difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control.

Recurring to the present case, it is clear that unless the board of directors is to be absolved upon the theory that they were justified in committing the affairs of the bank to Moore, and relying upon his good conduct, and his answers to the perfunctory questions which were occasionally put to him, until they were brought to the facts by the collapse of the bank upon the first prick of a financial stringency such as came upon the country in the summer of 1893, they must be held liable. It is with sincere commiseration and regret that the court feels compelled to reach this conclusion, in view of the consequence which must follow to these directors. But there is another side to this matter. The court cannot ignore the rights and interests of the depositors and others who have trustfully confided their money to the bank, and who now find that it was run through a shell into the hands of Moore, while the defendants turned their heads away, and failed to give them the protection which a proper discharge of their duties would have afforded. The records of the board of directors make a sorry showing, when

put in contrast with the financial history of the bank. The entries are few, at long intervals, and are almost wholly limited to the election of directors and the declaration of dividends. They are feebly supplemented by the oral testimony of the defendants, which tends only to show that individual inquiries were occasionally made by them, of a comparatively superficial character. There was no examination of the books; at least, none of any value. If there had been such examination by a fairly intelligent man, such as a director promises he is, the condition of things would have been seen. It is not irreconcilable with what they declared, when the bank failed, with respect to their knowledge of its affairs, and with what I must believe was substantially the truth of the matter. It may be conceded that the members of the board were not responsible for the malfeasance or nonfeasance of their associates, where the fault of the others was not known to them, and they were helpless to prevent the consequences; but in the present case the charge of negligence rests upon the whole board, and there is nothing to show that the defendants took any steps to retrieve the consequences of the joint negligence. If the defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented. I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticise his action.

The next question for determination is in respect of the date from which the defendants should be charged. It appears from the record of the board of directors that on January 2, 1886, a dividend of 10 per cent. was declared; on January 11, 1887, a dividend of 9 per cent.; on July 15, 1887, a dividend of 7 per cent.; January 10, 1888, a dividend of 5 per cent.; July 9, 1888, a dividend of 5 per cent.; January 8, 1889, a dividend of 5½ per cent.; January 14, 1890, a dividend of 8 per cent.; December 30, 1890, a dividend of 8 per cent.; and July 1, 1891, a dividend of 7 per cent. No dividend was declared in January, 1892, or in July of that year. It would seem to me that at the last-mentioned date the fact that a year had now gone by without any declaration of dividend, and no sufficient explanation thereof being shown, the attention of the board of directors to the bank's condition was challenged, and that, in the interest of those concerned, an examination into the causes should have been instituted. The test of the prudence and attention which an ordinarily discreet business man would give to his own affairs may properly be applied here. But no examination was made, and, indeed, so far as the records show, there never was but a single examination made by the board of directors, or any committee thereof; and that was on September 1, 1886,—more than six years before the failure of the bank. With serious misgiving that the right of the case would require the court to go further back than this, I have concluded to adopt the date of July 1, 1892, as the period from which the defendants must be held liable. Such examination as they should then have made would have been followed by putting the bank in liquidation, and I think the defendants should be held liable for the losses which the bank subsequently

sustained. An order of reference will be made for the ascertainment of the amount of such losses. Let a decree be entered in conformity with this opinion.

WESTERN NORTH CAROLINA LAND CO. et al. v. SCAIFE.

SCAIFE v. WESTERN NORTH CAROLINA LAND CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

Nos. 197 and 199.

1. ACTION TO DETERMINE ADVERSE CLAIM—INSTRUCTIONS.
In an action to determine an adverse claim to land under the North Carolina statute, an omission of the court to define the nature of adverse possession is not reversible error where the matter was not brought to its attention either by a prayer for instructions or by an exception to the charge for insufficiency in this respect, taken before the jury retired.

2. SAME—EFFECT OF ADVERSE POSSESSION—OMISSION TO CHARGE.
Where adverse possession by actual occupancy of part of a tract is relied on, a charge which fails to definitely state whether the adverse possession was limited to the particular land occupied or extended to the whole tract, and to clearly state the effect of such occupation under the circumstances of the case, constitutes reversible error, where exceptions to the insufficiency of the charge were taken in proper time.

3. APPEAL AND ERROR—ERRORS NOT ASSIGNED.
In an action to determine an adverse claim under the North Carolina statutes, where the court gave a misleading and insufficient instruction as to the effect of adverse possession, *held*, that in view of the far-reaching consequences of the verdict on this issue, and the special circumstances of the trial, the circuit court of appeals would exercise its discretion, under rule 11 (21 C. C. A. cxli., 78 Fed. cxii.), to notice the error, though not properly assigned.

Errors to the Circuit Court of the United States for the Western District of North Carolina.

M. Silver, A. C. Avery, and James H. Merrimon, for Scaife.

Richard C. Dale and F. A. Sondley, for Western North Carolina Land Co.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. We have decided that a new trial should be granted in these cases for the reasons that will hereinafter appear in the consideration of the fifth exception in No. 199, and this conclusion renders it unnecessary to consider many of the questions discussed in the very learned arguments which have been presented. The suit was brought for the purpose of determining the title to about 70,000 acres of land in Western North Carolina, claimed by plaintiff under a grant from the state of North Carolina to Robert and William Tate, dated May 30, 1795. The defendants claimed title under grants to W. W. Flemming, dated December 28, 1877, and a deed from Flemming to the defendant land company, and the action was brought in pursuance of an act of the general assembly of the state of North Car-

olina, which provides "that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." The complaint sets forth that the plaintiff was the owner in fee simple and entitled to the possession of a tract of land described therein, containing about 70,400 acres, except about 4,056 acres lying within said boundary, and previously granted by the state to other parties, and that the defendants were in wrongful possession of a portion of said lands. The answer of the defendants denied the title of the plaintiff and the wrongful possession, and, for a further defense, claimed "that, if the plaintiff has an apparent title to the land purporting to be described in said complaint, which these defendants deny, still the plaintiff cannot locate any such land, and no such land can be located or found." Prior to this action, a suit of like character had been commenced against the defendant land company, and a separate action of ejectment against one Jack Sheehan, alleged to be in possession of a part of these lands, but by agreement of counsel these suits were consolidated, and the case was heard upon the complaint and answer in which the defendants were joined; and it has been strongly urged that under this agreement of counsel the defendants were estopped from setting up title by adverse possession to any of the lands, except that portion in possession of Sheehan, which was a part of the lands embraced in grant No. 945; and that the claim of possession in Holafield, which was not developed until late in the trial, was a violation of this agreement, and operated as a surprise. We are of opinion that the agreement of counsel did not operate as an estoppel, and that the substituted answer to the consolidated complaint put in issue the title of the plaintiff, and under the general denial it was competent for the defendant to prove adverse possession in itself, or in any one claiming under it. The case was duly tried by a judge and jury under these pleadings upon issues submitted in accordance with the practice in the state of North Carolina. Upon the issues so tried the jury found that the plaintiff had made out his title from the original grantees; that he had established his boundaries to the land claimed in his complaint; and that the defendant Sheehan was in wrongful possession of tract No. 945. To the issue submitted in the words following: "Has there been a continuous adverse possession by the defendant the Western North Carolina Land Company of any part of the land described in the complaint for more than seven years under color of title? If yes, describe the location of the adverse possession,"—the answer of the jury was: "Yes. Holafield's possession on 915." Upon this verdict a judgment was entered in favor of the defendant land company.

The defendants' title was derived from W. W. Flemming by deed dated January 3, 1878, conveying 32,382 acres, by metes and bounds, being "the land as described by seventy-six state grants numbered from 904 to 967, inclusive, and from 971 to 982, inclusive, the grants from the state being dated December 28, 1877." It thus

appears that the verdict of the jury as to the adverse holding of Holafield in effect determined the title to the large body of land in dispute. Holafield lived in McDowell county, upon a tract of 50 acres, which he held under grant for about 27 years prior to the date of the trial. About 100 yards from his house lay a tract of land claimed by one Bird, who said that he had an entry for it. By a verbal agreement with Bird, he cleared a patch of 2½ acres adjoining his land, extended his fence so as to inclose it in his field, and remained in possession and cultivated it for five or six years, when one Flemming, the agent of the defendant land company, came to his house, and an agreement, of which the following is a copy, was entered into:

"Office of Lamp Post.

"Marion, N. C., April 5th, 1883.

"I., S. H. Flemming, agent of the Western North Carolina Land Company, do hereby authorize J. G. Bynum Holafield to cultivate the two pieces of land near his house, containing about 2½ acres, known as the 'Tract Cleared by David Bird,' and in consideration of the authority here given, he, the said Holafield, is to prevent any encroachments on the land of the company, as far as possible, and to report any such to me. This lease is for one year from date.

"Witness my hand and seal this April 5th, 1883.

"S. H. Flemming, Agent.

"Witness:

his
"P. X Burnet."
mark

It does not appear that this agreement was recorded, or that Bird was notified of it. About a year after this lease, Flemming was again at Holafield's house, and authorized him to go on cultivating the land, to use firewood and rail timber, and to clear more land if he wished. By virtue of this authority, continued by Houck, a subsequent agent of the land company, he cleared additional land, making in all about six acres, which he inclosed in the same field. There was no written lease subsequent to that of April 5, 1883. The rent charged Holafield was that he should "look after the land." The six acres thus inclosed by Holafield lay, so it is claimed, within the boundaries of grant No. 915. The testimony shows that the lands were in a wild, mountainous region, but that there were a number of settlements in the near neighborhood of Holafield, and that in the summer of 1889 a gentleman engaged in the lumber business was at Holafield's house, and established his headquarters near him, and cut and hauled away a quantity of timber; but it is not clear from the testimony whether or not this timber was cut on the lands in controversy. One of the witnesses examined at the trial testified that there were 50 or 75 families living within the lines of the plat displayed, but he did not know the nature of their claims.

This brings us to the consideration of the exception, which is as follows:

"Fifth exception: The said judge charged the jury upon the issues in regard to the defendant's possession as follows: 'Now, on that issue of possession, if you believe that Holafield entered into possession of that land, and was in possession of the land that he speaks of, within 915, under a lease from the agent

of the Western North Carolina Land Company, and remained in possession of the land that he speaks of for more than seven years continuously and adversely, I will charge you that that possession goes to the entire extent of the land claimed by him under deed made prior to that possession, and prior to the commencement of this action. And the evidence of that possession is that of Holafield.' Whereupon the counsel for the plaintiff insisted that this part of his honor's charge was erroneous: (1) Because, by the evidence of the said Holafield, his possession of the land was under Bird, and he never surrendered to said Bird, and said Bird never consented to his attornment to the defendant the Western North Carolina Land Company. (2) Because the said adverse possession of the said Holafield could not extend beyond the quantity of land mentioned and described in the paper writing from Flemming, agent of the defendant land company, to him, the limits of his said possession having been confined by said paper writing to 2½ acres. (3) Because, if the said Holafield held adverse possession in favor of the defendant land company, such possession was actual only to the extent of the said 2½ acres, and could not be extended by construction in favor of the defendant land company to any land outside of the actual possession of the said Holafield, so as to expose said land company to the action of the plaintiff, or any one under whom the plaintiff claims. (4) The lands claimed by the defendant land company, although included in one general boundary by the deed from W. W. Flemming to the said land company, are, nevertheless, divided by specific metes and bounds into more than 70 different tracts of land; the possession of the said Holafield being on tract No. 915. Therefore the said adverse possession of the said Holafield could not extend beyond the boundary lines of said No. 915; and as to No. 915 the possession of the said land company could be no more than a constructive possession outside of said Holafield's actual possession, and such constructive possession outside of said Holafield's actual possession, not exposing the said land company to the action of the plaintiff, could not have the effect to mature title in the defendant land company. (5) Because said Holafield's possession was not of that open and notorious character which can be considered sufficient to put the plaintiff, or those under whom he claims, upon notice of the claim of the said Holafield or of the defendant land company. (6) Because said Holafield's possession was not exclusive and was not uninterrupted."

That an imperfect title may ripen into and become in law a perfect title by reason of acquiescence in a prolonged and continuous adverse holding, and the failure of the true owner to assert his claim by entry or action, when an action will lie, is a proposition that is not disputed, and it is equally clear that the adverse possession which overcomes the legal title must be actual, open, and notorious, continuous and uninterrupted, exclusive and unequivocal. It has been strongly pressed in the argument that the omission of the presiding judge to define the nature of "adverse possession" is error. So it would have been had a request embodying the desired definition been presented in the form of a prayer for instructions. While this would have been the better practice, it would have been sufficient if an exception to the charge stating the insufficiency thereof on these grounds had been duly taken, for this would have brought to the attention of the judge, before the jury retired, the nature of the objection, and would have given opportunity to modify, enlarge, or correct his charge in respect to the matter excepted to; and his refusal, after his attention had thus been directed to the point, to instruct the jury fully as to the nature of an adverse possession, would have brought the subject here for review. The case has been argued as if this had been done, but an examination of the exceptions shows that they relate rather to the territorial extent of the adverse