summated by the payment of the purchase money, or by the doing of some other equivalent act, such as the surrender of a land warrant or the selecton of land to supply an ascertained deficiency in a land grant. It is generally agreed that, when such acts are performed, the equitable title becomes complete, subject, of course, to the right of the land department to cancel the entry, or the selection, prior to the issuance of the patent, for good and sufficient cause shown, why the entry or selection should not have been allowed. The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect. Gibson v. Chouteau, 13 Wall. 92, 101; Reynolds v. Plymouth Co., 55 Iowa, 90, 93, 7 N. W. 468; Calder v. Keegan, 30 Wis. 126; Musser v. McRae, 44 Minn. 343, 46 N. W. 673; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. 253. In the case last cited (Hussman v. Durham) the supreme court said:

"A title by relation extends no further backwards than to the inception of the equitable right. * * * In other words, the United States does not part with its rights until it has actually received payment, and if, by mistake, inadvertence, or fraud, a certificate of location, which is equivalent to a receipt, is issued, when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid."

In that case the court accordingly declined to give a patent effect by relation as of the date when the initial step was taken to acquire a title to certain public land by the location of a land warrant, where the result of giving it such effect would have been to subject the land to the claims of the holder of a tax title, although he had paid taxes which were assessed when the land was apparently subject to taxation, and had afterwards expended money in improving it.

In the light of these principles the complaint must be examined. The plaintiffs found their right to recover for coal mined and removed prior to December 31, 1894, on the allegation that Evans filed a coal declaratory statement on October 2, 1880. The filing of this statement, assuming the facts stated therein to be true, gave Evans, in the language of the statute, "a preference right of entry," nothing more and nothing less. Section 2348, Rev. St. U. S. Manifestly, it did not create such a complete equitable title as is acquired when public land is entered and paid for. To have made his equitable title complete, Evans should have proved his rights and paid for the land within one year after October 2, 1880. In default of so doing, the statute (section 2350, Rev. St. U. S.) declared that the land filed against should be subject to entry by "any other qualified applicant." The complaint shows affirmatively that this was not done; that no payment was made by Evans until December 31, 1894; and that, after the year limited for making payment had expired, Byron McMaster was permitted by the officers of the land department to enter the land, on the theory, no doubt, that Evans' preference right of entry had been forfeited. The only reason stated in the complaint why the entry of McMaster was eventually canceled by the officers of

the land department is that they found and decided that the entry was not made for his own benefit, but presumably for the benefit of the Durango Land & Coal Company. It is not alleged in the complaint that the McMaster entry was canceled because the plaintiff Evans had previously filed a declaratory statement, and obtained a preference right of entry, or that such preference right of entry in the judgment of the land department in any manner affected the validity of the McMaster entry. We must presume, therefore, that, but for the fact that McMaster did not enter the land for his own benefit, such entry would have prevailed over the preference right of entry originally secured by Evans, and that the land would have been patented to the defendant, on the ground that such preference right had either been lost or abandoned. In this aspect of the case, it follows that Evans' right to the land had its origin in the cash entry which he was allowed to make on December 31, 1894, after the McMaster entry was canceled, and that his patent ought not to be given effect by relation as of an earlier date, because whatever right he had theretofore acquired had been lost.

We have not overlooked the averment contained in the complaint, to the effect that the declaratory statement filed by Evans was suspended by order of the commissioner of the general land office "until such time when the necessary and proper instructions should have been issued by the said commissioner"; but, in our judgment, that allegation is not sufficient to show that the failure of Evans, for a period of 12 years, to make his proof and payment, was due to the neglect of the officers of the land department in preparing the necessary instructions under which such steps could be taken. The complaint does not show, by direct averment or necessary intendment, that from October 2, 1880, until June 27, 1892, the land department failed or refused to promulgate instructions under which Evans could have prosecuted his claim and perfected his entry; and, in the absence of such an averment, we will not presume that his rights were held in abeyance for such an unusual length of time, and that he was for 12 years deprived of the power to prove up his claim, and pay for the land, without fault of his own, and solely through the neglect of the officers of the land department. Inasmuch as the plaintiffs invoke the equitable doctrine of relation for the purpose of recovering the value of coal which the defendant company has taken out of the land in controversy, doubtless at great labor and expense, and during a series of years, they ought to show, by proper averments, why Evans remained silent and inactive for such a long period after his declaratory statement was filed, and they should also show that his apparent failure to comply with the law and to exercise due diligence was excusable. Without some further allegations showing how it happened that no action was taken by Evans towards perfecting his claim between October 2, 1880, and June 27, 1892, although for a greater part of that time the defendant company was in possession of the land, and mining coal thereon, the inference is clear that he must have been guilty of gross laches in prosecuting his claim, and in asserting his rights; and such laches on his part would seem to be a sufficient reason why his patent should not be given effect by relation as

of the date when he filed his declaratory statement. It may be that facts can be shown which will excuse Evans' apparent want of diligence in perfecting his title, but we are constrained to hold that the present complaint does not contain such a showing, nor any averments which would justify us in holding that his patent should be given effect by relation as of a date anterior to December 31, 1894. Under the averments of the complaint, as heretofore stated, there would seem to be a right to recover for such coal as the defendant company may have mined and removed from the land subsequent to the latter date, and for that reason we think that the demurrer to the complaint should have been overruled. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

SANBORN, Circuit Judge (concurring). I concur in the result in this case, but I am unable to agree to the views expressed in the opinion relative to the application of the doctrine of relation. As I read the complaint in this action, it shows that a competent quasi-judicial tribunal decided, in a case of which it had jurisdiction, that the defendants in error and those under whom they claimed never had any right or title to the land from which they wrongfully removed the coal in controversy, and that the plaintiffs in error, or one of them, Roger C. Evans, had during all the time after 1880 a right to the possession and use, and a preference right to enter the land, which eventually matured into a title. It does not appear to me that there is any occasion to abrogate or evade the settled doctrine of relation, in order to take from those who, according to the unassailable judgment of the land department, had a right to this land and its products, and to give to those who never had any such right the coal which the latter wrongfully took from it, and which may have constituted its chief value.

TEMPLE et al. v. GLASGOW et al.

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

No. 176.

1. CORPORATIONS — APPOINTMENT OF RECEIVERS — JURISDICTION — WAIVER OF OBJECTIONS.
   An objection to the jurisdiction of the court to appoint receivers for any other property of a corporation than that upon which the complaining creditors claim a lien should be taken in limine, and is waived when not raised until after a decree authorizing receivers to sell all the corporate property.
2. RECEIVERS—TIME OF APPOINTMENT—JUDGMENT LIENS.
   Judgments against a corporation, obtained between the entry of an order appointing receivers therefor and the approval of the receivers' bonds, create no lien on the property subject to the receivership. 73 Fed. 709, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

On September 17, 1892, the Connecticut River Banking Company, a corporation of Connecticut, filed its bill of complaint in the circuit court of the United States for the Western district of Virginia against the Rockbridge Company,

a corporation of Virginia, and against the Manhattan Trust Company, a corporation of New York, and F. T. Glasgow, a citizen of Virginia, trustees, alleging that it held, as collateral security for a debt due to it by the Rockbridge Company, certain past-due and unpaid first mortgage (series A) bonds of the said Rockbridge Company, secured by a deed of trust from said Rockbridge Company to the said Manhattan Trust Company and F. T. Glasgow, trustees; that, of said first mortgage (series A) bonds, there were outstanding, in all, about $120,000 or $130,000, of which no part of the principal or interest had been paid, and that the said Rockbridge Company was largely indebted to persons other than said mortgage bondholders, and was insolvent and unable to pay its debts, and that suits to a considerable amount had already been instituted against it, and other suits were threatened; that said company owned large and valuable properties, real and personal, in the county of Rockbridge, but was unable to realize funds to meet its defaulted engagements, and its officers and managers were unable to do anything to relieve it from its embarrassments; and that the interests of all parties concerned required that the company should go into liquidation, and its property and assets be placed in the hands of a receiver, to avoid being wasted by suits, and so that full justice might be done to all parties. The prayer was that the Rockbridge Company and the said mortgage trustees be required to answer, and that an injunction be granted restraining the Rockbridge Company from all further acts as a corporation, and for the appointment of a receiver of the property and assets of the company, in order that the same might be administered under the direction and control of the court, and that the debts might be collected, and the property sold, and the proceeds appropriated, under the direction of the court, to the payment of the company's debts according to their priorities; that all necessary accounts might be taken; and that the claims of all parties who should come in might be ascertained and adjudicated; and for general relief. Subpœnas were issued, and the Rockbridge Company and Glasgow were returned summoned to the October rule day, 1892, and the Manhattan Trust Company to the November rule day, 1892. The matter of the appointment of a receiver was, upon notice, set for hearing on October 17, and postponed to November 10, 1892, and on that day it was continued to the next regular term.

On December 6, 1893, one H. C. Parsons filed his petition in said suit, alleging, in substance, that in his own right, and as president of the Natural Bridge Forest Company, he was the owner of $17,500 of the first mortgage bonds of said Rockbridge Company, similar to those described in the bill, and that all of said mortgage bonds were past due and unpaid. And thereupon he concurred in the averments and the prayers in complainant's bill, alleging as additional grounds for the appointment of a receiver that the personalty of the defendant company under its management at that time was being rapidly wasted. On December 21, 1893, J. O. Burdett, receiver, filed a petition stating that he was the holder of $5,800 of said mortgage bonds, which were a lien upon the property described in the mortgage filed with the bill, and alleging that unless a receiver was appointed the assets of the defendant company would go to waste, and judgments would be obtained against it by different creditors. He joined in the prayer of the original bill, and asked, in addition, that "the property of said company embraced in the mortgage aforementioned be subjected to the lien of said mortgage, and be divided amongst the creditors secured therein, and, if your petitioner's debt should not be fully satisfied thereby, that he be allowed to share in the proceeds, pro rata, of any property not embraced in said mortgage, along with the unsecured creditors." On February 26, 1894, a similar petition was filed by the Glasgow Manufacturing Company, setting forth at great length an open account due it by the defendant Rockbridge Company, explaining how a large part of said account had been paid from the proceeds of certain mechanics' liens, and stating that the remainder thereof was secured by the hypothecation of $14,200 of said mortgage bonds. It was again stated that the defendant company owned valuable real and personal property not conveyed by said mortgage; that it was insolvent; that actions were pending against it which would soon go to judgment, and, unless some action was taken, the plaintiffs in said actions would acquire liens on the property "not embraced in said mortgage, giving them priority over cred-

itors who have not instituted actions at law." The appointment of a receiver was again prayed, and certain affidavits were filed with the petition in support of the allegations therein made.

Thereafter, upon notice to the defendants, the motion for the appointment of a receiver was renewed on February 26, 1894, and on that day a decree was entered, which, after reciting that it appeared to the court that the appointment of a receiver was necessary, decreed as follows: "It is adjudged, ordered, and decreed that J. Lewis Bumgardner and F. T. Glasgow be, and are hereby, appointed as receivers for said the Rockbridge Company, and that they shall, as soon as practicable, take possession, and that the officers and agents of the said company be directed to give them possession, of all the property, books, papers, and assets of the said company, of all nature and description. And the said receivers shall, as soon as practicable, make an inventory of the property and effects of the said company, and shall report the same to this court, with such suggestions and recommendations as they shall deem best, with a view to the liquidation of the indebtedness of the said company. And that said receivers are authorized to employ such agents, clerical, expert, and other assistance as they may deem proper, in order that the property of the company may be protected, the inventory above directed made, the books of the company examined and written up, if necessary, and such other work done as may become necessary in the discharge of their duty. And said receivers are directed to collect all debts due the said company, by suit or otherwise,—not incurring the expense of suit, however, on claims known to be insolvent, but only on such claims as they, in their judgment, may deem it best for the interests of the creditors of the company to institute suit upon; and they also shall have power to compromise claims on such terms as they both may agree upon. That the officers and agents of the said company are hereby enjoined and restrained from exercising any rights or control over the property, assets, books, and papers of the said company, and from interfering in any manner whatever with the control and management of the receivers over and with the same. And all persons who are, or claim to be, creditors of the said company, are hereby enjoined and restrained from instituting any suit or suits against the said company; and, in case any such suit or suits has or have been heretofore instituted against the said company, the further prosecution of the same is or are hereby enjoined and restrained. And it is further adjudged, ordered, and decreed that George E. Sipe, of Harrisonburg, Va., be, and he is hereby, appointed as a special master commissioner of this court for this purpose, whose duty it shall be, as soon as practicable, to take, state, and settle (1) an account of the property and assets of the Rockbridge Company; (2) an account of the debts and liabilities of the Rockbridge Company, and the order of their priorities; (3) any other matter which he may deem pertinent, or which any party in interest may require to be specially stated. But before executing the said account the said special master commissioner shall first advertise the times and places of his primary appointments once a week for four successive weeks in some newspaper published in the town of Harrisonburg, Virginia, and also in some newspaper published in the town of Lexington, Virginia, which said publication shall be deemed equivalent to personal service of notice on all parties in interest. And before said J. Lewis Bumgardner and F. T. Glasgow, receivers, shall be authorized to act under this decree, they shall each execute and file before the clerk of this court their bonds, with approved personal security, and to be approved by this court, in the penalty of ten thousand dollars, each separately, payable to the United States of America, and conditioned for the faithful discharge of his duty under this and all future orders and decrees of the court in this cause."

In pursuance of this decree, one of the receivers thereby appointed filed his bond, with sureties, on the 26th day of February, the day of his appointment, and the other receiver filed a similar bond on the 1st day of March following; but, as appears from the record, neither bond was approved by the court until March 2d. When the decree was entered, actions at law in favor of the appellants against said Rockbridge Company were pending in the circuit court of Rockbridge county, Va., and matured for a term of said court commencing on the 1st day of March, 1894. At this time the appellants were not parties to this suit, and on said 1st day of March, 1894, judgments were entered in said

actions at law in favor of the appellants. The special master, who was directed to state an account of the debts and liabilities of the Rockbridge Company, showing the order of their priorities, on June 3, 1895, filed his report. He reported certain judgments entered prior to the filing of the bill of complaint as liens upon all the property not covered by the mortgage, but as to the judgments of the appellants which were recovered at the March term, 1894, which commenced on March 1, 1894, and which, by Code Va. 1887, §§ 3287, 3576, dated back, and took effect as of the first day of the term, he reported that those judgments were not a lien on the property of the defendant corporation not included in the mortgage. The appellants excepted to this report. The case came on again to be heard on July 22, 1895, and the court ratified certain adjustments of mechanics' lien claims and other lien claims, which had been reported, and decreed a foreclosure sale of the mortgaged property, authorized and decreed a sale also of all the property not embraced in the mortgage, and authorized a sale of the lands in subdivisions and parcels. On December 12, 1895, the court overruled the appellants' exceptions, and confirmed the special master's report, and from that order this appeal is taken.

R. W. Winborne and S. H. Letcher, for appellants.

Robt. Catlett, for appellees.

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

MORRIS, District Judge (after stating the facts as above). The contention of the appellants that their judgments against the Rockbridge Company, which bear date as of March 1, 1894, are entitled to priority as liens on the company's real estate not included in the mortgage, is based, in the first place, upon the alleged want of jurisdiction in the court to appoint a receiver of any of the company's property, except that upon which the complainants, by virtue of their mortgage bonds, had a lien. It is undoubtedly true, and has been decided in many cases, that general creditors of either an individual or a corporation who have no judgment or other liens upon the debtor's property have no standing in equity to interfere with the debtor's possession of his property. This rule, and the exceptions to it, are fully discussed and explained in Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; and the effect of failure to bring such an objection seasonably to the attention of the court is thus stated on page 380, 150 U. S., and page 128, 14 Sup. Ct.:

"It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature in which it appeared that the plaintiffs had not exhausted their remedies at law; and the cases of Sage v. Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887, and Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, are cited as illustrations. But, passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions; and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration. Suppose the corporation and other defendants had made no defense, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and

a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors, because the administration of the assets of an insolvent corporation is within the function of a court of equity, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bills as framed,—an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted,—it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized, not merely in the cases cited, but also in those of Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594; Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. 604. None of these cases question the proposition that, if the objection is seasonably presented, it will be effective."

In the present case it is true that the complainants had a standing in court for equitable relief only because they had a specific lien on part of the company's property by virtue of their being holders of its bonds secured by mortgage on that property, and that, as to the other property of the company, they were simple contract creditors. In their bill of complaint and petitions and affidavits, they further alleged that all of the company's property was neglected and going to waste, that the company was hopelessly insolvent and unable to carry out the purposes for which it was organized, and that its personal property had disappeared. The bill was filed in September, 1892, but the prayer for the appointment of a receiver was not acted upon until February, 1894. No one in the meantime filed any objection, and additional petitions were from time to time filed by other bondholders, urging the court to appoint a receiver. The receivers, having been appointed by the order of February 26, 1894, took possession of all the company's property, and directed notice to be given to all creditors to file their claims, and the court proceeded to administer all the company's property according to the prayer of the bill; that is to say, to convert it into money to be distributed ratably among all the creditors, according to their respective legal priorities. By decree of June 3, 1895, the receivers were authorized to sell all the property in the manner most conducive to the interest of all parties concerned. So far as the record discloses, no one has ever objected to the jurisdiction of the court to pass any one of these decrees or orders. The exception of the appellants does not deny the jurisdiction of the court, but complains that in the distribution of the assets their judgments are not given priority, and allowed as a lien on the property not embraced in the mortgage. It seems to us, therefore, that the case stated by the bill being within the general scope of equity jurisdiction, and the action of the court in dealing with it being within the usual exercise of its equity powers, no argument or contention can now be based upon the want of jurisdiction, the point not having been called to the attention of the court below either in the exception or the assignments of error. Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. 604.

The other contention of the appellants is that their judgments, having been entered at the March term, 1894, became liens upon

the real estate of the company not embraced in the mortgage, just as if no receiver had been appointed, because the bond of one of the receivers was not filed until March 1st, and the bond of neither was approved until March 2d. If this was a case in which the rights of the parties depended upon the question of who first obtained actual possession of the property, we should feel that there was force in the appellants' contention. In Frayser v. Railroad Co., 81 Va. 388, relied upon by the appellants, the question of who had the better right was, in substance, a question of possession. It was a case of foreclosure of mortgage of a railroad, in which a receiver was appointed to take possession of all the property, moneys, books, etc., of the railroad company. A creditor had obtained judgment before the filing of the bill, and after the order appointing the receivers, but before they filed their bond, which was a prerequisite to their entering upon the performance of their duties, the judgment creditor had execution issued, and put it in the hands of the sheriff, which, under the statute of Virginia, gave him a lien upon all the personal property of the debtor, although not levied on nor capable of being levied on. Pending the qualification of the receivers, the court had ordered that the company should deposit the money in its treasury in a designated bank, to the credit of the cause. This money was derived from the earnings of the road prior to the time the bill was filed. The mortgagees had no right to any of the earnings prior to taking actual possession, and all earnings prior to taking possession on their behalf belonged to the company, and were liable to be taken by its creditors upon execution. It was held that the receivers were not, in any event, entitled to the earnings of the road accrued before the bill was filed. And in Edwards v. Edwards (1876) 2 Ch. Div. 291, cited by counsel for appellants, the question was whether the receivers had first obtained possession. It was a case of a bill to enforce a security, and for a receiver, filed by the holder of an unrecorded bill of sale. Under the act of parliament, unless the holder of the bill of sale had taken possession, or it had been recorded, it was null and void, as against executions, if the property remained in the possession of the party making the bill of sale. A creditor of the maker of the bill of sale had obtained a judgment before the filing of the bill, and, after the date of the order appointing the receiver, but before he had qualified himself to take possession by giving bond, the creditor levied his execution. It was held on appeal that it was the plain meaning of the order that the receiver was appointed conditionally upon his giving security, and before that he could not take possession; that both parties stood on their legal rights, and the judgment creditor had the better right, for the holder of the bill of sale had neither recorded it, nor had he taken possession. In Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, it was held that physical possession of the vessels in dispute was the test, solely because the admiralty court was not a court of concurrent jurisdiction with the state court, but, in matters of admiralty cognizance, had sole and exclusive jurisdiction, and withheld from seizing property sub-