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

possession than to the character thereof. It nowhere appears that, by exceptions or otherwise, the attention of the presiding judge was directed to this point in such a way as would enable him to see that the plaintiff desired that the jury should be specially charged as to the elements which constituted "adverse possession." It is claimed that the fifth exception does so in substance. We cannot see that it does, and if, with the full light of elaborate oral and printed arguments, it has not been made visible to us, we cannot hold it an error in the presiding judge that he failed to see it. On this point, therefore, the exception cannot be sustained. In other respects we are of opinion that this exception must be sustained. Holafield entered into possession under Bird, who claimed title by virtue of an entry which we understand by the laws of North Carolina is a conditional contract of purchase from the state. It was claimed that Bird's title was not perfected by actual purchase, and the state sold to W. W. Flemming, and by grant No. 915 conveyed title to him. The tract of land embraced in No. 915 having been subsequently conveyed to the defendant land company by deed which embraced many other grants, the agent of this company leased to Holafield "the two pieces of land near his house, containing about 2½ acres, known as the 'Tract Cleared by David Bird.'" The 2½ acres thus described were inclosed by a fence, and afterwards—but at what time the testimony does not disclose—additional land, to the extent of six acres in all, was taken into cultivation and actually occupied by Holafield. It is to such possession that the charge relates which is the subject of this exception, and is in these words:

"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."

We are of opinion that the charge was indefinite and misleading, and that the exceptions sufficiently pointed out the objections. The effect of Holafield's attornment to the land company without surrendering to Bird under whom he entered; the question of the extent of Holafield's adverse possession,—whether it was limited to the quantity of land mentioned and described in the paper writing from Flemming, the agent of the land company, and whether or not the alleged adverse possession of the land company outside the limits of the land actually occupied by Holafield was or not such a merely constructive possession as not to expose the land company to an action, and, therefore, not of a character to mature title; whether the possession of a minute portion of land in a territory embracing over 70,000 acres lying in a wild and mountainous region was of that open and notorious character which denoted an intention to usurp a possession beyond the boundaries actually occupied, and therefore such as required that an owner of reasonable diligence and ordinary vigilance should assert his title by action or otherwise; whether the alleged settlement of other parties within those boundaries is consistent with the claim of exclusive and unequivocal possession, which is nec-

essary in order to ripen an imperfect into a perfect title,—all of these were questions pertinent to the issue, and they were not covered by the charge. The plaintiff was entitled to instructions upon them, and, his exceptions having brought them to the notice of the court, its failure to charge the jury upon them was error.

Considering the far-reaching consequences of the verdict of the jury upon the question of the adverse possession of Holafield; that the testimony relating to such possession was not introduced until late in the trial, after many days had been devoted to other, and what were apparently regarded as more important, issues; that the distance of the locus in quo from the place of trial furnished some excuse, under the circumstances, for the failure to establish with due definiteness the lines and locations of settlements within the disputed boundaries, the knowledge of which is essential to the doing of exact justice between the parties,—we are of the opinion that the case is one which would with propriety justify, and should in justice require, this court to exercise that discretion which its eleventh rule allows in its concluding words, "but the court, at its option, may notice a plain error not assigned." So, even if we were in doubt whether the exceptions did in due form assign the errors complained of, we would feel ourselves impelled to exercise that option, which is to be rarely and reluctantly invoked, and notice the plain errors and omissions in the charge of the presiding judge. It is but simple justice to the memory of that learned and conscientious judge, who has since passed away, to say that such errors were due to the strain of a long and fatiguing trial, and perhaps to the omissions of counsel, due to the same cause. We are of opinion that a new trial should be granted, and it is so ordered.

NORTHWESTERN MUT. LIFE INS. CO. v. SEAMAN et al.

(Circuit Court, D. Nebraska. May 3, 1897.)

1. OFFICERS OF COURT—APPOINTMENT—RELATION TO JUDGE.
   The provision of 24 Stat. 552, that no federal judge shall "hereafter" appoint to any office or duty in the courts a person related to him within the degree of first cousin, does not invalidate such an appointment previously made.

2. CLERK OF COURT—APPOINTMENTS—MASTER—FORM OF ORDER.
   An order appointing a clerk of a federal court as master in chancery without assigning a special reason therefor, as required by 20 Stat. 415, is sufficient, however irregular, to clothe him with insignia of the office, so that his acts will be those of a de facto incumbent, and not subject to question in a collateral proceeding.

3. JUDICIAL SALES—VACATING APPOINTMENT.
   Under the Nebraska statute, giving judgment debtors the right to have their property appraised, and providing that it shall not be sold for less than two-thirds its appraised value, an appraisement cannot be set aside, as too low, where fraud in the appraisement is not alleged.

Bartlett, Baldridge & Debord, in support of exceptions.
Howard Kennedy, Jr., opposed.

MUNGER, District Judge. This case is on hearing to exceptions filed to the master's report of sale of real estate under a decree of foreclosure, and to set aside the appraisement. The exceptions, though several in number, present but two questions, viz.: (1) The authority of the master to act as such; and (2) the valuation as made by the appraisers.

The facts, briefly stated, are the following: The decree directed that the mortgaged premises should be sold by "a master in chancery of this court." No particular master was named. Under this decree the premises were appraised and sold by E. S. Dundy, Jr. It is shown, in support of the motion to set aside the appraisement and sale, that said E. S. Dundy, Jr., was on the 23d day of November, 1882, appointed clerk of the United States district court for the district of Nebraska, and has held such office from that date continuously to the present time; that, at the time of his appointment as such clerk, his father was judge of said court; that on the 25th day of January, 1886, a petition was presented to the judges of this court, signed by a number of attorneys, praying for the appointment of said E. S. Dundy, Jr., a master in chancery. On the same day an order was made by said judges appointing said Dundy master in chancery, which order was as follows:

"U. S. Circuit Court, District of Nebraska.

"On consideration of the annexed petition, it is ordered that E. S. Dundy, Jr., be appointed master in chancery of this court, and that he take and subscribe the oath of office, and file the same with the clerk of this court within thirty days.

"Leavenworth, Jany. 25, 1886. David J. Brewer, Circuit Judge.
"Elmer S. Dundy, District Judge."

Said E. S. Dundy, Jr., on the 4th day of February, 1886, took and subscribed to the proper oath of office, which oath, together with the petition and order of appointment, were on said day filed in the office of the clerk of this court; but the same were never recorded in any of the record books of said clerk's office.

From the foregoing state of facts it is urged that said Dundy was by law inhibited from acting as master in chancery, and that the sale in this case, by him as master in chancery, if not void, is at least avoidable. This contention is based on the following provisions of the United States statutes:

"That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge, to, or employed by such court or judge in any office or duty in any courts of which such justice or judge may be a member." 24 Stat. 552.

"No clerk of the district or circuit courts of the United States, or their deputies, shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment." 20 Stat. 415.

The section of the statute first above quoted, if applicable to sustain the claim of defendant in this case, must be held retroactive, and to have removed said Dundy not only from the office of master in chancery but that also of clerk, as it will be observed that his appointment to both positions was prior to the enactment of this provision of

the statute. To so hold is not only to overturn a well-settled rule of statutory construction, but also do violence to the language of the statute itself. In Murray v. Gibson, 15 How. 421, the court say:

"As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed a retroactive operation where this is not required by express command, or by necessary and unavoidable implication. Without such command or implication they speak and operate on the future only."

In U. S. v. Heth, 3 Cranch, 398, the following was stated:

"Words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

To the same effect are McEwen v. Den, 24 How. 242–244; Harvey v. Tyler, 2 Wall. 328, 347; Sohn v. Waterson, 17 Wall. 596; Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255; Fuller v. U. S., 48 Fed 654.

In the case of People v. Green, 58 N. Y. 295, it was held that an amendment to the charter of a municipal corporation, which provided that an officer of the city who accepted a seat in the general assembly of the state should be deemed to have vacated his office, was to be construed as prospective, and not to apply to officers who had already become members of the legislature. The decision in this case was based, not on the ground that the legislature did not have the power to thus regulate and change the tenure of officers already elected, but for the reason that the intention to so regulate was not clearly expressed in the act.

The language of the statute in question by its terms is clearly prospective. It says:

"No person related to any justice or judge of any court of the United States * * * shall hereafter be appointed by such court or judge to * * * any office or duty in any court of which such justice or judge may be a member."

The statute does not prohibit one already appointed from continuing to act and perform the duties of his office.

It is further urged that the appointment as master was void because no special reasons therefor were assigned in the order of appointment. It will be noticed that authority to appoint the clerk as master exists when there are special reasons therefor. It is fairly inferable, from the order of appointment, that it was made because asked for by petitioners. Whether that was a sufficient special reason, within the purview of the statute, it is unnecessary at this time to inquire. In Fischer v. Hayes, 22 Fed. 92, Justice Blatchford, speaking with reference to the appointment of a deputy clerk as master, when it was shown that the solicitors of the parties had assented to the appointment in open court, although such was not shown in the order, said:

"Under such circumstances, consent being an adequate special reason in a case of the kind, it must be presumed that, as the judge appointed Mr. Shields, he determined that the consent was an adequate special reason. Nothing, therefore, remains but the irregularity of omitting to state the special reason in the decree. * * * The irregularity, if it was one, in a case of consent, of not specifying the consent in the decree as the special reason for the appointment, is a mere defect or want of form, which may be disregarded."

However irregular we might regard the appointment of Mr. Dundy as a master in chancery of this court, the judges were not without