

tion, in determining whether he was a *bona fide* purchaser without notice. It is not believed to be the law that the mere fact that one takes by a quitclaim deed establishes that he is not a *bona fide* purchaser. A conveyance by quitclaim, like that by warranty deed, carries the title which the grantor can lawfully convey, and the grantee may rely upon the public records when he has no notice of an infirmity in his grantor's title, and pays a valuable consideration. The covenants of warranty in a deed are contracts by which the grantor becomes liable in case of failure or defect in title, though such deed will no more convey title when the grantor had none than will a deed of quitclaim. It is not seen why one who purchases by a quitclaim deed has not as much right to rely upon the record of titles as though he took by a warranty. If the cases cited by plaintiff's counsel touch this question, still we are unwilling they should control the case we are considering. To do so would, in our opinion, extend them beyond the facts upon which they rest.

We agree to the view urged by counsel, that one who takes merely a release of the interest of the mortgagor, whose unrecorded mortgage is outstanding, obtains only the equity of redemption subject to such mortgage. 1 Jones, Mortg. § 598; *Eaton v. Trowbridge*, Mich. Lawyer, April, 1878, p. 343. The rule is, also, that the purchase money must have been paid at the time of the discovery of plaintiff's unrecorded mortgage, in order to constitute Baker a *bona fide* purchaser. Baker, at the time he learned of the existence of plaintiff's mortgage, had paid the purchase price going to McGarry by a conveyance of his property. The incumbrance subject to which he bought, Baker had in part paid, and he was therefore not in condition to be placed *in statu quo*. There is nothing to show that he could receive back what he had parted with, or be made whole.

Complainant is entitled to the usual decree of foreclosure and sale as to 40 acres, described as the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 25, in town 5 N., of range 10 W.; but the 160 acres described as the N. W. $\frac{1}{4}$ of the same section will not be included in the decree.

EATON v. CALHOUN.

(Circuit Court, W. D. Tennessee. March, 1880.)

CIRCUIT COURTS—JURISDICTION—CASE ARISING UNDER FEDERAL LAWS.

In an action to recover certain premises, plaintiff averred that he acquired title "through a deed of the United States, executed by the commissioner of internal revenue, with the approval of the secretary of the treasury," by virtue of authority conferred by Act Cong. June 8, 1872, and that "the validity of said act, and his title thereunder, are the only questions in controversy in this case." *Held*, that these averments brought the case within Act Cong. March 3, 1875, conferring on the circuit court concurrent jurisdiction with the state courts in all suits of a civil nature arising under the constitution and laws of the United States.

At Law. Action to recover lands claimed under deed of commissioner of internal revenue. On demurrer to declaration.

Lucien B. Eaton, in pro. per.
Jos. M. Gregory, for defendant.

BAXTER, J. The defendant, by demurrer, denies the jurisdiction of this court, on the ground that both the plaintiff and himself are citizens of Tennessee; and this is the only question presented for our determination. The framers of the constitution seem to have been agreed upon three fundamental ideas—*First*, that a national judiciary was essential to the maintenance of the national authority; *second*, that its powers should be co-extensive with those of the legislative department; and, *third*, that it ought to be so organized and endowed as to insure all the purposes of its establishment. And in furtherance of these principles they made the constitution declare “that the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” But this constitution needed legislation to make it effective. Hence the twenty-fifth section of the judiciary act of 1789 prescribed a mode whereby parties claiming rights under the constitution or laws of the United States could, after unsuccessfully litigating the same through the state courts, have the judgments or decrees of the state courts against them re-examined and reversed or affirmed by the supreme court of the United States. But this remedy was found to be circuitous, dilatory, and expensive, to obviate which, congress passed the act of March 3, 1875, entitled “An act to determine the jurisdiction of the circuit court,” etc. This act, in explicit terms, confers original jurisdiction, concurrent with the courts of the several states, “on the circuit courts of the United States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States.” Parties, therefore, claiming rights under the federal constitution or laws, may, since the act of 1875, pursue the remedy given by the aforesaid twenty-fifth section, or, in lieu thereof, bring their suit, in the first instance, in the federal tribunals. But they must, in either case, show by proper and apt averments enough to maintain the federal jurisdiction. Does the plaintiff do this in this case? If he does, we are bound to retain and try the cause. Upon this point the plaintiff, after alleging title, etc., to the premises sued for, says that he acquired his title “through a deed of the United States executed by the commissioner of internal revenue, with the approval of the secretary of the treasury, by virtue of the authority conferred by the act of the 8th of June, 1872, and acts amendatory thereof,” and that his “claim of title arises under the aforesaid acts of congress,” and that “the validity of said acts of congress, and his title thereunder, are the only questions in controversy” in this case. These averments, admitted by the demurrer, bring the case within the purview of the act of 1875, and clothe the court with jurisdiction in the premises. The demurrer will therefore be disallowed, and defendant will be permitted to plead in bar. The district judge concurs.

BUCKLES v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. September 16, 1891.)

NONSUIT—FAILURE TO PAY COSTS—NEW ACTION.

Where plaintiff took a nonsuit in a state court after the hearing of the evidence and the giving of the instructions, and then, within the year, reinstates the same action in the same court, a motion should be entertained on removal to stay further proceedings until plaintiff has satisfied the costs in the first proceeding.

At Law.

This was an action of tort by Mary J. Buckles against the Chicago, Milwaukee & St. Paul Railway Company, instituted originally in the state court, and removed to this court on application of the defendant. Defendant has now filed a motion to stay further proceedings until plaintiff pays the costs assessed against her in the state court. Motion allowed.

Wm. M. Burris, for plaintiff.

Pratt, Ferry & Hagerman, for defendant.

PHILIPS, J. This is a motion to stay proceedings in this cause. It arises on the following state of the record and proofs: The plaintiff instituted action on the same cause of complaint—an alleged tort—against this defendant in the circuit court of Clay county, Mo. Issue was joined, and the case went to trial before a jury. After all the evidence was heard, and the court gave its instructions to the jury, the plaintiff took a nonsuit. There was a judgment against the plaintiff for the costs in that case, which have never been paid. Within the year from said nonsuit the plaintiff reinstated the same action against the defendant in said circuit court. On application of the defendant this cause was removed into this court. On motion of defendant the plaintiff was ruled to give security for costs, which she has failed to give, but has suggested to the court that she would make application to sue as a poor person. The defendant has filed an intermediary motion to stay further proceedings by the plaintiff herein until she has paid the costs assessed against her in the Clay county circuit court. In the common-law courts of England the practice indicated by this motion arose out of ejectment proceedings, in which one recovery of judgment was not *res judicata*, but the same action might be renewed. As a measure of just protection to the party who was thus subjected to repeated litigations over the same cause of action, the courts, in the application of an equitable principle to a common-law proceeding, entertained motions to stay the prosecution of the second action until the plaintiff paid the costs adjudged in the first proceeding. In other forms and character of actions this rule was not formerly applied as a matter of course. In certain conditions it might work injustice and hardships; as in the action for *assumpsit* for debt, where the plaintiff might not have any other means out of which to pay the cost than the debt which the defendant wrongfully detained