

personal and professional integrity, and following the same up with reckless evidence in support thereof, which the slightest investigation would have shown him to be wholly unfounded, presents himself as one more inclined to ask equity than to do equity, and one not in court with such clean hands as entitle him to demand of the court to consider favorably to him the partial equity suggested, even if it were otherwise well founded. Certainly, as the case was there presented, the decree of the circuit court dismissing the complainant out of court was properly given; and, even as the case is presented here, we see no sufficient reason to disturb the same. Affirmed.

BROWN et al. v. KING et al. (two cases).

(Circuit Court of Appeals, Fifth Circuit. May 29, 1894.)

Nos. 224, 225.

EQUITY PRACTICE—MASTER'S FEES.

The permanent master appointed in two suits to foreclose mortgages on a railway was a young man, not a lawyer, and without experience in railway accounts. The suits were not contested, and no matter of importance was litigated before him. His office expenses had been paid, and he had received \$6,000 on account of his compensation. The principal part of his work was done by the receiver's auditor, to whom was allowed therefor more than \$3,000. The master and the clerk of the court were appointed commissioners to sell the property, which was purchased at the upset price, \$500,000, and each received \$6,500 as commissions. His services extended very little over two years, during which he was absent five months or more; and he was also master in another railway foreclosure suit. *Held*, that his application for further compensation should be denied.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This was a petition by John King, permanent master in two suits for foreclosure of mortgages against the Florida Southern Railway Company, for allowance of further compensation to him as such master. The circuit court made a decree allowing such further compensation. Brown and others, members of the committee who had purchased the property, appealed.

T. M. Day, Jr., for appellants.

E. P. Axtell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. On March 18, 1890, the New England Trust Company and the American Loan & Trust Company exhibited their respective separate bills against the Florida Southern Railway Company in the circuit court for the northern district of Florida, seeking to foreclose mortgages held by them on the property of the railway company. A receiver was appointed to hold and operate the property, and the usual proceedings were had in the progress of the suits. On May 7, 1890, John King, the ap-

pellee, was appointed permanent master in each of the suits, "to do and perform all those things proper to be done by a master, to take evidence, and report on such questions and matters as should be referred to him." The suits were not contested. Decrees pro confesso were taken. The permanent master seems to have in some way passed on the reports and vouchers of the receiver as the same were prepared by the receiver's auditor, J. E. Starke, and presented to the court; and this auditor, besides his pay as auditor of the receiver, was allowed \$125 a month for 26 months as an expert accountant to assist the permanent master in passing on the receiver's accounts and vouchers. The permanent master's office expenses, including the services of a stenographer, seemed to have been paid by the receiver, on the proper decree of the court. No matters of great pith and moment appear to have been litigated before the permanent master. He was not a practicing or licensed lawyer. He was 28 years old when appointed. Before his appointment his business was that of a civil engineer. He had never served as master, or been in any way connected with courts, nor had any experience with railway accounts before his appointment. The final decrees of foreclosure were entered December 9, 1891. The appellee John King, and Phillip Walter, the clerk of the court, were appointed master commissioners to sell the mortgaged property. It was sold on March 7, 1892, to the appellants, as a purchasing committee, for the upset price, amounting to \$500,000. April 9, 1892, the sales were confirmed, and on the 30th April the proper deeds were delivered, and the property taken possession of by the purchasers. Final reports of the receiver were filed September 1, 1892. Pending the proceedings, the appellee John King received on account of compensation as master the sum of \$6,000, and received as his share of commissions for making sale of the mortgaged property \$6,500, making, as his compensation for service rendered in the suits, \$12,500. On April 23, 1893, he made application to the court praying for an order fixing his further compensation, which resulted in the passing of the decree appealed from, allowing him in each suit the sum of \$1,250 in addition to the amounts previously paid him. In suits in equity the allowance of compensation to masters is so largely a matter of discretion in the judge of the court of original jurisdiction that courts of error are reluctant to disturb such decrees as those appealed from in these cases. The discretion, however, is a legal discretion, and it may be so improvidently exercised, as to devolve on the court of appeals the duty of reviewing it. Unpleasant as it must always be to reverse the decrees of the circuit courts in such matters, we have been constrained to do so in a recent case,¹ and feel compelled to the same course in this case. If the decrees appealed from are affirmed, this young, inexperienced man will receive from this trust fund \$15,000 for a period of service extending very little over two years. During 26 months of that time the principal part of his work appears to have been done by an assistant, who was an experienced man in such work, and for whose services there was paid out of this trust more than \$3,000. In the most responsible work the master did he was

¹ Cutting v. Tavares, O. & A. R. Co., 9 C. C. A. 401. 61 Fed. 150.

assisted by the clerk of the court as a co-worker, who was paid out of the trust \$6,500 for his assistance. It is shown that during this period of something over two years the appellee was absent from the state of Florida for five months or more, and that he was also master in another railway foreclosure suit. It is stated in the brief of counsel for appellants, and not controverted by the counsel for the appellee, that "after the date of the deeding of the properties to the purchasers, but during a considerable portion of the time in which Mr. King claimed to be rendering services in the cause, he was also acting as master in the case of *The American Construction Company v. The Jacksonville, Tampa & Key West Railway Company*, and on May 1, 1893, he was appointed master in the case of *The Pennsylvania Company for Insurance on Lives and Granting Annuities v. The Jacksonville, Tampa & Key West Railway Company*." We refrain from further comment. We conclude that the decrees appealed from must be reversed, and the appellee John King's application for additional compensation as such permanent master denied, and the application dismissed, at his cost in the circuit court and in this court; and it is so ordered.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California. June 25, 1894.)

No. 184.

PUBLIC LANDS—PACIFIC RAILROAD GRANTS—FORFEITURE.

Act July 27, 1866 (14 Stat. 292), provided for the organization of the A. & P. R. Co., and granted lands to it to aid in the construction of a railroad between a point in Missouri and the Pacific ocean. Section 18 authorized the S. P. R. Co., a California corporation, to connect with this railroad near the California boundary, and, to aid in the construction of a railroad from there to San Francisco, declared that it "shall have the same grants of land subject to all the conditions herein provided." Act March 3, 1871 (16 Stat. 573), provided for the organization of the T. P. R. Co., with a grant of certain lands, and authorized (section 23) the S. P. R. Co. to construct a connecting railroad from a point on the Colorado river to San Francisco, "with the same rights, grants, and privileges," and subject to the same conditions, as were granted to it by Act July 27, 1866, § 18. *Held*, that the lands granted to the A. & P. R. Co. along the overlapping routes did not pass conditionally to the S. P. R. Co. by the act of 1871, though the A. & P. R. Co. had not complied with its grant at that time, but should be excepted from that grant; and the forfeiture by the A. & P. R. Co. (Act July 6, 1886) of such lands inured to the benefit of the United States rather than to that of the S. P. R. Co. and its grantees. *U. S. v. Southern Pac. R. Co.*, 13 Sup. Ct. 152, 163, 146 U. S. 570, 615, followed.

Bill by the United States against the Southern Pacific Railroad Company and others to recover lands. Decree for complainant.

Joseph H. Call, Sp. Asst. U. S. Atty., and the United States Attorney General, for the United States.

Joseph D. Redding, for defendants.

ROSS, District Judge. This is a suit in equity brought by the United States, the chief object of which is the establishment of

the alleged title of the government to about 700,000 acres of land situated in Los Angeles and Ventura counties, of this state, designated, according to the public surveys of the United States, as odd-numbered sections, and lying within the primary or 20-mile limit of the grant of July 27, 1866, made by congress to the Atlantic & Pacific Railroad Company, and also within the primary limits of the subsequent grant of March 3, 1871, made by congress to the Southern Pacific Railroad Company, and which lands are claimed by the last-named company, and those holding under it, by virtue of its grant. For nearly 100,000 acres of these lands the United States subsequently issued its patents to the Southern Pacific Railroad Company, a large part of which land, so patented, that company conveyed, for a valuable consideration, to third persons, all of which patents and some of which conveyances were executed prior to the institution of this suit. The Southern Pacific Company also contracted in writing with various other persons to convey to them, severally, other portions of said patented lands, and still other of said lands embraced within the limits of its grant. These persons are also made parties defendant to the bill, the objects of which include the annulling of the said patents, and the quieting of the complainant's alleged title to the whole of the lands embraced by the suit. The bill also makes parties defendant D. O. Mills, Garrit L. Lansing, and Lloyd Tevis, as trustees of certain mortgages executed by the Southern Pacific Railroad Company upon the lands covered by its grant, to secure the payment of certain bonds issued by it.

By the first section of the act of July 27, 1866 (14 Stat. 292), congress incorporated the Atlantic & Pacific Railroad Company, and authorized it to construct and operate a railroad from a point near the town of Springfield, in the state of Missouri, westward through Albuquerque, "and thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by such company for crossing; thence, by the most practicable and eligible route, to the Pacific" ocean. To aid in the construction of the road, there was granted to the Atlantic & Pacific Company, by the third section of the act, every alternate section of public land not mineral, designated by odd numbers, to the amount of 10 sections on each side of the road whenever it passes through a state, "and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office, and whenever," etc. The eighteenth section of the act provides as follows:

"That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad formed under this act, at such point near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and, in consideration thereof, to aid in its construction, shall have the same grants of land, subject to all the conditions and

limitations herein provided, and shall be required to construct its road under the like regulations as to time and manner with the Atlantic & Pacific Railroad herein provided for."

On March 3, 1871, congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." 16 Stat. 573. By the twenty-third section of that act it was provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles to the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

These grants were the subject of full consideration in the cases entitled U. S. v. Southern Pac. R. Co. (Nos. 67-69, consolidated), Same v. Colton Marble & Lime Co. (No. 88), and U. S. v. Southern Pac. R. Co. (Nos. 177, 178), reported in 45 Fed. 596, and 46 Fed. 683. My views in regard to them, while meeting with the approval of two of the justices of the supreme court (Justices Field and Gray), were by a majority of the court overruled. The cases in the supreme court will be found reported in 146 U. S. 570, 615, 13 Sup. Ct. 152, 163. A careful examination of the opinions of the majority of the court in those cases shows that it decided, among other things, that it was not the intent of congress that any of the lands embraced by the grant of July 27, 1866, to the Atlantic & Pacific Company should pass conditionally to the Southern Pacific Company by the grant of March 3, 1871, but, on the contrary, that congress intended that all lands embraced by the prior grant to the Atlantic & Pacific Company should be definitely excepted from the later grant to the Southern Pacific Company, and that the Atlantic & Pacific Company having forfeited the lands granted to it by the act of July 27, 1866, by reason of its failure to comply with the conditions upon which the grant was made, and congress having, by the act of July 6, 1886, declared the forfeiture, the latter resulted in restoring the lands to the government.

"The forfeiture," said the court, "was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit."

The court further observed:

"If the act of forfeiture had not been passed by congress, the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect."

In those cases the defendant company contended that no map of definite location of its line between the Colorado river and

the Pacific ocean was ever filed by the Atlantic & Pacific Company or approved by the secretary of the interior. The supreme court said that contention was based upon these facts:

"The Atlantic & Pacific Company claimed that, under its charter, it was authorized to build a road from the Colorado river to the Pacific ocean, and thence, along the coast, up to San Francisco; and it filed maps thereof in four sections. San Buenaventura was the point where the westward line first touched the Pacific ocean. One of these maps was of that portion of the line extending from the western boundary of Los Angeles county, a point east of San Buenaventura, and through that place to San Miguel Mission, in the direction of San Francisco. In other words, San Buenaventura was not the terminus of any line of definite location from the Colorado river westward, whether shown by one or more maps, but only an intermediate point on one sectional map. When the four maps were filed, and in 1872, the land department, holding that the Atlantic & Pacific Company was authorized to build, not only from the Colorado river directly to the Pacific ocean, but also thence north to San Francisco, approved them as establishing the line of definite location. Subsequently, and when Mr. Justice Lamar was secretary of the interior, the matter was re-examined, and it was properly held that, under the act of 1866, the grant to the Atlantic & Pacific was exhausted when its line reached the Pacific ocean. San Buenaventura was therefore held to be the western terminus, and the location of the line approved to that point."

And the court held that:

"The fact that its line was located and maps filed thereof in sections is immaterial. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. Indeed, all the transcontinental roads, it is believed, filed their maps of route in sections. So the question is whether the filing a map of definite location from the Colorado river, through San Buenaventura, to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado river to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is."

In the present case it is urged on the part of the defendants that in the former cases the supreme court determined the questions in relation to the location of the line of the Atlantic & Pacific Company as one of law; that there were no issues of fact in either of those cases in respect to the character of the maps there spoken of, or of the surveys upon which they were based, whereas, in the present case, the pleadings tender issues of fact in respect to all of those matters, upon which a large amount of evidence has been introduced; and this evidence, the defendants contend, establishes that the Atlantic & Pacific Company never did definitely locate its line between the Colorado river and the Pacific ocean, and that the pretended maps of definite location were but fraudulent pretenses, and amounted at most to but a general designation of its contemplated route. In my opinion, the evidence in the present case shows that to be true. It is unnecessary, however, to analyze it, and show the reasons for this conclusion; but it is as well to state that it finds strong support in the fact that if the maps filed by the Atlantic & Pacific Company in 1872, of its route between the Colorado river and the Pacific ocean, were maps of the definite location of its road, it never did file any map or maps designating its general route; for it is not pretended that the Atlantic & Pacific Company made more than one designation of the line in question. Yet the court, in *U. S. v. Southern Pac. R. Co.*, 146 U. S. 600, 13 Sup. Ct. 152, in speaking of this very grant of

July 27, 1866, as well as in the case of *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, in speaking of the similar grant to the Northern Pacific Company, held that "congress provided for two separate matters,—one, the fixing of the general route; and the other, the designation of the line of definite location." Nevertheless, in view of the rulings of the supreme court in the former cases regarding the grants in question, by which this court, of course, must be controlled, I do not see that it is essential to the government's case that the line of the Atlantic & Pacific Company should have been definitely located; for the surveys made opposite the lands in controversy, and maps thereof filed by it, constituted at least a designation of the general route of the road, upon which designation the law operated to withdraw all lands within the limits of the grant for the benefit of the grantee. *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. The facts that the Southern Pacific Company had previously, to wit, on the 3d day of April, 1871, filed in the office of the commissioner of the general land office a map designating the general route of the line it was authorized to build, and did build, under and by virtue of the act of March 3, 1871, and that thereafter, to wit, on the 21st of April, 1871, an order was made by the commissioner of the general land office withdrawing all lands within the primary as well as the indemnity limits of that grant from sale, location, pre-emption, or homestead entry, could not, under the rulings of the supreme court in the former cases, in any way affect the prior grant, which up to the time of its forfeiture, on July 6, 1886, remained effective and paramount. While, up to the time of the withdrawal for the benefit of the Southern Pacific Company, and for nearly one year thereafter, the Atlantic & Pacific Company had not filed any map indicating its line of road between the Colorado river and the Pacific ocean, still, when it did do so, in 1872, by maps showing, if not the definite location of its line, at least its general route (its right under its grant being, as decided by the supreme court, wholly unaffected by the subsequent grant to the Southern Pacific Company, and consequently by the proceedings had and taken thereunder), the law itself operated to withdraw all public lands within the limits of the grant to the Atlantic & Pacific Company for the benefit of the grantee (cases *supra*); and, the rights of that company continuing, as held by the supreme court, until the act of forfeiture passed by congress July 6, 1886, and the forfeiture being for the benefit of the United States, the necessary result is that, when it occurred, the lands were restored to the government, and did not pass to the Southern Pacific Company, or to its grantees, who necessarily took with notice of the grants, for such grants are laws as well as contracts. *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 598, 13 Sup. Ct. 152.

It results, I think, that there must be a decree for the government; and it is so ordered.

BOUND v. SOUTH CAROLINA R. CO. et al. Ex parte WALKER. Ex parte CALDER.

(Circuit Court, D. South Carolina. May 19, 1894.)

1. RAILROAD COMPANIES—MORTGAGES—TRUSTEES—COMPENSATION.

On maturity of bonds secured by a railroad mortgage after most of them had been retired, and the holders of nearly all outstanding had agreed to an extension of time, the trustee of the mortgage, on his own motion, and without request by the bondholders, brought suit to foreclose. The suit was never prosecuted to a decree, proceedings on a second mortgage being afterwards instituted in the federal court. *Held*, that the suit by the trustee was unnecessary, and he should not be allowed compensation or counsel fees therefor.

2. SAME.

In foreclosure proceedings on a second mortgage of a railroad, the lien of the first mortgage was not questioned. The holders of the bonds secured thereby had consented to an extension of time. *Held*, that the sole duty of the trustee under the first mortgage was to see that the amount due thereunder was determined, and a decree made conserving the interests of the bondholders; and for anything further he should not be allowed compensation or counsel fees.

This was a suit by Frederick W. Bound against the South Carolina Railway Company and others to foreclose a second mortgage on said company's railroad. H. Pinckney Walker and James M. Calder, trustees in the first mortgage of said railroad, filed petitions for compensation and counsel fees.

McCradys & Bacot and E. W. Hughes, for petitioners.
J. W. Barnwell and Mitchell & Smith, for respondent.

SIMONTON, Circuit Judge. The petitions are on behalf of two trustees of what is known in this case as the "old first mortgage" of the South Carolina Railroad Company. The petitions seek compensation to the trustees, including remuneration of the counsel employed by them. The two trustees did not act together, and their cases will be separately considered.

H. P. Walker, Trustee.

The old first mortgage of the South Carolina Railroad Company was executed in 1868, for the purpose of securing certain bonds of that company issued for taking up, by exchange or otherwise, certain bonds of the Louisville, Cincinnati & Charleston Railroad Company, for which the company was liable, guaranteed by the state of South Carolina. The bonds aggregated \$3,000,000 in all, and some of them were payable in sterling, and some in money of the United States. They were used as designed, and nearly every guaranteed bond was retired. The trustees of this mortgage were Henry Gourdin, H. Pinckney Walker, and James M. Calder. The mortgage is an ordinary railroad mortgage. No special provision is made in it for compensation to the trustees, and such compensation must depend on the law and practice of this court. *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728. Under a mortgage of this character, the duties of the trustees are usually dormant until and unless