

to this property by nonuser for the purpose for which it was obtained. There is no evidence of the intention of the railroad company to abandon the use of the land for the purpose for which it was obtained, except its nonuser for that purpose up to this time. Under the circumstances of this case, that is not enough to show an abandonment. *Johnston v. Hyde*, 33 N. J. Eq. 632. At the time the railroad company obtained the property from Mrs. Foltz there was no condition that it was to be used for machine shops, etc., within a certain time. A railroad may properly provide for future requirements of a more extended traffic, and may condemn more land than it at present needs, but only what may in good faith be presumed necessary when its traffic shall be extended. *Mills*, Em. Dom. § 58; note, p. 352, 27 Amer. & Eng. R. Cas., (*In re Staten Island Rapid Transit R. Co.*, [N. Y. App.] 8 N. E. Rep. 548.) The acts of Mrs. Foltz are of a character to create a condition where the railroad company holds the property by an implied contract. This is equivalent to a grant by Mrs. Foltz. This property, obtained by grant, expressed or implied, is not lost by a mere nonuser for the length of time the railroad company has held the property. *Barnes v. Lloyd*, 112 Mass. 224. In *Eddy v. Chace*, 140 Mass. 471, 5 N. E. Rep. 306, the supreme court of Massachusetts said:

"Mere nonuser of an easement like the one in question, though continued for more than 20 years, will not extinguish it. The owner of an easement may abandon it, but mere nonuser does not show an abandonment. To effect this the nonuser must originate in or be accompanied by some decided and unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it."

There may have been a nonuser of the part of the land in controversy for the time the railroad company has had it, but that does not of itself amount to an abandonment of the land. There must be other evidence of an intention to abandon it. *Johnston v. Hyde*, 33 N. J. Eq. 642.

I think that the injunction should be made perpetual to restrain Mrs. Foltz from proceeding with her action of ejectment for the recovery of the lands in controversy, and it is so decreed.

WHITEHURST *et al.* v. McDONALD.

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.)

No. 20.

BOUNDARIES—NATURAL STREAM—RIPARIAN RIGHTS.

Where the calls in a conveyance of land are for two corners, one at high-water mark on the bank of a stream, and the other at the stream, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, and all riparian rights pass, unless a different intention of the parties is shown by either their conduct or the conveyance. *County of St. Clair v. Lovingson*, 23 Wall. 46, and *Railroad Co. v. Schurmeier*, 7 Wall. 272, followed. 47 Fed. Rep. 757, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

In Equity. Bill by Richard H. McDonald against O. E. Whitehurst, Daniel J. Turner, Dennis Ethridge, and Frank Dusch, trustees of the Norfolk Classified Building Association, the said Norfolk Classified Building Association, and Joseph B. Allen, to remove cloud from and to quiet title. Judgment for complainant. 47 Fed. Rep. 757. Defendants appeal. Affirmed.

Wm. W. Old, for appellants.

Robert M. Hughes, for appellee.

Before BOND and GORF, Circuit Judges, and SIMONTON, District Judge.

BOND, Circuit Judge. In 1857 Mary Tarrant died seised of certain real estate in Virginia. She left surviving her three children and two grandchildren, one of whom was Mary E. O. Tarrant. The original Mary Tarrant died intestate, and Mary E. O. Tarrant was one of her heirs at law. The real estate of Mary Tarrant, by proper proceedings in the circuit court of the city of Norfolk, was duly partitioned among her heirs, and among other property allotted to Mary E. O. Tarrant was a certain tract of land in the county of Norfolk, Va., part of the original tract of which Mary Tarrant died seised. After this partition Mary E. O. Tarrant intermarried with one Charles Dashiell, and, still being seised of the real estate, by deed dated August 24, 1869, duly recorded, she and her husband conveyed it to George A. Martin and to E. J. Bennett and Robert McCurdy, with general warranty. By a deed of even date and delivery with the last-mentioned deed, and as a part of the same transaction, the parties grantees in it conveyed to T. F. Owens, as trustee, the lands so conveyed to them, to secure the purchase money for which notes had been given. Martin & Elliott, Bennett, and McCurdy having defaulted in payment of these notes, T. F. Owens sold the property at public auction to Gilbert Elliot. Gilbert Elliot, November 8, 1871, conveyed the land to Charles Stewart, who by deed dated April 8, 1880, conveyed the same to Richard H. McDonald, the complainant, who took undisturbed possession of the land. On the 26th of June, 1884, Charles Dashiell and his wife, Mary E. O. Dashiell, conveyed to Obed E. Whitehurst one undivided half interest in so much of said tract awarded to her in the partition of her grandmother's estate as lies between high-water mark and the channel of the Elizabeth river, and by another deed, in 1887, they conveyed the other undivided half to Joseph B. Allen. This bill is filed to remove this cloud from and to quiet title.

It is altogether likely, if not quite certain, though it does not distinctly appear in the record, that when Mary E. O. Tarrant and Charles Dashiell, her husband, conveyed to Elliot, Martin, Bennett, and McCurdy their interest in the 37½ acres of land allotted to Mary E. O. Tarrant by the circuit court of Norfolk, the description in that deed followed the metes and bounds in the commissioner's report. They make no reservation of any riparian rights in the deed, and if she had any rights riparian

derived from the fact that she was seised of the land back of the water front, and bounded by the river, when she conveyed by the same metes and bounds the land in partition acquired, she conveyed, unless the deed made some reservation, all the rights, privileges, and appurtenances which title to the land gave her. By the law of Virginia, the rights of riparian owners extend to low-water mark. *French v. Bankhead*, 11 Grat. 136. But whether or not the description of the land made in the deed from Mary E. O. Tarrant and her husband, Dashiell, to Elliot, Martin, Bennett, and McCurdy, corresponded exactly with the metes and bounds given in the report of the commissioners, the description in that deed is sufficient to convey to the grantees all the riparian rights which the ownership of the land could give, incident and appurtenant to adjacent land. One of the boundaries in this deed is in the following words: "Thence south, 32 degrees west, 12.15 chains," to a stake at high-water mark on the Elizabeth river; thence north, 57 degrees 15 seconds west, 17.90 chains, to the corner of J. W. Brinton's land. The only corner which Brinton's land there makes is with the Elizabeth river. The supreme court in *County of St. Clair v. Lovington*, 23 Wall. 46, and *Railroad Co. v. Schurmeir*, 7 Wall. 272, has settled this question for us. "It may be considered," say the court, "a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream, or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing the intention of the parties was otherwise." There is nothing here, either in the deeds themselves or in the conduct of the parties, who waited 15 years before finding out that they had any claim to riparian rights, to show any reason to exclude the operation of this canon of American jurisprudence, or that the grantors in the deed to Elliot, Martin *et al.* did not intend to come under it. We have not answered *seriatim* the errors assigned, but what we have said answers them all. We think the decree of the court below was the proper one to make, and it is affirmed, with costs.

COLUMBUS CONSTRUCTION CO. v. CRANE CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1892.)

No. 28.

1. CONTRACTS—SALE—AGENCY.

Plaintiff and defendant entered into a written agreement, in which the defendant agreed to purchase in its own name and upon its own credit, as the agent irrevocable of the plaintiff, certain goods, and to deliver the same at a specified time. *Held*, that defendant was liable to plaintiff, as a vendor, for failure to deliver the goods according to the agreement.

2. SAME—CONSTRUCTION.

The fact that there was attached to such agreement an exhibit showing a form of contract with a manufacturer for the manufacture and sale of such goods does not bind the defendant to procure the goods under such contract.