

administrator from himself, either directly or indirectly. It is doubtful if it is intended to prohibit a purchase by the administrator from an heir. At the same time, such a purchase would undoubtedly be subject to the general rules which control dealings where a fiduciary relation exists. The sale would be void if any unfair advantage were taken of the heir by the executor or administrator. But it is immaterial whether or not the purchase from Warren F. Mills by the defendant is within the inhibition of the statute. The consent of the heir and sole devisee of the Warren H. Mills estate that the defendant should purchase this property, and the acceptance and retention by him of the promissory note made in payment of the purchase price, amount to such complete authorization and ratification of the transaction that its validity cannot now be questioned. *Grim's Appeal*, 105 Pa. St. 383; *Dunlap v. Mitchell*, 10 Ohio, 117. It is not contended that the purchase price was inadequate, or that the sale was procured by unfair means. Warren F. was upon the ground. He had seen the personal property, and knew its value. The one-half interest in it had been bequeathed him by his father's will. The other half he had purchased from his father's former partner. He treated it all as his own property. He sold the whole to the defendant. The sale was made in good faith. Its validity is not called in question by any creditor, and it is not shown that any right has been prejudiced thereby. Warren F. Mills was content to accept the defendant's note in payment without security. He could not, if now living, repudiate his own deliberate act in so doing, and none of the parties to this suit is in position to do more than he could have done.

I am convinced, from the evidence, that it was the intention of Warren F. Mills and the defendant that a mortgage should be executed to secure the payment of the note given for the purchase price of the land, and it is not proven that that agreement was abrogated, as testified by the defendant. It will be the decree of the court that the defendant execute a mortgage upon the land so conveyed to him, in the terms of the mortgage prepared by Warren F. Mills, and that, in case no such mortgage is executed, there be decreed to be a lien upon said property so conveyed from the date of the conveyance thereof, in lieu of such mortgage, and that the defendant pay the costs of this suit.

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SOUTHERN PAC. R. CO. v. GOODRICH et al., (two cases.) SAME v. MALCOLM. SAME v. NORTON. SAME v. GREEN.

(Circuit Court, N. D. California. May 22, 1893.)

#### QUIETING TITLE—PLEADING.

In federal courts, sitting in states where the local statutes have dispensed with possession by complainant as a prerequisite to maintaining the suit, a bill in equity to quiet title to land is demurrable, which fails to

allege affirmatively either that plaintiff is in possession, or that both complainant and defendant are out of possession.

**In Equity.** Bills by the Southern Pacific Railroad Company against Goodrich and others to quiet title to land. Respondents demur. Demurrer sustained.

Joseph D. Redding, for complainant.

S. F. Leib, for respondents.

**McKENNA**, Circuit Judge, (orally.) This is a bill in equity to quiet title to certain real estate. The bill alleges the incorporation of the company, and contains the usual allegations of the grant of the land to complainant by the act of July 27, 1866, and that it is within 20 miles of said road, and not reserved, and that the United States had full title thereto, and that it was free from pre-emption or other rights; that the company had filed its map of definite location, and built its road, which was accepted, and that it had performed all other conditions required to earn the land, and entitle it to a patent; that respondent, unknown to complainant, but subsequent to the filing of the map of definite location, made a location upon said land as lieu land, in lieu of a 36 section of school land; that said land was afterwards awarded to respondents by the state of California, and a patent issued to them, by virtue of which they claim the land, which is alleged to be worth \$5,000, and over; that complainant had repeatedly applied to the commissioner of the general land office and to the president for a patent, but they refused, and complainant has repeatedly and in a friendly manner applied to respondents to convey said land to complainant; and that the patent from the state constitutes a cloud on the title. Respondents demur to the bill, on the ground, among others, that complainant's remedy, if it have any, is at law, and not in equity.

Section 723 of the Revised Statutes, repeating the sixteenth section of the judiciary act of 1789, provides "that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." The supreme court, commenting on this section, said substantially in *Hipp v. Babin*, 19 How. 278, that whenever a plaintiff can proceed at law he must, because the defendant had a constitutional right to a trial by jury. Can the plaintiff in this case proceed at law? In *Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. Rep. 158, it was decided that a grant of the kind described in the bill was one in praesenti and of the legal title. See, also, *Railroad Co. v. Amacker*, 1 C. C. A. 345, 49 Fed. Rep. 529, and *Railroad Co. v. Wright*, (in circuit court of appeals in this circuit, Jan. 16, 1893,) 4 C. C. A. 193, 54 Fed. Rep. 67. The plaintiff, therefore, has the legal title, and, if the defendants are in possession of the land, it can sue at law. Under a precisely similar grant, ejectment was maintained in *Salt Co. v. Tarpey*, supra. It is said in *Whitehead v. Shattuck*, 138 U. S. 150, 11 Sup. Ct. Rep. 276, if plaintiff is the owner in fee of the premises, it can establish that fact in an action at law, and, if the evidences of defendant's title are void, that fact plaintiff can also

show. There is no occasion for resort to a court of equity, either to establish its right to the land, or put it in possession thereof.

But the bill does not show that defendants are or are not in possession, and therefore does not show that an action at law can or cannot be maintained. Does it therefore show that an action in equity can be? Prior to the enactment of local statutes dispensing with possession in the plaintiff in actions to quiet title, the conditions of a suit in the federal courts were the legal title and possession. Since the enactment of such statutes, the legal title is still necessary. The local statutes have been interpreted by the supreme court in *Frost v. Spitley*, 121 U. S. 557, 7 Sup. Ct. Rep. 1129; *Holland v. Challen*, 110 U. S. 15, 20, 3 Sup. Ct. Rep. 495; and *Whitehead v. Shattuck*, 138 U. S. 150, 11 Sup. Ct. Rep. 276, *supra*. In *Frost v. Spitley*, commenting on the Nebraska statute, the court say:

"By reason of that statute, a bill in equity to quiet title may be maintained in the circuit court of the United States for the district of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for."

"The requisite of the plaintiff's possession," the court says, "is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills."

The rule which was insisted on in this case was the legal title in plaintiff.

*Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495, was also a suit to quiet title for what the bill described as wild and unoccupied land. Neither party, therefore, was in possession. The court, following the local statute of Nebraska, which enables a plaintiff to sue, though not in possession, sustained the bill. To the objection that, by entertaining the suit, controversies properly cognizable in a court of law will be drawn into a court of equity, it was replied:

"There can be no controversy at law respecting the title or right of possession of real property when neither party is in possession. An action at law, whether in the ancient form of ejectment, or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking."

In *Whitehead v. Shattuck* such a case did arise. It was also an action to quiet title, and the plaintiff alleged he was the owner of the premises, and that the defendant claimed them under a patent of the United States, and was in possession. It was decided that he had a plain, speedy, and adequate remedy at law. The action was brought in Iowa, and the Code of the state authorized an action to be brought to determine and quiet the title to real property by any one having an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession; but the court refused to follow the statute. It held that, while this statute enlarged the powers of the courts of equity of the state, it could not enlarge the powers of the federal courts, or annul the force of the law of congress declaring

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that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law," or the constitutional right of parties in actions at law to a trial by jury. It is hardly necessary to say that the California Code has no greater powers than the Iowa Code to give jurisdiction to federal courts in equity. These cases, therefore, must be held to establish that to sustain a suit in equity to quiet title in the federal courts, when the plaintiff is out of possession, the defendant must also be out of possession; in other words, the land must be unoccupied land.

In this case we have seen the bill has no allegations of possession in either the plaintiff or the defendants, and this, it is claimed, distinguishes the case from *Holland v. Challen*, in which it appeared that the defendant was not in possession, and from *Whitehead v. Shattuck*, in which it appeared that he was. But the essentials of jurisdiction are defined in those cases, and, being essential, must be alleged. The remedy in equity is the alternative to the want of a remedy at law; hence it is not enough to show that the plaintiff may not have, but it should appear that he actually has not, a plain, adequate, and complete remedy at law. *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336, cited by counsel for the complainant, is not necessarily antagonistic to these cases. If it is so, it must be deemed to be overruled by them. The plaintiff in that case derived title through an act of congress to a railroad company granting it certain land. The defendant claimed under a patent of the United States. It was held that the latter was a cloud upon plaintiff's title, but neither counsel nor the court gave any attention to the question of possession, or its effect on the jurisdiction of the court. The later cases are explicit in this regard, and show that the remedy at law is complete.

The case of *Railroad Co. v. Stanley*, 49 Fed. Rep. 263, decided by Judge Ross, in the circuit court of the southern district, does not militate with the views which I have expressed. The bill in that case alleged a grant to the Texas Pacific Railroad Company of the land in controversy, and that the defendant asserted title under a patent from the state. The defendant demurred, on the grounds that complainant did not have legal title, and did not show that it was in possession. These grounds were held, and correctly held, to be insufficient. From aught that appears, however, the defendant may have been also out of possession, and the condition of federal jurisdiction complete.

The demurrer will be sustained, and on the ground alone that I have stated. The other grounds are not passed upon.

This will apply to the cases of *Southern Pacific Railroad Company v. Goodrich*; *Southern Pacific Railroad Company v. Malcolm*; *Southern Pacific Railroad Company v. Norton*; and *Southern Pacific Railroad Company v. J. E. Green*.

Mr. Redding: I should like 30 days, if your honor please, to amend, so as to make that allegation sufficient. The Court: Is

there any objection to that? Mr. Lieb: No, sir. Mr. Redding: As I understand the ruling of the court, it is that we fail to allege that the defendant was not in possession, and that is the reason of the sustaining of the demurrer. The Court: The ruling of the court is that as the complaint does not show complainant is in possession, nor show that both it and respondent are out of possession, it does not show jurisdiction in equity. Mr. Redding: That was exactly the method that the bill was framed upon,—that neither plaintiff nor defendant is in possession. It is not alleged that the plaintiff or defendant is in possession. The Court: You may amend to allege that the complainant and defendant are both out of possession. Mr. Redding: I understand that the bill does allege that now. That was the intention of the bill,—that neither the plaintiff nor defendant was in possession. It is not alleged that either the plaintiff or defendant was in possession. The Court: There is an absence of allegation. The court holds there must be a presence of allegation showing the conditions of jurisdiction. Mr. Redding: I will take 30 days to amend to put the allegation in the affirmative that neither the plaintiff nor defendant is in possession. The Court: Then the other points of the demurrer will be passed upon.

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Ex parte DAVIDSON.

(Circuit Court, D. Washington, N. D. August 23, 1893.)

1. COURTS—JURISDICTION—WAIVER OF FORM OF PROCEEDING.

On an application by the receiver of a railroad for a rule to show cause why possession of certain real property should not be surrendered to him, where the parties and the subject-matter are within the jurisdiction, and respondent voluntarily answers asserting a right to the premises, and submitting his claim for adjudication, he thereby waives his objection to the form of the proceeding.

2. PUBLIC LANDS—WHAT INCLUDED IN GRANT.

Where ledges or spits or tongues of land project out beyond the meander line of a bay, they are included as part of the fractions of sections shown on the government survey, and conveyed by government patent.

3. SAME—ACQUISITION OF RIGHT TO POSSESSION.

In a controversy for the possession of such a ledge between the receiver of a railroad and one claiming ownership it appeared that the railroad company had acquired title from the patentee to the fractional section from which the ledge extended; that the person to whose rights the claimant succeeded, at the time of the railroad survey, claimed nothing but the privilege of burning a coalpit, and was afterwards employed by the railroad company for the express purpose of holding possession of the land for it, and acting as watchman of the company's property thereon, being compensated by money and supplies and free house rent; and that claimant derived his interest by purchase from such agent. *Held*, that the railroad company had title to the property, and that the receiver was entitled to possession.

4. SAME.

If the land in question did not pass by the government patent, the title remained in the United States, and the right to possession was acquired by the railroad company when it located its line, selected the land, filed articles of incorporation and maps, and secured the approval of the secretary of the interior, pursuant to the act of March 3, 1875, granting right of way, etc., to railroads.