

342, 14 Sup. Ct. 134. Section 770 of the Revised Statutes fixes the salary of a district attorney, and section 771 makes it his duty "to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned." Sections 823 to 827, inclusive, prescribe the fees which shall be allowed to district attorneys "in civil or criminal cases," "in cases of admiralty," "in cases at law," and for other specified services, and that "no other compensation shall be allowed them." When these provisions are construed, as in *Gibson v. Peters* it is declared they must be construed, in connection with sections 1764 and 1765, which forbid compensation for "extra services" and "extra allowance or compensation, in any form whatever," "unless the same is authorized by law," there can be no doubt of the right conclusion. The contention of the appellant is that the services in question were rendered by virtue of a special statute, which provided that the department of justice should represent the interests of the United States in legal proceedings under the act, including flowage damage cases (18 Stat. 506, c. 166); that this act, unlike section 380 of the Revised Statutes, under which the case of *Gibson v. Peters* arose, did not require that the district attorney should have charge of the cases arising under it, and that the cases were not "civil causes," or "cases at law," for which docket fees are allowed by section 824, but special proceedings under the Wisconsin statute for the assessment of damages. It may be conceded that in the state court the proceeding for the assessment of damages was a special proceeding, as distinguished from a civil cause or case at law, but on appeal, which either party was entitled to take, and certainly in the federal court after transfer, "the proceeding," to use the words of the supreme court in *U. S. v. Jones*, 109 U. S. 513, 517, 3 Sup. Ct. 346, "so far as the ascertainment of compensation is concerned, takes the form of a regular action at law, in which the petitioner becomes the plaintiff and the contestants the defendants." The damage cases, therefore, from the time the appellant was directed to cooperate in them, like the case in equity and the action in ejectment, were "civil causes" or "civil actions" in which the United States was concerned, and which it was a part of the appellant's official duty to prosecute or defend. It has been suggested that, in any event, the appellant ought to recover his expenses, but, as the court made no finding in respect to the items of expense, the question is not in the record. The judgment of the circuit court is affirmed.

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P. J. WILLIS & BRO. v. COLE et al.

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

No. 345.

HOMESTEAD—EVIDENCE TO SHOW ESTABLISHMENT—CREATION OF LIENS.

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

This was a suit, originally brought by P. J. Willis & Bro., Incorporated, against James P. Cole, Lewis Cole, and T. W. Huddleston, to enforce the lien of a trust deed upon certain lands situated in Bosque county, Tex. Afterwards, by stipulation of the parties, Thomas R. Lawson, trustee in said deed of trust, was made a party plaintiff, and Mary Cole, wife of Lewis Cole, was made a party defendant. The circuit court found upon the evidence that part of one tract covered by the deed of trust was, at the time of the execution thereof, the homestead of Lewis Cole and wife, Mary L. Cole, for which reason it held that no lien could or did attach thereto by virtue of such deed. The court, however, decreed the enforcement of the lien against the remainder of the land embraced within the terms of the deed of trust. From this decree the complainant appealed.

As shown by the assignments of error set out below, the controverted question was mainly one of fact. No opinion was written by the circuit court.

First assignment of error: The court erred in holding that the 200-acre tract claimed by Lewis R. Cole and Mary L. Cole as their homestead was such, because it appears that the burden of proof was upon them to show the fact to be such, and the trust deed of date December 14, 1891, signed by Lewis R. Cole and Thomas F. Lawson, recites that the southeast quarter of block 27, in the town of Morgan, was at that very particular time his homestead, and that he was then using, occupying, and enjoying the same as such, and that the 200 acres in controversy in this suit was not his homestead; and in this statement he was supported upon the trial by two witnesses, T. W. Huddleston and F. M. Hornbuckle, whereby the complainant established beyond controversy the fact that the homestead of Lewis R. Cole, and consequently that of his wife, was the southeast quarter of block 27 in Morgan, and not the 200 acres in controversy.

Second assignment of error: The court erred in holding that the 200 acres in controversy was the homestead of Lewis R. Cole and Mary L. Cole, in this: that it was clearly established that, although Lewis R. Cole and wife once occupied this 200 acres as a homestead, the same was abandoned for this purpose in June, 1891, and that thereafter, until within a few days of the date of the deed of trust in question, December 14, 1891, Lewis R. Cole and wife occupied the southeast quarter of block 27 in the town of Morgan as their homestead; and there is no evidence in the record to show any removal from that homestead at Morgan (if any is shown) was not an incidental removal; nor was there any evidence to show that prior to the 14th day of December, 1891, any declaration was made by Cole and his wife dedicating the 200 acres in the country as their homestead, or indicating an abandonment of the southeast quarter of block 27 in Morgan as their homestead. So that, so far as the evidence goes, the removal (if any) from the homestead in Morgan was incidental, not with the intention of abandonment, but, on the contrary, with the intention of retaining the same as a homestead, as shown by the recital to that effect by Lewis R. Cole in his solemn deed of trust to Thomas F. Lawson, for the use of complainant, on the 14th day of December, 1891.

Eugene Williams, for appellant.

Maco Stewart, for appellees.

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

PER CURIAM. The record showing no reversible error, the decree appealed from is affirmed.

## NEWBEGIN v. NEWTON NAT. BANK OF NEWTON et al.

(Circuit Court of Appeals, Eighth Circuit. January 16, 1895.)

No. 461.

**1. DECEIT—SUBSCRIPTION FOR INCREASE OF BANK STOCK.**

One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank, at a time when no increase had been authorized, upon false representations of the cashier as to the bank's condition and ability to pay dividends, it being in fact insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid.

**2. LACHES—WHAT CONSTITUTES.**

In an action against a national bank and its receiver to recover money paid under false representations, as a subscription for an increase of capital stock, a jury being waived, the court found facts clearly entitling plaintiff to recover. It then further found that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of stock was not authorized until the 24th day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner. The court thereupon rendered judgment for defendants. *Held*, that there was nothing in the finding sufficient to support the conclusion as to laches, and that the judgment must be reversed.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by Henry Newbegin against the Newton National Bank of Newton and John Watts, receiver thereof, to recover money alleged to have been paid by reason of false representations. In the circuit court a jury was waived in writing, and the court, having found the facts, rendered judgment for defendants. Plaintiff brings error.

The facts, as found by the court, were "that plaintiff, on or about the 1st day of June, 1890, paid to the defendant the Newton National Bank the sum of \$6,683.60 in payment for the 62 shares of the increase capital stock of the said bank; that said bank had made application for permission to increase the capital stock of said bank from \$100,000 to \$200,000; that plaintiff had been induced to subscribe for said shares by the representations of C. R. McLain, the cashier of defendant bank; that said C. R. McLain represented said bank to be in good condition, having no bad debts, and that said increase of capital stock would pay dividends; that said representations induced said plaintiff to subscribe for said stock; that said representations were false; that said bank was, at the time said representations were made, insolvent, and that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of said stock from \$100,000 to \$200,000 was not authorized until the 24th day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner." Upon the facts thus stated, it was announced that "the court doth find, as a conclusion of law, that defendant is, by reason of the laches of plaintiff, entitled to recover, and thereupon renders judgment for defendant as follows," etc.

Henry Newbegin and Samuel R. Peters, for plaintiff in error.

C. S. Bowman and C. Bucher, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.