

would have remanded it with directions to render judgment in favor of the defendant below. Having remanded it generally, without directions, it follows that a trial de novo was intended. In *Dickson v. Bank*, 11 Colo. App. 154, 52 Pac. 745, this court said: "As we understand the law, and as it is written in the cases, a general judgment of reversal sends a case back for trial and for the same proceedings and with the same rights to the litigants as though no trial had been had, and no judgment had been entered. The antecedent judgment is vacated and set aside, and, if the pleadings presented an issue, that issue stands for trial before the proper tribunal, which may be either the court or the jury, according to the nature of the suit. * * * The court has precisely the same power over the record and the proceedings as it had at the time that the original trial was entered on, and before the judgment was rendered." Counsel for appellee maintains that the above ruling is qualified by the following language appearing later in the opinion: "It may be quite probable that if the appellants are in no wise able to change their testimony or alter their proof, or enlarge it so as to bring it within our decision, the court would enter a judgment as of nonsuit, and would hardly do the idle thing—submit to a jury on the same evidence an issue which we had already adjudged could not be maintained on that proof." We do not think that the language last quoted lessens the force or effect of the general principle laid down in the first quotation above set forth. Indeed, it seems to us to rather support the view which we take—that is, that, upon a judgment of reversal generally, there should be a retrial of the cause as a matter of right—for the last quotation above clearly indicates that it was in the mind of the writer that a trial had been had, and that after the introduction of testimony at such trial the court, as a matter of law, under the opinion of the appellate court, should rule that the evidence was insufficient to sustain the issue presented.

An examination of the records, opinions, and decisions of the appellate courts of this state leads to the conclusion that it has been their practice to state specifically in the opinion the judgment or order which is to be entered by the trial court, whenever it is intended that a final disposition should be made upon the record as it stands, but, when a reversal generally is ordered, a trial de novo in the trial court is intended. Under the Code (Mills' Ann. Code, § 398) the appellate courts are permitted, and we believe it is their duty, to give final judgment, or to direct such order or judgment to be entered in the trial court as will end the litigation, and promptly secure to the parties their legal rights. Therefore, where the judgment is reversed generally, the presumption is that the court could not direct such order or judgment, and the general rule as to the effect of a reversal generally is to be followed. The

general rule as laid down by the great weight of authorities, and as expressed in section 580 of Elliott's Appellate Procedure, is as follows: "The judgment reversing the judgment or decree of the trial court, expressed in general terms and without specific directions or instructions, operates to completely annul the judgment or decree of the lower court, and to restore the parties to the position they occupied when the original decree or judgment was rendered. Its effect is substantially the same as that of a judgment awarding a new trial, for, in general, it opens up the whole case." To the same effect, *Crispen v. Hannovan*, 86 Mo. 168; *Stearns v. Aguirre*, 7 Cal. 443; *Ryan v. Tomlinson*, 39 Cal. 646; *City v. Bogardus*, 188 Ill. 72, 58 N. E. 675; *Laithe v. McDonald*, 7 Kan. 254; *McDonald v. Swisher*, 60 Kan. 610, 57 Pac. 507. The general rule, as announced by Elliott, supra, must be understood with the qualification that a judgment of reversal does not always and necessarily open up the entire case. We believe, however, that this case comes within the general rule as above stated, from the language of the last paragraph of the opinion, to wit, "Upon the evidence, as it is presented in this record"—clearly indicating that, upon other and different evidence which might be brought out upon another trial, a different conclusion might be reached.

The court committed error in sustaining the motion for nonsuit and denying a trial de novo, for which the judgment must be reversed, and the cause remanded, with directions to grant a trial de novo. Reversed.

McMURRAY et al. v. WRIGHT, Mayor.

AICHELE et al. v. CHAMBERLAIN.

(Court of Appeals of Colorado. June 13, 1903.)
MUNICIPAL CORPORATIONS—MERGER OF CITY AND COUNTY—NEW CHARTER—ELECTION OF CHARTER BOARD—CANVASSING VOTES—ELECTIONS—STATUTES.

1. Mills' Ann. St. §§ 1588, 1624, 1626 (being the state election law), provide that the county clerk and two justices chosen by him shall canvass the votes, deliver a certificate, etc., and that special elections shall be conducted as nearly as practicable in like manner with general ones. Sess. Laws 1893, p. 190, c. 78 (Denver City Charter), provides that the city council shall canvass the returns in city elections. The constitutional amendment ratified November, 1901, made the city of Denver and the county of Arapahoe, in which it was situated, a corporate body, known as the "City and County of Denver." The mayor and boards of Denver, the county clerk, justices of the peace, and other officers, were to continue in office until the election of their successors as provided for, and the charter of the city of Denver was to continue as far as applicable, and an election was to be held for the selection of persons to frame a new charter for the city and county, which election should be conducted "as provided by law." *Held*, that the provision of the old Denver City charter making the city council a canvassing board in municipal elections was not applicable to the election of the charter commission, such pro-

vision applying solely to elections for municipal purposes, and the provision that the charter commission election should be conducted as provided by law clearly referred to the public law of the state, and hence the clerk of the county of Arapahoe and two justices were the proper canvassing board.

Appeal from District Court, City and County of Denver.

Suit by Thomas S. McMurray and others against Robert R. Wright, Jr., and others, as mayor and common council of the city of Denver, and suit by Fred J. Chamberlain against Julius Aichele and others. Judgment in the first case dissolving an injunction restraining defendants from canvassing the vote taken for the election of persons to draft a charter for the city and county of Denver, and in the second case an injunction restraining defendants from the same acts made perpetual. From the judgments, the unsuccessful parties appeal. Injunction in the second suit dissolved, and the injunction in the first suit made perpetual.

Jas. H. Brown, T. J. O'Donnell, W. H. Bryant, Guy Le R. Stevick, and Jas. H. Pershing, for appellants. Harvey Riddell and Ward & Ward, for appellees.

THOMSON, P. J. In prescribing the manner in which elections shall be conducted, it is provided by the general election law of the state that, as soon as all the votes shall have been read over and counted, the judges of election shall make a certificate, under their hands, and attested by the clerks, stating the number of votes each candidate received, designating the office for which he was a candidate, and cause the certificate to be delivered to the clerk of the county in which the election was held, and that on the 10th day after the close of the election, or sooner, if all the returns be received, the county clerk, taking to his assistance two justices of the peace of his county, one of whom belongs to a political party different from his own, shall proceed to open the returns, canvass them, and make out and deliver a certificate of election to each of the persons having the highest number of votes for the county and precinct officers, respectively. The law further provides that special elections shall be conducted, and the results thereof canvassed and certified, in all respects, as near as practicable, in like manner as general elections. Mills' Ann. St. §§ 1588, 1624, 1626. Article 4 of the charter of the city of Denver provides for the election of officers for that city, naming the offices to be filled, and fixing the time of the election. It further provides that the city council shall meet in joint convention on the first Thursday succeeding every such election, and canvass the returns of the votes cast in the various wards and precincts of the city at such election, in such manner as may be prescribed by ordinance, and, upon the completion of the canvass, declare the result,

whereupon a certificate of election, signed by the mayor and attested by the city clerk, shall immediately issue to the persons elected. Sess. Laws 1893, p. 190, c. 78. An amendment to the Constitution was proposed by the General Assembly on the 18th day of March, 1901, which was duly ratified and approved by the qualified electors of the state at the general election in November, 1901. By section 1 of that amendment the municipal corporation known as the "City of Denver," and all municipal corporations and that part of the quasi municipal corporation known as the "County of Arapahoe," included within the exterior boundaries of the city of Denver as the same should exist at the taking effect of the amendment, were consolidated and declared to be a single body politic and corporate, by the name of the "City and County of Denver." By the terms of section 2, the officers of the city and county of Denver were to be such as by appointment or election should be provided for by charter; but every charter must designate the officers who should respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable. Section 3 provided that, immediately upon the canvass of the vote showing the adoption of the amendment, it should be the duty of the Governor to issue his proclamation accordingly, and thereupon the city of Denver and all municipal corporations and that part of the county of Arapahoe included within the boundaries of the city should merge into the city and county of Denver, and the terms of office of all officers of the city of Denver, the included municipalities, and the county of Arapahoe should terminate, except that the then mayor, auditor, engineer, council (which should perform the duties of a board of county commissioners), police magistrate, chief of police, and boards of the city of Denver, should be, respectively, the same officers of the city and county of Denver; that the engineer should be ex officio surveyor, and the chief of police ex officio sheriff, of the city and county of Denver; that the then clerk and ex officio recorder, the treasurer, the assessor, and coroner, of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, should be, respectively, the same officers of the city and county of Denver; that the district attorney should be ex officio the attorney of the city and county of Denver; and that the several officers should hold their offices as specified only until their successors should be duly elected and qualified as in the amendment provided, except that the then district judges, county judge, and district attorney should, respectively, serve the full terms for which they were elected. So much of section 4 as is necessary to a consideration of the questions presented by this record reads as follows: "The charter and ordinances of the city of Den-

ver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter, and, within ten days after the proclamation of the Governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the Secretary of State, and shall thereupon become and be the charter of the city and county of Denver, * * * and shall become the organic law thereof, and supersede any existing charters and amendments thereof." Section 5 provides for future amendments of the charter, or the adoption of a new charter, by the citizens of the city and county of Denver. Sess. Laws 1901, p. 97 et seq., c. 46. Pursuant to the requirement of section 4, proclamation of the adoption of the amendment by the Governor having been duly made, the council of the city and county of Denver called an election for members of the charter convention, to be held on the 2d day of June, 1903, which election was accordingly so held, and the returns of the election delivered to Julius Aichele, former clerk of Arapahoe county, and, at the time of receiving the returns, clerk of the city and county of Denver by virtue of the amendment. The council of the city and county of Denver insisted that a canvass of the returns could not lawfully be made, except by it; and Julius Aichele, the city and county clerk, asserted authority in himself to make the canvass, with two assistant justices whom he had chosen for the purpose. At the suit of Thomas McMurray et al., a temporary injunction was

allowed against the mayor and the members of the council, restraining them from interfering with the returns until the further order of the court; and at the suit of Fred J. Chamberlain the clerk and his two justices were similarly enjoined. The two cases were finally heard together, with the result that the injunction against the mayor and council was dissolved, and that against the clerk and justices, made perpetual. These judgments have been brought here for review by appeal.

The moment the constitutional amendment took effect, the municipal corporation known as the city of Denver, and the quasi corporation known as the "County of Arapahoe" ceased to exist, and a new body politic and corporate was created, called the "City and County of Denver." At the same time the terms of all officers of the city of Denver, the included corporations, and the county of Arapahoe, except the district judges, the county judge, and district attorney, expired; but for the purpose of furnishing the new corporation with a government until, under the charter to be framed, an election for the proper officers could be had, the mayor, council, boards, and certain other officers of the city of Denver, and certain of the officers of Arapahoe county, were constituted by the amendment officers of the city and county of Denver. The mayor and the persons composing the council of the city of Denver became, by virtue of the amendment, the mayor and council of the city and county of Denver. The mayor and members of the council, as well as all other officers of the new corporation, derive their title to office solely from the amendment. They have, therefore, such powers as it expressly confers, or are legitimately deducible from it and consistent with it, and no other. A power expressly conferred on the council is the power to enact an ordinance calling an election for members of the charter convention. The council is also clothed with all the powers of a board of county commissioners. What those powers are, is to be found in the statutes of the state pertaining to county government. The old charter of the city of Denver, in so far as it is the charter of the city and county of Denver, is likewise to be considered in determining the extent of the council's authority. But that charter is not the charter of the city and county, except qualifiedly. It is such charter only in so far as it is applicable to the constitution of the new corporation. However, subject to this qualification, the council of the city and county of Denver possesses all the powers conferred by the charter upon the city council of the city of Denver.

The right of the council to canvass the vote cast at the charter election is not expressly conferred by the amendment, nor is its exercise necessarily incident to the power to call the election. Neither does it belong to the council when acting in the capacity

of a board of county commissioners. Whatever such board might lawfully do, it may do, but the canvassing of the returns of the votes cast at an election is not confided by the law to a board of county commissioners. Not being conferred elsewhere, the authority asserted in the council, if it exists at all, must be found in the provisions of the charter of the city which are applicable to the city and county.

The constitutional amendment requires the election of members of a charter convention to be conducted as provided by law; and, if article 4 of the old charter can be held applicable to an election possessing the features and characteristics of this, then it may be conceded that the words "as provided by law" have reference to its provisions, and that it furnishes the rule for the conduct of the election. While the only election provided for in the charter was an election for mayor and other city officers, yet if this had been an election specially authorized for some purely municipal purpose by an amendment to the charter, in which no specific provision had been made for the conduct of the election, then the mode prescribed by the charter for the conduct of other city elections should be followed. *McCrary on Elections*, § 415; *People v. County Commissioners*, 6 Colo. 202, 209. But the only election which could be held by the authority of the old charter was a city election. The city was powerless to hold an election except for strictly municipal purposes. The provisions of its charter regulating its elections are therefore wholly inapplicable to county elections, or to any elections except those necessary to the conduct of the affairs of a city; and, unless this election for members of the charter convention was an election for purely municipal purposes, they are inapplicable to it.

The corporation created by the constitutional amendment is denominated the "City and County of Denver." Its boundaries embrace the territory formerly occupied by the city, and other territory belonging to Arapahoe county. A complete county and city government is furnished to the new corporation. The amendment provides it with a mayor, council, and other city officers; and with a body having the authority of a board of county commissioners, a sheriff, clerk, recorder, county judge, and all other county officers. The duties of city officers are prescribed by the charter, and the duties of county officers by the general laws of the state. That the city government and the county government are in the hands of the same persons is immaterial. The distinction between the functions pertaining to a city government and those pertaining to a county government is not, and does not purport to be, affected by the amendment. While the city and county of Denver is a city, it is also a county; and any election lawfully held by

its inhabitants is a county as well as a city election.

We find our warrant for the foregoing observations in section 3 of the amendment, the purpose of which evidently was to equip the new corporation with a complete county as well as city government until such time as by the adoption of the charter a permanent government should be provided; and in section 2, which requires that every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable.

Speaking with reference to the nature of the amendment, in *People v. Sours* (a case recently decided by our Supreme Court, and not yet officially reported) 73 Pac. —, Mr. Justice Steele said: "Even by constitutional amendment, the people cannot set apart any portion of the state in such manner that that portion of the state shall be freed from the Constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal or city government. The duties of judges of the district court, county judges, district attorneys, justices of the peace, and generally of county officers, are mainly governmental; and, so far as they are governmental, they may not be controlled by other than state agencies without undermining the very foundation of our government. Under the Constitution of the United States, the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state such officers as may be necessary to perform the duties assumed by the state government under the general laws as they now exist, or as they may hereafter exist. This distinction between the governmental duties of public officers and their municipal duties is fundamental, and therefore is not avoided or affected by the consolidation. * * * The provision that every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable, completely contradicts the assumption that the amendment regards such duties as being subject to local regulation and control." The question before the court in that case was the validity of the amendment, but the language we have quoted is expressive of its opinion of the character of the corporation which was created by the amendment.

Article 14 of the Constitution provides for counties and county officers. By section 2 of the amendment, the new corporation is made subject to the general provisions of that arti-

cle and of the state legislation enacted in pursuance of it, so that, although a city, it is a county, equally with any other legal subdivision of the state to which the Constitution and statutes have given the name of county. It is to an election conducted by this corporation, in possession of all the attributes of a county as well as of a city, that we are asked to apply provisions which, in their scope and purview, are confined strictly to a proceeding incident to the government of a city. In so far as the functions of a city are to be exercised by the consolidated city and county, the charter and ordinances of the city are applicable to it, but they cannot be applicable to it when exercising the functions of a county. The election was held by the corporation in its combined city and county character, and the purpose for which the election was authorized concerned the corporation both as a city and county. While the election was both a city and county election, it was a single election. No line can be drawn by which its character as a county election may be separated from its character as a city election, and, inasmuch as the charter provisions are not applicable to it as a county election, they are not applicable to it at all. The term "law," when used without restriction or qualification, refers not to a special charter or a private act, but to the public law of the state or sovereignty. See *Commonwealth v. Pittsburgh*, 14 Pa. 177; *Baldwin v. Philadelphia*, 99 Pa. 164. And we think it clear that the Legislature intended the term to be understood in that sense. The portion of section 4 of the amendment providing for the election, and for the effect to be given to the charter and ordinances, is a single sentence, the several parts of which are interdependent. It requires an election to be held and a charter framed, and continues the old charter and ordinances, as far as they may be applicable, in force during the intermediate time. But while the charter of the old corporation is made, as far as applicable, the charter of the new body corporate until after the election is determined, the requirement as to the election is that it shall be conducted, not as provided by that charter, but as provided by law. In view of the intimate relation between the two provisions, if it had been the intention to apply the charter to the election, it occurs to us that the word "charter," instead of the word "law," would have been used. As, from the nature and purpose of the charter provisions concerning elections, they cannot be regarded as applicable to the election required by the amendment, unless specifically made applicable, and as they are not specifically made applicable, in order to find the mode of conduct of that election we must go to the general statute of the state regulating elections. We have referred to the provisions of that statute in so far as they relate to the manner in which the canvass of the returns shall be made. We must resort to those provi-

sions for a settlement of the question before us, and, in conformity with them, the canvass can be made only by the clerk of the city and county with the assistance of two justices of the peace.

The judgment in each case will be reversed, and an order entered here dissolving the injunction against Julius Aichele and his co-defendants, and reinstating the injunction allowed against the mayor and council, and making it perpetual. Reversed.

MURPHY et al. v. HOOD & LUMLEY.

(Supreme Court of Oklahoma. June 6, 1903.)

APPEAL—REVIEW—RULINGS ON CONTINUANCE—ABSENCE OF WITNESS—INSTRUCTIONS—EVIDENCE.

1. It is the settled law of this court that the granting or refusing to grant a continuance of a cause rests largely in the sound discretion of the trial court, and such ruling will not be disturbed by this court unless it clearly appears that there is an abuse of discretion.

2. Where a continuance of the cause is sought on the ground of an absent witness, the party applying for a continuance must clearly and concisely state the facts which he expects to prove by such absent witness, and their materiality must clearly appear. Mere conclusions of fact or of law do not satisfy the requirements of the statute. It must further appear from the showing that the party has exercised due diligence, and that there is a probability of procuring the testimony of the witness within a reasonable time; and, where the application for continuance is wanting in any of these essential matters, it is not error to refuse to grant a continuance.

3. Instruction No. 2 requested by the defendants was rightfully refused by the court, since it did not correctly state the law as applied to the evidence, and, as a consequence, would have misled the jury.

4. The bona fides of the sale or transfer in this case was a question of fact that was submitted to the jury under proper instructions of the court, and it is a well-settled rule of this court, that, where the evidence reasonably sustains the findings of the jury, such findings will not be disturbed.

(Syllabus by the Court.)

Error from District Court, Lincoln County; before Justice Burford.

Action by Hood & Lumley against W. J. Murphy and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

R. N. McConnell and M. Fulton, for plaintiffs in error. S. D. Decker and Fred A. Wagoner, for defendants in error.

HAINER, J. This was an action brought by Hood & Lumley, defendants in error, against the plaintiff in error, in the district court of Lincoln county, to recover the value of a certain stock of goods and merchandise alleged to have been wrongfully attached by the defendants in error and converted to their own use. The plaintiffs in error alleged in their answer that the goods were wrongfully taken under the writ of attach-

¶ 2. See Continuance, vol. 10, Cent. Dig. §§ 64, 69, 77, 119, 121, 133, 135.