

assigned, transferred, and conveyed to the former by the latter to hinder and delay his creditors, and that the plaintiff is the assignee of said decree in trust for Martin White, a creditor of said Elliott. The defendants demur to the bill separately, and assign numerous and different causes of demurrer, that on the argument were resolved or condensed into these: (1) The non-joinder of necessary parties, plaintiff and defendant; (2) the contract on which the plaintiff seeks to recover is void for champerty; and (3) the plaintiff has been guilty of laches. The facts stated in the bill are substantially these:

On September 12, 1868, Elliott formed a partnership with Ben Holladay and one C. Temple Emmet, by the name of "Ben Holladay & Co.," for the purpose of constructing and operating railways in Oregon, and thereafter the said partnership was engaged in the construction of the Oregon Central Railway Company, until November 5, 1869, when Holladay and Emmet commenced a suit against Elliott in the circuit court for Multnomah county to dissolve said partnership and settle the accounts thereof, which suit was afterwards transferred to the circuit court for the county of Marion, in which court, on September 28, 1877, a decree was entered dissolving said partnership, and adjudging Elliott to be indebted to the other members of the partnership in the sum of \$470, from which decree Elliott took an appeal to the supreme court of the state, wherein, on August 15, 1879, a decree was given dissolving said partnership, and providing that Elliott recover from Holladay the sum of \$21,919.46, and from Emmet the sum of \$8,596, with his costs and disbursements in that court, no part of which sums have been paid to Elliott, and there is now due on said decree from Ben Holladay said sum of \$21,919.46, with legal interest from August 15, 1879.

On February 10, 1874, Elliott, being unable to meet the expense of this litigation with his partners, applied to Martin White, then and now a citizen of California, for a loan of \$12,000, "to enable him to defend said suit, and for other purposes," and offered to secure the payment of the same by an assignment "of all his right, title, and interest" in said suit to the plaintiff, in trust for said White, whereupon the following contract was duly made and signed by the parties thereto:

"Memorandum of agreement between S. G. Elliott and Martin White, made the tenth day of February, 1874.

"A controversy exists between S. G. Elliott and Ben Holladay, and others, relating to the right of said Elliott in and to the Oregon Central Railroad Company, and its stock, bonds, franchises, and other property, which controversy involves substantially all the property and rights of the said company; and, among other things, at least three million two hundred thousand (3,200,000) dollars of the bonds of said company.

"For the purpose of asserting and maintaining his rights in said controversy, said Elliott has borrowed from Martin White the sum of twelve thousand (12,000) dollars in gold coin of the United States, and has agreed to repay the same within one year from the date of the last installment thereof, as

hereinafter provided, (and within two years from the date hereof, whether the last installment shall be demanded by said Elliott within one year from the date hereof or not,) with interest on each installment from the date of the advance thereof at the rate of ten (10) per cent. per annum.

"And in consideration of the loan of said sum by said White upon the terms herein stated, said Elliott has granted to said White the option, to be exercised within the period hereinafter limited, to take in lieu of the repayment of the sum loaned as aforesaid, free from all deductions or charges of any kind for any purpose, one-half of all the property aforesaid, of or pertaining to said railroad company, (except the bonds thereof,) that shall be recovered by said Elliott, and of the bonds of said company that shall be so recovered, after deducting one million dollars thereof for his (said Elliott's) use, and not exceeding one hundred thousand dollars thereof for R. P. & Jabish Clement, in payment for legal services; said option to continue until sixty (60) days after said Elliott shall have received possession of said property and notified White thereof; and if money or other property should be received in place of the property and bonds aforesaid, said option to exist and continue as to such money and property; the dividend thereof to be made in the proportions aforesaid, according to actual value.

"And to secure the performance of this agreement on his part, and to secure the payment of any additional advances not exceeding thirteen thousand (13,000) dollars that he may obtain from said White or other parties, said Elliott has assigned and conveyed in trust to Geo. C. Hickox all his right, title, interest, and claim in and to the property aforesaid.

"And in consideration of the agreement and acts of said Elliott, said White has agreed to loan to said Elliott said sum of twelve thousand (12,000) dollars in gold coin of the United States, and to advance the same upon his demand in installments from time to time, as the same shall be required, upon the terms aforesaid.

"Signed in duplicate, at San Francisco, California, this tenth day of February, 1874.

[Signed]

"S. G. ELLIOTT.  
"MARTIN WHITE."

And in pursuance of said agreement, Elliott executed and delivered to the plaintiff the following sale and assignment, namely:

"In consideration of the sum of twelve thousand dollars in gold coin of the United States, to me paid, and other valuable considerations, I, S. G. Elliott, of the commonwealth of Massachusetts, have granted, bargained, sold, and assigned, and by these presents do grant, bargain, sell, and assign, unto George C. Hickox, of the city and county of San Francisco, state of California, all my right, title, interest, and claim, both in law and equity, in and upon the stock, property, and assets of the Oregon Central Railroad Company of Salem, Oregon, and the Oregon & California Railroad Company, of Portland, Oregon, the firm of A. J. Cook & Co., and the firm of Ben Holladay & Co.

"In witness whereof, I have hereunto set my hand and seal this thirteenth day of February, 1874.

[Signed]

"S. G. ELLIOTT. [Seal.]

"Witnesses: MARTIN WHITE, R. P. CLEMENT."

Between this date and March 25, 1879, White, in pursuance of this agreement, and upon the security of this sale and assignment, advanced to Elliott, and others for him, including \$2,000 paid to the defendant Effinger, the sum of \$22,589.65, no part of which has been repaid.

The defendant Effinger was the attorney for Elliott in the litigation with Holladay and Emmet, and claims a lien on the decrees given by the supreme court against them for his compensation as such attorney, and the plaintiff admits that he is "entitled to some compensation" for his services, but how much he does not know, and therefore he makes him a party defendant.

During the pendency of this litigation Ben Holladay was indebted to sundry persons, including Joseph Holladay, and in October, 1871, he gave the latter, on account of said indebtedness, his note for \$100,000, with interest at the rate of 1 per centum per month; and in November, 1876, gave a second note in discharge of the first one for the sum of \$160,000, with interest at a like rate, and, to secure the payment of the same, transferred and conveyed to Joseph Holladay, at divers times between said last-mentioned date and the date of said decree against him, all the real and personal property owned by him in Oregon, consisting of lands, stocks, notes, bonds, mortgages, and other personal property, then worth \$225,000 and now worth \$500,000. Portions of this property were in the name of and held by third persons as the naked trustees of Ben Holladay, and the transfers and conveyances thereof to Joseph Holladay were made by them on the direction of the former, of which the latter had knowledge.

The bill also alleges that Ben Holladay has had no property in his own name, since the date of said decree, out of which the same could be satisfied by legal process, and is now insolvent and unable to pay the same, except out of the property aforesaid; that the transfers and conveyances aforesaid were made and directed by Ben Holladay and received by Joseph Holladay with the understanding and agreement between them that the same were taken and received by the latter partly as a security for the payment of said last-mentioned note, and also "that said property was to be held in the name of Joseph Holladay, so that the same could not be attached, levied upon, or taken by the other creditors" of Ben Holladay, of whom Elliott was one; that the said transfers and conveyances were made by the latter "with intent to hinder and delay the said Elliott and other creditors of the said Ben Holladay in the collection of their lawful debts and demands;" that at the date of said transfers and agreements it was understood and agreed between Ben Holladay and Joseph Holladay that the former should receive a large portion of the profits of said property, while the remainder should be retained by the latter on account of said note; and that, in pursuance thereof, he did, from time to time, send and deliver to Ben Holladay large sums of money, the profits of said property,—all of which is contrary to equity and good conscience, and in contravention of the plaintiff's rights in the premises.

The objection of laches is not made by Elliott's demurrer, and the ground on which it is made by the other defendants is not distinctly indicated. But has the plaintiff been guilty of laches or un-

reasonable delay in enforcing his right or claim? The suit was commenced on April 26, 1884. The money, for which the decree in *Holladay v. Elliott* is claimed to be a security, was advanced to Elliott by White at intervals of less than a year, and in almost every month of each year, except the year of 1878, from June 13, 1874, to March 25, 1879. It was advanced, not on account, but on an agreement to do so, from time to time, as Elliott might demand or require it, and but for the provision in the agreement as to the time of payment, the right of action against Elliott to recover the same, or any portion thereof, would not have accrued to White until the whole amount was delivered or advanced or offered and declined. But the agreement for the advance or loan provides that the first \$12,000 shall be repaid within one year from the advance of the last installment thereof, which was made before September, 1874, and therefore the right of action to recover this sum accrued by September, 1875, and was barred in six years thereafter, and before the commencement of this suit. Or. Code Civil Proc. § 6, sub. 1. The delivery of the remaining \$10,589.65 was completed on March 25, 1879, and without any contract as to when it should be repaid, and therefore it became payable at once; but even then the right of action to recover the same occurred within six years before the commencement of this suit. Upon this state of the case White could, at the commencement of this suit, have maintained an action against Elliott to recover this second sum, but not the first one.

But it is immaterial whether an action could now be maintained by White against Elliott to recover this money or not. This is not such an action, but a suit brought by a person claiming to be the assignee of a decree to subject the property of the debtor therein to its payment and satisfaction. And it can be maintained, although the right of action against Elliott to recover the money in question is barred by lapse of time. The statute bars the remedy against Elliott in six years, but does not destroy the debt, and it still exists for the purpose of enforcing any lien or pledge given to secure its payment. *Quantock v. England*, 5 Burr. 2628; *Sparks v. Pico*, 1 McAll. 497; *Myer v. Beal*, 5 Or. 130; *Goodwin v. Morris*, 9 Or. 322; 2 Pars. Cont. 379; Rap. & Law. Dig. "Limitations."

Assuming, then, for the present that the plaintiff is the assignee of the decree against Ben Holladay, and that the latter has no property in this jurisdiction subject to execution, except that which he has conveyed or disposed of to Joseph Holladay with intent to hinder and delay the enforcement of said decree, the plaintiff has a clear right to maintain this suit to set aside said conveyance or disposition so far as it is an obstacle in the way of such enforcement, unless he has delayed the commencement of the same unreasonably. 3 Pom. Eq. Jur. § 1415; Wait, Fraud. Conv. § 60.

The only questions that Elliott can litigate in this case are his indebtedness to White and the assignment to the plaintiff, both of which