SUPREME COURT DECISIONS.

[Filed January 30, 1891.]

Appeal from Superior Court, San Francisco; Department One—E. R. Garber, Judge.

For appellant, Alfred Clarke.

For respondent, George Flournoy, Jr.

IN BANK.

CLARKE, Appellant, vs. REIS, Treasurer, etc., Respondent. } No. 13,880.

This action was brought for the purpose of forcing, by writ of mandate, the respondent to pay the appellant, who was the assignee of a claim of a dismissed police officer, one Pugh, the amount of $256, principal, and costs and damages to the amount of $25.

This sum of money was claimed under and by virtue of an Act of the Legislature approved April 1, 1878. (Statutes 1878, p. 879.)

It is asserted that the $2 per month which the police officer claims to have paid into the fund held by the Treasurer was money in which he had a vested right, and that on his discharge he was entitled to have it returned to him or his representative.

The petition was demurred to as not stating facts sufficient to constitute a cause of action; the demurrer was sustained and the writ dismissed. From the judgment rendered in the premises this appeal is taken.

The statute, under which this right is set up by the plaintiff, has received construction from the appellate court of this State in Pennie vs. Reis (80 Cal. 269), and from the Supreme Court of the United States, in the same case, on writ of error (132 U. S. Rep., p. 471). These cases hold that a police officer, such as the assignor of the appellant, never had any claim on the fund involved here, except upon the happening of certain contingencies, mentioned in the Act of the Legislature of California, to which we have just adverted; under which Act alone could any right have vested in the plaintiff or his assignor.

The voluminous and argumentative petition filed herein does not, in our opinion, state such facts as bring the appellant within any of the contingencies of the statute which he invokes, and we therefore advise that the judgment be affirmed.

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

THE COURT.

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

[Filed January 31, 1891.]

Appeal from Superior Court, San Francisco—J. G. Maguire, Judge.

For appellant, George B. Merrill, of counsel, T. I Bergin.

For respondent, F. G. Newlands.

DEPARTMENT TWO.

F. P. MCLENNAN, Administrator, Appellant, vs. THE BANK OF CALIFORNIA, Respondent. } No. 12,944.

This action was brought by Donald McLennan, now deceased, and was tried, judgment entered and notice of intention to move for a new trial served and filed during his life-time. After his death his administrator, the present plaintiff, was substituted, and a new trial refused.

From the order made in the premises the plaintiff appeals.

The action is to recover of the defendant, a banking corporation, the sum of ten thousand dollars, and interest. It is alleged in the complaint that on the 27th day of November, 1869, the Mission and Pacific Woolen Mills consolidated, a corporation, made, executed, and duly indorsed and delivered to the plaintiff a certain promissory note for ten thousand dollars. (Trans., fols. 6 and 7.) That upon the receipt of that note, the plaintiff deposited it with the defendant, to be collected in due course of banking business. That the note and certain accrued interest thereon was paid by the maker of the note to the defendant on the 26th day of April, 1870. That afterwards, on the 26th of August, 1875, the defendant closed the doors of its bank, stopped payment, etc., and refused to pay the plaintiff the money collected by it for him.

The defense was that the note was never received by the bank from the plaintiff for collection, but was given by the plaintiff into the hands of W. C. Ralston to be collected and the proceeds used by him for his own benefit, and that in accordance with this, the money was collected by the bank at the request of Ralston, placed to his credit, and paid out to him on his checks drawn against his account as a depositor with the bank.

The statute of limitations was set up, and also certain demands against the plaintiff held by the bank, were pleaded by way of set off, to an amount exceeding the claim of the plaintiff. The court found in favor of the defendant; "That the plaintiff never deposited the said note of November 27, 1869, with the defendant to be collected; that the plaintiff never deposited said note of November 27, 1869, with the defendant." (Tr. folios 50, 51.) It further held that the plaintiff's cause of action, if it had been otherwise good against the bank, which it was not, was not barred, but that the cause of action by the plaintiff on its counter demands against the defendant, was barred by the statute of limitations. So that upon the findings as made judgment was rendered against the defendant for costs.

The first ground urged for a reversal of the order denying a new trial is, that the court did not give its decision and file it with the clerk, *within thirty days* after the cause was submitted for decision under Section 632 of the Code of Civil Procedure.

The provision of the statue in question is directory merely. (Broad vs. Murray, 44 Cal. 228; McQuillan vs. Donahue, 49 Cal. 157; Hayne on New Trials and Appeals, Sec. 238, note 13.)

The main ground, as it seems, urged by the appellant for the reversal of the order is, that the trial court misconstrued the evidence given in the cause, and that the findings against the plaintiff are not in accord with such evidence if properly and legally considered. The only oral evidence in the case introduced by the plaintiff to sustain the contention that the note was placed in the hands of Mr. Ralston, the then cashier of the Bank of California, for collection by the bank, the proceeds to be placed therein to the credit of the plaintiff, was the testimony of Donald McLennan and the witness Tibbey, the latter having been at one time an employe of the bank, but was not at the time he testified. Mr. Ralston, the only other person who might have testified as to the exact nature of the transaction by which he took the note from McLennan for collection, was dead at the time of the trial. So that whether he took it as cashier of the bank, or in his individual capacity must rest mainly, if not entirely, upon whether the emphatic and positive statements made by McLennan and Tibbey ought to have been given full credit by the trial court.

The note, which it is claimed that Ralston collected and had the proceeds placed to his credit in the bank, and drew it out by check and used it for his own private purposes, was made in renewal of a *second* note, which last had been in the hands of Tibbey, a friend of McLennan's, to be collected by Tibbey, for McLennan. When it became due, Tibbey placed it in another bank for collection, and Colonel Fry, the president of the mill corporation, the maker of the note, was not ready to pay it, and told Mr. Ralston, who was largely interested in the corporation, of the fact of the inability of the corporation at that time to meet the note, and that Tibbey had it for collection. Ralston was, as appears abundantly in the record, a man and friend in whom McLennan had the utmost confidence, at whose instance the latter had several times given his name on various notes, and had at Ralston's personal request loaned at one time $30,000 to the mill corporation. In fact it would appear as if McLennan on account of the confidence he had in Ralston, and his intimate personal and business relations with him as shown by McLennan's evidence, if he had been requested to do it, would at any time have intrusted or loaned to Ralston, either his name, credit or money.

Under these existing personal relations between Ralston and McLennan, Mr. Ralston inquired of Tibbey about this second note. He was informed that the note was held in confidence as agent by Tibbey; then Tibbey saw McLennan, who told him to tell Ralston who the note belonged to. This was done, and an interview occurred between Ralston, Tibbey and McLennan, by means of which Ralston became possessed of the note, had it renewed and placed the renewed note in the bank for collection as deposited for his own account individually, and used the proceeds personally.

Another circumstance appears in the case, in the evidence of McLennan, and that is, that although he says that Ralston told him the money had been collected on the note, and placed to McLennan's credit in the Bank of California, that he never once made any inquiry of any one else about the bank if such was the fact, never made any demand for it for years afterwards, or during Ralston's life-time, except to Ralston, and never drew a check against it, or made any effort to get it, as is usual in cases when men have money on deposit in banks.

After Ralston's death, and during the temporary suspension of the bank, this action is brought, and when a large alleged indebtedness of McLennan to the bank is barred by the statute of limitations, and his claim being against a bank cannot be likewise barred. All these facts were before the trial court.

In addition to certain suspicious facts and circumstances, which time does not admit of mention, it appears in the testimony of McLennan, that he first positively and emphatically declared that he had no interest or claim in the third note. And afterwards (folios 107-8, 123-4-5), declared that he had. The reason which he assigns for not claiming this interest in the first instance being as stated by himself, in answer to questions by his counsel, which questions and the answers are:

"Q. This morning you were asked in regard to the first and second notes, and you said that the third note was not yours. I should like to know if you have any explanation to make about that?

"A. Well, I made a great mistate this morning, because I thought that not having any physical connection in the third note, that it might not belong to me, or it might prejudice my standing in court. I at once saw my mistake, and beg now to correct it. I claim ownership in that note, the same as the other two notes. I claim ownership in any note having any connection with the transaction.

"Q. You also said that you never authorized or ratified the taking up of the third note. What do you mean by that?

"A. Well, I mean to say by that, whatever the bank done in connection, or in the shape of an accommodation to the mill, of course it was no doings of mine, any more than the proceeds from any accommodation they might afford the mill, I claim the payment—claim the money." (Trans., fols. 155-6-7.)

From this it seems as if the witness thought himself justified in making his recollection conform to his supposed interests, and that he was ready to and did make what he calls a "mistake" in his own favor, as to the statement of a fact, or a claim of interest, when to do otherwise and state the fact or claim correctly, would, as he said, "*prejudice my standing in court.*"

Space forbids us enumerate all the other instances, either, as claimed, resulting from the want of recollection, or otherwise, where it would seem that the witness caused "intestinal" conflicts in his testimony, or made statements inherently improbable in their nature. But such appears to us to have been the character of his testimony, and under such circumstances we do not see, in view of the decisions of the appellate court of this State, that the trial court was compelled to regard as true his statement as to how Ralston became possessed of the note. (Crook vs. Forsythe, 30 Cal. 662; Bernal vs. Wade, 46 Cal. 667; Blankman vs. Vallejo, 15 Cal. 639-646; Baker vs. Fireman's Fund Ins. Co., 79 Cal. 34-41; Mogk vs. Peterson, 75 Cal. 501.)

Mr. Tibbey's mistakes and corrections also leave it doubtful if his recollection of the facts just as they occurred when Ralston took the note are to be relied on, and besides the peculiar relations between Ralston and McLennan, and all the facts and circumstances surrounding the transaction, and the conduct of the plaintiff afterwards, as above adverted to, might well cause the trial Judge to doubt the correctness of the memory of the witness.

It is further claimed that the books of the bank showing the alleged indebtedness of the plaintiff, as set up by counter-claim, were inadmissible in evidence. The transactions of a bank, relating in large measure with its customers, to the receipt of money from them and the paying of it out to them, on loan or check, it would seem as if their books showing the original entries of such transactions are admissible and competent evidence for the bank. (Morse on Banks, 3d ed. Sec. 295, note, pages 510, 511; Union Bank vs. Knapp, 3 Pickering, Mass. 96, 109; Watson vs. Phœnix Bank, 8 Met. Mass. 217, 220, 221.)

Even if the claim of the defendant was barred by the statute of limitations, this did not render this evidence to show the original indebtedness inadmissible, for it might happen in such a case that the party introducing it would be able to show facts which would take it out of the operation of the statute, and after the date of the claim and its nature are shown, it then becomes a question for the court to determine from all the evidence whether such claim is or not enforceable under the statute. While a recovery on such claim may be barred, this does not render proof of the claim in the first instance incompetent. Besides, the findings of the court are that the claim was barred, hence the plaintiff is not prejudiced. The same rule applies to the objection to the admission in evidence of the promissory note for $16,841 75, executed by the plaintiff to the defendant.

There are other objections urged to the admission or exclusion of evidence. We have given to arguments made and authorities cited minute and thorough consideration, and have examined the transcript carefully, but we cannot see wherein any prejudice could have been suffered by the plaintiff.

The decision of the court was, unquestionably, correct, and even if some evidence was admitted and other evidence excluded, perhaps improperly, it yet appears that, even then, the evidence unobjected to in the record was unaffected, as that admitted against objection, and that excluded was not of sufficient importance to change the result. Perceiving no prejudicial error in the record we advise that the order appealed from be affirmed.

FOOTE, C.

I concur:
BELCHER, C.

THE COURT.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

[Filed February 3, 1891.]

Appeal from Superior Court of San Diego County—George Puterbaugh, Judge.

For appellant, L. L. Boone.

For respondent, Reinoehl & Harrison.

DEPARTMENT ONE.

RUSS LUMBER AND MILL COMPANY, Respondent, vs. G. A. GARRETTSON ET AL., Appellants. } No. 13,954.

The plaintiff, a corporation, brought this action to foreclose a lien for materials furnished for, and used in, the erection of a building on land owned by defendant, Garrettson.

It is alleged in the complaint that on the 17th day of February, 1888, defendant Garrettson entered into a contract with defendants Wanberg & Nelson, whereby they agreed to erect and finish for him a building on a certain described piece of land; that on various occasions between the 22d day of February and the 20th day of May, 1888, the plaintiff, at the instance and request of the contractors, furnished materials, viz.: lumber, laths, shingles and windows, to be used and which were actually used in the erection and construction of the building specified in the contract; that the market value of the materials so furnished and the amount agreed to be paid therefor is the sum of $1,112 56, of which sum $300 has been paid, and the balance of $812 56 is still due, owing and unpaid to the claimant; that on the 23d day of February, 1888, the plaintiff duly gave to Garrettson a written notice that it had agreed to furnish the materials as aforesaid for the erection of said building, and thereafter there became and was due and owing from him to the contractors, on account of the contract, an amount largely in excess of the balance so due and unpaid to plaintiff, and sufficient to answer its claim, including costs and attorney's fees; that Garrettson is now, and during all the time herein specified, was the owner of the lot of land on which the building was erected, and all thereof is necessary for the convenient use and occupation of the building; that on or about the 20th day of June, 1888, the building was completed, and thereafter, on the 13th day of July following, plaintiff, for the purpose of securing and perfecting a lien for the moneys so due upon the building and land described, under the provisions of Chapter II., Title IV., Part III., of the Code of Civil Procedure, filed for record in the Recorder's Office of the county in which the property was situated, its claim of lien, which was duly verified and three days later duly recorded, and a copy of which, marked "Exhibit A," was attached to and made a part of the complaint.

Defendant Garrettson demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action "for the reason that the instrument set forth in said complaint as 'Exhibit A,' and purporting to be a notice of claim filed for record in the Recorder's Office, does not comply with the statute in such cases made and provided, inasmuch as there are no words or clauses contained therein which set out a claim of lien on certain property to be charged therewith, and the statement of demand is entirely wanting;" and also on the ground that the complaint was ambiguous, uncertain and unintelligible, "for the reason that it appears upon the complaint that the contract therein was for an amount exceeding one thousand dollars from the sum of money therein set forth, and from the fact that Wanberg & Nelson are made party defendants; but it does not state whether there was a written contract filed in accordance with law, or set out said contract in the complaint as the best evidence." The demurrer was overruled and he then answered.

The case was tried and judgment rendered foreclosing the lien, as prayed for. From that judgment Garrettson alone appeals, without any statement or bill of exceptions.

It is argued for appellant that the complaint was insufficient, because there was no averment as to what was the contract price between the owner and contractors, or that there was any express agreement to pay anything, or as to what was the reasonable value of the work to be done; and hence, it is said, there was nothing to show that any sum ever became due under the contract from the owner to the contractors.

It is true that neither the contract price nor the reasonable value of the work was specifically set forth in the complaint; and the averment that, after the plaintiff gave Garrettson written notice that it had agreed to furnish the materials, there became and was due and owing from him to the contractors, on account of the contract, an amount in excess of the balance due and unpaid to the plaintiff, was a statement of conclusions of law rather than of facts. And, of course, this statement, if tested by demurrer, would have been insufficient. It was, however, not so tested, nor was it in any way traversed by the answer. The point seems to be made here for the first time. Under such circumstances, we think, the complaint should be held sufficient in this regard.

In this connection it is suggested that if Garrettson agreed to pay a price for the erection of his building, and the amount exceeded $1,000, the contract was void unless properly recorded, and if the amount was less than $1,000, he was not required to reserve 25 per centum thereof for thirty-five days after the building was completed, but could pay the price at any time, and in any way agreed on by the parties. And it is said, for aught that appears in the complaint, the price may have been fully paid before the work commenced, or may have been a prior indebtedness. But the statute, after providing that if the contract price exceeds $1,000, the contract, or a memorandum thereof, must be recorded or otherwise be wholly void, goes on to say, "and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to be done and furnished at the special instance of the owner, and they shall have a lien for the value thereof." (Sec. 1183, C. C. P.) And the next section (Sec. 1184, C. C. P.) has this provision: "Any of the persons mentioned in Section 1183, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor and furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount and value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both * * * Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter."

Under these provisions, whether the contract was recorded or not, if proper notice was given, and if sufficient money was then due, or afterwards became due, from the owner to the contractors, to pay the plaintiff's claim—and that sufficient did become due is not denied or questioned—it was the duty of the owner to withhold the same from the contractors, and the plaintiff is now entitled to have his claim of lien therefor enforced.

But it is urged that it does not appear what were the contents of the notice given by the plaintiff to the owner, and that it should therefore be held insufficient to meet the requirements of Section 1184 of the code. The complaint alleges that the plaintiff furnished the materials to be used in the construction of the building, stating in general terms the kind of materials, at the instance and request of the contractors, naming them, and that the amount agreed to be paid for all thereof was $1,112 56. It is then alleged that the plaintiff gave to the owner of the property a written notice that it had agreed to furnish the materials *as aforesaid*, etc. The words "as aforesaid" evidently referred to the materials and the persons to whom they were furnished and the value thereof as before stated, and hence we think the notice must be held sufficient.

It is also objected that the complaint must allege that a claim of lien has been verified and filed, containing certain statements, and that the complaint is insufficient in this respect. It was alleged that a claim of lien was verified and filed, and a copy thereof was attached to and made a part of the complaint, and whether it contained the required statements or not was shown by the lien itself.

It is further objected that the claim of lien is defective in that it does not purport to charge the property, nor state the name of the owner of the building, nor state to whom the materials were furnished, nor the terms of the contract.

A substantial compliance with the statute is all that is required. (Tredinnick vs. Mining Company, 72 Cal. 78.)

The claim of lien states that Garrettson was the owner of a lot of land, which is described, and that he entered into a contract with Wanberg & Nelson by which they agreed to erect and finish for him a building on the lot, and that the building was completed at a time named; that the plaintiff furnished the materials under a contract with Wanberg & Nelson, by which they agreed to pay the market value thereof at date of delivery in cash, and the whole value and balance unpaid are stated; and that the plaintiff, on a day named, duly gave a written notice to Garrettson that he had agreed to furnish the materials as aforesaid; wherefore it claimed the benefit of the provisions of the Code of Civil Procedure, relating to liens of mechanics on real property.

The above seems to be a sufficient statement that Garrettson was the owner of the building which was erected for him on his land, and that the materials were furnished to Wanberg & Nelson, his contractors. To say that the name of the owner of the building, and the names of the persons to whom the materials were furnished, are matters of mere inference, since it does not *necessarily* follow that the owner of the land is the owner of the building, and the materials *might* have been furnished to a sub-contractor or other persons, seems to us to be not even a plausible argument. So the terms of the contract, we think, were sufficiently stated. (See Hills vs. Ohliz, 63 Cal. 104, and Jewell vs. McKay, 82 Cal. 144.) And the demand that the plaintiff have the benefit of the law relating to liens was a sufficient statement that it claimed a lien on the described lot of land with the building thereon.

It is objected that there is a variance between the contract set out in the complaint and that set out in the claim of lien. We see no material variance. The contract, as set out in both papers, seems to be substantially the same.

It is also objected that the findings of the court are insufficient to support the judgment. This is rested upon the tenth finding, which reads as follows: "That on the 13th day of July, 1888, plaintiff, for the purpose of securing and perfecting a lien for the money so due it as aforesaid upon the land and premises and building aforesaid, hereinafter described, pursuant to the provisions of Chapter II., Title IV., Part III. of the Code of Civil Procedure of the State of California, filed for record in the office of the Recorder of San Diego County, California, where said premises are situated, its claim therefor duly verified in its behalf by its manager, S. S. Johnson, and that said claim of lien is in due form and was filed in due time and is a valid subsisting claim of lien under the law."

We think the finding sufficient.

Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position. The case of Phelps vs. M. C. G. M. Co. (49 Cal. 356), cited in support of it, only holds that the material man, in an action to enforce a lien, was not entitled to a personal judgment against the owner.

We find no material error in the record, and advise that the judgment be affirmed.

BELCHER, C.

We concur:
HAYNE, C.,
FOOTE, C.

THE COURT.

For the reasons given in the foregoing opinion the judgment is affirmed, and the court below is directed, upon the filing of the remittitur therein, to allow the plaintiff as a part of the costs upon this appeal a reasonable fee for the services of its attorneys in this court.

[Filed February 2, 1891.]

Appeal from Superior Court of Los Angeles County—Lucien Shaw, Judge.

For appellants, Hugh J. and William Crawford.

For respondent, Charles McFarland and Sargent & Harpham.

DEPARTMENT ONE.

FRICK ET AL., Appellants, vs. MORFORD, Respondent. } No. 13,659.

The plaintiffs applied to the Superior Court of Los Angeles County for a writ of mandate to the Superintendent of Streets of the City of Los Angeles, directing him to make an assessment for certain work done by them in laying a sewer in Seventh street, under a contract with the city authorities. In their application they aver that they entered into a contract with the Superintendent of Streets by which they agreed to lay the sewer "in accordance with plans and specifications therefor on file in the office of the City Surveyor," * * * "but said plans and specifications were faulty and erroneous in this: that about eight feet of sewer more were required by said plans and specifications to be laid, and were laid by affiants, than was authorized by the resolution of intention;" that they had performed their work to the satisfaction of the Superintendent of Streets, and that he accepted the same and made an assessment therefor, "and in said assessment included the cost and incidental expenses of said unauthorized eight feet;" that they brought an action to recover the amount of a portion of the assessment against one H. L. Williams, who had refused to pay the same, "because of said excess of work," and that they had dismissed the said action.

The defendant demurred to the application, and his demurrer having been sustained, the plaintiff declined to amend, and appealed to this court from the order denying the writ. The plaintiffs do not in their application aver in terms that the assessment that had been issued was void, nor can we say from the facts averred by them that it was void. Neither do they aver that the court in which they brought an action upon it decided that it was void, but they say that they dismissed their action against Williams upon "becoming convinced from the rulings of the honorable court that judgment could not be recovered by them."

If the assessment was a valid one, the Superintendent of Streets cannot be required to make another, and unless facts showing that it was not valid were clearly set forth in their application, the court was justified in refusing to grant the writ.

1. The plaintiffs do not show very clearly in their application wherein the plans and specifications which were on file in the office of the City Surveyor "required about eight feet of sewer more to be laid" than was authorized by the resolution of intention, but we understand therefrom that they required the sewer to be laid to a point 988 feet west of the east line of Pearl street, instead of 980 feet westerly therefrom, as specified in the resolution. If this be the fact, it would result that the plaintiffs laid the westerly eight feet of the sewer without authority, and that they are not entitled to an assessment for that portion of the work done by them. It does not result, however, that the assessment for the work done by them that had been authorized by the resolution of intention was void.

Neither does it clearly appear from the application where the lot of Williams was situated with reference to this excess of eight feet. If it was wholly or in part within the eight feet, the plaintiffs are not entitled to an assessment against that part of the lot not fronting upon the work authorized by the City Council. If his lot was east of the 980 feet limit the assessment against it would not be rendered void by the fact that the entire assessment purported also to make a charge upon lots that were not within the resolution of intention. Inasmuch as the price at which the plaintiffs were to do the work was estimated by the lineal foot, the cost of that which was done by them outside of the 980 feet limit could be easily segregated from the remainder. (Himmelman vs. Hoadley, 44 Cal., 276.)

2. If the assessment embraced only the frontage upon the 980 feet covered by the resolution of intention, but included the expense of laying the sewer in the eight feet outside of that limit, it was an error which could have been corrected by the City Council upon appeal, and the failure to take such appeal was conclusive upon the owner as well as upon the contractor. (Himmelman vs. Hoadley, *supra;* Boyle vs. Hitchcock, 66 Cal. 129.)

If the lot of Williams as assessed was partly within the 980 feet authorized by the resolution of intention to be "improved" by the sewer, and partly outside thereof, it was the duty of plaintiffs to appeal to the City Council within thirty days after the date of the warrant for the purpose of having the assessment corrected. Upon such appeal the City Council would have limited the assessment to the 980 feet authorized by their resolution of intention.

Section 11 of the Act of March 8, 1885 (Stats. 1885, p. 156) provides that: "The *contractor* * * * having or making any objections to the correctness or legality of the assessment * * * shall within thirty days after the date of the warrant appeal to the City Council. * * Upon such appeal the said City Council may * * * set aside, alter, modify or correct the assessment in such manner as to them shall seem just; * * * and may instruct and direct the Superintendent of Streets to correct the assessment in any particular, or to make and issue a new assessment to conform to the decisions of the City Council in relation thereto. All the decisions and determinations of said City Council *, * * shall be final and *conclusive upon all persons entitled to appeal* under the provisions of this section, as to all errors, informalities and irregularities which said City Council might have remedied and avoided."

It was the duty of the plaintiffs, and not of Williams, to take this appeal. They were interested in having a legal and correct assessment. If the assessment was illegal and created no lien upon his land, Williams was not a person who would feel "aggrieved," and was not required to appeal for the purpose of giving to the plaintiff a valid assessment. (Smith vs. Cofran, 34 Cal. 310.)

It follows that, inasmuch as the plaintiffs did not appeal from the act of the Superintendent of Streets in making the original assessment, they are concluded thereby, and are not entitled to have it corrected in any other mode.

It is unnecessary to decide whether any part of the work to be done under the resolution of intention "is the improvement of an entire crossing," or whether it was necessary to post notices of the passage of the resolution "in front of each quarter block liable to be assessed."

The order appealed from is affirmed.

HARRISON, J.

We concur:
PATERSON, J.,
GAROUTTE, J.

[Filed February 3, 1891.]

Appeal from Superior Court, Los Angeles County, Walter Van Dyke, Judge.

For appellant, Chapman & Hendrick.

For respondents, C. McFarland, S. M. White, Graff, Gibbon & Creighton.

DEPARTMENT TWO.

JESSE YARNELL, Appellant, vs. CITY OF LOS ANGELES, ET ELS., Respondents. } No. 13,920

This is an action brought by a resident, and taxpayer, against the City of Los Angeles, M. D. Johnson, Treasurer of said city, and the City Bank, a private corporation. The purpose of the action is to enjoin the said Treasurer from depositing the public moneys of the city with said bank pursuant to a certain contract between the city and the bank. Defendants filed a general demurrer—"that said complaint does not state facts sufficient to constitute a cause of action." An answer, and supplemental answer, were filed, together with some affidavits, and the case was submitted. Subsequently the court rendered judgment by which it was "ordered, adjudged and decreed, that the demurrer to the complaint be sustained;" that plaintiff was not entitled to the injunction; that the order to show cause be discharged, and the action dismissed; and that defendants recover their costs. Plaintiff appeals from the judgment, and it is clear that the appeal turns upon the sufficiency of the complaint, and the correctness of the decision of the court upon the demurrer. Upon the face of the complaint appear the following facts:

The city of Los Angeles is a municipal corporation existing under what is generally called a "freeholders' charter," formed in pursuance of the amendment of Section 8 of Article XI. of the State Constitution, approved March 10, 1887. (Stats. of 1887, p. 88.) The charter was approved by the Senate and Assembly on January 21, 1889. Section 44 of the charter provides, among other things (in brief), that it shall be the duty of the City Clerk, on a certain day of January in each year, to advertise for sealed proposals from banks of deposit as to the terms upon which they will "receive and disburse the public moneys of said city." The proposals are to specify the rate of interest, estimated upon daily balances, which the bank will allow on the public moneys deposited. And "the bank offering the highest rate of interest shall be appointed the depositary of public moneys." After it is ascertained who is the highest bidder the council is to enter into a contract with the bank, providing that the latter shall pay "all warrants drawn upon the City Treasurer" so long as there is city money in the bank to meet the warrants on the various funds. Provision is made for a bond to be given by the bank. "Upon approval of such bond, and the signing of such contract, the council shall direct the City Treasurer to deposit each day, when such bank is open for transaction of busines, with the bank thus selected, all public moneys of said city by him collected or received. For each such deposit the treasurer shall take the receipt of the bank, and from and after the deposit of such money in said bank the treasurer and his bondsmen shall no longer be liable therefor." Under this section of the charter the city made the kind of contract provided for therein with the defendant, the "City Bank," and the defendant Johnson, Treasurer, was, under such contract, about to deposit the public money in said bank when this action was commenced. The question presented is whether or not the provisions of said Section 44 of the charter are constitutional and valid.

Section 6, of Article XI. of the Constitution, provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws;" and the amendment to Section 8, of Article XI., under which the Los Angeles charter was framed, provides that certain cities may frame charters for their own government "consistent with and subject to the Constitution and laws of this State." If, therefore, the provisions above stated, of said Section 44 of the charter in question are inconsistent either with the Constitution, or with any law which is "general" in the sense in which it is used in the clauses above quoted, then they are invalid and void. And we think that they are inconsistent with both.

There are several clauses of the Constitution which point to the intent that public moneys shall not be used by, or for the benefit of, private persons and corporations; but one or two of them only need be invoked here. Section 13, of Article XI. provides that "the Legislature shall not delegate to any special commission, private corporation, company, association or individual, any power to make, control, appropriate, supervise, or *in any way interfere with* any county, city, town or municipal improvement, *money*, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." The only method proposed to avoid this provision is to say that while the Legislature may not do the thing prohibited it may authorize its creatures, municipal corporations, to do it. But the thing which the Legislature is forbidden to do, it cannot delegate to another to do, unless such power of delegation is given by the Constitution itself. And in other places there is such power of delegation given. For instance, in Section 12 of Article XI. the Legislature is forbidden to impose taxes on municipalities for municipal purposes, *but* may, by general laws, vest such power in the municipal authorities; and in Section 14 of the same article, the Legislature is prohibited from creating any offices in municipalities for the inspection, etc., of merchandise, etc.; but, it is provided, that the municipality "may, when authorized by general law, appoint such officers." In Section 13, however, there is no such power of delegation given. Under the construction contended for by respondent, while the Legislature is prohibited by Section 26 of Article IV. from authorizing lotteries, it could give that power to municipalities.

Again, carrying out the same intention, Section 16, of Article XI., which does not speak of the *Legislature*, but deals directly with municipalities themselves, provides that all moneys of any municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited "with the Treasurer, or other legal depositary, to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they respectively belong." The word "Treasurer" is the one by which the custodian of public money is usually designated, and he is a public officer; and the phrase "other legal depositary" is clearly used to designate such public officer, whether he be called in any particular municipality "Treasurer" or by some other name. It certainly does not mean a private individual or corporation. And, in the case at bar, the relation between the city and the City Bank, under the contract, is, we think, simply that of creditor and debtor—the bank being a borrower of the public money.

But if the bank could be held to be a public officer, then the contract would be in the face of Section 17, of Article XI., which provides that "the making of profit out of county, city, town, or other public money, *or* using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law." In this section the phrase "making of profit out of county, city, town, or other public money," is an independent clause and, of itself, constitutes a felony, and is not dependent upon the subsequent words "not authorized by law," so that these latter words need not be here construed.

We think, also, that the section of the charter under review is inconsistent with both the spirit and the letter of the general laws of the State relating to public moneys. For instance, Section 426 of the Penal Code defines "public moneys" as including all moneys belonging to "any city, county, town or district;" and Section 424 provides that "each officer of this State, or of any county city, town, or district of this State, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys who" commits certain acts with respect to such public moneys as are enumerated in ten subdivisions of the section, "is punishable by imprisonment in the State prison for not less than one nor more than ten years, and is disqualified from holding any office in this State." This is certainly a "general law" within any reasonable definition of that term that could be suggested, and the forty-fourth section of the charter is clearly inconsistent with it. Counsel contend that said section 424 (P. C.) is qualified, in most part at least, by the words "without authority of law," which occur in the first subdivision. But waiving here the meaning of the word "law" as applied to a charter adopted by only a part of the law-making power, it is sufficient to say that Section 224 enumerates a great many things which one having custody of public moneys may do which are not "authorized by law" in any sense, and which are declared to be crimes punishable by imprisonment in the State prison, and by debarment from office. But if a private corporation should commit any of these crimes how could it be made to suffer the penalty prescribed? It has neither a body to be imprisoned, nor a right to hold office of which it could be deprived. It seems clear, therefore, that a scheme which places public moneys in the possession and control of a private corporation is entirely inconsistent with the provisions of the section of the code above quoted.

Without referring with further detail to other provisions of the Constitution and the laws, our conclusion is that the parts of Section 44 of the charter of the city above referred to, and the said contract attempted to be made under it, are inconsistent with both the Constitution and the general laws of the State; that the complaint in this action states facts sufficient to constitute a cause of action, and that the court below erred in sustaining the demurrer.

(The point is hinted at, though not pressed in the briefs, that a taxpayer cannot maintain this action. We suppose that counsel wish the case decided on its merits, and not upon an issue in the nature of one raised by a dilatory plea, for their arguments go almost entirely to the point of the constitutionality and validity of the part of the charter assailed. We think, however, that in this case, where it is proposed to take all the public moneys of the municipality out of the hands of their legal custodian, and place them in the possession and control of a private corporation, a taxpayer has sufficient interest in the subject matter to prevent, by suit, the consummation of the illegal act.)

The judgment is reversed, with direction to the Superior Court to overrule the demurrer to the complaint.

MCFARLAND, J.

We concur:
DE HAVEN, J.,
SHARPSTEIN, J.

[Filed February 2, 1891.]

Appeal from the Superior Court of Los Angeles County—H. K. S. O'Melveny, Judge.

For appellant, Edwin Baxter.

For respondent, Will D. Gould and Jas. H. Blanchard.

DEPARTMENT TWO.

FOSS ET AL., Appellants, vs. JOSEPH HINKELL, Respondent. } No. 14,014.

This is an action of ejectment. Judgment went for defendant, and plaintiffs appeal.

Plaintiffs claim title under an United States patent to the Southern Pacific Railroad Company, dated April 4, 1879, and a deed from said company to plaintiffs, dated June 20, 1887. Defendant claims as a pre-emptor, contending that at the date of the definite location of the Southern Pacific Railroad, which was on or about April 3, 1871, the land in contest was within the exterior limits of the San Jose Rancho, a valid Mexican grant, and was therefore reserved from the grant to the railroad company.

There was a former trial of this case, and a former appeal. At that trial the court made certain findings and gave judgment for plaintiffs. On appeal this court determined most of the questions involved favorably to defendant (Foss vs. Hinkell, 78 Cal. 158), and the decision of this court then made as to those questions has become the law of the case. But this court reversed the judgment for want of a finding whether or not the land was within the exterior boundaries of said rancho. The court below had found that according to a survey called the "Thompson Survey," the land *was* within said boundaries, and that according to a survey called the "Hancock Survey," it was *not*, and this court, in its opinion, said: "The exterior limits of the rancho do not depend on any survey made of it. The land sued for may be within such exterior limits though excluded from the survey. Though Hancock may have excluded this land from his survey, it still may be within the exterior boundaries of the rancho as granted by the Mexican Government. What the exterior limits of such granted rancho were must be determined by the *expediente* of the grant issued by the Mexican Government, including petition, *diseno*, and grant, the boundaries designated in which may be identified by parol evidence. (See Doolen vs. Carr, *supra*)." And for this defect in the findings the judgment was reversed, and the cause remanded "with directions to the court below to find, on the testimony already introduced, and such further testimony as may be introduced by either party, whether or not the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the rancho San Jose as granted by the Mexican Government, and on such findings to enter judgment." And so when the case went back to the trial court there was only one issue—the one last above stated—to be determined.

When the case was heard again in the trial court, that court, following the said directions of this court, found "that the land in suit *was* on the third day of April, 1871, within the exterior boundaries of the Rancho San Jose as granted by the Mexican Government," and gave judgment accordingly for defendant. And it is evident that the judgment must stand unless the court committed material errors in ruling upon the admissibility of evidence; or unless the said finding is not supported by the evidence.

Appellants took certain exceptions to the admission of certain evidence; but the point is not pressed in the brief, and—especially when we consider what was decided when the case was here before—we see no error on this point.

The main contention of appellants is that the finding is not supported by the evidence. Their counsel argue that the court must have found the land in suit to be within the exterior boundaries of the rancho simply because it was *claimed* that said boundaries included said land. But there was introduced in evidence the original petition, the *expediente*, the *diseno*, the act of judicial possession, various maps, decrees and proceedings, and also oral testimony of witnesses as to the exterior boundaries of the rancho. It would be a useless labor here to review all this evidence. It is sufficient to say that after a full consideration of the evidence we are not prepared to say that the court was not warranted in finding that the land in suit was within the exterior limits of the San Jose Rancho, "as granted by the Mexican Government."

The judgment and order denying a new trial are affirmed. MCFARLAND, J.

We concur:
DEHAVEN, J.,
SHARPSTEIN, J.

BEECHAM'S pills cure bilious, nervous ills.