

the names and places of abode of the other persons interested in the assets; that an account be taken of the trust funds, and the complainant's share therein; that he have compensation for his contributions to the trust fund; and that a distribution of said trust funds be had.

To this bill the respondents have demurred for the following causes:

(1) That the cause of complaint is barred by the statute of limitation; (2) that the causes of complaint are stale, and ought not, therefore, to be taken cognizance of; (3) generally that no case is stated for relief.

It is to be noted that the foundation of the complainants' claim to relief is his alleged membership of the Harmony Society, and the performance of work and labor in its behalf for a period of 12 years prior to 1831, amounting in value to a sum exceeding \$500. In that year he severed his connection with the society, thus emancipating himself from the bondage in which he had been held, and was entirely free and competent to assert his legal rights. If he wished to obtain compensation for his labor, an action at law was *then* available to him to recover it. If he desired to assert a claim upon the property of the Harmony Society, as one of its beneficiaries, a court of equity was *then* open to him for the administration of appropriate relief. But he rested in entire inaction for more than 50 years, not even having made a demand upon the society, in any form, until the seventh of May, 1882.

And it is also to be noted that, for 17 years after the scales fell from his eyes and he was convinced that marriage was not a mortal sin, during the life of Mr. Rapp, against whose character and memory the most vigorous epithets of reproach are directed with unceasing reiteration, he made no movement whatever to obtain an account of the trust and of his own interest in it. And yet Mr. Rapp, as the founder of the society and of the trust, and the sole manager of all its business, was peculiarly capable—if he was not the only person who could do so—of furnishing all required information touching all its affairs, and especially of the nature, condition, and administration of the trust. Besides, the complainant does not seek compensation for his labor alone—for that he might have been remitted to his legal remedy; but the fundamental prayer of his bill is that the trust be abrogated as founded in imposture and hence unlawful in its beginning; and yet for 50 years he was quiescent.

Ought the bill, then, to be entertained?

A suitor in equity is required to be "prompt, eager, and ready" in the pursuit of his rights. Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged.

"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 suits in this court." *Smith v. Clay*, Amb. 645, quoted with approval in *Brown v. County of B. Vista*, 95 U. S. 160.

So, also, says Mr. Justice SWAYNE in the case last referred to :

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which 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."

And again :

"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 et non dormientibus jura subseruiunt*." 1 Story, Eq. Jur. § 529.

Unless, then, these principles of law are inapplicable to the present case, the complainant has lost any title to relief which he may have had. It is urged that this is an express, continuing, and subsisting trust, and that, therefore, no lapse of time will impair the complainant's right to relief. Such a trust is set up in the bill, and the demurrer admits it to be of that character; and we must, therefore, so treat it.

But it is alleged to have been an imposture, and unlawful in its inception, and the main relief sought is that it be "rescinded and held for naught" on that ground. Was, then, there no duty of diligence on the part of the complainant under these circumstances? This is forcibly answered by Judge WOODWARD in *Price's Appeal*, 4 P. F. Smith, 482 :

"And if he had gone for rescinding it, and had convinced the court that it was a catching bargain that ought not to be enforced against him, still he would have encountered that principle of equity that refuses relief to stale demands, and which requires conscience, good faith, and reasonable diligence in parties complainant. In *Roberts v. Tunstall*, 4 Hare, 262, the vice-chancellor assumed that the deed in question there might have been impeached on both grounds assumed against it, if the transaction had been of recent occurrence, but on the authority of several cases refused to interpose after 18 years delay to sue, and declared that the principle of the decisions is, that after so

great delay the injured party must be held to have waived his right to relief,— a principle which presupposes a right to set aside the transaction independently of that fact.”

Doubtless, where a valid express trust has been created, and is recognized or treated by both parties to it as subsisting, mere delay on the part of the *cestui que trust* may not defeat his remedy for the enforcement of his rights under the trust. But there is abundant authority for the statement that when a trustee denies the right of the *cestui que trust*, and his relation to the latter, in respect of the trust property, becomes adverse from that time, the right of the *cestui que trust* to relief is subject to the operation of the law of laches. 7 Johns. Ch. 90.

The trust alleged here was instituted for the equal and exclusive benefit of the members of the Harmony Society. It was part of the religious as well as secular polity of the society. Fellowship in the society was the only recognized title to participation in its benefits. When that fellowship ceased, from whatever cause, all further interest in the trust and all the privileges of membership were necessarily lost and were denied. From that time forth the relations of the withdrawing member and the society, as to all the incidents of membership, were adverse. This was the attitude of the complainant and of the society towards each other. He adjured a tenet of its religious creed, and proposed to violate one of its fundamental rules. He was, therefore, compelled to leave it, and thenceforth ceased to exercise any of the privileges or to enjoy any of the benefits of membership, but was, as to all these, placed in adverse relations with it. And yet, for more than 50 years, he acquiesced in this hostile denial of his right, never questioning the validity of the trust, or making any claim to a participation in it. Negligence such as this, so long-continued and so expressive, must be considered as a waiver of his right to relief.

We do not discuss or consider the first and third causes of demurrer, because we regard the second as decisive of the case. The demurrer, therefore, is sustained upon the second cause assigned, and the bill must be dismissed with costs; and it is so ordered.

EXPRESS TRUSTS. It is generally true that statutes of limitation do not apply to express and continuing trusts. These are not cognizable at law but only in equity, and there the trustee cannot, during the continuance of the

fiduciary relation, set up the statute of limitations against his *cestui que trust*. (a) Nor are direct and continuing trusts barred in equity by any rule as to laches, or lapse of time analogous to statutory rules of limitation at law. Lapse of time is no bar to enforcing a trust admitted or proved to be continuing and in existence. (b) But the general rule just stated is subject to exceptions in three classes of cases, wherein the statute of limitations or lapse of time will bar even an express trust (1) where there is a concurrent remedy at law in which there is a fixed limitation; (2) where there is an open denial of the trust, with notice, which requires action by the *cestui que trust*, and afterwards a lapse of time which would amount to a bar in law; (3) where there are circumstances shown which, with lapse of time, raise a presumption that the trust has been extinguished. (c)

If the trustee denies the right of the *cestui que trust*, and claims adversely to him, this amounts to an abandonment of the fiduciary character. It is a renunciation of the trust. So where there is a settlement and a receipt given by the *cestui que trust* to the trustee. The trust ceases as to all matters prior to the settlement. And from the date of renouncing the trust, or of settling and balancing its accounts, time begins to run against the *cestui que trust*, during which his silence and acquiescence may operate to bar his rights if he finally undertakes to assert them, either at law or in equity. (d)

Great delay in seeking to enforce a trust will always have great weight against the trust, especially where the nature and character of the trust has become obscure, or the acts of the parties or other circumstances give rise to presumptions against it. (e) But the question, does a trust exist? must always depend upon the nature of the trust, the relative situation of the parties to the subject-matter of the trust, their relations to each other, and upon all concomitant circumstances, of which lapse of time is but one. (f) Among the cases wherein lapse of time has largely determined the court to hold that no trust has been established, or that the trust established was different from that claimed or was barred by lapse of time, are the following: Where, in the absence of bad faith, rent was received by trustees instead of interest at the ordinary rate (which interest would have amounted to more than the rent) for a period of 80 years, ending more than 20 years before suit was brought, it was decided that the rent must be deemed a substitution and satisfaction for such interest during the same period. (g) In *Mumford v. Murray* (h) the representatives of one *cestui que trust*, under a conveyance in trust to pay debts, filed a bill for an account against the trustee. He objected that certain creditors, *cestuis que trust* under such deed, should have been made parties to the bill. But it appeared that no claim had been made by such creditors for 20 years, during which time the trust fund had been almost constantly in controversy, and the trustee defendant had repeatedly stated to the

(a) *Lawson v. Blodgett*, 29 Ark. 195; *Young v. Mackall*, 3 Md. Ch. 398; *Fishwick v. Sewell*, Har. & J. 393; *Shibla v. Ely*, 6 N. J. Eq. 181.

(b) *McDonald v. Sims*, 3 Ga. 353; *Dow v. Jewell*, 18 N. H. 340.

(c) *Paschall v. Hinderer*, 28 Ohio St. 568.

(d) *Murlock v. Hughes*, 15 Miss. 219; *Williams v. First Presby. Soc.* 1 Ohio St. 474; *Dean v. Dean*, 9 N. J. Eq. 425; *Wellborn v. Rogers*, 21 Ga. 558.

(e) *Taylor v. Blair*, 14 Mo. 437; *Mitchell v. O'Neil*, 4 Nev. 504; *Robertson v. Maclin*, 3 Hayw. 70.

(f) *Dean v. Dean*, 9 N. J. Eq. 425; *Atty. Gen. v. Old South Soc.* 13 Allen, 47.

(g) *Atty. Gen. v. Old South Soc.* 13 Allen, 47.

(h) 6 Johns. Ch. 1.

plaintiff that such creditors had been satisfied. It was decided that the defendant was precluded from making the objection.

An assignment by an administrator to his individual creditor of choses in action belonging to his intestate, without any actual fraud, may raise a constructive trust on the part of the creditor; but a court of equity will not declare it to exist after a lapse of 20 years from the time when the transaction became known.(i) Where 70 years had elapsed since a sale of stock alleged to have been in trust for a person dead at the time of filing the bill, who was not ignorant of nor deceived as to the facts, and who never claimed under the alleged trust, it was held that equity would not interfere to establish the trust.(j) So, where a party abandons or refuses to acknowledge a trust and holds land adversely, the statute of limitations will run against claimants to such land in equity as well as at law.(k) Where three several holders of notes secured by a trust mortgage severally bought parcels of the mortgaged land sold on execution under a paramount judgment, and a holder of other notes secured by the mortgage, who knew of the purchases, after waiting nine years, brought suit to charge such purchasers as trustees, his claim was held barred by laches.(l)

Instances of the enforcement of trusts, notwithstanding the lapse of long periods of time, are the following: While a son was absent and his whereabouts unknown, his mother became his guardian and received his estate. Upon her death her distributees took it with knowledge of the manner in which she held it, and agreed to hold it subject to the claim of the son or his representatives. The latter subsequently claimed the property and it was decided that the distributees took it subject to the trust in favor of the son, and, not holding it adversely, could not set up the statute of limitations, and that they were liable for profits.(m) In *Griffin v. Macaulay*(n) it is decided the *cestui que trust* (creditor) under a deed, whose interest thereunder was admitted, was not guilty of laches because he did not compel an account by suit from the trustees for more than 20 years after the deed was made, and then permitted the suit to abate, and did not file another bill until after the lapse of another 20 years.

Under an agreement between A. and B. in 1837, B. took a transfer of a land certificate to hold one-half in trust for A. The patent was issued in 1847, and B. acknowledged the trust in 1848. The first act of hostility to A.'s claim was the sale of the land by B.'s administrator in 1852, and the suit to enforce the trust was begun in December, before the payment of the purchase money. It was decided that the claim was not stale.(o) Land of a debtor was sold under a deed of trust, in the absence of the trustee, and bought by a creditor for one-half its value, who took possession at once, making no improvements, and holding the property five years and a half, receiving a large rental. It was decided that this period of delay did not cut off the debtor's right to redeem.(p) Where some of the devisees of an undivided tract of land re-

(i) *Morris v. Duke*, 2 Pat. & H. 462.

(j) *Halsey v. Tate*, 52 Pa. St. 311.

(k) *Baumer v. Straup*, 21 Md. 323; *Merriam v. Hassam*, 14 Allen, 516; *Marr v. Chester*, 1 Swan, 416.

(l) *Knox v. Randall*, 21 Minn. 479.

(m) *Moor v. Shepard*, 2 Duv. (Ky.) 123.

(n) 7 Grat. 476.

(o) *Hodges v. Johnson*, 15 Tex. 57.

(p) *Spurlock v. Sproule*, 72 Mo. 503.

covered possession of the whole tract in an action to which the rest of the devisees were not made parties, it was held that the heirs of the latter devisees, who brought suit to recover the shares of their ancestor within a short time after they had knowledge of their interest in the land, were not barred, though about 18 years had elapsed since the first devisees had entered into possession.(q) Where a bill shows an undoubted equitable title in the complainants, and seeks a divestiture of the outstanding naked legal title in the heirs of the deceased trustee, a defendant who is alleged to be in possession, and committing waste, but whose possession is not shown to be hostile to the complainants, cannot set up the staleness of the complainants' demand, though it appears to be more than 30 years old.(r)

CONSTRUCTIVE TRUSTS. In cases involving constructive trusts a different rule prevails. Lapse of time, especially when coupled with occupancy and improvement 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 right to relief originally clear.(s) The following periods of time have been held to bar actions to establish and enforce resulting trusts: (t) 17 years;(u) 19 years;(v) 20 years a bar;(w) 21 years;(x) 25 years;(y)

(q) *Hume v. Long*, 53 Iowa, 299.
 (r) *Shorter v. Smith*, 56 Ala. 208.
 (s) *Sunderland v. Sunderland*, 19 Iowa, 325; *Newland v. Early*, 3 Tenn. Ch. 714; *Trafford v. Wilkinson*, 3 Tenn. Ch. 701; *Douglas v. Lucas*, 63 Pa. St. 11; *Hall v. Doran*, 13 Iowa, 363; *Best v. Campbell*, 62 Pa. St. 478; *Brown v. Guthrie*, 27 Tex. 610; *Strempler v. Roberts*, 18 Pa. St. 283; *Robertson v. Macklin*, 3 Hayw. 70; *Buckford v. Wade*, 17 Ves. 97; *Delane v. Delane*, 7 Bro. P. C. 279; *Clegg v. Edmonson*, 8 De G., M. & G. 787; *Groves v. Groves*, 3 T. & J. 172; *Peebles v. Reading*, 8 Serg. & R. 434; *Graham v. Donaldson*, 5 Watts, 471; *Haines v. O'Connor*, 10 Watts, 315; *Miller v. Blose*, 30 Grat. 744; *Jennings v. Shacklett*, 30 Grat. 765; *King v. Purdee*, 96 U. S. 90; *Midner v. Midner*, 26 N. J. Eq. 299; *Smith v. Patton*, 12 W. Va. 541; *Harden v. Parsons*, 1 Ed. 145; *Villines v. Norfleet*, 2 Dev. Eq. 167; *Portlock v. Gardner*, 1 Hare, 594; *Beckford v. Wade*, 17 Ves. 97; *Chalmer v. Bradley*, 1 J. & W. 59; *Cholmondeley v. Clinton*, 1 J. & W. 151; *Smith v. Clay*, 3 Bro. Ch. 639; *Hawley v. Cramer*, 4 Cow. 117; *Dobson v. Racey*, 3 Sandf. Ch. 61; *Powell v. Murray*, 3 Edw. Ch. 644; *Anderson v. Burchell*, 6 Grat. 405; *Colman v. Lyne*, 4 Rand. 454; *Irvine v. Robt.*, 3 Rand. 649; *Gould v. Gould*, 3 Story, 516; *Hough v. Richardson*, 3 Story, 659; *Veasie v. Williams*, 8 How. 134; *Hallett v. Collins*, 10 How. 174; *Wagner v. Baird*, 7 How. 234; *McKnight v. Taylor*, 1 How. 161; *Platt v. Vattier*, 9 Pet. 405; *Andrew v. Wrigley*, 4 Bro. Ch. 124; *Blennerhassett v. Day*, 2 B. & B. 118; *Gregory v. Gregory*, Cowp. 201; *Jac.* 631; *Selsey v. Rhodes*, 1 Bligh, N. S. 1; *Champion v. Rigby*, 1 R. & M. 539; *Ex parte Granger*, 2 Deac. & Ch. 459; *Collard v. Hare*, 2 R. & M. 675; *Norris v. Neve*, 3 Atk. 38; *Pryce v. Byrn*, 5 Ves. 681; *Morse v. Royal*, 12 Ves. 355; *Medlicott v. O'Donnell*, 1 B. &

B. 156; *Hatfield v. Montgomery*, 2 Port. 58; *Bond v. Brown*, 1 Harp. Eq. 270; *Edwards v. Roberts*, 7 Sm. & M. 544; *Peacock v. Black*, Halst. Eq. 535; *Steele v. Kinkle*, 3 Ala. 352; *Smith v. Clay*, Amb. 645; *Bond v. Hopkins*, 1 Sch. & Lef. 413; *Hovenden v. Annesley*, 2 Sch. & Lef. 630; *Stackhouse v. Barnston*, 10 Ves. 466; *Ex parte Dewdney*, 15 Ves. 496; *Kane v. Bloodgood*, 7 Johns. Ch. 93; *Dexter v. Arnold*, 3 Sumn. 152; *De Couche v. Savetier*, 3 Johns. Ch. 190; *Murray v. Coster*, 20 Johns. 576; *Provost v. Gratz*, 6 Wheat. 431; *Hughes v. Edwards*, 9 Wheat. 439; *Elmendorf v. Taylor*, 10 Wheat. 168; *Miller v. McIntire*, 6 Pet. 61; *Sherwood Sutton*, 5 Mason, 143; *Williams v. First Presby Soc.* 478.
 (t) *Baker v. Read*, 18 Beav. 393; *Emerick v. Emerick*, 3 Grant, 295; *Hite v. Hite*, 1 B. Mon. 177.
 (u) *Bruce v. Child*, 4 Hawks, 372.
 (v) *Norris' Appeal*, 71 Pa. St. 124; *Walker v. Walker*, 16 Serg. & R. 379; *United States Bank v. Biddle*, 2 Pars. Eq. 31; *Perry v. Craig*, 3 Miss. 525; *Field v. Wilson*, 6 B. Mon. 479; *Thompson v. Blair*, 3 Murphy, 593; *Ward v. Van Bakkelen*, 1 Paige, 100; *Farr v. Farr*, 1 Hill, Eq. 391; *Bruce v. Child*, 4 Hawks, 372; *Ferris v. Henderson*, 12 Pa. St. 54; *McDowell v. Goldsmith*, 2 Md. Ch. 370; *Smith v. Clay*, 3 Bro. Ch. 639n; *Hovenden v. Annesley*, 2 Sch. & L. 636; *Stackhouse v. Barnston*, 10 Ves. 466; *Prace v. Byrn*, 5 Ves. 681; *Bright v. Legerton*, 29 Beav. 60; 2 De G., F. & J. 606; *Hodgson v. Bibby*, 32 Beav. 221; *Browne v. Cross*, 14 Beav. 105; *Re McKenna*, 13 Ir. Eq. 239; *Clanricarde v. Henning*, 30 Beav. 175; *Scott v. Haddock*, 11 Ga. 253; *Obel v. Bishop*, 1 De G., F. & J. 137.
 (w) *Selsey v. Rhoades*, 1 Bligh, N. S. 1.
 (x) *Blennerhassett v. Day*, 2 B. & B. 118.

27 years;(y) 30 years;(z) 38 years;(a) 40 years, and the death of all the parties;(b) 46 years;(c) 50 years.(d) On the other hand, the following lapses of time has been held not to be a bar: 11 years;(e) 12 years;(f) 18 years.(g)

The true view is that the lapse of time is only one circumstance of the many from which the conclusion of laches must be drawn. Each case is to be determined by its own facts.(h)

EXCUSES. The lapse of time or laches which will bar the enforcement of a trust may be excused; as, for example, by lack of knowledge on the part of the *cestui que trust*, his absence from the country, his disability, such as infancy, insanity, or coverture. The delay may even have been caused by the defendant himself, in which case it is, of course, no bar to the action.(i) Mere lapse of time will not bar infant heirs from relief on a constructive trust originating in fraud. In this case the three children of the intestate were all under 12 years of age at the time of the administrator's fraudulent sale of the land of the deceased, through a by-bidder, to himself in 1844. The administrator remained in possession until his death, in 1859. Against his devisee the three heirs, in 1861, brought a bill for a reconveyance, and an account of the rent and profits. There was no showing of the date of their discovery of the fraud or of acquiescence in the wrong, but a presumption arose from their age, sex, and distant locality that there was no such laches as would bar relief.(j) And 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 of 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.(k) But want of evidence is not an excuse for delay after notice; (l) nor is poverty and inability to prosecute any excuse.(m)

Receipt of a part of the property due from the trustee is not a waiver of the rights of the *cestui que trust* to the whole of the trust property.(n) Nor is mere neglect to sue for a few years a bar.(o) And a *cestui que trust* must

- (y) *Hayes v. Goode*, 7 Leigh, 46.
 (z) *Harrod v. Fountleroy*, 3 J. J. Marsh, 549;
Bond v. Brown, Harp. Eq. 270; *Page v. Booth*, 1
 Rob. Va. 161; *Phillips v. Beldon*, 2 Edw. Ch. 1.
 (a) *Powell v. Murray*, 10 Paige, 256.
 (b) *Prevost v. Gratz*, 6 Wheat, 431.
 (c) *Maxwell v. Kennedy*, 8 How. 210.
 (d) *Anderson v. Barwell*, 6 Gr. 405.
 (e) *Mulhellen v. Muram*, 3 Dr. & W. 317.
 (f) *Newman v. Early*, 3 Tenn. Ch. 714; *Butler*
v. Haskell, 4 Des. 551.
 (g) *Grisby v. Mousley*, 4 De G. & J. 78; *Bell v.*
Webb, 2 Gill, 263.
 (h) *Michoud v. Girod*, 4 How. 561; *Wafford v.*
Wilkinson, 3 Tenn. Ch. 701; *Boone v. Chiles*, 10
 Pet. 177; *Pyce v. Byrn*, 5 Ves. 681; *Carpenter v.*
Canal Co. 35 Ohio St. 307; *Provost v. Gratz*, 6
 Wheat. 431.
 (i) *Sears v. Shafer*, 6 N. Y. 268; *Richardson v.*
Jones, 3 G. & J. 163; *Doggett v. Emerson*, 3 Story,
 700; *Callendar v. Collgrove*, 17 Conn. 1; *Phalen*
v. Clarke, 19 Conn. 421; *Henry Co. v. Winnebago*,
 52 Ill. 299; *Hallett v. Collins*, 10 How. 174; *Rider*

- v. Blackerton*, 3 Swans. 81n; *Michoud v. Girod*, *
 How. 561; *Ferris v. Henderson*, 12 Pa. St. 49;
Pickett v. Loggan, 14 Ves. 215; *Purcell v. Mc-*
Namara, Id. 91; *Aylewood v. Kearney*, 2 B. & B.
 263; *Murray v. Palmer*, 2 Sch. & Lef. 487; *War-*
ner v. Daniels, 1 W. & M. 111; *Bowen v. Evans*,
 2 H. L. Cas. 257; *Trevelyan v. Charter*, 11 Cl. &
 Fin. 714; *Napton v. Leaton*, 71 Mo. 358. See
Henry v. Conn, 12 Ohio, 193; *Geaton v. Geaton*, 4
 Bradw. 579.
 (j) *Miles v. Wheeler*, 43 Ill. 123.
 (k) *Taylor v. Taylor*, 8 How. 201; *Brown v.*
Carter, 5 Ves. 877; *Crispell v. Dubois*, 4 Barb.
 333; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G.,
 M. & G. 133.
 (l) *Parkam v. McCravy*, 6 Rich. Eq. 114.
 (m) *Perry v. Craig*, 3 Mo. 516; *Locker v.*
Armstrong, 2 Dev. & B. 174; *Maxwell v. Kennedy*,
 8 How. 210; *Roberts v. Tunstall*, 4 Hare, 357.
 (n) *Thompson v. Finch*, 22 Beav. 316; 8 De G.,
 M. & G. 560.
 (o) *Hanchett v. Briscoe*, 22 Beav. 493.

have actual knowledge of the breach of trust before acquiescence can be inferred, and it is not the duty of the *cestui que trust* to make inquiry.(p) Nor can a *cestui que trust* sue until his interest falls into possession.(q)

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(p) *Thompson v. Finch*, 22 Beav. 325; 8 De G., M. & G. 560; *Life Ass'n of Scotland v. Siddall*, 3 De G., F. & J. 73; *Provost v. Gratz*, 6 Wheat. 481; *Mellish's Estate*, 1 Pars. Eq. 456; *Beeson v. Beeson*, 9 Barr. 300.

(q) *Knight v. Bower*, 2 De G. & J. 421, 413; *Life Ass'n of Scotland v. Siddall*, 3 De G., F. & J. 72.

TYSEN and others *v.* WABASH RY. Co. and others.*

(Circuit Court, D. Indiana. February 16, 1883.)

1. RAILROAD CONSOLIDATION—INDIANA STATUTE OF—POWER AND LIABILITY OF CONSOLIDATED COMPANY UNDER.

The result of consolidation under the statute is that the statute becomes part of the contract of consolidation; the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. The consolidated company is substituted for them. Unsecured debts of the latter remain unsecured debts of the former. The consolidated company may execute a mortgage upon all of the consolidated property, which would be paramount to the unsecured debts of the constituent companies.

2. VENDOR'S LIEN—DEBT OF THIRD PERSON—WHEN A LIEN.

When the consideration for the conveyance of property is the payment by the vendee of the debt of a third person, a lien exists upon the property conveyed for the benefit of such third person.

3. SECURITY—LIEN—EQUITY EFFECTUATES INTENT, REGARDLESS OF FORM.

Whenever it fairly appears from an instrument, notwithstanding its form, that it is intended to afford a security, an equitable lien exists in favor of the person in whose behalf the provision is made.

In 1862 the Toledo & Wabash Railway Company, of Ohio and Indiana, made an issue of bonds to the amount of \$600,000, with interest payable semi-annually at 7 per cent., and principal payable May 1, 1883. Each bond bore upon its face the name, "equipment bond," although they were not especially secured upon any equipment of the company. At the time of their issue the company was liable for bonds to the amount of \$5,900,000, secured by mortgages. In 1865 the Toledo & Wabash Railway Company became consolidated with other companies in Illinois, and the Toledo, Wabash & Western Railway Company was formed. In the articles of consolidation one of the "bases and conditions" thereof was stated to be, as to all bonds, that they "shall, as to the principal and interest thereon, as

*Reported by Charles H. McCarer, Asst. U. S. Atty.