

are confessed by his demurrer, subject to the objection that they are void for champerty. The indebtedness of Ben Holladay to the owner of the decree against him is also admitted, and the only other question open to contest in the case is the validity of the transfers and conveyances to Joseph Holladay, and the extent of Effinger's claim for compensation as an attorney; and the objection of laches can only be made by said Holladay. As was said by this court in *Manning v. Hayden*, 5 Sawy. 379: "In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it;" and in *Hall v. Russell*, 3 Sawy. 515: "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property." As has been said, so far as Joseph Holladay is concerned, this is a suit to set aside certain transfers and conveyances to him by Ben Holladay, so far as may be necessary to satisfy the decree against him, on the ground that they were made with intent to hinder and delay the plaintiff in the enforcement of the same, contrary to the statute of frauds, (Or. Laws, 528, § 51; 13 Eliz. c. 5;) and upon the question of time is analogous to an action to recover the possession of the property, and ought ordinarily to be considered as barred within the same time as such action. An action to recover the possession of real property is not barred in this state until 10 years from the time the right to maintain it accrues, (Sess. Laws 1878, p. 22;) and an action to recover the possession of personal property, or damages for the taking or detention thereof, may be brought within six years from the time the cause of action accrues.

The decree in question was obtained on August 15, 1879, and if the right to maintain this suit accrued then, as I think it did, the plaintiff has not been guilty of laches. Following the analogies of the statute as applied to actions at law, the suit was commenced in time, both as to the real and personal property affected by the alleged invalid disposition to Joseph Holladay.

The assignment by Elliott, among other things, of all his right, title, interest, and claim, both in law and in equity, in the firm of Ben Holladay & Co., was valid and operative, and transferred to the plaintiff all his interest in said firm. 1 Pom. Eq. Jur. § 168; Burr. Assignm. § 100. It also gave him the option to make himself a party to the litigation then pending between Elliott and his partners in said firm, to ascertain and determine their respective interests therein and liabilities thereto, or to allow it to proceed in the name of the assignor for his benefit. *Ex parte Railroad Co.* 95 U. S. 226.

But counsel for Joseph Holladay insists that this "secret assignment was a fraud upon the courts," and ought not, therefore, to be upheld. But this assertion is certainly unfounded in both law and fact. The contention with Holladay and Emmett, whether conducted in the name of Elliott or Hickox, turned, so far as the former was

concerned, upon his right and liabilities, and it could make no difference in the opinion or action of the court whether Elliott or his assignee had the ultimate benefit of its decree. Nor was the proceeding in violation of that provision of section 27 of the Code of Civil Procedure, which declares that "every action shall be *prosecuted* in the name of the real party in interest." In my judgment the term "prosecuted" is used in this section in the sense of "commenced," and does not prevent a party from assigning his interest in the subject-matter of an action after it has been duly commenced, or require that the assignee shall make himself a party thereto, or dismiss the same and commence another action in his own name. And so the provision appears to have been construed in *Garrigue v. Loescher*, 3 Bosw. 578, cited in Wait's Annotated Code, 115. But, if a suit is even brought in the name of a party after he has assigned his interest in the subject-matter, the objection is waived unless made by answer. Whether an action is brought in the name of the assignor or assignee is a mere matter of form and convenience, and does not touch the merits of the controversy. The statute is enabling rather than restrictive, and is intended to authorize an assignee of a chose in action to sue in his own name rather than to compel him to. Besides, Elliott was not a plaintiff in the suit with his partners, and did not commence or prosecute it, although it may be inferred, from the fact that a decree was given in his favor, that by a cross-bill, or otherwise, he sought and obtained relief therein.

Elliott's interest in the firm of Ben Holladay & Co. having been duly assigned to the plaintiff, pending the suit in the state court to dissolve the same and ascertain the interests of the several partners therein, thereafter the same was maintained and conducted, so far as Elliott was or is concerned, in his name, for the benefit of his assignee, according to the terms and purpose of the assignment. And the decree obtained therein, in the name of Elliott, is considered in equity as a decree in favor of Hickox, his assignee. The thing assigned was Elliott's interest in the partnership,—a matter yet unknown, and to be ascertained in the pending suit thereabout; and the subsequent decree therein represented and stood for that interest, and passed by the assignment to Hickox as soon as it was made or came into existence. *Field v. Mayor, etc.*, 6 N. Y. 179; *Williams v. Ingersoll*, 89 N. Y. 508; *Wright v. Parks*, 10 Iowa, 342; 1 Pom. Eq. Jur. § 168; Story, Eq. Jur. § 1040.

Another ground of the demurrer is that there is a defect of parties. And, first, it is claimed that Martin White, the *cestui que trust*, ought to have been joined in the bill with the trustee as plaintiff. It is admitted that the general rule is that, in a suit respecting trust property, brought either by or against the trustee, the *cestui que trust* or beneficiary is a necessary party. Story, Eq. Pl. § 207. But to this rule there are exceptions, and this case falls within one of them. When the suit by the trustee is merely to recover or to reduce to possession the trust

property, and is in nowise intended to control the administration or disposition of it, or to affect the right or relation of the *cestui que trust*, the latter is not a necessary party. Story, Eq. Pl. § 212; *Carey v. Brown*, 92 U. S. 172.

In this case the trustee merely seeks to obtain the trust fund—the money due on the decree against Ben Holladay—for the use of White, the *cestui que trust*, according to the purport and effect of the trust. It is also insisted that the several persons, to-wit, Thomas Brown, W. H. Hampton, George W. Weilder, W. L. Halsey, Ben Holladay, Jr., L. R. Patton, and the Oregon Real Estate Company, who held the legal title to much of this property when it was transferred or conveyed to Joseph Holladay, are necessary parties defendant to the suit. These parties were the mere agents and employes of Ben Holladay, and held this property in trust for him as a matter of convenience, and absolutely subject to his direction. They were naked trustees without interest or discretion.

And, *first*, this is not a purely creditors' bill, in which the plaintiff seeks to discover, and subject to the payment of his debt, equitable assets in the hands of the debtor, or property which he has transferred to others, under such circumstances as to leave an equitable interest in himself; but it is a suit to set aside specific covinous transfers and conveyances made by the debtor, which obstruct and prevent the plaintiff from enforcing his decree against the former by execution levied on the property included in such transfers or conveyances. So far as Ben Holladay is concerned, his indebtedness to the assignor of the plaintiff is established by the decree, and is no longer open to controversy; and the transfers and conveyances in question are good against him, and can only be avoided at the suit of a creditor. He has, then, no interest in this controversy. His indebtedness is fixed, and the property sought to be affected has passed beyond his control, and he cannot be prejudiced, in any legal sense, by a decree which may subject it to the payment of his debts. *In re Estes*, 6 Sawy. 459; *Collinson v. Jackson*, 8 Sawy. 365; *Bump*, Fraud. Conv. 548; *Wait*, Fraud. Conv. §§ 129, 171; *Fox v. Moyer*, 54 N. Y. 128.

It follows that while Ben Holladay is a proper party to this suit, he is not a necessary one, and might have been omitted from the bill. And his agents and trustees, who conveyed this property to Joseph Holladay under his direction, have less interest in the suit, or the subject-matter of it, if possible, than he has. As against them, also, the conveyances are good. They passed the legal title to Joseph Holladay. These parties have no longer any interest in the property or power over it. No relief is sought against them, and they cannot be prejudiced by any decree that may be given in the suit. The case of *Gaylords v. Kelshaw*, 1 Wall. 81, cited by counsel for Joseph Holladay, decides nothing to the contrary of this. Kelshaw, being the debtor and grantor in the alleged fraudulent conveyance, was a proper, although not a necessary, party in that case. But, being made a

party defendant, without any averment as to his citizenship, it did not appear that the court had jurisdiction. Accordingly, the case was remanded, with leave to the plaintiffs to amend their bill generally, which they might do by alleging the citizenship of Kelshaw, if it was sufficient to give the court jurisdiction, or by omitting his name from the bill. The general rule is that no person need be made a party to a suit who has no interest in it, and against whom nothing is demanded. Story, Eq. Pl. §§ 153, 228-231; *Kerr v. Watts*, 6 Wheat. 550; *Trecothick v. Austin*, 4 Mason, 44; *Bump Fraud. Conv.* 548. This proposition is tacitly admitted by the counsel for Joseph Holladay, but he contends that the transfers and conveyances in question were, in fact, only mortgages, and therefore the legal title to the property is still in these trustees, and they are necessary parties to any suit in which that title is sought to be affected or the legal estate disposed of. But, whatever the real fact may be as to the relations between Ben and Joseph Holladay concerning this property, there is nothing in the fact stated in the bill to warrant any such conclusion. On the contrary, the case made by the bill is one where a debtor transfers and conveys to one creditor his property with intent to thereby "hinder and delay" his other creditors, including the plaintiff. True, it is not alleged that these transfers and conveyances were made with intent to defraud. Neither is it necessary to the plaintiff's rights to the relief demanded that they should be. Under the statute, it is sufficient if the conveyance is made with intent, either "to hinder, delay, or defraud" creditors. These words are not synonymous, and a conveyance made with either intent may be avoided by any "person so hindered, delayed, or defrauded." Wait, *Fraud. Conv.* § 11; *Bump, Fraud. Conv.* 19.

That these transfers and conveyances were made with intent to hinder and delay the debtor's creditors is directly alleged in the bill, and is sufficiently shown by the facts, that the property included in them is all that the debtor had, at least in this state; that its value was largely in excess of the debt due Joseph Holladay, who is his brother; and that the debtor has since regularly received to his own use a large portion of the rents and profits thereof.

And, *lastly*, is the contract upon which the money was advanced by White to Elliott void for champerty?

And, *first*, in the mouth of Elliott, at least, this may be considered anything but a meritorious defense. In 1874, when he was needy and sore, pressed by rich and powerful parties, who sought to exclude him from his share in an enterprise in which he appears to have thought there were millions for him, he applied to White, the party for whose benefit this suit is brought, for aid in this struggle, who thereupon advanced him money to enable him to assert his rights in court and maintain himself generally, upon no other security for its repayment, with legal interest, than an assignment of his interest in the firm of Ben Holladay & Co., then involved in litigation.

The option or alternative contained in the writing of February 10th, by which White was given the election to take, instead of his money and interest, one-half of the railway property that might be awarded to Elliott in the suit with Holladay and Emmett, after deducting the trifling sum of a million dollars' worth of the company bonds for Elliott's individual use, and one hundred thousand dollars more for his private counsel, though undoubtedly champertous, as involving a division of the field or product of the litigation, is a distinct agreement from that involved in this suit. The assignment under which the plaintiff seeks to enforce the decree against Ben Holladay was not given to secure the performance of this option, but the repayment of the money loaned. The contingency upon which the right to exercise this option depended never occurred, for Elliott never obtained "the possession" of any of said property, or notified White thereof. This suit is brought to enforce the assignment given by Elliott as security for money loaned him under the writing of February 10th, which he has failed to repay. And while it does, in my judgment, steer clear of the champertous option clause, its maintenance does involve the recognition of the agreement under which the money was advanced to Elliott, to enable him to make good his defense in the suit with his partners; and if this is void for maintenance, the assignment falls with it. The assignment or security stands no better, in this respect, than the debt or contract out of which it arose, and for which it was given.

It does not appear that the courts of the state have ever passed on the question whether the old English law of maintenance is in force here as a part of the common law or not. The evident modern drift of both the English and American courts is in the contrary direction, and the old doctrine of maintenance, which includes champerty, is treated as something belonging to the past and not suited to the circumstances of this age. *Findon v. Parker*, 11 Mees. & W. 679; *Wright v. Tebbitts*, 91 U. S. 252; *McPherson v. Cox*, 96 U. S. 416; *Small v. Mott*, 22 Wend. 405; *Thalhimer v. Brinkerhoff*, 3 Cow. 643; *Richardson v. Rowland*, 40 Conn. 570; *Sedgwick v. Stanton*, 14 N. Y. 291; *Mathewson v. Fitch*, 22 Cal. 93; *Hoffman v. Vallejo*, 45 Cal. 566.

In *Small v. Mott*, *supra*, Chancellor WALWORTH says "that most of the absurd rules relative to maintenance, which are found in the early reports of the English courts of justice, were founded on the broad and sweeping provisions of the statutes" of Edw. I. and III., and Rich. II. For instance, chapters 25, 28, and 30 of 3 Edw. I., prohibited the king's officers, such as clerks, sheriffs, justices, or "stewards of great men," from taking part in quarrels depending in the king's courts, or maintaining any suits "hanging" in such courts for lands or other things on part or profit thereof.

There is no statute in Oregon against maintenance, and, by express enactment, a valid conveyance may be made of lands in the adverse possession of another, while chases in action may be sued on in the

name of the assignee. Or. Laws, p. 516, § 8; p. 110, § 27. It is not likely that this contract would be held void here for maintenance. But it is not necessary for this court to anticipate the action of the state courts on this question.

This contract was made in California, and in contemplation of law was to be fulfilled or performed there. It has been held in that state since 1863 that there is no law there against any form of maintenance. *Mathewson v. Fitch*, and *Hoffman v. Vallejo*, *supra*. And the contract being valid there, is valid here. Story, Conf. Laws, §§ 242, (1,) 279, 280.

But it is contended that the assignment or security taken for the performance of this contract related to property in Oregon, and could only be fulfilled or enforced here, and therefore the contract for the loan ought to be considered as made here, and its validity tested by the law of Oregon. But the authorities are uniformly otherwise. Story, Conf. Laws, § 287; *De Wolf v. Johnson*, 10 Wheat. 367. In the latter case, Mr. Justice JOHNSON, speaking for the court, says:

"Taking foreign security does not necessarily draw after it the consequences that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract."

The demurrer is overruled, and the defendants have 20 days in which to answer.

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MARINE GRAIN & STOCK EXCHANGE v. WESTERN UNION TEL. Co. and another.

(Circuit Court, N. D. Illinois. October 13, 1884.)

CHICAGO BOARD OF TRADE—DISTRIBUTION OF REPORTS BY TELEGRAPH.

The Chicago board of trade has the right to decide to what persons besides its own members the telegraphic reports of its dealings, collected by its own employes, shall be distributed.

In Equity.

*Bisbee, Ahrens & Decker*, for complainant.

*Williams & Thompson*, for defendants.

BLODGETT, J. The bill in this case was filed for the purpose of obtaining an injunction for restraining the defendants from breaking the connection of the telegraph wires under their control with certain instruments and tickers in the office of complainant; the principal allegations being that complainant is a corporation, duly organized under the laws of Illinois, for the purpose of dealing in grain, etc., and carrying on a brokerage and commission business in this city in such commodities, and is now engaged in such business; that