

Galpin Vs. Page

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Appellant : Galpin

Respondent : Page

Judgement :

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U.S. Supreme Court Galpin v. Page, 85 U.S. 18 Wall. 350 350 (1873)

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Galpin v. Page

85 U.S. (18 Wall.) 350

ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF CALIFORNIA

SYLLABUS

1. Where in suits brought in a state court to settle an alleged co-partnership between the plaintiffs and a deceased partner, the supreme court of the state decided that there had been no sufficient service on an infant defendant who had succeeded to an undivided interest in the property of the deceased partner, and consequently that the lower court had had no authority to appoint a guardian *ad litem* for such infant, and therefore reversed a decree directing a sale of the property of the deceased, such adjudication is the law of the case, and is binding upon the circuit court of the United States in an action brought by a grantee of the heirs of the deceased against a purchaser at a sale under such decree.

2. A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited authority; their jurisdiction must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face.

3. The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. When the record

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states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact or that the fact was otherwise than as averred.

4. The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits and over proceedings which are in accordance with the course of the common law.

5. The tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits.
6. When, by legislation of a state, constructive service of process by publication is substituted in place of personal service and the court upon such constructive service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, the statutory provisions must be strictly pursued.
7. Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of the common law -- that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.
8. The law imputes to an attorney knowledge of defects in legal proceedings for the sale of property taken under his direction.
9. The title of an attorney purchasing property at a judicial sale decreed in proceedings in which he acted as an attorney falls by the law of California with the reversal of the decree directing the sale, independent of defects in the proceedings, and conveyances after such reversal pass no title as against a grantee of the original owner of the property.

Philip Galpin brought an action against Lucy Page for the possession of certain real property situated in the City of San Francisco. The case was tried by the court

by the stipulation of the parties without the intervention of a jury. Both parties claimed title to the premises from the same source, Franklin C. Gray deceased, who died in the City of New York, in July, 1853, intestate, possessed of a large property

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in California, both real and personal. Of the real property the premises in controversy were a portion. The deceased left surviving him a widow Matilda, of whom a posthumous child was born in December afterwards, named Franklina. By the statute of California, the entire estate of the deceased vested in the widow and child in equal shares.

The plaintiff asserted title to the demanded premises through conveyances authorized by the Probate Court of the City and County of San Francisco, which administered upon the estate of the deceased. The defendant claimed title under a purchaser who bought at a commissioner's sale had under a decree of the district court of the state rendered in an action brought to settle the affairs of an alleged co-partnership between the deceased and others. It was admitted that the plaintiff acquired the title unless it had previously passed to the purchaser at the commissioner's sale. It was therefore upon the validity of the decree in the district court and the consequent sale and deed of the commissioner that the present case was to be determined.

The action in which that decree was rendered arose in this wise:

In February, 1854, William H. Gray a brother of the deceased, brought a suit in equity in the district court of the state (which embraced at the time the City of San Francisco) against Joseph C. Palmer and Cornelius J. Eaton, who had been appointed administrators of the estate of the deceased, and against the widow, Matilda, and James Gray, the father of the deceased. In his bill the complainant alleged that a co-partnership had existed between himself and the deceased which embraced commercial business in which the latter was engaged and the purchase and sale of real estate; that the co-partnership business was carried on,

and the titles of the real property purchased were taken in the individual name of the deceased, but that the complainant was interested in all its business and property to the extent of one-third. The object of the suit was to have the affairs of the alleged co-partnership settled, and to obtain a decree awarding one-third of its property to the complainant.

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The allegation of the bill that a dormant and universal co-partnership had existed between the complainant and the deceased was without any just foundation in fact, for, as hereinafter mentioned, it was afterwards held by the supreme court of the state to be unsupported by the evidence in the case.

The bill omitted to make the child, Franklina, a party, and accordingly, in June following, a supplemental or amendatory bill was filed by the complainant, referring to the original bill and stating the birth of the child, that she was entitled to share in the estate of the deceased, and that she was absent from the state, a resident with her mother in Brooklyn, in the State of New York and praying that she might be made a party defendant, that a guardian *ad litem* might be appointed for her, and that the complainant might have the same relief prayed in the original bill.

Subsequently an order was made by the court directing service of the summons upon the new defendant by publication. It was preceded by a recital that it appeared to the satisfaction of the court that the defendant resided out of the state and that she was a necessary party to the action. It was not stated in the order in what way the facts recited appeared. It seemed probable that the court might have acted upon the statements of the supplemental complaint. The statute of the state which authorizes constructive service by publication is as follows:

"When the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof or a county judge, and it shall in like manner appear that a cause of action exists against the

defendant in respect to whom the service is to be made, or that he is a necessary or property party to the action, such court or judge may grant an order that the service be made by the publication of the summons. [[Footnote 1](#)] "

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In December following, upon the petition of the plaintiff, a guardian *ad litem* was appointed for the child. The other defendants appeared by attorneys and answered.

In January, 1855, Eaton, who had been a clerk of the deceased, and who, as administrator, was made defendant in the above action of Gray, resigned his trust and commenced a suit in the district court of the state against Palmer, the remaining administrator, and against the widow and child. In his bill he also alleged that a co-partnership had existed between him and the deceased, that such co-partnership embraced all the business and real estate transactions of the deceased, and that his interest in the partnership and its property was one-fourth.

In this action, publication was made of the summons issued against the defendant Franklina, but it nowhere appeared in the record that any application was ever made to the court or judge thereof for an order directing the publication, or that any such order was ever made. So far as appeared from the record, it was the voluntary act of the complainant without judicial authority or sanction. The supreme court afterwards held that no sufficient service was ever made of the summons issued. In September following, after the publication thus made, upon application of the complainant, the same person was appointed guardian *ad litem* for the infant defendant in this action, who had previously been appointed such guardian *ad litem* in the other action. The other defendants appeared by attorney and answered.

On the 23d of October following, upon the stipulation of the guardian thus appointed and the attorneys of the other defendants, the two actions were consolidated into one. Four days subsequently, a decree was entered in this consolidated action, and from a certificate of the judge appended to the decree, it

would seem to have been entered without trial and by consent and agreement of the parties. By this decree it was adjudged that a co-partnership had existed between Eaton and the deceased, which embraced all the property, real and personal, and all the business of each

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of them, and that in this co-partnership Eaton had an interest of one-fourth; that there had also existed at the same time a co-partnership between Gray and the deceased, which also embraced all the property, real and personal, and all the business of each, and that in this co-partnership Gray had an interest of one-third; that the latter co-partnership was subject to the co-partnership with Eaton, and that therefore Eaton should take one-fourth of the estate, and Gray one-third of the remaining three-fourths, and that the residue should be equally divided between the widow and child. By the decree, a reference was also ordered to a commissioner to take and state an account of the business profits and property of the two co-partnerships, with directions upon the confirmation of his report to sell all the property, real and personal, of both co-partnerships, and upon the confirmation of the sales to execute proper conveyances to the purchasers.

The commissioner stated an account as required, his report was confirmed, and by a decree of the court, made in April, 1856, a sale of the entire property of the two alleged co-partnerships was ordered. The sale was had under this decree in May following. At that, sale the premises in controversy were bid off by Gwyn Page, one of the attorneys of the plaintiff, Gray and to him the commissioner executed a deed. Page subsequently sold and conveyed an undivided half of the premises to J. B. Crockett, his law partner, also one of the attorneys of the plaintiff, Gray and the latter in June, 1863, conveyed his interest to Lucy Page, the defendant in the case. The interest of Gwyn Page in the remaining half passed by devise to the defendant.

On appeal to the supreme court of the state, the decree of the district court was, at the October Term of 1857, reversed on the ground that no sufficient service of summons was made upon the infant Franklina under the statute, in the case of

Eaton against Palmer, and that until such service, no guardian *ad litem* could be appointed for her, and on the further ground that the evidence presented had not established a co-partnership between William H. Gray and the

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deceased. The case was accordingly remanded to the district court, and afterwards both suits were dismissed.

The circuit court gave judgment in the suit below for the defendant, and the plaintiff thereupon brought the case here on writ of error. In its opinion, which accompanied the record and in which the circuit court went into an elaborate argument to show that the District Court of California had, when its decree was rendered, apparently, jurisdiction, the circuit court held that the record in the state court could not be attacked collaterally unless it affirmatively showed that the court did not have jurisdiction. Its language was as follows:

"The record in the consolidated action is here attacked collaterally, and not on appeal, or in a direct proceeding of any kind to reverse, set aside, or vacate the decree. The rule is different in the two cases. When attacked collaterally, it is not enough that the record does not affirmatively show jurisdiction, but, on the contrary, it must affirmatively show that the court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated on some direct proceeding taken for that purpose. "

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MR. JUSTICE FIELD, after stating the facts of the case, delivered the opinion of the Court as follows:

The supreme court of the state in its opinion, to which we are referred in the findings, speaks of its decision as though there were two separate decrees before it, but this is an evident inadvertence, as there was but one decree, and that was reversed for the reasons assigned as applying to proceedings in the separate suits before their consolidation. After the reversal of the decree, it is possible that the

suits proceeded independently of each other as before their consolidation, until the dismissal disposed of them entirely.

The defendant relies upon the validity of the decree of the district court, notwithstanding its subsequent reversal, to uphold the commissioner's sale and deed. Her position is this: that the district court of the state was a court of general jurisdiction; that being such, it is presumed to have had jurisdiction both of the subject matter and persons which authorized the rendition of the decree in question; that such presumption is conclusive, and the validity of the decree cannot be collaterally attacked by any matter outside of the record, and that, therefore, the sale made under the decree before it was reversed is not affected by the reversal.

The position of the defendant was sustained by the circuit court. "The record in the consolidated action," says that court,

"is here attacked collaterally, and not on appeal, or in a direct proceeding of any kind to reverse, set aside,

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or vacate the decree. The rule is different in the two cases. When attacked collaterally, it is not enough that the record does not affirmatively show jurisdiction, but, on the contrary, it must affirmatively show that the court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated on some direct proceeding taken for that purpose."

If the rule as thus stated were universally true, it would not support the decree in the case at bar, for the record in the consolidated action does affirmatively show that the district court never acquired jurisdiction over the person of Franklina C. Gray in one of the actions, and therefore had no more authority to appoint a guardian *ad litem* for her in that action than it had to appoint attorneys for the other defendants. That record embraces the judgment of the appellate court as well as the decree of the district court, and it contains an express adjudication of the appellate court to that effect. The record of itself establishes, therefore, the

invalidity of the decree. The adjudication of the appellate court constitutes the law of that case upon the points adjudged, and is binding upon the circuit court and every other court when brought before it for consideration. The circuit court possesses no revisory power over the decisions of the supreme court of the state, and any argument to show that that court mistook the law and misjudged the jurisdictional fact would have been out of place. There were no facts before the circuit court which were not before the supreme court of the state when its judgment was pronounced.

But the rule of law as stated by the circuit court is not universally true. It is subject to many exceptions and qualifications, and has no application to the case at bar.

It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction

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not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists, the latter will be presumed. This is familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them, there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face.

But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply

the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face, the answer to the attack would always be

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that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.

The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law.

The tribunals of one state have no jurisdiction over the persons of other states unless found within their territorial limits; they cannot extend their process into other states, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. "The authority of every judicial tribunal, and the obligation to obey it," said Burge in his Commentaries, "are circumscribed by the limits of the territory in which it is established." [[Footnote 2](#)] "No sovereignty," says Story in his Conflict of Laws,

"can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals. [[Footnote 3](#)]"

And in *Picquet v. Swan*, [[Footnote 4](#)] the same learned justice says:

"The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits, and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the Court of King's Bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle that a court created within

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and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority."

In *Steel v. Smith*, Mr. Chief Justice Gibson, of the Supreme Court of Pennsylvania, after referring to the citations we have made from the treatises of Burge and Story says:

"Such is the familiar, reasonable, and just principle of the law of nations, and it is scarcely supposable that the framers of the Constitution designed to abrogate it between states which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extraterritorial jurisdiction which would

confound all distinctive principles of separate sovereignty. [[Footnote 5](#)]"

Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length had it not been impugned and denied by the circuit court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and

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has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

When, therefore, by legislation of a state constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every state in the Union. It has been so held by the Supreme Court of California in repeated instances. In *Jordan v. Giblin*, [[Footnote 6](#)] decided in 1859, service of publication was attempted, and the court said that it had already held,

"In proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression."

In *Ricketson v. Richardson*, [[Footnote 7](#)] decided in 1864, the court, referring to the sections of the statute authorizing service by publication, said:

"These sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance."

In *McMinn v. Whelan*, [[Footnote 8](#)] decided in 1866, the plaintiff in ejectment traced his title from one Maume. The defendants endeavored to show that the title had passed to one of them under a previous judgment against Maume. This judgment was recovered against Maume and others, who were nonresidents of the state, upon service of summons by publication. It appeared from the record that a supplemental complaint had been filed in the action, and that the summons published was issued upon

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the original complaint, and not after that had been superseded by the supplemental complaint. It was objected that the publication thus made was insufficient to give the court jurisdiction of the person of the absent defendants; the objection was answered by the position that the judgment could not be questioned collaterally for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed in the absence of evidence on the face of the record to the contrary. But the court held the objection well taken, and after referring to the case of *Peacock v. Bell*, in *Saunders*, said that that case

"involved the question of jurisdiction as to the subject matter of the action and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any intendment of jurisdiction over the person of the defendant

when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued."

But it is said that the court exercises the same functions and the same power whether the service be made upon the defendant personally or by publication, and that therefore the same presumption of jurisdiction should attend the judgment of the court in the one case as in the other. This reasoning would abolish the distinction in the presumptions of law when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And indeed it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. "However high the authority to whom a special statutory power is delegated," says Mr. Justice Coleridge, of the Queen's Bench,

"we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and

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that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions. [[Footnote 9](#)]"

"A court of general jurisdiction," says the Supreme Court of New Hampshire,

"may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to

be without the jurisdiction which does not distinctly appear to be within it. [[Footnote 10](#)]"

The qualification here made that the special powers conferred are not exercised according to the course of the common law is important. When the special powers conferred are brought into action according to the course of that law -- that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment of decree is asked or by seizure or attachment of the property where a judgment *in rem* is sought -- the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this Court in *Harvey v. Tyler*. [[Footnote 11](#)] But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

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The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction. Upon this subject the commentators on Smith's Leading Cases, after referring to numerous decisions holding that in such cases the record must show a compliance with the provisions of the statutes conferring the special jurisdiction, very justly observe that,

"the inconveniences which may occasionally result from this course of decision are more than compensated by the lesson which it teaches, that from whatever source

power may come it will fail of effect when unaccompanied by right. [[Footnote 12](#)]"

In the supplemental complaint filed in the action of *Gray v. Eaton* and others, and in the original complaint of *Eaton v. Palmer*, the absence of Franklina from the state and her residence in another state are alleged. The record in the two actions, and of course in the consolidated action, shows that she was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the district court, which otherwise might have been indulged is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides, in case of absent and nonresident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is

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the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the state, it could hardly be expected that it would be followed by a federal court so as to cut off the right of a citizen of another state from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued.

The provisions mentioned were not strictly pursued with respect to the infant defendant. There were various omissions and irregularities in the proceedings taken which prevented the jurisdiction over her from ever attaching. It is unnecessary to specify them, as the effect of some of them has been the subject

of judicial determination by the supreme court of the state. That court has adjudged that no sufficient service was ever made upon her, and that until such service, no guardian *ad litem* could be appointed for her; and that adjudication is conclusive. It follows that the decree against her, and all proceedings founded upon such decree, so far as her rights are concerned, necessarily fall to the ground. Judgment without jurisdiction is unavailing for any purpose.

The decree being thus reversed, the title acquired by Page, the purchaser at the commissioner's sale, falls with it. He was one of the attorneys of the plaintiff Gray and the law imputes to him knowledge of the defects in the proceedings, which were taken under his direction and that of his co-partners, to obtain service upon the infant. The conveyance by him of an undivided half to his law partner, also one of the plaintiff's attorneys, was made after the decree of the district court had been reversed for want of jurisdiction over the infant. The partner also took his interest with knowledge of this defect. The protection which the law gives to a purchaser at judicial sales is not extended in such cases to the attorney of the party, who is presumed to be cognizant of all the proceedings.

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In many of the states it is the law that a purchaser at a judicial sale loses his title upon a reversal of the judgment or decree under which the sale was made where such purchaser is a party to the judgment or decree. In *Reynolds v. Harris*, it was held by the Supreme Court of California that where a plaintiff bought property under a judgment, he must restore it to the defendant on a reversal of the judgment, the court observing, after citing several cases, that the current of authority, broken only by a case or two, went

"directly to the point that a party obtaining through the judgment before reversal any advantage or benefit, must restore what he got to the other party, after the reversal. [[Footnote 13](#)]"

The writer of this opinion endeavored to combat this doctrine in a case in the circuit court of the United States where a purchase had been made under a

decree in that court for the enforcement of a mechanic's lien. In that case, the complainant was mentioned in the decree as a possible bidder, and provision was made for crediting his bid on the amount adjudged due to him. On a reversal of the decree the court sustained the sale, and endeavored in its opinion to show that on principle the same protection should extend to purchasers under judgments and decrees when parties as when strangers. The law, however, of the state does not appear, so far as we are enabled to discover from the decisions of its Supreme Court, to have been changed since the decision in *Reynolds v. Harris*. And according to that law the purchasers being the attorneys of the parties, and standing in the same position as the parties, could not maintain their title independent of any defects of jurisdiction in the proceedings.

The same doctrine prevails in Missouri. "The restitution," says the supreme court of that state,

"to which the party is entitled upon the reversal of an erroneous judgment, is of everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under

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execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie; not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before the reversal. [[Footnote 14](#)]"

The same doctrine is asserted in *McJilton v. Love*, by the Supreme Court of Illinois, [[Footnote 15](#)] and is there stated to be well established by authority, and numerous cases in support of the position are cited. In New York, the doctrine would seem to be settled in the same way. [[Footnote 16](#)] As this case must go back for a new trial, this position can be more fully considered than it appears to have been by the court below.

The defendant in this case acquired her interest, one-half, by devise from the purchaser, Page; and the other half by conveyance from one of the attorneys years after the reversal of the decree.

It follows that the judgment must be

Reversed and the cause remanded for a new trial.

DAVIS, J., did not sit in the case, and took no part in its decision.

[[Footnote 1](#)]

Civil Practice Act of California, section 30; Hittel's General Laws of California, page 724.

[[Footnote 2](#)]

Commentaries on Colonial and Foreign Law, p. 1044.

[[Footnote 3](#)]

Section 539.

[[Footnote 4](#)]

5 Mason 40.

[[Footnote 5](#)]

7 Watts & Sergeant, 451.

[[Footnote 6](#)]

12 Cal. 100.

[[Footnote 7](#)]

26 *id.* 149.

[[Footnote 8](#)]

27 *id.* 300.

[[Footnote 9](#)]

Christie v. Unwin, 3 Perry & Davison 208.

[[Footnote 10](#)]

Morse v. Presby, 5 Foster 302.

[[Footnote 11](#)]

2 Wall. 332.

[[Footnote 12](#)]

Vol. 1, p. 1012.

[[Footnote 13](#)]

14 Cal. 680.

[[Footnote 14](#)]

41 Mo. 416.

[[Footnote 15](#)]

13 Ill. 486.

[[Footnote 16](#)]

Jackson v. Cadwell, 1 Cowen 644.