SUPREME COURT DECISIONS.

[Filed February 9, 1891.]

Original proceeding—habeas corpus.
For petitioner, M. Cooney.
For respondent, Henry I. Kowalsky.

IN BANK.

EX PARTE CLARK ON HABEAS CORPUS. } No. 20,190.

Petitioner is the mother of Charles Henry Clark, a minor, and the respondents, who are husband and wife, claim that he has become their child by adoption. This claim is based upon an order made November 16, 1888, by Hon. John F. Finn, one of the Judges of the Superior Court of the City and County of San Francisco. Attached to the order is a written consent signed by James P. Clark and Annie E. Clark, the parents of the child, consenting that "said Charles Henry Clark may be adopted by Jacob Reulein. Following this is a written agreement and consent signed by *David* Reulein and Mrs. Katie Reulein, in which the latter consents that David Reulein might adopt the child, and in which David Reulein agrees to adopt the child and treat him thereafter in all respects as his own lawful child. The order of the Judge recites that the parents, James P. and Annie E. Clark, and Jacob Reulein and Katie Reulein, his wife, appeared before him bringing with them said Charles Henry Clark, aged two years and eleven months; that he examined each of said persons separately, and from such examination found that Jacob Reulein was desirous of adopting said Charles; that his wife, Katie, consented to such adoption, and that it was for the best interests of the child that such adoption should take place; that the parents having signed the necessary consent, and said *Jacob* Reulein having executed the proper agreement, it was, therefore, ordered that said Charles Henry Clark should thenceforth be regarded and treated in all respects as the child of said Jacob Reulein.

The petitioner herein alleges that the child is restrained of his liberty by *John D.* Reulein and Katie Reulein. The writ was addressed to them, and an answer has been filed signed by John D. Reulein and Katie Reulein, admitting that they hold the custody of the child, and claiming the right to do so under the order above referred to.

It will be observed that the parents consented to the adoption of their child by *Jacob* Reulein. that the agreement to adopt is signed by *David* Reulein; and that the order of the court gives the child to *Jacob* Reulein. There is nothing in the record of the proceeding to show that the names Jacob Reulein, David Reulein and John D. Reulein indicate one and the same person.

In our opinion the order is void, and affords respondents no warrant for the detention of the child. It confers no right upon them, and is manifestly too uncertain, when read in connection with the agreements and consents upon which it was based, to render any one liable as the parent by adoption—especially one whose name does not appear in the record **at all.**

There is another objection which is fatal to the validity of the proceeding. Section 226, C. C., provides that all the persons interested must appear before the Judge of the Superior Court *of the county where the person adopting resides.* There is nothing in the order, or in any of the papers referred to, showing that Jacob Reulein, or David Reulein, was a resident of the City and County of San Francisco. It has been held—and we think correctly—that in cases of this kind, the power of the court being special, and not exercised according to the course of the common law, its decisions must be regarded and treated like those of courts of limited and special jurisdiction; and that jurisdiction in such cases, although the court be one of general jurisdiction, must appear by the record, as to both subject-matter and the person. (Furgeson vs. Jones, 17 Or. 204).

We have held that our law of adoption is not unconstitutional (Estate of Stevens, 83 Cal. 322), but to acquire any right under it its provisions must be strictly followed, and all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former. A child by adoption cannot inherit from the adopting parent unless the act of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law, and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another. (Tyle vs. Reynolds, 53 Ia. 146; Shearer vs. Weaver, 56 *Id.* 578.)

It was stated on the argument that proceedings were pending before Judge Finn to amend the record so as to show that the respondent, John D. Reulein, is the same person referred to in the proceedings as Jacob Reulein and David Reulein. Assuming that the power to amend the record as suggested exists—a matter upon which we express no opinion—we must on *habeas corpus* take the record as we find it, and determine the rights of the parties accordingly.

Counsel for respondents earnestly urge the court to consider that the claim of respondents has been acquiesced in for several years by the petitioner; that respondents have treated the child well; that a warm affection has sprung up between him and themselves; that petitioner practically abandoned her child when she consented that the order of adoption might be made; and asks permission to prove that respondents are in every sense more worthy to have the custody of the child than the petitioner is. But there can be no estoppel in such a case, and the fitness relatively of the respective parties to care for the child is not a proper subject of inquiry in this proceeding. It is conceded that both parties are competent and fit persons to care for the child.

It is doubtless true, as claimed by respondents, that a parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation, but there is no basis for any such claim in this case. The minor is a young child, incapable of caring for himself, and there is no pretense that the respondents have any authority over him other than such as is conferred by the order referred to.

It is ordered that the respondents, John D. Reulein and Katie Reulein, forthwith restore to the petitioner herein the care, custody and control of said Charles Henry Clark. PATERSON, J.

We concur:
DE HAVEN, J.,
HARRISON, J.,
SHARPSTEIN, J.,
MCFARLAND, J.,
GAROUTTE, J.,
BEATTY, C. J.

[Filed February 11, 1891.]

Appeal from Superior Court of Los Angeles County—Lucien Shaw, Judge.
For appellant, Anderson, Fitzgerald & Anderson, Del Valle & Munday.
For respondents, A. Brunson and Stephen M. White.

IN BANK.

PIO PICO, Appellant, vs. COHN, ADMINISTRATOR, ET ALS., Respondents. } No. 13,892.

This is a suit in equity to vacate and annul a final decree in another action between the same parties on the ground that it was procured by fraud.

The Superior Court sustained a demurrer to the complaint and thereupon gave judgment for the defendants, from which the plaintiff appeals. The principal question presented by the appeal, and the only question we find it necessary to consider, is whether the complaint taken as true, presents a case entitling the plaintiff to the relief demanded, or to any relief.

It is alleged that in April, 1883, the plaintiff was owner of several parcels of real estate in Los Angeles, then worth over two hundred thousand dollars, and of still greater value now; that one parcel of the land had been sold under decree of foreclosure, and the time for redemption was about to expire; that there were other pressing liens resting upon the whole property, amounting, with the sum necessary to redeem the parcel sold, to about sixty-two thousand dollars as then estimated; that plaintiff was anxiously endeavoring to raise money to effect such redemption and save his property from sacrifice; that one B. Cohn, since deceased, whose administrator is the principal defendant herein, offered to loan, and did loan, him the necessary sum, taking for security a grant absolute in terms of the incumbered property. The consideration expressed in the deed was the exact sum at which the liens and incumbrances on the land were estimated—sixty-two thousand dollars. The value of the land, was as above stated, over two hundred thousand dollars.

Within a month or two after the execution of his deed plaintiff tendered Cohn $65,000 and demanded a reconveyance, which was refused, whereupon he commenced an action to compel a reconveyance, alleging in his complaint that his grant to Cohn was, in fact, a mortgage to secure a loan. Cohn answered, alleging that the transaction was an absolute sale. Upon a trial of this issue the Superior Court found for the plaintiff and decreed a reconveyance upon payment of $103,000, this being the amount of the sum originally advanced by Cohn, and certain additional sums which he was found to have expended subsequently in the compromise and settlement of other claims against the property.

But, on motion of the defendants in that action, the Superior Court ordered a new trial unless the plaintiff would consent to a modification of the findings and decree adding $35,000 to the amount to be paid defendants upon reconveyance of the land, and the plaintiff failing to consent to such modification the order for a new trial was made absolute, and upon appeal of the plaintiff was affirmed by this court. (67 Cal. 258.) Thereupon a new trial was had in the Superior Court, but before a different Judge, who found upon the principal issue in favor of the defendants, and decreed against the right of redemption. From that decree and an order denying his motion for a new trial the plaintiff again appealed to this court, where the decree and order were affirmed (78 Cal. 384), upon the ground that the evidence being conflicting the findings of the lower court could not be disturbed.

It is to annul the decree so affirmed that the present action is brought, and the fraud by which it was procured is shown by allegations, in substance as follows: At the date of the original transaction with Cohn, Pico was an old man over 80 years of age, unable to speak or understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in Cohn, relied upon him implicitly, and at his solicitation abstained from consulting his usual legal advisers. In the conduct of the negotiations with Cohn the only other person present was one Pancho Johnson, who knew everything that took place, and well knew that the transaction was a loan and security and not a purchase and conveyance absolute, and shortly after the execution of the deed so stated in the presence of Pico's attorneys and numerous other persons. Relying on Johnson's knowledge of the transaction and his statements concerning it Pico called him as a witness on the first trial of the action to redeem, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance. But in spite of his adverse testimony, the court, as above shown, found for the plaintiff. Before the cause came on for trial a second time Johnson was dead, but his testimony, as given on the first trial, had been reduced to writing and was on file among the papers in the case. Plaintiff and his counsel knew that this testimony was false in its general statement to the effect that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify, but they had no evidence of such bribery, although they had used the utmost diligence to discover it.

Upon mature consideration, they decided at the second trial to put in evidence the written transcript of Johnson's testimony at the first trial. Among their reasons for doing so were the following: Other testmony in the case showed that Johnson was present during the negotiations between Pico and Cohn, not only as interpreter, but as the particular friend and adviser of the former, and counsel for plaintiff feared that by omitting to offer Johnson's testimony they would incur the odium of suppressing evidence known to exist, whereas by putting it before the court they would have the advantage of some facts that they could prove by no other witness—they would have his admission of other facts inconsistent with the theory of a sale; the court would see that he was hostile to Pico, and he could be contradicted by proof of his statements made in the presence of others. Without going more fully into the reasons which induced counsel for plaintiff to submit the testimony of Johnson to the consideration of the court on the second trial of the former action, we content ourselves with saying that the allegations of the complaint show that the course pursued by them was, under the circumstances, wise and proper, if not absolutely necessary. But, contrary to their expectations, the court believed his false testimony, and for that reason alone decided against the plaintiff. In support of this conclusion the complaint sets out the substance of all the testimony of Cohn and Pico and in detail the material portions of Johnson's testimony, from which, with other averments, it appears that but for Johnson's positive perjury and suppression of the truth the judgment here in question would not have been given. This being shown, it is next alleged that after the final affirmance of that judgment by this court, plaintiff made the discovery that Cohn had paid Johnson two thousand dollars to testify falsely. The particulars of this bribery and its discovery are detailed in the complaint, and show that on the very morning that Johnson gave his testimony Cohn placed two thousand dollars in the hands of one Forbes, with directions given in Johnson's presence to pay it to him if he testified to an absolute sale, and that immediately after he had so testified he demanded and received the money.

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would upon another trial gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud?

After a careful and extended examination of the authorities we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation, and when parties have once submitted a matter or have had the opportunity of submitting it for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.

What then is an extrinsic or collateral fraud within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party and connives at his defeat; or, being regularly employed, corruptly sells out his client's interest. (U. S. vs. Throckmorton, 98 U. S. 65-6, and authorities cited.) In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial. But when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If unfortunately he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong in such case is, of course, a most grievous one, and no doubt the Legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation in which nothing was ever finally determined would be worse than occasional miscarriages of justice, and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony, for if this could be done once it could be done again and again *ad infinitum.*

But counsel for appellant seeks to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not and could not have been the subject of investigation at the trial of the original action.

We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense; the means by which he induced the witness to swear falsely was but an incident. It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes—the evil and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from U. S. vs. Throckmorton, *supra.* The decision in that case has been approved by this court as recently as *In Re* Griffith, 84 Cal. 113.

The following decisions of this court are also in point: Allen vs. Currey, 41 Cal. 321; Amador vs. Mitchell, 59 Cal. 176. Many other authorities to the same effect are cited in the brief for respondents.

On the other hand the case of Laith vs. McDonald, 7 Kansas 254, and 12 Kansas 340, directly support the position of appellant, as does the case of Fabrilius vs. Cock, 3 Burr, 1771.

The case of Verplanck vs. Van Buren, 76 N. Y. 247, and Dringer vs. Receiver, etc., 42 N. J. Eq. 573, contain expressions which seem to imply the same doctrine, but they do not directly support it. Other cases cited by appellant are less in point.

We think, on the whole, that it is settled by the great weight of authority that the plaintiff's action cannot be maintained, and that the judgment of the Superior Court must be affirmed. So ordered. BEATTY, C. J.

We concur:
MCFARLAND, J.,
SHARPSTEIN, J.,
PATERSON, J.

[Filed February 11, 1891.]

Appeal from Superior Court of Placer County—B. F. Myers, Judge.
For appellant, F. P. Tuttle, Grove L. Johnson, of counsel.
For respondents, J. D. Sullivan and J. M. Fulweiler.

IN BANK.

NEIL LIND AND JOHANNA LIND, Respondents, vs. F. CLOSS, Appellant. } No. 13,379.

BY THE COURT.

When this cause was in Department One the following opinion was prepared by Commissioner Belcher. It is hereby adopted by the court in bank and for the reasons therein stated the judgment and order of the Superior Court are reversed, and the cause remanded:

"The facts stated in the complaint are these: The plaintiffs were husband and wife, and on or about the 26th day of October, 1887, at their residence in the town of Auburn, Placer County, 'the defendant wickedly, maliciously and violently assaulted said Johanna Lind, one of the plaintiffs herein, by jumping upon her while she was in bed, and holding her down, and wilfully contriving and intending to injure plaintiffs, defendant did then and there ravish and carnally know said Johanna Lind without her consent and against her will, whereby she was made sick and sore in body,' etc., to the plaintiffs' damage in the sum of $50,000.

"The answer denies that defendant, at the time named in the complaint, or at any time, violently or wickedly or maliciously or at all assaulted the plaintiff, Johanna, or that he jumped upon her or held her down, or that he ravished her or carnally knew her against her consent or against her will, and denies that she was made sick or sore in body, or that by reason of the premises plaintiffs had suffered damages in the sum of $50,000, or in any other sum.

"The case was tried before a jury and a verdict returned for $2,500 damages, for which judgment was entered. The defendant moved for a new trial upon the ground, among others, that the verdict was not justified by the evidence, and his motion was denied. The appeal is from the judgment and order.

"The plaintiff, Johanna, was called as a witness and testified that she was born in Germany and had been married about six years; that she was married in Connecticut and about a year thereafter came to California; that in April, 1887, she and her husband went to defendant's place and worked for him for one month; that they then left, but after about three months the husband again worked for defendant for one month; that in September, 1887, they went to live in a house known as the Collins house, and about fifteen minutes walk from defendant's house; and, that on the morning of October 18th, the husband went to San Francisco, leaving the witness alone with her two children. What afterwards occurred the witness relates as follows:

"'When evening came I put the children to sleep, and I locked my door and then I sat down to write a letter. Before I went to bed I went again to see if the doors and windows were fastened tight. I then went to bed. I could not sleep. I was afraid, and very near midnight I heard somebody knock. Somebody came then to the house and knocked several times, and asked if Mr. Lind was at home. I didn't answer the first, but then he knocked again and said: "Mrs. Lind, open the door. I want to come in to you"—and I could hear then right away it was Mr. Closs, and I said: "No, sir, Mr. Closs." I was not going to open the door—"if you want to see me, come to-morrow." I would be at home, and he went, and it was only a minute and I heard something at the back door, and in a minute he stood in my sleeping room where I was lying with my children, and he said that I should make room for him in the bed so he might come into bed to me, and I told him I would not let him come in the bed, and he said I should not be particular, and that I was such a funny woman. I was not like other women he had ever known in his life. And so in that time he had his clothes off and he jumped right into bed, and I put my little baby on the side because I wanted and needed both my hands, and he took off the quilt and he tried to do several things. He took hold of me and was trying to do what he wanted.

"'I struggled with him fifteen or twenty minutes. I told him he should leave me, and that I should make it hot for him, and so at last he got out of the bed and dressed himself and went away. I didn't rest any that night, and in the morning was sick and remained sick two or three days.

"'My husband came home the next day, and I was sitting there sick when he came home, and the next day after that we packed up, and the third day we went to San Francisco, and I got sicker and sicker. Was sick a month after that. I had pains all over, and brain fever; pains in my head.'

"And on cross-examination the witness said: 'I went to bed on this night about 9 or 10 o'clock. My bedroom is a front room. To get into my bedroom a person coming in the back door would have to pass through two rooms.

"'Before Closs came in, he knocked at the bedroom window several times.

"'I heard a noise at the back door, and in a moment Closs was in the room. The door opened with very little noise. I heard no crashing sound. I examined the lock afterwards, and there was nothing broken.

"'There was a light in the bedroom. I had my two children in bed with me, one on each side of me. When Closs came in I said to him, "You have no business here," and that he should walk right out. He commenced talking to me, and while he was talking he was taking his clothes off.

"'He disrobed entirely down to his undershirt. I remained in bed all the time. As quick as he had his clothes off he jumped into the bed, threw the bed clothes over and lifted up my clothes.

"'We did not wake the children up. I was pushing him away from me. He did not beat or strike me. He did not accomplish his purpose. He then got up, dressed and went away.

"'He didn't hurt me, but tried to keep me down

"'In the latter part of October, about ten days after it occurred, I told my husband. I told my husband just as I have stated here. After talking with my husband he said he would fix Closs, and he would demand $1,000 from Closs; and I sat down and wrote a letter to Closs demanding $1,000. I first went to a lawyer about it in January, 1888.

"'Closs called on me while I was in San Francisco, about three weeks after this trouble. He called again between Christmas and New Year's, and saw my husband and myself. He called on me and my husband at those times in San Francisco to try to settle.'

"The defendant was a witness in his own behalf and testified that he had a ranch of eighty acres, about one mile from the town of Auburn, on which he had resided for about four years; that in February, 1887, he desired help on his ranch and advertised for it; that in answer to the advertisement the plaintiffs came to his ranch, and the wife went to doing household work and the husband ouside work for him; that they then left and moved into the 'Collins house,' which was about ten minutes' walk from his house; He then says: 'In October she told me her husband was going to San Francisco. I went to her house about half-past ten or eleven o'clock. I did not know whether Lind had returned or not; I knocked at the window and asked if Lind was there, and I asked her to let me come in, and she told me first to go away and come to-morrow. Mrs. Lind told me that he was not there, and then I went around and went in by the open back door. * * * * *

"'The door was not locked, I was not obliged to put my shoulder to the door, and made no unusual effort to get in. When I lifted the thumb-latch the door opened readily.

"'I went in the bedroom, and Mrs. Lind picked up a child which was in the bed and put it in an adjoining bed.

"'I undressed myself and stayed there a couple of hours. Mrs. Lind asked me to come back the following day. I saw her next day and the day after, and she was not sick at all.

"'Mrs. Lind asked me for the use of my buggy to go to the station, and I myself took Mrs. Lind to the depot in the buggy the second day after this night. She gave me her address in San Francisco and invited me to call when I went down.

"'I went to see her in San Francisco, and she there told me that her husband had suspicioned something and she had told him only of this one night when he was away, and that her husband was mad, and I should give him a few dollars. * *

"'I saw Mrs. Lind in the presence of Mr. Sullivan and there told her that she knew I never had used any violence, and that it was all done with her will. She admitted that. She then said she wouldn't like to go to Auburn, and if I would pay $500 she would not.

"'I never used any violence on her, and never made any assault upon her. Everything was done with her will and consent.'

"The husband was called as a witness in rebuttal and testified: 'Had a conversation with Closs about Christmas, 1887, and he told me about having connection with her on the night of October 18, 1887, and that he had never done so before.'

"This was substantially all the testimony in the case, and the question is, did it justify the verdict?

"The court instructed the jury that the complaint charged a violent assault made by defendant upon the person of Mrs. Lind, and that she was debauched against her consent and will; that the case turned upon the question of violence, and that if violence was used, as charged, then they should find for the plaintiffs; but that if no violence was used, the connection being with her consent, then the verdict should be for defendant.

The instructions were the law of the case, so far as the jurors were concerned, and they were bound to follow them, whether they deemed them correct or not.

"As to whether violence was used or not, the testimony was conflicting. Mrs. Lind stated positively that violence was used, and the defendant stated equally positively that it was not. If the case had been rested on this conflict alone, the judgment, under a well settled rule, would have to be affirmed. But other facts and circumstances appeared which seem to us to militate strongly against the truthfulness of Mrs. Lind's statements.

"The following examples may be noted: She testified that defendant did *not accomplish his purpose,* and that she told her husband about the matter as she had told it in court, and yet the complaint, which was verified by the husband and filed in February following, charges that he did accomplish his purpose, and this defendant in effect admitted both in his answer and testimony. How is this discrepancy to be accounted for?

"She further testified that she did not tell her husband of the outrage which she had suffered for ten days, though she was made sick by it and so continued for a considerable time. Is it probable that a woman would, under such circumstances, remain silent so long in the presence of her husband?

"The defendant testified that two or three days after the alleged offense, when Mrs. Lind was about to leave for San Francisco, she asked him for the use of his buggy to go to the station, and that he took her to the depot in his buggy; and this is not denied. Now, is it conceivable that a woman, who had been treated as it is claimed she had been, would so soon ask or accept such favors from the man who had committed the wrongs against her?

"Defendant further testified that Mrs. Lind gave him her address in San Francisco, and invited him to call on her there; and this is not denied. Now, is it possible that she would have done so if she had been assaulted, as stated, two days before?

"Again, defendant testified that on one occasion, when he saw Mrs. Lind in San Francisco, he told her in the presence of Mr. Sullivan that she knew he had never used any violence, and she so admitted. Now this statement was either true or false. If true, it shows that the plaintiffs, under the instructions of the court, were not entitled to recover. But it was not denied, though she and Sullivan must have been in court, and if untrue presumably would have denied it.

"It has been several times held in this State, where the accused parties had been convicted of rape on the testimony of the complainant alone, and under circumstances tending to throw discredit upon her testimony, that the judgments should be reversed, the court saying that 'a conviction upon such evidence would be a blot upon the jurisprudence of the country and a libel upon jury trials,' and that 'the ends of justice demand that the cause shall be tried anew.' (People vs. Benson, 6 Cal. 221; People vs. Hamilton, 46 Cal. 540; People vs. Brown, 47 Cal. 447; People vs. Ardaga, 51 Cal. 371.)

"We think these cases in point here, and that the ends of justice require that this case be tried anew.

"We therefore advise that the judgment and order be reversed and the cause remanded for a new trial. BELCHER, C.

"I concur:
"FOOTE, C."

[Filed February 12, 1891.]

Appeal from Superior Court of San Francisco County, Department Four—James G. Maguire, Judge.
For appellant, Vincent Neale, Ben Morgan of counsel.
For respondent, Edward F. Fitzpatrick, George W. Fox.

DEPARTMENT ONE.

SHAIN, Appellant, vs. EIKERENKOTTER, Respondent. } No. 13,019.

This is an appeal from an order granting a motion to vacate the levy of an execution.

The transcript contains a copy of the notice of the motion, indorsed "read on hearing of motion to vacate levy of execution, November 16, 1888, James G. Maguire, Judge." Also a copy of the affidavit used, indorsed in the same manner, a copy of the order granting the motion, of the notice of appeal, and the affidavit of service thereof.

When the cause was called for argument to-day (February 11th) the respondent moved to dismiss the appeal on the ground that there was nothing in the record to show that the court below acted upon the papers referred to in the transcript, and the motion was granted.

It is claimed by appellent that the indorsement made by the Judge is a sufficient authentication of the papers used; that no other certificate is necessary to identify them, and that a bill of exceptions is unnecessary.

There is nothing to show that *all* of the papers used on the hearing in the court below are before us in this transcript. The Judge may have granted the motion on account of the invalidity of the judgment; the execution itself may have been void. It is claimed by appellant that these things will not be presumed because the notice of motion states that the application will be made on the ground that the property upon which the execution was levied is exempt from execution sale. This may be granted, although as a matter of fact the notice states that the motion will be based on all the papers in the case, and still the order will be sustained upon the presumption that counter affidavits were filed and used by the respondent. There is nothing to show that counter affidavits were not filed, and every presumption is in favor of the validity of the judgment.

We do not hold that a bill of exceptions is necessary in cases of this kind. The papers may be properly authenticated by the certificate of the Judge (Somers vs. Somers, 81 Cal. 614); but it must be made to appear in some manner that all of the papers used on the hearing are contained in the transcript. In this case it appears simply that the papers referred to and copied in the transcript were indorsed as having been used on the hearing, and placed on file in the court below. Whether or not any other papers were used on the hearing, as stated before, does not appear.

For the reasons above stated the order dismissing the appeal will stand as entered herein. PATERSON, J.

We concur:
HARRISON, J.,
GAROUTTE, J.

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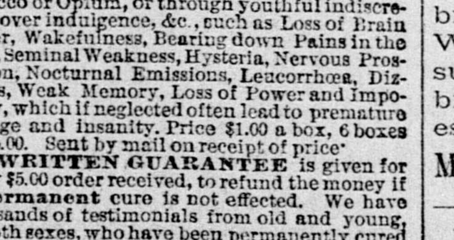

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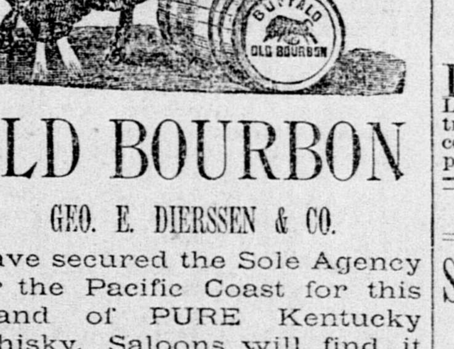

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Railroad Time Table.

SOUTHERN PACIFIC COMPANY.

PACIFIC SYSTEM.

January 19, 1891.

Trains Leave and are due t Arrive at Sacramento.

LEAVE	TRAINS RUN DAILY.	ARRIVE
6:15 A	Calistoga and Napa	11:40 A
3:05 P	Calistoga and Napa	8:40 P
12:50 A	Ashland and Portland	5:55 A
4:30 P	Deming, El Paso and East	7:00 P
7:30 P	Knights Landing	7:10 A
10:50 A	Los Angeles	9:35 A
12:05 P	Ogden and East—Second Class	2:25 A
11:00 P	Central Atlantic Express for Ogden and East	8:15 A
3:00 P	Oroville	10:30 A
3:00 P	Red Bluff via Marysville	10:30 A
10:40 A	Redding via Willows	4:00 P
2:25 A	San Francisco via Benicia	11:40 A
6:15 A	San Francisco via Benicia	12:35 A
8:40 A	San Francisco via Benicia	10:40 P
3:05 P	San Francisco via Benicia	8:40 P
*10:00 A	San Francisco via steamer	‡6:00 A
10:50 A	San Franc'o via Livermore	2:50 P
10:50 A	San Jose	2:50 P
4:30 P	Santa Barbara	9:35 A
6:15 A	Santa Rosa	11:40 A
3:05 P	Santa Rosa	8:40 P
8:50 A	Stockton and Galt	7:00 P
4:30 P	Stockton and Galt	9:35 A
12:05 P	Truckee and Reno	2:25 A
11:00 P	Truckee and Reno	8:15 A
12:05 P	Colfax	8:15 A
6:15 A	Vallejo	11:40 A
3:05 P	Vallejo	†8:40 P
*6:35 A	Folsom and Placerville	*2:40 P
*3:10 P	Folsom and Placerville	*11:35 A

*Sunday excepted. †Sunday only. ‡Monday excepted. A.—For morning. P.—For afternoon.

RICHARD GRAY, Gen. Traffic Manager.
T. H. GOODMAN, General Passenger Agent.