the grounds: First. That said cause is not one cognizable before the United States court. Second. That the petition for transfer, as well as the entire record in said case, shows that it is not one arising under the constitution or laws of the United States. Third. That neither from said petition nor record does it sufficiently appear that there is any disputed construction of any statutes or constitutional provision of the United States involved, or that the decision of the case depends upon the construction of any such law or constitutional provision. Fourth. That from said petition it is manifest that said suit is not one arising under the constitution of the United States. This motion, on the 10th day of said month of February, was overruled. Afterwards, a general replication was filed, and testimony taken, upon which, together with the pleading and exhibits, the court, on the 1st day of April, 1895, rendered a decree adverse to the complainant, and dismissed its bill, with costs. From this decision an appeal has been taken to this court.

The first assigned error is that the circuit court did not have jurisdiction to try and determine said cause. According to the decisions of the supreme court in Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. 357; and Railway Co. v. Skottowe (recently decided, but not yet officially reported) 16 Sup. Ct. 869,—a case cannot be removed from a state court to the circuit court of the United States as one arising under the constitution, laws, or treaties of the United States, unless that fact appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings. Under these repeated decisions, we are constrained to hold that this instant case was improperly removed to the circuit court. A critical examination of the complainant's bill fails to show us any case necessarily arising under the constitution or laws of the United States. The decree of the circuit court is reversed, and the cause is remanded to the circuit court with instructions to that court to remand the same to the state court from which it was originally removed.

BELL et al. v. KRUEGEL et al.

(Circuit Court of Appeals, Fifth Circuit. May 5, 1896.)

No. 450.

MORTGAGE—FAILURE OF CONSIDERATION.

One K. arranged, through M., for a loan of $5,000 from B. & Co., to be secured by mortgage on certain land, in the improvement of which the money was to be used. He delivered his note and mortgage, and received $1,900; the remaining $3,100, by agreement with M., being retained by the latter, to be paid out as the improvements were made. Before K. received any of it, M. failed and made an assignment. K. then filed his bill against B. & Co., M., and the latter's assignee, to set aside the mortgage. B. & Co. alleged that M. had no authority to loan their money on the terms alleged, and that they knew nothing of the agreement for the retention of the $3,100. *Held*, that whether or not B. & Co. ratified this agreement, as

K. had received $1,900, and no more, he was entitled to a decree allowing him a credit of $3,100 on his note and mortgage, such note and mortgage to be delivered to B. & Co., reserving to them the right to recover from M. the $3,100, either as held by them for B. & Co., or as misappropriated without their authority.

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

On July 28, 1893, Herman Kruegel, appellee, instituted this suit in the district court of Dallas county, Tex., against C. S. Bell & Co., Murphy & Bolanz, and E. T. Loughborough, alleging that C. S. Bell & Co., who resided in Ohio, acting through Murphy & Bolanz as their agents, had prior to June 13, 1893, agreed to lend him $5,000 upon the security of certain real estate; that he had executed his note for said sum payable to C. S. Bell & Co., three years after date, with interest at 8 per cent. per annum, payable semiannually, and had also executed a mortgage or trust deed in which J. P. Murphy was named as trustee to secure said note; that these instruments had by him been delivered to Murphy & Bolanz on June 13, 1893, the day of their date; that the purpose of the loan was to improve the property on which the deed of trust rested; that he (Kruegel) received $1,900 of the money, and $3,100 thereof was retained by Murphy & Bolanz, to be paid out as the improvements were made; that on July 22, 1893, before the improvements were completed, Murphy & Bolanz, having appropriated to their own use the $3,100, had become insolvent, and made a general assignment to E. T. Loughborough; that said Loughborough or Murphy & Bolanz had possession of said instruments, and were about to send them to C. S. Bell & Co., in Ohio. He prayed for an injunction restraining the sending of the note to C. S. Bell & Co.; that the note, coupons, and trust deed be canceled; and that a receiver be appointed to hold them pending the suit. Kruegel alleged that he was "ready, willing, and anxious to repay to C. S. Bell & Co. the said sum of $1,900 received by him." C. S. Bell filed formal answer in the case on August 15, 1893, and, on same day, filed petition and bond for removal, which was granted on August 18, 1893. Transcript was filed in the circuit court, put on the equity docket, and an order to replead made. The appellee Kruegel then filed a bill of complaint at great length, but alleging substantially as in his original petition, and, in addition, claiming damages for breach of contract on the part of C. S. Bell & Co., in failing to furnish him the money contracted for, as follows: $400, paid Murphy & Bolanz, commission for securing the loan for him; $700, expended for labor and materials in making improvements on the lot; loss of rents, at rate of $130 per month, for each month since September 15, 1893, which he alleged the lot, if improved, would have yielded; and a balance of $918.60 out of the $1,900 received by him from C. S. Bell & Co., which he had on deposit with Murphy & Bolanz when they failed. The prayer was for the cancellation of the note, coupons, and deed of trust, for damages as above set out, and that the amount received by Kruegel be ascertained, and that they have a reasonable time to repay it, that the injunction be perpetuated, and for general relief. C. S. Bell & Co. answered under oath, setting up that they had the sum of $5,000 on deposit with Murphy & Bolanz, who were bankers, prior to June 13, 1893; that Kruegel employed Murphy & Bolanz to negotiate his note secured by deed of trust; that they had authorized Murphy & Bolanz to loan the $5,000 on improved real-estate security; that Murphy & Bolanz, acting as agent for both Kruegel and C. S. Bell and C. E. Bell (composing the firm of C. S. Bell & Co.), and Kruegel, arranged the loan; that Kruegel made the note and deed of trust, and delivered same to Murphy & Bolanz for C. S. Bell & Co., and the $5,000 was then placed to Kruegel's account with Murphy & Bolanz, and was charged against C. S. Bell & Co. on their account with Murphy & Bolanz; that C. S. Bell & Co. had no knowledge of any agreement between Kruegel and Murphy & Bolanz by which Murphy & Bolanz were to retain in their bank any of the money, and had not authorized Murphy & Bolanz to make such agreement; that the agreement between Kruegel and Murphy & Bolanz regarding the retention by them of $3,100 was secretly and fraudulently made by Kruegel and themselves for the benefit of Kruegel, as C. S. Bell & Co. would not have made the loan on such terms. They deny that they knew

Murphy & Bolanz were charging Kruegel the commissions of $400, or that they knew before July 25, 1893, that Murphy & Bolanz were insolvent, but, on the contrary, aver they believed them to be solvent and safe brokers, which was also the opinion prevailing at the time in Dallas, Tex. The bill was taken as confessed against J. P. Murphy and Chas. F. Bolanz, comprising the firm of Murphy & Bolanz, on October 1, 1894. Replication was filed October 1, 1894. A hearing was had on July 13, 1895, and a final decree was rendered in favor of appellee; directing the cancellation of the note and deed of trust in case Kruegel should pay $581.40, with 6 per cent. interest from June 13, 1893, at any time before June 13, 1896; directing, in event of such payment, that J. P. Murphy, trustee, reconvey the property to Kruegel; that, in case the sum adjudged should not be paid within the time limited, C. S. Bell & Co. should be at liberty to foreclose for the amount adjudged, with six per cent. interest; that until June 17, 1896, all parties be enjoined from indorsing, assigning, or negotiating the note and deed of trust; that after June 17, 1896, in the event payment of $581.40, with interest, had not been made, the appellants should be enjoined "from indorsing, assigning, or negotiating said note and deed of trust only to the extent of $4,418.60"; and that defendants and plaintiffs each pay one-half the costs. From this decree, C. S. and C. E. Bell appeal.

J. M. McCormick and Wendell Spence, for appellants.

M. M. Parks, for appellees.

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

PARDEE, Circuit Judge (after stating the facts). The evidence in the case is not conflicting, and shows the facts to be substantially as set forth in the pleadings. The legal conclusion from the contract between Murphy & Bolanz and Kruegel is that Murphy & Bolanz held the $3,100 as a depositary for both Bell & Co. and Kruegel, with the understanding that, if Kruegel made the improvements upon the property mortgaged as he had agreed to do, then he was to receive the $3,100, and owe the full amount of the note; if he did not make the improvements, then the money was to be held for the security of Bell & Co., and to be applied to reduce the note pro tanto. The improvements that Kruegel agreed to make were not made, and probably because of the failure of Murphy & Bolanz, resulting in this: that, of the $5,000 loan, Kruegel only received the sum of $1,900. In the view we take of the case, it is not material to determine whether Bell & Co. knew of and ratified the arrangement. If they did know of it, and ratified it, then they can only recover from Kruegel the sum of $1,900, actually received by him. If they did not know of it, and the transaction in their behalf, on the part of Murphy & Bolanz, was unauthorized, then Murphy & Bolanz made an unauthorized appropriation of Bell & Co.'s money to the extent of $5,000; and as $1,900 of the sum went into Kruegel's hands, and is represented in the note and mortgage, a trust in favor of Bell & Co. resulted for that amount. There is no evidence showing Bell & Co. in any wise parties to, or bound by, the arrangement between Murphy & Bolanz and Kruegel by which part of the $1,900 was left on deposit with Murphy & Bolanz, to be drawn as Kruegel might go forward with the improvements. Kruegel admits judicially, and testifies in the case, that he received this $1,900; that it was placed to his credit on the books of Murphy & Bolanz, and drawn against by him as he saw fit, until the failure of

Murphy & Bolanz. Under these facts proved and judicially admitted, we are of opinion that Kruegel is liable for the sum of $1,900, with stipulated interest, and that equity will be done in the premises by allowing Kruegel a credit on the note at the date of execution of the sum of $3,100; reducing the coupons for interest pro rata; giving to Bell & Co. the possession of the note and coupons thus credited and reduced; and reserving to them the right to recover from Murphy & Bolanz the said sum of $3,100; and reserving to Kruegel the right to recover from Murphy & Bolanz such part of the $1,900 deposited with them as had not been drawn out at the time of the Murphy & Bolanz failure.

The following decree should be entered in the case: The court finding that the consideration of the note for $5,000, dated June 13, 1893, payable to the order of C. S. Bell & Co., at the office of Murphy & Bolanz, in Dallas, Tex., three years after the date thereof, has failed to the extent of $3,100, and that the said deed of trust is, in equity, a security or lien for the sum of $1,900 only, it is ordered, adjudged, and decreed that upon plaintiff Kruegel's paying to C. S. Bell & Co. the sum of $1,900, with 8 per cent. interest thereon from June 13, 1893, on or before the date of the maturity of said note, to wit, June 13, 1896, at the office of McCormick & Spence, in the city of Dallas, Tex., the defendants, C. S. Bell, C. E. Bell, J. P. Murphy, Charles F. Bolanz, and E. T. Loughborough do deliver up to the plaintiff Kruegel, to be canceled, the said note, coupons, and deed of trust, as fully paid and satisfied; and that the said J. P. Murphy do reconvey unto the said plaintiff Kruegel, within five days after such payment, the property covered by the said deed of trust, free and clear of all incumbrance thereon by reason of such deed; and, in case the plaintiff shall not pay unto the said C. S. Bell & Co. said sum of $1,900, with interest as aforesaid, within the time aforesaid, the said J. P. Murphy and Charles F. Bolanz shall within a delay of five days from the 13th of June, 1896, indorse a credit upon the said note, of date June 13, 1893, in the sum of $3,100, and shall indorse a credit on each one of the six coupons given for payment of interest on such note the sum of $124, and shall then deliver said note and coupons to said C. S. Bell & Co. It is further ordered, adjudged, and decreed that the injunction formerly granted in this case be continued so far as to enjoin and restrain the defendants from indorsing, assigning, or negotiating said notes, coupons, and deed of trust until after June 13, 1896, and if said plaintiff shall pay the said sum of $1,900, with interest, as aforesaid, unto the said C. S. Bell & Co., on or before that date as hereinbefore provided, the defendants are perpetually restrained from assigning, indorsing, or negotiating the same. But if said plaintiff Kruegel shall fail to pay said sum of $1,900, with interest, as aforesaid, on or before June 13, 1896, as herein provided, then the defendants C. S. Bell and C. E. Bell are restrained from indorsing, assigning, or negotiating said note and deed of trust, except the same is charged with the credit of $3,100, as herein provided; otherwise than as herein provided, the injunction referred to is dissolved. It is further ordered and adjudged that the plaintiff Kruegel and the defendants Bell & Co. each

pay one-half of the costs incurred in this cause. The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree in conformity with the views herein expressed.

SOUTHERN PAC. R. CO. v. GROECK et al.

(Circuit Court, S. D. California. May 18, 1896.)

No. 347.

RAILROAD LAND GRANTS—SELECTION OF LANDS—LACHES.

A grant of land was made to a railroad company, by act of congress, in July, 1866. In January, 1867, the company located the general route of its road, and filed the map thereof, but did nothing towards definitely locating its road until 1888, when it constructed the road, and did not file the map of the definite location until April, 1889. In the meantime, in September, 1885, one G. settled on certain lands within the indemnity limits of the grant, and was allowed by the officials of the land office to file his declaratory statement therefor, at that time, and to enter and pay for the land in June, 1886, receiving a patent therefor in April, 1890. The railroad company made no attempt to select such land until December, 1891, and waited until February, 1892, before bringing suit against G. to cancel his patent and recover the land. *Held* that, in the absence of excuse for such delay, the railroad company was guilty of such laches as to bar it from relief in equity against G.'s adverse claim, notwithstanding the land, at the time G. settled on it, was withdrawn from settlement.

Wm. Singer, Jr., and W. F. Herrin, for complainant.
W. B. Wallace and Joseph H. Call, for defendants.

ROSS, Circuit Judge. To the original bill in this case a demurrer was sustained, upon the ground that the bill showed upon its face such laches on the part of the complainant as precluded it from the recovery sought. Railroad Co. v. Groeck, 68 Fed. 609–617. Leave was, however, given the complainant to amend its bill, and accordingly it filed an amended bill, to which the respondents interposed a plea, which the complainant caused to be set down for argument, and which has been argued and is now for disposition. For the purpose of disposing of the plea, the court must assume, without proof on either side, the facts to be as set out in the bill, where not controverted by the plea, and, where so controverted, or inconsistent, to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. U. S. v. California & O. Land Co., 148 U. S. 31–39, 13 Sup. Ct. 458; Farley v. Kittson, 120 U. S. 304–314, 7 Sup. Ct. 534; Rhode Island v. Massachusetts, 14 Pet. 253–258.

The case as now presented is not, in my opinion, as strong for the complainant as when it was last under consideration. As now presented, it shows that, notwithstanding the grant to the complainant, under which it claims the piece of land in controversy, was made by congress July 27, 1866 (14 Stat. 292), and that the complainant, on or before the 3d day of January, 1867, located the general route of the road it was authorized to build by the act

making the grant, and filed with the secretary of the interior a map, on that day, showing the general route of the road as located, which map was accepted by the secretary, and on the same day transmitted by him to the commissioner of the general land office, to be filed in that office, which was done on the same day, yet the complainant did nothing towards definitely locating that portion of its road opposite the land in controversy prior to the year 1888, and never attempted to select the land in controversy until December 31, 1891, for which long delay the bill, as amended, affords no excuse. It appears, from the bill, as amended, that the piece of land in controversy, which is within the indemnity limits of the grant, is opposite that section of the complainant's road extending from Huron westerly to Alcalde, and that that portion of the road was not constructed until the year 1888, and that the complainant never filed a plat in the general land office showing the definite location of that portion of its road until April 2, 1889, years after the defendant Groeck went upon the land, claiming the right of settlement, and had been allowed by the officers of the land department to enter and pay for it, and but little more than one year before the government issued to him its patent therefor. True, the land was not, at the time, subject to Groeck's settlement, for the reason that it then stood withdrawn from such settlement or sale for the benefit of the complainant; but the complainant was then sleeping upon its rights, and continued to sleep upon them until February 11, 1892, when it commenced this suit. The question, therefore, remains whether the facts alleged do not disclose such laches on the part of the complainant as makes it proper for a court of equity to withhold its aid. A decree in its favor would be, in effect, to hold that the complainant, without any reason or excuse therefor being shown, was entitled to tie the hands of the government, the government being passive, and therefore consenting, and exclude from all the odd sections within what might prove to be the indemnity limits of its grant all persons who might seek a settlement thereon, for a period extending from the date of its grant, July 27, 1866, until the year 1888, without in any way indicating the definite location of its road,—a period of more than 21 years; and that it could continue to wait until April 2, 1889, before filing in the office of the commissioner of the general land office a map showing its definite location, and until December 31, 1891, before attempting to exercise its right of selection, and until February 11, 1892, before instituting suit to establish its claim to a piece of land falling within the indemnity limits of its grant, as fixed by the final and definite location of its road, as against one who settled upon it on the 2d day of September, 1885, and for which he was allowed by the officers of the local land office to file his declaratory statement on September 7, 1885, and which he was allowed by the officers of the land department to enter and pay for June 7, 1886, and for which the government issued to him its patent April 11, 1890.

The bill, as amended, shows that the section of the complainant's road opposite the land in controversy was constructed prior to the

filing in the general land office of a map showing its definite location, but, so far as appears, nothing whatever was done by the complainant tending to indicate the definite location of that section of the road until the year 1888, during which year it was constructed. The bill, as amended, does not show that this long delay of the complainant in indicating the definite location of that part of its road opposite the land in controversy was in any respect caused by any failure or neglect on the part of the government or of any of its officers, nor does it show any excuse for waiting, after the construction of that portion of its road in 1888, until December 31, 1891, before making any attempt to select the piece of land in controversy, nor for waiting until February 11, 1892, before bringing this suit. The fact, as made to appear by the pleadings now before the court, that the complainant actually constructed its road before filing with the commissioner of the general land office a map showing its definite location, would seem to indicate quite clearly that the complainant treated the map of its general route there filed on the 3d day of January, 1867, as its map of definite location. At all events, it was the business of the complainant to fix definitely the location of its road, and to indicate that line by a map filed in the general land office. Neither the government nor any other company or individual could do so for the complainant. The delay and neglect in that regard was the delay and neglect of the complainant, and of nobody else. In this aspect of the case, it is unimportant that, when Groeck settled upon the land, on September 2, 1885, claiming the right to pre-empt it, the land was not legally open to settlement, because withdrawn from such settlement or sale for the benefit of the complainant company. The fact remains that Groeck did enter upon it under an adverse claim to the complainant, and that his claim was recognized by the officers of the land department of the government, and that, notwithstanding those facts, the complainant continued to sleep upon its rights for more than six and a half years before appealing to the court for relief,—a period considerably longer than that prescribed by the statute of California for the bringing of an action for the recovery of real property. Code Civ. Proc. Cal. §§ 318, 319, 343, 738.

It is true that the laches of which the complainant was guilty prior to Groeck's settlement is no concern of his, and that, if the government was content, no third party has the right to complain; but certainly he is entitled to avail himself of such laches as occurred subsequent to the commencement of his adverse claim,—a claim which existed uncontested for more than six and a half years. While the statutes of limitations applicable to actions at law do not apply to suits in equity, courts of equity are governed by the analogy of such statutes. Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is pas-

sive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." This doctrine has been repeatedly recognized and acted on by the supreme court. Curtner v. U. S., 149 U. S. 676, 13 Sup. Ct. 985, 1041; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, and cases there cited.

An order will be entered sustaining the plea, with leave to the complainant, if it shall be so advised, to reply to the plea, and take issue in respect to the matters of fact therein alleged, within 20 days from this date.

SOUTHERN PAC. R. CO. v. SMITH et al.

(Circuit Court, S. D. California. May 18, 1896.)

No. 426.

RAILROAD LAND GRANTS—INDEMNITY—LIMITS OF SELECTION.

A railroad company, to which a grant has been made by congress of alternate sections of public land, on each side of its road, with the right to select other lands, within a limited distance beyond such alternate sections, in lieu of lands sold or otherwise disposed of by the government, cannot select indemnity lands on one side of its road, to make good losses sustained on the other side. U. S. v. Burlington & M. R. R. Co., 98 U. S. 334, followed.

Wm. Singer, Jr., and W. F. Herrin, for complainant.

N. Blackstock, Geo. J. Dennis, and Joseph H. Call, for defendants.

ROSS, Circuit Judge. The tracts of land in controversy in this suit having been patented to the defendant Smith under the pre-emption laws of the United States, and by him afterwards conveyed to the defendant Wolff, the complainant, claiming to be entitled to them by virtue of a congressional grant, brought this suit to obtain a decree that the title conveyed by the patent is held in trust for it, to compel the conveyance thereof to the complainant, and to enjoin the defendants from asserting any title to the lands. The grant under which the complainant claims is that of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes" (16 Stat. p. 573), by which the complainant was authorized to construct a line of railroad from a point at or near Tehachipi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to the complainant by the preceding act of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast" (14 Stat. p. 292). The terms of the grant under which the complainant claims are, therefore, to be found in the act of July 27, 1866. So far as applicable to the present case, it was a grant of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road the complainant was authorized to build, to which the

United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such route should be designated by a plat thereof filed in the office of the commissioner of the general land office; and where, prior to that time, any of the sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including reserved numbers."

The bill as amended, to which the defendants interposed a plea, which plea the complainant caused to be set down for argument, and which has been argued and submitted to the court for decision, alleges, among other things, that, on or before April 3, 1871, complainant fixed the general route of the entire line of railroad which it was authorized by the act of March 3, 1871, to construct, and that, on April 3, 1871, the line of the road was designated on a plat thereof, filed on that day in the office of the commissioner of the general land office; that the said general route, plat, and designation of the line were duly approved and accepted by the commissioner of the general land office and by the secretary of the interior, and, on April 21, 1871, the commissioner of the general land office, by direction of the secretary of the interior, dated April 19, 1871, withdrew the odd-numbered sections of land, within 30 miles of the railroad line shown upon the said plat, from sale or location, pre-emption, or homestead entry, which order of withdrawal has ever since continued in force and effect, except in so far as, if at all, the same may have been affected by an order of the secretary of the interior, dated August 15, 1887, directing the restoration of all land withdrawn and held for indemnity purposes under the grant to the complainant. The bill, as amended, further alleges that, on May 16, 1871, complainant accepted the terms, conditions, and impositions of the act of March 3, 1871, and thereafter constructed and fully equipped the entire railroad provided for in the act in five several sections, along the route designated upon the plat filed April 3, 1871, and that, after the completion of the construction and equipment of the said sections, respectively, commissioners were duly appointed by the president to examine the same, who did so, and reported to the president the completion and equipment of the road in accordance with the requirements of the act, which report was accepted and approved by the secretary of the interior and by the president; that the section of the road opposite which the land in controversy is situated extends from San Fernando to Mojave, in respect to which section the report of the commissioners was made February 17, 1877, and was approved by the president March 2, 1877. The bill, as amended, further alleges that, on February 17, 1877, the complainant filed with the secretary of the interior a map of that portion of its road showing the definite location and construction thereof, which map was approved by the secretary of the interior March 6, 1877. The bill, as amended, also describes the

tracts of land lost to it, in lieu of which it claims the lands in controversy, and alleges that the lands so lost are situated on the north side of its road as definitely located and constructed, and within 20 miles of that portion of the road, as constructed, extending from Spadra to San Gorgonio, and that the lands so lost to complainant were granted, as part of the Rancho Muscupiabe, prior to the time when the line of the complainant's railroad was designated by a plat thereof filed in the office of the commissioner of the general land office; that the tracts of land in controversy, which are specifically described in the bill as amended, are parts of an odd-numbered section situated on the south side of the complainant's road as definitely located and constructed, and distant more than 20 miles from, but lying within 30 miles of, that section of the road which extends from San Fernando to Mojave, which tracts were, at the time of the passage of the act of March 3, 1871, vacant and unappropriated public lands of the United States, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and have ever since so remained, excepting, only, as they have been affected by the laws of congress and the acts of the parties in the amended bill mentioned. The bill, as amended, further alleges that, on October 3, 1887, complainant filed its indemnity list No. 25 in the land office of the United States at Los Angeles, within which district the lands in controversy are situated, describing the tracts in controversy as selected by the complainant in lieu of the aforesaid lands lost to complainant; that the indemnity list of the complainant was in the form, and accompanied by the certificates, affidavits, and fees, required by law and the rules and regulations prescribed by the secretary of the interior and the commissioner of the general land office; that, by the filing of the list, with the accompanying papers, complainant did, on October 3, 1887, duly select, under the direction of the secretary of the interior, the tracts in controversy, by virtue of the grant contained in the act of March 3, 1871; and that, at the time of such selection, the complainant had not, nor has it yet, selected or received lands to the extent or amount earned and acquired by it by virtue of the granting act.

The plea denies that the map filed by the complainant in the department of the interior in the year 1871 was anything more than a map of the general route of the road it proposed to build under the authority of the act of March 3, 1871. It denies that the lands described in the bill as amended are situated within 30 miles of the line of the general route designated upon the map filed by the complainant in the department of the interior, and alleges that the said lands are situated more than 30 miles from that line. It alleges that on or about the ——— day of August, 1887, the secretary of the interior made and entered in his records an order revoking and annulling all orders previously made reserving lands within the indemnity limits of every grant made to the complainant railroad company, and restoring them to the public domain, except so far as they had theretofore been lawfully selected by complain-

ant. The plea further alleges that, from March 3, 1871, to October 3, 1887, the complainant did not select, or apply to select, the lands involved in this suit as indemnity lands, under the direction of the secretary of the interior or otherwise; and the defendants deny that the secretary of the interior approved the complainant's application to select the lands in controversy, and allege that he rejected the same. The plea further alleges that, on the 7th day of December, 1887, the defendant Smith settled upon the lands in controversy, and, on the same day, filed his declaratory statement in the United States land office therefor, and that, on May 2, 1890, he applied to the register and receiver of the local land office of the district where the lands are situated to make final proof under the pre-emption laws and the regulations of the interior department, and that, in pursuance thereof, on June 2, 1890, he made final proof showing that he had complied with all the requirements of the pre-emption laws, and thereupon he paid to the United States the purchase price for the lands in controversy and received from the register and receiver of the local land office a final certificate for those lands in due form of law, and on November 3, 1891, a patent was issued by the United States to Smith therefor.

From the facts alleged, it appears that the lands in controversy are not within 30 miles of the general route of the road as located by the complainant, and as indicated on the map filed by it in the office of the commissioner of the general land office. They were not, therefore, withdrawn from pre-emption or sale, for the benefit of the complainant, either by the order of the secretary of the interior or by operation of the granting act itself. Nevertheless, the lands in controversy are within 30 miles of, but more than 20 miles from, the road as definitely located and constructed, and, if vacant and unappropriated, were subject to be taken as authorized by the law, to make good losses sustained by the complainant within the primary limits of its grant. Complainant attempted to select these lands, which are situated on the south side of its road, on October 3, 1887, in lieu of lands situated on the north side thereof within the primary limits of the grant, and which were lost to complainant, by including them in a list filed on that day in the proper local land office, in the form and accompanied by the certificates, affidavits, and fees required by law. This was prior to any attempt at settlement on, or entry of, the lands by the defendant Smith; his settlement, which was the basis of the patent subsequently issued to him, having been made December 7, 1887. Complainant commenced the present suit March 10, 1892, but little more than four years after the inauguration of the adverse claim of the defendants.

The lands in controversy being within the indemnity limits of the complainant's grant, and being, at the time of the complainant's attempted selection of them, vacant and unappropriated, to which the United States had full title, and not falling within any of the exceptions to the grant, and the complainant having done all in its power to select them by filing in the proper office its claim to them in due form, accompanied by the affidavits and certificates re-

quired by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill, unless it be, as contended on the part of the defendants, that indemnity lands on one side of the road cannot be selected to make good losses sustained by the complainant on the other side. That they cannot is, I think, in effect, held by the supreme court in the case of U. S. v. Burlington & M. R. R. Co., 98 U. S. 334–342. On the authority of that case, a decree will be entered sustaining the plea, and dismissing the bill, as amended, at complainant's cost.

HART v. BIER et al.

(Circuit Court, E. D. Louisiana. May 30, 1896.)

PRINCIPAL AND AGENT—AGENT'S KNOWLEDGE—PARTICIPATION IN ILLEGAL ACTS.

One J. H. filed his bill against B., alleging that his four notes for $25,000 each, together with certain negotiable bonds as security, had been delivered by his agent S. H., to B., without consideration, but, though B. had acknowledged the discharge of all obligations of J. H., he refused to surrender the notes and bonds, or to disclose their whereabouts, and thereupon prayed for a decree awarding him possession thereof. B., in his answer, averred that the bonds were in fact the property of one M. H.; that he, as the broker of said M. H., had become the purchaser of a franchise from the city of N. O.; that, at the request of M. H., he had falsely sworn, in legal proceedings instituted in connection with the sale of the franchise, that he was himself the bona fide owner of the franchise; that he had repeated such false testimony before the grand jury, in order to protect M. H. from threatened proceedings for corrupt dealings with the authorities of the city of N. O.; that the notes and bonds had been furnished to him by S. H., the agent of complainant, in order to corroborate such false testimony, by showing apparent proceeds of a sale of the franchise; and that complainant had knowledge, through his agent, of all these corrupt and immoral transactions. M. H., having been made a party, disclaimed all ownership of or interest in the bonds. The cause being set down on bill and answers, *held*, that the question of ownership of the bonds was settled in complainant's favor by the disclaimer of M. H., and that, as it could not be presumed and was not alleged that the purpose and scope of S. H.'s agency for complainant were unlawful or authorized immoral acts, complainant was not to be charged with the knowledge acquired by his agent while participating in illegal and criminal transactions, and accordingly, not being in pari delicto with defendant, was entitled to the decree sought for the surrender of the bonds.

Rogers & Dodds, for complainant.
Lazarus, Moore & Luce, for defendants.

Before PARDEE, Circuit Judge, and PARLANGE, District Judge.

PER CURIAM. The complainant, Judah Hart, a citizen and resident of the city and state of New York, brought his bill against the defendant Henry Bier and the firm of Lazarus, Moore & Luce, attorneys, and therein alleged that on or about the 22d day of November, 1893, he was the owner of 124 first mortgage bonds of the Municipal Ice Company, of the face value of $1,000 each; that, subsequent to said date, the complainant executed and delivered, through his agent, Samuel J. Hart, to him (Bier) his (complainant's) four certain promissory notes, of the sum of $25,000 each, due and