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No. 2399

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

May Term, 1914

WESTERN UNION TELEGRAPH CO.

AND

SOUTHERN PACIFIC CO.

APPELLANTS

VS.

POSTAL TELEGRAPH CO.

APPELLEE

Brief of Appellee

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

FREDERICK V. HOLMAN and
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Solicitors for Appellee and of Counsel

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

FILED

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WESTERN UNION TELEGRAPH COMPANY and SOUTHERN PACIFIC COMPANY,
Appellants,

vs.

POSTAL TELEGRAPH COMPANY,
Appellee.

Brief of Appellee

Appeal from the Decree of the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE

This suit was begun in August, 1911, by the Postal Telegraph Company filing its bill of complaint against the Southern Pacific Company. It appears from the allegations in the original bill that the complainant is maintaining and oper-

ating a line of electric telegraph over the railroad right of way of the defendant in the State of Oregon. This telegraph line forms part of a general telegraph system extending through the states of California, Oregon, Washington and other states of the Union.

It was alleged that the defendant Southern Pacific Company controls and operates its railroad right of way under a lease from the Oregon & California Railroad Company, which received a land grant from the United States and that the railroad is a post road of the United States.

The part of complainant's telegraph line which forms the subject of this controversy extends from Eugene in the County of Lane, State of Oregon, to New Era, in the County of Clackamas, State of Oregon, a distance of 103 miles. This telegraph line was constructed in the year 1886 by Pacific Postal Telegraph-Cable Company, the predecessor in interest of the complainant. The telegraph poles were erected, in part on the railroad right of way, and in part on the land immediately adjoining it, so that the cross-arms and wires overhang the right of way. The line, as originally constructed, has been maintained and operated by the complainant and its predecessor in interest since the date of its original construction. It is alleged in the bill that this occupancy has been open, notorious, peaceable, adverse, continuous and uninterrupted so that the complainant has thereby acquired the inde-

feasible right to maintain, use, repair and reconstruct its telegraph line, as it now exists, in such manner as may be required of it in the proper performance of its corporate functions.

Finding it necessary to reconstruct the line, in order to replace worn out and defective material, and being prevented in this attempted reconstruction by the exercise of force on the part of the defendant Southern Pacific Company, the complainant sought relief from a court of equity. It prayed for a decree enjoining the Southern Pacific Company from interfering with it in the exercise of its rights to maintain and reconstruct this telegraph line.

To this bill the defendant Southern Pacific Company filed its answer, making certain admissions and denials, and pleading, as matter of affirmative defense, first, that the telegraph line in question was originally constructed by the predecessor in interest of the complainant under the authority of an order granted by the District Court of the District of Oregon in 1886. This order required the Receiver of the Oregon & California Railroad Company, which then operated and controlled the right of way in question, to permit the telegraph company to place certain poles upon the railroad right of way during the existence of the receivership. It was further alleged that the original entry was permissive and that the occupancy, after the termination of the receivership, continued to be per-

missive. By reason of the requirements of the Southern Pacific Company, it is alleged this permission was subsequently revoked.

The additional defense was pleaded that all of the matters involved in this suit were adjudicated in 1907 in a condemnation action brought by the Pacific Postal Telegraph-Cable Company against the Oregon and California Railroad Company and the Southern Pacific Company. This condemnation action involved a right of way for a new and distinct telegraph line over the right of way of the Oregon and California Railroad Company from the City of Portland to the Oregon-California state line, a distance of 366.61 miles.

After joining issue upon the answer of the Southern Pacific Company, the complainant proceeded to take testimony in support of the allegations in its bill, in New York, Chicago, and the State of Texas, and while engaged in taking testimony, entered into negotiations with the Southern Pacific Company for an amicable settlement of this suit. Such settlement was agreed upon between the complainant and the defendant Southern Pacific Company, involving not only the 103 miles of right of way covered by the original bill, but an adjustment of all right of way matters in dispute from the City of Portland to Ashland. These negotiations proceeded so far that a contract was prepared which in all essentials was satisfactory to both the complain-

ant and the defendant Southern Pacific Company, and which, after conferences between the attorneys of these two companies, was agreed upon by both parties as a final settlement and adjustment of all existing differences between them.

Before executing this contract, the Southern Pacific Company submitted the same, for its approval, to the Western Union Telegraph Company, because of a contract existing between the Southern Pacific Company and the Western Union Telegraph Company purporting to vest in the latter company certain exclusive rights and privileges for the construction and maintenance of telegraph lines upon the railroad right of way in question. The Western Union Telegraph Company refused to approve this contract and the Southern Pacific Company subsequently declined to execute it solely because of such refusal. Thereupon, the defense of this suit was taken over by the Western Union Telegraph Company.

The complainant, being advised of the fact that the proposed settlement of this litigation had been prevented by the Western Union Telegraph Company, filed a supplemental bill making this company a party defendant, setting forth the negotiations had with the Southern Pacific Company and the agreement reached with it, and requiring the Western Union Telegraph Company to show by what right it interfered with and attempted to prevent the settlement of this con-

troversy agreed upon between complainant and the Southern Pacific Company.

To this supplemental bill the Western Union Telegraph Company made answer, admitting that the proposed agreement between the Southern Pacific Company and the complainant was laid before it by the Southern Pacific Company for its consideration and approval, and further admitting that it declined to approve said proposed agreement, and in pursuance of the contract existing between it and the Southern Pacific Company, assumed and took over the defense of this suit.

In its answer the Western Union Telegraph Company pleaded a contract entered into between it and the Southern Pacific Company in October, 1901. This contract provides, in detail, the respective rights and obligations of the parties thereto in connection with the construction, maintenance and operation of telegraph lines over the railroad rights of way therein enumerated, among others, the right of way of the Oregon and California Railroad Company which is affected by this controversy. The ninth section of this contract provides as follows:

SECTION NINE.

Exclusive Right of Way. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands

and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance and operation of lines of poles and wires and underground or other lines for commercial or public telegraph and public telephone uses or business, with the right to construct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder.

Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained

against the Railroad Company in respect to any of the matters in this section mentioned.

By its answer the Western Union Telegraph Company claimed the right to object to or prevent such or any settlement between the complainant and the Southern Pacific Company as might involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and the complainant, the Western Union Telegraph Company claimed no right to object, unless its approval of such proposed settlement was made a condition upon which the Southern Pacific Company undertook to execute such agreement, in which case it claimed that it might withhold its assent and thereby prevent the execution of such agreement, whether it had any interest in or was to be affected by such agreement or not. It further said that it had the right to object to the execution of the agreement between the Southern Pacific Company and the complainant not only as to itself, but to object to the execution thereof by the Southern Pacific Company so far as such execution might injuriously affect, impair or destroy any of its vested rights.

Issue being joined upon the allegations of the supplemental bill and the answers of the defendants thereto, further testimony was taken, and thereafter the court entered a decree holding that the defense of the suit having been taken over

by the Western Union, and the Southern Pacific Company being but a nominal party, the controversy is reduced to the narrow limit as to whether the Western Union, under its contract with the Southern Pacific Company, can defeat the latter's negotiations with the Postal Company by simply refusing to approve the contract agreed upon. The lower court came to the conclusion that the clause of the contract between the Western Union Telegraph Company and the Southern Pacific Company, purporting to grant to the Telegraph Company the exclusive privilege of occupying the railroad's right of way for the maintenance of its telegraph lines, is against public policy and void. That, there being no interference with the rights of the Western Union either alleged or shown, it could not be injured by the consummation of these negotiations, and it ought not to be heard to interpose objections thereto. Based upon this opinion, a decree was entered authorizing the execution by the Southern Pacific Company of its proposed contract with the complainant and enjoining the Western Union Telegraph Company from interfering with the execution thereof. This decree, therefore, so far as the Western Union Telegraph Company is concerned, merely prohibits an interference with the execution of a contract, with the execution of which it has no contract right to interfere and which, when executed, can result in no interference with its properties or impairment

of its rights. So far as the Southern Pacific Company is concerned, the decree merely directs that it do what it is willing and has proposed doing, and, as will be hereafter shown, is merely declaratory of the existing rights of the complainant on its railroad right of way.

SPECIFICATIONS OF ERROR

The specifications of error in appellants' brief do not comply with the rule of this court requiring a particular statement of the points wherein the decree is alleged to be erroneous. An examination of the assignments of error shows that the points raised by these assignments resolve themselves into three classes:

First: As to whether the Western Union Telegraph Company was a proper party defendant in the litigation and properly brought before the court by the supplemental bill.

Second: As to whether the contract between the Western Union Telegraph Company and the Southern Pacific Company is void insofar as it attempts to create exclusive telegraph rights over the railroad right of way.

Third: As to the right of Western Union Telegraph Company to prevent a settlement of this suit by either active or passive interference with the settlement agreement reached by the real parties in interest.

Rule 11 of this court provides that errors not assigned will be disregarded. The argument of appellants, therefore, that appellee has acquired no prescriptive rights on the railroad right of way should be disregarded. It is answered, however, by appellee, with a view of showing that the decree is not open to criticism either so far as the technical accuracy of the record is concerned or so far as the substantial merits of the controversy are concerned.

BRIEF OF THE ARGUMENT

I.

WESTERN UNION TELEGRAPH COMPANY WAS A NECESSARY PARTY DEFENDANT AND WAS PROPERLY BROUGHT BEFORE THE COURT BY THE SUPPLEMENTAL BILL.

Equity Rule 57. (The supplemental bill was filed before the new equity rules became effective.)
21 Encyc. of Pl. & Pr. 36;
Mellor v. Smither, 114 Fed. 116 at 120;
Curtis Davis & Co. v. Smith, 105 Fed. 949 at 951;
Chapman v. Yellow Poplar Lumber Co., 143 Fed. 201 at 208 and 210;
Pomeroy's Equity Jurisprudence (3d Ed.), Sections 191 and 195.

II.

THE CLAUSE OF THE CONTRACT BETWEEN SOUTHERN PACIFIC COMPANY AND WESTERN UNION TELEGRAPH COMPANY PURPORTING TO GRANT EXCLUSIVE RIGHT OF WAY PRIVILEGES TO THE TELEGRAPH COMPANY IS AGAINST PUBLIC POLICY AND VOID.

Transcript of Record, page 180;
United States v. Union Pacific R. R. Co., 160 U. S. 1;
Georgia R. & B. Co. v. Atlantic Postal Telegraph-Cable Company, 152 Fed. 991 at 998;
Western Union Telegraph Co. v. B. & O. Tel. Co., 23 Fed. 12;
Pacific Postal Telegraph-Cable Co. v. Western Union Telegraph Co., 50 Fed. 493 at 495;
Western Union Tel. Co. v. B. & O. Tel. Co., 22 Fed. 133 at 134;
B. & O. Tel. Co. v. Western Union Telegraph Co., 24 Fed. 319.

III.

INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE SETTLEMENT OF THIS LITIGATION WAS PROPERLY ENJOINED.

Pomeroy's Equity Jurisprudence (3d Ed.), Sections 1339 and 1351;

Watson v. Sutherland, 72 U. S. 74 at 79;
Henry, Lee & Co. v. Cass County Mill & Elevator Co., 42 Ia. 33;
American Law Book Co. v. Edward Thompson Co., 84 N. Y. Sup. 225;
Chesapeake & O. C. A. Co. v. Fire Creek Coal & Coke Co., 119 Fed. 937 at 947;
Nashville C. & St. L. Ry. Co. v. M'Connell, 82 Fed. 65 at 75 and 81;
Flaccus v. Smith, 199 Pa. St. 128.

IV.

THE DECREE THAT SOUTHERN PACIFIC COMPANY EXECUTE THE CONTRACT WITH POSTAL TELEGRAPH COMPANY WAS A VALID EXERCISE OF THE EQUITABLE POWER OF THE COURT:

(A) THE SOUTHERN PACIFIC COMPANY WAS WILLING TO EXECUTE THE CONTRACT.

Transcript of Record, page 328.

(B) THE SOUTHERN PACIFIC COMPANY MADE THE APPROVAL OF WESTERN UNION TELEGRAPH COMPANY A CONDITION PRECEDENT ONLY SO FAR AS WAS REQUIRED BY THE VOID PROVISIONS OF ITS CONTRACT.

Transcript of Record, pages 330, 161 and 165.

(C) THE ASSENT OF WESTERN UNION TELEGRAPH COMPANY WAS NOT A

PREREQUISITE SINCE IT HAD NO VALID INTEREST IN THE SUBJECT MATTER.

Transcript of Record, page 162.

22 Cyc. 742;

Vol. 5 Pomeroy's Equity Jurisprudence (3d Ed.), Sections 12 and 263;

Parsons v. Marye, 23 Fed. 113 at 121;

In re Lennon, 166 U. S. 548 at 555;

Whitecar v. Michenor, 37 N. J. E. 6 at 7 and 14;

Pokegama S. P. Lumber Co. v. Klamath R. L. & I. Co., 86 Fed. 528 at 533;

Weimer v. Louisville Water Co., 130 Fed. 251 at 256.

(**The foregoing questions are the only ones presented by the assignment of errors.**)

V.

POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT TO THE EASEMENTS RECOGNIZED BY THE CONTRACT WITH THE SOUTHERN PACIFIC COMPANY.

Boyce v. Missouri Pacific R. R. Co., 168 Mo. 583;

Texas & Pacific R. R. Co. v. Scott, 77 Fed. 726 at 730;

Spottiswoode v. Morris & Essex R. R. Co., 61 N. J. L. 322 at 332;

Hume v. Rogue River Packing Co., 51 Ore. 237 at 252;

Curtis v. LaGrande Water Co., 20 Ore. 34 at 43;

Western Union Telegraph Co. v. Polhemus, 178 Fed. 904 at 905.

VI.

THE ORIGINAL ENTRY BY POSTAL TELEGRAPH COMPANY, IF PERMISSIVE, TERMINATED WITH THE RECEIVERSHIP, AND THE OCCUPANCY SINCE THE TERMINATION OF THE RECEIVERSHIP HAS BEEN ADVERSE.

Transcript of Record, pages 41 to 48, inclusive;

Transcript of Record, pages 274, 275, 276, 296, 308, 311;

Claflin v. Boston & Albany R. R. Co., 157 Mass. 489;

Ball v. Campbell, 6 Idaho 754 at 759;

Gregory v. U. S., 10 Fed. Cas. 1195 at 1197;

Coon v. Froment, 49 N. Y. Sup. 305 at 306;

City of Chicago v. Stearns, 105 Ill. 554 at 558.

VII.

THE DEFENSE OF RES ADJUDICATA WAS NOT ESTABLISHED.

24 A. & E. Encyc. of Law, 724 (and cases cited in note 1, page 725);

24 A. & E. Encyc. of Law, 773 (and cases cited in note 1);

24 A. & E. Encyc. of Law, 781;

Postal Telegraph-Cable Co. v. O. S. L. R. Co., 104 Fed. 623 at 625;

O. S. L. R. Co. v. Postal Telegraph-Cable Co., 111 Fed. 842 at 844.

(The foregoing are the only additional points presented in appellant's brief, and not raised by the assignment of errors.)

VIII.

THE COMPLAINANT, BEING ENGAGED IN A PUBLIC SERVICE, INTERFERENCE WITH ITS NECESSARY EASEMENTS WILL BE ENJOINED.

Roberts v. Northern Pacific Ry. Co., 158 U. S. 1 at 11;

Northern Pacific Ry. Co. v. Smith, 171 U. S. 260 at 271;

Northern Pacific Ry. Co. v. Murray, 87 Fed. 648;

Fresno St. Ry. Co. v. Southern Pacific R. R. Co., 135 Cal. 202;

Southern California Ry. v. Slauson, 138 Cal. 342;

Donahue v. El Paso & S. W. R. R. Co., 214 U. S. 499.

IX.

THE TESTIMONY SHOWS:

(A) THAT THE POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT ON THE SOUTHERN PACIFIC RIGHT OF WAY.

See testimony of the witnesses Annand, Durkee, Blake and Coyle, beginning respectively on pages 273, 276, 295 and 300 of Transcript of Record.

(B) THAT ITS CONTINUED MAINTENANCE AND USER OF EXISTING EASEMENTS WILL CONSTITUTE NO INTERFERENCE WITH THE SOUTHERN PACIFIC COMPANY OR THE WESTERN UNION TELEGRAPH COMPANY.

See testimony of witnesses Tuttle, Baker, Beaumont, McNicol, McReynolds, Smith and Stevenson, beginning respectively on pages 216, 222, 225, 228, 234, 239 and 242 of the Transcript of Record. (The foregoing testimony relates principally to the question of interference by induction.)

See also the testimony of the witnesses Lynch, Parrett, Sutherland and Capen at pages 285, 303, 313 and 314 of Transcript of Record; and also complain-

ant's Exhibit 19 at page 338, and Exhibit X at page 365 of Transcript of Record.

(C) AN AGREEMENT BY SOUTHERN PACIFIC COMPANY TO TERMINATE THE LITIGATION AND A MALICIOUS INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE EXECUTION OF THIS AGREMEENT.

Testimony of the witness Overbaugh at page 325, and complainant's Exhibits 21 and 22 at pages 344 and 353 of Transcript of Record.

X.

THIS COURT, HAVING ACQUIRED JURISDICTION, SHOULD ENTER A DECREE DETERMINING THE LITIGATION BY EITHER:

(A) AFFIRMING THE DECREE OF THE LOWER COURT, OR

(B) ENJOINING INTERFERENCE WITH THE NECESSARY MAINTENANCE BY COMPLAINANT OF EASEMENTS ACQUIRED BY PRESCRIPTION AND USED IN THE PERFORMANCE OF A PUBLIC SERVICE.

ARGUMENT

Appellee makes two principal contentions in the argument of this suit:

First: It contends that no error arose in the lower court which justifies a reversal or modification of the decree.

Second: It contends that, even if it be held that there was technical irregularity in the decree of the lower court, nevertheless this court, in any modification of that decree that it may find necessary, should make a change in form only and by a modified decree should afford to the appellee the same protection of its rights as was extended to it by the lower court and to which, under the facts of this case, it is clearly entitled.

I.

WESTERN UNION TELEGRAPH COMPANY WAS A NECESSARY PARTY DEFENDANT AND WAS PROPERLY BROUGHT BEFORE THE COURT BY THE SUPPLEMENTAL BILL.

By demurrer to the supplemental bill, and in the argument, the point was raised by appellants that Western Union Telegraph Company is not a proper party defendant in this cause and that the complainant is entitled to no relief against it. The facts of this case should not be lost sight of in a consideration of this point. Litigation was pending between the complainant and the

Southern Pacific Company. This had been settled by a carefully prepared compromise agreement. The execution of this agreement was prevented by the Western Union Telegraph Company and a continuance of the litigation enforced by it. The Western Union Telegraph Company assumed the defense of this litigation and is now undertaking this defense by appeal in this court. Is not a party which prevents the settlement of pending litigation between two other parties and which takes over the defense thereof from one of them, a proper and necessary party to the suit which, because of its acts alone, continues to exist?

The supplemental bill in this cause was filed August 7, 1912, prior to the time the new equity rules became effective. Rule 57 of the old rules, then controlling, provided as follows:

> "Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), **or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary** to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party." (Emphasis ours.)

An examination of the supplemental bill discloses the fact that the filing of this bill was properly permitted under rule 57 for two reasons:

First: There was a change of interest in the parties to the original suit. The original suit was brought upon the correct theory that the only necessary parties thereto were the complainant and the defendant Southern Pacific Company. While this suit was pending and subsequent to the agreement being reached which resulted in a settlement of all existing differences between these original parties, the Southern Pacific Company made an unwilling recognition of interest in the right of way in Western Union Telegraph Company. This, so far as the complainant is concerned, created a new party in interest to this controversy as effectually as if the Southern Pacific Company had alienated its right of way or an interest therein subsequent to the commencement of the original suit. It is true that the only interest recognized by the Southern Pacific Company was an interest based upon the exclusive features of a contract which the lower court properly held to be void as against public policy. But that fact did not appear and could not be determined until the Western Union Telegraph Company was brought before the court and that contract submitted to the court for its consideration.

Second: The prosecution of the litigation between the complainant and the Southern Pacific

Company had ceased because they had reached a settlement of their differences. The execution of this settlement was prevented by an interloper, Western Union Telegraph Company. This settlement and this act of the Western Union Telegraph Company transpired subsequent to the filing of the original bill. These facts justified the filing of such bill, in which the principal relief asked for is a discovery as against the Western Union Telegraph Company of its right to interfere in the pending cause.

The general rule on this point is laid down in Vol. 21 Encyclopaedia of Pleading and Practice, page 36, as follows:

> "In a suit in equity new parties, when necessary, may be added by supplemental bill, where the proceedings are in a state in which the object cannot be obtained in any other way. A supplemental bill is proper for the purpose of introducing parties who although they should have been made parties to the original bill were omitted, or for the purpose of bringing in parties who were not originally proper parties but have become proper or necessary parties *pendente lite.*"

A general consideration of this subject is found in the case of Mellor v. Smither, 114 Fed. 116 at page 120, where the court said:

"The correct decision of this case turns on the question whether or not the plaintiff at the time he filed his bill had a cause of action. If he had no cause of action, then he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill. 1 Beach, Mod. Eq. Prac., Sec. 496; Straughan v. Hallwood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29; Hill v. Hill, 10 Ala. 527. But where a cause of action exists at the filing of the bill which is defectively presented by the bill, the defects may be remedied by amendment (Equity Rules 28, 29), and matters occurring after the filing of the bill may be presented by supplemental bill (Equity Rule 57; Jenkins v. Bank, 127 U. S. 484, 486; 8 Sup. Ct. 1196, 32 L. Ed. 189; Hoxie v. Carr, 1 Sumn. 173, Fed. Cas. No. 6,802). Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. Stafford v. Howlett, 1 Paige, Ch. 200. But, in cases where the plaintiff had no cause of action when the bill was filed, neither amendment nor supplemental bill presenting occurrences subsequent

to the filing of the bill can prevent its dismissal."

In the case of Curtis Davis & Co. v. Smith, 105 Fed. 949, the syllabus is as follows:

> "Where, pending a suit in equity for infringement of a trade-mark, complainant sold its business, good will, and trade-marks to another, but did not convey its right to recover for past infringement, it parted with only a part of its interest in the suit, and the court, having acquired jurisdiction, will retain it to dispose of all the questions involved, and will permit the filing of a supplemental bill to bring the grantee before it as a party complainant."

And at page 951 the court quoted from Daniell's Chancery Practice as follows:

> "If, after a suit was instituted, any circumstance occurred which, without abating the suit, occasioned an alteration in the interest of any of the parties, or rendered it necessary that new parties should be brought before the court, the proper method of doing it was by supplemental bill. * * * * If a plaintiff, suing in his own right, made such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he brought the alienee before the court by supplemental bill."

In the case of Chapman v. Yellow Poplar Lumber Co., 143 Fed. 201, the syllabus is in part as follows:

> "Complainant brought a suit in equity against a corporation and certain individuals to obtain a reconveyance of standing trees to which he had an equitable title, which he had conveyed to the individual defendants for the benefit of the corporation. Pending the suit a compromise agreement was made between complainant and the corporation, by which the latter agreed to 'forthwith' cause a reconveyance to be made of certain of the trees, and of the remainder on payment of a sum for which they stood as security; it was also stipulated that the cause should stand continued to await the final determination of an action at law pending between the parties for the purpose of enabling complainant, if necessary, to enforce the latter conveyance. Such conveyance was subsequently made, but no conveyance was made of the trees, which were to be reconveyed forthwith; but, on the contrary, the corporation caused certain of them to be cut and converted the same to its own use. Held, that the compromise agreement had the effect of a consent decree, and under its terms complainant had the right, by a supplemental bill in the original cause, not only to require such conveyance, but also an accounting for the trees so converted as ancillary relief, espe-

> cially in view of the fact that his title to the trees was equitable and would not sustain an action at law for the conversion."

And at page 210 of the opinion, the court discussed the sufficiency of the supplemental bill as follows:

> "As to the sufficiency of this amended and supplemental bill, it may be said that no demurrer was interposed to it, and, if the bill was insufficient, it should have been demurred to. But we have no doubt of the legal sufficiency of the bill, and no doubt of the jurisdiction of the court to entertain it in this suit. Indeed, the matter appears to us to be peculiarly a subject for cognizance by way of a supplemental bill, as arising pending the suit, by the act of the principal defendant and affecting the sufficiency of the relief prayed for in the original bill. 4 Minor's Inst., p. 1262 (1131), and authorities there cited."

Apply these principles to the facts of this case. We find that the Western Union Telegraph Company took over the entire defense of this cause. It thereby upheld the Southern Pacific Company in its threatened acts of aggression which preceded the compromise agreement with the complainant. The Southern Pacific Company, by its passivity, recognized the rights claimed by the Western Union Telegraph Company. The attitude of the Western Union Telegraph Company is based

upon a claim of interest in the subject matter of the controversy. Under the authority of the rules laid down in the foregoing cases, the filing of the supplemental bill and the bringing in of the Western Union Telegraph Company as a party defendant were clearly necessary and proper. The complainant was entitled to the relief prayed for against the Western Union Telegraph Company in the event that the allegations of the supplemental bill should be found to be true.

Remember also that the principal relief prayed for by the supplemental bill was for a discovery against the Western Union Telegraph Company. The complainant had the right to be advised by virtue of what rights Western Union Telegraph Company attempted to intervene and prevent the settlement agreed upon by complainant and the Southern Pacific Company. The right to a discovery is one of the most important rights peculiarly within the province of a court of equity. This point is discussed in Pomeroy's Equity Jurisprudence in Section 191, as follows:

> "In one most important sense 'discovery' is not peculiar to and does not belong to the auxiliary jurisdiction. Every suit in equity brought to obtain relief is or may be most truly a suit for discovery; for the complainant may always, and generally does, by the allegations and interrogatories of his bill, call upon and force the defendant to disclose by his answer under oath facts and circumstances

within his knowledge in support of the plaintiff's contention; and the plaintiff may perhaps go to the hearing, relying largely, and sometimes wholly, upon the evidence thus furnished by the compulsory admissions of the defendant's answer. This incident of chancery pleading, so entirely at variance from the common-law practice, by which the conscience of the defendant could be probed, and which was so powerful an instrument in eliciting the truth in judicial controversies, has been essentially adopted by the reformed system of procedure. Under that procedure this chancery mode of pleading for the purpose of eliciting facts as well as presenting issues has been essentially applied to all equitable suits, except those causes of action in which the defendant's admissions might expose him to criminal prosecution, penalties, and the like. * * * * The bill for a discovery is proper, either when the complainant therein has no other proof than that which he expects to elicit by its means from the defendant, or when he needs the matters thus disclosed to supplement and aid other evidence which he furnishes; or indeed whenever the court can fairly suppose that facts and circumstances discovered by means of the bill can be in any way material to the complainant therein in maintaining his cause of action or defense in a suit."

See also the discussion in Section 195 where the following language is used:

> "As this auxiliary jurisdiction was contrived to supply a great defect in the ancient common-law methods, which was a constant source of wrong to suitors at law, and as it was intended to promote right and justice, discovery was, from the outset, favored by courts of equity; and as a general doctrine, it will always be enforced, unless some recognized and well-established objection exists in the particular case to prevent or to limit its operation."

The Western Union Telegraph Company became a proper party to this litigation when it interposed objections preventing the consummation of the settlement agreement between the complainant and the Southern Pacific Company. It became a necessary party when it advanced a claim of interest in the subject matter of this controversy and assumed the defense of this suit in behalf of the principal defendant herein. And for purposes of discovery it immediately became a proper and necessary party defendant when it advanced a claim of interest in the subject matter and a right to defend the litigation.

The trouble with the rules laid down and the authorities cited in appellants' brief is that they do not measure up to the facts of this case. Concede, as they contend, that a supplemental bill

must not state a new cause of action. Then examine the supplemental bill and particularly the prayer for relief. It appears from the allegations of the supplemental bill that the settlement between the Southern Pacific Company and the Postal Telegraph Company was at a standstill because of the Western Union Telegraph Company. The facts in question were fully pleaded. The complainant then asks, first, for a writ of subpoena directed to the Western Union Telegraph Company; second, for a discovery by this company of its claim of interest in the controversy; third, **for the relief prayed for in the original bill;** and fourth, that the settlement contract be made the basis of a decree adjudicating the rights of the parties. (See Transcript of Record, p. 142.)

Appellee did not ask the court to decree the execution of this contract, as stated by appellants on page 21 of their brief, although the court, quite properly, subsequently did decree that it be executed. It asked for a discovery by the Western Union Telegraph Company and for the relief prayed for in the original bill. It also contained a suggestion, afterwards adopted by the court, that the tentative agreement serve as a guide in preparing the decree. These facts being true, it was not improperly filed within the principles alleged by appellants.

II.

THE CLAUSE OF THE CONTRACT BETWEEN SOUTHERN PACIFIC COMPANY AND WESTERN UNION TELEGRAPH COMPANY PURPORTING TO GRANT EXCLUSIVE RIGHT OF WAY PRIVILEGES TO THE TELEGRAPH COMPANY IS AGAINST PUBLIC POLICY AND VOID.

The record in this cause shows that the only interest in this controversy possessed by the Western Union Telegraph Company is the interest created by the agreement between it and the Southern Pacific Company purporting, among other things, to confer upon the Western Union Telegraph Company, certain exclusive right of way privileges upon the railroad rights of way of the Southern Pacific Company. In the consideration of this defense and in the construction of this contract, the lower court held that this particular provision of the contract was contrary to public policy and void. This finding of the court is presented as error in the second assignment of appellants. The ruling of the court was obviously correct and is not attacked in appellants' brief. Appellee merely calls attention to, without quoting from the cases where the same question has been determined, cited under the second point in its brief of the argument.

III.

INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE SETTLEMENT OF THIS LITIGATION WAS PROPERLY ENJOINED.

It is conceded that the complainant and the defendant Southern Pacific Company have reached a settlement of all differences between them. It is because of interference on the part of Western Union Telegraph Company that this litigation was continued in the lower court and is now brought before this court. The record discloses no real interest in this controversy on the part of Western Union Telegraph Company. Its only interest is that created by the provisions of a contract which have repeatedly been held to be against public policy and therefore void. Its real interest in fostering litigation and attempting to prevent the Postal Telegraph Company from rebuilding its line is so obvious that "he who runs may read."

The decree of which it here complains affects its interest in no way. The decree provides that it, "its officers, servants, agents, employes and counsel, are hereby enjoined and restrained from interfering with the execution of" the contract between the Southern Pacific Company and the complainant. As has already been shown, it has no right, under contract, to interfere with the execution of this agreement. This agreement in no way affects its physical properties. It appears

from the record that the complainant is merely asking to continue the existence of what has existed without interruption since 1886, without interference with the properties of the Western Union Telegraph Company. The Western Union Telegraph Company appears in this case, therefore, merely as a meddlesome interloper attempting to prevent the execution of a contract between the Postal Telegraph Company and the Southern Pacific Company entered into between them in a spirit of fairness and in an attempt to adjust their differences without burdening the courts with unnecessary litigation. It was a proper exercise of the equitable power of the court when such acts on the part of the Western Union Telegraph Company were enjoined. The fundamental principle of equity jurisdiction which justifies this part of the decree is stated in Pomeroy's Equity Jurisprudence, Section 1338, as follows:

> "In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows:

Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited,* unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise."* (Italics in text.)

* * * * * * *

"It may therefore be stated as a general proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property, *requires the aid of an injunction,* a court of equity has jurisdiction and will exercise that jurisdiction, to grant an injunction." (Italics in text.) (Section 1339.)

The facts of this case measure up to these rules. Nor is specific authority lacking to show the inherent power in a court of equity to act by injunction, as the lower court has acted in this case.

In the case of Watson v. Sutherland, 72 U. S. 74 at 79, the court said:

> "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued."

This court might well follow this principle as furnishing authority for the decree of the lower court enjoining interference on the part of the Western Union Telegraph Company.

The Western Union Telegraph Company appears in these proceedings as one not interested in the subject matter of the controversy, but attempting to intervene in the case and prevent the execution of a settlement between the original parties to the suit. It has been held that a voluntary agreement between the parties litigant as fully and finally determined the controversy as a verdict could do, and that after such agreement one not a party to the record should not be allowed to interpose and renew a controversy which has been settled between the parties to the record, either by verdict or voluntary agreement. (Henry, Lee & Co. v. The Cass County Mill and Elevator Company, 42 Ia. 33.)

There is a further line of authorities to which appellee wishes to call attention. These are those cases which lay down the doctrine that a court of equity will, by injunction, prevent a third person from interfering with or preventing the execution of contractual agreements between other persons.

The American Law Book Co. brought a bill in equity against the Edward Thompson Company seeking to restrain the defendant from taking steps to cause the subscribers to the encyclopedia of plaintiff to repudiate their subscriptions. The contention was made that the plaintiff had no remedy in equity because any party to a contract has the right to break it and pay damages, and that what the party can do, another person may ask him to do without restraint by injunction. It was also argued that there was no precedent for such an injunction as the plaintiff sought, but it was decreed by the court in this case in 84 N. Y. S. 225, at page 226, that:

> "If there be no exact precedent for this injunction, none is needed. * * * * The invasion of a legal right being apparent, and the inadequacy of relief at law being clear, a case for injunctive relief is made out; and, indeed, direct authority for an injunction upon a very similar state of facts is not wanting."

It was held in Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942 at 947:

"If, then, the agent has obtained a special interest or property in the subject of the contract, has he not a right of action against a third party, whose wrongful acts prevents the delivery by his principal of the subject of the contract? And if he has, and such remedy is ineffective, for any of the reasons warranting the interposition of equity in ordinary cases, may not he appeal to a court of equity for protection of this interest? Suppose the individual defendants had wantonly and maliciously induced the defendant companies to violate their contract with the plaintiff, would it not have a right of action against them? Undoubtedly. See West Virginia Transp. Co. v. Standard Oil Co. (W. Va.), 40 S. E. 591, 56 L. R. A. 804. And if such right of action was ineffective, for any of the reasons authorizing a resort to equity, might it not ask an injunction to prevent the continuance of such interference. I think so. * * * * It makes no difference whether a man is wrongfully and maliciously induced to cease business relations with me, or whether he is maliciously and wrongfully prevented from doing so. The effect is the same. The means in either case are wrongful, and in either case the wrongdoer is liable, in so far as the injury is the natural and probable result of the wrongful acts."

A similar principle was enunciated in the case of Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65. In this case certain ticket brokers or scalpers were enjoined from dealing in railroad tickets to the Tennessee Centennial Exposition in violation of the contracts contained in said tickets. At page 75 the court said:

> "The second objection to the exercise of the injunctive process is what counsel in argument calls a 'fundamental objection,' based upon the fact that it is a novel application of the writ of injunction, not sanctioned by previous precedents. * * * * This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject.
>
> "* * * * It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves

an extension of the remedy, and often a change in the form of the remedy."

And further, at page 80, the court said:

> "The case simply calls for an application of the injunctive process to prevent complainants' business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights."

In the case of Flaccus v. Smith, 199 Pa. St. 128 (48 Atl. 894), the court enjoined a labor union from enticing the employes of the complainant to break their contracts with the complainant by becoming members of the labor union. The theory of the court was based upon the following principle:

> "Such an interference with it was an interference with his business, and, if unlawful, cannot be permitted. The court found that the interference was injurious to him, and, if allowed to continue, would utterly ruin his business. The damages resulting from such

an injury are incapable of ascertainment at law, and justice demands that specific relief be furnished in a court of equity. The test of equity jurisdiction is the absence of a plain and adequate remedy at law to the injured party, depending upon the character of the case as disclosed in the pleadings. If equity alone can furnish relief, the injunction must be issued. Watson v. Sutherland, 5 Wall. 79, 18 L. Ed. 580. With this test applied to the pleadings and the facts found by the learned judge in the court below, the decree which he made was proper."

The facts in this case show that the Southern Pacific Company was either induced or enticed to violate, or prevented from performing its contractual obligations to complainant by the malicious and unjustified interference of Western Union Telegraph Company. The contract between the complainant and Southern Pacific Company was actually entered into. There remained only the physical execution of the agreement setting that contract forth. By preventing this execution Western Union Telegraph Company came into this case as an obstructer of justice, and under the authority of the cases cited, such interference on its part was properly enjoined by the lower court.

IV.

THE DECREE THAT SOUTHERN PACIFIC COMPANY EXECUTE THE CONTRACT WITH POSTAL TELEGRAPH COMPANY WAS A VALID EXERCISE OF THE EQUITABLE POWER OF THE COURT:

(A) THE SOUTHERN PACIFIC COMPANY WAS WILLING TO EXECUTE THE CONTRACT.

It is shown by the testimony of complainant's witness Overbaugh, is admitted by the pleadings, and is practically conceded by the attorneys for the appellant, that the Southern Pacific Company was ready to execute the agreement set forth in the decree. The Southern Pacific Company is still willing to execute this agreement. The decree of the lower court requiring its execution is objectionable to the Western Union Telegraph Company and to it only, because of the dog-in-the-manger policy adopted by that company.

(B) THE SOUTHERN PACIFIC COMPANY MADE THE APPROVAL OF WESTERN UNION TELEGRAPH COMPANY A CONDITION PRECEDENT ONLY SO FAR AS WAS REQUIRED BY THE VOID PROVISIONS OF ITS CONTRACT.

The argument is made by the appellants that the contract between the Southern Pacific Com-

pany and the complainant has no vitality or legal force because a condition precedent to such contract was that the Western Union Telegraph Company assent thereto, and this it has never done. Appellee contends that this position is not supported by the record. The record shows that the Southern Pacific Company and the complainant formulated an agreement in settlement of their disputes. It further shows that this writing was submitted to the Western Union Telegraph Company for its approval, and that such approval was not given. But it nowhere appears that the Southern Pacific Company made a condition precedent to this agreement becoming effective, that Western Union Telegraph Company should give its assent. Appellee submits that the true condition as shown by the record, and as in fact it existed, was that Southern Pacific Company sought the approval of Western Union Telegraph Company only to protect itself against a claim that might be made by this company that Southern Pacific Company had violated its contract with Western Union Telegraph Company in entering into this settlement agreement with the complainant. There is nothing in the record to show that Southern Pacific Company had any interest in the attitude of Western Union Telegraph Company towards this agreement, except as it might be affected by the existence of the contract which the lower court determined to be void as against public

policy. The whole subsequent conduct of this litigation indicates to the contrary. Deeming it unwise to act in violation of the terms of its agreement with Western Union Telegraph Company until such agreement had been declared void by the courts, Southern Pacific Company did not physically execute its contract with complainant. But under the authority of the same clause which caused it to seek the approval of Western Union Telegraph Company, it threw the burden of the defense of this litigation upon that company when its assent to the settlement agreement was refused and the continuance of the litigation made necessary. The statement that the securing of this assent was a condition precedent to the settlement agreement becoming binding is not borne out by the record. The securing of this assent was made a condition precedent only so far as it might be required by the terms of the contract between the Southern Pacific Company and the Western Union Telegraph Company. This contract being invalid in this particular, the condition ceased to exist. This record shows a complete contract, without condition precedent, requiring for its consummation only a compliance with the decree of the lower court directing the physical execution of the writing into which the terms of the contract itself have been incorporated.

(C) THE ASSENT OF WESTERN UNION TELEGRAPH COMPANY WAS NOT A PREREQUISITE SINCE IT HAD NO VALID INTEREST IN THE SUBJECT MATTER.

It has already been shown that the contractual relation between Western Union Telegraph Company and Southern Pacific Company confers upon the former no right to intervene in this litigation by preventing the execution of the settlement agreement with Postal Telegraph Company. Nor can such consent be demanded by reason of any other conditions that exist. It is true that Western Union Telegraph Company has acquired certain valid rights upon the right of way of Southern Pacific Company, and it is undoubtedly true that it is entitled to protection of those rights. But it does not appear by the record that the proposed settlement between the complainant and Southern Pacific Company will in any way interfere with or impair the valid rights of Western Union Telegraph Company, nor can such fact be shown. The record shows that the complainant is merely seeking to continue in existence an easement which it has enjoyed without interruption for nearly thirty years. This easement has existed without interfering with the easement upon the railroad right of way also enjoyed by the Western Union Telegraph Company. This latter company appears, therefore, before this court, not seeking protec-

tion of its own rights, for with such rights there has never been nor can there be hereafter interference; it appears here for reasons best known to itself, and not appearing in the record, seeking to prevent the complainant from securing protection in the enjoyment of its rights in the manner voluntarily acceded to by the Southern Pacific Company, the real party in interest.

The decree of the court directed the execution of this settlement agreement for the reasons above shown. The agreement should be executed and the order of the court requiring its execution was proper.

By the decree in question the court followed the fundamental principle of equity jurisdiction that equity acts *in personam* and not *in rem*. By an order directed to the defendant, Southern Pacific Company, personally, it required the execution of the agreement which should be executed and carried into effect in order to protect the interests of the complainant.

In Volume 5, Pomeroy's Equity Jurisprudence, Section 12, the rule is stated:

> "In the infancy of the court of chancery while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies

and decrees should operate *in personam* upon defendants, and not *in rem*. The meaning of this simply is, that a decree of a court of equity, while declaring the equitable estate, interest or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant, but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary act was necessary to carry the decree into execution; if he refused to convey, the court could endeavor to compel his obedience by fine and imprisonment."

If, in equity, there exists a right on the part of the complainant to the enjoyment of the easements afforded to it by the agreement, the court was within its powers in decreeing the execution of this agreement. It is such an act as is performed by a court of equity every day in compliance with that basic principle of equity which

requires the court to enter a personal decree rather than one *in rem.* And this principle is not altered merely because the decree is in effect a mandatory injunction.

In 22 Cyc. at 742, the rule is laid down:

> "Mandatory injunctions command the performance of some positive act. * * * * There is no doubt as to the power of courts of equity to issue mandatory injunctions."

In the case of Parsons v. Marye, 23 Fed. 113, at page 121, the rule is stated:

> "Must we go into the elementary books to find warrant for such a process? Jeremy, in his Equity Jurisdiction, says: 'An injunction is a writ framed *according to the circumstances of the case, commanding* an act which the court regards as essential to justice, or *restraining* an act which it considers contrary to equity and good conscience.'
>
> "The mandatory injunction may be in the direct form of command, or in the direct form of prohibiting the refusal to do an act to which another has a right." (Italics in text.)

In the leading case of In re Lennon, 166 U. S. 548, where by injunction the court enjoined the defendant, a locomotive engineer, from refusing to afford and extend facilities for an interchange of interstate business to a railroad that was employing engineers not members of the Brother-

hood of Locomotive Engineers, the statement is made at page 556:

> "Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it. Robinson v. Lord Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 Kay & Johns, 389; Beadel v. Perry, L. R. 3 Eq. 465; Whitecar v. Michenor, 37 N. J. Eq. 6; Broome v. New York & New Jersey Telephone Co., 42 N. J. Eq. 141."

This decision is quoted with approval in the case of Wiemer v. Louisville Water Co., 130 Fed. 251 at 256, and the same principle is recognized in Whitecar v. Michenor, 37 N. J. Eq. 6 at page 14.

The point is not new in this circuit. In the opinion written by Mr. Justice Morrow in the case of Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co., 86 Fed. 528, elaborate consideration is given to any objection which might be urged against the decree in the case at bar. At page 533 of the opinion, we find the statement:

"It is contended that the injunction, although preventive in form, was mandatory in effect, its execution resulting in a change in the status of the parties. This contention assumes that the court will recognize the respondent as asserting, at the time the bill was filed, a claim of possession to the property under a color of right to such possession, and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction."

Appellee calls the particular attention of this court to the statement of Mr. Justice Morrow that "Equity will not permit a mere form to conceal the real position and substantial rights of the parties. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relation of the parties."

Appellee conceives this to be a correct and forceful enunciation of the fundamental principle upon which equity jurisprudence is based.

It cannot see that the appellants in this case, either by their assignments of error or by their brief, have presented any reason or made any suggestion to this court which shows that the substantial rights of the parties to this controversy require anything other than an unqualified affirmance of the decree of the lower court.

V.

POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT TO THE EASEMENTS RECOGNIZED BY THE CONTRACT WITH THE SOUTHERN PACIFIC COMPANY.

The rights and easements which plaintiff is here seeking to have protected were acquired by it through the adverse possession maintained by it and its predecessor in interest. Theoretically, the statute of limitations does not apply to an easement, but by judicial interpretation the result is the same as if the statute did so apply, so that an adverse user of an easement for the period specified in the statute barring actions for the recovery of land, is now, by analogy, held to be a conclusive judicial presumption of a prescriptive right by a lost grant. (Boyce v. Missouri Pacific R. R. Co., 168 Mo. 583.)

In the case of Texas & Pacific Ry. Co. v. Scott, 77 Federal 726, an easement for a right of way for a railroad was held to have been acquired by reason of the adverse possession of the right of

way during a period exceeding the limitation period. The court held that while there was no direct testimony as to a claim of right on the part of the company,

> "there is the fact of the building of the railroad, necessarily at considerable expense, over this right of way, and its open, notorious, and continuous occupancy and use. The conceded facts show a quiet and usual control and use of this property every day for 36 years, while all outward indications point to a belief in the rightfulness and justice of the company's possession. There was no special claim of right in words, but there was this general assumption of right by the acts and conduct of the company. There was no necessity for any special claim of right, for it was never questioned. We think it clear that Scott's right of action against the company as to this easement existed in 1856, and continued all along after that time, and that, this right not having been asserted for 36 years, the company has, by limitation and prescription, acquired the right to an easement over the land, which cannot be interfered with by the plaintiff, either as purchaser or as heir at law of Scott." (Texas & Pac. Ry. Co. v. Scott, 77 Fed. 730.)

So also the Supreme Court of New Jersey held as follows:

"The courts of this state, also, in deciding upon the effect of prescription as conferring a right to an easement which is not within the statute of limitations, but with respect to which twenty years' adverse enjoyment has been adopted in analogy with the statute of limitations as raising a presumption of grant, have held that the presumption arising from an adverse use for twenty years is an irrebuttable presumption and confers a right which is equivalent to title in corporeal hereditaments." (Spottiswoode v. Morris & Essex R. R. Co., 61 N. J. Law 322 at 332.)

The same principle has been recognized by the Supreme Court of Oregon which held:

"The use and enjoyment which will give title by prescription to an easement or other corporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate; that is to say, as respects prescriptive title, it must be adverse, under claim of right, continuous, uninterrupted, open, peaceable, exclusive, and with the full knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period, and while the owner of the servient tenement is under no legal disability to assert his right." (Hume v. Rogue River Packing Company, 51 Oregon 237 at 252.)

The test of the character of occupancy which will create a prescriptive right has been stated by the Supreme Court of Oregon in the following language:

> "If its inception is permissive or under a license from the owner, it cannot avail to work an ouster. To effect that result, the possession taken must be open, hostile, and continuous; 'he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.' Under this rule, an adverse possession cannot grow out of a permissive enjoyment; and so speak the decisions without a dissentient voice, including this court." Citing cases. (Curtis v. LaGrande Water Co., 20 Oregon 34 at 43.)

As was said by the Circuit Court of Appeals for the Third Circuit, in the case of Western Union Telegraph Co. v. Polhemus, 178 Fed. 904 at 906:

> "Now, the telegraph line being authorized, a recognized factor of commerce (Pensacola Co. v. Western Union Co., 96 U. S. 1, 24 L. Ed. 708), and being a public use (Western Union Co. v. Penna. R. R. Co. [C. C.] 120 Fed. 371), and having been in use all these years, it is to be presumed that the right so to do, with reference to abutting landowners, was acquired

from the predecessors of these respondents who then owned the abutting lands here concerned, in which event due compensation for present and future use thereof was either paid to or waived by them."

VI.

THE ORIGINAL ENTRY BY POSTAL TELEGRAPH COMPANY, IF PERMISSIVE, TERMINATED WITH THE RECEIVERSHIP, AND THE OCCUPANCY SINCE THE TERMINATION OF THE RECEIVERSHIP HAS BEEN ADVERSE.

Appellants contend that appellee has acquired no prescriptive rights because its original entry was permissive. This question not having been presented in the assignment of errors, its consideration by this court is not a matter of right on the part of appellants. But appellee wishes an affirmance of the decree of the lower court, not only so far as its technical accuracy is concerned, but because this decree should be affirmed as an equitable adjustment of the rights of the interested parties. The original bill prayed for an injunction from interference by the Southern Pacific Company with the exercise by complainant of easements on the railroad right of way for a distance of 103 miles. If the original entry was permissive at all, it was permissive because of an order entered in the Circuit Court for the District of Oregon in 1886, requiring the Receiver of the Oregon & California Railroad

Company to permit the predecessor in interest of the complainant to enter upon the railroad right of way at certain specified points. An examination of this order shows two important facts:

First: That the places upon which entry was permitted are by no means co-extensive with those places where the complainant enjoyed easements for which it sought protection by the original bill.

Second: The order, by its terms, provided that the privileges "are granted merely for the time being and shall not in any event extend beyond the period during which the said railway company remains in the charge and under the control of this court by reason of the present receivership."

There is no evidence, therefore, to show under what authority the original entry was made by the complainant **except at the particular points enumerated in the court order above referred to.** As to all other points, upon the authority of the cases hereinbefore cited, the entry will be presumed to have been based upon a grant.

And even as to those points at which the original entry appears to have been permissive, **such permission was for a definitely defined time which has long since expired.** After the termination of the receivership the

complainant could not justify its occupancy upon the order of the court. By its express terms this order ceased to be effective when the receivership ended. After the termination of the receivership the rights of the parties must be determined as if this order had never been entered. There being no evidence to indicate what relationship existed between the parties after the termination of the receivership, the principle again becomes controlling that the character of the occupancy not being shown, it will be presumed to have been based upon a grant.

But without this presumption, and in the absence of this principle, no such permissive occupancy has been shown as is sufficient to prevent the acquiring of a prescriptive right. If the doctrine contended for by appellants be recognized, no prescriptive right could ever be acquired. Practically every adverse occupancy that endures for the prescriptive period is permissive in that no positive steps to dispossess are taken. But the permission referred to presupposes something more positive than a mere quiescence. It involves an affirmative act. In order that the acquiring of a prescriptive right be prevented there must be a knowing and active extension of privilege to the occupant and the reception of such privilege by him.

In the case of Claflin v. Boston & Albany R. R. Co., 157 Mass. 489, it was held that where the right to use a farm crossing of a railroad acquired by

reservation in the conveyance of the right of way terminated with the death of plaintiff's grantor, the prescriptive right to continue such use cannot be acquired in less than twenty years. It is apparent from the petition in this case that if the twenty years had elapsed, the court would have held that a prescriptive right was acquired even though the right as originally existing was based, not upon adverse user, but upon a reservation in the original grant.

The permissive enjoyment referred to in the LaGrande Water Company case, *supra,* means a decided assent, an affirmative act with a knowledge of what is done under the permission. As was said by the Supreme Court of Idaho in the case of Ball v. Campbell, 6 Idaho 754 at 759:

> "Permission implies leave, license, consent."

The word "permit" is defined in the case of Gregory v. U. S., 10 Fed. Cases, 1195 at 1198, as follows:

> "The word 'permit' is defined thus: 'To grant permission, liberty or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize.' The word 'suffer' is defined thus: 'To allow; to admit, to permit.' The word 'admit' is defined thus: 'To permit; to suffer; to tolerate.' The word 'allow' is defined thus: 'To suffer; to tolerate.' The word

> 'tolerate' is defined thus: 'To allow so as not to hinder; to permit as something not wholly approved; to suffer; to endure; to admit.' Every definition of 'suffer' and 'permit' includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is what is to be done."

There is no permissive enjoyment within the meaning of the rule in the LaGrande Water Company case unless such permissive enjoyment is one licensed or granted or authorized or sanctioned within the meaning of the rule laid down in the case of Coon v. Froment, 49 N. Y. Sup. 305 at 306, where the court said:

> " 'To permit' is * * * * equivalent to 'to give leave,' 'to license,' 'to warrant in writing,' 'to grant,' 'to empower,' 'to authorize,' 'to sanction.' "

If permission be given the meaning of mere quiescence the principle would be, in effect, destructive of the principle of adverse possession. There are few prescriptive rights acquired by force of arms.

See also the case of City of Chicago v. Stearns, 105 Ill. 554 at 558, where the court refers to the definition in Webster's dictionary of the words "permit," "allow" and "suffer," saying:

> " 'Permit' is the most positive, denoting a decided assent."

But in the case at bar, as shown by the testimony to which attention was directed in the brief of argument, there was no affirmative act on the part of the Oregon & California Railroad Company or the Southern Pacific Company extending to the complainant or its predecessor in interest any permissive rights in this right of way. They took the rights which they are here seeking to protect, occupied these rights openly, notoriously and continuously for nearly thirty years, and the question of permissive enjoyment is raised merely because no other point of attack suggests itself.

VII.

THE DEFENSE OF RES ADJUDICATA WAS NOT ESTABLISHED.

One of the affirmative defenses set up by the Southern Pacific Company in its answer is that of *res adjudicata.* This question is also presented in appellants' brief as a fact indicating an admission by the appellee of the non-existence of its rights over the right of way of the Southern Pacific Company.

In 24 Am. & Eng. Encyc. of Law at 724, it is said:

> "The persons between whom a judgment or decree in a suit is conclusive in a subsequent suit are the parties to the prior suit and their privies, and as a general rule it is con-

clusive only between them. The mere fact that a person had an interest in the subject-matter of the prior suit will not render the judgment or decree therein conclusive upon him."

At page 773 the rule is stated:

"A judgment is not *res Judicata* as to a question not appearing upon the face of the record or shown by extrinsic evidence to have been determined in the action."

At page 781 it is stated:

"The test of identity is found in the inquiry whether the same evidence will support both actions."

Apply these general principles to the facts of this case and we find that the proceeding brought in 1907 was an action at law brought by the Pacific Postal Telegraph-Cable Company, a New York corporation, against the Oregon & California Railroad Company and the Southern Pacific Company for the purpose of acquiring by condemnation an easement to construct a telegraph line from the City of Portland to the state line between the States of Oregon and California. An examination of the complaint in that case, set forth in defendant's answer, will show that an absolutely different right was therein sought to be acquired from the right here claimed by appellee. At the very time this right was

sought by Pacific Postal Telegraph-Cable Company, appellee was the possessor and user of the rights which form the subject of this controversy. So it appears that the parties to these different controversies were different, and that the subject matter was different. It is also obvious, under the test laid down in the American & English Encyclopoedia of Law, that the evidence which would support a condemnation proceeding for a right to build a new telegraph line would not support a claim of a prescriptive right to maintain certain poles and overhanging cross-arms of the nature here sought to be protected. The theory is exploded by a clear statement of the facts.

The mere fact that the Pacific Postal Telegraph-Cable Company and the appellee are affiliated concerns (and they are affiliated) does not alter the principle. This court has already had occasion to consider the relationship between the different corporations making up the system known as the Postal Telegraph-Cable System. It has already been held that the close inter-corporate relationship which exists between these different companies will not cause one of them to be denied the rights to which it is otherwise entitled. Postal Telegraph-Cable Co. v. O. S. L. R. Co., 104 Fed. 623 at 625; O. S. L. R. Co. v. Postal Telegraph-Cable Co., 111 Fed. 842 at 844.

The Pacific Postal Telegraph-Cable Company acquired a prescriptive right over the Southern

Pacific right of way. This right it conveyed to the appellee, the Postal Telegraph Company of Oregon. Thereafter, the Pacific Postal Telegraph-Cable Company sought to acquire a new easement on the Southern Pacific right of way by condemnation proceedings. The reasons which may or may not have prompted it to abandon this case, after the verdict of the jury, have absolutely no bearing upon this controversy and can have been injected into this argument for no other purpose than to prejudice this court against the appellee. By bringing this condemnation action the Pacific Postal Telegraph-Cable Company in no way referred to or made admissions against the rights then existing in favor of and used by the appellee. Nor does it need any citation of authority to show that it could not have made admissions binding upon the appellee, an entirely distinct corporation, even had it attempted so to do.

VIII.

THE COMPLAINANT, BEING ENGAGED IN A PUBLIC SERVICE, INTERFERENCE WITH ITS NECESSARY EASEMENTS WILL BE ENJOINED.

The court should not lose sight of the fact that in this case the public has an interest. This is not a controversy between one private person and another private person, but is a controversy in which a public utility corporation is attempt-

ing to protect the rights necessary to the performance of its public service. It is, of course, not contended that a corporation engaged in performing a public service is entitled to take the private property of another without compensation. But the courts for many years have recognized the doctrine that when a company engaged in the performance of a public service has taken and used property, whether with compensation or without compensation, then the interest of the public is of such a nature that the property owner will not be permitted to maintain either trespass or ejectment against the corporation. By a parity of reasoning the corporation will be entitled to an injunction preventing interference with the easements necessary to be exercised in affording its service to the public. The leading case on this point is the case of Roberts v. Northern Pacific Railway Co., decided by the Supreme Court of the United States in 1894, and reported in 158 United States at page 1. At page 11 the court said:

> "So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either tres-

pass or ejectment for the entry, and will be regarded as having acquired therein and be restricted to a suit for damages." Citing cases.

The same principle has been repeatedly recognized and attention is called to the cases of Northern Pacific Ry. Co. v. Smith, 171 U. S. 260 at page 271; Northern Pac. Ry. Co. v. Murray, 87 Federal 648; Fresno St. Ry. Co. v. Southern Pacific Railroad Company, 135 California 202; Donahue v. El Paso & S. W. R. R. Co., 214 U. S. 499.

Under the authority of these decisions, even had the original entry of the appellee been wrongful (as it was not), and even had it acquired no prescriptive rights (although it has), nevertheless it would be the duty of a court of equity to protect it from interference with the operation of this telegraph line which it is necessary for it to use in performing that duty which, as a common carrier, it owes to the public. And should this court for any reason find it necessary to modify the decree of the lower court, it should nevertheless enter a decree which would protect the appellee in the continued user of the easements it is now using, even though the payment of compensation to the Southern Pacific Company might be required as a condition precedent to such continued enjoyment.

IX.

THE TESTIMONY SHOWS:

(A) THAT THE POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT ON THE SOUTHERN PACIFIC RIGHT OF WAY.

It cannot be denied that appellee and its predecessor in interest have occupied the right of way of Southern Pacific Company continuously, openly, notoriously and adversely since the line was constructed in the place where it now stands in 1886. It is only necessary, therefore, to refer to the testimony of complainant's witnesses Annand, Durkee, Blake and Coyle, where the character of the user is fully set forth and the facts stated which show the acquiring by complainant of prescriptive rights. The only answer made to this claim of prescriptive rights is that the original entry was permissive. This contention, however, has heretofore been fully met and it seems unnecessary to unduly lengthen this brief with further argument on this point.

(B) THAT ITS CONTINUED MAINTENANCE AND USER OF EXISTING EASEMENTS WILL CONSTITUTE NO INTERFERENCE WITH THE SOUTHERN PACIFIC COMPANY OR THE WESTERN UNION TELEGRAPH COMPANY.

Looking to the merits of this controversy, attention is again called to the fact that appellee is merely seeking protection in the rights which it has so long enjoyed. This protection, while of vital importance to appellee, in no way acts unfavorably upon the appellants. The claim was made in the answer of Southern Pacific Company that the use of all of its railroad right of way is required for railroad purposes, more especially because of the installation of an automatic system of block signals. This statement is not supported by the record. A wealth of testimony on this point was taken by complainant and a casual examination of the testimony of the witnesses Tuttle, Baker, Beaumont, McNicol, McReynolds, Smith and Stevenson (many of them entirely disinterested and some of them, if at all biased, inclined to approach this question from the attitude of the railroad man rather than the telegraph man) will show how preposterous is this claim. Attention has been called by appellants to the testimony of the witness McKeen. In a consideration of his testimony it should be borne in mind that this testimony was received in this case by agreement between the parties and was a transcript of the testimony given by this witness in the condemnation action tried in 1907, where an entirely different state of facts and a completely different condition was referred to than that which exists in the case at bar. The testimony of McKeen was received only "so far as the same

is applicable to the issues of this case." (Transcript of Record, page 314.) Applying this test to this testimony, we find that it does not controvert the statements made by witnesses for the complainant, who refer directly to the physical conditions shown to exist in this cause.

Nor can there be any other interference of any kind with the physical properties of either of the defendants, or the performance by them of the public services in which they are engaged. The most complete and effectual answer which could be made to such a contention is the fact that the conditions which now exist, and for the continuance of which appellee is seeking protection, have existed for nearly thirty years. Appellants convict themselves of less than fairness when they seek to convince this court that there is interference with or injury to the conduct of their business by a continuance of physical conditions which they have permitted to exist without complaint for twenty-five years. And that there is and can be no such interference is demonstrated by the testimony of the witnesses Lynch, Parrett and Capen for the complainant. The existence of appellee's line is, in fact, of benefit to the defendant Southern Pacific Company, as appears from the testimony of its witness Sutherland, shown on page 313 of the Transcript of Record.

Attention is also called to complainant's Exhibit 19 shown at page 338 of the transcript,

wherein is set forth a synopsis of a large number of contracts entered into between telegraph companies and railroad companies providing for the maintenance of telegraph lines upon railroad rights of way. This exhibit and plaintiff's Exhibit X shown at page 365 of the transcript (and inserted as a contract fairly representative of the contracts abstracted in Exhibit 19), are conclusive on the point that the continuance of the existing easements of complainant will work no hardship upon or interference with either of the defendants.

(C) AN AGREEMENT BY SOUTHERN PACIFIC COMPANY TO TERMINATE THE LITIGATION AND A MALICIOUS INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE EXECUTION OF THIS AGREEMENT.

It is a matter of regret to appellee that the lower court and this court have been burdened with a consideration of this cause. While appellee first invoked the aid of the courts, it feels in no way responsible for the fact that the necessity of determining this litigation has been thrust upon them. To all intents and purposes the litigation was terminated and the rights of all parties having any real interest in the controversy definitely settled by the agreement entered into between the complainant and the Southern Pa-

cific Company. While this litigation was pending the representatives of these two companies agreed upon an adjustment of their differences and incorporated this agreement into a written instrument of which the preliminary and final drafts appear in the record as complainant's Exhibits 21 and 22. The inquiry then becomes pertinent as to why this final draft was not executed and the court relieved from what should have been an unnecessary burden. And no answer can be found to this question save one. Western Union Telegraph Company, in no way itself affected by this agreement and with no right to participate in this settlement, except as such right might be claimed under the provisions of a contract, void as against public policy, for purposes of its own, stepped in and prevented this settlement. It was then required to assume, and is now bearing, the burden of the future conduct of this litigation. Representing, as it does, an extreme example of unjustified and unfair competition, showing, as it does, a desire and intention to injure and annoy the complainant, even though by so doing it in no way benefits itself, appellee marvels that it has the temerity to appear in a court of equity and ask for sanction of or support in so unjustifiable an undertaking.

X.

THIS COURT, HAVING ACQUIRED JURISDICTION, SHOULD ENTER A DECREE DETERMINING THE LITIGATION BY EITHER

(A) AFFIRMING THE DECREE OF THE LOWER COURT, OR

(B) ENJOINING INTERFERENCE WITH THE NECESSARY MAINTENANCE BY COMPLAINANT OF EASEMENTS ACQUIRED BY PRESCRIPTION AND USED IN THE PERFORMANCE OF A PUBLIC SERVICE.

Courts of equity came into being to correct abuses, the correction of which was not possible in the courts of common law. It is a maxim of equity that it looks to the substance and not to the form. These courts are now doing much to answer the criticisms made, with more or less justice, against our judicial system, complaining that our courts are courts of law and not of justice. But one coming before a court of equity must ask for justice however little he may desire it. Although appellee has read the brief of appellants and considered the points advanced by them, it does not learn because of what facts or circumstances natural justice and equity require anything other than a complete affirmance of the decree of the lower court. Appellants' argument were better directed to a court of law, whose hands are sometimes tied by the narrowness of

the limits within which it may move. It makes a poor appeal to the conscience of the chancellor.

In this case the record is complete, the equities are overwhelmingly in favor of appellee, the only interested defendant is quiescent, and the only active defendant is devoid of justification for its activity. Appellee feels it is weakening its case by attempting to argue it or do more than barely state it. There never was a case which called more loudly for the exercise of the plenary powers of a court of equity than does this case. Nothing has been suggested that requires action by this court other than an unqualified affirmance of the decree of the lower court. But should for any reason this court deem that decree improper in form, or in violation of technical rules through which it alone can be or has been attacked, nevertheless this court can and should finally determine this controversy and adjust the respective rights of the parties hereto by a decree of its own. The lower court by its decree, in effect, protected the complainant in the continued maintenance and user of those easements which it has for many years enjoyed and the future enjoyment of which is essential to the performance of its public duties. And this court can do no less than protect the complainant in the same way and to the same extent, either by affirming the existing decree or by entering a decree which shall enjoin all interference on the part of the defendants with the future use by

complainant of those rights to which it has so conclusively shown it is entitled.

Respectfully submitted,

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