had been previously made. To whom or for what amounts is not said. Hamilton then executed the paper subject to them, and Mr. Spain so received it, without knowing that he could have any interest in the fund. Had they been otherwise, Mr. Spain's claim of priority would have been lost by his omission to make those inquiries suited to the occasion, and he leaving it in the power of Hamilton to make assignments to others of parts of the same fund. There is no doubt that he did so to Corcoran & Riggs, to Robb & Co., and to Hill, without either of them having had notice of any dealing between Hamilton and Spain. They have the right to a priority of payment out of the fund, and we affirm the decree of the Circuit Court with costs.

CASE REMANDED.

Messrs. Justices MILLER and SWAYNE dissented.

GRAY *v.* BRIGNARDELLO.
BRIGNARDELLO *v.* GRAY.

1. The ancient doctrine that all rights acquired under a judicial sale made while a decree is in force and unreversed will be protected, is a doctrine of extensive application. It prevails in California as elsewhere; and neither there nor elsewhere is it open to a distinction between a reversal on appeal, where the suit in the higher court may be said to be a continuation of the original suit, and a reversal on a bill of review, where, in some senses, it may be contended to be a different one. But purchasers at such sale are protected by this doctrine only when the power to make the sale is clearly given. It does not apply to a sale made under an interlocutory decree only; or under a conditional order, the condition not yet having been fulfilled.
2. A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form, cannot be entered in that shape *nunc pro tunc* in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory.

IN July, 1853, Franklin C. Gray, of California, died in the State of New York, leaving there a widow, Matilda, and an infant daughter, Franklina, and property held in *his* name,

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in California, appraised at $237,000. In January, 1854, administration was granted to J. C. Palmer and C. J. Eaton. In February, 1854, William H. Gray, a brother of deceased, filed a bill in chancery in one of the State courts of California, to wit, the District Court of the Fourth Judicial District, against Palmer, Eaton, the widow, and infant daughter (*service on the infant, then residing with her mother in Brooklyn, New York, being made by advertisement in a California newspaper*, and one H. S. Foote being appointed by the court her guardian *ad litem*), alleging a partnership between him and the deceased in his lifetime. In April, 1855, *Eaton, who had now resigned his administratorship*, commenced a similar suit against his late co-administrator Palmer, *but not at this time making William H. Gray a party*. In October, 1855, these two suits were consolidated by *consent of parties*, and *on the 27th October*, 1855, a decree was entered by *consent, the fact of consent, however, not being stated in the decree itself*. The decree adjudged that a partnership existed between Eaton and the deceased, and a different partnership between William H. Gray and the deceased, each partnership embracing *all business and all property, real and personal, of the parties*, and decided that the partnership of William H. Gray was subject to that of Eaton; it further settled the proportionate interest of each partner, and directed an account of the partnership transactions to be taken by a certain James D. Thornton, who was appointed a commissioner for that purpose, and that he should make a report of his actings and doings. The decree proceeded further in these words:

"And the court doth further decree, that the commissioner, *after he shall have made such reports as aforesaid, and the same shall have been passed upon by the court, and in accordance with such further directions in this behalf, if any, which the court may give him, do proceed to sell*, as in sales under execution, all the property, *real* and personal of the said *partnerships*, both or either of them, of whatever name or nature, for cash."

In pursuance of the directions of this decree, the commissioner made a report on the 25th of March, 1856, and *this*

report being still unconfirmed, he proceeded to sell the decedent's property, and, on the 3d May, 1856, sold a lot in San Francisco to a certain Brignardello, for $19,040. The sale was public; every way fair, apparently, so far as concerned Brignardello. The price was a very good one, and it had been paid. The commissioner subsequently, May 14, 1856, made a report to the court of his sale, stating that he had "sold the real estate *ordered to be sold by the decree pronounced on the 27th October*, 1855." The whole proceeds amounted to about $70,000.

It will be observed that the decree above set forth contemplated, apparently, a sale only after the commissioner should have made a report, and the same had been passed on by the court. This circumstance appeared to have struck some of the parties concerned, and the record brought up to this court disclosed the following further proceedings in court, *dated eleven days after the sale;* and *the only further proceedings which it did disclose.* They read thus:

DECREE AMENDING INTERLOCUTORY DECREE.

W. H. Gray

v.

J. C. Palmer, adm'r of F. C. Gray, dec'd, et als., and

C. J. Eaton

v.

J. C. Palmer, adm'r of F. C. Gray, dec'd, et al.

On this day came the several parties, Palmer and defendant, by their respective attorneys, and it appearing to the court that copies of the rule to show cause made on the 10th day of May, 1856, and of the affidavit on which said rule was founded, have been duly served on the respective attorneys of the several defendants, and on H. S. Foote, guardian *ad litem* for the infant defendant, and the said defendants having shown no cause why the motion of said W. H. Gray, *to amend the interlocutory decree entered in the above causes on the 7th day of April*, 1856, should not be granted, *and the court being satisfied that said interlocutory decree and that said error was the result of a mistake and inadvertence on the part of the attorney who drew up the same:* It is ordered

that the motion of the said W. H. Gray to amend said interlocutory decree, so as to make the same conform to the original decree and to the commissioner's report filed herein, on the 25th day of March, 1856, be and the same is hereby granted.

And ordered, on motion of said W. H. Gray, that the following amended interlocutory decree be entered *nunc pro tunc, in lieu* of the said decree which was entered on the 7th of April, 1856, to wit:

Same Parties

v.

Same Parties.

James D. Thornton, the commissioner, appointed, &c., having filed his report herein on the 25th day of March, 1856, it is hereby ordered, that the said report be, and the same is hereby confirmed; and it is further ordered, that said commissioner do proceed to sell all the property, real and personal, of the said partnership, as directed in the former decree of the court, and to receive the proceeds, out of which he *shall pay the costs and expenses of this suit*, and the remainder shall be paid and distributed to the several parties according to their respective rights, &c. But it is ordered, that before making said distribution, &c., commissioner report to this court his proceedings in the premises and the amount in his hands subject to such distribution, and the several interests of the respective parties therein upon the basis settled in his former report.

Indorsed: Filed May 14, 1856.

The result of all the sales, payments, and other proceedings in the business was, that the property, real and personal, of the decedent, was wholly absorbed, and the estate left in debt to the surviving brother, William H. Gray, in a sum of $3533.17; there not having in fact been enough of the estate of $237,000 left to pay for a tombstone that had been erected to the Gray deceased; and $900, or thereabouts, being, by common consent of parties, appropriated to that purpose, and made "a charge upon the estate generally."

The widow now conceiving that the proceedings had been collusive and irregular, took an appeal from the decrees obtained by Eaton, as also by Gray, against her husband's estate. This was about six months after the sale. On the

Statement of the case.

hearing of the appeal, the decree was reversed in the case of Eaton's bill, as to the infant, on the ground that she being in New York, had not been sufficiently served by a publication in California, and in the case of W. H. Gray's bill, as to all the defendants, because the proof was not sufficient to establish a partnership.*

Brignardello and others being in possession, however, under his purchase, the widow and infant daughter, joining in their action, now brought ejectment in the Circuit Court of the United States for the Northern District of California, the suit on which the writs of error now here were taken.

The title of Gray, the decedent, being undisputed, and the land having passed by his death, intestate, under the laws of California, to his widow and child, in equal shares, a *primâ facie* title was made in favor of the plaintiff. In order to defeat this title the defendants set up that they were *bonâ fide* purchasers, at a judicial sale under decree of a court having jurisdiction, putting in evidence the judicial proceedings already mentioned. Various objections, on the other hand, were set up to the validity of the proceedings prior to the rendition of the decree, as *e. g.* that the infant, being in New York, was not properly served with process by a publication made in California. The court below charged that the infant was not served, nor brought into court; that the judgment-roll in the consolidated action was no record as to her; and that the deed of Thornton the commissioner was void as to her, and this notwithstanding that the purchasers were innocent purchasers, for full price and at a sale fairly conducted; but it charged also—this instruction being specifically excepted to—that the decree did operate to divest the title of the widow. Judgment was accordingly entered in favor of the infant for an undivided moiety of the lot, and against the widow as to the other half; such several judgment being permitted by the rules and practice of the court. Two writs of error were now sued out; *one* by Brignardello and others, the defendants

* 9 California, 616.

below (case No. 169 upon the docket); the other by the widow, Matilda C. Gray, one of the plaintiffs (case No. 223). The points raised here were the correctness of the judgment, as above stated.

Mr. Galpin, for the widow and infant, relied on several grounds taken in the court below against the validity of the proceedings, prior to the rendering of the judgments in the equity suits. He also contended,

1. That the decree of sale, having been reversed for not serving the infant, and for error, the sale fell with the decree by which it was supported. The general doctrine, that "the *judgment* may be reversed for error, but the authority of the *writ* [of sale] stands, for it is distinct from that of the judgment," was not denied; but it was contended that the present case was peculiar. Here, on appeal, it was declared that no partnership had ever existed. Every semblance of authority to sell was thus carried away. There was not a "distinct authority" existing after reversal of a judgment, but an annihilation of any semblance of "authority" for what had been done. The case thus fell within the authority of the New York case, *Wambaugh* v. *Gates*.* On a reversal upon *a bill of review*, indeed, the title of the purchaser is not lost; because a bill of review commences a new action, and a different one from that in which the decree was rendered. But an appeal is part of the same action, in which and out of which the title grew, and the action is not terminated until the appeal is determined.† Having bought prior to that determination, the purchaser bought *pendente lite*, and took subject to the result of the appeal.

2. There was no existing authority to sell when the sale was made, and no subsequent proceeding mentioned in the record shows an authority that acted retrospectively, even if such authority could be given, which it could not be. Can an illegal act, done without any authority, be supported

* 4 Selden, 138.

† Fenno *v.* Dickinson, 4 Denio, 84; Traver *v.* Nichols, 7 Wendell, 434.

by a subsequently made but antedated direction? If so, a sheriff may take one's property or life, in advance of the verdict, and find his authority in a subsequent execution or sentence, entered *nunc pro tunc*, as of the day of trial.

Mr. Carlisle, *contra*, and after replying to the grounds taken by the other side as to the validity of the proceedings in the equity suits prior to the order of sale:

1. There is no suggestion of fraud on the part of the purchaser. The sale was public and fair; the price more than full; and having been made while the decree was in force, the purchaser's rights are not affected by a reversal. This ancient and generally settled principle of law is acknowledged in this court, and in the courts of California alike.* It must be settled everywhere, as well for the interests of heirs and debtors as of purchasers themselves. No man would buy or bid at a judicial sale, if he was to lose the land because of the subsequent reversal of the judgment.

Acts done under even a *fraudulent* judgment, so far as they affect third persons, are valid.†

2. That part of the record dated May 14, 1856, shows that there was a power to make the sale. From the recitals in that part it may be *inferred* that the court did, on the 7th April, 1856, make an order of sale, and that the omission to put it in proper form "was the result of a mistake and inadvertence on the part of the attorney who drew up the same." An entry *nunc pro tunc* is accordingly made, and the sale is validated. The recital of record, that a decree was entered on the 7th April, 1856, is sufficient evidence that one was made; though it may not appear in the record brought up.

Mr. Justice DAVIS delivered the opinion of the court.

The character of the suits brought in the State court by C. J. Eaton, by W. H. Gray, the parties to them, the kind

* Grignon *v.* Astor, 2 Howard, 340; United States *v.* Nourse, 9 Peters, 8; Reynolds *v.* Harris, 14 California, 667; Farmer *v.* Rogers, 10 Id., 335.

† Sims *v.* Slacum, 3 Cranch, 300; Blight *v.* Tobin, 7 Monroe, 619.

of evidence on which they were sustained, and their ultimate termination, provoke comments, but we forbear to make them.

The vital question in these cases is this: "Did the decree of the 27th of October, or any subsequent decree or proceeding in the court, authorize the sale that was made of the real estate of Franklin C. Gray, and under which sale the defendants below claimed title?"

Numerous objections have been taken here, and were taken in the court below, to the validity of the proceedings prior to the rendition of the decree, which, although interesting, will not be discussed, and no opinion given, as it is not necessary to decide them.

It is a well-settled principle of law, that the decree or judgment of a court, which has jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know, that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar.*

But did the decree or decrees relied on to defeat the plaintiffs' title authorize the sale that was made?

The decree of the 27th of October, 1855, found the existence of the partnerships, and the interest of each member of the firm, and a commissioner was appointed to take and

* Voorhees *v.* Bank of United States, 10 Peters, 449; Grignon's Lessee *v.* Astor, 2 Howard, 319.

state the accounts, and to ascertain the nature and extent of the partnership property, and to report to the court. The decree proceeds to say, that the commissioner, "*after he shall have made such reports*, and the same *shall have been passed upon by the court*, and in accordance with such further directions in this behalf, if any, which the court may give him, *do proceed to sell* all the real and personal estate of the said partnership, both or either of them." This decree is manifestly interlocutory. No authority was given to sell until the commissioner had reported the state of the accounts, and what property was owned by the different firms, and the court had passed on the report. The court, properly enough, reserved the right to approve or disapprove the report before the authority to sell was complete. How could the court know, until the accounts were stated, whether anything was due William H. Gray, or Eaton, and consequently, whether there was a necessity to sell real estate? It is monstrous to suppose that any court would order a sale to be made, especially where the interests of an infant defendant would be imperilled, until it was judicially ascertained that the rights of others demanded it. In pursuance of the directions given by the decree, the commissioner made his report on the 25th of March, 1856, and without waiting for its confirmation, actually sold, on the 3d day of May following, real estate to the value of nearly $70,000. And, as if to fix beyond question the authority under which he acted, he states to the court in his report of sales, made May 14th, that he sold "the real estate ordered to be sold by the decree pronounced on the 27th day of October, 1855."

But it is claimed that a *nunc pro tunc* decree, subsequently entered, gave the power to make the sale, and rendered valid what, without it, would have had no validity.

The only proceedings which the record discloses are those set out, *ante*, p. 629–30, and under them the claim is made.

The motion there speaks of an interlocutory decree having been entered on the 7th day of April, which it was desired to correct. And the court, in passing on the motion, say that there was an error in the decree, which was the re-

sult of a mistake, and direct an amended decree to be entered *nunc pro tunc*, in lieu of the one which was entered on the 7th of April.

This motion and order are predicated on a state of facts which did not exist. No decree was ever entered on the 7th of April, nor on any other day prior to the sale, and we cannot, therefore, even conjecture what the errors and mistakes were which it was desirable to correct. If the court had said, that on the 7th of April, the report of the commissioner was approved, and the sale ordered, but through inadvertence or neglect on the part of the court or its officers, the proper entries were not made, then it might well be argued that a *nunc pro tunc* decree could be made. A *nunc pro tunc* order is always admissible, when the delay has arisen from the act of the court.* But that is not this case. There is nothing to show that the report of the commissioner was approved prior to the sale; no evidence that any decree was entered, or any authority even to make one, on the day stated, nor in fact that the court was in session on that day. By no rule of law can a decree, which was clearly an afterthought, and made subsequent to the sale, bolster up the authority to make it. Purchasers at a judicial sale are protected, when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court, which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree, yet, if he does sell, his act is without authority of law, and is void.

The sale made by James D. Thornton, the commissioner appointed by the judge of the District Court of the Fourth Judicial District of California, on the 3d day of May, 1856, was without authority of law, and void. The purchasers at that sale acquired no rights against the heirs of Franklin C. Gray, and the deeds given by the commissioner conveyed no title. These general views are decisive of this controversy.

* Fishmongers' Co. *v.* Robertson, 3 Manning, Granger and Scott, 970.

The court below directly charged the jury, that it was their duty to find a verdict against the plaintiff, Matilda C. Gray, which instruction was particularly excepted to, and was erroneous.

Case No. 169, in which Brignardello and others are plaintiffs in error, is affirmed with costs; and case No. 223, in which Matilda C. Gray is plaintiff in error, is reversed with costs, and remanded, and a *venire de novo* awarded.

JUDGMENT ACCORDINGLY.

BEAVER *v.* TAYLOR.

1. Under the *first* section of the Statute of Limitations of March 2, 1839, of Illinois, entitled "An act to quiet possessions and confirm titles to land,"—which section gives title to persons in "actual possession of land, or tenements, under claim or color of title made in good faith, and who for seven successive years continue in such possession, and during said time pay all taxes,"—the bar begins with the *possession* under such claim and color of title; and the taxes of one year may be paid in another. But under the *second* section of the same act, which section says that, "whenever a person having color of title, made in good faith, to *vacant* and *unoccupied* land, shall pay all taxes for seven successive years," he shall be deemed owner,—the bar begins *with the first payment of taxes* after the party has acquired color of title. Hence, in a trial of ejectment, when the said different sections of this statute are set up, any instructions, outside of the facts, which do not keep this distinction between the two sections in view, and by which the jury, without being satisfied as to the requisite possession under the *first* section, *might*, under the *second* section, have found for the party pleading the statute, upon the ground that the taxes had been paid for seven successive years, although the first payment was made less than seven years before the action was commenced, will be reversed, upon the well-settled principle that instructions outside the facts of the case, or which involve abstract propositions that *may* mislead the jury to the injury of the party against whom the verdict is given, are fatally erroneous.

2. To prove payment of taxes, the defendant offered in evidence two *receipts without dates;* and to prove the date offered two *letters having dates,* which letters inclosed the receipts; also to prove the date, and the agency of the person who had made the payment and written the letters, offered certain *entries in the account books of the parties* on behalf of whom the payment was alleged to have been made. These persons