RIVER IMPROVEMENT.

Reassembling of the Convention, and Some Warm Discussion.

A Proposition to Have the State Reclaim Swamp Lands is Not Approved.

The California River Improvement Convention reassembled yesterday afternoon at Firemen's Hall for the first time since last winter.

Chairman P. E. Platt called the convention to order, and stated that the session was a special one, called for the purpose of hearing the report of the Executive Committee, and also consider the advisability of requesting the Legislature to make an appropriation for the improvement of the river banks. In conclusion, Mr. Platt said that, inasmuch as a number of the delegates to the convention were representing their respective districts at the Capitol, and could not attend, it might be advisable to postpone the meeting until evening.

The Chairman's idea, however, did not meet with the approval of all those present. Some of them said they had come a long distance, and were anxious to get through, so it was decided to go on with the business before the convention.

Senator Rose, of Colusa, moved that a Legislative Committee of five be appointed, to consider the proposition of petitioning the Legislature for an appropriation for the reclamation of lands along the river banks.

THE FIRST OBJECTION.

It had been whispered about prior to the assembling of the delegates that the appropriation proposition was going to meet with some opposition.

Mr. Rose's motion was productive of the first "kick."

Mr. Berry, of Sutter County, took the floor and said he considered the Senator's motion premature. A legislative committee should not be appointed until the convention had determined the nature of the legislation desired—if any legislation was necessary. Such a committee might recommend something that did not suit, and all its work would be lost.

Dr. G. M. Dixon, of this city, said he understood the proposed committee was only to act for the afternoon, and its duty would not be to draw up any bill for the Legislature.

After some further discussion, Senator Rose withdrew his motion.

EXECUTIVE COMMITTEE'S WORK.

The subject was then dropped temporarily, and Dr. Dixon, Chairman of the Executive Committee, was asked for the report of that committee. He gave it verbally. He said that the committee went to work immediately after the adjournment of the convention which appointed it, last winter, and collected data, maps, etc., and the members placed themselves in communication with the California representatives at Washington. It seemed at first that the committee would have an easy task, but the members soon found out their mistake. They found that the only way to get the attention of Congress to their desires was to send a delegation there, so the river counties were asked for contributions for this. Some of the counties responded magnanimously, but others did not. The delegation went, however, and did good work. He was sure that, had not the delegation gone to Washington, the river improvement proposition would be no further along than it was two years ago. Not that the California Senators and Representatives did not give the matter the attention that they should, but because it was up-hill work and it was difficult to attract the attention of Congress.

THE WASHINGTON DELEGATES.

By request, Senator Rose and Mr. Ohleyer gave the convention some information regarding the manner in which they, as members of the delegation that went to Washington, worked and what they accomplished. Both were satisfied that all that could be done was accomplished, and that in the course of time the river counties will get what they desire. The Government did things on methodical and business principles, and did not appropriate money for schemes with which it was not thoroughly acquainted. They considered that the Government acted wisely in appointing a Board of Engineers to make surveys and estimates and suggest plans before any appropriation is made. The delegation found that there was a suspicion among the Washington authorities that the scheme was being gotten up to benefit a few private interests, and it was difficult to disabuse their minds of this suspicion.

Engineer Marsden Manson, of San Francisco, who was also one of the delegation, made similar remarks.

C. E. Grunsky suggested that the principal business now before the convention was the providing of means of assisting as much as possible the Board of Engineers, which was to report to Congress; and next, the suggestion of any legislation that might be necessary regarding any work to be done by the State.

Dr. Dixon offered a resolution to the effect that a committee of seven be appointed by the Chair, whose duty it would be to assist the Board of Engineers in the way of furnishing data and other information. The resolution was adopted.

The Chair announced that the committee would be appointed later.

THAT OBJECTIONABLE BILL.

Senator Rose then suggested that the proposition to put a bill before the Legislation, be taken up. Most of them wished to discuss the matter and wanted to get through with it.

A roll of type-written matter was produced from somebody's inside pocket and handed to Secretary Grunsky to read.

It was very lengthy. It provided, briefly, that the State should make a large appropriation for the purpose of reclaiming swamp lands and overflowed districts—draining lands and strengthening levees.

After the reading of the bill the convention took a recess.

After the convention reassembled in the evening, President Platt stated that the evening would be devoted to the discussion of the proposed bill.

E. E. Leake was the first to address the assemblage. He said he did not believe it was in the province of the convention to consider the bill at all. The members were not appointed to do any such thing but to memorialize Congress to make an appropriation for preserving the navigable streams of the State. He did not believe they had any authority to consider the bill which had been prepared.

NOT THE CONVENTION'S BUSINESS.

Mr. Leake then asked permission to read a paper prepared by George Ohleyer, and he was allowed to do so. Mr. Ohleyer used the argument that the convention was called upon to act on a measure entirely foreign to the purpose for which it was constituted. The State had no interest in the matter of reclaiming the swamp land districts; the expense should be borne by the owners of the land. The subject brought before the convention was a complete departure from its purposes, and he raised a point of order and objected to any discussion of the bill.

President Platt stated that although he was a member of the Executive Committee which had drawn up the bill, he had not met with them and had not seen the bill till it had been read yesterday afternoon. He had not changed his views on the subject, and believed that the convention was established for no other purpose than the possibility of fixing the responsibility on the General Government.

Mr. Platt was about to remark that he thought the point of order was well taken when Mr Rose, of Colusa, asked permission to say a few words.

SENATOR ROSE'S VIEWS.

"I must confess," said he, "that this is a very singular proceeding, when a man gets up and, after making a long argument on a point of order, asks that the Chair decide without hearing the other side. I desire to say this, that the condition of the country a year ago was one of overflow and disaster. But for this condition the convention would not have been called. The people were suffering from flood and they wanted to relieve themselves. It was important that they appeal to the General Government for aid. There was no Legislature in session at the time the Boards of Supervisors of the overflowed districts appointed the delegates to the convention, but Congress was. We took the position that we should embark on any plan propored for the carrying out of our purposes. Some general system of reclamation was needed in the entire State, for a hundred of millions of dollars were lying dormant in the heart of the State. The movement which we proposed, namely, to seek aid from the State, will not endanger the aid which we expect from Congress. I do not believe the members of this convention who are opposed to considering the bill were bound by iron-clad rules not to consider the question of obtaining State aid."

WOULD DO NO HARM.

Doctor Dixon said he did not understand by any means that the convention was restricted solely to the matter of devising means for obtaining aid from the Federal Government. The Executive Committee had worked day and night in preparing the bill for the good of the people living in the valleys of the State. There were two things to be considered. The first was that which devolved on Congress to dredge out the rivers and make the streams navigable, and the second was that which would naturally fall on the State, to care for the swamp lands and establish a system of drainage for them. The State should fortify the work of the Government by draining the lands and strengthening the levees. He thought the bill should be fairly considered and then if the convention choosed, it could vote it down.

Mr. Barry of Sutter County said he had no objection to considering the bill as an individual and a citizen, but he did object to considering it as a delegate appointed by his Board of Supervisors. The measure was never contemplated by them, and he believed that two years hence would be a more opportune time to discuss the bill. He favored the point of order as made by Mr. Leake.

E. H. Wilbur and others spoke against considering the bill, and others believed that it was a pertinent matter and was important.

THE BILL KNOCKED OUT.

Chairman Platt ruled that the point of order as made, was well taken.

Mr. Rose appealed from the ruling of the Chair, but upon a vote it was sustained.

A motion was then made that the convention request the Legislature to appoint a committee of three from each house to lend aid to the Government Board of Engineers in the work of finding out the needs of the rivers.

A lively discussion ensued and the motion was lost by about a two-thirds vote.

Secretary Grunsky, by request, read the resolution introduced by Assemblyman Clark last Thursday reviewing the condition of the Sacramento River, and advising that means be obtained to improve it.

It was ordered that the sentiment of the resolution be indorsed.

On the suggestion of Senator Dray, a committee of three was appointed to see that any resolutions or bills passed by the Legislature would get to Washington.

Mr. Platt appointed Eugene J. Gregory and Ed Leake, and the convention insisting, he consented to serve on the committee himself.

Doctor Dixon wanted to know how the funds at the disposal of the convention stood. He said he thought the committee of seven appointed at the afternoon session to assist the engineers in obtaining information as regards the needs of the river would incur some expense, and he did not believe there was much money in the treasury.

Treasurer Eugene J. Gregory informed the convention that there was left $24 41.

WE'LL GO FOR THE SUPERVISORS.

Several of the delegates present offered to contribute from their own pockets, but Doctor Dixon moved that the members ask the Boards of Supervisors of their respective counties to make a liberal appropriation toward defraying the expenses of the convention. The motion was carried.

Upon motion of Mr. Gregory, it was ordered that a vote of thanks be tendered the gentlemen who constituted the delegation who went to Washington and succeeded in getting Congress to appoint the Board of Engineers to examine the rivers in the State.

A vote of thanks was also tendered the officers of the convention, after which the meeting adjourned, subject to the call of the Chair.

THEY WILL ASSIST.

The following seven gentlemen were appointed a committee to consult with the Government Engineers and give them such information as they desired concerning the condition of the rivers: Doctor Dixon, Wm. Johnston, Eugene J. Gregory, Marsden Manson of San Francisco, George Ohleyer of Yuba City, Dr. Stone of Marysville, A. H. Rose of Colusa, and A. R. Briggs of San Francisco.

The committee organized last evening by electing the following officers: President, Doctor Dixon; Vice-President, Wm. Johnston; Secretary, Marsden Manson; Treasurer, Eugene J. Gregory.

BRIEF NOTES.

The pay-roll of the State Printing Office for the past two weeks amounted to $6,030 80.

Joseph Judd, Chief Engineer of the Water Works, reported that 25,531,000 gallons of water were pumped during the past week. The running time of the Holly engine was 120 hours, and the Stevens 50½ hours.

M. S. Hammer has lately had a new and modern plate-glass front placed in his drug store, corner Fourth and K streets, which is a great improvement, and when its twelve gas jets are lighted, with as many colored bottles, presents a brilliant effect.

There was an installation of officers of the Dania Society, at the Knights of Pythias Hall, Saturday evening. The officers were installed by Grand President R. Dryer, and were as follows: President, C. Simonson; Vice-President, N. Jensen; Secretary, A. Johnson; Treasurer, R. Dryer; Inside Guard, H. K. Jacobson; Conducter, G. Norman; Trustees, J. Lund and A. Anderson; Delegate to Grand Lodge, A. Anderson.

Weather Forecast.

Forecast till 8 P. M. Tuesday: For Northern California—Fair weather; frosts.

OF exquisite flavor, pure and wholesome. Angostura Bitters is a standard table delicacy. Sole manufacturers, Dr. J. G. B. Siegert & Sons.

SUPREME COURT DECISIONS.

[Filed January 5, 1891.]

Appeal from Superior Court, San Luis Obispo county—V. A. Gregg, Judge.

For appellant, Graves, Turner & Graves.

For respondent, Haggin & Van Ness, of counsel J. M. Wilcoxson.

DEPARTMENT TWO.

LYNCH, Appellant, vs. WELBY, Respondent. } No. 13,743.

This action is for the recovery of $3,623 damages, alleged to be sustained by reason of an alleged breach of a contract of the parties, by the defendants. The contract was in effect that defendants would purchase of the plaintiff all the steers belonging to him on the 11th day of May, 1888, that were three years old and upwards, and that were then or that would be merchantable beef by the 1st day of July, 1888, the number of which was estimated by the parties to be about 300 head.

And the parties further agreed that if there should arise any question between them as to what steers would make merchantable beef, the question should be decided by arbitration, each party to select one arbitrator, and if the two could not agree, they should select a third to settle the question.

Pursuant to this agreement, plaintiff gathered his said band of cattle, and the defendants selected therefrom 90 head of the largest and most choice steers of said band, and paid the plaintiff therefor at the rate of $40 per head, and requested plaintiff to have another and complete gathering of the cattle on the 1st day of July, 1888, at which time defendants would take the remainder of the steers as per agreement, and plaintiff had gathered and ready for delivery the residue of his band, consisting of 176 head of steers, which he insisted then, and still insists, were good merchantable steers. Defendants refused to accept all of said steers, but offered to select from said band only so many as in their opinion were then merchantable beef—48, or possibly 50 head, in all. Thereupon plaintiff insisted upon choosing arbitrators, as stipulated in said agreement, to decide how many of said steers were merchantable beef. Plaintiff chose one William Epperson, and the defendants one A. J. Harris, with the understanding if they could not agree they should select a third person to act with them.

It does not appear that the arbitrators so selected ever decided that any of said steers were merchantable beef, or that they ever differed or failed to agree upon how many were or were not merchantable beef, or that they ever selected a third person to act with them. The only reason appearing in the record for not proceeding with the arbitration is that the defendant, Judge, announced that he could not abide by the decision of the arbitrators. He said, according to the testimony of one of the witnesses, that Lynch was not willing to do anything toward settling the matter, and as far as he, Judge, was concerned, he would not have another thing to do with the cattle, and turned and rode out of the field. That was evidently treated by all of the parties as a revocation by defendants of their agreement to arbitrate. About two weeks after the failure to arbitrate plaintiff sold 176 head of cattle to Lux & Miller for $29 68 per head, and this action is prosecuted to recover the difference between the price which defendants agreed to pay for cattle of the kind and quality specified in their agreement with plaintiff, and the price paid for the 176 head sold to Lux & Miller.

Whether the cattle which defendants refused to accept were of the kind and quality that they agreed to take is a question upon which there is a plain conflict of evidence, and we cannot disturb the verdict of the jury upon that question.

We think the instructions of the court placed the matters in issue fairly before the jury.

Judgment and order affirmed.

SHARPSTEIN, J.

We concur:
THORNTON, J.
MCFARLAND, J.

[Filed January 5, 1891.]

Appeal from Superior Court, San Luis Obispo county—V. A. Gregg, Judge.

For appellant, William Shipsey.

For respondent, W. B. Dillard.

DEPARTMENT TWO.

EZRA CARPENTER, Respondent, vs. A. R. HATHAWAY, Appellant. } No. 13,765.

Plaintiff brought this action to dissolve a partnership, for an accounting, and to establish his interest in certain lands acquired as partners, and obtained a judgment in his favor. Defendant appeals from the judgment, also from an order denying him a new trial.

The main facts, as shown by the findings, may be briefly stated as follows:

About November 15, 1885, the plaintiff, who was then County Surveyor of San Luis Obispo county, had special knowledge of the location and quality of certain large tracts of vacant Government land on the Carisa plains in that county, then offered at private sale for $1 25 per acre, but he was without means to purchase any of the land.

On or about that date he and the defendant, who was possessed of both means and credit, entered into a verbal agreement whereby the plaintiff, upon his part, agreed to assist in pointing out, locating, and entering in the name of the defendant, such portions of the lands as the latter might deem it advisable to purchase for their joint benefit; and the defendant, upon his part, agreed, in consideration thereof, to furnish a team and wagon for the inspection of the lands, to purchase the lands of the Government, and furnish the necessary money therefor, and when so purchased to take charge of and sell the same for cash at a reasonable profit, as opportunities might occur; and after each sale to deduct from the proceeds of each sale the price paid to the Government for the land sold, and pay over promptly to the plaintiff one-half of the remainder.

Between the date of the agreement and the 5th day of June, 1886, the plaintiff and the defendant had, pursuant to the agreement, acquired 3,169 acres of land, the title to which stood in the name of the defendant. Upon the latter date defendant gave plaintiff a written acknowledgment to the effect that the defendant had acquired title from the United States Government to 3,169 acres of land, and that it was understood and agreed that the plaintiff was to share equally with the defendant in the profits of the land.

Thereafter, about August 15, 1886, and pursuant to the same agreement, the defendant acquired title to 640 acres of land.

On April 11, 1887, while all the lands were still held under the agreement, the defendant sold and conveyed to one A. R. Taylor, a near relative of the defendant, 1,937 acres of land for the sum of $2 per acre. Of this price he received but one dollar per acre, and voluntarily, but without the plaintiff's consent, and contrary to their agreement, gave credit to the grantee for the remainder of the purchase price, which still remains unpaid, the defendant not having taken steps to collect it.

Had this latter amount been collected, the net proceeds of the sale, after deducting the sum of $1 25 per acre paid to the Government, would have been the sum of $1,445, one-half of which the plaintiff would have been entitled to. Defendant, however, paid him but $125 on account, which the plaintiff admitted in his complaint.

On June 1, 1889, and at various times subsequent, the plaintiff demanded of the defendant an account of the lands sold, and the money received therefor, and also the payment to him of his share of the net proceeds of the sale; but the defendant failed and refused to render him any account, or to pay him any portion of the net profits of the sale, except the sum of $125, admitted as before stated.

Prior to the first demand for an account of the lands sold having been made, that is, on November 1, 1888, the defendant received an offer of $3 per acre for all the lands acquired under the agreement, and was urged by the plaintiff to accept it; but having sold a portion to Taylor he could not do so, and has ever since been unable to sell the remainder of the lands.

The land sold to Taylor was the only portion of the lands that the defendant sold, and the only amount of money, in which the plaintiff had any interest, that the defendant misappropriated, was the amount he gave his relative, Taylor, credit for indefinitely.

On these facts the Court awarded the plaintiff $597 50, with legal interest thereon from the date of the sale of the portion of the land to Taylor, and an undivided one-half interest in the lands remaining unsold, subject, however, to a lien in favor of the defendant for the sum of $1 25 per acre to cover the purchase price he paid therefor to the Government.

The defendant contends that the written superseded the oral agreement, and that, according to the latter, the profits were not to be divided until all the lands were sold.

The verbal agreement, alleged in the complaint as the foundation of the action, was entered into in November, 1885, and all the land in question, except the 640-acre tract, was acquired pursuant to it, nearly seven months before the writing was made, which defendant claims superseded the verbal agreement.

The writing itself does not contain anything inconsistent with the verbal agreement; it merely states the substance of it. The only witnesses examined in the cause were the parties to it, and nowhere in their testimony does it appear that the writing was given or received as a contract which was intended to supersede all their previous negotiations and stipulations concerning the same subject matter. The defendant testified that: "There was no written agreement from January till June, and the reason I made that little writing was I was afraid that Carpenter was afraid of my verbal agreement, and I told him at the time my word was as good as my bond." (Fol. 112.)

The plaintiff testified (fol. 101, 102): "My contract with defendant became complete when the writing of June 5, 1886, was executed. That writing contains the substance of the agreement."

The foregoing is all the testimony that was given concerning the writing, and we think the court was justified in finding therefrom, in view of the contents of the writing itself, that it was given and received as a mere acknowledgment or memorandum of the verbal agreement. The statement of the plaintiff that the contract became complete, etc., must, when read in connection with the defendant's statement of the distrust with which he thought plaintiff regarded him, mean that he (the plaintiff) felt safe in having a tangible and complete acknowledgment of the existence of their verbal agreement and of his interest in the land, the title to which stood wholly in the name of the defendant. The agreement itself was not completely performed at the time the written acknowledgment of it was given to the plaintiff; it was still executory and remained so until the judgment herein was entered.

Now, as the verbal agreement was, that the lands were to be sold for cash at a reasonable profit, as opportunities to make sales should occur, and the profits were to be divided promptly after each sale, it is clear that the plaintiff was not compelled to wait until all the lands were sold for his share of the profits.

Defendant further contends that, as he borrowed money with which to purchase the lands and paid interest thereon, the profits should have been ascertained, in the court below, by deducting from the price for which he sold a portion of the lands to Taylor, not only the $1 25 per acre paid to the Government therefor, but the interest he had paid thereon, and the taxes and other expenses necessarily incurred in acquiring, keeping, and disposing of the property.

As to the interest, it is sufficient to say that it was not stipulated for in the agreement, and as to taxes and other necessary expenses, even if they were properly chargeable, there was no evidence of them offered, nor claim made therefor at the trial.

It is further urged that no provision was made for the payment of future taxes upon the unsold portion of the lands in which plaintiff was awarded an interest.

It was not necessary to make any further provision therefor, because as that portion of the lands was divided equally between them and the plaintiff's interest made subject to a lien for $1 25 per acre in favor of the defendant to secure the purchase price, the plaintiff's interest is taxable to himself alone, and not to the defendant.

As to the 640 acres purchased under the agreement after the written acknowledgment of June 5, 1886, was given, the Court in awarding the plaintiff his half interest therein, in addition to the lien imposed thereon in favor of the defendant for the price per acre paid by him to the Government, extended such lien to cover interest at the legal rate from the date of the purchase of the tract.

The finding upon which this allowance of interest is based is claimed to be unsupported by the evidence. We are inclined to think so, too; but as it is in favor of the defendant he is not injured by it.

It is also claimed by the defendant that the 640-acre tract was erroneously brought within the agreement. The evidence that it was acquired under the agreement is quite strong; both parties testified that it was so acquired; but the defendant, in order to defeat the plaintiff's claim respecting it, testified as follows: "The written declaration I gave Carpenter embraces all the land described in the complaint, except the 640 acres in sections 5 and 6, township 31 south, 19 east; that I acquired in August afterwards. *If he kept his agreement, that was to be included in it.*" To which we may add, the Court found that he fully performed the agreement upon his part, and this finding is supported by the evidence.

We advise that the judgment and order be affirmed.

GIBSON, C.

We concur:
BELCHER, C.
VAN CLIEF, C.

THE COURT.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

[Filed January 3, 1891.]

Appeal from Superior Court, Alameda County—(Name of Judge does not appear.)

For appellant, G. W. Langan.

For respondent, D. M. Connor.

DEPARTMENT TWO.

JAMES T. RYAN, Respondent, vs. GEO. S. FITZGERALD, Appellant. } No. 12,962

This action of claim and delivery was for the recovery of the possession of certain horses and colts and two mowers, or their value, and damages for their taking and detention.

The defendant admits the taking of the property as a Constable under a writ of execution on a judgment against Jeremiah Ryan, the assignee of the plaintiff. (Tr. folio 22-3.)

The cause was tried by a jury, who returned this verdict: "We, the jury in the above entitled cause, find for the plaintiff the possession of the following property: The horses and colts described in the complaint, or its value, the sum of $1,225, with damages in the sum of $18 55." (Folio 28.)

Upon that verdict a judgment was rendered for the plaintiff that he have and receive possession of the property mentioned in the verdict, specifying it, "or for the sum of $1,225, the value thereof, in case a delivery thereof cannot be had, and in case a delivery of any portion thereof cannot be had, then for the value of such portion of said property, together with $18.55 damages, and for costs taxed at $39 50." From this judgment an appeal is taken on the judgment roll, and the appellant claims a reversal thereof, because:

"The verdict is uncertain in this: It does not provide for a delivery of the property to the plaintiff, if delivery can be had, and does not, nor does the judgment, state for what the damages are given. The complaint claims damages for taking as well as for detention. Damages for detention only are permitted, and so far as appears the damages may have been awarded for the taking only." (Appellant's P. and A., p. 2.)

It was unnecessary that the verdict should have provided for any delivery of the property, if such could be had. When the jury found the right of possession to be in the plaintiff, then the conclusion of law followed, as provided in Section 657 of the Code of Civil Procedure, that he was entitled to delivery, if it could be had, and if not, to the value of the property as found by the jury in the alternative; this the judgment must contain, but not the verdict. For, as to the judgment, the form of it must be provided in the section of the Code of Civil Procedure *supra*, but Section 627 of the same code, which prescribes what the verdict of the jury shall contain, requires no finding as to delivery at all.

As to the second matter of objection, that in reference to the uncertainty of the verdict for damages, whether it is given for *taking* or *detention*, it may be said: That in an action of the kind in hand, damages may be claimed and recovered for both taking and detention. (Arzaga vs. Villaba, 24 Pac Rep., 656.) And the verdict being for a sum certain for *damages*, not specifying which kind, will be presumed to cover both grounds alleged for damage. Again, the objection going to the form of the verdict should have been taken in the court below, and it is too late to urge it here. (Campbell vs. Jones, 41 Cal. 515).

It is urged further that because the jury found for the plaintiff for the possession of a part of the property only, and as to the balance their verdict was silent, that a judgment based thereon is void, as not responsive to the issue raised by the pleadings, that is the right of possession of the whole of the property sued for.

Conceding that if such a verdict had been rendered for the defendant, that it would have been insufficient to support the judgment, under the rule laid down in Miller vs. Jewett (66 Cal. 216), yet the defendant here does not allege in his answer that the plaintiff has the possession of any of the property, but that an officer of the law has it under a writ in this case (fol. 18). The plaintiff has only obtained judgment for a part of the property, and has no right to possession of the balance. There is nothing to show but that the defendant is entitled thereto, and that it cannot be withheld from him. The verdict and judgment here being silent as to the balance of the property, it must be held that the plaintiff was denied any further relief than he has obtained, and he is precluded from any further litigation with the defendant as to this balance. (Gray vs. Dougherty, 25 Cal. 277).

But in this case the defendant has asked for a return of the property, and it does not appear that he has given bond and sureties, who have justified, and in that case it would have been the Sheriff's duty, under Section 515, C. C. P., to have delivered the property to the plaintiff, and it must be presumed that he has done so. Therefore, since the plaintiff has determined by the verdict and judgment to be entitled to this balance of the property, the judgment here should be so modified as to require his return of it to the defendant, and in other respects the judgment should be affirmed, and we so advise.

FOOTE, C.

We concur:
BELCHER, C. C.
HAYNE, C.

THE COURT.

Ordered the judgment be modified in accordance with the views above expressed, and as so modified, the judgment is affirmed.

[Filed January 5, 1891.]

Appeal from Superior Court, San Bernardino County—C. W. C. Rowell, Judge.

For appellant, Waters & Gird, Curtis & Otis, George E. Otis.

For respondent, Willis, Cole & Craig, Harris & Gregg.

DEPARTMENT TWO.

GEORGE MILLER, Respondent, vs. THE HIGHLAND DITCH COMPANY ET AL., Appellants. } No. 14,017.

Plaintiff was the owner of a tract of land situated about one mile southerly from the San Bernardino range of mountains. Part of the tract was in a high state of cultivation. Coming out of said mountains, and trending towards plaintiff's land but not reaching it, is a canyon called Baldridge Canyon. The natural waters of said canyon would not flow upon plaintiff's land, but, as found by the court, "would spread out on the lower lands without cutting any particular channel, the tendency of the flow being to spread out over the said lower lands north of plaintiff's premises and become absorbed in the soil." But the defendants, by means of three different ditches, turned foreign water into said canyon, and the commingling water from said ditches passed through said canyon, and by cutting new channels, etc., flowed out and over plaintiff's land, covering part of it with sand and debris, and thus doing him damage. All of the ditches, however, were not owned jointly by all of the defendants. Each ditch was owned and operated by part only of the defendants who had no interest in the other ditches; and there was no concert of action—that is, no common design—between the owners of one ditch and the owners of the other ditches. The action was brought to enjoin all the defendants from continuing the wrong, and, also to recover damages jointly against all the defendants for the injury already done. The court gave judgment decreeing an injunction, and also adjudging damages against all the defendants, jointly, for $972 33. Defendants appeal from the judgment and from an order denying a new trial; and the only point they make is that the joint judgment for damages is erroneous, because there was no concurrent or joint act or negligence on the part of defendants which caused the damage.

It is clear that the rule as established by the general authorities is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert, or unity of design, between them. It is held that in such a case the tort of each defendant was several when committed; and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants; and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors. (Chipman vs. Palmer, 77 N. Y. 51; Little Schuylkill Nav. Co. vs. Richards, Adr., 57 Penn. St. 182; Sellick vs. Hall, 47 Conn. 260; Gould on Waters, Sec. 222; Pomeroy on Remedies, Sections 307, 308.) The case of Blaisdell vs. Stephens et al. (14 Nev. 17) is very similar to the case at bar, and involved the very point under discussion. In that case several defendants were sued "for wrongfully flowing waste water from their lands to the injury of plaintiff's ditch, and for an injunction to restrain such wrongful flowing of waste water." It appeared, however, that the defendants "own, occupy and irrigate separate and distinct tracts or parcels of land each in his own right;" and they moved for a nonsuit upon the ground that it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants." The trial court overruled the motion, and, on appeal, the Supreme Court of Nevada held that the nonsuit should have been granted, and said in its opinion: "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other." On rehearing, however, it was held that these judgments against defendants was proper; but the judgment, so far as it awarded damages, was reversed.

The principal has not been changed in this State, either by statute or judicial decision. The latest authority on the point here is Temple vs. Gold Run D. and M. Co. (66 Cal. 138). That was a case where it was sought, by the equitable remedy of injunction, to restrain the commission of acts similar to those complained of in the case at bar; and the appellant sought to invoke, as against the injunction, the principal above stated as applicable to actions at law for damages. This court held, however, that the rule did not apply to the equitable remedy; but it expressly stated that it would apply to an action for damages. Counsel for appellant, in support of their position, had cited a number of cases; and in alluding to them this court said as follows: "Each of those cases was decided upon the principle that where several persons acting independently of each other, engage in the commission of wrongful acts, the torts are distinct and not joint; and each is only severally liable for the injury caused by his own act, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right." It may be contended that the earlier case of Hillman vs. Newington (57 Cal. 56) established a different doctrine; but it must be remembered that the main purpose of that action was to procure and maintain an injunction. The judgment awarded only nominal damages—$1. Before that time there had been some doubt whether several wrongdoers, acting independently, could be joined in an equitable proceeding to procure an injunction against all; and, indeed, it had been once held in this State (Keys vs. Little York G. and W. Co., 53 Cal. 724) that it could not be done. The language of the Court in Hillman vs. Newington must, therefore, be considered as referring especially to the right of equitable remedy. There was practically no question of damages before the court; and no question was raised as to the distinction between the equitable and the legal remedy. The case is referred to in the opinion of the Court in the later case of the People vs. The Gold Run Co. above mentioned, where Hillman vs. Newington is evidently considered as settling only the equitable remedy. (And, of course, the distinction is very plain between holding one defendant liable for the past wrongs of all the others, and simply enjoining all from continuing wrong in the future.) We think, therefore, that under the law as clearly settled, the joint judgment against the defendants for damages is erroneous.

We have considered this case somewhat at length, because it is contended that the rule as above stated will in some instances work a hardship to owners of property injured by the joint consequences of acts of several persons not acting in concert. No doubt there may be cases where it would be difficult to make sufficient proof against one of such persons if sued separately. But it cannot be made clear that the opposite rule would work less wrong. At all events, we must declare the law as we find it. If the law were changed so that in a case like the one at bar a several judgment could be given against each defendant, for the proportionate part of the joint damage which his individual acts had caused, it may be that such change would be in furtherance of justice. But the suggestion of such change could be properly made only to the law making power.

The judgment appealed from, so far as it awards damages against defendants, is reversed, and in all other respects the judgment is affirmed. Let appellant recover the costs of this appeal.

Order overruling motion for new trial affirmed.

MCFARLAND, J.

We concur:
THORNTON, J.
SHARPSTEIN, J.

[Filed January 3, 1890.]

Appeal from the Superior Court of the County of Fresno—M. K. Harris, Judge.

For appellant, Jarboe, Harrison & Goodfellow.

For respondent, Thompson & Thompson.

DEPARTMENT TWO.

O. L. ABBOTT, Respondent, vs. THE 76 LAND & WATER CO., Appellant. } No. 13,980.

The option in plaintiff to buy the land under the lease or cropping contract entered into by the plaintiff and defendant, bearing date 7th day of December, 1885, continued for two years, from the 1st day of October, 1886. It makes no difference that it was not inserted in the second lease. it was left out of the second lease by agreement, as something unnecessary.

The defendant had a right to change the purchase price during the execution of the lease, provided it did so prior to the 1st of October of each year. It never did change this price. It therefore remained as in the first contract.

The plaintiff exercised and gave notice of his intention to purchase under the option clause above mentioned, on the 3d of September, 1887, and then offered to pay the installment of the purchase money then due, viz: One-fourth of it, and interest on the portion not then due, and offered to comply in all respects with his contract. The defendant refused to receive the money and repudiated its contracts with the plaintiff.

We think that the judgment is correct and in accordance with the principles of law, and should be affirmed.

The statements of the Secretary of the defendant corporation, made to plaintiff, were properly admitted. It is evident that the conduct of the whole business was left by the company to him; that he was fully authorized to act, and did act for the company in its dealing with plaintiff and others in the like situation in regard to the business connected with the leasing and disposition of its lands. The determination of this action by the Court below is in accordance with well settled legal principles. The record shows no error.

Judgment affirmed. THORNTON, J.

We concur:
SHARPSTEIN, J.
MCFARLAND, J.

In Demand.

[Folsom Telegraph, Jan. 10th.]

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