determined in that; and also by the evidence which the defendant gave, under his pleadings, as to the facts upon which that decision was based. Megerle v. Ashe, 33 Cal. 84. The former adjudication was therefore no bar to the action in hand.

Lastly, it is assigned as error that the court overruled the objections taken by the defendant to the official reporter's transcript of the testimony of a witness given on the former trial and offered in evidence by the plaintiff. No objection was made that the witness was not shown to be beyond the jurisdiction of the court, nor as to the mode of proving his testimony. The only objections were that the testimony itself was not signed by the witness, that it was not his deposition, and that it was secondary evidence. But by subdivision 8, § 1870, Code Civil Proc., it is provided that "the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter," may be given in evidence. And as it was proved that the witness was out of the state, and no objection was made to the transcript as evidence of his testimony, there was no prejudicial error in the ruling. Judgment and order affirmed.

ROSS and MCKINSTRY, JJ., concurred.

Hearing in bank denied.

VAILES v. BROWN.

(*Supreme Court of Colorado.* Oct. 19, 1891.)

COUNTY ELECTION—CONTESTS—JURISDICTION.

1. Under the act of 1885 the county judge, sitting in term time in his regular capacity as the county court, is invested with jurisdiction to try and determine contested election cases of county officers. Whether the county judge sitting in vacation may exercise such jurisdiction, not determined.

2. Section 14 of the act is to be construed as a statute of limitations upon a summary proceeding; and when the period for filing the statement under said section has fully elapsed, excluding the day when the votes are canvassed, the time cannot be extended merely on the ground that the last day happens to fall on Sunday.

(*Syllabus by the Court.*)

Error to La Plata county court; H. GARBANATI, Judge.

William T. Vailes and Callahill Brown were opposing candidates for the office of commissioner of La Plata county at the general election in November, 1890. The vote being canvassed, it appeared that the total number of votes cast for said office was 1,223, of which Vailes received 614; Brown, 608; scattering, 1. Vailes received the certificate of election. This proceeding was instituted in the county court by Brown for the purpose of contesting the election of Vailes. The case being tried, the court found in favor of the contestor, Brown, and rendered judgment declaring him to have been duly elected. Vailes brings the case to this court by appeal. Reversed.

Decker & O'Donnell, N. C. Miller, W. C. Davidson, and *Spickard & Pike,* for plaintiff in error. *Russell & McCloskey,* for defendant in error.

ELLIOTT, J., (*after stating the facts as above.*) This was a contested election case under the act of April 10, 1885, (Sess. Laws, p. 193.) The contestor having filed his statement and served his summons, the contestee appeared, and, first by demurrer and afterwards by answer, challenged the jurisdiction of the court over the proceeding. The grounds of objection to the jurisdiction of the court were: *First,* that the proceeding was tried and determined by the county court instead of by the county judge; *second,* that the written statement of contest was not filed in the office of the clerk of the county court within 10 days after the day when the votes were canvassed.

1. The act of 1885, supra, is somewhat ambiguous as to whether the county judge or the county court shall exercise jurisdiction in contested election cases of county officers. Upon careful consideration of its various provisions from section 13 to section 22, inclusive, we are satisfied that the county judge, sitting in term-time, in his regular capacity as the county court, is invested with jurisdiction to try and determine such election contests. Whether the county judge sitting in vacation may or may not exercise such jurisdiction, we need not now determine. The court did not err in overruling the challenge to its jurisdiction on the ground that the proceedings were had before the county court instead of the county judge.

2. From the record it appears that the votes were canvassed on November 6, 1890. The contestor did not file the written statement of his intention to contest the election until November 17, 1890. Section 14 of the statute requires that the statement shall be filed "within ten days after the day when the votes are canvassed." Hence it is contended by appellant that the court below was without jurisdiction over the proceeding. On the other hand, it is claimed by appellee that, as November 16, 1890, fell on Sunday, the contestor was entitled to file his statement on the following Monday. In a recent contested election case under the act of 1885 Mr. Justice HAYT, in delivering the opinion of this court, used the following language: "The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature, and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. * * * The act is not only special in character, but it furnishes a complete system of procedure within itself. * * * It provides for a written statement as the basis of the proceedings." See Schwarz v. County Court, 14 Colo. 47, 48, 23 Pac. Rep. 84, and authorities there cited. In McCrary, Elect. (2d Ed.) § 276, it is said: "A statutory provision requiring notice of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election, or the like, is peremptory, and the time can-

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not be enlarged. * * * And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested elections, because promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly or in great part expired." It has been held that where a rule to plead expires on Sunday the party has the next day in which to plead; but this rule has generally been limited in its application to causes over which the court has already acquired jurisdiction. Cock v. Bunn, 6 Johns. 326. So, where administrative or judicial acts are required to be performed within a specified time, if the last day falls upon Sunday, the succeeding Monday becomes the return-day or court-day, unless the same be also a legal holiday. In re Computation of Time, 9 Colo. 632, 21 Pac. Rep. 475. So, also, the Civil Code of this state (section 382) provides that "the time within which an act is to be done as provided in this act" shall exclude the last day if it be Sunday; but the rule is expressly limited to matters provided for in the Code. The act of 1885, regulating proceedings in contested election cases, contains no such provision; and it is, as we have seen, "a complete system of procedure within itself." Its provisions, therefore, must be construed by general rules applicable to statutory construction. There is, undoubtedly, some conflict of authority in respect to the rule by which time as applied to statutes is to be computed. The question has sometimes been resolved by considering whether from the nature of the case a rigorous or liberal construction should be given. See opinion by Chief Justice TILGHMAN in Sims v. Hampton, 1 Serg. & R. 411. In Kansas, for the purpose of allowing a party to redeem his lands from a tax-sale, and in Pennsylvania, for the purpose of enabling a party to perfect an appeal, a method of computing time has been adopted which excludes the last day when it falls on Sunday. English v. Williamson, 34 Kan. 212, 8 Pac. Rep. 214. In re Goswiler, 3 Pen. & W. 200. In Massachusetts a similar rule has been declared for the purpose of preventing the forfeiture of life insurance policies. Hammond v. Insurance Co., 10 Gray, 306. But the latter case, like others cited in the brief of counsel for appellee, pertains to the construction of contracts rather than statutes. When the computation of time under statutes becomes necessary, an entirely different rule prevails in Massachusetts. See Cooley v. Cook, 125 Mass. 408, where Chief Justice GRAY states the rule as follows: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the legislature to exclude them appears manifest." The case of Haley v. Young, 134 Mass. 366, was a bill in equity to redeem land from a mortgage. The last day of the three years fell on Sunday. The court, in its opinion, referring to the life insurance case in 10 Gray, supra, used the following language: "It is said that at common law, when the time for the performance of a contract according to its terms expires on Sunday, a performance on the following Monday is good. But this rule, whatever may be the extent of it, has not been applied to acts which by statute are required to be done within a time therein limited." The Massachusetts rule for computing time under statutes is fully sustained by the New York cases. The case of People v. Luther, 1 Wend. 42, related to the redemption of lands sold under execution. The last day of the 15 months happening on Sunday, an offer to redeem on the next day was held to be too late. So in Ex parte Dodge, 7 Cow. 147, where the time fixed by statute within which an appeal might be taken was 10 days, and the last day fell on Sunday, the court said: "Sunday has in no case, we believe, been excluded in the computation of statute time." The case at bar involves the construction of section 14 of the act of 1885, supra, as a statute of limitations upon a summary proceeding. There has been much discussion whether the statutory period for commencing actions or proceedings should be held to include or to exclude the first day; and the decisions upon this subject have generally been arrived at by considering whether the time begins to run from or after an act done, or from or after a particular day. Wood, Lim. Act. p. 95 et seq.; Arnold v. U. S., 9 Cranch, 120; In re Tyson, 13 Colo. 489, 22 Pac. Rep. 810. From the wording of section 14, supra, it is clear that the first day must be excluded. The statute gives the contestor "ten days after the day when the votes are canvassed" to file his statement. After much consideration we are satisfied, both upon principle and authority, that when the statutory period for filing the statement of an election contest for county officers under the act of 1885 has fully elapsed, excluding the day when the votes are canvassed, the time cannot be extended merely on the ground that the last day happens to fall on Sunday. This is the reasonable, as well as the natural and literal, interpretation of the statute. Any other construction of such an act would be unwarranted. Whenever recourse to the courts becomes necessary to determine the result of an election, public and individual interests alike require that the proceeding should be commenced and prosecuted promptly. McCrary, Elect. supra. The statement of contest not having been filed within the time required by the statute, the court below erred in entertaining jurisdiction of the case. The judgment is accordingly reversed, and the cause remanded, with directions to the county court to dismiss the proceeding.

COOPER v. PERRY.

(*Supreme Court of Colorado.* Oct. 19, 1891.)

DOCUMENTARY EVIDENCE—REVIEW ON APPEAL.

1. In an action by an administrator on a note, letters written by defendant to plaintiff's decedent in his life-time are competent evidence

against defendant without accounting for their custody.

2. Where the testimony is conflicting, and it is incumbent on defendant to prove his defense by a preponderance of evidence, a verdict for plaintiff will be sustained.

Appeal from district court, Arapahoe county; DAVID B. GRAHAM, Judge.

Action in *assumpsit* by John Perry, administrator of the estate of J. S. Fretz, deceased, against Thomas J. Cooper. From a judgment for plaintiff defendant appeals. Affirmed.

W. N. McBird, for appellant. *Pence & Pence*, for appellee.

HAYT, J. Appellee, John Perry, as administrator of the estate of J. S. Fretz, deceased, brought this action against Thomas J. Cooper, appellant. The suit is on a promissory note for $2,500, given by Cooper, and payable to J. S. Fretz or order. The note is dated July 5, 1882, and bears interest at the rate of 10 per cent. per annum. Appellant's defense is based upon the claim that in 1878 he performed services for which Fretz agreed to pay him $2,500, the amount to be paid only out of a certain judgment when collected; signing an attachment bond in a suit then pending in one of the courts in this state, and appearing as a witness in said suit upon two trials constituting the services rendered, appellant paying his own expenses from his home in Chicago to Denver, the place of trial, and return, upon both occasions. In explanation of the fact that the note bears a date subsequent to the time at which the judgment rendered in the attachment suit was satisfied, it is claimed that appellant met Fretz on the day of the date of the note, and demanded of him payment of the $2,500; that Fretz refused payment, alleging as a reason for such refusal that the judgment had not yet been paid; and that appellant, not knowing that the judgment had been paid, borrowed the $2,500 of Fretz, giving his note therefor, which is the same note here declared upon. The due execution and delivery being admitted at the trial, the defendant, Cooper, introduced evidence tending to prove the above defense. To overthrow this, appellee offered in evidence certain letters written by appellant to Fretz during his life-time. These letters strongly tend to show that the defense was false in fact, and not interposed in good faith. The first error presented for our consideration relates to the admission of the letters in evidence, the objection being that their custody was not sufficiently accounted for. The assignment is entirely without merit. It is shown beyond controversy that the signature of Mr. Cooper was genuine, and that the letters themselves were in his handwriting. Under these circumstances, it was not necessary to account for their custody, although, as a matter of fact, the record shows that even this was attempted in this instance. Without such a showing the letters were properly admissible. No rule of evidence is better settled than that letters, written by a party to the action, containing self-disserving admissions, are competent evidence against him. The case below was tried to a jury. No fault is found with the instructions of the court. It is claimed, however, that the verdict of the jury is contrary to the evidence. The evidence in the case is quite conflicting. The burden of proving the defense interposed rested upon defendant. In addition to his written admissions, as stated, many circumstances appear tending to overthrow his defense. It was the peculiar province of the jury, under the circumstances, to decide upon the conflicting evidence. We see no reason to interfere with the conclusion reached. The judgment is accordingly affirmed.

TELLER *et al.* v. HARTMAN *et al.*

(*Supreme Court of Colorado.* Oct. 19, 1891.)

HARMLESS ERROR—EXCESSIVE VERDICT—EVIDENCE OF PARTNERSHIP—PLEADING.

1. A material allegation of the complaint, not denied in the answer, will be taken as confessed.

2. Upon an appeal by a part of the defendants against whom a judgment is rendered, error in the judgment, affecting only a defendant not appearing, will not be considered.

3. When items are improperly included in a verdict, the error may be cured by remitting the amount prior to judgment.

4. A contract for the sale of goods, which provides that the goods shall be charged for at reasonable prices, and the buyers to have a credit of one half the profits, does not establish a partnership between the sellers and purchasers.

(*Syllabus by the Court.*)

Appeal from district court, Summit county; L. M. GODDARD, Judge.

Appellees, John H. Hartman and Martin Hartman, commenced this action in the district court of Summit county. In the complaint it is alleged that the plaintiffs were partners doing business under the firm name of J. H. Hartman & Bro., and that the defendants were partners doing business as the Teller Tie & Timber Company. It is further alleged that the defendants, doing business as aforesaid, are indebted to the appellants in the sum of $2,261.25 upon an account for goods sold and delivered by the plaintiffs to the defendants between the 8th day of February, 1887, and the 15th day of June, 1887. At the time of filing the complaint, an affidavit of attachment was also made and filed, the grounds thereof being that the claim was upon an overdue book-account. Afterwards a writ of attachment was duly issued and levied upon the property of the Teller Tie & Timber Company. The answer consists of a specif denial of each allegation of the complaint, except the allegation in reference to the partnership of the plaintiffs, which stands undenied. After denying the partnership of the defendants, as alleged in the complaint, it is stated that J. C. Teller and J. C. Allen were the only partners constituting the Teller Tie & Timber Company. The trial to a jury resulted in a verdict for the plaintiffs in the sum of $2,062.97. Thereupon the plaintiff remitted the sum of $179.65, this being the amount charged for goods sold after the 1st day of June. Judgment was entered for $1,883.32. Defendants appeal. Affirmed.

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