as its own, by advertising them extensively for sale, and by contracting to convey, and by conveying, a large portion thereof to its codefendant, the Winona & St. Peter Land Company, which has likewise dealt with them as its own, and by making numerous sales and conveyances of other portions of the land to actual settlers, who have entered upon and improved their several holdings. The facts disclosed by the record leave no room for doubt that the appellant's predecessor in interest, the Hastings Company, had actual as well as constructive notice, many years before the present bill was filed, that these lands had been certified to the state, that the state had deeded them to the Winona Company, and that many persons were purchasing and settling on the lands, and were making valuable improvements thereon, under deeds from the Winona Company, in the belief that such deeds conveyed to them an indefeasible title. It further appears that notwithstanding such knowledge, actual and constructive, the Hastings Company failed to assert any claim to the lands, or to take any action looking to the establishment of its alleged right, until the year 1886, when the present suit was instituted, although its road was in process of construction from and after the year 1870, and was completed past the lands now in dispute to the western boundary of the state by December 1, 1879.

Moreover, the present record shows that through lapse of time the Winona Company has lost certain documentary evidence which would probably have rendered its title unassailable to all of the lands now in dispute that lay in and east of range 38, if this suit had been more seasonably brought. It appears that a letter was written by the commissioner of the general land office on July 10, 1865, directing the register and receiver of the land office at St. Peter, Minn., to withhold from pre-emption, homestead, and private entry certain odd-numbered sections lying within the indemnity limits of the Winona Company. The original letter directing such a withdrawal in favor of the Winona Company has been lost, and on the trial below the appellees were compelled to produce what purported to be a copy of said letter, which was in fact a copy of a copy of the original letter, the original having been recorded in the office of the commissioner of the general land office. The copy, upon which the appellees are compelled at this time to rely, contains an order made on July 10, 1865, for the withdrawal of all odd-numbered sections within the 10 and 20 mile limits of the Winona Company, (the same being its indemnity limits,) "to the west line of township twenty-eight west." As there is no such township in the state of Minnesota as "number twenty-eight west," it is claimed by the appellant that the order of withdrawal was void for uncertainty, and that the subsequent grant to the Hastings Company, of July 4, 1866, took effect, even within the limits intended to be embraced by the order of withdrawal, no matter what such intended limits may have been. On the other hand, it is urged by the appellees that on July 10, 1865, all odd-numbered sections within the indemnity limits of the Winona Company were withdrawn for its benefit, to the west line of range 38 W.; that the original

letter of the commissioner of date July 10, 1865, and accompanying diagrams, would show such fact if the same had not been lost, and that a mistake was made in copying the original letter into the records of the land department, from which record the copy now in evidence was obtained. There are several circumstances which strongly support such contention on the part of the appellees, even if they do not demonstrate that all of the odd-numbered sections lying in and east of range 38 were withdrawn from entry and sale for the benefit of the Winona Company on July 10, 1865, and were for that reason beyond the reach of the grant to the Hastings Company of July 4, 1866. But we do not allude to the letter of July 10, 1865, at this time, for the purpose of deciding that it operated as an effectual withdrawal of all the lands in and east of range 38 for the benefit of the Winona Company. We refer to the loss of that letter, in this connection, simply for the purpose of showing to what extent the title of many persons to large and valuable tracts of land has been jeopardized and put in peril by the loss of documentary evidence on which that title depends, solely through the failure of the Hastings Company to assert its alleged right at an earlier day.

In view of what has already been said, and without stating the facts more in detail, we are of the opinion that the plea of laches is fully sustained by the state of facts disclosed by the present record, for reasons that were stated at considerable length in the former case of Railway Co. v. Sage, supra, and which we need not now repeat.

But it is urged in opposition to this view, by the appellant's counsel, that the bill shows that the grant to the Hastings Company under the act of July 4, 1866, was a grant in praesenti; that by filing its map of definite location on June 26, 1867, it became vested with the title to all of the free odd-numbered sections within 10 miles of its road; and that upon the completion of its road such title became absolute and took effect by relation as of date June 26, 1867, without the necessity of any further conveyance from the general government or the state of Minnesota. In view of these several propositions, it is further claimed that it was unnecessary for the Hastings Company to pray, as it did, for a decree divesting the Winona Company of the legal title to the lands in dispute, and vesting the same in the complainant company; that the legal title was at the time, and is now, well vested in the complainant; that the relief demanded in the bill was originally misconceived, and was unnecessary; and that notwithstanding the prayer for specific relief, and the allegation that the legal title is held in trust for the complainant, the court should now retain and treat the bill as one filed by the owner of the legal and equitable title to remove a cloud therefrom; and it is further insisted that in such an action neither the plea of laches nor limitations is available to the appellees as a defense. We shall not pause to discuss the question whether, at the time of the filing of the bill, the Hastings Company was in fact vested with the legal and equitable title to the lands, as is now claimed, or whether it misconceived the relief to which it was then

entitled. If that contention is tenable, it would necessarily lead to the consideration of the further question—whether, being out of possession and holding a perfect legal title to the lands now in dispute, the Hastings Company could in that event maintain its standing in a court of equity, where it now finds itself. We accordingly overlook these latter questions, and pass to the more important contention of appellant's counsel, on which its right to relief ultimately rests,—that neither the plea of laches nor limitations is available as a defense to a bill to remove a cloud from one's title. There is some conflict of authority touching the right of the legal and equitable owner of lands, who is out of possession, to maintain a bill to remove a cloud from the title. The right in question has been denied on several occasions by the supreme court of the United States, but from an early day such right has been conceded to an owner out of possession of the courts of Minnesota, and in a case coming from that state we would undoubtedly be justified in following the rule which obtains in the local courts. Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. Rep. 1129; Orton v. Smith, 18 How. 263; Donnelly v. Simonton, 7 Minn. 167, (Gil. 110;) Hamilton v. Batlin, 8 Minn. 403, (Gil. 359.)

But, while conceding to the holder of the legal and equitable title who is out of possession the right to maintain a bill to remove a cloud from the title, we are not able to concede that in such cases the defendant is disabled from pleading either laches or limitations. It is manifest, we think, that the latter doctrine can only be invoked by a complainant in a bill to remove a cloud upon his title when he is in possession, and the adjudged cases show that the doctrine has only been applied under those circumstances. Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. Rep. 741; Miner v. Beekman, 50 N. Y. 337, 343.

There are obvious reasons why the holder of the legal and equitable title to lands, who is in possession of the same, should not be confronted with the plea of laches when he files a bill to cancel some void or invalid conveyance which operates as a cloud upon his title. Possession of the premises by the true owner is good and sufficient notice to the world of his rights therein, by reason of which third parties need not be prejudiced by any dealings they may have with the holder of the invalid conveyance, while the existence of the cloud is a continuing injury like a public nuisance. Under such circumstances, no harm can result in holding that no period of delay on the part of the owner in asserting his right to have the cloud removed will bar him of his remedy. But the case is far different when the person filing such a bill is out of possession and the person proceeded against is in possession, or, if not in actual possession, is the holder of a record title that is without any apparent flaw or defect. In such cases the doctrine that neither laches nor limitations can be invoked as a defense to a bill filed to remove a cloud upon a title has no just application, and, if tolerated, would frequently lead to gross injustice. It will accordingly be found that in the state of Minnesota, where the rule prevails that a person out of possession may maintain such an action, and the fact that he is out

of possession constitutes no defense, it is nevertheless held that, when such a bill is filed by a person not in actual possession of the disputed premises, the party proceeded against is at liberty to plead either laches or limitations as a defense. Bausman v. Kelley, 38 Minn. 197, 204, 36 N. W. Rep. 333.

We are accordingly of the opinion that the ground upon which the learned counsel for the appellant have attempted to evade the plea of laches interposed by the Winona Company, is untenable, and, so holding, the decree of the circuit court must be in all things affirmed.

EVANS v. CHARLES SCRIBNER'S SONS et al.

(Circuit Court, N. D. Georgia. October 10, 1893.)

1. SERVICE OF PROCESS—ABSENT DEFENDANTS.
   Service may be had upon an absent defendant, under Rev. St. § 738, when the suit is brought to cancel for fraud a deed of lands situated within the district.
2. SAME.
   But such service cannot be had when the suit is for the purpose of setting aside alleged fraudulent transfers of life insurance policies issued by a foreign company, and which are not within the district, although such company, in compliance with a state statute, has deposited bonds with the comptroller general of the state, especially when the company acknowledges its liability on the policies, and offers to pay the amount thereof into court.
3. SAME.
   Where the cancellation of the deed and of the transfers of the policies is sought in the same suit, service as to the former cause of action will not draw to it jurisdiction as to the latter, as there is no connection between the two.

In Equity. Bill by Flora W. Evans, administratrix, against Charles Scribner's Sons and others. Motion to set aside service and order of service made under Rev. St. § 738. Granted in part and denied in part.

Hamilton Douglas, for complainant.
B. H. & C. D. Hill, for the insurance company.
Mayson & Hill, for Scribner's Sons.

NEWMAN, District Judge. In this case the complainant is a resident of this district, and brings her bill against Scribner's Sons, citizens and residents of the state of New York; and the Northwestern Mutual Insurance Company, a corporation of the state of Wisconsin, and citizen and resident of that state. The purpose of the bill is twofold: First, to require the defendants Scribner's Sons to bring into court and to have canceled as fraudulent a deed of conveyance to certain real estate in the city of Atlanta, and this district, which deed is alleged to have been obtained by duress and fraud. The value of the real estate, as the pleadings now stand, is alleged to be more than $2,000. The other purpose of the bill is to set aside transfers of certain insurance policies in the Northwestern Mutual Life Insurance Company on the life of complainant's de-