

point of intersection of the two veins, together with such right of way for the purpose of taking out mineral as is now accorded to the owners of a cross vein when it passes through an older location. As it is the right to the surface ground lying within the triangle that is now in dispute, we are unable to see that the defendant company can acquire a paramount right thereto as against the owner of the Excelsior claim, except by taking the same action under existing laws that other persons would be required to take if they desired to appropriate it as abandoned property.

It is further insisted by the plaintiff that the circuit court committed another error, to his prejudice, in instructing the jury, in substance, that the plaintiff ought not to recover if it appeared that he was not entitled to the possession of the full quantity of land described in his declaration, to wit, 752-1000 of an acre, although it did appear that he was entitled to recover a triangular piece containing a less area. This assignment of error on the facts disclosed by the present record would seem to be well taken. In a suit in ejectment a plaintiff is not ordinarily limited in his recovery to the precise quantity of land specified in his declaration, but may recover a less quantity. We would not, however, be understood as expressing a definite opinion on the last assignment, for the reason that considerations may have been present to the mind of the trial judge which are not disclosed to us by the present record or by the briefs of counsel, which, in the present case, fully justified the instruction complained of. This is a matter which is accordingly left open for reconsideration on a second trial.

For the error in the charge first above indicated the judgment of the circuit court is hereby reversed, and the cause is remanded, with directions to award a new trial.

SAGE v. WINONA & ST. P. R. Co. et al.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

No. 224.

1. LACHES—RAILROAD LAND GRANTS.

A land-grant railroad company, having both actual and constructive notice, is guilty of laches in delaying 14 years to assert title to lands lying within its grant limits, which have been selected as indemnity lands by another land-grant company, certified as such to the state, and by it conveyed to the company, and large portions of which have been openly sold by the latter to purchasers and settlers; especially when, by such delay, documentary evidence has been lost which would probably render unavailable defendant's title to a large portion of the disputed lands. *Railway Co. v. Sage*, 1 C. C. A. 256, 49 Fed. Rep. 315, 4 U. S. App. 160, followed.

2. SAME—QUIETING TITLE—PLAINTIFF OUT OF POSSESSION.

The rule that neither limitations nor laches is available as a defense to a bill to remove a cloud from title is applicable only when complainant is in possession.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The federal courts in Minnesota will follow the rule of the local courts permitting suits to remove cloud from title to be brought by one out of possession.

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

Statement by THAYER, District Judge:

This was a suit brought by the Hastings & Dakota Railway Company, hereafter termed the "Hastings Company," against the Winona & St. Peter Railroad Company, hereafter termed the "Winona Company," and the Winona & St. Peter Land Company, to settle the title to a large quantity of land situated in the state of Minnesota, which was claimed by the railway companies, respectively, under different overlapping land grants. Before the suit was brought to a final hearing, Russell Sage, the appellant, became vested with all of the rights of the Hastings Company, and was thereupon substituted as complainant.

The bill of complaint contained the following allegations, in substance: That by an act of congress approved on July 4, 1866, (14 Stat. 87, 88,) there was granted to the state of Minnesota, for the purpose of aiding in the construction of a railroad from Hastings, in the state of Minnesota, through the counties of Dakota, Scott, Carver, and McLeod, in said state, to such point on the western boundary of the state as its legislature might determine, every alternate section of land designated by odd numbers to the amount of five full sections per mile on each side of said road; that by an act of the legislature of the state of Minnesota, of date March 7, 1867, the aforesaid grant was accepted by the state, and all of the lands, interests, rights, powers, and privileges granted thereby to the state were conferred upon the Hastings Company, and the western terminus of its road was fixed by the terms of said legislative act at any point on the western boundary of the state of Minnesota between the Big Stone lake and the third standard parallel; that the Hastings Company thereupon surveyed a line of railroad on the route above indicated, and caused a map of definite location to be filed in the general land office of the United States on June 26, 1867, and subsequently constructed and completed said line of road in full accordance with said act of congress, and thereby became entitled to all of the odd numbered sections of land lying within 10 miles of its located line, to which no homestead or pre-emption claims had attached prior to June 26, 1867, when its map of definite location was filed. The bill further showed that under and by virtue of certain acts passed by the legislature of the territory of Minnesota, and by the legislature of the state of Minnesota, the Winona Company was duly incorporated, and became entitled to such lands as were granted to the territory of Minnesota by an act of congress approved March 3, 1857, (11 Stat. 195, 197,) in aid of building a line of railroad from Winona, Minn., via St. Peter, to a point on the Big Sioux river south of the forty-fifth parallel, and also to such additional lands as were granted to the state of Minnesota in aid of building the same line of road by a subsequent act of congress, approved March 3, 1865, (13 Stat. 526, § 1;) that the Winona Company thus became entitled to all of the odd-numbered sections of land lying within 10 miles of its road, to which no homestead or pre-emption claims had attached at the date of its definite location, with the right to make up for any deficiency that might be occasioned by locations under the homestead and pre-emption laws, by selecting other odd-numbered sections lying within 20 miles of its road. It was further alleged that, to make up for losses within the granted limits of the Winona Company, there was selected in its behalf certain odd-numbered sections of land (the same being the sections now in controversy) which lay within 10 miles of the located line of the Hastings Company, and were thus within its granted limits; that the said lands so selected for the Winona Company were each and all selected subsequent to June 26, 1867, after the road of the Hastings Company was definitely located; and that said lands of right belonged to the Hastings Company. It was further shown by the bill that the lands now in controversy, which were selected for the Winona Company to make up for losses within its granted limits, all lay within 20 miles of the road of the Winona Company; that they were certified to the state of Minnesota by the secretary of the interior for the benefit of the Winona Company as lands properly belonging to it; and that the state had duly conveyed them to the Winona Company. In view

of the premises, the bill charged that the Winona Company, and all persons to whom it might have conveyed any portion of said lands, held the title thereto in trust for the Hastings Company, and it accordingly prayed that the Winona Company, and its codefendant, the Winona & St. Peter Land Company, to which, as the bill showed, some of the lands had been conveyed, might be decreed to hold the title of said lands in trust for the Hastings Company, and that they might be compelled to account for the proceeds of all of said lands which they had severally sold.

The answer of the Winona Company (so far as it is deemed material to state its contents) averred, in substance, that all of the lands in controversy in this suit were withdrawn from the market by the secretary of the interior, and were reserved for the Winona Company in aid of building its road, as early as February 12, 1867, some months before the Hastings Company filed its alleged map of definite location, and that the latter company acquired no right to any of said lands by filing said alleged map on June 26, 1867. The Winona Company further alleged that a large portion of the lands in controversy were certified to the state of Minnesota by the secretary of the interior for the benefit of the Winona Company, as early as March 11, 1868, and were conveyed by the state to the Winona Company on September 2, 1868; that the residue of the lands were thus certified to the state for the Winona Company on April 3, 1871, and were conveyed by the state to the railway company on February 26, 1872. In view of the latter facts the defendant companies pleaded laches and the statute of limitations as a bar to the action.

The circuit court on the final hearing dismissed the bill, and the complainant has appealed from such decree.

Jared How and J. M. Gilman, (Homer E. Eller, on the brief,) for appellant.

Thomas Wilson, (Lloyd W. Bowers, on the brief,) for appellees.

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

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The record before us discloses that the case at bar, in all of its essential features of pleading and evidence, is like the case of *Railway Co. v. Sage*, (8th Circuit,) 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. Rep. 315, which was recently decided by this court. The lands now in controversy lie within the appellant's granted limits, as defined by the act of July 4, 1866, and also within the indemnity limits of the appellee railway company. They aggregate something over 47,000 acres, are of the alleged value of \$240,000, and appear to be distributed along the line of the appellant's road from range 29 W. to and including range 42 W.

It is shown by the testimony that a portion of the lands which are claimed by the appellant were certified to the state of Minnesota by the general government, as lands which of right belonged to the Winona Company, and that they were conveyed by the state to the latter company nearly 18 years before the present bill was filed, and that the residue of said lands were so certified and conveyed to it more than 14 years before the commencement of the present proceedings. In the mean time,—that is to say, from the years 1868 and 1872, respectively, when the lands were deeded to the Winona Company,—that company has openly dealt with them

as its own, by advertising them extensively for sale, and by contracting to convey, and by conveying, a large portion thereof to its codefendant, the Winona & St. Peter Land Company, which has likewise dealt with them as its own, and by making numerous sales and conveyances of other portions of the land to actual settlers, who have entered upon and improved their several holdings. The facts disclosed by the record leave no room for doubt that the appellant's predecessor in interest, the Hastings Company, had actual as well as constructive notice, many years before the present bill was filed, that these lands had been certified to the state, that the state had deeded them to the Winona Company, and that many persons were purchasing and settling on the lands, and were making valuable improvements thereon, under deeds from the Winona Company, in the belief that such deeds conveyed to them an indefeasible title. It further appears that notwithstanding such knowledge, actual and constructive, the Hastings Company failed to assert any claim to the lands, or to take any action looking to the establishment of its alleged right, until the year 1886, when the present suit was instituted, although its road was in process of construction from and after the year 1870, and was completed past the lands now in dispute to the western boundary of the state by December 1, 1879.

Moreover, the present record shows that through lapse of time the Winona Company has lost certain documentary evidence which would probably have rendered its title unassailable to all of the lands now in dispute that lay in and east of range 38, if this suit had been more seasonably brought. It appears that a letter was written by the commissioner of the general land office on July 10, 1865, directing the register and receiver of the land office at St. Peter, Minn., to withhold from pre-emption, homestead, and private entry certain odd-numbered sections lying within the indemnity limits of the Winona Company. The original letter directing such a withdrawal in favor of the Winona Company has been lost, and on the trial below the appellees were compelled to produce what purported to be a copy of said letter, which was in fact a copy of a copy of the original letter, the original having been recorded in the office of the commissioner of the general land office. The copy, upon which the appellees are compelled at this time to rely, contains an order made on July 10, 1865, for the withdrawal of all odd-numbered sections within the 10 and 20 mile limits of the Winona Company, (the same being its indemnity limits,) "to the west line of township twenty-eight west." As there is no such township in the state of Minnesota as "number twenty-eight west," it is claimed by the appellant that the order of withdrawal was void for uncertainty, and that the subsequent grant to the Hastings Company, of July 4, 1866, took effect, even within the limits intended to be embraced by the order of withdrawal, no matter what such intended limits may have been. On the other hand, it is urged by the appellees that on July 10, 1865, all odd-numbered sections within the indemnity limits of the Winona Company were withdrawn for its benefit, to the west line of range 38 W.; that the original