

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.

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.

5. SAME—FAILURE TO PERFECT TITLE—RIGHT OF OTHERS TO POSSESSION.

The fact that the land is yet unsurveyed, and that the railroad company cannot perfect its title by filing a map within 12 months after government survey, as provided by section 4 of the act, does not entitle others to take it under other claims, as the appropriation of the land for railroad purposes takes it out of the body of the public domain.

6. SAME—PRE-EMPTION—HOMESTEAD.

The court will take judicial notice that the lands surrounding Seattle harbor, including the land in question, have for years been selected and known as the site of a city; and as the land is unfitted for, and could not be taken as, agricultural land, under the pre-emption law, and is excluded from the operation of the homestead law, an individual could not acquire title to it simply by living upon and improving it.

In Equity. Application by Thomas R. Brown, receiver of the Seattle, Lake Shore & Eastern Railway Company, for a rule on Jacob Davidson, to show cause why he should not surrender to the receiver possession of certain real property alleged to belong to said company. The respondent filed an answer containing exceptions to the proceeding for want of jurisdiction in the court, and also setting forth an adverse claim to the property, on the ground that the same is unsurveyed public land of the United States; that he purchased improvements thereon from one Lewis S. Rice; and that he claims the right to occupy said land and acquire the title under the United States homestead law. An issue was joined by a replication, and the case was heard upon the pleadings and evidence. Exceptions overruled, and findings and decree for the receiver.

E. M. Carr, for receiver.

P. P. Carroll, for respondent.

HANFORD, District Judge, (orally.) The parties to this proceeding and the subject-matter are within the jurisdiction of the court, and the respondent having voluntarily set forth in his answer his claim to the premises, and thereby submitted the same for adjudication in this summary proceeding, I hold that the objections to such form of proceeding have been waived.

In reaching a determination of the question at issue as to the right of possession, it is proper to take into account the character and description of the land itself, as well as the grounds upon which the parties respectively base their claims to right of possession. This land appears by the undisputed testimony in the case to be a low ledge or sand spit, extending out from the mainland into the harbor of Seattle. In making the government surveys the surveyor took no account of it. It is either land that has been made by accretion since the survey was made, or else the surveyor intentionally or negligently made no note of it as land, and ran the lines so as to leave it outside of the government survey. It is "land," as distinguished from "tide flats," over which the tide ebbs and flows. It lies above the line of ordinary high tide, and is not land to which the state of Washington has any right or claims any right. The declaration in the constitution of this state (article 17) that the people of this state assert proprietorship in the shores and beds of rivers and navigable waters up to the line of ordinary high water

is sufficient to exclude this from any claim of the state, because, by the undisputed testimony in the case, it is above ordinary high tide. No claim therefore can be predicated upon the rights of the state of Washington.

It is land to which the United States government had the title, and the government is the primary source of title. Whatever rights can be claimed by any one must rest upon the laws of the United States or a patent or grant from the government of the United States. Now, the receiver representing this railroad corporation is the plaintiff in the case, and should, if he prevails at all, prevail by virtue of having shown by the evidence a *prima facie* right to have possession; and after a *prima facie* showing is made, if there appears to be opposed to it a colorable claim, then his right should appear by the evidence to be superior or paramount to that of the defendant. The government being the source of title, the question is whether this railroad company has acquired any right to claim this land under the laws of the United States or any patent or grant from the government. It appears by the maps that, in making the surveys, sections were cut into fractions, and were made fractional by the shore of this bay, and all the grants or conveyances that the United States has made of those fractions are grants of land bounded upon tide water. The meander line is not controlling as fixing the boundary; it is simply a series of tangents run at different angles for the purpose of ascertaining approximately the quantity of land in each legal subdivision to be paid for. But the navigable water of the bay is the boundary. It is true that the decisions establish the rule that conveyances of land upon tide water convey no riparian rights; that is, no legal title to anything beyond the boundary. But a patent does convey title to all the lands within the established boundaries shown by official maps of the government surveys. *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; *Forsyth v. Smale*, 7 Biss. 201; *Mann v. Land Co.*, 44 Fed. Rep. 27. Now, the surveys have fixed the boundaries of those fractions fronting upon the tide water of this bay, and I think that, according to the rules established by the decisions, whatever ledges or spits or tongues or points of land project out beyond the meander line are included as part of the fractions conveyed by the patents. If that is the correct view of this matter, by the chain of title including conveyances from the patentee of the United States the railroad company has acquired the title to this sand spit and owns it.

In addition to the conveyances, there is undisputed evidence that the railroad company had prior possession, and, as against this defendant, Davidson, has now the right of possession. It appears from the testimony that Mr. Rice was engaged in burning a coal-pit at the time the projectors of the railroad went there to make surveys, and he was living in a cabin close to the bank, and claiming nothing except the privilege of burning a coalpit there. He was afterwards employed by the railroad company for the express purpose of holding possession of this piece of ground for the railroad company. He received from persons interested in the com-

pany money and supplies. Groceries and provisions were furnished him as compensation for holding possession of that piece of ground for the company, and he continued to receive moneys and supplies until the time of his death, for that purpose and with that understanding. In addition to that, the house he lived in was built by the railroad company, and he was allowed to live in it rent free as a further compensation, or as part of his compensation for services rendered by him to the company by living upon and holding that piece of ground, and acting as watchman to protect the tools and other property that was left upon it belonging to the company. Now, Mr. Rice could no more, by a pretended sale of his improvements to Mr. Davidson, give the right to possess and occupy that ground than a farmer's hired man could, in the absence of the farmer, sell the farm, so as to put him to the inconvenience of having to prove his title in order to regain possession. The law will not tolerate any such thing as a tenant or employe dispossessing his landlord or employer, either by setting up and claiming adverse possession himself, or by letting another into possession. Such an attempt as that is deceitful and fraudulent, and something that no right can be predicated upon under any conditions whatever. Mr. Rice was put in possession of that property, and a house was built for him there, as an employe of the company, and he could not dispose of the right of possession to another, even one who might deal with him in good faith, and without any knowledge of a fraudulent intent on his part.

But Mr. Davidson does not occupy even that position. He never saw this ground, according to his own showing, until November, 1889. The inception of his claim of right was by becoming a creditor of Rice, and loaning him money and doing work for him with a team, in payment for which he claims that in 1890 Rice attempted to deliver it over to him. He had known before that time that the railroad company claimed the ground. He had known that Mr. Rice was there as an employe of the company, and, instead of going to the company to find out about it, he inquired of Rice, and took Rice's say so. Now, any man buying property in good faith, with knowledge that another person had a claim before attempting to buy it, would go and see that person, and find out about it, unless he intended to take his chances of success in a controversy. So it is plain that Mr. Davidson, in buying the property from Rice, knowingly bought merely the chances of being able to hold it against the railroad company by litigation or otherwise. He is in the position of a man who has bought a lawsuit on speculation.

I am led to the conclusion that the railroad company has the title to the property. It had prior possession. The receiver has made a *prima facie* case, and, as against it, there is only a wrongful claim of possession at the utmost.

In regard to the title, this can be said further: that, if this piece of ground did not pass by the patents which the United States government issued, the title remained in the United States

up to the time when the railroad company located its line of road, and selected this piece of ground for a station, filed its articles of incorporation and maps with the department of the interior, and secured the action of the secretary of the interior in approving it, and thereby, under the provisions of the act of March 3, 1875, (Supp. Rev. St. [2d Ed.] 91,) acquired it by grant from the United States to the company direct. The act does not limit the right of railroad corporations to acquire ground for right of way and station purposes to surveyed lands. It plainly contemplates that railroads may be extended across unsurveyed lands, and it simply requires that, after the surveys are made, a profile or map shall be filed and approved by the secretary. This land was surveyed by an employe of the railroad company, and notes of the survey accompanied the map, and there is room to argue at least that the secretary of the interior approved this survey. But, whether that is so or not, the railroad company have acquired the right under said act to have possession. If the title has not been perfected by filing a map after survey, the land being yet unsurveyed, the land is not for that reason exposed to be taken under another claim. The appropriation of it for railroad purposes takes it out of the body of the public domain, and prevents any settler from going upon it and claiming it under any of the other land laws of the United States.

The land is not subject to be taken under the homestead or pre-emption laws. It is not land that can be settled upon and taken under either of those laws, or any law that I know of that gives an individual the right to acquire title to land by living upon and improving it. The land laws of the United States are very liberal in giving the people the right to settle upon agricultural land, and acquire title to it, and in providing for the sale of mineral and timber lands. But this piece of ground comes within the provisions of neither of those laws. It is not mineral land nor timber land. It is not land that can be taken as agricultural land under the homestead law. The terms of the homestead law authorize a settler to acquire a homestead upon unappropriated public lands upon which he may have filed a pre-emption claim, and which may be subject to entry under the pre-emption laws. Section 2258 of the Revised Statutes of the United States excepts and reserves certain classes of land from entry under the pre-emption law. Among the descriptions of land so reserved are lands included within the limits of any incorporated town, or selected as a site for a city or town, or used in any way for trade or business.

Now, it is a matter of such general knowledge that the court will take judicial notice of it, that the lands surrounding this harbor have been for many years selected for and known as the site of a city. It is true that it has not all of it been covered and occupied by brick buildings or city improvements, but it is—all of it—the site of a city, and occupied for purposes of trade and business. The land in controversy lies on the water front next to tide water. It is not land that can be taken as agricultural

land under the pre-emption law; and, if not under the pre-emption law, then it is excluded under the homestead law. Any pretense of a man that he has taken up such a piece of ground right in the harbor of the city of Seattle, as a farm, or to maintain a poultry yard upon it, is a transparent sham. The land is valuable for other purposes, and no one would contemplate using it for purposes other than those for which it is most valuable; that is, as a location for trade and business. As early as 1885 this railroad company went there, and surveyed this land, and entered into possession of it for the purpose of business; and, long before Mr. Davidson saw it, it was occupied and actually used for business and trade, and was therefore reserved from entry by the terms of the pre-emption law.

On this question as to the right of possession, I have no doubt, and shall hold, that the receiver is entitled, as against Mr. Davidson, to have immediate possession of the ground. I direct that an order be prepared requiring the respondent within 10 days to vacate the premises, and surrender possession to the receiver, and the order will be enforced by proper proceedings, if necessary.

ADAMS v. SPOKANE DRUG CO.

(Circuit Court, D. Washington, E. D. October 7, 1893.)

NATIONAL BANKS—RECEIVER—ACTION ON NOTE—EQUITABLE DEFENSES.

In an action at law by the receiver of a national bank on a note, the maker may plead as set-off any debt of the bank to him existing at the time of its failure, as the receiver takes the choses in action belonging to the bank subject to all claims and defenses which might have been interposed as against the bank before the liens of the United States and general creditors attached. *Yardley v. Clothier*, 49 Fed. Rep. 337, followed.

At Law. Action by J. H. Adams, receiver of the Citizens' National Bank of Spokane Falls, against the Spokane Drug Company, upon a promissory note. Demurrer to an answer, pleading a set-off. Overruled.

Jay H. Adams, in pro. per.

Cy Wellington, for defendant.

HANFORD, District Judge. This is an action by a receiver of a national bank upon a promissory note for \$5,000, given to and owned by said bank. The answer alleges that the amount of the loan for which said note was given was not actually paid, but was credited by said bank to the defendant as a deposit subject to check; that thereafter the defendant purchased of said bank three bills of exchange on the Chase National Bank of New York, for sums aggregating \$3,500, and paid for the same, by checks against said deposit; that the bills of exchange were presented in due course of business, but acceptance thereof was refused, for the reason that the drawer had failed; that, at the time of the suspension of said bank, part of said deposit still remained to the credit of the defendant; that, before the action was com-

menced, the defendant tendered to the receiver said bills of exchange, and a sum of money equal to the full amount of the principal and interest due on said note, after deducting therefrom the balance of said deposit and the amount of said bills of exchange, with protest fees, and the tender has been made good by bringing said bills of exchange and money into court. The suspension of the bank and appointment of the receiver occurred before the maturity of the note. The case has been argued and submitted upon a demurrer to said answer.

In the case of *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148, the supreme court held that the receiver of a national bank took the assets as a mere trustee, and not as a purchaser for value; that, in the absence of a statute to the contrary, demands and choses in action which belonged to the bank were in his hands, subject to all claims and defenses that might have been interposed as against the bank before the liens of the United States and the general creditors attached; and that there is nothing in the statutes relating to national banks to deprive a customer of an insolvent national bank of the right to set off a debt, or obligation of the bank to him, existing at the time of its failure, against a promissory note which did not become due until after the failure, according to the ordinary rule in equity applicable to cases wherein the reciprocal liabilities of insolvents and others have to be adjusted, and the judgment of the United States circuit court for the southern district of Ohio was reversed for error in sustaining a demurrer to a defense similar to the one pleaded in this case. I should have no difficulty in reaching a satisfactory conclusion, harmonious with the reasoning of that decision, were it not for the fact that in the same opinion the learned chief justice argues that the statute of Ohio, allowing a set-off to be interposed as a defense in an action at law, is not applicable as a rule of practice in the federal courts; and he makes the following emphatic annunciation: "We are of the opinion that the circuit court had no power to grant the set-off in question in the suit at law." The reason given is that "legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted." In England the right to set off a debt due to a defendant from the plaintiff in an action at law is given by St. 2 Geo. II. c. 22, § 13, and made perpetual by 8 Geo. II. c. 24, § 4. Most of the states of the Union, if not all, have long ago enacted similar laws. We have such a statute in the state of Washington. The practice has prevailed in the courts of this country, state and federal, for so long, and has been so often sanctioned by the supreme court of the United States, that the right of a defendant having such a defense to avail himself of it would seem to be firmly established. 2 Pars. Cont. 734; *Partridge v. Insurance Co.*, 15 Wall. 573; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. Rep. 696. In the case last cited, Mr. Justice Gray shows that the Pennsylvania law of set-off has been in force nearly two centuries. In *Scott v. Armstrong* the supreme court reversed the

judgment of the circuit court for not allowing the set-off pleaded by the defendants in that case, and approved the decision of the circuit court for the eastern district of Pennsylvania in the case of *Yardley v. Clothier*, 49 Fed. Rep. 337, which was an action like the one at bar, and in which a similar defense was sustained. Considering what was done, notwithstanding what was said by the supreme court, I feel warranted in following *Yardley v. Clothier*.

The demurrer is therefore overruled, and, the plaintiff having elected to stand upon his demurrer, a judgment in favor of the defendant for costs will be entered.

UNITED STATES v. OREGON & C. R. CO. et al.

(Circuit Court, D. Oregon. September 8, 1893.)

No. 1,982.

1. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EXTENT OF GRANT.
Act of July 2, 1864, (13 Stat. 365), which authorized the construction of the Northern Pacific Railroad from Lake Superior westerly to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, Or., granted lands in aid of the construction on each side of "said railroad line." *Held*, that the grant extended to the road with its branch, and not merely to the main trunk line.
2. SAME—RESERVATION OF "GRANTED" LANDS.
The grant to the Northern Pacific Railroad was of "every alternate section of public land, not reserved, sold, granted * * * at the time the line of road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." *Held*, that the reservation of "granted" lands was not made in contemplation of a subsequent grant of the same lands to the Oregon & California Railroad.
3. SAME—GRANT IN PRESENTI.
The grant of land to the Northern Pacific Railroad conveyed a present title, subject to the right of the United States to re-enter on failure of the railroad to comply with conditions subsequent, and made the land so conveyed "granted" land, within the operation of the subsequent grant to the Oregon & California Railroad, which also reserved "granted" land.
4. SAME—PRIORITY OF GRANT.
The grant of lands to the Oregon & California Railroad did not gain a priority over the grant to the Northern Pacific Railroad, either by the fact that the Oregon & California Railroad filed its map of definite location, constructed a portion of its road, and received patents for the land, before the maps of the line of the Northern Pacific Railroad, showing the conflict of grants, were filed, or by the fact that no portion of the Northern Pacific was finally constructed on the line of such maps.

In Equity. Suit by the United States against the Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans to cancel patents, and restore land to the public domain. Defendants demur. Demurrer overruled.

Daniel R. Murphy and John M. Gearin, for the United States.

W. D. Fenton and L. E. Payson, for defendants.

GILBERT, Circuit Judge. By act of congress of July 25, 1866, a grant of lands was made to the Oregon & California Railroad Company to aid in the construction of a line of railroad within the state of Oregon, beginning at Portland, and running thence to the