

and remedies of the parties, so long as it cannot be said that the receivers were in possession as the agents and under the control of the coal and iron company, is not perceived. The sales in question, as already stated, were made by the receivers, in their own name, and in the conduct of a business which, presumably, had the sanction of the court. The obligations of their vendees was to them. The legal title was theirs, and consequently the right to sue; and if, while in office, they had brought suit against Daube & Rosenheim upon the original contracts of sale, the latter could have availed themselves of no set-off or counterclaim on account of their dealings with the coal and iron company prior to the appointment of the receivers. For such purposes, the business done by the receivers was not a mere continuation of the business of the company. If there had been an executory contract, with mutual obligations, between Daube & Rosenheim and the company, the receivers, it is settled, would have had the choice, within a reasonable time after appointment, and under the authority of the court, to abide by the contract or to reject it; and is it to be said, in view of the strict rule by which the contracts of suretyship and guaranty are governed, that a guarantor, who has become responsible for one of the parties to such a contract, is subject to consequences and contingencies dependent upon the election of any receiver who may be appointed for the other party? If such consequences are exceptional, and result, as has been suggested, from "rules of policy appropriate to the equitable jurisdiction," protection against them is no less important, and, as we conceive, no less clearly within the guarantor's right to insist upon the letter of his contract, than if invasions of his rights at law were involved.

Judgment reversed, and case remanded, with direction to grant a *venire de novo*.

UNITED STATES v. JONES et al.

(Circuit Court, D. Nevada. December 12, 1896.)

No. 628.

1. OFFICERS OF MINTS—BONDS—RETROSPECTIVE CONDITIONS.

Under Rev. St. § 3501, relative to bonds of officers of mints, the bond of an assistant or clerk should be conditioned, like that of a superintendent, for "the faithful and diligent performance of the duties of his office," and is therefore valid, as a statutory bond, only so far as it is prospective in its character.

2. SAME—DEFALCATION PRIOR TO EXECUTION OF BOND.

On a bond given by an assistant melter and refiner of a mint, conditioned that he "has faithfully performed" and "shall continue to faithfully perform" the duties of his office, recovery cannot be had for a defalcation occurring prior to the execution of the bond, unless it be alleged that all or part of the funds unaccounted for were in his hands when the bond was given, or that legal regulations of the treasury department required him to give bond for past transactions.

Upon Demurrer to Complaint.

Chas. A. Jones, U. S. Atty., for plaintiff.

Wm. Woodburn and Trenmor Coffin, for defendants.

HAWLEY, District Judge (orally). This action is brought for a breach of the condition of a bond given by John T. Jones as assistant melter and refiner of the United States mint at Carson, Nev., in the sum of \$5,000, with Jacob Klein and Frank Golden as sureties, dated November 13, 1893. The condition of the bond is as follows:

"The condition of the foregoing obligation is such that, whereas, the said John T. Jones was on the first day of March, A. D. 1890, appointed assistant melter and refiner of the mint of the United States at Carson City, Ormsby county, state of Nevada: Now, therefore, if the said John T. Jones has faithfully and diligently performed, executed, and discharged, and shall continue to faithfully and diligently perform, execute, and discharge, all and singular the duties of said office according to the laws of the United States, then this obligation to be void and of no effect; otherwise, to be and remain in full force and virtue."

The district judge of the district of Nevada certified to the sufficiency of the sureties November 15, 1893. The bond was certified by the director of the mint as satisfactory November 24, 1893, and was approved by the acting secretary of the treasury November 24, 1893. The breach of the condition of said bond is alleged in the complaint as follows:

"And for assigning a breach of the said condition, the said attorney of the United States of America says that, while the said John T. Jones was such assistant melter and refiner as aforesaid, to wit, from and including the 30th day of June, A. D. 1892, until and including the 9th day of April, A. D. 1895, there came to his hands, were received by him, taken into his possession, and committed to his charge, as such assistant melter and refiner, for the purpose of being coined, certain gold and silver metals, belonging to and which were the property of the United States of America, to a large amount and of great value, to wit, to the amount and value of twenty-three thousand dollars, and which by law he should have accounted for and turned over to the said United States of America, to wit, in the state and district aforesaid; yet, although the said John T. Jones afterwards, to wit, on the 23th day of June, A. D. 1893, was requested to account for and turn over to the said United States of America the said gold and silver metals, or the value thereof, he did not then or afterwards account for or turn over the same, their value, or any part thereof, to the said United States of America, and the said gold and silver metals still remain wholly unaccounted for, and the amount and value thereof as aforesaid due and wholly unpaid to the said United States of America, together with lawful interest thereon from the day last mentioned."

The defendants demur to the complaint, "and for cause and grounds of demurrer allege and show to the court that said complaint does not state facts sufficient to constitute a cause of action in this: that it appears from the face of said complaint that no violation or breach of the conditions of the bond or writing obligatory sued upon occurred after the execution thereof."

Section 3501 of the Revised Statutes reads as follows:

"The superintendent, the assayer, the melter and refiner and the coiner of each mint before entering upon the execution of their respective offices shall become bound to the United States with one or more sureties approved by the secretary of the treasury in the sum of not less than ten nor more than fifty thousand dollars with condition for the faithful and diligent performance of the duties of his office; similar bonds may be required of the assistants and clerks in such sums as the superintendent shall determine with the approbation of the director of the mint."

The contention of the defendants is that the bond in question is retrospective, and therefore void, except as to any breach of the

bond that occurred after the date of its execution. The breach is alleged as of a prior date to the giving of the bond. There is no averment in the complaint that the defendant Jones, at the time the bond was given, had any property in his possession belonging to the United States, or that thereafter any such property came into his hands, which he was requested to account for and turn over to the United States.

The contention of the plaintiffs is that if a bond in direct terms provides for a retrospective effect it is valid; that a bond conditioned for the faithful discharge of official duties may be required by the officers of the government from their subordinates, whether there is or is not any act of congress requiring such bond to be given; that such bond may be made retrospective, and when so made voluntarily, without duress, and without constraint, is binding, unless there is an act of congress which forbids the acceptance of such bonds.

It is admitted by the defendants that, if there is no statute upon the subject, a bond voluntarily given would be valid as a common-law bond; but it is denied that such a common-law bond would have a retroactive effect, except by virtue of some special act permitting it to have that effect. How stand the authorities upon this subject? What are the principles of law which should govern this case?

It is well settled that if an official bond be taken, with conditions which are in part prescribed by the statute, and in part not prescribed, the validity of the bond will depend upon whether the two parts are divisible, and can be separated from each other. If they can, then the bond is valid for the part of it which is in conformity with the statute; but, if upon conditions which are not separable, then the entire bond is void. If the bond in question is to be treated as a statutory bond, it falls within this general rule, and it would necessarily follow that the retroactive part of the conditions of the bond could not be enforced. *Armstrong v. U. S.*, Pet. C. C. 46, Fed. Cas. No. 549; *U. S. v. Howell*, 4 Wash. C. C. 620, Fed. Cas. No. 15,405; *U. S. v. Brown, Gilp.* 155, 182, Fed. Cas. No. 14,663.

In *Armstrong v. U. S.*, it appeared that in June, 1796, one Smith was appointed by the supervisor of New Jersey to collect the internal revenue within a particular district; that he gave bond, with one Willis as security; that he was afterwards required to give additional security, and on January 1, 1799, he, together with Armstrong and Case as sureties, executed a new bond, with the condition "that the said Smith had faithfully executed the duties of a collector, and would thereafter faithfully execute the same"; that, when this latter bond was given, Smith was indebted to the United States for collections theretofore made, and during the year 1799 became indebted in an additional sum for moneys collected by him which he had not accounted for; that judgment was rendered for the United States for the whole sum; and that the sureties thereupon brought this suit in equity to enjoin the collection of the judgment. Washington, Circuit Justice, in delivering the opinion, said:

"One object of this bond most clearly seems to have been to secure a debt previously due to the United States, and the court does not mean to say that security in such cases may not be legally taken by the officers of the United

States; but, when a statutory bond is taken, it ought to conform, in substance, at least, to the requisitions of the statute; and, if it go beyond the law, it is void, at least so far as it does exceed those requisitions. This is an official bond, which the supervisor had a right to demand, and Smith was obliged to give, if he meant to continue in office; but the substantial form of the bond required by the act of congress was prospective only, and no other could be legally taken. A contrary doctrine would open the door to great oppression, and ought, therefore, to be discountenanced."

In *U. S. v. Brown*, one Nicholas Kern was appointed by the president of the United States collector of taxes and internal duties for a collector's district in Pennsylvania, and gave bond with the conditions that "the aforesaid Nicholas Kern has truly and faithfully discharged, and shall continue truly and faithfully to discharge, the duties of said office according to law, and shall particularly faithfully collect and pay according to law all moneys assessed upon such district." This bond was taken under the provisions of the act of congress of July 22, 1813, which required the condition of the bond to be "for the true and faithful discharge of the duties of his office according to law." Judge Hopkinson reviewed at great length all of the decisions having any bearing upon the subject, and, in the course of his opinion, said:

"Where a statute authorizes a bond to be taken in a prescribed manner, or for certain expressed purposes, and declares that if it be not so taken the bond shall be void, then it may not stand good for any purpose, however lawful in itself, if it be not conformable to the statute; but where the statute only directs the condition of the bond, and does not avoid it if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorized part of the condition, and so much may be recovered under it, and no more."

At the close he gives the result of his examination of the authorities as follows:

"From this examination of the cases, we may consider it to be settled that, if a bond be taken at the common law, with a condition in part good and in part bad, a recovery may be had on it for a breach of the good part. This being the general common-law principle, it is incumbent upon the defendant to show that a different rule is established in regard to the statutory obligation on a bond authorized and required to be taken by the statute. An able and laborious endeavor has been made to sustain this distinction by the cases, and arguments drawn from them, to which I have referred with a careful examination. In my opinion the distinction is not supported, as applicable to a case like the present, in which there is nothing in the statute declaring that bonds that vary from the prescribed form shall be altogether void, and in which the good part of the condition may be easily separated from the bad. Nothing is required to be added to the contract, and nothing to be taken from it, but what is favorable to the obligor, by diminishing the extent of his responsibility."

In *Hawes v. Marchant*, 1 Curt. C. C. 136, Fed. Cas. No. 6,240, decided in 1852, Curtis, Circuit Justice, in discussing the questions concerning the validity of bonds, said:

"In *U. S. v. Tingey*, 5 Pet. 115, the defendant, who was a surety of a purser in the navy, in a joint and several bond, pleaded that the conditions of the bond differed substantially from the requirement of the act of congress, and that the same was extorted from the purser and his sureties as the condition of his retaining his office. The court held the plea good. In conformity with this are a great number of decisions, some of which are *U. S. v. Gordon*, 7 Cranch, 287; *U. S. v. —*, Fed. Cas. No. 14,413; *U. S. v. Gordon*, Id. 15,232; *U. S. v. Morgan*, Id. 15,809; *Beacon v. Holmes*, 13 Serg. & R. 190; *Purple v. Purple*, 5 Pick. 226. And the cases in which it has been held that, if the condition of a

statutory bond contains stipulations which are not required by the statute, but separable from those which are required, the latter may be enforced and the former rejected, silently, at least, acknowledge the same rule, by requiring that the one should be separable from the other, and by denying all efficacy to those provisions which have been inserted without warrant of law. Among this latter class of cases are *U. S. v. Bradley*, 10 Pet. 343; *U. S. v. Linn*, 15 Pet. 315; *Hall v. Cushing*, 9 Pick. 395; *Van Deusen v. Hayward*, 17 Wend. 67; *Ring v. Gibbs*, 26 Wend. 502; *Shunk v. Miller*, 5 Pa. St. 250. The rule which avoids such bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding citizens against oppression by the illegal exercise of official power. It is well stated by Sewall, J., in *Churchill v. Perkins*, 5 Mass. 541, that where the plaintiff demands the fruit of an obligation obtained *colore officii*, it must be shown that the demand is justified by some authority of the office; otherwise, it is against sound policy, and is void by the principles of the common law. By '*colore officii*,' however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid simply because it contains something which the statute does not authorize. *U. S. v. Bradley*, 10 Pet. 364; *U. S. v. Linn*, 15 Pet. 290. Whether it can be enforced or not depends upon the possibility of separating the part of the condition authorized and required from the residue of the condition, where the condition is not wholly in conformity with the law, and that is the only objection to the bond."

See, also, *U. S. v. Humason*, Fed. Cas. No. 15,421.

The principles announced in these authorities are conclusive upon the questions raised by the demurrer. A review of the authorities cited by the attorney for the United States will show that there are no doctrines therein announced which are in opposition to the views above expressed. Most of them are cited by Mr. Justice Curtis in *Hawes v. Marchant*, and but few of them need be further noticed.

In *U. S. v. Hodson*, 10 Wall. 395, 408, the court, in considering the validity of a licensed distiller's bond, held that, where a statute directs a bond to the government to be given by persons exercising certain employments, and to be conditioned for the performance of several particular acts, which it specifically states, and the agent of the government takes a bond conditioned, not in the specific way the statute directed, but for the parties' compliance with "all the provisions" of the act "and such other acts as are now or as may hereafter be in this behalf enacted," the bond, if it has been voluntarily given, and is not contrary to law or public policy, is valid as against a party who has enjoyed benefits under it, and this, although the statute, which required the bond to be conditioned in a particular way, contain numerous other provisions which it makes the duty of persons exercising employments under it to comply with, but for which it does not contemplate the giving of any bond; and that a bond which a statute says that a party whom it requires to be licensed as a distiller "shall" give before his license is issued, and which makes it a penal offense for him to exercise the business of a distiller without taking out such license, is a voluntary bond. The court, after quoting the principles announced in *U. S. v. Tingey*, *U. S. v. Bradley*, and *U. S. v. Linn* with approval, said:

"It is a settled principle of law that, where a bond contains conditions some of which are legal and others illegal, and they are severable and separable,

the latter may be disregarded, and the former enforced. Applying this principle to the case before us, all which this instrument contains with reference to statutes other than the act of 1864, under which it was taken, may be rejected, and the generality of the reference to that act may be so limited as to include only what is covered by the conditions prescribed by the statute, and if those conditions were incorporated and set out in the bond in *hæc verba*. An authority exactly in point for this construction is found in the well-considered case of *Ohio v. Findley*, 10 Ohio, 51. The principal in the bond in that case was a county treasurer. The bond was conditioned that he should perform his official duties according to law. The statute, as in the case before us, was specific in its requirements as to what the bond should contain, and the condition, it was admitted, largely exceeded them. The court said: "That part which is legal is marked out in the statute book itself, and is therefore as completely severable from the rest as if the two parts were separated in the condition of the bond."

With reference to voluntary bonds the court said:

"Every one is presumed to know the law. Ignorance, standing alone, can never be the basis of a legal right. If a bond is liable to the objection taken in this case, and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors."

There are numerous decisions to the same effect: *Chadwick v. U. S.*, 3 Fed. 750, 754; *Taylor v. Fleckenstein*, 30 Fed. 99, 103; *Diamond Match Co. v. U. S.*, 31 Fed. 271; *Rogers v. U. S.*, 32 Fed. 890; *Tyler v. Hand*, 7 How. 573, 583; *U. S. v. Mora*, 97 U. S. 413, 422; *Jessup v. U. S.*, 106 U. S. 147, 151, 1 Sup. Ct. 74; *Constable v. S. S. Co.*, 154 U. S. 51, 78, 14 Sup. Ct. 1062.

These decisions are not opposed to the contention of the defendants. Their claim is that the bond in question is a statutory bond, and that such a bond cannot be made retroactive where the statute is prospective in its requirements. In *U. S. v. Tingey*, 5 Pet. 115, the court held that a bond voluntarily given by a disbursing officer of the United States, through the proper department, to secure the faithful performance of his duty, is a valid contract, though the taking of such bond may not be prescribed by any act of congress. The action was upon a bond executed by Lewis Deblois, a purser of the navy, as principal, and Thomas Tingey and others, as his sureties, upon condition that, if Deblois should regularly account, when thereto required, for all public moneys received by him from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States as should be duly authorized to settle and adjust his accounts, and should, moreover, pay over, as might be directed, any sum or sums that might be found due to the United States upon any such settlement or settlements, and should also faithfully discharge in every respect the trust reposed in him, then the obligation to be void. This condition was variant from the provisions of the statute, which required the bond to be given faithfully to perform all the duties of purser of the navy of the United States. The bond as given was not limited to the duties of dis-

bursments of Deblois as purser, but created a liability for all moneys received by him in and for all public property committed to his care, whether officially, as purser, or otherwise. The court, in discussing the question as to how far a bond, voluntarily given to the United States, and not prescribed by any statute, is a valid instrument, and upon the question whether the United States have in their political capacity a right to enter into contracts or to take bonds in cases not previously provided for by law, said:

"Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. This principle has been already acted on by this court in the case of *Dugan v. U. S.*, 3 Wheat. 172, and it is not perceived that there lies any solid objection to it. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this court as ever having been sanctioned by any judicial tribunal."

But, in discussing the other pleas interposed by the defendants, it is clearly shown that the bond was not a voluntary bond, because it was prepared and transmitted to Deblois by the navy department, and he was required and demanded to execute the same as a condition of being permitted to remain in the office of purser. The court, upon this point, said:

"There is no pretense, then, to say that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party upon the peril of losing his office. It was extorted under color of office against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede, the requisitions of law. It would be very different where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office."

In *U. S. v. Boyd*, 15 Pet. 187, the court held that sureties upon an official bond of a receiver of public moneys cannot be made liable for any default of their principal which occurred prior to the date of their bond; but, if the moneys due the government were received by the principal before the date of the bond, and he then had the money in trust for the United States at the date of the execution of the bond, and failed to account for such moneys afterwards, this would constitute a breach of the bond which was conditioned for the faithful execution of the duties of the office. The case came before the supreme court for final hearing upon the merits (*U. S. v. Boyd*, 5 How. 29, 49), and from the evidence it appeared that the acts of the receiver, out of which the defalcation in the case arose, were in direct violation of the law, and constituted a breach of official duty which made him liable at once as a defaulter to the United States, and would have subjected his sure-

ties upon the official bond, if one had been given covering this period. But, by some mistake or oversight, no such bond had been given, although required by law to be given, before the receiver entered upon the duties of his office, and the defalcation of the receiver happened before June 15, 1837, the date the bond in question was given. The court, in the course of its opinion, said:

"It is clear, therefore, that the defalcation had accrued and Boyd had become a defaulter and debtor to the government before the present sureties had undertaken for his fidelity in office, unless we construe their obligation to be retrospective, and to cover past as well as future misconduct, which has already been otherwise determined."

See, also, *Farrar v. U. S.*, 5 Pet. 373, 389.

The principles announced in *U. S. v. Ellis*, 4 Sawy. 590, Fed. Cas. No. 15,047, support the contention of the defendants. It is true that the court held that a bond given by a collector of customs for the faithful discharge of the duties of his office, if given after he assumes office, binds the sureties for the acts of the collector prior to its date. Why? Because the act of congress of March 2, 1799 (1 Stat. 705), expressly so provides. The opinion of Mr. Justice Field speaks for itself, and is as follows:

"The act of March 2, 1799 (1 Stat. 705), provides that every collector shall give a bond to the United States within three months after he enters upon the execution of his office and furnishes the form of the bond. The condition in the form applies as well to the past as the future acts of the collector. Its language is: 'If he has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office according to law, then the above obligation to be void and of no effect; otherwise, it shall abide in full force and virtue.' The act of June 4, 1844 (5 Stat. 661), requires the bond to be given before the collector shall be qualified to enter upon the performance of his duties. Of course, if given before the office is assumed, the condition embracing past acts would be unmeaning and useless. But if, for any cause, such bond should not be executed or approved until after the assumption of the office, or the sureties accepted should be found upon further information to be insufficient, the form prescribed by the act of 1799 might very well be adopted. We do not perceive any such repugnancy between that act and the act of 1844 that the former is necessarily superseded by the latter. We are of opinion that in some cases the provisions of the former act may properly be followed. So far, therefore, as the bond is for the faithful discharge of the duties of the collector, under the act of 1799, our judgment is that it binds the sureties for his acts from the 13th of November, 1852. But, as a bond of a depository of the public moneys and fiscal agent of the United States under the act of August, 1846, so far as that act imposes new and additional duties on the collector, not covered by his ordinary official bond, the case is different. That act contemplates security against future responsibility, not for past transactions. In the absence from it of provisions otherwise directing, the bond exacted must be held to apply only to subsequent acts. So far as it is made retrospective, it is void. Where a statutory bond goes beyond the requirements of the statute, it is, for the excess, without obligatory force."

The present case was argued by the respective counsel, and has been disposed of, so far as the contention of counsel is concerned, without any special reference to the peculiar averments of the breach of the condition of the bond. It is alleged in the complaint that, while John T. Jones was assistant melter and refiner of the Carson mint, to wit, "from and including the 30th day of June, A. D. 1892, until and including the 9th day of April, A. D. 1895, there came to his hands, were received by him, taken into his posses-

sion, and committed to his charge, for the purpose of being coined, certain gold and silver metals, the property of the United States, of the value of \$23,000, which by law he should have accounted for and turned over to the United States." If this portion of the averment is true, then it would follow that, for the value of the metal that came into his hands after the execution and delivery of the bond, "until and including the 9th day of April, 1895," the sureties would be liable. But it is further alleged that, "although the said John T. Jones afterwards, to wit, on the 28th day of June, A. D. 1893, was requested to account for and turn over to the said United States of America the said gold and silver metals, or the value thereof," he did not then or afterwards account for or turn over the same or the value thereof, or any part thereof; that the gold and silver metals still remain wholly unaccounted for, and that the amount and value thereof is due and wholly unpaid. It will readily be seen that this part of the averment is apparently inconsistent with the first portion thereof. By the latter part of the averment the date is limited to the 28th day of June, 1893, thus indicating that the entire defalcation occurred prior to the date of the execution of the bond. The case was argued upon the theory, and has been so considered by the court, that the alleged breach of the bond was for a defalcation which occurred prior to the 28th day of June, 1893. If this be true, it is difficult to determine why it was first alleged that the gold and silver metals came into his hands from and including June 30, 1892, "until and including the 9th day of April, A. D. 1895." The complaint should be amended, in the particulars referred to, so as to conform to the facts in the case whatever they may be.

The statute, in providing that "similar bonds may be required of the assistants and clerks," is intended to be in terms the same as required of the principal for the faithful and diligent performance of the duties of his office, and, as a statutory bond, must be construed to be valid only so far as it is prospective in its character. It is a cardinal rule in the interpretation of statutes that they must be construed as prospective in all cases except where the legislative intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute. This rule rests upon no constitutional limitations of the legislative power, but is a doctrine of the common law, founded upon the recognized injustice of a method of making laws by which the legislature looks backward to discover past errors to be corrected and past acts to be remedied. In order, therefore, to enable the plaintiffs herein to recover upon the breach of the condition of the bond as alleged in the complaint, construing the averment to be to the effect that the entire defalcation occurred prior to the execution of the bond, it would be essential that an amendment or amendments thereto should be made by the further allegations, if the facts of the case will so justify, that the defendant John T. Jones had the gold and silver metal, or some part thereof, in his hands at the time the bond was executed, or that certain rules and regulations, which the treasury

department or director of the mints had the authority under the existing laws to make, had been adopted requiring the giving of a bond by the assistant melter and refiner to cover past transactions.

The demurrer is sustained, and the plaintiffs are given until the rule day of this court in February next to amend the complaint.

TEXAS & P. RY. CO. v. SCOTT.

(Circuit Court of Appeals, Fifth Circuit. December 1, 1896.)

No. 483.

1. RAILROAD COMPANIES — RIGHT OF WAY — ADVERSE POSSESSION — CONTRACT VOID UNDER STATUTE OF FRAUDS.

In 1856, one S. made a verbal contract with a railway company to give it a right of way over his land if the company would establish a depot at a certain point on such land. The railroad was built on the land, and the depot established and maintained for 36 years, during which also the railway company, and another company with which it was consolidated, and which succeeded to its rights, continued to use the track built on S.'s land in the usual manner, without controversy or dispute as to their right. *Held*, that the contract between S. and the railway company being void under the statute of frauds, and the right of action to recover the right of way occupied by the railway company, or its value, having accrued at once, the railway company's possession during the 36 years had been adverse, and it had acquired, by limitation and prescription, the right to an easement in the land.

2. SAME—AGREEMENT TO BUILD DEPOT—ABANDONMENT.

At the end of the 36 years, the depot was abandoned, for reasons connected with the company's interests and the public convenience. *Held*, that the contract between S. and the railway company, even if valid, did not bind the railway company to keep up the depot forever, but that maintaining it for 36 years, and until the company's interests and public convenience required its abandonment, was a substantial compliance with the terms of the contract.

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

T. J. Freeman and F. H. Prendergast, for plaintiff in error.

W. C. Lane and S. R. Jones, for defendant in error.

Before McCORMICK, Circuit Judge, and NEWMAN and PAR-LANGE, District Judges.

NEWMAN, District Judge. The facts of this case, as gathered from the record, are as follows: In 1856, W. T. Scott, Sr., was the owner of a considerable tract of land on the line of the then contemplated Southern Pacific Railway Company. Scott made a verbal contract with the railway company, by which he gave to the company the right to use a strip 100 feet wide, over his land, for a right of way, if the company would establish a depot at a point on said land now known as "Scottsville," and would further give said Scott and his family free transportation over the road. W. T. Scott, Sr., was a director of the Southern Pacific Railway Company at the time the agreement was made. The railroad was, in the year named, built on Scott's land, in accordance with the agreement, and the depot

was established at Scottsville. In 1873 the Southern Pacific Railway Company was consolidated with the Texas & Pacific Railway Company, and it seems that by this consolidation the Texas & Pacific Railway Company acquired the rights and assumed the liabilities of the Southern Pacific Railway Company. Since the consolidation in 1873, the road has been controlled and operated by the Texas & Pacific Railway Company. In 1892 the station agent at Scottsville and the telegraph operator were removed. No reason is shown in the record for their removal, but it was presumably because, in the opinion of those controlling the company, it was not to its interest longer to keep the agent and the telegraph operator at Scottsville. At the time of this change, in 1892, W. T. Scott, Sr., was dead, and the title to the tracts of land through which the Southern Pacific Railway (now the Texas & Pacific Railway) had been constructed was in R. R. Scott. In January, 1893, R. R. Scott brought suit in the district court of Harrison county, Tex., which was subsequently removed into the circuit court of the United States. This suit seems to have been for damages for breach of contract caused by the removal of the station agent and the operator at Scottsville, and which, it is claimed, practically amounted to a discontinuance of the station.

There was a demurrer to the plaintiff's petition, as follows:

(1) "Because said petition shows on its face that it is a suit on a contract made in 1856, verbally, and not in writing, which was more than thirty-six years before this suit was filed, and therefore said suit is barred by the law of limitation of two years; and said suit is also barred by the limitation of ten years."

(2) "Because said petition shows that said contract was for the sale of real estate, and was not in writing, and was therefore contrary to the statute of frauds, and was therefore void."

(3) "Because said contract was verbal, and not in writing, and was not to be performed in the space of one year from the making thereof, and was therefore contrary to the statute of frauds."

(4) "Because the defendants and those under whom they claim have been in actual adverse possession of said right of way, as shown by the plaintiff's petition, for thirty-six years, wherefore plaintiff's right to recover the land is barred by the law of limitation of ten years."

The demurrer setting up the defense that the contract sued on was void, because contrary to the statute of frauds, in that it was not to be performed within one year, was sustained by the court. The demurrer to the first petition in the circuit court and to the supplemental petition, on the ground that the plaintiff showed no right to recover the right of way, was overruled, and it was held that the plaintiff could recover the value of the right of way occupied by the defendant company on the land described. Subsequently, there was a jury trial, which resulted in a verdict for the plaintiff for the value of the right of way, and, perhaps, for certain damages to the remainder of the land not offset by peculiar benefits to the land resulting from the construction of the railroad. The amount of the verdict was \$2,700, with interest from April 1, 1892. On objection of defendant that the verdict was excessive, the court ordered that a remittitur be entered, and judgment be rendered for \$1,916, with interest thereon from April 1, 1892, at 6 per cent. per annum, making in all \$2,318.26.

The defendant, in the proper time, excepted to certain portions of the charge to the court, and to refusals to charge.

Among the requests refused were the following:

"The jury are charged that in this case the plaintiff cannot recover, because the evidence shows that the defendant company has substantially complied with the contract set out in plaintiff's petition, by keeping the station at Scottsville fully equipped from 1856 up to April, 1892. The jury are charged that the plaintiff in this case cannot recover, because the cause of action is barred by limitation."

"That the contract sued on, as having been made between W. T. Scott, Sr., and the railway company, did not constitute such a contract as ran with land, or created any charge on the land, described in plaintiff's petition, and would not pass to the plaintiff by his acquiring title to the land; but, if any cause of action accrued to any person by a breach of said contract, it would be a suit for damages for breach of said contract."

The other exceptions to the charge as given, and to the refusals to charge, need not be referred to, as the case is presented here. It will be perceived, therefore, that the court held that the contract between W. T. Scott, Sr., and the railway company, for a right of way, in consideration of the establishment of the station and free transportation for Scott and his family, was void; and it was further held that the abandonment of the station in 1892 gave to the then owners of the Scott land the right to recover the value of the right of way, and incidental damages to the remainder of the tract. There is some doubt as to whether this is a suit by R. R. Scott, as purchaser of the land, and certain interveners, children and grandchildren of W. T. Scott, Sr., made parties merely for convenience, and to avoid difficulty in showing title, or a suit by the heirs of W. T. Scott, Sr. The view we take of the case, however, renders a determination of this question unnecessary.

The case presents itself here in a double aspect: First. If the contract between W. T. Scott, Sr., and the railway company is void, has the company obtained the right to an easement over and upon the land by possession and use? Second. If the contract between W. T. Scott, Sr., and the railway company was valid, has it been complied with by the company? The contention for the plaintiff below (defendant in error here) is that the possession of the company of its right of way was a mere license; that it was a tenancy under Scott; and that the establishment and continuance of the depot, and the allowance of free transportation, were in the nature of rent for the right of way; and, further, that the holding of the company was subordinate to, and in recognition of, Scott's title, and not adverse to it. Is this true, or is the opposite contention true, that, under the facts, the company has, by open, peaceable, continuous, and adverse possession, acquired a full prescriptive right to the right of way over the lands? There is no doubt that if the contract between Scott, Sr., and the railway company, under which the company took possession of this land, was void, Scott's right of action to recover the land accrued immediately. There is no question but that the occupancy of the company was open, peaceable, continuous, and uninterrupted from 1856 to 1892, a period of 36 years. Was the possession adverse, so that it would ripen into

title? The company certainly constructed the railroad across this entire tract of land. There were embankments and cuts presumably, and, indeed, according to the evidence. Such work was done unquestionably, as was necessary and usual, considering the nature of the land, to level and prepare it as a right of way, and to construct thereon the track. There seems to have been no controversy and no difficulty whatever as to the rights of the company and Scott and his successors in title, until 1892. During all of this time the railway company kept up this part of its track, and operated its trains over it. As to whether or not these facts constitute adverse possession in Texas will be best determined by the rulings of the Texas courts on the subject.

In the case of *Railway Co. v. Gaines*, decided by the Texas court of civil appeals, and reported in 27 S. W. 266, the doctrine which seems to control in Texas on this subject will be shown by an extract from the opinion, given at length, as follows:

"A single question is here presented for our consideration, which is: Does the adverse possession and continuous use of a strip of land for 18 years, as a right of way for the operation of trains by a railway company, create an easement over such land by prescription? A good many cases in this state have touched upon this question, but only one case is found where it has been squarely decided. In the case of *Railway Co. v. Harris*, 2 Tex. Civ. App. 540, 22 S. W. 237, it was held that an easement of a right of way could be acquired by a railway company by prescription in 10 years; that being the time it would take, in this state, to raise the prescription of a grant (*Haas v. Choussard*, 17 Tex. 590), and the full period of limitation prescribed by our statute (*Railway Co. v. Chaffin*, 60 Tex. 554). It is settled, we think, in this state, that the public may acquire the right of way for a public road over the land of another by prescription. *Franklin Co. v. Brooks*, 68 Tex. 681, 5 S. W. 819; *Compton v. Bridge Co.*, 62 Tex. 722; *Click v. Lamar Co.*, 79 Tex. 124, 14 S. W. 1048. We see no good reason why the same principle would not apply to railroads in reference to right of way. We have been unable to find any case, where the necessary requisite exists, that the court has failed to find in favor of an easement. Such authorities from other jurisdictions as we have been cited to, which have decided this question, hold that an easement can be acquired by a railroad by prescription. *Organ v. Railway Co.* (Ark.) 11 S. W. 103; *Cogsbill v. Railway Co.* (Ala.) 9 South. 512, and others. And those of our state that have in any way discussed the question, except the case of *Railway Co. v. Harris*, supra, while not deciding the question, intimate that in a proper case an easement can be so acquired. *Railway Co. v. Wilson*, 83 Tex. 153, 18 S. W. 325; *Railway Co. v. Chaffin*, 60 Tex. 554. Then, let us see if the case at bar comes within the rule. What requisites are necessary to create an easement, we think, are fully stated in the case of *Railway Co. v. Wilson*, supra. The court says: 'The doctrine is well established that the burden of proof is upon the party claiming an easement in the land of another, without any contract or express grant thereto, to establish all the necessary facts from which the right may be presumed in his favor. He must clearly show open and peaceable possession for the full period required under the statutes to preclude a recovery of land against one having no other title, and, at least, with the implied acquiescence of the owner, and that during all such times the use and enjoyment of the right have been exclusive, uninterrupted, and continuous, and under a claim of right adversely to the owner of the fee. If there is a failure to establish any of these essential elements by a preponderance of the evidence, the claim to an easement cannot be maintained.' All of the essential elements have been established, by a preponderance of the evidence, by the railway company in this case. In fact, there is no controversy as to the facts of the case. The railway took possession of the strip eighteen years ago, with the knowledge of the owner; has held adverse possession ever since, using and enjoying the same, which use and enjoyment have been exclusive, uninterrupted, and continuous. In the absence of any direct

testimony as to the claim of right to the strip, the manner of use and holding is sufficient to base a presumption that the railway was claiming adversely, and was sufficient to put the owners on notice of its claim to an easement in the land. We are of opinion that, under the law and facts, the railway company had acquired an easement in the land by prescription for a right of way."

So here, while there is no "direct testimony" as to a claim of right on the part of the company, there is the fact of the building of the railroad, necessarily at considerable expense, over this right of way, and its open, notorious, and continuous occupancy and use. The conceded facts show a quiet and usual control and use of this property every day for 36 years, while all outward indications point to a belief in the rightfulness and justice of the company's possession. There was no special claim of right in words, but there was this general assumption of right by the acts and conduct of the company. There was no necessity for any special claim of right, for it was never questioned. We think it clear that Scott's right of action against the company as to this easement existed in 1856, and continued all along after that time, and that, this right not having been asserted for 36 years, the company has, by limitation and prescription, acquired the right to an easement over the land, which cannot be interfered with by the plaintiff, either as purchaser or as heir at law of Scott.

Passing from this view of the case, and looking at it in another light, and on the assumption that the contract between Scott, Sr., and the railway company was a valid and binding contract, then what is the legal situation of the parties? Scott allowed the railway company to occupy the land referred to in the verbal contract, and the company established a depot thereon of as complete and satisfactory character as could be claimed, and granted Scott transportation for himself and family, presumably, from what appears, during his life. Was this a compliance on the part of the railway company with its contract?

On the question now presented, the case of *Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, is very much in point. The city of Marshall agreed to give the Texas & Pacific Railway Company \$300,000, in county bonds, and 66 acres of land within the city limits, for shops, depots, etc.; and the company, in consideration of the donation, agreed to establish permanently its eastern terminus and Texas offices at that city, and to establish and construct at said city the main machine and car works of said company. The city performed its agreement, and the railway company complied with it on its part by making Marshall its terminus, and establishing its principal offices for Texas and machine shops, etc., at that point. After the expiration of eight years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The supreme court held: (1) That the contract on the part of the railway company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years, and until the interests of the railway company and of the public demanded the removal of some or all of these subjects of the con-

tract to some other place. (2) That the word "permanent," in the contract, was to be construed with reference to the subject-matter of the contract; and that, under the circumstances of this case, it was complied with by the establishment of the terminus and the offices and shops contracted for, with no intention at the time of removing or abandoning them. (3) That if the contract were to be interpreted as one to forever maintain the eastern terminus, and the shops and Texas offices at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity; that the remedy of the city for breach, if there was a breach, was at law. While it is held that, if there was any remedy, it was at law, by an action for damages, still it is clear, from the opinion of the court, and such is clearly the effect of the reasoning that the city of Marshall had no cause of action. This is said in the opinion:

"It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place."

There was a much stronger case against the railway company than the case now before the court, in that the agreement there was in writing, and the word "permanent" was used as to the establishment and maintenance of the shops, etc. If there was a compliance on the part of the railway company with a contract such as was that with the city of Marshall, by the continuance of the shops, car works, etc., for eight years, how much fuller compliance is there here, where there is nothing whatever said as to permanency, and where the depot is established and maintained in full compliance with the contract for 36 years, and until the exigencies of business rendered its discontinuance necessary. It may be remarked that no claim whatever is made by counsel for Scott as to that part of the agreement in reference to free transportation over the railway.

To further discuss the case in this aspect would be useless and unnecessary. We think that the decision just quoted from the supreme court, and especially the reasons given by the court for the decision, are conclusive of the question presented here. It cannot be true that an agreement on the part of a railway company to establish a station at a particular point is an agreement to keep it there forever. It must be that such an agreement is made subject to the general exigencies of business, the public interests, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business. The contract having this limitation, we think that the establishment of a railway station, and its maintenance, to the full extent expected or claimed, for 36 years, is, under all the circumstances, a substantial and sufficient compliance with the terms of the contract relied on here. So that, viewing this case from either standpoint, assuming the contract to be valid or invalid, we are satisfied that no cause of action is shown against the railway company. The case, therefore, must be reversed and remanded, with directions for further proceedings in accordance with this opinion.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.
(Circuit Court of Appeals, Seventh Circuit. January 4, 1897.)

No. 280.

RAILROAD COMPANIES—GOVERNMENT AID—RAILROAD REPORTS.

Act June 19, 1878 (1 Supp. Rev. St. p. 194), requiring certain reports, prescribed by the auditor of railroad accounts, to be made by railroads to which the United States have granted any loan of credit or subsidy, in bonds or lands, or which have received from the United States lands granted to them to aid in the construction of their roads, does not apply to the railroads which were incorporated by the several states, and received from them the grants of land made to such states to procure the construction of railroads.

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

J. H. M. Wigman, for the United States.

George R. Peck, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. This action was brought by the United States to recover of the Chicago, Milwaukee & St. Paul Railway Company the penalty prescribed by the act of congress entitled "An act to create an auditor of railroad accounts and for other purposes," approved June 19, 1878, for neglect to make a report as required. 20 Stat. 169, c. 316, § 5. The circuit court sustained a demurrer to the declaration, and gave judgment for the defendant. The case is sufficiently stated in the opinion delivered in support of that ruling (*U. S. v. Chicago, M. & St. P. Ry. Co.*, 69 Fed. 89); and we fully concur in the conclusion there declared, that the statute under which the action was brought is not applicable. The judgment is therefore affirmed.

COUNTY OF LEWIS AND CLARKE v. UNITED STATES.

(District Court, D. Montana. November 20, 1896.)

No. 58.

1. **FEDERAL PRISONERS IN STATE JAILS — KEEPING AND SUBSISTENCE — STATE STATUTE.**

The Montana statute provides that persons may be committed under authority of the United States to any jail in the state "upon payment of the expenses of supporting such prisoners, ten dollars per month to the county, for the use of the jail, and all legal fees to the jailer." *Held*, that this means \$10 per month for all the prisoners so confined, and not \$10 per month for each one of them.

2. **SAME—EFFECT OF STATE STATUTES.**

A state statute authorizing the use of county jails for the confinement of United States prisoners on certain terms as to charges and fees is not binding on the United States, as, by Rev. St. § 5547, the keeping and subsistence of such prisoners is made a matter of contract, under the control of the attorney general.

R. R. Purcell, for plaintiff.

P. H. Leslie, U. S. Atty.