In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 44

FRED Y. OYAMA and KAJIRO OYAMA,
Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS.

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SUMMARY STATEMENT OF THE MATTER INVOLVED.

Fred Y. Oyama, an American citizen, born in San Diego, California, in 1928, was named as one of the defendants in an action brought by the Attorney General of the State of California in the Superior Court of the State of California, in and for the County of San Diego, to procure a judgment ordering escheated to the State of California certain real property situated in San Diego County under the provisions of the so-called California Alien Land Law. (Tr., pp. 1-8.) (See Appendix.)

Also named as a defendant in the proceeding was Kajiro Oyama, the father of petitioner, an alien by virtue of his birth in Japan and alleged to be ineligible to citizenship for that reason.

The further essential facts are thus stated in the opinion of the Supreme Court of the State of California:

> "In the petition filed by the attorney general, he asserted that certain real property, by reason of its conveyance in violation of the Alien Land Law, has escheated to the state. Two causes of action were pleaded. In the first one, it was alleged that Kajiro Oyama, Kohide Oyama, formerly Kohide Kushino and Ririchi Kushino, are of the Japanese race, natives of the Empire of Japan and citizens and subjects of that country and, by reason thereof, are not eligible to citizenship under the laws of the United States; that Fred Y. Oyama is the son of Kajiro and Kohide Oyama, and is of the Japanese race but was born in California in 1928; and that June Kushino also is of the Japanese race and was born in

California in 1921. There has never been a treaty permitting a native of Japan to acquire an interest in the agricultural land of this country. Since 1935, by appointment of the Superior Court of the State of California, in and for the County of San Diego, Kajiro Oyama has been the duly qualified guardian of the person and estate of Fred Y. Oyama, a minor. June Kushino attained the age of 21 years in 1942 and during her minority, Ririchi Kushino was the guardian of her person and estate.

"In 1934, the petition continued, Kajiro Oyama and Kohide Oyama purchased certain agricultural land in San Diego County and a purported conveyance of it was made by one Yonezo Oyama to Fred Y. Oyama. The purchase price of $4,000 was paid to Yonezo Oyama by Kajiro and Kohide Oyama. Upon the execution and delivery of this purported deed, Kajiro and Kohide Oyama entered into the possession of the property and have ever since occupied and cultivated it as their own, and have had in their own right the beneficial use and enjoyment of the lands for agricultural purposes. The purchase of the property and the taking of the deed in the name of Fred Y. Oyama was a mere subterfuge, a fraud upon the People of the State of California and a violation of the Alien Land Law of California. Moreover, these persons acted wilfully and knowingly and with intent to obtain the ownership and use of the agricultural lands for their own use.

"Other allegations of this count were that Kajiro Oyama failed to render any account to the superior court for his receipts and expendi-

tures as guardian, and has not filed any annual or other account or report with the Secretary of State of California, as required by section 5 of the Alien Land Law. No account or report has been filed by the guardian with the County Clerk of San Diego County or served upon the district attorney, but in conducting business affecting the land in controversy, Kajiro Oyama used the name 'Fred Oyama' and 'Y. Oyama', and maintained checking accounts in each of those names for the purpose of evading and violating the Alien Land Law.

"The second cause of action incorporated some of the allegations of the first count, including those having to do with the race, nativity, citizenship and status of the parties. It then pleaded that in 1937, the Superior Court of the State of California, in and for the County of San Diego in the matter of the guardianship of June Kushino, made an order confirming the sale of certain described land in that county from her to Fred Y. Oyama for a purchase price of $1,500. Upon the making and recording of that order, Kajiro and Kohide Oyama entered into possession of the property and have since occupied and used it as their own and have had in their own right the beneficial use of the land for agricultural purposes. All of these acts were done by Kajiro and Kohide Oyama, wilfully, knowingly and with intent to violate the Alien Land Law of the State of California. The prayer of the petition was that the land conveyed to Fred Y. Oyama be decreed to have escheated to the state as of the date of the respective deeds; also that, as against the state, each of the defendants be forever

barred from asserting any claim or title to either parcel.

"The defendants demurred to the petition upon the grounds that it did not state facts sufficient to state a cause of action, that the court lacked jurisdiction, that the California Alien Land Law is unconstitutional, and that the causes of action are barred by the statutes of limitations. The demurrer was overruled.

"By answer, the defendants admitted the race and Japanese citizenship of Kajiro Oyama, Kohide Oyama, and Ririchi Kushino, but denied that, by reason thereof, they are not eligible to citizenship under the laws of the United States. They admitted the pleaded facts as to the birth and race of Fred Y. Oyama and June Kushino, and also the allegations concerning the guardianship proceedings. But the answer denied that Kajiro and Kohide Oyama purchased the property described in the complaint and asserted that Kajiro Oyama provided the money to purchase the two parcels of property as a gift to his son. Each of the transactions was made in good faith and for the purpose of acquiring for their son a means of earning a livelihood and for the further purpose of guarding and husbanding the gift for that purpose. The property described in the complaint is agricultural land, but Kajiro and Kohide Oyama have not occupied, used or cultivated the land as their own or had the beneficial use of it. As an affirmative defense, the defendants alleged that the state should not recover because of laches.

"Upon the trial of these issues, John C. Kurfurst was the only witness. He testified that he

had known the Oyama and Kushino families since about 1932. When the Japanese were evacuated from the Pacific Coast, he rented the land in controversy and, by two checks, paid the rent to Fred Oyama. These checks were returned to him endorsed in that name. Kurfurst had never heard the name Kajiro Oyama; he had always known the father of the family as 'Fred' and stated that 'everybody else called him Fred.' But he had received a letter signed 'Fred Oyama' notifying him that the property was being turned over to a Mr. Kelly, although Kurfurst had never heard the writer refer to himself by that name.

"Other testimony of Kurfurst was that at one time Oyama, senior, said 'Some day the boy will have a good piece of property because that is going to be valuable.' However, he admitted that in a letter which he wrote, in referring to 'Fred Yoshihiro Oyama,' he meant the son and not the father. He knew that the property belonged to the boy, Fred Oyama, and to June Kushino; also that the father was running the boy's business. But he did not know whether the checks were made out by the 'old man or the young fellow' and he did not know 'whether the boy signed it or Mr. Oyama.'

"Evidence of official records showed that no reports, pursuant to the requirements of the Alien Land Law, had been filed by the defendants. The state also provided that in the guardianship proceedings, on two occasions, the father of Fred Y. Oyama, as guardian, applied for leave of court to borrow money and to mortgage the property as security for the indebtedness. Both applications were granted.

"Upon evidence, the court found all of the facts alleged in the petition to be true. The conclusions of law drawn from these facts were that, as of 1934 and 1937, respectively, title to the two parcels of real property in question was vested in and did escheat to the State of California and the defendants were perpetually enjoined from setting up or making any claim to the land. The appeal is from that judgment." (The foregoing quotation is from the opinion of the California Supreme Court.)

The State Supreme Court affirmed the judgment of the Superior Court.

(See opinion of the Supreme Court of the State of California, Appendix A, 29 Advance California Reports, 157; 173 Pac. (2d) 794.)

A petition for a rehearing was denied by the State Supreme Court November 25, 1946. (Tr., p. 120.)

The Supreme Court of the State of California incorrectly states both the law and the facts in the following language:

"The property in question passed to the State of California by reason of deficiencies existing in the ineligible alien, and not in the citizen Oyama. The citizen is not denied any constitutional guarantees because an ineligible alien, for the purpose of evading the Alien Land Law, attempted to pass title to him. It is the deficiency of the alien father and not of the citizen son which is the controlling factor; therefore, any constitutional guarantees to which the citizen Oyama is entitled may not properly be considered, for the deficiency

in a person other than himself is the cause for the escheat. Property which the citizen never had he could not lose, and as the land escheated to the state instanter, he acquired nothing by the conveyance, and the Alien Land Law took nothing from him." (Tr., p. 117.)

The Supreme Court, in justifying its opinion, states as follows:

> "The trial court's findings in regard to the violation of the statute are fully supported by the evidence. The inference to be drawn from the evidence that the real property was conveyed to the son, thereby putting it beyond the power of the father to deal with the property directly, the father's failure to file the reports required of a guardian, the unexplained failure of the father or any one of the defendants, to offer himself as a witness, and the presumption created by section 9 of the Alien Land Law, are ample in this regard.* Indeed this evidence convincingly points to the conclusion that the minor son had no interest in the property, his name being used only as a subterfuge for the purpose of evading the Alien Land Law."

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*The provisions of section 9 of the Alien Land Law insofar as they are pertinent are as follows:

> "A prima facie presumption that the conveyance is made with such intent (to prevent, evade, or avoid escheat) shall arise upon proof upon any of the following groups of facts:
>
> 'a. The taking of the property in the name of a person other than the persons mentioned in section 2 hereof, if the consideration is paid or agreed or understood to be paid by an alien mentioned in section 2 hereof.'
>
> "* * * In each of the foregoing instances the burden of proof shall be upon the defendant to show that the conveyance was not made with intent to prevent, evade, or avoid escheat * * *"

It is thus noteworthy that the entire case, insofar as it pertains to the minor citizen record holder of title who claims to be the beneficiary of his father's gift, rests upon the statutory presumption used in lieu of proof. All the other evidence pertains to the acts of his guardian, and the only evidence in support of the judgment depriving the citizen child of his real property is the statutory presumption which, under the law of California, constitutes evidence as contrasted with the law in some other jurisdiction that it is merely a rule of procedure.

This is further emphasized by the provisions of section 9 that the defendant must do more than to meet the presumption—he must overcome it.

The Supreme Court of California considered itself bound by decisions of the United States Supreme Court in

Terrace v. Thompson, 263 U. S. 197;
Cockrill v. California, 268 U. S. 258, 45 S. Ct. 490, 69 L. ed. 944;
Frick v. Webb, 263 U. S. 326, 44 S. Ct. 115, 68 L. ed. 323;
Webb v. O'Brien, 263 U. S. 313, 44 S. Ct. 112, 68 L. ed. 318;
Porterfield v. Webb, 263 U. S. 225, 44 S. Ct. 21, 68 L. ed. 278.

Only one of these cases involved the rights of an American citizen (*Cockrill v. California, supra*), and that case has been overruled, by implication, at least, by the decision of this court in *Morrison v. California,* 291 U. S. 82.

Porterfield v. Webb, 263 U. S. 225, merely upheld the constitutionality of the California Alien Land Law, insofar as it denied to aliens ineligible to citizenship the right to own land in the State of California.

Terrace v. Thompson, supra, held constitutional a statute of the State of Washington which forbade the ownership of land by aliens who had not declared their intention to become citizens.

Webb v. O'Brien, supra, again held that the California Alien Land Law, insofar as it limited the privileges of ineligible aliens to acquire real property, was not in conflict with the Fourteenth Amendment, and the opinion of Justice Butler points out that at common law aliens have no capacity to hold land against the state and, if taken, the land will be escheated to the state.

Frick v. Webb, supra, merely goes one step further and holds that forbidding aliens ineligible to citizenship to acquire stock in a corporation holding land for agricultural purposes does not deny the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

In not one of these cases is it held that an American citizen may not own land in his own right merely because the consideration for the purchase of the land was paid by his father, who was an ineligible alien.

Cockrill v. California, supra, might seem at first blush to pronounce a contrary ruling. The decision,

however, turned upon a question of fact. It is apparent from the opinion of Justice Butler that it was either admitted or established by the evidence that Cockrill, who was an American citizen and **unrelated to the ineligible alien,** took title to the property in his own name as the result of a specific agreement to hold the legal title for the alien, and that he himself had absolutely no interest whatever in the land involved. What is said in the opinion as to the presumption created by the statute, which is here assailed, is *obiter dicta* only; it was totally unnecessary to the decision because, without the application of the presumption, evidence was sufficient to show a deliberate attempt to evade the provisions of the statute by the taking of title in the name of an American citizen who never occupied the land thereafter and exercised no dominion over it, thus permitting its exclusive occupancy and unretarded control by the ineligible alien.

The *Cockrill* case held in substance that a statutory presumption, which may be overcome by evidence sufficient to raise a reasonable doubt, was constitutional under the facts of the case.

Since then, of course, the law has been amended so as to give the defendant citizen the burden of proving that the conveyance, made when he was six years of age, was not made with the intent to prevent, evade or avoid escheat. Clearly, if the rule of convenience is resorted to to justify the presumption and shifting of the burden of proof, the citizen defendant will find it no more possible or convenient

to adduce the proof than will the state. It is equally clear that the statutory provision as to presumption and burden of proof was provided because of the difficulty involved in adducing evidence to sustain the State's case.

As was pointed out in *Morrison v. California,* 291 U. S. 82, where a similar presumption was held invalid as to an American citizen, the only case in which the presumption would be of value would be in a case like the case at bar, where injustice will probably result from the invocation.

Under the law as it now exists, it is only necessary that the State prove a transfer of agricultural land has been made to this citizen child, and that his ineligible alien father provided the money furnished as consideration. Upon proof of these two facts, the land in question was escheated to the State of California because the defendant failed to prove by a preponderance of evidence that the conveyance made when he was six years old was not made with the intent to avoid, prevent, or evade escheat.

There is not an iota of evidence that the man who signed his name as grantor to the deed to this citizen petitioner of the property conveyed in 1934, or that the judge who approved the sale of the other piece of property to the child in 1937, intended to evade or avoid the Alien Property Act.

It is clear that the child was presumed to accept the benefit of the gift, and that the title to the property vested in the child. See: *Estate of Yano,* 188 Cal. 645;

People v. Fujita, 215 Cal. 166. Thus there is no evidence of any contrary intent on his part.

In effect, the *Cockrill* case recognized the general law of California that where two strangers are involved in a transaction in which one furnishes the consideration for the transfer of real property, and the property is transferred to the other, a presumption arises of a collateral agreement between these two parties that *the person furnishing the consideration has a beneficial interest in the land.*

This is a recognition of the common experience of mankind. There is clearly a rational connection between the facts established—including the fact that the parties are strangers—and the presumption of the interest in the party furnishing the consideration.

It is because of this that we have the law of resulting trusts.

Likewise, because of the experience of mankind, under the general law recognized in the State of California, no presumption of a resulting trust arises if the party furnishing the consideration and the party taking the title by the convenience are related by consanguinity.

The presumption that they intended to create a trust is deemed to be overcome, and an inference will be indulged that the party who furnished the consideration contemplated not a beneficial ownership in himself but an absolute ownership in the grantee, the amount of the consideration being a gift to the latter.

This is the situation where the parties are husband and wife. See:

Shaw v. Bernal, 163 Cal. 262, 124 Pac. 1012.

This is likewise true where the relationship is that of parent and child.

See:

Lezinsky v. Mason Malt Whiskey Distilling Co., 185 Cal. 240, 196 Pac. 884;

Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321;

Quinn v. Reilly, 198 Cal. 465, 245 Pac. 1091.

In the *Estate of Yano, supra,* and in *People v. Fujita, supra,* it was held that even though the father is an ineligible alien, no presumption of resulting trust arose from the fact of the father furnishing the consideration, despite the general law of the state as codified in Section 853 of the Civil Code, which provides:

> "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

So we reiterate the *Cockrill* case merely recognized the general law of resulting trust.

In the instant case because of the consanguinity, under the California law in the absence of the specific provision of Section 9 relied upon by the California Supreme Court, it would be inferred that the father

who furnished the consideration contemplated not a beneficial ownership in himself but an absolute ownership in the grantee, the minor citizen son, the amount of the consideration being a gift by the father to the son.

Since this inference of gift is the result of common experience, it follows that the presumption set up contrary to common experience, under which it is presumed that there was no gift and that the transaction was with the intent to vest the beneficial interest in the father, becomes fanciful, arbitrary and unreasonable, and therefore is unconstitutional and void.

It is, of course, fundamental that a statute valid under one set of facts may be invalid when applied to another set of facts. A question may arise as to the subject matter itself. Thus, the statute may be perfectly valid in its general application and yet be held to be void in a particular application.

See:

11 *Am. Jur.* 738;
Nashville v. Walters, 294 U. S. 405;
Poindexter v. Greenhow, 114 U. S. 270.

Thus the statute, when applied to a transaction involving strangers, is consistent with the general law pertaining to resulting trusts, but when applied to a transaction involving a father and son, is in direct conflict with the law of trusts applicable where there is consanguinity between the party furnishing the consideration and the grantee named in the deed.

In *Hamilton v. Hubbard, supra,* the following language is used:

> "Ordinarily, indeed, where a conveyance is made to one and the consideration paid by another, a trust is 'presumed' in favor of the latter. (Civil Code section 853.) But this presumption arises only in transactions between 'strangers to each other' (1 Perry on Trusts, section 126) and is not indulged in where the conveyance is to the 'wife or child, or other persons for whom the person paying the consideration is under some natural, moral or legal obligation to provide.' In such cases the presumption is 'that the purchase and conveyance were intended to be an advancement for the nominal purchaser.' "

Thus it is plain that an instruction in accordance with this exception from the rule of resulting trusts that the presumption was that the father furnished the consideration for the purchase for the benefit of his son would be proper, though in conflict with the presumption raised by Section 9 of the Alien Land Law.

The Supreme Court of the United States has repeatedly indicated that there are substantial limitations upon the right of legislative bodies to replace fact by legislative fiat in the judicial determination of life, liberty or property.

In *Manley v. Georgia,* 279 U. S. 1, a statute providing that every insolvency of a bank should be deemed fraudulent and the officers responsible, and further providing that the defendant might repel the presumption of fraud by showing the affairs of the bank

had been fairly and legally administered, was held in conflict with the due process clause of the 14th Amendment.

In *Western and Atlantic Railroad v. Henderson,* 278 U. S. 577, a statute, providing that when a collision between a railroad train and a vehicle at a crossing resulted in death, a presumption arose that the railroad and its employees were negligent, and the company was liable unless it showed due care in the matters alleged against them, was held unreasonable and arbitrary and in violation of the due process clause.

In *Bailey v. Alabama,* 219 U. S. 219, a statute providing that any person entering into a contract to do work with intent to defraud and who thereby obtained payment, and without just cause and with like intent and without refund of the money advanced, refused to do the work or refund the money without just cause, constituted *prima facie* evidence of intent to defraud. The court said that the object of the statute was to hit cases destitute of inferences, but that the law required a rational relation between the facts, or the inference becomes arbitrary, and held the statute unconstitutional. (See: *O'Neill v. U. S.,* 19 Fed. (2d) 322; *Tot v. U. S.,* 319 U. S. 463, 63 S. Ct. 1241.)

In the *O'Neill* case the court held that in order for the legislature to provide such presumption of the main fact and issue, there must be:

1. Some rational connection between the fact proved and the ultimate fact presumed;

2. That the inferences from the fact proved may not be unreasonable or unnatural;

3. That the accused may not be deprived of the proper opportunity to present his defense to the main facts so presumed.

Certainly, there is no rational connection between the furnishing of the consideration for real property by the father and the conveyance of the real property to his son and the presumption that the entire transaction is fraudulent, merely because the father was an ineligible alien.

Likewise, such an inference is unreasonable and unnatural in view of the relationship of father and son, and finally, the accused son is deprived a proper opportunity to present a defense by virtue of the provisions casting upon him the burden of proof.

It should be noted that in none of these cases heretofore cited, with the exception of *Manley v. Georgia, supra,* did the statute go so far as to throw upon the defendant the burden of overcoming the presumption.

In the case of *Morrison v. California,* 291 U.S. 82, where the Alien Property Act was involved, and a presumption similar to that provided for in section 9a of the Alien Property Act was involved, the court refused to sustain the legality of such a presumption, and pointed out that under the convenience rule, it was just as convenient for the state as it was for the defendant to furnish the proof sought to be substituted for by the presumptions as it was for the defendant to prove such facts, and that to shift to the

defendant the burden of proving sufficient facts to raise a reasonable doubt (as distinguished from proving sufficient facts to outweigh the presumptions, let alone equal it), might very easily result in injustice to the defendant in the only type of cases wherein such a presumption would be of value.

Ordinarily, a rule of convenience, justifying such a shift in the burden of proof, is applied only when the subject matter is a negative averment or a fact relied upon by the defendant as a justification or a fact lying peculiarly within his knowledge. (See *People v. Quarez,* 196 Cal. 404; *People v. Whiteman,* 114 Cal. 338 at page 344.)

THE PROVISIONS OF SECTION 9 OF THE ALIEN PROPERTY ACT OF 1920 APPLIED TO A CITIZEN SON OF AN INELIGIBLE ALIEN FATHER RELEGATE HIM TO A SECOND CLASS CITIZENSHIP.

As we have heretofore pointed out, no resulting trust is presumed to arise where a father furnishes the consideration, and the deed is made to the son. This is the General Law of the State of California. Section 9 of the Alien Property Act provides by statute that a different situation shall exist in the event the son to whom the property is deeded has the misfortune to have as his father an ineligible alien.

We thus find that the children residents of the State of California are divided into two classes, insofar as property rights are concerned. These classes are:

1. **Children whose fathers are eligible to citizenship, or are citizens of the United States.** . . . Such a child, even if an alien himself, has the benefit of the general law of the State of California and his father may make a gift of real property to him by furnishing the consideration for the property, and directing that the deed run to the child, without the inhibitions of any statutory presumption, and without having shifted to him, the child, the burden of proving the intent of his father at the time the conveyance was made, was to commit a fraud upon the State of California.

2. **A citizen of the United States who has as a father an ineligible alien.** . . . As to this child, if the State of California challenges his title to real property, and the identical facts in the above paragraph are shown, a presumption arises that the intent of the father was fraudulent, and the burden of proving the innocent intent of the father shifts from the State of California to the citizen child grantee.

In the *Estate of Yano,* 188 Cal. 645, the Alien Property Act of 1920 was likewise involved. The question was whether or not a citizen child had the right to have his ineligible alien father appointed guardian of real property deeded to the child, an infant, the consideration for which had been furnished by the father because the father knew he was ineligible to hold real property.

The Act provided that no ineligible alien disqualified to hold property could be appointed guardian of a

portion of the estate of a minor consisting of property which the alien was inhibited from acquiring, and further provided that a public administrator be appointed guardian of a minor citizen whose parents are ineligible to appointment.

The court held, beginning at page 656:

"The foregoing observations apply with equal force to the proposition that the Act of 1920, taken in connection with Section 1751 of the Code of Civil Procedure, denies to the child, Tetsubumi Yano, the privileges guaranteed to her by the fourteenth amendment to the Constitution of the United States and by Section 21, Article I of the Constitution of this state. Section 21 declares that no *citizen* or class of *citizens* shall 'be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.' The child is a native citizen of the United States and of the State of California. Nothing can be denied to her because of her race or color that is not denied to all citizens regardless of race or color. Any privilege that is given generally to citizens of other races must also be given to her upon the same terms, and her race cannot be considered as a factor in the problem, or as a cause for denial thereof to her. **The effect of the two laws would be that all native minor children possessed** of agricultural land in this state, whose parents are aliens residing in this state and eligible to citizenship, would have the privilege of having their father or mother appointed guardian of that part of their estate, while, on the other hand, all native-born minors who are possessed of agricultural land in this state, whose parents are aliens and reside here, but are ineligible to citizenship, if a guardianship of such land is necessary or

convenient, would be compelled to have strangers as such guardians. Furthermore, while a native California child of alien Japanese parents, if over fourteen years of age, could nominate its own father as the guardian of its personal property or of its real property leased for purposes of trade or residence, solely (Code Civil Proc., Sec. 1748) it must nominate some stranger as guardian of any farming land it may own. No such burdensome disability is imposed upon any native-born child whose parents are eligible to citizenship. All such discriminations are forbidden by the constitutional provisions above mentioned.

"It is argued on behalf of respondent that the object of the law is to prevent evasions of the law forbidding aliens ineligible to citizenship to acquire, possess, or enjoy agricultural land, that the only class doing so is composed exclusively of aliens who cause land, to be vested in their own minor children, with a view of being appointed guardian of the estate of such children, and that it is permissible for the state to regard the persons who are producing the evil which it desires to prevent, as a class by themselves and to enact such measures operating only upon that class as may be necessary to accomplish the desired object, as has been pointed out in *Patsone v. Pennsylvania,* 232 U.S. 138 (58 L.Ed. 539, 34 Sup. Ct. Rep. 281; see also Rose's U. S. Notes), and *Ex parte Spencer,* 149 Cal. 401 (117 Am. St. Rep. 137, 9 Ann. Cas. 1105, 86 Pac. 896.) But even in such case, as has been shown, the differences on which the classification is based must suggest a reason for the peculiar legislation and the legislation must be such as will have some tendency to remove the evil intended to be prevented. The

appointment as guardian would not enable such parents to acquire, possess, or enjoy agricultural land, and therefore their ineligibility to such appointment could not prevent their so doing. A guardian neither acquires, possesses, or enjoys the property belonging to the ward, in any accurate or legal meaning of those terms. At most, he merely has, for some purposes, the control of the property, but the control is not in his own right and does not inure to his benefit. He controls it as trustee only, and is held to strict accountability to the child for all the benefits accruing from the use of it. He must render such accounts annually, or oftener, if required by the court. (Code Civ. Proc., Secs. 1773, 1774.) He must hold all the receipts from the farming operations as the property of the native-born child, and must use so much of it for the support and education of the child as may be necessary, and no more, and must safely invest the remainder as the property of the child and for its sole use and benefit. In all of his acts as guardian he is under the supervision and control of the superior court of the county. His compensation is limited to the reasonable value of his services and is to be fixed by that court. The use is in the child, not in the guardian. When the child becomes of age the control of the guardian immediately ceases. If the child should die the control would pass forthwith to its heirs, and the alien parent, in that event, would not even inherit the property or any part thereof. It seems plain that since the alien parent could not by this means evade the operation of the law, nor acquire, possess or enjoy agricultural land, the law cannot be upheld on the ground that such persons constitute a class, and the only class, who attempt to evade

the law forbidding alien ownership. They could not by the use of such guardianship enjoy the right of ownership. The classification is, therefore, clearly arbitrary and does not 'suggest a reason which might rationally be held to justify' the peculiar legislation addressed to the class, as is said in *Darcy v. Mayor,* etc., supra.

"**The object sought to be attained by the statutory provisions, that is, to discourage the coming of Japanese into this state, may be a proper one, and may be even desirable for the promotion of the welfare and progress of the state.** The court can only consider its validity under the limitations of the Constitution. A similar object prompted the adoption of the anti-Chinese provisions of the Constitution of 1879, which, so far as they were effectual, were declared invalid by the Federal Courts. This entire question is international in character and is a matter properly to be disposed of by the Federal Government. Appeal for its adjustment should be made to Congress, rather than to attempt to accomplish it by discriminatory legislative measures of the state.

"Our conclusion is that the provisions of the Initiative Act of 1920 forbidding the appointment of an alien resident, ineligible to citizenship, as guardian of the farming land of his native-born child, and authorizing the removal of such parent, if previously appointed as such guardian, are invalid.

"The order appealed from is reversed."

Thus, at the time of passage of the Act, the court took judicial knowledge that its purpose was to dis-

courage the coming of Japanese into the State of California.

Fred Oyama, in reality, is being penalized by the State of California because of qualities or conditions pertaining to his father and mother.

It is because of the racial origin of the father and mother that in the trial of his case handicaps were imposed upon him by means of presumption and the shifting of the burden of proof which would not have been imposed upon him if his father and mother had a different racial origin.

A somewhat similar situation arose in an earlier California case of *Sacramento Orphanage & Children's Home v. Chambers,* 25 Cal. App. 536, and the reasoning used by the California court is applicable to the case at bar. In that case the petitioner was the orphan asylum which sought payment under the provisions of the California *Political Code,* authorizing payment of state aid for the care of orphans.

The minor, for whom care was rendered by the orphan asylum and for which care payment was sought of the state, was a native-born citizen of California of alien parentage.

Section 2289 of the *Political Code* provided that no state aid should be rendered to a child whose parents had not resided in the state for three years, or whose parents were not citizens.

It was contended that this provision was void because it conflicted with Amendment 14 of the United

States Constitution and Section 21 of Article I of the California Constitution.

Section 21 of Article I of the California Constitution provides:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

The court said:

> "The child for whose support aid is herein sought is a citizen of this state. He was born in this state while his parents were residents thereof. It is undoubtedly true, as stated by respondent, that 'Every child born here is a citizen of the state if its parents are residents of the state. Thus, a child born here, whether its parents are citizens or aliens, immediately becomes a citizen of the United States, but its second citizenship follows the residence of its parents.' The child is and was an orphan under the age of fourteen years and was cared for by such an institution as is contemplated by said statute providing for state aid. What is the basis then, for discrimination between him and other citizens who are orphans under the age of fourteen years and under the care of the same or of similar institutions? Is it any quality of condition affecting him personally, that would make such classification reasonable and just? Is there any 'natural, intrinsic, or constitutional distinction' differentiating him from the other minor orphan citizens who are receiving and who are entitled to receive state aid? The answer, of course, must be in the nega-

tive. The distinguishing quality or condition relates not to him but to his parents. It would be a strange construction of the constitutional provisions that would permit privileges to be conferred upon one citizen of the state and withheld from another for the reason that there was a difference in the political status of the parents. Mentally, morally, and physically, no doubt, the sins and infirmities of the parents are often visited upon their descendants, but in the realm of civil and political rights and privileges no such principle can be recognized or tolerated. *To affirm the proposition contended for by respondent, that one citizen is, and another is not entitled to this privilege in consequence of the difference in the citizenship and residence of their parents is to deny all efficacy to the constitutional mandate that privileges and immunities must be granted to all citizens upon the same terms.*

"The purpose of the legislature is unquestionably a commendable one, but it must be accomplished in a legal and constitutional manner. Restrictions affecting all citizens alike might be imposed which would prevent abuse of the privilege and which would be open to no valid objection.

"If the condition of residence or citizenship related to the minor orphan himself, it probably could be said that the classification was just and reasonable and within the purview of the Constitution. No doubt the legislature might require the beneficiary to be a citizen of the state and a resident therein for a certain period. If he were not a citizen, said constitutional provisions could not, of course, be invoked, and three years might not be an unreasonable requirement as to resi-

dence. There would thus be presented in the condition and status of the minor, a just basis for valid discrimination. But that is entirely different from the requirement here as to the citizenship and residence of the parents. The injustice of the rule contended for could not be more impressively illustrated than in the present instance. If said provision as thus understood is to be enforced no aid can ever be granted to said minor for the reason that death has rendered it impossible for either of his parents to become a citizen or resident for the requisite time. No such arbitrary and extraneous discrimination is sanctioned by our fundamental law."

SECTION 9 OF THE ALIEN PROPERTY ACT IS IN CONFLICT WITH TITLE 8, UNITED STATES CODE ANNOTATED, SECTIONS 41 AND 42.

The little-referred to Section 5 of the 14th Amendment specifically provides for the adoption of legislation for the implementation of the amendment.

In accordance with the expressed authority conferred by this provision of the amendment, the so-called civil rights statutes were long ago adopted. Section 41 of Title 8 U.S.C.A. provides:

> "All *persons* within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

Under the provisions of this statute, it would appear that even the alien defendants are entitled to protection against such statutes as the Alien Property Act. They do not have the same right as white citizens to make and enforce contracts; they do not have the same rights as white citizens to be parties; by reason of the statutory presumptions, they do not have the same right as white citizens to give evidence, and are not accorded the full and equal benefit of all the laws providing for the security of persons and property as enjoyed by white citizens.

The three propositions in the decisions of the United States Supreme Court sustaining the constitutionality of the various Alien Property Acts which run throughout those decisions as a basic thread of reasoning are:

1. That the rights of an alien are materially different from those of a citizen;

2. That at common law, an alien had no right to become the owner of real property, and that upon office found, it would escheat to the sovereign;

3. That since Congress had divided aliens into two classifications, those ineligible for citizenship, and those eligible for citizenship, this federal act of classification was justification for a state to likewise distinguish between the two classes and prohibit the class comprised of those ineligible for citizenship from acquiring an interest in real property.

With the first proposition, we have no quarrel. Certainly, there are some matters in which citizens are distinguishable from aliens, *particularly in their relationship with the federal government.*

However, it should be remembered that the 14th Amendment governs state action, and while frequently referred to as establishing the rights of "citizens" against aggression by state government, the concluding phrases of Section 1 reads as follows:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

In those two final phrases of this amendment, as distinguished from the other phrases thereof, the people involved need not be citizens of the United States. Certainly, a resident alien of the State of California is a "person within its jurisdiction." Likewise, in the civil rights statutes adopted, pursuant to the provisions of this amendment, the protection given by the statute is given to "all persons within the jurisdiction of the United States."

The fact that under the common law an alien has no right to own real property as against the sovereign certainly cannot constitute the basis for the constitutionality of the state statute adopting the common law, when a federal statute provides that all persons within the jurisdiction of the United States shall have the same right to enforce contracts and to the benefit of all laws for the security of property as is enjoyed by white citizens.

Title 18, U. S. C. A., Section 52 provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subject, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his *color* or *race*, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

It is clear that a statute cannot be constitutional at the same time that a person acting under the color of the law is subject of federal criminal action.

In the foregoing act, the word "alien" is used.

The third basis for the constitutionality of the Alien Property Act is that it does not improperly classify because the federal government has already classified aliens.

The 14th Amendment and the Civil Rights statute do not deal with the power or duty of the federal government, or with the rights or privileges of aliens in relation to the federal government; nor do they deal with naturalization. Congress is given specific power

> "to establish a uniform rule of naturalization . . ."
>
> (Article 8, Clause 4, U. S. Constitution.)

Likewise, Congress has the sole right to establish the rules for and control of the entry of aliens into

the United States, and can make such an entry conditioned upon such terms as it desires—reasonable or unreasonable.

These powers admittedly reposed in Congress by the Constitution, and exercised by Congress constitutionally, to classify aliens as those eligible for citizenship and those ineligible for citizenship, cannot constitute a basis for classification by the state which differentiates between white citizens and aliens, and which state legislation deprives the aliens of equal right

> "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property of all citizens."

And certainly an Alien Property Act, such as ours, subjects such aliens and their citizen children to punishments, pains, penalties and exactions materially different from those to which white citizens are subjected.

Thus we find that the federal decisions have fallen into a fundamental error in that they have confused the relation of aliens to the federal government with the relation of aliens to the state government, which relations with the state governments are subject to the inhibitions against state actions included in the 14th Amendment and the Statutes of Congress heretofore referred to.

This is clearly true of the theory that the common law property disabilities of aliens justify a state statutory disability when such a state statute is in direct

conflict with the 14th Amendment and the Civil Rights statutes.

It is hard to uphold the constitutionality of the Alien Property Act upon the theory that the state has properly classified citizens, aliens and ineligible aliens, when the state, by the 14th Amendment and the Civil Rights statutes, is forbidden to make such a classification.

To say that the state's classification is constitutional, because for other purposes the United States Government can adopt such a classification, is illogical and unsound.

While it is correct that in the *Slaughter House* cases the Supreme Court by dictum indicated that the 14th Amendment and the Civil Rights statute afforded protection only to those of African nativity and descent, this dictum has long since been overruled, and the 14th Amendment and the Civil Rights statute constitute a bulwark of defense against state aggression available to any person in the United States.

See: *Kentucky v. Powers,* 201 U. S. 1.

All of the cases dealing with the various Alien Land Laws trace back to *Terrace v. Thompson,* 44 S. Ct. 15, 263 U. S. 197. In that case the Alien Land Law of Washington excluded aliens who had not in good faith declared their intentions to become citizens of the United States from the ownership of any interest in lands.

Terrace claimed he desired to lease agricultural lands to a Japanese farmer, and that the Attorney

General had threatened to enforce the act against him if he entered into such a lease and would forfeit the leasehold and prosecute him criminally.

It was contended by Terrace, among other things, that the act was in conflict with the due process and equal protection clauses of the 14th Amendment. A motion to dismiss for failure to state a cause of action was granted.

The court held that alien inhabitants of a state could claim the protection of the due process clause or the equal protection clause of the 14th Amendment.

The court recognized that under the 14th Amendment, an alien, as well as a citizen, is protected against the arbitrary and capricious or unjustly discriminatory action of the state, and that the alien is protected in his right to "earn his living by following ordinary occupations of the community."

As was heretofore pointed out, it was stated that Congress has the exclusive jurisdiction of naturalization, and the state has the power to deny aliens the right to own land within its borders. (Citing cases interpretive of the common law and tracing their descent from the decision in *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L. ed. 453.)

Thus we see that by pedigree these cases trace their reasoning to a decision long antedating the adoption of the 14th Amendment or the passage of the Civil Rights statutes.

Likewise, in *Terrace v. Thompson,* supra, classification by Congress of those eligible and those ineligible

for citizenship under the constitutional provision authorizing such an act, is referred to as justification for similar classification by the state. We have heretofore commented concerning this.

Truax v. Raisch, 239 U. S. 33, was cited as holding that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the 14th Amendment to secure.

To own and rent land, both of which are forbidden by the Alien Property Act of California, would seem to fall within the definition of a common occupation.

Perhaps in recognition of this, we find the following language appearing in Article 1, Section 1 of the Constitution of California:

> "All men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing and protecting property. . . ."

Despite this language, it is a criminal offense—a felony—for this American citizen child to allow his alien father to remain or go upon the land to farm or cultivate the same and enjoy directly or indirectly the beneficial use of the lands, the crops or the proceeds from the sale of the crops. (See Section 11a of the Alien Property Act of 1920.)

Thus, we find a further discrimination against this American citizen as contrasted with other children who are permitted to have their fathers manage and cultivate their farms and to remain upon and go upon and participate in the crops and in the proceeds therefrom.

As a general rule, children in the State of California are entitled to support and maintenance by their fathers, and the father is required to make provision for them, but the act of the father of Fred Oyama in making provision for him, which would have been deemed meritorious, were it not for his status as an ineligible alien, is presumed to be a fraud, and the child is deprived of his property by reason of this statutory presumption, arising from a transaction in which he had no part, except to be the passive recipient of a gift, and concerning the facts contemporaneous with the transaction, in view of his six years of age, he must have had no personal knowledge.

Let us point to the situation under the Alien Property Act, which we believe demonstrates the fanciful and arbitrary nature of the statutory presumption.

If the ineligible alien father furnishes the consideration for the purchase of commercial or residential property, and the deed names his American citizen child as grantee, the general law of California is applicable and an inference is drawn that the consideration was intended as a gift.

No resulting trust is presumed to arise, even though under the law the ineligible alien actually could legally acquire an interest in such residential or commercial property.

Yet, under identical circumstances with the lone exception that the property involved is agricultural in nature, a statutory presumption arises that the conveyance was made with the intent to prevent or evade the Alien Property Act.

Under the phraseology of the act, it would seem that there must be some evidence that the grantor and the grantee intended to evade the act. Yet, in the case at bar, there is no evidence of the intention of the grantor, or the six year old grantee, or of the man furnishing the consideration, save and except a statutory presumption, which apparently is construed to supply evidence of the intent of each of the three.

Under any rational theory, the fact that the father himself was ineligible to become the owner of agricultural land would seem to strengthen the general law that no resulting trust arose. (*Peo. v. Fujita, supra.*)

THE ENFORCEMENT OF THE LAW BY THE STATE OF CALIFORNIA HAS BEEN ARBITRARY AND DISCRIMINATORY.

This Honorable Court is entitled to take judicial notice of the officially reported decisions of the appellate courts of the State of California.

In the reported decisions of the appellate courts of California are a number of cases in which the Alien Property Act of California is involved.

No case appears in which the state has sought the escheat of land under the provisions of the Alien Property Act, unless the basis for the escheat was that the party furnishing the consideration for the transfer of the land was of Japanese ancestry.

This court can likewise take judicial notice of the fact that under the naturalization laws of the United States, there are other nationalities than Japanese

who are ineligible to citizenship, and that over the years since the passage of the original act in 1913, there has been a greater number of nationalities ineligible to citizenship than there are presently. For instance, it is only recently that those of Chinese nationality are permitted to become naturalized.

It is true that some of these reported cases have interpreted the Alien Property Act as being applicable to races other than the Japanese. Not one of these is an escheat case.

It can be demonstrated by a review of the reported cases pertaining to the Alien Property Act that in cases where land was held by persons ineligible to own such land under the provisions of the Alien Land Act no action to escheat said property was instituted by the state, even though such persons in other litigation between themselves and parties, other than the State of California, had admitted that they had purchased the land in violation of the Alien Property Act, and that the conveyance was made to prevent or evade the escheat provisions of the act.

Before 1923, where an ineligible alien took title to agricultural land, he obtained a defeasible title. His right to the land, even though he was an ineligible alien, was subject to attack only by the state. Because he had defeasible title, if he transferred title prior to the institution of an action to escheat and transferred it to a person who was not subject to the ineligibility clauses of the Alien Property Act, such grantee obtained a good and invulnerable title. (*Suwa v. Johnson,* 54 Cal. App. 119.)

In 1923 the Alien Property Act was amended to provide that the title escheated as of the date of conveyance made with the intent to evade the act.

This was upheld in *People v. Oyama, supra,* the court holding that:

> "Property which the citizen never had he could not lose, and as the land escheated to the state instanter, he acquired nothing by the conveyance, and the Alien Land Law took nothing from him."

Since the *Oyama* case also held that no statute of limitations applies where land had escheated under the provisions of the Alien Land Act, any property conveyed or sought to be conveyed with the intent to evade the act since 1923, is now the property of the State of California under the theory of the State of California.

We therefore turn to the California Reports. The case of *Takeuchi v. Schmuck* is reported in 206 Cal. at 782 (1929). There, the plaintiff, an American citizen of Japanese ancestry, sued to recover a deposit made for the purchase of real property.

> "The trial court denied recovery to the plaintiff on the theory that plaintiff's father paid the amount of the deposit and taxes in the accomplishment of an illegal conspiracy between the father and daughter, a minor, 17 years of age, whereby legal title to said property should be held by the daughter, but the entire beneficial interest vested in the father, an alien ineligible to citizenship, in violation of the provisions of the Alien Land Law. Statute of 1923, page 1020.)"

The court upheld the findings of the trial court that there had been a conspiracy participated in by the father and daughter to violate the provisions of the Alien Land Law.

The court refused to uphold the conclusion of the trial court that Schmuck and his wife were not parties to the conspiracy and stated:

> "The rights of the parties must therefore be determined as between persons *in pari delicto*".

The court, referring to Mr. and Mrs. Schmuck, said:

> "They were conspirators in an attempt to violate the statute in the same sense as were the Japanese father and daughter with whom they dealt . . ."

A review of the digest of cases in California discloses that at no time was an action ever brought against Schmuck to declare this property escheated to the State, despite the findings of the highest court in the State of California that they entered into an agreement for the conveyance of land with the intent to evade the Alien Land Law.

This land in Imperial County still remains unclaimed by the state.

In the case of *California Delta Farms, Inc. v. Chinese American Farms, Inc.*, 204 Cal. at page 524, 3400 acres of agricultural land in San Joaquin County were involved. The purchase price was approximately $900,000. Under an executory transaction, the final installment matured in 1928. On September 15, 1924, an action was begun by the plaintiff to declare for-

feited all rights of the defendant Chinese American Farms, Inc. under this contract whereby the plaintiff agreed to sell, and the defendant to buy, the 3400 acres of agricultural land.

The defendant, after denial of default, set up among other defenses the enactment in 1920 of the Alien Land Act, effective December 9 of said year, contending that thereby the consideration for all unexecuted portions of the contract became illegal and in violation of the penal provisions of the said statute.

It has been held in *Mott v. Cline,* 200 Cal. 434, that the executory provisions of a contract for the sale of land under an option of purchase were within the prohibitory language of the Alien Property Act, and a conveyance in accordance with the option would escheat the property.

Acompanion case, entitled *California Delta Farms, Inc. v. Chinese American Farms, Inc.,* is reported in volume 207 California Reports at page 298 (1929).

The opinion contains a comprehensive statement of the facts involved. There is a recital of pleading in which it was alleged by the defendant that the plaintiff, at the time they entered into an agreement to sell the 3400 acres of agricultural land, knew that the $50,000 paid upon the contract prior to the formation of the corporation was more than 80 per cent advanced by Chinese aliens, and that after the corporation was formed and the contract was transferred to the corporation, that 80 per cent of the outstanding stock was actually, equitably and beneficially owned by aliens ineligible to citizenship, and that this situa-

tion continued throughout the time covered by the contract.

It further appears in the pleading, as recited in the opinion of the Supreme Court, that after the Alien Land Law was adopted and amended in 1923, the entire contract became impossible of performance, and that the agreements and understandings, plan, and scheme of the plaintiff and defendant corporation to effect a transfer of the property mentioned in the agreement

> "became and were and now are in violation of the terms and provisions of the Alien Land Law of 1920 and 1923". (See page 303.)

The trial court found that 95 per cent of the stockholders were Chinese aliens ineligible to citizenship; that the entire land was agricultural land; that the defendant corporation was organized for the purpose of taking over the contract for the sale of land, and that it was known to the plaintiff that ineligible aliens would be the owners to some extent at least of said stock, and that 80 per cent of the first payment on the contract was made by ineligible aliens. The court said:

> "The completion of this contract would form conclusive proof of a conspiracy under the act if the plaintiff possessed knowledge of the extent of ownership of defendant stock by ineligible aliens". (See pages 305 and 306.)

The court stated:

> "It may be that respondent is not *in pari delicto* with appellant as to matters occurring subsequent to December 9, 1920."

One searches the reports of California in vain for any record of an attempt by the state to escheat these 3400 acres of agricultural land in San Joaquin County.

This, despite the opinion of the Supreme Court of the state that the appeal

> "is controlled by the provisions of the Alien Land Law which became effective December 9, 1920 (Statute of 1921), and particularly by section 10 thereof . . .".

Section 10 made it a crime for two or more persons to conspire to effect a transfer of real property or of an interest therein in violation of the Alien Land Law.

The case of *People v. Entriken* is reported in 108 Cal. App. 29. There Entriken was found guilty of conspiring with an alien Japanese in the making of a lease of agricultural lands in violation of the Alien Land Law.

The Japanese testified as a witness for the People.

In July, 1928, the alien Japanese entered into possession of the land and began to farm it. In November, 1928, a written lease was signed by Entriken, and the lessee's name was signed by the alien Japanese without authority.

The alien Japanese continued to farm the land with the knowledge of Entriken.

Despite this conviction in a criminal proceeding of violation of the Alien Land Law, no proceedings appear of record wherein the State of California sought to escheat the land of the Caucasian landlord, after proving the evasion beyond a reasonable doubt.

The events pertaining to the transaction resulting in the case of *People v. Nakamura,* 125 Cal. App. 268, decided in 1932, are still more illuminating as to the course of action adopted by the state.

An action seeking the escheat of land was brought against the defendants Ono and Nakamura and others. It was claimed that the defendants purchased agricultural land in San Diego County and had the land conveyed to Nakamura, a citizen of Japanese ancestry.

The transaction occurred in 1926.

Delpy was alleged to have been paid $6,000 by the alien defendants on account of the purchase price of the land.

It was alleged that alien defendants entered into possession and that all of the acts of all of the defendants, including Nakamura, were with the intent to violate and evade the Alien Property Act. Judgment was entered for the defendants for lack of competent proof in support of certain allegations.

The state appealed from the judgment upon the ground that error had been committed in sustaining defense objections to taking testimony from the defendants under the provisions of section 2055 of the Code of Civil Procedure.

The judgment was reversed.

In 1937, the District Court of Appeal decided the case of *Delpy v. Ono.* (See 22 Cal. App. (2d) 301.) The same land in San Diego County and the same defendants were involved. In 1931 the appellant, Delpy, received from Nakamura, the title holder, a note for

the balance of the purchase price secured by a trust deed on the property. The action for escheat was still pending. In 1934 Nakamura, the title holder till then, conveyed 20 acres of the land to each of the four citizens of minor age, all citizens of the United States.

The appellant Delpy alleged he was the owner of the trust deed and had pursued the proper course after default thereunder, and the trustee had issued its deed conveying the property to him, Delpy.

The action was one in an unlawful detainer to secure the possession of the land.

> "In their answer, the respondents attacked the validity of this trust deed by setting forth allegations tending to show that the transaction was from the beginning a conspiracy between the parties to evade the Alien Land Law, and that it was entered into and carried out with that intent and purpose in mind." (See page 302.)

The trial court made findings sustaining these allegations of the answer and concluded Delpy was not entitled to relief.

The appellate court held the evidence in support of the attack upon the validity of the trust deed and the note secured thereby was inadmissible and the findings in connection therewith lent no support to the judgment, and for that reason it was reversed.

Again the records disclose no attempt to escheat the land despite the findings of the trial court that the transaction pertaining to it were entered into with the intent to evade the Alien Land Law.

Thus, we have two cases in which courts have found that Japanese have conspired with Caucasians to violate the Alien Property Act. In one case the Caucasian was a landlord who made a lease in violation of the act. Under the provisions of the act, the fact that he made the lease constituted sufficient grounds to escheat the land, but no attempt was made to enforce the provisions of the act against the Caucasian land owner, and he or his successors in title still hold the land, even though under the provisions of the law there was an escheat *instanter*. This is the *Entriken* case, *supra*.

In the *Delpy* case, an actual attempt was made to deprive the Japanese of the land. (See: *People v. Nakamura, supra.*)

However, thereafter, Delpy reacquired title in accordance with the provisions of the deed of trust, the execution of which was claimed to be a part of the conspiracy to evade the Alien Property Act with Delpy, one of the conspirators.

Once the title to the very land involved in the escheat action in the case of *People v. Nakamura, supra,* was back in the hands of the Caucasian Delpy, the state ceased its attempt to enforce the provisions of the Alien Property Act and left the Caucasian co-conspirator in possession of the land.

It is hard to imagine any more dramatic or certain demonstration of the arbitrary and discriminatory nature of the enforcement of the Alien Property Act.

In the *Entriken* case the state, if its position is sound, has been the owner of the land since 1928. The

District Court of Appeal in 1930 affirmed the conviction of Entriken which meant that they found evidence sufficient to establish beyond a reasonable doubt that Entriken had violated the Alien Property Act by leasing his land to an ineligible alien.

In the *Nakamura* case, the state, if its position be sound, has been the owner of the land since 1926.

The actions of the state towards these Caucasian land owners, who violated the provisions of the Alien Property Act, are certainly confirmatory of the situation of which the Supreme Court of California took judicial notice when it used in the course of its decision in the *Estate of Yano, supra,* the following language:

> "The objects sought to be attained by the statutory provisions, that is, to discourage the coming of Japanese into this state, may be a proper one and may be even desirable for the promotion of the welfare and the progress of the state. The court can only consider its validity under the limitations of the Constitution. A similar object prompted the promotion of the anti-Chinese provisions of the Constitution of 1879, which, so far as they were effectual, were declared invalid by the federal courts."*

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*In regard to the anti-Chinese legislation, and in particular to the attempts to conceal the discriminatory purpose by adopting such phrases as "ineligible to citizenship" or "electors" or "any and all persons", see the anti-Chinese Land Law of California and ten other states, 35 California Law Review, page 7, at 51, 52, and 53. See also the Appendix A, beginning at page 54 which deals particularly with the anti-Chinese legislation of California.

See also the article entitled "California Alien Land Law and the 14th Amendment" in the same issue, California Law Review, page 61.

In 1935 the Supreme Court had before it *Babu v. Petersen,* 4 Cal. (2d) 276. This involved the ownership of 20 acres of agricultural land in the County of Butte. All parties, except one American and one Spaniard, were members of the Hindu race and admittedly ineligible to citizenship, and therefore within the prohibitory clauses of the Alien Land Law. Babu sought to foreclose a mortgage executed by Helen Petersen in 1927.

Mrs. Petersen answered and cross-complained and pleaded the ineligibility to citizenship of the Hindu parties and the agricultural nature of the land.

> "She alleged that said persons last named conspired together to violate the Alien Land Law of this state by colorable transfers to prevent escheatment of said real property to the State of California, . . ." (pages 279 to 280).

The trial court found that Helen Petersen was not a party of the conspiracy to evade the Alien Land Law. Despite this finding of the trial court upon appeal,

> "The testimony of said attorney, Memill, Babu and even Helen Petersen and her mother cannot be read and reconciled with any other rational conclusion than that Helen and her mother, who were identified with the Hindu colony, were guilty participants in the transaction which placed Babu and Memill in the occupancy and possession of said agricultural lands." (See page 288.)

Again the court said:

> "It seems very clear upon the case presented that all of the parties to this action are *in pari delicto* . . ."

The court reversed the judgment, giving to Mrs. Petersen a writ of possession because of her participation in her conspiracy to evade the Alien Land Law and concluded its opinion with these words:

> "The state in a special proceedings is the only party that may maintain an escheat proceeding. Section 7 of said action provides:
>
> > 'The Attorney General or District Attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced. . . . Upon the entry of final judgment in such proceedings the title to such real property shall pass to the State of California as of the date of such acquisition in violation of the provisions of this act.' " (Page 289.)

Despite this open invitation by the highest court in this state, no escheat action has ever been brought involving these lands.

Thus we see that under the doctrine enunciated in *Yick Wo v. Hopkins,* 118 U. S. 356, since we have a situation where the law has been administered with an unequal and evil hand, the judgment should be reversed.

Since the beginning of the war with Japan, many proceedings for the escheat of land have been instituted in the various counties of California against persons of Japanese ancestry. Only after repeated attacks upon the unequal administration of the law has an action for escheat ever been instituted, unless based upon the Japanese ancestry of the parties involved in the transaction. Despite the repeated find-

ings of the Supreme Court in the cases heretofore referred to that transactions had been entered into for the purpose of evading the provisions of the act, no attempt has even been made to seize the land, unless it was claimed that the beneficial ownership was in one of Japanese ancestry.

This is particularly pertinent in view of the fact that the Supreme Court in *People v. Oyama, supra,* has decided that the provisions of Section 315 of the Code of Civil Procedure which reads as follows:

> "*When The People Will Not Sue.* The People of this state will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the People to the same unless
>
> 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or
>
> 2. The People, or those from whom they claim, shall have received the rents and profits of such real property or some part thereof within the space of ten years,"

will not protect Fred Oyama in his claim to title, even though the title has stood continuously in his name in excess of the statutory ten-year period.

Surely, the officers of the State must be assumed to have notice of the official reports of the state Supreme Court and the District Courts of Appeal.

Under this interpretation of the law that no statute of limitations protects title as against an action for escheat, no reason appears for the failure of the

state to proceed against lands involved in the cases referred to where it has been testified or pleaded that the transaction was entered into with the intent to evade the Alien Land Act and where the trial courts and appellate courts have found that the transactions were entered into with such intent, except that in those cases the parties involved were not of Japanese ancestry.

We therefore respectfully submit that on each of the grounds set forth in this brief the Alien Property Act of California is unconstitutional because of its substance and because of the manner in which it has been administered, and that judgment should be reversed.

Dated, San Francisco, California,
October 15, 1947.

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(Appendix Follows.)

Appendix.

Appendix

The pertinent provisions of the Alien Land Law as amended are as follows:

"ALIEN PROPERTY INITIATIVE ACT OF 1920. * * *

"1. *Rights of aliens eligible to citizenship.* All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this State and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this State.

"2. *Rights of other aliens.* All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise. * * *

"7. *Escheat of property acquired in fee: Manner of institution of proceedings: Cooperation of district attorney or county counsel: Supervision by Attorney General: Time of passage of title: Application of Secs. 2, 3 and 7: Land acquired in enforcement of mortgage.* Any real property hereafter acquired in

fee in violation of the provisions of this act by any alien mentioned in Section 2 of this act, or by any company, association or corporation mentioned in Section 3 of this act, shall escheat as of the date of such acquiring, to, and become and remain the property of the State of California. The Attorney General shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by Section 474 of the Political Code and Title 8, Part 3 of the Code of Civil Procedure. When requested by the Attorney General it shall be the duty of the district attorney or the county counsel of the proper county to join him in the enforcement of all the provisions of this act and in the investigation of violations thereof and the instituting and carrying on of escheat proceedings under this section. The Attorney General shall supervise the work of the district attorneys and county counsel in all such matters. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California, as of the date of such acquisition in violation of the provisions of this act. The provisions of this section and of Sections 2 and 3 of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon or interest in such property so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in Section 2 or Section 3 hereof shall hold for a longer period than two years the possession of any agricultural land

acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt. * * *

"9. *Conveyance to prevent escheat.* Every transfer of real property, or of any interest therein, though colorable in form, shall be void as to the State and the interest thereby conveyed or sought to be conveyed shall escheat to the State as of the date of such transfer, if the property interest involved is of such a character that an alien mentioned in Section 2 hereof is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmitting or inheriting it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

"A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in Section 2 hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in Section 2 hereof. * * *"

Deering's California General Laws, 1944 Edition, Vol. 1, Act 261, pp. 129 *et seq.*