S256665

IN THE SUPREME COURT OF CALIFORNIA

LUIS SHALABI

Plaintiff and Appellant

v.

CITY OF FONTANA, et al.

Defendants and Respondents.

REVIEW OF A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO, CASE NO. E069671
SAN BERNARDINO COUNTY SUP. CT., CASE NO.: CIVDS1314694

RESPONDENTS' MOTION FOR ORDER GRANTING JUDICIAL NOTICE OF BRIEFS FILED IN GANAHL V. SOHER, 5 P. 80 (CAL. 1884)

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TABLE OF CONTENTS

A. "Why the Matter to Be Noticed is Relevant to the Appeal" 5

B. "Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court" 6

C. "If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code ... section 451, 452, or 453" 6

D. "Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the .. appeal" 6

CERTIFICATE OF WORD COUNT 8

PROOF OF SERVICE 9

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of Am. of California v. City of Glendale,
4 Cal.2d 477 (1935) 6

Fluor Corp. v. Superior Court,
61 Cal.4th 1175 (2015) 6

Ganahl v. Soher,
5 P. 80 (CAL. 1884) 1, 4, 10

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort,
91 Cal.App.4th 875 (2001) 5

McAdory v. Rogers,
215 Cal.App.3d 1273 (1989) 6

Pac. Indem. Co. v. Transp. Indem. Co.,
81 Cal.App.3d 649 (1978) 6

Smith v. Selma Community Hosp.,
(2010) 188 Cal.App.4th 1 (2010) 5

Statutes

Evid. Code, § 452, subd. (d) 7

Evid. Code, § 459 5

Evidence Code section 451, 452, or 453" 6 ..... 2, 5, 7

Evidence Code section 452 7

Respondents City of Fontana, Vanessa Waggoner, and Jason Perniciaro, hereby make this motion for an order granting Respondents' request for judicial notice of the parties briefs filed in the matter of Ganahl v. Soher, Case No. 8441, Ganahl v. Soher, 5 P. 80 (Cal. 1884). A copy of each brief is attached hereto as **Exhibit 1**.

Upon a party's request, this Court has the same power as any other court to take judicial notice of a matter properly subject to judicial notice. Evid. Code, § 459; Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, 91 Cal.App.4th 875, 881 (2001); Smith v. Selma Community Hosp. (2010) 188 Cal.App.4th 1, 45 (2010) (sua sponte judicial notice).

This motion is governed by Rule 8.252. "To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order." Cal. Rules of Court, rule 8.252, subd. (a)(1). "The motion must state: (A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; (D) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal." Cal. Rules of Court, rule 8.252, subd. (a)(2). "If the matter to be noticed is not in the record, the party must serve and file a copy with the

motion or explain why it is not practicable to do so. The pages of the copy of the matter or matters to be judicially noticed must be consecutively numbered, beginning with the number 1." Cal. Rules of Court, rule 8.252, subd. (a)(3). The Court should grant the present motion, which complies with all of the foregoing requirements.

A. "Why the Matter to Be Noticed is Relevant to the Appeal"

In evaluating this Court's precedent, it is appropriate to determine whether the Court gave "consideration or analysis" to an extant rule or statute. Cf., Fluor Corp. v. Superior Court, 61 Cal.4th 1175, 1223 (2015). In construing this Court's prior opinions, the Court may look to the parties' briefs to determine what issues were considered. See, Bank of Am. of California v. City of Glendale, 4 Cal.2d 477, 485 (1935); Pac. Indem. Co. v. Transp. Indem. Co., 81 Cal.App.3d 649, 659, n.2 (1978) ("Reference to briefs is a permissible method of ascertaining what issues were before a court.").

Respondents request judicial notice of all of the briefs filed in the Ganahl matter, Case No. 8441, which were produced upon request to the California State Archives. (See, **Exhibit 1**). See, McAdory v. Rogers, 215 Cal.App.3d 1273, 1275 (1989) (granting judicial notice of briefs filed in connection with prior published opinion). Because the briefs are relevant to assess the issues considered by this Court in Ganahl, the Court should grant judicial notice of these materials.

B. "Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court"

The briefs in Ganahl were not presented to the trial court, which correctly followed its holding as stated in this Court's opinion without questioning the same. There was no reason to undertake such a comprehensive assessment of Ganahl in the trial court.

C. "If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453"

Under Evidence Code section 452, this Court may take judicial notice of the briefs filed in Ganahl. Section 452 permits judicial notice of: "Records of (1) any court of this state...." Evid. Code, § 452, subd. (d).

D. "Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal"

The briefs filed in Ganahl relate to proceedings occurring long before the judgment subject of the appeal.

Respondents have served and will file a copy of the briefs in Ganahl (**Exhibit 1**") with this motion. The pages of the copy of the matter to be judicially noticed is also consecutively numbered, beginning with RJN

/ / /

000001. For these reasons, Respondents respectfully request that this Court grant the present motion.

DATED: September 27, 2019

Respectfully submitted,

LYNBERG & WATKINS
A Professional Corporation

By: /s/ S. FRANK HARRELL
S. FRANK HARRELL
PANCY LIN
RUBEN ESCOBEDO III
Attorneys for Respondents, CITY OF FONTANA, VANESSA WAGGONER, and JASON PERNICIARO

CERTIFICATE OF WORD COUNT

The text of this brief consists of 1,235 words as counted by the Microsoft Office Word 2016 version word-processing program used to generate this brief.

DATED: September 27, 2019

Respectfully submitted,
LYNBERG & WATKINS
A Professional Corporation

By: /s/ S. FRANK HARRELL
S. FRANK HARRELL
PANCY LIN
RUBEN ESCOBEDO III
Attorneys for CITY OF FONTANA, VANESSA WAGGONER, and JASON PERNICIARO

EXHIBIT "1"

CALIFORNIA STATE ARCHIVES
1020 O Street
Sacramento, CA 95814
(916) 653-2246

CA STATE ARCHIVES
1020 O ST
SACRAMENTO, CA. 95814-5704
916-653-7715

Phone Order

xxxxxxxxxxx2048
VISA
Entry Method: Manual

Amount: $	39.00
Tax: $	0.00
Total: $	**39.00**

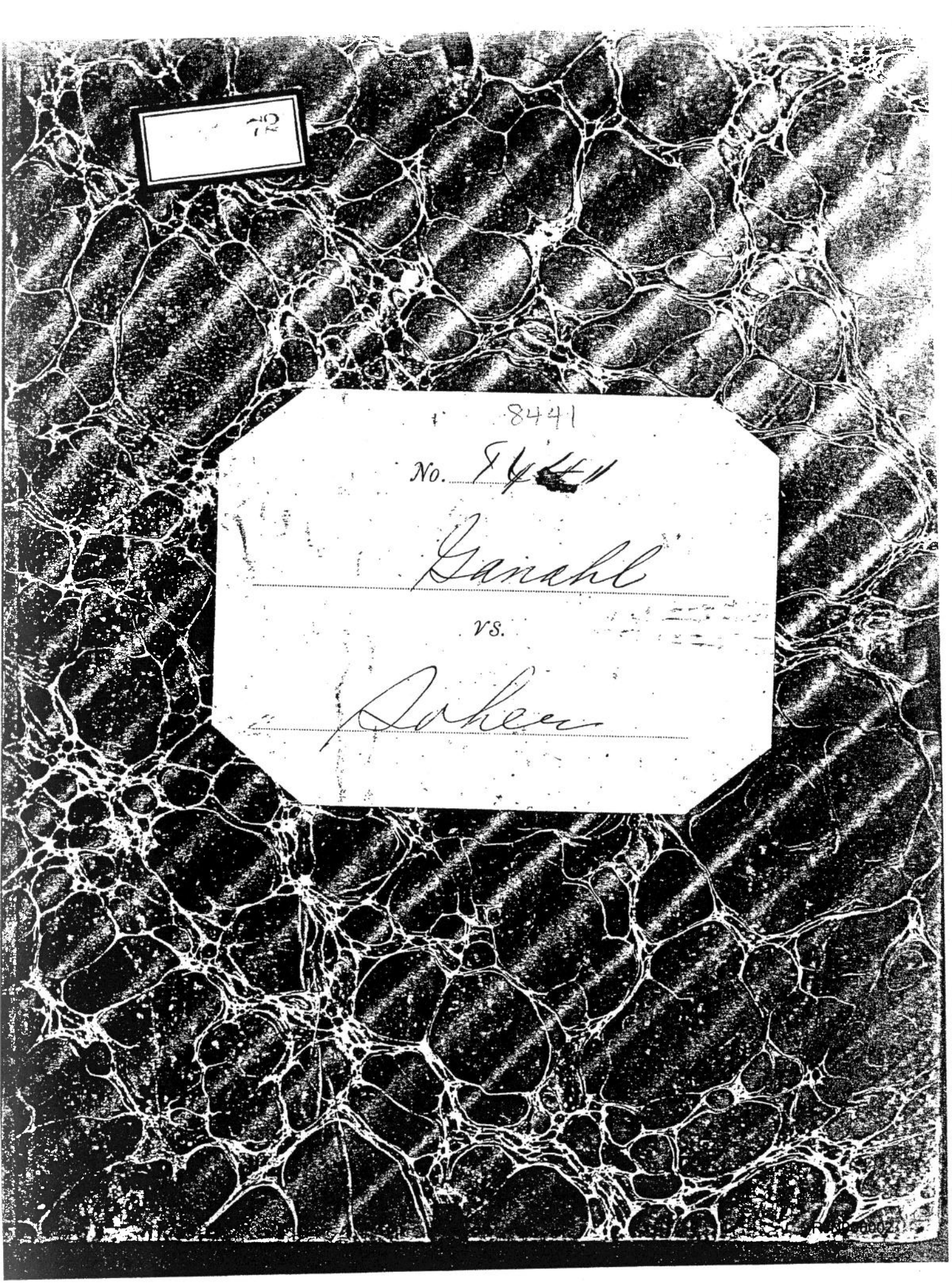
05/30/19 08:02:39
Inv #: 000000001 Appr Code: 08004D
Apprvd: Online
AVS Code: ZIP MATCH Z
CVV2 Code: MATCH M

Customer Copy

THANK YOU!

RECEIPT

RJN000001


8441
No. 1944
Ganahl
vs.
Parker

Original

No. 8441.

In the Supreme Court

of the

State of California.

HENRY GORDON GANAHL ET ALS.,
Appellants,

VS.

LEWIS SOHER ET ALS.,
Respondents.

APPELLANTS' POINTS AND AUTHORITIES.

CARTER P. POMEROY,
Attorney for Appellants.

Filed, Septr. 4, *1884.*

Jno. H. McCarthy *Clerk.*

By L. J. Kibby *Deputy Clerk.*

SAN FRANCISCO:
PRINTING DEPARTMENT OF A. L. BANCROFT & COMPANY.
1884.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

HENRY G. GANAHL ET ALS.,
Appellants,
vs.
LEWIS SOHER ET ALS.,
Respondents.

STATEMENT OF FACTS.

This is an action of ejectment brought to recover possession of certain real estate, situated in the City and County of San Francisco, and known as fifty-vara lot number thirteen hundred and sixty-seven (1367). On the trial in the lower Court the defendants recovered judgment. The plaintiffs moved for a new trial, which was denied. They thereupon brought this appeal from the judgment, and from the order denying their motion for a new trial.

The plaintiffs claim title to the lot in controversy as the heirs-at-law of one Henry Ganahl. The evidence shows that said Henry Ganahl acquired the same by virtue of a grant to him from John W. Geary, the then Alcalde of San Francisco, dated December 10, 1849. Said Henry Ganahl, the original grantee, died intestate in the State of Georgia, on May 12, 1855. At the time of his death he left surviving the present plaintiffs, to wit: Maria Ann Ganahl, his wife; Ann Elizabeth Ganahl, his daughter, and Henry Gordon Ganahl, his son. At the time of his death said plaintiffs were, and ever since have been, residents of the State of Georgia. The plaintiff Henry Gordon Ganahl was born on the eleventh of April, 1855. At the time of his father's death he was, therefore, one month and one day old. The plaintiff Ann Elizabeth Ganahl was born on May 21, 1853. At the time of her father's death she was, therefore, one year, eleven months, and twenty-one days old. The plaintiff Maria Ann Ganahl was of age at the time of her husband's death. The present action was commenced on April 11, 1881.

The defendants, in their answer, deny the title of the plaintiffs, and assert that the same is in

themselves, *first*, by reason of the adverse possession of themselves, their ancestors, predecessors, and grantors, under sections 318, 319, and 1573 of the Code of Civil Procedure; and *second*, by reason of a certain probate sale of the premises in controversy, by one Andrew D. Smith, the alleged administrator of Henry Ganahl, the original grantee, to one Leon Smith, through whom the defendants claim. The validity and effect of such alleged sale are the principal questions at issue, and the facts connected therewith, as the same appear in the transcript, are as follows:

On September 20, 1867, one Andrew D. Smith filed in the Probate Court of the City and County of San Francisco a petition for letters of administration on the estate of Henry Ganahl, deceased; an order was thereupon made, on the same day, directing the clerk to give notice of such application, "in the manner required by law," by posting; such order appointed Monday, the thirtieth day of September, 1867, at 11 A. M. of said day, as the time for hearing such application; notice of such application, as ordered, was accordingly posted on September 20, 1867, by one D. A. Baum, in three places, one at the Court House, one at the U. S. Post Office, and one at the Hall of Records, in said

city and county. An affidavit showing such posting was made by the said D. A. Baum, on September 21, 1867, and filed on September 30, 1867. On September 30, 1867, an order was attempted to be made by the then probate judge, ordering the issuance of letters of administration to one Andrew D. Smith. The record of such probate proceedings further shows the issuance of letters of administration to said Andrew D. Smith, on the estate of Henry Ganahl; the appointment of appraisers thereon; the inventory and appraisment thereof; the petition for the sale of said lot 1367, (being the property in controversy;) notices of hearing of said petition; the order directing the sale to be made; the return of the sale, showing it to have been made to one Leon Smith; the order confirming the sale, with notices of the hearing of the same. It further was shown that none of the plaintiffs appeared in such probate proceedings. To the introduction in evidence of the judgment roll of said probate proceeding, the plaintiffs objected, on the ground that it appeared on the face of the record, that the Probate Court never acquired jurisdiction in the matter of said estate, by reason of the insufficiency of the posting of notices of the hearing of

the petition of Andrew D. Smith, for letters of administration, in this: that it appeared upon the face of said record, that said notice was only posted for nine days before said hearing, whereas the law requires, and did at such time require, a posting of at least ten days before such hearing. The court overruled such objection, to which ruling the plaintiffs duly excepted. To the introduction of the deed from said Andrew D. Smith to Leon Smith the plaintiffs objected, for the same reason. Their objection was overruled, and an exception taken. In his charge to the jury, the court instructed them that, under section 1573 of the Code of Civil Procedure, the present action was barred, as to the plaintiff Henry G. Ganahl, for the reason that the same was not commenced within three years after he arrived at the age of majority. The plaintiffs excepted to such charge. (Transcript, pages 57-59.) The jury gave verdict for the defendants.

First. The Court erred in admitting in evidence the record of the proceedings in the estate of Henry Ganahl, deceased, and the deed from Andrew J. Smith to Leon Smith. Such proceedings were void *in toto*. The Court never acquired jurisdiction over such matter, nor over the persons of the

present plaintiffs, by reason of the insufficiency of the notice of the hearing of the application for letters.

I.

At the time when this attempted probate proceeding was instituted, the law provided that "when any petition praying for letters of administration has been filed, the clerk must give notice thereof by causing notices to be posted in at least three public places. * * * *Such notice must be given at least ten days before the hearing.*" (C. C. P., sec. 1373; Probate Act, sec. 60.) The following section provides that parties interested may appear and contest the application; and the next section authorizes the issuance of letters, *after it has been "first proved that notice has been given according to law."*

In the case at bar, the petition for letters was filed on September 20, 1867; the hearing was set for, had, and letters issued on the thirtieth of the same month. Between these two dates, the required notice of ten days could not be given. A hearing on the ninth day, or on the tenth day itself, would be beyond the jurisdiction of the Court, and its subsequent action in appointing an

administrator, and his entire acts, would be utterly null and void.

That the required notice of ten days could not be given before the hearing, is plain from the simplest calculation. The day on which the notice was posted must be excluded from the calculation. The first day, therefore, in which the notice commenced to run was September 21st. The ten days notice to which the parties interested were entitled before the hearing, would not have expired until the end of September 30th, and a hearing on that day was one day too soon for the Court to acquire jurisdiction. Even if it is held that the notice commenced to run on the day it was posted, still ten full days before the hearing could not have elapsed. The record shows that the hearing was set for and had on a Monday. The tenth day, counting the day of posting as the first, would have fallen on the preceding Sunday. By the direct provision of the statute, the notice should then have been continued for one more day. It is clearly demonstrated, therefore, that on whatever day the notice is held to have commenced running, the hearing was had one day too soon.

Williams vs. Supervisors, 58 Cal., 237.

Alameda Macadamizing Co. *vs.* Huff, 57 Cal., 331.
People *vs.* McCain, 50 Cal., 210.
People *vs.* McCain, 51 Cal., 360.
Price *vs.* Whitman, 8 Cal., 415, 418, and cases cited.
Himmelman *vs.* Cahn, 49 Cal., 285.
Pearson *vs.* Pearson, 46 Cal., 609-635.
Cal. Code Civil Proc., sec. 12.
Practice Act, sec. 530.
Meredith *vs.* Chaney, 59 Ind., 466.
Handley *vs.* Cunningham, 12 Bush, 402.
Protection Life Ins. Co. *vs.* Palmer, 81 Ind., 88.
Wood *vs.* Webb, 52 Ala., 452.
Wood *vs.* Commonwealth, 11 Bush, 220.
Bemis *vs.* Leonard, 118 Mass., 502.
Walsh *vs.* Boyle, 30 Md., 262.
Thorne *vs* Mosher, 20 N. J. Eq., 257.
Duffy *vs.* Ogden, 64 Pa. St., 240.
Avery *vs.* Stewart, 7 Am. Dec., 250, and note.
Murfree's Heirs *vs.* Carmack, 26 Am. Dec., 234, and note.
Early *vs.* Dow, 16 How., 611.
Political Code, sec. 3259.

II.

That the giving of the notice and compliance with all other requirements of the statute are prerequisite to the jurisdiction of the Probate Court, and if such notice is insufficient, the Court's subsequent acts are void and may be collaterally attacked, is settled by abundant authority.

Pearson *vs.* Pearson, 46 Cal., 609-635.
Beckett *vs.* Selover, 7 Cal., 234-237.
Estate of Boland, 55 Cal., 310.
Pryor *vs.* Downey, 50 Cal., 388.
McMum *vs.* Whelan, 27 Cal., 300.
Freeman on Judgments, sec. 125 and cases cited.
Code of Civil Procedure, sec. 1916.
Seaverns *vs.* Gerke, 3 Sawy., 353.
Galpin *vs.* Page, 18 Wall., 350.

Second. The Court's instruction that the plaintiffs' action was barred by section 1537 of the Code of Civil Procedure, because the same was not commenced within three years after the sale, was erroneous. Such section has no application to void sales by persons acting as executors or administrators, where the invalidity results from an entire want of jurisdistion in the Court over the

matter of the estate. The operation of the section is confined to sales by those who are executors or administrators in fact.

Seaverns *vs.* Gerke, 3 Sawyer, 353, 368.

CARTER P. POMEROY,

Attorney for Appellants.

Service of the within brief is hereby admitted on this 2d day of September 1882

W. J. Gilden

attorney for Respondents

Original

No. 8,441.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

HENRY GORDON GANAHL et als.,
Appellants,

vs.

LEWIS SOHER, et als.,
Respondents.

POINTS AND AUTHORITIES

Of Defendants and Respondents on Appeal.

H. J. TILDEN,
Attorney for Respondents.

CARTER P. POMEROY,
Attorney for Appellants.

Filed this 6 day of September, A. D. 1884.

JNO. W. McCARTHY, Clerk,

By D. Williams Deputy Clerk.

1884.

FRANK EASTMAN & Co., Printers, 509 Clay St., S. F.

31 S.H.H.

In the Supreme Court
of the
State of California

Henry Gordon Ganahl et al
Plaintiffs
vs
Louis Sher, Nora Scully
Rasche et al
Defendants.

I, H. J. Tilden hereby suggest and state that one of the defendants to wit Nora Scully Rasche is dead and that she died since the appeal was taken in this case to this Court.

That Flora Rasche has been duly appointed Executrix of the Estate of said Nora Scully Rasche deceased and that letters of administration with the will annexed of said deceased have been duly issued to said Flora Rasche by the Superior Court of the City and County of San Francisco State of California and that said Flora Rasche is now the duly appointed and acting Executrix of the Estate of said Nora Scully Rasche Deceased.

Wherefore I suggest and pray that said Flora Rasche Executrix of the Estate of said Nora Scully Rasche deceased be substituted as a defendant in this case in place and stead of said deceased and

No 8441.

Supreme Court.

Henry Gordon Ganahl
et al
vs
Lewis Solner, Nora Scully
Rasche et al

Suggestion of H J Tilden that Tilden Rasche be substituted as defendants in the above entitled action in place of Nora Scully Rasche Deceased

Filed Sept 10/84
J. W. McCarthy
Clerk
By J. L. Kilby
Deputy Clerk

H. J. Tilden
Atty for Defts.

that due notice of this Court's motion assisting such substitution.
September 8th 1884.

H J Tilden
Attorney for Defendants.

Supreme Court
Ganahl WPA #17872

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA.

HENRY GORDON GANAHL ET AL.,
Plaintiffs and Appellants,

vs.

LEWIS SOHER ET AL.,
Defendants and Respondents.

POINTS AND AUTHORITIES

OF

Defendants and Respondents on Appeal.

FACTS.

This is an action in ejectment to recover Fifty-Vara Lot No. 1367, in the City and County of San Francisco.

The defendants deny the allegations of the complaint, and allege they are the owners of said lot, and plead the Statute of Limitations.

The plaintiffs, to sustain the allegations of the complaint, introduced an Alcalde grant to one Henry Ganahl, dated December 10th, 1849, and the depositions of the plaintiffs, wherein Henry Gordon Ganahl testifies that he was born on the eleventh day of April, 1855; that Maria Ann Ganahl is his mother; and Ann Elizabeth Ganahl is his sister, and that she was born on the twenty-first day of May, 1853; that they have always been citizens of the State of Georgia; that his father's name was Henry Ganahl, and that he came to California in 1849, and died in Georgia on the twelfth of May, 1855; that he, the witness, never was in possession of said land or any part thereof.

Maria Ann Ganahl testifies that her husband went to California in 1849, that he died on the twelfth of May, 1855, and that her son was born April 11th, 1855, and her daughter the twenty-first of May, 1853; that she never was in possession of the lot in dispute or any part thereof.

Ann Elizabeth Ganahl testifies to the same facts as above.

Plaintiffs then proved by the defendants that they were in the possession of the portions of said land claimed by them respectively, and that they held the same by purchase.

The defendants proved by Asa D. Hatch, William Davis, Henry H. Bigelow and others, that J.

A. Van Houten had the possession and claimed to own this 50-vara lot from 1850 or 1851 until he sold and conveyed the same to the grantors of the defendants. That he fenced it in 1850 or 1851, paid taxes on it, and exercised acts of ownership over it, and that it was generally known as Van Houten's land.

The defendants then introduced in evidence a deed of conveyance from said Van Houten, dated August 15th, 1855, conveying said lot to W. H. Post, and also mesne conveyances made by said Post and his grantees to the defendants, whereby they acquired the title of said Van Houten to said lot; and also introduced in evidence the records of the Probate Court of the City and County of San Francisco in the matter of the estate of Henry Ganahl, deceased, showing a sale of all interest of the estate of said Henry Ganahl in and to the said lot to one Leon Smith, and the deed of the administrator of said estate to him, and mesne conveyances from him and his grantees to the defendants of the respective portions of said lot owned by them.

The evidence shows that the defendants and their grantors have claimed to own, and have occupied the lot ever since 1850 or 1851, and have fenced and erected buildings and improvements thereon of the value of many thousand dollars, and that the lot was assessed to John A. Van

Houten and his grantees, and the taxes paid by them until the same was conveyed to the defendants, and that the same has been assessed to and paid by defendants since their purchase of their respective portions thereof.

I.

There is no evidence that the husband and father of the plaintiffs ever owned the lot in dispute, except an Alcalde grant to one Henry Ganahl.

There is no evidence that he ever occupied the same, or did anything in relation thereto; but the evidence shows that J. A. Van Houten fenced the lot in 1850 or 1851, and claimed to be the owner, and paid the taxes thereon prior to the death of Henry Ganahl.

And the presumption is, after the lapse of thirty years, that said Ganahl conveyed the same to J. A. Van Houten, and that he was the owner thereof. (Code of Civil Procedure, Sec. 1963, subdivisions 11 and 12.)

II.

Van Houten being in possession of the land, claiming the same as his own, fencing, paying taxes, and exercising acts of ownership over the same prior to the death of Henry Ganahl, and he

and those to whom he conveyed the same continuing such possession for thirty years, prior to the commencement of this action, and erecting permanent improvements thereon, gives them a good title against all the world.

Arrington vs. *Liscom*, 34 Cal., 365.
Cannon vs. *Stockmon*, 36 *Id.*, 540.
Langford vs. *Poppe*, 56 *Id.*, 73.
Sharp vs. *Blankenship*, 59 *Id.*, 288.

If Van Houten's adverse possession had not continued for five years prior to the death of Henry Ganahl, the Statute of Limitations having begun to run against him in his lifetime, it continued to run, and the title became vested in Van Houten upon the expiration of five years from his entry thereon in 1850.

Angel and Ames on Limitations, Sec. 477.
Fleming vs. *Griswold*, 3 Hill (N. Y.), 85.
Hogan vs. *Kurtz*, 94 U. S., 778–9.
Demarest vs. *Wynkoop*, 3 John. Ch., 139 to 144.
Sanford vs. *Sanford*, 62 N. Y., 553.
Mercer vs. *Selden*, 1 How. (U. S.), 48.
Jackson vs. *Roosevelt*, 18 John., 40.
Crosby vs. *Dowd*, 61 Cal., 597.
Harris vs. *McGovern*, 2 Sawyer, 516.

If the time to bring an action had not expired when Henry Ganahl died, his heirs or adminis-

trators had only six months thereafter to commence an action.

2d Hittell's General Laws, Paragraph 4366, Sec. 24.

Code of Civil Procedure, Sec. 353.

Tynon vs. *Walker*, 35 Cal., 636, and cases above cited.

III.

Neither of the plaintiffs are within either of the saving clauses of section 328 of the Code of Civil Procedure.

The section provides that a person within the age of majority may bring an action within five years after such disability shall cease, *but such action shall not be commenced after that period.*

The mother never labored under any disability, and Ann Elizabeth Ganahl was born on the 21st of May, 1853, and was, when this action was commenced, on April 11th, 1881, over twenty-seven years of age, and Henry Gordon Ganahl was born on the 11th day of April, 1855, and became of age on the first minute of the 10th day of April, 1876, and had all of that day to commence the action, and the five years within which he could commence this action expired on the 9th day of April, 1881.

2 Kent's Commentaries, side page 233, Chapter 31, under the head of Infants, says: "The age

of majority is completed on the beginning of the day preceding the anniversary of the person's birth." (1st Bouvier's Law Dictionary, title Infants, page 705.)

In the case of

Phelan vs. *Douglass*, 11 How. Pr. Reports, (N. Y.) page 193,

the plaintiff brought suit to redeem land sold under a foreclosure of mortgage, and the statute gave him ten years within which to bring the action after he became of the age of majority. He was born on the 14th of December, 1820, and he commenced his action on the 13th day of December, 1851, and the Court says: "He could have sued on the 13th day of December, 1841. His disability to sue ended with the expiration with the last moment of the 12th day of December, 1841. He had ten whole years after such '*disability removed*' to bring suit. We must, in computing that ten years, take in the 13th day of December, 1841, because he had the whole and entire part of that day to sue in. * * * Computing that as the first day of the ten years, and that period expired with the expiration of the 12th day of December, 1851. He did not sue until the 13th of that month, and then his whole ten years had expired and the statute barred his claim."

So in this case, Henry Gordon Ganahl became of age on the beginning of the 10th day of April, 1876. He had the whole of the 10th day of April, 1876, to sue in, and the five years expired on the last moment of the 9th day of April, 1881, and his claim, if any, is barred by the statute.

State vs. *Clark*, 3 Harr., (Del.) 557.
Hamlin vs. *Stevenson*, 4 Dana (Ky.), 597.

Our Civil Code, Sections 25 and 26, lays down the same rule, that the age must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority.

Section 328 of the Code of Civil Procedure says that a person laboring under such disability may commence an action *within* the period of five years after such disability shall cease, but not *after*.

I know of no rule of law allowing any time thereafter to commence the action, even if the last day of that time is Sunday. See

People vs. *Luther*, 1 Wend., 42.
People ex rel Knight vs. *Blanding* 10 P. L. J., 514.
Hibernia Bank vs. *O'Grady*, 47 Cal., 579.
Presbney et al. vs. *Williams*, 15 Mass., 193.
Patrick vs. *Faulke*, 45 Mo., 314.
Bissell vs. *Bissell*, 11 Barb., (N. Y.) 96.
Hiley vs. *Young*, 134 Mass., 364.
Cooley vs. *Cook*, 125 Mass., 406.
Ex-parte Dodge, 7 Cow., 147.

IV.

But if Henry Gordon Ganahl's claim was not barred by reason of the five year's limitation, it is barred by section 1573 of Harston's Practice, which provides that no action for the recovery of real estate, sold by an executor or administrator, can be maintained, unless it be commenced within three years next after the sale.

Admitting that Henry Gordon Ganahl became of age on the 11th of April, 1876, the action was barred three years thereafter, to wit, on April 11th, 1879, two years before this action was commenced.

Harlow vs. *Peck*, 33 Cal., 520.
Meeks vs. *Olpherts*, 10 Otto, 568.
Leffingwell vs. *Warren*, 2 Black, (U. S.) 599.

The plaintiff claims that the sale by the administrator of the estate of Ganahl was void, because the notice for the hearing of the petition for letters of administration was not posted ten days, as required by law.

The notice was posted on the 20th day of September, 1867, and the hearing of the petition was on the 30th day of September, 1867, making eleven days including both days, or ten days excluding the day of the hearing of the petition.

The statute in force at that time, section 60, Belknap's Probate Law, provided that such notice

must be given at least ten days before the hearing.

Section 1373 of the Civil Code is the same in that respect.

The notice in this case was given ten days before the hearing.

The notice being given on the 20th of September, the ten days expired on the expiration of the 29th of September.

Estate of Osgood Myricks, R., 153.

This was a case of sale of real estate, and section 1547 provided that notice of the time and place of sale must be published for three weeks successively next before the sale.

The first publication was on the 19th of June, and the hearing on the 10th of July, and the Court held the notice commenced at the commencement of the 10th of June and ended at midnight of the 9th of July, and was three weeks notice before the hearing.

Section 1303 of the Code of Civil Procedure, in regard to Wills, shows that the ten days notice includes the first and last days of the publication.

People ex rel Knight vs. *Blanding*, 10 P. L. J., 514.
Mich vs. *Mayhew*, 51 Cal., 514.

In the last case the defendant offered in evidence a list of illegal votes cast at the election,

served on the 7th, the trial commenced on the 10th, and the plaintiff objected that the list was not served three days before the trial, as provided in section 1116 of the Code of Civil Procedure, which says no testimony can be received of illegal votes unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, &c. The Court held the list was served in time.

The language of section 1116 and 1373 is of the same import—the one says the notice must be given at least ten days before the hearing, and the other, that the list must be delivered three days before the trial.

See

Griffith vs. *Bogert*, 18 How., (U. S.) 158.
Charles vs. *Stanberry*, 3 John, 261.
Central Bank vs. *Alden*, 41 How. Pr., N. Y., 102.

This was a judicial sale; and even if the sale had been void, by reason of the Court not having jurisdiction to order the sale, the Statute of Limitation would apply because, as stated in the cases above cited, if the sale was regular and valid, there would be no necessity of invoking the aid of the Statute of Limitations.

The Statute of Limitations applies to all probate sales, void as well as voidable.

Code of Civil Procedure, Section 1573.
Harlow vs. *Peck*, 33 Cal., 520.
Meeks vs *Olpherts*, 10 Otto, 568.
Meeks vs. *Vassault*, 3 Sawyer, 210–216.
Holmes vs. *Beal*, 9 Cush., 223.

V.

The authorities cited by appellants have no application to the facts in this case.

In the case of

Williams vs. *Board of Supervisors of Sac. Co.*, 58 Cal., 237,

the law provided that the petition should be published for four weeks next preceding the hearing, and the Court held that as seven full days intervened between some of the days of said publication it was insufficient.

In the case of

Alameda Mac. Co. vs. *Huff*, 57 Cal, 331; and
People vs. *McCain*, 50 Cal., 210; and
People vs. *McCain*, 51 Cal., 360,

the law required the notice to be published daily for five days, Sundays excepted, and the Court held that five days' publication, including Sunday, was insufficient.

In *Himmelmann* vs. *Cain*, 49 Cal., 285, the law required the notice to be published for five days, and it was published from the 25th to the 29th day of August, which was held sufficient.

In *Pearson* vs. *Pearson*, 46 Cal., 609–635, the law required the notice to be published four weeks (twenty-eight days) before the time of hearing, and the order for publication was made on the 8th day of May, fixing the hearing for the 4th of June, which showed the publication must include the first and last days to make twenty-eight days, while in the case at bar there were eleven days, inclusive of the first and last days.

In *Meredith* vs. *Clancey*, 59 Ind., 460, the law provided that the time and place of sale under execution shall be advertised three weeks successively next before the sale, and the first publication was on the 12th of December, and the sale took place on the 1st of January, showing that the time of the advertisement included the first and last days, and the Court held the notice insufficient, and said either the first or the last day should be excluded.

In case of *Handly* vs. *Cunningham*, 12 Ky., 401, the question was when an Act of the Legislature took effect. The Act provided that, "This Act shall take effect and be in force from and after the first day of September, and the Court held it was not in force on the first day of September.

And in *Wood* vs. *Commonwealth*, 11 Ky., 220, the law required an appeal to be taken within sixty days from the rendition of the judgment, and the Court held the day of the rendition of the judgment must be included.

The case of *Bemis* vs. *Leonard*, 118 Mass., 502, simply held that in computing time from the date or day of the date, or from certain acts or events, the first day must be excluded.

The case of *Walsh* vs. *Boyle*, 30 Md., 266, decides that an order of the Court allowing each party to take evidence on one day's notice that a notice served on the 28th to take evidence on the 29th, was one day's notice and sufficient.

In *Thorne* vs. *Mosher*, 20 N. J. Eq., 257, the question was whether a tender of interest on the sixteenth was in time on a bond which provided that the interest should become due on the first, and if the same remained unpaid fifteen days thereafter, the whole sum should become due, and the Court held the first day should be excluded.

In the case of *Duffy* vs. *Ogden*, 64 Penn. St., 241, the question was whether a three months' notice to terminate a lease was sufficient. The lease was for one year from the 25th day of March, and the notice was given on the 25th day of December. The Court held the lease expired on the 24th day of March, and that the 25th day of December, the day of giving the notice, must

be counted, and, therefore, the three months' notice previous to the termination of the lease was completed on the 24th day of March, and was sufficient. The cases in Seventh American Decisions, 250, and Twenty-sixth American Decisions, 234, held that the first day must be excluded and last day included. In the case of *Early* vs. *Doe*, 16 How., U. S., 611, the question was whether twelve weeks' notice of a sale for taxes was published or not.

The first publication was on Saturday, the twenty-sixth of August; and last on the fifteenth of November, and the Court held the notice was not published twelve weeks.

The Court says the twelve weeks expired on the seventeenth day of November, which by computing the time will be found to be Friday, and as the Court held, the sale was made two days too soon. It seems to me this is an authority that the first and last day of the publication should be included. The following cases show that the notice given in this case was sufficient. In case of *Cann* vs. *Warren*, 1 Houstans, Del., 188, the Court held the notice served on the fifth of November for the fifteenth of November was ten days notice and sufficient.

In the case of *Anderson* vs. *Baughman*, 6 Mich., 298, the Court held that under a rule requiring four days notice, exclusive of the day of service,

that a notice served on the twenty-eighth of April for the second day of May was sufficient.

In the case of *Thomas* vs. *Affick*, 16 Penn St., 14, the law provided that no writ shall be sued out against any Justice of the Peace until notice in writing shall have been delivered to him at least thirty days before suing out the writ.

The notice was served on the nineteenth of May, and suit brought the eighteenth of June, and the Court held that the first day should be included and the last day excluded, and that the suit was not brought too soon. In *Northrop* vs. *Cooper*, 23 Kan., 432, the question was whether a notice of sale had been published thirty days.

The statute required publication for at least thirty days before the day of sale.

The first publication was October 13th, and the sale November 12th. It was contended that full thirty days must intervene between the first and last publication, but the Court held that the notice was sufficient.

The same rule is adopted in the case of *Hageman* vs. *Ohio Building and S. Association*, 25 Ohio, St., 186–207.

In *Foulds* vs. *People*, 66 Ill., 210, the law required the notice of sale to be posted six days; it was posted on the afternoon of the fifteenth for the twenty-first of the same month. Held sufficient.

I submit that the notice of the hearing of the petition for letters of administration was sufficient, but if it had not been, the cases cited by appellant in regard to void judgments has no application to an innocent purchaser at a judical sale.

There is no proof or allegation that the purchaser at the probate sale had any notice of any defect in the proceedings, and I believe it is a universal rule that an innocent purchaser at such sale for value is not effected by any error of the Court in such proceedings when the judgment appears upon its face to be regular.

In this case the degree or order recites that due proof was made that notice of the hearing was given of the application at least ten days before the hearing, and there is no claim that the proceedings for the sale and the confirmation thereof were not strictly in accordance with the requirements of law.

Mayo vs. *Foley*, 40 Cal., 282.
Jones vs. *Gillis*, 45 Id., 541.
Reeves vs. *Kennedy*, 43 Id., 643.

The case of *Galpin* vs. *Page*, 18 Wall, 375, recognizes this principle; the purchaser was one of the attorneys of the plaintiff in the proceedings for the sale, and the Court says "the protection which the law gives to a purchaser at judical sales, is not extended in such cases to the attorney of

the party who is presumed to be cognizant of all the procedings." And even if this sale was void, the statute of limitation applies as shown by the cases cited above.

I respectfully submit that the judgment should be affirmed.

H. J. TILDEN,

Attorney for the Defendant and Respondent.

Service of a copy of the within
admitted this 8th day of September 1884

Carter P. Pomeroy
Attorney for the
Plaintiff and Appellants.

Supreme court
Gonahl WPAF17872

No. 8,441.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

HENRY GORDON GANAHL et als.
Plaintiffs,

V.

LEWIS SOHER et als.
Defendants,

Brief for Appellants on Hearing in Bank.

CARTER P. POMEROY,
Attorney for Appellants.

Filed this 10th *day of August, 1885.*

J. W. McCarthy, Clerk.

By Frank Dwyer, *Deputy Clerk.*

Law Journal Print, W. A. Woodward & Co., 522 California St. S. F.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

HENRY G. GANAHL ET ALS.,
Appellants.

v.

LEWIS SOHER ET ALS.,
Respondents.

Brief for Appellants on Hearing in Bank.

I.

In computing the ten days, during which the notice of the hearing of the application for letters of administration must be given, the day on which the notice was posted, to wit. the 20th day of September, must be excluded from the reckoning. This is the generally received rule, irrespective of statute. The Practice Act in force at the time of the probate proceedings in question (sec. 530;

Statutes, 1851, 104; 1861, 591), as well as section 12 of the present Code of Civil Procedure, is explicit on this point, and the decisions in California in regard to the computation of time, as well as the weight of modern authority in other States, are to the same effect.

In Price *v.* Whiteman, 8 Cal., 415, the law in regard to the computation of time was elaborately considered, and a conclusion reached in harmony with my contention.

This case was a proceeding for a writ of mandamus, against certain State officers, to compel them to allow petitioner's claim, under an Act of the Legislature, which had been presented to the Governor on April 3, 1856, and which was asserted to have become a law through the failure of the Governor to return it within ten days. The Journal of the Senate showed that the bill was returned by the Governor on April 15, 1856, without his approval. The Constitution provided "that if any bill presented to the Governor shall not be returned within ten days after it shall have been presented, Sundays excepted, the same shall become a law." It will be noted that this case presented the very point at issue in the case at bar—that is, when did the ten days commence to run, and when was the limitation completed? On this point the Court held that the day on which the bill was presented was to be excluded from the reckoning; that the day after was the first day of the limitation, and that the ten days—Sundays not being counted—did not terminate until the end of

the fifteenth of April. This case was subsequently affirmed, on this identical point, in Iron Mountain Co. *v.* Haight, 39 Cal., 540.

In Himmelman *v.* Cahn, 49 Cal., 287, the validity of a street assessment was called in question. The assessment was resisted, and claimed to be invalid, by reason of insufficiency in the time during which the notice inviting proposals for the work was posted.

The statute required such notices to be posted in the office of the Superintendent of public streets and highways for five days. (This statute differs from the provision of the Probate Act only as to the length of time required for the posting.) The notice in question was posted on the 25th of August, and the posting ended on the 29th. The Court held this notice insufficient, and all subsequent proceedings based thereon void. McKinstry, J., in rendering the opinion of the Court, said: "The notice should remain posted in that office for five official days. In other words, *it must be posted before the commencement of the first day;* that is, before 9 o'clock, A. M., *when, by statute, the office is to be opened, and remain posted during the whole of the first, second, third, fourth, and until 4 o'clock, P. M., of the fifth day,* at which time the statute authorizes the office to be closed." This decision was affirmed in

Brooks *v.* Satterlee, 49 Cal., 289.

The case of Bemis *v.* Leonard, 118 Mass., 502, is a leading case in regard to the computation of

time. The opinion of Chief Justice Gray contains an elaborate review of the English and American authorities. The opinion is too long for quotation, but the general result reached is that in computing time from the date, or from the day of the date, or from a certain act or event, the day of the date is to be excluded from the reckoning. It was accordingly held that under a statute requiring the copy of the writ and of the return of the attachment of bulky personal property to be depo ited in the town clerk's office " at any time within three days thereafter " the day of the attachment is to be excluded. This opinion is a clear exposition of the law on this subject, and the attention of the Court is particularly directed to it.

Sheets *v.* Selden, 2 Wall., 177, is the most recent decision of the United States Supreme Court on this question. In this case a lease provided that the rent should be paid semi-annually, on certain days, and that, if any instalment should remain unpaid for one month from the time it should become due, the lessor might enter and take possession. It was held that the day on which the rent fell due must be excluded in computing the month which was to elapse before the right of entry accrued ; and it was said that the general current of modern authorities. on the interpretation both of contracts and statutes, where time is to be computed from a particular day, or a particular event, is to exclude the day designated.

In Seekouk *v.* Rehoboth, 8 Cush., 371, this same rule was affirmed, and among other reasons

assigned for it was that, otherwise, an act to be done in one day must be done on the same day, and as there is no fraction of a day, such stipulation must create an obligation to do it *instanter*. And it was accordingly held, that under a statute by which a town liable for the support of a pauper, was required, in order to exempt itself from liability beyond a certain rate, to remove him " within thirty days from the time of receiving legal notice that such support has been furnished," the day on which the notice was received should not be included in the thirty days.

In Millett *v.* Lemon, 113 Mass., 355, it was decided that, under a statute which prohibited the giving of a second notice of a desire to take the poor debtor's oath until the expiration of seven days from the service of the former notice, the day of the service of the first notice must be excluded, and that when that day was the 24th of the month, a new notice on the 31st was bad.

In Page *v.* Weymouth, 47 Me., 238, it was held that in computing time, the day of publication of the notice must be excluded.

In Anderson *v.* Baughman, 6 Mich., 298, it was held that where by rule four days are required in reckoning time on a notice of hearing, the day on which the notice is served is to be excluded.

In Hall *v.* Casserly, 25 Miss., 48, it was said that the proper mode of computing time, where notice for a specific time is to be given before an act can be done, is to exclude the day on which the notice was given.

In New York it is held that where, by the rules of practice, any subsequent proceeding in a cause is required to be had within a certain number of days after a prior proceeding, such as the entry of an order or the service of a notice, the day on which the order is entered, or the notice served, is excluded. See:

Vandenburgh *v.* Van Rensselear, 6 Paige, 147.
Irving *v.* Humphreys, Hopk., 364.
Bissell *v.* Bissell, 11 Barb., 96.

In State *v.* McLendon, 1 Stew., 195, it was held that in computing the two days, in which a prisoner capitally indicted in Alabama, is entitled to have a list of the jurors before the trial, the day of delivery of the list and the day of the trial are to be excluded.

Robinson *v.* Foster, 12 Iowa, 186, is directly in point as to the computation of the time of notice, required by the probate act to be given "at least ten days before the hearing." In this case it was decided that, under a statute which required notice to a defendant which should "leave at least ten days between the day of service and the first day of the next term," both days must be excluded in computing the time.

Under a statute requiring that certain penalties incurred by railroad companies should be sued for within ten days, the day on which the penalty was incurred, was held to be excluded, in

People *v.* N. Y., etc. Co., 28 Barb., 284.

See this subject also discussed, and conclusions reached in harmony with my contention in the notes to

Avery *v.* Stewart, 7 Am. Dec., 250.
Murfree's Heirs *v.* Carmach, 26 Am. Dec., 234.

In Perham *v.* Kuper, 61 Cal., 331, defendants claimed under a sheriff's deed which was executed on the 5th of April, 1875. The execution sale took place on October 5, 1874. *Held*, on the authority of section 12 of the Code of Civil Procedure, that the judgment debtor had the whole of the 5th day of April, 1875, in which to redeem; that the act of redemption was to be done within six months after the execution sale; thus deciding that the day of the sale was not reckoned as the first day of the six months allowed for redemption.

II.

Even if it be conceded, as contended for by counsel for the respondents, that the first day of the ten days notice was the day of posting, to wit, the 20th day of September—still the notice, under the circumstances of this case, was insufficient. Granting—for the sake of the argument,—that the notice commenced to run on that day, the statutory period of limitations would have expired, as stated by counsel for the respondents, on the end of the 29th day of September. But, unfortunately for his position, the 29th day was Sunday, and by the express requirement of the statute then in force (Stat., 1851,

104; Stat., 1861, 591), as well as under section 12 of the Code of Civil Procedure, the notice should have remained posted during the whole of the following Monday, the 30th. The language of the statute on this subject is as follows:

"The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

It was suggested on the argument that this statute had no application to the giving of the notice in question. A little consideration of the statute, will, I think, convince the Court of the fallacy of this position. The statute is broad in its language, and was evidently intended to establish one certain and uniform rule in regard to the computation of time, in place of the uncertainty which the argument in this case shows to have existed among the decisions. If we analyze the statute with reference to the present case its applicability is at once apparent. The "act provided by law" was the posting of the notices of the petition for letters of administration; "the time in which" this act—which, from its very nature was a continuing act—was to be done was *at least* "ten days before the hearing." If, therefore, instead of the words "the time in which," and "act provided by law," we insert their equivalents, the statute would read as follows:

"The ten days before the hearing in which the notice of the petition for letters of administration is to be posted, is computed by excluding the first

day (the day of posting) and including the last, unless the last day is a holiday, and then it is also excluded."

I respectfully submit that this brief analysis demonstrates the applicability of the statute with mathematical certainty.

That this is the correct manner in which to compute the duration of a statutory limitation, when the last day thereof, falls on Sunday, has been recognized by this Supreme Court in several recent cases.

In Alameda Mac. Co. *v.* Huff, 57 Cal., 331, it was held that, under an act requiring that a notice inviting certain proposals for street work, should be published daily, Sundays excepted, in a newspaper, for five days, a publication commencing Wednesday, March 4, and ending Sunday, March 8, was insufficient, and that the last publication should have been on the 9th—the following Monday. The proceedings based on this insufficient publication were held void.

The same point was decided in

People *v.* McCain, 50 Cal., 210.
People *v.* McCain 51 Cal., 360.

In Estate of Rose, 63 Cal., 346, the effect of the rule is even better illustrated. That was an appeal from an order directing the sale of real estate of a deceased person. The sixtieth day, after which an appeal could not be taken, fell on Monday, January 2. The preceding Sunday was

New Years Day, consequently the 2d was a holiday.

It was accordingly held, that the sixty days limitation on the right of appeal, did not expire until the end of January 3d, and that an appeal taken on that day was in time.

In Muir *v.* Galloway, 61 Cal., 498, this point was again directly decided, in connection with the extension of time for preparing a statement on motion for a new trial. The facts were as follows: On October 20th, 1880, verdict was rendered. Notice of intention to move for a new trial was filed and served by defendants, October 29th. November 8th, defendants obtained from the Judge of the Court below an order granting ten days from date in which to prepare and serve their proposed statement on motion for new trial. On November 18th, another extension of ten days was granted by the Judge. November 28th was Sunday. On November 27th, the Judge made an order allowing defendants ten further days from November 29th, within which to prepare and serve their proposed statement. The statement was served on December 9th, 1880. It was held that, 1. The orders of the Judge did not extend the time for preparing and serving the statement more than thirty days. 2. The last day of the period of extension fixed by one of the orders being Sunday, it is not to be computed as any portion of the time granted by the order, but it is a supplementary day, superadded by law. 3. The proposed statement was prepared and served in time.

III.

It having been conclusively established that the notice of the petition for letters of administration in the matter of the estate of Henry Ganahl, was insufficient, by reason of a posting for nine days only, when the Statute expressly required a posting for at least ten days before the hearing, the next question that suggests itself is, what effect did this have upon the subsequent attempted action of the Probate Court? The answer to this question is easy. The effect was to render null and void all the subsequent acts of the Probate Court, including the appointment of Andrew Smith as administrator, and to vitiate all of his attempted acts, including the sale of the property in question. A cursory review of a few general principles will show the truth of this statement.

Proceeding for the settlement of the estates of deceased persons are proceedings *in rem*, and, if jurisdiction be acquired over the particular *res*, they are binding against the whole world. But the mere facts that such proceedings are *in rem*, does not dispense with the necessity of some kind of notice, either to the parties interested or to the world in general. Such notice must be given before the jurisdiction of the Court attaches over the particular subject matter in a given estate, notwithstanding the Court may have a general *inherent* jurisdiction over the settlement of estates. If no such notice be required by statute, or if the notice required by statute be not given, the proceedings in connection with a particular estate

would be absolutely void, as being in conflict with the constitutional guaranty that no person shall be deprived of his property without due process of law.

In recognition of this rule the statutes of California, as well as of all the other states to which my attention has been directed, regulating the settlement of the estates of deceased persons, of minors, or of persons *non compos mentis*, invariably require such notice of the proceeding to be given. Such notice is generally constructive, either by publication or posting. A personal citation on the parties interested is sometimes required. It may be conceded, that, in such case, a constructive service by publication or posting, is sufficient to bind the property of the estate, and to give jurisdiction to the Court. However that may be, it is the universal rule that, where the statute requires a notice of the application for letters testamentary, of administration or of guardianship, to be given by publication or posting, and there is no appearance of the parties interested, the statutory requirements must be strictly pursued, otherwise the Court does not acquire jurisdiction over the parties, or over the particular *res*—the subject matter of the estate.

This result follows, whether the probate proceedings are regarded as general or special; and although the Probate Court be considered one of general rather than of inferior or special jurisdiction. The notice in such case is identical with, and serves the same purpose as, the substituted

service of summons by publication against an absent or non-resident debtor. It certainly can need no citation of authority to convince the Court that, in order to confer jurisdiction over the property which it is designed to subject to the satisfaction of the judgment, or over the parties interested, under such substituted service of process, all the statutory requirements, down to the minutest detail, must be observed.

See Pennoyer *v.* Neff, 95 U. S., 714.
Galpin *v.* Page, 18 Wall., 351.
Belcher *v.* Chambers, 53 Cal., 435.
Randolph *v.* Bayne, 44 Cal., 370.
McCurry *v.* Hooper, 12 Ala., 823; 46 Am. Dec., 280.
Palmer *v.* Oakley, 2 Doug., 433; 47 Am. Dec., 41.
Jordan *v.* Giblin, 12 Cal., 100.
McMinn *v.* Whelan, 27 Cal., 312.

The doctrines thus briefly stated have been frequently approved by the Supreme Court of California. This Court has repeatedly affirmed the rule that a strict compliance with all the statutory requirements in regard to the notice, is a pre-requisite to the jurisdiction of the Probate Court, and, if such notice be insufficient, the Court's subsequent acts are void and may be collaterally attacked.

In Pearson *v.* Pearson, 46 Cal., 635, the validity of a decree of distribution in the estate of a deceased person was collaterally attacked, at the in-

stance of one of the heirs. The law at that time provided three different ways for notifying the persons interested in the estate of the petition for distribution. One of these ways—which was attempted to be followed—was by a publication of notice for four successive weeks. The record disclosed the fact that the order directing publication limited the time thereof to less than four weeks. The Court held a publication in conformity with the order insufficient; that a publication for the time required by statute was essential to the jurisdiction of the Court; and that the want of jurisdiction rendered the decree of distribution void and open to collateral attack.

In Prior *v.* Downey, 50 Cal., 388, the doctrine was reasserted, in the most positive terms, that the provisions of the Probate Acts, in reference to sales of real property of a decedent, are *strictissimi juris*, and a failure to comply therewith prevents the Probate Court from acquiring jurisdiction over the sale, and renders the same void, and subject to collateral or direct attack. This doctrine is approved in

Wilson *v.* Hastings, 5 West Coast Rep., 31.
Estate of Smith, 51 Cal., 563.
Fitch *v.* Miller, 20 Cal., 385.
Spigg Estate, 20 Cal., 125.
Estate of Boland, 55 Cal., 320.
Reynolds *v.* Wilson, 15 Ill., 395; 60 Am. Dec., 752.

In Becket *v.* Selover, 7 Cal., 233, it was held that a failure to give the required notice of the petition for letters of administration was fatal to the jurisdiction of the Probate Court, and rendered the acts of a person attempted to be appointed as administrator void.

In Seaverns *v.* Gerke, 3 Saw., 364, the effect of a guardian's sale, in the absence of a notice to the parties interested, of the application for letters of guardianship, was elaborately considered by the Circuit Judge of this district. The statute in force at the time of the appointment of the guardian whose acts were called in question, required that notice to the parties interested, of the application, should be given in such manner as the Judge should order. No such notice was given. This absence of notice, after an elaborate analysis of the decisions, was held fatal to the jurisdiction of the Court over the person and estate of the minor, and rendered void a subsequent sale of the property of the ward made by the person whom the Court had attempted to appoint as guardian. In this case, the Court based its decision upon the opinion of Mr. Justice Field, in Galpin *v.* Page, 3 Saw., 126, in which the general doctrine of service by publication, or substituted service of process, so far as the same affects the jurisdiction of the Court, was discussed.

In Randolph *v.* Bayue, 44 Cal., 370, the validity of a probate proceeding, admitting the will of one Hildebrand, was collaterally called in question. The statute at that time required that "if the heirs

of the testator reside in the county, the Court shall direct citations to be issued and served upon them, to appear and contest the probate of the will at the time appointed. No such citation was served, and for that reason the Court held the proceedings void, for want of jurisdiction. In his opinion, Rhodes, J., speaking for the Court, said: "Although proceedings for the proof of wills are usually treated as proceedings *in rem*, yet, if the statute requires certain persons shall be notified, such provisions must be complied with, in order to give the Court jurisdiction."

In the case of Williams *v.* Supervisors, 58 Cal., 237, the Court held that in proceedings under the provisions of the Political Code for the reclamation of swamp land, the statutory publication of the petition required by section 3,447, was one of the jurisdictional steps in the proceedings, and if the petition was not published as required, all of the subsequent proceedings were void. In this case, the publication was held insufficient, for the reason that more than seven days intervened between certain of the publications, which the statute required to be made "weekly." This case is directly in point, and shows that where the jurisdiction of the Court over the subject matter of the proceedings—that is, over the *res*—depends upon a statutory notice by publication or posting, instead of a personal service, the requirements of the statute are jurisdictional and must be strictly observed—otherwise the proceedings are void.

IV.

Having shown, as I think, conclusively, that the Probate Court never acquired jurisdiction over the matter of the estate of Henry Ganahl; that all its proceedings were utterly void; it necessarily follows that there never was any administrator of said estate. Therefore the admission in evidence of the record in the matter of said estate, including the proceedings for the sale of the land in dispute, and the administrator's deed, was erroneous. It follows, also, that the Court's instruction, that the plaintiffs' action was barred by section 1,573 of the Code of Civil Procedure, because the same was not commenced within three years after the sale, was likewise erroneous. Such section has no application to void sales, made by persons purporting to act as executors or administrators, where the invalidity results from an entire want of jurisdiction in the Court over the matter of the estate. The operation of the section is confined to sales by those who are executors or administrators, under a valid appointment, in a proceeding in which the Court had jurisdiction.

Pryor *v.* Downey, 50 Cal., 399.
Seaverns *v.* Gerke, 3 Saw., 353, 368.
McNeil *v.* First Cong. Soc., 4 West Coast Rep., 421.

To defeat the plaintiffs' contention on this point, the defendants rely upon certain cases in California, interpreting section 1,573 of the Code of Civil Procedure, and on one case in Massachusetts under

a somewhat analogous statute. The cases in California all had reference to a probate sale in the same estate. The cases from 10 Otto, 568, and 3 Sawyer, 210, were in connection with the same sale. The case in Massachusetts was similar. The sale was held void, for insufficiency in the proceeding for the sale, to wit, for insufficiency in the petition for the sale. The cases fell within the direct language and purpose of the statute, and no question was raised in either of them, as to the jurisdiction of the Court over the subject matter of the estate, or to the validity of the appointment of the executor making the sale. In each of such cases there was an executor, acting under a valid appointment. In the case at bar there never was an administrator. Consequently there could be no "sale by an executor or administrator." The condition which the statute itself imposes upon its operation never existed. The inapplicability of the statute to the sale in question seems apparent upon the most casual inspection of its language. Certainly, the mere fact that the sale was made by one who called himself an administrator would not be sufficient to put the statute in operation, although the deed purported to be made by order of the Probate Court. The order of such Court, in a proceeding in which it had never obtained jurisdiction, could give no further or greater effect to the sale, than the sale would have if it purported to be made entirely without the intervention of the Probate Court. The soundness of this position is established by abundant authority.

In Pryor *v.* Downey, 50 Cal., 388, 399, Mr. Justice McKinstry, in rendering the opinion of the entire Court, considered the effect of a probate sale by a person acting as an administrator, under an order of the Probate Court, when such person had failed to comply with the conditions of the order of the Court appointing him. In this case the Court used the following language, on page 399: "Foster, therefore, was not administrator of the estate, and both the pretended sale by him and the order purporting to authorize it made by the Probate Court—then a Court of limited and inferior jurisdiction—were inoperative to transfer to the purchaser any right or estate in the land, legal or equitable. *Nor can any recognition by the Probate Court make one an administrator de facto. No person can fill that position, except after due appointment and qualification.* Under our system, there is probably no such thing as an executor *de son tort*; at all events, no man can be executor *de son tort* in regard to land. And, generally, it may be said, an executor *de son tort* is an executor only for the purpose of being sued, or made liable for the assets with which he has intermeddled. It necessarily follows, that an attempted sale of an estate by one not an executor or administrator can transfer no right, even though there should be a subsequent order of the Probate Court, as upon a final accounting by the pretended administrator."

In the very recent case of NcNeil *v.* First Cong. Soc., 4 West Coast Rep., 421; this point was

directly decided by this Court. In this case the defendants claimed title to the premises in controversy under a decree of confirmation by the Probate Court of San Francisco, of an administrator's sale of the real estate of a decedent. This sale the Court held absolutely void for entire want of jurisdiction in the Probate Court over the matter of the estate of the deceased. The defendants then relied upon section 1,573 of the Code of Civil Procedure. The Court held the section inapplicable, because the premises in controversy were not subject to sale, as the Court had no jurisdiction over the subject matter of the estate. The learned counsel for the respondents attempts to distinguish this case from the one at bar. But the distinction, so far as the question under discussion is concerned, is neither real nor apparent. In each case the sale questioned was attempted to be made under the provisions of the probate act; in each case, such sale was attempted to be ordered and confirmed by the Probate Court. The only distinction that can be made between the two cases is, that in McNeil *v.* First Cong. Soc., the invalidity of the sale was due to an *inherent* want of jurisdiction over the subject matter of the estate; while in the case at bar the want of jurisdiction was due to a different cause. But the same effect follows the want of jurisdiction. In each instance the attempted action of the Court is void. It necessarily follows, that if section 1,573 is inapplicable to a probate sale in a proceeding in which the Court lacks *inherent* jurisdiction, it is likewise

inapplicable to a sale when there is an entire want of jurisdiction due to any other cause, such as a failure to give notice of the petition for letters of administration.

In the cases of Seaverns *v.* Gerke, 3 Saw., 368, and Prior *v.* Downey, 50 Cal., 397, the effect of the statute of 1866, validating probate sale under orders of Probate Courts in this State, was considered. In considering this statute in connection with its application to the guardian's sale mentioned, Mr. Justice Sawyer, used language which is applicable, by analogy, to the case at bar; on page 368 he said: "There is something more in the probate proceedings under consideration than a defect of form or mere errors. There is a failure to acquire jurisdiction of the parties whose interests are to be affected—a failure of authority to act at all. This is, it is true, the result of an 'omission' to give notice; but it is hardly to be supposed that the Legislature contemplated such an omission. The term doubtless refers to omissions in the acts to be performed in the exercise of a jurisdiction, which has once attached, and not omissions of acts essential to give jurisdiction to act at all. If the act was intended to include the latter, then it must be void as to such matters. Before the passage of the acts, the proceedings, as we have seen, were utterly void for want of jurisdiction. The rights of the complainants were as much unaffected by the proceedings as if they had never been taken." The decision in Prior *v.* Downey is to the same effect.

V.

The statement made by counsel for the respondents in his brief, and reiterated on the argument, that the Statute of Limitations commenced to run against Henry Ganahl prior to his death, by reason of adverse possession of Van Houten, and consequently continued to run against his heirs, the present plaintiffs, without interruption, is not sustained by the evidence. As stated by the appellants, in their second specification of errors (Trans., p. 61) there is no sufficient evidence showing, or tending to show, that prior to the death of Henry Ganahl, the ancestor of these plaintiffs, that these defendants, their grantors, predecessors, ancestors, or those under whom they claim, were in sufficient open, notorious, exclusive and adverse possession of the demanded premises, claiming to own the same, to set the Statute of Limitations in motion prior to the death of Henry Ganahl. The only evidence having the slightest tendency to show adverse possession prior to the death of Henry Ganahl is the testimony of Asa D. Hatch (Trans., p. 27–29); of William Davis (Trans., p. 30–32); of Catherine Broad (Trans., p. 32–34); of Samuel West (Trans., p. 35–36); of Henry H. Bigelow (Trans., p. 38).

All these witnesses agree in testifying that when they first became acquainted with the lot in controversy, and until long after the death of Henry Ganahl, it was a mere sand hill; entirely unimproved; covered with scrub oaks and lupins; that

Van Houten never resided on the property, or otherwise occupied it; the only evidence of adverse possession is the hearsay testimony that he claimed to own it, and sometime between 1850 and 1855, erected a fence on one or two sides of the lot. On cross-examination it appeared that this fence, or at least part of it, was what is known as a "brush fence." (See Testimony, Hatch, folios 83, 83; Bigelow, folios 113, 114.) This fence, the testimony shows to have been soon covered with the drifting sand, as was also the fence on one side of the lot said, by the witness Broad, to have been erected by her husband. (See testimony, Broad, folio 98; West, folio 104, 107.) Mr. West also testifies that the division fence, erected by him, after Ganahl's death, was soon broken down by the winds and sand; that it had to be replaced two or three times; and that the old fence taken up by him, was all rotten and good for nothing.

It is respectfully submitted that this testimony of the defendants' own witnesses, is far from sufficient to establish adverse possession prior to the death of Henry Ganahl. There is no evidence that Van Houten was ever in the "actual continued occupation of the land," within the meaning of Section 324 of the Code of Civil Procedure. But the fence erected about the lot was not a "substantial inclosure," within the meaning of that statute, as it was soon covered with sand, so as to become invisible.

Borel *v.* Rollins, 30 Cal., 409.
Polach *v.* McGrath, 32 Cal., 15, and cases cited.

Moreover, it has been decided in this State that a "brush fence" is not a substantial inclosure within the meaning of the statue.

Hutton *v.* Shoemaker, 21 Cal., 453.

Again, the evidence of Broad (page 33) shows that Van Houten's alleged possession of the lot in controversy was neither uninterrupted nor continuous. She testifies that Van Houten was compelled to bring suit against one McGuire to obtain possession of the property.

VI.

Even if the court should be of the opinion that the evidence of the defendants' witnesses is sufficient to show adverse possession in the defendants' grantors, prior to the death of Henry Ganahl, it should not, on that account, refuse the plaintiff a new trial for error in the admission of the probate proceedings, and in the instructions. It will be noted that the plaintiff had no opportunity to offer evidence in rebuttal of the defendants' evidence of adverse possession, until after the Court had admitted in evidence the administrator's deed. That deed determined the plaintiff's case so far as that trial was concerned. Any evidence offered by them against the claim of adverse possession could have had no possible effect upon

the verdict. Under such circumstances it has been the invariable practice of the Court to order a new trial. See

Schroeder *v.* Schweizer Lloyd, etc, 60 Cal., 467.

VII.

The only remaining question to be considered, is the one suggested by counsel for respondents, that Henry G. Ganahl, the present plaintiff, became of age on the first minute of the tenth day of April, 1876, and consequently this action, as to him, was barred on April 9, 1881. In support of this position he relies upon the artificial rule of the common law, determining the period of minority. A simple reference to the provisions of the Code will dispel this illusion. The Civil Code provides, section 25, minors are:

"1. Males under twenty-one years of age.

"Section 26. The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the *corresponding* day completing the period of minority."

The only difficulty that can arise in the construction of this section is in determining the meaning of the phrase "completing the period of minority." A reference to the preceding section will show that the "period of minority" is twenty-one years in males, and eighteen years in females. If we accept the method of computation suggested by counsel for the respondents, the word "corres-

ponding," in section 26, must be entirely ignored. The first minute of the "corresponding day" necessarily means the "corresponding day" of the month, twenty-one years after the day of birth. This is the method of computation that was adopted by department one in this case and it is undoubtedly correct. In their note to section 26, the Code Commissioners state that it was their intention to change the common law rule. The correctness of this interpretation is rendered indisputable when we considered the definitions of the words "year" and "day" given in the Political Code. It is provided therein, "Section 3,257. The term 'year' means a period of three hundred and sixty-five days, * * * and the added day of a leap year, and the day immediately preceding, if they occur in any such period, must be reckoned together."

"Section 3,259. A day is the period of time between any midnight and the midnight following."

Applying these provisions to Sections 25 and 26 of the Civil Code, and Henry G. Ganahl was born on the first minute of the 11th of April, 1853; he attained his majority on the first minute of the "corresponding" day, twenty-one years, or twenty-one times three hundred and sixty-five days, thereafter—that is, on the first minute of April 11, 1876. He was entitled to commence an action for the recovery of whatever interest he had in the land in dispute, within the period of five years thereafter. (Section 328, C. C. P.) This period would have

expired at the end of the 10th day of April, 1881, *but such day was Sunday;* and, by the express provisions of the Codes, he had the whole of the following Monday, the 11th of April, in which to bring his action. He brought it on that day, and consequently it was in time.

See Civil Code, Sections 10, 11.
Code of Civil Procedure, Secs. 12, 13.
Alameda Mac. Co. *v.* Huff, 57 Cal., 331.
People *v.* McCain, 50 Cal., 210.
People *v.* McCain, 51 Cal., 360.
Estate of Rose, 63 Cal., 346.
Muir *v.* Galloway, 61 Cal., 498.
Perham *v.* Kuper, 61 Cal., 331.

The counsel for the respondents asserts that these sections of the Codes are inapplicable to this case, because of the language of Section 328 of the Code of Civil Procedure, preventing the bringing of the action after five years. But this is merely begging the question. The question is, when does the five years terminate. The law says, not until the end of the Monday following the Sunday, which otherwise would have been the termination. The Sunday, in such case, as cited in Muir *v.* Galloway, is a *dies non;* not to be counted in the period of limitation; "a supplementary day superadded by law."

It respectfully submitted that the appellant, Henry G. Ganahl, is entitled to a new trial in this case, and that it should be so ordered.

CARTER P. POMEROY,
Attorney for Appellants.

Service of a copy of the within admitted

this 10 *day of August, 1885.*

Wilder & Wilder.

Attorney for Respondents.

Supreme Court
Ganahl WPA # 17872

8441

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

HENRY GORDON GANAHL ET ALS.,
Appellants,

vs.

LEWIS SOHER ET AL.,
Respondents.

PETITION FOR HEARING IN BANK.

To the Honorable the Supreme Court of the State of California.

The plaintiff and appellant, Henry Gordon Ganahl, prays that he be granted a hearing in bank in the above-entitled cause, for the reason, which he most respectfully submits, that the judgment of Department One of this Court, as shown by the opinion of Mr. Justice Ross, was based upon a misconstruction of section 328 of the Code of Civil Procedure.

Filed December 15th 1884
J. H. McKinney Clerk
By Deputy Clerk

See also Estate of Ray, 63 Cal. 346. This case is directly in point.

This was an action of ejectment. The defendants, among other defenses, relied upon the five years Statute of Limitations, as found in section 318 of the Code of Civil Procedure. The facts of the case in connection with this defense are correctly stated in the opinion of Department One, with the exception that the Court nowhere mentioned and apparently overlooked the controlling fact that the *tenth day of April*, 1851, *was Sunday*. Such day being Sunday, the plaintiff, by the very terms of the statute regulating the computation of time, had the whole of the following day, to wit, the 11th of April, 1881, in which to bring his action. He brought his action on that day, and consequently the same was brought in time. The universal rule as established by the Code is, that where the last day of the time within which an act can be done *falls on Sunday*, the party has the whole of the following Monday in which to act.

Civil Code, sections 10, 11.
Code of Civil Procedure, sections 12, 13.
Alameda Mac. Co. *v.* Huff, 57 Cal. 331.
People *v.* McCain, 50 Cal. 210.
People *v.* McCain, 51 Cal. 360.

This is the view that the learned judge of the trial Court took in his instructions to the jury.

He charged them that so far as Henry Gordon Gaskill was concerned, the action was brought within the five years limitation. (See Transcript, page 54.)

It is respectfully submitted that the Court erred in holding that the appellant Henry Gordon Gaskill's cause of action was barred by the five years Statute of Limitations. Wherefore the petitioner prays that he be granted a hearing in bank.

CARTER P. POMEROY,
Attorney for Petitioner.

Supreme court
Banahl WPA#17872

No. 8,441.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

HENRY G. GANAHL, et als.

Appellants,

vs.

LEWIS SOHER, et als.

Respondents.

BRIEF FOR RESPONDENTS

ON HEARING IN BANK.

H. J. TILDEN,

Attorney for Respondents.

Filed this 17th *day of August, 1885,*

J. W. McCarthy, Clerk,

By Frank Myers *Deputy Clerk.*

1885.

FRANK EASTMAN & Co., Printers, 509 Clay St., S. F.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

HENRY G. GANAHL, ET ALS.,
Appellants,
vs.
LEWIS SOHER, ET ALS.,
Respondents.

No. 8441.

BRIEF OF RESPONDENTS

ON HEARING IN BANK.

FACTS.

The evidence of the plaintiffs, pages 17, 18 and 19 of Transcript, shows that John W. Geary, first Alcalde of San Francisco, issued a grant of the fifty-vara lot in dispute, to Henry Ganahl, the

husband of one. and father of the other two plaintiffs, in December, 1849, and that he died in Georgia on the 12th day of May, 1855; and that Elizabeth Ganahl was born on the 21st day of May, 1853, and that Henry Gordon Ganahl was born on the 11th day of April, 1855, and that neither of the plaintiffs were ever in possession of the lot.

The evidence for the defendants shows the following facts — pages 27 and 28 of Transcript :—

Asa Hatch testifies that he located in 1849 on the lot opposite the one in dispute, and built a house and lived there about twenty years, and was acquainted with this lot in dispute, and that Mr. Van Houten claimed the ownership of this lot in 1853. That he, Van Houten, agreed to and did pay for half of the fence and bulkhead on the south side of the lot.

That there was a front fence built, and he presumed Van Houten built it, and that there was a brush fence around the rest of it.

On cross-examination he testifies that from the transactions with Van Houten, he found out he owned the lot ; and on page 29 he says:—

Van Houten pretended to be in possession. When I went to him, I asked him if he owned the

property, and he said "Yes." All I know is he claimed to own it.

On pages 30 and 31 of Transcript —

William Davis testifies that he was acquainted with this lot in 1851 and '52, and that Mr. Broad fenced the lot for Mr. Van Houten in 1853 or '54; and that he knew the lot from 1852 or '53 or 1858, and up to 1860, and that he always thought it was Van Houten's lot. That was the general talk among those who knew the lot. I never knew of but two owners for the lot, that was Van Houten and Lipman.

On page 34 of Transcript Columbus Bartlett testifies that Mr. Lipman bought the lot in 1869 and built a house on it.

Thomas Young, on page 34, testifies that he bought the lot of Mrs. Van Houten, and that it was fenced.

And on page 35 Samuel West testifies that he first became acquainted with the lot in 1858, and he found an old fence on the lot; that he understood Van Houten owned the lot.

On page 38 Henry Bigelow testifies that he knew Van Houten in 1851, and up to 1853. That Van Houten claimed to own this lot in 1851–2–3.

"I saw the lot in 1850 and 1851; there was a brush fence around it; it was built under the order of Van Houten."

Then follows, on page 39, &c., the evidence of the defendants, that they purchased the land and built residences thereon.

The defendants then put in evidence deeds showing a chain of title from Van Houten to the defendants, and also the probate proceedings in the matter of the estate of Henry Ganahl, page 42, showing that the lot was sold at Probate sale, and deeds showing that the defendants herein acquired that title.

And defendants also proved, pages 49 and 50 of Transcript, that the lot was assessed to unknown owners from 1850-51 to 1853-54; and thereafter to 1858–59 to John A. Van Houten, and that Van Houten paid the taxes from 1850–51 to 1858–59, when he sold it to Wm. H. Post, and that the lot has been assessed to, and taxes paid by, the defendants and their grantees ever since.

Points and Authorities.

I.

The respondents claim that the evidence shows that Van Houten was in possession of the lot,

claiming the same as his own, several years if not full five years before the death of Van Houten, and that the Statute of Limitations having begun to run against Henry Ganahl before his death, it continued to run and the title became vested in Van Houten upon the expiration of five years from his entry thereon in 1850.

Angell and Ames on Limitations, section 477, says: "When the statute has once begun to run it will continue to run without being impeded by any subsequent disability."

In *Hogan* vs. *Kurtz*, 94 U. S., 779, the Court says: "When the statute has begun to run it will continue to run without being impeded by any subsequent disability."

In *Crosby* vs. *Doud*, 61 Cal., 597, the Court says: "Crosby's possession was not invaded in his lifetime; had it been and had the Statute of Limitations been set in motion during that period its running would not, of course, have been arrested by the subsequent disability of the plaintiff."

In *Harris* vs. *McGovern*, 2 Sawyer, 515, the Court says: "When the Statute of Limitations once begins to run upon a right of action to recover lands, it is not interrupted by the subsequent descent of such right of action to a party laboring under a disability to sue at the time of such descent cast."

The same rule is adopted in the following cases:

Fleming vs. *Griswold*, 3 Hill, N. Y., 85.
Demarest vs. *Wynkoop*, 3 John. Ch., 139–144.
Sandford vs. *Sandford*, 62 N. Y., 553.
Mercer vs. *Selden*, 1 Howard U. S., 48.
Jackson vs. *Roosevelt*, 18 John., 40.
Kistler vs. *Hereth*, 39 Am. R., 132–134.

The Civil Code, Section 1007, says: "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of property *confers a title thereto*."

Cannon vs. *Stockmon*, 36 Cal., 538.
Arrington vs. *Liscom*, 34 Cal., 365.

II.

The respondents claim also that the plaintiffs' right is barred by reason of their not commencing the action within five years after their disability was removed.

The counsel for plaintiffs admits that the action is barred as to Maria Ann Ganahl and Ann Elizabeth Ganahl, but claims that it is not as to Henry Gordon Ganahl.

The facts show that Henry Gordon Ganahl was born on the eleventh day of April, 1855, and this

action was commenced on the eleventh day of April, 1881. The question is, when did Henry become of the age of majority?

2d Kent's Commentaries, side page 233, Chapter 31, under the head of Infants, says:

"The age of majority is computed on the beginning of the day preceding the anniversary of the person's birth."

See also, 1st Bouviers' Law Dictionary, title Infants, page 705.

This plaintiff, then, became of age on the first minute of the tenth day of April, 1876, and he had all of that day in which he could have commenced the action, and his full five years to commence the action expired on the ninth day of April, 1881, because if he had all of the tenth day of April, 1876, to commence the action, the last day of the five years thereafter must have expired on the ninth day of April, 1881. If you include the tenth day of April, 1876, and the tenth day of April, 1881, you give him six tenth days of April, or one day more than five years.

In the case of

Phelan vs. *Douglass*, 11 How. P. R., 193,

the plaintiff brought suit to redeem land sold under foreclosure of mortgage.

The statute gave him ten years within which to bring the action after he became of the age of majority. He was born on the 14th day of December, 1820, and the Court says: "He had ten whole years after such disability removed to bring suit. We must in computing that ten years take in the 13th day of December 1841, because he had the whole and entire part of that day to sue in * * * computing that as the first day of the ten years, and that period expired with the expiration of the 12th day of December, 1851. He did not sue until the 13th of that month, and then his whole ten years had expired and the statute barred his claim." See also:

State vs. *Clark*, 3 How. (Del.), 557.
Hamlin vs. *Stevenson*, 4 Dana (Ky.), 597.

The Code, it seems to us, does not change the above rule as to when a person arrives at the age of majority. Section 26 Civil Code, says:

"The time must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day, completing the period of minority." Certainly plaintiff's minority was completed on the 10th day of April, 1876, or else we would allow him 22 eleventh days of April to complete his minority.

The plaintiff then had all of the 10th day of

April, 1876, to commence his action, and the five years expired with the expiration of the 9th day of April 1881.

But if this was not so we claim that under sec. 328 of the Code of Civil Procedure, which provides that "the time during which such disability continues, is not deemed any portion of the time limited for the commencement of such action * * * but such action may be commenced *within* the period of five years after such disability shall cease; *but such action shall not be commenced after that period.*

The statute not only provides that an action may be commenced *within* five years after the disability shall cease but expresly provides that *such action shall not be commenced after that period.* And we claim that even if he had all of the 10th day of April to commence the action, the fact of that day being Sunday, did not give him another day, because that is expresly prohibited by the very statute he claims under.

We think the decisions of the Court sustain this position.

In the case of

The People vs. *Luther*, 1 Wend., 43,

a party, whose land had been sold, attempted to

redeem. The statute gave him fifteen months within which to redeem, and that time expired on the 13th day of April, which was Sunday, and he tendered the money on Monday, the 14th, and the Court held it was too late. See also

Hibernia Bank vs. *O'Grady*, 47 Cal., 579.
Presbney vs. *Williams*, 15 Mass., 193.
Patrick vs. *Faulke*, 45 Mo., 314.
Bissell vs. *Bissell*, 11 Barb., 96.
Haly vs. *Young*, 134 Mass., 364.
Ex-parte Dodge, 7 Cowen, 147.
Ellen vs. *Elliott*, 67 Ala., 432.

In the last case it was claimed under a statute similar to section 10 of the Civil Code, that when the last day of the expiration of the time was Sunday, that the party had all of the next day, but the Court held the statute had no application.

III.

We also claim that the plaintiff's claim is barred by section 1573 of Hartson's Practice, which provides that no action for the recovery of real estate, sold by an executor or administrator, can be maintained unless it be commenced within three years next after the sale.

But the counsel for plaintiffs claim, the notice of the hearing of the petition for letters of administration on Henry Ganahl's estate, was not posted for the length of time required by law, and therefore the whole proceedings were void.

We think the notice was given for the length of time required by law.

It was posted on the 20th day of September and the hearing was on the 30th day of September.

The statute at that time—section 60 Belknap's Probate Law, was the same as section 1373 of the Code of Civil Procedure, which provides that notice must be given at least ten days before the hearing,—by excluding the first and including the last day, we have ten days, and we think that has been the rule adopted and the practice in a large majority of cases in the Probate Court.

Estate of Osgood Myricks, R., 153.

This was a case of sale of real estate, and section 1547 provided that notice of the time and place of sale must be published for three weeks successively next before the sale.

The first publication was on the 19th of June, and the hearing on the 10th of July, and the Court held the notice commenced at the commencement of the 19th of June and ended at midnight of the 9th of July, and was three weeks notice before the hearing.

Section 1303 of the Code of Civil Procedure, in regard to Wills, shows that the ten days' notice includes the first and last days of the publication.

People ex rel Knight vs. *Blanding*, 10 P. C. L. J., 514.
Mich vs. *Mayhew*, 51 Cal., 514.

In the last case the defendant offered in evidence a list of illegal votes cast at the election, served on the 7th; the trial commenced on the 10th, and the plaintiff objected that the list was not served three days before the trial, as provided in section 1116 of the Code of Civil Procedure, which says "no testimony can be received of illegal votes unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes," &c.. The Court held the list was served in time.

The language of section 1116 and 1373 is of the same import—the one says the notice must be given at least ten days before the hearing, and the other, that the list must be delivered three days before the trial.

In the case of *Cann* vs. *Warren*, 1 Houstans, Del., 188, the Court held the notice served on the fifth of November for the fifteenth of November was ten days notice and sufficient.

In the case of *Anderson* vs. *Baughman*, 6 Mich., 298, the Court held that under a rule requiring four days notice, exclusive of the day of service, that a notice served on the twenty-eighth of April for the second day of May was sufficient.

In the case of *Thomas* vs. *Affick*, 16 Penn. St., 14, the law provided that no writ shall be sued out against any Justice of the Peace until notice in writing shall have been delivered to him at least thirty days before suing out the writ.

The notice was served on the nineteenth of May, and suit brought the eighteenth of June, and the Court held that the first day should be included and the last day excluded, and that the suit was not brought too soon.

In *Northop* vs. *Cooper*, 23 Kan., 432, the question was whether a notice of sale had been published thirty days.

The statute required publication for at least thirty days before the day of sale.

The first publication was October 13th, and the sale November 12th. It was contended that full thirty days must intervene between the first and last publication, but the Court held that the notice was sufficient.

The same rule is adopted in the case of *Hage-*

man vs. *Ohio Building and S. Association*, 25 Ohio, St., 186–207.

In *Faulds* vs. *People*, 66 Ill., 210, the law required the notice of sale to be posted six days; it was posted on the afternoon of the fifteenth for the twenty-first of the same month. Held sufficient.

See the following cases which also held that the notice is sufficient:

Griffith vs. *Bogert*, 18 How. (U. S.) 158.
Charles vs. *Stanberry*, 3 John, 261.
Central Bank vs. *Alden*, 41 How. Pr. N. Y., 102.

The authorities cited by appellants have no application to the facts in this case.

In the case of

Williams vs. *Board of Supervisors of Sac. Co.*, 58 Cal., 237,

the law provided that the petition should be published for four weeks next preceding the hearing; and the Court held that as seven full days intervened between some of the days of said publication it was insufficient.

In the case of

Alameda Mac. Co. vs. *Huff*, 57 Cal., 331; and
People vs. *McCain*, 50 Cal., 210; and
People vs. *McCain*, 51 Cal., 360,

the law required the notice to be published daily for five days, Sundays excepted, and the Court held that five days' publication, including Sunday, was insufficient.

In *Himmelmann* vs. *Cain*, 49 Cal., 285, the law required the notice to be published for five days, and it was published from the 25th to the 29th day of August, which was held sufficient.

In *Pearson* vs. *Pearson*, 46 Cal., 609–635, the law required the notice to be published four weeks (twenty-eight days) before the time of hearing, and the order for publication was made on the 8th day of May, fixing the hearing for the 4th of June, which showed the publication must include the first and last days to make twenty-eight days, while in the case at bar there were eleven days, inclusive of the first and last days.

In *Meredith* vs. *Clancey*, 59 Ind., 466, the law provided that the time and place of sale under execution shall be advertised three weeks successively next before the sale, and the first publication was on the 12th of December, and the sale took place on the 1st of January, showing that the time of the advertisement included the first and last days, and the Court held the notice insufficient, and said either the first or the last day should be excluded.

In case of *Handly* vs. *Cunningham*, 12 Ky., 401, the question was when an Act of the Legislature took effect. The Act provided that, "This Act shall take effect and be in force from and after the first day of September," and the Court held it was not in force on the first day of September.

And in *Wood* vs. *Commonwealth*, 11 Ky., 220, the law required an appeal to be taken within sixty days from the rendition of the judgment, and the Court held the day of the rendition of the judgment must be included.

The case of *Bemis* vs. *Leonard*, 118 Mass., 502, simply held that in computing time from the date or day of the date, or from certain acts or events, the first day must be excluded.

The case of *Walsh* vs. *Boyle*, 30 Md., 266, decides that an order of the Court allowing each party to take evidence on one day's notice, that a notice served on the 28th to take evidence on the 29th, was one day's notice and sufficient.

In *Thorne* vs. *Mosher*, 20 N. J. Eq., 257, the question was whether a tender of interest on the sixteenth was in time on a bond which provided that the interest should become due on the first, and if the same remained unpaid fifteen days thereafter, the whole sum should become due, and the Court held the first day should be excluded.

In the case of *Duffy* vs. *Ogden*, 64 Penn. St., 241, the question was whether a three months' notice to terminate a lease was sufficient. The lease was for one year from the 25th day of March, and the notice was given on the 25th day of December. The Court held the lease expired on the 24th day of March, and that the 25th day of December, the day of giving the notice, must be counted, and, therefore, the three months' notice previous to the termination of the lease was completed on the 24th day of March, and was sufficient. The cases in Seventh American Decisions, 250, and Twenty-sixth American Decisions, 234, held that the first day must be excluded and the last day included.

In the case of *Earle* vs. *Doe*, 16 How., U. S., 611, the question was whether twelve weeks' notice of a sale for taxes was published or not.

The first publication was on Saturday, the twenty-sixth of August, and last on the fifteenth of November, and the Court held the notice was not published twelve weeks.

The Court says the twelve weeks expired on the seventeenth day of November, which, by computing the time, will be found to be Friday, and, as the Court held, the sale was made two days too soon.

It seems to me this is an authority that the first and last day of the publication should be included.

In the case of *Pryor* vs. *Downey*, 50 Cal., 399, no administrator was appointed.

In *Wilson* vs *Hastings*, 5 West Coast Rep., 31, the petition was held insufficient to give the Court jurisdiction.

In *McNeil* vs. *First Congregational Society of S. F.*, 4 West Coast Rep., 421, the deceased died before the adoption of the Probate Law, and the Court held that the Act subsequently passed did not give the Court jurisdiction of the estate.

IV.

I claim, further, that the filing of the petition stating the jurisdictional facts gave the Court jurisdiction of the subject matter, and that if there was any irregularity in the proceedings thereafter, the judgment of the Court could not be attacked collaterally.

In the matter of James, Administrator, 22 How., P. R., 409, it was claimed the administrator's authority was void because the parties were not cited, but the Court said the Surrogate of Albany obtained jurisdiction of the subject, not by the citations, but by the residence of intestate within the County of Albany at the time of his death.

Under our statute the filing of the petition, stating the necessary facts, gives the Court jurisdiction of the subject matter.

In *Warner* vs. *Wilson*, 4 Cal., 312–313, the Court below ruled out the evidence in relation to the appointment of a guardian and the letters of guardianship, because no service was made on the ward, and the Supreme Court reversed the lower Court on that ground, and said the evidence should have been admitted, that the same could not be questioned in a collateral proceeding.

Freeman on Judgments, Section 126, says there is a difference in obtaining jurisdiction, and a defect in obtaining jurisdiction.

The fact that defendant is not given all the time allowed by law to plead will not ordinarily make a judgment vulnerable to a collateral attack.

See also, Section 608, same author.
Whitwell vs. *Barbier*, 7 Cal., 63.
Sheldon vs. *Wright*, 5 N. Y., 518.

In *Haynes* vs. *Meeks*, 10 Cal., 118, the Court says: "The fact of the death of the intestate, and of his residence, are foundation facts upon which all the subsequent proceedings must rest.

Irwin vs. *Scriber*, 18 Cal., 503.
Peck vs. *Strauss*, 33 Cal., 683.
Lucas vs. *Todd*, 28 Cal., 184.

3d Redfield on Wills, *page 59, clause 3, says: "When the Court has jurisdiction of the subject matter, the probate is conclusive in every particular."

Same authority, *page 123, clause 5, lays down the same rule.

Also, on *page 121, note 2, says the deceased, at the time of his death, must have been domiciled or else have some estate within the jurisdiction of the Court.

These two leading facts being conceded the Court acquires jurisdiction both of the general subject and of the particular cause.

V.

This was a judicial sale, and the Court having jurisdiction of the subject matter and the cause, the appointment of the administrator was not void; but if it had been, the Statute of Limitation applies.

Harlan vs. *Peck*, 33 Cal., 520.
Meeks vs. *Olphert*, 10 Otto., 568.
Meeks vs. *Vassault*, 3 Saw., 210-216.
Holmes vs. *Beal*, 9 Cush., 223.

I submit that the notice of the hearing of the

petition for letters of administration was sufficient, but if it had not been, the cases cited by appellant in regard to void judgments has no application to an innocent purchaser at a judicial sale.

There is no proof or allegation that the purchaser at the probate sale had any notice of any defect in the proceedings, and I believe it is a universal rule that an innocent purchaser at such sale for value is not effected by any error of the Court in such proceedings when the judgment appears upon its face to be regular.

In this case the decree or order recites that due proof was made that notice of the hearing was given of the application at least ten days before the hearing, and there is no claim that the proceedings for the sale and the confirmation thereof were not strictly in accordance with the requirements of law.

Mayo vs. *Foley*, 40 Cal., 282.
Jones vs. *Gillis*, 45 Id., 541.
Reeves vs. *Kennedy*, 43 Id., 643.

The case of *Galpin* vs. *Page*, 18 Wall, 373, recognizes this principle; the purchaser was one of the attorneys of the plaintiff in the proceedings for the sale, and the Court says "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."

I respectfully submit that the judgment should be affirmed.

H. J. TILDEN,

Attorney for the Respondents and Defendants.

Service of the within Brief of Respondents is hereby admitted this 17th day of August. 1885.

Carter P. Pomeroy

Atty. for Appellants.

Supreme court
Ganahl WPA #17872

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1100 Town & Country Road, Suite 1450, Orange, California 92868, (714) 937-1010.

On September 27, 2019, I mailed the foregoing document described as **RESPONDENTS' MOTION FOR ORDER GRANTING JUDICIAL NOTICE OF BRIEFS FILED IN GANAHL V. SOHER, 5 P. 80 (CAL. 1884)** on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Ortiz Law Group 1510 J Street, Suite 100 Sacramento, CA 95814-2097 jesse@jesseortizlaw.com Counsel For Plaintiff LUIS SHALABI (1 copy)	Clerk of the Court, Dept. S32 Hon. Wilfred J. Schneider Jr. SAN BERNARDINO COURTHOUSE 247 W. Third Street San Bernardino, CA 92415 Trial Judge (1 copy)
Fourth District Court of Appeal 3389 Twelfth Street Riverside, CA 92501 (1 Copy)	Supreme Court 350 McAllister St. San Francisco, CA 94102 (1 original plus 8 paper copies)

I placed the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelopes with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 27, 2019, at Orange, California.

Debra Miranda

DEBRA MIRANDA