

UNITED STATES *v.* McELROY and others.

(Circuit Court, D. Kansas. December 16, 1885.)

## MORTGAGE—FORECLOSURE OF—RIGHT OF GOVERNMENT TO REDEEM—STATUTE OF LIMITATIONS—LACHES.

Neither the statute of limitations nor laches will bar the government as to any claim for relief in a purely governmental matter; but when the government comes as a complainant into a court of equity, asserting the same rights as an individual,—a mere matter of dollars and cents, involving no question of governmental right or duty,—although technically the statute of limitations may not bar, the ordinary rules controlling courts of equity as to laches should be enforced. *U. S. v. Beebe*, 17 Fed. Rep. 37, followed.

## In Equity.

*W. C. Perry* and *C. F. Ware*, for complainant.

*J. D. McCleverty*, for defendant.

BREWER, J. This is a bill brought by the government to redeem. The facts are these: On August 7, 1869, one Moses McElroy was the owner in fee of a lot in Fort Scott. On that day, for value, he executed a mortgage for \$3,500 to one Polly Palmer. On the sixteenth day of October, 1869, the present complainant recovered a judgment of \$2,000 in the United States district court for this state against said McElroy. On November 6, 1869, execution was issued on this judgment and levy made upon said lot; said execution was returned unsatisfied for want of bidders at the sale. On a subsequent execution, and on May 30, 1871, said lot was sold at the front door of the courthouse in the city of Fort Scott to the present complainant, and on October 16, 1871, said sale was confirmed and deed ordered made to the complainant. On May 30, 1871, said mortgagee, Polly Palmer, commenced a foreclosure suit in the district court of Bourbon county, and on October 4, 1871, decree of foreclosure was rendered in her favor. Thereafter the property was sold under that foreclosure and on January 4, 1872, the sheriff's deed was executed and delivered to said mortgagee, Polly Palmer, and duly filed for record in the office of the register of deeds in Bourbon county, Kansas. In that foreclosure proceeding the present plaintiff was not made a party, and indeed could not be without its consent. Both the mortgagor and mortgagee have since deceased, leaving heirs, as against whom this bill to redeem is filed.

The bill in this case was filed November 28, 1884, more than 12 years after the sheriff's deed in foreclosure to Polly Palmer, and more than 13 years after the sale to the government on the execution. To this bill a demurrer has been filed, and the question presented is whether, by laches or limitation, the plaintiff is barred of any remedy. Unquestionably, if the plaintiff was a private individual, the statute of limitations would cut off all right to redeem; but it is said that the statute of limitations runs not against the government. This is unquestionably true, and it may also, for the purposes of this case, be

conceded that neither the statute of limitations nor laches bar the government as to any claim for relief in a purely governmental matter; but when the government comes as a complainant into a court of equity, asserting the same rights as a private individual,—a mere matter of dollars and cents, involving no questions of governmental right or duty,—it seems that, although technically the statute of limitations may not bar, the ordinary rules controlling courts of equity as to the effect of laches should be enforced. In the case of *U. S. v. Beebee*, 17 Fed. Rep. 37, this rule was laid down by the circuit court of this circuit:

“Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the government becomes a party to a suit in its courts it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.”

I think that doctrine eminently just and correct. It is especially true in a case like this. The government could not, except at its own will, be made a party to any foreclosure suit. When a complainant is therefore, in a foreclosure suit, unable to compel the appearance of the government or to have its rights adjusted and foreclosed, it would be cruel to hold that a party standing by its own will aloof from the power of the courts could bide its time, and after the lapse of many years, when property values have changed, when parties have acted in the faith of perfect title, come into a court of equity and say that all these proceedings go for naught so far as title is concerned, and now claim a property which by the combined efforts and action of many individuals, among whom is such complainant, has been largely increased in value. I hold, therefore, that the claim of the government is barred by its own laches, and that the demurrer must be sustained and the bill dismissed.

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BURMESTER and others v. PHILLIPS and others.

(Circuit Court, E. D. Virginia. December, 1885.)

**SALE OF CHATTELS—PROPOSAL MAY BE WITHDRAWN BEFORE ACCEPTANCE.**

An order was mailed on the fourteenth March by a house in Charleston, South Carolina, to a house in Fredericksburg, Virginia, for a cargo of white Rappahannock corn, at 51 cents a bushel, free on board vessel, and 7 cents freight, to be shipped “on receipt” of letter. The order could not be complied with at once. In answer the Fredericksburg house say they will correspond for the corn, and endeavor to procure vessel, at the prescribed prices. On April 4th the Fredericksburg house write and telegraph that they have secured the corn at the price, and vessel at the rate of freight, prescribed. In due course of mail answer should have been received to the telegram by the sixth, and the letter by the eighth, April. No answer positively accepting the corn was received by the 11th, when the Fredericksburg house telegraphed that the corn