

"How, then, shall a court of equity determine the amount due on this contract? Six per cent. on the amount loaned, being the legal rate in Texas, and being the contract rate made by the parties, and being recognized as a fair rate, is certainly a proper rate to apply. Is the borrower entitled to the application of any credit upon his loan for the amount paid upon his dues? Ordinarily no, as the lender has failed to comply with the conditions governing the withdrawal of his stock. In this case, however, the appellant waives any such formalities, and concedes that the borrower is entitled to a credit equal to the withdrawal value of such stock, and contends that this is the extent of the credit to which he is entitled. This value can be ascertained from the provisions of the stock certificate."

If the contract is not usurious,—and we hold that it is not,—the above method of ascertaining the amount due is not unfair to the debtor, and we are disposed to adopt it.

The remaining question is as to insurance paid by complainant. As the deed of trust specifically provides that the premises shall be kept insured, and, in case of default made by the mortgagor, the same should be performed by the appellant, and all expenses incurred in so doing should be paid by the mortgagor, with interest at the rate of 12 per cent. per annum from the date the same was incurred or paid, and as the record shows that thereunder the appellant has paid the sum of \$745.69 insurance, we are of opinion that the court below erred in not including that amount, with interest, in the personal judgment rendered against William J. Logan.

The decree of the circuit court appealed from is reversed in so far as it declares the bond sued on usurious, and in so far as it restricts the judgment in favor of the Building & Loan Association of Dakota against William J. Logan to the sum of \$4,361.50; and the cause is remanded, with instructions to the court below to enter a judgment in favor of the Building & Loan Association of Dakota against William J. Logan for the sum of \$7,500, together with interest thereon at the rate of 6 per centum per annum from January 1, 1892, together with the sum of \$745.69, paid for insurance, with interest thereon at the rate of 12 per centum per annum from the respective dates upon which the payments were made, aggregating a sum of \$9,805.50, less the withdrawal value of said shares of stock, said value being \$1,606; the same aggregating, after deducting the aforesaid credits, the sum of \$8,199.50, the same to bear interest at the rate of 6 per centum per annum from date of filing mandate. The decree of the court below is affirmed, except as above reversed and modified, with costs in this court, and the court below against appellee, William J. Logan.

COLES v. NORTHRUP.

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

No. 340.

EQUITY—JURISDICTION—TRIAL OF TITLE TO LAND.

A receiver of the property of the P. Co., appointed in an equity suit, filed a petition for an order requiring one C.—who was alleged in the petition to be occupying, as tenant, certain real estate of the P. Co.—to deliver pos-

session of such real estate to the receiver. C. was notified of the petition, and filed a plea to the jurisdiction; alleging that, for more than the statutory period of limitation, he had held the land adversely, under claim of title. The plea was traversed, and, upon the hearing, evidence was given tending to show title in C. by adverse possession. *Held*, that C. was entitled to a trial by jury of the issue of title, and the court had no jurisdiction, in the equity suit, to determine such issue.

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

This suit was commenced in the circuit court by the following petition:

"Your petitioner, W. H. Northrup, humbly represents: (1) That, as shown by the records of this court, he has heretofore been appointed receiver in the case of D. W. Thom et al. v. Pensacola Terminal Company, and, as such receiver, authorized and directed to take possession of all the property, real and personal, of the defendant. (2) That, at the time of the said order, C. M. Boulden and Graham Gordon, respectively vice-president and president of said company, held in trust for the said defendant the east half of the tract of land in the county of Escambia, state of Florida, known as the 'John Donaldson tract,' and being section 51, T. 2 S., R. 30 W., of which said tract, with the exception hereinafter mentioned, your petitioner, under said order, took possession. (3) That at the time of said order one John Coles occupied a portion of the said east half of said tract, as the tenant of the said Gordon and Boulden, trustees as aforesaid; the said Coles having obtained possession of the said property from his father, one Samuel Coles, who was a tenant, by a written indenture of lease, of J. C. Petterson, who was the remote grantor of the said Gordon and Boulden, trustees as aforesaid, and had also been a tenant under a written indenture of lease of E. B. La Pice, executor of R. A. Watson, deceased, grantor of said J. C. Petterson. (4) That your petitioner has demanded the possession of the said John Coles, and that the said Coles has refused to deliver the possession thereof to your petitioner, as of right he ought to do. Wherefore, your petitioner prays that the said John Coles may be required, by an order of this court, to deliver up the said possession of the said property to your petitioner, in order that it may be administered by him under the order appointing him as aforesaid. And your petitioner will ever pray, etc.

W. H. Northrup, Receiver."

And thereupon the following notice appears to have been served:

"In the United States Circuit Court, Northern District of Florida, at Pensacola.

"In the Matter of the Petition of W. H. Northrup, Receiver in the Case of D. W. Thom et al. v. Pensacola Terminal Company.

"You will please take notice that we have filed a petition in the above court to recover possession from you of that portion of the east half of section 51, T. 2 S., R. 30 W., known as the 'John Donaldson Tract,' in Escambia county, Florida, now occupied by you, and that a hearing of said petition, and of each answer as you may then have filed, will be had before the Hon. Chas. Swayne, judge of said court, on November 5, A. D. 1894, or as soon thereafter as the same can be heard.

"Blount & Blount, Sols. for Petitioner.
"To John Coles, Esq., Defendant."

The appellant filed sworn plea as follows:

"In the Matter of the Petition of W. H. Northrup, Receiver of the Pensacola Terminal Company, v. John Coles.

"The Plea of the Above-Named Respondent to the Petition of the Above-Named Petitioner.

"The respondent, John Coles, by protestation, not confessing or acknowledging all or in any part of the matters or things in the said petition contained and mentioned to be true, in such manner and form as the same are therein set forth and alleged, pleads thereto, and, for plea to the whole peti-

tion, says that respondent did not obtain possession of said property in said petition described from his (respondent's) father, Samuel Coles, as alleged in said petition, but that respondent entered into possession of said premises under claim of title, exclusive of any other rights, founding such claim upon a written instrument of the date of October 29, 1877, as being a conveyance of the premises in question, and that respondent has been in continued occupation and possession of said premises included in said instrument for a period of time longer than seven years before the filing of said petition, to wit, for a period of more than sixteen years. Wherefore, and relying upon the above facts, which said respondent avers to be true, respondent says that a court of equity has no jurisdiction to hear, try, and determine this cause. Wherefore, the respondent prays the judgment of this honorable court whether he ought to be compelled to make any other or further answer to said petition, and respectfully prays to be hence dismissed with his reasonable costs in this behalf most wrongfully expended."

This plea was traversed, and thereupon the cause was heard before the chancellor. John Coles testified as follows:

"My name is John Coles. I bought this place from Matthew Burke about sixteen years ago, and gave him, as well as I can remember, about \$40 for the place. He was living there at the time. I cannot read or write. Matthew Burke gave me this paper when I bought the place [producing following paper]:

"\$35.00.

Pensacola, Florida, Oct. 29th, 1877.

"This is to certify that I, Matthew Burke, and my wife, Sarah Burke, did sell and deliver to John Coles one place on the Big Bayou, said place being the place upon which the said John Coles now lives. We, Matthew and Sarah Burke, release all of our right and claim to said place, and all it contains, in consideration of half payment of all demands.

his
 "Matthew X Burke.
 mark
 her
 "Sarah X Burke.'
 mark

"Matthew Burke is dead. I have lived on this place for sixteen or seventeen years. Since the date of this paper, I have claimed it as my own, and have never paid rent to any one, and never recognized any one as my landlord. My father and mother lived there with me. My father never lived there before I did. I brought him there. Matthew Burke lived there before I did."

Cross-examination: "I have been married about five years, and am about 41 years old. My father lived with me. I have been away from home at work several times for a month, and once or twice as long as two months at a time,—usually, only a week at a time. This was my home all of the time, and, when away at work, I always left my clothes there. My father died about three years ago. He was ninety-odd years old when he died. He lived with me. Once, when I came back home and told my father that I had heard that he had signed a lease to this place to Mr. Fisher, he said that he had signed some kind of a paper. He said that he understood that it was something about taxes. He had no authority to sign a lease to this place. I claim it as my own. I signed a lease to the place across the road from this place where I live, and paid Mr. Fisher a dollar on it. I bought out the improvements from Prince Jones, who had leased it, and I went up to Mr. Fisher's office, and signed a lease to the place, and paid Mr. Fisher a dollar on that lease on the Prince Jones place. When I bought from Matthew Burke, he said he sold me his claim. He said that the place was his. I do not recollect, when I went to pay Mr. Fisher the dollar for rent on the Prince Jones place, that he put into it a receipt to my father, and that I told him that this was for my place,—the Prince Jones place,—and not for my father's place. I do not remember going up to Mr. Fisher's office with my father to pay the rent on this place."

Redirect: "The place I bought from Matthew Burke, now in controversy, has been inclosed for fifteen or sixteen years, and I have been living on it all the time. I live there now."

In support of his plea he also produced the evidence of three other witnesses, and rested his case. Contrary evidence was offered, tending to show that the property belonged to the Pensacola Terminal Company, and that one Solomon Coles, father of John Coles, had in July, 1886, and again in July, 1888, signed leases of the property in question, and that John Coles was present when said leases were signed. After hearing the evidence, the judge rendered a decree that the receiver was entitled to the possession of the property, that John Coles was holding possession as tenant of the receiver, and that John Coles should deliver possession upon demand. Coles appealed.

John S. Beard, for appellant.

W. A. Blount and A. C. Blount, for appellee.

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

PER CURIAM. The appellant contends that on the issue whether he held the property in question as owner in his own right, or as a tenant of the receiver, he was entitled to a trial by jury, and we think he was. He was a stranger to the equity case in which the receiver was appointed. He claimed as owner for 17 years under writings that more or less supported his claim; and, as to him, the proceeding to dispossess him of the property was, to all intents and purposes, a suit in ejectment. The decree appealed from is reversed. The cause is remanded, with instructions to dismiss the petition of the receiver, but without prejudice to his right, under the direction of the court, to institute proper proceedings at law to recover the property in controversy.

LASHER et al. v. McCREERY et al.

(Circuit Court, D. West Virginia. February 25, 1895.)

1. TAXATION—FORFEITURE OF LANDS—FAILURE TO ENTER ON COMMISSIONER'S BOOKS.

The omission of a tract of land from the books of the commissioner of the revenue for only two years (1843 and 1844), and the failure afterwards to charge up the back taxes for said years, did not work a forfeiture of said land to the state under the act of the legislature of West Virginia of 1869 (chapter 125).

2. SAME.

There can be no forfeiture, under said act of 1869, for nonentry on the commissioner's books, unless the land was left off said books each year for five successive years, and the omission of the land from said books for any less number of years than five did not work a forfeiture under said act.

3. SAME—PROCEEDINGS AGAINST REMOTE GRANTOR.

Robert Morris owned a tract of land containing 480,000 acres, in Virginia, and in 1797 he conveyed it away. In 1843 it was sold by the commissioners of delinquent and forfeited lands in the name of Henry Cramond, a remote grantee of the said Morris. In 1853, Michael Bouvier, to whom it had passed by mesne conveyances from the purchaser at said sale, divided it into six separate parcels, all of which he afterwards conveyed to others, except one parcel of 8,400 acres. So far as appears, the several parcels were assessed to their respective owners, one of said parcels, con-