THE EVENING NEWS.

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NEWS OF THE DAY.

—The Institution for the Blind, at New York, has been damaged by fire to the amount of $25,000.

—A boy of sixteen years, named Churchill, living in New York, fatally shot his father, last night.

—A bill has passed both branches of the Arizona Legislature, making Phœnix the capital of the Territory.

—The strike is ended on the Canadian Grand Trunk Railroad.

—General Moriones has been appointed Commander in Chief of the Spanish army of the north.

—The Catholic diocese of Boston, Philadelphia, Milwaukee and Santa Fe are to be archdioceses, and their bishops archbishops.

—In a speech at Milwaukee, by Senator Carpenter, last night, he ascribed his recent defeat principally to the opposition of the railroads.

—The celebration of Shrove Tuesday was on a magnificent scale in several southern cities yesterday; at Memphis it was the finest show of the kind ever held there.

—Seventy-five thousand dollars damage by fire at Pittsburg, Pa.

—It is said that Governor Campbell of Wyoming will shortly be nominated for third assistant secretary of State.

—The funeral of the late Senator Buckingham took place at Norwich, Conn., yesterday, and was very largely attended.

—The first railway train passed through the Hoosac tunnel yesterday.

—The text of the proposed new revenue bill will be found in today's telegrams.

—The C. P. Kimball carriage company, at Portland, Me., has failed.

—According to a Washington dispatch to the Chicago *Inter-Ocean* trouble for Arkansas is very probable, as, unless Congress takes action to reinstate Brooks, it is the opinion that Grant will take similar steps in regard to Arkansas as in the Louisiana case, and will use whatever means may be necessary to overturn Garland and reinstate Brooks.

—One hundred thousand dollars damage by fire, at Farmingham, N. Y., last night.

—Ex-senator Thayer, of Nebraska, has been nominated Governor of Wyoming Territory.

JUDGE SUTHERLAND'S ARGUMENT.

THE elaborate and able argument of Judge Sutherland, in his plea of abatement, in the Third District Court, as our readers will perceive, crowds out our usual variety of matter to-day. The Judge quotes a large number of authorities in support of the position he assumes, and the argument is considered a very masterly presentation. It was not answered in court, Chief Justice McKean contenting himself with merely overruling it, briefly and verbally.

MARDI-GRAS.—This term, mentioned in the dispatches in the NEWS to-day, is the French for Shrove Tuesday, the day before the beginning of the fast of Lent. Mardi-Gras is celebrated by many French Catholics, and some others, by grand display, processions, feasting, etc.

ARGUMENT ON PLEAS IN ABATEMENT,

By Judge J. G. Sutherland, in the case of The People vs. Thomas E. Ricks, under indictment for murder, in the Third District Court, Salt Lake City. Delivered February 2, 1875.

In the two cases against Thomas E. Ricks, in the two cases against George Q. Cannon, and in the case against George Reynolds, pleas in abatement were filed, setting up substantially the same facts. To the pleas in the case of Ricks, indicted for murder alleged to have been committed in 1860, the District Attorney filed a replication, which was demurred to on the part of the defendant. The case was brought on to argument upon this state of the pleadings last week, before the District Court, Chief Justice McKean presiding.

The following is Judge Sutherland's argument in full in behalf of the defendant—

May it please the Court: I contend—

I. The replications are all demurrable on the grounds stated in the demurrer.

The District Attorney, by filing replications, apparently intends to offer contest on the facts—the pleading he resorts to implies that, and it is not adapted to testing in point of law the sufficiency of the pleading replied to.

When the particular contents of the replications, however, are considered, it will be seen that they do not propose any contest upon the facts stated in the pleas.

The defendant is entitled to the benefit of those facts, but there can be no trial to establish them, unless they are denied and put in issue, and there is no need of a trial if they are admitted.

The rules of pleading are based on these truisms, hence it is a fundamental rule that a plea or replication must confess or avoid, or traverse some one material fact alleged on the other side as essential to the cause of action or defence. Upon this legal proposition I refer to the authorities on my brief. The first is the case of Rex vs. Hughes (2 Barn. & Cress. 368), in which Holroyd, J., said—

"It is a fundamental principle of pleading that you must confess and avoid, or traverse some one material fact; and the same rule applies to replications as to pleas. The question to be tried in this case is, whether the election of Hughes was good or not. The prosecutor could only put that in issue by a direct and not by an argumentative denial of the validity of the election. These replications state a number of facts, from which a conclusion of 'Not duly elected' is to be drawn. Upon that ground it is clear that the replication are bad." 1 Chitty's Pl., 622, 643, 647; U. S. vs. Buford, 3 Pet., 12, 31; Steph. Pl., 138-9.

The case of the United States vs. Buford is an authority equally explicit. Judge McLean delivered the opinion, and in the course of it said—

"In the correct order of pleading, it is necessary that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea."

None of these replications has done either—no material fact in either plea has been either traversed or confessed and avoided.

All the facts stated in the pleas are admitted. They state certain facts as grounds for quashing the indictment. The replications state either all of the same facts, or a part—not answering the rest, as reasons why the indictment should not be quashed.

Such facts, stated in the plea, as are restated in the replications, are of course admitted; and those not answered at all, passed over in silence, are for that reason admitted. 1 Chitty's Plead., 611, 623; Carpenter vs. Briggs, 15 Vt., 34; Briggs vs. Dorr, 19 John, 95; Raymond vs. Wheeler, 9 Cow., 295; 3 Caines, 164; Tolland vs. Sprague, 12 Pet., 333.

In Raymond vs. Wheeler the court decided expressly, "that a fact asserted on one side (in pleading) and not denied on the other is admitted." The other authorities cited to this point are equally clear, equally explicit.

If on comparison of the statement of facts in the pleas with the restatement of the same in the replications, there is found any discrepancy, and the restatement accepted as true where it differs, from the plea, would tend to support the indictment, it must be remembered that there is no traverse of the pleas, nor of any fact stated in them, except such as can be implied from such discrepancy; hence, if there is any such traverse it is argumentative, therefore insufficient, demurrable.

Serj. Williams, in note (2) to Bennet vs. Filkins, 1 Saund, 21., says—

"Whenever any material fact is alleged in any pleading which, if denied, will, upon issue joined, decide the cause one way or other, if the adverse party plead a matter inconsistent with and contrary to such allegation, he *must* traverse it." 1 Chitty's Pl., 643, 648, 539.

An issue can not be made by two affirmative statements. Van Santo, Pl., 785; Steph. Pl., 385.

II. As there is no sufficient replication there must be judgment for the defendant on the pleas in abatement, unless *they* are defective *in substance.* 1 Chitty's Plead., 449; Rex. vs Knollys, 2 Salk., 509.

Of course if the facts stated in the pleas make out no objection to the indictment, they are of no avail, and defendant could get no advantage from an admission of them or verdict establishing them.

III. The pleas allege five sufficient objections to entitle the defendant to have the indictment quashed—

1. The grand jury was constituted with 23 *members.*

2. The grand jury was vitiated *by the discharge of Neff, Wilson, and Bennion.*

3. *It was vitiated by drawing, during the term, without any necessity, and putting in the panel, four additional jurors.*

4. *It was vitiated by the presence on the jury of William F. James, who did not own taxable property and pay taxes in this territory.*

5. *It was vitiated by the presence on the jury of Ephraim McLaughlin in the place of Jesse E. Murphy,* the latter being first drawn and summoned, and he having appeared pursuant to the summons, and being a qualified juror.

I shall offer some remarks and some authorities on these several points.

1. The grand jury that found the indictment contained too many jurors; 15 was the complement fixed by law; and that objection is properly taken by the first plea.

A common law grand jury may consist of 12 or 23 jurors or any intermediate number. 4 Black. Com. 302-3; Burrill's L. Dic., Title "Grand Jury;" Story's Const., § 1784; King vs. Mank, 4 Ad. and El., 236; 2 Cai. Ca., 98; 2 Cush., 149.

That is the jury required by the Constitution. Art. V. Amendments to Const. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." See 1 Bish. Cr. Proc., § 725, 726.

It is competent for the legislature to fix a definite number, and any number that would be a good grand jury at common law.

Congress has done something to diminish the latitude allowed by the common law, in providing that such juries shall consist of not less than 16 jurors in the federal courts. 13 U. S. St., 500; See 9, Id. 72, 4 Id., 188.

The same thing has been done in California.

The Territorial Legislature, in the absence of any conflicting law of Congress, may of course fix the number, within constitutional, i.e., common law limits, and make the number precise and definite.

There is Congressional and Territorial legislation in regard to juries; the former, of course, is paramount as far as it extends, but no further.

The legislation of Congress is remedial and recent, and is contained in what is popularly known as the Poland Bill. The Territorial statutes had fixed the number to be drawn for both juries, and how many should be impanelled to form a grand jury. These laws were in force when the Poland bill was passed. Hence, unless that Act repealed them they are still in force. They required the definite number of 18 jurors to be *summoned* for each jury, and precisely 15 to be impanelled as a grand jury.

The territorial law seems to require, in terms, both juries to be drawn and summoned for every term of the district court; but it is merely directory, not mandatory; a term could be legally held without either. They are expected to be called when the interest of the public, or of suitors, requires them.

If it should happen, at any term, that no criminal case existed to be considered by a grand jury, and no issue of fact to be tried, the judge would be warranted in directing that no jury be drawn. Like considerations would justify the judge in suffering a term to pass with one jury instead of both. This court has practically so construed the law; for several terms have been heretofore permitted to elapse without any jury being drawn, merely because there was no recognized officer competent to notify them to appear. The law is supposed not to require a vain thing, neither to draw a jury that cannot be summoned, nor to summon a jury that will have nothing to do. 14 Ohio St., 315, 325.

The clause of the Poland bill, which I shall presently quote, was undoubtedly framed in view of this sense of the territorial law, and this uniform construction of it here, and like statutes elsewhere, under which it has not been a matter of course to have one or both juries at all terms of court. That clause is as follows—

"Whenever a grand or petit jury is to be drawn, to serve at any district court, the judge of such district shall give public notice of the time and place of drawing *such* jury."

Obviously this provision was enacted in view of other laws determining when one or both juries might or should be drawn. It pre-supposes such laws; or at all events, that on contingencies, not regulated by the Poland bill, there would be, sometimes, one of these juries, and at other times *both,* for by another clause it is provided, "If a grand *and* petit jury are to be drawn, the grand jury shall be drawn first."

The notice required to be given of the drawing of a "grand or petit jury," as expressed in the Act is, "of the time and place of drawing *such jury.*" When both are to be drawn, of course the notice is of the time and place of drawing *such juries.* The notice must therefore specify by name, the *jury* or *juries* to be drawn, as a matter of routine, in order to comply with that clause of the Poland bill.

It is to be observed that this notice, as provided for, if given in the terms of the statutes, will impart no information in respect to how many jurors shall be drawn for either jury, except by reference to the existing territorial laws on that subject. If those territorial laws are in mind, as they are supposed to be, if still in force, naming a *grand* jury, as one to draw jurors for, would be equivalent to saying "18 jurors for a grand jury," and so of a petit jury. This act of Congress not requiring anything more explicit, the judge giving the notice is not at liberty to state any other number than those terms, "*grand jury,*" and "*petit jury,*" would import, though he might properly state the number, explicitly, that they do import.

At the time stated in the notice for the drawing, after the ballots have been properly mixed and mingled, the Poland bill directs that the marshal or his deputy, "*shall proceed to fairly draw by lot such number of names as may have previously been directed by such judge.*" This provision confirms the correctness of the exposition that has been given of the foregoing clause. One clause is to be interpreted by another in the same statute. This is a cardinal rule of interpretation. It commends itself and needs no support from authority, but it is supported by the very highest authority and is universally acknowledged. In this last clause the Poland bill itself explicitly treats a notice that a "grand" or "petit" jury will be drawn, as a notice stating the *number* of jurors to be drawn. In Strode vs. the Stafford Justice, (2 Brock.), Marshall, C. J., said—

"Without reasoning upon this subject, the books abound with authorities which seem to be conclusive. In 1 Inst., 381, Lord Coke says—'It is the most natural and genuine exposition of a statute, to construe one part by another of the same statute; for that best expresseth the meaning of the makers.' He afterwards adds—'And this exposition is *ex visceribus actus.* The instances which illustrate this axiom, in the construction of statutes, are numerous.'"

The two clauses quoted from the Poland bill expound each other; read together, they give directions in respect to two things which are components of one proceeding—that of drawing a jury. What is "*directed*" to be done at the *drawing* is simply what was required by the other clause to be stated in the notice. That this exposition is the true one is so obvious, that the rule from which it results is declared to be an *axiom* by the most eminent jurist our country has ever produced.

The *direction* supposed in the clause relating to the drawing to have been given, requires no further comment than that the notice required of a drawing is not directed to be given uniformly the same, or positively for either *one* or for *both* juries. The language presupposes, as has been before said, that sometimes *one* jury would be drawn and sometimes *both.* The number to be *drawn* is treated in the law, therefore, as contingent, uncertain, until made definite and precise by the notice. This notice is required to be given by the judge. Hence, when he has given notice of the drawing of both grand and petit juries, he has "*directed*" the drawing of such number of jurors as are necessary for them. This construction gives full and natural effect to every word of the statute relating to this subject, and requires nothing to be supplied by intendment, or stricken out as redundant. The phrase, "*as may have previously been directed by said judge,*" is satisfied by a specification of the juries to be drawn. The number of which each jury should consist was previously fixed by law. Shall that phrase be construed, without necessity, to mean more? Shall it be considered to have a deeper import to cover a new subject not otherwise mentioned in the act?

The subject of determining of how many jurors a grand jury shall consist is an important one, and it must be conceded that there is no *express* power granted to the judges on that subject. If granted, the grant is found by construction, doubtful construction, for a natural reading of the statute excludes that power. It is more than probable that there would have been a plain declaration if so grave a duty had been intended to be imposed. There is an express direction in the minor matter of fixing the time and place of drawing, and a plain implication that the judge shall determine whether one or two juries shall be drawn, and can it be that a weightier matter, that of determining the precise constituency of the grand jury, should be left to doubtful construction? To make the language in question import more than the drawing of jurors in pursuance of the notice, treating a notice of drawing one jury as a "direction" to draw eighteen jurors, and a notice of drawing both juries as a "direction" to draw thirty-six jurors, eighteen for grand jurors first—to make it mean more than this, is not required to give it full and complete effect, nor to fill out the full sense of any preceding provision. On the contrary, to make that phrase imply that the judge has made an order fixing the membership of the grand jury which had not been mentioned or required in the preceding part of the act, is to insert new terms in the statute, and to give them the effect of repealing by implication antecedent legislation not otherwise repugnant to the provisions of the Poland bill.

Judge McKean.—Probably there is no difference of opinion between counsel as to the number of jurors required in the federal courts sitting in the States; they must consist of at least sixteen and may not exceed twenty-three. I want to ask what number constituted a grand jury in territories before the Poland bill passed.

Judge Sutherland.—If there was no local statute I should say the territory had the common law jury, which might consist of twelve or any number above, not exceeding twenty-three.

Judge McKean.—Does not the Act of Congress which prescribes the number for the federal courts govern the territorial courts in federal cases?

Judge Sutherland.—In Englebrecht vs. Clinton it was held that the territorial courts for all cases had to obtain jurors under the territorial laws.

Judge McKean.—That is undoubtedly so in *territorial cases.*

Judge Sutherland.—The Poland bill, as before remarked, is a remedial statute—it was passed to remedy certain supposed defects in the previous laws relating to the courts of this Territory; to more clearly define their several jurisdictions, to secure a more satisfactory method of selecting jurors, and to make them eligible to serve in both federal and territorial cases.

The *number* of jurors that the local law required or limited for grand juries was never a subject of complaint or dispute.

What is the scope of this Act of Congress? It is not a general revision of all the laws relating to jurors. If it were, all other laws would be deemed merged in or superseded by it.

"A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as on reason and common sense, operate to repeal the former." Bartlett vs. King, 12 Mass., 545; Smith's Com., Sec. 3787; Goodman vs. Bostwick, 7 Mass., 142.

It does not cover the whole subject matter of the former law. It does not specify the number of jurors; it does not specify when a grand jury shall be drawn, nor when a petit jury shall be drawn, nor when both shall be; it does not direct the manner of summoning them (Sec. 8, Act of Jan. 21, 1859), how to coerce their attendance, nor the mode of dealing with delinquents (Sec. 15, same act). It does not prescribe the practice on challenges for cause, or even mention them, nor the oath to be administered (Sec. 17, Act of Jan 21, 1853), nor regulate the performance of their duties (Sec. 11, Act Jan. 21, 1859, L. Utah, p. 70) after being sworn.

Sec. 7 of the Poland bill disapproves of the entire territorial "Act in relation to marshals and attorneys," and if the intention had been to disapprove of any other *entire* Act, it is fair to suppose it would have been done in like direct and explicit terms. It does by manifest repugnancy repeal the whole of the territorial Act of Feb. 18, 1870, amending the jury law of Jan. 21, 1859, except the provisions which I now contend are still in force, namely, 1st, the provision fixing the number of grand and petit jurors that shall be summoned for any given term; and 2d, the number of grand jurors that shall be impanelled to make a grand jury. If the Poland bill intended to abrogate these provisions also, it intended to expurge the whole Act, and would have said so. Had that been the intention, it would have been manifested in the same manner, as in disapproving of the other Act. It would have been named by its title and expressly disapproved.

This Section 7 intimates that there is territorial legislation which is contrary to its provisions; but no entire acts. It expressly disapproves of "All laws of said Territory inconsistent with the provisions of this act," not all laws relating to the subjects mentioned in the act, but only inconsistent laws. What is disapproved, therefore, is displaced by repugnancy; in other words, there is no repeal of territorial legislation, except by implication. Such repeal results solely from the incompatibility of the later and older statutes.

I now invite attention to the principles that are applied to the construction of statutes which are claimed to repeal earlier ones by implication.

In Bank vs. Commonwealth, 10 Barr, 442, this subject was discussed. On the 1st of April, 1835, a general law was passed requiring the several banks of the State to pay to the State treasurer a tax on their dividends, graduated in regular progression from 8 to 11 per cent., the amount being determined by the rate per cent. of profits declared. Before the passage of this act the Easton Bank, the plaintiff in error, in common with other banks of the State, was subjected by law to the payment of 8 per cent. of the profits declared the preceding year.

On the 7th of April, 1835, an act was passed to re-charter the Easton Bank, extending it fifteen years from the first Wednesday of May, 1837. The second section provides that the bank shall, after the first Wednesday of May, 1837, and thenceforth during the full time for which its charter is extended, pay into the treasury of the commonwealth, in the manner now directed by law, the same tax as was imposed by the prior act of April 1. The bank contended that the two acts were inconsistent, and the former repealed, so far as it would otherwise apply to this bank, by implication.

I now quote from the opinion of the court—

"This argument is based upon the fact that while the first of these statutes directs the payment of the graduated tax by all the banks, immediately after the date of its enactment, the younger of them appoints the payment of them, so far as the Easton Bank is concerned, to commence on the first Wednesday of May, 1837, leaving an interval of more than two years between the respective periods, which it is thought involves an irreconcilable inconsistency. If this be so, doubtless it works a repeal of the elder statute, for the maxim is *legis posterior is contrarias abrogant.* But it is said that the rule is received with great caution, *for it is generally necessary that the intention to repeal be expressed in clear and unambiguous language, and not be left to be inferred from a subsequent statute. And the maxim is subject to the restriction that an ancient statute will be impliedly repealed by a more modern one, only when the latter is couched in negative terms, or when the matter is so clearly repugnant that it necessarily implies a negative, for implied repeals are not favored by law.* 2 Dwar. on St., 638, 673; Williams vs. Prichard, 4 T. R., 24; Rex vs. Barton, 12 A. & E., 470. *When both acts are merely affirmative, and the substance such that both may stand together, both shall have a concurrent efficacy.* 1 Bl. Com., 89; Dr. Foster case, 11 Rep., 57. In our case it is to be observed, the posterior statute contains no negative words. It ordains that the tax shall be paid after May, 1837, but it does not say that it shall not be paid before that period. It is therefore not clearly repugnant with the first act which provides for an earlier payment and no more. They are both merely affirmative laws, and may both stand together, having an operation during different periods."

Judge Story said, in Wood vs. U. S. (16 Pet. 342, 363), "That it (a statute in question) [illegible] expressly, or in direct terms, [illegible] and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say necessary implication, *for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it; for they may be merely affirmative or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.*"

Mr. Justice Swayne, in McCool vs. Smith (1 Black, 459, 470), said—

"If the plaintiff can succeed in this action it must be because the act of 1837 impliedly repeals this provision (of a statute just quoted) as to this case. If there were no such statutory provision, the act of 1837 being in derogation of the common law would be construed strictly." "*A repeal by implication is not favored.*" "*The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together.*"

He cites with approbation Bowen vs. Lease, 5 Hill, [illegible] and Williams vs. Potter, 2 Bar., 316; S. C. 12, 316.

In Bowen vs. Lease, Nelson, C. J., said—

"The invariable rule of construction in respect to the repealing of statutes by implication is, that the *earliest act remains in force unless the two are manifestly inconsistent with and repugnant to each other,* or *unless, in the latest act, some express notice is taken of the former, plainly indicating an intention to abrogate it.* As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, *in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable.*

"The last act is an implied repeal of the first so far as the provisions of the two are incompatible, but leaving the original law in full force and effect in all other respects. Livingston vs. Harris, 11 Wend., 329, 334.

In Attorney General vs. Moon, 1 Wis., 513, it was said—

"It is neither the duty nor the province of courts to construe two separate acts, so that the latter of the two must of necessity repeal the former. In the exercise of this power by a court, the line of distinction between legitimate *judicial* duties and assumed *legislative* ones may be sometimes so very vague and indefinite as to be imperceptible. *Whenever the two acts are susceptible of a construction which will give an operation to both, without doing violence to either, it is incumbent on the court to search for some allowable means to give them such a construction. This will best further the intention of the legislature; and it is only when the nature of the provisions, and the words used, are such as to render it impossible to reconcile them, that the court will feel called upon to apply the doctrine of repeal by implication.*"

"The rule of construction on this subject is, that if there be two affirmative statutes, or two affirmative sections of the same statute, upon the same subject, then one does not repeal the other, if both may consist together, and we ought to seek for such a construction as will reconcile them together."

Chief Justice Shaw said, in Goddard vs. Boston, 20 Pick., 410—

"Statutes, being *in pari materia,* are to be construed together. *A later statute on a given subject, not repealing an earlier, in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter.*" Davis vs. Fairbairn, 3 How. (U. S.), 636.

The Territorial Act of Feb. 8, 1870, contains provisions requiring eighteen men to be summoned for a grand jury and eighteen men for a petit jury. Sec. 4 requires that "the court shall impanel out of the list summoned as grand jurors fifteen eligible men to serve as a grand jury."

We contend that every word and clause of the Poland Bill can be construed so as to have a reasonable effect, just the effect intended, without conflicting in the least with either of the provisions, just stated, of the Territorial act. If so, they are not repealed. The court is by law required to recognize both as in force.

But even if a contrary view be taken, the clauses that have been referred to can not be made to mean more than that the judge may direct how many grand and petit jurors shall be *drawn* and *summoned.* Then what is there to hinder the application of Sec. 4 of the Territorial Act, that "the judge shall impanel out of the list summoned 15 to serve?"

No provision of the Poland bill breaks the force of that command. It is true the Poland bill says, "*The jurors so drawn and summoned shall constitute the regular grand and petit jurors for the term for all cases.*" This does not mean that all the grand jurors so drawn and summoned shall go into and make the grand jury, and all the petit jurors a petit jury. This court has already practically repudiated that construction. All the persons drawn and summoned as grand jurors did not in fact go into the grand jury that was impanelled for the October term. A part of them were discharged. This provision has not been held by this Court to govern the *personnel* of the juries, but the number necessary to a legal complement. If it were so construed, no challenges to the polls, of either jury, for cause could be allowed, as only peremptory challenges are expressly provided for, and they doubtless are confined to the traverse jury.

This Court has not, I repeat, deemed itself bound to retain all the grand jurors so drawn and summoned to make the grand jury; only the number drawn has been kept good and retained. The latter is not required by any, not even the first intimation, unless it results from the Court, retaining all and the identical persons drawn.

Chan. Walworth, in Donaldson vs. Wood (22 Wend, 397), said—

"To give a correct interpretation of the legislative will, where a statute was intended to remedy the injurious operation of a previous rule or principle of law, the Court should place itself in the situation of the legislature which passed the statute; that is, contemplate, in the first place, the law as it previously existed, the necessity and probable object of the change, and then give such construction to the language used by the law makers, in providing the remedy, as to carry their intention into effect, so far as it can be ascertained from the terms of the statutes."

The clause in question was intended to have an important effect in removing doubts that had existed in the administration of the previous law, and to produce uniformity in dealing with federal and territorial cases. To remove all question, and establish this uniformity, this act very properly provides that, "the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term *for all cases.*" These concluding words indicate the probable object of the provision. The other words are used merely to convey the command to that point, that the jurors so provided shall make the juries for federal and territorial causes. What is a regular grand jury? This act does not inform us. The Territorial act and the Constitution do. What is a regular petit jury? There is no answer in the Poland Bill. There is, however, in the Constitution and Territorial laws.

In what sense does the Poland Bill direct that the persons so drawn and summoned shall constitute these juries, *reddendo singula singulis*? To constitute is *to form:* the jurors so drawn are to be constituents of them to the required number, if the jurors so drawn and summoned hold out sufficient in number; if not, and more are necessary, they may be afterwards drawn.

In this sense, or so construed, the clause under discussion has no bearing whatever on the number of which the juries shall severally consist. The gist of it is that the jurors so drawn shall be constituents of the juries, and shall be eligible to act in "all cases." Hence, there is nothing in the Poland Bill that is repugnant to the law of this Territory commanding that fifteen jurors shall be impanelled and sworn as the precise number of the grand jury.

It is a rule of construction that all statutes in *pari matina* shall be construed together as though embraced in one act. The last act passed is to be read and interpreted as if all antecedent and consistent laws were recited in it as still in force." Chap. 14, Smith's Com., par. 636, 645.

So read, the law in regard to drawing and constituting juries, so far as modified, is as follows—

"Whenever a grand or petit jury is to be drawn to serve at any term of a District Court, the judge of such district shall give public notice of the time and place of the drawing of *such jury* (stating of course whether one or both) which shall be at least twelve days before the commencement of such term; and on the day, and at the place fixed, the judge of such district shall hold an open session of his Court, and shall preside at the drawing of such jury. And the clerk of such Court shall write the name of each person on the jury list returned and filed in his office on a separate slip of paper as nearly as practicable of the same size and form; and all such slips shall, by the clerk in open court, be placed in a covered box, and thoroughly mixed and mingled; and thereupon the U. S. marshal, or his deputy, shall proceed fairly to draw by lot from said box *such number of names as may have previously been directed by said judge;* and if both a grand and petit jury are to be drawn, the grand jury shall be drawn first; * * * and the jurors so drawn and summoned shall constitute the regular grand and petit jurors for the term for all cases. The Court shall empanel, out of the list summoned as grand jurors, fifteen eligible men to serve as a grand jury," &c.

Since, therefore, the grand jury was required to consist at its organization of fifteen members, selected from eighteen drawn, and it was actually composed of twenty-three members, it was not a legal grand jury and could find no valid indictment.

The incompetency of a single juror; having too many or too few; selecting them, or one of them, contrary to law; or, in any manner constituting the grand jury, otherwise than is pointed out in the statute, vitiates the jury, so that it can not find a valid indictment.

These objections may be taken by plea in abatement, as no other remedy is provided by statute. And as many pleas as there are objections may be put in.

In a note on p. 3.9 of 1 Arch. Cr., Pr., and Pl., it is said—

"Under a statute requiring that grand jurors shall be freeholders, a plea in abatement to an indictment setting forth that some of the jurors who served on the grand jury were not freeholders was held good. State vs. Rockafellow, 1 Halsh, 332." State vs. Duncan, 7 Yerg., 271.

In People vs. Earnest, 45 Cal., 29, the court says—

"The statute requires that a copy of the order of the court for the summoning of the grand jury should be delivered to the Sheriff, and that it shall be the duty of that officer to summon the grand jury, 'upon the receipt of the order,' etc. In this case the only order delivered to the Sheriff was an order to summon twenty-four persons to serve as trial jurors. This trial jury was subsequently empanelled by the court as a grand jury, and found the indictment upon which the prisoner was convicted, and his motion to set aside the indictment, duly made on that ground, was denied. Had a subpoena been issued to summon twenty-four witnesses in the case, there would be just as much authority in the court to impanel them as a grand jury as to impanel this trial jury as a grand jury."

The judgment was in this summary way reversed.

In People vs. Hernden, 5 Blackf., 75, the defendant pleaded in abatement that one of the grand jurors who preferred the bill, and who had been selected as a *talesman,* was not a householder or freeholder. The state demurred; the demurrer was overruled and the defendant discharged. The court says—

"The circuit court was correct in sustaining the plea. The statute regulating the summoning of grand and petit jurors requires that the jurors be selected from the list of taxable persons, and that they be reputable freeholders or householders of the proper county. A *talesman* is such a person as is qualified to be on the original panel.

"If a grand jury lack any of the qualifications required by the statute, it is good cause of challenge; or the defendant, before issue joined, may plead the objection in avoidance. Vattier vs. State, 4 Blackf., 73; 1 Chitty's Cr. L., 308; Bac. Abr., tit. Juries. A." Judgment affirmed, sec. 11, Ind. 478.

In Hardin vs. State, 22 Ind., 317, 351, a plea in abatement was the subject of discussion and the court says—

"When a person is under prosecution for an indictable offence, whether in custody or on bail, it would perhaps devolve no hardship upon him to require that he should take his objection to the grand jury about to enquire into the offence with which he is charged, or any member thereof by way of challenge, and not permit him to forego the challenge, and afterwards set up the objection by plea in abatement. *But where a person is not under prosecution for an offence, he can not be supposed to anticipate that a charge may be made against him, before the grand jury, and in such cases we think he may plead in abatement to the indictment the disqualification of any of the grand jurors who found it,*" referring to the preceding case of State vs. Herndon, 1 Whart. C. L., Sec. 472; 1 Arch. Pl. Pr., 289.

In Hanes Dig. of Cr. L., 478, is this note of a Virginia case—

"Where an indictment is found by the grand jury, one of whom was an alien, the bill or presentment may be avoided by plea." Commonwealth vs. Cherry, 2 Virg. Cas., 20."

In Porter vs. State, 23 Miss., 578, after the grand jury had been organized, sworn and charged, one juror was excused and a substitute, summoned from bystanders, held that this substitution vitiated the whole body. The Court says further—

"If the action of the court had stopped with the discharge, no such result would have followed; *for after the discharge of the juror in question, a sufficient number to constitute a legal grand jury remained, the body would have preserved its organization, and possessing all the requisites of a legally constituted grand jury, its acts, to all intents, would have been valid. But the Court having acted without authority, manifestly could not, by such illegal and void act, acquire a right to cause the substitute to be sworn in the place of the discharged grand juror. The admission, therefore, of this person upon the panel of the grand jury, and his participation in their deliberations, vitiated the whole body.*"

Another quotation from this opinion appears in a note to sec. 724 of 1 Bish., Cr. Proced.—

"The only case in which the circuit courts possess the authority to cause other grand jurors to be sworn after the original panel has been sworn are those in which some grand juror, after he has been impaneled and sworn, has died, or is sick or absent. In such case the court may order substitutes to be summoned from among the bystanders."

In State vs. Brown, 5 Eng. (Ark.), 78, it was held to be good cause of abatement that the foreman of the grand jury, by whom the indictment was found, was not a citizen of the State, or that a member of the grand jury was not a householder or freeholder.

In State vs. Clarissa, 11 Ala., 57, it was held that objections to the grand jury must be taken by plea in abatement, at the term in which the indictment was found. And in State vs. Greenwood, 5 Porter, 474, it was held that the question whether a grand jury has been drawn, summoned and impanelled according to law, can only be considered under a plea in abatement.

In Mississippi, when a grand jury is not impanelled in the way prescribed by statute they have no power to find a valid indictment. Stokes vs. State, 24 Miss., 621. See State vs. Middleton, 5 Porter, 474 (Ala). See State vs. Miller, 3 Ala., 343.

In 1 Arch. Pr., and Pl., by Waterman, 319 it is said:—

"The incompetency of the grand jurors who find a bill is a matter which may be pleaded in abatement," citing the following authorities—Nagent vs. State, 19 Ala., 540; State vs. Foster, 9 Texas, 65; Jackson vs. State, 11 Id., 261; Rawls vs. State, 8 Sm. and M., 599; McQuillen vs. State, Id., 587; State vs. Rickey, 5 Halst., 83; State vs. Greenwood, 5 Porter, 474; State vs. Middleton, Id., 483; Stewart vs. State, 7 Eng., 190; Baker vs. State, 23 Miss., 243; Smith vs. State, 19 Conn., 493; State vs. Brooks, 9 Ala., 10; State vs. Wills, 11 Hump., 222; State vs. Duncan, 7 Yerg., 271.

"However numerous the grand jury may be, it seems that if one of them be open to exception he vitiates the whole of the jury since it cannot be assumed that he is not of the twelve that united in finding the bill." 1 Am. Cr. L., sec. 465; Barney vs. State, 12 Sm. and M., 68; State vs. Duncan, 7 Yerg., 271; State vs. Jacobs, 6 Texas, 197.

3 Bacon's Abs., tit. Juries, A, "If one of the grand jury who find an indictment, be within any of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it."

In 1 Bish. Cr. Proc., sec 749, is a summary of the law on the subject of these pleas in abatement—

"If any one of the grand jury is personally incompetent to serve as such, as, for instance, if he is an alien, or if he is not a freeholder or house holder, where the statute law of the State requires such qualification, the presence of such a disqualified person serving as a grand juror vitiates the whole finding. And the defendant may avail himself of the objection by a plea in abatement. In this way, also, the defendant may bring forward the objection, equally serviceable to him, that the grand jury finding the indictment consisted of too many members, or too few, or that it was otherwise incompetent. So, likewise, may he, according to the doctrine prevailing in some, and perhaps in most of the States, thus avail himself of an irregularity in the summoning or empanelling of the grand jury; or show that the grand jurors have not been selected according to the directions of the statute."

Any number of pleas may be pleaded. 1 Bish. Cr. Proc., sec. 433, 437.

2. The grand jury was vitiated by the discharge of Neff, Wilson, and Bennion.

This objection is of no practical importance, if it shall be held that 15 jurors is the legal complement of a grand jury, under the laws which govern in this Territory.

If the first plea is overruled, it must be on the ground that the territorial statutes, in respect to the number of jurors to be drawn and impanelled, have been abrogated, and on the theory, therefore, that a common law grand jury may be impanelled; that the judge may make the number definite within common law limits, fixing it in his discretion when he gives notice of the drawing; that the number so fixed governs for the term; that for the October term the number was regularly fixed at 23.

Neff, Wilson and Bennion severally possessed all the statutory qualifications. They were not challenged or discharged for wanting either of them.

I dispute the right of the people to challenge such jurors, those regularly listed, drawn and summoned, on the grounds upon which these jurors were discharged.

I concede that grand jurors ought to be in accord with the policy of the criminal law. They should be in hearty accord with the government in its endeavor to prevent crime, and in the punishment of crime as a means; they should have no subjective scruples against punishment of these grave offences which vitally affect the peace and good order of communities. The design of the law in prescribing the qualifications of jurors, and in regulating the mode of selecting them, is to obtain jurors who will aid in such an administration of the laws against crime as will subserve the ends of good government.

The jurors in question, who were discharged, were rejected for supposed want of accord with the government on the subject of the law against polygamy. They were set aside on the assurance of the district attorney that it was a subject that the jury would have to deal with.

Criminal laws are not all of equal importance. Some are aimed at preventing the commission of those acts which are essentially and morally wrong, or, as jurists denominate them, acts *mala in se;* others, at acts that, in the wisdom of the lawmaker, are denounced in the interest of some debatable theory of social economy. The citizen may be at one with the government in deprecating all the acts forbidden, but dissent on the measure of punishment; the citizen may, likewise, not assent to the declared turpitude of the act punishable as a crime, in some exceptional cases, without being in either instance hostile to the government, or opposed to the general policy of the criminal laws.

Individual opinions are so various respecting the proper theory and effect of retributive laws, as they exist, that unanimity has seldom been witnessed in any intelligent panel of grand jurors.

The statutes require jurors to possess certain qualifications, wanting these, they are ineligible. But, if possessing these, they are still rejected, it must be because other laws exist requiring other qualifications, and because notwithstanding the possession of the statutory qualifications jurors may still be under disability to serve. If the qualifications required by the statute are only treated as the external indicia of moral fitness, and to be accepted as good evidence thereof no longer than till contradicted, then other than this statutory evidence of moral fitness ought to suffice, when it proves that fitness. Merely evidentiary facts, which are inconclusive in favor of fitness, should not be treated as invariable and essential accompaniments. If they are not the elements of that fitness, either in whole or in part, why may not other evidence establish it? The decisions, however, make the statutory qualifications a *sine qua non*—they are indispensable. There is no doubt that non-residence, alienage, or inability to read and write in the English language disqualifies absolutely.

In addition to the assurance of fitness afforded by the qualifications mentioned in the statutes, there is another even more important; each juror, put in the grand list, is selected by the Probate Judge, or the clerk of this court, from at least forty eligible men. Is it not presumed that a juror so eligible and so selected, is in every sense suitable and qualified? Thereupon is not every desirable quality legally implied and taken for granted? Such a juror is undoubtedly competent. No plea in abatement could be allowed to quash an indictment found by him. But it is manifest that the Poland Bill does not take away the right to challenge for favor.

Peremptory challenges are provided for, those for cause are not. As that act prescribes all the qualifications of both juries, if there still exists the right to challenge petit jurors for cause, as might have been done before that act was passed, the same right as it previously existed of challenging grand jurors, must also continue. It is true that challenge to petit jurors, when allowed, only removes them from a particular case, yet as the practice was to discharge altogether a grand juror, on challenge allowed, doubtless that practice may still be followed, though it is different in California. People vs. Butler, 8 Cal., 435; People vs. Eniswood, 29 Id., 146; 32 Id.

To the extent therefore that challenges to jurors of either jury were previously allowed, they are, I admit, allowed under the operation of the Poland bill. But on what principle? Undoubtedly on the principle already stated, that act contains only affirmative provisions on this subject, and therefore only displaces the previous statute or common law where there is a positive and irreconcilable repugnance.

The authorities on this subject are very explicit. They will serve to support the objection to the juror James, who had not the property and taxpaying qualification. They will be brought to the attention of the court when I come to discuss the plea relating to him. They also support my views on the first plea.

Now admitting the right of challenge for cause as it existed prior to the Poland Bill, the important inquiry is, To what extent was it allowed to the polls of the grand jury?

At common law there was no challenge allowed to the polls of the grand jury, or plea allowed questioning their competency, unless for want of one of the qualifications necessary at common law, or for some defect in the mode of selecting under the statutes. They were required to be *probi et legales homines,* and it was a good exception that one returned was an alien, a villien outlawed for crime, returned at the instance of the prosecutor, or otherwise than by the proper officer. Buc. Abr., tit Jarvis, A.; Hawk., 315; 1 Blackf., 317.

In this country a right of challenge for favor has been recognized to some extent. Defendants have the right to the same extent as to the polls of the petit jury. 1 Burr's Trial, 38.

But the people or prosecution do not seem to have so general a privilege. The right has been exercised in a few instances, *in capital cases,* to set aside jurors who could not conscientiously find indictments for crime where the punishment might be death. Jones vs. People, 2 Blackf., 475; Gois vs. People, 3 Ind., 329. See State vs. Yellick, 7 Iowa, 287.

Upon reason as well as authority the right of challenge ought to be confined to such cases. The jurors are selected in the interest of the government, and the state can present cases at its option.

In Commonwealth vs. Barrell, 16 Pick., 153, a prosecution for arson in burning a church, it was held that even a petit juror was not to be asked "whether in his opinion the act set forth in the indictment was of such a character that it ought not to be punished by law, nor whether he thought the punishment prescribed by law was unfit for the offence."

In all cases, less than capital, the government is to accept such jurors, grand and petit, as possess the statutory qualifications, when selected in the required mode, subject to such peremptory challenges of petit jurors as are allowed by statute.

The vacancies caused by these erroneous challenges were at once filled by drawing other jurors from the box. The discharge of the three jurors in question was therefore one step in the process of changing the membership of the grand jury. The jury was constituted on the theory that twenty-three jurors became the legal complement of the grand jury, under the judge's order before term; that his order made it necessary to impanel and maintain that definite number. Upon that theory, of course, the irregular discharge of one originally drawn would result, as was the case at the October term, in an illegal substitution of jurors.

3. The jury was vitiated by three jurors being drawn without any necessity to fill the places of these discharged.

The Constitution of the United States was extended over this Territory by the Organic Act. By the Constitution trials for crimes must be had upon presentment or indictment of a grand jury. The grand jury of the Constitution is the grand jury of the common law, and this is the grand jury provided for in the "Poland bill."

Suppose I concede that the "direction" the judge is authorized by that act to give in respect to the number of jurors to be drawn, implies the exercise of a discretion touching the constituency of the grand jury, such a discretion as is inconsistent with the territorial act fixing the number precisely at fifteen, and that that statute is therefore repealed by implication. What then? Does it follow that the number ordered to be drawn is to govern through the term, by a like Procrustean rule? Will that order have the effect of a statute fixing the number to compose the grand jury for that term, so that the number so mentioned must be impanelled and be kept full to organize the jury and to preserve its organization? The Poland bill does not declare any such practice or rule. That discretion, if it is granted, is no other than that which courts have always possessed, when they have had jurisdiction, not restricted or regulated by statute, to employ a common law inquest. It is a jurisdiction to summon twenty-four, and to empanel in his discretion twelve, or any greater number, not exceeding twenty-three. Mr. Chitty says—

"At the sessions, it is not an unusual practice, after fifteen or sixteen names have been called, to consider the inquest as complete, and not to insist upon the service of the rest, who may happen to be in attendance." 1 Chitty's Cr. L., 311.

Mr. Bishop says—

"There need not be more than twelve, either concurring or present, or even having a nominal existence on the panel." 1 Bish. Cr. Pr., Sec. 725.

See also Porter vs. State, 23 Miss., 578, already referred to.

The Poland bill contains one clause that may pertinently be repeated in this connection—"The jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases." I will distribute this language and apply it singly to the grand jury. Then it will read—"The jurors so drawn and summoned shall constitute the regular grand jury for the term for all cases."

If this passage is understood literally to require all the persons so drawn and summoned to be impanelled to make a grand jury, then the *number* would be retained as a consequence, for there could be no challenges, and the number would be retained only as an incidental consequence. That construction has not been adopted. I need say nothing of the absurdity of such a construction of the same words applied to the petit jury, with reference to which the same discretion is granted.

But there is here a plain and unmistakable command, that the jurors so drawn and summoned before the term shall constitute the grand jury. These words require that the jury shall be formed of jurors so drawn. The petit jury or juries must be formed, likewise, of jurors so drawn and summoned, not necessarily by putting all into one jury, but each is to be made up of constituents so obtained.

I have conceded the right of challenge. When all challenges have been disposed of, the command still continues—make the grand jury of the jurors so drawn and summoned. Can it be done? Nineteen jurors so drawn and summoned were in attendance. They could legally constitute a grand jury according to the common law. They could legally constitute such a grand jury as the Poland bill provides for—that requires it to be so constituted. There was no necessity to draw others; putting others not so drawn and summoned, before the term, into the panel was a violation of the prescribed mode of constituting the jury.

It is true the same section of the Poland bill contains this further provision—"If during any term of the district court any additional grand or petit jurors shall be necessary, the same shall be drawn from said box."

I am not able to perceive that this clause has any application, though it contains all the authority there is for drawing jurors during the term. It only authorizes a new drawing when *necessary.* If nineteen jurors will make a grand jury, the Poland bill commands that they shall constitute it, on the theory that the Territorial Act fixing the number is repealed. The common law says that 19 jurors are sufficient for a grand jury; the Poland Bill does not repeal the common law; therefore, if the Territorial Act does not fix the number, the Poland Bill, construed by the common law, does. It says peremptorily and plainly, if 19 is the number of grand jurors "so drawn and summoned," not discharged, they "shall constitute the regular grand jury for the term."

4. The grand jury was vitiated by the presence on the panel of Wm. F. James, who was disqualified because he did not own taxable property and pay taxes in this Territory.

Section 4 of the Territorial Act of Jan. 29, 1859, is as follows:

"A person is not eligible to serve, and therefore shall not serve, on any grand or petit jury, in any court in this Territory, unless he is a male citizen of the United States, is over twenty-one years of age, is of reputed sound mind and discretion, is not so disabled in body as to be unable to serve, has not been convicted of any capital or infamous crime, *owns taxable property and pays taxes in this Territory,* and has been a constant resident therein during the year preceding his being selected to serve as a juror."

The argument made, and the authorities cited, in support of the first plea, are applicable to this point. The Territorial statute just quoted was in force at the time the Poland Bill passed, and is yet, unless repealed by that act. This statute of the Territory prescribed the qualifications of jurors for all cases, as well the cases arising under the laws of the United States as territorial cases. Engelbrecht vs. Clinton, 13 Wall, 434.

There is no express repeal in the Poland Bill, and I contend there is none by implication. Such repeals are not favored; and they are not declared, unless there is an irreconcilable repugnance between the earlier and later statute. Bank vs. Commonwealth, 10 Penn., 442; Davis vs. Fairbairn, 3 How., 636; McCool vs. Smith, 1 Black, 459, 470, Atty. Gen'l vs. Brown, 1 Wis., 513; Wood vs. U. S., 16 Pet., 342-363; Bowen vs. Lease, 5 Hill, 221; Snow vs. U. S. *ex rel.* Hempstead.

In the eleventh year of Henry IV. an English statute was passed that thereafter no indictments should be made but by the King's lawful liege people, duly summoned by the proper officer, and that any indictment otherwise found should "be void, revoked, and forever held for none."

In the third year of Henry VIII. another act was passed, directing that all panel of grand juries to be returned by the sheriffs and their ministers before the justice, &c., should be *reformed,* by putting to and taking out of the names of persons so impaneled, by the direction of the justices, and that they should command the sheriffs to put other persons in the same panel, and when so reformed should be *good and lawful.* 3 Bac. Abr., tit Juries, A.

The subsequent decisions were that this latter statute did not take away the force of that of 11th Henry IV., except so far as they are repugnant; and therefore if any indictor be outlawed or returned at the nomination of any person, except the justices under their authority to reform the panel, the indictment might be avoided by plea.

The rule to be deduced from the authorities generally on this subject is that if the two acts can be reconciled, and both have effect, they will be so construed as to harmonize, and both operate.

If both statutes are affirmative, it is in general easy to reconcile them, unless the last is a revision and covers the whole subject matter of the first, and is plainly intended to afford the only rule on the subject. Davis vs. Fairbairn, 3 How., 636.

The Poland bill undoubtedly does not affect [illegible] the only rule intended to govern the subject of the constituency of juries. Three of the original panel and several drawn afterwards were discharged upon a rule not found in the Poland bill. Jurors undoubtedly must be twenty-one years [illegible] but the rule requiring it is not to be found in the Poland bill.

If Neff, Wilson and Bennion were properly discharged, being discharged for want of other than the qualifications mentioned in the act of Congress, then the Poland bill does not repeal the previous law on the subject of juror qualifications, except in the particulars mentioned, and expressly modified, as in the particular of residence.

5. The grand jury was vitiated by the presence on the panel of McLaughlin in the place of Jesse E. Murphy.

The latter was drawn first; he was ordered to be summoned; he was summoned; his attendance within a reasonable time, but before McLaughlin was either accepted or the grand jury sworn.

This objection depends on no debatable construction of the Poland bill. It rests wholly on this postulate—that when a juror is chosen to fill a place, necessary to be filled, and his attendance can be obtained within a reasonable time, and he is qualified, no other juror can be substituted.

Under the jury law jurors are required to serve; and when so chosen, if qualified, they are required to serve; and no power exists to discharge or substitute. The juror is to be relieved from jury duty and the [illegible] may make application to the court upon the [illegible] legally act upon that application. I do not speak of such substitutions, but against any not effected by the exercise of judicial discretion.

The summons was out for Murphy and served on him pursuant to order, and before his attendance was obtained according to that summons McLaughlin was drawn, or when he was drawn, he did not know of Murphy had been included.

There are provisions of the Poland Bill that have an important bearing on the question here raised. I have contended [illegible] either of these jurors, there was no *necessity* for drawing [illegible] number of jurors in attendance. But I do not now repeat that argument. [illegible] there was a necessity to empanel more jurors, and a legal organization could be effected with a less number, as Murphy was a qualified juror. [illegible] procured within a reasonable time, and [illegible] successful process for obtaining his attendance, and [illegible] pending and not discharged, there was no authority to draw McLaughlin in his place. The only provision of the Poland bill that authorizes the drawing of jurors during a term—

"If during any term of the District Court, any additional grand or petit jurors shall be necessary, the same may be drawn from said box."

[illegible] the attendance of those drawn can not be obtained in a reasonable time, others may be drawn in the same manner.

It was judicially determined that Murphy's attendance should be procured. It was deemed possible to obtain it within a reasonable time, and since he was summoned to appear on the 7th of Oct., it is [illegible]. But Murphy appeared actually in Court a few hours after he was drawn, and on the day before the reasonable time expired. He was there also at the time he was required by the summons. [illegible] McLaughlin because the complement of jurors had been drawn; no other name was authorized to be drawn in Murphy's place, because, in fact and by judicial inference, Murphy's attendance could be obtained as soon as and even sooner than it was required. The Poland bill confers no more power to change one juror than [illegible] and the consequence of irregularly changing one is as serious as that of changing the whole panel.

In conclusion I must assure your honor that I have convinced myself that all these points are well taken; and if either one is good it is fatal to the indictment.

The subject of the last plea I submit without argument.

Our Country Contemporaries.

Ogden *Junction,* Feb. 9—

The Pioche *Journal* of the 4th inst. says: "About 2 o'clock this afternoon a miner named Thomas Riley met his death in the Newark mine. He went down the shaft to fill tubs, and it seems that in running the car loaded with rock from the first station to the shaft, and the trap not being down, he ran the car into the shaft and was pulled in with it and fell to the bottom, a distance of seven hundred feet, and was instantly killed, and also shockingly mutilated. Deceased was a native of Ireland, aged about 30 years. He leaves behind the reputation of an upright and honorable man. His untimely and shocking death is greatly deplored."

A dastardly attempt has been made to oust from office the postmaster of this city, in order that a perfect stranger may obtain the position. The manner in which this proceeding has been manipulated, calls for indignant protest of all our citizens, irrespective of creed or party.

A document was presented to a few of our business men, yesterday, in behalf of one N. J. Sharp, said to be a postal clerk on the Union Pacific railroad. Sharp represented to some that the appointment was already secured if the signature of certain of our citizens could be obtained, and that the special mail agent for Utah was desirous that he should have the position. To others it was intimated that Postmaster Hall had resigned the office; and in this way some signatures were obtained, and the petition has been forwarded to Washington.

It appears that this Sharp has some influence at the seat of government, through relatives. But we can hardly believe that a worthy and able official, like Mr. Hall, against whom his superior officers can find no fault, and who has raised the post office in this city to a second rate position, restoring the confidence in it which once was lost, will be ousted without the shadow of a reason, simply to make way for a stranger, whose only recommendation is that he is somebody's fifty-sixth cousin, or a Congressman's distant relation by marriage.

A counter petition should be immediately forwarded to the Postal Department with the protest of all who have signed Sharp's document under false representations.

Such tricks as the above are a little too sharp, and the perpetrator of it has demonstrated his total unworthiness of public office in any capacity. He should be expelled from the service altogether without delay.