

their position in this respect. There is apparent conflict in the decisions on the circuit in relation to both of the propositions on which the plaintiff's case here proceeds. Fortunately, I am not called upon to undertake the task of reconciling these decisions, and my duty is discharged when I choose between the opinions of these courts of equally high authority and equally entitled to the greatest respect. I think the correct doctrine upon this subject was announced in the case of *Latimer v. Bard*, 76 Fed. 536. I think, too, in principle, the cases of *Upton v. Tribilcock*, 91 U. S. 45, *Sanger v. Upton*, 91 U. S. 64, and *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 43 U. S. App. 551, 22 C. C. A. 378, and 75 Fed. 433, are applicable. I do not think the position of the Gronewegs, two of the defendants in the case, is different or that the case as to them authorizes a different ruling from that made as to the other defendants. It has not been pointed out that their status is specially different by reason of having original instead of increased stock. On the contrary, it is evident that it would not be different, so far as their relation to the question now made is concerned. They must have been informed by the face of their certificates of stock that it was original instead of increased stock, and it is not in the least likely that their conduct would have been at all different from what it has been if they had been expressly informed that they were furnished with original instead of increased stock. So, without giving the case a more particular discussion, I hold that the plaintiff is entitled to recover upon both grounds indicated herein, and decree will go accordingly.

NORTHERN PAC. RY. CO. v. SODERBERG.

(Circuit Court, D. Washington, N. D. March 14, 1898.)

1. PUBLIC LANDS—RAILROAD GRANTS—DETERMINATION OF CHARACTER OF LAND.

In a suit to enjoin the removal of stone from unsurveyed lands which would fall within the odd sections of a railroad grant, the court will not undertake to determine, in advance of a decision by the land department, the question as to whether the land is mineral or nonmineral.

2. SAME—WASTE BEFORE TITLE DETERMINED—INJUNCTION.

A railroad company has an interest in the odd-numbered sections within its grant, and, before the question of the mineral or nonmineral character of such land has been determined by the land department, the commission of waste thereon calculated to work irreparable injury to the land itself will be restrained, the court retaining the case for further consideration after such question shall have been determined.

3. SAME—INJUNCTION TO RESTRAIN REMOVAL OF STONE—ADVERSE ENTRY AFTER SUIT.

A suit to restrain the removal of stone from an odd-numbered section within a railroad grant, before the mineral or nonmineral character of the land has been determined, cannot be defended on the ground of an entry, made by defendant after the suit was commenced, under Act Aug. 4, 1892, authorizing the entry of land chiefly valuable for building stone, where such entry was not put in issue by proper plea.

This was a suit in equity by the Northern Pacific Railway Company against J. A. Soderberg, to enjoin him from working a granite quarry on certain lands claimed by the complainant.

Fred M. Dudley, for complainant.
Geo. H. Fortson, for defendant.

HANFORD, District Judge. This is a suit for an injunction to restrain the defendant from working a granite quarry in unsurveyed land, which, when surveyed, will be within the lines of an odd-numbered section within the place limits of the Northern Pacific Railroad Company's land grant, and to prevent the defendant from removing and selling building stone taken from said quarry. The main question upon which the parties have joined issue is whether the particular subdivision of land within which the quarry is situated is mineral or nonmineral, within the intent and meaning of the act of congress granting lands to the Northern Pacific Railroad Company to aid in the construction of its main and branch lines. The decisions of the supreme court establish the rule that, where lands of a particular class or description have been granted by an act of congress, without making other particular provision as to the manner in which the same are to be identified, questions as to the character of lands within the limits of the grant, which are claimed under it, are to be decided in the first instance by the officers of the land department, and that decisions of such questions made in the land department are conclusive, unless impeached for fraud, or overruled by the courts on the ground of error in the interpretation or application of the law. *Steel v. Refining Co.*, 106 U. S. 447-457, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573-587, 11 Sup. Ct. 380; *Barden v. Railroad Co.*, 154 U. S. 288-349, 14 Sup. Ct. 1030; *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559-577, 17 Sup. Ct. 188. In the case of *Barden v. Railroad Co.* the supreme court of the United States, having under consideration this identical land grant, ruled that the law places under the supervision of the interior department and its subordinate officers acting under its direction the control of all matters affecting the disposition of public lands of the United States, and that the officers of said department are especially authorized to determine whether lands claimed under any particular law or congressional grant, are swamp lands, timber lands, agricultural lands, or mineral lands, and to so designate them in the patents which it issues. The decision is direct and positive to the point that the land department has power to determine the question as to the mineral or nonmineral character of any particular tract claimed under the grant, and that its decision of such question must be accepted by the courts as conclusive. In the opinion of the court by Mr. Justice Field, the rule is laid down as follows:

"There are undoubtedly many cases arising before the land department in the disposition of public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

This suit has reference to unsurveyed land, the mineral or nonmineral character of which has not yet been determined. This court therefore will not, at this time, offer advice to the land department by deciding the question in advance. However, the complainant has an interest in the odd-numbered sections within its grant, entitling it, while questions as to its title are in abeyance, to preventive relief by an injunction to restrain the commission of waste, as by the cutting or destruction of timber, the mining and extracting of coal, the quarrying and removing of building stone, or the destruction of native grass giving value to lands for grazing purposes, or other like acts calculated to work irreparable injury to the land itself. *Erhardt v. Boaro*, 113 U. S. 537-539, 5 Sup. Ct. 565; *Lanier v. Alison*, 31 Fed. 100; *Railroad Co. v. Hussey*, 9 C. C. A. 463, 61 Fed. 231.

In his argument, counsel for the defendant makes the point that the testimony shows that the defendant is holding possession of the land in controversy in pursuance of an entry which he has made thereon under the act of congress approved August 4, 1892, providing that lands which are chiefly valuable for building stone may be entered, and title thereto acquired, under the laws of the United States relating to placer mineral claims. 2 Supp. Rev. St. p. 65. I hold, however, that the defendant has no right to defend on this ground, for the reason that he does not, in his answer, plead any such right, and the testimony shows that the notice of his claim posted on the land was dated a long time after this suit was commenced. He cannot prevail by virtue of a right initiated after the suit was commenced, and not put in issue by an answer or plea. A decree will be entered granting an injunction as prayed for, with a proviso at the foot of the decree retaining the case for further consideration; and when the question as to the mineral or nonmineral character of the land shall have been determined by the land department, supplemental pleadings may be filed by either party, and the injunction will then be made perpetual, or the case dismissed, as the right of the parties shall then be made to appear.

MANN et al. v. KEENE GUARANTY SAV. BANK OF KEENE, N. H., et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 977.

1. APPEAL AND ERROR—FINDING OF FACT.

Where the trial court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct, and, unless an obvious error has intervened in the application of the law or an important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.

2. DEEDS—MENTAL CAPACITY.

In determining a question of mental capacity to execute a deed, the question is not whether the grantor's mental powers were impaired, or whether she had ordinary capacity to do business, but whether she had any—the smallest—capacity to understand what she was doing, and to decide intelligently whether or not she would do it.

3. SAME—EVIDENCE.

A woman was paralyzed for eight years prior to her death, and during that time was unable to sign her name, but it was signed by her daughter or other person, and her acknowledgments taken to 34 conveyances of real estate. Her husband and children treated her as though she was competent to make deeds, 10 different magistrates took her acknowledgments to conveyances, and all who knew her treated her as sane. A decree of foreclosure of a mortgage was resisted on the ground that she was mentally incapable of understanding or executing it. Many witnesses testify that her mental capacity was not greater than that of a child three or four years old, and that she could not transact any business whatever. *Held*, that the legal presumption being that she was sane and capable, and all who knew her having so treated her, the decree of the court that she was mentally capable simply gives legal effect, after her death, to the existence of a fact which all seem to have conceded during her life, and such decree should not be disturbed.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

N. W. Norton (W. G. Weatherford and J. M. Prewett, on brief), for appellants.

John McClure (Morris M. Cohn, on brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree of foreclosure of three trust deeds made by John Parham and Anna W. Parham, his wife, dated on December 29, 1886, May 28, 1888, and July 1, 1889, respectively. The right side of Anna W. Parham was paralyzed on August 21, 1884, and she died on December 31, 1892. During the intervening time her physical and mental powers were impaired, but she was able at times to walk about her room with the aid of a crutch, and she could talk, and understand conversation about her flowers and her physical wants. Her husband was dealing in real estate. She was unable to sign her name to conveyances on account of the paralysis of her right hand, but her name was signed by her daughter, or some other person, and her acknowledgments were certified to 34 conveyances of real estate, including trust deeds and mortgages, while she was suffering from this paralysis. When the trust deeds in suit were made she was the owner of 320 acres of land which are described in them. The appellants are her heirs at law, and their defense to this suit was that when her name was signed to the trust deeds, and when her acknowledgments of their execution were certified, she was mentally incapable of understanding or executing them. The evidence upon the issue presented by this defense was conflicting. Many witnesses testified that Mrs. Parham's mental capacity was not greater than that of a child three or four years old, that she could not carry on a connected conversation on any subject, and that she could not understand or transact any business whatever during the time in which she was suffering from paralysis. On the other hand, her husband and children treated her as though she was competent to make trust deeds and mortgages during all this time. Her husband delivered conveyances to which his daughter had affixed his wife's

name and upon which magistrates had certified her acknowledgments. One of her daughters signed her name to these various conveyances, and allowed them to be delivered without objection or protest. Her son-in-law, acting as guardian for a minor child, accepted a mortgage which she executed in 1889 as security for \$3,000 of his ward's money. Between 1886 and 1890 one of her sons, acting as a notary public, certified her acknowledgments to five deeds. Ten different magistrates took and certified her acknowledgments of the execution of conveyances while she was suffering from this disease. Actions frequently speak louder and more truthfully than words, and it is difficult to contemplate the treatment accorded to Mrs. Parham by the members of her family and the magistrates of her vicinity without great doubt whether she was so incapable of conducting simple business transactions as some of the witnesses for the appellants now testify. The question is not whether her mental powers were impaired. It is not whether or not she had ordinary capacity to do business. It is whether she had any—the smallest—capacity to understand what she was doing and to decide intelligently whether or not she would do it. *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, and 53 Fed. 415, 421; *Stewart v. Lispenard*, 26 Wend. 303; *Ex parte Barnsley*, 3 Atk. 168; *Hill v. Nash*, 41 Me. 586; *Jackson v. King*, 4 Cow. 216; *Dennett v. Dennett*, 44 N. H. 531. Perhaps this rule and the reason for it have never been better expressed than by Senator Verplanck in *Stewart v. Lispenard*, *supra*, when he said:

“To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself essential to legal capacity, would create endless uncertainty, difficulty, and litigation, would shake the security of property, and wrest from the aged and infirm that authority over their earnings or savings which is often their best security against injury and neglect.”

In view of the testimony to which we have adverted, we are unwilling to hold that the court below committed any error in the application of the law or made any mistake in the consideration of the evidence when it concluded that the legal incapacity of Mrs. Parham was not clearly established. Where the trial court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct, and, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821; *Warren v. Burt*, 12 U. S. App. 591, 7 C. C. A. 105, and 58 Fed. 101; *Plow Co. v. Carson*, 36 U. S. App. 456, 18 C. C. A. 606, and 72 Fed. 387; *Farmers' Loan & Trust Co. v. McClure*, 49 U. S. App. 43, 24 C. C. A. 66, and 78 Fed. 209, 210.

The legal presumption was that Mrs. Parham was sane and capable. All who knew her so treated her while she lived. The decree of the court simply gives legal effect after her death to the existence of a fact which all seem to have conceded during her life. It ought not to be disturbed. A motion was made to dismiss this appeal,