DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

LEWEY *v.* H. C. FRICK COAL CO. SUPREME COURT OF PENNSYLVANIA. MARCH 11, 1895.

Statute of Limations—Ignorance of Cause of Action.

In an action of trespass to recover damages for the unlawful mining of coal under plaintiff's land, the equitable rule that the statute of limitations shall run only from discovery, or a time when discovery might have been made, should be applied.

As equity is administered in Pennsylvania through the common law forms of action, the plaintiff should not be turned out of a court of law in order to be admitted at the equity side of the same court. He may, therefore, in an action of trespass for illegal mining, recover compensation in the same manner that he would on a bill for account.

In such a case the jury should be instructed that, while the statute of limitations may be available as against the penal consequences of the trespass, it is not available as a defence against payment for the coal actually taken and converted to the use of the defendant. *It seems* that even in law the statute of limitations runs against an injury committed in or to a lower stratum, only from the time of actual discovery, or the time when discovery was reasonably possible.

Opinion of WILLIAMS, J.: "Mere ignorance will not prevent the running of the statute in equity any more than at law; but there is no reason resting on general principles, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer. It seems to be the general doctrine in courts of law that the plaintiff is bound to know of an invasion of the surface of his close. The fact that his land is a forest and that the defendant goes into its interior to trespass by the cutting of timber,

does not relieve against its operation. What is plainly visible he must see at his peril, unless by actual fraud his attention is diverted and his vigilance put to sleep. But ought this rule to extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others and for that reason he is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing. If an adjoining landowner reaches the plaintiffs coal through subterranean ways that reach the surface on his own land and are under his actual control, the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal one hundred feet under the surface.

The case at bar affords an excellent illustration of ignorance due to the defendant's conduct and without fault on the part of the plaintiff.

The defendant was mining its own coal through its own shafts or drifts opened on its own lands. In the course of its operations and for its own convenience it pushed an entry or passage under the plaintiff's lands and appropriated the coal removed therefrom. It was bound to know its own lines and keep within them. If by mistake or for any other reason it did invade the mineral estate of another and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact and pay for the coal taken. Its failure to do this is in its effects a fraud upon the injured owner, and if he has no knowledge of the trespass and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute."

THE OPERATION OF STATUTES OF LIMITATIONS IN CASES OF IGNORANCE OR CONCEALMENT OF THE CAUSE OF ACTIONS.

There are in the books two cases whose facts are substantially identical with those of the principal case.

The first of these, *Hunter* v. *Gibbons*, 1 H. & N. 459,

decided in 1856 in the Court of Exchequer, was the case of an application to be allowed to reply, as an equitable answer (under § 85, C. L. Procedure Act, 1854) to a plea of the statute of limitations, in an action for trespass to coal lands,— that the trespasses were underground, and had been fraudulently concealed from the plaintiff till within six years before suit. The application was refused, and POLLOCK, C. B., said: —"It would be highly mischievous, and would open the door to a flood of litigation, if we decided that this replication could be pleaded. No case has decided that fraud is an answer to every matter that may be set up as a defence. Plaintiff must go into equity and obtain redress, which that court ought to give him if his contention here is well founded. Plaintiff complains of a trespass to his land. Defendant answers that the act was done so long ago that it cannot be called in question in a court of law. To that plaintiff purposes to reply fraud. Plaintiff's counsel cited one authority to show that where there has been a fraud the statute cannot be set up. If that were so, if a man could reply to a plea of the statute that his debtor had prevented him from suing by fraud, the equitable replications would be as common as the promises of payment which people used to prove before Lord Tenterden's Act. . . . No sort of litigation would be likely to be more lasting or expensive than a question whether, fifteen years ago, a man took his neighbor's coal by mistake or fraud."

ALDERSON, B., added: "The terms of the enactment are absolute, and there is no provision for the case where a person is prevented from suing by fraud. Such being the plain meaning of the words, plaintiff now calls upon us to say that notwithstanding the statute a person may maintain an action, if prevented by fraud from suing. But it is for the legislature, not for us, to say that. There is no distinction between trespasses underground and upon the surface."

The other case is *Williams* v. *Pomeroy Coal Co.*, 37 Ohio State, 583 (1882). There, the lessee of a coal mine worked over into the land of an adjoining proprietor, and after taking out all the coal from the demised premises, surrendered his lease. The plaintiff, having subsequently purchased the adjoin-

ing land, in mining thereon, in ignorance of the overworking of defendant, struck such working, whereby the water from the abandoned mine overflowed his own. In an action for damages against the former lessee, it was held that he was not liable as for nuisance, not having been the owner of the land; and that the plea of the statute was good as to the action for trespass, the court maintaining that, in the application of the statute, there is no distinction between trespasses underground and upon the surface, nor whether the cause of action is known or unknown to the plaintiff within the time limited by the statute, and further, that the bar to a recovery in an action for a trespass includes all the consequences resulting from such trespass. Citing *Hunter* v. *Gibbons* (*supra*).

The present case, although in form an action at law, is professedly decided upon equitable principles, and does not, therefore, come within these rulings.

The case of *Gibbs* v. *Guild*, 3 Q. B. D. 59 (1882), presents a similar state of affairs. There it was held that the replication of concealed fraud and absence of reasonable means of discovery, in an action for money lost by defendant's representations, was good upon equitable principles; and since the Judicature Act, practically abolishing distinctions between law and equity, would be admissible in the Court of Appeal.

As a general rule, in equity, where the injured person has been kept in ignorance of his right to sue, by affirmative, fraudulent conduct of the defendant, the statute of limitations does not begin to run until the cause of action has been discovered or become known, or until it might have been discovered by a reasonable use of the available means.

This is equally true in the case where the concealment is an inherent incident of the original wrong—that is to say, where the wrong complained of is of a fraudulent character, thus necessarily involving concealment,—and in the case where to this fraud there are superadded positive acts intended to prevent a discovery.

These propositions are practically unquestioned, and in many states have been extended by statute to actions at law. (See Wood on Limitations, p. 362.)

See also, as illustrative cases, decided under such statutes, *Taylor* v. *R. R. Co.*, 13 Fed. 152; *Vigus* v. *O'Bannon* (Ill.), 8 N. E. 778; *Shreves* v. *Leonard* (Ia.), 8 N. W. 749; *Barlow* v. *Arnold*, 6 Fed. 351; *Losch* v. *Pickett* (Kan.), 12 Pac. 822; *Tompkins* v. *Hollister* (Mich.), 27 N. W. 651; *Bank* v. *Perry* (Mass.), 11 N. E. 81; *Leavenworth Co.* v. *Ry. Co.*, 18 Fed. 209; *Riper* v. *Howard* (N. Y.), 13 N. E. 632; *Dickon* v. *Hays* (Pa.), 7 Atl. 58; *O'Dell* v. *Rogers* (Wis.), 30 N. W. 229; *Boyd* v. *Blankman*, 29 Cal. 19 (1865); *Wear* v. *Skinner*, 46 Md. 257 (1873); *Commissioners* v. *Smith*, 22 Minn. 97, (1875); *Cock* v. *Van Etten*, 12 Minn. 522; *Parker* v. *Kuhn*, 21 Neb. 413 (1887); *Marbourg* v. *McCormick*, 23 Kan. 24 (1879); *Walker* v. *Soule*, 138 Mass. 510 (1885).

Where the matter is regulated by enactment, providing that the statute shall run in actions for relief against fraud, etc., only from the date of discovery, actions not based on fraud are held not to come within the saving: *Howk* v. *Minnick*, 19 O. St. 462 (1869); *District of Boomer* v. *French*, 40 Ia. 601 (1875); *Gall* v. *McDaniel*, 72 Cal. 334 (1887).

In *Quimby* v. *Blackey*, 63 N. H. 77 (1884), the court said: "The fraud by which a cause of action is concealed need not be other than that which caused the original injury, in order to avoid the operation of the statute of limitations.

"The defendants' neglect to give information to the plaintiff of the finding of his money, and to restore it to him, knowing it was his, was a fraud. By their silence and inaction afterward, 'the original fraud was kept on foot.' Their wilful silence was a fraudulent concealment of plaintiff's cause of action, and constitutes a sufficient answer to the plea of the statute."

Mr. Justice MILLER, in the leading case of *Bailey* v. *Glover*, 21 Wall. 342 (1874), said: "The appellant relies upon a proposition which has been very often applied by the courts under proper circumstances in mitigation of the strict letter of general statutes of limitations, namely, that when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it.

This proposition has been incorporated in different forms in the statutes of many of the states, and presented to the courts under several aspects where there were no such statutes. And while there is unanimity in regard to some of these aspects there is not in regard to others.

In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

A long list of authorities may be cited: *Booth* v. *Lord Warrington*, 4 Bro. Parl. Cas. 163; *South Sea Co.* v. *Wymondsell*, 3 P. Wms. 143; *Hovenden* v. *Lord Annesly*, 2 Sch. & Lefroy, 634; *Stearnes* v. *Page*, 7 How. 819; *Moore* v. *Greene*, 19 How. 69; *Sherwood* v. *Sutton*, 5 Mass. 143; *Snodgrass* v. *Bank*, 25 Ala. 161; *Bowman* v. *Sanborn*, 18 N. H. 205; *Way* v. *Cutting*, 20 N. H. 187; *Wear* v. *Skinner*, 46 Md. 257; *Short* v. *McCarthy*, 5 E. C. L. R. 403; *Brown* v. *Howard*, 6 E. C. L. R. 43; *Granger* v. *George*, 11 E. C. L. R. 406; *Michoud* v. *Girod*, 4 How. 503 (1846); *Veazie* v. *Williams*, 8 How. 134; *Meader* v. *Norton*, 11 Wall. 442 (1870); *Brown* v. *Buena Vista*, 95 U. S. 157; *Rosenthal* v. *Walker*, 111 U. S. 185; *Tracr* v. *Clews*, 115 U. S. 528 (1885); *Kirby* v. *Lake Shore, &c., R. R. Co.*, 120 U. S. 130 (1886); *Ferris* v. *Henderson*, 12 Pa. 49 (1849); *Payne* v. *Hathaway*, 3 Vt. 212; *O'Dell* v. *Burnham* (Wisc.), 21 N. W. 635; *Bradford* v. *McCormick* (Ia.), 32 N. W. 93; *McAlpine* v. *Hedges*, 21 Fed. 689; *Carr* v. *Hilton*, 1 Curtis C. C. 238; *Vane* v. *Vane*, L. R. 8 Ch. 383; *Rolfe* v. *Gregory*, 4 De G. J. & S. 576; *Buckner* v.

Calcote, 28 Miss. 568; *Lewis* v. *Welch*, 48 N. W. 608 (Minn. 1891); *Manatt* v. *Starr*, 72 Ia. 677 (1887); *District of Boomer* v. *French*, 48 Ia. 601; *Wilder* v. *Leser*, 72 Ia. 161 (1887); and many others that might be cited.

It would seem, however, that even in equity, "The concealment which will avoid the statute must go beyond mere silence. It must be something done to prevent discovery . . . some trick or contrivance intended to exclude suspicion and prevent inquiry:" *Wood* v. *Carpenter*, 101 U. S. 185 (1879); *Boyd* v. *Boyd*, 27 Ind. 429; *Stanley* v. *Stanton*, 36 Ind. 445; *Shreves* v. *Leonard* (Ia.), 8 N. W. 749; *Stewart* v. *McBurney* (Pa.), 1 Atl. 639; *Jackson* v. *Buchanan*, 59 Ind. 370; *Pilcher* v. *Flinn*, 30 Ind. 202.

Mere constructive fraud is not enough: *Farnam* v. *Brooks*, 9 Pick. 212 (1830); *Wilmerding* v. *Russ*. 33 Conn. 67 (1865), where an administrator sold stocks of the estate to himself, crediting the estate with their market value, and transferring them to a friend to hold for him, and it was held that, the circumstances not showing actual fraud, the statute ran from the date of the sale.

Silence or failure to notify the other party of the existence of a cause of action does not amount to a fraudulent concealment, the means of discovery being available to both parties, and the defendant not having such peculiar facilities for knowledge as to cause him to stand in a fiduciary relation: *Shreves* v. *Leonard* (Ia.), 8 N. W. 749; *Stewart* v. *McBurney* (Pa.), 1 Atl. 639; *Wynne* v. *Cornelison*, 52 Ind. 312; *Ware* v. *State*, 74 Ind. 181; *Churchman* v. *Indianapolis*, 110 Ind. 259.

In a case where a debtor disclosed to the personal representatives of his creditor the fact of his indebtedness, his omission to state its amount was held not to be such fraudulent concealment as would toll the statute: *Sankey* v. *McElevy*, 104 Pa. 265 (1883).

In some jurisdictions it is held that ignorance of the cause of action is of no avail to avoid the statute, unless there be proof either of actual fraudulent concealment, or of something in the nature of the cause of action which would tend to make it conceal itself.

An averment of "no knowledge *or means of knowledge*" has been held insufficient: *Phelps* v. *Elliot*, 29 Fed. 53 (1886); *Dee* v. *Hyland* (Utah), 3 Pac. 388.

Furthermore, "a party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it." . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occured must be shown to be consistent with the requisite diligence:" *Wood* v. *Carpenter*, 101 U. S. 185 (1879); *Buckner* v. *Calcote*, 28 Miss. 432; *Nudd* v. *Hamblin*, 8 Atl. 130; *Cole* v. *McGlathry*, 9 Me. 131; *McKown* v. *Whitman*, 31 Me. 448; *Rouse* v. *Southard*, 39 Me. 404; *Ormsby* v. *Longworth*, 11 Ohio St. 653; *Ainsfield* v. *More*, 46 N. W. 828 (Neb. 1890); *Wilton* v. *Merrick Co.* (Neb.), 20 N. W. 111; *Pearce* v. *Curran* (R. I.), 3 Atl. 419; *Cummings* v. *Bannon* (Md.), 8 Atl. 357; *Vigus* v. *O'Bannon* (Ill.), 8 N. E. 778; *Murphy* v. *Reedy* (Miss.), 2 So. 167; *Mathias* v. *O'Neil* (Mo.), 6 S. W. 253; *Board* v. *Vincent* (Mich.), 33 N. W. 44; *McAlpin* v. *Hedges*, 21 Fed. 689; *Simmons* v. *Baynard*, 30 Fed. 532; *Laird* v. *Kilbourne* (Ia.), 30 N. W. 9; *Perry* v. *Smith* (Kan.), 2 Pac. 784; *King* v. *McKellar* (N. Y.), 16 N. E. 201; *Hughes* v. *Bank* (Pa.), 1 Atl. 417; *Chetham* v. *Hoare*, L. R. 9 Eq. Cas. 571 (1870); *Norris* v. *Haggin*, 28 Fed. 275 (1886).

"In actions seeking relief on the ground of fraud, where the statute of limitations has created a bar, the cause of action is not considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud complained of; but this does not absolve him from all effort or diligence to obtain such knowledge; and facts of which he might have obtained knowledge had he sought it from its natural sources of information, which were at his command, will be deemed within his knowledge:" *Taylor* v. *S. & N. Alabama R. Co.*, 13 Fed. 152 (1882).

In equitable actions seeking relief against the consequences of a mistake, the statute runs from the time when the mistake is or should have been discovered: *Gould* v. *Emerson*, 160

Mass. 438 (1894); *Manatt* v. *Starr*, 72 Ia. 677 (1887); *Hunter* v. *Spottswood*, 1 Wash. 145; *Massie* v. *Haskill*, 80 Va. 789 (1885); *Cranmer* v. *McSword*, 24 W. Va. 594; (1884).

"While it is true that mistakes of law when standing alone, cannot usually furnish a ground for equitable relief, yet where one has the right to and does rely upon another, who omits to state a most material legal consideration within his knowledge and affecting the other's rights, but of which the other is ignorant, and *acts* under this misplaced confidence, and is misled by it, a court of equity will afford relief, especially if such action inures to the advantage of the person whose advice is taken, even though no fraud was intended: *Tompkins* v. *Hollister*, 60 Mich. 470 (1886).

The cases dealing with the question in equity may be classified according to their opposite conceptions as to the binding force of the statute in courts of chancery. The great majority of the authorities hold that the statute is followed only by analogy, and as expressing in a convenient form an equitable doctrine: *Humbert* v. *Trinity Church*, 24 Wend. 587 (1840), and cases cited; *York* v. *Bright*, 4 Humph. (Tenn.) 312 (1843); *Norris* v. *Haggin*, 28 Fed. 275, 277; *Brooksbank* v. *Smith*, 2 Y. & C. 58 (1836); ALDERSON, B.

But, it has been held in Massachusetts, on the one hand, that "the statute operates as a bar in equity of its own force and not by the discretion of the court: *Farnam* v. *Brooks*, 9 Pick. 212 (1830); and, on the other hand, in West Virginia, that " in a suit in equity to enforce a purely equitable demand, the defence of the statute can have no application of itself or by analogy to any limitation in courts of law. Such cases must be determined by courts of equity upon rules and principles of their own: " *Cranmer* v. *McSwords*, 24 W. Va. 594 (1884).

As to the application of the foregoing rules in actions at law, there is an irreconcilable conflict of authority in America.

In *Bailey* v. *Glover* (*supra*), MILLER, J., said: " Many of the courts hold that the rule is sustained in courts of equity,

only on the ground that those courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles: *Troup* v. *Smith*, 20 Johns. 33; *Callis* v. *Waddy*, 2 Munf. 511; *Miles* v. *Barry*, 1 Hill (S. Car.), 296; *York* v. *Bright*, 4 Humph. 312.

On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law: *Bree* v. *Holbech*, Douglas, 655; *Clarke* v. *Hougham*, 3 Dowl. & Ryl. 322; *Granger* v. *George*, 5 B. & C. 149; *Turnpike Co.* v. *Field*, 3 Mass. 201; *Welles* v. *Fish*, 3 Pick. 75; *Jones* v. *Caraway*, 4 Yeates, 109; *Rush* v. *Barr*, 1 Watts, 110; *Pennock* v. *Freeman*, 1 Watts, 401; *Mitchell* v. *Thompson*, 1 McL. 9; *Carr* v. *Hilton*, 1 Curtis, 230.

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"We are of opinion, that the weight of authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common law side of the court's calendar as to those on the equity side."

It must be remembered that this case was in equity, and was decided under a statute of limitations which applied by its own language, to courts of equity as well as those of law;

and the court premised: "If there be an exception to the universality of its language, it must be one which applies under the same state of facts to suits at law as well as to suits in equity."

The following additional cases apply the rule in common law actions: *Mitchell* v. *Buffington*, 10 W. N. C. 361 (1881); *McDonnell* v. *Potter*, 8 Pa. 189 (1848); *Jones* v. *Conway*, 4 Yeates, 109 (1804); *Ferris* v. *Henderson*, 12 Pa. 49 (1849); *Pennock* v. *Freeman*, 1 Watts, 401 (1833); *Glenn* v. *Lightner's Exr.*, 40 Pa. 199 (1861); *Morgan* v. *Tener*, 83 Pa. 306 (1877); *Wickersham* v. *Lee*, 83 Pa. 416 (1877); *First Mass. Turnpike* v. *Field*, 3 Mass. 201 (1807); *Welles* v. *Field*, 3 Pick. 74; *Rush* v. *Barr*, 1 Watts, 110 (1832, 1825); *Hughes* v. *Bank*, 110 Pa. 428 (1883).

The fraudulent concealment pleaded in suspension of the statute need not be proved, in civil actions, beyond reasonable doubt: *Ossipee* v. *Grant*, 59 N. H. 70 (1879).

Where the aggrieved party was ignorant that the defendant had any connection with the transaction, it is not necessary, in order to arrest the bar of the statute, to prove diligent efforts to fasten the fraud on such defendant: *Clews* v. *Traer*, 57 Ia. 459 (1881).

The other side of the controversy is epitomized in *Troup* v. *Smith*, 20 Johns. 33. This was assumpsit for negligence, want of skill, and fraud in making a survey, the land being so covered with trees that the plaintiff did not discover the defects in the survey until after the statutory period had elapsed. SPENCER, C. J., said:

"There is a marked and manifest distinction between a plea of the statute of limitations in a court of law and in a court of equity. The best and fullest view of the effect in a court of equity is given by Lord Redesdale, in 2 Sch. & Lef. p. 634. He says, that although the statute does not, in terms, apply to suits in equity, it has been adopted there as a rule prescribed by the legislature; and the reason he gives, why, if the fraud has been concealed by the one party, until it has been discovered by the other, within six years before the commencement of his suit, it shall not operate as a bar, is this;

that the statute ought not, in conscience to run, the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time. This is very intelligible and sound doctrine in a court of equity; and is, I apprehend, the true and only tenable ground to deprive a defendant of the benefit of the plea. Courts of equity not being bound by the statute any further than they have seen fit to adopt its provisions as a reasonable rule, and then only in analogy to the general doctrine of that court, are perfectly right in saying that a party cannot, in good conscience, avail himself of the statute when, by his own fraud, he has prevented the other party from coming to a knowledge of his rights, until within six years prior to the commencement of the suit. But courts of law are expressly bound by the statute; it relates to specified actions; and it declares that such actions shall be commenced and sued within six years next after the cause of such actions accrued, and not after; thus not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period. I know of no dispensing power which courts of law possess and arising from any cause whatever; and it seems to me that where the legislation in the same statute gives an extension of time [in certain cases] that it would be an assumption of legislative authority to introduce any other proviso.'"

In *Campbell* v. *Vining*, 23 Ill. 525 (1860), the court said: "The courts in Massachusetts, Georgia and Pennsylvania hold the doctrine, that as against a right of action dependent on the existence of a secret fraud, the statute of limitations runs only from the period of the discovery of the fraud. In all those cases, the courts bend the statute of limitations to include cases not within its operation, as those states have no chancery courts. They all refer to the dictum of Lord Mansfield in *Bree* v. *Holbeck*. . . . It is very clear, this eminent judge does not lay down the general doctrine that fraud may, in all cases, be applied to a plea of the statute, as the courts before referred to have done, and on the strength of his dictum. He merely says: "There may be cases," without specifying them. See *Short* v. *McCarthy*, 5 E. C. L. R. 403; *Brown* v. *Howard*, 6

E. C. L. R. 43; *Granger* v. *George*, 11 E. C. L. R. 406; *Leonard* v. *Pitney*, 5 Wend. 31; *Allen* v. *Mille*, 17 Wend. 202; *Smith* v. *Bishop*, 9 Vt. 116; *Collis* v. *Waddy*, 2 Munf. 511; *Hamilton* v. *Shepperd*, 3 Murph. 115; *Thompson* v. *Blair*, Ibid. 583; *Miles* v. *Barry*, 1 Hill (S. C.), 191; *Pyle* v. *Beckwith*, 1 J. J. Marshall, 445; *Ellis* v. *Kelso*, 16 B. Mon. 296 (1857).

In *Freeholders of Somerset* v. *Veghte*, 44 N. J. L. 509 (1882), it was held that courts cannot engraft on the statute exceptions not contained therein, however inequitable the enforcement of the statute without such exceptions, may be. The fraudulent concealment of a cause of action does not justify the inference of a new promise which will check the operation of the statute at law. MAGIE J., after a review of of the authorities, concluded that there was no well considered English case upholding the rule contended for, and that the American cases on that side were explainable by peculiarities of the cases, or by the fact that in the states where they were decided there were no separate courts of chancery.

Where there is no proof either of fraud, or of the absence of reasonable means of discovery, mere ignorance of the cause of action is still less a bar to the running of the statute at law than in equity; and here, as there, means of knowledge equals knowledge.

In *Nudd* v. *Hamblin*, 8 Atl. 130 (1864), it was held that the omission to disclose a trespass upon real estate to the owner, if there is no fiduciary relation between the parties, and the owner has the means of discovering the facts, and nothing has been done to prevent his discovery, is not such a fraudulent concealment as will prevent the operation of the statute; the court saying: "The plaintiff had the means of ascertaining the cause of action by the exercise of ordinary vigilance, and as defendant took no pains to conceal his acts, either while he was committing the trespasses or at any time afterwards, his mere neglect to go to the plaintiff and give her information of what he had done, is not such concealment on his part as the statute contemplates."

See, also, *Foster* v. *Rison*, 17 Gratt. 321; *Campbell* v. *Long*, 20 Ia. 382; *Bassand* v. *White*, 9 Rich. Eq. (S. C.), 483;

Bank v. *Waterman*, 26 Conn. 324; *Abell* v. *Harris*, 11 G. & J. (Md.) 361; *Martin* v. *Bank*, 31 Ala. 115; *Davis* v. *Cotton*, 2 Jones Eq. (N. C.) 430; *Flemming* v. *Colbert*, 46 Pa. 498; *Moore* v. *Juvenal*, 92 Pa. 484 (1880); *McDowell* v. Potter, 8 Pa. 189 (1848); *Owen* v. *Western Saving Fund*, 97 Pa. 47; *Campbell's Admr.* v. *Boggs*, 48 Pa. 524 (1865); *Steele's Admr.* v. *Steele*, 25 Pa. 154 (1855); *Jordan* v. *Jordan*, 4 Greenl. 175; *Thomas* v. *White*, 3 Litt. 177; *Fraley* v. *Jones*, 52 Mo. 64; *Wells* v. *Halpin*, 59 Mo. 92; *Gebhard* v. *Sattler*, 40 Ia. 153; *Brown* v. *Brown*, 44 Ia. 349; *Phoenix Ins. Co.* v. *Dankwardt*, 47 Ia. 432; *Higgins* v. *Mendenhall*, 51 Ia., 135; *Hecht* v. *Slaney*, 14 Pac. 88 (Cal. 1887); *Murphy* v. *Reedy*, 21 So. 167 (Miss. 1887); *Cotton* v. *Brown*, 4 S. W. 294 (Ky. 1887); *Brown* v. *Houdlette*, 10 Me. 339; *Pearce* v. *Curran*, 15 R. I. 298 (1886); *Cockrell's Exr.* v. *Cockrell*, 15 S. W. 1119 (Ky. 1891); *Perry* v. *Elgin*, 26 S. W. 4 (Ky. 1894); *Moore* v. *Boyd*, 74 Cal. 167 (1887); *Cooper* v. *Lee*, 21 S. W. 998 (Tex. 1892); *Purdon* v. *Seligman*, 43 N. W. 1045 (Mich. 1889); *Bishop* v. *Little*, 3 Me. 405; *Fritschler* v. *Koehler*, 83 Ky. 78 (1885); *Commissioners* v. *Smith*, 22 Minn. 97; *Conner* v. *Goodman*, 104 Ill. 365; *Adams* v. *Ipswich*, 116 Mass. 570; *Mast* v. *Easton*, 33 Minn. 161 (1885); *Buckle* v. *Chrisman's Admrs.* 76 Va. 678 (1882); *Furlong* v. *Stone*, 12 R. I. 437 (1879); *Smith* v. *Bishop*, 9 Vt. 110; *Schultz* v. *Board*, 95 Ind. 323; *Binney* v. *Brown*, 116 Pa. 169.

In some instances it has been held that, although means of discovery were open, the circumstances were such as to justify the plaintiff in failing to employ such means. See *Mitchell* v. *Buffington*, 10 W. N. C. 361 (1881); *Falley* v. *Gribling*, 26 N. E. 794 (Ind. 1891); *Scherer* v. *Ingerman*, 110 Md. 428; *Bradford v. McCormick*, 71 Ia. 129 (1887).

A mere suspicion of wrong is not tantamount to a discovery of the fraud so as to start the running of the statute: *Marbourg* v. *McCormick*, 23 Kan. 24 (1879).

S. D. M.