

than \$3,000 a year for the receiver's counsel is unreasonable. In our opinion, a fair and just allowance should not exceed \$6,000, in addition to the \$4,000 already paid. We have not reached the conclusion that we must reduce these allowances without reluctance, for the reason that in such cases what is a fair compensation is so much a matter of judicial discretion; but we think it is important that the circuit courts of appeals should endeavor in their respective circuits to bring about as much uniformity in such allowances as the cases will admit of. Such services, under some peculiar circumstances, or by agreement of the parties before the court, or upon ex parte applications, have often been, in many courts of this country, so extravagantly compensated that we think there has been a tendency to establish a standard of compensation in matters connected with railroad foreclosures which is unreasonably liberal as compared with similar services in any other employment or with respect to any other subject-matter.

Decrees reversed, and proceedings remanded, with directions to modify the decree in No. 104 so as to award \$1,750 to the receiver, and in No. 90 so as to award \$6,000 to the receiver's counsel; each party to pay his own costs in this court, and one-half of the costs of printing the record.

SETTLE et al. v. HARGADINE-McKITTRICK DRY-GOODS CO.

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

No. 322.

PARTNERSHIP—POWER OF ONE PARTNER TO MORTGAGE.

It is within the power of one member of a partnership, acting in good faith, to make a valid chattel mortgage of all the partnership property, to secure partnership indebtedness.

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

This was a suit by the Hargadine-McKittrick Dry-Goods Company against George M. Settle and others to set aside a chattel mortgage. The circuit court gave judgment for the plaintiff. Defendants bring error.

H. D. McDonald and E. S. Connor, for plaintiffs in error.

James G. Dudley, for defendant in error.

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

McCORMICK, Circuit Judge. The only question necessary to be considered in this case is whether one partner can execute a valid chattel mortgage on all of the partnership property to secure partnership indebtedness. This case was tried in the circuit court without a jury, and the judge to whom it was submitted answered the question just stated as follows:

"I find, as a matter of law, that as W. J. Ritchie had no express authority from his partner, J. A. Carter, to execute the instrument of writing in evi-

dence in this cause, under the law of partnerships, where each partner acts as agent of the other partner within the scope of the partnership business; he had no implied authority or power to execute such instrument, and, without the assent of his partner, to transfer and convey all of the partnership property, of every description, placing same in the possession of a third party as trustee, to dispose of same absolutely, and out of the proceeds to pay certain preferred creditors, thereby immediately putting an end to the partnership, and breaking up the partnership business."

The property conveyed in the mortgage was personal property, to wit:

"All of our stock of goods, consisting of dry goods, boots, shoes, clothing, hats, caps, notions, etc., also all the counters, shelving, and other fixtures, in the storehouse now occupied by us, also one iron safe; all of said goods being situated in the storehouse belonging to Mrs. Eliza Gibson, on the east side of the public square, in Paris, Lamar county, Texas, now occupied by us as a dry-goods and clothing store; and we hereby also transfer and assign to the said Geo. M. Settle, as trustee, all the notes and accounts now due to us, also one bale of cotton at J. B. Anderson's gin. This conveyance is intended as a chattel mortgage to secure the payment in full of all the above-named debts; and we hereby deliver the immediate possession of all said above-named personal property to the said Geo. M. Settle, and he is hereby authorized and empowered to take the same into his possession, and proceed to sell the same at public or private sale, by retail, in lots, or in bulk, as to him may seem best, within three months from this date, and the proceeds of the same to apply to the payment of all the above-named debts, after paying all the expenses of executing this trust, including a commission of five per cent. to himself, as compensation for his services, and a reasonable amount for attorney's fees and counsel, and the residue, if any, he shall hold subject to our order. And the said Geo. M. Settle is hereby authorized and empowered to collect and to sell all of said notes and accounts at public sale or private sale, with or without notice, and to transfer and assign the same to the purchaser or purchasers thereof, and the proceeds of the said sale to apply to the payment of all of said above-named debts."

This is a chattel mortgage in Texas. It was executed in the name of the firm by one only of its members. The debts secured were partnership debts. There is no suspicion of fraudulent action or intent as to the other partners, or as to unpreferred creditors, beyond the mere fact of preference. We cannot concur in the conclusion of law announced and acted on by the circuit court. We do not deem it useful to review the authorities on the question. To our minds they support but one conclusion. The reasoning in support of the power of one partner to make such a mortgage has, perhaps, never been more clearly and forcibly stated than by Judge Marshall in *Anderson v. Tompkins*, 1 Brock. 456, Fed. Cas. No. 365, and by Judge Shaw in *Tapley v. Butterfield*, 1 Metc. (Mass.) 515. With these all subsequent decisions substantially agree. Any apparent departure is due either to local statutes or to the presence of some element of actual fraud. The statutes and decisions in Texas have not modified the doctrine, and no element of actual fraud is present in this case. As the judgment of the circuit court was evidently based on the erroneous view of the law indicated, we do not notice the other points suggested in the interesting brief submitted for the defendant in error.

The judgment of the circuit court is reversed, and the case remanded to that court, with direction to award a new trial.

SAVAGE v. WORSHAM.

(Circuit Court, S. D. California. April 1, 1895.)

PUBLIC LANDS—HOMESTEAD ENTRIES—BILL TO CONTROL TITLE.

A bill seeking to control title to land patented to defendant under a homestead entry alleged that complainant, in the belief that the land in question was embraced in a homestead entry filed by him, made valuable improvements thereon long prior to defendant's homestead entry; but there was no allegation that complainant had made application to permit him, by reason of the mistake, to cancel his entry in whole or in part, and include therein the land in question. *Held*, that the bill could not be maintained, for it was not enough to show that defendant should not have received the patent, but it must be made to appear that the land should have been awarded to complainant, had the law been properly administered by the land department.

This was a bill in equity by William E. Savage against William G. Worsham, seeking to control title to certain lands.

William E. Savage, in pro. per.
Chapman & Hendrick, for defendant.

ROSS, Circuit Judge. The complainant, by his bill, seeks to control the title to a certain portion of the S. W. $\frac{1}{4}$ of section 22 in township 2 S., of range 11 W. of the San Bernardino base and meridian, situated in Los Angeles county, Cal., which quarter section was conveyed to the defendant by a patent issued by the government pursuant to a homestead entry thereof made by him. The tract to which the complainant claims to be entitled is the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section mentioned, concerning which the bill alleges that complainant, in the belief that it was a portion of the land embraced in a homestead entry which he had filed on the 23d of March, 1885, had made valuable and substantial improvements long prior to the time when the defendant made his homestead entry. If it be conceded that the bill shows that the entry of the defendant was improperly allowed, and the quarter section, including the 40 acres in controversy, was improperly patented to the defendant by the government, still an insuperable objection to the bill, as presented, is that it does not show that the complainant is entitled to the 40-acre tract. It shows that complainant believed that the 40-acre tract in controversy was included within his own homestead entry, but that, as a matter of fact, it was not. It does not disclose any change in his homestead entry, nor any application on his part to the officers of the land department to permit him, by reason of his mistake, to cancel his entry, in whole or in part, and include therein the 40 acres in question. Certainly, so long as his entry stood, he was not legally entitled to another homestead. A seasonable application on his part to the officers of the land department to cancel his entry in part, and include therein the 40-acre tract in controversy, upon the ground that it had been inadvertently omitted therefrom, might have been granted, and, no doubt, would have been, in the event of a sufficient showing. But, so far as the bill shows, no such application was made by the complainant. Until