

*The Lessee of GABRIEL SWAYZE and MARY his wife, Plaintiffs in error,
v. ROBERT BURKE, D. SHERMAN, GEORGE JACKSON and JAMES HINSMAN, Defendants.

Fraud.—Bonâ fide purchaser.

John Ormsby died in Allegheny county, Pennsylvania, in December 1805, having a son, Oliver, who administered to his estate; he had also a son who had married in Mississippi, and who died in 1795, leaving an infant daughter; Oliver Ormsby filed no inventory of the estate of his father, and never settled an account as administrator; and in 1826, he confessed a judgment in favor of the Messrs. Penns, for a part of the purchase-money of valuable real estate, which had been held by John Ormsby, in his lifetime. In the suit against him for this debt, Mr. James Ross acted as the attorney for the plaintiffs; and in 1827, the real estate was sold under an execution issued by Mr. Ross on the judgment, and was purchased by Mr. Ross for \$3000; he having, before the purchase, given Oliver Ormsby to understand, and having publicly declared, that he would hold the property as a security for the debt due to the Messrs. Penns; and on the payment of the debt, that he would relinquish all claim to it. In April 1831, Oliver Ormsby paid the debt to Mr. Ross, and took a conveyance of the property; at the same time, he gave a receipt, as administrator of John Ormsby, to the sheriff, for the balance of of the \$3000; he claimed to hold the property so purchased as his own. In March 1828 Oliver Ormsby wrote to the wife of the plaintiff in this ejectment, who was the daughter of John Ormsby, junior, stating that his father had not left more property than would pay his debts; there was evidence, that less than one-tenth of the real estate would have satisfied the judgment, for which the land sold to Mr. Ross; the latter had no knowledge of any fraudulent purpose of the administrator. The daughter of John Ormsby, junior, having intermarried with Gabriel Swayze, with her husband, brought an ejectment to recover a moiety of the land which was held by Oliver Ormsby, under the conveyance from Mr. Ross. The court instructed the jury, that, "in matters of fraud, courts of law and chancery have a concurrent jurisdiction; it is, therefore, within the province of the jury, to inquire, whether the conduct and proceedings of Oliver Ormsby, whereby the legal title to the property in dispute became vested in himself, for his exclusive use and benefit, were in fraud of his co-tenant Mary Swayze; and if they were, the verdict ought to be for the plaintiffs." "That the fraud should be brought to the knowledge of Mr. Ross; and that if Mr. Ross took a valid title under the sheriff's deed, the title of the vendee would judge be good, under the circumstances disclosed in the evidence." We think that they erred in charging the jury that the deed to Ormsby was valid, unless they should find that Ross participated in the fraud.

It is clear, that a purchaser at sheriff's sale cannot protect himself against a prior claim of which he had no notice; or be held a *bonâ fide* purchaser, unless he shall have paid the money.¹

That fraud is cognisable in a court of law, as well as in a court of equity, is a well-established principle; it has often been so ruled in this court.

As there is no court of chancery, under the laws of Pennsylvania, an action of ejectment is sustained, on an equitable title, by the courts of that state. Such is not the *practice^{12]} in the courts of the United States; and if the plaintiffs in an ejectment fail to show a paramount legal title in themselves, they cannot recover.²

¹ No person can claim to occupy the position of a *bonâ fide* purchaser, without notice, unless he has acquired the legal title, and paid the purchase-money in full. *Villa v. Rodriguez*, 12 Wall. 338. And the payment of the purchase-money must be affirmatively shown, otherwise than by the recital in the deed. *Bolton v. Johns*, 5 Penn. St. 145; *Jackson v. Summerville*, 13 Id. 359; *Coxe v. Surtwell*, 21 Id. 480; *Lloyd v. Lynch*, 28 Id. 419. The purchaser of an equitable title takes subject to all countervailing equities to which it was subject

in the lands of his vendor. *Chew v. Barnet*, 11 S. & R. 389; *Reed v. Dickey*, 2 Watts 459; *Kramer v. Arthurs*, 7 Penn. St. 165. He does not occupy the position of a *bonâ fide* purchaser, as against the owner of the legal title. *Aldrich v. Bailey*, 71 Id. 246.

² It is well settled, that in the federal courts, ejectment will not lie on an equitable title. *Bagnell v. Broderick*, 13 Pet. 436; *Gilman v. Poindexter*, 10 How. 257; *Fenn v. Holme*, 21 Id. 481; *Hoopes v. Scheimer*, 23 Id. 235; *Sheirburn v. Cordover*, 24 Id. 423; *Carson v. Boudinot*,

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ERROR to the District Court for the Western District of Pennsylvania. The case, as stated in the opinion of the court, was as follows :

An action was instituted in the district court of the United States for the western district of Pennsylvania, by the lessors of the plaintiffs, Gabriel Swayze and wife, citizens of the state of Mississippi, for the recovery of a tract of land in Allegheny county, in the state of Pennsylvania, to October sessions 1833. The plaintiffs and the defendants claimed the land under a deed from John Penn and John Penn, junior, proprietaries of Pennsylvania; the land forming part of one of the manors reserved by the proprietaries. John Ormsby died intestate, in 1791, and left a son, named Oliver, a daughter, Sidney, who intermarried with John Gregg; a son named John, who married and died in the state of Mississippi, leaving a daughter Mary, an infant, at the time of his decease; and who had since intermarried with Gabriel Swayze, the plaintiff in error. In December 1807, Oliver Ormsby administered to the estate of his father, John Ormsby, and gave the usual administration bonds; but he filed no inventory of the estate of the intestate; nor did he, at any time, settle an account of his administration of the estate.

The estate of John Ormsby, deceased, was indebted to John Penn and John Penn, junior, for the land purchased from them, in the sum of \$467.64; and on the 6th of September 1826, the administrator confessed a judgment in their favor, for the amount of the debt; upon which judgment, an execution was forthwith issued by Mr. Ross, their attorney, and the land of John Ormsby was levied on and sold; Mr. Ross being the purchaser of the same, for \$3000. At the time of the purchase of the estate, Oliver Ormsby, the administrator, was absent. Mr. Ross declared, in the most public manner, that Ormsby, the administrator, or any of the family of the deceased John Ormsby, might redeem the land, at any time, on the payment of the debt and interest. Before the sale, Oliver Ormsby, the administrator, was informed by Mr. Ross, that he only wanted the money due upon the judgment, and that he did not intend to buy the land, to hold it. Ormsby, the administrator, was in possession of the land, at the time of the sale, and continued in possession of it; and at the time of the sheriff's sale, [*18 or when the deed for the land was made to him, by the sheriff, Mr. Ross paid no money. The rents and profits of the land were continued to be received by Oliver Ormsby; and in April 1831, he paid to James Ross, Esq., the sum of \$523, the amount of the judgment, and the interest due thereon, and took from him a conveyance of the land in fee-simple; giving to the sheriff, at the same time, as administrator of John Ormsby, a receipt for the sum of \$3000, less \$523, the amount of the payment to James Ross, Esq., in satisfaction of the debt due to the Messrs. Penns. The land consisted of eighteen coal-hill lots, and of thirty-five acres of land adjoined to them, and was now of great value. It was highly valuable at the time of the sheriff's sale. The defendants were in possession of the property, as tenants of Oliver Ormsby, when the suit was commenced.

In March 1828, in answer to an application for information as to the value of the estate of John Ormsby, by Mrs. Swayze, one of the lessors of

2 W. C. C. 33; *Carpentier v. Montgomery*, 13 Wall. 480. Nor can a defendant in ejectment defend in an equitable title. *Larrieviere v.*

Modegan, 1 Dill. 455; *Hull v. Austin*, 1 Deady 104; *Stark v. Starr*, 1 Sawyer 15.

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the plaintiff, Oliver Ormsby wrote, "my father, at his death, was not possessed of more property than a sufficiency to pay his debts, having, from time to time, sold to individuals, and conveyed to his children." Evidence was also given, conducing to prove, that by a sale of two of the coal lots, the judgment could have been satisfied.

The case was tried at October term 1835, and a verdict and judgment were rendered for the defendants, under the charge of the district judge. The plaintiffs excepted to the opinion of the court, and prosecuted this writ of error.

On the trial of the cause, the counsel requested the district judge to charge the jury, "in matters of fraud, courts of law and chancery have a concurrent jurisdiction. It is, therefore, within the province of the jury, to inquire, whether the conduct and proceedings of Oliver Ormsby, whereby the legal title to the property in dispute became vested in himself, for his exclusive use and benefit, were in fraud of the rights of his co-tenant, Mary Swayze; and if they were, the verdict ought to be for the plaintiffs." The court gave the instructions as requested, with this qualification, that the fraud should be brought to the knowledge of Mr. Ross; if he took a valid title, under the sheriff's deed, the title of his vendee would be good, under the circumstances disclosed in the evidence.

*14] *The argument of *Fetterman*, for the plaintiffs in error; and of *Watts*, for the defendants, was submitted to the court, in writing, at the close of January term 1836.

Fetterman contended, that it is now an admitted maxim at law, that fraud is cognisable at law, as well as in equity; and whether that inquiry can be made in an action of ejectment, is the question. This court, in the case of *Gregg v. Sayre's Lessee*, 8 Pet. 252, says, "it is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery in case of fraud; but when matters alleged to be fraudulent are investigated in a court of law, it is the province of the jury to find the facts, and determine their character, under the direction of the court." It is worthy of remark, that that was an action of ejectment.

We find also, that as early as *Fermor's Case*, 3 Co. 77 a, the principle settled, "that fraud vitiates all transactions;" so, in *Gilbert v. Burgott*, 10 Johns. 462, which was an action of ejectment, KENT, Chief Justice, in delivering the opinion of the court, says, "courts of law have concurrent jurisdiction in all cases of fraud; fraud will invalidate, in a court of law, as well as in a court of equity, and annul every contract and conveyance connected with it; a fraudulent estate is as no estate, in judgment of law." Lord MANSFIELD, in the case of *Cadogan v. Kennett*, Cowp. 434, says, "the principles and intent of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law could have attained every end effectuated by the statutes of Elizabeth:" and the same judge, in *Bright v. Eynon*, 1 Burr. 395, remarks, "fraud or covin may, in judgment of law, avoid every kind of act." Courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. So, Judge PARSONS, in *Boynton v. Hubbard*, 7 Mass. 112, "but when a court of law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief shall not be obtained there." So, in

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18 Johns. 111, which was the case of an ejectment on an alleged fraud in a sheriff's sale, the same principle is expressly re-affirmed ; also, in *Fleming v. Slocum*, same book, p. 403-4 ; and in Pennsylvania, in *Gilbert v. Hoffman*, 2 Watts 66, which was an action of ejectment, Justice ROGERS, in delivering the opinion of the court, reiterates the same principle : "a covinous conveyance of land, is as no conveyance against the interest intended to be defrauded." "It is certainly not the duty of a court, *to protect the interest of a person who has been detected in an attempt at fraud." [*15 "The devisee or heir whom the vendee attempted to defraud, for the attempt affects him as well as creditors, asks the aid of the statute against this fraudulent conveyance, on the ground, that his title cannot be affected by a fraudulent sale. His remedy is strictly at law, for fraud is cognisable in a court of common law, as well as in a court of equity. A fraudulent vendee has no equity, and is not entitled to claim the protection of law on that ground." This case, as well as in the cases of *Riddle v. Murphy*, 7 Serg. & Rawle 230 ; *Bowers's Lessee v. Crafts*, 18 Johns. 110 ; *Lazarus v. Bryson*, 3 Binn. 54 ; 5 Cow. 67, 78 ; *Johnston's Heirs v. Harvy*, 2 P. & W. 93, were actions of ejectment, in which the question of fraud was considered as proper matter of inquiry.

Unless, according to the opinion of the judge of the district court, Mr. Ross is guilty of fraud, the plaintiffs cannot recover ; no matter how fraudulent the intentions and conduct of Oliver Ormsby may have been. The heir of John Ormsby cannot recover from Oliver Ormsby, unless she proves that Mr. Ross was *particeps criminis*. The debt for which the property was sold, was due at the death of John Ormsby ; its existence was known to Oliver Ormsby, his administrator ; he promised to pay it, in 1820. In Pennsylvania, lands have always been assets for the payment of debts. *Graff v. Smith's Administrators*, 1 Dall. 481 ; *Morris v. Smith*, 1 Yeates 238. Either to an action of debt, as a cause of action, or when resort must be had to a *scire facias*, after the death of the debtor, it issues not against the heirs, upon whom the law cast the inheritance ; but against the executor or administrator, who, so far as relates to the payment of the debts, is the trustee of the real estate. *Rogers v. Rogers*, Hopk. Ch. 526-7, a case very similar to this ; and *Brown v. Webb*, 1 Watts 411.

How does it become material to show, that Mr. Ross was guilty of fraud ? It is alleged, that Ormsby was guilty of an attempt to defraud his co-heirs out of this property ; and if he was guilty of such, how can his situation be either benefited or injured by the fact that Mr. Ross was or was not equally guilty of the fraud ? The law abhors all kinds of fraud, whether open or by any kind of indirection ; and when the action is against the party guilty of the fraud, or his heirs, it is *not for him or his heirs to shelter themselves from the consequences of his own wicked designs. As early [*16 as *Tresham's Case*, 9 Co. 110, in an action against an administrator, it was resolved by the court, on the 4th point of the case, "that although a general allegation of covin, which, as held in *Talboise's Case*, ought to be between two or more, would be sufficient ; yet *à fortiori*, in case of fraud which may be in the heart of one only ; for if one by deed make a fraudulent gift of his goods to divers, who knew not of it, it is fraudulent in him who makes it." And so it was adjudged in *Turner's Case*, 8 Co. 133 a, that fraud may be in one or one party only ; and again, in the same case, the court say, that

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fraud may be committed by one alone: and in *Turner's Case*, the court held, that although an administrator may lawfully confess a judgment in favor of one creditor, yet if that creditor afterwards is satisfied, or offers to compromise, and offers to take sixty pounds for one hundred pounds, and the administrators do not do it, to the intent that the judgment may stand in force, so that third persons may be defrauded, and the administrators convert the deceased's goods to their private use, which is altogether against their office and the trust reposed in them; and therefore, be such agreement, either precedent, before the recovery, or subsequent, after the recovery, it is all one as to the creditor, who is a third person; for he is defrauded as well by the subsequent agreement as by the agreement precedent: and in 2 Johns. Ch. 42-3, it is ruled, that a deed, fraudulent on the part of the grantor, may be avoided, though the grantee may be a *bona fide* purchaser, and ignorant of the fraud.

This brings us to the important inquiry in this case, whether an executor or administrator, or any other individual standing in a fiduciary capacity, can purchase the real estate, either directly or indirectly, at a public sale, occasioned by his own neglect and misfeasance, as in this, and hold the same, to the exclusion of his co-heirs; upon this point, the books are full of authority. Courts both of law and equity have reiterated the position, that it cannot be done. The law will not thus suffer a man to be led into temptation, by taking away from him all inducement to fraud. The general principle is strongly laid down in the able commentaries of Mr. Justice Story, on Equity, 318. The principle applies, however inconvenient to purchasers in any given case; it is poisonous in its consequences; and the same principle is advocated by Chancellor Kent, in his commentaries, vol.

*17] 4, p. 438-9. *On this point, there was also cited, *Wormley v. Wormley*, 8 Wheat. 441; 1 Mason 241, 345; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Lazarus v. Bryson*, 3 Binn. 54; *Moody v. Vandyke*, 4 Ibid. 43; *Rham v. North*, 2 Yeates 118; *Lamberton v. Smith*, 13 Serg. & Rawle 310; *Rogers v. Rogers*, Hopk. Ch. 527; *Downes v. Gray*, 3 Meriv. 200; *Nelthrop v. Pennymann*, 14 Ves. 510; *Whelpdale v. Cookson*, 1 Ves. sen. 9; *Ex parte Lacey*, 6 Ves. 626; *Lister v. Lister*, 6 Ibid. 630; 1 Powell on Mortgages 124; *Coles v. Trecothick*, 9 Ves. 234; *Evertson v. Tappen*, 5 Johns. Ch. 439.

After referring to these cases, we may appeal to the facts of this case, and confidently ask, where was the necessity of proving that Mr. Ross lent himself to the fraudulent intentions of Oliver Ormsby, before we can recover from trustees the estate he and they held by fraud. It is humbly imagined, in this part of the case, the learned judge was in error. An individual may concert a scheme of fraud, he may employ a hundred different agents, they may each believe his intentions perfectly honest—they, as in this case of Mr. Ross, may not know that there were other lawful heirs to the estate, except Ormsby and his lunatic sister, then partly under his care—they may each believe his intention pure; and yet we must prove them all parties and privies to the fraudulent intentions of the maker of the fraud, before we can defeat the estate so unfairly acquired. How was Mr. Ross to know whether there was personal property to pay the debts? How was he to know that Mrs. Swayze was an heir, residing in Mississippi? How was he to know that Oliver Ormsby had been guilty of falsehood to her; that in

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1828, a year after the sheriff sold, before a dollar was paid either by Ross or Ormsby, that Ormsby had written to her, telling her his father had left no property? Yet Oliver Ormsby knew all these things, and the court say, although he was guilty of fraud, yet the plaintiffs cannot recover, unless Mr. Ross was also guilty of it.

In considering that part of the charge of the court connected with this point, we do not wish to scan it nicely, but to give it a fair and liberal construction; and in doing so, must observe, that it neither corresponds with the facts of the case, nor the law of the land, as we understand it. It is all true, that Mr. Ross attended at the sheriff's sale, and had the property knocked off to him in a lump, "chilling, by his presence, the sale," saying, "If Ormsby or any of his family can get able to redeem it, he, or any of his family, might have it, on paying the debt and interest;" the very effect of a declaration of this kind would be *to prevent the property from bringing its full value. Ross never interfered with Ormsby in the [*18 possession of the property—paid no money to the sheriff, and there was no money paid until 1831, when Ormsby paid Ross the amount of the judgment, and receipted to the sheriff, as administrator of his father's estate, for the balance of the bid at the sale. How then could the court take the facts of the case from the jury, and say "that Mr. Ross, who never paid a dollar, was a *bona fide* legal purchaser—that he bought for himself, not as a trustee for Ormsby or any body else?"

It was relied on, as one of the strong circumstances conducing to prove fraud, that there was no change of possession. It may also be well asked, to whom did the property belong, when Ormsby receipted to the sheriff, as administrator of his father's estate? The property is paid for, if paid at all, with the money of the heirs of John Ormsby. Without their consent, no man and no court had a right to convert more of the real estate into money, than was sufficient to pay the debts. We have here the case of an administrator purchasing at sheriff's sale, individually, and paying for the land with the plaintiff's money. Can plaintiffs resort to the land? In 1 Serg. & Rawle 144, where real estate was bought by a guardian, with the funds of his wards, the land was treated as theirs; and his making the conveyances to himself exclusively, was held fraudulent of itself: what is this but the ordinary case of a man purchasing with the money of others, and taking the deed in his own name? See *Kister v. Kister*, 2 Watts 324; and *Lane v. Dighton*, Ambl. 408; *Lench v. Lench*, 10 Ves. 506; and *Waite v. Whorwood*, which was the case of an executor, in 2 Atk. 159; *Wolf v. Eichelberger*, 2 P. & W. 347. So, in *Hempstead v. Hempstead*, 2 Wend. 109, it is expressly said by the court, that *cestuis que trust*, who have paid the consideration money of land patented in other names, may maintain ejectment. See opinion of the court, page 134. In *Fellows v. Fellows*, 4 Cow. 682, it was decided, that an administrator who buys land on a judgment of his intestate, must account for it to his *cestuis que trust*; he was an agent and trustee, and could not divest himself of the trust. Cited also, on this point, the cases of *Hampton, Guardian*, 17 Serg. & Rawle 144; *Ryerson v. Nicholson*, 2 Yeates 516; *Groff v. Jones*, 6 Wend. 522; *Cary v. Sprague*, 12 Ibid. 46; *Bowen's Lessee v. Craft*, 18 Johns. 110; *Jackson v. Newton*, 18 Ibid. 362; *Woods v. Monell*, 1 Johns. Ch. 502; *Stead v. Course*, 4 Cranch 403; *Sampson v. Sampson*, 4 Serg. & Rawle 329; *Greenleaf v.*

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Burk, 9 Pet. 292 ; 2 Watts *494-5; *Commonwealth v. Breed*, 4 Pick. 460 ; *Benham v. Cary*, 11 Wend. 83 ; *Bryden v. Walker*, 2 Har. & Johns. 292 ; 8 Cow. 406 ; 4 Wend. 303 ; 2 Watts 66 ; 7 Wend. 438 ; 2 Mason 536 ; *Rhoades v. Selin*, 4 W. C. C. 720.

Watts, for the defendants in error, upon the exception taken by the counsel for the plaintiff to the charge of the court, that fraud must be brought to the knowledge of Mr. Ross, and that the title derived from him was good in his vendees, contended, that this point involved a question of law and a question of fact. As to the question of law, that the court had jurisdiction of the subject-matter of controversy, the court answered it as requested by the plaintiff ; for the whole cause, the charge of the court, the verdict and judgment, was based upon the fact that the court did entertain jurisdiction. And as to the matter of fact, whether the conduct of Oliver Ormsby was fraudulent or not, it was expressly referred to the jury to determine. Any other direction by the court would have been erroneous. This point necessarily raises the question, whether the conduct of Ormsby was fraudulent ? The argument of the plaintiff assumes the fact, that Mr. Ormsby was the trustee of the heirs of his father, John Ormsby, deceased. In Pennsylvania, there is no kind of connection between the administrator of the personal estate, and the interests of the heirs, as regards the real estate ; as to the realty, the administrator is as a perfect stranger ; and upon a sale of it by the sheriff, upon an execution, he may become the purchaser. Cases have been cited, in the argument of the plaintiff's counsel, to show that an administrator cannot become a purchaser of land sold by himself ; also, that fraudulent conduct of an administrator, in making sale of land, will vitiate it. This is true, but it is difficult to discover what application it has to the law of this case. Whenever an administrator makes a sale of land in Pennsylvania, he does not do it as an administrator *ex officio*, but by a special order of the orphans' court, for some particular purpose ; such as the payment of debts. In such case, he cannot be the vendor and vendee ; and it is equally plain, he must act fairly in conducting such sale ; and this is the principle established by the cases referred to.

If the plaintiff had it in his power to show that personal estate of John Ormsby had come to the hands of his administrator, O. Ormsby, to an amount *20] sufficient to pay the debt of the Penns ; and that he had *not paid it, but suffered the land to be sold, and become the purchaser himself, there would have been some pretext for the argument, that O. Ormsby's title was fraudulently obtained ; but as the facts are, and the proof in the cause is, that, although O. Ormsby did take out letters of administration, no estate ever came to his hand to be administered, or which, by law, was applicable to the payment of the debts of the intestate ; no trust, in relation to the land in dispute, existed between the parties to this action ; and Oliver Ormsby was as competent to become the purchaser at sheriff's sale, as any other individual.

But he did not thus purchase. When James Ross purchased the land, he purchased it for himself ; and if he be believed, he never had any previous understanding or arrangement with O. Ormsby on the subject. His object was, first, to secure the debt due to the Penns ; and that accomplished, he was willing to convey to O. Ormsby his title to the land, upon being released

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from the payment of the balance of the purchase-money, after Penns' judgment was paid. Mr. O. Ormsby agreed to take the land from him, at the price he had paid for it. Who were defrauded? The heirs of John Ormsby? By whom? Mr. Ross expressly says, that O. Ormsby was not present at the sale, that he was away from home, and when he returned, he told him of it; he also says, that, at the time of the sale, his intention was, and he said, at the time the property was sold, if Mr. Ormsby or any other of his family was able to redeem it, he might have it, on the payment of the money. At that period, these lots were of very little comparative value; and perhaps, O. Ormsby was the only individual who would have given for them the price at which they sold at sheriff's sale.

O. Ormsby gave his receipt to the sheriff for the balance of the purchase-money, after the payment of the lien for which the land was sold, thus charging himself as administrator, and his surety in the administration bond, with this money, for which he was accountable to the heirs. Under the facts of this case, it is quite impossible, that there could have been fraud on the part of O. Ormsby alone; if fraud were committed, James Ross must have been a party to it; for, if he were a *bond fide* purchaser of the land at sheriff's sale, all idea of fraud, subsequently committed, is out of the question; for O. Ormsby never had one trait of the character of a trustee with respect to this land. The conveyance by James Ross to him, is absolute, and unqualified by any trust; and it is not pretended to be shown, that O. Ormsby purchased the land in trust for the plaintiff. It was pertinently *remarked by the court below, in their charge to the jury: "Suppose, [*21 the property had depreciated in value, after he received the conveyance from Mr. Ross, would he have been permitted, under the circumstances disclosed, to cast it upon the estate of John Ormsby, and to cancel his liability arising from his receipt to the sheriff? But the claim of the plaintiff is founded upon an alleged fraud of O. Ormsby; and the answer to it is, that it most manifestly appears, that, before he did one act, or uttered one syllable in relation to the land in controversy, there was an indefeasible legal title vested in James Ross, by a judicial sale. O. Ormsby was bound by no legal or moral obligation to accept James Ross's offer to permit him to redeem; and if he did accept it, it was upon the terms mentioned in the deed, by which the transaction was consummated and the title vested in him."

But it is said, that a number of lots were levied on in mass, and so sold, instead of having been separated. What had O. Ormsby to do with that? If heirs or creditors were injuriously affected by it, their remedy was to apply to the court to set the sale aside; but that was not done: nor have the defendants, upon the trial of this cause, pretended to prove that the lots were worth one dollar more than the price for which they sold.

The question of fraud, being a matter of fact, was distinctly submitted to the jury by the court; and they have found against the allegation.

McLEAN, Justice, delivered the opinion of the court.—An action of ejectment was brought in the western district of Pennsylvania, by the plaintiffs, against the defendants, to recover the land in controversy. Both parties claim by descent from John Ormsby, sen., who died in Allegheny county, Pennsylvania, in December 1805. The deceased had a son, Oliver,

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who survived him, and who administered on his estate ; and a daughter, Sidney, who married Isaac Gregg. He had also a son called John Ormsby, jun., who married in the Mississippi country, and died in August 1795. Mary Swayze, the wife of the plaintiff, is the daughter of this son ; and was an infant at his decease.

In December 1807, Oliver Ormsby gave bond, as administrator of his father ; but it seems he filed no inventory of the personal estate, as the law required, nor did he ever settle his administration account. On the 6th

*22] September 1826, as administrator, he confessed a *judgment for \$467.64, in favor of Messrs. Penns, Mr. James Ross acting as the attorney of the plaintiffs. An execution was issued on this judgment, and the premises were sold to Mr. Ross for \$3000. He declared, publicly, at the sale, that Ormsby or any of his family might redeem the land, at any time, on the payment of "debt and interest ;" and Mr. Ross further states, that before the sale, Mr. Ormsby was informed, that he only wanted the money on the judgment, and that he did not intend to buy the land, to hold it. No money was paid by Mr. Ross at the sheriff's sale, or at the time he received the sheriff's deed. Ormsby remained in possession of the land, receiving the rents and profits ; and in April 1831, four years after the sheriff's sale, he paid Ross \$523, the amount of the judgment and interest ; and received from him a conveyance of the land. At this time, Ormsby receipted to the sheriff, as administrator, for the balance of the \$3000, after deducting the amount paid to Ross. The sheriff's deed to Ross, and the deed from him to Ormsby, were recorded on the same day.

The land in controversy consists of eighteen coal-hill lots near Pittsburgh, and thirty-five acres adjoining them, which is now of great value ; and was worth a large sum, at the time of the sheriff's sale.

There was a letter in evidence, written by Oliver Ormsby to Mrs. Swayze, dated 19th March 1828, at Natchez, in which he says : "My father, at his death, was not possessed of more property than a sufficiency to pay his debts ; having from time to time, sold to individuals, and conveyed to his children." And there was evidence conducing to show, that the sale of two of the lots would have satisfied the judgment.

On these facts, and others in the case, the counsel for the plaintiffs prayed the court to instruct the jury, that, "in matters of fraud, courts of law and chancery have a concurrent jurisdiction. It is, therefore, within the province of the jury to inquire, whether the conduct and proceedings of Oliver Ormsby, whereby the legal title to the property in dispute became vested in himself, for his exclusive use and benefit, were in fraud of his cotenant, Mary Swayze ; and if they were, the verdict ought to be for the plaintiffs." This instruction was given, as requested, with this qualification, "that the fraud should be brought to the knowledge of Mr. Ross ; and that, if he took a valid title under the sheriff's deed, the title of
*23] *his vendee would be good, under the circumstances disclosed in evidence." To the refusal of the instruction, as requested, and the instruction as given, an exception was taken ; which raises the question of law, whether, to render the title of Ormsby, as set up by the defendants, inoperative and void, it is essential, that Ross should have participated in the fraud.

The charge of the judge was explicit on this point. He not only

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instructed the jury, that, to make the title of Ormsby fraudulent, Ross must have had a knowledge of the fraud ; but assuming, it would seem, the province of the jury, he declared that the fairness of the transaction was above suspicion.

That fraud is cognisable in a court of law, as well as in a court of equity, is a well-established principle. It has been often so ruled in this court. As there is no court of chancery, under the laws of Pennsylvania, an action of ejectment is sustained, on an equitable title, by the courts of that state. Such is not the practice in the courts of the United States ; and in this case, if the plaintiffs fail to show a paramount legal title in themselves, they cannot recover.

It is unnecessary to inquire, whether, under the circumstances, Ormsby did not receive the conveyance of the land from Ross, in trust for the heirs of his father generally. This inquiry would be appropriate in the exercise of a chancery jurisdiction, on a bill framed for the purpose. But the jury were limited to the question of fraud. The deed by the sheriff to Ross, and the one from him to Ormsby, contain upon their face all the requisites of legal conveyances ; and they must be operative to convey the title, unless the circumstances under which they were executed make them void.

In 1807, Ormsby took out letters of administration ; but he seems to have acted, in the management of the estate, without regard to the law, or the obligations of his administration bond—he filed no inventory, made no settlement of his accounts. In 1825, he promised to pay the debt in the hands of Ross, but he took no step to fulfil this promise. It was his duty, as administrator, to make application to the orphans' court for authority to sell as much of the real estate as would pay the debt ; but, to obtain this order, it would have been necessary to show that the personal assets were exhausted. In 1826, he confessed a judgment, and suffered an execution to be taken out, and the property in controversy to be sold. He remained in the undisturbed possession of the property, enjoying the rents and profits ; and then received a conveyance of the land from Ross, on [*24 the payment of the judgment, and receipting to the sheriff for the balance of the purchase-money. And prior to this time, by his letters, he informs Mrs. Swayze, who lived in Mississippi, and still resides there, that the property left by his father would all be consumed in the payment of debts.

In deciding the question of law raised by the exception, it may not be proper for this court to say, whether these facts do not show fraud in the administrator. The facts were properly before the jury, and it was for them to determine the question of fraud. But, may Ormsby and his representatives hold the land under their deed, unless it shall be shown that Ross participated in the fraud ?

A *bonâ fide* purchaser, without notice, is not affected by the fraud of his grantor ; and it is admitted, that a conveyance by such purchaser, to a person who may have knowledge of the fraud, would be valid. But the purchase and conveyance of Ross, cannot be considered as coming within this rule. In the first place, Ross did not purchase, with the intention of holding the property. This was declared publicly at the sale ; and some time before it took place, the same determination was made known by him to the administrator. And, in the second place, it appears the purchase was never perfected by Ross. He received the sheriff's deed, but he paid no part of

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the consideration. In this state the matter remained four years; and until the administrator paid the judgment, and receipted to the sheriff for the residue of the purchase-money. On this payment, he received a deed from Ross; and then he caused the sheriff's deed to be placed on record. In making the purchase, Ross seems to have had no design to aid the administrator in the perpetration of a fraud, if such were his intention; or to defeat or embarrass the claims of the heirs of John Ormsby, sen. By the proceeding, he was desirous of securing the debt placed in his hands for collection; and for the payment of which he felt himself personally responsible. The judgment, and the sale of the land, secured the desired object. It might have been secured by the judgment only. The purchase, at the sheriff's sale, was not made by Ross, on his own account, or for the benefit of the plaintiffs in the judgment. Having fixed a lien on the land by the judgment and sale, he did not desire to complete his purchase by the payment of the money. *And it is clear, that a purchaser at sheriff's sale, cannot protect himself against a prior claim, of which he had no notice; or be held a *bonâ fide* purchaser, unless he shall have paid the money.

Had the administrator, under the circumstances of this case, become the purchaser at the sheriff's sale, could he have held the land, as a *bonâ fide* purchaser? His omission of duty, in failing to account for any assets which may have come into his possession, and his neglect to apply to the orphans' court, for authority to sell a part of the real estate to pay the debt, connected with the judgment and the proceedings under it, are facts from which a jury might, in the exercise of their judgment, have inferred fraud. Had the administrator fraudulently furnished an agent with money, and employed him to purchase at the sheriff's sale, could a title thus acquired be held valid against the heirs of John Ormsby, sen., though the deed might have been made to the agent? The agent may be supposed to have been made the innocent instrument of fraud, by the administrator; and whether the title apparently remained in the agent, or had been conveyed to the administrator, could not the fraud be inquired into at law? There may not have been, in terms, an agreement between Ross and the administrator, that the purchase should be made at the sheriff's sale, by the former, as agent of the latter. But, before the sale, the administrator was assured by Ross, that he would not purchase to hold the land; and his high character was a sufficient guarantee on the subject; and may not this conduce somewhat to show to a jury why the eighteen lots, and the thirty-five acres adjoining, were sold on the execution, when the sale of two or three of the lots would, probably, have satisfied the judgment? The money was paid by the administrator.

In making the purchase, Ross seems, in effect, to have acted as the agent of the administrator; and it was proper for the jury to inquire, whether the transaction was not fraudulent. If the administrator suffered the land to be sold, through the agency of Ross, with the view of securing the title to himself, to the exclusion of the other heirs of his father, the proceeding was fraudulent and void. And as Ross could not be considered a *bonâ fide* purchaser, against the legal and equitable right of the plaintiffs, he not having paid the purchase-money; the deed which he executed to Ormsby is not a *bonâ fide* conveyance. Had the plaintiffs brought their action against

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Ross, he could not have defended himself, under the sheriff's deed :
 *without showing the payment of the consideration. Nor is this deed a good defence against the right of the plaintiffs, under the [*26
 circumstances of the case, when set up by Oliver Ormsby or his representatives. To the objection already stated to the title of Ross, may be super-added all the circumstances going to show fraud in the administrator ; and of which the jury are the proper judges.

We think, therefore, that the judge erred in charging the jury that the deed to Ormsby was valid, unless they should find that Ross participated in the fraud ; and on this ground, the judgment of the court below is reversed, and the cause remanded for further proceedings.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel : On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the district court be and the same is hereby reversed ; and that this case be and the same is hereby remanded to the said district court, with instructions to award a *venire facias de novo*.

*NATHANIEL S. BENTON, District-Attorney of the UNITED STATES [*27
 for the Northern District of New York, v. MELANCTHON T.
 WOOLSEY, The BANK OF UTICA, *et al.*

Practice.

The district-attorney of the United States filed an information in his own name, in behalf of the United States, in the district court for the northern district of New York, to enforce a mortgage given to the United States, by Woolsey, one of the defendants. This form of proceeding had been for a long time used, without objection, in the courts of the United States, in New York ; and was doubtless borrowed from the form used in analogous cases, in the courts of the state of New York, where the state itself was the plaintiff in the suit : the United States may be considered as the real party, although, in form, it is the information and complaint of the district-attorney.

It is certainly desirable that the practice should be uniform in the courts of the United States ; and that, in all suits where the United States are the real plaintiffs, the proceeding should be in their name ; unless it is otherwise ordered by act of congress.

APPEAL from the District Court for the Northern District of New York. The district-attorney of the United States for the northern district, filed in the district court, an information on behalf of the United States, for the purpose of foreclosing a mortgage executed by Melancthon T. Woolsey to the United States, in July 1825, as a security for the payment of a debt due by him to the United States, in one year after its date. The mortgage comprehended land in the county of Jefferson, and in the county of St. Lawrence, New York ; it was recorded in Jefferson county, on the 26th day of November 1830, and in the county of St. Lawrence, on the 10th of June 1831.

The bank of Utica had obtained a judgment against Melancthon T. Woolsey, in the supreme court of New York, on the 17th of October 1816, for \$16,000, which judgment was docketed on the 24th of November 1817. No execution was issued on this judgment until it was revived by a *scire facias*, on the 9th July 1828. A *fieri facias* was then issued on the judg-