

was less than 75 per cent. of its par value. The difficulty to be met was not that increase stock might not in good faith be sold at less than par, but in the fact that the by-law authorizing the increase required the new stock to be sold at par. Elliott made the transfer of this patent right July 6, 1892, and on January 31, 1893, the directors passed a resolution in the following words:

"Resolved, that, for and in consideration of the sum of \$1.00, the right transferred to this company by J. M. Elliott, Jr., for the manufacture of his vertical hook coupler, be, and is hereby, transferred back to him. All rights by this transfer are released and conveyed back to him, the same as though said transfer made on the 6th day of July, 1892, had not been made."

The arrangement by which this patent right was to be taken at the price fixed was for the purpose of evading the condition prescribed by the shareholders, namely, that the increase stock should be sold at par. This seems to have been known to Elliott. The resolution by which he reacquired the patent, at the nominal sum of one dollar, must be construed either as a rescission of the agreement for the purchase of his patent, or as but a part of the original illegal scheme by which the limitation upon the power of the directors to sell the new stock at less than par was to be evaded. In either event, the appellee is not entitled to the credit, it not appearing that the patent was of any value to the corporation while it held the title. The subsequent agreement of the receivers to allow this credit was a mere proposed compromise settlement, and never carried out, appellee refusing to pay the balance due upon obtaining such credit or to give his notes therefor.

The decree must be reversed and remanded, with direction to enter a decree against appellee for \$6,997.32, with interest from the filing of the petition of the receivers. Appellee will pay the costs of this court and costs under the petition in the court below.

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CENTRAL TRUST CO. v. EAST TENNESSEE LAND CO. et al. (FORD, EATON & CO., Interveners).

SCHUMACHER et al. v. SAME.

(Circuit Court, E. D. Tennessee. March 6, 1897.)

1. EQUITY—MASTER'S REPORT.

The report of a master upon a question referred to him will not be disturbed, except in case of clear error.

2. RECEIVERS OF CORPORATIONS—DISAFFIRMANCE OF CONTRACTS.

The receiver of an insolvent corporation is not bound to carry out its executory contracts, unless he elects to do so for the best interests of the estate in his charge, and such a contract cannot be enforced against a receiver who has not signified his adoption of it, but has resisted its enforcement.

3. SALE OF LAND—ACTION FOR DAMAGES.

The vendor of land contracted to be sold to a corporation which has since become insolvent, and whose estate is being administered, in case the receiver elects not to go on with the contract, has a claim in damages for the breach, but it is a claim at large, and not accompanied by a vendor's lien.

Upon the Intervening Petition of Ford, Eaton & Co.

White & Martin, for Ford, Eaton & Co.  
Geo. W. Easley and Prichard & Sizer, for East Tennessee Land Co.

SEVERENS, District Judge. In this case the petitioners seek to recover the purchase price of some land which the petitioners claim to have sold to the East Tennessee Land Company by executory contract prior to the commencement of this suit, and for the enforcement of an alleged vendor's lien upon the land so sold. The master to whom this and other matters were referred has reported against the petitioner, placing his decision upon the lack of a good title in the petitioners. As appears from the facts disclosed, there are several questions of doubt in regard to whether the petitioners are entitled to recover, and, if so, whether upon the footing of the contract for the contract price, or whether they would be limited to damages consisting of the difference between the contract price and the actual value of the land. The petition cannot be treated as one for the specific performance of the contract, for that has already been denied by a former decree of this court, so that their footing here must stand upon the right in a common-law suit to recover damages to which they may be entitled, that remedy being reserved to them. There is some controversy in the decision of the courts upon the question whether a vendor, upon tendering a deed which is refused by the vendee, can recover the contract price; and in some quarters it is held that, inasmuch as a common-law court has no authority to compel a specific performance, and the result of the suit will be to leave the title in the vendor, the proper measure of damages is the difference between the contract price and the value of the land. This question arises in the present instance, for there would be no vendor's lien for mere unliquidated damages resulting from the refusal of the vendee to go on with the contract. Practically, the present suit to compel payment of the purchase money upon tender of conveyance, with a prayer for the enforcement of a vendor's lien, amounts to a suit for specific performance. Another question of doubt and of difficulty is whether the execution of a deed by one of two executors in whom a former owner of the land vested a power of sale was valid, or was capable of confirmation by the separate act of the other executor, performed several years later. Other objections are raised by the receiver, which I will not stop to consider.

It appears from the foregoing statement that the question of the sufficiency of this title was fairly a matter for determination by the master. The rule applicable to a master's report is that it will not be disturbed except in case of clear error; and it seems to the court that the petitioner does not show such a state of the case as would warrant the court, under this rule, to reverse the master's decision. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *The Cayuga*, 8 C. C. A. 188, 193, 59 Fed. 483. But there is another ground which is not stated expressly as a ground of his action by the master, but which, nevertheless, is apparent upon the facts of the case. This contract, when the receiver

was appointed, was executory. The receiver was not bound to execute that contract, but might adopt it or not, as he should think for the best interests of the estate committed to his charge. Being in charge of an insolvent estate, he could elect whether he would execute the contract, or abide the damages resulting from its breach; and in exercising his discretion he may properly take into account the equities of the holders of other unperformed obligations of the East Tennessee Land Company. *Wabash W. Ry. Co. v. United States Trust Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Dushane v. Beall*, 161 U. S. 513, 515, 516, 16 Sup. Ct. 337. He has at no time signified his adoption of the contract, but, on the contrary, has resisted its enforcement. No doubt, there would still be left to the vendor a claim in damages for the breach of the contract if at the time when it went into insolvency and was transferred to the receiver a cause of action had arisen; but this would be a claim at large, and would not be accompanied by a vendor's lien. If the petitioner in this case was proceeding for relief of that kind, it ought probably to be allowed; but, as that is not the object of the petition, and would, in the existing state of the main case, be substantially fruitless, it is not supposed to be worth while to deal with the petition on that aspect further. For the reasons above stated, the exception to the master's report will be overruled.

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UNITED STATES v. GUGLARD et al.

(Circuit Court, S. D. California. February 1, 1897.)

No. 689.

1. EQUITY JURISDICTION—ENJOINING TRESPASSES—ACCOUNTING.

A bill alleging trespasses by defendant on the plaintiff's land, and the cutting and removal of growing timber therefrom, to the injury of the inheritance, with threats by defendant to continue such trespasses, and praying an injunction to restrain the same, states a case for equitable relief; and a court of equity, having acquired jurisdiction under such bill, will decree an account and satisfaction for the injuries already done.

2. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill in equity, alleging trespasses on the plaintiff's land, and cutting and removal of timber therefrom by one defendant and the purchase and disposal by another defendant of the timber so cut and removed, and thereupon praying an injunction against the cutting and removal of the timber, and an accounting by both defendants, is not multifarious.

On Demurrer to the Bill.

George J. Denis, U. S. Atty.

Walter F. Haas, S. O. Houghton, and Chas. D. Houghton, for defendants.

WELLBORN, District Judge. The bill alleges that complainant is, and since the 30th day of May, 1848, has been, the owner of certain lands therein described, and that said lands are not mineral; that there has been growing on said lands a large quantity of timber, trees, and wood; that on the 1st day of October, 1893, and