and his ruling thereon is not reviewable in the absence of manifest abuse of discretion.

2. It is not ground for change of venue for prejudice of a judge that he tried the case once before without a jury, and rendered a judgment against the party who applies for the change of venue.

3. Where an application for a change of venue on the ground of prejudice of the in-

habitants of the county was supported by the affidavit of the plaintiff and six other residents of the county, showing that the case had been discussed, and that the defendant was a man of great influence in the county, but in opposition affidavits of ten citizens were filed, stating that they never heard of the controversy, and it was reasonable to suppose that there were many persons competent to serve as jurors, an order denying the application was not an abuse of discretion of the trial judge.

4. An application for a continuance on the ground of absence of material witnesses is addressed to the discretion of the court.

5. Where an application for a continuance was made on the ground of absence of material witnesses, and one of the witnesses had not been a witness on a prior trial, and efforts to discover his whereabouts had been unavailing, and there was no statement in the affidavit for continuance that, if a continuance was granted, the other witnesses would be present at the next term of court, there was no abuse of discretion in denying the application.

6. An entryman on public lands entered and made final proof in November, 1896, and in January, 1897, contracted with defendant to sell the land to him, and obtained his patent thereto April 10, 1897, and immediately after this agreement was made the entryman left the land, and the purchaser entered, and continued in sole possession thereof. *Held*, that such contract was not in violation of the laws of the United States prohibiting the entry of lands by one person for the benefit of another.

7. Defendant contracted to purchase land from the entryman, and immediately thereafter the entryman left the land, and defendant entered into sole possession and made permanent improvements thereon. The entryman thereafter went to work on plaintiff's ranch, and subsequently deeded the property to plaintiff. Plaintiff and defendant lived in the same neighborhood, and plaintiff knew of defendant's possession and improvement of the land, and there was evidence that defendant, having heard that the entryman intended to break his contract with him, sent word to plaintiff that he would kill him if he purchased the land. *Held*, that plaintiff purchased with notice of defendant's claim, and was not entitled to recover the land.

Appeal from district court, Eagle county.

Action by Frank Doll against Jack Stewart to recover lands. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Chas. K. Phillipps, for appellant. L. R. Thomas and T. A. Dickson, for appellee.

STEELE, J. Suit was brought by the appellant (plaintiff below) to recover the possession of certain lands claimed by him, and which he alleges the defendant, without right or title, did enter and oust and eject him from, and for damages in the sum of $1,500, and for the rents and profits of said land while he has been excluded therefrom. The defendant, in his answer, admitted that the plaintiff had purchased the property from R. M. Southwick on the 10th of October, 1897, and that the patent of the United States had issued to said Southwick for said lands on the 10th of April, and was duly recorded on the 1st of July, 1897. He denies that he did enter into or upon said lands, or any part thereof, and oust or eject the plaintiff therefrom; denies that he has withheld or still withholds the possession of said lands from the plaintiff; and for a cross-complaint and counterclaim alleges that in November, 1896, said Southwick made final proof, and duly entered and paid for said land in the United States land office at Glenwood Springs; and, further, that in the month of January, 1897, he (the defendant) made and entered into a contract with the said Southwick to purchase the said lands for the sum of $500, whereby the said Southwick sold the said lands to him for the said sum, and thereupon said defendant, under and pursuant to said contract and agreement, entered into the possession and occupancy of said lands, and has expended thereon in labor and improvements large sums of money; that the said defendant and his family have resided on said lands ever since January, 1897, and defendant has been in the actual, open, and notorious possession of said lands, and has made permanent, lasting, and valuable improvements thereon, under and pursuant to said contract; that the plaintiff well knew all of said facts at the time and long prior to his pretended purchase of said lands from said Southwick; that prior to the 10th of October, 1897, the said defendant demanded from said Southwick a deed conveying said lands to him, but that said Southwick failed and refused to make said deed; that the said plaintiff conspired and confederated with the said Southwick to cheat and defraud the defendant out of his rights in said premises, and to deprive him thereof, and did procure from said Southwick a conveyance of said lands, but took said deed subject to the rights and equitable title of the defendant; and praying that the equitable title to the land aforesaid be adjudged and decreed to be in the defendant, and that he is entitled to a conveyance of the legal title now standing in the name of the plaintiff, and that the plaintiff be decreed to make, execute, and deliver to the defendant a good and sufficient deed of said premises. The replication of the plaintiff denies the allegations of new matter, and each and every allegation contained in the cross-complaint and counterclaim. On April 4, 1899, the cause was tried by the court, and judgment was rendered in favor of the defendant. On the 25th of April, 1899, plaintiff paid all costs, and moved for a new trial under section 272 of the Code. On June 5, 1899, the motion for new trial was granted. On July 22, 1899, plaintiff filed his motion for change of venue, supported by affidavits. Counter affidavits were filed on the 17th of October, 1899. The motion for change of venue was heard before the judge of the district court at chambers in Leadville, and was denied. On April 9, 1900, the cause was set for trial for the 4th of June, 1900. On the 4th of June, 1900, motion for a continuance, supported by affidavits, was made by the plaintiff, and upon

¶ 4. See Continuance, vol. 10, Cent. Dig. §§ 17, 58.

said day the motion was denied, and the cause was tried to the court, a jury being expressly waived by both the said parties, and the court rendered judgment in favor of the defendant. To the refusal of the court to change the venue of the cause, to the order of the court overruling the motion for a continuance, and to the judgment of the court, the plaintiff excepted.

The cause is brought here upon appeal by the plaintiff, and he assigns as error the overruling of the motion for change of venue, the overruling of the motion for continuance, and the rendering of judgment in favor of the defendant because it is against the law and against the evidence, and should have been rendered in favor of the plaintiff. The motion for change of venue is based upon the grounds: First, that the plaintiff fears he will not have and receive a fair trial in the district court of Eagle county, on account of the prejudice of the judge of said court; second, because the defendant has an undue influence over the minds of the inhabitants of said Eagle county; and, third, because the inhabitants of said Eagle county are prejudiced against the plaintiff, so that he cannot and does not expect a fair trial of this case within said Eagle county. This motion was supported by the affidavit of the plaintiff, in which he sets forth that the judge of said court is prejudiced against him for the reason that the cause had already been once tried and determined on the merits before the judge of said court without a jury, that upon such trial a direct and very positive conflict of testimony occurred, and that, notwithstanding the sworn testimony of the plaintiff, the judge of said court adopted the statements of witnesses who contradicted the plaintiff in the essential and vital facts, and found against the plaintiff, and rendered judgment for the defendant; and that affiant is therefore compelled to believe and does believe that the judge of said court has no confidence in the credibility of plaintiff, and that upon a second trial of this case such lack of confidence must influence the mind of said judge to the material prejudice and injury of plaintiff. In support of his statement that the said defendant has an undue influence over the minds of the inhabitants of said Eagle county, the plaintiff, in his affidavit, alleged, among other things, that the defendant has been in possession of the lands in controversy for a great number of years; that he has made the same a home for himself and his family during such period, and has obstinately refused to surrender possession thereof, and that public sentiment, overlooking the right of the matter, has been very strongly exhibited in favor of the defendant, and has been studiously cultivated by the defendant as an "old timer" in said county, and in many other ingenious ways, by reason whereof the inhabitants of said county have placed great faith in the right of the said defendant to have and maintain possession of said lands; that the mere continuous residence of the defendant upon said lands, and the raising of his family of several children thereon, have operated to influence public opinion strongly in his favor, and have thus given him an undue influence over the minds of the inhabitants of said Eagle county in this controversy, which, the affiant avers, is a matter of great notoriety and public interest in said county. The affidavit of the plaintiff is supported by the affidavits of six persons who are residents of Eagle county, who aver that the facts stated in the affidavit of the plaintiff are true. Counter affidavits were filed by ten persons, who aver that they have resided in Eagle county for ten years past, and that they had never heard the merits of the controversy discussed; that it is not true that the inhabitants are prejudiced against the plaintiff; and that hundreds of men could be found that never heard of the cause, and who could act as jurors, and that no reason existed why a fair and impartial trial could not be had in Eagle county. The affidavit for continuance alleges that plaintiff cannot safely go to trial at the June term of the court on account of the absence of Randolph M. Southwick and A. E. Mulkey, who are material witnesses for the plaintiff; and further alleges that in the month of September, 1899, the said witness Southwick resided in the state of Utah, and that in May, 1899, the plaintiff met the said witness in the state of Utah, and discussed with him the facts in the controversy pending in this action; that the said Southwick then stated that he was about to go prospecting, and would be gone from said place in the state of Utah until some time in September or October, 1899; that upon his return to said town he would attend before any commissioner appointed by the court for the purpose of giving his deposition; that plaintiff thereupon asked the said witness to make affidavit to the facts in this case, in order that proper written interrogatories might be prepared, and be attached to the commission which might issue with the same; and that in pursuance of such request the said Southwick made and subscribed his affidavit. The affidavit of said Southwick, made before a notary public, sets forth facts connected with the title to said property, and generally denies the allegations of the defendant's cross-complaint and counterclaim, and proceeds also to deny the statements made by said defendant at the former trial of the cause; the affiant stating that the substance of the defendant's testimony had been read to him. The plaintiff, in his affidavit filed in support of his motion for a continuance, recites that in the month of October, 1899, he caused a dedimus to issue directed to George E. Lee, a notary public residing in the state of Utah, commanding him to take the testimony of said Southwick; that attached to said dedimus were a great number of interrogatories;

but that said commission has never been returned, nor has any deposition been taken in pursuance thereof, for the reason that the said Southwick had departed from said place in the state of Utah, and had not yet returned thereto; that during the month of March, 1900, he (the plaintiff) caused an advertisement to be published in the Bingham Bulletin, a newspaper of general circulation in the county of Salt Lake and state of Utah, being the place of the last known residence of said Southwick, and that the same was duly published for four consecutive weeks, by which advertisement plaintiff, by his attorneys, offered a reward for the postal address of the said Southwick; that no answers were ever received to such public advertisement; that said Southwick, if personally present at the trial of this cause, or if his deposition can be obtained and produced upon the trial, will testify that no agreement of sale or purchase of the lands described in the complaint was ever at any time entered into by and between the said Southwick, or any other person for him. The plaintiff states in his affidavit that the witness A. E. Mulkey is a material witness for him, and that he will prove by said Mulkey that the said defendant, Stewart, told said Mulkey that the lands described in the complaint were entered and proved up by Southwick under an agreement that Southwick would convey them to the said Jack Stewart after final proof; that a subpœna for said Mulkey was placed in the hands of the sheriff of Teller county on the 8th of May, 1900, and that said subpœna has not been returned; and the plaintiff alleges that he believes that, if said cause is continued for this term of court, he will be able to have the witnesses present at the next term thereof.

It is within the discretion of the trial judge to grant or refuse applications for change of place of trial, and, unless there is a manifest abuse of such discretionary power, the action of the trial court in refusing such application is not reviewable. Power v. People, 17 Colo. 178, 28 Pac. 1121; Michael v. Mills, 22 Colo. 439, 45 Pac. 429. A judge is not disqualified to sit in the second trial of a cause in cases where the law grants to a party a new trial; and it cannot be ground for an application for a change of venue upon the ground of prejudice of the judge that he has tried the case before, without the aid of a jury, and has rendered judgment against the party who applies for the change of venue.

We cannot say that there was an abuse of discretion on the part of the court in refusing the motion for change of venue upon the ground that the inhabitants of the county were prejudiced against the defendant. Counter affidavits were filed by ten citizens of Eagle county. They stated that they had never heard of the controversy between the parties, and it is reasonable to suppose that there were many other persons within the limits of the county who would be competent to serve as jurors.

Applications for continuance are also addressed to the discretion of the court, and are not reviewable except in cases where there appears to have been an abuse of the discretion. It does not appear that the trial judge abused his discretion in this instance in refusing to grant a continuance. It appears from the affidavit of the plaintiff that the witness Southwick was not to be found in the state of Utah, and that after advertisement in a newspaper published at his last known residence no trace of him was found. An application for a continuance upon the ground of absence of a material witness should be refused, unless it appears that there is some probability that the witness will be present at the next term of court. This did not appear, and the court was not required to postpone the case under the facts as they appeared to exist. The witness Southwick was not called as a witness at the first trial, and, although his residence was known, and his affidavit taken sometime before the last trial, no effort appears to have been made to take his deposition at a time when he was within reach of the process of the court. The witness Mulkey, who, plaintiff was informed, resided at Cripple Creek, was not found by the sheriff of Teller county, although subpœna was placed in his hands on the 8th day of May, 1900, and the trial of the cause did not occur until the 4th of June, 1900; and there was no statement in the affidavit which would warrant the court in finding that, if a continuance were granted, the attendance of the witness Mulkey could be procured at the next term of the court. We are of opinion, therefore, that the motion for change of venue and the application for a conntinuance were not improperly denied and overruled.

The plaintiff insists that the testimony shows that the defendant and Southwick entered into an illegal contract by the terms of which Southwick was to make final proof for the land in controversy, and, after the making of such final proof, make a conveyance of the property to the defendant; and that such contract, being in violation of the laws of the United States, should not be enforced. This court has held that such contracts cannot be enforced, and that the court will decline to relieve parties who enter into any such contract, because the same is in violation of the laws of the United States (Brown v. Kennedy, 12 Colo. 235, 20 Pac. 696; Everett v. Todd, 19 Colo. 322, 35 Pac. 544); but the testimony does not disclose any such agreement. The defendant does not claim it, and the affidavit of the entryman filed with the application for continuance does not disclose it. The contract set forth in the pleadings and established by the evidence is that Southwick, in consideration of the sum of about $500, paid partly

in cash, and partly in live stock furnished and board and lodging supplied, agreed to convey to the defendant the land in controversy; that immediately after this agreement was made Southwick left the ranch, and that Stewart entered into the sole possession thereof, with his family, and made valuable and permanent improvements upon the land. The testimony shows that the plaintiff and the defendant were acquainted with each other, and lived in the same neighborhood; that the defendant frequently passed the plaintiff's place; and that Southwick was working on the ranch of the plaintiff when the deed was executed. The plaintiff, therefore, knew at that time that the defendant was in the possession of the land, that he was making improvements thereon, and that the person from whom he procured the deed was not in the possession of the land. A witness testified that Stewart, having heard rumors that Southwick intended to evade his contract, sent word to Doll that he would kill him if he purchased the land. Other witnesses testified that Southwick, when approached upon the subject of making a conveyance of the property, drove the witnesses away, using a loaded Winchester rifle for that purpose, and at the same time stating that he had already executed a deed to the wife of the defendant. These facts, appearing upon the trial, we think were sufficient to warrant the court in finding that the plaintiff had knowledge of the claim of the defendant to the property; and, as a matter of law, these facts were sufficient to place the plaintiff upon inquiry.

We are therefore of opinion that the judgment of the district court should be affirmed, and it is accordingly done. Affirmed.

FISHER v. KANSAS CITY HUMBOLDT MIN. CO.

(Supreme Court of Colorado. June 30, 1902.)

APPEAL—DIVIDED COURT—AFFIRMANCE.

1. Where one judge of the supreme court is disqualified in a cause, and the other two disagree, the judgment of the trial court will be affirmed, under Civ. Code, § 403, providing for affirmance if the court shall be equally divided.

Error to district court, Arapahoe county.

Proceedings between George L. Fisher and the Kansas City Humboldt Mining Company. Judgment for the mining company, and Fisher brings error. Affirmed.

Wolcott, Vaile & Waterman and Thomas H. Hardcastle, for plaintiff in error. S. D. Walling, for defendant in error.

PER CURIAM. As Mr. Justice GABBERT was disqualified to sit in this cause, it was heard by the CHIEF JUSTICE and Mr. Justice STEELE. The former thinks the judgment should be reversed, the latter that it should be affirmed. Section 403 of the Civil Code provides that whenever the supreme court shall be equally divided in opinion on hearing an appeal or writ of error, the judgment of the court below shall stand affirmed. No useful purpose would be subserved by discussing the questions involved, and no opinion will be filed.

The judgment is affirmed. Affirmed.

GABBERT, J., not sitting.

BANK OF HERINGTON v. WANGERIN.

(Supreme Court of Kansas. Oct. 11, 1902.)

ALTERATION OF NOTE—LIABILITY OF MAKER.

1. Where a negotiable instrument is delivered to a payee, complete in all of its parts, the maker thereof is not liable thereon, even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution.

2. Such maker is not bound at his peril to guard against the commission of forgery by one into whose hands such instrument may come.

(Syllabus by the Court.)

In banc. Error from district court, Marion county; O. L. Moore, Judge.

Action by the Bank of Herington against Carl Wangerin. Judgment for defendant, and plaintiff brings error. Affirmed.

Fred D. Carman and Thornton Cooke, for plaintiff in error. N. F. Miesse, for defendant in error.

CUNNINGHAM, J. The defendant in error, Wangerin, executed his note for $60 to one McNaspy, as payee. The note was written by the payee upon a printed blank, and in such a manner that, after Wangerin had signed, McNaspy was enabled to place in the scroll prepared for the figures representing the number of dollars the figure "1" before the figures "60," and to write in the line prepared for the written amount, and before the word "sixty," the words "one hundred and." This was all done in such a manner that no one would be able to discover the change or alteration by the closest scrutiny, and thereby the note appeared to be one executed by Wangerin for the sum of $160. This note was sold for its full value to the plaintiff in error, in the regular course of business, before maturity, and without notice of any change. The question is, whether the bank can recover either the face of the note or the original consideration of $60 from Wangerin. The district court held that it could not. The authorities are at variance upon this proposition; the greater weight, and, as we think, the better reasoned, being that no recovery can be had upon the note. The cases holding the contrary rule do not agree upon the reasons therefor. Some place it upon the ground of negligence on the part of the maker, in

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. §§ 985, 987, 988, 991.