Statement of the case.

interview, and that he knew that Lake was the other partner in the firm of Martin & Co., we look upon it as remarkable; pointing clearly to one conclusion, namely, a determination to keep from Martin all the funds of the concern, and all information of its condition, in order that he might perform the *operation* of buying Martin's interest at a sacrifice.

We are of opinion, from a careful examination of the testimony, that Brooks occupied towards Martin a relation of confidence and trust, being his partner, his agent, and his brother-in-law, and having also entire control of the partnership business; that he took advantage of this position to conceal from Martin the prosperous condition of the concern, and purchased from him his interest, for a price totally disproportioned to its real value; and that, under such circumstances, it is the unquestionable duty of a court of chancery to set aside the contract of sale.

DECREE AFFIRMED WITH COSTS.

Mr. Justice CATRON dissented briefly; on the ground that the partnership, having been formed for the purpose of speculating in soldiers' *claims* to warrants, the original transaction was a fraud upon the act of Congress; violating public policy; and that in such a case equity does not interfere.

BADGER *v.* BADGER.

Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where,

1. The trust is *clearly* established.
2. The facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust.*

And in cases for relief, the *cestui que trust* should set forth in his bill, specifically, what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of his rights.

BADGER died in 1818, leaving a widow and ten children, one of whom only was of age at that time; the others being

minors, of different ages. One of them came of age in 1824; another in 1828; a third in 1831; a fourth in 1834; a fifth in 1835; a sixth in 1837. The eldest son, Daniel Badger, took administration on the estate in 1819, an uncle being joined with him; and soon after filed an inventory of the estate, its debts, and liabilities. In 1820, having settled one administration account, the administrators obtained leave from the court to sell certain portions of the real estate. None of these proceedings were the subject of question.

In 1827, they filed a further account, which had indorsed upon it what purported to be the written approval of the widow and heirs, the latter acting by their guardians. By this account they claimed credit for several thousand dollars, alleged to have been advanced for the estate, and in 1830 got leave from court to sell as much real estate as would pay this balance. Public sale of the real estate was accordingly made; when it was bought by a friend of Daniel Badger, the administrator, and soon afterwards conveyed to him. The widow died in 1855, aged 74.

In 1858, *James* Badger, a son and heir, whose age did not appear, further than from the fact of the father's death in 1819,—and one of the persons *who by his guardian, now dead, had approved of the account of* 1827,—filed a bill against his brother Daniel,—administrator, as aforesaid,—in the Circuit Court for the Massachusetts District, charging that the account of 1827 was false and fraudulent; that the real estate had been sold beneath its value, and bought in for his said brother, the administrator; that before this purchase he had silenced the objections of some of the heirs who opposed the sale by purchasing their shares; and had forged, or fraudulently procured the signature of the widow, his mother; and in this way had obtained license from the court to sell. The bill alleged, that "the fraudulent acts and doings of the said Daniel were unknown to the complainant and his coheirs, until within five years last past," and prayed an account, &c.

The answer of Daniel Badger, the defendant, denied the allegations of the bill generally; and, on the last point, de-

nied "that the complainant, or any of the said heirs-at-law of said intestate, did not have personal knowledge of all acts and doings of said Daniel (the administrator), in reference to the sale and purchase of these estates until within five years."

There was much testimony from different members of the family; the charges of the bill being more or less supported by the evidence of heirs who had sold out what rights they had to James Badger, the complainant below. Some of the witnesses testified that Daniel, the defendant, who bore his father's name exactly, had often declared that, being the oldest son and bearing the paternal name, he was entitled to *all* the property. One of the witnesses was a daughter, born in 1807.

The court below dismissed the bill as being stale. On appeal the question was, whether this was rightly done?

Mr. Robb, for the complainant in error: We are entitled to the relief prayed for, unless we have lost our rights by the lapse of time, or the statutes of limitations, or are otherwise estopped from asserting them.

It may be true that courts of equity consider themselves bound by the statutes of limitations, which govern courts of law in like cases; and in many other cases they act upon the analogy of the limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession; courts of equity will act upon the like limitations, and apply it to all cases of relief sought upon equitable titles or claims touching real estates. These, as abstract propositions, we do not controvert. But they do not furnish any ground for refusing the relief prayed for in this bill. If the defendants invoke the protection of this abstract principle, they must clearly bring themselves within it. It is not for the plaintiff to show that he is *not* barred by the statute, but for the defendants to show that he is; they must make it appear by a proper plea and proof, that they are entitled to the benefit of the limitation. It will be said that more than twenty years had elapsed since the sales took place, before

this suit was commenced, and that this is apparent on the record. But it does not appear that this plaintiff became *of age* twenty years before the commencement of the suit. The inference is that he did not.

Nor are we barred by any rule of limitations, peculiar to courts of equity, because of alleged laches. We do not admit "that courts of equity treat a less period than the one specified in the statute as a bar to the claim." Story, J., says:* "In a case of trusts of lands, nothing short of the statute period, which would bar a legal estate or right of entry, would be permitted to operate in equity as a bar of the equitable estate." Certainly no bar, either legal or presumptive, will begin to run until after the cause of action or suit has arisen; and in equity, in cases of fraud and mistake, it will begin to run only from the time of the discovery of such fraud or mistake, and not before. The license to sell, we assert and show, was procured by fraud.

Daniel Badger sustained to his mother and brothers and sisters, more especially the minors, a relation of peculiar trust and confidence, of both natural and legal obligation. He was not only administrator, and thus the guardian of their interests, but he was her son and their protector. It was his duty, imperatively imposed, to deal with them frankly and truthfully and honestly, and a court of equity will hold him strictly to it. If he suffered them to be deceived, this was a fraud upon them. But whether fraud or mistake, they will not be barred, either by the statute or by laches, until they discovered it. When was that? Certainly not until long after these sales took place. There can be no acquiescence without full knowledge of facts. Even a written acknowledgment of acquiescence in his acts, made in ignorance of their rights, would not bind them. In *Michoud et al.* v. *Girod et al.*,† this was so held, in the following words: "Even acquittances given to an executor, without full knowledge of all the circumstances, where information had been withheld by the executor, are not bind-

* Baker *v.* Whiting, 3 Sumner, 486.

† 4 Howard, 503.

ing." And this court set aside and annulled a decree in favor of one of the executors for a large amount, although there had been a judgment in his favor by a competent court, after a full trial before arbitrators, and an allowance of the sum so found to be due him in the executor's account.

When did they first discover that they had been deceived and imposed upon by their brother? or, in other words, when did they first learn that their estates were not legally liable to be taken and sold for payment of debts? for not until that time will the limitation begin to run.

The bill alleges, substantially, that this was not known to them until within five years before the commencement of the suit. The answer does not deny this. It is, at least, evasive. The bill does not allege that they "had no knowledge of the sale and purchase of these estates until," &c., and the answer denies what is not alleged,—leaving the allegation unanswered.

Sufficient does not appear to make it the duty of this court to shield the defendant from accountability for his acts,—acts certainly never permitted to such a trustee,—on the ground that the plaintiff has grossly neglected to enforce his rights in the premises.

But, in cases of actual fraud, courts of equity do not adopt or follow the statutes of limitations; they will grant relief within the lifetime of the party who committed it, or within thirty years after it has been discovered, or become known to the party whose rights are affected by it.

The rule, as stated by the court, in *Michoud et al.* v. *Girod et al.*, just cited, is universally recognized and applied by courts of equity. It has been affirmed by this court in subsequent cases, and we do not think it will be controverted. It was held, in that case, that "a purchase, *per interpositam personam*, by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud upon the face of it;" and that "this rule applies to a purchase by executors, though they were empowered by the will to sell the estate;" and "that a purchase so made by executors will

be set aside." The sales in the case at bar took place in 1830; the present suit was begun in 1858, and in the lifetime of the person upon whom the fraud is proved, and within thirty years after it had been discovered. There was sufficient motive for an *heir's* not attempting to set the sale aside, in the fact that the widow would have had her dower in whatever land might be recovered.

Mr. Merwin, contra.

Mr. Justice GRIER delivered the opinion of the court.

The numerous cases in the books as to dismissing a chancery bill because of staleness, would seem to be contradictory if the dicta of the chancellors are not modified by applying them to the peculiar facts of the case under consideration. Thus, Lord Erskine, in an important case once before him, says: "No length of time can prevent the unkennelling of a fraud." And Lord Northington, in *Alden* v. *Gregory*,* with virtuous indignation against fraud, exclaims: "The next question is, in effect, whether delay will purge a fraud? Never—while I sit here! Every delay adds to its injustice and multiplies its oppression." In our own court, Mr. Justice Story has said:† "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief."

Now these principles are, no doubt, correct, but the qualifications with which they are stated should be carefully noted:

1st. The trust must be "clearly established."

2d. The facts must have been fraudulently and success-

* 2 Eden, 285.

† Prevost *v.* Gratz, 6 Wheaton, 481.

fully concealed by the trustee from the knowledge of the *cestui que trust.*

The case of *Michoud* v. *Girod*, cited by the appellant's counsel, is an example of the class in which the concealment of the fraud was the aggravation of the offence. The facts of the case were "clearly established" by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their faith and their knowledge, between things seen or heard by themselves, and those received from family or neighborhood gossip, or upon that most unsafe of all testimony, conversations and confessions,—remembered or imagined,—partially stated or wholly misrepresented. The fraudulent concealment was also clearly established. The heirs, who lived in Europe, were deceived by the false representations of the executor, and kept in total ignorance of the situation and value of the estate, having no other information on the subject than that communicated to them by him. The delay was not the consequence of any laches in the heirs, but was caused by the successful fraud of the executor, and was but an aggravation of the offence.

But the case before us has none of the peculiar characteristics of those to which we have referred. For more than twenty-five years the widow and heirs have acquiesced in this sale, and it is more than thirty since the administration account was settled, which is alleged to have been fraudulent. The guardian of the complainant, who approved the account, is dead; the widow died in 1855. Two of the heirs were of full age in 1831, and the others afterwards. This bill was filed in 1858. The bill does not state the age of complainant. But at the time of filing his bill, he must have been over forty years of age.

The whole transaction was public, and well known to the widow and the heirs, and their guardians. The purchase of the estate by the administrator could have been avoided at once, if any party interested disapproved of it. There was not and could not be any concealment of the facts of the

case. The complainant claims as assignee of his elder brothers and sisters, and uses them as witnesses to prove the alleged fraud after a silence of over thirty years. They attempt to prove the signature of their mother to the documents on file in the court to be forged, and this after the death of the mother, who lived for twenty-eight years after the transaction without complaint or allegation either that her signature was fraudulently obtained or forged. A daughter, who was twenty-three years of age when this sale was made, and had full knowledge of the whole transaction, after near thirty years' silence, now comes forward to prove that her concurrence and assent was obtained by fraud; and now, after the death of the guardian and the mother, who could have explained the whole transaction, the aid of a court of chancery is demanded to destroy a title obtained by judicial sale, after the parties complaining, with full knowledge of their rights, have slept upon them for over a quarter of a century.

Now, the principles upon which courts of equity act in such cases, are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purposes of this decision:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

"In many other cases they act upon the analogy of the like limitation at law. But there is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance

or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill, in this case, is entirely defective in all these respects. It is true, there is a general allegation, that the "fraudulent acts were unknown to complainant till within five years past," while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill. That his mother was entitled to dower in the land if the sale was set aside, was no impediment to his pursuit of his rights, while her death may have removed the only witness who was able to prove that his complaint of fraud was unfounded, and that it was by the consent and desire of the family that the property was kept in the family name by the only one who was able to advance the money to pay the debts of the deceased; a fact fairly to be presumed from her silence and acquiescence for twenty-four years.

The court below very properly dismissed this bill, and refused to examine into accounts settled by the courts with the knowledge of all parties concerned, and commencing forty years and ending thirty years ago, and to grope after the truth of facts involved in the mists and obscurity consequent on such a lapse of time.

If a further reason were required for affirming this decree, it might be found in the statute of Massachusetts, declaring that "actions for land sold by executors, administrators, or guardians, cannot be maintained by any heir or person

claiming under the deceased or intestate, unless the same be commenced within five years next after the sale. But we prefer to affirm the decree for the reasons given, without passing any opinion on the effect of this statute.

DECREE AFFIRMED WITH COSTS.

BROBST *v.* BROBST.

1. Where the Circuit and District Judge agree in parts of a case, and dispose of them by decree finally, but are unable to agree as to others; and certify as to them a division of opinion, both parts of the case may be brought to the Supreme Court at once and heard on the same record.
2. A party allowed to enter an appeal bond, *nunc pro tunc*, in a case where the court supposed it probable that his solicitors had been misled by a peculiar state of the record and mode of bringing up the questions from the court below.

IN this case, in the court below, some questions had been disposed of finally by the Circuit and District Judges, and others were suspended by their inability to agree and a consequent division of opinion. An *appeal* was taken from the part covered by the final decree, and *a certificate of division upon the residue of the case.* No appeal bond had been entered.

A motion was now made to dismiss the appeal for want of an appeal bond entered into as required by the act of Congress. It was also objected that no appeal could be taken from the decision of the court below, until the certificate of division of opinion in the same cause between the judges was disposed of in this court.

Mr. Justice NELSON delivered the opinion of the court.

It appears that an appeal has been taken from that part of the case covered by the final decree, and a certificate of division upon the residue.

There is no objection to this practice. It has been recognized and acted upon in several instances in this court.