corporation; that the appellees, Meyer, Green, and Ogle, had entered into a conspiracy to wreck the power company by the use of said stock, and so threatened to disrupt its organization and to acquire its property, claimed the appellees were insolvent, and prayed they be enjoined from voting the 402 shares at a stockholders' meeting to be held for general relief, etc. The appellees by their answer denied the wrongful issuance of the 400 shares to Johnson; allege its validity and regularity of the proceedings, including the transfer to Ogle; allege a bona fide sale of the two shares to the other parties for value, and their lawful sale and transfer to appellee Green. Replication by plaintiffs denied the new matters in the answer. Thereafter the plaintiff the Hinsdale Electric Light & Power Company filed its motion in writing praying the action be dismissed against the defendants, upon which the court caused an order to be entered dismissing the action as to the plaintiff the power company at its cost. At the hearing upon this motion, January 26, 1904, the plaintiff Peniston was present by counsel, who participated in the argument, but the record is silent as to his position thereon. No objections or exceptions appear to have been made or taken by him to the granting of this motion and the entering of the order of dismissal. Upon the following day the cause again came on for consideration, at which time, counsel for appellant, Peniston, demanded a trial of the cause. Counsel for the appellees then suggested to the court that, as the plaintiff the power company had dismissed the action as to it, there was no issue presented by the pleadings to be tried, and the action should be dismissed, to which the court stated: "The court will hold that there is no issue to try in which the plaintiff Peniston is separately interested, and the judgment of the court will be that this cause be dismissed. The court has decided the validity of that stock in the case that we have just been discussing,"—upon which final judgment of dismissal was entered. Appellant, Peniston, appeals, and has assigned two errors for our consideration; the first being the dismissal of said cause as to the appellant, Peniston, which we think is well taken.

The complaint, when stripped of the allegations as to the interest of the power company regarding its 400 shares, the conspiracy, wreckage, etc., still leaves the statements that appellees, or some of them, have and are attempting to vote, control, and use, in bankrupting the company, 2 shares of its capital stock belonging to the appellant, and that this stock, with the other owned by him, would give appellant, Peniston, a majority of the total. These allegations were denied by the answer, making a direct issue as to the title of the 2 shares between the appellant, Peniston, and some one or more of the appellees, also the question of the right to vote and control them, the result of which meant the control of the corporation, and the prayer for general relief, if the allegations in the complaint were sustained, would entitle him to the control, the right to vote, and an assignment of this stock; the pleadings thus showing that appellant, Peniston, did have a separate interest from the power company in the ownership, voting, and control of these 2 shares. We are not advised by the record as to the meaning of the language by the lower court where it states: "The court has decided the validity of that stock in the case that we have just been discussing." It might have been the 400 shares, or the 2 shares, or both, for aught we know, as the record other than by this statement, is silent as to any other case or what stock; and, if the statement by the court had so advised, it could not be controlling, as we are not at liberty to assume that the rights of the parties here as to this stock were res judicata, without proper pleadings and proof.

The second assignment of error "in dismissing said cause as to the appellant, the Hinsdale Electric Light and Power Company" will not be considered, for the reason that no objection appears to have been made or exceptions taken upon such ruling; and, while it is true that section 387, Mills' Ann. Codes, dispenses with the necessity of taking exceptions to the ruling of the court upon certain written motions, it does not, in some instances, do away with the reason or necessity for making objections at the proper time in some appropriate way, for, as stated by Mr. Justice Elliott in the case of D. & R. G. R. R. Co. v. Ryan, 17 Colo. 104, 28 Pac. 81: "* * * That if counsel neglect to object or to point out errors occurring at the trial in such time and manner as will give opportunity for their correction, they will not, in general, be heard to complain of such errors in a court of review." Being unable to ascertain from the record the position of counsel for appellant at the time this order was made, and no objection appearing to have been made at that time, we cannot be expected to pass upon it here.

For the reasons stated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

STEELE, C. J., and GABBERT, J., concur.

NORDLOH v. PACKARD.

(Supreme Court of Colorado. May 3, 1909.)

1. JUDGES (§ 49*)—DISQUALIFICATION.

Under Mills' Ann. Code, §§ 30. 31, a party has no absolute right to have his cause tried by a judge other than the regularly elected and presiding judge of the court on the alleged

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ground of the latter's prejudice; the matter lying in the sound discretion of the judge to whom the application is made.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 187; Dec. Dig. § 49.*]

2. JUDGES (§ 50*) — DISQUALIFICATION — GROUNDS.

Where, in an election contest, there was some evidence that the ballots were tampered with either while they were in the custody of the county clerk or after they were delivered into the custody of the county judge, the county judge should have refused to try the contest.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 189; Dec. Dig. § 50.*]

3. JUDGES (§ 56*)—EXPIRATION OF TERM—UNCOMPLETED BUSINESS.

While the statute requiring the trial to begin not more than twenty nor less than ten days after joining issue is imperative, the time of the ending of the trial is not limited, and where a county judge was disqualified to try an election contest, and was unable to secure another judge before his successor's term began, he should not have pronounced final judgment, but should have left the uncompleted contest to his successor.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 235–241; Dec. Dig. § 56.*]

4. JUDGMENT (§ 852*)—SUSPENSION—POWER OF COURT AFTER TERM.

Where, in an election contest, final judgment was rendered, including an order setting aside a certificate of election issued to contestee, and granting a certificate to contestor, an order made after adjournment of the term and at a succeeding term, suspending for a definite period the execution of the judgment, was void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1564; Dec. Dig. § 852.*]

Appeal from Adams County Court; A. H. Gutheil, Judge.

Election contest by Albert H. Packard against Henry Nordloh. Judgment for contestor, and contestee appeals. Reversed and remanded.

Geo. Allan Smith and B. E. Woodward, for appellant. Harrie M. Humphreys and James H. Brown, for appellee.

CAMPBELL, J. At the general election in November, 1908, Henry Nordloh and Albert H. Packard were opposing candidates for election to the office of county commissioner of Adams county. The count of the official returns of the election officers made by the county canvassing board gave Nordloh 182 majority, and thereupon the certificate of election was issued and delivered to him. Packard, being dissatisfied, instituted this contest in the county court against Nordloh, and in the written statement which our special statute requires alleged, in legal effect, that if the election had been honestly conducted and the votes fairly counted, as they were not, the majority would have been in his favor; but, because of various mistakes made and frauds perpetrated by the election officers and others in conducting the election and counting the vote, he was wrongfully deprived of his majority and the certificate given to Nordloh. Nordloh filed his answer December 14, 1908, and, after denying the material allegations of the statement, and averring that the election was honestly conducted and the vote correctly counted, alleged that in case the court in hearing the contest should open the ballot boxes and count the ballots as contestor had requested, and such count showed a majority in the latter's favor, that result would be due to fraudulent and criminal conduct by persons working in the interests of contestor, who, after the election officers delivered the ballot boxes to the county clerk, their legal custodian, and before the judicial count, if any, was made, tampered with and changed the ballots as cast and first counted to correspond with the allegations of contestor's written statement. After this answer and the replication thereto were filed and the issues made up, counsel for contestee on December 17th served notice on counsel for contestor that he would make application to the court, and support it with affidavits, to call in another judge to try the case upon the ground that the presiding judge was prejudiced against contestee. On the day set for its hearing, and in the presence of counsel for contestor, contestee's counsel called the attention of the court to this proposed application, and, as we infer, because of the natural delicacy counsel have in such matters, indicated that he would rather orally suggest the disqualification to the court than formally to file a motion, and added, if the court chose not to act upon the suggestion, the application would be presented in the regular way. Upon an intimation by the court that it would not be necessary to make a formal application, and that he certainly would endeavor to get another judge to try the case, but that, if it could not be done, contestee would be advised so that the formal application could be filed as of that date, contestee withheld the application from the files. Six days later, and on December 23d, counsel for contestee again called the court's attention to this matter, apparently supposing that final disposition of it had not been made, whereupon the court said that the order for calling in another judge had already been made. After some further conversation between the judge and contestee's counsel, with reference to statements in the supporting affidavits, the truthfulness of which the judge then denied, and upon objection interposed by contestor's counsel to any further discussion or hearing unless the papers were formally filed, the court permitted contestee to file, and he did file, them as of the time when the suggestion concerning the same was first made. The court ended the interview by saying that he would endeavor to get another judge, and was doing so as fast as he could, and hoped to succeed in such endeavor upon the fol-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lowing day. Thereafter and upon the day set for trial, December 29th, counsel for both parties appeared, and the judge remarked that he had made arrangements with an outside judge to be present and try the case, and had supposed that the latter would be present for that purpose, but that only that morning, while counsel were present in court awaiting convening of the court, he had received a message by long-distance telephone from the outside judge that he could not come. The presiding judge then stated that, since he had failed in his effort to have counsel agree on allowing the contest to go over until his successor took office, there was nothing else for the court to do but to try the contest, and he immediately called the case for trial and ordered counsel to proceed, to all of which contestee duly objected. The trial was begun and evidence heard, and the court, deeming the showing of contestor sufficient therefor, ordered the ballot boxes to be opened and proceeded to count the ballots, which were taken from the boxes for that purpose, with the result that instead of a majority of 182 for Nordloh, which the official count by the canvassing board showed, Packard's majority was shown to be 252. The court awarded judgment, canceling contestee's certificate of election, declaring contestor elected, and granting to him a certificate of election; from which contestee has appealed.

A number of errors were assigned, but only two are argued by contestee: The first, that the county judge should not have tried the case; the second, that the judgment was not sustained by the evidence. The second ground will be disregarded, and the case will be reversed because the county judge should not have decided the contest.

The special statute (Sess. Laws 1885, p. 193), which furnishes the special procedure for the trial of contested election cases, has no specific provision for a change of the place of trial, or for an application, such as is made here, for calling in another judge to try a case upon the ground of prejudice or partiality of the regularly elected and presiding judge. Counsel seem to agree, however, that, in the absence from this statute of any such authority, our Code of Procedure, which does make such provision, should be followed. Under sections 30 and 31 of Mills' Annotated Code a party has not the absolute right to have his cause tried by a judge other than the regularly elected and presiding judge of the court on the alleged ground of the latter's prejudice. The matter lies in the sound discretion of the judge to whom the application is made, and his decision is not reviewable unless an abuse of discretion is shown. People v. District Court, 30 Colo. 488, 71 Pac. 388; Doll v. Stewart, 30 Colo. 320, 70 Pac. 326. The showing here was on its face inadequate, and, had the court made an order overruling the application, there would be no error, were it not for the matters to which we now refer. The record does not show that the application was ever formally passed upon, though the court's proceeding with the trial was perhaps equivalent to a denial; but the presiding judge unquestionably gave contestee to understand, upon which the latter acted, that he would not sit, and that another judge would be called in to try the case. It was not until the very hour of the hearing that the court announced that another judge could not be obtained, and that the parties must proceed before the court as presided over by the judge to whose sitting objection was made. There is nothing in the record to discredit the judge's statement that he was unable to secure the presence of another judge. By our statute the trial must begin not more than 20, and not less than 10, days after the joining of issue. Before the alleged disqualification of the judge was suggested by contestee, his answer was on file, in which the issue was squarely made that the ballots were tampered with after they had been counted and deposited in the ballot boxes by the election officers. The evidence is that the ballot boxes and pollbooks were deposited, as required by law, with the county clerk, where they remained for several days. After this contest was begun, upon an application of contestor and without notice, the court ordered the county clerk to turn over the ballot boxes to the bailiff of the court, and the county judge had the ballot boxes at once thereafter placed in his own vault in the courthouse, of which he, the judge, had the only key, and he was the only person who had access to and control over the place where the ballot boxes were stored. Thereafter, and until they were produced and opened during the progress of the trial, they remained in his custody as county judge, though watchers of both parties were present in an adjoining room to see that they were not molested.

The issue thus presented by the answer made it highly desirable, if not imperative, that the county judge should not preside at the trial of the case and decide questions of fact which affected the integrity of the official ballots. The claim of contestee in argument, with some testimony tending to sustain it, that an opportunity for tampering with these ballots was furnished and embraced, and the ballots tampered with either while they were in the custody of the county clerk or after they were delivered into the custody of the county judge, adds emphasis to the impropriety of the county judge's sitting to pass upon the issues which were involved, and whose proper solution depended, in part, upon the integrity of his own official acts as custodian of the ballots. As such issue was in the case, made so by his own act in assuming the duty of a custodian, the judge of his own motion should have refused to try the contest, as apparently he did at

one time, and we cannot permit a judgment rendered, under such facts, to stand. True, the few days remaining of the judge's term of office afforded scant opportunity for a prolonged trial, and a further delay on the 23d of December might have prevented its conclusion before his successor's term began. There may be force in contestor's argument that Packard, as a representative of his political party, ought not to have given his consent to a postponement of the hearing, as that might have prevented an organization of the board of county commissioners in the interests of his political party. But these, and all such considerations, are subordinate to an impartial administration of justice and to those proprieties which courts must observe, not only because it is right they should do so, but in order to retain public respect and secure willing and ready obedience to their judgments. True, the statute is imperative that the hearing shall commence within a fixed time after joining of issue, but the time of its ending is not limited. And, while such cases should be speedily tried and determined, the judge was in error in supposing that failure of counsel to agree to continue the contest until his successor qualified made it essential that he should try and determine it. This court in Clanton v. Ryan, 14 Colo. 419, 24 Pac. 258, held that an election contest may be tried notwithstanding a change of county judges after its commencement, though the successor must conduct the trial de novo. The county judge in this case, as apparently was his determination in the beginning, ought not to have decided this contest. If, to save the rights of the parties, the trial should have been entered upon December 29th, the court should have ordered the trial then to proceed and thereafter secured, if possible, another judge to try the case de novo before his successor's term began; but, if this could not be accomplished, the county judge should not have pronounced final judgment, but should have left the incompleted contest as a legacy for his successor in office.

Wholly without reference to the merits of the case, we have no doubt that this contest should not have been decided by Judge Gutheil, even if it was necessary for him to begin it and turn it over unfinished to his successor. This record discloses that after final judgment, which included an order setting aside and holding for naught the certificate of election theretofore issued to Nordloh, and granting a certificate of election to Packard, Judge Glass, the successor in office of Judge Gutheil, made an order suspending for a certain period of time the execution of the judgment which granted the certificate of election and awarded the office to Packard. This was manifest error, and must be set aside. Even at the same term at which such judgment was rendered the trial court would not have power to make such an order, and certainly, after the adjournment of the term and at a succeeding term of court, such an order is absolutely void. Judgment is reversed, the certificate to Packard canceled, Nordloh's certificate to remain in force and effect until and unless canceled by final judgment, and the cause remanded for a new trial.

Reversed and remanded.

STEELE, C. J., and MUSSER, J., concur.

BARTON et al. v. RIVERSIDE WATER CO. et al. (L. A. 2,141.)

(Supreme Court of California. April 21, 1909.)

1. WATERS AND WATER COURSES (§ 107*)—SUBTERRANEAN WATERS—WELLS—DEPRECIATION OF SUPPLY—INJUNCTION—ESTOPPEL.

Defendant R. company in 1899 and 1900, owing to excessive droughts and additional diversions of water from a subterranean basin by others, bored additional wells, which were necessary to furnish sufficient water for public use. That the wells were being bored, and the water taken to a city to supply the previous use, was notorious, as was also knowledge that such diversions would decrease the common supply. A complaint was filed to restrain the use of such additional wells on June 4, 1904, though most of the plaintiffs testified that the wells so bored immediately affected their own. *Held*, that complainants were estopped to enjoin the continued use of such wells under the rule that, where a complainant has stood by while a development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it will affect his own water supply, an injunction will be refused.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

2. WATERS AND WATER COURSES (§ 107*)—PERCOLATING WATERS — CORRELATIVE RIGHTS.

The doctrine of correlative rights in percolating waters was a change in the law, so that a clear case must be made thereunder to justify an injunction to prevent a continuance of the use of such waters, taken in good faith before such doctrine was enunciated, and which use was in full operation at that time.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

3. WATERS AND WATER COURSES (§ 102*)—PERCOLATING WATERS—ARTESIAN WELLS.

Where new artesian wells objected to drew their water from the same supply from which the owners had previously taken water under a valid diversion, and the new wells did not increase the amount diverted, they constituted a mere change of the place of diversion, without injury to others who were therefore not entitled to complain.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 102.*]

4. WATERS AND WATER COURSES (§ 105*)—PERCOLATING WATERS—DIVERSION—CHANGE OF PLACE.

One having a right to take a definite quantity of water from a basin of permeable material saturated therewith, and not composing part of any stream, may change his place of diversion,