Wormley Vs. Wormley

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SooperKanoon Citation : sooperkanoon.com/78976

Court : US Supreme Court

Decided On : 1823

Appeal No. : 21 U.S. 421

Appellant : Wormley

Respondent : Wormley

Judgement :

Wormley v. Wormley - 21 U.S. 421 (1823)
U.S. Supreme Court Wormley v. Wormley, 21 U.S. 8 Wheat. 421 421 (1823)

Wormley v. Wormley

21 U.S. (8 Wheat.) 421

APPEAL FROM THE CIRCUIT

COURT OF VIRGINIA

SYLLABUS

A trustee cannot purchase or acquire by exchange the trust property.

Where the trustee in a marriage settlement has a power to sell and reinvest the trust property whenever in his opinion the purchase money may be laid out advantageously for the *cestui que trust,* that opinion must be fairly and honestly exercised, and the sale will be void where he appears to have been influenced by private and selfish interests, and the sale is for an inadequate price.

Where a discretion is reposed in the trustee and confidence placed in his judgment by the instrument creating the trust, it is a case peculiarly subject to this rule; it is contemplated that his judgment should be free and impartial and unbiased by personal interests.

Quaere, how far a *bonae fidei* purchaser, without notice of the breach of trust, in such a case, is bound to see to the application of the purchase money.

Where the purchase money is to be reinvested upon trusts that require time and discretion, or the acts of sale and the reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money.

But wherever the purchaser is affected with notice of the facts, which in law constitute the breach of trust, the sale is void as to him, and a mere general denial of all knowledge of fraud will not avail him if the transaction is such as a court of equity cannot sanction.

A *bonae fidei* purchaser without notice, to be entitled to protection, must be so not only at the time of the contract or conveyance, but until the purchase money is actually paid.

This Court will not suffer its jurisdiction in an equity cause to be ousted by the circumstance of the joinder or nonjoinder of merely formal parties who are not entitled to sue or liable to be sued in the United States' courts.

The original bill was filed by the respondents, Mary Wormley, and her infant children, suing by their next friend, against the appellants, Hugh W. Wormley, her husband, Thomas Strode, as trustee, Richard Veitch, as original purchaser, and David Castleman and Charles McCormick, as mesne purchasers from Veitch of the trust property, for the purpose of enforcing the trusts of a marriage settlement, and obtaining an account, and other equitable relief. The bill charged the sale to have been a breach of the trusts, and that the purchasers had notice.

In contemplation of a marriage between Hugh W. Wormley and Mary Wormley, (then Strode), an indenture of three parts was executed on 5 August, 1807, by way of marriage settlement, to which the husband and wife, and Thomas Strode, her brother, as trustee, were parties.

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The indenture, after reciting the intended marriage, in case it shall take effect, and in bar of dower and jointure, &c.;, conveys all the real and personal estate held by Hugh W. Wormley under a certain indenture specified in the deed, as his paternal inheritance, to Thomas Strode, in fee, upon the following trusts, *viz.,*

"for the use, benefit, and emolument of the said Mary and her children, if any she have, until the decease of her intended husband, and then, if she should be the longest liver, until the children should respectively arrive at legal maturity, at which time each individual of them is to receive his equal dividend, &c.;, leaving at least one full third part of the estate, &c.;, in her possession for and during her natural life; then, on her decease, the landed part of the said one-third to be divided among the children, &c.;, and the personal property, &c.;, according to the will, &c.;, of the said Mary, at her decease. But if the said Mary should depart this life before the decease of the said Hugh W. Wormley, then he is to enjoy the whole benefits, emoluments, and profits, during his natural life, then to be divided amongst said W.'s children, as he by will shall see cause to direct, and then this trust, so far as relates to T. Strode, to end, &c.;, and so, in like manner, should the said Mary depart this life without issue, then this trust to end, &c.; But should Wormley depart this life before the said Mary, and leave no issue, then the said

Mary to have and enjoy the whole of said estate for and during her natural

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life, and then to descend to the heirs of the said W., or as his will relative thereto may provide."

Then follows this clause.

"And it is further covenanted, &c.;, that whenever, in the opinion of the said Thomas Strode, the said landed property can be sold and conveyed, and the money arising from the sale thereof be laid out in the purchase of other lands, advantageously for those concerned and interested therein, that then and in that case the said Thomas Strode is hereby authorized, &c.;, to sell, and by proper deeds of writing to convey the same and the lands so purchased shall be in every respect subject to all the provisions, uses, trusts, and contingencies, as those were by him sold and conveyed. And it is further understood by the parties that the said H.W.W., under leave of the said Thomas Strode, his heirs and assigns, shall occupy and enjoy the hereby conveyed estate, real and personal, and the issues and profits thereof, for and during the term of his natural life, and after that, the said estate to be divided agreeably to the foregoing contingencies."

The property conveyed by the indenture consisted of about 350 acres of land, situate in Frederick County in Virginia. The marriage took effect, and there are now four children by the marriage. For a short time after the marriage, Wormley and his wife resided on the Frederick lands, and a negotiation was then entered into by Wormley and the trustee for the exchange of the Frederick lands for lands of the trustee, in the County of Fauquier. Various reasons were suggested

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for this exchange, the wishes of friends, the proximity to the trustee and the other relations of the wife, and the superior accommodations for the family of Wormley. The negotiation took effect, but no deed of conveyance or covenant of agreement recognizing the exchange was ever made by Wormley, and no conveyance of any

sort or declaration of trust substituting the Fauquier lands for those in the marriage settlement was ever executed by the trustee. Wormley and his family, however, removed to the Fauquier lands and resided on them for some time. During this residence, *viz.,* on 16 September, 1810, the trustee sold the Frederick lands by an indenture to the defendant Veitch for the sum of $5,500, and to this conveyance Wormley, for the purpose of signifying his approbation of the sale, became a party. The circumstances of this transaction were as follows:

The trustee had become the owner of a tract of land in Culpepper County in Virginia, subject to a mortgage to Veitch, and one Thompson, upon which more than $3,000 were then due and a foreclosure had taken place. To discharge this debt and relieve the Culpepper estate was a leading object of the sale, and so much of the trust money as was necessary for the extinguishment of this debt was applied for this purpose. At the same time, Strode, as collateral security to Veitch for the performance of the covenant of general warranty contained in the indenture, executed a mortgage upon the Fauquier lands, then in the possession of Wormley. In

1811, Veitch conveyed the Frederick lands to the defendants Castleman and McCormick for a large pecuniary consideration in pursuance of a previous agreement, and by the same deed made an equitable assignment of the mortgage on the Fauquier lands. About this time, Wormley having become dissatisfied with the Fauquier lands, a negotiation took place for his removal to some lands of the trustee in Kentucky, and upon that occasion a conditional agreement was entered into between the trustee and Wormley for the purchase of a part of the Kentucky lands in lieu of the Fauquier lands at a stipulated price if Wormley should, after his removal there, be satisfied with them. Wormley accordingly removed to Kentucky with his family, but, becoming dissatisfied with the Kentucky lands, the agreement was never carried into effect. Afterwards, in April, 1813, Castleman and McCormick, by deed, released the mortgage on the Fauquier lands in consideration that Veitch would enter into a general covenant of warranty to them of the Frederick lands, and on the same day the trustee executed a deed of trust

to one Daniel Lee subjecting the Kentucky lands to a lien as security for the warranty in the conveyance of the Frederick lands, and subject to that lien, to the trusts of the marriage settlement if Wormley should accept these lands, reserving, however, to himself a right to substitute any other lands upon which to charge the trusts of the marriage settlement. At this period, the dissatisfaction of Wormley was known to all the parties, and Wormley was neither a party nor assented to the deed, and

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Castleman and McCormick had not paid the purchase money. In August, 1813, the trustee sold the Fauquier lands to certain persons by the name of Grimmar and Mundell without making any other provision for the trusts of the marriage settlement.

At the hearing, the court below pronounced a decree declaring

"That the exchange of land made between the defendants, Hugh W. Wormley and Thomas Strode, is not valid in equity, and that the defendant, Thomas Strode, has committed a breach of trust in selling the land conveyed to him by the deed of 5 August, 1807, for purposes not warranted by that deed, in misapplying the money produced by the said sale, and in failing to settle other lands to the same trusts as were created by the said deed, and that the defendants, Richard Veitch, David Castleman, and Charles McCormick, are purchasers with notice of the facts which constitute the breach of trust committed by the said Thomas Strode, and are therefore in equity considered as trustees, and that the defendants, David Castleman and Charles McCormick, do hold the land conveyed, &c.;, charged with the trusts in the said deed mentioned until a court of equity shall decree a conveyance thereof. The court is further of opinion that the said defendants are severally accountable for the rents and profits arising out of the said trust property while in possession thereof, and that the said defendants, Castleman and McCormick, are entitled to the amount of the encumbrances from which the land has been relieved by any of

the defendants, and of the value of the permanent improvements made thereon, and of the advances which have been made to the said Hugh Wallace Wormley by any of the defendants for the support of his family, the said advances to be credited against the rents and profits, and the value of the said permanent improvements, and of the encumbrances which have been discharged and which may not be abated by the rents and profits, to be charged on the land itself, and it is referred to one of the commissioners of the court to take accounts according to their directions, and report,"

&c.;

The court afterwards partially confirmed the report which had been made, reserving some questions for its future decision:

"And it being represented on the part of the plaintiffs that they have removed to the State of Kentucky and are about removing to the State of Mississippi, and that it will be highly advantageous to them to sell the trust estate and to invest the proceeds of sale in other lands in the State of Mississippi to the uses and trusts expressed in the deed of August 5, 1807, and it appearing also that there is no fund other than the trust estate from which the sum due to the defendants, Castleman and McCormick, can be drawn, this Court is further of opinion that the said trust estate ought to be sold and the proceeds of sale, after paying the sum due to the defendants, Castleman and McCormick, invested in other lands in the State of Mississippi to the same uses and trusts,"

&c.; The sale therefore was decreed; commissioners were appointed to make it; the

proceeds to be first applied in satisfaction of the sums found due by the commissioner's report and the balance to be paid to the trustee to be invested by him in lands lying in Mississippi

"for which he shall take a conveyance to himself in trust, for the uses and trusts expressed in the deed of 5 August, 1807 . . . , and the court being of opinion that Thomas Strode is an unfit person to remain the trustee of the plaintiff, doth further order, that he shall no longer act in that character,"

&c.;, and proceed to appoint another in his stead, of whom bond and surety was required.

So much of this last decretal order as directs a sale of the property therein mentioned was suspended until the further order of the court

"unless the said David Castleman and Charles McCormick shall sign and deliver to the marshal or his deputy, who is directed to make the said sale, an instrument of writing declaring that should the decree rendered in this cause be reversed in whole or in part, they will not claim restitution of the lands sold, but will consent to receive in lieu thereof the money for which the same may be sold, which instrument of writing the marshal is directed to receive and to file among the papers in the cause in this Court."

So much of the decretal order as directs the land to be sold to the highest bidder was subsequently set aside, and until the appointment of a trustee, the marshal directed to receive propositions for the land, and to report the same to the court, which would give such further directions respecting the sale of the said land as shall then appear

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proper. Whereupon the defendants appealed from all the decrees pronounced in the cause.

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MR. JUSTICE STORY delivered the opinion of the Court, and after stating the case proceeded as follows:

Such is the general outline of the case, and in the progress of the investigation it may become necessary to advert to some other facts with more particularity.

And the first question arising upon this posture of the case is whether Strode, the trustee, by the sale to Veitch, has been guilty of any breach of trust. And this seems to the Court to be scarcely capable of controversy. That there are circumstances in the case which raise a presumption of bad faith on the part of the trustee and expose him to some suspicion cannot escape observation. But assuming him to have acted with

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entire good faith, his proceedings were a plain departure from his duty. In respect to the supposed exchange of the Fauquier for the Frederick lands, it is impossible for a moment to admit its validity. In the first place, it was not made between parties competent to make it. Wormley had no authority over the estate after the marriage settlement. The chief object of that settlement was to secure the property to the use of the wife and children during the joint lives of the husband and wife. And though it is said in another part of the deed that Wormley shall occupy and enjoy the estate and the issues and profits thereof during his life, yet this was to be under leave of the trustee, and to suppose that he thus acquired an equitable interest for life is to defeat the manifest and direct intention of the other clauses in the deed, which avow the whole object to be the security of the estate during the same period for the use of the wife and children. The true and natural construction of this clause is that it points to the discretion which the trustee may exercise as to allowing the husband to occupy the estate, and take the profits for the maintenance of the family, whenever the trustee perceives it may be safely done, without involving the trustee in any responsibility to which he might be exposed by such a permission without such an authority. But at all events the right to dispose of the equitable fee to anyone, much less to the trustee himself, did not exist in Wormley, and any exchange attempted to be made by him, however beneficial, would have been utterly void. But no

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exchange was in fact consummated.

It is true that the removal to the Fauquier lands took place upon an agreement to this effect, but no definitive conveyance was ever made, and the trustee himself never settled and never took a step towards settling the Fauquier estate upon the trusts of the marriage settlement, as it was his indispensable duty to do if he meant to conduct himself correctly. As to the substituted Kentucky lands, the transaction was still more delusive. The agreement for the substitution was merely conditional, depending upon the subsequent election of Wormley, and his dissent put an end to it. As to the conveyance to Lee, ostensibly for the trusts of the settlement, it can be viewed in no other light than an attempt to cover up the most unjustifiable proceedings. That conveyance was not executed until after the dissent and dissatisfaction of Wormley were well known, and so far from its containing any valid performance of the trusts, it expressly gives a prior lien to the purchasers of the Frederick lands as security for their covenant of warranty; and to complete the delusion, the trustee reserved to himself the authority to substitute any other lands, leaving the trusts to float along without fixing them definitively upon any solid foundation. If we add that the Fauquier lands were mortgaged to the purchasers for the same covenant; and that this mortgage was discharged only for the purpose of selling the property to Grimmar and Mundell, we shall come irresistibly to the conclusion that the trustee never was in a situation

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to give an unencumbered title on either the Fauquier or Kentucky lands to secure the trusts, and that if he was, he never in fact executed any conveyance for this purpose. In every view, therefore, of this part of the case, it is clear that no valid exchange did or could take place, and that as there was no equitable or legal transmutation of the property from the *cestuis que trust,* it remained in the trustee, clothed with all the original fiduciary interests.

But, independent of these considerations, there is a stubborn rule of equity, founded upon the most solid reasoning and supported by public policy, which forbade any such exchange. No rule is better settled than that a trustee cannot

become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor, he must always desire to sell as high, and as purchaser to buy as low, as possible, and the law has wisely prohibited any person from assuming such dangerous and incompatible characters. If there be any exceptions to the generality of the rule, they are not such as can affect the present case. On the contrary, if there be any cogency in the rule itself, this is a strong case for its application, for by the very terms of the settlement, the trustee was invested with a large discretion and a peculiar and exclusive confidence was placed in his judgment. Of necessity, therefore, it was contemplated that his judgment should be free and impartial and unbiased by personal interests. The asserted

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exchange, so far at least as it affects to justify or confirm the proceedings of the trustee, may therefore be at once laid out of the question.

Then was the sale to Veitch a breach of trust? The power given to the trustee by the settlement is certainly very broad and unusual in its terms, but it is not unlimited. The trustee had not an unrestricted authority to sell, but only when, in his opinion, the purchase money might be laid out advantageously for the *cestuis que trust.* It is true the sale and reinvestment are to be decided by his opinion, which is an invisible operation of the mind. But his acts nevertheless are subject to the scrutiny of the law, and if that opinion has not been fairly and honestly exercised, if it has been swayed by private interests and selfish objects, if the sale has been at a price utterly disproportionate to the real value of the property, and the evidence demonstrate such facts, a court of equity will not sanction an act which thus becomes a fraud upon innocent parties.

Much ingenuity has been exercised in a critical examination of the nature of the power itself as it stands in the text of the settlement. It is contended that the acts of sale and of reinvestment are separate and distinct acts, and the power to sell is therefore to be disjoined from that of repurchase, so that the sale may be good though the purchase money should be misapplied. How far a *bonae fidei*

purchaser is bound in a case like the present to look to the application of the purchase money need not be decided in this case. There is much reason in the doctrine that where the

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trust is defined in its object and the purchase money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase money, for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence than those who have bought under an apparently authorized act. But in the present case, it seems difficult to separate the acts from each other. The sale is not to be made, unless a reinvestment can, in the opinion of the trustee, be advantageously made. He is not to sell upon mere general speculation, but for the purpose of direct reinvestment. And it is very difficult to perceive how the trustee could arrive at the conclusion that it was proper to sell unless he had at the same time fixed on some definite reinvestment which, compared with the former estate, would be advantageous to the parties. Although, therefore, the acts of sale, and purchase, are to be distinct, they are connected with each other, and at least as to the trustee there cannot be an exercise of opinion such as the trust contemplated unless he had viewed them in connection. If he should sell without having any settled intention to buy, leaving that to be governed by future events, he would certainly violate the confidence reposed in him. *A fortiori,* if he should sell with an intention not to reinvest but to speculate for the

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purpose of relieving his own necessities or of appropriating the trust fund indefinitely to his own uses.

Now in point of fact what has the trustee done in this case? He has sold the trust property to pay his own debts. He has never applied the proceeds to any

reinvestment. To this very hour there has been no just and fair application of the purchase money. The Fauquier lands are gone, the Kentucky lands have been rejected and are loaded with liens, and there is nothing left but the personal responsibility of the trustee, embarrassed and distressed as he must be taken to be unless the trusts are still fastened to the Frederick lands. Can it then be contended for a moment that there is no breach of trust, when the sale was not for the purposes of reinvestment? When the party puts his right to sell not upon an honest exercise of opinion at the time of sale, but upon a distinct anterior transaction, invalid and incomplete, by which he became clothed with the beneficial interest of the estate? When he claims to be not the disinterested trustee selling the estate, but the trustee purchasing by exchange the trust fund, and thus entitled to deal with it according to his own discretion and for his own private accommodation, as absolute owner? Where the purchase money is to be applied to extinguish his own debts and there is no proof of his means to replenish, or acquire an equal sum from other sources? In the judgment of the Court, the sale was a manifest breach of trust. It was in no proper sense an execution of the power. The power,

in the contemplation of the trustee, was virtually extinguished. He sold not because he intended an advantageous reinvestment, but because he considered himself the real owner of the estate. The very letter as well as the spirit of the power was therefore violated, for the trustee never exercised an opinion upon that which was the sole object of the power to sell, an advantageous reinvestment.

The next point for consideration is whether the defendants Veitch and Castleman and McCormick were *bonae fidei* purchasers of the Frederick lands without notice of the breach of trust. If they had notice of the facts, they are necessarily affected with notice of the law operating upon those facts, and their general denial of all knowledge of fraud will not help them if, in point of law, the transaction is repudiated by a court of equity. If they were *bonae fidei* purchasers without notice, their title might have required a very different consideration.

And first as to Veitch. The deed to him contained a recital of the marriage settlement and the power authorizing the sale. He therefore had direct and positive notice of the title of the trustee to the property. There is the strongest reason to believe that he was fully cognizant of the exchange of the Frederick and Fauquier lands negotiated between Wormley and the trustee. The certificate from Wormley respecting the exchange, and expressing satisfaction with it, which was procured a few days before the sale and which Veitch now produces, shows that he

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must have had a knowledge of the exchange. Its apparent object was to ascertain the state of the title. The removal of the Wormley family and their known residence at this time on the Fauquier lands strengthen this presumption. If he knew of the exchange, he could not but know that he purchased of the trustee an estate, which he claimed as his own, in a bargain with an unauthorized person, and that the trustee was at the same time the vendor and purchaser. He also knew that the sale to himself was not in execution of the power or for the purpose of reinvestment, for according to the other facts, the exchange had already effected that, and no further reinvestment was contemplated. He took a mortgage as additional security for the warranty on the sale of the Fauquier lands, not even now alleging that he did not know their identity. And under these circumstances he could not but know that there had been no actual conveyance or declaration of trust of the Fauquier lands in execution of the trust, for otherwise the trustee could not have mortgaged them to him. He therefore stood by, taking a conveyance from the trustee of the trust estate, knowing at the same time that no reinvestment had been made which could be effectual and that no reinvestment was contemplated as the object of the sale, and as far as his mortgage could go he meant to obtain a priority of security that should ride over any future declaration of trust.

This is not all. The very sale of the trust fund was to be not for reinvestment, but to pay a large

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debt due to himself upon which a decree of foreclosure of a mortgaged estate had been obtained, and he could not be ignorant that the application of the trust fund to such a purpose was a violation of the settlement and afforded a strong presumption that the trustee had no other adequate means of discharging the debt or of buying other lands advantageously in the market. And yet, with notice of all these facts, the deed itself from the trustee to Veitch contains a recital that the sale was made "with the intention of investing the proceeds of such sale in other lands, of equal or greater value." This was utterly untrue, and could not escape the attention of the parties. Veitch then had full knowledge of all the material facts, and he does not even deny it in his answer, for that only denies the inference of fraud, which is a mere conclusion of law from the facts as they are established. Purchasing, then, with a full knowledge of the rights of Mrs. Wormley and her children and of the breach of trust, Veitch cannot now claim shelter in a court of equity as a *bonae fidei* purchaser for a valuable consideration.

The next question is whether Castleman and McCormick are not in the same predicament. In the judgment of the Court they clearly are. They purchased from Veitch, whose deed gave them full notice of the trust, and they could not be ignorant of the recital in it, since their title referred them to it. They must have perceived, that the sale to Veitch, in order to be valid, must have been with a view to reinvestment of the purchase money

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in other real estate. It was natural for them to inquire whether the sale had been made under justifiable circumstances and whether there had been any such reinvestment. Previous to the sale to Veitch, they had entered into a negotiation with the trustee himself for a direct purchase of the Frederick lands, and on that occasion became acquainted with the fact that the trustee was largely indebted to Veitch, and that one object of the sale was to apply the proceeds to the payment of that debt. How then could they be ignorant that the proceeds of the sale, which was very soon afterwards made to Veitch, were to be applied to extinguish the same debt and that the transfer was not in execution of the trust, but to administer to the trustee's own necessities? This is not all. Before the execution of the deed

to them, they knew of the arrangement respecting the Fauquier lands, and that Wormley had become dissatisfied with the bargain. They knew that these lands had not been settled by the trustee upon the trusts of the settlement, and they took an equitable assignment of the mortgage from Veitch of the same lands. It may be said that the evidence of these facts is not positively made out in the record, but if it be not, the circumstantial evidence fully supports the conclusion. The answer itself of Castleman and McCormick does not deny notice of these facts. It states, indeed, that they supposed the transaction with Veitch fair, because they were satisfied that the trustee never received more from Veitch than what he has given the *cestuis que trust* credit for.

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Was it a fair execution of the trust so to sell the estate and to give credit for the proceeds? To apply them to pay the trustee's debts, and relieve his necessities? To sell without any definite intention as to a reinvestment? They also deny all knowledge of fraud. But this is a mere general denial, and does not negative the knowledge of the facts from which the law may infer fraud.

The subsequent conduct of Castleman and McCormick shows that they were not indifferent to the execution of the trust, but that they felt no interest to secure the rights of the *cestuis que trust.* They were privy to the removal to Kentucky and exhibited much anxiety to have it accomplished. They knew subsequently the dissatisfaction of Wormley with that removal and with the Kentucky lands. Yet they, in the year 1813, relieved the Fauquier lands from their own encumbrance and enabled the trustee to dispose of it for other purposes than the fulfillment of the trusts for which it had been originally destined. And throughout the whole, their conduct exhibits an intimate acquaintance with the nature of their own title and the manner and circumstances under which it had been acquired by Veitch, and the objections to which it might be liable. And they ultimately took the general warranty of Veitch, upon releasing their claim on the Fauquier lands, as a security for its validity.

There is a still stronger view which may be taken of this subject. It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the

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contract or conveyance, but at the time of the payment of the purchase money. The answer of Castleman and McCormick does not even allege any such want of notice. On the contrary, it is in proof that upwards of $3,000 dollars of the purchase money was paid in the autumn of 1813 and the spring of 1814. And this was not only after full notice of the anterior transactions but after the commencement of the present suit.

It appears to us, therefore, that the circumstances of the case can lead to no other result than that Castleman and McCormick were not purchasers without notice of the material facts constituting the breach of trust, and that therefore the Frederick lands ought in their hands to stand charged with the trusts in the marriage settlement. The leading principle of the decree in the circuit court was therefore right.

Some objections have been taken to the subordinate details of that decree, but it appears to us that the objections cannot be sustained. The decree directs an account of the rents and profits of the Frederick lands while in possession of the defendants. It further directs an allowance of the amount of all encumbrances which have been discharged by the defendants and of the value of any permanent improvements made thereon, and also of any advances made for the support of Wormley's family. These advances are to be credited against the rents and profits and the value of the improvements and of the discharged encumbrances not recouped by the rents and profits are to be a charge on the land itself. A more

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liberal decree could not, in our opinion, be required by any reasonable view of the case.

An objection has been taken to the jurisdiction of the Court upon the ground that Wormley, the husband, is made a defendant, and so all the parties on each side of the cause are not citizens of different states, since he has the same citizenship as his wife and minor children. But Wormley is but a nominal defendant, joined for the sake of conformity in the bill, against whom no decree is sought. He voluntarily appeared, though perhaps he could not have been compelled so to do. Under these circumstances, the objection has no good foundation. This Court will not suffer its jurisdiction to be ousted by the mere joinder or nonjoinder of formal parties, but will rather proceed without them and decide upon the merits of the case between the parties who have the real interests before it whenever it can be done without prejudice to the rights of others.

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MR. JUSTICE JOHNSON.

After the most careful examination of this voluminous record, I think it

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due to the parties defendant to express the opinion that I cannot discover any evidence of fraud in any part of their transactions.

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The proposed exchange between the Frederick and Fauquier lands, was made openly and deliberately,

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upon consultation with friends of the *cestuis que trust,* and obviously had many prudential

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considerations to recommend it. That Wormley and his family must have starved had they remained

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upon the lands in Frederick is abundantly proved, and no worse consequences could have

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happened to them from either of these exchanges. It is satisfactorily shown also that the exchange

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for the Fauquier land was highly advantageous. Taking money as the most correct comparison of

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value, it appears that the Frederick land, after being long hawked about for sale and having $1,000 added to its value by Strode in the extinction of the mother's life estate, sold for no more than $5,500, a sum satisfactorily proved to be its full value at the time, whereas the Fauquier land, after Wormley's refusal to take it, was sold for $8,000. So that the two tracts then stood, in comparison of value, as $4,500 to $8,000. And that Strode was fully sensible of the great difference in value and satisfied to bear the loss is positively proved by the fact that when Wormley resolved to move to Kentucky,

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they established the value of the Fauquier lands between themselves at $7,000, and Strode actually gave an acknowledgment to Wormley for $6,500, the balance of the $7,000 after dividing with him the sum paid for his mother's life estate.

The case is one in which, it is true, the conduct of the defendants is greatly exposed to misrepresentation and misconstruction, but when reduced to order and

examined, the circumstances admit of the most perfect reconciliation with the purest intentions. It is true that Strode was in debt; that it was necessary to sell the Fauquier lands to satisfy his creditors; that the money arising from the Frederick land was applied to the payment of Strode's debts. But there was nothing iniquitous in all this. It is perfectly explained thus: the Fauquier land must be sold to pay Strode's debts; the situation of the Wormleys on the trust estate was so bad that no change could make it worse; the removal to the Fauquier lands was thought advisable by all their friends; where, then, was the fraud in letting them have the Fauquier lands at an under price and paying his debts out of the actual proceeds of the trust estate? The money arising from the latter was, under this arrangement, the price of the former. It was in fact paying his debts with the price of his own property, not that of the trust estate.

It has been argued that

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the sale of the trust estate was not made with a view to reinvestment, but the evidence positively proves the contrary. It goes to show that the reinvestment was the leading object, and actually took place previous to

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the sale of the trust estate. And even if that construction of the power be conceded which would require the sale and reinvestment to be simultaneous acts, or that which would render the purchaser liable for the application of the purchase money, the facts of the case would satisfy either exigency. For the reinvestment was actually made simultaneously with the sale, or, if it was not finally consummated, the cause is to be found altogether in the anxiety of the defendants to satisfy a capricious man and the ignorance of Strode in supposing himself justified in yielding to Wormley's judgment or will.

Had Strode actually sold the Fauquier lands, paid off his encumbrances from the purchase money, then sold the Frederick land and reinvested the fund in a repurchase of the Fauquier lands, there could not have been an exception taken to

the sufficiency of the reinvestment. And then the transaction would, in a moral point of view, have been necessarily regarded as favorably as I am disposed to regard it. Yet it is unquestionable that, thus stated, it presents a correct summary of the whole transaction as made out in the evidence. It has, however, been put together so as to admit of distorted views, and such will ever be the case where men expose themselves to suspicion by mixing up their own interests with the interests of others placed under their protection. I can see nothing but liberality in the conduct of Strode towards Wormley, and little else than improvidence, caprice, and ingratitude in the conduct of the latter.

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Nevertheless there are canons of the court of equity which have their foundation not in the actual commission of fraud, but in that hallowed orison "lead us not into temptation."

On of these is that a trustee shall not be permitted to mix up his own affairs with those of the *cestui que trust.* Those who have examined the workings of the human heart well know that in such cases, the party most likely to be imposed upon is the actor himself, if honest, and if otherwise, that the scope for imposition given to human ingenuity will enable it generally to baffle the utmost subtlety of legal investigation. Hence the fairness or unfairness of the transaction or the comparison of price and value is not suffered to enter into the consideration of the court on these occurrences; but the rule is positive and general that the *cestui que trust* may be restored to his original rights against the trustee at his option. And where infants, &c.;, are interested, they will be restored or not with a view solely to the benefit of the *cestuis que trust.* It is unquestionable from the evidence that both Veitch and Castleman and McCormick must be affected by both legal and actual notice of the transactions of Strode. They are therefore liable to the same decree which ought to be made against the latter.

It is, however, some satisfaction to me to be able to vindicate their innocence, while I feel myself compelled to subject them to a serious loss. The rule which

requires this adjudication may in many cases be a hard one, but it is a fixed rule, and has the sanction of public policy.

Decree affirmed with costs.