QUEEN LOO'S SUBJECTS.

[Written for the SUNDAY UNION by Lynn Lubin.]

Some people have a strange capability of remaining long in one position in perfect repose, and Kingsley makes it one of the chief charms of his little, bright-eyed heroine, Eleanor, that she possessed this art of sitting absolutely still for any length of time with the most perfect grace—a most difficult and rare accomplishment, he affirms, and also a most useful one.

Now Loo—"Queen Loo," her brothers called her—possessed this, to me, more provoking than useful faculty. In certain moods—generally when in trouble or doubt, or upon the point of a decision—she would seat herself in the large armchair, and, clasping her white hands together, remain so for an hour, and sometimes longer, in perfect silence.

It was useless to attempt to arouse her by comments or questionings; brief monosyllables—usually evasive of the purpose—were the sole results; argument and scolding proved equally as useless.

This morning she had been thus sitting and meditating for at least three-quarters of an hour, when she suddenly looked up and spoke:

"Wynette, dear, Dan and I are going out this afternoon on a water excursion. The Vernons and Don Tillas are to be in the party, and, as we are to start at 4, we will take supper on the boat. We will return and reach home by 9."

"Could you not have deferred the party until some evening when father and mother were at home? I do not like your going without their permission. Should anything happen to you, I will be severely blamed for not having objected more strongly to your going."

"Your objection! Pray what do they think that would amount to? They are too much accustomed to my willfulness to be angry at you, never fear."

"Perhaps so," I replied, much hurt, "but I think these endless junketings and water parties are not best for you, nor Dan either; beside that, you always insist on going in the Plymouth, and you know, Loo, the pilot is often too full to steer the boat safely. I wonder at the company entrusting him with so many precious lives on these excursions."

"The company must know what it is about, certainly."

"It may, but confidence in an unfaithful man is like a broken tooth, or a foot out of joint, it may prove disastrous in the end. Is Dr. Gray to be of the party?"

"Of course, it's got up for him, to show him the beauties of our rural life and the picturesque scenery along the Hudson."

"He has had ample time for seeing them over and over again. I understood he was to have gone home last week. Why is he prolonging his stay like this?"

"Do you suppose I am answerable for the doctor's movements? He may remain a month or so for aught I know—or care," and she hummed a gay snatch of a song to herself.

"You do know and you do care! What are his intentions?" I asked, determining, if possible, to draw from her the confidence she should have placed in me unasked.

"I suppose to flutter, moth-like, around the flame till he gets his wings singed for his pains," she replied in a defiant manner. I believed then that her hours of meditation had been spent trying to decide this one point.

"Oh, Loo! I dislike such heartlessness on your part. You know Dr. Gray is worthy of any woman's love. God stamped indelibly gentleman upon his brow; wrote it upon his heart, incarnated it in his every thought. He stands before his friends the impersonation of all that is manly and of good report. He is in every sense an honorable man. Do you intend to entrap him into a declaration of affection and then refuse him, as you have done others? Think how you deceived poor Selorm and Frank Douan!"

As I mentioned Frank Donan's name, a whole world of comic humor shown in her large, lustrous eyes.

"I despise an effeminate man as much as I do a masculine woman. Would you have me mated to that effeminate piece of humanity who had the coolness to lay himself and some ninety pounds per annum at my feet?"

"No, but I think you commit a grave error in encouraging men whom nothing could induce you to love."

"I know all that, Wynn, but what were Queen Loo without her kingdom and her subjects; aye, victims, if you are so inclined to think them? These men admire, court and like me, but not one of them loves me with the self-denying love which your husband bore to you—a love true through life until death—the only love worthy a woman's acceptance. Come, don't cry, Wynn, I did not mean to recall memories that wound; but young Selorme has transferred his allegiance to Mabel Miller; so much for his broken heart; and Frank Donan has joined the High Church and advocates celibacy of the clergy. Dr. Gray, I doubt, will never do me the honor to propose. He is so cold, so passionless, so faultless—don't speak of him. I don't think, Wynn, I shall ever marry anybody, because I shall never love anyone well enough. But I am in no mood for further lecturing, and besides it is time to call Dan," and she went upstairs to get her hat and cloak.

Dan stood in the hall whistling softly to himself, and as I passed through he caught me gently by the arm. "I say, Wynn, it's such an awful bore these water parties. I don't want to go this afternoon, though I can't to save me tell any reason why. I would much rather stay at home with you and Dot, but Queen Loo wants to go, and I can't let her go without me. But some premonition of evil clings to every thought of going, try to ward it off as best I may."

The evening seemed very quiet. My bachelor brother, Henry, sat reading aloud to me the daily news. My time was occupied finishing a garment for my little wee Dot, sleeping so sweetly in the big arm chair beside me. My thoughts were busy and time passed unheeded until I was aroused with a start by the old clock in the mantle chiming out the hour of nine; surely it must be wrong—no—my watch and the chiming of the old church clock corroborated the fact.

Hark! Surely that was not Dan's step on the walk; his was a quick, sharp tread; this was lagging as if the bearer of unpleasant news.

Do you know, reader, what it is to sit quietly by your fireside, with contentment just settling quietly over all your being, and then to lift your head at the sound of an opening door and your eyes meet the pale face of some bearer of ill news?

"Oh, Henry!" I exclaimed, "what has happened?" for my brother had answered the door-bell and was returning, standing white as death in the middle of the room, moving his dry lips without a sound, and with such a look in his eyes. "Oh, Henry! do tell me what has happened!"

I think the sight of my anxiety restored him, and in another moment he had recovered himself and told me of the drunken pilot, the sudden shipwreck and that our brother Dan had lost his life. Dan who had so recently left us, full of life and health, but with a premonition of impending evil.

"How did it happen? When? Where?" I asked breathlessly. "And Loo, is she safe?"

"Yes, Loo is safe and unharmed, but Dr. Gray was hurt—almost killed—in his attempt to rescue Dan, but of no avail. Dan was killed almost instantaneously."

The news of the calamity came with such sudden and stunning force, that its very weight and intensity seemed to deaden the anguish. Over and over again I said to myself "It is impossible; I must be dreaming," when Henry, re-entering the house, said:

"Wynn, dear sister, is the room ready?"

I understood him.

"Yes, Henry," and I went to meet Loo and the corpse.

"Let all be in perfect quietness," I said to the faithful, sorrowing servants, "for they are bringing Dan home."

The pale moon poured a flood of silver light through the window on his wierd, dead face and the black pall that covered his coffin, as I sat by his side after quietness had been restored. It was near midnight. Some one entered the room. I looked up to see Loo standing beside our dear darling. I don't know which looked the palest.

She knelt by the coffin, and with her hands clasped together, silently gazed at the cold, calm face before her, gazed long and earnestly. Almost an hour had thus passed.

"Loo, darling, don't grieve so; surely God knows what is best."

"God! Don't tell me He had anything to do with it! It was I who killed him. Yes, I killed him! I coaxed him to go—even against his own will. I am his murderer! He is one of Queen Loo's victims," and with one wild shriek she fell fainting across the corpse.

Eight weeks she lay in the room above, hovering between life and death; sanity and insanity contending for the mastery. More intolerable than the first hours of a great sorrow is the waking up after it and finding it all true, and we cry in our agony, "God help us!" as we find it a living reality.

Oh, the awfulness of that waking; when even before the heavy-lidded eyes open to the light of day, while yet in a transition state between sleeping and waking, we are conscious somehow of an oppressive weight, a sense of something wrong; and then the truth rushes upon us and we turn our faces to the wall in the utter helplessness of depair.

Thus was Loo's waking to life again. But Heaven is merciful and human love is great; though one link snap after another in the great chain of loves, the ties that bind us to life are still strong. No suffering save one is eternal.

Vain indeed would it be to try to tell how sorely we missed our precious brother. Let each afflicted one put himself or herself into our place and his own heart can then inform him, but Loo's smiles were slow to return as she trod the weary path through the valley of desolation.

She was very much changed. Even in repose in those hours of meditation the over-wrought tension of her nerves never relaxed. Sweet, sorrowful curves were around the mouth, heavy, mournful, gray eyes; deep lines traced on the clear, broad forehead, with hardly a tinge of color in her thin, white face, and the flood of auburn curls that used to stream so jauntly from under her hat, was now folded back in loosely drooping braids, while in her eyes, and in her voice, and in her mute, clinging caress there was some great unspeakable change, like the opening of a new life.

Human experience may err, but it may have needed some crueller process than the gentle influences of love to work this change, for from girlhood she had awakened to the reality of perfect womanhood.

An entrance in the hall, a movement through the open door, and Dr. Gray entered the room. "Many waters cannot quench love, neither can the floods drown them." Loo looked up. A low, broken murmur escaped her lips.

"I have come back to you, Loo," he said. "Yes, back, back from death unto life, each of us, but—Dan—"

Dr. Gray took her in his arms and laid here queenly head upon his breast, and while they rejoiced over the long existing mutual love each acknowledged for the other, they wept sorowfully for the life that had gone out forever at the moment of their discovery of that love.

THE EVICTION.

The day arrived, the inauspicious day,
For Farmer Wallaston to move away.
The mortgage was foreclosed, the Sheriff come
To take possession of his ancient home;
That home, creation of long years of toil—
For he himself had broke the virgin soil
Full half his life ago. The Indians then
His neighbors were, saw few of other men.
Around his cabin in the moonlight gray
The wolf and panther prowled in quest of prey.
With lissome motions, nature's artless grace,
The spotted fawns would oft each other chase
Before his puncheon door, all heedless of his face.
Then life was hope, for he was young and strong,
Sang as he plowed, nor thought of aught but song.
There at the cabin door his faithful wife,
Fair, blue-eyed partner of his daily life,
Would often sit, nor yet the rolling sun
Had twelve months measured since they twain were one.
Toil then was but another name for play,
For Nancy's smile charmed all his cares away.
Nor did they once imagine they were poor,
They never looked behind, but always looked before.

He sees her now, all bent with weight of years,
And time's deep furrows full of bitter tears,
Beholds her fondly linger o'er each trace
Of love's sweet labors; each familiar face
Of shrub and flower she visits, and she looks,
Wringing her hands, upon the blessed nooks
Where bloom her tiger-lilies and moss rose,
And where her favorite flowering almond grows,
Her velvet pansies, and the fragrant pink,
And scarlet honeysuckles where do drink
The humming birds at eve and bees in early morn.

"Ah me," she cries, "that ever I was born,
Or lived to see this day, or hear of debt,
Cursed be our notes or mortgages, and yet
'Twas falsehood lured us both to sign the deed;
How oily was his tongue, our hearts did bleed
At his recital; only give him time,
'Twas all he wanted; not a single dime
Should we be worser, so we signed his bond,
Nor dreamed of this, nor ever looked beyond.
Oh fatal confidence! but yesterday
The villain, clad in broadcloth, drove this way;
Grinned as he passed the gate, as glad to see
His bondsmen brought to want and misery.

And must I never, never see thee more,
Dear, dear old homestead! never by the door
The climbing rose and honeysuckle train,
Or watch their blushing beauty smile again?
Or at the gate the purple lilac smell?
Or mark the globes upon the snowball swell?
Or scold the thorny privet clambering o'er the well?
Now stranger forms shall fill the rustic seat,
And alien eyes your opening beauties greet.
Along the paths unwelcome feet shall tread,
And gaudy carpets on these floors be spread.
Oft have I hoped that when with me shall time
Reverse the glass and I shall seek the clime
My dear ones gone inhabit, and the men
Should sadly bear me out feet foremost, then,
Then I had hoped to pass between these trees.
Delusive fancy! Surely no man sees
An hour before him, nor can he forecast
Where he shall die, or where be laid at last."
Thus wept and mourned the sorrow-laden dame.

Now through the gate the ancient neighbors came,
And wrung their hands, and said "Good-by!" and prest
Love tokens on them, prayed that in the West
Their aged feet would find the welcomed rest
Denied them here; prayed that some little farm
From utter want would keep them; and no harm
Should e'er befall them! "Thanks!" the farmer said.
"It matters not where'er my feet be led,
I'll ne'er forget you, comrades of my youth.
And if an old man's blessing, who the truth
And honor loved, whose sympathizing heart
Brought him to loose both house and land, that part
Be ever with you. God will surely bless
His aged servants in the wilderness.
Some little yet remains, brief is our stay,
Sufficient, let us trust, for our short day."

And then he lifted up his voice and wept,
And they wept with him and the children crept
Into the old dame's lap, who little wist,
And clasped their arms about her neck and kissed
Her on both withered cheeks and smoothed her hair
And called her "Grandma, ever good and ever fair."

But now the Sheriff spoke and said that he
Must do his duty. Would they give the key?
And then the wagon was brought round, the load
Was filled in carefully, and when was stowed
All they would take, into the yielding seat
The old pair clomb with hesitating feet;
Spoke to the faithful team that started on
With faces lifted towards the setting sun,
Nor sadder spectacle he ever shone upon.

—*Prairie Farmer.*

The custom of throwing a slipper after a bride is said to come down from ancient times. Long before the Christian era a defeated chief would take off his shoes and hand them to the victor to show that the loser of the shoes yielded up all authority over his subjects. Therefore, when the family of a bride throw slippers after her they mean that they renounce all authority over her.

The late Duke of Rutland, when walking one day in his grounds, came across a game-keeper's little girl. "Well, little one," he asked, "and what do you call yourself?" "For what we are going to receive make us truly thankful," replied the little one with apparent irreverence. It seems that the child's mother's instructions had been: "If you meet the Duke be quite sure to say, 'Your Grace.'"

A State of Siege

How many people there are who regard the coming of winter as a constant state of siege. It seems as if the elements sat down outside the walls of health and now and again, led by the north wind and his attendant blasts, broke over the ramparts, spreading colds, pneumonia and death. Who knows when the next storm may come and what its effects upon your constitution may be? The fortifications of health must be made strong. **SCOTT'S EMULSION** of pure Norwegian Cod Liver Oil and Hypophosphites of Lime and Soda will aid you to hold out *against Coughs, Colds, Consumption, Scrofula, General Debility, and all Anæmic and Wasting Diseases,* until the siege is raised. *It prevents wasting in children.* **Palatable as Milk.**

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SUPREME COURT DECISIONS.

[Filed January 19, 1891.]

DEPARTMENT ONE.

H. EDWIN MOORE, Appellant, vs. LONG BEACH DEVELOPMENT Co., Respondent. } No. 13,789.

The respondent contends that the statement upon motion for a new trial, which appears in the transcript, cannot be looked into for the reason that it is not *identified* as having been *used* upon the hearing of the motion.

There is but one notice of appeal, and that is both as to the judgment and the order denying a new trial. The stipulation at the end of the transcript is to this effect: "It is hereby agreed that the foregoing transcript contains a full, true and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite deposit in lieu of an undertaking was given within the time prescribed by law; that the foregoing is a full, true and correct transcript of the record on appeal, and that the appeal herein may be heard thereon."

If the word *appeal*, as used in the stipulation, was intended to apply to both the order denying a new trial, and the judgment, then it covers the statement of the case which appears in the transcript, which is in due form, and appears to have been *settled* by the Judge, and *filed* on February 3, 1890, the order denying a new trial was made on the 17th of February, 1890.

It is plain that the appeal was taken from both order and judgment, and the stipulation evidently refers to them both where the word *appeal* is used. Since the stipulation states that the "appeal herein may be heard" upon the record on appeal in the transcript, it is proper that the statement here, under all the facts appearing in the record, should be held as being one that can be looked into on the appeal from the order denying a new trial.

The main argument for the reversal of the judgment and order, by the appellant, seems to be that the evidence is insufficient to show that the plaintiff was a *boarder* and not a *guest* of the innkeeper who was sued, and the former contends that if a guest he is entitled to recover, but not as a boarder. (Appellant's brief, p. 3.)

The case, as stated in the complaint, is that of an individual who goes to an inn, as a guest or transient traveler, and while he is there the inn burns down and he loses his baggage, containing wearing apparel, jewels and other personal valuables, occasioned by the negligence of the defendant and his servants, and seeks to make the innkeeper responsible for the loss. The fire appears to have been purely accidental, and there is nothing to show that the goods lost were not under the control of the owner, kept in his rooms, or that they were ever in the manual possession of the innkeeper.

Nor is it proved or found that the fire or loss occurred by any negligence of the defendant, its servants or agents. But the plaintiff contends that an innkeeper is an insurer of the goods of his guests, placed in the inn, even as against loss by fire, as well as robbery and theft, and that if they are lost or injured while there, by any of these agencies, that the innkeeper must make good the loss.

It does not seem that any case, as to such a loss by fire, has been adjudicated by the appellate court of this State. But in Mateer vs. Brown (1 Cal. 221), and in Pinkerton vs. Woodward (33 Cal. 600), cases where the loss to the guest seems to have been occasioned by robbery, it was held that the innkeeper was an insurer of the property committed to his care, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.

Conceding, therefore, without deciding, that the view urged by the appellant is the law of this State upon the matter in hand, the real question for determination here is whether the evidence shows the plaintiff to have been a *guest* or a *boarder*. Each case, as to this point, turns upon its special state of facts. There is no doubt in our minds upon the facts here, that the plaintiff and his family were boarders whose time of remaining at their place of sojourn depended upon their own volition. They went to the inn to ascertain if it was a place where the health of the wife of the plaintiff would be benefitted, with the determination to remain there indefinitely, perhaps for a *very long time*, if such should be the case. But with a view, if her health did not improve, to leave at any time. (Trans., fols. 184-5-6 and 189.) It was also shown that the plaintiff, before going there with his family, had made an arrangement for terms of entertainment at a great deal less than those for a transient traveler, and by the month, and they went prepared to stay, if they desired, for a considerable time, and to enjoy all the gayeties that might take place. (Fols 190, 194, 195.) They had no other place of residence, and for the time being this inn was to be such, subject as to time of stay to their volition, but at reduced rates of board by the month. (Fols. 192, 195, 196.)

It was evidently the hope and the expectation of the plaintiff and wife that her health would be benefited at this inn, which was a pleasure resort, its principal business season being that of the summer. And it is fair to presume that they thought it would benefit her, and went prepared to stay as permanent boarders, rather than transient travelers. These facts were known to the defendant, and with this idea in the minds of both the contracting parties together with the fact that the plaintiff had just been boarding at another inn, at another place, and had left there some of his goods, such as he did not expect to need at the defendant's inn, and had no fixed home, and that he got reduced terms of board and did not place his valuables in the care of the innkeeper, are very persuasive that it was the intention of all the parties that he should be a boarder and not a mere transient traveler or guest; and for the time being a resident on the place where he was intending to board. Under these facts and others appearing in the record, we cannot say that the findings of the court below are not sufficiently supported by the evidence.

We therefore advise that the judgment and order be affirmed. FOOTE, C.

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

THE COURT.

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

[Filed January 19, 1891.]

Appeal from Superior Court of Los Angeles County—W. H. Clark, Judge.

For appellant, Brunson, Wilson & Lamme.

For respondent, Dunn & Hunter, Jay E. Hunter.

DEPARTMENT TWO.

N. C. SMITH, Respondent, vs. G. F. MOHN, SR., Appellant. } No. 13,898.

This action was commenced on the 19th day of April, 1889, to recover the sum of $1,000, with interest thereon, alleged to be due from defendant to plaintiff under a contract for the sale of land.

It is alleged in the complaint that, on the 6th day of September, 1887, the plaintiff and defendant entered into a written agreement, a copy of which is set out in full, whereby the plaintiff, as party of the first part, agreed to sell and convey to the defendant, as party of the second part, and the latter to buy, a certain described parcel of land for the sum of $2,200, to be paid as follows: Seven hundred dollars cash, the receipt of which was acknowledged, $500 on January 1st, 1888, and the balance of $1,000 on May 1st, 1888, with interest at 8 per cent.

It is further alleged that the first two payments were made, and that the sum of $1,000, with interest, "became due, according to the terms of said contract, on the 1st day of May, 1888, no part of which has been paid by defendant although often requested so to do.

"That plaintiff has duly performed all of the conditions of said contract to be performed by him to this time and has been constantly and now is ready and willing, and prior to the institution of this suit offered to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance by defendant with the terms of said contract as therein set forth, but defendant said he would not accept a deed, and refused to pay said money."

The agreement set out contains this provision: "It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof by said party of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys theretofore paid under this contract, and all his interest in or to said moneys, or said property, shall thereupon immediately cease, as fully as if said moneys had never been paid or this agreement entered into.

"And the said party of the first part on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed, with certificate of title."

The defendant, by his answer, denied that "plaintiff and defendant entered into the written agreement, a copy of which is set out in the complaint," admitted that he signed it; and averred "that his signature thereto was obtained by false and fraudulent representations of the said plaintiff made by and through his agents employed by him for the sale of said premises in said contract described." He then states that he was solicited by one C. J. Longstreet to purchase the property, and declined to do so; that Longstreet and D. G. White, his partner in the real estate agency business, informed him that they had contracted to purchase the property in his, defendant's, name, and had paid on account of the purchase price a sum of money, which they claimed to have advanced for him; that he then and there refused to confirm the purchase or to take the property, whereupon they produced the written contract, a copy of which is set out in the complaint, and which had then been signed by the plaintiff, and insisted that he should execute it and become the purchaser of the property, and that he positively refused to make the purchase or sign the contract; that upon such rafusal they informed the agent of plaintiff for the sale of the property that defendant refused to sign the contract, and offered to return the same to the agent and cancel it, and demanded a return of the money paid by them on account thereof, but the agent refused to receive or cancel the contract, or to repay the money; that thereupon it was agreed between them that White should become the purchaser, procure the signature of defendant to the contract, and take an assignment thereof and pay the balance of the purchase price; that Longstreet and White informed defendant of this agreement, and requested him to attach his signature to an assignment indorsed on the contract to White, and that he at first refused, but finally did it upon their assurance that it was a mere matter of form, and that he would incur no liability thereunder; that subsequently upon like request and assurance he signed the contract; that the plaintiff thereafter received the contract and the first and second payments therein provided for, with full knowledge and notice that White was the purchaser of the property and the real party in interest as the vendee thereof; and that the plaintiff did not at any time call upon defendant for any money or to comply with any of the terms of the contract until after White had made default in the last payment, and that defendant never did make any payment for or on account of the said purchase or furnish any money therefor.

The case was tried and the findings of the court were as follows:

First—That on the 6th day of September, 1887, the plaintiff being the owner of the parcel of land described, "entered into an agreement in writing with the defendant, G. F. Mohn, Sr., whereby the plaintiff agreed to sell and the defendant agreed to buy said land upon the terms and conditions set forth in plaintiff's complaint and the exhibit marked 'Plaintiff's Exhibit No. 2.'"

Second—That Longstreet and White were not the agents of plaintiff, or employed by him for the sale of the said premises.

Third—That the signature of the defendant to the said agreement of purchase and sale was not obtained by false and fraudulent representations of the plaintiff, made by and through his agents.

Fourth—That plaintiff did not aecept and receive the contract, or the first and second payments thereon, with the knowledge and notice that White was the purchaser of the property, or the real party in interest as the vendee thereof.

Fifth—That the plaintiff, prior to the institution of this suit, offered to execute and deliver to defendant a deed of the premises, together with a certificate of title, and demanded of him the balance due on the contract, but defendant declined to accept the deed and refused to pay the money.

Sixth—That there is now due the plaintiff upon said contract the sum of $1,167, principal and interest.

The court gave judgment for the plaintiff for the amount found due, with costs, and the defendant appealed.

It is contended for appellant that the findings were defective and insufficient in several particulars.

First—It is claimed that there was no sufficient finding that defendant ever executed the contract set forth in the complaint, or as to what were the terms and conditions upon which the sale was made. This position is rested upon the last clause of the first finding, that the parties entered into an agreement to sell and buy the land upon the terms and conditions set forth in the complaint, *and* the exhibit marked plaintiff's exhibit No. 2. It is said that this exhibit is not made a part of the pleadings, findings or record, and is not referred to except in this manner. But the contract of sale was set out in *haec verba* in the complaint. The defendant admitted that he signed that contract, and only alleged in substance that he did not execute it, in a legal sense, for the reason that his signature was obtained by fraud. There is no question, therefore, as to what were the terms and conditions of the contract which the defendant signed, and on which the plaintiff relied for a recovery. The only question then is, was the defendant bound by the contract, or not bound by it, because of the alleged frauds? The words "and the exhibit marked plaintiff's exhibit No. 2," may be rejected as surplusage, as the finding is complete without them. It may be remarked in this connection, that the evidence is not brought up in the record and we are not advised as to what was introduced, but, if need be, we might assume that plaintiff offered his contract and it was received and marked as his "exhibit No. 2."

It is next objected that the court found only the amount "due the plaintiff upon said contract," and not that the sum named was due from defendent. But as the plaintiff and defendant were the only parties who signed the contract, it must follow as a necessary inference, in view of the other findings, that if anything was due the plaintiff it was due from the defendant. We think therefore that this finding was sufficient.

It is further objected that the findings as to the affirmative matters set up in the answer were not sufficient. The substance of these matters is:

First—That defendant's signature to the contract was obtained by fraud, consisting of false and fraudulent representations, etc.

Second—That White was the purchaser and the real party in interest, and was so accepted and regarded by the plaintiff.

It is true that findings should respond to and cover all of the material issues raised by the pleadings, but they should be statements only of the ultimate facts, and not of the probative facts. (Mathews vs. Kinsell, 41 Cal. 512.) In this case, we think the findings did meet and negative all the ultimate facts affirmatively alleged in the answer, and that they should be held sufficient.

It is also contended that, under the rule that pleadings are to be construed most strongly against the pleader, the averment in the complaint that plaintiff "prior to the institution of this suit offered to execute and deliver to defendant a deed of said premises together with a certificate of title, upon compliance," etc., must be construed as relating to a time immediately preceding the institution of the suit; that the offer of a deed and demand of payment were therefore not made until nearly eleven months after the money sued for became due and payable; and that plaintiff, by his neglect to tender the deed and demand payment when the money became due, had lost all right to sue for and recover the money under the express provisions of the contract. The provisions of the contract relied upon as effecting this result are those above quoted.

It will be observed that it is also averred in the complaint "that plaintiff has duly performed all of the conditions of said contract to be performed by him to this time." This was a sufficient averment of the performance of conditions precedent (Sec. 457, C. C. P.), and it is not denied by the answer. This being so, how can it be said that plaintiff was in default and thereby lost his rights?

But however this may be, it should be noticed that the substance of the provisions relied upon is, that time is of the essence of the contract, and if defendant shall fail to comply with its terms, then the plaintiff shall be released from all obligations to convey the property, and defendant shall forfeit all right thereto and to the moneys paid, and all his interest in or to the said moneys and property shall immediately cease, as fully as if the moneys had never been paid or the agreement entered into."

In this there is no provision that the plaintiff shall forfeit his rights if the money is not paid on time; and in Wilcoxson vs. Stitt, 65 Cal. 596, where a similar contract was under review, it was held that the failure of the vendee to make the payments provided for did not make the contract void, so far as the vendor was concerned, but that he had the option to avoid or enforce the contract, and might, if he elected to do so, sue for and recover the balance of the purchase money.

That case seems to be decisive of this, and, as the above are all the points made for a reversal, we advise that the judgment be affirmed. BELCHER, C.

We concur:
VANCLIEF, C.,
HAYNE, C.

THE COURT.

For the reasons given in the foregoing opinion the judgment is affirmed.

[Filed January 19, 1891.]

Appeal from Superior Court—T. H. Reardon, Judge.

For appellant, Graves, Turner & Graves.

For respondent, William Shipsey.

DEPARTMENT TWO.

CITY OF SAN LUIS OBISPO, Respondent, vs. PETTIT, COUNTY TREASURER, ETC., Appellant. } No. 13,856.

This was an action to recover delinquent taxes. The property taxed was a sum of money deposited with the defendant in his official capacity under an order of the Superior Court in a pending case. During the fiscal year 1887-8, the defendant reported the deposit to the Assessor, who, however, did not assess it to him, but (probably acting under a mistaken view of the law) assessed it to the plaintiffs in the suit. The tax was not paid. In the following year the property was assessed to the defendant. But upon the theory that it had "escaped assessment" the preceding year, the amount of the assessment was doubled. The trial court gave judgment for the plaintiff and the defendant appeals. The points made relate to the validity of the assessment.

1. In doubling the assessment the Assessor acted under a provision of the Political Code, which is as follows:

Section 3649. "Any property discovered by the Assessor to have *escaped assessment* for the last preceding year, if such property is in the ownership or under the control of the same person who owned or controlled it for such preceding year, may be assessed at double its value."

The validity of this provision was affirmed in Biddle vs. Oakes (59 Cal. 95), in which case the court said that the Legislature had power to impose a penalty for neglect to have an assessment made. In the case before us there was no such neglect, because the defendant reported the property to the Assessor. But we do not understand the decision as confining the operation or validity of the provision to cases where there has been neglect on the part of the person to whom the assessment is made. The terms of the provision indicate no such limitation. The language is general and applies to all cases where property has escaped assessment in the preceding year, whatever may have been the cause of such escape.

Nor do we think that upon this construction the provision is invalid. Its evident purpose is to carry out the general intention pervading the revenue system, that all private property shall bear its share of the burden of taxation. This is certainly a legitimate purpose, and the means employed to carry it out are not, in our opinion, in violation of any constitutional provision. The section does not provide that the property shall not be assessed in proportion to its value. It provides in effect that in certain cases assessments for two different years may be made in one, and therefore goes in effect merely to the time at which an assessment may be made. We see no constitutional objection to this. It is true that in exceptional cases it might happen that the property would increase in value since the preceding assessment; and hence that merely doubling the assessment would not be an accurate way of arriving at the value for the preceding year. But in the great majority of cases doubling the assessment would be a fair enough way of arriving at a valuation for the preceding year. And if in exceptional cases the method would result in an over-valuation, and it be assumed (for the purposes of the opinion) that in such cases the over-valuation would render the assessment void, it would have to be shown that the case was of such exceptional character. In this case no such question can arise, because the property assessed was money; and for all practical purposes was of the same value from year to year. The provision therefore is valid and covers the case before us.

It is to be observed that the condition of the double assessment is not that the property should have escaped *taxation*. It is not enough therefore to show that the tax was not paid. The property must have escaped "assessment." But in our opinion the word assessment in this connection means a *valid* assessment. A thing which has the semblance of an assessment, but which is void and of no effect, is for all practical purposes no assessment, and furnishes no reason why a proper assessment should not be made. The question therefore must turn upon whether the assessment for the year 1887-8 was valid or invalid.

In our opinion it was invalid. The method of making an assessment in such a case as this is prescribed by the following provision of the Political Code:

Section 3647. "Money and property in litigation in possession of a County Treasurer, of a court, County Clerk, or Receiver, must be assessed to such Treasurer, Clerk, or Receiver, and the taxes be paid thereon under the direction of the Court."

There was a plain violation of the provision of this section, and the well established rule is that if an assessment is not made as prescribed by the statute it is void. (Grotefend vs. Ultz, 53 Cal. 666; Grimm vs. O'Connell, 54 Cal. 522; Hearst vs. Egglestone, 55 Cal. 367; Brady vs. Dowden, 59 Cal. 51; Bosworth vs. Webster, 64 Cal. 1; Daly vs. Ah Goon, 64 Cal. 512; Klumoke vs. Baker, 68 Cal. 559.) It is true that the code provides that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." (Political Code, Section 3628.) But whatever may be the meaning of this provision, it does not apply to personal property. (Lake County vs. S. B. Q. M. Co. 66 Cal. 17.)

The assessment for 1887-88 was therefore invalid, and a re-assessment in the following year was proper.

2. It is contended that there was no authority of law for making the levy.

Section 871 of the Municipal Corporation Act provides that the City Trustees "shall have power and it shall be their duty to provide by ordinance a system for the assessment, levy and collection of all city or town taxes, not inconsistent with the provisions of this chapter, which system shall conform as nearly as the circumstances of the case may permit, to the provisions of the laws of this State in reference to the assessment, levy and collection of State and county taxes, *except as to the times for such assessment, levy, and collection.*" (Laws 1883, p. 273.)

The ordinance passed in pursuance of the above provision contained, among other things, the following:

Section 3. "The manner, form and time of *assessing and collecting* city taxes shall be the same as is prescribed by the Political Code of the State of California for assessing and collecting State and county taxes; and all the provisions of Title IX of Part III. of said Political Code are hereby adopted and are ordained to be, and are, the law for *assessing and collecting* city taxes, as to manner, mode and time," etc. (Trans., fol. 46.)

The objection consists of two branches which we shall consider separately.

a. It is argued that the statute above quoted *forbids* the city from assessing, levying and collecting its taxes at the same time as the State and county. But we do not so construe the provision. It simply leaves those matters to the discretion of the City Trustees, who may fix any time they see fit. There is nothing to prevent them from selecting the time fixed for the other taxes.

b. It is said that the ordinance in question provides only for "assessing and collecting" the taxes, and not for levying them, as to which it is contended that no provision is made.

But in the first place we think that the words "assessing and collecting" are used in the ordinance in a general sense, and include the operation called levying the tax. The words are so used in the Constitution. As is said in the clear and satisfactory argument of the counsel for the respondent: "The foundation of the city taxing power is in the Constitution. Article IX., Section 12, provides that the Legislature * * * may by general laws vest in the corporate authorities power to *assess* and *collect* taxes.' There is no authority to 'levy' unless one of the words 'assess and collect' includes levy."

In the second place the ordinance does not confine itself to an adoption of the provisions of the code by a general reference to them as those in relation to the assessment and collection of taxes. It goes on to designate specifically the provisions adopted by saying: "and all the provisions of Title IX., Part III., of said Political Code are hereby adopted." The part of the code so designated contains provisions for levying the tax. (Sections 3713 to 3719); and the ordinance makes provision for the difference in officers, etc. (Tr. fol. 47, et seq).

3. It is contended that the provisions of the ordinance quoted conflicts with Section 879 of the Municipal Corporation Act. The section referred to provides in substance that the delinquent taxes shall be collected by the City Attorney by suit in the name of the city (Laws 1883, p. 277), while the portions of the Political Code adopted by the ordinance provide that such taxes shall be collected by the Tax Collector by sale of the property (Sec. 3765 et seq). But if it be conceded that these portions of the ordinance are in conflict with the statute (as to which see City of Placerville vs. Wilcox, 35 Cal. 21,) it does not follow that the whole ordinance is void. "Nothing is better settled than that if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected." (Ex parte Christensen, 85 Cal. 212). The provision for the collection of the delinquent taxes seem distinctly separable from the other parts of the ordinance, and may therefore be rejected. The preceedings in this case were in accordance with the statute, the suit having been brought under section 879, above referred to.

In the view we have taken it is not necessary to consider the effect of the amended ordinance.

We therefore advise that the judgment and order appealed from be affirmed. HAYNE, C.

We concur:
BELCHER, C.
FOOTE, C.

THE COURT.

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

CONCURRING OPINION.

I concur in the judgment and in the foregoing opinion. The money which was the subject of the double assessment for the year 1888-89 did not bear its share of taxation for the preceding year. If the owner had waived the invalidity of its assessment for the fiscal year 1887-88 and had paid upon such assessment the tax levied for that year, a different question would have been presented. DEHAVEN, J.

AT AUNTY'S HOME.

One time when we's at aunty's house—
'Way in the country—where
They's ist but wood and pigs and cows
An' all's out-doors and air!
An' orchurd swing, an' churry trees,
An' churries in 'em! Yes, an' these
Here red-head birds steal all they please
An' tech 'em ef you dare!
W'y wunst, one time when we wuz there,
We et out on the porch!

Wite where the cellar door wuz shut
The table wuz, an' I
Let aunty set by me and cut
My wittles up—an' pie.
Tuz awful funny! I could see
The red-heads in the churry tree;
An' bee hives, where you got to be
So keerful goin' by;
An' comp'ny there, an' all! An' we,
We et out on the porch!

An'—I ist et p'surves an' things
'At ma don't 'low me to—
An' chickun gizzurds (don't like wings
Like paruuts does, do you?)
An' all the time the wind blowed there
An' I could feel it in my hair,
An' ist smell clover ever'where!
An' a old red-head flew
Purt' nigh wite over my high chair,
When we et out on the porch!

—*James Whitcomb Riley in Boston Transcript.*

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