SUPREME COURT DECISIONS.

[Filed March 2, 1891.]

DEPARTMENT ONE.

NOONE, Respondent, vs. TRANSATLANTIC INSURANCE COMPANY, Appellant. } No. 12,928

This was an action upon a policy of insurance. The plaintiff had a verdict and judgment for $3,717 50, and the defendant appeals from such judgment, and from an order denying its motion for new trial.

The grounds which are relied upon for a reversal are the following:

First—It is argued that there was a breach of warranty in relation to the distance of neighboring buildings from that which was covered by the insurance.

The policy contained the following provisions: "Fourth—The application and survey upon which the issuance of a policy is predicated shall be considered a part of it and a warranty by the assured. If the assured, by a written or verbal application for insurance, or by survey, plan or description or otherwise, makes any erroneous representations, or omits to make known any fact material to the risk, * * * * then, and in every such case, this policy shall be void."

The application upon which the policy was issued stated that the building insured was ninety feet from other buildings, but after answering the various questions contained the following: "And the applicant hereby covenants that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, *so far as the same are known to the applicant* and material to the risk."

The evidence showed very clearly that the building insured was not ninety feet from other buildings, but was somewhat under eighty feet therefrom. And in relation to this the Judge instructed the jury as follows:

"The defendant in this action seeks to avoid its liability under this policy upon the ground, among others, that in the application originally made the applicant stated that the building nearest to the one destroyed was ninety feet away, whereas defendant now claims that it was but seventy-two feet distant, and that there was another building only seventy-four feet away. It is for you to determine from the evidence whether the distance was or was not ninety feet. If you find it was not, it is for you to determine whether such misrepresentation was or was not material, and upon this point you must consider all the evidence relating to the materiality of the statement.

"If you find that the nearest building was not ninety feet away, and that this was a material statement, it rendered the policy void, and the plaintiff could not recover unless the defendant waived its right to declare the policy void."

If the provisions of the policy and application taken together amounted to a warranty that the building insured was ninety feet away from other buildings, the above instruction was both erroneous and injurious to the appellant. But in our opinion, although at first view there is some want of harmony between such provisions, they do not show that there was any such warranty as is contended for by the appellant. The application first states that the building insured was ninety feet from other buildings, but concludes with a covenant or agreement that the statements therein contained are true "*so far as the same are known to the applicant.*" The different provisions must be read together; and, when so read, we think it clear that there was no warranty that the building insured was ninety feet from other buildings. The case of National Bank vs. Insurance Company (95 U. S. 673) is precisely like this case, except that the statement which was claimed to be untrue was as to the value of the property. It is true, as claimed by the appellant, that value depends a good deal upon opinion and probability, and is not, like distance, a matter which can be accurately ascertained. But the court expressly stated that its opinion did not proceed upon such a construction of the policy. It said: "We rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty."

If there was no such warranty as is claimed by the appellant the charge was more favorable than it had a right to expect; and it could not have been injured thereby.

There is nothing in the evidence tending to show that the plaintiff knew exactly what the distance was. The difference between ninety feet and seventy-four or seventy-two feet is not one which the plaintiff would be apt to know; and what evidence there is on the subject tends to show that she did not know it.

Second—The policy provided that the loss, if any, was "to be paid within sixty days (if this company shall so elect) after due notice and proof thereof made by the assured and received at the office in accordance with the terms of this policy hereinafter mentioned." It also contained a provision that in case of loss the assured should forthwith give notice of such loss, "and shall also produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or Notary Public shall certify."

In this connection it may be stated that the Civil Code has the following provision, viz.:

Section 2637. "If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified."

The plaintiff produced to the company the certificate of one Ramage to the facts required to be stated. But it is conceded that he was not the nearest magistrate or notary, and that the person who was such (one Turner) had been applied to, and had refused to give the certificate. In connection with this refusal the plaintiff introduced evidence tending to show that her attorney had informed the company's adjuster that "the reason why the certificate was not signed by Mr. Turner was that he had been engaged by the companies or had been employed by the companies to take some affidavits for them, and for that reason, as I had been informed by Mrs. Noone, he had refused to sign them."

There was also evidence tending to show that a few days after the fire Turner had given instructions to have measurements taken of the distance of the building insured from other buildings. And we do not see why he should have done so unless he was acting in the interest of the company. The inference that he was so acting is not rebutted by any evidence. And if he was employed by the company, it was not necessary for the plaintiff to produce evidence to the company of such fact.

In relation to the foregoing the court charged the jury as follows:

"Evidence has been offered to show that at the time plaintiff furnished proofs of loss to the company, the attorney for plaintiff stated that the reason why the certificate attached to the proofs was not made before the nearest notary was because Mr. Turner, the nearest notary, had refused to sign it, stating to the plaintiff that he had been engaged for the company and could not do it. It is the duty of the court to determine whether by so doing the plaintiff furnished to the company reasonable evidence that the refusal of Mr. Turner was not induced by any just grounds of disbelief in the facts necessary to be certified. If you believe this evidence, the court instructs you that the reason given to the company for not producing the certificate of Mr. Turner, the nearest notary, was sufficient and that the certificate furnished was a sufficient compliance with the requirements of the policy as modified by the law."

There may have been a slight inaccuracy in the statement of the testimony in this instruction. But, as above stated, if Turner was employed by the company to take measurements, etc., as is to be inferred from the evidence, we think that of itself was a reason why the plaintiff was relieved of the necessity of getting his certificate to the justice of her claim; and that it was not necessary to inform the defendant of the fact.

In this view there was nothing to be waived, and all that part of the case relating to waiver may be regarded as surplusage.

We do not see any conflict in the instructions or any material error in relation thereto, or in the record. Our opinion is that the judgment and order denying a new trial should be affirmed.

BELCHER, C.

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

THE COURT.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

[Filed March 2, 1891.]

DEPARTMENT TWO.

THE PEOPLE, Respondent, vs. CHARLES JOHNSON, Appellant. } No. 20,711.

The defendant was charged in the information filed against him with the crime of burglary, and with a prior conviction of grand larceny. He was tried and found guilty of burglary in the second degree. Judgment was entered that he be imprisoned in the State Prison for the term of ten years. From this judgment he has appealed, but the record brought up contains no bill of exceptions and none of the instructions given to the jury.

In support of the appeal it is argued that the defendant, as shown by the record, was arraigned only for the crime of burglary and pleaded simply not guilty; that this plea put in issue every allegation of the information, and upon it he was tried and found guilty simply of burglary in the second degree; that as there was no verdict as to the prior conviction, it could not be taken into consideration in pronouncing judgment, and hence, as the maximum term of imprisonment authorized by the statute in such a case was five years (Penal Code, Sec 461), the judgment was illegal and should be reversed.

It is true that the record as originally filed in this court showed no admission by the defendant, or finding, as to the alleged prior conviction, but on suggestion of a diminution of the record, and amendment duly certified was subsequently filed, showing that after the appeal was taken the trial court amended its record of the case *nunc pro tunc*, so as to show that on the day of the trial the defendant admitted the prior conviction set forth in the information and withdrew his former denial thereof. The record, therefore, as now presented, does not support the argument.

The defendant clearly had the right at any time to withdraw his plea of not guilty to the charge of prior conviction, and to confess the same; and, having done so, the jury had nothing to say or find in regard to it. The verdict covered the only issue submitted to the jury, and upon it the court was authorized to fix the penalty, as it did, at ten years' imprisonment. (Penal Code, Sec. 666; People vs. Brooks, 65 Cal. 300.)

It is also argued that the record affirmatively shows error, because it appears therefrom that the verdict was rendered on January 15, 1890, and the court thereupon appointed January 17th as the time for pronouncing judgment, and on the last named day pronounced the judgment appealed from. It is said that, under Section 1191 of the Penal Code, the time fixed for pronouncing judgment, in cases of felony, must be at least two days after the verdict, and that the minutes show that two *full* days could not have intervened.

A sufficient answer to this point is that one found guilty of a felony may waive the time which the code says must elapse between the verdict and sentence, and may consent that judgment be pronounced immediately. (People vs. Robinson, 46 Cal. 94.) Here it does not appear that the defendant ever made any objection in the court below on account of this alleged shortness of time, and he must therefore be held to have assented to it. In People vs. Mess (65 Cal. 174,) the same point was made, and, as we think, correctly held untenable.

It is further said that the record shows affirmatively that an oral charge was given by the court to the jury, and that this was error, calling for a reversal of the judgment. But the giving of an oral charge is not necessarily error. The statute says: "The Judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law. If the charge be not given in writing it must be taken down by the phonographic reporter." (Penal Code, Sec. 1093, sub. 6.) Here it does not appear that the charge complained of was not given at the request of the defendant, nor that it was not taken down by the phonographic reporter. It will be presumed, therefore, that it was so taken down. The well-settled rule is that error is not to be inferred, but must affirmatively appear in the record. (People vs. Huff, 72 Cal. 117; People vs. Leong Sing, 77 Cal. 117; People vs. Cline, 83 Cal. 374.)

Another point made for reversal is, that the judgment was illegally pronounced, for the reason that the defendant was not informed by the court or under its direction of the nature of the charge against him, or of his plea or of the verdict. And it is said, under this head, that the minutes do not show that the judgment was pronounced in open court, or by any Judge of the Court, and that it cannot be seen therefrom whether there was any Judge present, or whether the court had been or was opened.

These objections are sufficiently met and answered by the recitals in the judgment itself, as shown by the certified copy thereof in the record, which are sufficient to show that the judgment was pronounced in open court and by the Judge thereof, and to meet the requirements of Sections 1200 and 1207 of the Penal Code.

It is further said that the judgment fails to show that it was pronounced for any crime committed within the jurisdiction of the court, and that it simply *orders* that defendant be *punished* by imprisonment, but does not *direct* that he be imprisoned, and hence is not such a judgment as is contemplated in criminal practice.

There is nothing in these objections. The information charged that the offense was committed in the city and county of San Francisco, and it was not necessary that the judgment should state where it was committed. It was "ordered, adjudged and decreed" that the defendant be punished by imprisonment in the State Prison, and this was all that is necessary.

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.

[Filed March 3, 1891.]

IN BANK.

G. A. SWASEY, Respondent, vs. C. H. ADAIR AND MRS. O. ADAIR, Appellant. } No. 13,178.

This is an action brought under Sections 509, *et seq.*, of the Code of Civil Procedure, for the recovery of certain personal property, consisting of the furniture of a lodging-house.

The plaintiff, at the commencement of the action filed the necessary affidavit and undertaking and demanded the delivery of the property to him.

The defendants are husband and wife, but they appeared separately in the action and the husband made no defense. The wife, Mrs. O. Adair, filed an answer claiming the property as her own, and gave a bond conditioned as required by law, whereupon the property was redelivered to her. At the trial she and her husband both failed to appear and judgment was entered against them jointly for the return of the property, or its value, $2,500, and for costs. Subsequently, upon her motion, the judgment against her was set aside and a new trial granted to her; but apparently the judgment as against her husband was allowed to stand. The case was thereafter tried upon the issues made by her answer to the complaint, and a second and separate judgment rendered against her for the return of the goods, or their value, fixed at $2,000, and for costs. From this judgment and from an order denying her motion for a new trial she has appealed to this court, giving the ordinary undertaking for $300, but no undertaking to stay proceedings.

The plaintiff and respondent has caused execution to be issued, not upon the judgment appealed from but upon the first judgment entered, as above stated, against the appellant and her husband, and left to stand against him when set aside as to her. Under this execution the Sheriff is threatening to take the property in controversy from the possession of a Mrs. Shaeffer, who claims it as a vendee of a party to whom it was sold and delivered by the appellant after its re-delivery to her.

Upon a verified petition, showing these facts, appellant now moves this court for a writ of *supersedeas* directing the Sheriff to return said execution and commanding a stay of all proceedings on said judgment pending the determination of her appeal.

The case presents some anomalous features: There are two separate judgments in favor of the plaintiff for the return of the same goods or their value, fixed in one judgment at $2,500 and in the other at $2,000. One judgment being against C. H. Adair, the husband, and the other being against the appellant, Mrs. O. Adair, his wife. Execution is issued on the judgment against the husband, and under it the Sheriff is threatening to take the goods in controversy from the vendee of the wife, to whom they were sold after re-delivery to her upon her giving the statutory undertaking. (C. C. P., Sec. 514.)

In aid of her appeal from the judgment against her and for the protection of her vendee appellant asks us to stay proceedings upon the judgment against her husband, from which there has been no appeal.

Several questions arise upon this state of facts, but we shall confine ourselves to a discussion of those which we deem essential in the disposition of the motion before us.

It seems impossible that the Sheriff could rightfully take the goods from appellant's vendee under an execution issued upon a separate judgment against C. H. Adair, between whom and said vendee there is no sort of privity, but whether we can on this appeal interfere with the proceedings on that judgment is a question not free from difficulty, and one which we do not care to decide unless it is clear that the appellant is entitled to a stay of proceedings on the judgment from which she has appealed.

Is she then entitled to such stay without having given a stay bond?

It is contended that in this respect the action of replevin differs from other actions, and that the defendant, having given the redelivery bond prescribed by Section 514 of the Code of Civil Procedure, is entitled to retain the property until the final determination of the case on appeal without other security.

In support of this proposition we are referred to the language of said section, to Section 1247 of Cobbey on Replevin and to Corn Ex. Bk. vs. Blye (102 N. Y. 305), but we find nothing in either of the citations to support the contention of appellant.

The language of Section 514 of the Code of Civil Procedure is not at all inconsistent with the proposition that a judgment for plaintiff, in an action for the recovery of personal property, is immediately enforceable by a return of the property in specie, unless the defendant gives an additional bond to stay proceedings pending his appeal. On the other hand, Section 943 of the Code of Civil Procedure expressly provides that, "if the judgment appealed from direct the delivery of * * * personal property, the execution of the judgment cannot be stayed by appeal unless the things directed to be delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant * * * to the effect that the appellant will obey the order of the appellate court upon the appeal."

For these reasons we think the appellant is not entitled to an order of this court for a stay of proceedings on the judgment from which she has appealed. In other words, we consider that we can grant such relief on the mere motion of an appellant, and as an incident of our appellate jurisdiction, in those cases only where the appeal has been so taken and perfected as to operate a stay according to the provisions of the statute.

There are, of course, other grounds beside the taking of an appeal, for staying execution of a judgment, and several such grounds are presented in this motion. But these, we think, should be presented in the Superior Court, by some proper motion or proceeding there, and brought here, if at all, by appeal from the orders of the Superior Court.

It is contended, for instance, that the redelivery bond given by the appellant extinguished plaintiff's property in the goods and that it is a bar to a judgment for their return in specie. It is further alleged that suit has been commenced against the sureties on that bond and that this estops the plaintiff from reclaiming the goods. It is contended that the judgment against C. H. Adair is no longer in force, being necessarily set aside by the order vacating it as to the appellant. But whatever merit there may be in these propositions we do not think they can be made the ground of an original motion in this court.

The motion of the appellant for a writ of *supersedeas* is denied, and the order heretofore made for a temporary stay of proceedings is hereby vacated and annulled.

BEATTY, C. J.

We concur:
DEHAVEN, J.,
MCFARLAND, J.,
HARRISON, J.,
SHARPSTEIN, J.
PATERSON, J.,
GAROUTTE, J.

[Filed March 4, 1891.]

DEPARTMENT TWO.

BRIDGET WILSON, Respondent, vs. JOHN MORIARTY, Appellant. } No. 13,921.

This is an action to rescind a written lease by plaintiff to defendant of a lot and house thereon in the city of Los Angeles, on the ground of alleged fraud on the part of the defendant in procuring the lease; or, if a rescission thereof cannot be had, that the lease be reformed on the ground of alleged mistakes of the plaintiff, which the defendant knew at the time the lease was executed.

The court denied a rescission of the lease, but reformed it. From the judgment reforming the lease, and from an order denying his motion for a new trial, the defendant brings this appeal.

The lease, as executed, was for the term of ten years, at a rental of $150 per month, with the privilege of a renewal for another term of ten years at the same rent. As reformed the lease is for the term of only five years, and without the privilege of renewal for any term.

The ultimate facts upon which the revision of the lease was based are expressed in the sixth finding of the court, as follows:

"That when plaintiff executed said lease, she did not understand said lease to be a lease for ten years, with the privilege of ten years more, but she understood said lease to be for a single term of five years. And the defendant then and there, at the time of the execution of said lease by plaintiff, well knew that the plaintiff did not understand the same to be for ten years, with the privilege of renewal, and well knew that she understood the same to be for a single term of five years, and the defendant fraudulently induced the plaintiff to understand said instrument, and to execute the same under such misunderstanding."

These facts, if justified by the evidence, undoubtedly support the judgment. Section 3399 of the Civil Code provides, that, "when through * * * a mistake of one party, which the other, at the time, knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

But counsel for appellant contend that the finding of the facts above quoted is not justified by the evidence.

The court found as evidentiary facts, which are not disputed, that the plaintiff is unable to read or write; that the defendant is a shrewd merchant and business man of plausible manners, and was on terms of friendship with the plaintiff and her husband—John Wilson; that the defendant drew the lease; and, that the lease was not read to or by the husband, or read to the plaintiff except by the notary at the time she acknowledged it.

The testimony of the plaintiff and her husband was to the effect that during three or four months before the execution of the lease the defendant had been importuning them for a lease of the property for a term of five years; that plaintiff was unwilling to lease the property for a longer term than two years; that the defendant finally persuaded the husband to advise the plaintiff to execute a lease for the term of five years, which he did, on the ground that the defendant would be a good tenant, with whom they would have no trouble in collecting rent; thereupon the plaintiff consented to the term of five years; that after the defendant drew up the lease he met the plaintiff on the street near her husband's blacksmith shop and requested her to go with him to the notary's office and acknowledge it, and her husband then told her to do so, but did not accompany them; when they arrived at the notary's office the defendant offered to read the lease to her, saying it was in his handwriting, but the notary said the law made it his duty to read the instrument to her, as she was a married woman, and he did then read it to her; but believing that the defendant had drawn the lease according to the agreement, and that she already knew that it was a lease for the term of five years only, she did not give sufficient attention to the reading of the notary to discover, and did not discover, that it was a lease for ten years, or that it differed from the lease theretofore agreed upon; and that when she acknowledged the execution she understood and believed it to be a lease for the term of only five years without any privilege of renewal.

Thomas Leahy testified that about two years before the trial the defendant requested him to go to John Wilson and try to get a lease of the property to defendant for the term of five years; that witness went to Wilson and tried to persuade him to give the lease for five years, but Wilson said: "No, I will not give it for five years; I will give it for three." Witness reported Wilson's answer to defendant.

Michael Leahy testified that he "went, at Moriarity's request, to Mr. Wilson, to see if he could get a lease for ten years, and Mr. Wilson said he would not give it for so long. I took that answer back to him."

H. Boettcher testified that in March, 1887, the rental value of the property as leased to defendant was $250 per month.

G. F. Conant testified that he had been a collector of rents for about six years and knew the rental value of the property, and that the rental value of the building in March, 1887, "would be something like $350. After the building was remodeled and put in shape as it is now, the store-room would have brought about $200 per month at least. I don't know how many rooms there are in the two upper floors, but they would have brought from $8 to $10 a room, taken as a whole." (It is stipulated that there are twenty-one rooms on the two upper floors). There is no other evidence as to the rental value of the property than that of these two witnesses. This testimony as to the rental value of the property is cited, and considered relevant for no other purpose than so far as it may tend to show defendant's motive for desiring a long term at the rent reserved in the lease.

The defendant testified that he never represented to plaintiff or to her husband, that the lease drawn by him was for the term of five years, but that he drew the lease according to an understanding or agreement had with the husband, which the husband was to advise the plaintiff to accept; but he does not testify that the plaintiff ever agreed to a term of ten years, or that she was ever informed that the lease drawn by him was for a term of ten years, unless she understood the reading thereof by the notary. Nor does he testify that the husband ever read or saw the lease drawn by him, or that he ever informed the husband that it was for a term of ten years, but merely that he drew the lease according to a previous agreement with the husband, which agreement the husband, in his testimony, denies.

Under the settled rule of this court as to conflicting evidence in cases of this kind, I think the finding, as to plaintiff's mistake, should not be disturbed. The mistake being established, I think the circumstances tend to prove that the defendant "knew or suspected" it; and that the finding to this effect should also be sustained. The alleged fact that the defendant knew or suspected the plaintiff's mistake was not susceptible of direct proof, except by the testimony of the defendant, and it may be of some significance that defendant failed to testify, on his own behalf, that he did not know or suspect the alleged mistake at the time of the execution of the lease.

2. Counsel for appellant contend that it is essential to the support of the judgment that the averments of the complaint to the effect that the plaintiff was of weak mind, that the consideration was inadequate, and that the defendant fraudulently concealed from the plaintiff a material part of the contents of the lease, or prevented her from understanding it, should have been proved and found.

The only fraud necessary to sustain the judgment is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff, known to or suspected by the former, at the time of the execution of the lease. This is all that is required by Section 3399 of the Civil Code. (Higgins vs. Parsons, 65 Cal. 280; Cleghorn vs. Zumwalt, 83 Cal. 156.)

There is nothing inconsistent with this in the law of the case as laid down on the former appeal. (77 Cal. 596.) That appeal was from a judgment for defendant on demurrer to the original complaint, which prayed for, only, a rescission of the lease; and it was merely decided that the complaint was sufficient. After the cause was remitted, the plaintiff amended her prayer by asking the alternative relief of revision of the lease in case a rescission should be denied. The complaint contains several averments not essential to this alternative relief; and, among them, inadequacy of consideration and weak-mindedness of the plaintiff. If plaintiff only intended to lease her property for a term of five years, instead of twenty years, and the defendant knew or suspected her true intention, it is quite immaterial, for the purpose of merely reforming the lease, on the ground of mistake, that the plaintiff was not weak-minded, and that the monthly rent reserved was an adequate consideration for a lease of twenty years. (Higgins vs. Parsons and Cleghorn vs. Zumwalt, *supra.*)

For the purpose of testing the sufficiency of the findings the case should be regarded, simply, as a case to reform the lease under Section 3399 of the Civil Code on the ground of a mistake of the plaintiff known or suspected by defendant. In this view of it, all the objections on the ground of insufficiency of the findings not heretofore considered appear to be irrelevant.

3. Appellant's counsel contend that "the code provision (Sec. 3399 C. C.) was not framed to benefit the indifferent, or those who are grossly careless, and must be construed as requiring the exercise of at least ordinary care;" and, therefore, that relief should be denied the plaintiff on the ground of her neglect to give such ordinary attention to the reading of the lease by the notary as would have enabled her to understand its contents. In support of this point the cases of Hawkins vs. Hawkins (50 Cal. 558) and Metropolitan Loan Association vs. Esche (75 Cal. 513) are cited. Neither of these cases is in point. The former was an action to avoid a written contract on the ground that the plaintiff was induced to sign it by false representations of the defendants, that "it was like the verbal agreement" which preceded it, and which it was intended to replace, the defendants knowing that the written contract was not like the verbal agreement; and the plaintiff, believing such representation of defendants to be be true, signed the written contract without reading it, although he had full opportunity to do so. The lower court sustained a general demurrer to the complaint, and this was affirmed on appeal. The complaint made neither a case of mutual mistake, nor a case of mistake of one party which the other knew or suspected. The defendants were not mistaken, and it was not alleged that they knew or suspected any mistake on the part of the plaintiff. The object of the action was to annul a contract, simply on the ground of such actual fraud as induced a mistake on the part of the plaintiff, which the defendants were not alleged to have known or suspected. So, in the latter case, when the defendants by cross-complaint sought to reform the bond on which the suit was brought, on the ground of mutual mistake of the parties, it was found that there was no mistake on the part of the plaintiff; neither was there any averment, finding or pretense that the plaintiff knew or suspected any mistake on the part of the defendants.

4. As another distinct cause of action, the plaintiff alleged that some time after the execution of the written lease, and while she was still ignorant that it was a lease for ten years, instead of five years, she was induced by defendant to add an additional story to the leased house, and to make other improvements, at a cost of $13,200, in addition to the improvements required by the lease; and that defendant verbally promised to pay a reasonable rent for such improvements, in addition to the rent reserved by the lease; that when these improvements were completed, on or about January 5, 1888, the plaintiff endeavored to agree with defendant as to the increase of rent on account of said improvements, but defendant refused to agree upon, or to pay, any additional rent for said improvements, although the rental value of the property was thereby increased $150 per month. The prayer as to this cause of action is, that the lease "be so amended and reformed as to carry out the subsequent agreement with reference to the additional improvements put upon the premises, and to provide that the amount of monthly rental shall be increased so as to include a reasonable rental on account of said improvements, to-wit, the sum of $150 per month."

The defendant denied that he induced the plaintiff to make these additional improvements, or that he promised to pay any additional rent therefor.

The court expressly declined to find upon the issue of fact as to these improvements, "for the reason that this court considers and adjudges the same to be immaterial and not proper matter for adjudication in this case;" and, as a conclusion of law, further said: "The court does not decide whether or not the plaintiff is entitled to recover from the defendant any additional rental for additional improvements made upon said premises by the plaintiff after the execution of said lease described in the complaint, and the court decides this case without prejudice to the rights of either plaintiff or defendant in the matter of said additional improvements."

Counsel for appellant insist that the court erred in thus disposing of this branch of the case relating to the additional improvements.

It will be observed that this branch of the case has no connection with the lease, or with the cause of action to reform the lease, as it is founded upon an alleged subsequent parol agreement to pay reasonable rent for improvements additional to those required by the written lease, and not upon any agreement or promise to reform or alter the written lease. Nor does the judgment reforming the written lease, in any degree, depend upon the alleged subsequent agreement therefor; nor upon any fact alleged or denied in relation thereto. Therefore, it would not be necessary or proper to reverse the judgment reforming the written lease for any error (conceding there was error) in disposing of the distinct cause of action resting solely upon the alleged subsequent agreement. It would seem that the effect of the action of the court was a dismissal of the alleged cause of action based on the subsequent agreement, without prejudice to the rights of either party, for the reason that the court considered "the same to be immaterial, and not proper matter for adjudication in the case." It is not quite clear why the court so considered it. It may have been because it was thought to be improperly joined with the other cause of action; or, possibly, because the facts stated did not constitute a cause of action. If so, the court should have sustained defendant's demurrer on one of these grounds. But no point is made here on the overruling of the demurrer. If the plaintiff was entitled to any relief upon the alleged subsequent contract, it is clear that she was not entitled to the specific relief prayed for, viz.: That the written lease "be so amended and reformed as to carry out the subsequent agreement with reference to the additional improvements," for surely the lease could not have been amended or reformed by incorporating into it a distinct subsequent agreement. But whatever may have been the ground upon which the court based its action in substantially dismissing this branch of the case without prejudice to the parties, and whether or not it erred in so doing, I think it appears that the defendant was not thereby injured.

I therefore think the judgment and order should be affirmed.

VAN CLIEF, C.

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

THE COURT.

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

[Filed March 2, 1891.]

DEPARTMENT TWO.

PEOPLE, Respondent, vs. JAMES BARTON, Appellant. } No. 20,712.

The defendant was convicted by the jury which tried him of burglary in the first degree. He pleaded not guilty as to that charge, but admitted prior conviction of grand larceny as charged in the information.

The notice of appeal states that the appeal is taken from the judgment, from an order denying a motion in arrest of judgment, and from an order denying a motion for a new trial. (Tr. fol. 28.) But it nowhere appears that any such motions were ever made or acted upon.

There is no bill of exceptions in the record.

The first point made for a reversal af the judgment is, that the time appointed for pronouncing it was not at least two days after verdict, and is therefore in violation of Section 1191 of the Penal Code.

The defendant seems to have made no objection at any time to this action of the trial court, and under the decision of the appellate court in People vs. Mess (65 Cal. 174) the point made is without merit.

It is further claimed that the offense being a felony, error is shown upon the minutes of the court, in that it is there stated that the charge to the jury was given orally. It is true that Sub. 6 Section 1093 of the Penal Code requires that where the charge in such a case is not given in writing it must be taken down by the phonographic reporter. But it is not made to appear here that it was not so taken down, and the presumption must be that it was. The defendant must show error affirmatively. (People vs. Tonielli, 81 Cal. 279; People vs. Carroll, 80 Cal. 153; People vs. Marks, 72 Cal. 46; People vs. Huff, 72 Cal. 117; People vs. Leong Sing, 77 Cal. 119; People vs. Cline, 83 Cal. 377).

It is said that the judgment was illegally pronounced because it does not appear from the judgment roll that the defendant was informed, as he should have been, under Section 1200, P. C., by the court, or under its direction, of the nature of the charge against him, or of his plea, or of the verdict. Conceding that it appears to have been held in People vs. Murback (64 Cal., 372) that these preliminary statements are necessary, and that they form no part of the judgment pronounced, yet it does not appear in the record that such statements were not made, and the presumption must be indulged that they were, unless the appellant has shown to the contrary, which he has not done.

The prior conviction of larceny was confessed by the defendant. (Fol. 15.) The jury then passed only upon the charge of burglary. (Fol. 17-18.) "The judgment follows the verdict and confession of the defendant, and is in all respects regular," as we think. (Ex parte Young Ah Gow, 73 Cal., 442.) The admission of prior conviction of larceny here is not shown to have been brought out by any question of the court, but appears, so far as the record shows, to have been voluntarily made when the defendant was called on to plead. (Fol. 15.) As before said, it is for the appellant who claims error to show it.

We perceive no prejudicial error, and advise that the judgment be affirmed.

FOOTE, C.

We concur:
BELCHER, C.
HAYNE, C.

THE COURT.

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

[Filed March 2, 1891.]

DEPARTMENT ONE.

EX PARTES IRWIN ON HABEAS CORPUS. } No. 20,793.

The petitioner was convicted in the Superior Court of Sonoma County of the crime of grand larceny, and on the same day, and before sentence was pronounced in the first case, was convicted of the crime of burglary. He was sentenced by the court to serve a term of nine years in the State Prison in the grand larceny case, and in the burglary case the court imposed the sentence of five years in the State Prison, said term to commence at the expiration of the term of nine years, imposed in the grand larceny case. His first term of imprisonment commenced on the 21st day of October, 1879, and he remained in the State Prison until August 21, 1880, when he escaped therefrom. He was captured and again confined under the first judgment on the 9th day of November, 1880. Thereafter an information was filed against him in the Superior Court of Marin County for the crime of escaping from prison, and he was tried, convicted and sentenced to serve a term of nine years, "said term of imprisonment to commence from the time he would otherwise have been discharged from said prison."

Allowing the credits provided for by statute, the petitioner's first term expired not later than December 9, 1884, and if the term of imprisonment for escaping from the prison commenced to run at the expiration of the term which he was serving when he escaped, all of the terms of imprisonment imposed by the three judgments—allowing the credits provided for by statute, all of which it is admitted he has earned—have expired, and the petitioner is entitled to his discharge.

Section 105 of the Penal Code provides that "every prisoner confined in the State Prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the State Prison for a term equal in length to the term he was serving at the time of such escape, said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." The last clause of this section was added by amendment of the section, in April, 1880, and plainly states that the term of imprisonment for an escape from the prison shall commence to run from the time that the prisoner would have been discharged from the prison if he had not escaped therefrom. The petitioner's term of imprisonment for the escape did not commence to run until he had served the fourteen years imposed by the two judgments of the Superior Court, less credits allowed, because, except for his escape, he would not have been discharged from the prison until he had served out the full term imposed by the two judgments. The language of the section is unambiguous, and its meaning is clear.

Petition denied. PATERSON, J.

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

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