from 1868 to 1881, the period covered by these deeds, would have disclosed to the claimants a dealing with all this property by its possessors utterly inconsistent with anything but their exclusive ownership. A large surburban village was constructed on the tract, with all the numerous recorded changes of ownership and permanent improvements which that implies. The claimants would hardly be justified in supposing that small householders, who had put their savings into town lots and brick houses, were doing so as tenants in common with unknown heirs, and in subserviency to their title. And this suggests another aspect of the case, which renders it still more difficult to sustain the theory that defendants purged their disseisin of claimants by accepting deeds from other heirs of the brothers and sisters of William Barr, Sr., or in any other way. A close examination of this entire record satisfies the court that when Morgan and his grantees filed their bills to quiet their title, in 1847, they supposed they had acquired all the outstanding interests of the heirs of the brothers and sisters of William Barr, Sr. Morgan so stated in his bill, and his acts and those of his grantees manifest their confidence in this belief. Indeed, when Morgan received the first Wood deed, it is probable that he then thought he had the title of all the heirs. The recital in the Wood deed, and the character of Morgan's deed to Considine, indicate as much. That Morgan should have been so much mistaken as the facts found by the court below indicate is not strange when we consider the difficulty that the parties to this record have had in tracing the true history of the various and remote branches of this numerous and widely-spread family in these days of quick communications. The egregious lapses of memory in many witnesses as to near members of the family, and the uncertainty of the claimants themselves as to their immediate relatives, show that it was entirely possible for Morgan and Wood, in 1850 and later, to have been misled as to the number and identity of the descendants of William Barr's brothers and sisters, who were far along in life when the century began. In 1858, it does appear, from his petition to perpetuate testimony, that he knew that the interests of some of the heirs of Samuel Barr were outstanding, but he and his grantees bought these as soon as the decision of the supreme court made it possible. The deposition of Maria Bigelow, taken on the petition of 1858, showed that the number of William Barr, Sr.'s, brothers and sisters was six. Her statements made it probable that the lines of two, and perhaps three, had become extinct. The finding in the Poor-Considine case was made on the basis of four inheriting lines, and in 1871 the deed of Andrew Barr's alleged heirs recited the shares on the basis of five such lines. The court below found that there were six. The sixth line was made by proof of a will by one brother who was known to have died without issue. The identity of this testator with the brother of William Barr, Sr., was fiercely contested, and the evidence presented a close question, both on its weight and competency. The evidence of the descent of those claimants who claim under Sarah or Mary Grafton, a sister of William Barr, Sr., though found

by the court below to be sufficient to sustain it, is by no means so conclusive, after years of careful preparation by acute and industrious counsel, that Morgan and his grantees, with the lights they had, might not reasonably have supposed that this line had become extinct. We quite concur with the learned judge who delivered the opinion of the court below in thinking that the deeds which Morgan and his grantees received from the Barr heirs covered those of all the heirs they could find or hear of. It was not until the decision in the case of Poor v. Considine by the supreme court of the United States had been spread abroad in the published reports of that court, and had shown the chance of an inheritance to any one bearing the name of Barr who traced his descent back to Pennsylvania, that these slumbering claimants began to appear from distant states. Till then they were as ignorant of their interests as the defendants were of their existence. Morgan and his grantees, it now appears, had actually acquired in 1860 a large part of the share descending to each of four lines, and then had deeds from other claimants, whose descent and interest Mrs. Bigelow was unable to fix in 1858, and which cannot even now be satisfactorily established. These circumstances make it entirely reasonable and probable that Morgan and his grantees in good faith believed, as they said they did, in 1847, in 1858, and in 1863, that they had acquired the interests of all the heirs of William Barr, Sr.'s, brothers and sisters, with the exception of a small interest which became theirs in 1868. From time to time, as new claimants appeared, they bought them off to round out their title, made defective by this new development, and with no intention of admitting, and not in fact believing, that there were other interests outstanding of the same kind. Each settlement after 1868 was made by the harassed possessors with the assurance that the interest purchased was the last. Indeed, it is in evidence that the counsel who had negotiated the last purchase declined employment by the present claimants, or some of them, because he had made such strong representations to the possessors that his clients were the only heirs whose shares had not been acquired. The court below expressly found that the defendants had acquired all the outstanding interests they could find or hear of. We have already pointed out why this series of purchases cannot be construed into a change in the adverse holding by Morgan and his grantees against all the world, in view of the course of their dealings with the property, which continued the same from 1860 to 1886. But what we now wish to emphasize is that even if these purchases are to be construed as admissions that the vendors had titles superior to that of the vendees, and as controlling evidence of an intention on the part of the vendees to claim under the title thus acquired, they certainly could not be held to be admissions of title in the claimants, and evidence of an intention to claim under them, whose existence and heirship they did not then suspect, and the heirship of many of whom, on the evidence adduced, they even now deny. A claim of title under an ancestor is not a claim of title under the heir, when the heirship is not known or admitted. Acquiescence in the title of one heir is entirely consistent with a possession ad-

verse to a coheir, when the fact of the relationship between the two is unsuspected or is the point in dispute. The fact of heirship is as material to a title by descent as the existence or validity of a deed to a title by purchase, and acquiescence in the title of the ancestor and some of his heirs is no more an acknowledgment of the title of his unknown heirs than would the recognition of the title of a grantor and some of his grantees be an acknowledgment of the title of other grantees claiming under a deed, the existence, genuineness, or validity of which was not admitted. The contention of the claimants and the holding of the court below on this branch of the case, when reduced to their last logical analysis, amount to this: that when one in the exclusive possession of a tract of land, claiming it in fee under the known heirs of a former owner, is confronted with the claim of one asserting an interest in the property as an hitherto unknown heir of such former owner, and, through fear of its validity, buys it in the confident belief that it is the only outstanding interest, he thereby becomes the avowed cotenant of all other heirs of the same former owner, of whose existence he has no suspicion, so that his possession forever after is their possession. If this is the law, surely it is a trap for the prudent as well as the unwary. Under such circumstances, to impose on the defendants obligations to the claimants which grow out of the fiduciary relation existing between avowed tenants in common, merely because defendants were trying to strengthen their title as its defects became revealed to them and to avoid the chance of litigation, seems to us to work against them great injustice.

Some argument is made to show that Morgan and his grantees ought to have known of the heirship of complainants and cross-complainants, if they did not, and that if they had used due diligence they might have discovered it. It would be a new doctrine, indeed, if persons in possession under a most notorious, distinct, and explicit claim of title in fee, in order to make their possession adverse to all the world, were bound to show the use on their part of due diligence in hunting up unknown heirs, and their failure to discover them. In Foulke v. Bond, 41 N. J. Law, 527, the court of errors and appeals of New Jersey, in considering a case not unlike this, on its facts, under a statute in which good faith is a necessary element of successful adverse possession, though it does not seem to be in Ohio (Yetzer v. Thoman, 17 Ohio St. 130, 132, 133), used this language:

"It is contended on the part of plaintiff that the defendant had constructive notice of the imperfection in his title, on the principle that a party is legally chargeable with knowledge of the contents of the deeds in his claim of title, and therefore was not a purchaser bona fide. But the doctrine of constructive notice does not apply in such a case. There must be proof of actual fraud. Mere neglect to inquire into the state of the title is not sufficient evidence of fraud. Nor does the rule that what is sufficient to put a party on inquiry operates as notice apply in such case. There must be clear and satisfactory proof of knowledge that the title supposed to be acquired was invalid, accompanied by proof of an intent to defraud the real owner. Clapp v. Bromagham, 9 Cow. 531. If the law were otherwise under the system of recording adopted in this country, a disseisin of one tenant in common by a conveyance of the entire estate by his cotenant would be quite impossible." Pages 542, 543.

The court of appeals of New York, in Sands v. Hughes, 53 N. Y. 287, said:

"The mere taking by a purchaser of a bad title is not fraud; nor is the doctrine of constructive notice of defects in the title, arising out of neglect in the purchaser to investigate, applicable on the question of adverse possession. This was decided by the court of errors in the case of Clapp v. Bromagham, 9 Cow. 558, where a deed from the committee of a lunatic and a deed from one of several tenants in common were held each to be a good basis for an adverse possession in the grantor."

But, even if due diligence were necessary, the court below, in its finding already alluded to, acquitted the defendants of failure to exercise it. The result is that the adverse possession of Morgan and his grantees against claimants began in 1860, when Maria Bigelow's life estate determined by her death, and ripened into an indefeasible title some five years before this suit was brought, and became and is a complete bar to this action.

It is claimed that the case of some of the cross complainants is taken out of the operation of the statute by the fact that suits to partition this land were brought by them in the court of common pleas of Hamilton county against the defendants in 1881, before the 21 years after the death of Maria Bigelow had expired. It does appear from the record that, six days before the statutory period had expired, four suits were brought for partition against a part of the defendants, to partition the tract in question,—one by Robert Barr, one by Samuel Barr, one by Jane Chapman, and one by Martha Reed. Each plaintiff claimed one-fortieth interest in the tract, as heir of William Barr, Sr. Three years later Samuel Barr, Jane Chapman, and Martha Reed filed cross petitions in Robert Barr's suit. Samuel Barr joined with him in this cross petition James Barr and others, and claimed one-fifth of the entire tract as devisees under the will of old Robert Barr, brother of William Barr, Sr., in addition to the one-fortieth interest set up in his suit of 1881. About a year after the filing of the cross petitions the separate suits of Samuel Barr, Jane Chapman, and Martha Reed were voluntarily dismissed. In 1889, four years later, the cross bill was filed below, in which all these interests were set forth and relied on as grounds for partition here. Meantime a decree for partition was rendered by the common pleas court for interests aggregating $^{13}/_{520}$ of the entire tract, in favor of some of the plaintiffs, and an appeal was taken to the state circuit court, where it is pending for trial de novo. It might be difficult to see how the bar of the statute could be avoided, except in the case of Robert Barr, and then only for the interest he originally claimed, to wit, one-fortieth. But we do not find it necessary to pass on this question at all, and we do not do so, because we are clearly of opinion that, however completely the claimants in the suits in the state court may have escaped the bar of the statute for the purposes of those suits, they cannot be pleaded in this action, begun several years later, to avoid the statutory bar to relief here. The bringing of one action does not stop the statute, when pleaded in a later action. Delaplaine v. Crowninshield, 3 Mason, 329, Fed. Cas. No. 3,756; Stafford v. Bryan, 1 Paige,

239; Moore v. Green, 19 How. 69, 71; Crane v. French, 38 Miss. 503, 525, 528; Callis v. Waddy, 2 Munf. 511. A judgment in ejectment in favor of the plaintiff establishes his right of entry, but does not suspend the statute of limitations. To do this there must be a change of possession. Smith v. Trabue, 1 McLean, 87, Fed. Cas. No. 13,116; Doe v. Stevens, 1 Houst. 240; Jackson v. Haviland, 13 Johns. 229, 235; Doe v. Reynolds, 27 Ala. 364, 377; Smith v. Hornback, 4 Litt. (Ky.) 232. If Robert Barr or any of his co-claimants have a good right to any interest in this land saved from the bar of the statute by the suit or suits now pending in the state courts, they must prosecute it there. Here they, equally with all their co-complainants, are barred.

One other contention of the complainants should be here noticed, although not pressed before the court in argument. In an amendment to the second amended bill, the complainants Sarah King, daughter of Augusta King, and Marcus and Luella Love, her granddaughters, sought to avoid the statute of limitations by the following averment as to their disability:

"Complainants further allege that Augusta Grafton, one of the heirs of Mary Grafton, intermarried with one James King in the month of August, 1858, prior to the determination of the life estate of Maria Bigelow; that she remained in coverture until some time in December, 1879, and that the complainants Sarah King and Marcus Love and Lauretta Love, who are the heirs of Augusta Grafton aforesaid, were therefore under disability until December, 1879, at which time said coverture was removed; and that their right of action accrued in 1879."

Augusta King was found by the court below to be an heir of Sarah or Mary Grafton, sister of William Barr, Sr. It was through her that Sarah King and the two Love children claimed. The evidence shows that her husband, James H. King, died in 1869, instead of 1879, as averred. The statute began to run against the wife at that time, and made the bar complete 21 years after the death of Maria Bigelow, in 1860. By section 4978, Rev. St. Ohio 1890, the rights of married women were saved for 10 years after the removal of the disability, if the disability continued during the 21 years; but, where the disability was removed more than 10 years before the expiration of the 21 years, the saving clause had no possible application. The bar of the statute was therefore complete against Augusta King before her death, in 1885, and she had no estate in this land which could descend to these minor complainants.

The appellants assign error to the action of the court below in taking jurisdiction of this partition in equity before the disputed questions of title had been settled by action at law. In view of our very clear conviction that on the merits the statute of limitation is a complete bar, we have deemed it best not to consider this assignment of error. The dreadful weight of this litigation should be lifted as soon as possible from this unfortunate quarter section, and, having reached the conclusion stated, we would, if we could, avoid a decision which would simply transfer this tedious and expensive controversy to another forum, there to drag its slow and exhausting length along. The objection to the equitable jurisdiction of the court below in a case

like this is one which can be waived. It is of a class of actions usually cognizable in equity, and though it be conceded that, for a special reason, it should be heard at law first, the rule is, in such a case, that the objection, if not made below, will not be considered here. Reynolds v. Watkins, 9 C. C. A. 274, 60 Fed. 824; Reynes v. Dumont, 130 U. S. 355, 9 Sup. Ct. 486; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594. As the complainants and cross complainants went into equity, they cannot complain of a decree on the merits; and we may assume that the defendants, whatever may have been their previous view, are now willing to waive any objection on this ground.

Our holding as to the plea of the statute of limitations disposes of this case, and makes it unnecessary to consider any of the many interesting questions of pedigree evidence and allowances for improvements, and the much-contested validity, construction, and effect of old Robert Barr's will, which, together with the question decided, have been elaborated in the brief of counsel for appellants with an industry, ability, and copiousness of authority rarely equaled in this court. The decree of the circuit court is reversed, with instructions to dismiss the bill at the costs of the complainants and cross complainants, both in this court and the court below.

On Rehearing.

(June 14, 1895.)

Those of the appellees who were cross complainants below have filed one petition for rehearing, and those who were complainants below have filed another, based on somewhat different grounds. The petition of the cross complainants is chiefly based on the ground that the court had no jurisdiction to consider the issue upon which it decided the decrees below and directed the dismissal of the bill and cross bill. The issue decided was that the claim of title to the land in question set up in the bill and cross bill was barred by the statute of limitations. The contention of petitioners is that because the decree by which this issue was decided in the court below was entered November 17, 1891, and no appeal was allowed to that decree within six months after its rendition, its correctness cannot be examined here on the present appeal from a subsequent decree entered August 9, 1894. If the decree of 1891 is to be regarded as a final decree, the contention is sound, and the question raised therefore turns on the finality of that decree. Before examining the question on its merits, it should be said that the defendants below, out of abundant caution, lest this objection should be raised, applied to the circuit court, composed of Judges Jackson and Sage, for the allowance of an appeal from the decree of 1891 within six months after its rendition, and that those judges refused to allow the appeal on the ground that, under the decisions of the supreme court and the well-established rules of federal appellate procedure, the decree of 1891 was merely an interlocutory decree. Still further, to avoid possible prejudice to their right to appeal,

the defendants applied to me, as a member of the circuit court of appeals, for the allowance of an appeal. I wrote to Mr. Justice Brown, then assigned, as circuit justice, to this circuit, and presented the question of the finality of the decree to him. We concurred in the view taken by the judges at the circuit, refused to allow the appeal, and at the next session of the court of appeals caused an order to be entered embodying such refusal. When this cause, on the appeal subsequently taken and allowed, came on to be heard, a motion was made by counsel for appellees to dismiss or strike out certain assignments of error made by appellants, on the ground that they were based on issues disposed of in the decree of 1891, and not cognizable on this appeal. The motion was overruled on the ground that that decree was not a final decree. For the third time, on this petition, the same question is made. In view of the irremediable wrong which would be done to appellants if the refusal of both the circuit and appellate courts were erroneous, we should be very slow to change our views already expressed on this subject. A further examination completely satisfies us of the correctness of our first conclusion. The argument of counsel for petitioner persistently ignores the fact that the question of the finality of a decree, for purposes of appeal or otherwise, in the federal courts, is not affected by the procedure in the state courts, but must be governed by the statutes of the United States, and the procedure and rules of decision in those courts. Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. 150; Andes v. Slauson, 130 U. S. 435, 9 Sup. Ct. 573; Insurance Co. v. Hamilton, 11 C. C. A. 42, 63 Fed. 93; Bronson v. Schulten, 104 U. S. 410.

The bill and cross bill below were for partition of real estate. By the issues made on the pleadings, it became necessary to determine the interests and descent of the complainants and cross complainants from the ancestors in whom the original title was conceded to have been, and also the question whether the right of entry had not been barred by the statute of limitations. But these issues were but incidental to the main relief asked, which was a partition of the land, and a setting apart of their proper shares to the complainants and cross complainants. But for the fact that this was the main object of the bill, no possible ground for the jurisdiction of a court of equity existed. A mere dispute concerning title and right to possession must inevitably have been dismissed from the equity side of the court, and redocketed on the law side. In an equitable action for partition, the preliminary inquiry of the court is always as to the various undivided interests; and not until after these are fixed does the court proceed to its main judicial function in such cases,—of determining how the partition prayed for can be equitably made, and of making it. The decree of November, 1891, settled what the various undivided interests of the parties to the cause were, and found that the complainants and cross complainants were entitled to partition. It appointed three commissioners to make partition, with authority to employ a surveyor and to allot to the parties their respective shares as declared

in the decree, but, if they found it impossible to partition any tract without manifest injury, to report this fact. It further directed the commissioners to appraise every tract, with and without improvements, separately stating the value of improvements prior to the falling in of the life estate in 1860, and of those made between that date and the filing of the bill, and of those made since. They were authorized to take testimony as to all these matters, and were directed to report their proceedings to the court, and all questions as to improvements on the premises were reserved for future order of the court. The cause was further referred to a special master to report special facts as to the improvements; also to report the rents and profits received from the land through certain periods, also taxes and assessments paid, also rents and profits attributable to improvements and to land without improvements; and to reduce evidence taken to writing, and to report the same, with his conclusions, to the court. The court reserved the question of accounting of rents and profits, and of the allowances for taxes and expenses, for further order. The question of the finality of decrees is not free from difficulty, under the decisions of the supreme court, as Mr. Justice Brown points out in the case of McGourkey v. Railway Co., 146 U. S. 536, 545, 13 Sup. Ct. 170. The general rule that the learned justice lays down in this, the last expression of the supreme court on the subject, is as follows:

"It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final."

Judged by this standard, the decree of 1891 was plainly not final. Neither the character of the partition nor the accounting was settled by this decree. Each was dependent on further judicial action of the court, in approving or disapproving the action of its judicial subordinates. The voluminous record of the evidence before the master and commissioners, and the strenuous controversies before the court below on the questions thus reserved, testify most emphatically to the interlocutory character of this decree. The court below treated it as merely interlocutory by subsequent amendments, and by refusing the allowance of the appeal, and this circumstance is allowed to have weight with the appellate court in determining whether the decree is final, in a doubtful case. McGourkey v. Railway Co., 146 U. S. 536, 550, 13 Sup. Ct. 170. Fortunately, however, we are not obliged in this case to refer to general rules to settle the question of the interlocutory character of this decree. In Green v. Fisk, 103 U. S. 518, the complainant filed a bill for partition of real estate not susceptible of partition (as the land in this case was also reported to be), praying a partition by sale. The court entered a decree finding the exact interest of complainant in the land, and his right to partition, and referred the case to a master "to proceed to partition according to law, under the direction of the court." It was held that it was not a final

decree. The following remarks of Chief Justice Waite, who spoke for the court in that case, are specially applicable to this.

"In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made and confirmed by the court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. * * * A decree cannot be said to be final until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant, in severalty, her share of the property, in money or in kind. This can only be done by a further decree of the court. Ordinarily, in chancery, commissioners are appointed to make the necessary examination and inquiries and report a partition. Upon the coming in of the report, the court acts again. If the commissioners make a division, the court must decide whether it shall be confirmed before partition, which is the primary object of the suit, is complete. If they report that a division cannot be made, and recommend a sale, the court must pass on this view of the case before the adjudication between the parties can be said to be ended."

If the decree of November, 1891, was not a final decree, as the foregoing authoritative language conclusively shows, then no final decree was entered until August, 1894; and an appeal properly taken and allowed from that decree brings up for review all the questions in the cause, both those decided by the decree of 1891 and those subsequently arising.

A second ground urged for a rehearing is that I was disqualified to sit as a member of this court, to hear this cause, because, as a circuit judge, in the circuit court, I had passed upon the question whether the decree of November, 1891, was a final appeal, and had made the order of the circuit court shown in the record of the proceedings disallowing the appeal. This ground is based on a mistake of fact. The order referred to in the record was made by Judge Sage, with Judge Jackson's concurrence. The application for the allowance of the appeal was made to me as a member of the court of appeals, and refused by me as such, with the concurrence of Mr. Justice Brown, and a record of our action spread upon the minutes of this court. That Judge Sage made the order in the circuit court is shown, not only by the affidavit of counsel and clerk, but also by the indorsement of his initials upon the original order. No evidence is adduced tending to support this ground of the motion. It does appear, by reference to the minutes of the circuit court, which this court has examined sua sponte, that Judge Sage and I were both present in the circuit court on the day when the order refusing the appeal was entered; but I was there for the purpose of sentencing two convicted persons, and took no part in the order, as the indorsement of the original order shows.

All the other grounds urged for a rehearing on behalf of cross complainants, except one, have been so fully considered in the opinion already filed that we think it unnecessary to refer to them, except to say that nothing now presented leads us to change our views of them, as already expressed. One contention of counsel for the cross complainants did escape notice in our opinion, because

of the many more formidable ones we felt it necessary to consider at length. As it has been repeated in the petition for rehearing, it is only proper that we should now refer to it. The contention is that although Maria Bigelow, the life tenant, died in August, 1860, and the claimants had an immediate right of entry into the lands in suit, as the owners of the remainder, there was so much doubt whether claimants were entitled, as remainder-men, or the direct descendants of William Barr, Sr., and his sons-in-law, were thus entitled, that the running of the statute was suspended until 1868, when the decision of the supreme court of the United States in favor of the descendants of William Barr, Sr.'s, brothers and sisters made it clear that the claimants and their coheirs had an interest in the property, and therefore that the period of limitation did not expire until 1889, three years after the bringing of this action. This proposition, which to the court is somewhat startling, is sought to be supported on the authority of New Orleans v. Gaines, 15 Wall. 634; Fortune v. Center, 2 Ohio St. 537; and Trustees v. Campbell, 16 Ohio St. 11. The first case involved the question how many years of rents and profits Myra Clark Gaines was entitled to recover from the city of New Orleans on the land withheld from her. It was held that certain limitations of the Civil Code of Louisiana upon the time within which actions for rent and personal actions might be brought did not apply to a claim for rents and profits of land, the title to which was in dispute between the plaintiff and defendant, and that really no cause of action arose for rents and profits until the main suit, as to the title, was determined. Whether this case turned on the peculiar provisions of the Louisiana Code, or not, it is not necessary to determine. It suffices to say that the case has no possible application here. The action which claimants failed here to bring was the main action to assert and determine the title, and the suit of Poor v. Considine did not in the slightest degree interfere with their bringing such a suit. The question of law decided in Poor v. Considine was, of course, of interest to them, in supporting their claim of title; but it is a novel doctrine that claimants of land, out of possession, may silently delay asserting their claims until somebody else may by his suit have secured from the court of last resort the decision of a doubtful question of law, upon which the validity of their title depends. The case of Fortune v. Center, 2 Ohio St. 537, has nothing in it in the remotest degree sustaining such a proposition. In fact, the court did not refer to the statute of limitations, because it was not involved in the case. In the case of Trustees v. Campbell, 16 Ohio St. 11, the point decided was that a general statute of limitation for suits for trespass did not apply to a suit begun under a special statute authorizing such a suit for trespass on lands held in trust by the state. The aid that this case gives to the proposition of counsel does not appear.

The counsel for the complainants also files a petition for rehearing. The chief ground urged in this petition is that the decree appealed from was entered upon August 8, 1894, in the circuit court,

while the case was docketed in this court and the transcript filed here on July 24, 1894, at a time when the cause was not in condition to permit appeal. Therefore it is urged that this court never had jurisdiction to review the decree which by its order is now reversed. The discrepancy thus stated arises merely from a misprision of the then clerk of this court, in marking upon the appearance docket the wrong date for the filing of the transcript. It appears that the record in the court below was so voluminous, and both appellants and appellees were so anxious to have the cause speedily heard and decided in this court, that they made an arrangement with the clerk of this court to have large parts of the record printed under his supervision before the final decree was formally entered and the appeal was taken, and that an early number upon the docket was held open by the clerk for this case, and the date of the docketing was thus by mistake marked before any appeal had been taken, and before any return had been in fact made. The record shows that the appeal was taken August 15, 1894, and the certificate of the circuit clerk to the return of the transcript to the appeal is dated October 1, 1895. These dates are contained in the properly certified original record on file in this cause. The evidence conclusively establishes that the return to the appeal was not filed in this court until October 9, 1894. Immediately after the docketing of the case and filing of the transcript, counsel for appellees appeared, and filed motions to dismiss on other grounds, and, on the overruling of these, filed their briefs upon the merits. Such acts would seem to constitute a waiver of any irregularity in the docketing of the cause, if that were essential. In order to make the record speak the truth, however, we think it proper to make an order by which it shall be made to appear upon the docket of this court that the return and transcript were, as a fact, lodged in this court on October 9th, and not upon July 24th, as the docket incorrectly states. This petition also reviews some of the alleged errors of this court in the opinion already filed. We carefully read the entire record and the briefs of counsel, and gave this case the full consideration that its intrinsic importance, and the fact that we were reversing the action of two learned and able judges, required, and are entirely satisfied of the correctness of our conclusions. This leads us to deny the motion made by counsel for cross complainants that we certify certain questions arising in the case to the supreme court. If there ever was a case which should be ended, this is the case.

A motion is also made that we modify the order of reversal already made, so as to save the rights of those claimants who brought suit in the common pleas court in 1881. We should be glad to make an exception in the order which should relieve those claimants of any embarrassment that this order and adjudication ought not rightfully to impose upon them. But we do not see how any exception can safely be made, with the data before us. Nor do we think its absence will cause unjust embarrassment to cross complainants. We have ordered the bills and cross bills dismissed on

the merits of the defense of the statute of limitations. In so far as we have here determined that adverse possession began against all the claimants on August 3, 1860, and continued until 1886, it would seem that such a finding should hereafter estop all parties to this suit from raising the question in any suit pending. The bringing of the suits in 1881 did not save the bar of the statute in this suit, whatever effect it had in the suits in the state court, and we have not passed on the effect of it on those suits, because not within our jurisdiction. Every court called upon to consider the effect of our order and adjudication upon those suits will be advised that the fact of the bringing of those suits was immaterial in this suit, to save the bar of the statute, and will measure and limit the estoppel of our decree on the merits by that knowledge; but we cannot safely undertake, by exceptions to our decree on the merits, to limit with exactness the estoppel which other courts shall ascribe to it, when other circumstances, material and relevant to the issue before them, are presented, which were wholly immaterial in the determining of the issue before us. The motion to modify the order of reversal heretofore made is denied.

ALLEN et al. v. SEAWELL et al. BROCK et al. v. SAME. HIDY et al. v. SAME. TRUMPER et al. v. SAME. GATES et al. v. SAME. YATES et al. v. SAME. SMITH et al. v. SAME. LOVELESS et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1895.)

Nos. 214–221.

1. PAROL PARTITION—ESTOPPEL—OHIO LAW.
In Ohio, a parol partition of land, consummated by possession and acquiescence under it for any less period than that which creates the bar by the statute of limitations, does not vest the legal title in severalty to the allotted shares; but such partition, acquiesced in for any considerable length of time, will estop any person joining in it, and accepting exclusive possession under it, from asserting title or right to possession, in violation of its terms; and if such a partition is made by the husband of a married woman, and consented to by her, and is fairly and equally made with respect to her rights, it is a good defense against her and her heirs in an action by them to recover her undivided interest in the shares allotted to her cotenants. Berry v. Seawall, 13 C. C. A. 101, 65 Fed. 742, followed.

2. SAME—EVIDENCE—PRESUMPTION.
In the absence of evidence to the contrary, the fact that the cotenants of a tract of land have occupied the several portions, in severalty, for more than 50 years, with the knowledge and consent of each other, and have exercised acts of exclusive ownership and control over the respective shares, without objection or claim on the part of other cotenants, raises a strong presumption of fact that there was an actual division by agreement, express or tacit, of the land between the cotenants, according to the lines of exclusive occupancy; and one of such cotenants, who is sued by another for an undivided share of the portion occupied by him, is entitled to have the jury so instructed.

3. PLEADING—EJECTMENT—ESTOPPEL.
It seems that the defense of estoppel in pais is open to a defendant in an action of ejectment, under the general issue or a general denial.