of his wife and four young girls, from being turned out of doors, he besought the defendant to buy, and she did buy, this mortgage on his house, at an expense of $2,400, foreclosed it, and gave him the use and rent of the house and property from 1859 until he died in 1886, on the sole condition that he should pay the taxes, and keep the improvements in repair. In 1866, Mr. Marr, who was still living in this house of the defendant, and was very poor, besought a neighbor of his, who was going east, to go to the defendant in Maine, tell her of his extreme poverty, and beseech her to buy a piece of land and put him on it as her tenant, so that he could there earn a comfortable living for his family. This neighbor carried the message to the defendant, and in response she came from Maine to Minneapolis, in 1866, for the purpose of buying a farm, and putting her brother upon it as her tenant, so that he might there support his family, and educate his children. Immediately on her arrival she took pity on his poverty, and bought him a pair of horses, a wagon, and harness, for him to earn his living with during that winter. She then bought the land here in controversy, caused it to be conveyed to herself, paid $4,000 cash for it, and gave a mortgage back for $2,200, which she subsequently paid. In March, 1867, Mr. Marr and his family moved upon the farm in controversy, and he continued to occupy and cultivate it from that date until he died. For the horses, wagon, harness, and other purchases of personal property the defendant made for this brother, and in the expenses of her trip to Minnesota to assist him, she expended about $1,000 in the fall of 1866. In the spring and summer of 1867 she advanced $645 to enable him to plow and seed this farm, and buy machinery to operate it. In 1873, at his request, she intrusted him with $1,500, to buy 10 acres of land adjoining her farm, and to invest the balance in pine lands for her. He took the money, but never bought the 10 acres, never invested any of it in pine lands, and never accounted for or paid back any of all these moneys so advanced and intrusted to him, which amount to more than $3,000. About the year 1871, Mr. Marr grubbed and broke up about 30 acres of new land on this farm, and within two years after he received the $1,500 from the defendant to invest for her he built upon it a granary, machinery building, hennery, ice house, shingled the house and barn, moved an old building across the road and attached it to the house, enlarged the cellar, and built a new kitchen, so that the buildings were made more spacious, useful, and comfortable, at an expense of about $1,700; but no permanent improvements appear to have been made by him subsequent to 1875.

Under these circumstances, it is insisted by the complainant that in November, 1866, the defendant contracted orally to convey this farm to Marr for $6,200, whenever he was able to pay this sum. The witnesses most favorable to complainant, however, go no further than to testify that in conversation with Marr at the time of the purchase of the farm the defendant told him she was buying the place for him to make a home for himself and his family, and that the farm should be his at any time he could pay back what she had paid for it, and Mr.

Marr assented to this, and said he would do the best he could. No witness testifies that he told her he thought he could, or said to her he would, buy and pay for the farm; and all agree that he was to have the possession and use of it to support his family, for an indefinite time, whether he bought and paid for it or not. In view of this fact, and the further fact that the defendant furnished the money to buy the seed and machinery required in 1867 to raise the first crop, and that at Mr. Marr's request she came to Minnesota for the express purpose of buying a farm to put him on as her tenant, so that he might there support his family, then in great want, we are not satisfied that Mr. Marr, by his act of taking possession of the farm in the spring of 1867, either intended to or did agree to buy this farm, and pay the $6,200; and the entire evidence strongly points to the conclusion that he never made any such contract.

Specific performance of oral agreements to convey land, where the purchasers have entered under the contracts, and made permanent improvements upon the land, has long been enforced in equity, on the ground that a failure so to do would work a fraud on the purchasers through the loss of their improvements; but in the case at bar the reason of this rule ceases, because the entire improvements made by Mr. Marr were far less in cost and value than the money he received from the defendant after he took possession of the farm, and which he never repaid. No equity, therefore, in favor of the complainant arises here on account of these improvements. Complainant's witnesses seek to draw this contract, after a lapse of 22 years, from detached fragments of desultory conversations between defendant and Mr. Marr while she was visiting at his house on her errand of mercy in 1866, from family talk at meal times, and from subsequent admissions of hers to strangers that she had given Mr. Marr a chance to buy the farm by paying the original purchase price; but no witness testifies that Mr. Marr ever agreed with her to purchase, and pay this price; and, even if the defendant had offered to sell to him for $6,200 in 1866, such an unaccepted offer would surely be of no avail 20 years later, and after the death of Mr. Marr.

On the other hand, the answer of the defendant unqualifiedly denies this contract of sale that is sought to be culled from these fragmentary, desultory conversations. It is clearly proved that the purpose for which Mr. Marr besought the defendant to come to Minnesota in 1866, and the purpose for which she did come, was to buy a farm for him, to get a living on for himself and his family as her tenant; that both parties at that time sent for one B. F. Cutter to come to Minneapolis, to assist them in the purchase of such a farm; that he was present at Mr. Marr's house with them, advised and directed the negotiations while the purchase was being made, and remained until the negotiations were closed; and he testifies that the agreement was that Mr. Marr should occupy the farm, pay the taxes and insurance, keep the improvements in repair, and have all he could raise on the farm, and that there was no agreement to sell it to him. It is clearly proved that Mr. Marr, in his sched-

ules in bankruptcy in 1868, swore that he had no interest in any real estate under any contract; that in all his letters and writings that appear in evidence he mentioned this land as the defendant's farm, and never as his own; that in his lifetime he repeatedly asked the defendant to sell the farm to him, and she repeatedly refused; that to a cloud of witnesses he stated that the farm was hers, and to many that he was living on it as defendant's tenant under the arrangement set forth in the answer, and that he had no interest in it. It is clearly proved that the farm rapidly increased in value, until in 1883 it was worth $40,000, and that he never offered or attempted to pay the $6,200 for it, or to enforce his contract to buy it, but struggled on in despondency to his death. It is useless to further review this testimony. We are unable to believe that the defendant made any contract to sell this land to Marr for $6,200, or that he made any contract to purchase it.

Specific performance of an oral contract to convey land ought not to be decreed 20 years after the alleged date of the contract, unless the proof of the contract is full, clear, and satisfactory. *Purcell* v. *Miner*, 4 Wall. 513; *Colson* v. *Thompson*, 2 Wheat. 336; *Carr* v. *Duval*, 14 Pet. 84; *Lanz* v. *McLaughlin*, 14 Minn. 72, (Gil. 55;) Pom. Spec. Perf. § 136, and authorities there cited. In this case the proof of the contract is vague, uncertain, and fragmentary, while the surrounding circumstances, the situation, relation, acts, and statements of the parties to it while both were living, and for 19 years after its alleged date, make its existence improbable. It is incredible that a man of ordinary intelligence, with the right to purchase for $6,200 a farm that as early as 1883 was worth $40,000 should rest for years in silence and poverty without exercising his right, and die without attempting to enforce it. The proof of the contract is far from full, clear, or satisfactory.

Again, an offer of sale of land must be accepted in a reasonable time in order to bind the proposer, and one which stands for 20 years, and until after the death of the party to whom it is made, without compliance with its terms or any agreement to comply therewith on his part, is abandoned by the lapse of time, and its subsequent acceptance will not bind the proposer. Leake, Eq. Cont. 41; Pom. Spec. Perf. § 65; *Meynell* v. *Surtees*, 25 Law J. C. H. 257, 259; *Minnesota Linseed Oil Co.* v. *Collier White Lead Co.*, 4 Dill. 431.

Even if, as some of the witnesses testified, the defendant did tell Mr. Marr in 1866 that he could have the land by paying her the $6,200 she paid for it when he was able, inasmuch as he never did pay it, or agree to pay it, during the subsequent 19 years of his life, the complainant could not, after his death, accept the proposition, offer to perform it, and thereby make a contract binding upon the defendant.

Further, the specific performance of a contract in equity always rests in the sound discretion of the court, and where, upon a review of all the circumstances of the particular case, it is patent that it will produce hardship and injustice to either of the parties, they may be left to their remedies at law. In such a case a court of equity is not bound to render a decree of specific performance, even though the contract is es-

tablished. *Willard* v. *Tayloe*, 8 Wall. 557, 567; *Godwin* v. *Collins*, 3 Del. Ch. 189, 201, 205; *Joynes* v. *Stratham*, 3 Atk. 388; *Buxton* v. *Lister*, Id. 385; *Radcliffe* v. *Warrington*, 12 Ves. 326, 332; *Underwood* v. *Hitchcox*, 1 Ves. Sr. 279; *Seymour* v. *De Lancey*, 6 Johns. Ch. 222. For 27 years the sisterly affection and generous bounty of the defendant protected her unfortunate brother, his wife, who brings this suit, and their children, against poverty and misfortune. To her they were indebted for a house to live in, a farm, seed, horses, machinery, all things needful with which to secure from the fertile soil of Minnesota a comfortable living, education for their children, and a respectable station in society. To them for 27 years she gave all the income arising from the $2,400 she invested in 1859 at her brother's request, to save his family from being turned out of doors at St. Anthony, all of the income arising from the use of the investment of the $6,200 in the farm from the year 1866 to the present time, and the principal and interest of more than $3,000, which she advanced to her brother between 1866 and 1874. Neither misfortune, importunity, nor faithlessness seemed to cool her affection or exhaust her bounty. By her bounty this brother and his family were assisted until his death, his children have grown up and married, and his widow and devisee now asks this court to compel this defendant to perform a contract alleged to have been made 25 years ago, which, by its terms, would compel her, upon receipt of $6,200, which she put at risk in 1866 for her brother's comfort, to transfer to the complainant this farm, which has fortunately so increased in value that, if defendant may still hold it, it will be a fitting reward of her generosity. Such a contract would in itself be hard and inequitable under the circumstances of this case. The decree the complainants seek would be unjust to the defendant, and, if such a contract was clearly established, this court would hesitate long before it would award such a premium to ingratitude. The bill is dismissed.

DE MARTIN *v.* PHELAN.

(*Circuit Court of Appeals, Ninth Circuit.* July 18, 1892.)

LACHES—WHAT CONSTITUTES.

In a bill to have a deed declared a mortgage and to be allowed to redeem, complainant alleged that she was the owner in fee of certain lands, subject to three mortgage liens, aggregating $185,000, two of which had been foreclosed; that prior to the decree of foreclosure defendant purchased all of said liens, "as a means of securing title to said property and for no other purpose;" that complainant was then in indigent circumstances, and defendant, well knowing the same, took advantage thereof, and by means of said mortgage indebtedness induced her to sell him her equity of redemption, and to make him a deed of said lands for $19,000, whereas they were in fact worth $45,000. The bill showed that nearly 10 years had elapsed since the conveyance, but alleged that since the sale defendant had been absent from the state "for a period aggregating four years." *Held* that, whether the conveyance be regarded as a deed or mortgage, complainant, in the absence of excuse for the delay, must be deemed guilty of laches. 47 Fed. Rep. 761, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Bill praying that a deed be declared a mortgage and that complainant be allowed to redeem the lands. The circuit court sustained a demurrer to the bill for want of equity, (47 Fed. Rep. 761,) and, complainant declining to amend, subsequently dismissed the same. Complainant appeals. Affirmed.

George D. Collins, for appellant.

Wm. F. Herrin, (*H. L. Gear*, of counsel,) for appellee.

Before McKENNA and GILBERT, Circuit Judges, and DEADY, District Judge.

McKENNA, Circuit Judge. This is a suit in equity to have a deed declared a mortgage, which was executed by plaintiff in favor of defendant, and that she be adjudged entitled to redeem. The case is presented on bill and demurrer. The plaintiff is a woman, and alleges that on the 4th of November, 1881, she was the owner and seised in fee of certain lands which were subject to three mortgage liens, aggregating $185,000, two of which were foreclosed on the 13th of August, 1881, by judgment and decree; that prior to the decree defendant purchased all of said liens "as a means of securing the title to said property and for no other purpose;" that on said day plaintiff was in indigent circumstances and great need, and continued so until November 4, 1881, which defendant knew; that he took advantage of her destitute condition, and by reason of said indebtedness purchased by him induced her to transfer said lands to him for the sum of $19,000, on said 4th of November, 1881, and make, execute, and deliver to him a deed of conveyance, "because [to quote the language of the bill] of her helpless and destitute condition aforesaid, of which said defendant took advantage in securing said deed;" that at that time her interest in said property, to wit, the equity of redemption, was of the value of $45,000, and more, which defendant knew. The plaintiff also alleges that defendant has been absent from said state of California for a period aggregating four years since the 4th of November, 1881. The defendant demurred to the bill on the grounds that plaintiff was not entitled to the relief prayed for or any relief; that it did not appear that the deed was intended as security for money loaned or indebted; that plaintiff does not show that the defendant took unfair advantage of her necessities, or exercised undue influence over her, or that she has ever notified him of her intention to rescind said deed, or offered to return the consideration therefor; and that the bill shows that she has been guilty of laches, and is barred by section 343 of the Code of Civil Procedure of California. The court below sustained the demurrer, and plaintiff declined to amend.

It is not necessary to decide whether the bill sufficiently shows that defendant took unfair advantage of plaintiff or exercised undue influence over her. Whatever her rights were, she was very lax in asserting them. The bill says the deed was intended as a transfer of the property described in it; that the "oratrix did make, execute, and deliver to

said defendant a deed of conveyance." The intention, then, was clear. There was no misunderstanding or confusion about the kind of instrument she executed or intended to execute. It was a deed, not a mortgage. But it was obtained, she says, from her helplessness and destitution. These could not have continued for nearly 10 years,—the time which has elapsed since the making of the deed to the commencement of the suit. Indeed, her destitution was relieved by the payment to her of $19,000, and whatever influence or fraud was practiced on her could not have continued very long, and she must have been able soon after the transaction to clearly review and estimate its character and value to her. It is not alleged that the circumstances which invested the transaction continued afterwards. When unembarrassed by poverty, when free from plaintiff's influence or fraud, it was her right, if she desired, to rescind the transaction, or, putting it strongest for her, to claim the transaction as a loan and security. But the right should have been exercised and notified to the defendant within a reasonable time. *Oil Co.* v. *Marbury*, 91 U. S. 592. We do not think that nine years and ten months is a reasonable time. If she was excused for four years on account of defendant's absence from the state, she was not excused for five years and ten months of his presence in the state. The commencement of the suit is the first intimation of her dissatisfaction, and the plaintiff does not allege that defendant was absent from the state continuously for four years, but "for a period aggregating four years since the 4th of November, 1881." In other words, the "period" was a broken, not a continuous, one, and she had therefore opportunities of communicating with him.

The plaintiff's counsel attempts to distinguish between a right to regard the instrument as a mortgage and a right to regard it as a deed and to rescind it, admitting in the latter case that section 343 of the Code of Civil Procedure controls, and that plaintiff is guilty of laches. We cannot entertain the distinction. There is a difference, great in material and legal effects, between a deed and a mortgage, but the difference does not indulge plaintiff's delay. That consists in not exercising within a reasonable time a right the defendant's imposition or fraud gave her, which right did not grow out of or depend upon the character of the instrument she executed; and the defendant was as concerned to know, as entitled to know, from plaintiff, she having the election, whether the instrument was to be regarded as a mortgage, with its consequences, as to know whether it was to be rescinded absolutely, with consequences which would follow.

The cases in which a person is held as a trustee *ex malificio* are clearly distinguishable from the one at bar. There is no suggestion in the statute of limitations of the state. In fixing within what period a claim will become stale, the supreme court in *Oil Co.* v. *Marbury*, cited *supra*, says: "We are but little aided by the analogies of statutes of limitation." And in *Sullivan* v. *Railroad Co.*, 94 U. S. 811, says: "Every case is governed chiefly by its own circumstances. Sometimes the statute of limitations is applied; sometimes a longer period than that prescribed

by the statute is required. In some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly;" citing a number of cases. Besides, the plaintiff's laches is wholly independent of the statute of limitations. Judgment is affirmed.

THE JOHN SHILLITO CO. *v.* MCCLUNG, Surveyor of Customs.

(*Circuit Court of Appeals, Sixth Circuit.* September 17, 1892.)

No. 24.

1. CUSTOMS DUTIES—APPEALS FROM COLLECTOR—POWERS OF ASSISTANT SECRETARIES OF THE TREASURY.
   An importer suing the collector to recover duties paid, in order to avoid the bar resulting from his failure to bring the action within 90 days after the decision of his appeal to the secretary of the treasury, as required by Rev. St. § 2931, alleged that such decision was void because made, not by the secretary, but by the assistant secretary, acting in his official capacity as assistant. *Held*, that as the assistant secretaries would have authority to decide such appeals, if that duty were assigned to them by the secretary, or in case of his absence or sickness, (Rev. St. §§ 161, 177, 179, 236, 245,) it must be presumed, in the absence of a contrary showing, that the appeal was lawfully decided.
2. SAME—ASSISTANT SECRETARIES.
   Rev. St. § 245, providing that the assistant secretaries of the treasury "shall examine letters, contracts, and warrants prepared for the signature of the secretary of the treasury, and perform such other duties in the office of the secretary of the treasury as may be prescribed by the secretary or by law," does not confine the powers of the assistants to the duties of a like nature with those here enumerated, especially when read in connection with sections 161 and 177, which impose more enlarged duties in certain contingencies.
3. SAME—APPEAL FROM COLLECTOR—DECISION.
   A decision by the secretary of the treasury that he will not entertain an appeal from the decision of the collector of customs, because the protest was not filed in time, is a decision "on the appeal," within the meaning of Rev. St. § 2931, which requires suit to be brought within 90 days after such decision.
4. SAME—NOTICE TO IMPORTER.
   When an appeal from the collector of customs is lawfully pending before the treasury department, the secretary has authority to determine the same at any time, without first notifying the importer; nor is he required to notify the latter of the result of his decision. 45 Fed. Rep. 778, affirmed.
5. SAME—ACTION TO RECOVER DUTIES—ESTOPPEL.
   A suit against a collector of customs, to recover duties paid, is practically a suit against the United States; and, as the government is not bound by an estoppel, the fact that the collector did not notify the importer of an adverse decision by the secretary of the treasury upon the importer's appeal does not prevent the collector from setting up as a defense that the suit was not brought within 90 days from that decision, as required by Rev. St. § 2931. 45 Fed. Rep. 778, affirmed.
6. SAME—ESTOPPEL—ASSIGNMENT OF CLAIM.
   An estoppel *in pais* operates only in favor of the person actually misled, and an assignee of a claim for duties paid cannot rely upon an estoppel alleged to arise from acts of the collector which misled the assignor.
7. SAME.
   An assignee of an unliquidated claim for duties alleged to have been illegally exacted cannot maintain a suit thereon against the collector, for the assignment of such a claim is void under Rev. St. § 3477.

Error to the Circuit Court of the United States for the Southern District of Ohio, Western Division.