

land-office in 1852 may have been correct, both as to the law and as to the facts relating to the actual condition of the land, as to being overflowed or not. Their condition may subsequently have changed, and to permit of oral proof now upon this point would lead to endless confusion, and perhaps work great injustice to the parties concerned. The only safe course is to act upon the principle announced by the supreme court, and treat the decision of the tribunal appointed at the time to determine that fact as final. The conclusion must therefore be that the decision of the land-office in 1852, not having been reviewed by the state of Ohio, as the law permitted, became final and conclusive as against the state, and neither the state nor its privies can now be permitted to come and controvert that decision. But the amended answer avers that the particular land for which the plaintiff brings suit was included in the land sold under the direction of the general land-office of the United States. The demurrer concedes that fact. It must therefore follow that, upon the pleadings as they stand, the defendant is entitled to the judgment, and the petition must be dismissed.

GOODYEAR DENTAL VULCANITE Co. v. WHITE, (two cases.)

(Circuit Court, S. D. New York. April 24, 1891.)

ABATEMENT AND REVIVAL—LACHES.

After the lapse of nearly 12 years after the death of a sole defendant in a suit in which issue has never been joined, though the suit was begun 4 years before his death, the suit cannot be revived against his executors.

At Law.

W. H. L. Lee, for petitioner, cited the following cases on the question of delay:

Beach v. Reynolds, 53 N. Y. 1; *Coit v. Campbell*, 82 N. Y. 509, and cases cited; *Bennett v. Cook*, 43 N. Y. 537; *Evans v. Cleveland*, 72 N. Y. 486; *Lyon v. Park*, 111 N. Y. 350, 18 N. E. Rep. 863.

LACOMBE, Circuit Judge. These are motions to revive two actions, the one for maintenance,—the defendant being charged with the malicious defense of and interference in certain suits in which he had no interest,—the other for slander of title to personal property. They were commenced, the former in this court in 1873, the latter in the state court in 1875, in which year it was removed into this court. Issue has never been joined. The sole defendant died on or about December 29, 1879, in Paris, France, and was at the date of his death a resident of Philadelphia, Pa. On December 31, 1879, his will was duly admitted to probate in the city of Philadelphia, and within two months thereafter letters testamentary were duly issued to his executors, who have entered upon the execution of their duties, and are still acting as such. The

defendant left a large amount of personal property in the city of New York, of which his executors have taken possession, when does not appear by the papers, but presumably soon after their appointment. On December 17, 1886, the petitioner was duly appointed receiver of the property of the plaintiff, and on July 21, 1890, filed his petition for a revival of the actions against the executors of the defendant.

A careful examination of the cases cited on the exhaustive brief of the petitioner's counsel (particularly 82 N. Y. 509; 72 N. Y. 486, *Lyon v. Park*, 111 N. Y. 350, 18 N. E. Rep. 863; 53 N. Y. 1) leads to the conclusion that the application for an order of substitution and revival should not be granted. The later cases seem to warrant the proposition that section 757 of the New York Code is not constraining on the court, and that in granting a motion for continuance it should exercise a legal discretion, and refuse the relief when there has been a lapse of time after statement equal to the statute of limitations applicable to the original claims. It is no doubt true that the two later cases were of equitable nature, but there was, at common law, no right to revive such actions as these at all, and it only exists in this state by virtue of an express statute, which, so far as its language is concerned, makes no distinction between legal and equitable actions. Unless the authorities in this state were very clear in support of the proposition, I should not grant a motion to revive where so great a time has elapsed as in this case. The modern doctrine treats the subject of limitations as a matter in which the public is concerned, as well as the individual; and defenses resting upon the lapse of time, which were heretofore deemed unmeritorious, are no longer so considered.

Nor do I find in the fact that the executors have continuously resided in Pennsylvania, and that the petitioner is a resident of New York, and the original plaintiff a New York corporation, sufficient excuse for the delay in making this motion. If an action can be revived against a foreign executor upon the theory that he has taken property which the decedent left within the state, then the executor was not absent from the state for the purposes of this motion. If on that theory the action could be revived now, it could have been revived as soon as the executor took the property.

It is not necessary to consider the effect of the excuses for delay offered by the receiver. Under the view here taken, the right to revive had been lost before the appointment of a receiver.

DE ESTRADA v. SAN FELIPE LAND & WATER CO.

(Circuit Court, S. D. California. May 11, 1891.)

EQUITY—LACHES—LAPSE OF TIME.

Where a bill in equity discloses that complainant was informed as early as 1876 by her brother that her father, who died in 1848, had left a will devising to her certain land in California; that, after making some inquiries through her husband, she remained quiescent until 1888, when she learned that the land had been conveyed in 1850 to defendant's grantor by one assuming to act as executor of her father's will, and that the title was confirmed by the board of land commissioners under Act Cong. March 3, 1851, and that she did not bring suit until 1890,—her claim will be held to be stale notwithstanding it also appears that she was ignorant, and in great poverty, and a demurrer to the bill sustained.

In Equity. On demurrer to bill.

Lamar & Castle and *W. H. C. Ecker*, for complainant.

Hutton & Swanwick, for defendant.

Ross, J. This is a suit in equity, brought by the complainant to establish her alleged right to an undivided interest in the Rancho Valle de San Felipe, which was granted by the Mexican government on the 30th day of May, 1846, to Felipe Castillo, the father of complainant, and is situated in what is now San Diego county, Cal. The original bill was filed herein on the 29th of January, 1890, and the amended bill, to which the present demurrer is interposed, was filed July 22, 1890. In the amended bill it is alleged that the complainant is the illegitimate daughter of Felipe Castillo, who, it is alleged, died in the city of Los Angeles, Cal., in the year 1848, leaving four children surviving him, namely, the complainant, and Loreto, Manuel, and Refugio Castillo. It is alleged that Felipe Castillo died seized of the rancho in question, and that he left a will, by which he devised it in equal shares to his four named children, and appointed as the executor of the will one Augustine Olivera, a resident of Los Angeles; that Olivera declined to act as such executor, but that on the 25th of May, 1850, he, together with Loreto Castillo, Manuel Garfias, and Juan Foster, "in fraud of the rights of your orator herein, caused to be made and delivered to said Juan Foster a certain instrument in writing, whereby the said Loreto Castillo then and there pretended to and did declare himself to be the executor of the said last will and testament of said Felipe Castillo, and the agent of his said two brothers, said Manuel and Refugio, and empowered to sell said Rancho Valle de San Felipe;" that in and by said written instrument Loreto Castillo pretended to sell and convey to Foster the whole of the rancho; that Loreto was not at the time of the execution of the conveyance the executor of the will, nor had he any power or authority from Manuel or Refugio to sell their interest in the rancho, or in any manner to represent them, all of which, it is alleged, was well known at the time to Loreto, Olivera, Foster, and Garfias; that in the year 1855 Foster presented to the board of land commissioners (created by the act of March 3, 1851, to ascertain and settle the private land claims in California) a petition for the confirmation to him of the title to said rancho,