

case. But in the latter case the plea was said to consist of three parts: "First, a restatement in detail of some of the facts alleged generally in the bill." The issue of fact found for the plaintiff, on a stipulation, is said to have related to this first part of the plea, and the second and third parts are said to have been mere matters of law arising on the bill. So the case stood somewhat as if the bill had been demurred to, or the plea had been set down for argument, whereby the part found would, in either way, have stood admitted. Thereupon the justice said that the question argued was not presented by the record, and that, "as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained, and must be overruled, and the defendants ordered, in accordance with the thirty-fourth rule in equity, to answer the bill." The requirement to answer may have been made at the request of the plaintiff for further discovery, as well as because of the form of the plea and the limited finding. This case does not overrule the former one expressly, and, as here understood, does not do so impliedly. In *Elgin Wind-Power & Pump Co. v. Nichols*, 65 Fed. 215, 12 C. C. A. 578, since both of these cases, a final decree in a cause on a patent founded on a finding for the plaintiff of an issue joined by traverse of a plea was affirmed by the circuit court of appeals of the Seventh circuit.

In this case the substance of the plea is that the invention was so made in the defendant's employment, and the patent was so procured at its expense, that it has an implied right, under the patent, like a territorial right to the extent of its roads, to use the invention in the construction and operation of its roads. This impliedly admits the existence and validity of the patent. The right of the defendant as to some of its roads is found on the traverse of the plea in its favor, and as to some in favor of the plaintiff. The thirty-third equity rule provides that "if upon an issue the facts stated in the plea be determined for the defendant they shall avail him as far as in law and equity they ought to avail him." As the plea is pleaded to the whole bill, and is not sustained to the whole, perhaps, but for this rule, the plaintiff would, without leave to the defendant to amend, be entitled to a decree for the whole alleged infringement, but under this rule certainly the finding of the right of the defendant to the extent of certain of its roads ought to avail the defendant to that extent. Decree for an injunction and an account, except as to Broadway Line to Bowling Green.

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UNION TRUST CO. v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, D. Massachusetts. June 3, 1898.)

No. 438.

ANCILLARY RECEIVERS—ACTIONS AGAINST.

Ancillary receivers in Massachusetts of a Kansas railroad company are not liable for a tort committed by the original receivers of the company in Kansas.

This was an intervening petition, claiming damages of the receivers of the Atchison, Topeka & Santa Fé Railroad Company for personal injuries sustained by the petitioner while a passenger on a train.

Louis D. Brandeis, for receivers.

Sherman L. Whipple, for petitioner.

LOWELL, District Judge. The petition sets out that the Atchison Railroad and all its assets were placed in the hands of Walker and McCook, as receivers, said persons having been appointed as receivers by this court; that the said receivers, on October 5, 1895, were operating a train on the said railroad, in which train the petitioner was a passenger; and that the petitioner, while so traveling, was injured by the negligent management of the train, wherefore she asks this court to grant to her a trial by jury upon her claim for damages, and that the said receivers be notified by this court to appear and make answer to her claim. The answer sets out that the receivers appointed by this court have never operated any train, and that the injuries suffered by the petitioner were suffered in Kansas. It was stated in argument without contradiction, and it appears sufficiently from other papers in the case, that the train in question was operated by the named persons as receivers of the Atchison Railroad, appointed by the United States circuit court for the district of Kansas, in which state the named persons were originally made receivers of the Atchison Railroad, and that the receivership in Massachusetts is ancillary. The relation of ancillary receivers to the original and principal receivers of a corporation has not yet been fully defined, nor have the courts yet determined precisely in what respects they are to be treated as identical, and in what respects as separate legal persons. For the determination of this question, it would seem to be unimportant whether the original and ancillary receivers are the same or different natural persons.

The case of *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, decides that a judgment obtained against an ancillary receiver in the state of his appointment binds only the property in his custody as such ancillary receiver, and ancillary receivership is in that case treated as analogous to ancillary administration. See *Johnson v. Powers*, 139 U. S. 156, 15 Sup. Ct. 525. If original and ancillary receivers are to be treated as different legal persons in respect of the judgments obtained against them for the debts of the corporation, and in respect of the application of the property in their hands to the payment of these debts, it would seem that they must be treated as different legal persons in respect of the management of the property in their hands, and in respect of the torts for which they are liable in connection with this management. It follows, therefore, that the tort for which the petitioner seeks to recover in this case was committed, not by the ancillary receivers appointed in Massachusetts, but by the original receivers appointed in Kansas, over whom this court has no jurisdiction, and that, inasmuch as the Massachusetts receivers committed no tort against the petitioner, this petition should be dismissed. I am aware that opinions have been rendered by some circuit courts in which may be found expressions not in

apparent harmony with the decision in *Reynolds v. Stockton*. See *Ames v. Railway Co.*, 60 Fed. 966; *New York Security Co. v. Equitable Mortg. Co.*, 71 Fed. 556. If there be anything in the latter decisions inconsistent with the above-mentioned decisions of the supreme court, I am compelled to disregard it. The petitioner relies also upon section 3 of chapter 866 of the Acts of 1888, but that section applies to suits brought without the previous leave of the court. If the petitioner is advised that she can obtain service upon the Kansas receivers sufficient to bring suit against them in this district, she has but to institute the suit by serving them accordingly. Petition dismissed.

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CALIFORNIA & OREGON LAND CO. v. RANKIN et al.

(Circuit Court, D. Oregon. May 6, 1898.)

No. 2,415.

INDIAN TREATY—RIGHTS ACQUIRED.

Where, in a treaty made subsequent to a road grant, Indian lands are ceded to the United States with a reservation of a right to a residence on part of them "until otherwise directed by the president," such reserved right is not a new right founded on the treaty, but the restricted right is a continuous one, and is prior and superior to the road grant. 85 Fed. 94, affirmed on rehearing.

This was a motion for a rehearing in the suit of the California & Oregon Land Company against Charles E. Worden, reported in 85 Fed. 94.

BELLINGER, District Judge. In the petition for a rehearing filed in this case the position heretofore taken by complainant that by the treaty with the Indians the lands in controversy were ceded to the United States, that the right of occupancy now held by the Indians is a new right acquired by the treaty, and that, the treaty being subsequent to the road grant, such right is subject thereto, is restated with great clearness, and the argument in its support is strongly re-enforced. Particular attention is called to the language of the proviso in the treaty by which the residence of the Indians therein provided for is to continue "until otherwise directed by the president," and the contention is made that this language shows that the rights now held by the Indians are not the same rights originally held by them, but are new rights bottomed on the treaty, and therefore subsequent in time to the road grant. My conclusion is that it is not material whether the rights in question are equal in extent with those originally held by the Indians. It may be conceded that these rights are not the same with reference to their extent, but it does not follow that they are new. When there is a cession with a reservation, the right reserved may be a less right than that originally held, but it is not for that fact a new right. There is nothing to shake the conclusion that the right of occupancy enjoyed by the Indians has never as to these lands been surrendered by them. If, having an unlimited right of occupancy in all the lands