to be defeated, if obtained by fraud, only by direct action of the party defrauded; and that the subsequent conveyance to Crocker by the grantor of Bellangee did not devest the title. To the like effect is Graham v. Railroad Co., 102 U. S. 148. But here Davidson had the equitable title. The United States held the legal title in trust for him. It later conveyed the legal title through error, and Dunfield, the grantee, and those holding under him, took it with notice of the error, or under such circumstances that in equity they must be charged as trustees. Davidson conveyed his equitable title supposing he had the legal title. Although the original error of description runs through the entire chain of title, we must hold that the effect of the conveyances is in equity to vest the equitable title to lot 2 in the appellant. This conclusion is sustained by authority which we are not at liberty to disregard. Thus, in May v. Adams, 58 Vt. 74, 3 Atl. 187, two tenants in common divided their lands by deed of partition. There was a mutual mistake in the deed in that the language did not correctly describe the line agreed upon. The agreed line was recognized and understood by them to be the one described in the deed so long as they were the owners, and the parties to the suit purchased with like understanding, and recognized it for several years. It was held that the mistake was remediable in equity both between the original owners and their grantees. So, also, in Widdicombe v. Childers, 124 U. S. 404, 8 Sup. Ct. 517, Smith, the grantor of the defendant, purchased at the proper land office the southeast quarter of a section; but the register by mistake described it in the application as the southwest quarter, and the entry in the plat book showed the purchase and sale of the southeast quarter. The plaintiff, with full knowledge of these facts, afterwards located and obtained a patent for the southeast quarter. It was held that he was a purchaser in bad faith, and that his legal title, though good as against the United States, was subject to the superior equities of Smith and of those claiming under him. We are unable to distinguish between that case and the one in hand. The facts bear remarkable similarity. To like effect is Hoyt v. Gooding, 99 Mich. 71, 58 N. W. 41.

It is alleged that this bill should not be sustained, because of laches. The location by Davidson was made June 10, 1869. The suit was brought in the year 1893. The lands are known as "pine lands," and were for many years after the entry remote from railway communication. They doubtless were obtained, as most lands of similar character in the northern section of the state were purchased, with a view to the prospective increase in value of pine timber. It is true that nearly 24 years had elapsed prior to the filing of the bill to correct the error. But that is not controlling. There must be neglect in the enforcement of a right, and such negligence presupposes knowledge of one's right. So laches may be excused from ignorance of one's right or from the obscurity of the transaction. What is required is that one seeking the aid of equity should use reasonable diligence in his application for relief. Thus in Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, it is said that the decisions on the question of laches "proceed on the assumption that the party to

whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." And on page 373, 145 U. S., and page 874, 12 Sup. Ct., it is said that "laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties." In Halstead v. Grinnan, 152 U. S. 412, 416, 14 Sup. Ct. 641, it is observed:

"The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

See, also, Alsop v. Riker, 155 U. S. 448, 15 Sup. Ct. 162; Gildersleeve v. Mining Co., 161 U. S. 573, 16 Sup. Ct. 663.

Applying these principles to the facts stated in the bill, we are unable to say that the appellant or any of his grantors is properly chargeable with laches. We can discover here no sleeping upon one's rights, or any negligence in ascertaining those rights. There was no assertion of claim to this lot 2 by any one other than Davidson's grantees until the month of August, 1892, when Cohn, with knowledge of the mistakes, designedly imposed upon his grantor, and obtained a legal title to the lot which he had not purchased, and which his grantor did not claim. That was the first assertion of an adverse claim to the property to which the appellant had equitable title. There was no actual invasion of the possession until December, 1892, and thereafter the appellant proceeded with diligence, both by notification to the parties and by suit, in the assertion of his rights. During the period between the location of the lands by Davidson and the assertion of title by Cohn there was nothing to put the parties upon inquiry with respect to the mistake. An investigation of the records of the land office at Stevens Point or Wausau would not have suggested an error; to the contrary, would have confirmed them in the belief that there was no error. It is true that an examination of the plat in the general land office at Washington would have disclosed the mistake, but, without anything to put them upon inquiry, and in the absence of any adverse claim to the property, we are not prepared to say that diligence required a journey to Washington, or communciation with the general land office at Washington, to verify the correctness of the government plat in the land office at Stevens Point or Wausau. There was, therefore, no negligence in failing to apply for a correction of the error under sections 2369, 2372, Rev. St. Neither Davidson nor his grantee knew, or could reasonably be charged with knowledge, of the errors prior to the assertion of title by Cohn. Until then they had no knowledge of their rights, and

there was no sleeping upon their rights; nor has Dunfield or any of his grantees been prejudiced by the lapse of time.

It is also asserted that the appellant's right of action is barred by the statute of limitations of the state of Wisconsin. Subdivision 4, § 4221, Rev. St. Wis., classifies actions which must be commenced within 10 years, and the subdivision is as follows: "An action which, on or before the 28th day of February in the year 1857 was cognizable by the court of chancery, when no limitation is prescribed in this chapter." It is true that a suit to correct a mistake in a deed must be brought within 10 years, and that the term commences at the delivery of the defective deed. Parker v. Kane, 4 Wis. 1. But the statutes of Wisconsin also provide (section 4231):

"If, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after such person shall return to or remove to this state. But the foregoing provision shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue is a resident of this state; and if, after a cause of action shall have accrued against any person, he shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

This provision of law clearly indicates the intention of the legislature of the state with respect to the application of the statutes of limitations, that there must be a person who may be sued, and one upon whom process may be served. Thus section 4233 provides that the statute of limitations shall not operate against infants, insane persons, or a person imprisoned upon a criminal charge, during the time of such disability. From 1869, when the mistake occurred, and a cause of action arose in favor of Davidson, to October 20, 1885, when Dunfield made his entry, the legal title to lot 2 was in the United States, the equitable title being in Davidson. It was not possible for Davidson to assert his right during that period, for the sovereign is exempt from suit. Under such circumstances it would be most unjust to apply the statute of limitations. Such statutes do not bind the sovereign without its consent. They cannot bind the individual in the assertion of a right as against the sovereign exempt from suit. We cannot believe that the legislature of the state designed that it should have such an application. The suit was brought within 10 years after the conveyance of the legal title to Dunfield. We are of opinion that the court below erred in sustaining the demurrer to the bill, and that the decree dismissing the bill must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

FARMERS' LOAN & TRUST CO. v. IOWA WATER CO. et al.

(Circuit Court, S. D. Iowa, E. D. May 4, 1897.)

1. IRREGULAR DECREE—VACATION AFTER TERM—APPOINTMENT OF MASTER.
A final decree entered on the report of a special master, appointed in violation of 25 Stat. 437, forbidding the appointment of relatives of the judge within the degree of first cousin to offices in the court, etc., is not thereby rendered absolutely void, so that the court will have power to set it aside on motion at a subsequent term.

9. OFFICERS OF COURT—APPOINTMENT—RELATIVES OF JUDGE.
Quære, whether two men who marry sisters are so related by "affinity or consanguinity," within the meaning of 25 Stat. 437, that one of them, if he be a federal judge, may not appoint the other a special master to hear and report on an isolated case.

This was a suit in equity by the Farmers' Loan & Trust Company against the Iowa Water Company and others, in which the New England Waterworks Company, C. H. Venner, and others intervened. The cause was heard on a motion to vacate the final decree and certain antecedent orders.

H. Scott Howell, for the motion.
W. E. Blake, opposed.

THAYER, Circuit Judge. This is a motion to vacate an order of reference, made by the district judge for the Southern district of Iowa, to a special master on April 14, 1896; also to vacate a report of the master made and filed on November 7, 1896, and a final decree entered on said report on February 19, 1897. The term of court at which said decree was entered expired on April 12, 1897, and the motion to vacate the above orders and decree, and to clear the record, was not made and filed until April 21, 1897. The ground of the motion is that, because the district judge by whom the order of reference was made and the special master by him appointed married sisters, the order of reference was made in violation of the provisions of section 7 of the act of August 13, 1888 (25 Stat. 433, 437, c. 866), and that the master's report in pursuance of said order of reference, and all subsequent proceedings taken thereunder, including the final decree, were and are utterly void. The parties who are interested in the proceedings as interveners, to wit, the New England Waterworks Company and C. H. Venner, have appeared and interposed an objection to the motion; the objection being that, inasmuch as the term at which the final decree was entered had lapsed before the motion was filed, the court is without power, on a mere motion, to vacate the final decree and precedent orders. The rule is well settled that a court of law or equity has power at any time to vacate an order or decree which is utterly nugatory and void. Ex parte Crenshaw, 15 Pet. 119, 123; Shelley v. Smith, 50 Iowa, 543, 544; Insurance Co. v. McCormick, 20 Wis. 265. But a court, for obvious reasons, cannot exercise the same control after the lapse of the term, unless armed with such power by the provisions of some statute, over final judgments and decrees which are not void, but are simply erroneous or irregular. In the latter class of cases relief must be sought, after the lapse of the term, by writ of error or appeal, or by a bill of review or writ of error coram nobis. Bronson v. Schulten, 104 U. S. 410; Sibbald v. U. S., 12 Pet. 488. A mere motion will not suffice. Whether relief can be granted on the present motion depends, therefore, on the decision of the question whether the order of reference and the final decree entered on the master's report are, as they are claimed to be, utterly void. The court is of the opinion that this question must be answered in the negative. It is not denied that the court by whom the case was tried had full jurisdiction

of the parties and of the subject-matter of the controversy. It is also clear that the judge of said court by whom the decree was entered was not personally disqualified to hear and determine the case, either by relationship to some of the parties or by having a personal interest in the litigation. Besides, the final decree of February 19, 1897, was the act of said judge done and performed after he had fully reviewed the testimony which was submitted to the master, and the master's findings, on exceptions duly taken to his report. It is to be further noted that the relationship, if any, existing between the judge and the master, was known to all the parties when the order of reference was made, and no exception was taken to the order of reference on that ground, nor was any exception taken to the master's report after it was filed, or to the final decree, on the ground that the master was not qualified to serve in that capacity.

Another consideration bearing upon the subject in hand must also be kept in mind. The statute above cited is as follows:

"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 court of which said justice or judge may be a member."

It is obvious from an inspection of the foregoing statute that, in its relation to the case in hand, it presents the question whether two men who happen to marry sisters are so related "by affinity or consanguinity" that the one, if he happens to be a federal judge, may not appoint the other as a master to hear and report upon an isolated case. Without expressing a definite opinion upon this question, it is to be observed that it is by no means certain that the statute has any application to the case at bar. Counsel have termed the relationship between the district judge and the special master as that of brother-in-law, because they married sisters, but this is not correct, since the term "brother-in-law" is thus defined: "The brother of one's husband or wife; also one's sister's husband." Cent. Dict.; Webst. Dict. The phrase "related by consanguinity" means related by blood, a relationship which did not exist in the present case; while the phrase "related by affinity" is the relationship which is contracted by marriage between the husband and the blood relations of the wife or between the wife and the blood relations of the husband. Whart. Law Dict.; Enc. Dict. 1896. In the light of these definitions, it admits of grave doubt whether the relationship existing between the judge and the master is comprehended by the language of the statute. It is furthermore doubtful whether the appointment of a person to act as a referee or special master in a given case is an appointment to an office or duty in the court, within the purview of the statute. But, whatever may be the correct view with reference to the questions last suggested, it is only necessary to say, at present, that they are questions to be determined in the first instance by the judge upon whom the duty of appointing a master or a referee is devolved. When a court is called upon to choose a master or referee, such action necessarily involves a consideration and decision of the question whether the person proposed is qualified to

act in that capacity. The decision of that question is within the legitimate power of the judge, and is the exercise of a judicial function. It is difficult to perceive, therefore, how an error made in the decision of the question can have the effect of rendering all subsequent proceedings, based upon the action of the master, utterly nugatory and void, especially when, as in the present case, the judge himself was not disqualified to hear and decide the case, and the court over which he presided had acquired full jurisdiction of the parties and the subject-matter. It results from these views that the final decree and the precedent orders were not utterly void, and that the court is without power to disturb the decree on a mere motion. An order will accordingly be entered overruling the same.

LEHIGH VALLEY R. CO. v. KISZEL.

(Circuit Court of Appeals, Second Circuit. May 3, 1897.)

1. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE BOILER.
Where an employé was injured by the explosion of a boiler 18 years old, and there was evidence that the usual duration of such boilers was from 18 to 22 years, *held*, that the question whether, if the boiler was defective, its condition should not have been known by defendant, was one for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.
Plaintiff, a common laborer, having some previous knowledge of the management of boilers, was injured by an explosion of an old boiler, while at work about it, in subordination to another employé having charge thereof. There was evidence that, shortly before the explosion, the boiler was found to be leaking badly, and that plaintiff remonstrated with the person in charge against keeping it in use, but was overruled by him. *Held*, that the court properly refused to charge that, if plaintiff knew of the danger, it was contributory negligence to remain in the vicinity without making efforts to draw the fire or reduce the pressure.

In Error to the Circuit Court of the United States for the Southern District of New York.

The action was brought by Stephen Kiszel to recover damages for personal injuries received by him while in the defendant's employ, by the explosion of one of its boilers upon its premises at Lost Creek, Pa., on the evening of July 28, 1894. The jury rendered a verdict of $2,500 for the plaintiff. This writ of error was brought by the defendant.

Allan McCullough and Chas. W. Pierson, for plaintiff in error.

F. W. Catlin, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complaint alleged that the accident solely resulted from the defendant's negligence in using a boiler that was, to its knowledge, defective and out of repair, and that the explosion occurred by reason of this defective condition. The answer, in addition to a general denial, alleged also, as defenses, that the accident was caused by the contributory negligence of the plaintiff, and by the negligence of one of his fellow servants.

The facts, as narrated by the plaintiff on the trial, are, in outline, as follows:

"On the day of the accident, plaintiff, who had been in the company's employ at Lost Creek for several years, working part of the time in the breaker, and part of the time in the boiler house, was assigned to work at the boiler house, to assist John Miller. Miller was fireman in charge, in the absence of James Egan, the head fireman, who was unwell that day. There were seven sets of boilers in this boiler house, three boilers to each set, making twenty-one boilers in all. The boilers rested at one end on a wall, and were hung at the other end on girders. When Kiszel began work, about 2 o'clock p. m. on the day of the accident, the fires were already lighted under eighteen boilers. The other three were cold, having been out of use for a week for repairs to the flues and surrounding masonry. A fire was put under these three boilers between 5 and 6 o'clock p. m., while he was at his supper."

About 7 o'clock he was told by Miller to watch these three boilers, and found that the water in the first boiler just caught the middle gauge, and was higher than that gauge in the second and third boilers. The first boiler was the one that exploded. At a quarter past 8, when he was looking under it, he saw that the water was "dropping down in the middle from the boiler." Miller was there at the time, and also looked at the boiler, and said, "Most of those boilers leaked." About five minutes before 9 o'clock, Miller, Shields, who was hoisting engineer, and Laubach, who was the pumpman, came to look at the boiler. Kiszel also looked in, and saw that it was leaking badly. It exploded at 9 o'clock, and Miller, Shields, and Laubach were killed. Nothing had been done to extinguish the fire or blow off steam or disconnect this set of boilers from the rest. The boiler in question was a plain cylinder boiler, made at the Hazelton shops. The Hazelton boilers are considered about the best make of boilers used in that region. It was regularly inspected every six months. The last inspection had been made on March 2, 1894, between four and five months before the accident. At that time the inspector went into the boiler with a lamp and his tools, and examined the boiler and the rivets, and reported the boiler good. It had been in active use and working well up to the time the fires were drawn for repairs to the masonry, about a week before the accident.

The defendant moved, at the close of the testimony, for the direction of a verdict in its favor, because no negligence or want of care on its part had been established, whereas the plaintiff had been guilty of contributory negligence, and because the negligence, if any, was that of Miller, a co-employé with the plaintiff. The denial of this motion is the subject of one or more of the assignments of error. The adequate difficulty which prevented the direction of a verdict was the state of the evidence upon the questions of fact. Kiszel was the only survivor who knew anything of the occurrences during the afternoon and evening before the explosion, and the inferences which could fairly be drawn from his testimony on the trial were against the safety of the boiler, and were not in favor of the negligence of Miller, who was admitted by his employers to have been a competent fireman. Kiszel, shortly after his injury, when he was in the hospital, had given a history of the accident, and had also testified before the coroner, and his statements on both those occasions bore with severity

upon the carelessness of Miller, but upon the trial the drift of his testimony was quite different. The prominent fact which he then sought to have inferred was the defective character of the boiler. He said that it was originally half an inch thick, and that on the bottom, where the break occurred, it had worn down to an eighth of an inch, and that the bottom was worn out. The other testimony adverse to its safety, and which called upon the defendant for the exercise of care in its examination, and in the maintenance of its soundness, was in regard to the usual duration of the life of a boiler, and upon this point the defendant's witnesses alone testified. One said, "I have known some of them [the Hazelton boilers] to last eighteen or twenty years." Another said that they lasted from 20 to 22 years. Another said, "I have known them to last twenty years." The exploded boiler was 18 years old. The opinion of the defendant's experts who subsequently investigated the subject was that the crack and the resulting explosion were due to the unequal expansion of the bottom and the top of the boiler, caused by too sudden and hot a fire when the boiler was cold and the masonry was still damp, and there was not enough water in the boiler. Upon this state of the evidence, especially in regard to the time when a boiler must be expected to wear out, the question of an unsoundness which ought to have been ascertained by the defendant's agents or representatives could not be taken from the jury. But it is said that the defendant had discharged its duty by the purchase of a boiler of the best material, from manufacturers of the best reputation, by semi-annual careful inspection of it, and by its previous freedom from indications of leaks, for the defendant is not a warrantor of the absolute safety of its machinery, and is not liable for the consequences of unknown defects which reasonable and accurate investigation, made at the time when due care requires that such investigation should be made, failed to discover. That statement of the law is not objectionable, but the question of a defendant's liability for the defects of old machinery turns upon the continued exercise of due care, for its duty to its employés is only discharged when "its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés." Hough v. Railway Co., 100 U. S. 213. It was a question of moment in this case whether, if this boiler was defective, its condition, after 18 years of use, ought not to have been previously ascertained by the defendant. The difficulty which prevented the trial judge from taking the question of the defective condition of the boiler from the jury was also apparent in regard to the negligence of Miller. As the plaintiff presented Miller's conduct to the jury, he was apparently thoughtful, and not inattentive, but his conduct was heedless and willful, if the declaration of Kiszel before the coroner and in the hospital, and the inferences directly deducible from his story, were true. The question was one of the credibility to be given to the plaintiff as he appeared upon the stand, and the jury decided in his favor.

The defendant made divers requests to charge in regard to the