SUPREME COURT DECISIONS.

[Filed at Sacramento, March 19, 1891.]

Appeal from the Superior Court of Tulare County—Wm. W. Cross, Judge.

For appellants, O. L. Abbott.

For respondent, N. O. Bradley and G. E. Lawrence.

IN BANK.

IN THE MATTER OF D. L. WRIGHT ET AL., Insolvents. } No. 13,806

The only questions presented by this appeal are as to the sufficiency of the petition and the verification. They are as follows:

"In the Superior Court of the County of Tulare, State of California. In the matter of D. L. Wright and W. B. Wright, co-partners, doing business under the firm name of D. L. and W. B. Wright, insolvent debtors.

"To the honorable, the Superior Court of the County of Tulare, State of California:

"The petition of D. S. Cohn and S. Cohn, doing business under the firm name of Cohn & Co., Frederick Kern, Matthew McGovern, Frank T. Elam and George Wright, respectfully shows: That petitioners are each residents of the State of California, and that D. L. Wright and W. B. Wright, co-partners doing business under the firm name of D. L. & W. B. Wright, above named, are residents of the County of Tulare, State aforesaid, and are indebted to your petitioners as follows: To said firm of Cohn & Co. in the sum of $1,241 85, on a promissory note executed and delivered by said firm of D. L. and W. B. Wright to said firm of Cohn & Co., of date October 28, 1889, for the principal sum of $1,375, bearing interest at the rate of 10 per cent. per annum, no part of which has been paid, save and except the sum of $152 15, leaving now due on said note the sum of $1,241 85, to Frederick Kern in the sum of $60 75 for goods, wares and merchandize sold and delivered to said insolvents within the last two years; to Matthew McGovern in the sum of $8 50, for care of team and livery bill, furnished within two years last past; to Frank T. Elam in the sum of $7 85, for blacksmithing and lumber, furnished within two years last past; George Wright in the sum of $6, for brick and mortar, furnished within two years last past—in all $1,324 95; and each and all of said sums are now due, and the same or no part thereof has been paid, and neither of said petitioners has become a creditor of said firm of D. L. & W. B. Wright by assignment within thirty days prior to the filing of this petition; that said D. L. & W. B. Wright, co-partners as aforesaid, were on the 7th day of December, 1889, insolvent; that said firm of D. L. & W. B. Wright did, on or about the 7th day of December, 1889, transfer and convey to one E. E. Giddings and John Nance their certain livery stable and outfit, and their stock belonging to said livery stable, and other property, situate in the town of Dinuba, and in Tulare County, with intent to delay, defraud and hinder their creditors, and your petitioners herein, from collecting their just claims against said firm; that said firm of D. L. & W. B. Wright have transferred and conveyed all their property within thirty days last past, and now have no property, as your petitioners are informed and believe, subject to attachment.

"Wherefore your petitioners pray that the said court issue its order to said D. L. & W. B. Wright, co-partners doing business under the firm name of D. L. & W. B. Wright to show cause at a time and a place fixed by the court, why they should not be adjudged insolvent debtors, and the surrender of their estate be made for the benefit of their creditors in manner required of insolvent debtors.

his
MATTHEW × MCGOVERN.
mark,
FREDERICK KERN,
D. S. COHN & S. COHN,
Co-partners as Cohn & Co.,
FRANK T. ELAM,
GEORGE WRIGHT."

Witness to signature of Matthew McGovern, N. O. BRADLEY.

"State of California, } ss.
County of Tulare. }

"D. S. Cohn, Matthew McGovern and Frederick Kern being each severally and duly sworn, says: That he has heard read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters that he believes it to be true, and said D. S. Cohn, above named, further says that he is now and was at all times herein mentioned a member of the firm of Cohn & Co. above named.

his
MATTHEW × MCGOVERN,
mark
FREDERICK KERN,
D. S. COHN."

Witness to signature of Matthew McGovern, N. O. BRADLEY.

The objection to the petition is that it does not show that the creditors were creditors of the partnership, rather than of D. L. and W. B. Wright, as individuals. The allegation is that D. L. and W. B. Wright, doing business as partners under the firm name of D. L. and W. B. Wright, are indebted, etc.—and not that the firm of D. L. and W. B. Wright are indebted, etc. I think this averment can only be understood as charging that the indebtedness arose in the business of the co-partnership.

There is no provision in the Insolvent Act for adjudging two or more persons insolvent and providing for a joint assignment except Section 35, which authorizes such proceedings in favor of or against partners, in reference to partnership debts and assets. In such case the proceeding is properly for or against them individually as partners. This must be so, for the separate estate of each member of the firm also passes to the assignee. And such was the practice in bankruptcy in the Federal courts. Partnership debts are, after all, only joint obligations, and the firm cannot be insolvent unless the individual members are so. It is doubtless necessary to show what the partnership debts are, for various questions are likely to arise between individual and firm creditors in marshaling of the assets and paying debts. The form adopted here in the averment of the partnership indebtedness is quite similar to that which has always been employed in pleading partnership indebtedness, and I think is sufficient.

The objection to the verification is that it is in the usual form for the verification of a pleading, which includes matters stated on information and belief.

There are no matters in the petition stated to be on information and belief, and the statute does not prescribe the form of the verification. Where different creditors, however, having several debts, are required to join in a verification, some of the matters must necessarily be stated upon the information and belief of each of the affiants.

I think the petition and verification sufficient, and the judgment and orders appealed from should be affirmed.

TEMPLE, C.

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

THE COURT.

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

[Filed at Sacramento, March 20, 1891.]

Appeal from the Superior Court of Tulare County—Wm. W. Cross, Judge.

For appellant, E. L. Craig and Horace Hawes.

For respondent, Justin Jacobs and W. A. Gray.

IN BANK.

ESREY, Respondent, vs. S. P. R. R. Co., Appellant. } No. 13,914.

This was an action for damages for personal injuries. The plaintiff had a verdict and judgment for $5,000, and the defendant appeals from the judgment and an order denying its motion for a new trial.

The following are the material facts:

The accident occurred at Leemore, a small town between Tulare and Huron, in the afternoon of February 13, 1889. The plaintiff had gone to the depot with a friend, one Miss Furnish, to bid good-bye to an acquaintance, one Mrs. Shively, who took the freight train which passed Leemore about that time. The general features of the locality are as follows: The main track ran east and west. Almost parallel with it, and a few feet to the south, was a side switch, which ran alongside a platform about four feet high, and came into the main track a little farther to the east. The platform was about 100 feet long, and was about three feet from the first rail of the side switch. The train was headed towards the east. Its forward part, consisting of the engine and some flat cars, uncoupled from the caboose (which was left standing on the main track opposite the platform) for the purpose of taking on some box cars which were on the western end of the side switch.

Mrs. Shively got into the caboose, and, the plaintiff and Miss Furnish having taken leave of her, started to go around by the western end of the platform to the street which crossed the track there. They changed their minds, however, and went towards the eastern end. By this time the engine and the platform cars were backing down the side switch, and plaintiff was aware of the fact. She says: "I knew the train was switching before I crossed, but I thought I had time to escape any danger." "And I thought that the space between the cars—I had never paid any particular attention to that—and I thought that the space between the cars and the platform would be wide enough that I could walk right along, without being injured in the least." She "crossed the switch just at the end of the box-cars." Miss Furnish did not cross the switch. In this regard plaintiff says: "At this time Miss Furnish was with me. She did not cross the track with me. I told her I thought we had ample time to get across. I don't know what her answer was, exactly. I know she didn't come. I could not say whether she said anything to me about going, or that there was not time to cross the track before the cars came. There was no time for talking. She might have spoke, but I did not hear." Miss Furnish says that she did not cross because she was afraid.

There were two brakemen employed on the train. One of them (Ferguson) was on the ground near the box-car for the purpose of signaling the engineer. The other (Williams) was on the end of the flat-car, but got down to make the coupling when the end of the train neared the box-car. He says: "A young lady ran in between the box-car and the flat-car, and I told her to get out of there or you will get hurt, and she said I am not afraid." The fact that he did say this is corroborated by Miss Furnish, by one Benton, "an engineer and pumper" about the station, and by Mrs. Shively. The plaintiff says that if the brakeman spoke to her she did not hear him, and it is assumed that her statement in this regard is true.

After she had crossed the switch she found that she had not time to get around the platform before the end of the train reached her, so she stood with her back against the platform. While standing in this position the flat cars passed her but did not touch her, and she does not seem to have been alarmed. In this regard her testimony was as follows: "Q.—The brakeman at this time was about six feet from you. Could you not have spoken to the brakeman and asked him to hold until you could get around the corner? A.—Yes, sir, I could. Q.—Did you attempt to? A.—No, sir. Q.—Did you do anything but press back against the platform? A.—I did not because I thought I was perfectly safe." The same sense of security appears from her conversation with Mrs. Shively. The latter says: "I looked out the caboose window and saw the plaintiff standing between the flat car and the platform. I told her I thought it was a dangerous place where she was. She said she was all right;" and the plaintiff admits that this conversation occurred.

The defendant's employes evidently shared plaintiff's opinion that there was no danger, for they paid no further attention to her. The brakeman, Williams, says: "I went about my work, made the coupling, and Mr. Ferguson, the other brakeman, gave the signal to go ahead. When he gave the signal to go ahead, the girl was out of my sight. I did not see her. She must have gone behind the box-car or I would have seen her." The engineer says he did not see her when he got the signal. And the fireman who had seen her cross the switch says: "She disappeared from my sight; I cannet tell which way she went." And he went on ringing the bell without troubling himself further about the matter.

The plaintiff's account does not differ materially from this. Her testimony is as follows:

"Q.—You did not ask either brakeman to stop the train? A.—No, sir. Q.—But simply pressed back against the platform? A.—I did. Q.—State whether or not you are positive that both these brakemen saw you. A.—I am positive. Q.—I ask you now with reference to that. Do you mean to say at this time that both of these brakemen were looking at you at the time the car was coupled, and you were standing here, pressed up against the platform? A.—I mean to say that both could have seen me. Q.—You mean to say that both could have seen you? A.—Yes, sir. Q.—You don't mean to swear positively that they were both looking at you at that time? A.—I didn't say they were looking at me at that time, but I know positively they both saw me. They saw me standing there. Q.—At some time? A.—At some time. Q.—You don't mean, then, however, to be understood by the jury that at the time the coupling was made and the signal given to start that both these brakemen were looking at you in this position? A.—I could not say they were looking at me just at that time, but I am positive they both saw me. Q.—As I understand, you are positive that while you were standing there, and the train was coming in, that they saw you over on that side of the car? A.—Yes sir."

These extracts show clearly enough that the employes on the train saw the plaintiff go in between the flat-cars and the box-cars, and saw her standing up against the platform as the flat-cars passed her, but paid no further attention to her—apparently sharing her belief that she was safe.

But neither she nor they seem to have thought of the fact that the box-cars were wider than the flat-cars. She says: "When the cars began to move I noticed that the box-car was considerably wider than the flat. Then I fully realized my danger. Not until that time." The first box-car struck and crushed her shoulder. Whereupon she threw herself upon the ground and the train passed without injuring her further.

All of the foregoing facts appear without substantial contradiction. The only conflict is as to whether she heard the brakeman tell her not to go in there, and for the purpose of the opinion it is assumed that she did not hear him.

Upon these facts, it seems clear that her own negligence contributed directly and proximately to the injury. She had voluntarily placed herself in a dangerous position—a position in which, as it turned out, she would be almost certain to be injured by the running of the cars in the ordinary way, and from which her more prudent companion shrank back in fear. Now, if the defendant's employes had not seen her position of danger, the defendant would have owed her no duty to take any particular precaution, and consequently would not have been guilty of negligence. (Toomey vs. S. P. R. R. Co., 24 Pac. Rep. 1074.) But the defendant's employes saw her in time to have avoided the accident, and hence were bound to use care. The brakemen ought to have stopped the train, and, if necessary, compelled her to get out of harm's way. They did not do this, and hence were guilty of negligence. But the complaint does not charge that there was anything willful or wanton against the defendant. It simply alleges that the defendant "carelessly and negligently" ran one of its cars against the plaintiff; and this is all that the evidence shows. For this negligence on the part of the defendant, plaintiff would have had a cause of action if there had been no contributory negligence on her part. But the rule is that wherever the negligence of the plaintiff contributed directly and proximately to the injury, there can be no recovery. Such negligence must have contributed to the injury not remotely, but directly and proximately. (Needham vs. S. F. and S. J. R. R. Co., 37 Cal. 409; Kline vs. C. P. R. R. Co., 37 Cal. 406; Fernandez vs. Sac. R. R. Co., 52 Cal. 53.) But I think that such was the case here. The plaintiff's negligence was certainly not remote in point of time. She voluntarily went into a dangerous place where she had no right to be, and the brakemen very foolishly allowed her to do so. The fatal mistake after this was in not thinking of the fact that the box-cars were wider than the flat-cars; and this was evidently shared by all the parties. The plaintiff probably was correct in the opinion which she expressed to Mrs. Shively shortly after the accident. "She said it was some of her foolishness—it was her own fault. I asked her, What in the world did you go in there for? She said some of her own foolishness."

I think the judgment and order appealed from should be reversed and the cause remanded for a new trial.

VAN CLIEF, C.

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

THE COURT.

[Beatty, C. J., dissenting.]

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

[Filed March 21st.]

Habeas corpus.

Police Court, San Francisco.

For petitioner, Benj. B. Haskell.

For people, District Attorney Wm. S. Barnes.

IN BANK.

EP PARTE ESTRADO.—No. 20,819.

The petitioner is held in the custody of the Chief of Police of the City and County of San Francisco, under a commitment which recites an order of the Police Judge holding her to answer "on a charge of felony, to-wit: enticing a minor away for the purpose of prostitution, committed as follows: Said Cora Estrado did, in the City and County of San Francisco, on the 25th day of February, 1891, willfully, unlawfully and feloniously, take away a certain female under the age of eighteen years"—naming her—"of the age of seventeen years, from her father, for the purpose of prostitution."

It is claimed that the imprisonment of the petitioner is unlawful for two reasons:

First—Because the order recited in the commitment does not show that the father of the girl from whom she was taken had the legal care of her person; and,

Second—Because the evidence adduced at the examination does not show any reasonable or probable cause for holding that the petitioner is guilty of the offense charged.

The first ground is not alleged in the petition upon which the writ was issued but is taken by way of objection to the return, and rests upon counsel's construction of Section 267 of the Penal Code, which reads as follows:

"Section 267. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the State prison not exceeding five years and a fine not exceeding one thousand dollars."

According to the construction of this section contended for, it is not sufficient to allege and prove that a girl has been taken away from her father, mother or guardian; it must also be alleged that the father, mother or guardian had the legal charge of her person.

But a father, mother or guardian necessarily has the legal charge of the person of a minor child or ward, and the true construction of the statute only requires averment and proof of legal custody when the child is taken from some other person.

Moreover, a defect in the commitment in describing the offense is immaterial if it is sufficiently described in the order indorsed on the depositions, (ex parte Keil, 85 Cal. 309, and cases cited), and it is not alleged in this case, either in the petition or by way of traverse to the return, that a sufficient order was not so indorsed.

The second ground relied on is, if possible, more barren of merit than the first.

We note in passing, that the petition, so far as this ground is concerned, was wholly insufficient to call for the issuance of the writ under the decision in Ex parte Walpole (84 Cal. 584). But the writ was issued, and on the return enough of the depositions was read to show that the petitioner induced a girl of seventeen years to go to a house of prostitution for the ostensible purpose of domestic service. She did not disclose to the girl, or her father, what the character of the place was. It is contended that this does not show that the purpose of taking the girl to the house was to make her a prostitute. But clearly, such evidence would sustain a verdict against the petitioner. It is not to be supposed that a procuress will furnish direct and positive proof of her guilt by openly proposing a life of shame to a girl that she is seeking to lead astray; on the contrary, every motive of policy will conspire to induce her to pursue a course of indirection in carrying out her design, and she is to be judged not by what she says so much as by what she does. (People vs. Marshall, 59 Cal. 386.)

If a person is to be presumed to intend the natural consequences of his acts, it is certainly fair to presume that when a woman takes a young girl, without the knowledge or consent of her parents, and puts her to work as a domestic servant in a house of prostitution, she intends to lead her to take up that sort of life; for, it is very certain, that amidst such surroundings she cannot long preserve either reputation or modesty.

And a court should look with extreme suspicion upon such an excuse as the petitioner offers for her conduct. To treat it with any favor would make the nefarious traffic of which she is accused easy and safe—when it ought to be made difficult and dangerous. An example which would enforce the lesson that domestic servants for such places are to be sought outside of the ranks of immature girls would be extremely salutary.

The prisoner is remanded.

BEATTY, C. J.

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

[Filed at San Francisco, March 24, 1891.]

Appeal from the Superior Court of Santa Clara County—Francis E. Spencer, Judge.

For appellant, Morehouse & Tuttle.

For respondents, G. A. Johnson, D. W. Harrington and S. G. Tompkins.

DEPARTMENT ONE.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. HANFORD L. GORDON, Appellant. } No. 20,737.

This is an action charging the defendant with an assault with a deadly weapon upon the person of one Charles H. Potter, with intent to kill and murder said Potter. The defendant was convicted of an assault with a deadly weapon, and fined $2,500, and in default of the payment thereof it was ordered that he be imprisoned in the County Jail of Santa Clara County at the rate of one day for each $4 of said fine, and not exceeding in the aggregate 625 days. This appeal is from the judgment and the order denying defendant's motion for a new trial.

Among the grounds relied upon by defendant's counsel to support this appeal, it is claimed the court misdirected the jury as to the law of the case.

The court gave the jury the following instructions:

"Upon a trial for an assault to commit murder, the assault and the intent being proved, the burden of proving circumstances of mitigation, justification or excuse therefor, devolves upon the accused, unless the proof upon the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon, with intent to inflict upon the person of the prosecuting witness a great bodily injury, or of a simple assault, or that the defendant was justified or excused."

The learned Judge of the lower court has attempted by the foregoing instruction to apply the principle found in Section 1105 of the Penal Code as to the shifting of the burden of proof in cases of homicide to the present case—a charge of assault with intent to commit murder. Such an application of that section of the code cannot be made, for it only treats of cases of homicide. (People vs. Cheon Foon Ark, 61 Cal. 527; People vs. Rodrigo, 69 Id. 605; People vs. Wise, 80 Id. 45; Com. vs. McKie, 1 Gray, 61.)

This principle of the shifting of the burden of proof in cases of homicide is purely a creation of the statute, and must be limited to the words of the statute. It is based upon the theory that certain presumptions shall take the place of evidence, and was not intended to change the rule of evidence.

But, aside from any authority upon the question, it does not appear that the burden of proof could possibly shift at any stage of the proceedings, or under any state of circumstances, in a case similar to the one under discussion.

The presumptions which follow from the act of killing in the case of homicide, and which are impliedly recognized by Section 1105, are inapplicable to and have no relationship with the offense of assault with intent to commit murder, and this is fully exemplified by a cursory examination of the instruction heretofore quoted, for such an examination proves the instruction to be misleading, contradictory, and practically meaningless.

The language of the instruction is, "the *assault* and the *intent* being proved, the burden of proving circumstances of justification, excuse, etc., rest upon the accused, unless, etc." If the assault and the intent to commit the murder are proven, the offense is made out perfect and complete in every portion, and the foregoing instruction can only be correct in the sense that when the prosecution has proven the defendant guilty, it behooves him to do something in his own behalf or suffer the consequences of his proven guilt.

The serious vice in the instruction then follows, "unless the proof on the part of the prosecution tends to show that the crime committed only amounted to an assault with a deadly weapon with intent to inflict upon the person of the prosecuting witness a great bodily injury, or of a simple assault, or that the defendant was justified or excused." This proviso or exception never could exist in connection with the previous assumption that the guilt of the defendant of the crime of assault with intent to commit murder had already been established by the evidence of the prosecution, and it has no signification whatever when taken in connection with the former part of the instruction.

If the defendant had been convicted of an assault with intent to commit murder he would have been entitled to a new trial by reason of error in the foregoing instruction, but having been found guilty of the crime of "assault with a deadly weapon" only, he is acquitted of the higher offense, to which the instruction alone is pointed and consequently is acquitted of the intent to murder and necessarily was not prejudiced thereby. (People vs. Swift, 66 Cal. 349; People vs. O'Neal, 67 Cal. 378; People vs. Boling, 83 Id. 380.)

The court gave the following instruction to the jury:

"The prosecutor Potter has testified in substance that at the time in question he was sitting in front of the Lamolle House, in a chair on the sidewalk, unarmed. That the defendant came up and addressed him in a *sharp tone* and immediately made a demonstration to draw a pistol upon him. That he, Potter, thereupon sprang up from his chair and grappled with the defendant and struck him in the face. * * * Other witnesses corroborate in whole or in part that portion of the prosecutor's statement of the transaction after the conflict had commenced."

All the testimony of the prosecuting witness, Potter, as to these matters, is as follows:

Examination-in-chief: "I was seated in a chair in front of the Lemolle House, on Santa Clara street, near San Pedro street. I was seated looking east, and thinking about something. I had been there about twelve or fifteen minutes, when some one came up and addressed me as, 'Ah, there!' or 'Hello, there.' I looked quick, and H. L. Gordon, the defendant, was standing about two feet from me. As I jumped around in this way he started for his overcoat pocket with his right hand. I immediately jumped up and grabbed him. * * * I saw him make a motion for his side coat-pocket, and I immediately grabbed his hand."

Cross-examination: "The first time I saw him was when he was standing in front of me at the Lamolle House. I first saw defendant when he got in front of me on the sidewalk about three or four feet from me. * * * When he came up he said: 'There,' or 'Ah, there,' or 'Hello, there.' I don't know which, but I heard the word 'there,' which was significant. When he spoke to me I had my legs crossed, and I looked around, and he immediately attempted to step back, and started his right hand for the side of his overcoat pocket. I raised up and grabbed him, etc. * * * I grabbed him with my left hand on his right wrist as he had his hand in his pocket. * * * He was trying to get his pistol out of his pocket. He had his right hand in his pocket. * * * The first time I saw Gordon he was endeavoring to get his pistol in his hand."

It appears by the record that there was a wide divergence between the testimony of the prosecuting witness and the defendant as to the matters which occurred at the immediate inception of the difficulty between those parties, and as the defendant in this case insisted at the trial that the shooting was done in self-defense, it was a matter of vital importance to the jury to know who began the affray, and this was essentially and solely the province of the jury to determine from the testimony of all the witnesses.

While Section 19, Article VI., of the Constitution allows Judges to state the testimony to the jury, yet this principle has always been strictly enforced, and necessarily so, for, that Judges must not charge juries with respect to matters of fact, is a constitutional prohibition which has been jealously guarded and rigidly upheld from the earliest judicial history of the State.

In the case of the People vs. Williams, (17 Cal. 147), Justice Baldwin used the following language, which is as trite now as when used in that early case:

"The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which jurors pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court; a word, a look, or a tone, may sometimes in such cases be of great or even of controlling influence. A Judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts."

As we have seen in this case, the Judge undertook to state to the jury the substance of the prosecuting witness' testimony, which is a very dangerous thing to do, for it is essentially the province of the jury to decide what the substance of the prosecuting witness' testimony was. Selecting what constitutes the substance of a witness' testimony is to a greater or less extent a matter of opinion, and the jurors and the Judge may have held widely different views as to what the substance of the prosecuting witness' testimony really was in this case.

In the instruction under consideration the court states that the witness, Potter, testified: "That the defendant came up and addressed him in a *sharp* tone, and immediately made a demonstration to draw a pistol upon him." This goes to the very gist of the main inquiry in the case; and, while the foregoing may be, in a certain sense and to a limited extent, the substance of what the witness said happened at the commencement of the trouble, yet the witness in his testimony says that "someone came up and addressed me as 'Ah, there,' or 'Hello, there.'" Now, *someone* is not necessarily the defendant, and it appears nowhere in the testimony of the witness that he was addressed in a *sharp* tone of voice. Now, this is significant, for if the remark was made in a "sharp tone," it might indicate anger, animosity and ill-will toward the witness, and it was for the jury to decide whether the tone of defendant's voice was sharp or not.

Again, the court makes the witness say, "And *immediately* made a demonstration to draw a pistol upon him." Now, the witness really did say, "As I jumped around in this way, he started for his overcoat pocket with his right hand;" and surely it is for the jury, and the jury alone, to determine the full meaning of these words as actually used by the witness.

And if in other portions of the witness' testimony he made statements contradictory to those just quoted, or which more fully coincide with the views of his testimony as expressed by the Court in his charge to the jury, then it is pre-eminently the duty of the jury to say from all his statements what is the substance of his testimony, as to what did occur at the moment when these two parties met.

At the conclusion of this instruction to the jury the Court used this language: "Other witnesses corroborate in whole or in part that portion of the prosecutor's statement of the transaction after the conflict had commenced."

It appears the parties came to blows, were separated, and then the shooting followed. This is the very moment of time at which the crime was committed, if committed at all, and for the Court to tell the jury that the testimony of the witness Potter as to these important matters is corroborated by other witnesses surely prejudiced the rights of the defendant to his great disadvantage, and violated that constitutional prohibition that juries must not be charged as to matters of fact.

Upon an examination of the other points relied upon by appellant, we find no error.

For the foregoing reasons let the judgment be reversed, and the cause remanded for a new trial.

GAROUTTE, J.

We concur:
HARRISON, J.,
PATERSON, J.

[Filed in San Francisco, March 24, 1891.]

Mandamus.

For petitioners, J. H. Magoffey.

For respondents, C. W. Thomas.

IN BANK.

A. C. RUGGLES ET AL., Petitioners, vs. BOARD OF TRUSTEES OF THE CITY OF WOODLAND, Respondents. } No. 14,396.

Mandamus to compel the respondents to call and provide for the holding of an election of city officers.

Prior to May 6, 1890, the city of Woodland, in Yolo County, was a municipal corporation under a special charter. On that date a proposition to reorganize as a city of the fifth class, under the general incorporation Act, approved March 13, 1883, was duly submitted to the electors of said city and approved by a majority vote.

Thereafter, on June 16, 1890, at a special election held in obedience to the provisions of Section 4 of said Act, the respondents and other city officers enumerated in Section 751, *i. e.*, the officers of a city of the fifth class, were duly elected and have ever since been acting as such.

The petitioners, who are citizens, taxpayers and electors of said city, have demanded that the respondents call a general city election to be held on the second Monday of April, 1891, for the choice of successors to themselves and the other officers enumerated in Section 751; but the respondents on March 9, 1891, by formal resolution entered upon their minutes, refused to call such election, whereupon this proceeding was commenced.

It is proper to say that this refusal of the respondents to call an election for the choice of their successors does not appear to have been inspired by any wish to prolong their own tenure of office beyond the term fixed by law, but only by the desire to secure an authoritative construction of two apparently conflicting provisions of the statute in order that the city may proceed regularly and lawfully under its new charter.

By Section 4 of the Act referred to it is provided that the officers chosen at the special election, to be held within six weeks after the vote in favor of reorganization is declared, shall hold their respective offices "*only* until the next general municipal election to be held in such city and county, city or town, and until their successors are elected and qualified."

By Section 752 of said Act it is provided that all the elective officers of cities of the fifth class shall be chosen at a general municipal election to be held therein on the second Monday in April in each odd-numbered year. The Marshal, Assessor, etc., are to hold their offices for two years from and after the Monday following the day of their election, and the members of the Board of Trustees are to hold for four years from and after the same date, and until their successors are elected and qualified.

So far all the provisions of the statute are perfectly consistent and unqualifiedly support the contention of petitioners that an election must be held on the second Monday of April of this year.

But Section 752 contains a *proviso* that the first Board of Trustees "*elected under the provisions of this Act* shall at their first meeting so classify themselves by lot as that three of their number shall go out of office at the expiration of two years and two at the expiration of four years."

It cannot be denied that the respondents are embraced by the terms of this *proviso*, for unquestionably they are the first Board of Trustees elected under the provisions of this Act. But if the *proviso* is construed literally it is directly in conflict with the provision of Section 4, that the Trustees elected at the first (the special) election are to hold only till the next general municipal election, and until their successors are elected and qualified.

To reconcile this conflict, and to render the various provisions of the Act sensible and coherent, it is necessary in place of the words "this Act" in the *proviso*, to read *this section* or *this chapter*. And this accords with the evident intention of the Legislature, which was that all the elective officers of the city should be chosen at the same time, and enter upon their respective offices at the same time. As to all other officers except members of the Boards of Trustees, Education, etc., there is no doubt that they must be elected on the second Monday of April of the odd numbered years, and hold their respective offices for two years from the following Monday. We think it clear that the Trustees (except those drawing the short term after the first general election, and those elected provisionally at the special election) are to hold four years from the same date.

From these views it follows that a peremptory writ should issue as prayed.

So ordered. BEATTY, C. J.

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

[Filed March 25, 1891.]

Appeal from Superior Court of Stanislaus County—William O. Minor, Judge.

For appellant, E. G. Knapp, T. Z. Blakeman and Wright & Hazen.

For respondents, Turner & Maddux and J. H. Budd.

IN BANK.

MOULTON VS. KNAPP—No. 12,212.

In Moulton vs. Knapp, 85 Cal. 385 (this cause), an injunction had been granted on a verified complaint alone. It was held that plaintiff's remedy, if any they had, was by motion to set aside the execution, and to stay all process until the expiration of the year; that plaintiffs were not entitled to an injunction. That decision is the law of the case, and is conclusive of the question involved in this appeal. The judgment appealed from is based upon the complaint on which the preliminary injunction referred to was granted, and decrees to plaintiffs the relief therein prayed for.

Judgment reversed. PATERSON, J.

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

[Filed in Sacramento, March 25, 1891.]

Appeal from Superior Court of Colusa County—E. A. Bridgford, Judge.

For appellant, B. F. Howard and S. C. Tompkins.

For respondent, H. M. Albery and W. G. Dyas.

IN BANK.

MINNIE SPECT, Respondent, vs. LOU G. SPECT, Appellant. } No. 14,075.

The defendant in her answer to a complaint in ejectment, which was in the ordinary form, denied all its allegations, and, "for a separate and equitable defense to plaintiff's action, and for the purpose of obtaining equitable relief herein," alleged that in October, 1875, Jonas Spect, who was then the owner and in possession of the demanded premises, conveyed the same to one Montgomery; that in October, 1876, said Jonas Spect borrowed from the defendant the sum of $2,200, and executed to her his promissory note therefor; that on the second day of January, 1877, he procured said Montgomery to convey the demanded premises to her, and that at the same time, and as a part of the same transaction, an agreement was entered into between herself and said Jonas Spect, declaring that said conveyance was made as security for the payment of said promissory note; "that by virtue of said conveyance from Montgomery, and said agreement, and by the consent of said Jonas Spect, defendant took possession of the demanded premises, and has ever since remained, and is now in actual possession of the same, claiming them as her own; that no part of said $2,200 has ever been paid, principal or interest, but the whole thereof is now due and unpaid, amounting to $5,632," and prayed judgment that plaintiff's complaint be dismissed. The action was tried by the court, and judgment rendered for the plaintiff. The court made findings of the facts alleged in the complaint, and incorporated therein the following statement with reference to the equitable defense set up in the answer: "The court declines to find on the fact whether or not defendant has a mortgage lien on the premises in controversy, for the reason that the court is of the opinion that it is not necessary for the disposition of the issues involved in this case to find upon that matter, this being an action of ejectment, and the only question involved being the right to the possession of the premises described in plaintiff's complaint." The defendant has appealed directly from the judgment, and presents as a ground for its reversal that the court failed to find upon the issues presented by her equitable defense.

Inasmuch as the court gives as its reason for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and, therefore, the rule announced in Himmelman vs. Henry (84 Cal. 104) has no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment.

The court does not find by what means the plaintiff became the owner of the demanded premises, but as it is alleged in the equitable defense above named that Jonas Spect was the owner at the time he made the conveyance to Montgomery, we must assume that the plaintiff's title is derived under him, and is, therefore, subject to whatever incumbrance was created by the foregoing acts in favor of the defendant, and that the plaintiff can assert no greater rights to the premises than could Jonas Spect himself, were he the plaintiff herein. It may also be assumed although it does not appear in the record, that such point was presented to the court below, that the defendant's right of action upon the debt for which this mortgage was given to her was barred by the statute of limitations.

The question to be determined is, "Can a mortgagor, who has placed his mortgagee in possession of the mortgaged premises, maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations?"

Section 2927 of the Civil Code declares that "a mortgage does not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration." The right of the mortgagee to take the possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. (Fogarty vs. Sawyer, 17 Cal. 589; Edwards vs. Wray, 11 Biss. 251.) In taking such possession the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character or any different or greater protection than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage. A mortgage is defined by Section 2920 of the Civil Code to be "a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession." The use of the term "hypothecate" signifies that possession is not an incident of the mortgage, and that the *fact* of possession is entirely distinct from the *contract* of hypothecation. When, therefore, in addition to the contract of hypothecation, the debtor gives to his creditor the possession of the mortgaged premises, he thereby in addition to the mortgage which he has executed, pledges to him the land also as security for the debt, and confers upon him such rights as are incident to a pledge.

The common law recognized this species of landed security. It was there called *vadium vivum*, as distinguished from the *vadium mortuum*. This is defined by Chancellor Kent to be: "When the creditor takes the estate to hold and enjoy it without any limited time of redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged, the land, by right of reverter, returns to the original owner." (4 Kent, Com. 137; 2 Bl. Com. 157; Co. Litt. 205 a.) The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the statute of limitations has barred all right of action to recover the debt. (Jones vs. Merchant's Bank, 4 Robt. 221.) Under the same principle the mortgagee in possession is entitled to retain such possession until the debt is paid. "The mortgagee's right, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands." (Kortright vs. Cady, 21 N. Y. 364.) "On the same principle that the party who holds goods in pledge for a debt may retain those goods, even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt." (Henry vs. Confidence M. Co., 1 Nev. 622.) In Dutton vs. Warschauer, 21 Cal. 625, it is said: "When possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed in the absence of clear proof to the contrary to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the morgagor and all others until such satisfaction is obtained."

The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. These principles when once established become the guidance of courts of law as well as of equity, even in those countries where the tribunals of law and equity are distinct. It was said by Lord Redesdale: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Section 307, C. C. P., declares: "There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." While all distinctions in the *form* of actions are abolished, yet the principles upon which the rights of parties are to be determined remain to guide the judgment of the court. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title (Booth vs. Hoskins, 75 Cal. 271) or to enjoin a sale under the power given by him in the security (Grant vs. Burr, 54 Cal. 298), or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity.

In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid. (Phyffe vs. Riley, 15 Wend. 248; Hubbell vs. Moulson, 53 N. Y. 225; Fee vs. Swingley, 6 Mont. 596; Roberts vs. Sutherlin, 4 Or. 220; Cooke vs. Cooper, 18 Or. 142; Frink vs. LeRoy, 49 Cal. 314; Tallman vs. Ely, 6 Wis. 244; Brinkman vs. Jones, 44 Wis. 512; Sahler vs. Signer, 44 Barb. 614; Madison Ave. Church vs. Oliver St. Church, 73 N. Y. 82; Den vs. Wright, 7 N. J. L. 175; Wells vs. Van Dyke, 109 Pa. St. 335; Duke vs. Reed, 64 Tex. 705; Jones on Mortgages, Sec. 715.)

The debt is not satisfied or paid by mere lapse of time. The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield and not as a sword. "It has never been held that the expiration of the statutory time for bringing an action to recover a debt, or to enforce any personal obligation operated either as an extinguishment or payment. Such a result cannot be derived from the language of our statute, the reason or policy of the law, or the decisions of courts in this State or elsewhere." (Grant vs. Burr, 54 Cal. 301.) The mortgagee after the mortgage debt has been barred by the statute of limitations, cannot by any affirmative proceedings on his part invoke the aid of the court for the collection of the debt; but, if the mortgagor has placed him in the possession of the land mortgaged, he does not lose the right thus conferred upon him, and can resist any action by the mortgagor to deprive him of this security. In Frink vs. Le Roy (49 Cal. 314) a decree of foreclosure and sale of the mortgaged premises was entered in 1859. Thereupon Le Roy, one of the mortgagees, took possession of the premises under an agreement between the parties that he might do so, and apply the rents to the satisfaction of the judgment. In 1870 Frink, who had succeeded to the interest of the mortgagor in the premises, brought an action in ejectment against Le Roy for their recovery. Le Roy in his answer by way of equitable defense set up the mortgage, the judgment forclosing the same, and the agreement under which he had taken possession. To this defense the plaintiff pleaded the statute of limitations. Upon an appeal from a judgment in favor of the plaintiff, the Supreme Court held that the statute of limitations had no application, and that Le Roy's right to remain in possession under the agreement was not affected by it, saying that: "The equity of Le Roy to be maintained in possession until satisfaction of the debt, is not lost from the fact that for upwards of ten years he has been in the actual possession of that of which he is now sought to be deprived." In Hubbell vs. Moulson (53N. Y. 225), it was held that the mortgagor could not maintain an action in ejectment against the mortgagee for the mortgaged premises, even though he could prove at the trial that the mortgagee had received from the lands sufficient rents and profits to satisfy the debt; that such receipt did not *ipso facto* satisfy the mortgage and discharge its lien, but was in the nature of an equitable set-off to the amount due upon the mortgage debt, and that until after a judicial determination had been had upon an accounting in equity, and the application of these receipts decreed by the court in satisfaction of the debt, the mortgage was not satisfied.

Section 346, C. C. P., provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." If the mortgagor could maintain ejectment against his mortgagee, after the debt for which the mortgage was given had become barred by the statute of limitations, he would have no need to bring an action to redeem the mortgage; and if the mortgagee had maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage, such adverse possession would be a complete defense to the action of ejectment. Mere lapse of time does not constitute adverse possession, but, if the mortgagor could maintain ejectment as soon as the right of action upon the debt were barred by the statute of limitations, the provisions of this section would be meaningless.

It follows from a consideration of the principles which we have herein stated, that the equitable defense alleged by the defendant was, if sustained by proofs, sufficient to defeat the plaintiff's right of recovery; and that the failure of the court to make findings upon the issues so presented was error, for which the judgment must be reversed; and it is so ordered.

HARRISON, J.

We concur:
MCFARLAND, J.,
SHARPSTEIN, J.,
PATERSON, J.,
DEHAVEN, J.,
GAROUTTE, J.,
BEATTY, C. J.

[Filed at San Francisco, March 25, 1891.]

Appeal from the Superior Court of Contra Costa County—Jos. P. Jones, Judge.

For appellant, Philip Teare.

For respondents, William and George Leviston.

DEPARTMENT TWO.

HALL ET AL., Respondents, vs. WALLACE, Appellant. } No. 13,034.

This is an appeal from a judgment and order denying defendant's motion for a new trial in an action of unlawful detainer.

The plaintiffs allege that on or about the 1st day in May, 1886, they by a verbal agreement and lease leased and demised to the defendant certain premises now in his possession, to have and to hold at the will of the plaintiffs. That plaintiffs on the 7th day of January, 1888, terminated said lease by giving defendant a notice in writing to remove from the said premises within a period of one month from said date, and on the 28th day of March, 1888, three days' notice in writing was given by plaintiffs to defendant requiring and demanding of him possession of said premises; but defendant neglected and refused for the space of three days after said demand was served on him, and ever since has neglected and refused to surrender possession of said premises.