Wherefore plaintiffs pray restitution thereof, etc.

Each and every allegation of the complaint is specifically denied by the defendant.

And the defendant further answering alleges that he entered into possession of said premises and made valuable improvements thereon, under a verbal agreement with one Watson, an agent of plaintiff Carpentier, to purchase the same whenever said Carpentier had perfected his title thereto. Defendant further alleges that he has always been ready and willing, and is now ready and willing to pay for said land the price which he agreed to pay therefor.

Upon these issues the parties went to trial before a jury, which returned a verdict for the plaintiff for the restitution of the premises without damages, upon which a judgment was entered that the plaintiff recover from the defendant the restitution of the possession of said premises.

The contention of appellant is that he "did not occupy the premises as a tenant at will or for a term, but on a definite verbal agreement to purchase the land improved by him." A verbal contract for the sale of real property, or for an interest therein is invalid, and if made by an agent of the party sought to be charged is invalid unless the authority of the agent be in writing subscribed by the party sought to be charged. (Civil Code, Section 1623.) Here there was no written agreement to sell by the owner of the property, or authority in writing to an agent to sell. The alleged agreement is doubly invalid, (1) it was not in writing. (2) it was not made by an agent having authority in writing to make it.

We think the entry and holding of the defendant under a void agreement constituted him a tenant at will. That being so, the record presents no error committed by the court which could affect the substantial rights of the parties.

Judgment and order affirmed.

SHARPSTEIN, J.

We concur:
DEHAVEN, J.,
MCFARLAND, J.

[Filed March 26, 1891.]

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

For appellants, William L. Gill; of counsel, A. S. Kittredge.

For respondent, S. O. Houghton.

DEPARTMENT ONE.

AMELIA A. WINSLOW, Respondent, vs. O. F. GOHRANSEN, Appellant. } No. 13,114.

The appeal in this case is direct from the judgment upon the judgment roll alone. The appellant seeks its reversal upon the ground that the court below did not make findings upon all the issues in the case. The complaint is in the ordinary form of a complaint in ejectment. The answer denies its several allegations, alleges title in the defendant, pleads the statute of limitations, and sets up an equitable defense. The court found only the facts which were alleged in the complaint, and rendered judgment in favor of the plaintiff.

In Himmelman vs. Henry (84 Cal. 104), it was held that "a failure to find upon some issue a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Appellant seeks to distinguish the present case from Himmelman vs. Henry by the fact that it is recited in the findings herein that "the court proceeded to hear said cause upon the issues made by the complaint and the answer of the defendant thereto; and the court having heard the proofs of the parties in support of the issues last aforesaid and the arguments of counsel, makes the findings of fact and conclusions of law;" and he contends that this recital is a sufficient compliance with the rule laid down in Himmelman vs. Henry.

If we should concede that this statement in the findings is sufficient to authorize us to assume that evidence was received upon the issues presented by the answer, it would not follow that the failure to make a finding upon such issues was error available to the defendant upon this appeal. The opinion of the court in Himmelman vs. Henry, that a judgment would not be reversed for failure to find upon an issue, "unless it was shown that evidence was submitted in relation to such issue," necessarily implied that the evidence so shown must be sufficient to authorize such a finding as would "have the effect of invalidating a judgment fully supported by the findings made." Such a finding would not be authorized if the evidence introduced was insufficient to sustain the allegations presenting the issues, any more than it would if there were no evidence introduced in reference thereto. In either case the finding of the court could only be against the allegation, and consequently would not "invalidate" the judgment rendered in accordance with the other findings; and, inasmuch as the failure to make such finding would not affect the substantial rights of the appellant, the judgment ought not to be reversed. (C. C. P. Sec. 475.) The appellant is not prejudiced unless the court shall fail to make such findings in his behalf as will countervail its other findings; and, as error in the court below is not to be presumed, but must be shown by him, it is incumbent on him to produce before this court the evidence that was presented to that court in order that we may determine whether any error was committed in failing to make such findings. If the omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize the reversal of the judgment. (Hutchins vs. Castle, 48 Cal. 156.)

The issues upon which the court made no finding in the present case were issues tendered by the answer, and it was incumbent on the defendant to introduce evidence in their support. There is no presumption that such evidence was introduced, and, unless the defendant did introduce evidence, which unless controverted would sustain his allegations, the court was not required to make any findings thereon. It is not enough for him to show merely that evidence was introduced, but it must also be shown that the evidence which was introduced was sufficient to support his allegations.

The recital by the court that it "heard the proofs of the parties in support of the issues," does not imply that any particular proof was heard, nor does it have reference to proof upon any particular issue. It certainly does not imply that the proofs which it heard were sufficient to sustain the allegations of the answer. In Himmelman vs. Henry it was recited in the findings that "the court having heard the allegations and proofs of the respective parties, finds as matters of fact as follows." This recital was not deemed sufficient in that case to justify the presumption that any evidence was offered upon the issues on which no finding was made, and we do not perceive any substantial distinction between the recital in that case and in the one before us.

The judgment appealed from is affirmed.

HARRISON, J.

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

[Filed March 27, 1891.]

Appeal from Superior Court, San Francisco—T. K. Wilson, Judge.

For appellant, James F. Smith, Smith & Murasky.

For respondent, J. C. Bates; of counsel, Myrick & Deering.

DEPARTMENT ONE.

MCKEEN, Respondent, vs. NAUGHTON, Appellant. } No. 13,630.

Action to determine conflicting claims to certain real property.

The appellant claims title to the land in controversy by virtue of a purchase thereof at a sale under an execution issued upon a judgment of the Municipal Court of Appeals of San Francisco in favor of one Harry Pateman against Robert McKeen and W. H. Norton for the sum of $277 70, including costs.

The action of Pateman vs. McKeen and Norton was commenced in the court of a Justice of the Peace for the City and County of San Francisco and judgment therein rendered on May 8, 1879, in favor of the plaintiff therein and against the defendants in that action.

On June 6, 1879, the defendants therein served and filed a notice of appeal from said judgment to the *County Court* of said city and county, but no undertaking thereon was filed until June 9, 1879.

The case was tried in the Municipal Court of Appeals on September 24, 1879, and on that day said court rendered the judgment under which the appellant claims. No order was made by the County Court transferring the case to the Municipal Court of Appeals until *after* the latter court had given its judgment. But on November 11, 1879, such order of transfer was made, and which also directed that the same be filed *nunc pro tunc* as of June 14, 1879.

It is claimed by respondent that this judgment was void for want of jurisdiction, and that, therefore, no titled passed under the execution sale mentioned, and this is the principal question for decision here.

It is unnecessary to determine whether it was competent for the Legislature, under the Constitution then in force, to transfer to the Municipal Court of Appeals a portion of the jurisdiction conferred by that Constitution upon the county, as it is clear that the Municipal Court of Appeals never acquired any jurisdiction of the case of Pateman vs. McKeen and Norton for other reasons. There was no attempt to take an appeal to the Municipal Court of Appeals, and the attempted appeal to the County Court was ineffectual. If it be assumed that the undertaking given upon such attempted appeal was sufficient in amount, still the County Court acquired no jurisdiction of the action, as the undertaking was not filed within thirty days after the rendition of the judgment in the Justice's Court. (Code Civ. Pro., Secs. 974, 978; Coker vs. Superior Ct., 58 Cal. 177.)

In the case just cited this court said: "To effectuate an appeal from the judgment of a Justice of the Peace, three things are necessary, viz.: The filing of a notice of appeal with the Justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking, and all these things must be done within thirty days after the rendition of the judgment. (Secs. 974, 978, C. C. P.) All of these are jurisdictional prerequisites; none of them can be dispensed with, nor can any one of them be supplied, or, if fatally defective, be remedied after the time limited in the statute; for, until all the prerequisites are completed, the appeal is not effectual for any purpose."

This view of the law has been approved in the later cases of Call vs. Superior Court (68 Cal. 25) and Duterte vs. Superior Court (84 Cal. 536) and must be considered as the settled rule here.

The Act creating the Municipal Court of Appeals did not attempt to confer upon it any other than appellate jurisdiction, "the same power and jurisdiction in civil appeal cases as is possessed by the said County Court." Act of April 1, 1878 (Statutes 1877-78, p. 947).

And it would seem that in order to call into exercise this appellate jurisdiction in a given case, there must have been an effectual appeal taken in such case, either directly to such court or to the County Court. And if in the case of an attempted appeal to the County Court the action should in any manner be transferred, either by force of the statute referred to or by order of the County Court, to the Municipal Court of Appeals, that court would not thereby obtain any greater jurisdiction of the cause than was possessed by the County Court.

The appeal to the County Court in the case of Pateman vs. McKeen and Norton being ineffectual for any purpose for the reasons hereinbefore stated, it necessarily follows that the judgment rendered on such appeal in the Municipal Court of Appeals was without authority and therefore void.

2. It appears that there was a motion made in the Municipal Court of Appeals to dismiss the appeal in the case of Pateman vs. McKeen and Norton on the ground that no appeal had been taken, as required by law. The motion was denied. The appellant insists that thereby the respondent here is estopped from asserting want of jurisdiction in that court to hear and give judgment in the case.

If it be assumed that the respondent resisted that motion, still we do not think that such action would estop him to question in this action the jurisdiction of that court. The matter of this alleged estoppel is not set out in the answer of the defendant, as it should be if relied upon as a defense. (Clark vs. Huber, 25 Cal. 594; Davis vs. Davis, 26 Id. 39.)

But passing over this defect in the answer, the fact that the appellants therein resisted the motion to dismiss the appeal in that action cannot work the estoppel claimed. Every fact in connection with the attempted taking of the appeal was within the knowledge of the respondent therein, and being chargeable with a knowledge of the law, neither he nor the appellant here, who stands in his place, can be heard to say that he was *deceived* by any contention of the appellants in that action, as to the *law* governing appeals from Justices' Courts, and involved in the decision of that motion.

"The representation, in order to work an estoppel, must generally be a statement of *fact*. It can rarely happen that the statement of a proposition of law will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact." (Bigelow on Estoppel, p. 438.)

There is nothing in this case which takes it out of this general rule.

Judgment and order affirmed.

DEHAVEN, J.

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

[Filed March 27, 1891.]

Appeal from Superior Court, San Francisco—J. V. Coffey, Judge.

For appellant, Henry E. Highton.

For respondent, Pillsbury & Blanding.

DEPARTMENT TWO.

IN THE MATTER OF THE ESTATE OF JOEL NOAH, DECEASED. } No. 12,999.

Most of the questions involved in this case were considered and passed upon in the case of the same title, reported in 73 Cal., p. 583. It is now further shown that one of the executors of Joel Noah's will, William M. Morris, died on the 1st of October, 1887; that the two surviving executors proceeded to settle up the estate; that on the 29th of November, 1887, they presented and filed their final account, with a petition praying that the account be settled and the estate in their hands be distributed; that on the 12th of December following, after due and regular notice, the matter came on to be heard and no objection being made thereto, a decree in due form of law was made and entered settling and allowing the accounts of the executors and distributing all of the estate remaining in their hands, and that afterwards, on the 14th day of May, 1888, a decree in proper form was made and entered discharging the executors from all liability to be incurred thereafter by them.

The appellant, as widow of Joel Noah, deceased, commenced this proceeding by filing in the Superior Court on the 12th of June, 1888, her petition, praying that the decree settling the final account of the executors and distributing the estate, be vacated and set aside, and that she, as such widow, be allowed out of the estate of deceased, for her support and maintenance, the sum of one hundred dollars per month, to take effect from his death on the 28th of August, 1883.

The petition sets out all the proceedings in the former case, and then, to show that the petitioner is now entitled to the relief prayed for, proceeds to state "that the inventory and appraisement of the property of the said deceased, returned and filed herein on the 13th day of November, 1883, by the executors of said estate as aforesaid, was false and untrue, in this: That said inventory and appraisement did not include and set forth the following described property belonging to said deceased, to wit: Cash in the hands of the said William M. Morris, one of the executors, to the amount of $8,550; United States bonds in the hands of said William M. Morris, belonging to said deceased, to the amount of $10,000; cash on deposit in the London and San Francisco Bank, Limited, belonging to said deceased, to the amount of $20,000, which was drawn out of said bank by said Morris after the death of said deceased, on a power of attorney which was rendered void by the death of said deceased; that when the said inventory and appraisement was returned to and filed in this court, the said William M. Morris, one of said executors, knew that the money and property described in the last preceding paragraph belonged to said deceased, and knew that the same should have been described, set forth, and included in said inventory, but the said William M. Morris, knowingly, deceitfully, and fraudulently, and for the purpose of deceiving and defrauding your petitioner and the court, did not disclose his possession thereof, and omitted to include the sums, or any part thereof, in said inventory in order to impose upon the court, and in order that the action and decision of this court might be influenced and prejudiced against your petitioner, and in order that the court might be made to believe that the estate of the said deceased was smaller than it really was. And the said William M. Morris, then and there, and thereafter, connived and conspired with the devisees under the will of said deceased to deceive and impose upon this court, by agreeing upon a secret and clandestine distribution of said money and property in the hands and under the control of the said Morris, as aforesaid, and the same was, in pursuance of said fraudulent, collusive, and clandestine agreement, thereafter distributed by said Morris to said devisees without the knowledge or consent of this court."

The petition also states that the petitioner did not learn of these facts until on or about the 5th of May, 1886, and that, notwithstanding she exercised all the diligence in her power in searching for and collecting testimony to establish them, she did not succeed, and could not have succeeded in doing so, until immediately before the 12th of December, 1887, and that it was impossible for her to cause to be prepared and filed a new petition, asking for an allowance, before the decree of distribution was made and entered.

The executors demurred to the petition on the ground that it did not state facts sufficient to entitle the petitioner to the relief prayed for, or to any relief. And when the petition came on to be heard, the executors, by their counsel, moved the court for a dismissal thereof, upon the ground that a decree of distribution had been duly given, made, and filed; that the executors had been discharged from all their liabilities as such executors; that the court had no jurisdiction to hear the petition; and also because the whole matter was *res adjudicata*. The court granted the motion and entered an order dismissing the petition. From that order this appeal is prosecuted.

In Willis vs. Farley (24 Cal. 491) it appeared that an action was commenced to foreclose a mortgage against the property of an estate, and process was served on one Shirley as administrator, after the estate had been distributed and the administrator discharged. It was said: "When that action was commenced and the decree was entered there was no such administrator, and hence, the whole proceeding was of no binding validity, it was to all intents and purposes a nullity; for, by the discharge of the administrators they were as completely separated from the business of the estate as if they had been dead; and J. M. Shirley had no right to appear in or be a party to any suit as the representative of the estate which had passed from his hands, and respecting which his authority had long before then wholly ceased."

It is claimed for appellant that that case is unlike this, and not in point, because here there was a direct application to have the discharge set aside on the gound that part of the estate had been concealed and kept back. But, under the circumstances shown, we fail to see how this fact can in any way aid the appellant.

On the former appeal it was held that under the statute only those who were the immediate family of the deceased, and were by law entitled up to his death to look to him for support and protection, could claim any allowance for support out of the estate. And the court, after reviewing the authorities, said (73 Cal. 589): "It is enough to say that—since the appellant voluntarily made an agreement with her husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation and voluntarily continued to live apart from him without any attempt to set aside the agreement or to assume again the matrimonial connection, or even to demand further means for her separate support—the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued, during the settlement of the estate, the 'reasonable support' which the husband, in ordinary cases, is presumed to furnish his wife."

As is readily seen, the decision did not depend upon the amount or value of the estate, but rested solely upon the fact that the petitioner, under the statute, was not entitled to the relief demanded. Now conceding, as claimed, that it was the duty of the court below, when informed under oath, even by a stranger, that a large part of the estate had been concealed and withheld from administration, to arrest all proceedings, until the truth or falsity of the accusation should be ascertained, and, if found to be true, to vacate its order of distribution and discharge, still appellant's rights were in no way affected by the action of the court, and she was not thereby "aggrieved."

It results, we think, that the appellant's petition was properly dismissed, and we advise that the order be affirmed.

BELCHER, C.

We concur:
VANCLIEF, C.,
FOOTE, C.

THE COURT.

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

[Filed at Sacramento March 28, 1891.]

Appeal from the Superior Court of Sacramento County—W. C. Van Fleet, Judge.

For appellant, Johnson, Johnson & Johnson.

For respondent, Robert T. Devlin, A. L. Hart and J. C. Tubbs.

IN BANK.

IN THE MATTER OF THE ESTATE OF JOSEPH BAUQUIER, DECEASED. } No. 13,979.

Joseph Bauquier died leaving an estate estimated at about $20,000. In his will he named his daughter, Mrs. Rode, executrix. Letters having been refused her, Frank Bauquier, a son of the deceased, the Public Administrator, and one Smith, severally applied for letters. At the hearing a contest was inaugurated between Bauquier and the Public Aministrator. The court denied the application of Bauquier and Smith, and appointed the Public Adminstrator, and thereupon Bauquier took this appeal.

An appeal had been previously taken by Mrs. Rode from the order denying her application to be appointed executrix. Since the submission of this case here, that order has been reversed and thereby the right of Mrs. Rode to be appointed executrix apparently settled. The matters involved in this appeal therefore have become practically of little consequence.

We think, however, it must be held in this case, that it was error to hold that the fact that Frank Bauquier was prejudiced against his sister disqualified him to act as administrator. Therefore the order denying his application and appointing the Public Administrator should be reversed.

TEMPLE, C.

We concur:
VANCLIEF, C.,
FOOTE, C.

THE COURT.

For the reasons given in the foregoing opinion the judgment and order appealed from is reversed.

[Filed March 28, 1891.]

Appeal from Superior Court, San Francisco—Walter H. Levy, Judge.

For appellants, Bishop & Watt; of counsel, John H. Durst.

For respondent, Haskell & Meyer, Otto Tum Suden.

DEPARTMENT TWO.

PHILLIPP KLOSE, Respondent, vs. WM. HILLENBRAND ET AL., Appellants. } No. 13,927.

The plaintiff, Klose, had judgment in this action that a certain deed of conveyance to a one-half interest in certain real property situate in San Francisco, from him to one William Hillenbrand, of date the 25th of April, 1888, was procured by fraud and artifice; that it was null and void and conveyed no interest of Klose to the property therein described, and that ever since that date the plaintiff has been and now is the owner of and entitled to the possession of an undivided one-half part or share of the lot of land described in the deed with the improvements thereon. And further that a conveyance from William Hillenbrand of the same property by deed executed on the 21st of January, 1889, to his wife, Anna Hillenbrand, was executed in fraud of the rights of the plaintiff, and is null and void. It was further ordered and adjudged that the plaintiff be let into the quiet possession, occupation and enjoyment of the undivided one-half part or share of the lot of land and premises described in the judgment, and that the plaintiff recover his costs. From that judgment and an order denying a new trial this appeal is taken.

It appears from the evidence on behalf of the plaintiff, that he was at the time he signed and acknowledged the deed to William Hillenbrand, a person advanced in years, and of great weakness of mind, although not amounting to disqualification; that he made the deed without adequate consideration, and without independent advice; that he was induced to make that instrument by an imposition practiced upon him on the part of Dr. Schmitz, the father of Anna Hillenbrand, who was the plaintiff's attending physician; in this that Klose was informed by the doctor that he was dangerously sick, and that it would be better in order not to retard the building of a house on the lot conveyed, which was then being erected by William Hillenbrand and Klose jointly; that he, Klose, should execute a deed to Hillenbrand of Klose's interest in the property, but that this instrument should have included in it a clause that it was not to go into effect unless Klose should die from his then illness, and should not be delivered or go into effect until after his death from such illness. But without any authority from Klose, after Schmidt had obtained the deed in this way, Hillenbrand got possession of it and placed it upon record. After Klose found this out, he was uneasy and asked to look at it, so that he could have it examined by a friend, presumably to see if his wishes had been carried out as promised. He was put off, however, from time to time, by the promises of Hillenbrand to deal fairly with him and in good faith carry out the original design as understood by Klose, viz.: that if he got well from the illness, for which the father of Mrs. Hillenbrand was treating him, the deed should be destroyed.

But so far from drawing the deed as he agreed to do, or delivering it as he promised, the physician of Klose violated both his agreements, with the knowledge and connivance of Hillenbrand and wife. The deceived and confiding old man brought this action after he found that so far from keeping the promises made to him, these parties, bent on preserving their unjust advantage, had fully consummated it, as they supposed, by Hillenbrand conveying the property to his wife.

It is first contended for the appellants that the evidence is insufficient to support the findings. We think that which was introduced by the plaintiff is ample for that purpose.

It is next contended that the complaint does not allege that the deed was to contain a clause that it was not to go into effect unless the plaintiff died from his then illness, but the pleading only alleges that the clause was to be to the effect that the deed was not to go into effect until after the death of Klose without reference to whether he died from his then illness or not. That, therefore, the evidence and findings are conflicting with the case made in the complaint. A careful examination of the pleading in question does not bear out this contention. It is manifest from the whole language employed, although the same is not couched in the clearest terms for that purpose, that the pleading as to that matter conforms to the findings and evidence.

It is alleged in the complaint, and found to be a fact by the finding, "That said William Hillenbrand at once took possession of said deed from the hands of said Schmitz (the doctor), and caused the same to be recorded by said Schmitz in the office of the County Recorder of the City and County of San Francisco, as though the same had been delivered to him by this plaintiff, when, in truth and in fact, the said deed has never been delivered to said Hillenbrand."

The argument made in this connection by the appellants, for a reversal of the judgment and order, seems to be that this finding shows that the deed was delivered by Schmitz, and that as he had the power confided to him to deliver it conditionally, that although he used this power by violating his promise to the plaintiff, yet it was a legal delivery, and hence the finding that there was no delivery conflicts with the fact, which states that delivery was given by the possession taken by Hillenbrand from Schmitz. In other words, although Schmitz violated his promise not to deliver, yet this did not affect the delivery so far as Hillenbrand was concerned.

We cannot conceive how such an act can accomplish the legal result claimed. (Brison vs. Brison, 75 Cal. 527: C. C., Section 1572). The allegation of the pleading and the finding show no authorized delivery to Hillenbrand, but a possession and a recording of the deed fraudulently obtained and made.

But if we were to concede the specific points made by the appellants involving the pleadings and findings as being well taken, the judgment and order should not be reversed as the pleadings, findings and evidence all show this much at the very least, viz.: That Klose made a deed that he did not intend to make; that he was old, sick, and of impaired intellect; that the instrument was made without any adequate consideration and without independent advice, but to the contrary by intended and deceptive advice, and that he would have moved to set it aside in seasonable time, but for the promises made him by William Hillenbrand, and that as soon as he unwillingly discovered that he had been deceived by those he had reason most to trust he sought through the courts to obtain redress.

Under this state of facts, as we understand the rule in such cases, laid down in Richards vs. Donner (72 Cal. 210-211), it would seem that no prejudicial error has been committed, and that the judgment and order should be affirmed.

FOOTE, C.

We concur:
VANCLIEF, C.,
BELCHER, C.

THE COURT.

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

[Filed at San Francisco, March 26, 1891.]

Appeal from the Superior Court of Santa Cruz County — F. J. McCann, Judge.

For appellant, E. Spalsbury and W. E. Turner.

For respondents, T. H. Laine and Wm. T. Jeter.

DEPARTMENT ONE.

BARNHART, Appellant, vs. KRON, Respondent. } No. 13,233.

The plaintiff moved the court below to re-tax the bill of costs filed by the respondent, by striking out each and every item thereof, upon the ground that none of said items were incurred by the respondent in maintaining or establishing any part of his defense to the action, but that each of said items was so incurred by his co-defendant. The court denied the motion, and the plaintiff has appealed.

The allowance or disallowance of items for the expenses and disbursements incurred upon the trial of an action must be left in nearly every instance to the discretion of the Judge before whom the cause was tried. He has an opportunity to know the issues that are tried, the character of the prosecution and of the defense, the principal points upon which the witnesses are called, and whether there existed any necessity for calling them. We must assume that he would not allow costs to a party for witnesses that were unnecessarily called, or in a case like the present for witnesses who were not called for the respondent. There is nothing in the record in the present case which shows that the court did not properly exercise its discretion in refusing to strike out the items objected to. The plaintiff does not in his affidavit show that the witnesses named in the bill of costs were not necessary for the defense of the respondent, or that they did not testify in his behalf. His statement that certain of the witnesses were called as witnesses for the co-defendant of the respondent, and did not testify on behalf of the respondent, "except in a general manner in connection with H. F. Kron * * * and that they did not testify on behalf of Oscar Kron, as contradistinguished from H. F. Kron," is an admission that they did in some respects, or upon some matters, testify in behalf of the respondent. So, too, his statement that other witnesses "did not testify as to any separate issue as made by the answer of Oscar Kron," does not sufficiently show that the items for their defense as witnesses should be stricken from the cost bill. The character of their testimony at the trial is not a test of the necessity for incurring the expense of subpœnaing them as witnesses. The memorandum of costs filed by the respondent is supported by the affidavit of his attorney that "the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred in said action," and, unless controverted, should control the decision of the court.

The fact that the items for the fees of the Sheriff, the clerk and the reporter were for services performed for both defendants, and not "for services performed for Oscar Kron alone," would not authorize the court to strike these items from the cost bill. The respondent may have himself paid all of these items, and if so they were expenses necessarily incurred by him in his defense.

The order appealed from is affirmed.

HARRISON, J.

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

[Filed at Sacramento, March 28, 1891.]

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

For appellant, Justin Jacobs.

For respondent, C. G. Lamberson.

IN BANK.

ESTATE OF J. H. DANIELSON, DECEASED, EDWARD ERLANGER, Appellant, vs. WM. DANIELSON, Respondent. } No. 14,058.

J. H. Danielson died intestate and unmarried, leaving two brothers in this State.

March 13, 1890, the appellant, who was not a relative of decedent, filed a petition asking for letters and at the same time the written consent of Theodore Danielson, a brother of deceased, to his appointment.

March 24, 1890, Theodore Danielson filed a petition asking for letters for himself.

April 7, 1890, the court appointed both petitioners administrators, and both qualified.

April 29, 1890, William Danielson, another brother of the decedent, who had been temporarily absent from the State, filed a petition asking that Erlanger's appointment be revoked, and that he be appointed in his stead.

July 9, 1890, the court, after due notice, made an order revoking the letters to Erlanger and appointed William Danielson. In making this order the court assumed to be acting under Section 1383, C. C. P. From these orders Erlanger appeals. July 16, 1890, the notice of appeal was served and filed.

No undertaking on appeal was filed, but according to a statement in the transcript an order was made September 15, 1890, dispensing with security on appeal. Such order is supposed to be authorized by Section 946, C. C. P. It is also contended that no bond was required under Section 965, C. C. P.

We cannot agree with this contention. Plainly on this appeal the appellant is not acting in another's right in the sense of Section 946, C. C. P. And we think it equally evident that Section 965 has no application to this case. This is not a proceeding had upon the estate of which he was administrator within the purview of that section. In the first place he was not administrator. Whatever effect his appeal, when perfected, would have upon the order removing him, it was in full force until then. It follows that when he filed his notice he was not such an officer, and then had no administrator's bond. Suppose the contrary were held, and the order removing him was affirmed. How could his sureties be held for costs incurred after his duties as administrator had ceased?

But the section has reference to matters in which the estate is interested. This is his personal matter. The undertaking of his sureties is that he shall faithfully perform the duties of his office. How can he be said to be discharging official duty in appealing from an order relieving him from such duty? It is true the Legislature has the power to provide for obligations not mentioned in the bond, or entirely outside of its apparent scope, and one becoming surety after the law has been enacted will be bound accordingly, for he will be presumed to know of the law. But this is a harsh rule, and the Legislature will not be presumed to have intended such consequence, unless the intent is clear. Here the intendments are all the other way. We think the appeal should be dismissed.

TEMPLE, C.

We concur:
BELCHER, C.,
VANCLIEF, C.

THE COURT.

For the reasons given in the foregoing opinion, the appeal is dismissed.

Letter from Hon. J. W. Husted.

Hon. James W. Husted, who is serving his sixth term as Speaker of the Assembly of the State of New York, writes:

"STATE OF NEW YORK,
ASSEMBLY CHAMBER,
ALBANY, Jan. 16, 1890.

"I desire once more to bear my testimony to the value of ALLCOCK'S POROUS PLASTERS. I have used them for twenty-five years past, and can conscientiously commend them as the best external remedy that I have known. Years ago, when thrown from a carriage and seriously injured, I gave them a thorough trial. In a very short time the pain that I was suffering disappeared, and within a week I was entirely relieved. On another occasion, when suffering from a severe cough, which threatened pulmonary difficulties, which I was recommended to go to Florida to relieve, I determined to test the plasters again. I applied them to my chest and between the shoulder blades, and in less than a fortnight was entirely cured. On still another occasion, when suffering from an attack of rheumatism in the shoulder to such an extent that I could scarcely raise my arm, I again resorted to the plasters, and within a very few days the rheumatism entirely disappeared. I have them constantly by me, whether at home or abroad. My family as well as myself have found them to be a sovereign remedy, both for external and internal troubles. I never had but one kidney difficulty in my life, and the application of the plasters cured me in a week. I desire, as I said before, to bear my testimony in a public way to their efficacy, and I know of no better way of doing it than by giving you my personal experience."

"Parson" Davies.

"Parson" Davies has told the story how he gained his sobriquet. Said he: "A number of years ago I was managing Dan O'Leary, the great pedestrian, in a match at a popular garden in New York that we rented of old W. H. Vanderbilt, now deceased. Mr. Vanderbilt seemed to take considerable interest in O'Leary, and would come over and stand by the fence, looking on for hours at a time. In those days I used to wear a dark suit of clothes, with a coat cut Prince Albert style. Well, one day Vanderbilt saw me talking to O'Leary, and he asked of a bystander, pointing to me, who that clerical-looking man was. When informed who I was he said he never would have believed it, for I looked more like a parson than a sporting man. That little conversation got into the Associated Press and I have been styled Parson Davies ever since."

EASE your cough by using Dr. D. Jayne's Expectorant, a sure and helpful medicine for all throat and lung ailments, and a curative for asthma.

Miscellaneous.

No one doubts that Dr. Sage's Catarrh Remedy really cures Catarrh, whether the disease be recent or of long standing, because the makers of it clinch their faith in it with a $500 guarantee, which isn't a mere newspaper guarantee, but "on call" in a moment.

That moment is when you prove that its makers can't cure you.

The reason for their faith is this:

Dr. Sage's Remedy has proved itself the right cure for ninety-nine out of one hundred cases of Catarrh in the Head, and the World's Dispensary Medical Association can afford to take the risk of your being the one hundredth.

The only question is—are you willing to make the test, if the makers are willing to take the risk?

If so, the rest is easy. You pay your druggist 50 cents and the trial begins.

If you're wanting the $500 you'll get something better—*a cure!*

DR. ABERNETHY'S
GREEN GINGER BRANDY.

Cures CRAMPS and COLIC

"It is composed of the purest materials, and represents the full medicinal value of Jamaica Ginger in the highest degree of perfection."
WM. T. WENZELL,
Analytical Chemist.

Sold by Druggists and Wine Merchants.

JOS. N. SOUTHER MANUFACTURING CO.,
SAN FRANCISCO.
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DR. LESLIE'S
SPECIAL
PRESCRIPTION
IS THE ONLY KNOWN
REMEDY IN THE
WORLD
THAT WILL ABSOLUTELY
CURE
SICK HEADACHE!

TESTIMONIALS.

TOD & CRAWFORD,
Commission Merchants and Dealers in Building Material.

SANTA ROSA, Cal., Jan. 19, 1891.

BRIGGS MEDICINE CO.—Gents: Yours of the 15th received. I shall be glad to assist you in promoting the sale of Dr. Leslie's Special Prescription. Indeed, most of what I have bought of you in the past four years has been given away, myself having been completely cured after a life-time of headache, as I shall gladly certify. Should you write to either Dr. Markell or Dr. Mason, of this place, you may refer to TOD & CRAWFORD, as to the superiority of your Special Prescription. Yours truly,
WILL. TOD.

Price, 25 Cents. Sold by all Druggists.

Briggs Medicine Co., San Francisco, Cal.
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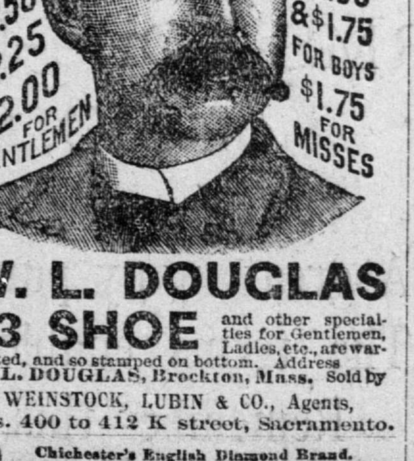
BOOTS AND SHOES DRESSED WITH
Wolff's ACME Blacking
NEVER GET HARD AND STIFF.
WATERPROOF and warranted to preserve leather, and keep it soft and durable.

10c 10c 10c 10c Will pay for the Cost of Changing Plain White Glass vessels to Ruby, Emerald, Opal, or other Costly Glass. 10c 10c 10c 10c

PIK-RON FOR GLASS WILL DO IT.

$5.00. $4.00 $3.50 $2.50 $2.25 $2.00 FOR GENTLEMEN



$3.00 $2.50 $2.00 FOR LADIES $2.00 & $1.75 FOR BOYS $1.75 FOR MISSES

W. L. DOUGLAS
$3 SHOE and other specialties for Gentlemen, Ladies, etc., are warranted, and so stamped on bottom. Address W. L. DOUGLAS, Brockton, Mass. Sold by

WEINSTOCK, LUBIN & CO., Agents,
Nos. 400 to 412 K street, Sacramento.

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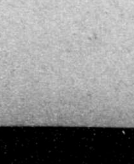
PENNYROYAL PILLS
Original and Only Genuine.



SAFE, always reliable. LADIES ask Druggist for *Chichester's English Diamond Brand* in Red and Gold metallic boxes, sealed with blue ribbon. Take no other. *Refuse dangerous substitutions and imitations.* As Druggists, or send 4c. in stamps for particulars, testimonials and "Relief for Ladies," *in letter*, by return Mail. 10,000 Testimonials. *Name Paper.*
Chichester Chemical Co., Madison Square, Philada., Pa.
Sold by all Local Druggists.

Capay Valley Lands.

A CAPAY COLONY.

Busy Fruit-Growers in a Pretty Yolo Valley—Tancred and Its Adjoining Farms.

IN THE SPRING OF LAST YEAR Robert A. and Neal D. Barker associated themselves with William McKay, all of Oakland, with a view of searching out a suitable location in which to engage in the profitable occupation of fruit-growing. After visiting many localities, they decided on the Capay Valley, Yolo County, and the Rhodes tract at Tancred.

Negotiations were opened with the Capay Valley Land Company, owning the tract in question. With W. H. Mills, the General Agent of that company, they arranged for the purchase of about 220 acres of foothill land. This being more than they had thought of taking for their own use, they spoke to a number of friends about it, with the result that the tract was divided among the following people: B. L. Hickok, 40 acres; W. T. Barnett, 20 acres; N. T. Greathead, 20 acres; Mrs. L. Greathead, 20 acres; W. McKay, 20 acres; N. D. Barker, 20 acres; R. A. Barker, 20 acres; J. P. Brownlee, 20 acres; E. H. Haslett, 10 acres; Joseph Barker, 10 acres; A. W. Kelly, 10 acres, and Frederick Kelly, 10 acres.

So far this had been merely a private venture of the gentlemen above named, but in talking up the question of dividing the land already purchased, it was found that so many more would like to join it than the area of the purchase would admit of, that it was suggested on all hands, "Why not get some more land and divide it up in the same way?" Then followed the idea of a stock company to take hold of a larger tract and arrange for the cultivation of the whole of it, after subdividing it according to the requirements of the subscribers. A provisional board was formed, a prospectus issued, and finally, on the 5th of June, 1890, the Western Co-operative Colonization and Improvement Company was duly registered and proceeded to business, with the following officers: President, William McKay; Vice-President, M. P. Brown; Directors—H. C. Ellis, Charles Brooke and R. A. Barker; Secretary and General Manager, Neal D. Barker; Solicitor, C. E. Snook; Treasurer, First National Bank of Oakland.

The balance of the tract, 373 acres, was purchased. A contract was entered into for the purchase of a large number of fruit trees, vines, etc. This early purchase of trees was the means of saving between $3,000 and $4,000 to the company, the prices in some cases having more than doubled since then.

The ideas which the prospectus set forth have been but slightly modified and the progress of the company has been uninterrupted. Those who went into it doubtingly have become enthusiastic, and almost all the members arranged to set out all their lands in fruit trees, etc., the first year. Consequently in this, the first season, some 40,000 trees and between 20,000 and 30,000 vines will be planted.

The satisfactory working of this scheme has had the effect of attracting considerable attention to the work of the Colony Company, and a number of people are now desirous of joining in with them. An additional 200 acres have been added to the sixty acres originally purchased.

For the company is predicted a very bright future, as well as for the beautiful valley in which their operations are conducted. How this marvelous little garden has come to be so long neglected is a puzzle to every one who has visited it, but one thing is very sure, and that is that this neglect will never again be felt in the valley.

The fruits set out are mostly of the standard varieties—peaches, apricots, Bartlett pears, prunes, figs, raisin grapes, etc., while along both sides of the avenues, throughout the tract, walnuts will throw their graceful shade. A considerable number of citrus trees are also being set out; quite a sufficient number to demonstrate that these fruits can be successfully grown in the valley, about which the colonists appear to have no doubt, provided proper care is given to the young trees. Neal D. Barker, General Manager of the company, resides on the tract, and to his care is to be ascribed much of the success of the venture.

Mention should be made of the town-site, about which there is a pleasant innovation which might with profit be followed by more ambitious places. A small park of some three acres has been laid out right in the center of the town. This park it is proposed to beautify by planting in it from time to time as many of the beauties and curiosities of tree and shrub life as may be obtained by diligent search and a wise expenditure of money. It is not expected that Tancred will ever be a large and busy city, but it is thought that it can be made a very pleasant little place to dwell in.

A petition has been circulated recently and very largely signed, asking the county to accept Island avenue, on the colony tract, as a county road, and to build a bridge across Cache Creek at this point, in order to give the settlers on the east side of the creek access to Tancred Station. The Tancred colonists are quite willing to give the necessary right of way, and are very desirous of having a bridge there, as the colony lands extend along both sides of the stream. It is thought that it would be a very wise expenditure of public money to grant them this very necessary improvement, as the operations of such companies are of widespread benefit to the whole county and State. The attractions and comforts of the cities are well known, but to those who are willing to settle on the land and show that the country also affords attractions and comforts and ways of making money pleasantly, every inducement should be held forth.

The following is a list of the principal members of the Tancred Colony, with the number of acres owned by each, and a fact worthy of mention is that in each contract or deed issued by the Colony Company there is a provision that no intoxicating liquor shall ever be manufactured or sold on the land. The apparent success of the enterprise shows that the ideas and plans of the colony, as set forth in the prospectus some time ago, are not impracticable: C. T. Hull, Berkeley, 5 acres; W. P. Hammon, Oakland, 14 acres; C. S. Kasson, San Francisco, 11 acres; Jos. Barker, 10 acres; A. W. Kelly, Kincardine, Ont., 5 acres; N. T. Greathead, 5 acres; R. G. Greathead, Oakland, 10 acres; R. A. Barker, San Francisco, 10 acres; N. D. Barker, Tancred, 10 acres; Dr. K. Favor, San Francisco, 27 acres; J. P. Brownlee, Kincardine, Ont., 9 acres; W. T. Barnett, Berkeley, 5 acres; M. P. Brown, 10 acres; Chas. Brook, Sr., Oakland, 10 acres; W. C. Boutelle, Berkeley, 20 acres; Mrs. T. A. Crelin, Oakland, 5 acres; C. H. Peach, Tancred, 5 acres; H. C. Ellis, Oakland, 10 acres; J. Vanstone, Winnipeg, 10 acres; E. A. Vanstone, Tancred, 5 acres; E. Wadsworth, Sacramento, 5 acres; M. A. Thomas, Oakland, 6 acres; James Graham, San Francisco, 11 acres; A. Stark, 12 acres; J. Stark, 10 acres; Mrs. M. Vrooman, 5 acres; C. E. Snook, 10 acres; C. T. Greathead, 12 acres; Wm. McKay, 5 acres; Mrs. Wm. McKay, Oakland, 5 acres; Mrs. E. C. Wooley, Brooklyn, N. Y., 10 acres; Mrs. H. Beckley, Oakland, 5 acres; T. A. Marriett, 5 acres; J. C. Harrison, Tancred, 5 acres. The land reserved by the Colony Company, including townsite, consists of 61 acres.

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