

UHLE v. BURNHAM *et al.*

(Circuit Court, S. D. New York. June 5, 1891.)

SECURITY FOR COSTS—DELAY.

A motion for security for costs which is in effect an application for security as to extraordinary disbursements growing out of an order of reference, and which were not in contemplation of either party at an earlier stage of the case, will not be denied on the ground of delay, because not made until after the entry of the order of reference.

In Equity. On motion for security for costs.

Charles Putzel, for plaintiff. *David A. Sullivan*, for defendants.

LACOMBE, Circuit Judge. Were this a motion for the ordinary security for costs, I should be inclined to deny it, on the ground of delay; but it is really an application for security as to extraordinary disbursements, which were not within the contemplation of either party until quite recently. The granting of such a motion at this stage of the case is within the discretion of the court. *Huginin v. Thatcher*, 18 Fed. Rep. 105; *Stewart v. The Sun*, 36 Fed. Rep. 307. Inasmuch as the application was made with reasonable diligence after the entry of the order of reference, the plaintiff should give security in the amount of \$1,000 for so much of the costs and disbursements as may consist of releree's fees and stenographer's charges.

GALBES v. GIRARD *et al.*

(Circuit Court, S. D. California. June 1, 1891.)

1. EQUITY—LACHES—EVIDENCE.

Where a bill in equity showed that the acts complained of occurred from 12 to 16 years before it was filed, and not only that they were matters of record, and open to inspection, but that complainant and his mother, to whose interest he succeeded on her death in 1885, had, as early as 1876, commenced proceedings in the state courts to secure the rights now asserted, and that the last of the suits so brought was dismissed by the court on the stipulation of counsel in 1879, but that "until a long time" afterwards complainant did not know of such dismissal, he will be charged with a knowledge of the act of his counsel, and the bill dismissed for laches.

2. CONSTITUTIONAL LAW—SUITS AGAINST THE STATE.

Const. Cal. art. 20, § 6, provides that "suits may be brought against the state in such manner and in such courts as shall be directed by law;" but, where no law has been passed by the state authorizing such suits, a motion to dismiss as to the state in a suit in which the state is made a party defendant, must be sustained.

In Equity. On motion to dismiss, and demurrer to the bill.

"Bill by Manuel Jesus Galbes, a citizen of Chili, against James N. Girard and others. The bill alleged that Juan Galbes died in California in 1874, owning real and personal property in the state, and leaving surviving him Lorena Gamboa Galbes, his wife, and a son, plaintiff in this action. The bill then alleged that, in pursuance of a conspiracy, letters of administration were in 1874 fraudulently granted to one Howe, without notice to the widow or plaintiff. In 1876 the estate was closed up, and distribution made to Dolores Diaz Menesses and Juana Diaz Menesses. By sundry mesne conveyances from the Menesses, defendant Girard, in 1881, acquired title to the property for an inadequate consideration, and with knowledge of the facts. The bill also alleged that in 1876 the present plaintiff and the widow, who were both unable to speak English, instituted an action in the probate court for San Luis Obispo county, claiming the property, but their petition was dismissed

in 1878. Afterwards, also in 1878, the present plaintiff and the widow instituted an action in the superior court for San Luis Obispo county, alleging their relationship to deceased, and claiming the property. This action was dismissed in 1879, without knowledge of the widow or plaintiff, who supposed the action to be pending until a long time thereafter. In 1883 the state of California brought an action, claiming that the property had escheated to it, and the state was also joined as a party defendant. Defendant Girard demurred to the bill, and the state moved to dismiss as to it."

Ross, J. To the bill in this case the state of California as well as certain individuals are made defendants. So far as the state is concerned, its exceptions to the jurisdiction and motion to dismiss the bill must be sustained, upon the ground that there is no law authorizing such suit to be brought against it. *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. Rep. 504. It is provided by the constitution of California that "suits may be brought against the state in such manner and in such courts as shall be directed by law." Section 6, art. 20. But the legislature of the state has not enacted any law authorizing the bringing against the state of such a suit as the present. Until it does so, the suit, so far as the state is concerned, cannot be maintained. *Beers v. State*, 20 How. 527.

The demurrer of the individual defendants raises several objections to the bill, but one of which it is necessary to consider. In my opinion, the bill shows on its face such laches that a court of equity should withhold the aid invoked. To call such a court into activity there must not only be conscience and good faith on the part of complainant, but reasonable diligence as well. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, and cases there cited. In the present case the acts which form the basis of complainant's bill occurred from 12 to 16 years before the bill was filed. They were not only matters of record, and open to public inspection, but the bill shows on its face that complainant and his mother, to whose interest in the property in question he is alleged to have succeeded by her death in 1885, as early as 1876 commenced proceedings in the courts of the state to secure the same rights now asserted by complainant. The last suit so brought was dismissed by the court February 3, 1879, on the stipulation of counsel for the respective parties. In the present bill it is alleged that complainant did not know of such dismissal "until a long time" afterwards. But the act of his counsel in that particular was his act, of which he must be held to have had knowledge. A period more than double that allowed by statute in California for the recovery of real property was thereafter allowed to elapse before the institution of the present suit. I think the cause of suit stale, and that it should therefore be held barred by lapse of time. It is therefore unnecessary to decide whether a court of equity should refuse relief upon the ground that the bill shows that complainant's remedy is at law, or as to the sufficiency of the bill in other particulars.

The exceptions and motion filed by the state of California and the demurrer of the individual defendants are sustained, and the bill dismissed, at complainant's cost.

UNITED STATES *v.* SIOUX CITY & ST. P. RY. CO. *et al.*

(Circuit Court, N. D. Iowa, W. D. June 1, 1891.)

PUBLIC LAND—RAILROAD GRANT—FORFEITURE.

By Act Cong. May 12, 1864, public lands were granted to the state of Iowa to aid in building a railroad from Sioux City to the Minnesota state line, and another from McGregor westward, to the total amount of the alternate odd numbered sections within the limit of 10 miles along each side of the railroad. In a proceeding between the two railroad companies it was held by the supreme court of the United States that where they intersected each other, and the limits overlapped, each company took under the grant half the designated lands. One of the companies failed to earn the lands in the overlapping limits by building its road. *Held*, that such lands reverted to the United States, and were added to the unappropriated public domain, and the other road takes no title thereto under the grant.

In Equity.

Bill in equity by the Sioux City & St. Paul Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and certain settlers upon the land in dispute, to adjust certain land grants and cross-bills by the Chicago, Milwaukee & St. Paul Railway Company and by the settlers.

W. H. H. Miller, Atty. Gen., and *E. C. Hughes*, Sp. Asst. Dist. Atty., for the United States.

John W. Carey, for Chicago, M. & St. P. Ry. Co.

W. L. Joy, for settlers.

SHIRAS, J. The original bill in this cause was filed for the purpose of adjusting the rights of the Sioux City & St. Paul Railway Company under the land-grant act of May 12, 1864. A hearing thereon was had, and the conclusions reached are set forth in the opinion of the court reported in 43 Fed. Rep. 617, to which reference may be made for a more full statement of the facts upon which the decree of the court proceeded. The result of the findings upon the hearing was that the Sioux City & St. Paul Company was not entitled to hold the lands in Dickinson and O'Brien counties in the state of Iowa, which the state of Iowa had refused to convey to that company, for the reason that the company had not built the entire line of railway from Sioux City, Iowa, to the Minnesota state line, which was the object sought to be accomplished by the grant made in the act of congress of May 12, 1864, and that for the portion of the line actually built the company had received more lands than it was legally entitled to under the terms of the grant. Upon the announcement of the conclusion reached in that case, the Chicago, Milwaukee & St. Paul Railway Company obtained leave to appear in the case and file a cross-bill, for the purpose of asserting a claim to the lands in Dickinson and O'Brien counties, based upon the fact that the act of May 12, 1864, contained two grants for railroad purposes, *i. e.*, the one in aid of the line from Sioux City to the Minnesota state line, and the other in aid of the line from McGregor westwardly, on or near the forty-third parallel of north latitude, to the point of intersection with