

tend to do more than to refuse the injunction prayed for, but the decree, as entered, dismisses the bill upon its merits, which would probably have the effect of preventing the company from hereafter asserting the right to enter upon the land in any mode for the purpose of removing the coal therefrom. Sufficient appears upon the record to show that the complainant has some rights under the deed to the defendants, but the facts necessary to fully ascertain and adjudicate the extent of such rights are not made to appear. This court cannot, therefore, render a decree upon the merits; nor, on the other hand, do we deem it equitable to affirm a decree which in effect holds that the company has no right to enter upon the land in question, under any circumstances, or for any purpose. In our judgment, it would have been entirely proper for the circuit court to have refused to pass upon the case until evidence had been taken upon the matters in dispute, or, if that course was not deemed advisable, to have dismissed the bill, without prejudice to future proceedings in court, in case the parties could not agree upon their respective rights. Under these circumstances, the decree dismissing the bill of complaint will be affirmed, but with the modification that such dismissal shall be without prejudice to the right of the Union Pacific Railway Company to hereafter institute such proceedings at law or in equity as may be necessary for the ascertainment, protection, and enforcement of its rights in the land in question.

---

PEPPER v. TAYLOR et al

(Circuit Court of Appeals, Sixth Circuit. February 15, 1893.)

No. 77.

**SALE—RESCISSION.**

The buyer of a horse gave his notes, indorsed by a third person, for the purchase price, but subsequently sent back the horse, with a notification that he rescinded the sale. The seller accepted and kept the horse, but did not return the notes, having already negotiated them. The holder of the notes subsequently sued the maker and indorser, and a compromise judgment was entered, and paid, for part of the amount, and all of the notes were surrendered. *Held*, that the seller, by receiving back the horse, became bound to return the notes, and, as he failed to do so, he was liable to the maker and indorser for the sum they had paid thereon.

Appeal from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by T. F. Taylor and W. M. Parrish against R. P. Pepper for the cancellation of certain promissory notes. Taylor had bought a horse from defendant, Pepper, and given his notes in payment, secured by Parrish's indorsement. Subsequently, and before any of the notes fell due, Taylor, being about to fail in business, sent the horse back to Pepper, with a request to deliver up the notes. Pepper received back the horse, but did not return the notes, having already negotiated them. Subsequently Parrish and Taylor were sued by the holder of the notes, and a compromise judgment was entered, and paid, for the amount of two of the notes, and all of them were thereupon surrendered. The circuit court entered a de-

cree in favor of the complainants for the amount which they had been compelled to pay upon the notes, and from this decree defendant appealed. Affirmed.

The following opinion was delivered by BARR, District Judge, in the court below:

"If there was any ambiguity in Taylor's letter of February 3, 1889, or doubt as to his purpose in sending the horse, 'Judge Lindsay,' to Mr. Pepper, that doubt was entirely removed by Taylor's letter of February 6, 1889. This letter, according to Mr. Pepper's evidence, was received by him at the time he accepted the delivery of the horse; and, according to Addison's statement, before he accepted the horse. It is, we think, immaterial which statement is correct. In either event, Mr. Pepper, having full knowledge that a rescission of the purchase of the horse was intended when he accepted his delivery, is bound, and became under a legal obligation, to return the notes of Taylor and Parrish, which had been given for the horse.

"It appears from the evidence that one of these notes was held by the Farmers' Bank and the other three by the Deposit Bank, at Frankfort, and Parrish was sued on the two first maturing, and judgment rendered against him. This judgment was rendered in the state of Virginia, and a compromise entered into between the banks and Parrish, by which he paid \$1,325, and the other two notes were surrendered to him. In view of this compromise, made, presumably, with the consent of Mr. Pepper, he is only liable to indemnify Parrish to the extent of the money thus paid, i. e. \$500 and \$825, with interest from the time of payment; that is, \$500, with interest from the 2d of December, 1889, and \$825, with interest from the 1st day of March, 1890. There is no evidence of the amount of the cost paid by Parrish in the suit in Virginia, and therefore a decree will not go for this cost.

"The suggestion that Parrish subsequently sold the two notes surrendered to him, and may thus have fully indemnified himself for the money paid the banks, is not to be considered. There is not an intimation anywhere in this record that Mr. Pepper was bound on those notes, and all the presumptions are the other way. It would have been absurd for the Deposit Bank to surrender two notes of Taylor, Parrish, and Pepper,—one for \$700 and one for \$725,—in consideration of the payment of the other, for \$675, of the same parties, by Parrish. Whatever may be the rights of Taylor, as against Parrish, because of the sale of these notes upon which he remained bound, is not before this court. That matter must be settled elsewhere. Mr. Pepper is entitled to the proceeds of the sale of the horse, 'Judge Lindsay,' and Parrish is entitled to a decree against Pepper for \$500, with interest from December 2, 1889, and \$825, with interest from March 1, 1890; and complainants are entitled to their costs in this suit. Let a decree go accordingly."

William Lindsay and Frank Chinn, for plaintiff in error.

Wm. C. P. Breckinridge and John T. Shelby, for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and SAGE, District Judge.

PER CURIAM. The decree of the lower court is affirmed on the grounds clearly stated by the judge who heard the cause, and rendered said decree. The proof establishes that the appellant accepted a return of the horse under such circumstances and conditions as to warrant the finding that he made his election to rescind the contract of sale, and thereby became bound to indemnify the appellees for what they had to pay on the notes, which the appellant should have canceled, surrendered, or taken up himself.

The decree is affirmed, with costs.

## KINNE et al. v. WEBB et al.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 179.

**1. EQUITY—RESCISSION OF CONTRACTS—UNREASONABLE DELAY.**

Where a party is entitled to rescind a contract on the ground of fraud, he must act promptly, with no vacillation, no unreasonable delay, no attempt to speculate upon his option. He must elect to rescind, and proceed as far as lies in his power to place himself and his purchaser in statu quo. This is especially true as applied to speculative property which is liable to great fluctuation in value. 49 Fed. Rep. 512, affirmed.

**2. SAME.**

Where the owner of mining property, thinking the same has become exhausted, sells it to one who practices no fraud to obtain it, she cannot maintain a bill to rescind the sale after the lapse of seven years, and after the discovery of additional ores, which enhance the value of the land many fold.

**3. LACHES—STATE STATUTES OF LIMITATION.**

A federal court should not, at the instance of a widow, set aside a transfer of personal property by her husband to his children by a former marriage, made shortly before his death, when, with full knowledge of the facts, she has remained silent for more than five years, which is sufficient under the Missouri statute to bar an action to recover personal property.

**4. HUSBAND AND WIFE—ANTENUPTIAL CONVEYANCE.**

A man about to marry may convey a reasonable portion of his property to his children by a former wife, and such conveyance is not a fraud upon the second wife.

Appeal from the Circuit Court of the United States for the Western District of Missouri. Affirmed.

O. H. Dean, (I. J. Ketcham and C. O. Tichenor, on the brief,) for appellants.

L. C. Krauthoff, (E. O. Brown, J. V. C. Karnes, and Daniel B. Holmes, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is a bill in equity to rescind a sale and avoid a deed made by the appellant Sarah M. Webb, now Sarah M. Kinne, April 24, 1883, of all her interest in the estate of her deceased husband, John C. Webb, to his children and devisees, Elijah T. Webb, Martha E. Hall, and Mary S. Burgner. The circuit court dismissed the bill. 49 Fed. Rep. 512.

In March, 1877, John C. Webb resided in Webb City, Jasper county, Mo., and was the owner of about 1,000 acres of land in that county, 160 acres of which was valuable mineral land, from which lessees of his were mining zinc and lead. He was a widower, and had the three children above named. He had conveyed to the defendant Martha E. Hall 20 acres of mineral land, and on the 3d day of March, 1877, he conveyed to the defendants Webb and Mary Burgner 40 acres of land of that character, in order that his gifts to each of his three children might be equal; but this deed was not