ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CALIFORNIA.[1]

COURT OF CHANCERY OF NEW JERSEY.[2]

CONSTITUTIONAL LAW.

Regulation of Commerce.—The term "commerce," as employed in section 8, Art. I. of the Constitution of the United States, is not limited to an exchange of commodities only, but includes, as well, "intercourse" with foreign nations, and between the states; and the term "intercourse" includes the transportation of passengers: *People* v. *Raymond*, 34 Cal.

When the Congress, in the exercise of its constitutional right, has by its legislation established regulations of commerce with foreign nations, and among the several states, its authority is paramount and exclusive, and its enactments supersede all state legislation on those subjects. Whether the states could constitutionally exercise this power in the absence of congressional legislation, not decided: *Id.*

In the case where the state has not the constitutional power, by means of direct legislation, to regulate the intercourse of its citizens with foreign nations, and with the other states, it cannot accomplish by indirect methods what it is forbidden to do directly: *Id.*

By the enactment of section 285 of the United States Internal Revenue Act, 2 Bright. Dig. 271, the Act of August 30th 1852, and the Act of March 6th 1855, 10 U. S. Stat. at Large 61, 715, Congress has undertaken to regulate the entire business of transporting passengers by sea: *Id.*

The act entitled "An act to provide revenue for the support of the government of this state from a tax upon foreign and inland bills, passengers, insurance companies, and other matters," passed May 14th 1862, has no reference to the execution of the inspection laws of this state, and is not in the nature of a police regulation, but is a measure designed for revenue purposes only: *Id.*

The stamps which, by the provisions of the act, are required to be purchased from the state, are to be regarded in no other light than as a tax on the contract for passage, to be paid by the passenger. This is a regulation of commerce within the meaning of section 8, Art. I. of the Federal Constitution, and the act is unconstitutional and void: *Id.*

Certificate of Election to ex officio Office.—It is not essential to the right of entry on the discharge of the duties of an *ex officio* office, that the incumbent should receive a separate certificate of election thereto, or take therefor a separate oath of office, when not specially so required by the act creating or regulating such office: *People* v. *Kelsey*, 34 Cal.

Power of Legislature.—The legislature has the constitutional power

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[1] From J. E. Hale, Esq., Reporter; to appear in 34 Cal. Rep.

[2] From C. E. Green, Esq., Reporter; to appear in vol. 4 of his Reports.

by enactment to divest an officer of an *ex officio* office to which he had been elected and duly qualified, by a repeal of the law under which he became invested therewith, provided, where such office be created under the Constitution, such repeal does not in effect abolish such office: *Id.*

In such case, however, this power does not extend to the transfer of an *ex officio* office which, under the Constitution, is required to be filled by election, to the incumbent of another office who has not been elected to such *ex officio* office: *Id.*

The clause, to wit: "Assessors and collectors of town, county, and state taxes shall be elected by the qualified electors of the district, county, or town in which the property taxed for state, county, or town purposes is situated," contained in section 13 of Art. XI. of the Constitution, is imperative and mandatory, and restricts the power of the legislature to a particular mode of providing such assessors and collectors in the first instance, subject to such mode of filling vacancies which may be occasioned by the death, resignation, or other legal disability of the incumbent as the Constitution has, and statute law may, provide: *Id.*

The legislature may by law devolve the office and duties of tax collector upon the incumbent of any other elective office, but such law must precede the election of such officer, and his election must be by the qualified electors of the tax collector's district: *Id.*

The act entitled "An act making the county treasurer of San Joaquin county *ex officio* tax collector," passed April 2d 1866, was not designed to fill a vacancy in the office of tax collector, but it was to make the treasurer, instead of the sheriff, of San Joaquin county tax collector. In so far as the act provides for the transfer of said office to take place before an election of such treasurer occurs, it is unconstitutional and void: *Id.*

Contract. See *Railroad.*

Specific Performance—Laches.—A delay of fifteen years in calling for the specific performance of a parol contract for the conveyance of land, without any attempt to enforce it in the lifetime of the contractor, is a circumstance of great weight against the party seeking performance, and will render necessary more strict and fuller proof, and a closer scrutiny of the evidence: *Eyre* v. *Eyre and Others*, 4 C. E. Green.

Part performance will take a contract out of the Statute of Frauds. when it has been in part performed in such manner that a refusal would be a fraud on the other party. But for this purpose the contract itself must be clearly proved, and the acts of part performance must be referable to the contract alone: *Id.*

Debtor and Creditor.

Fraudulent Conveyance.—A conveyance made in consideration of the grantee's assuming the mortgages upon the property, amounting to one-fourth of its value, declared voluntary and void as against the creditors of the grantor, as to three-fourths of the value; but being positively intended also to delay and defraud creditors, it was declared void *in toto*, and the purchaser (at a sheriff's sale of the property) entitled to hold the same free from all claim of the grantee except for the amount due on such mortgages held or paid by him and the interest thereon, the

rents and profits to be set off against so much of those debts as are due to the grantee: *Mead* v. *Combs*, 4 C. E. Green.

Mortgage fraudulent as to Creditor.—A judgment-creditor purchasing at sheriff's sale, under his judgment, is entitled to have a mortgage upon the property, given by the defendant in execution in embarrassed circumstances, set aside and declared void as against such purchaser on the ground that it was given to delay and defraud creditors, and without consideration: *King* v. *Storey and Others*, 4 C. E. Green.

Bill to set aside Conveyance in fraud of Creditor.—A creditor cannot file a bill to set aside a transfer of property fraudulently made by his debtor, until he has a judgment or execution, such as would give a lien on that property if not transferred: *Green* v. *Tantum*, 4 C. E. Green.

At common law, a judgment or execution gave no lien upon the choses in action of the debtor or debts to him. But by the Act of March 7th 1850, to prevent fraudulent trusts and assignments, and the supplements to the Chancery Act, a creditor upon the return of an execution *nulla bona*, has a lien upon the choses in action of his debtor, and can maintain a suit to set aside a fraudulent assignment: *Id.*

Although a purchaser of property transferred by a debtor to defraud his creditors, pay full consideration and have no notice that the property is transferred to him for that purpose, yet if the circumstances are such from which he must have inferred that such was the object, the sale will be set aside as against a creditor: *Id.*

Deed.

Variation by parol agreements.—Where a deed expresses a consideration, though merely nominal and never paid, no use results to the grantor, and parol proof that the conveyance was intended to be in trust for the grantor will not raise a trust: *Hogan* v. *Jaques and Others*, 4 C. E. Green.

A trust estate cannot be sold by execution: *Id.*

That a deed absolute on its face was really given as security for a debt and intended only as a mortgage, may be shown by parol proof, but the proof must be very plain where the debt does not remain, or is considered as paid by giving the deed: *Id.*

A verbal promise by the grantee to the grantor that he would reconvey the land upon receiving back the amount of his debt will not be enforced; much less against a purchaser for valuable consideration, without notice: *Id.*

Ejectment.

Writ of Restitution.—A party and her tenants, coming into possession of lands, after an action brought to recover possession, under a prior unrecorded deed from two of the defendants in the action, of which plaintiff had no notice when the action was commenced, were properly dispossessed under a writ of restitution, issued on a judgment for plaintiff in said action: *Mayne* v. *Jones*, 34 Cal.

A motion made to set aside the return to the writ, showing the dispossession of said party and her tenants, and to reinstate them in possession, upon a showing of said facts, under the peculiar circumstances of the case disclosed by the record, was properly denied by the court

below. (*Leese* v. *Clark*, 29 Cal. 672, cited as authority, and error in report of that case corrected): *Id.*

Where a defendant, duly served in an action brought to recover possession of lands, was in possession of a portion of the demanded premises as guardian of an infant who held an unrecorded conveyance thereof, of which plaintiff had no notice when the action was commenced: *held*, that such defendant, and the infant and her tenants, who entered subsequent to the commencement of the action, were properly dispossessed under a writ of restitution issued on a judgment for plaintiff in said action: *Id.*

Equity.

Practice.—A complainant cannot dismiss his own bill as to part of the relief prayed, and proceed with the residue; he must apply to amend: *The Camden and Amboy Railroad Co.* v. *Stewart*, 4 C. E. Green.

Party's own Fraud.—A court of equity will not relieve against a conveyance made to prevent the grantor's property from being sacrificed and his creditors from recovering their money. And no subsequent promise for the reconveyance of such property, founded on such fraudulent consideration, will be enforced: *Eyre* v. *Eyre and Others*, 4 C. E. Green.

Parties to Bill.—Where the answer of one of several defendants objects to a bill for want of proper parties, and the controversy as to that defendant is settled before the final hearing, the objection will be disregarded: *Booraem* v. *Wells*, 4 C. E. Green.

In a suit to set aside a conveyance to a trustee to hold in trust for one person for her life, and at her death to such of her children as she may appoint, such children as the *cestui que trust* may have are not necessary parties; their interest is too uncertain and contingent: *Id.*

Executor. See *Will.*

Frauds, Statute of. See *Contract.*

Highway.

Surveyor's Return—Encroachments on.—A return of surveyors of the highways coming up collaterally in this court, cannot be judged void or disregarded for any irregularity or deficiency, if the surveyors had jurisdiction of the subject-matter: *Tainter* v. *Morristown*, 4 C. E. Green.

It is not necessary that a commission be appointed to ascertain the lines of an ancient highway before proceeding to remove encroachments alleged to be thereon, when the true limits and courses thereof can be ascertained with accuracy and certainty, and in fact are so ascertained by survey: *Id.*

Time will not legalize an encroachment upon a public highway: *Id.*

The Act of March 24th 1859 (Nix. Dig. 751), applies not to ancient highways, but to roads not opened, used or worked within twenty years after being laid out: *Id.*

Husband and Wife.

Action by.—Where, pending a suit by a husband and wife for the

specific performance of an agreement to convey real estate to the wife, the wife dies, and her children have not been made complainants, and there is no order that the suit should proceed in the name of the surviving complainant, no decree can be made: *Hand* v. *Jacobus and Wife*, 4 C. E. Green.

Divorce—Evidence.—Divorce, on the ground of adultery, will not be decreed upon the testimony of a *particeps criminis*, herself notoriously unchaste, and in her evidence untruthful and reckless, uncorroborated by any circumstances that lead to the conviction of the defendant's guilt: *Clare* v. *Clare*, 4 C. E. Green.

The proof of adultery, to justify a decree of divorce, must not only be clear and direct, but it must be entitled to and command belief: *Id.*

INFANT. See *Tenant for Life.*

INJUNCTION.

Dissolution of.—An injunction will be dissolved upon the answer only when it denies explicitly the facts upon which the equity of the bill is founded; it is not sufficient that it denies the inference to be drawn from those facts or their effect: *Teasey* v. *Baker*, 4 C. E. Green.

JUDGMENT.

Collaterally attacked for want of Jurisdiction.—The judgment of a court of superior jurisdiction may be collaterally attacked upon the ground that the court by which it was rendered had no jurisdiction, either of the subject-matter or of the person of the defendant, or both: *Hahn* v. *Kelly and Morse*, 34 Cal.

Such facts or circumstances only can be shown or relied on, in support of such attack, as affirmatively appear on the face of the record, or what, under the law as it read at the date of the judgment, constituted the judgment-roll: *Id.*

Verity of Record or Judgment-Roll.—The judgment-roll, as prescribed by the Civil Practice Act, constitutes the record of a court of superior jurisdiction, and, because it imports absolute verity, it cannot be collaterally attacked by proof *aliunde*: *Id.*

It is not essential that the jurisdiction of a superior court should affirmatively appear in the judgment-roll; if it does not, and the contrary does not therein affirmatively appear, jurisdiction will be conclusively presumed: *Id.*

Inspection of the Record.—The rule by which inspection of the record is governed is, that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. In such case, it will be presumed that what ought to have been done was not only done, but rightly done; but where the record states what was done, it will not be presumed that something different was done. A want of jurisdiction affirmatively appears on the face of the record, when whatever was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction: *Id.*

Another rule is, that the whole record must be permitted to speak, as where that portion which is denominated the proof of service, is not

silent, but recites facts and acts done, as constituting the service made, and which, if the record were otherwise silent, would make it affirmatively show a want of jurisdiction of the person of defendant, yet if, in another part, as the judgment, further facts or acts, not irreconcilable with the former, be recited, which establish such jurisdiction, it is sufficient to uphold the judgment: *Id.*

Where the judgment recites the fact that the defendant has been duly served with process, it is a direct adjudication by the court upon the point, and is as conclusive on the parties as any other fact decided in the cause, provided it does not affirmatively appear from other portions of the record, consisting of the judgment-roll, that the recital is untrue: *Id.*

Legal Presumptions as to Jurisdiction of Courts.—The rule is, that the presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of courts of superior or general jurisdiction, which, in this state, comprise all courts of record, and this rule obtains equally, whether their proceedings be by the course of the common law or statute law, or be in the acquisition of jurisdiction of the person of defendant, by making either actual or constructive service of the summons on him; but that no such presumptions are indulged in favor of the jurisdiction or regularity of the proceedings of courts and tribunals of inferior or limited jurisdiction, which, in this state, comprise all courts not of record, and all special boards and tribunals which are created by law and clothed with judicial functions of a limited and special character; and all persons who claim any right or benefit under their judgments must show their jurisdiction affirmatively: *Id.*

LEGACY. See *Will.*

LIMITATIONS, STATUTE OF. See *Highway.*

Right of Redemption, when Barred.—The right of the mortgagee to maintain an action on the debt, and to enforce the lien of the mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal; and when one is barred by the Statute of Limitations the other is also barred: *Arrington* v. *Liscom et al.*, 34 Cal.

Title Under.—An adverse possession of land for the period of time prescribed by the Statute of Limitations, not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the adverse holder: *Id.*

As a Source of Title to Lands.—A party who has been in the exclusive adverse possession of lands for a period of time which, under the Statute of Limitations, vests him with a title thereto, may maintain an action against a party claiming under a record title, to have said adverse claim determined and adjudged null and void as against him: *Id.*

"Title to land is the means whereby the owner of lands has the just possession of his property." A party, under the Statute of Limitations, may acquire an absolute right of possession in lands as against all the world; such a right as, when ousted, will restore him to and effectually protect him in his just possession thereof, even against one having the

written title. An adverse possession, therefore, confers a substantial title, and it is such a title as entitles the holder to all the remedies to quiet his possession that are incident to possessions under written titles: *Id.*

Action to remove Cloud upon Title.—An apparently good record title to land constitutes a cloud upon a title thereto which has been subsequently acquired by adverse possession under the Statute of Limitations, which the holder by adverse possession is entitled to have removed. This statute would have performed but half its mission as a statute of repose, if the party relying upon it, as to a party claiming under a written title, must wait till he is attacked before he can reduce the evidence of his title, which otherwise rests only in parol, to the form of a permanent record: *Id.*

MORTGAGE. See *Limitations.*

Of Chattels.—Under the Act, concerning chattel mortgages, of March 24th 1864, Pamph. L. 493, a mortgage upon chattels situate in a different county from that in which the mortgagor resides, and recorded only in the county where the chattels are situate at the time of the execution of the mortgage, is entitled to priority in payment over another mortgage, of a prior date, but of which the subsequent mortgagees had no notice, and recorded subsequently, though recorded in the county where the chattels lay, and also in that where the mortgagor resided at the time of its execution: *De Courcey and Others* v. *Little and Others,* 4 C. E. Green.

Of Canal-Boat.—By a statute of New York, any mortgage on canal-boats, or a copy thereof, is required to be filed in the office of the auditor of the canal department, and within thirty days next preceding a year from the filing thereof, a copy is required to be again filed, or the mortgage shall be void as against the creditors of the mortgagor or subsequent purchasers or mortgagees in good faith:

Held, upon a bill to foreclose such a mortgage, the second copy whereof was not filed till after the year had elapsed, that the mortgage was valid as against attachments sued out in this state, after the actual filing of such second copy, for wages accrued since such filing, but must be postponed to such wages as accrued before the refiling, as well before as after the default: *Herrick* v. *King and Others,* 4 C. E. Green.

For Collateral Security.—If a mortgagee who holds a mortgage for $10,000 as collateral security for a note of the mortgagor for that amount, at the request of the mortgagor assigns the mortgage to a third person for $7500 in cash, credits this sum on the note, and retains the note, and the balance of $2500 is paid by the mortgagor, such mortgage in the hands of the assignee is a valid security for $7500 only as against subsequent encumbrancers at the time of the assignment. That is the only part of the debt for which it was given that remains unpaid: *Hoy* v. *Bramhall,* 4 C. E. Green.

A conveyance of part of mortgaged premises "subject to the payment of all liens now on the same," does not create a personal obligation on the vendor to pay the mortgage or any part of it; but it makes the part so conveyed as against the residue subject to its proper proportion of the mortgage-debt, and to that only: *Id.*

A mortgagee who holds a mortgage on two parcels, one of which is subject to a second encumbrance, will be compelled first to exhaust the security on which the second encumbrancer has no lien, or to subrogate the second encumbrancer to his claim on the parcel mortgaged only to him: *Id.*

Former Recovery on Bond for part of the Amount.—A suit brought in New York upon a bond by a person to whom it was assigned as collateral security for a less amount, in which only the amount for which it was assigned as collateral security was recovered, and to which the obligee was no party, does not satisfy and extinguish the bond as against the obligee. And in a suit brought by the absolute assignee of the bond and mortgage subsequent to such collateral assignment, he will be entitled to a foreclosure of the mortgage for the residue due upon it, beyond the amount recovered: *Brumagin* v. *Chew*, 4 C. E. Green.

The effect of such recovery will be determined by the law of the state of New York. And the well-established rule that the proceedings in any suit will not affect any one but a party to it, will be assumed to be the law of New York, until it is shown that a different rule is established there: *Id.*

Default of Payment of Interest.—An agreement by an assignee of a bond and mortgage that he would call at the office of the obligor for the interest, does not make that office ever after the only legal place for payment, and is not in form or legal effect an agreement so as to affect the bond: *McCotter* v. *De Groot*, 4 C. E. Green.

But when, in consequence of such agreement, the obligor failed to pay his interest within the thirty days limited by the condition of the bond, equity will relieve him from the forfeiture of his condition by such neglect: *Id.*

A demand by the assignee after the thirty days had elapsed, although he had not called as promised, for the payment of the principal, and a refusal to accept the interest, is notice that he did not mean to be bound by his promise. And where the obligor subsequently offered to pay that interest, and the interest about to become due, but made no tender of the latter interest within the thirty days after it became due, the complainant was held to be entitled to the principal: *Id.*

PARTITION. See *Tenant in Common.*

Proceedings and Return of Commissioners.—Exceptions will not lie to the return of commissioners in a suit for partition (on the ground of inequality of value in the lots). The correct practice in such case is by motion to suppress the return: *Hay* v. *Estell and Others*, 4 C. E. Green.

The court will set aside and quash the return of commissioners of partition when the partition has been made upon wrong principles, or in disregard of the rights of the parties, or where there is great and evident inequality in the division. But to set aside a partition for mere inequality, when there is no partiality or improper conduct of the commissioners, the proof must be clear, and the inequality considerable: *Id.*

The theory that commissioners in partition are, like arbitrators, judges voluntarily chosen by the parties to decide between them, and therefore they are concluded by their judgment, whether right or wrong, if not given corruptly or through favor, dissented from: *Id.*

The question to be considered by the court, on motion to quash the partition, is, whether the inequality is more than can be fairly accounted for by the difference in judgment between men of discretion in valuing the property: *Id.*

PUBLIC ADMINISTRATOR.

Authority to administer on a particular Estate.—The public administrator of the city and county of San Francisco can take upon himself the duties of an administrator of a given estate only by virtue of a special grant from the Probate Court, made upon a petition therefor filed in the matter of such estate. He does not, by virtue of his office, acquire the right to administer upon any particular estate: *In the Matter of the Estate of Hamilton*, 34 Cal.

While one administrator of an estate is in office, there is no power in the probate judge or court to appoint a new one: *Id.*

The order for the appointment, as provided in section 62 of the Probate Act, the qualification of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of administrator of an estate. The appointment is *in fieri* until the appointee has qualified and received his letters: *Id.*

Under our statute, an administrator can only establish his official character, when denied, by the production of his letters with the oath of office annexed, or of a certified copy of the record thereof, made according to the requirements of section 72 of the Probate Act: *Id.*

RAILROAD.

Contract between Connecting Roads as to Division of Fares.—In a contract between companies owning connecting lines of railroad, for the continuous transportation of passengers and freight over both lines, it is lawful to agree upon a division of the fares, by which one company allows part of the fares earned on its line to the other company: *Sussex Railroad Co.* v. *Morris and Essex Railroad Co.*, 4 C. E. Green.

Such contract is valid as to future extensions of the road, even as to such as may be authorized by future legislation: *Id.*

A contract made by a railroad company which by its terms includes any future extension of the road, will include in its operation not only such as were authorized by law at the making of the contract, but such as were afterwards authorized by subsequent legislation: *Id.*

A contract between railroad companies using the same gauge, to transport passengers and freight continuously over both lines, does not imply a contract on the part of either company that it will not change the gauge of its road: *Id.*

A bill for an account of fares received according to a contract previously made between the parties, is not technically a bill for specific performance so as to induce a court of equity to refuse relief on the ground that the contract is inequitable: *Id.*

REVERSION. See *Tenant for Life.*

TENANT FOR LIFE.

Waste—Sale of Reversion.—A life tenant is bound to keep the premises in repair, not excepting dilapidations occasioned by ordinary

wear and tear in the proper use of the premises: *In Matter of Sale of Lands of Mary E. Steele, an Infant*, 4 C. E. Green.

The reversionary estate of an infant will not be sold because there may be a great advantage in the sale to the tenant for life, when the benefit to the infant is doubtful or inappreciable: *Id.*

TENANT IN COMMON.

Partition between—Parol Promise to Convey.—A verbal agreement by one co-tenant with another that he will convey to him his interest in the premises, is no bar to a suit for partition: *Polhemus and Wife* v. *Hodson and Wife*, 4 C. E. Green.

WASTE. See *Tenant for Life.*

Injunction against Cutting down Shade-trees, &c.—The unlawful cutting down of fences, shade-trees, and ornamental shrubbery, is an irreparable injury, and, where established, will be suppressed by the preventive powers of this court: *Tainter* v. *The Mayor of Morristown*, 4 C. E. Green.

WILL.

Legacy—Chargeable on Real Estate.—Where the real and personal estate of the testator have been blended in one common fund, and the personalty is insufficient to pay debts, and the words "not herein otherwise disposed of" are added to the residuary clause, legacies will be charged upon the real estate: *Dey* v. *Dey's Admr.*, 4 C. E. Green.

In determining whether a legacy is chargeable upon the real estate, the court will consider the circumstances of the testator, and the nature and amount of his property: *Id.*

A legacy to a widow, evidently intended by the testator to be paid to her, before the proceeds of his property were invested (in accordance with the directions of the will) for her use, will not be abated in case of a deficiency, in favor of legacies not payable till two years after the death of the widow: *Id.*

Direction to sell Land—Power of Executor.—An executor has no power to sell the lands of his testator, unless directed to do so by the will, either expressly or by implication: *Lippincott's Executor* v. *Lippincott*, 4 C. E. Green.

The appointment of one as executor of a will that directs lands to be sold, does not, of itself, confer on him the power to sell. But if the executor is directed by the will, or bound by law, to see to the application of the proceeds of the sale, or if the proceeds in the disposition of them are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred on the executor by implication: *Id.*

Power of Sale.—If a will direct executors to sell a certain tract after the death of a certain legatee, and contains no other power of sale, a sale in the lifetime of such legatee is void: *Booraem* v. *Wells*, 4 C. E. Green.

A direction to rent out the house and lands devised for the use of a legatee during his life, and to make such other arrangement as the executors might deem expedient for his support on the same, does not by implication give the executors power to sell: *Id.*