

utes upon this action upon the judgments. Such proceedings, or rather such want of proceedings, do not constitute a suit pending upon the judgments within the rule invoked by plaintiff's counsel, especially in view of the fact that in these very *mandamus* proceedings before Mr. Justice BREWER, then circuit judge of this circuit, all the vital questions in this case were considered and determined adversely to the plaintiff, and the writ quashed, in *U. S. v. Township of Oswego*, 28 Fed. Rep. 55, in 1886.

If the plaintiff in this case has failed to collect the money that was due him it has not been because he was remediless under the law. It has been because for more than five years he issued no writ upon his judgments when he could have had a writ for the asking, and because he brought no suit, and made no application to revive his judgments, for more than three years after they became dormant, at a time when there was ample opportunity to serve notice and process upon the defendant. The judgment against him was right, and it is affirmed.

HEWITT v. STORY *et al.*

(Circuit Court, S. D. California. June 13,

IRRIGATION—APPROPRIATION—ABANDONMENT.

Certain persons appropriated, by means of the B. ditch, the water remaining in a stream after two prior appropriations. The supply proving insufficient after several years, they each purchased a certain number of shares in the T. ditch and the water appropriated by it, and diverted the same to the B. ditch. After a time other shareholders in the T. ditch also, by permission, diverted their water through the B. ditch, and finally the T. ditch was abandoned, and all the water taken through the B. ditch. Thereafter for many years the entire amount of water taken through the B. ditch was distributed in proportion to the ownership of shares in the T. ditch appropriation, without regard to the original appropriation by means of the B. ditch. *Held*, that this constituted an abandonment by the original appropriators and their successors of their claim to the water originally taken by the B. ditch.

In Equity. Bill by Isaac L. Hewitt against Warren Story and others to establish a right to take certain water for irrigation and other purposes, and to restrain interference therewith. Bill dismissed.

For prior reports, see 39 Fed. Rep. 158, 719.

Rowell & Rowell, John A. Wright, A. W. Thompson, and Brousseau & Hatch, for complainant.

George E. Otis, H. C. Rolfe, Byron Waters, Curtis & Otis, and R. E. Houghton, for defendants.

Ross, District Judge. I have examined the voluminous record in this case with care, and am of the opinion that the averments of the bill as amended are not sustained by the evidence. The complainant's contention is that he is the owner, and entitled to be protected in the use, of 333½ inches, measured under a 4-inch pressure, of the waters of the Santa Ana river, which he alleges were appropriated by his predecessors

in interest through and by means of a ditch called the "Berry Roberts Ditch," the use of which he and they continuously enjoyed until the alleged wrongful interference therewith by the defendants shortly before the commencement of this suit. To review in detail the evidence, which embraces more than 2,300 pages, would serve no useful purpose; nor, in the view I take of the case, is it necessary to make any reference to a very large part of it. The case shows that prior to the appropriation under which the complainant claims two appropriations of the waters of the river had been made,—one by means of a ditch called the "North Fork Ditch," tapping the river not far from where it debouches from the mountains into the San Bernardino valley; and the other, called the "South Fork" or "Timber" ditch, which took water from the same side of the river, (the north side,) but some distance lower down. The respective parties to this suit are not agreed, and the evidence is conflicting, in respect to the quantity of those two appropriations; but, in my view of the case, that is not a matter of importance here. The appropriation upon which the suit is based was made by Berry Roberts, Henry Suverkrup, and George A. Craw in the year 1869, and was of the "waste water" of the river, by which, I think, from the evidence, was intended the water remaining after the North Fork and Timber ditches should be supplied. The ditch through which they appropriated this waste water tapped the river on its south side, and between the head of the North Fork ditch and that of the Timber ditch. They designated their ditch the "Berry Roberts Ditch." Roberts, Suverkrup, and Craw at the time occupied and claimed separate and distinct portions of section 16, township 1 S., range 3 W. of the San Bernardino meridian; Roberts claiming 160 acres, and Suverkrup and Craw, in the aggregate, 240 acres, which were subsequently acquired by the complainant, as herein-after stated. At the time of, and for many years after, the appropriation by Roberts, Suverkrup, and Craw, there was in existence in San Bernardino county a board of water commissioners created by an act of the legislature of the state to regulate the distribution of water in accordance with the rights of the parties in interest, with authority to appoint water overseers, etc. In the records of this board, referred to and relied on by both sides to this controversy, appears the following entry of date February 19, 1870:

"By request of Henry Suverkrup, Berry Roberts, and G. A. Craw, W. T. Morris and E. Kerfoot, water commissioners for San Bernardino county, California, located a water ditch to be known as the 'Berry Roberts Ditch.' The water claimed by the aforesaid parties for this ditch is the waste water of the Santa Ana river, taken out on the southeast bank of said river about four miles northeast from section sixteen, (16,) township No. 1 south, range No. 3 west, San Bernardino meridian, running thence nearly a southwest direction to the said sixteenth (16) section, and to be used for irrigating purposes, and to be equally apportioned among said parties on the land of the said sixteenth (16) section owned by said parties; and also Berry Roberts was appointed overseer for the aforesaid ditch for the present year.

"Done on the 19th day of February, A. D. 1870.

"W. T. MORRIS,
"E. KERFOOT."

Under this appointment Roberts took charge of the Berry Roberts ditch as water overseer, and through and by means of it Roberts, Suverkrup, and Craw conducted the waste water of the river so appropriated to their respective tracts of land in section 16 for irrigation and domestic uses. They had a few trees planted, a small garden, and a few acres in potatoes and corn, not exceeding in the aggregate 40 or 50 acres; and, in the aggregate, they cultivated in grain some 50 or 60 acres. They also permitted one or more of their neighbors to participate in the use of the water, conditioned upon their contributing to keep the ditch in repair. Roberts conveyed his interest in the 160 acres of land claimed by him, together with his interest in the Berry Roberts ditch and in the waste water, to one Ball in 1870, and Ball thereupon succeeded Roberts as overseer of the Berry Roberts ditch. Craw, whose tract of land contained 160 acres, conveyed his interest in it to Suverkrup in 1872. He testified (subject to objections on the part of the defendants as to the competency of the testimony) that he also sold to Suverkrup his interest in the Berry Roberts ditch and in the waste water. During the years 1870, 1871, and 1872 the parties owning these interests in the Berry Roberts ditch and in the waste water appropriated by means of it used the water when they could get it for the irrigation of the land they had under cultivation and for domestic purposes; but at times during those years, owing probably to evaporation and to the porous nature of the soil through which the water ran, the owners of the Berry Roberts ditch found that the waste water of the river was insufficient to supply their needs. Accordingly, Ball, who, as has been said, had succeeded to the one-third interest of Berry Roberts in the Berry Roberts ditch and in the waste water, and who had also succeeded him as overseer of that ditch, purchased 40 shares in the Timber ditch and in the water appropriated by means of it; and Suverkrup, who, in addition to his original one-third interest, the complainant claims had also succeeded to the one-third interest of Craw in the Berry Roberts ditch and in the waste water, purchased 30 shares in the Timber ditch and in the water appropriated by means of it. The water thus acquired by Ball and Suverkrup in the Timber ditch appropriation they diverted and conducted through and by means of the Berry Roberts ditch to their respective tracts of land in section 16. Subsequently, and with their consent, various of the other owners of shares in the Timber ditch appropriation diverted and conducted the water to which they were entitled by virtue of the Timber ditch appropriation through and by means of the Berry Roberts ditch. This ditch continued in charge of the successive water overseers appointed by the board of water commissioners. In June, 1874, Suverkrup conveyed his interest in the 240 acres then claimed and possessed by him, together with his interest in the Berry Roberts ditch and in the waste water, and together, also, with the 30 shares in the Timber ditch appropriation, to one Borron; and in October, 1881, Borron contracted to sell the same to the complainant, and executed to him a deed therefor in 1882. When Borron purchased in 1874 the land now owned by the complainant he went into possession of it, remaining in

personal possession something more than a year, and then put an agent in charge, who remained in possession for Borron until his sale and conveyance to complainant. During all of the time that Borron owned the land, and at the time of complainant's purchase of it, there was but a small part of it under cultivation. In 1874, Ball and Borron, as owners of shares in the Timber ditch appropriation, were diverting and using the water belonging to them as such share owners through the Berry Roberts ditch; and in that year some of the other owners of shares in the Timber ditch appropriation applied to them for permission to divert and conduct the water pertaining to their shares in the Timber ditch appropriation through the Berry Roberts ditch, which permission was accorded upon condition that the applicants should aid in enlarging and repairing the Berry Roberts ditch, which they did. After 1874 no water was taken from the river through the Timber ditch, but all of the water theretofore diverted through and by means of that ditch was thereafter diverted through and by means of the Berry Roberts ditch, and many, if not all, of the owners of shares in the Timber ditch appropriation continued to use the water to which they were entitled by virtue of that appropriation through the Berry Roberts ditch. It does not appear that permission to do so was granted to any considerable number of the shareholders in the Timber ditch appropriation by the then owners of the Berry Roberts ditch; but the case shows that (whether rightfully or wrongfully) the shareholders in the Timber ditch appropriation took possession and control of the Berry Roberts ditch, and through it diverted and conducted the water theretofore diverted and conducted by the Timber ditch; and that from at least as early as 1877 all of the water diverted and conducted through and by means of the Berry Roberts ditch was distributed by the water overseer in charge, and accepted and used by the respective claimants of it, including Ball and Borron, in proportion to the number of shares held by them, respectively, in the Timber ditch appropriation. The Berry Roberts ditch was enlarged and kept in repair by the parties so using it, and in 1877, upon application made to the board of water commissioners, a change was made in its route and in the point of its diversion of water from the river, in order to avoid a sand wash and a consequent loss of water; the board of water commissioners at the same time directing that the ditch should be thereafter known as the "South Fork of Santa Ana" for irrigation purposes. This change was made by the parties using the water of the ditch, under the charge of the water overseer, Ball. There was also a subsequent change in the ditch similarly made. The water diverted and conveyed by means of this ditch continued to be allotted to the respective claimants to it in proportion to the number of shares held by them, respectively, in the Timber ditch appropriation. It was so allotted and used during the more than five years of Borron's ownership that the witness Tolles acted as his agent, and it was so allotted and used continuously after the complainant's purchase in 1881-82. It is true that there is evidence that both Borron and complainant from time to time asserted that they were entitled to the water embraced by the waste water appropriation;

but the mere assertion of such a claim, unaccompanied by acts in vindication and maintenance of it, is of no avail. The evidence, in my opinion, shows that this claim was not respected by the other parties using and in control of the Berry Roberts ditch and the water thereby diverted and conveyed, who at least as early as 1877 allotted all of the water diverted from the Santa Ana river by means of the ditch theretofore known as the "Berry Roberts Ditch" in proportion to the number of shares held by them in the Timber ditch appropriation. For more than five years immediately preceding complainant's purchase from Borron, the latter, through his agent, Tolles, acquiesced in and accepted such allotment of the waters of the Berry Roberts ditch. Such use and control of that ditch and allotment of its waters were wholly inconsistent with the claim that any part of the waters thereby diverted and conveyed was water embraced by the waste water appropriation. Borron's failure to continue the use of the water under that appropriation, and his acquiescence in and acceptance of the allotment of the waters diverted by and conveyed through the Berry Roberts ditch, in proportion to the shares held by the respective parties who assumed control of and maintained it in the Timber ditch appropriation, was a clear abandonment of the waste water appropriation. One of the essential elements of a valid appropriation of the waters flowing over the public lands is its use for some beneficial purpose, which use, of course, is to be referred to the claim under which it is exercised. Not only does the evidence show that the waste water appropriation upon which this suit is based was abandoned during its ownership by the complainant's grantor and predecessor in interest, Borron, but it shows also that the abandonment was acquiesced in by the complainant after his purchase. The waters of the ditch in question continued to be allotted to and used by the respective parties who controlled and maintained the ditch, including the complainant, in proportion to the number of shares held by them, respectively, in the Timber ditch appropriation, which use and control of the ditch and allotment of its waters were, as has been said, wholly inconsistent with the claim that any part of the waters thereby diverted and conveyed was water embraced by the waste water appropriation.

Finding, as I do, from the evidence, that there was an abandonment by the immediate grantor of the complainant, as well as by the complainant himself, of the water embraced by the appropriation upon which the suit is based, it becomes unnecessary to determine whether there could be, in view of the evidence in the case, any valid appropriation of 333½ inches, measured under a 4-inch pressure, of the waters flowing over the public lands, for the irrigation of, and domestic use upon, complainant's 240 acres of land, or to decide any of the other points made by counsel. The bill, as amended, must be dismissed at complainant's cost; and it is so ordered.

UNION LOAN & TRUST CO. v. SOUTHERN CALIFORNIA MOTOR ROAD CO.
et al.

(Circuit Court, S. D. California. June 13, 1892.)

RAILROAD COMPANIES—FORECLOSURE OF MORTGAGE—RIGHTS OF MORTGAGEES.

A bill to foreclose a railway mortgage alleged the company's insolvency, and the insufficiency of its assets to pay the mortgage bonds. The company contested the validity of the bonds, and during the litigation moved the court to order the receiver to pay certain sums to its counsel for services rendered and to be rendered; also to pay its office expenses, and the salary of its secretary, claiming that such payments were absolutely necessary to maintain its corporate existence and enable it to defend. Held that, as such bonds were *prima facie* valid, the holders were entitled to all the assets, and to make such payments would be to impair their vested rights.

In Equity. Suit by the Union Loan & Trust Company against the Southern California Motor Road Company and others to foreclose a mortgage. Heard on motion of defendant for payment of its counsel fees and expenses. Denied. For former report, see 49 Fed. Rep. 267.

Wilson & Lamme, for complainant.

W. P. Gardiner, for intervener.

R. E. Houghton, for defendant.

Ross, District Judge. This suit was commenced to foreclose a mortgage, executed by the defendant corporation to secure the payment of certain of its bonds. At the commencement of the suit a receiver was appointed to take possession of the property involved in it pending the litigation, and he has since been, and now is, in its possession. The defendant motor road company is contesting the validity of the bonds, and an application is now made to the court on its behalf to direct the receiver to pay out of the moneys in his hands certain sums to the counsel of the defendant corporation for services rendered and to be rendered the corporation in such contest, and also to pay the salary of the secretary of the corporation, and its office expenditures incurred since the taking of possession of the property by the receiver. It is said in support of the motion that it is absolutely necessary that such payments should be ordered to enable the defendant corporation to make its defense to the action, and in order that it may maintain its existence as a corporation. That may be so; but, if it is, it constitutes no valid ground for the interference by the court with the vested rights of the complainant. The bonds and mortgage sued on are *prima facie* valid, and because of the alleged insolvency of the defendant corporation, and the insufficiency of the property mortgaged to pay them, the court took the property into its possession to protect and enforce the rights of the mortgagee. If the bonds and mortgage are in fact valid, it is the right of the mortgagee to demand that all of the property included in the mortgage, less the costs of the court, and the expenses necessarily and properly incurred by the receiver in its management, operation, preservation, and betterment, shall be applied to the satisfaction of the lien.

To divert any portion of the property to the payment of any other claim or demand is to that extent to impair the vested right of the mortgagee to have his lien paid and discharged out of the mortgaged property. Some timely observations upon this subject will be found in the case of *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950. And the conclusion here reached will also be found supported by the text writers. See High, Rec. (2d Ed.) p. 331 *et seq.*; Beach, Rec. pars. 376, 752; Gluck & B. Rec. pp. 296, 297. Motion denied.

COOSAW MIN. CO. v. FARMERS' MIN. CO. *et al.*

(Circuit Court, D. South Carolina. June 17, 1892.)

INJUNCTION BOND—ASSESSMENT OF DAMAGES—ACTION ON.

A federal court, which, on granting a temporary injunction, requires the giving of a bond for possible damages, may, on dissolving the injunction, itself decide what damages, if any, should be paid; and it would never send the bond to another jurisdiction to be sued upon, and only in very exceptional cases would it send the matter before a jury.

In Equity. Bill by the Coosaw Mining Company against the Farmers' Mining Company and B. R. Tillman and others, constituting the board of phosphate commissioners of the state of South Carolina. A temporary injunction having been granted and dissolved, defendants now move that the injunction bond be delivered to them to bring such actions thereon as they may be advised. Motion denied, and a special master appointed to take testimony as to the damages.

J. L. McLaurin, Atty. Gen., and *Mower, Mitchell & Smith*, for the motion.

McCrary, Sons & Bacot and *Smythe & Lee*, opposed.

SIMONTON, District Judge. Upon filing the bill in this case, the court, on the 6th day of March, 1891, granted the prayer of complainant for a temporary injunction. The order for the injunction required the complainant to enter into bond, with surety, in the penal sum of \$25,000. Such bond was executed. Its condition is that the complainant and its sureties shall pay to the defendants "any and all damages which they may suffer by reason of the injunction, if it shall be finally determined that the complainant in this action is not entitled thereto." The order granted leave to the defendants to move for the dissolution of the injunction at any time after eight days' notice. The defendants answered. Notice of motion to dissolve the injunction was made on the 6th October, 1891; and on the 5th April, 1892, an order was made dissolving the injunction. Meanwhile, pending this bill, the defendants B. R. Tillman and others, the board of phosphate commissioners, filed their complaint, with summons, to the state court, praying an injunction against the present complainant. The injunction was granted, and the