their officers and agents, or strangers, to appropriate the equity, or its proceeds or substitute, it is no cause for complaint by the appellants, unless the values so disposed of exceeded the prior liens and included something which justly belonged to them. That has not been shown, and the contrary is in effect admitted by the theory of the petition for a rehearing.

The petition is denied.

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## HATCH v. FERGUSON et al.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1895.)

No. 164.

1. RATIFICATION—ESTOPPEL—UNAUTHORIZED CONVEYANCE.

One H., a white man, and his wife, J., an ignorant and inexperienced Indian woman, were seised of 160 acres of land acquired under a pre-emption claim, and had also partially completed the residence required to secure another 160 acres under the homestead laws. H. began proceedings to commute for the price, and buy the homestead before completing his residence, but died before the proceedings were completed. J. renewed the proceedings, and completed the same. While they were pending, J. gave to one F., the executor of her husband, a power of attorney to sell her lands. Before the issue of the patent to J., F., under her power of attorney, sold all her interest in both tracts to one H. for a price per acre which was equal to the value at the time, but was paid only for one-half the number of acres in each tract; F. and H. then supposing J. owned no more, and intending to deal only as to that quantity. J., before the execution of the power of attorney, had intended to sell the land. She knew of the sale, received the proceeds, and used the same in the purchase of other property, and, without objection, allowed a purchaser from H. to make extensive improvements on the property, greatly enhancing its value. J. afterwards sought to set aside the sale on the ground that the power of attorney was obtained by F. through misrepresentation and fraud, and that she did not intend to sell the land. *Held*, that as to the one-half interest in each tract intended to be conveyed by the deed made by F., as J.'s attorney, to H., the sale was ratified, and J. estopped to dispute the same, whether or not she had power, at the time the sale was made, before the issue of the patent for the homestead land, to convey the same, and whether or not the power of attorney was obtained from her by F. through misrepresentation and fraud.

2. PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY—REFORMATION OF DEED.

Some time after the sale to H., F. learned that J. was entitled to the whole of the homestead tract, and asked and received from H. payment for the half thereof not paid for when the deed was given. The weight of evidence showed that this did not occur till after J.'s suit to set aside the deed was commenced, to which both F. and H. were parties. *Held*, that the commencement of the suit having revoked F.'s authority, whatever it was, payment for the land at this time gave no rights to H., and J. might have had the deed reformed to agree with the agreement between F. and H. at the time of the sale.

3. BONA FIDE PURCHASER—NOTICE—OFFICER OF CORPORATION.

H. conveyed the whole homestead tract and the half of the pre-emption tract to one N. It was not clear whether H., in making the purchase from F., had or had not acted as agent for N. N. sold the land to the E. Co., a corporation, of which H. was president. The negotiations for this purchase of the land were wholly conducted by other officers of the E. Co., and the bargain was agreed upon at a meeting of the executive committee having charge of the matter for the company, at which H. was not

present. *Held*, that the E. Co. was not chargeable with H.'s notice of the infirmity of the title to the second half of the homestead tract, and, as a bona fide purchaser thereof for value, was entitled to hold the same.

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

This was a suit by Josephine Hatch against E. C. Ferguson, Henry Hewitt, Jr., and the Everett Land Company, to set aside a conveyance. The circuit court rendered a decree for the defendants. 57 Fed. 959. Complainant appeals.

A. D. Warner and James Hamilton Lewis, for appellant.

Brown & Brownell, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Josephine Hatch, an Indian woman, and a citizen of Oregon, brought a suit against the appellees to set aside her conveyance of lands in the state of Washington. The complainant is the widow of Ezra Hatch, who was a citizen of the state of Washington, and who died on July 8, 1890. At the time of his death, Ezra Hatch had acquired title, under the preemption laws of the United States, to 160 acres in Snohomish county, state of Washington, which land may herein be designated as the "pre-emption claim." He had also resided four years upon a certain other 160-acre tract in the same county, which he had entered under the homestead law of the United States. Just prior to his death he contemplated selling his homestead claim, and in order to do so he had arranged to commute, and pay the government price therefor, rather than continue his residence another year, and acquire title under the homestead laws. His advertisement for that purpose was made, but upon the day set for taking final proof he died. He left a will devising all his interest in his two claims to his children. After his death his widow published her advertisement to commute the homestead claim, and upon the 19th day of September, 1890, made her proofs, as required by section 2301, Rev. St. U. S. On the following day she executed to the defendant Ferguson, who was the executor and guardian of the minor children, under the will of Ezra Hatch, a power of attorney authorizing him to sell her lands in the state of Washington. Final certificate was issued to her upon her payment of the commutation money, on the 26th day of September, 1890, and on the 29th day of November, 1891, patent to the homestead was issued. On the 21st day of October, 1890, Ferguson, under the power of attorney so given him by the widow, executed to the defendant Hewitt a deed of her interest in both the preemption and the homestead claims. It was then supposed that Josephine Hatch owned an undivided one-half interest, or a community interest, in both claims, and the sale was made upon the basis of $25 per acre, which, for 160 acres, amounted to $4,000. Hewitt paid Ferguson $2,000 in cash, and gave a mortgage upon both claims to secure a like sum. It was afterwards ascertained that the widow owned all of the homestead claim, which made

the number of her acres, conveyed by her, 240 instead of 160. After this fact was discovered, and after the commencement of this suit, Hewitt paid Ferguson $2,000 more, for the other 80 acres in the homestead claim, which was covered by the conveyance. The complainant alleged that the power of attorney to Ferguson was procured, and the conveyance to Hewitt was made, pursuant to a fraudulent conspiracy between Ferguson and Hewitt to defraud the complainant of her land; that she was ignorant of the English language, and that she was told by Ferguson at the time of signing the power of attorney that the same was a bond of friendship only, and that she did not intend to sell her land; and that the price at which the same was sold was grossly inadequate. The circuit court, after hearing the proofs, dismissed the bill.

It is contended on the appeal that the complainant was grossly deceived in signing the power of attorney, and that the same was void; that the complainant could not lawfully sell her homestead claim before the issuance of the final receipt; that the power of attorney to Ferguson was void for the further reason that it was made before the receipt was issued; that the terms of the power of attorney were not such as to authorize the sale of after-acquired land; that on the date of the execution of the power she had no interest in the homestead which could be conveyed; and that the power of attorney, being obtained by fraud, is a forgery, and could not be the basis of a conveyance of title, even to a bona fide purchaser.

The view we take of the evidence renders the discussion of these questions unnecessary. At the time of the death of Ezra Hatch the homestead claim was unimproved. The logging timber had been cut and removed, but the land was uncleared. It was situate upon a peninsula lying between the Snohomish river and Puget Sound. Its value at that time was probably no more than $1,500,—the price at which it is said Ezra Hatch had offered it for sale. By the time of the sale to Hewitt, the latter had begun to purchase other lands in that vicinity with a view to acquiring or controlling all the land in the peninsula, and forming a land company and building a city. As the plan progressed the values rose, from the fact of his purchases. The price paid to Mrs. Hatch is not shown to have been inadequate at the date of her sale. The testimony is voluminous and conflicting concerning the execution of the power of attorney, and the circumstances attending the same. Upon the part of the complainant and her witnesses, the testimony is that the defendant Ferguson sent for the complainant to come to his office, where he had a power of attorney prepared, ready for execution; that he had a conversation with her there in the Chinook language, in which he told her that the paper was an instrument in the nature of a bond of friendship; and that she executed the same, not knowing that it was a power of attorney; that she abandoned the land soon after, because directed to do so by Ferguson, whom she knew to be her husband's executor and her children's guardian, and who, as she thought, had

power to direct her movements; that although she removed to some distance, to a little town called "Marysville," where lots were purchased for her, and a house was built for her residence, she did so at the instance of Ferguson, and took no part in the purchase of the lots or the improvements thereon, or the furniture that was procured for her use; and that the land sold by her, instead of being of the value of $25 per acre, was worth several times that amount. Upon the part of the defendants, there is testimony that the power of attorney was fully explained to the complainant by Ferguson at the time it was signed, and that the notary public who took the acknowledgment of the same inquired of the complainant's daughter, a young woman who was within a few days of coming of age, whether her mother understood the instrument, and was answered that she did, and who further testified that he understood the Chinook language sufficiently to know what was said by Ferguson to the complainant at that time, and that he heard him explain to her the nature of the instrument.

If the case were to rest solely upon the evidence of what occurred at the time of signing the power of attorney, there might, perhaps, be proof sufficient to authorize the court to rescind the conveyance; but the case so made by the complainant is met by strong proof that prior to that date she had intended to sell the property, and that subsequent to that date she had received the proceeds, with full knowledge of the terms of the sale, and had herself used the proceeds in the purchase of other property, and had for a period of 18 months acquiesced in the sale, and stood by while the Everett Land Company (to whom Hewitt had transferred the property by mesne conveyances) made extensive and costly improvements upon the lands they had acquired upon the peninsula, whereby the value of the land that she had sold became very greatly enhanced. The proof that she had intended to sell the land prior to the meeting with Ferguson is afforded in the fact that almost immediately after her husband's death, and before she had had any conference whatever with Ferguson concerning the sale of the land, she advertised to commute the homestead upon which she and the children were residing, and to pay therefor the price of $1.25 per acre, rather than acquire title by residing thereon another year, and in the fact that she had no money wherewith to pay the commutation price, but expected to borrow the same until she should have sold her land. There is also direct evidence that she declared her intention to sell the land. She admits that shortly after the conveyance she removed from the homestead to Marysville, and that prior to that time Ferguson had informed her of the sale. She admits that she made no objection to the sale, or to the terms thereof. The testimony proves conclusively that it was her choice to reside at Marysville; that she selected lots there, and negotiated for their purchase, and authorized Ferguson to pay $600 for the same; that she approved the plans for a house, and authorized a neighbor to contract for its construction upon the lots; that Ferguson paid therefor out of the proceeds; that she selected furniture for the house, and requested Ferguson to pay for the same; that

she received money from Ferguson at different times, and finally, in March, 1891, she negotiated for and purchased a 40-acre tract of land with the remainder of the $4,000 which was the consideration for her deed to Hewitt. It was not until the commencement of this suit, about 17 months after the sale, that she expressed to the defendants her dissatisfaction therewith, and complained that she had not received enough for her land. In the meanwhile the Everett Land Company had expended large sums of money upon this and other lands they had purchased in the same vicinity, and the value of that tract had become largely enhanced thereby, so that when this suit was begun, in March, 1892, the complainant alleged in her bill that the value of the land in controversy was $5,000 per acre. These facts clearly amount to a ratification of the conveyance to Hewitt. The law applicable to the case, as expressed by Chancellor Kent, is as follows:

"There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal right against such person." Wendell v. Van Rensselaer, 1 Johns. Ch. 354.

The same doctrine has been expressed in the decisions of the supreme court of the United States. Bank v. Lee, 13 Pet. 107; Drakely v. Gregg, 8 Wall. 242; Morgan v. Railroad Co., 96 U. S. 716; Smith v. Sheely, 12 Wall. 358; Bronson v. Chappell, Id. 681. In the case last cited the court said:

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or, by his conduct, adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion."

The complainant, it is true, was an ignorant woman, and was unable to speak or understand the English language; but that fact, while it may lead the court to more carefully scrutinize the evidence upon which her ratification is said to be based, does not dispense with the observance of the rule of law applicable to all persons, whether ignorant or not,—that their acts in accepting the proceeds of a transaction such as this, and acquiescing in the same, are tantamount to a ratification thereof, and estop them from questioning its validity, as against third parties who have acted upon the faith thereof. The complainant is not to be classed among weak-minded persons. She was not so ignorant as not to understand the nature of a sale of real estate. She knew enough about her rights to advertise for the commutation of her homestead. She undoubtedly understood what had been done when Ferguson notified her of the sale to Hewitt. She knew that she must seek a home elsewhere, and that her attorney held in his hands the proceeds of the sale of her lands. She called upon him for those proceeds, and used the same in the purchase of other prop-

erty. It is difficult to conceive of a ratification more complete. She is thereby estopped to question the validity of the title of the Everett Land Company to all the land that was intended to be conveyed in the deed to Hewitt. But there was other land conveyed. Her deed to Hewitt, while it contains no precise description of the extent of the grantor's interest in the land, conveys all her right, title, and interest in the two claims. Ferguson and Hewitt conducted all the negotiations concerning the sale, and they are the only witnesses as to what it was the intention to convey. They both say that the agreement was that Mrs. Hatch's interest in the two claims should be sold to Hewitt for a consideration of $25 an acre, and that it was understood between them both that the quantity of that interest was 80 acres in each tract, or, in other words, that she owned a half interest in each claim. Ferguson says:

"My understanding was that Mrs. Hatch had an undivided one-half interest in each of these claims. I was not aware of anything to the contrary until the partition sale."

Hewitt says:

"We supposed at the time that she had a half interest in both claims." "We concluded that her interest was a half interest only, and, at $25 an acre, that would make $4,000." "I thought I was buying half of each claim."

He also testified, it is true, that it was his understanding that he was to pay $25 per acre for Mrs. Hatch's interest, whatever that interest might be; but the possession of this understanding, if such he had, upon his part, cannot overcome the force of his direct testimony, and that of Ferguson, as to what interest it was the intention to convey. It thus appears that the transaction was made with reference to one-half of each claim, and no more. Ferguson says that subsequently he was led to make inquiry concerning the amount of the interest which Mrs. Hatch had had in the homestead claim, from the fact that the partition suit brought by Hewitt against the minor heirs of Ezra Hatch on April 7, 1891, referred solely to the pre-emption claim, and did not include the homestead. He then, for the first time, learned that Mrs. Hatch, at the time of the sale, had owned the whole of the homestead, and that the deed made by him had conveyed the whole thereof to Hewitt. He says that he then demanded from Hewitt $2,000 more, as consideration for the extra 80 acres, but that Hewitt made no response to his demand, and never paid the same until after the commencement of this suit, in March, 1892. Hewitt testifies that he discovered, at some time after his purchase from Mrs. Hatch, that she had owned the whole of the homestead, instead of the half, as he had supposed, and that the deed to him conveyed the whole of that claim. He said nothing to Ferguson in regard to the matter, but he says that Ferguson discovered it at about the time of the partition suit, and that Ferguson never asked for the remainder of the money until about the time it was paid, which was a month after the commencement of this suit, and that the reason that he did not pay it sooner was that he was hard up, and needed the money.

Under this state of facts, the question arises, what were the

rights of the respective parties at the time the deed from Mrs. Hatch to Hewitt was delivered? Although that deed, in terms, conveyed all her interest in the homestead claim, it was clearly the intention of the parties to the transfer to convey only one-half thereof. Their bargain was for one-half, and the purchase price of one-half only was contracted to be paid and was paid. The conveyance of the whole interest was an error, the correction of which could have been compelled by the grantor, so as to conform to the intention of the parties. The minds of the contracting parties had not met upon a bargain by which the whole claim was to pass. Neither Mrs. Hatch nor Ferguson, her agent, could have compelled Hewitt to pay for the land so conveyed to him in excess of that which he had bargained for. There was no obligation upon the part of Hewitt to pay the extra $2,000, nor upon the part of Ferguson to receive the same. In equity, Mrs. Hatch was still the owner of one-half of the homestead. Were the subsequent dealings between the parties such as to consummate the sale of the other 80 acres, so that Mrs. Hatch may be said to have parted with her right and title in and to the same? At the commencement of the suit, from the nature of the allegations which were contained in the bill of complaint, there was clearly a revocation of the power of attorney that had been given to Ferguson. He had no right after that date to convey the lands of the complainant, or in any way to bind her. The Everett Land Company and Hewitt, both being parties defendant to the suit, and charged with notice of such matters as were therein alleged, were thereby notified of the attitude in which the complainant stood to Ferguson, and knew that Ferguson had no further right to act for her. The payment, therefore, of the $2,000, after the commencement of this suit, by Hewitt to Ferguson, and its acceptance and retention by the latter, have no bearing upon the determination of the question. Its decision must depend upon the acts done after the delivery of the deed from Mrs. Hatch to Hewitt, and before the commencement of this suit. There is nothing to show that between those dates there was an agreement or understanding between Ferguson and Hewitt whereby the deed to the homestead claim was to stand for the whole of Mrs. Hatch's interest therein, or the grantee in the conveyance was to pay for the 80 acres which had been unintentionally conveyed to him. The whole of the evidence concerning their dealings consists in the testimony of Hewitt that as early as the 30th day of December, 1890, when he conveyed the whole of the homestead claim to Norton by warranty deed, he had discovered the error, but that he made no mention thereof to Ferguson, and had no conversation with him concerning the matter until the latter demanded the payment of the $2,000, at or about the time the same was paid, and the testimony of Ferguson that after the commencement of the partition suit, which was the 7th day of April, 1891, he discovered that Mrs. Hatch had owned the whole of the homestead claim, instead of the one-half, as had been supposed, and that he demanded payment of an additional $2,000 from Hewitt upon that account.

What answer was made to such demand is not disclosed in the evidence, and the fact of the demand is denied by Hewitt, who says that Ferguson never asked for the other money until the time when it was paid. Mrs. Hatch, presumably, knew nothing of her rights in the homestead claim, nor of the extent of her interest therein, except such information as was given her by her agent. There is no evidence that he ever told her of his discovery that she had owned the whole instead of the half of the homestead claim, or that he had demanded the payment of the additional $2,000 from Hewitt.

The question then arises whether the Everett Land Company acquired title to this property as an innocent purchaser, without notice of the equities remaining in Mrs. Hatch. There is some dispute in the testimony as to whether or not Hewitt, in making the purchase from Mrs. Hatch, acted for himself or for his brother-in-law, Norton. The weight of the evidence is that he purchased for the latter. If he bought for himself, however, and subsequently sold to Norton, the latter acquired title to the whole claim, as an innocent purchaser, for there is no evidence that he knew anything of the antecedent circumstances. Having thus acquired the title, Norton could convey his interest to any one, and his vendee would be unaffected by notice. If, on the other hand, Hewitt purchased as the agent of Norton, the latter was chargeable with the knowledge possessed by his agent; and the question whether the Everett Land Company purchased as an innocent purchaser depends upon the effect to be given to the fact that Hewitt, the president of that company, had, from his participation therein actual knowledge of all the circumstances attending the purchase from the complainant. The Everett Land Company was incorporated on the 19th day of November, 1890, and Henry Hewitt was its president during the whole period covered by the transactions in question. The evidence shows, however, that he took no part in the negotiations leading up to the sale from Norton to the corporation. The negotiations were between Norton and one Weymiss, who was the general manager of the corporation, and a member of its executive committee. The decision to purchase the property for the corporation was made by the executive committee, or the members thereof that were resident in New York. Hewitt was at that time in Tacoma. Norton stated his terms to Weymiss, and after some negotiations a telegram was sent him from New York, signed, "Everett Land Company, Executive Committee," accepting the terms that he had offered. The committee instructed Hewitt to attend to the transfer and the payment of the purchase money. It does not appear that Hewitt participated, either as a member of the board of directors or as a member of the executive committee, in arriving at the conclusion to make the purchase. While there are cases holding that knowledge of a fact acquired by a single director is in no case notice to the corporation, unless (1) it is actually communicated to the board as a body, or (2) it has been acquired by the officer while acting officially in the business of the company, other

cases, and perhaps with the weight of authority, hold that where a director, having such knowledge, acts as a member of the board, upon the matter affected by the information, the corporation will be bound, whether such knowledge was acquired privately, or in the course of the business of the corporation. In Bank v. Campbell, 4 Humph. 395, the court held that, where a party had several agents, notice to one is notice to the principal, where the one having notice is engaged in the transaction; and, since every director of a bank is its agent, notice to one director, in a transaction in which he acts as one of the board, is notice to the bank, although the notice may not have been communicated to him in relation to the particular transaction in which he is about to act. In Craigie v. Hadley, 99 N. Y. 131, 1 N. E. 537, the court said:

"The general rule is well established that notice to an agent of a bank or other corporation, intrusted with the management of its business or of a particular branch of its business, is notice to the corporation in transactions conducted by said agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing, or on some prior occasion."

In Bank v. Cushman, 121 Mass. 490, the court said:

"If the note is discounted by a bank, the mere fact that one of the directors knew the fraud or illegality would not prevent the bank from recovering; but if the director who has such knowledge acts for the bank, in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge. A bank or other corporation can act only through its officers or other agents. As in other cases of agencies, notice to the agent, in the course of the transaction in which he is acting for his principal, of facts affecting the nature and character of the transaction, is constructive notice to the principal."

Of similar import are Terrell v. Bank, 12 Ala. 506; Bank v. Davis, 2 Hill, 464; Bank v. Campbell, 4 Humph. 394; Bank v. Payne, 25 Conn. 444; Foundry v. Dart, 26 Conn. 376.

The purchase by the Everett Land Company not only comes within the exceptions to the general rule that are recognized in the foregoing decisions, but it is embraced in the further exception, equally well established, that, where the officer who has the knowledge has also such connection with or interest in the subject-matter of the transaction as to raise the presumption that he would not communicate the fact in controversy, there is no imputation of notice to the corporation. Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758; Bank v. Gifford, 47 Iowa, 575; Wickersham v. Zinc Co., 18 Kan. 481. Hewitt had conveyed the land to Norton with covenants of general warranty. He was liable as warrantor for any defect in the title. The circumstances—the sale and warranty to Norton, the fact that the latter was his brother-in-law—were sufficient to inform the corporation that Hewitt's interests in this transaction might run counter to those of the corporation; and it would appear that the other directors of the company recognized this fact, since they took into their own hands the negotiations with Norton, and only called upon Hewitt to carry out the bargain they had made. The Everett Land Company is therefore the innocent purchaser of all the land which the complainant conveyed to Hewitt. The decree is affirmed, with costs to the appellees.

## SALINAS et al. v. STILLMAN et al.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 263.

1. MISTAKE—SUFFICIENCY OF ALLEGATIONS—LACHES.
Congress made an appropriation to acquire title to the Ft. B. reservation. After the act was passed, seven persons, heirs of one S., brought an action of trespass to try title to the reservation, against K., the commanding officer of the troops stationed thereon, in which several other persons intervened, claiming title. When the case was about to come on for trial, two of the plaintiffs and nearly all the interveners entered into an agreement, for the purpose of securing promptly a judgment which would make it possible to give a title acceptable to the United States, and to secure the appropriation, by which they undertook to co-operate on the trial in securing a verdict which would vest the title in two of the interveners, and, after such verdict had been secured, and the title passed and money paid, to submit their respective claims to certain arbitrators, who should divide the money between them. This agreement was not communicated to the court. The trial resulted in a verdict for the two chosen interveners, the land was conveyed to the government, and the money paid. Seven years later two of the plaintiffs in the action of trespass, one of whom was a party to the agreement, and an intervener in that action, who was also a party to the agreement, brought this suit to set aside the agreement for mistake, and the judgment in the action of trespass for mistake, and as a fraud upon the court. The only allegation as to mistake was that, for want of counsel and well-considered legal advice, W. (one of the complainants) was led into error in signing the agreement. *Held*, that, in view of the length of time elapsing before any attack was made on the proceedings, and the indefiniteness of the allegation of mistake, no case was made for setting aside the agreement or judgment on the ground of mistake.

2. PRACTICE—DECEIVING COURT—AGREEMENT TO AVOID LITIGATION.
*Held*, further, that there was no necessity for bringing the agreement to the attention of the court which tried the action of trespass, and its execution was not a fraud upon the court.

3. PUBLIC POLICY—SERVICES IN SECURING LEGISLATION.
The act making the appropriation provided that it should be paid directly to the owners of the property. The agreement between the parties to the action of trespass provided that, as soon as the money was received from the government, a considerable sum should be paid to an agent who assisted in procuring the appropriation. *Held* that, in the absence of any averment as to the nature of the services of such agent, it would not be presumed that his services were illegal, and that this provision constituted no objection to the agreement.

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

The preliminary facts appear to be as follows:

On March 3, 1885, the congress of the United States made the following appropriation:

"To enable the secretary of war to acquire good and valid title for the United States to the Fort Brown reservation, Texas, and to pay and extinguish all claims for the use and occupancy of said reservation by the United States, the sum of one hundred and sixty thousand dollars; provided, that no part of this sum shall be paid until a complete title is vested in the United States; and the full amount of the price including rent shall be paid directly to the owners of the property." 23 Stat. 507.

On June 30, 1886, the heirs of Miguel Salinas, to the number of seven, brought an action of trespass to try title in the district court of Cameron county, state of Texas, against W. L. Kellogg, commanding officer at Ft. Brown, to recover possession and title, fruits, and revenues of certain lands

described, which comprised the Ft. Brown reservation. This suit was afterwards removed into the United States circuit court for the Western district of Texas, and therein numerous persons, to the number of 22, intervened, claiming title. On July 13, 1887, two of the plaintiffs and nearly all of the interveners entered into an agreement, a copy of which, as an exhibit to the bill, is found in the record, the reasons for which agreement are found in the preamble thereto, as follows:

"That whereas, in March, 1885, the congress of the United States made an appropriation of the sum of one hundred and sixty thousand dollars ($160,000) to get a good clear title, free of all arrears, to the property known as 'Fort Brown,' which property and the title thereof are in litigation in this suit, and it is apprehended that unless in this court and by the judgment thereof a perfect title can be adjudged to certain of the parties, so as to meet the requirements of the Washington authorities, there is great danger of losing the said appropriation altogether; and whereas, this court will not last further than this week, and there is little probability of the parties to this agreement. who claim title to the whole of said property and the said money, working out to a complete and accurate adjudication by the judgment of this court, to be based on the verdict of the inevitable jury, all the rights of each party hereto who claim fractional interests in the said property, and it is therefore primarily desirable and necessary to have such a verdict and judgment in this action as will be attended with no complications, and be satisfactory to the department at Washington, and secondarily desirable to agree upon a method of working out and ascertaining the exact rights and interests of each party hereto after the judgment, and the conveyance to the government by the parties so adjudicated to be the owners, and the payment of said money therefor; and whereas, the sum of twenty thousand dollars ($20,000) will then be due and owing to certain agents at Washington, who assisted in procuring the said appropriation, who must first be paid from said fund when received; and whereas, there are certain parties to this action who claim interests in said property hostile and antagonistic to the interests of the parties hereto, which claims we believe will fail on the trial now presently to come off: Now, therefore, it is mutually stipulated and agreed by the parties represented in this agreement as follows," etc.

And in said agreement it was stipulated that all parties thereto should unite in promoting and procuring a verdict and judgment in the cause to the effect that the whole of said property and all dues thereto appertaining should be vested in and be held by James Stillman, of New York, and Thomas Carson, administrator with will annexed of the late Mrs. Maria Josefa Cavazos, deceased, who were styled "reconvening defendants" in said action; that, upon thus procuring such a verdict and judgment, the appropriate deed of conveyance should be made by said owners to the United States, and the usual warrant of the secretary of war upon the treasurer of the United States for the amount of said appropriation procured and obtained, and the sum of $20,000 due as aforesaid at Washington immediately paid from said funds by the arbitrators thereinafter named; that the balance of said fund should be deposited without delay in the banking house of Ball, Hutchings & Co., of the city of Galveston, to the credit of certain named arbitrators, to wit, Messrs. Wm. P. Ballinger, T. N. Waul, and David B. Culberson; that the parties to the agreement should submit their claims to these arbitrators, the arbitrators should meet as early as practicable, and the money should be divided between the claimants in proportion to the interest of each, as determined by the arbitrators, whose findings should be binding and conclusive. The agreement made provision for supplying the place of any arbitrator who was unwilling or failed to act. On the day following the date of the agreement, a trial was had of the action pending in the court before a jury, wherein, as the plaintiffs made no appearance, the cause was heard upon the pleas of reconvention of all the interveners, and a verdict rendered in favor of Stillman and Carson, administrator, etc., in the proportion of one undivided half each of the property in suit. Following the verdict, judgment was rendered against the plaintiffs, defendants, and other interveners, in favor of Stillman and Carson, administrator, etc.

On January 12, 1894, the present bill was filed by three joint complainants, to wit, Juan Salinas, who was one of the parties plaintiff in the suit at law,

and also one of the parties to the agreement in question; Vincente Salinas, who was one of the plaintiffs in the suit at law, but who denies that he was a party to the agreement in question; and H. E. Woodhouse, who was an intervener in the suit and a party to the agreement, attacking the said agreement for mistake upon the part of Juan Salinas and Henry E. Woodhouse in signing the same, and for inherent vices, and attacking the judgment as a fraud upon the court, because the agreement mentioned was not brought to the knowledge of the court and jury on the trial, thereby, as alleged, preventing a judicial determination of the issues as formed by the pleadings. The bill makes no defendants eo nomine, and prays for no process against any one, though in the middle of the bill there is a recital of the names of many persons who had become parties to the action at law, including the United States, but not disclosing the relations or interests of any one of them; and it is then averred that "said parties are now made parties hereto, together with Henry Wagner, of Cameron county, Texas." The only averment in the bill relating to any interest in the subject-matter of Henry Wagner is as follows: "Your petitioners further say that Henry Wagner is a resident citizen of Cameron county, Texas, and the city of Brownsville; is a successor of Wm. L. Kellogg, and one of the successors of Zachary Taylor, aforesaid; is now in possession of the land in suit of The Heirs of Miguel Salinas v. Wm. L. Kellogg, which is made the subject of petitioners' claims herein." The bill prays for relief as follows: "In consideration of the foregoing, and inasmuch as your petitioners are without legal remedy, these petitioners pray that said alleged judgment so rendered on the 14th day of July, 1887, be set aside, vacated, annulled, and held for naught; that your petitioners be accorded and afforded opportunity to proceed with the trial of petitioners' rights as set out and claimed in this petition, and in the original petition in the The Heirs of Miguel Salinas v. Wm. L. Kellogg, and in the intervention of H. E. Woodhouse filed in said cause, a copy of which original petition is attached, made an Exhibit A, and made a part hereof; and for any and all relief which to your honors seem just and equitable." Although no process appears to have been prayed for, issued, or served, Henry Wagner appeared and filed a general demurrer to the bill for want of equity. Thomas Carson, as administrator with the will annexed of Maria Josefa Cavazos, deceased, also appeared and filed general and special demurrers. The circuit court sustained the general demurrers of Wagner and Carson, some of the special demurrers of Carson, and, the complainants declining to amend, dismissed the bill. The complainants appeal to this court, assigning as errors, in substance, that the circuit court erred in sustaining the demurrers to the bill.

T. J. McMinn, for appellants.

H. J. Leovy and J. P. Blair, for appellees.

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

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The complainants' bill is framed in disregard of the equity rules of the supreme court of the United States and the generally recognized rules of equity pleading, but we gather from it that the complainants therein are seeking to set aside and annul a judgment, rendered at law in an action in which they and many others were parties, because the judgment was preceded by an agreement between some of the parties to the action in which provision was made for the recovery of the title, rents, and profits of real estate in favor of two of the parties thereto, to the exclusion of the rest, but under which eventual distribution should be made to all the parties according to interest as determined by the arbitration therein provided for. The agreement is attacked because of al-

leged error and mistake on the part of the complainants, in that, at the time of signing the same, the complainants were misled and misinformed as to the real purport and effect of the agreement by reason of the absence at the time of their counsel previously employed, and by the representations and persuasion of the attorneys of other parties; because the agreement was calculated to operate a fraud upon the court in the trial of the action then pending at law; because certain provisions therein contained were against public policy; because two of the arbitrators named in the agreement were of counsel for certain of the parties in interest; and because the provisions with regard to arbitration were not otherwise in accordance with the provisions of the Revised Statutes of Texas relating to arbitrations. It is also intimated in the bill that by reason of the agreement the title eventually to be given the United States would be in some way defective. The claim that the agreement was void for mistake on the part of the complainants in not being informed as to its real purport and effect, even if otherwise sufficient to warrant relief,—which is doubtful,—loses nearly, if not all, of its force when we consider the length of time which elapsed between the agreement and the institution of the present suit, to say nothing of the averments in the bill, in which it clearly appears that the complainants' real grievance is that the principal parties thereto did not at the time intend to carry out the agreement, and that they have during all these years delayed and refused to carry out the same. Besides this, the averments of the bill with regard to error and mistake on the part of the complainants are altogether too indefinite and general in regard to any mistake upon the part of the complainants.

We have searched the bill in vain to find a specific averment that at any time any or either of the complainants was actually misled or deceived as to the purport and effect of the agreement. The averment that "for want of counsel, and on account of the absence of well-prepared and well-considered legal advice, petitioner Woodhouse was led into error," is the nearest approach to any averment of the kind, and that is wholly insufficient. The agreement being between only two of the plaintiffs and part of the interveners in the action at law, and providing only for an ascertainment of the interest of the parties to the same after a favorable verdict should be obtained in the action, we are wholly unable to see that there was any necessity whatever for bringing the agreement to the notice of the court, or any impropriety whatever in failing to have it entered of record. So far as it was an attempt by the parties to settle their difference out of court by arbitration, or in any other amicable manner, the proceeding is to be commended rather than adversely criticised. Parties may adjust their differences out of court, and afterwards give effect to the settlement by a judgment or decree of court, which will be as binding and conclusive as any other adjudication. Nashville, C. & St. L. R. Co. v. U. S., 113 U. S. 261, 5 Sup. Ct. 460. The contention that the agreement was against public policy seems to be wholly based upon the fact that by the terms of the same a portion of the

moneys eventually to be derived from the United States for the purchase of the Ft. Brown reservation was to be paid to certain agents at Washington who assisted in procuring the said appropriation. It is true that the act of congress making the appropriation provides that the "full amount of the price including rent shall be paid direct to the owners of the property"; it is also true that contracts for services in procuring legislation by lobbying are against public policy; but, conceding this, it by no means follows that any fraud could or would have been perpetrated on the United States if, after the money had been paid by the United States directly to the owners of the property, the owners of the property had thereupon recognized and paid for legitimate services rendered by agents in procuring the appropriation. In the case of Trist v. Child, 21 Wall. 441, the distinction is clearly recognized between contracts for lobbying services and contracts for professional or other services legitimately rendered by agents. The bill is silent as to the character of the services rendered in Washington for which payment was to be made. We naturally indulge in the presumption that they were lawful. At the same time it is to be noticed that if the complainants' charge that the agreement was against public policy, and a fraud upon the government, is well founded, it by no means follows that the complainants in the present case can obtain relief on that ground. On the contrary, the court would be likely to apply the maxim in pari delicto against at least two of the complainants. The charge that two of the arbitrators named in the agreement were of counsel for parties in interest, and therefore disqualified to act, is without any merit, particularly when taken in connection with the fact that the bill utterly fails to show that the complainants were unaware of such employment and interest at the time the agreement was entered into.

It is true that the Revised Statutes of the state of Texas provide a mode of submitting causes for arbitration, which statutes do not appear to have been complied with in toto in the agreement in question; but the last article (56) of the title on the subject concludes as follows:

"Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such other mode as they may select." See Rev. St. Tex. tit. "Arbitration."

We are of opinion that the circuit court ruled correctly on the general and special demurrers to the complainants' bill, and that the assignments of error in this court are not well taken. As the complainants refused to amend in the circuit court, and stood on their bill, which was clearly defective in substance and for want of parties and as to the relief sought, we are constrained to sustain the circuit court in dismissing the bill. At the same time, we notice that, under the facts recited in the bill, the complainants have an equity which may hereafter require judicial recognition. The agreement attacked undoubtedly created a trust in favor of the parties thereto, and equity may require that such trust shall be recognized and enforced. In a suit for such purpose, the de-

cree dismissing the bill in the present case without reservation may be interposed, and perhaps with effect, as res judicata against the present complainants. To avoid this, and to save any equitable rights the complainants may actually have, a majority of this court are of opinion that the decree should be amended so as to show that the bill was dismissed without prejudice, but at complainants' cost. The decree of the circuit court appealed from is reversed, and a decree is rendered in favor of Henry Wagner and Thomas Carson, administrator with the will annexed of Maria Josefa Cavazos, deceased, dismissing the complainants' bill without prejudice, but with costs of this and the circuit court.

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KEMP v. NICKERSON et al.

(Circuit Court, D. Massachusetts. March 20, 1895.)

No. 344.

LACHES—STALE CLAIM.

K., an heir at law of one N., more than 23 years after the death of N. and the probate of his will, filed a bill against N.'s executors and trustees, alleging that under the will such executors and trustees had no exclusive property in or control over certain assets of the testator, and seeking distribution thereof as intestate estate. The bill gave no reason for the delay, and charged no imposition or fraud. *Held*, on demurrer, that the suit was barred by plaintiff's laches.

This was a suit by Phoebe D. Kemp against Seth Nickerson, Jr., and others, executors of John Nickerson, deceased, to obtain distribution of a part of the estate of the decedent. Heard on demurrer to the bill.

Harvey D. Hadlock, for complainant.
Robert M. Morse, for defendants.

COLT, Circuit Judge. This case was heard on demurrer to the bill. It appears from the bill that the plaintiff is an heir at law of John Nickerson, who died in 1869, leaving an estate estimated at $150,000; that an instrument purporting to be his last will and testament was approved and allowed by the probate court held at Barnstable in the commonwealth of Massachusetts; that the defendants were appointed executors and trustees under the will, and took upon themselves the duties thereof. The bill further alleges on information and belief that said instrument was prepared and signed when the said testator was in extremis. The bill further alleges that under the ninth clause of said instrument the defendants have no exclusive property in or control over the bank and railroad stocks coming into their hands as executors and trustees, and that the same should be distributed under the laws of Massachusetts as intestate estate. From the allegations in the bill it may be presumed that the will was probated in 1869, the year of the testator's death. This suit was not brought until 1893, or more than 23 years thereafter. There is no reason given in the bill why the plaintiff did not earlier institute suit, nor any excuse for her long delay; no impediment