UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF ILLINOIS.

IN CHANCERY.

OCTOBER TERM, A. D. 1885.

GILBERT D. MILLSPAUGH

vs.

THOS. C. McEWEN,
MILTON McEWEN,

AND

THE TRUSTEES OF THE PULLMAN LAND ASSOCIATION.

GENERAL AND SPECIAL DEMURRER TO THE BILL OF COMPLAINT.

SANDERS & HAYNES,
FOR THOS. C. AND MILTON McEWEN.

SPRINGFIELD, ILL.:
H. W. ROKKER, STATE PRINTER AND BINDER.
1885

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GENERAL AND SPECIAL DEMURRER TO THE BILL OF COMPLAINT.

TITLE TO THE LAND IN CONTROVERSY.

The substantial averments as to the title of the 160 acres of land in controversy are as follows:

In the war of 1812, Henry Millspaugh was a private in the army of the United States, and under the laws of Congress was entitled to a land warrant, granting to him 160 acres of government land. Henry Millspaugh was never married, nor did he ever apply for or receive his land warrant. But dying prior to 1847, intestate, left as his only heirs David Millspaugh, his brother, and Christina, his sister, who, in 1803, married William Lynn. All of these parties at this time lived in Yates county, New York.

On June 17, 1847, a land warrant for 160 acres of the public lands was in due form of law issued from the land office of the United States in the names of David Millspaugh and Christina Lynn, as the only heirs at law of Henry Millspaugh.

That on August 30, 1849, said land warrant was located through the United States land office at Chicago, upon the southeast quarter (S. E. $\frac{1}{4}$) of section fifteen (S. 15), township thirty-seven north (T. 37 N.), range fourteen east (R. 14 E.) of the third principal meridian (3d P. M.), in Cook Co., Illinois, which is the land in controvery, and subject to entry at that time.

On November 23, 1849, letters patent from the United States were issued jointly to David Millspaugh and Christina Lynn.

July 1, 1849, David Millspaugh died, testate, and seized and possessed of an undivided half interest in said land warrant, leaving as his only heirs at law his widow and five children, to-wit: Nancy, Epha, Frances, William S. and Archibald, and one grandson, Wm. F. Thompson, the only heir at law of Jane Thompson, a child of the said David Millspaugh, who died in 830 .

1455

The bill avers that the will of David Millspaugh was duly made and published in form sufficient to pass real estate under the laws of Illinois.

That in said Will, David Millspaugh devised and bequeathed to his son Archibald all other real estate and lands of any and every description of which he might die seized; and appointed said Archibald executor of the Will.

September 3, 1849, the Will was duly proved and admitted to probate, as a Will of real and personal property, according to the laws of the State of New York, in the Surrogate's Court, in the County of Yates and State of New York, a court having jurisdiction of the matter, and recorded in Cook Co., Ill., in 1884.

In the year 1851, Jane Millspaugh, widow of David, died, and Archibald Millspaugh and family moved to Michigan.

May 29, 1856, Archibald Millspaugh (who had married), with his wife and William S. Millspaugh and his wife, executed and delivered to the defendants, Thomas C. McEwen and Milton McEwen, a quit-claim deed of that date, of and relating to the land in Cook Co., Illinois, for which said Patent had been issued.

That in the same year, 1856, Thomas C. McEwen and Milton McEwen, obtained quit-ctaim deeds from the other hiers of said David Millspaugh for their several supposed interests as heirs at law of said David Millspaugh. That at the time of the execution of said deeds, from the recitals therein, Frances appears to be a married woman, and her husband does not join in the deed. That from Wm. F. Thompson and wife the said McEwens obtained, about the same time, a quit-claim deed, purporting to be for the south-*west* quarter (S. W. $\frac{1}{4}$) of section fifteen

(S. 15), township thirty-seven north (T. 37 N.), range fourteen east (R. 14 E.), of the third principal meridial (3d P. M.), in Cook Co., Illinois.

That on May 26, 1856, the said Thomas C. and Milton McEwen obtained a quit-claim deed from Christina Lynn, whose husband, Wm. Lynn, was then living, in the words and figures following, to-wit:

"This indenture, made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six, witnesseth that I, Christina Lynn, sister and heir at law of Henry Millspaugh, deceased, who was a recruit of Lieutenant T. W. Denton, of Thirteenth Regiment, United States Infantry, war of 1812, with Great Britain, of the County of St. Clair and State of Michigan, party of the first part, in consideration of the sum of forty-three dollars in hand paid by Milton and Thomas C. McEwen, of the County of Orange and State of New York, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain and quit-claim unto the said party of the second part, their heirs and assigns, forever, all her right, title, claim and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Lynn, the brother and sister and only heirs at law of Henry Millspaugh, deceased, as follows, to-wit:

"The southeast quarter of section numbered fifteen (15), in town ship numbered thirty-seven (37), north of range numbered fourteen (14), east, in the district of lands subject to sale at Chicago, State of Illinois, containing one hundred and sixty acres, by letters patent bearing date of November twenty-third, in the year of our Lord, one thousand eight hundred and forty-nine, and founded upon warrant number 27,495, reference being made to said pantent will more fully appear.

"To have and to hold the said premises with all the appurtenances thereunto belonging, or in anywise appertaining, to their only proper use, benefit and behoof of said parties of the second part, their heirs and assigns, forever.

"In witness whereof, the said grantors have hereunto set our hand and seals the day and year first above written.

her
"CHRISTINA + LYNN, [SEAL]
mark
"WILLIAM LYNN. [SEAL]

"Signed, sealed and acknowledged in presence of

"MARY LYNN,
"OBED SMITH."

"STATE OF MICHIGAN, }
"COUNTY OF ST. CLAIR. }

"On this twenty-seventh day of May, A. D. 1856, before me, a Justice of the Peace in and for said County of St. Clair, personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed. And the said Christina Lynn having been by me privately examined, separate and apart from the said husband, and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely and without any force or compulsion from her said husband, or from any one.

"OBED SMITH,
"*Justice of the Peace.*"

In the year 1871, Archibald Millspaugh died intestate, leaving as his only heirs at law his widow, Sarah E. Millspaugh, and the complainant, Gilbert D. Millspaugh. On February 17, 1877, Sarah E. Millspaugh died.

In 1875, Thomas C. McEwen executed and delivered a deed purporting to convey to Milton McEwen an undivided half interest in the N. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 15, T. 37, north range fourteen east of 3d P. M., in Cook Co., Illinois, and at about same time Milton McEwen executed and delivered to Thomas C. McEwen an undivided half interest in and to the S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of same quarter section.

That on March 12, 1880, said Milton McEwen and wife executed and delivered to Huntington W. Jackson warranty deed, of common statutory form, purporting to convey to said Jackson the North half (N. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section fifteen (S. 15), township 37 north (T. 37 N.), range fourteen east (R. 14 E.), of the third principal meridian, in Cook County, Illinois.

And on March 15, 1880, the said Thomas C. McEwen executed and delivered to said Huntington W. Jackson a similar deed, of like form, purporting to convey to said Jackson the south half (S. ½) of said quarter section.

That in May, 1880, said Huntington W. Jackson executed and delivered to Geo. M. Pullman a quit-claim deed, purporting to convey to said Pullman all the grantor's interest in and to the whole of said quarter section.

That the said Geo. M. Pullman and wife executed and delivered to the defendant, the Trustees of the Pullman Land Association, a quit-claim deed, purporting to convey to said defendant all their interest in and to that portion of said quarter section comprised within the following metes and bounds, to-wit:

"Beginning at the S. W. corner of the S. E. ¼ of said Sec. 15, running thence north along the west line of the said S. E. ¼ of said Sec. 15 to the N. W. corner of said quarter section: thence east along the north line of the said S. E. ¼ of said Sec. 15, to the west line of the Illinois Central Railroad right of way; thence southwesterly along the west line of said right of way to the south line of said Sec. 15; thence west along said south line of said Sec. 15 to the place of beginning, containing 78 acres, more or less."

Under the above named Patent and subsequent deeds, the Trustees of the Pullman Land Association have held undisputed possession, and occupied said land, and erected large and very extensive manufactories, and the large town of Pullman has been built up during this undisturbed possession and occupation since the date of their deeds in May, 1880.

THE PRAYER OF THE BILL.

The relief sought for by the bill of complaint is, that the deeds of conveyance from Archibald Millspaugh, and the other heirs of David Millspaugh, to Thomas C. McEwen and Milton McEwen

and wife, to Huntington W. Jackson; and from Huntington W. Jackson to George M. Pullman, and from George M. Pullman and wife to Trustees of the Pullman Land Association, and all title or claim of title of said Trustees of the Pullman Land Association to the said undivided half of said land (160 acres), by virtue of said deeds, be declared invalid and as of no effect against the rights of the complainant. That the Trustees of the Pullman Land Association may, under the direction of the Court, render a full and perfect account of all rents and profits derived by it from the said tract; and that the defendant, the Trustees of the Pullman Land Association, and all persons claiming under it, may be perpetually enjoined from setting up, or asserting, or attempting to put in force, or use any right, title or interest in or to said land, or any part thereof, under said deeds or otherwise; and that the complainant may be adjudged and declared the true, equitable and beneficial owner of said tract of land now claimed and possessed, as aforesaid, by the said Trustees of the Pullman Land Association, and be entitled to have and receive the legal title thereto in fee; and for such other and further relief as equity may require.

ARGUMENT ON DEMURRER.

The grounds in complainant's bill, on which this court of equity is asked to cancel the deeds through which the Trustees of the Pullman Land Association hold and occupy the land in controversy, are, *first*, that the deeds to the McEwens were not sufficient in form and manner of execution to pass the title to the lands in controversy, to the exclusion of the interests of the complainant; and, *second*, that the deeds, whether sufficient or not in form and execution to pass the title to the lands described, were obtained from the grantors by misrepresentation and fraud

on the part of the grantees, Thomas C. and Milton McEwen; and that their grantees, Huntington W. Jackson, Geo. M. Pullman, and the Trustees of the Pullman Land Association, had knowledge of the supposed misrepresentations and fraudulent acts of their grantors, Thomas C. and Milton McEwen.

FIRST— AS TO THE SUFFICIENCY OF THE DEEDS IN FORM AND EXECUTION.

The legal title of the whole 160 acres comes direct from the United States Government to the heirs of Henry Millspaugh, to-wit., David Millspaugh and Christina Lynn, to whom the land warrant was issued in June, 1847, located in July, 1849, and patent issued Nov. 30, 1849.

Here the chain of title divides, and an undivided half of the 160 acres descends, either by the Will of David Millspaugh, probated according to the laws of New York, September 3, 1849, to the devisee, Archibald Millspaugh, a son, and the sole executor, *as real estate;* or it passes, by process of law, to all of the heirs of David Millspaugh, to-wit., five children: Nancy, Epha, Frances, William S., Archibald, and a grandchild, Wm. F. Thompson, a son of Jane Thompson, a daughter of David Millspaugh, who died in 1830. In either event, if the deeds are held valid, the title merges in Thomas C. and Milton McEwen, through quit-claim deed of Archibald Millspaugh and wife, and William S. Millspaugh and wife, of date May 26, 1856, and by quit-claim deeds from all the other heirs at law of David Millspaugh, in the year 1856, executed and delivered to Thomas C. and Milton McEwen; the wife of David Millspaugh having died in 1851, thereby leaving only the five children and one grandchild as sole heirs of his property.

The land warrant issued in June 17, 1847, to David Millspaugh and Christina Lynn, jointly, (if considered real estate) the undivided half interest must have passed by the will to Archibald Millspaugh, as devisee, as the averments of the bill are, that "*David Millspaugh, on July 1, 1849, died seized and possessed of an undivided half interest in said land bounty warrant*" * * * "*That in and by his last will and testament, theretofore duly made and published in form sufficient to pass real estate under the laws of the State of Illinois, after making therein various other devises and bequests, which do not concern or affect the aforesaid land bounty or land warrant, the said David Millspaugh devised and bequethed to his said son, Archibald, all other real estate and lands of any and every description of which he might die seized.*" (Page 2, lines 1 to 20, of bill.)

Here the complainant admits that the Will was in due form of law, legally probated according to the laws of the State of New York, for the Will was made and published in Yates county, New York, and *that it was sufficient in form to pass real estate under the laws of the State of Illinois.*

The only question that arises on this branch of the case is, whether this land warrant, located in August, 1849, and on which Letters Patent issued November 30, 1849; *was real estate, and passed under the terms of the Will above stated.*

Section 2448, *U. S. Revised Statutes*, is as follows, to-wit:

"Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

This statute has reference to the manner of descent of the title to lands described in the patent on the death of the party applying for the same before it issues, and settles the question as to

what kind of property it is; and in settling that question, it also settles the question of *how it shall pass,* whether by the Will of David Millspaugh to Archibald Millspaugh, or by process of law to the heirs.

Under this statute, as to the descent of the land involved, it is to be considered as if the patent had been issued to David Millspaugh and Christina Lynn in the lifetime of David Millspaugh. It did, in fact, issue in their names, but after David's death, and during her life time.

Under this statute, and the decisions of the State and United States Courts, we think this patent must be considered real estate, and if so, the half interest of David Millspaugh passed under the Will to Archibald Millspaugh.

"It is not doubted that a patent appropriated lands. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose right did not commence previous to its emination."

Hoonagle et al. vs. *Anderson*, 7 Wheat. 211.

"The patent appropriates the land and gives the legal title to the patentee."

Boardman vs. *Reed*, 6 Pet. 328.

White vs. *Burnley*, 20 How. 280.

"In Virginia, the patent is the completion of the title, and establishes the performance of every prerequisite."

Stringer et al. vs. *The Lessee of Loring et al.*, 3 Pet. 241.

"A patent appropriates the land called for, and is conclusive against rights subsequently acquired."

Bouldin et ux. vs. *Massie's Heirs*, 7 Wheat. 149.

Brush vs. *Ware el al.*, 15 Pet. 106.

Taylor & Quarlees vs. *Brown*, 5 Cranch, 233.

The Statutes of the United States make a distinction between land warrants and patents, as to the matter of descent. In section 2444, *U. S. Revised Statutes*, we find * * * "And all military *bounty land warrants*, issued pursuant to law, shall be treated *as personal chattels*, and may be conveyed by assignment of such widow, heirs or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only."

"Equity treats that as done which is agreed to be done, so that money, which according to a Will or agreement is to be invested in land, is regarded, in equity, as real estate, and land which is to be converted into money, is regarded as money accordingly."

1 Washb. R. P. 31, 4th ed., sec. 34.

Seymour vs. *Frees*, 8 Wall. 214.

If this doctrine prevail, this land warrant must, we think, be considered real estate, as it was an agreement and contract on the part of the United States Government to give the parties named 160 acres of government land for the services rendered by their ancestor in the army of the United States. A land warrant refers only to land. It is a contract to give land, and nothing else. If this principle of equity prevails, this court must treat this agreement or contract by the Government as having been completed, and the land located, and the patent issued; and if so, there can be no doubt that the land was located and patent issued and the land covered by it would pass by Will under such terms as were used in this.

Archibald Millspaugh's interest, under this Will to the undivided half of the 160 acres, *was a vested estate, one where there is an immediate fixed right of present or future enjoyment.*

1 Washb. R. P. 34.

The Government of the United States warranted so much land, a *fixed amount*, for his present *or future enjoyment*, and the fact that it was not then located did not render his vested estate at all indefinite, or in any way uncertain. The location of the warrant was a mere incident, to be performed by the officers of the Government whenever called upon by the proper parties, and did not in any way whatever affect the amount, *or right* to this vested estate. The complainant uses the terms, "*died seized and possessed of an undivided half interest in said land bounty warrant;*" also, the terms, "*devised and bequethed.*" The term, "*seizin*" and "*possession,*" in fact necessarily implies possession, there being no difference between "seizin" and "possession," if the possession is with the intent on the part of him who holds it to claim a freehold. Yet there are distinctions in some of the applications of the words. Thus, though there may be a concurrent possession of the same lands by several persons, there cannot be such concurrent seizin.

"Seizin is applied to estates of which there is no present possession, such as remainders, *meaning that the party has a fixed vested right of future enjoyment.*" Moreover, the land may be, for a time, vacant as regards possession; but the *seizin* (cannot at common law) be in abeyance or suspense, *it must always be in some one as a freeholder.*"

Abbott's Law Dict., Vol. 2, 457, 458.

1 Washb. R. P., 3, et seq.

4 Kent Com., 388, 389.

These terms refer to and are applied to real estate, and being used by the complainant in his bill, in a proceeding on demurrer, we have a right to accept his terms, and consider that under the terms of the Will, this land warrant and patent, or the undivided half of it, passed to Archibald Millspaugh, and by him through his quit-claim deed to Thomas C. and Milton McEwen.

If the interest of David Millspaugh to the undivided half of the land covered by the land warrant did not pass to Archibald under the Will, then it remained a part of his estate, and passed by process of law to all his heirs; and if their deeds are valid, the title went to Thomas C. and Milton McEwen, through their quit-claim deeds of May 26, 1856, and thereafter in the same year. (Bill, p. 2, lines 33–40, and p. 3, lines 1–5.)

As to the averments (Bill, p. 3, lines 5–9) that the husband of Frances did not join in her deed to the McEwens, made in 1856, though the recitals therein indicate that at the time she was a married woman, it is sufficient to say, that a good and sufficient deed, executed in due form of law, has since been obtained for her supposed interest,—though it is difficult to see how this would in any way affect the supposed interest of the complainant.

The averments in reference to William F. Thompson and wife (Bill, p. 3, lines 9–14) are, that about the same time, (May 26, 1856,) Thompson and wife made a quit-claim deed to the McEwens for the south-*west* quarter (S. W. ¼) of section fifteen, (S. 15,) township thirty-seven north, (T. 37 N,) range fourteen east, (R 14 E.) of the third principal meridian, (3d P. M.,) in Cook county, Illinois. This deed evidently was made with the intention of conveying the same land as the other heirs conveyed, but was a misdescription as to the *quarter section* only—and subject in equity to correction—and discovered, undoubtedly, by the investigations made for this suit. The description, in all other respects, is correct, and the deed properly executed.

If our theory is correet, this Wm. F. Thompson had no interest in the land, as it had passed by the Will of David Millspaugh to Archibald Millspaugh, and by him, through quit-claim deed, to the McEwens.

The claim of title, in any view of the case, is therefore complete, on the complainant's own showing, as far as the sufficiency of the deeds and their lawful execution to the McEwens is concerned, from all the heirs of David Millspaugh to his undivided half interest in the land warrant and patent.

The undivided half interest of Christina Lynn in the land warrant passes, by quit-claim deed of May 26, 1856, to Thomas C. and Milton McEwen, and is set up, *in haec verba*, in complaints. (Bill, p. 3, lines 15–30, and p. 4, lines 1–26.)

In the body of the deed the language is:

"This indenture, made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six: Witnesseth, that I, Christina Lynn, sister and heir at law of Henry Millspaugh, deceased, who was a recruit of lieutenant T. W. Denton, of thirteenth regiment United State infantry, war of 1812, with Great Britain, of the county of St. Clair, and State of Michigan, party of the first part, in consideration of the sum of forty-three dollars in hand paid by Milton and Thomas C. McEwen, of the county of Orange, and State of New York, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain and quit-claim unto said party of the second part, their heirs and assigns forever, all her right, title, claim and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Linn, the brother and sister and only heirs at law of Henry Millspaugh, deceased, as follows, to-wit: The south-east quarter section numbered fifteen, (15) in township numbered thirty-seven, (37) north of range numbered fourteen (14) east, in the district of lands subject to sale at Chicago, State of Illinois, containing one hundred and sixty acres, by Letters Patent bearing date of November twenty-third, in the year of our Lord one thousand eight hundred and forty-nine, and founded upon Warrant number 27,495, reference being made to said patent will more fully appear. To have and to hold the said premises with all the appurtenances thereunto belonging, or in anywise appertaining, to their only proper use and behoof of said parties of the second part, their heirs and assigns forever.

"In witness whereof, the said grantors have hereunto set our hands and seals the day and year first above written."

her
"CARISTINA x LYNN, [SEAL.]
mark.

"WILLIAM LYNN. [SEAL.]

"Signed, sealed and delivered in presence of

"MARY A. LYNN,

"OBED SMITH."

"STATE OF MICHIGAN, }
COUNTY OF ST. CLAIR. }

"On this twenty-seventh day of May, A. D. 1856, before me, a justice of the peace in and for said county of St. Clair, personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed. And the said Christina Lynn having been by me privately examined, separate and apart from her said husband, and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely, and without any force or compulsion from her said husband, or from any one."

OBED SMITH,
"*Justice of the Peace.*"

This deed is in the usual form, except that the husband's name does not appear in the body of the deed: but he signs it, and it is lawfully acknowledged by both husband and wife in the presence of two witnesses, and one of the same name as the wife. That this is a good and sufficient deed, as to its form and execution, we have no doubt, and that such deeds have been frequently upheld by courts of law and equity.

"It was once thought that the grantor should be named, as such, in the deed. But this does not seem necessary, if the grantor signs it. Thus, where a deed purports to be that of a married woman, her name only appearing as grantor, but it was signed by her and her husband, who acknowledged it, it was held to be a *good grant of the husband*, as well as of the wife."

3 Washb. R. P., 4th ed , p. 266, Sec. 31.

Elliott vs. *Sleeper,* 2 N. H. 525.

Perkins, Sec. 36, Co. Lit., 6a, *Lord & Seal's case,* Mod. 46.

"It is sufficient if the wife execute the deed in proper form, *and the husband assent to the same in writing upon the deed, though he do not join in the execution.*"

Ingoldsby vs. *Juan,* 12 Cal. 564.

"In New York, the deed of a married woman may be good, although her husband do not join with her in making it, if she is examined separate and apart, and acknowledges the same."

Albany Fire Ins. Co. vs. *Bay,* (decided in 1850,]

4 Const., 9 S. C., Barb. 407.

Williard Real Est. 392.

See also, 4 Greenl., Cruise Dig., 18—Note.

2 Kent's Com. 150–154.

"The statute (of Illinois) has not required that the name of the husband or wife of the grantor shall appear in the granting clause, or elsewhere in the body of the deed. Unless made so by the statute, it is not imperative it shall appear. *It is sufficient for a valid* relinquishment of homstead that it is done in conformity with the statute."

111 Ill. 212. (Sept., 1884.)

Deutzer vs. *Walden,* 30 Cal. 138.

Armstrong vs. *Stovel,* 26 Miss. 275.

"Where persons sign a bond, they are bound by it, though their names do not appear in its body."

Smith vs *Crooker,* 5 Mass. 540.

Ahrend vs. *Odiorne,* 125 Mass. 50.

Seath vs. *Bush,* 61 Pa. St. 395.

Scheed vs. *Seibschultz,* 57 Ind.

Kursly vs. *Schenberger,* 5 Watts, 193.

A deed will be construed most strongly against the grantor.

3 Washb. R., p. 397, and citations.

2 Blackston's Com. 380.

Every deed must, if possible, be made operative. Cases exist in which almost every formal part of a deed has been dispensed with.

Coke on Littleton, 7a.

Bridge vs. *Wellington*, 1 Mass. 219.

William Lynn had only *an estate of curtesy* in this land—it belonged to his wife—and as far as executing a release to the same was concerned, it would be analagous to the release of the dower interest of a married woman, the husband not being subject to a separate examination by the magistrate who takes the acknowlment.

A married woman, by "signing the deed, she joins in it," and having done this, her dower is barred, if she takes the other steps pointed out by the statute. The deed as to dower transfers no title—it only extinguishes a contingent right. This is so when her name as grantor does not appear in the body of the deed, nor naming her or her dower in any way whatever. If properly examined, as the statute requires, before the acknowledging officer, the dower is barred.

Johnson vs. *Montgomery*, 51 Ill. 185.

In the beginning of a deed for separate real estate of a wife, where the parties are first stated, "A. B." in her own right, wife of "C. D.," was named in the clause of the deed as the party making the grant, but in the clause releasing homestead, the husband was named as "the party of the first part," and so in the covenanting and attesting clauses, and he also signed and acknowledged it as his and his wife's deed. "*Held*, that even if the statute of 1845 required the husband to join in the granting

clause, that fact was sufficiently shown by the deed taking the whole of it together."

Miller et al. vs. *Shaw et al.*, 103 Ill. 277. See p. 291.

Under the statute of 1845, a married woman might convey lands by joining with her husband in a deed therefor properly acknowledgad and certified; *but her acknowledgment was the operative act to pass the title and not delivering the deed, and a substantial compliance with the statute required.*

Hogan vs. *Hogan*, 89 Ill. 428.

From the above citations, and many others to the same effect, which could be produced, it appears to be immaterial whether the name of the husband or wife appears in the body of the deed. *The operative part of the instrument, to pass the title, is the signature and the acknowledgment, according to the required statutory form.*

In the case at bar there can be no question but that *both husband* and wife signed and sealed the deed in the presence of two subscribing witnesses, and they both acknowledged it—the wife being examined separate and apart from her husband, in full and complete accord, in every particular, with the requirements of the statute. What more could be done to make this a perfect deed and to pass the title, we cannot conceive.

There is no averment of fraud or imposition practiced upon grantors *in procuring their signatures and seals*, nor that the grantors were legally incompetent to make such a deed.

"A deed cannot be avoided in a court of law except for *fraud in its execution or imposition practiced* upon the grantor in procuring his signature and seal—a *fraud which goes to the question, whether the deed ever had any legal existence.* The law does not reach the cases of deeds procured by *undue influence* over the grantor, if he be of legal capacity. The only relief in such cases is in equity."

3 Washb. R. P., 281, sec. 18.

Truman vs. *Love*, 14 Ohio St. 155.
Hartshorn vs. *Day*, U. S. 19; How. 223.

In order to overturn a certificate of acknowledgment, a *clear case of fraud, or want of jurisdiction in the office, must be made out.* The facts relied upon to avoid the acknowledgment, must be pleaded.

Marsh vs. *Mitchell*, 26 N. J. Eq. 497.

A mere preponderance of fraud will nor suffice; it *must be clear, strong and assuring.*

Hughes vs. *Coleman*, 10 Bushn. 248.

The uncontroverted evidence of the grantor has been held insufficient to overcome the certificate.

Lickman vs. *Harding*, 65 Ill. 505.
Graham vs. *Anderson et al.*, 42 Ill., 514.
Federal Reporter, vol. 18, p. 368.

Under the above authorities and principles of both law and equity, we think the sufficiency of this deed in form and execution is established beyond a doubt, and that under it, the undivided half interest of Christina Lynn in the land warrant passed to the McEwens through her deed, joined by her husband, of date May 26, 1856.

This brings the title of the whole 160 acres into the McEwens, as far as the sufficiency of the deeds in form and execution is concerned, and must stand, we think, unless *fraud on the part of the McEwens, by way of undue influence and imposition over the grantors* can be established. All subsequent grantees of the McEwens received deeds made and executed as the law requires, and there are no averments in complainant's bill of their insufficiency, either in form or execution.

THE QUESTION OF FRAUD.

Fraud, in this case, can only be maintained, if at all, as we have already shown, on the ground of undue influence and imposition over the prior grantors on the part of the McEwens. Under this branch of the case, the averments of the bill (p. 6, lines 1–40, *et seq.*) are, that Thomas C. and Milton McEwen were purchasing land warrants and locating the same, and obtaining patents therefor for claimants in Orange county, New York.

That in *1846*, an agreement was made with David Millspaugh and Christina Lynn, heirs at law of Henry Millspaugh, to obtain a land warrant, locate and procure a patent from the government, they, the McEwens, paying all fees to the government, and costs in procuring the land warrant for 160 acres of land; and for their services and fees and costs, and expenses paid by them, the McEwens were to have one-half of the land covered by the patent. They are charged with falsely representing to David Millspaugh and Christina Lynn, that fees to the government had to be paid to procure such warrant and patent from the government; that said David and Christina were simple, unlearned country folk, farmers, and very little acquainted with business transactions; that Christina could not write, and was 70 years old, and David 71 years old; and both infirm in mind and body, and that neither of them had the slightest acquaintance with the laws of Congress, relating to military bounty lands, or the rights of soldiers or their heirs under said laws.

The above is the substance of the averments as to the agreement and the procuring of the same by the McEwens from David Millspaugh and Christina Lynn, for procuring the land warrant and the patent to the land involved in this case.

In this there are no traces of fraud that can in any way affect this title. The whole transaction was natural and legal. The McEwens, on the averments of the bill, made no serious misrepresentations. only their opinions, and were paying fully all that such interests at that time were worth; they paid their money for all necessary costs, fees and expenses, and there were then and now considerable sums of legetimate expenses attending the procuring of land warrants, making proof of the claim of the soldier and of heirs, and in locating the land, and in procuring the patent; and they took all the risk of any failures that might occur. The bill admits that the McEwens were to have one-half of the land covered by the patent for their expenses paid in procuring it. The cash expenses required at that time to be paid by the McEwens, and which they did actually pay in procuring this patent, according to the averments of this bill, would have purchased 160 acres of government land, and more too.

Suppose David Millspaugh and Christina Lynn had been young—say like the complainant, 37 years of age, and lawyers or judges, sound of mind and in body, instead of simple farmers, and thoroughly acquainted with all the laws of Congress and the rights of soldiers and their heirs under said laws, *would it have made any difference!* Would they not at that time, and even now, make similar agreements? and have not such agreements been held good time and again by all courts?

The rule laid down by Story is as follows: "Still, however, there may be such an unconscionableness or inadequacy in a bargain, *as to demonstrate some gross imposition or undue influence*; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) *shock the conscience and amount in itself to conclusive and decisive evidence of fraud.*"

Story's Equi-Jurisprudence—Vol. 1. 12th ed. p. 241, Sec. 2[illegible]6, and citations.

There is nothing whatever in the action of the McEwens in procuring the agreement from the Millspaughs that "*shocks the conscience, and that amounts in itself to conclusive and decisive evidence of fraud.*"

On a fair viewing of the circumstances under which this agreement was made by the McEwens and David Millspaugh and Christina Lynn, there does not appear any fraud or misrepresentations, or imposition or undue influence on the part of the McEwens, that could possibly induce any court to annul the agreement, even in an action between the parties themselves, much less to give them any consideration whatever in such a proceeding as the present bill of complaint.

The complainant in the bill (p. 7, et seq.) further avers that the McEwens, in pursuance of the agreement made in 1846, with David Millspaugh and Christina Lynn, obtained the land warrant in June 17, 1847, located it on lands subject to such entry in Cook County, Illinois, August 30, 1849, and procured a patent from the government November, 23, 1849, in the names of David Millspaugh and Christina Lynn, jointly, as the sole heirs of Henry Millspaugh; that they did not communicate this fact to David Millspaugh, who died July, 1, 1849, in his lifetime, nor to Christina Lynn, until in 1856; but obtained the said land warrant and patent from the land commissioner of the government, and kept the same in their possession.

That the McEwens had employed a real estate firm in Chicago as their agents in the matter of locating the land and obtaining the patent and in the payment of taxes on the land after it was

located; that these agents delivered the patent to the McEwens in January, 1850, without making known to Christina Lynn or the executor of David Millspaugh's Will, or any of his heirs, the fact that the land had been located and the patent issued, though their names and addresses were well known.

That the land was assessed in the name of the McEwens and taxes paid by them: that in 1849 and 1850 a colony located near the land and established a flourishing village, and that in 1852 the Michigan Central and Illinois Central Railroads, coming from the east and south, built their roads through this land, and formed a junction within one half mile south of this quarter section, which it was supposed would become a place of importance, the Illinois Central Railroad Company reserving from sale a quarter section of land adjoining the land involved in the bill.

That in May, 1852, the Illinois Central Railroad Company condemned about 12 acres of this quarter section in controversy for right of way, and the McEwens were parties defendant to the suit, and that damages were awarded to the legal owners.

That Thomas C. McEwen and Milton McEwen, in September, 1855, personally examined the land and reported it first rate land, and worth $20 to $25 per acre.

That in May, 1856, Thomas C. McEwen first made known the existence of the patent to Archibald Millspaugh, executor and devisee of the Will of David Millspaugh, and that under the agreement made with David Millspaugh and Christina Lynn, they, the McEwens, were the owners of at least one half of the land; that they had paid all taxes for seven years, from 1849 to 1856, inclusive, and had, under the laws of Illinois, acquired full legal right to all of the land, and that there still remained in the heirs of David Millspaugh only a nominal interest in said land.

That they, the McEwens desired a quit-claim deed for the purpose of removing an apparent cloud from their title, in order that the record might appear clear; that said land was all a swamp, incapable of cultivation, and of trifling value, and not likely to improve.

That said McEwens represented that they had paid for costs, fees and expenses, to the government in getting the warrant and locating it, and getting patent, money exceeding $100, and a large sum for taxes.

That in May, 1856, Archibald Millspaugh and wife, and William S. Millspaugh and wife, executed to the McEwens quit-claim deeds to an undivided one-sixth part, or an heir's portion, for the sum of $10, and that in the same year the other heirs executed similar deeds for the same consideration.

That in September, 1856, the McEwens took the condemnation money and used it, which had been paid into court by the Illinois Central Railroad Company, in the condemnation proceedings, for their right of way in 1852.

The above are the substantial averments in the bill, or charges of misrepresentations, concealments, and fraud on the part of the McEwens in procuring the quit-claim deeds from the heirs, and through which the title passes to their grantees, and on which this court is asked to cancel and set aside, on the ground of fraud, all the deeds.

We have given these averments in substance, for purpose of condensation and reply, in the order in which they appear above.

The McEwens evidently faithfully carried out their part of the agreement of 1846, and at once proceeded to pay out their money and procure the land warrant, which was obtained June

17, 1847—probably as soon as the proof could be made and papers prepared and presented in those days—and the land located August 30, 1849, and patent issued November 23, 1849. The patent was issued to David Millspaugh and Christina Lynn, jointly; but in meeting the averments of the bill as to the question of possession of the patent and the concealment of the same from the heirs until 1856, it must be remembered that under the terms of the agreement which the bill admits, the McEwens were to pay all the costs and have half of the land. *What more there was in the agreement not stated in the bill,* for the purposes of this demurrer, we cannot inquire, for we must meet the bill as it stands; but in a proceeding where *fraud* is charged, we are permitted to consider all the circumstances. From the circumstances, it is almost certain that the McEwens must have had full power to act for the other parties to the contract in the procuring of this warrant, locating it, and getting the patent, and for aught that appears in the bill, selling it on such terms as they pleased. Moreover, the Land Commissioner delivered the patent to the McEwens or their agents, and was obliged by law to notify the applicant, which would not have been done by that official unless they had some authority to receive it. Then, again, the McEweus had the equitable title to one-half of the land by the agreement, and could control that as they pleased, while the legal title rested in David Millspaugh, or his heirs, and Christina Lynn.

In the case of *Seymour* vs. *Freer,* U. S., 8 Wall. 214, the Court say: "They had a joint interest in the property. Seymour held the legal title, *but the rights of Priee* (in this case the McEwen's) *were as valid in equity as those of Seymour were at law.*"

Price's position in the above case, as far as title is concerned, is identical with that of the McEwens in the case at bar.

There seems to be, even from the fullest averments of the bill, no effort whatever to conceal the fact that a warrant had been issued and located, and a patent received from the government. The simple fact that they kept possession of it when they owned one-half of it, is certainly no proof or evidence of a desire to conceal it. The McEwens certainly had as much right to its possession as all the heirs together had, and having received it, and knowing it was then of little value, and having paid out in getting it probably all it was worth, they held it and paid the taxes, doubtless hoping some time to get back their money.

Then, again, David Millspaugh died in July, 1849, before the warrant was located, and being notified, undoubtedly, as the law required, that it had been issued, there could have been no effort to conceal the fact from him, for *he could write*, or, at least, that is the inference from the averments, and could easily have written or ascertained all about it. His postmaster, and the notice of its being issued, would have informed him where to write, or the lawyer that drew his Will. There was no fraud practiced upon Archibald Millspaugh, nor effort to conceal the facts. He closed up his father's estate under the Will in which he was heir to all the real estate, and executor, in 1851, in Yates county, New York. He then moved to Michigan and resided there until his death, in 1871, within two hundred miles of Chicago, or where the land is located at Pullman. The issuing of the land warrant and patent, and the locating of the same, was a matter of public record, and open to the inspection of all. There were post offices and railroads from 1846 to 1856, when the supposed fraudulent machinations of the McEwens were going on, and Archibald Millspaugh

could easily have ascertained all that had been done by the McEwens. It will not do to aver *"that he had no means of information."* He had the same facilities for traveling and using the mails as the McEwens had. He was, moreover, a man of at least some means—heir to real estate, and chosen above other heirs as executor of his father's estate. Yet the complainant, in order to make a seeming case (bill, p. 9, line 8, *et seq.*), avers that *his own father*, Archibald Millspaugh, in 1856 (*only five years after settling his father's estate in Yates county, New York*), "being yet wholly ignorant of the existence of the aforesaid patent, and of his rights as aforesaid to the land covered thereby, *and the affairs of his father's estate and the provisions of his Will, whereby he was himself constituted residuary devisee, having passed out of his mind and been forgotten by him*, was approached by said Thomas C. McEwen."

Courts can not protect against such supposed ignorance and forgetfulness of an executor of a Will, who had *within five years* closed it up, and then on the approach of Thomas C. McLwen' *forgets and allows to pass out of his mind the affairs of his father's estate, the provisions of his Will, and that he was residuary devisee.*

There is certainly no fraud in the conduct of the McEwens in the employment of agents in Chicago to attend to this or any other business they might have had in that city or vicinity, and, if there was any misrepresentations or concealments, it must have been when the McEwens procured the quit-claim deed from Archibald and Wm. S. Millspaugh and their wives, in May, 1856. In reference to this, we know of no law by which the vendee is required to fix the value of the vendor's property, nor to inform him what improvements have been made around his property, nor to furnish him with brains and ordinary business activity

and capacity. These are matters that he must ascertain and obtain for himself. Even giving the complainant the full benefit of all his extraordinary averments about the ignorance and forgetfulness of his father, when the McEwens *did state*, in 1856, that the warrant had been obtained and located, and the patent issued, Archibald Millspaugh was *not obliged to sell*. Their statements *were mere opinions*. He *was then* put upon notice of these averments, as to concealments, whether they were true, and ordinarily would have inquired at once where the land was, and would have ascertained its value before selling. Moreover, it was not Archibald Millspaugh alone that the McEwens dealt with, but his brother, Wm. S. and their wives, four persons, all interested in this property, and living within 200 miles of it, six hours ride, with full notice *at last*, that as heirs to the land warrant, they were entitled to an heirs' portion. With this notice, and probably a statement as to where it lay, as it is fully described in the deed, or at least all the facts were within their reach, as to its value and location, and yet they make the quit-claim deed. As to the averments, that the McEwens claimed to have paid the taxes for over seven years, from 1849 to 1856, and being entitled by the agreement to one-half of the land, and to the other by tax title, this may have all been true, and if there was any thing fraudulent in it, then was the time to have had it corrected, as the legal paper title was still in the heirs. It is probable, that the McEwens had to pay taxes in order to protect their interest in the land, as a matter of ordinary business prudence, and not with any intent to claim it under a tax title, until 1852, if at all. There would seem to be no motive to conceal any facts in regard to the agreement, the procuring the Land Warrant and locating the same, as the land was not worth enough, according to the averments of the bill, to make it an object. Then all the heirs of

David Millspaugh and Christina Lynn, knew that their uncle, Henry Millspaugh, was a soldier in the war of 1812, and *must have* known that he was entitled to a land warrant for 160 acres. Christina Lynn certainly knew that it was obtained and located, and patent issued in 1856, and was undoubtedly notified of the fact when it was issued by the commissioners who issued it, and she knew of the existence of the agreement; and undoubtedly her husband must have known the same fact. At any rate they ought have known these facts, and were put upon notice when the McEwens procured of them their quit-claim deed in 1856, and were in no sense compelled to make the deed. In fact her acknowledgment to the justice is, "and the said Christina Lynn having been by me privately examined, separate and apart from her said husband, and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely, and without any force or compulsion from her said husband, *or from any one.*

The averments of the bill, (p. 11, line 38, *et seq.*) as to the interest of the claimant, Gilbert D. Millspaugh, son of Archibald Millspaugh, they state that he was eight years old in 1856, and that would now make him 37 years of age—in the very prime of life—and of age for 16 years. If he has any rights whatever, and has any right now to assert them, they are based upon the averred imposition and undue influence of the McEwens in procuring the quit-claim deed from Archibald Millspaugh and wife in May, 1856.

We deny that any of these heirs ever had, according to the averments of the bill, or otherwise, any grounds of complaint against the acts of the McEwens, that any court of equity could take cognizance of, and if they ever did, they slept away their rights

and the opportunity to assert them; and that this complainant cannot, certainly, revive their supposed rights and interests after he has been of age 16 years, and after the McEwens have had undisturbed and undisputed, peaceable possession of these lands, and paid taxes for 30 years, from 1850 to 1880, and their grantees for 5 years, and until the present time. It is not the fault of the McEwens that there were no memoranda or papers of his father's referring to this transaction now to be found, nor that he did not discover his supposed rights until last year, 1884, as averred by the bill. The deeds from the heirs to the McEwens in 1856, fully describing the land, were publicly made, executed in due form, in St. Clair county, Michigan, the home of the complainant, and by his father and mother, uncle and aunt. They were of record, and in these days of easy communication and travel, the averments of the bill are not sufficient, at this late day, to protect, by a Court of Chancery, any supposed rights he might have had.

Publicly, the McEwens were in court, in 1852, in the land condemnation proceedings of the Ill. Cent. R. R. Co., and there recognized as defendants. Their acts in getting the deeds before a public official, recording the same, publicly obtaining the land warrant and locating the same, and appearing in court in a public proceeding, would indicate that they were not very successful, if they were intending or striving to conceal any part of their acts in this whole matter. The averment is that they, in 1856, after obtaining the quit-claim deeds, obtained the condemnation money paid into court in that proceeding in 1852, and appropriated it to their own use. This they had a right to do, after purchasing the land and being parties to the suit. Half of it was theirs by the agreement, at least, and was too trifling a sum to have any influence on the question of fraud and concealment.

According to the averments of the bill, (p. 10, lines 9–12) the whole amount was less than $53.00. As we view this question, there was no such concealment, misrepresentation or fraud, if anything of either, to amount to positive fraud, that would *shock the conscience,* and be conclusive of its use. That if there was anything in the acts of the McEwens that could be construed as concealment, imposition or undue influence, it would best come under the head of constructive fraud, in the relations of trust and agency, and will be discussed under that head.

INADEQUACY OF PRICE.

The substantial averments of the bill are, that the McEwens paid for the interest of Christina Lynn and her husband, as stated in their deed, $43.00; that to Archibald and William S. Millspaugh they paid $10.00 for an undivided heirs' portion, and the said sum being precisely the same as was paid by the said McEwens to each one of the other heirs at law of the said David Millspaugh. The bill avers that the McEwens had paid not to exceed $53.00 for taxes; That in 1855 and 1856, the said land was valued for taxation at $960; that the McEwens reported to their agents, in September, 1855, that said lands were first-rate lands, and worth at least $20 to $25 per acre; that in 1850 and 1856, the minimum price fixed by law for the sale of public lands was $1.25 per acre; that by the act of Congress, approved September 20, 1850, granting certain of the public lands to the State of Illinois, to aid in the construction of the Illinois Central Railroad, the price of all public lands lying within six miles of the route of said road was raised to $2.50 per acre; that in 1850, the valuation for taxation of this quarter section was $240; in 1851, $320; in 1852, $400; in 1853, $800; in 1854, $800; in 1855, $960; in 1856,

$960. That in 1880, one Beach purchased an adjoining tract of land, worth no more, if as much, as the quarter section in controversy, for $500 per acre, while the said Pullman paid the McEwens only about $312.50 per acre.

"*Mere inadequacy of price*, or any other irregularity in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For courts of equity as well as courts of law act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner, and upon such terms, as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon."

1 Story's Eq. Juris. 241.

1 Dean's Eq. Rep. 651.

11 Wheat. 124.

"Where no fiduciary relations exist between the parties dealing for the purchase of an estate, mere inadequacy of consideration or irregularity in the statement of it in the conveyance, is not sufficient to impeach the contract, so as to induce a court of equity to set it aside.

"Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition, or some undue influence; and in such cases courts of equity ought to interfere, upon the satis actory ground of fraud. But then, such unconscionableness or inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decided evidence of fraud."

1 Story's Eq. Juris. 240, 241, sec. 245 and 246.

"Yet, persons of full age are not allowed, in point of law, to object to their agreement as being injurious, unless the injury be excessive,—a rule wisely established for the security and liberty of commerce, which requires that a person shall not be easily permitted to defeat his agreements."

Ibid., 243.

* * * "Courts of equity will not relieve in all cases, *even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed in statu quo.*"

Ibid. 241, sec. 250.

Perly vs. *Catlin*, 31 Ill. 533.

The inadequacy of price must be so great as to afford a strong presumption of fraud.

Butler vs. *Haskell*, 4 Desaus, 651.

Udall vs. *Kennedy*, 3 Cow. 590.

Or must be coupled with some irregularity of the parties.

George vs. *Richardson*, Gilmer, 230.

In the purchase of a debt of $260,000 in certain promissory notes secured by mortgage for the sum of $600, at a sheriff's sale, it was held not necessarily fraudulent and void, for inadequacy of price.

Erwin vs. *Parham*, U. S., 12 How. 197, and citations.

It has been held that inadequacy of price of a reversionary interest, not so great as to shock the moral sense, was not cause for setting aside the sale where there was no fraud.

Mayo vs. *Carrington*, 19 Gratt., Va. 74.

So where property, under a trust deed, was sold for about two-thirds of its value.

Weld vs. *Rees*, 48 Ill. 428.

Until fraud does appear, the parties must be left to their rtghts, as settled and fixed by their contracts, legally made. Equity will not interfere. Ibid. 437.

In view of the above well established principles of equity on this subject, and the citations already made, we do not think that there was any inadequacy of price that would justify

a court of equity in interfering to cancel the deeds from the Millspaugh heirs to the McEwens, had a bill been filed immediately after the deeds were executed. To have succeeded even then, the complainants would have had to show fraud that would *shock* the moral sense, to have made any supposed inadequacy of price of avail. To make it available, it must be shown that the parties were unequal, or advantage taken of the distress of the vendor; or, that they were young or ignorant, or imbeciles. *None* of these conditions existed in the case at bar. The vendors were all matured men and women, fully capable to attend to their own property, and act as executor, one at least, of his father's estate. They were, or might have been, if they had sought the information, as well posted in reference to the value of this land as the McEwens were. There was, we think, *no fiduciary relation* existing between the heirs who made the deeds, and the McEwens, *at the time the deeds were made in May, 1856.* For that relation, if any ever existed between them, terminated when the McEwens informed the heirs that, according to the the agreement they had procured the land warrant, located it, and obtained the patent therefor. This must have been before the execution of the deeds of May, 1856, to the McEwens. This announcement, therefore, ended any relations of a fiduciary character, or of principal and agent, or of partnership relations, if any such ever existed under the agreement. The contract or agreement on the part of the McEwens had been fully executed, and their work done, and they were reporting to the heirs and ready to purchase the part of the land belonging to the heirs, if disposed to sell, and if not, to take deeds for their undivided half of the land belonging to them under the agreement.

The parties, therefore, stood upon equal terms and footing to buy or sell their interests in these lands, the same as if they had not had any relations with each other under the agreement. The Millspaughs were in no sense compelled to sell unless they chose to do so, nor were the McEwens compelled to buy the land.

As far as the law and equity in the matter was concerned, each party was as free to buy or sell as if they had never met or had any relations together in reference to this land. If there was any fraud on the part of the McEwens, in reference to their obtaining the land warrant and locating the same and getting the patent, it must have been in the supposed concealment of these facts from the Millspaughs. There may have been good and sufficient reasons why they kept possession of the land warrant and patent from 1849 to 1856, with no possible taint of fraud attached thereto, and dealing with the averments of the bill, its statements must be accepted on demurrer. But whether there was, or no, any fraudulent concealments or other acts of the McEwens up to the date of the deeds in 1856, such fraudulent acts were all *condoned* by the new contracts made in the deeds.

If the party defrauded enters into a new contract with full knowledge of the fraud, this condones it.

Davis vs. *Henry*, 4 W. Va. 571.

The fraud of the McEwens, according to the averments of the bill, lay in concealing the facts of where the land was, its value, and that a warrant had been obtained and located, and patent issued. The gist of these charges is the concealment that the patent had been obtained and the land located. When that fact was disclosed to the Millspaughs, it was *their duty* to have ascertained the value of the land, knowing where it was, the supposed fraud of concealment being fully known to the Millspaughs when the

deeds were executed in 1856. The making of them on the part of the Millspaughs, was a condonation of any supposed fraud prior thereto. This supposed fraud of concealment being, necessarily, from the nature of the case, disclosed before the deeds were executed, such fraud cannot be made ground of objection, or interference in equity.

Whiting vs. *Hill*, 23 Mich. 399.

The representations and statements of the McEwens as to the value of the land, and as to their ownership of the whole land by virtue of having paid the taxes for over seven years, have no bearing on the case (1 Story's Eq., Sec. 193) and it matters not whether they were true or false, *they were only the opinions of the McEwens*, and were not at all binding on the Millspaughs, all supposed fiduciary relations or those of trustee, if they ever existed, having expired when the McEwens announced that they had obtained the warrant and procured the patent.

On this point we quote from *Douglass* vs. *Littler et al.*, 58 Ills. 348:

"There was *no necessity of making the deed at once*, and by taking a little time for examination and inquiry, the defects in the tax-title might have been discovered before the making of the deed. Littler made no misstatement of any matter of fact; he said his tax-title was good, but made no statement of any matter going to show the title was valid. Whether it was good or not, was a question of law, for the decision of which Douglass, so far as then appeared, was as competent as Littler; and the facts upon which an opinion might be based, were placed within his reach by Littler, by his disclosing the proper source of information. The parties dealt upon equal terms; there was no special confidence or relations existing between them, and Littler was not guilty of a fraud for which this deed can be avoided, merely because he expressed an opinion as to the validity of his tax-title, which the facts did not justify, so long as he made no false statements to what those facts were.

"Ordinarily, matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against."

Drake vs. *Latham*, 50 Ill. 270.

1 Story Eq. Jur., sec. 197.

Storer vs. *Mitchell*, 45 Ill. 213.

Coil vs. *Pittsburg Fem. Col.*, 40 Penn. St. 445.

Pike vs. *Fay*, 101 Mass. 217.

Mooney vs. *Miller*, 102 Mass. 217.

1 Story's Eq., secs. 190–191.

On the ground, therefore, of mere inadequacy of price, if any existed, we do not think this such a case as would justify a court of equity in granting any relief, as it is not sufficiently and grossly inadequate to shock the conscience and prove clearly the existence of fraud.

There must, in general, be positive fraud, or constructive fraud, and this not merely suspected, but proved.

Trenchard vs. *Worley*, 2 P. Wms. 166.

1 Fonbl. Eq., chap. 2, sec. 8, note.

Inadequacy of price, it is now a well settled rule, affords no ground of relief. It is but one of a thousand circumstanoes from which fraud may be inferred.

1 Story's Eq., sec. 241.

1 Fonbl. Eq., chap. 2, sec. 9, note.

At the time the deeds were made (1856) the assessed value of the land was but $960, and had remained at that for two years, and this, too, though the bill avers that a large and thrifty colony had located a flourishing village in the immediate neighborhood of this land in 1849 and 1850, and that the Illinois Cent. R. R. and the Michigan Cent. R. R. completed their roads through this land in 1852. Yet the assessed valuation of the land—that which

is the most correct and reliable—gives it at $240 in 1850, $320 in 1851, $400 in 1852, $800 in 1853–54, $960 in 1855–56. Just what this land cost the McEwens, the bill does not aver. For aught disclosed in the bill, it may have cost them its actual value, for their expenses in procuring the land warrant, locating the same, and procuring the patent, and paying agents to look after the same and pay taxes, are not fully stated in the bill. At best, if there was any inadequacy of price paid for the deeds, was it *such a circumstance* as would lead the court to infer fraud on the part of the McEwens? And if it was not, it is not a material question. That the land became very valuable in 1880, when the McEwen's sold it, nearly a quarter of a century afterwards, is a matter of no consideration to this court.

In reference to the averments in the bill as to the concealing of the fact that they had procurred the land warrant and located the same, and had a patent for the same, and that David Millspaugh died ignorant of the fact that the warrant had been obtained; that Christina Lynn and Archibald Millspaugh were never informed of the fact that the warrant had been obtained and located and a patent procured, until 1856, in May, by the McEwens, it is sufficient to say, the laws of the United States sec. 4748, U. S. Revised Statutes, in force at the time this land warrant was issued, in reference to *notification of claimants for land warrants*, is as follows, to-wit:

"That the Commissioner of Pensions, on application being made to him, in person or by letter, by any claimant or applicant for pension, *bounty land*, or other allowance required by law to be adjusted or paid by the Pension office, shall furnish such persons, free of all expense, all such printed instructions and forms as may be necessary in establishing and obtaining said claims; and on the issuing of a certificate of pension, *or a bounty land warrant, he shall forthwith notify the* CLAIMANT *or* APPLICANT, *and also the agent or attorney in the case, if there be one, that such certificate has been issued or allowance made, and the date and amount thereof.*"

Here we have the statutory law of the United States, which commands and makes it the official duty of the Commissioner of Pensions to *notify, forthwith, the claimant or applicant, and also the agent or attorney, if there be one, that such certificate has been issued or allowance made, and the date and amonnt thereof.*

This government official *undoubtedly so notified David Millspaugh and Christina Lynn*, June 17, 1847, when the land warrant was issued, some two years before David died. That such a land warrant had been issued by the Government, and according to the averments of the bill, it issued to them jointly as heirs of Henry Millspaugh, the soldier in the war of 1812.

This official had certainly no interest in defrauding the Millspaughs out of the proceeds of this land warrant, nor of conspiring with the McEwens to do so. He was, moreover, to notify their agent or attorney, if there was one, of the same fact. It is beyond *the presumption* of the complainant or his imaginative attorneys to deny that this was done. It is also probable, amounting to a positive certainty, that the McEwens had regular powers of attorney to receive this land warrant from the parties to whom it was issued, or it would not have been sent to them by this official.

Moreover, public notice is given of all such transactions. In *U. S. Revised Statutes*, sec. 458, we find as follows, to-wit:

"All patents issuing from the General Land Office, shall be issued in the name of the United States, and signed by the President, and countersigned by the Recorder of the General Land Office, and shall be recorded in the office, in books kept for the purpose." (In force April, 1812.)

Section 460, *U. S. Revised Statutes*, is as follows, to-wit:

"Whenever any person claiming to be interested in or entitled to land under any grant or patent from the United States, applies to the department of the interior for copies of papers filed, and

remaining therein, in anywise affecting the title to such lands, it shall be the duty of the Secretary of the interior, to cause such copies to be made out and authenticated, under his hand and the seal of the General Land Office, for the person so applying."

Here, then, under statutory law of the United States, the Secretary of the Interior *is obliged* to keep full records of issues of land warrants and patents, and also to send copies of the same to all persons who apply and who are interested in lands thereunder; and the Commissioner of Pensions *is obliged*, under statutory law of the Government of the United States, to notify all claimants and applicants for *land warrants*. These officials undoubtedly did their official duties, and notified David Millspaugh and Christina Lynn of the date of their land warrant, that it had been issued, and the amount of their interest therein, as far as the government was concerned. *They, therefore, had notice of its issue, and knew where to apply, if they desired any information concerning the same.* What, then, becomes of the averments of the bill as to the ignorance of these claimants of the issue and location of the land warrant, and the procuring of the patent for the same, and the averred concealment of those facts by the McEwens? It fails utterly, and could scarcely have been possible, and yet the whole claim of the bill rests for its foundation on this averred ignorance of the Millspaughs of what was done by the McEwens, and their averred concealment of their every act in this connection.

If, then, there was no concealment, on the part of the McEwens, of the facts relative to procuring the patent and retaining the same, as we think impossible under the above circumstances and laws, and their statements as to the value of the land, and as to owning the land under tax titles, being mere opinions of theirs, and the inadequacy of price paid for the land, if any existed, at the dates of the deed, in 1856, these parties stood on

equal footing, and could contract with each each other as if no former relations had ever existed between them in relation to these lands, and the procuring a patent for the same.

FIDUCIARY OR TRUST RELATIONS.

The bill avers a relation of *Trust and Agency* as existing between the McEwens and David Millspaugh and Christina Lynn, and their heirs. Undoubtedly the McEwens, according to the averments of the bill, were the agents or attorneys of David Millspaugh and Christina Lynn, to do a definite and particular thing, and that was to procure for them a land warrant, locate the same, and perfect their title thereto to 160 acres of land, as heirs of the soldier of 1812, Henry Millspaugh; and when they had done this, their relation as principal and agent, or attorney and client, ceased. And for their services they were to have half of the land, and pay all expenses connected therewith. When they announced that they had accomplished this, which they did in 1856, their agency terminated, and out of this perfectly natural business transaction there could not possibly, as we think, arise any such fiduciary or trust relation, as is averred by the bill, that would in any way in law or equity prohibit the McEwens from purchasing the interest of these heirs, as they did do in 1856.

These heirs were all of age, not imbecile in body or mind, or in any way incapacitated to contract. They were not under any form of distress, or compelled to sell. They were entirely competent to act on the statements of the McEwens, whether true or false, as they pleased. They had full notice that the land warrant had been issued and located, and patent issued. They knew

where the land was located, at least, from the deeds the McEwens asked them to sign, if from no other source. They could easily have ascertained the value of the land. The means were within their power, and the McEwens were, in no sense, their guardians, administrators, executors or trustees, out of which the fiduciary relations, sought to be charged on them in the bill, arise.

The fact that they did sell to the McEwens the land in controversy at a price, which, after a quarter of century, seems to the complainant inadequate, will not justify a court of equity to interfere, under the circumstances here presented.

If there was any fiduciary relations whatever between the McEwens and the Millspaughs, at most it could only be a resulting or constructive trust, and in such cases the statute of limitations would apply, while it might in some cases be different in case of an express trust of a trustee and his *cestui que trust*.

Lapse of time, especially when coupled with occupancy and improvements of the property by the alleged trustee, has been held a bar to the enforcement of a resulting trust in many cases, even though the fraud was evident, and the rights to relief originally clear.

Sec. 15, Federal Reporter, p. 761, and very numerous citations.

Even children must act with reasonable promptness. If a child seeking to enforce against a parent a trust resulting from a conveyance from the child to the parent, obtained by the parent's exercise in improper influences waits until the parent has died, or until third parties have acquired rights, the remedy will be barred by lapse of time and laches.

The rule, that the Statute of Limitations will not protect trustees, applies only to express and not constructive trusts.

Boone vs. *Chiles*, 10 Pet. 177.

Hayman vs. *Keally*, 3 Cranch, c. c. 325.

Elmendorf vs. *Taylor*, 10 Wheat. 152.

Beaubien vs. *Beaubien*, 23 How. 190.

Trust signifies a holding of property subject to a duty of employing it, or applying its proceeds according to directions given by the persons from whom it was derived. A *Constrictive Trust* is "a trust founded neither on an expressed nor on a presumable intention of the party, but raised by a construction of equity without regard to intention, and simply for the purpose of satisfying the demands of justice and good conscience."

It is evident from these definitions that the McEwens could not possibly, under the facts and circumstances of this case, as averred in the bill of complainant, be held amenable to a court of equity as having any *express trust* from any of the Mill-paughs, and if anything, it could only be an implied or constructive trust. Nor do we believe that by any possible inference from the averments of the bill can any constructive trust be established in a court of equity, as the acts of the McEwens can be explained as a very simple, ordinary business transaction.

"It is doubtless true that when a person obtains the legal title to real property by imposition or fraud, and under such circumstances that he ought not, according to the rules of equity, to hold and enjoy the beneficial interests in the property, courts of equity, in order to administer complete justice between the parties, will raise a trust out of such circumstances; and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it, or execute the trust m such a mmner as to protect the rights of the defrauded party. Such trusts are called constructive trusts."

Perry on Trusts, Sec. 166.

Under this rule the complainant seeks to have the McEwens held as trustees of the land in dispute.

But the case at bar does not come under this rule, for the McEwens did not obtain the legal title to this land until 1856, when all prior fraudulent concealment, if any existed, as to procuring the land warrant and patent which left the legal title in David Millspaugh and Christina Lynn, from June 17, 1847, to May 26, 1856, had been discovered to them by the McEwens and condoned by them in the new contract, or quit-claim deeds made in 1856. There was at that time no other imposition or fraud or undue influence practiced by the McEwens, save the averred misrepresentations as to the value of the land and their ownership of the whole tract by virtue of payment of taxes for seven years, and these, as we have shown above, were their mere opinions, and not sufficient to establish constructive fraud even under this rule given by Perry, and cited above.

In *Wormley* vs. *Wormley*, 98 Ills. 547, the court say: "It can not be a resulting trust as to any one of the tracts, as such trusts are never created by agreement, but usually by the purchase of land with money of one person in the name of another, without the consent of the owner of the means."

Sheldon vs. *Harding*, 44 Ills. [illegible]8
Holmes vs. *Holmes*, 44 Ills. 168.

"A resulting trust is never raised unless *the money* of the *cestui que trust* was *used in the purchase* in which the trust is claimed."

Holmes vs. *Holmes*, 44 Ills. 168.

"A resulting trust can not be created by a contract or agreement. If a trust of any kind is created by contract, it will be express and not a resulting trust." Ib., 168.

A trust can only arise in favor of a party who pays the whole or some definite part of the purchase money, at the time the purchase is made.

Alexander vs. *Trames*, 13 Ills. 221; Ibid., *Perry* vs. *McHenry*, 227.

Williams vs. *Brown*, 14 Ills. 201.

Loomis vs. *Loomis*, 28 Ills. 454.

Walter vs. *Klock et al.*, 55 Ills. 362.

"To establish a resulting trust, the money of the *cestui que trust* must be used in the purchase of the property of which the trust is claimed to exist. Such a trust can not be created by agreement or contract."

Remington vs. *Campbell*, 60 Ill. 516.

The legislatures of New York, Michigan and Wisconsin provided by statutes that no resulting trust should exist except where the title was taken without the knowledge or consent of the party furnishing the consideration.

Sheldon vs. *Holmes*, 44 Ill. 69—Note.

Under the definition of trusts, it seems to us that there is no such relations between the McEwens and the Millspaughs as to create a trust of any kind, and as the McEwens paid all the money there was paid on the consideration, and as we have shown already that there was no fraud in obtaining the title from the government to David Millspaugh and Christina Lynn, and as they acted under an agreement and deeds throughout, there could not possibly arise out of their acts, even as averred in the bill, any resulting or constructive trust.

LACHES.

Laches need not be pleaded,—if the objection is apparent on the bill itself, it may be taken by demurrer.

Maxwell vs. *Kennedy*, 8 How. 222.

Lansdale vs. *Smith*, 16 Ent. N. J. 28.

And if the cause, as it appears on the hearing, is liable to the objection, the Court will refuse relief without inquiring whether there is a demurrer, plea, or answer setting it up.

Sullivan vs. *Portland R. R. Co.*, 94 U. S. 811.

Badger vs. *Rodger*, 2 Wall. 95.

"Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive, and does nothing. Laches and negligence are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of of suits in this court."

Smith vs. *Clay*, Amb. 645.

Brown vs. *Co. of Buena Vista*, 95 U. S. 160.

In that case, Chief Justice Swayne says: "The law of laches, like the principles of the limitation of actions, was dictated by experience, and is founded on a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of proof. The rule that gives it the effect prescribed, is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

"A defense peculiar to courts of equity is founded on the mere lapse of time, and the staleness of claims in such cases where no statutes of limitations directly cover the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there is gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."

2 Story's Eq., 1520.

The U. S. Supreme Court say:

"Every principle of justice and fair dealing, of the security of rights long recognized of repose of society, and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction 40 years after it occurred, when all the parties had lived and died without complaining of it, upon the suggestion of a construction of a will different from that held by parties concerned and acquiesced in by them throughout all this time."

Clarke vs. *Broomans, Ex'r*, 15 Wall. 509.

"A court of chancery is said to act on its own rule in regard to stale claims and demands; and independent of the statute, it will refuse to give relief when a party has long sl-pt on his rights, and when the possession of the property has been held in good faith without disturbance, and has greatly increased in value."

Boone vs. *Chiles*, 10 Pet. 248.

"Courts of equity refuse to interfere after a considerable lapse of time from considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim: *Vigilantibus, non dormientibus, jura subvenient.*"

1 Story's Eq. Ju. 520.

Fonbl. Eq., B. 1, ch. 4, sec. 27.

Jeremy on Eq. Ju., B. 3, pl. 3, ch. 5, 549–550.

Courts of equity, although not in strictness bound by the statutes of limitations, act by analogy to it, and in a proper case, apply an equitable rule to the limitations prescribed by the statutes.

Sherwood vs. *Sutton*, 5 Mass. 143. See 5 Mass. 95.

Bank of Louisiana vs. *Stafford*, 12 How. 327.

The personal representative is affected by the delay or acquiescence of the decedents to the same extent as if it were his own.

Hayden vs. *Bibby*, 8 Federal Law Rept. (N. S.) 266.

Under the above citations on the question of *laches*, and the facts in this case at bar, the complainant is not entitled, we think, to any relief, even upon his own showing. He stands in no better position than his father, Archibald Millspaugh, and the other heirs, but is affected by the delay or acquiescence of the decedents to the same extent as if they were his own. Undoubtedly, David Millspaugh must have had the notice from the Commissioner of Pensions which that official was obliged by law to *send forthwith on the issuing of the*

land warrant to David Millspaugh and Christina Lynn, June 17, 1847, and undoubtedly Christina Lynn reeeived a similar notice at the same time. Then the issuing of the patent, November 30, 1849, and the locating of the land warrant August 23, 1849, through the land office in Chicago, were acts of public record, and the means of ascertaining what had been done were within the reach of Archibald Millspaugh and all the other heirs interested in this land. They must have known that as heirs of David Millspaugh and Christina Lynn, they were entitled to a land warrant by virtue of being heirs of Henry Millspaugh, the soldier in the war of 1812. It would be preposterous, in this age of activity and anxiety to accumulate property, that they could remain in ignorance of these facts. There can be no denial of the fact, that whatever may be said as to prior concealment, the fact that a land warrant had been obtained from the Government and located, and a patent received therefor, was fully disclosed to Archibald Millspaugh and wife and Wm. S. Millspaugh and wife, May 26, 1856, and to all the other heirs when, in that same year, they all made their quit-claim deeds.

They then knew where the land was located, and could easily have ascertained its value, had they chose to do so. Archibald Millspaugh lived within 200 miles of the land from 1856, when the quit-claim deed was made, to 1871, *over 15 years*, when he died; his widow, 21 years when she died, in 1877. Here, then, was acquiescence in the acts of the McEwens for 15 and 21 years, of the parties giving the quit-claim deeds to the McEwens on the 26th of May, 1856, and no complaint of fraud, or undue influence, or inadequacy of price, or imposition; and the parties were in the prime of life, and fully able to protect their rights and make their own contracts.

Then, again, the present complainant being eight years old in 1856, when the quit-claim deeds were made, is now 37 years of age, *having been of age 16 years.* He has lived, since then, within 200 miles of the greatest city of the century, in many respects, and of this land. That he could have lived so long in the very place where the deeds were made, and not have known of his father's interests in this land, under the circumstances, seems utterly incredible.

At any rate, it would be a very great stretch of equity to grant any relief in a case where the interested parties had slept on their supposed rights from 1856 to 1885, a period of thirty years, while during this whole time the McEwens and their grantees have paid the taxes, held peaceful and undisputed possession of the lands, and built thereon a large and flourishing town, and invested millions of dollars in large and expensive manufacturing interests, without any effort whatever on the part of the sleepers to assert their supposed rights. It would be an exceedingly difficult thing to find *a staler claim and one resting on a more slender foundation*, and we know of no rule of equity, practice or precedent that would authorize a court to interfere at this late day, to grant the relief sought, even if a meritorious case could have been made in 1856, between the Millspaugh heirs and the McEwens, when the concealment fraud on the part of the McEwens, if there ever was any, must have been discovered and fully disclosed to the Millspaugh heirs when the deeds were executed to the McEwens. The fact, too, that the McEwens held the land from 1856 to 1880, is evidence, at least, that they were not afraid of their title, and were willing that it should be investigated; and the fact that the title stood this way undisturbed for 26 years, when such a proceeding as the complainant's, if it had any foundation, would have placed the parties in *statu quo,* will go far to-

ward forbidding the relief now sought, when the land has become exceedingly valuable, and rights of innocent parties have accrued.

Then, again, equity cannot interfere after such a lapse of time, in which most of the parties of the transaction are dead, and the records largely lost or destroyed, and where it would be impossible to put the parties in *statu quo*.

THE STATUTE OF LIMITATIONS.

But the statute of limitations, in connection with the laches apparent on the face of complainant's bill, is fatal to the relief prayed for.

Courts of equity, although not strictly bound by the statute of limitations, act by analogy to it, and in proper case apply an equitable rule to the limitations prescribed by the statute.

Sherwood vs. *Sutton*, 5 Mass. 143.

See 5 Mass. 95.

Bank of Louisiana vs. *Stafford*, 12 How. 327.

"Chancery adopts limitations at law, or treats less periods as barring claim."

Castner vs. *Walrod*, 83 Ill. 171.

Courts of equity act by analogy upon limitation law.

Sloan vs. *Graham*, 85 Ill. 26.

Upon application of heirs, administrator's sale will not be set aside for mere irregularities after lapse of nineteen years.

Goodbody vs. *Goodbody*, 95 Ill. 456.

Equity follows law in allowing defense of statute.

Harris vs. *Mills*, 28 Ill. 44.

"That no person shall commence an action for recovery of lands, nor make an entry thereon, *unless within twenty years*

after the right to bring such action, or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as hereinafter provided."

Revised Statutes Illinois, ch. 83, par. 1.

"If such right or title first accrued to an ancestor, or predecessor of the person who brings the action, or makes the entry, or to any person from, by, or under whom he claims, the twenty years shall be computed from the time when the right or title so first accrued."

Ibid. par. 2.

"The right to make an entry or bring an action to recover land, shall be deemed to have first accrued, at the times respectively hereinafter mentioned; that is to say—

"1st. When any person is disseized, his right to entry or action shall be deemed to have accrued at the time of such disseizin.

"2. When he claims *as heir or devisee of one who died seized*, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy or other estate intervening after the death of such ancestor or devisor; in which case his right shall be deemed to accrue when such intermediate estate expires, or when it would have expired by its own limitations."

Ibid. par. 3.

Evidently this statute of limitations would commence to run, under *paragraph 2*, from the time when the right or title first accrued to the ancestor or predecessor of the person bringing the action. The right or title, therefore, first accrued to David Millspaugh in November 30, 1849. The date of the patent that gave him title, and would, under the twenty years' limitation of this statute, have expired November 30, 1869, for this action is brought by Gilbert D. Millspaugh, who claims *under him and his title*, and has no better or other claim under this title than David Millspaugh or his heirs, through whom this title passed to the McEwens.

"Under the statute, it is not essential that a party who takes possession of land and holds adversely to the owner, should enter under a deed or muniment of title to cause the limitation

of twenty years to run in his favor. It is sufficient for a party to take possession under a claim of ownership, and hold the time required by the statute."

Weber vs. *Anderson*, 73 Ill. 439.

Turney vs. *Chamberlain*, 15 Ill. 273.

"*It is the possession* that bars the owner of a recovery. If the owner permits the occupation of his land for a period of twenty years, by a party asserting ownership, he will be barred by the statute from making an entry, or bringing an action to regain possession. *No deed is required to the inception, the continuance or completion of the bar.*"

"A deed is not necessary to transfer the possession of land held adversely to the owner, and where *one person succeeds to the possession* of another, and it becomes necessary to connect the possession of the two to make the period required to bar the owner, the transfer of possession may be shown by parol evidence."

Weber vs. *Anderson*, 73 Ill. 439.

Scheetz vs. *Fitzwater*, 5 Burr. 131.

"Doubtless the possession must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any agreement, conveyance or understanding, which has for its object a transfer of the rights of the possessor, or of his possessions, and is accompanied by a transfer of possession in fact."

Smith vs. *Chapin*, 31 Conn. 531.

"Not even a writing is necessary, if it appear that the holding is continuous and under the first entry."

Crispin vs. *Hannoren*, 50 Mo. 544.

Menkins vs. *Blumenthall*, 27 Mo. 203.

"The mode adopted for the transfer of the possession, may give rise to questions between the parties to the transfer; but as respects *the rights of third persons*, against whom the possession is held adversely, it seems to us to be immaterial, if successive transfers of possession were, in fact, made, whether such transfers were effected by Will, by deed or by mere a agreement, either written or verbal."

McNeely vs. *Langan*, 22 Ohio St. 32.

Murr vs. *Gillian*, 1 Caldwell, 511.

Overfield vs. *Christie*, 7 Ser. and Raw. 173.

Shannon vs. *Kinney*, 1 A. K. Marshall, 3.

Under these decisions, there would seem to be no doubt but that the complainant is barred from any supposed right to the title or interest in this land. For the McEwens had possession of the land from 1849, by the payment of taxes and by acts of ownership, and claiming ownership, and actually owning one-half of the land by virtue of the agreement with David Millspaugh and Christina Lynn, of 1846. In 1852, their claim was recognized publicly by a court, in the condemnation proceedings of the Ill. Cent R. R. Co., in which they were made defendants. In 1856, they received deeds from all the heirs to this land, and held continuous, peaceable, undisturbed possession, and paid the taxes until 1880. From the time they took possession of this land in 1850, to the time they sold, in 1880, *thirty years of continuous, undisputed possession had been held and enjoyed by them.* Their grantees held the same possession, and under the same title, up to 1884 or 1885, making a continuous, undisturbed possession, under the claim of the McEwens, *for 34 years.* The averments of the bill fully admit the possession and holding of the McEwens.

The statute above cited uses the terms "*seized and possessed of the premises.*" As above shown, "seizin necessarily implies possession, there being no difference between "seizin" and "possession," if the possession is with the intent on the part of him who holds it to claim a freehold. Yet there are distinctions in some of the applications of the word; thus, though there may be a concurrent possession of the same lands by several persons, there cannot be such concurrent seizin."

"*Seizin* is applied to estates of which there is no present possession, such as remainders, *meaning that the* party has a fixed vested right of future enjoyment. Moreover, the lands may be

for a time vacant, as regards possession, but seizin (cannot, at common law,) be in abeyance or suspense; it must always be in some one as freeholder."

Abbott's Law Dict., Vol. 2, 457–58.

1 Washt., R. P. 3, *et seq.*

4 Kent Com., 388–89.

"*Seizin* means possession under some legal title, or right to hold. The possession may be shown by parol. The title must be shown by proper conveyance." Abbott's Law Dict., Vol. 2, p. 458.

Ford vs. *Gomes*, 49.

"Seizin in law arises when the grantor of real estate gives the right of present possession to the grantee. Seizin in deed is the actual possession of the freehold estate."

Hart vs. *Dean*, 2 MacArthur, 60.

Possession in law is the control or custody of a thing; detention of anything as one's own and for his enjoyment, occupation, actual or constructive, of such object or property, and as applied to lands, means an actual residence on the land, or such cultivation, use and enjoyment of the same, by visible acts of ownership, as would give notice to the owner and others of the adverse possession of the land.

Kimbo vs. *Hamilton*, 28 Tex. 560.

The owner may be said to have an "estate" *in possession*, unless there be some intervening estate in the land, the owner of which has a present paramount claim as against him.

Campau vs. *Campau*, 19 Mich. 116–123.

Under the averments of the bill it is evident that the McEwens were *seized and possessed* of this land when the deeds were executed in May, 1856, by the Millspaugh heirs, if not in 1849, when the land warrant was located and patent issued.

Twenty years actual possession, claiming title against the world, is complete bar to other claims.

Lavalle vs. *Strobel*, 89 Ill. 370.

It has been held that "upon a possession of *36* years by one tennant in common, not paying or accounting with his co-tenants for rents and profits, or recognizing his rights to the premises, an ouster would be presumed, and that the occupant held adversely, and that an entry was barred and a recovery could not be had in ejectment."

Doe ex dem, etc., vs. *Prosser*, 1 Cowpr. R. 217.

Also, "where one tennant in common disseizes other co-tennants, and holds adversely, the statute will bar an action by his co-tenants, and it was held that the sale of the whole tract by one co-tennant to a third person, the sale being followed by adverse possession, amounts to an ouster or disseizen of co-tennants, and the statute of limitations will bar their action or entry."

Goerrey vs. *Urig*, 18 Ill. 238.

Even in case of a *trustee*, the statutes of limitation will run, the rule being well established that "so long as the duties of the trustee remain undischarged, the trustee cannot avail himself of the statute of limitations for his defense. *But if the trustee openly denies the trust and acts adversely, the statute will begin to run, and may ultimate in a bar to the rights of the cestui que trust.*"

Albretch, Adm., etc., vs. *Wolf, Admx., etc.*, 58 Ill. 186.

Taylor vs. *Quayle*, 91 Ill. 378.

Neither the statute of limitation nor any rule of laches runs against a party in possession. Such rules are solely for the protection of the party in possession against claimants out of possession.

Mills vs. *Lockwood*, 42 Ill. 110.

"It is well settled that where courts of law and equity have concurrent jurisdiction, a claim barred at law will be barred in equity, and even where the jurisdiction in equity is exclusive, if the remedy sought is analagous to a remedy at law, the limitation will apply."

"In cases of *direct and express trusts, the statute of limitations will apply from the time the trust was disavowed by the trustee, and an adverse right or interest is insisted upon, and made known to the cestui que trust.*"

Hancock vs. *Harper*, 86 Ill. 445.

Thus, even if a relation of trust, as is averred, existed in the case at bar, *the trustees*, the McEwens, certainly disavowed it in 1856, and set up an adverse claim under the deeds, and held the same over 30 years, made that fact known to the *cestui que trust*, the Millspaughs at that time when they procured their deeds, and the statute of limitations then commenced to run, if not in 1849, when the adverse possession of the McEwens commenced, under the above decisions the statutes of limitations commenced to run at one or the other of those dates, and under either of them is a complete bar to the relief sought by the complainant.

NOTICE OF THE SUPPOSED FRAUDULENT ACTS OF THE M'EWENS TO THEIR GRANTORS.

We do not think the averments of the bill as to notice on the part of the grantees of the McEwens, of their supposed fraudulent acts in obtaining the title to the land in controversy, sufficient to merit the consideration of the Court, and even if of importance in some proceedings, they are immaterial in our view of the case, for all rights of Gilbert D. Millspaugh were extinguished, if he ever had any, long before the title passed from the McEwens by the quit-claim deeds of 1856, and the undisputed possession by them of the land until 1880, twenty-four years, beside the adverse holding of possession and payment of taxes from 1870 to 1880.

The complainant has endeavored to weave a vail of fraud over all the acts of the McEwens from the first agreement to procure the land warrant to their' sale of the lands in 1880. But the gauzy fabric is too thin to avail them at this late day There was,

as we viewed it, no fraud in the original agreement to procure the land warrant, pay all the expenses and have half of the land. This was but one of a thousand similar, ordinary business transactions, and one only of principal and agent or attorney, and terminated when the warrant was procured, located and the patent issued, or at fartherest when the deeds were made to the McEwens in 1856. There was no effort at concealment, nor was there motive for it, at least until 1852, when the two railroads passed through the land, for before that, it was unquestionably a swampy piece of land, of little, if any more, value than it had cost in cash on the part of the McEwens.

As we have shown, David Millspaugh and Christina Lynn undoubtedly were notified of the issuance of the land warrant in June, 1847, by the Commissioner of Pensions, whose duty it was to notify *all applicants*, and their attorneys if any in the case, of such fact. The acts of the McEwens were all public in locating the land and procuring the patent, and in appearing in the condemnation proceedings of the Ill. Cent. R. R. Co., in 1852. If this land was so valuable, it is singular that some other speculators, of whom there were always a plenty around Chicago, did not purchase this land, as *the legal title was in the Millspaughs* in the land warrant, the patent office and the land office of the government in Chicago, within a short distance of the land, and any one could have ascertained that the legal title was in the Millspaughs. But if the averments of the bill are true, no one approached the Millspaughs to purchase the very valuable land until the McEwens came to purchase it, in 1856. The only thing that remains of even apparent fraud at that time, on the averments of the bill, is the reprepresentations of the McEwens as to the value of the land,

and their averred statements, that by virtue of the payment of taxes for over seven years, that they owned the whole tract, and the charge of inadequacy of price paid for the quit-claim deeds. We think we have fully shown that if the statements of the McEwens were as averred in the bill, they were only *their opinions*, and do not amount to any such undue influence or imposition as in equity would justify any court to interfere.

The Millspaughs were all of age, sound of body and mind, in 1856, fully competent to contract, and not under any distress or compulsion, and if not satisfied with the price offered, or the statements made by the McEwens, they should not have sold their interests or made the deeds.

But if all the averments of the bill were taken as true, the laches manifested on the part of Archibald Millspaugh and the other heirs in acquiescing in the title and possession of the land obtained and enjoyed by the McEwens under the deeds of 1856, and that of the complainant until last year, would defeat any supposed rights now claimed under the bill. Most of the parties to the transactions are now dead, and the averments of concealment of the issuing of the land warrant, its location, and the procuring of the patent until 1856, upon which exists all the charge of fraud, cannot be proved, if it ever existed. David Millspaugh died in 1849, and his widow (Jane) in 1851, and his son (Archibald) in 1871, and his widow (Sarah E.) in 1877, and Milton McEwen is also dead. It is a fair presumption that William S. Millspaugh and wife, and Christina Lynn and husband, are dead.

The statutes of limitations have long since barred the claims of the complainant, if he ever had any, as we think we have

shown, and that there is now no relief for the complainant upon any grounds presented in the bill, nor upon any view taken of the case as presented by the complainant, and we therefore ask that the demurrer be sustained, and the bill dismissed.

SANDERS & HAYNES,

For Thomas C. and Milton McEwen.

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