

KEENER *v.* UNION PAC. RY. CO.

*Circuit Court, D. Colorado.*

May 7, 1888.

NEW TRIAL—AS OF RIGHT—TIME OF MOTION.

After judgment for defendant in an action for the possession of land, plaintiff paid the costs, and filed a motion for a new trial before the first day of the succeeding term. *Held*, under Code Civil Proc. Colo. § 254, providing that the party against whom such judgment is rendered may, at any time “before the next succeeding term,” upon paying all costs, have the judgment vacated upon application to the court, that the motion was in time, and that delay of the court in acting upon the motion did not defeat the right granted by the Code.

At Law. On motion for new trial. For the original report see 31 Fed. Rep. 126.

*Wells, McNeal & Taylor*, for plaintiff.

*Teller & Orahood*, for defendant.

BREWER, J. After judgment for defendant in an action for the possession of real property, plaintiff paid the costs and filed a motion for a new trial before the first day of the succeeding term, and now asks an order of the court vacating that judgment, and granting him a new trial. It is objected that the application is not made in time. The statute (Code Civil Proc. § 254) provides that, when judgment shall be rendered,

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etc., "it shall be lawful for the party against whom such judgment is rendered at any time before the next succeeding term, to pay all costs recovered thereby, and upon application the court shall vacate such judgment." It seems to me the party has brought himself within the very letter of the statute. It says, "before the first day of the next succeeding term." The party did pay the costs, and did file his motion, and that is making his application. Delay in the action of the court does not defeat his right. The hardship of this case, if there be hardship, ought not to interfere with the general rule. The case must be controlled by that rule. Judgment vacated, and a new trial ordered.