

W. P. Preble, Jr., for the motion.  
Jerome Carty, opposed.

LACOMBE, Circuit Judge. Subsequent to the passage of the act of 1887, and prior to the decision of the supreme court in *Re Hohorst*, 150 U. S. 659, 14 Sup. Ct. 221, applications such as this, when made upon like facts, were uniformly granted in patent causes in this circuit, and the decided preponderance of authority in other circuits approved such a disposition of them; the act of 1887 being construed as operating in restriction of jurisdiction. The opinion in the *Hohorst* Case has been held to apply to all patent causes by Judge Wheeler in *Smith v. Manufacturing Co.*, 67 Fed. 801, and by Judge Townsend to apply only to such suits when brought against aliens. *Union Switch & Signal Co. v. Hall Signal Co.*, 65 Fed. 625. See, also, opinion of Judge Colt in *Donnelly v. Cordage Co.*, 66 Fed. 613. The latter construction commended itself to the judge now sitting, and has been followed in at least two cases, not reported. It is doubtful, however, whether the *Hohorst* Case can be thus distinguished in view of the later opinion of the supreme court in *Re Keasbey & Mattison Co.* (Dec. 16, 1895) 16 Sup. Ct. 273, where that court says that the *Hohorst* Case was "a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit courts of the United States by sections [of the Revised Statutes] re-enacting earlier acts of congress; and was, therefore, not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states." The motion to dismiss is therefore denied.

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GOWEN v. BUSH. DAVISON v. GIBSON. ST. LOUIS & S. F. RY. CO. v. BARKER.

(Circuit Court of Appeals, Eighth Circuit. February 3, 1896.)

Nos. 535, 605, 615.

CIRCUIT COURTS OF APPEALS—JURISDICTION—EFFECT OF CHANGE ON PENDING APPEALS.

Act March 1, 1895 (28 Stat. 693, c. 145), creating a court of appeals for the Indian Territory, containing no clause saving the jurisdiction of the circuit court of appeals for the Eighth circuit over pending appeals and writs of error, the latter court has no power to hear and determine any cases coming from the United States court in the Indian Territory which were pending and undetermined on its docket on March 1, 1895.

In Error to the United States Court in the Indian Territory.

J. W. McCloud, for plaintiff in error Gowen.

William H. H. Clayton (James Brizzolara, James B. Forrester, and James Parks were with him on brief), for defendant in error Bush.

S. B. Dawes (S. S. Fears was with him on brief), for plaintiff in error Davison.

William T. Hutchings (Nathan A. Gibson was with him on brief), for defendant in error Gibson.

P. L. Soper (Edward D. Kenna was with him on brief), for plaintiff in error St. Louis & S. F. Ry. Co.

R. Sarlls, for defendant in error Barker.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In the above-entitled cases the several writs of error were sued out before the act of March 1, 1895 (28 Stat. 693, c. 145), creating a court of appeals for the Indian Territory, and giving it appellate jurisdiction over the United States courts in that territory, took effect. The several writs of error now in question were therefore properly sued out and returned to this court. But the cases had not been heard when the act of March 1, 1895, went into operation. The point is now made that, inasmuch as the act of March 1, 1895, contains no saving clause reserving to this court the power to hear and decide such cases coming from the United States court in the Indian Territory as might be pending and undetermined at the time the act of March 1, 1895, took effect, this court is now without power to hear and decide such cases. We are constrained to hold that this point is well taken. The act of March 1, 1895, unquestionably deprived this court of the appellate jurisdiction theretofore exercised over the United States court in the Indian Territory, and it contained no express reservation of power to hear and decide such cases as might be pending when the act in question took effect. The case is therefore on all fours with *Railroad Co. v. Grant*, 98 U. S. 398, where it was held that when the jurisdiction of an appellate court over cases coming from an inferior court is taken away by statute, the statute operates to deprive it of the power to hear and decide cases already pending on its docket which came from such inferior court, unless the power to hear and decide such cases is expressly reserved. With reference to this question Mr. Chief Justice Waite said:

"A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such privilege, once granted, may be taken away, but, if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse, or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or writ already taken or sued out, but it takes away our right to hear and determine the cause if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit, because our jurisdiction is gone." See, also, *Butler v. Palmer*, 1 Hill, 324.

In view of this decision it seems obvious that this court has no power to hear and decide any cases coming from the United States court in the Indian Territory that were pending and undetermined on its docket on March 1, 1895. Following the practice indicated in *Railroad Co. v. Grant*, *supra*, the writs of error in each of the above-entitled cases will be dismissed, each party to pay his own costs.

## WHEELER et al. v. BILLINGS et al.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1895.)

No. 554.

## 1. EQUITY PRACTICE—ACCOUNTING—DIRECT ACTION OF COURT.

It is not necessary that an account decreed in a suit in equity should be stated by a master, but it is within the discretion of the court, if for any reason it deems it proper to do so, to state the account itself, after an examination of the testimony taken by one or more masters.

## 2. SAME—APPORTIONING INTERESTS—ABSENCE OF PARTIES—FORM OF RELIEF.

The owners of the D. mining claim and the owners of sundry adjacent claims, between whom and the owners of the D. claim there had been disputes as to their respective rights in certain locations, organized the C. Mining Co., and conveyed to it their various rights in the disputed locations. One-half the stock was assigned to the owners of the D. claim. The other half was placed in trust for the owners of the other claims, who could not agree upon a division of the stock, with the understanding that an account should be kept of the ore taken from the several locations, and the proceeds, after deducting one-half for the owners of the D. claim, should be paid to the grantors of the several claims. Subsequently, in a suit brought by third parties against the assumed owners of the E. Mine, one of the locations, it was adjudged that an interest in the location belonged to such third parties. *Held* that, in the absence of some of the parties interested in the stock of the C. Mining Co. held in trust, the court could not, in such suit, apportion the stock so held, and direct a transfer of the shares, but that the most that could be done was to adjudge that the assumed owners of the E. Mine should transfer a proper proportion of such interest as they had in such stock to the parties found to have had an interest in the location.

## 3. RATIFICATION—UNAUTHORIZED SALE—ESTOPPEL.

*Held*, further, that said assumed owners of the E. Mine should not be excused from transferring to those found to be the true owners their interest in the stock of the C. Mining Co., on the ground that their transfer of the location to the C. Co. could be attacked, and the location recovered from the C. Co., by such true owners, since the latter, by claiming and accepting the stock, would be held to have ratified the sale, and to be estopped from taking such action to recover the location.

## 4. FRAUD—FOLLOWING PROCEEDS OF PROPERTY.

Large sums having been paid, under the agreement by which the stock of the C. Co. was placed in trust, to the assumed owners of the E. Mine, who were also owners of other claims sold to the C. Co., *held*, that the true owners of the E. Mine were entitled to recover from the assumed owners only such part of said money as could be shown to have been paid them as the proceeds of ore taken from the E. Mine.

## 5. SAME—SUCCESSIVE ACTORS—INDIVIDUAL—CORPORATION.

The assumed owners of the E. Mine, as against whom the true owners were adjudged to be entitled to the same, or the proceeds thereof, were one W., who held the mine for a time individually, and a corporation organized by W., to which he conveyed the mine, and of which he was a stockholder, officer, and active manager. *Held*, that no decree for the profits of the mine during the time of W.'s individual holding could be rendered against the corporation, but that a decree could properly be rendered against both W. and the corporation jointly for the profits of the period during which the mine was held by the corporation.

## 6. EQUITY PRACTICE—DEFENSE INTERPOSED OUT OF TIME—PROOF.

When a defense in an equity suit is withheld until a late stage in the litigation, after the issues, as at first raised, have been decided, and the