in favor of innocence and against the imputations of fraud. It is unreasonable, after such a great length of time, to require positive proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that courts can expect, if the parties are all living, owing to the frailty of memory and human infirmity, is that the material facts can be given with certainty to a common intent. But, if some of the parties and many of the witnesses are dead, as is the case here, the most that can ordinarily be expected is to arrive at probabilities, and substitute general presumptions of law for actual knowledge. It therefore follows that, in all such cases, fraud and wrongdoing ought not to be imputed to the living, unless the evidence of fraud upon one side, and lack of knowledge, or means of knowledge, upon the other side, are made clear beyond a reasonable doubt. U. S. v. Beebee, 17 Fed. 37; Hinchman v. Kelley, 4 C. C. A. 189, 54 Fed. 63; Hammond v. Hopkins, 143 U. S. 224, 274, 12 Sup. Ct. 418. Having carefully examined all the facts and circumstances of this case, and duly considered the principles of law applicable thereto, my conclusion is that the defense of laches and lapse of time must be sustained.

The views already expressed are conclusive of the case, and render it unnecessary to consider the further question presented by the facts, whether the title of the respondent derived from the proceedings had in the probate court was of such a character as would, of itself, enable the respondent to defeat the suit as to the property therein involved. The respondent is entitled to a decree dismissing the bill, with costs.

NORTHERN PAC. R. CO. et al. v. MUSSER SAUNTRY LAND, LOGGING & MANUF'G CO. et al.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 208.

1. PUBLIC LANDS—GRANTS TO RAILROADS—RESERVATIONS.
By act of July 2, 1864 (13 Stat. 365), congress granted to the N. P. Co., in aid of the construction of its railroad, "every alternate section of public land not mineral, designated by odd numbers * * * on each side of said railroad line * * * not reserved * * * or otherwise appropriated * * * at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." On July 6, 1882, the N. P. Co. filed a plat of the definite location of its line, within the state of Wisconsin, in the office of the commissioner, and in September, 1882, had completed such line. By act of June 3, 1856 (11 Stat. 20), congress had granted to the state of Wisconsin, in aid of the construction of a railroad, certain public lands in that state on each side of the road as it should be located, providing that if any lands within such grant had been sold or appropriated, other lands, within 15 miles from the road, might be selected by the state, subject to the approval of the secretary of the interior. The state bestowed this grant upon the S. C. Co. By act of May 5, 1864, congress made a further grant to the state in aid of the construction of such road, and provided that the indemnity lands might be selected within 20 miles from the line as definitely located. The state also bestowed this grant on the S. C. Co., which adopted a definite line, and notice of such bestowal and adoption was given to the secretary of the

interior. On February 28, 1866, the commissioner of the general land office directed the officers of the local land office to withhold the lands within the limits of such grants to the S. C. Co. from sale or location, and such lands were withdrawn accordingly, including certain lands more than 15 and less than 20 miles from the line of the S. C. Co., and within the place limits of the grant to the N. P. Co., as afterwards definitely fixed by the location of its line. The rights of the S. C. Co. afterwards passed to the C. & O. Co. which in 1882 completed the line, and in 1883 selected, as indemnity lands, part of the lands so withdrawn, within the limits of the grant to the N. P. Co. In 1885, the C. & O. Co. conveyed such lands to the M. Co. In 1889, it having been ascertained that the grant to the C. & O. Co. was satisfied without such lands, that company canceled its selection thereof. The M. Co. then made a cash entry of such lands, which was accepted, without regard to a protest made by the N. P. Co. *Held*, that the reservation of said lands by the land department excepted them from the operation of the grant to the N. P. Co., and that company acquired no right to them, either before or after the definite location of its line.

2. SAME—POWER OF LAND DEPARTMENT.

Held, further, that it was within the power, and was the duty, of the land department, even after the passage of the act of July 2, 1864, making the grant to the N. P. Co., to reserve for the benefit of the C. & O. Co. the lands necessary to satisfy the prior grant made to it.

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

This was a suit by the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, its receivers, against the Musser Sauntry Land, Logging & Manufacturing Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company to quiet the complainants' title to certain lands. The circuit court sustained a demurrer to the bill. Complainants appeal. Affirmed.

The appellants, complainants below, claim title to the lands in controversy under the third section of an act of congress approved July 2, 1864, which, so far as it bears upon the questions involved, is as follows: "Sec. 3. And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any 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 definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: provided further, that the railroad company receiving the previous land grant may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms

named in the first section of this act." 13 Stat. 367. The Northern Pacific Railroad Company, hereafter called the "Pacific Company," accepted this grant on December 29, 1864. On July 30, 1870, it fixed the general route of its road, extending through Wisconsin, within 20 miles of the lands in controversy. Thereafter it proceeded with the survey and location of its line, and on July 6, 1882, definitely fixed that portion of its line extending opposite these lands by filing a plat thereof in the office of the commissioner of the general land office. The lands in controversy are within the limits of the grant, as defined by the plat of definite location filed July 6, 1882. By September, 1882, the Pacific Company had completed the line of its road coterminous with these lands; and such line, having been examined by commissioners appointed for that purpose by the president, was reported by them to have been completed in a good, substantial, and workmanlike manner, as required by the act of congress; and thereafter, on September 16, 1882, the president approved said report, and ordered that patents for the lands earned by the construction of the road should be issued to the company. These facts show that the legal title to these lands is vested in the Pacific Company, if not within the exceptions enumerated in the granting act. Whether these lands are within any of these exceptions depends upon the following facts: By an act entitled "An act granting lands to the state of Wisconsin to aid in the construction of railroads in said state," approved June 3, 1856 (11 Stat. 20), congress granted to that state, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to St. Croix river or lake, between townships 25 and 31, and thence to the west end of Lake Superior and to Bayfield, every alternate section of land designated by odd numbers, for six sections in width, on each side of said road. The act further provided that in case it should appear that the United States had, when the line of said road was definitely located, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the governor of the state to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections or parts of sections above specified, so much lands, in alternate sections or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of pre-emption had attached: provided that the lands so located should in no case be further than 15 miles from the road, and selected for and on account of such road. The state accepted this grant, and bestowed that portion of it which pertained to the line from the St. Croix river or lake to the west end of Lake Superior and to Bayfield upon the St. Croix & Lake Superior Railroad Company. On September 20, 1858, this company definitely located the line of its road between these points. The lands in controversy did not fall within either the place or indemnity limits as established under this grant. By an act approved May 5, 1864 (13 Stat. 66), entitled "An act granting lands to aid in the construction of certain railroads in the state of Wisconsin," it is provided: "Section 1. That there be and is hereby granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by the act of congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the secretary of the interior from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts

of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state for the use and purpose aforesaid: provided, that the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist." The state accepted this act March 20, 1865, and on the same day conferred all the lands, rights, and privileges granted by the above section upon the St. Croix & Lake Superior Railroad Company. That company accepted the grant April 22, 1865, and, by a resolution of its executive committee, adopted the line as already located under the act of June 3, 1856, as the line of the road under the act of May 5, 1864. On May 5, 1865, copies of these resolutions, and of the act of the legislature of Wisconsin conferring this grant upon the St. Croix & Lake Superior Railroad Company, were filed with the secretary of the interior. On February 28, 1866, the commissioner of the general land office directed the register and receiver of the district land office to withhold the odd-numbered sections within 10 and 20 miles of said line, so fixed, from sale or location, pre-emption settlement, or homestead entry. This order was received and filed in the district land office on March 17, 1866.

The lands in controversy lie within the 20-mile limits of this withdrawal, but are more than 15 miles from the line as fixed. The St. Croix & Lake Superior Railroad Company having failed to construct said railroad, the grant to it was declared forfeited to the state. In February, 1882, the appellee the Chicago, St. Paul, Minneapolis & Omaha Railway Company, hereinafter called the "Omaha Company," succeeded, under the legislation of the state, to the rights of the St. Croix & Lake Superior Railroad Company; and during that year it completed the road past these lands and to the west end of Lake Superior. On May 12, 1883, and June 14, 1883, one W. H. Phipps, as agent for the Omaha Company, filed lists for selection of indemnity lands claimed as inuring to said company under said grant, including, among others, the lands in controversy. These selections were allowed by the officers of the district land office, but were never approved by the commissioner of the general land office nor by the secretary of the interior. The governor of the state caused patents for the lands in controversy, with other lands, to be issued to the Omaha Company. In 1885 and 1886 the Omaha Company executed deeds for these lands to the grantors of the Musser Sauntry Land, Logging & Manufacturing Company, which company acquired whatever interest in these lands was conveyed to the Omaha Company by the state. The secretary of the interior having completed the adjustment of the grants made by the acts of 1856 and 1864, it was ascertained in 1889 that these grants were satisfied without the lands in controversy; and on November 25, 1889, the Omaha Company relinquished these lands, with others, and requested that the attempted selection should be canceled, which cancellation was made in February, 1890. In November, 1889, the Musser Sauntry Company, having ascertained that these lands would not inure to the railroad company under the grant, applied to purchase the same, under the provisions of an act of congress approved March 3, 1887. The register and receiver of the district land office, disregarding the Pacific Company's protest, allowed the application, and accepted the cash tendered for the lands. In February, 1890, the secretary of the interior, in a ruling made in the course of the adjustment of the Omaha Company's grant, held that the indemnity lands, under the act of May 5, 1864, reserved by order of the commissioner of the general land office of February 28, 1866, were, by reason of such reservation, excepted from the operation of the grant to the Pacific Company in the act of July 2, 1864. On December 19, 1890, this ruling was reaffirmed, and is still in force. On March 5, 1891, in accordance with the rulings of the secretary of the interior, the Musser Sauntry Company made a new application to

purchase the lands in controversy, which was allowed; and on May 5, 1891, the Musser Sauntry Company was allowed to, and did, make a cash entry of these lands. The Pacific Company appealed from this allowance, but, on October 3, 1892, the commissioner of the general land office affirmed it, holding that these lands were excepted from the operation of the grant to the Pacific Company by the withdrawal order of 1866. To the complainants' bill setting out these facts, and praying that their title to these lands might be quieted, and that the defendants be enjoined from receiving or accepting patents therefor from the United States, and from cutting and removing the timber therefrom, the defendants interposed a demurrer, on the ground that the bill did not state a case entitling the complainants to any equitable relief. The demurrer was sustained, and, the complainants electing to stand upon their bill, a decree was entered dismissing the same for want of equity. From this decree the present appeal is prosecuted.

James McNaught and F. M. Dudley, for appellants.

Thomas Wilson, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

After making the foregoing statement, the opinion of the court was delivered by BAKER, District Judge.

The lands in controversy are within the place limits of the Pacific Company's road. The title, therefore, passed to that company, if the lands were subject to the operation of the grant made by the third section of the act of July 2, 1864. The contention is that these lands were not subject to the operation of this grant, for the reason that they were withdrawn by the land department, in February, 1866, in order to satisfy the grant of indemnity lands made by the earlier acts of June 3, 1856, and May 5, 1864. These lands are within the indemnity, and not within the place, limits of the grant to the Omaha Company. The grant to the Pacific Company is of "every alternate section of public lands, * * * to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any 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 definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof." The rule that a grant by congress does not operate upon lands theretofore lawfully reserved, for any purpose whatever, has too often been declared to be longer open to discussion. As was observed by the supreme court in the case of Railroad Co. v. Forsythe (decided June 3, 1895, and not yet officially reported) 15 Sup. Ct. 1020, "there can be no doubt as to this rule, or as to the fact that lands withdrawn from sale by the land department are considered as reserved within its terms." The lands in controversy within the indemnity limits of

the Omaha Company's road were not granted by the acts of 1856 or 1864. They were simply withdrawn from sale, pre-emption, or homestead entry by the action of the land department, in order that the beneficiary of the grant might, in case the full amount of lands granted was not found within the place limits, select therefrom enough to supply the deficiency. These lands, being within the indemnity limits of the Omaha Company, might be required to satisfy the earlier grant; but not being granted, they were still within the disposing power of congress. It has often been held that "until selection was made, the title remained in the government, subject to its disposal at its pleasure." Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 421, 5 Sup. Ct. 208; U. S. v. McLaughlin, 127 U. S. 428, 450, 455, 8 Sup. Ct. 1177; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 511, 10 Sup. Ct. 341; U. S. v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 374, 12 Sup. Ct. 13. It follows that, notwithstanding the grant in the acts of 1856 and 1864 to the Omaha Company, the title to the indemnity lands which might be required to supply the deficiency in its place limits remained in the government, and was subject to its disposal at its pleasure. The congress might, without any violation of the rights of the Omaha Company, have granted to the Pacific Company all the lands within the indemnity limits of the former company, if it had chosen to do so. It is insisted that, as such grant might have been made, the act of July 2, 1864, ought to be so construed as to deny to the land department the power to withdraw any lands which, upon the definite location of the line of the Pacific Company, might be found to be within its place limits, although such withdrawal was made in order to satisfy the claims of an earlier grant to indemnity lands. The grant in the act of July 2, 1864, is a grant in praesenti. Its language is, "that there be, and is hereby granted." The construction and effect of such words of grant have often been considered by the supreme court. In the case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. 389, Mr. Justice Field, speaking for the court, said:

"The language of the statute is, 'that there be, and hereby is granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in praesenti; that is to say, it is of that character as to all lands within the terms of the grant and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as not to be open to discussion. Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, Lawrence, etc., R. Co. v. U. S., 92 U. S. 733; Missouri, Kansas, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 491; Railroad Co. v. Baldwin, 103 U. S. 426."

The foregoing statement of the law was quoted and approved in the recent case of U. S. v. Southern Pac. R. Co., 146 U. S. 570, 593, 13 Sup. Ct. 152. The lands in controversy were reserved, at the

time of the definite location of the line of the Pacific Company, by an order of the land department made after the passage of the act of July 2, 1864. These lands, having been reserved, were excepted out of the grant as much as if, in a deed, they had been excluded from the conveyance by metes and bounds, provided the reservation was one which the land department had the power to make. The true question for decision is, did the land department have lawful authority to reserve, after the passage of the act of July 2, 1864, lands which on the definite location of the road were found to be within the place limits of the Pacific Company, in order to satisfy the claims of an earlier grant to indemnity lands? The act of July 2, 1864, contains no limitation in this regard on the power of the land department. By excepting out of the grant all lands reserved for any public use, it impliedly recognizes the power of the land department to make such reservations. There is no language in the act which denies or limits the authority of the land department to make reservations for public purposes at any time before the definite location of the line shall have been fixed. What lands ought to be reserved in order to satisfy the various acts of congress, must, in the nature of things, be left largely to the discretion of this department. It is said that it would lead to monstrous injustice if the land department were clothed with such power. We see no force in this suggestion. No injustice will be done to the Pacific Company by holding that the land department has authority to reserve enough of the public domain to satisfy all earlier grants. In our judgment, that department is invested with such authority. A reference to some of the cases will, we think, make this apparent. The case of Wolcott v. Des Moines Co., 5 Wall. 681, is a leading case, and one of the earliest in which the effect of a reservation by the land department was considered. On August 8, 1846, congress granted to the then territory, now state, of Iowa, for the purpose of aiding it to improve the navigation of the Des Moines river from its mouth to the Raccoon Fork, one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river. In 1856, congress made a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of certain railroads, by which act it was provided, "that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object whatsoever, be and the same are hereby reserved to the United States from the operation of this act." It was decided, in the case of Railroad Co. v. Litchfield, 23 How. 66, that the grant of August 8, 1846, did not extend above the mouth of the Raccoon Fork. Lands above the mouth of that fork had been reserved for the improvement of the navigation of the Des Moines river, first by the secretary of the treasury, and afterwards by the secretary of the interior. The lands the title to which was in controversy were situated above the mouth of the Raccoon Fork, and were within the place limits of the grant in aid of the railroads. It was contended that these lands had not been reserved by competent authority; that they were not within the limits of the

grant of August 8, 1846; and therefore that the railroad took the title to them under the latter grant. This contention was denied, the court observing:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the specific purpose of aiding in the improvement of the Des Moines river, first by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department, under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the land office to reserve from sale the lands embraced in the grant. Otherwise, its object might be utterly defeated."

So the acts of 1856 and 1864, by necessary implication, carried not only the power, but the duty, of the land department, to reserve for the benefit of the Omaha Company the lands necessary to satisfy the grant made to it. In the case of Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, it was held that, where a homestead right had attached to a tract after the grant, and before the time of definite location of a railroad company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railroad company under its grant; that the grant only attached to lands which were the subject of the grant at the time of definite location; and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time the grant became fixed. On page 644, 113 U. S., and page 566, 5 Sup. Ct., Mr. Justice Miller, in delivering the opinion of the court observed:

"The right of the homestead having attached to the land, it was excepted out of the grant as much as if, in a deed, it had been excluded from the conveyance by metes and bounds."

This doctrine was affirmed in Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856. The supreme court has decided, in many cases, that the withdrawal by the land department operated to exclude from sale, purchase, or pre-emption all lands embraced in such withdrawal or reservation, and that it also operated to exclude from the grant to a railroad company all lands so withdrawn or reserved, for any public purpose or use, at the time of the definite location of its line. Bullard v. Railroad Co., 122 U. S. 167, 7 Sup. Ct. 1149; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308. In the case last cited it is said:

"The validity of this reservation was sustained in the case of Wolcott v. Des Moines Co., 5 Wall. 681. In that case it was held that, even in the absence of a command to that effect in the statute, it was the duty of the officers of the land department, immediately upon a grant being made by congress, to reserve from settlement and sale lands within the grant; and that, if there was dispute as to its extent, it was the duty to reserve all lands which,

upon either construction, might become necessary to make good the purposes of the grant. This ruling as to the power and duty of the officers of the land department has been followed in many cases."

In the case of Hamblin v. Land Co., 147 U. S. 531, 536, 13 Sup. Ct. 353, it is said:

"A reservation by the interior department, it is well settled, operates to withdraw the land from entry under the pre-emption or homestead laws;" citing Wolcott v. Des Moines Co., 5 Wall. 681; Wolsey v. Chapman, 101 U. S. 755; Bullard v. Railroad Co., 122 U. S. 167, 7 Sup. Ct. 1149; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308.

These cases, and others to the same effect, establish the principle that the land department is invested with authority to withdraw or reserve public lands from sale, entry, or grant for the purpose of devoting them to some public purpose or use, in pursuance of an act of congress; and that the withdrawal of such lands at any time before the title to the lands attach, under a grant, by the definite location of a railroad line, excludes them from the mass of public lands upon which a legislative grant will operate. The reason is obvious. Otherwise a later grant might operate to defeat or impair the effect of a prior grant. Whenever congress makes a grant of public land in aid of a public improvement, it is not to be supposed that it was within the legislative intent to defeat or impair the full effect of the prior grant, unless such purpose is manifested in plain and unambiguous terms. When public lands have been segregated from the common mass by an act of congress, or by an order of the land department withdrawing them from entry or sale, for the accomplishment of some specific public purpose, it has never been held that such lands were embraced within the operation of a grant in aid of the construction of a railroad, should the order of withdrawal afterwards from any cause be revoked. Lands so reserved or withdrawn at the time of the definite location of a railroad line are not embraced within the terms of the grant. The grant, though made prior to the reservation, does not attach to lands withdrawn to satisfy an earlier grant, for the reason that they are excluded therefrom by the clear and explicit language of the act of congress.

It is argued that the fundamental error in the decision of the court below is in overlooking the fact that the earlier grant to the Omaha Company passed no title to, and made no grant of, the indemnity lands. It is true that no title to the indemnity lands could vest in the Omaha Company until such lands were located and selected, and such location and selection had been approved by the land department. But the earlier grant, while conveying no title to the indemnity lands, operated as a covenant or promise by the government to convey those lands, which bound it in good faith to do no act which would defeat or impair such covenant or promise. So far as the Pacific Company is concerned, it has no just ground of complaint; for, in reserving these lands for the benefit of the earlier grant, the land department has simply done what the plighted faith of the government required it to do. While the right to these indemnity lands rested in covenant or contract, it

imposed on the government a strong moral obligation to cause such acts to be done as would protect the just expectations of the Omaha Company from disappointment. And although the grant to the Pacific Company was one operating in praesenti, still its title did not, and by the express terms of the statute could not, attach to any specific lands, until the line of its definite location was fixed,—and then only to public lands, not reserved or otherwise appropriated. The lands in controversy, at the time of the definite location of its line, were reserved by competent authority, for the benefit of an earlier grant, and hence were not embraced within the operation of the grant to the Pacific Company. We have carefully examined all the authorities cited by counsel for the appellants, and find nothing in conflict with the views here expressed. The conclusion reached makes it unnecessary to consider the other questions presented. There is no error in the decree, and it will be affirmed, at the cost of the appellants.

WALTERS et al. v. WESTERN & A. R. CO. (STEWART, Intervener).

(Circuit Court, N. D. Georgia. June 1, 1895.)

No. 358.

1. TAXATION—EXEMPTIONS.

The state of Georgia, being the owner of a railroad, leased the same to certain persons who were formed into a body corporate and granted immunity from taxation upon the property used for railroad purposes, except as to a tax of one-half of 1 per cent. on their net income. Upon the expiration of the lease, when the property was about to be surrendered back to the state, the assets of the company were placed in the hands of receivers, to wind up its affairs, who thereafter received and held considerable amounts of money and other property. *Held*, that the immunity from taxation ceased with the termination of the lease and expiration of the charter, and that the property in the receivers' hands was subject to taxation.

2. SAME—PENALTY—LACHES.

Held, further, that, as the receivers had made no return of the property in their hands, the taxing officers would not be held barred from enforcing their claim because it was not presented within a period fixed by the court for the presentation of claims against the receivers; but, as they had made no application for the payment of the tax, they would not be permitted to exact a penalty for delay in payment.

This was an intervening petition, filed by A. P. Stewart on behalf of the state of Georgia and county of Fulton, and by the city of Atlanta, in the cause of William T. Walters against the Western & Atlantic Railroad Company, to enforce the payment of certain taxes by the receivers appointed in that cause. The receivers demurred to the petition.

A. P. Stewart and L. S. Rosser, for intervener.
Anderson & Colville, for city of Atlanta.
Payne & Tye, for defendant.

NEWMAN, District Judge. Taxation is the rule, and immunity from taxation is the exception. It is governmental policy that all

property should bear its just proportion of the public burden. Acts of the legislature exempting property from taxation are strictly construed, as to the extent of the exemption, in favor of the government and against the exemption. The fact that property is in the hands of a receiver of a court does not exempt it from taxation. The foregoing well-recognized and fundamental rules are stated for the purpose of applying them to the following state of facts: The state of Georgia is the owner of the Western & Atlantic Railroad, a line of road extending from Atlanta to Chattanooga, Tenn. On the 24th day of October, 1870, the legislature of the state passed an act for the lease of this road, and providing for the incorporation of the lessees as a body politic, and granting them certain immunities and exemptions, among which were, as construed by the supreme court of the state, exemption from taxation, except as to a tax of one-half of 1 per cent. on their net income; the exemption to be confined, however, to property used for railroad purposes. The lease in pursuance of this act was executed on the 27th day of December, 1870, the lessees becoming a body corporate by the provisions of the act referred to, under the name of the Western & Atlantic Railroad Company. The road was operated by that company during the lease which, having expired on the 27th day of December, 1890, and the property about to be surrendered back to the state, on the application to this court, by certain shareholders, the assets of the company were placed in the hands of receivers, who were to hold such assets and wind up the affairs of the company for the benefit of the creditors and shareholders. The receivers have had in their hands considerable funds from time to time, but have not returned the same for taxation to the state, county, or city of Atlanta, in which city the office of the receivers is, and where the principal office of the Western & Atlantic Railroad Company was located. The state, county of Fulton, and city of Atlanta now bring their petition in this court and ask to be allowed to intervene in the equity cause to have the amount of the taxes due on the funds in the hands of the receivers ascertained, and pray an order requiring the receivers to pay the same. To this application demurrers have been filed by the receivers, and the question before the court is on these demurrers. The matter for determination is the liability of this property for taxes. The question raised by the demurrers, simply stated, is that, the Western & Atlantic Railroad Company having been exempt from taxation except on its net income, and there having been no net income since the expiration of the lease and its charter, these assets are not subject to taxation at all. It is urged that the state, having invited these lessees to take its property in charge and operate it, and having granted certain immunities in connection with the contract of lease, will not now be allowed, before this fund resulting from its operation can go into the hands of the shareholders, to subject it to taxation. The same contention applies, of course, to the county and city as subordinate to the state. Applying the well-settled rule that exemptions from taxation are strictly construed against the exemption, it is clear that the immunity granted in this instance ceased with the termination of the lease and the expiration of the charter. It would not be ex-

tended beyond its necessary terms. It is said, however, that where the state undertakes to enter into a contract in reference to property it descends from its position as a sovereign, and must be treated as an individual entering into a contract. The authorities cited in support of this view refer to exemptions granted where benefits are received by the state as consideration for the exemption. The lease of the Western & Atlantic Railroad Company was for what must have been treated as a fair rental value of the property, and the exemption from taxation was the same as that granted to the Central Railroad, the Georgia Railroad & Banking Company, and the Macon & Western Railroad, and simply places it on the same footing with other railroads in the state. The legislature does not seem to have intended to do more than to treat it like other railroad corporations. The lease of the property by the state as the owner thereof, and the terms and conditions of the same, was one thing, and as to that, doubtless, the state's act and its contract would be considered as that of an individual. The exemption from taxation, however, was not the act of the state in its capacity as owner of the property, but in its capacity as a sovereign, and no good reason is perceived, under the facts of this case, why the exemption should have a different construction than that of any other tax exemption. Especially is this true when the extent of the exemption was the same as that allowed to several other railroad corporations. Construed in this way, it appears that the period for which the exemption was granted is ended. There is no net income so that the tax of one-half of 1 per cent. can be collected from that source, and no good reason is perceived why the property is not subject to taxation like any other property in the state. Certain statutes of the state, as contained in the Code of Georgia, have been cited in argument. Section 799 is as follows:

"All real and personal estate, whether owned by individuals or corporations, resident or nonresident, are liable to taxation, unless specially exempted."

Section 803 is in this language:

"Lands or other property belonging to citizens of the United States non resident of this state, can not be taxed higher than the property of residents, but all the property of such non residents, whether their property be real or personal, in this state, must pay taxes on the same herein."

This property, if it is subject to taxation at all, must be taxed as a lump sum in the hands of the receivers. It is not a question, such as has been argued, of the taxation of intangible shares in a corporation at the residence of the stockholder, but the question in issue, according to these petitions, is of the taxation of material, visible property. It is, to a large extent, actual money, as alleged, held by the receivers in the state, county, and city claiming the tax. It is not different from any other property in the hands of receivers of court, which all the authorities agree is subject to taxation in the locality where it is held by these officers of court. In my opinion, these receivers should have returned this property for taxation to the state, county, and city; and, having failed to do so, the court will require them to pay such amount as should have

been paid at the proper time. On the 26th day of May, 1893, the court passed an order with reference to the filing of claims against the Western & Atlantic Railroad Company, as follows:

"It being made to appear to the court that this cause has been pending in this court since the 20th day of December, 1890, and all parties having claims against the defendant have had since then to file the same, and it being desirable to end the litigation and distribute the assets as early as possible, it is, upon motion of complainant's solicitor, ordered, adjudged, and decreed that all persons having claims or demands against the late the Western & Atlantic Railroad Company, defendant in said cause, intervene in said cause and file a full and complete statement of their said claims or demands on or before the rules day in August, 1893, so that the same may be heard and adjudged. It is further ordered, adjudged, and decreed that all claims or demands not made as provided herein be and the same are barred from participating in any part of the assets of said the late the Western & Atlantic Railroad Company. It is further ordered, adjudged, and decreed that the receivers in said cause cause notice to be published for a period of sixty days prior to said rules day in August in some one of the daily papers published in the city of Atlanta."

It is contended that, under the terms of this order, these claims for taxes are presented too late. It may be true that the officers charged with their collection have not been as diligent as they might have been in presenting their claims for the same to the court, yet it is equally true that under the view entertained by the court these receivers should have returned the property for taxation, or at least have asked the direction of the court in respect to it. Officers charged with the collection of the state and municipal revenue must depend, to a large extent, upon those whose duty it is to make return of the same. Especially is this true as to the kind of property in the hands of these receivers. These petitions will be entertained, therefore, and the amount of tax due by the receivers on the assets in their hands determined. The court will not, however, entertain these claims for double taxation. The petitions set out that, under the law, persons failing to return their property for taxation in a certain time are subject to double taxation. If the attention of the court had been called to this matter by proper petition it would have been disposed of long ago, and there can be no possible ground, on a petition presented at this late date, to ask for a penalty against these receivers.

An answer has been filed in this case for the complainants in the bill, by their solicitor, which it is unnecessary to consider at present, as the case is now heard on demurrer filed by the receivers to the petitions. It does raise questions of fact which will be important for consideration hereafter as to the extent to which the assets can be taxed. This legal question is raised by the answer, that the funds in the hands of the receivers is net income, and that the net income has already paid its tax from year to year, and should not be subject to additional taxation. This position appears untenable. The company was subject to a tax of one-half of 1 per cent. on its net income during the lease. The lease expired in 1890, and this property has been held during these years in the hands of the receivers, as has been stated, and it seems to be true that it is net income or profit, as claimed, arising from the operation of the railroad by the company; but it comes back to the same question

at last,—that it is property in the hands of receivers of court, as to which there is no exemption if the exemption it had, strictly construed, ended with the lease. The facts of this case are so peculiar and unusual that the decisions which have been cited have been of little use in determining it. It is left after all to be controlled by the general principles stated in the beginning of this opinion. The case has been held up for some time, and doubts have been entertained as to the correct solution of the matter, but if this condition of mind still existed it would not justify the court in deciding against the right to taxation. The existence of the exemption, under all the authorities, must appear beyond a reasonable doubt, to justify its allowance. An extract from the opinion of the court in the case of Bank v. Tennessee, 104 U. S. 493, expresses the well-settled rule on this subject in this way:

"That statutes imposing restrictions upon the taxing power of the state, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed, is a familiar rule. Against the power nothing is to be taken by inference and presumption. Where a doubt arises as to the existence of the restriction, it is to be decided in favor of the state."

It certainly cannot be said that the right of this property in the hands of the receivers to be exempt from taxation is free from doubt. The conclusion is that the assets in the hands of these receivers are subject to taxation, but not to double taxation or penalty, and that the order of May 26, 1893, will not be enforced as against these claims. The demurrer will be overruled except as to the claim of double tax.

NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO WATER CO. et al.

(District Court, E. D. Wisconsin. July 17, 1895.)

1. JUDGMENTS—PRIVIES—STOCKHOLDERS IN CORPORATION.
   Persons who, at the time of the commencement of a suit against a corporation and the rendition of judgment therein, hold, as collateral security, stock in such corporation, which has been transferred to them on the books of the corporation, and who participate actively in the management of such corporation, are so far stockholders as to be privies to the judgment, and estopped to attack it in a collateral proceeding.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CHANGE OF RULING.
   When a federal court has made a decision respecting the rights of parties before it in particular property, based on the rulings of the highest court of a state as to the interpretation of a statute of such state, and the state court afterwards reverses its ruling, it is not the duty of the federal court to reverse its decision as to the rights of the parties in the same property in proceedings subsequently arising.

3. CORPORATIONS — RATIFICATION OF UNAUTHORIZED ACTS — RIGHTS OF THIRD PARTIES.
   An instrument claimed to be a mortgage was executed on September 13th by officers of a corporation, without authority of the board of directors and without the corporate seal. It was not delivered on that day, but on September 15th was placed with a bank which, on that or the next day, made an advance of money. On September 15th a mechanic's lien accrued on the property alleged to be covered by such mortgage. On October 29th the mortgage was ratified by the directors and stockholders of the cor-

poration, and a formal instrument executed under the corporate seal, antedated to September 13th. *Held*, that such mortgage could not operate to create a lien superior to the mechanic's lien accruing before the ratification.

4. SAME—LIABILITY OF STOCKHOLDERS.
A corporation was organized in July, 1890, and its stock subscribed but not paid for. In September the corporation agreed with A. and W. that its entire stock should be transferred to them as collateral security for moneys to be advanced. On October 2d certificates of stock were issued to the subscribers, and immediately transferred by them in blank to A. and W. Soon after, upon request of A. and W., these certificates were surrendered and new ones issued to A. and W. in their own names, for which they gave receipts to the original subscribers stating that such stock was held by them as collateral for moneys to be advanced. A. and W. also subsequently caused the stubs of their certificates to be indorsed with memoranda that the shares were held as collateral. In January, 1891, the original subscribers assigned all their interest in the stock and in the company to dummies nominated by A. and W., and were thereupon released from liability as indorsers on notes given to A. and W. for advances to the corporation, which was thereafter actually managed and controlled by A. and W. *Held*, that A. and W. became by these transactions the absolute owners of the stock, and liable for the amounts unpaid thereon to the extent necessary to discharge the indebtedness of the corporation.

Miller, Noyes, Miller & Wahl, for complainant.
W. H. Webster, for defendants.

JENKINS, Circuit Judge. I have given due consideration to the evidence and the able arguments submitted at the hearing. I deem it essential only to state as briefly as may be the conclusions to which I have arrived, without stopping to elaborate the reasons compelling thereto.

First. I cannot doubt that Andrews and Whitcomb are concluded by the mechanic's lien decree rendered October 3, 1892, against the Oconto Water Company, so far as the determination of the lien is concerned, if that decree ought now to be enforced,—a question subsequently considered. A judgment is conclusive against the parties and privies, unless impeached for fraud or want of jurisdiction. A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding. Sanger v. Upton, 91 U. S. 56, 59; Graham v. Railroad Co., 118 U. S. 161, 177, 6 Sup. Ct. 1009; Hawkins v. Glenn, 131 U. S. 319, 329, 9 Sup. Ct. 739; Glenn v. Liggett, 135 U. S. 533, 542, 10 Sup. Ct. 867; Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co., 46 Fed. 584, 587; Bennett v. Glenn, 8 U. S. App. 419, 5 C. C. A. 353, 55 Fed. 956. Garland and Todd, who held $99,700 of the capital stock out of a total of $100,000 of capital, transferred their stock to Andrews and Whitcomb as collateral security. This stock was surrendered to the company and, at the request of Andrews and Whitcomb, new certificates for a like amount of stock were issued to them on the 18th day of October, 1890. Such stock has since stood and now stands in their names. The mechanic's lien suit was brought on the 30th day of January, 1891. At the commencement of and during the pendency of that suit, not only were Andrews and Whitcomb the holders of the stock standing in their

names on the books of the company, but they actually controlled the business of the corporation. As appears by the letter book of the company, offered in evidence, Mr. Andrews conducted the correspondence,—sometimes in his own name, sometimes in the name of the corporation. It is true they held this stock all this time as collateral security, but it is also true that they actually participated in, and in fact controlled, the policy and operations of the company at and after the commencement of the suit. The employment of counsel to defend that suit, if not actually authorized by them, could not, under the circumstances, have been unknown to them and unapproved by them. Counsel defending that suit was at the time, and since has been, the counsel of Andrews and Whitcomb. Holding the stock, although as collateral security, coupled with the active management of the affairs of the corporation, in my judgment, constitute them stockholders, so far as to conclude them by the judgment rendered against the company. They are not in a position to attack that judgment collaterally. The case of Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. 590, is not in conflict. That was a case of bondholders, not of stockholders. In such case no like privity exists upon which to rest the conclusiveness of the judgment.

Second. In National Foundry & Pipe Works v. Oconto Water Co., 52 Fed 43, affirmed, upon appeal, 7 C. C. A. 603, 59 Fed. 19, involving the mechanic's lien claim here asserted, this court held that under the law of Wisconsin a mechanic's lien existed for the materials furnished the Oconto Water Company in the construction of its plant. Since the affirmance of that decree by the circuit court of appeals, the supreme court of Wisconsin, in the case of Chapman Valve Manuf'g Co. v. Oconto Water Co., 60 N. W. 1004, with respect to the construction of the plant in question, has held that no mechanic's lien exists under the laws of Wisconsin for labor and supplies furnished a quasi public corporation furnishing water supply to the public. This decision reverses the former holdings of that court referred to in the opinion of this court reported in 52 Fed. 43, and in conformity to which holdings that decision was made, and changes the public policy of the state in respect to the application of the mechanic's lien law to a quasi public corporation. The question is therefore sharply presented whether this court should, in regard to this particular property, in respect to which it has determined that a lien exists, recede from its position in deference to the changed position of the supreme court of Wisconsin, and should follow its latest holdings. It is without question the duty of the federal court to avoid conflict with the well-settled decisions of the state courts, and they will lean towards an agreement of views if the question is balanced with doubt; but where, at the time of a decision by a federal court, there has been no settled construction by the supreme court of a state of a statute of that state, the duty is devolved upon the federal court to determine that question independently, and a federal court is not called upon in such a case to reverse its judgment in that case because the supreme court of the state has subsequently reached a different conclusion. It is much more the duty of a federal court to stand by its judgment when, as here, the decision of this court was

founded upon the construction placed by the supreme court of the state upon this very statute, applying it to public corporations by a series of decisions covering a period of nearly 30 years, declaring it to be the public policy of the state that the mechanic's lien law should extend to and include the property whether of public or private corporations, except property owned by a municipal subdivision of the state. Hill v. Railroad Co., 11 Wis. 215; Purtell v. Forge & Bolt Co., 74 Wis. 132, 42 N. W. 265. It cannot be doubted that these cases are in fact, although not in terms, overruled by the decisions referred to and by the principles asserted in Chicago, M. & St. P. Ry. Co. v. City of Milwaukee (Wis.) 62 N. W. 417, 419, 420. It is, of course, competent for the supreme court of the state to recede from its former rulings, and to establish a different policy for the state. It will doubtless be proper for this court, in any case hereafter arising, where rights have accrued subsequent to the last decision of the supreme court of the state upon the question, to give due consideration to the later rulings of that tribunal. But, with respect to the rights here involved, which had accrued before and had been determined by this court prior to these later decisions, I can only say in the language of the supreme court of the United States, that:

"It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy, and then simply register their decision, or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view we should gladly do so, but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion." Burgess v. Seligman, 107 U. S. 20, 35, 2 Sup. Ct. 10.

I am therefore constrained to the conclusion that it is my duty in this case to adhere to my former decision, to the effect that the complainant and R. D. Wood & Co. were entitled to mechanics' liens upon this property.

Third. The instrument claimed to be a mortgage, under which Andrews and Whitcomb assert their right, is dated September 13, 1890, signed by Garland as president and Todd as secretary of the Oconto Water Company. Its execution was not authorized by the board of directors, nor was the instrument sealed with the seal of the company. It was not delivered on that day, but was placed with the bank on the 15th, on which or on the subsequent day an advance of money was made by the bank on a draft of Andrews and Whitcomb on Maine, which was paid by the latter some few days thereafter. The 15th of September was the date that the mechanic's lien accrued upon the property, as decreed in favor of the complainant and R. D. Wood & Co., although it appears from the stipulation filed that the first delivery of material to the Oconto Water Company was on the 8th of September. This instrument of mortgage, executed by Garland, was formally ratified at a meeting of the stockholders of the company on the 29th of October, 1890, and by the board of directors of the company on the same day, and at that time the formal contract or mortgage was executed by the officers of and under the seal of the company, but antedated to September 13th. Assuming this instrument to cover all the property of the company, it could not oper-

ate to create a superior lien as against creditors whose rights accrued prior to such ratification. It is said in Cook v. Tullis, 18 Wall. 332, 338:

"The general rule as to the effect of a ratification by one of the unauthorized act of another, respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification: The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able, not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."

See, also, Galloway v. Hamilton, 68 Wis. 651, 32 N. W. 636.

I therefore conclude that the liens of the complainant and of R. D. Wood & Co. are superior and paramount to any rights of Andrews and Whitcomb in the property, that their judgments are valid and effectual, and should be enforced.

Fourth. An interesting question to be determined is whether, under the circumstances disclosed by the evidence, Andrews and Whitcomb are liable to the creditors of the corporation as stockholders of the company. It is essential that the facts should be precisely stated, with a view to a correct application of the law to the case in hand. At the organization of the company in July, 1890, its entire capital stock was subscribed for as follows: By C. C. Garland, 990 shares; by F. H. Todd, 7 shares; by F. B. Barnes, J. W. McCabe and W. E. Krippene, 1 share each. Certificates of stock were issued to these parties, respectively, on the 1st and 2d days of October, 1890. It may be fairly said that none of this stock was actually paid for by parties subscribing, and that they were severally liable to the company and its creditors for the amount of their respective subscriptions. By the memorandum contract of the 13th day of September it was agreed by the company that the entire $100,000 of stock should be transferred to Andrews and Whitcomb as collateral security for the money to be advanced. On the 2d day of October, 1890, Garland sent to Andrews and Whitcomb the certificates issued to himself and to Todd, transferred in blank, and promised to remit the three certificates for one share each within a few days, unless Andrews and Whitcomb should prefer that they should be retained by Garland. On the 7th day of October Andrews and Whitcomb returned the certificates, requiring that the stock should be transferred to themselves upon the books of the company. On the 18th day of October, 1890, Garland surrendered those certificates, and the company issued certificates for 97 shares to Andrews and Whitcomb, and Garland forwarded the certificates to them. On the 22d day of October, 1890, Andrews and Whitcomb executed to Garland a receipt therefor, acknowledging the receipt from Garland individually of certificates representing 997 shares of the capital stock of the company, and stating that such stock was held as collateral to secure the payment of all moneys which may be advanced under contract, Exhibit A thereto attached, which contract was like the memorandum agreement of September 13th. On the 20th day of December, 1890, at the request of Andrews and

Whitcomb, the secretary of the company indorsed upon the appropriate stubs of the stock book memoranda that the shares of stock represented were owned by Garland, and issued to Andrews and Whitcomb merely as collateral. On January 12, 1891, Andrews and Whitcomb being dissatisfied with Garland's management of the company declined to arrange for the advance of any further funds unless his connection was severed, and it was arranged that Garland should resign as president and as director of the company and assign all of his interest in the stock and all his interest of every kind in the company to one George W. Sturtevant, in consideration of which Andrews and Whitcomb released Garland from liability as indorser upon the notes given them by the Oconto Water Company to the amount of $40,000 for so much money loaned the company. At the same time Wheeler, Elkins, and Todd, who had on October 15, 1890, respectively, become the transferees of the shares of stock issued to Barnes, McCabe, and Krippene of one share each, assigned their respective shares of stock as follows: Wheeler assigned to the defendant Whitcomb, Elkins assigned to S. W. Ford, and Todd assigned to the defendant Andrews. Neither Sturtevant nor Ford paid any consideration for the stock. They were mere dummies in the enterprise, acting in the interest of Andrews and Whitcomb, and the transfer was made to give the latter full control of the management of the corporation, which they thereafter exercised. By this transaction Andrews and Whitcomb became the absolute owners of the stock. The transfer to Sturtevant was not recorded upon the books of the company, although he appears by the minutes to have acted at the meetings as the holder of the 990 shares of stock, but in fact acted as the dummy and agent of Andrews and Whitcomb.

It has been repeatedly held that the transferee of stock who causes the transfer to be made to himself on the books of a corporation, although he holds it merely as collateral security for a debt of his transferer, is liable for unpaid balances thereon due to the company or to the creditors of the company. Pullman v. Upton, 96 U. S. 328; Bank v. Case, 99 U. S. 631; Sleeper v. Goodwin, 67 Wis. 592, 31 N. W. 335. But it is said here that the company itself pledged this stock to Andrews and Whitcomb for a debt by the company to them. It is true that by the agreement dated September 13th, the company undertook to make immediate transfer in trust to Andrews and Whitcomb of its entire capital stock as collateral. The true reading of that agreement, judged in the light of the subsequent conduct of the parties, is that the company agreed to procure the subscribers to transfer to Andrews and Whitcomb all the stock of the company. Andrews and Whitcomb took the stock, not from the company, but from the stock subscribers holding it. They required for their protection against the creditors of the stockholders an absolute transfer of the stock on the stock book of the company, but they were careful afterwards to have it recognized that they held that stock merely as collateral, and that Garland and Todd owned the stock subject to the debt for which it was pledged.

If the case rested here, there might be reason to uphold the con-

tention that the authorities cited, holding liability of the pledgee of the stock, are distinguishable from the case in hand. In those cases the pledgees received their stock directly from the stockholders, and as collateral to the debt due by the stockholders. Here the stock was caused to be transferred by the company as collateral to a liability of the company, the stockholders acquiescing to enable the company to keep its obligation. Creditors stand in the right of the corporation, and they can only enforce the obligation of the stockholder where the corporation could do so. This I think is the extent to which the case of Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, has gone. The whole discussion there was whether persons to whom a corporation pledges its stock as collateral were within the exemption of the statute of Missouri which provided that:

"No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of the executor, administrator, guardian, or trustee shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such funds, would have been if he had been living and competent to act, and held the stock in his own name." 1 Wag. St. c. 37, art. 2, § 9.

The court held that the case was within the exemption of the statute, notwithstanding the supreme court of Missouri, after the decision of the case in the court below, had taken a contrary view. It will be observed that the statute there under consideration carefully provided that the liability to creditors should remain somewhere, and that the holder of the stock merely as collateral should not be held. There the corporation pledged its unissued and unsubscribed stock; here the company caused to be pledged stock issued to subscribers. There the corporation had no recourse to subscribers; here it had. One of the reasons assigned for holding the transferee of stock liable is "that the creditors of the bankrupt company are entitled to the whole capital of the bankrupt as a fund for the payment of the debts due them. This they cannot have if the transferee of the shares is not responsible for whatever remains unpaid upon his share, for by the transfer on the books of the corporation the former owner is discharged." Pullman v. Upton, supra. Here Garland and the other original owners of the stock had simply consented to the transfer of their stock as collateral. Under the Missouri statute they would be, in law, the owners of it, subject only to the equities of Andrews and Whitcomb, and would remain liable to the company for whatever was unpaid upon that stock, notwithstanding its transfer. By the transaction of January 12, 1891, Garland and the others conveyed their equitable interest in that stock in fact to Andrews and Whitcomb, although nominally to Sturtevant and others. The use of the names of Sturtevant and Todd was a mere makeshift, the whole purpose of the transaction being, in consideration of the release of Garland from his indorsement and of his resignation as president and director, to put absolutely in Andrews and Whitcomb the ownership of that stock. The transfer

was impressed with a secret trust in favor of Andrews and Whitcomb. A stockholder cannot escape liability by the use of the name of a dummy. Aultman's Appeal, 98 Pa. St. 505; Roman v. Fry, 5 J. J. Marsh. 634. That such was the transaction is manifest from the fact that Andrews and Whitcomb thereafter took actual management and control of the corporation. I think, therefore, that by that transaction they became the absolute owners of the stock, and with it took upon themselves the liability which the law imposes upon such owners, even if, as is not the case, a statute like that of the state of Missouri obtained in the state of Wisconsin.

In Pullman v. Upton, supra, it was asserted that, by the transfer upon the books of the corporation "the former owner is discharged." If this be correct, in the absence of any statute like that of Missouri, Garland and his co-subscribers were discharged from liability to stockholders upon transfer of their stock to Andrews and Whitcomb, and unless the latter be liable the recourse of creditors would be gone,—a result which the law would not favor. But, when Garland and Todd subsequently dispossessed themselves of all interest in the stock and property of the company, nominally to Sturtevant but actually to Andrews and Whitcomb, the latter became the absolute owners of the stock standing in their names upon the books of the company, and with such absolute ownership assumed the liability to creditors which the law imposes upon such ownership, if they were not primarily liable as holders of the stock as collateral security. I conclude, therefore, that Andrews and Whitcomb are liable for all unpaid amounts upon the stock standing in their name, so far as may be necessary to discharge the indebtedness of the company.

Fifth. I am of opinion that the instruments executed by the company to Andrews and Whitcomb were made in good faith and for a valuable consideration,—that they were not withheld from record by their procurement, nor with their consent, nor in fraud of creditors. I need not enter into discussion of the vexed question of what passed to Andrews and Whitcomb under these instruments, because the conclusions heretofore suggested furnish the complainant and the intervening creditors an adequate remedy, and render any decision of that subject unnecessary and perhaps unprofitable. I shall assume for the purposes of the decree that the instrument conveying the franchise also conveyed the plant.

Sixth. The bonds issued are, in accordance with the previous ruling upon a motion for injunction, and in accordance with the decision of the supreme court of the state, held to be void, and they should be delivered up to be canceled.

Seventh. I need not decide the question whether Andrews and Whitcomb are entitled in equity to any priority over the lien of the complainant and R. D. Wood & Co. by reason of their subsequent advances for the completion of the plant. That question passes out of the case upon the holding of their personal responsibility, and under the decree that must necessarily be entered upon the conclusions which I have reached.

THE SEGURANCA.

GUIMARAES et al. v. PROCEEDS OF THE SEGURANCA.

(District Court, S. D. New York. May 2, 1895.)

NONDELIVERY OF OIL CARGO—LEAKAGE—LIGHTERAGE—SHIPPER'S RISK — GOVERNMENT CUSTODY—CONSIGNEE'S LACHES — CUSTOM HOUSE REPORT NOT EVIDENCE.

Five thousand cases of oil were deliverable at Rio in lighters at shipper's risk; the local regulations required it to be put in the custody of customs officers till the duties were paid. The consignees, though duly notified of the ship's delivery in lighters to the customs authorities, delayed for nine weeks to pay the duties and take the oil ashore, and then claimed nondelivery of 1,132 cases, and loss and damage to other cases. The ship proved delivery into lighters and to the government officers of all the oil save 102 cases broken: *Held*, that the delivery to the officers in lighters was a good delivery, and that the ship was responsible only for loss by breakage and from leakage for a reasonable time in which to pay the duties and land the goods; that the custom house report of missing cases nine weeks after, was not competent evidence of nondelivery; and that upon the whole evidence a loss of 250 cases only was chargeable against the ship.

This was a libel by Zelmira de Castro Guimaraes, and others, against the proceeds of the steamship Seguranca, to recover for alleged loss and damage upon a consignment of oil in cases.

Cary & Whitridge and W. P. Butler, for petitioners.
Carter & Ledyard and E. L. Baylies, for mortgagee of steamer.

BROWN, District Judge. The above libel was filed against the proceeds of the steamer Seguranca deposited in the registry of this court, for the recovery of an alleged loss and damage of part of a consignment of 5,000 cases of oil shipped from New York to Rio on board the Seguranca in January, 1893. The claim is contested by the Atlantic Trust Company, a mortgagee of the vessel, which claims the proceeds in the registry.

The petition alleges the nondelivery of 1,132 cases out of the 5,000; that 1,005 other cases were damaged, so that a part of contents was lost; and that 209 cans were delivered without the wooden cases which should have inclosed them.

The steamer arrived at Rio in February, and owing to her draft of water, her cargo had to be discharged by lighters. The cases of oil being inflammable, were required, under the local authority, to be delivered at the government warehouses, unless at once removed and the duties paid. The twelfth clause of the bill of lading for the oil in question provided, that it should be "lightered ashore at shipper's risk, but at company's expense, provided it did not lie in lighters or hulks for longer than 48 hours after it is discharged into said lighters, and for demurrage thereafter." The oil was all discharged from the ship into lighters by the 24th of February; and there is general testimony on behalf of the ship from those who took part in the delivery, and superintended it, that all the oil was delivered into the lighters in accordance with the manifest, and that