no evidence of a sale to Desmoland; none of his alien character, if there had been a sale to him; the sale to L'Amoureaux did not subject her to forfeiture; and not a fact had been made out in evidence, which was not even more reconcilable with a state of innocence than a state of guilt.

I confess I think it a hard case.

Decree affirmed, with costs.

[Chancery. Trust. Jurisdiction.]

Hugh Wallace Wormley, Thomas Strode, Richard Veitch, David Castleman, and Charles M'Cormick, *Appellants*,

v.

Mary Wormley, Wife of Hugh Wallace Wormley, by George F. Strother, her next friend, and John S. Wormley, Mary W. Wormley, Jane B. Wormley, and Anne B. Wormley, infant children of the said Mary and Hugh Wallace, by the said Strother, their next friend, *Respondents*.

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 trusts*, 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.

Quære, How far a *bonæ fidei* purchaser, without notice of the breach

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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 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 *bonæ 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 non-joinder of merely *formal* parties, who are not entitled to sue, or liable to be sued, in the United States' Courts.

APPEAL from the Circuit Court of Virginia. 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 M'Cormick, 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 the 5th of 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. &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 sug-

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gested 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, recognising 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 the 16th of September, 1810, the trustee sold the Frederick lands by an indenture, to the defendant, Veitch, for the sum of five thousand five hundred dollars; 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 3000 dollars 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

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1811, Veitch conveyed the Frederick lands to the defendants, Castleman and M'Cormick, 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 M'Cormick, 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 M'Cormick 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 the 5th of 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 M'Cormick, 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 M'Cormick, 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 M'Cormick, are entitled to the amount of the encumbrances from which the land has been relieved by any of

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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 M'Cormick, 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 M'Cormick, 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 5th of August, 1807, &c. 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 M'Cormick, 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 ap-

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

Feb. 21st.

Mr. *Jones*, for the appellants, argued, 1. That in point of fact, all the arrangements of the trustee for exchanging and disposing of the trust estate, were not only fair and honest, but a discreet exercise of his authority; highly beneficial to the *cestui que trusts*, and entirely to their advantage.

2. That whether they were so or not, was no concern of the purchasers under the trustee: he being invested, by the terms of the trust, with a clear discretion, which invited all the world to treat with him, as with one having a complete authority to act upon his own opinion of what was discreet and expedient in the administration of the trust, and not as with one executing a defined duty or authority, either purely ministerial, or mixed with a limited discretion over the subordinate details.

3. That the *selling* of the trust estate, and the *investing* of the proceeds, were, in their nature, and by the terms of the deed, to be two distinct substantive acts in the exercise of the discretionary authority vested in the trustee; and were not to be done *uno flatu:* therefore the purchaser claiming a title under one consummate act in the exercise of that discretion, was not responsible for any subsequent indiscretion or fraud of the trustee, in the progressive execution of the trust. Wherever the deed confers an immediate power of sale, for a purpose which cannot be immediately defined and ascertained, but must be postponed for

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any period of time, however short, the purchaser is not bound to see to the application of the purchase money.[a] It is observed by Sir W. Grant, Master of the Rolls, that the doctrine, binding the purchaser to see to the application of the money, has been carried farther than any sound equitable principle will warrant.[b] But it has never been extended to a case like the present, where the mode in which the money is to be invested, depends upon a variety of contingent and complicated circumstances, which are submitted to the judgment and discretion of the trustee. Where the trust is, to pay debts and legacies, the purchaser is discharged by payment to a trustee.[c]

But it might, perhaps, be said, that the authority to sell is combined with that to apply the proceeds. But he contended, that they were entirely independent and unconnected. They might indeed be associated in the mind of the trustee, but that remaining a secret in his breast, could not affect an innocent purchaser with the consequences of any subsequent error or fraud of the trustee. Where indeed the *cestui que trust* is no party to the sale, nor to the original deed creating the trust, there may be more room for the application of the doctrine, as to the purchaser seeing to the application of the money. Such are deeds of assignment for the payment of debts, in which the creditors are frequently not, originally, parties.

a Balfour v. Welland, 16 *Ves.* 150.
b *Id.* 156.
c *Co. Litt.* 290 b. *Butl. Note* 1. s. 12.

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And in the case cited, the Master of the Rolls says, that the circumstance of the creditors coming in and executing the deed, consummates the authority of the trustee, to give a valid discharge for the purchase money of an estate sold by him.[a] But here the *cestui que trusts* are not only parties to the deed creating the trust, but assenting to the very transaction now complained of.

4. So that if the mere discretion of the trustee be not competent, *per se*, strictly to justify the purchasers under him, and to protect their title; still, the peculiar circumstances of this case give them a superinduced equity against the claims of the *cestui que trusts:* 1st. The previous consultation and deliberate approbation of the respective parents, and other disinterested friends of such of the *cestui que trusts* as were *sui juris*. 2dly. The agency of those who were *sui juris*, in soliciting and recommending the measure in question, their active co-operation in it, and their subsequent acquiescence. 3dly. The approbation of the parents of such of the *cestui que trusts* as were not *sui juris*. These circumstances would have afforded sufficient evidence of the expediency of the measure, to have induced a Court of Chancery, upon the application of the parties, to have sanctioned and directed it. Consequently, all the present plaintiffs are devested of every pretension to equitable relief: and so far as the claim is urged for the advantage of those who were *sui juris*, and who, by their active co-operation and implicit acquiescence

a Balfour v. Welland, 16 *Ves.* 157.

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encouraged and promoted the sale, it must be repudiated by the Court as inequitable and unconscientious. Wormley and wife were the efficient *cestui que trusts*. The equitable proprietary interest was in them. They were both *sui juris*. A married woman is considered as a *feme sole* as to property settled to her use, whether in possession or reversion, and she may dispose of it, unless particularly restrained by the terms of the settlement.[a]

There is no such universal, inflexible rule, as that the trustee cannot change the trust estate.[b] If he had a discretionary power, it signifies not how the payment was made, and whether a credit was given or not. Nor is this such a purchase, by the trustee himself, as will invalidate the sale in respect to *bonæ fidei* purchasers.[c] It is not a sale by himself to himself. He does not unite both the characters of vendor and vendee, and, therefore, it does not involve the mischiefs meant to be corrected by the rule. The consent of the *cestui que trusts* who are *sui juris*, confirms the sale, at least as to these innocent purchasers.

5. But if all these positions should be overruled,

a Sturges v. Corp, 13 *Ves.* 190. [See, on the subject of the power of a *feme covert* over her separate estate, the *Methodist Episcopal Church* v. *Jacques*, 3 *Johns. Ch. Rep.* 77. and Ewing v. Smith, 3 *Dessausure's Rep.* 417.]

b 2 *Fonbl. Eq.* 88. note *f.* 1 *Fonbl. Eq.* 191—196. Fraser v. Bailey, 1 *Bro. Ch. Rep.* 517.

c Whitecote v. Lawrence, 3 *Ves.* jr. 740. Lister v. Lister, 6 *Ves.* 631. *Ex parte* James, 8 *Ves.* 348. Coles v. Trecothick, 9 *Ves.* 246. Randall v. Errington, 10 *Ves.* 423.

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he insisted, that the decree of the Court below was erroneous in its details: because it should, in the first instance, have decreed, as against the trustee himself, an execution of the trust; and, in the alternative of his failure and inability, the repayment of the purchase money by Veitch, the original purchaser from the trustee; and the land in the hands of the appellants, Castleman and M'Cormick, who were purchasers with a general warranty from Veitch, as he was from the trustee, should have been the last resource, after the others had been exhausted; and then only to raise the money due, giving Castleman and M'Cormick an option to retain the land by paying the money; instead of decreeing the land to be sold at all events for the benefit of the *cestui que trusts*. The appellants ought not to have been held to account for the mesne profits; because Wormley, the only person yet entitled to receive them, was a party to the sale, and was clearly competent to alien the estate, and the rents and profits, during his life; he being sole *cestui que trust* for life; and thus, if the sale is to be set aside at all for the benefit of his wife and children, it can only be to the extent of protecting and securing their future and contingent interests.

6. He also contended, that the bill must be dismissed for want of jurisdiction. Wormley, the husband, is made a party defendant, though he is a citizen of the same State with his wife and infant children, who are plaintiffs.[a]

a Strawbridge v. Curtis, 3 *Cranch's Rep.* 267. Corporation of New-Orleans v. Winter, 1 *Wheat. Rep.* 94.

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The *Attorney General*, contra, argued, 1. That the trustee had broken every one of the trusts he had undertaken to perform, on assuming the fiduciary character. If he, therefore, were now in the actual possession of the Frederick lands, if he had conveyed them, and taken back a reconveyance to his own use, there could be no question, that a Court of equity would hold these lands in his possession subject to the original trusts. But if the appellants purchased with knowledge of the trusts, and of the breach of trust, equity converts them into trustees, with all the liabilities of the original trustee.[a] He argued upon the facts to show, that they were chargeable with this knowledge. Although they had denied, in the answer, all fraud on their own part, and all knowledge of fraud in others, yet they do not deny a knowledge of such facts as affects them with the consequences of the trustee's misconduct.

2. It may be laid down as a general proposition, that trustees are incapable of becoming the purchasers of the trust subject. The two characters of buyer and seller are inconsistent: *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*[b] Where the trust is for persons not *sui juris*, as *femes covert*, infants, and the like, the Court will, under no circumstances whatever, be they ever so fair between the parties, (as consulting friends, &c.) confirm a purchase of the

a Adair v. Shaw, 1 *Scho. & Lefr.* 862. Sanders v. Dehew, 2 *Vern.* 271. 2 *Fonbl. Eq.* 152. 15 *Ves.* 350. Bovey v. Smith, 1 *Vern.* 149. S. C. 2 *Cas. in Ch.* 124.

b *Sugd. Vend.* 422, 423. and cases there cited.

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trust property by the trustee, unless it be done under the immediate authority and sanction of the Court.[a] It cannot be established even by a sale at public auction, or before a master.[b] The only mode in which it can be done, is by a previous decree of permission, which the Court will not grant, unless where it is clearly for the benefit of the *cestui que trust.*[c] A sale made without such permission, may, or may not, be confirmed, at the option of the *cestui que trust.*[d] And in order to set aside a purchase by a trustee, it is not necessary to show, that he has made any advantage by his purchase.[e] But the whole of this subject has been so thoroughly examined by Mr. Chancellor Kent, in several cases determined by him, that it is unnecessary to do more than to give the Court a general reference to the authorities cited by him.[f] The rule is applicable with peculiar force to the present case, because here the purchase was not under the sanction of the Court, nor at a master's sale, nor at auction, where the trustee resists a fair competition; there was no payment of the purchase money to the use of any of the *cestuis que trust;* and (if we were bound to show, that the trustee has made an advantage) he has made all

a Davidson v. Gardner.

b *Sugd. Vend.* 427.

c *Id.* 432.

d 5 *Ves.* 678. 6 *Ves.* 631.

e *Ex parte* James, 8 *Ves.* 348. *Ex parte* Bennett, 10 *Ves.* 393.

f Green v. Winter, 1 *Johns. Ch. Rep.* 27. Schiefflin v. Stewart, *id.* 620. Davoue v. Fanning, 2 *Johns. Ch. Rep.* 252.

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the advantage. If Strode had been a trustee merely for the purpose of sale, he could not have acquired the trust fund by purchase. But his was not a mere power to sell; it was a power to sell, whenever he could, in his honest opinion, invest the proceeds of the sale advantageously in other lands, to be settled to the same uses. The sale, without a reinvestment, was a breach of trust. Those who purchased under him had notice of the breach of trust.

3. The general principle is, that a purchaser from a trustee is bound to see to the application of the purchase money. But that principle is stated with this limitation, that he is only thus bound where the trust is of a defined and limited nature, and not where it is general and unlimited, as a trust for the payment of debts generally.[a] That is, if the trust be of such a nature that the purchaser may reasonably be expected to see to the application of the purchase money, as if it be for the payment of legacies, or of debts which are scheduled or specified, the purchaser is bound to see that the money is applied accordingly; and that, although the estate be sold under a decree of a Court of equity, or by virtue of an act of parliament.[b] And Mr. Sugden says, that those most strongly disposed to narrow this rule, do still hold, that where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the

a *Sugd. Vend.* 367.
b *Id.* 368.

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trust of which they have notice.[a] This is what Sir W. Grant says, in the case cited on the other side, with this addition, that "where the sale is made by the trustee, *in performance of his duty*, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase money."[b] But here the sale was made, not in performance of the trustee's duty, but in violation of it; and the supposed assent of the husband and wife, to the breach of trust, will not cure it.[c]

March 12th. 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

a *Sugd. Vend.* 373.
b Balfour v. Willard, 16 *Ves.* 151.
c Thayer v. Gold, 1 *Atk.* 615.

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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 any one, 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 situa-

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tion 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.

Rule, that a trustee cannot purchase, peculiarly applicable to this case.

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 unbiassed by personal interests. The asserted ex-

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change, 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.

The sale to Veitch, a breach of trust.

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.

How far the purchaser is bound to see to the application of the purchase money.

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 *bonæ 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 connexion. 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 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,

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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 M'Cormick, were *bonæ 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 *bonæ fidei* purchasers, without notice, their title might have required a very different consideration.

The purchasers of the trust property affected with notice of the breach of trust, so as to invalidate the sale to them.

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

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 *bonæ fidei* purchaser for a valuable consideration.

The next question is, whether Castleman and M'Cormick 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 pur-

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chase money 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 M'Cormick, 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 M'Cormick 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 fulfilment 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.

A *bonæ fidei* purchaser without notice, must be so down to the time of the payment of the purchase money.

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 M'Cormick does not even allege any such want of notice. On the contrary, it is in proof, that upwards of 3000 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 M'Cormick 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 non-joinder 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.[a]

Jurisdiction of the Court not affected by the joinder of mere formal parties.

a The general rule and its exceptions, as to who are necessary parties to a bill in equity, are so fully and clearly laid down by Mr. Justice STORY, in the case of *West* v. *Randall*, (2 *Mason's Rep.* 181—190.) and the principles of practice asserted in the judgment, are so closely connected with the above position in the principal case in the text, that the editor has thought fit to subjoin the following extract. It is only necessary to state, that the case was of a bill filed by an heir or next of kin for a distributive share of an estate.

"It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants, in the subject matter of the bill, ought to be made parties to the suit, however numerous they may be. The reason is, that the Court may be enabled to make a complete decree between the parties, may prevent future litiga-

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tion, by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the Court, or to others, who are interested by a decree, that may be grounded upon a partial view only of the real merits. (*Mitf. Pl.* 29. 144. 220. *Coop. Eq. Pl.* 33. *&c.* 185. 2 *Madd.* 142. *Gilb. For. Rom.* 157, 158. 1 *Harris. Ch. Pr.* ch. 3. p. 25. *Newl. Edit.* Leigh v. Thomas, 2 *Ves.* 312. Cockburn v. Thompson, 16 *Ves.* 321. Beaumont v. Meredith, 3 *Ves. and Beames*, 180. Hamm v. Stevens, 1 *Vern.* 110.) When all the parties are before the Court, it can see the whole case; but it may not, where all the conflicting interests are not brought out upon the bill. *Gilbert*, in his *Forum Romanum*, p. 157. states the rule, and illustrates it with great precision. 'If,' says he, 'it appears to the Court, that a very necessary party is wanting; that without him no regular decree can be made; as where a man seeks for an account of the profits or sale of a real estate, and it appears upon the pleadings, that the defendant is only tenant for life, and consequently the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees, none of which will be bound either by the decree, or by the account to be taken of the testator's effects, and each of these legatees may draw the account in question over again at their leisure; or where several persons are entitled, as next of kin, under the statute of distributions, and only one of them is brought on to a hearing; or where a man is entitled to the surplus of an estate, under a will, after payment of debts, and is not brought on; or where the real estate is to be sold under a will, and the heir at law is not brought on. In these, and all other cases, where the decree cannot be made uniform, for as, on the one hand, the Court will do the plaintiff right, so, on the other hand, they will take care that the defendant is not doubly vexed, he shall not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties, and whose fault it was that it was not done.' The cases here put are very appropriate to the case at bar. That in respect to legatees, probably refers to the case of a suit by one residuary legatee,

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

where there are other residuary legatees; in which case it has often been held, that all must be joined in the suit. (Parsons v. Neville, 3 *Bro. Ch. Cas.* 365. Cockburn v. Thompson, 16 *Ves.* 321. Sherritt v. Birch, 3 *Bro. Ch.* 229. Alward v. Hawkins, *Rep. T. Finch*, 113. Brown v. Rickets, 3 *Johns. Ch. Rep.* 553.) But where a legatee sues for a specific legacy, or for a sum certain on the face of the will, it is not in general necessary, that other legatees should be made parties, for no decree could be had against them, if brought to a hearing; (Haycock v. Haycock, 2 *Ch. Cas.* 124. Dunstall v. Rabett, *Finch*, 243. Attorney General v. Ryder, 2 *Ch. Cas.* 178. Atwood v. Hawkins, *Rep. F. Finch*, 118. Wainwright v. Waterman, 1 *Ves.* jr. 311.) and in general, no person, against whom, if brought to a hearing, no decree could be had, ought to be made a party. (De Golls v. Ward, 3 *P. Wms.* 310. Note.) And when a party is entitled to an aliquot proportion only of a certain sum in the hands of trustees, if the proportion and the sum be clearly ascertained, and fixed upon the face of the trust, it has been held, that he may file a bill to have it transferred to him, without making the persons entitled to the other aliquot shares of the fund, parties. (Smith v. Snow, 3 *Madd. Rep.* 10.) The reason is the same as above stated, for there is nothing to controvert with the other *cestuis que trust.* I am aware that it has been stated by an elementary writer of considerable character, that one of the next of kin of an intestate may sue for his distributive share, and the master will be directed by the decree, to inquire and state to the Court, who are all the next of kin, and they may come in under the decree. (*Coop. Eq. Pl.* 39, 40.) This proposition may be true, *sub modo ;* but that it is not universally true, is apparent from the authority already stated. (See Bradburn v. Harper, *Amb. Rep.* 374. 2 *Madd.* 146. *Gilb. For. Rom.* 157.)

"The rule, however, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties, is not without exceptions. As Lord Eldon has observed, it being a general rule, established for the convenient administration of justice,

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

it must not be adhered to in cases, to which, consistently with practical convenience, it is incapable of application. (Cockburn v. Thompson, 16 *Ves.* 321. and see S. P. Wendell v. Van Rensselaer, 1 *Johns. Ch. Rep.* 349.) Whenever, therefore, the party supposed to be materially interested is without the jurisdiction of the Court; or if a personal representative be a necessary party, and the right of representation is in litigation in the proper ecclesiastical Court; or the bill itself seeks a discovery of the necessary parties; and, in either case, the facts are charged in the bill, the Court will not insist upon the objection; but, if it can, will proceed to make a decree between the parties before the Court, since it is obvious, that the case cannot be made better. (*Mitf.* 145, 146. *Coop. Eq. Pl.* 39, 40. 2 *Madd. Ch. Pr.* 143. 1 *Harris.* ch. 3.) Nor are these the only cases; for where the parties are very numerous, and the Court perceives, that it will be almost impossible to bring them all before the Court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the Court will proceed to a decree. Yet, in these cases, so solicitous is the Court to attain substantial justice, that it will permit the other parties to come in under the decree, and take the benefit of it, or to show it to be erroneous, and award a rehearing; or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the Court, if there be certainty or danger of injury or injustice. (*Coop. Eq. Pl.* 39. 2 *Madd.* 144, 145. Cockburn v. Thompson, 16 *Ves.* 321.) Among this class of cases, are suits brought by a part of a crew of a privateer against prize agents, for an account, and their proportion of prize money. There, if the bill be in behalf of themselves only, it will not be sustained; but if it be in behalf of themselves, and all the rest of the crew, it will be sustained upon the manifest inconvenience of any other course; for it has been truly said, that no case can call more strongly for

berately, upon consultation with friends of the *cestuis que trust*, and obviously had many prudent indulgence, than where a number of seamen have interests; for their situation at any period, how many were living at any given time, how many are dead, and who are entitled to representation, cannot be ascertained; (Good v. Blewitt, 13 *Ves.* 397. Leigh v. Thomas, 2 *Ves.* 312. Contra, Moffa v. Farquherson, 2 *Bro. Ch. Cas.* 338. Acc. Brown v. Harris, 13 *Ves.* 552. Cockburn v. Thompson, 16 *Ves.* 321.) and it is not a case, where a great number of persons, who ought to be defendants, are not brought before the Court, but are to be bound by a decree against a few. So, also, is the common case of creditors suing on behalf of the rest, and seeking an account of the estate of their deceased debtor, to obtain payment of their demands; and there the other creditors may come in and take the benefit of the decree. (Leigh v. Thomas, 2 *Ves.* 312. Cockburn v. Thompson, 16 *Ves.* 321. Hendricks v. Franklin, 2 *Johns. Ch. Rep.* 283. Brown v. Ricketts, 3 *Johns. Ch. Rep.* 553. *Coop. Eq. Pl.* 39. 186.) But Sir John Strange said, there was no instance of a bill by three or four, to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors. (Leigh v. Thomas, 2 *Ves.* 312. *Coop. Eq. Pl.* 39.) And legatees seeking relief, and an account against executors, may sue in behalf of themselves and all other interested persons, when placed in the same predicament as creditors. (Brown v. Ricketts, 3 *Johns. Ch. Rep.* 553.) Another class of cases is, where a few members of a voluntary society, or an unincorporated body of proprietors, have been permitted to sue in behalf of the whole, seeking relief, and an account against their own agents and committees. Such was the ancient case of the proprietors of the Temple Mill Brass Works; (Chancey v. May, *Prec. Ch.* 592.) and such were the modern cases of the Opera House, the Royal Circus, Drury Lane Theatre, and the New River Company. (Lloyd v. Loaring, 6 *Ves.* jr. 773. Adair v. New River Company, 11 *Ves.* 429. Cousins v. Smith, 13 *Ves.* 542. *Coop. Eq. Pl.* 40. Cockburn v. Thompson, 16 *Ves.* 321.) There is one other class of cases, which I will just mention, where a lord of a manor has been permitted to sue a few of his tenants, or a few of the tenants have been permitted to sue the lord, upon

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tial considerations to recommend it. That Wormley and his family must have starved had they re-

the question of a right of common; or a parson has sued, or been sued by some of his parishioners, in respect to the right of tithes. In these and analogous cases of general right, the Court dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right. (2 *Madd.* 145. *Coop. Eq. Pl.* 41. *Mitf. Pl.* 145. Adair v. New River Company, 11 *Ves.* 429.) But even in the case of a voluntary society, where the question was, whether a dissolution and division of the funds, voted by the members, was consistent with their articles, the Court refused to decree, until all the members were made parties. (Beaumont v. Meredith, 3 *Ves. and Beames*, 180.) The principle upon which all these classes of cases stand, is, that the Court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil, as it can consider other persons as *quasi* parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeoparded. Of course, the principle always supposes, that the decree can, as between the parties before the Court, be fitly made, without substantial injury to third persons. If it be otherwise, the Court will withhold its interposition.

"The same doctrine is applied, and with the same qualification, to cases where a material party is beyond the jurisdiction of the Court, as if the party be a partner with the defendant, and resident in a foreign country, so that he cannot be reached by the process of the Court. There, if the Court sees, that without manifest injustice to the parties before it, or to others, it can proceed to a decree, it acts upon its own notion of equity, without adhering to the objection. (*Coop. Eq. Pl.* 35. *Mitf. Pl.* 146. Cowslad v. Cely, *Prec. Ch.* 83. Darwent v. Walton, 2 *Atk.* 510. Whalley v. Whalley, 1 *Ves.* 484. 487. Milligan v. Milledge, 3 *Cranch's Rep.* 220.) The ground of this rule is peculiarly applicable to the

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

Courts of the United States; and, therefore, if a party, who might otherwise be considered as material, by being a made a party to the bill, would, from the limited nature of its authority, oust the Court of its jurisdiction, I should strain hard to give relief as between the parties before the Court; as for instance, where a partner, or a joint trustee, or a residuary legatee, or one of the next of kin, from not being a citizen of the State where the suit was brought, or from being a citizen of the State, if made a plaintiff, would defeat the jurisdiction, and thus destroy the suit, I should struggle to administer equity between the parties properly before us, and not suffer a rule, founded on mere convenience and general fitness, to defeat the purposes of justice. (Russell v. Clark, 7 *Cranch's Rep.* 69. 98.)

"I have taken up more time in considering the doctrine as to making parties, than this cause seemed to require, with a view to relieve us from some of the difficulties pressed at the argument, and to show the distinctions (not always very well defined) upon which the authorities seem to rest. Apply them to the present case. The plaintiff claims, as heir, an undivided portion of the surplus, charged to be in the defendants' hands and possession. No reason is shown on the face of the bill, why the other heirs, having the same common interest, are not parties to it. The answer gives their names, and shows them within the jurisdiction of the Court, and as defendants, they might have been joined in this suit without touching the jurisdiction of the Court, for they are all resident in this State. As plaintiffs they could not be joined without ousting our jurisdiction, for then some of the plaintiffs would have been citizens of the same State as the defendants. (Strawbridge v. Curtiss, 3 *Cranch's Rep.* 267.) Now, in the first place, the other heirs might, if parties, controvert the very fact of heirship in the plaintiff, and that would touch the very marrow of his right to the demand now in question.

The fact, however, is not denied or put in issue by the answer, and, therefore, as to the present defendants, it forms no ground of controversy. But they insist that the present suit will not close their accounts; and that the other heirs may sue them again, and controvert the whole matter now in litigation, and thus vex them

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with double inconveniences and perils. This is certainly true; and it is as certain, that they could not be made plaintiffs without ousting the present plaintiff of his remedy here. They might have been made defendants; but the question is, whether the plaintiff is compellable so to make them, unless they deny his heirship, or they collude with the defendants. If there be no controversy between him and them, he could have no decree against them at the hearing; and it would be strange, if, when he has nothing to allege against them, he must still name them as defendants in his bill. I agree to the general doctrine, that where a residuary legatee sues, he must make the other residuary legatees parties; and I think it analogous to the present case. But there the rule would not apply, if the other residuary legatees were in a foreign country, or without the reach of the jurisdiction of the Court. The case of the next of kin, put by Gilbert, in the passage before cited, is identical with the present. (*Gilb. For. Rom.* 157, 158.) But there the same exception must be implied. And even in a case where a mistake in a legacy, of an aliquot part of the personal estate, was sought to be rectified, and the next of kin were admitted to be necessary parties, (as to which, however, as the executor represents all parties in interest as to the personal estate, a doubt might be entertained, whether, under the peculiar circumstances of this case, they were necessary *defendants*,) (Peacock v. Monk, 1 *Ves.* 127. Lawson v. Barker, 1 *Bro. Ch. Cas.* 303. 1 *Eq. Abrid.* 73. p. 13. Anon. 1 *Ves.* 261. Wainwright v. Waterman, 1 *Ves.* jr. 311.) the Court dispensed with their being made parties, it appearing that they were numerous, and living in distant places, and the matter in dispute being small, and the plaintiff a pauper. (Bradwin v. Harpur, *Ambler*, 374.) The rule is not, then, so inflexible, that it may not fairly leave much to the discretion of the Court; and upon the facts of the present case, it being impossible to make the other heirs plaintiffs, consistently with the preservation of the jurisdiction of the Court, or to make them *defendants*, from any facts which can be truly charged against them, I should hesitate a good while before I should enforce the rule: and if the cause turned solely upon this objec-

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

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tion, I should not be prepared to sustain it. (Clarke v. Russell, 7 *Cranch*, 69. 98.) There is, indeed, a difficulty upon the face of the bill, that it shows no reason why the other heirs were not made parties, as plaintiffs; and if there had been a demurrer, it might have been fatal. But the answer seems to set that right, by disclosing the citizenship and residence of the other heirs; and, in this respect, relying on the facts as a defence, it may well aid the defects of the bill.

"There is, however, a more serious objection to this bill for the want of parties; and that is, that the personal representative of William West is not brought before the Court, and for this no reason is assigned in the bill. Now, it is to be considered that the bill charges the defendants with trust property, *personal* as well as *real*, and prays an account, and payment of the plaintiff's distributive share of each. I do not say that the heir, or next of kin, cannot, in any case, proceed for a distributive share against a third person, having in his possession the personal assets of the ancestor, without making the personal representative a party; but such a case, if at all, must stand upon very special circumstances, which must be charged in the bill. The administrator of the deceased is, in the first place, entitled to his whole personal estate, in trust for the payment of debts and charges, and as to the residue, in trust for the next of kin. The latter are entitled to nothing until all the debts are paid; and they cannot proceed against the immediate debtor of the deceased, in any case, any more than legatees or creditors, unless they suggest fraud and collusion with the personal representative, and then he must be made a party, or some other special reason be shown for the omission. (Newland v. Champion, 1 *Ves.* 105. Utterson v. Mair, 4 *Bro. Ch. Cas.* 270. S. C. 2 *Ves.* jr. 95. Alsagar v. Rowley, 6 *Ves.* 751. Bickley v. Dodington, 2 *Eq. Abrid.* 78. 253.) It is, therefore, in general, a fatal objection in a bill for an account of personal assets, that the administrator is not a party: nor is this objection repelled, if there be none at the time, unless there be some legal impediment to a grant of administration. (Humphreys v. Humphreys, 3 *P. Wms.* 348. Griffith v. Bateman, *Rep. T. Finch.* 334.) Now, upon the facts

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value, it appears, that the Frederick land, after being long hawked about for sale, and having 1000 dollars added to its value by Strode, in the extinction of the mother's life estate, sold for no more than 5500 dollars, 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 8000 dollars. So that the two tracts then stood, in comparison of value, as 4500 to 8000 dollars. 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,

of this case, it is apparent that William West died insolvent; and if so, it would be decisive against the plaintiff's title to any portion of the personalty. And as to the real estate, as that is also liable, in this State, to the debts of the intestate, this fact would be equally decisive of his title to any share in the real trust property. This shows, how material to the cause the personal representative of the intestate is, since he is, *ex officio*, the representative, in cases of this sort, of the creditors. But upon the general ground, without reference to these special facts, I think, that the personal representative of William West, not being a party, is a well founded objection to proceeding to a decree. I am aware, that a want of parties is not necessarily fatal, even at the hearing, because the cause may be ordered to stand over to make further parties; (Anon. 2 *Atk.* 14. *Coop. Eq. Pl.* 289. Jones v. Jones, 3 *Atk.* 111.) but this is not done of course; and rarely, unless where the cause, as to the new parties, may stand upon the bill and the answer of such parties. For if the new parties may controvert the plaintiff's very right to the demand in question, and the whole cause must be gone over again upon a just examination of witnesses, it seems at least doubtful, whether it may not be quite as equitable to dismiss the cause without prejudice, so that the plaintiff may begin *de novo*. (*Gilb. For. Rom.* 159.) If this cause necessarily turned upon this point alone, I should incline to adopt this course."

they established the value of the Fauquier lands between themselves at 7000 dollars; and Strode actually gave an acknowledgment to Wormley for 6500 dollars, the balance of the 7000 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 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 favourably 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."

One 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 M'Cormick, 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.