time of the decree or order declaring him a bankrupt. The word "order" in the 15th section refers either to that or to the order of sale; it is not material to which. If to the decree, then the deed of the assignee conveys only such title and estate as the bankrupt then had; if to the order of sale, then that is the time to which his right is referred. But in neither case can a sale divest a lien "existing before or at the time," or "immediately" before such order. Thus taken, the Bankrupt Act is an affirmance of the universal principle as laid down by the Supreme Court in *Rankin* v. *Scott*, 12 Wheat., 179, "that a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds," unless it be defective, or the party holding it has done some act to postpone him; and that a purchaser is bound by the lien unless there is a prior act of the legislature to protect him from it. 12 Wheat., 80. The second question therefore is answered in the negative.

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*333] *WILLIAM OLIVER AND MICAJAH T. WILLIAMS AND OTHERS, APPELLANTS, *v.* ROBERT PIATT.

In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosesoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice.[1]

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[1] CITED. *Clements* v. *Moore*, 6 Wall., 316; *Ex parte Morris & Johnson*, 9 Id., 607; *Slaughter* v. *Glenn*, 8 Otto, 245; *National Bank* v. *Insurance Co.*, 14 Id., 70; *Hooley* v. *Gieve*, 9 Abb. (N. Y.), N. C., 29; s. c. 9 Daly, 115; *Abel* v. *Brown*, 55 Md., 221; *Williamson* v. *Ellis*, 12 Phil. (Pa.), 339.

The *cestui que trust* may follow the property into the hands of a mere volunteer, whether he had notice or not. *Mansell* v. *Mansell*, 2 P. Wms., 679; *Saunders* v. *Dehew*, 2 Vern., 27; s. c. 2 Freem.Ch., 123; *Pye* v. *George*, 2 Salk., 680; *Boursett* v. *Savage*, L. R. 2 Eq., 134; *Lyford* v. *Thurston*, 16 N. H., 399. But third parties cannot require the *cestui que trust* to follow the trust property into the hands of purchasers for their protection. *Barr* v. *Cubbage*, 52 Mo., 404; *Smith* v. *Bowen*, 35 N. Y., 83.

So the property may be followed into the hands of a purchaser for value if he have notice of the trust. *McLeod* v. *First National Bank*, 42 Miss., 99; *Jones* v. *Haddock*, 41 Ala., 262; *Joor* v. *Williams*, 38 Miss., 546; *Lathrop* v. *Bampton*, 31 Cal., 17; *Aynesworth* v. *Halderman*, 2 Duv. (Ky.), 655; *Ryan* v. *Doyle*, 31 Iowa, 53; *Smith* v. *Walter*, 49 Mo., 250; *Joiner* v. *Cowing*, 17 Hun (N. Y.), 256; *Liggett* v. *Wall*, 2 A. K. Marsh. (Ky.), 149; *Denn* v. *McKnight*, 6 Halst. (N. J.), 385; *Hood* v. *Fahnstock*, 1 Pa. St., 470; *Wright* v. *Dame*, 22 Pick. (Mass.), 55; *Wigg* v. *Wigg*, 1 Atk., 382.

But a purchaser for a valuable consideration, without notice of the trust, is fully protected. *Jerrard* v. *Saunders*, 2 Ves., 457; *Fagg's* case, 1 Vern., 52; 1 Ch. Cas., 68; *Willoughby* v. *Willoughby*, 1 T. R., 763; *Boone* v. *Chiler*, 10 Pet., 177; *Varick* v. *Briggs*, 6 Paige, (N. Y.), 325; *High* v. *Batte*, 10 Yerg. (Tenn.), 335; *Halstead* v. *Bank of Kentucky*, 4 J. J. Marsh. (Ky.), 554; *Dixon* v. *Caldwell*, 15 Ohio St., 412; *Dillaye* v. *Commercial Bank*, 51

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Oliver et al. *v.* Piatt.

Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust.[2]

The option, however, belongs to the *cestui que trust* alone and is for his benefit, and not for the benefit of the trustee.[3]

If the trustee, after such an unlawful conversion of the trust property, should re-purchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such a case, has no right to insist that the trust shall, upon the re-purchase, attach exclusively to the original trust property.[4]

Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original property.

What constitutes notice of a trust?

An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee.[5]

Where, upon the face of the title-papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made,

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N. Y., 345; *Colesbury* v. *Dart*, 58 Ala., 573; *Hamilton* v. *Mound City Mutual Life Ins. Co.*, 3 Tenn. Ch., 124; *Heilner* v. *Imbrie*, 6 Serg. & R. (Pa.), 401; *Tomkins* v. *Powell*, 6 Leigh (Va.), 576. This rule is a shield to protect, and not a sword to attack, or a cloak for fraud. And the purchaser must *clearly* show that he is an innocent purchaser for value. *Marshall* v. *Frank*, 8 Pr. Ch., 480; s. c. 1 Anstr., 14; *Dobson* v. *Leadbeater*, 13 Ves., 230; *Hardingham* v. *Nichols*, 3 Atk., 304; *Kelsal* v. *Bennett*, 1 Id., 522; *Hughes* v. *Garner*, 2 Younge & C. Exch., 328; *Hughes* v. *Garth*, Amb., 421. See *Parker* v. *Crittenden*, 37 Conn., 148.

[2] APPLIED. *Tappan* v. *Ailsworth*, 13 R. I., 585; *Brown* v. *Lambert*, 33 Gratt. (Va.), 263. DISTINGUISHED. *Linville* v. *Leininger*, 72 Ind., 494. CITED. *Smith v. Vodges*, 2 Otto, 186; *Partee* v. *Thomas*, 11 Fed. Rep., 773; *Flint* v. *Bell*, 27 Hun (N. Y.), 157.

[3] The law is well settled that the *cestui que trust* has his election, either to proceed against the trustee personally or to follow up the property which was the object of the trust. *Flagg* v. *Mann*, 3 Sumn., 475, 486; *Calhoun* v. *Burnett*, 40 Miss., 599; *Roberts* v. *Mansfield*, 38 Ga., 452; *Freeman* v. *Cook*, 6 Ired (N. C.), Eq., 379; *Hawkins* v. *Hawkins*, 1 Dru. & Sm., 75; *Norman* v. *Cunningham*, 5 Gratt. (Va.), 72; *Lathrop* v. *Bampton*, 31 Cal., 17; but not against both. *Barker* v. *Barker*, 14 Wis., 131; nor can he claim profit of the actual investment for a part and the original fund and interest for the rest. *Baker v. Disbrow*, 25 Hun (N. Y.), 29; see *Gaines* v. *Ligardi*, 1 Woods, 56.

[4] The *cestui que trust* may follow the property or funds of the trust so long as it can be identified, and claim all the benefits of the new purchase, whether the title was taken in the trustee or in a third person with notice. *Ex parte Montefiore*, 9 Bank Reg., 171; *Georges* v. *Pye*, 7 Bro. C. C. 221; S. P. *Pierce* v. *McKeeham*, 3 Watts & S. (Pa.), 280; *Bush* v. *Bush*, 1 Strobh. (S. C.) Eq., 377; *Bonsall's Appeal*, 1 Rawle (Pa.), 274; *Bailey* v. *Inglee*, 2 Paige, (N. Y.), 278; *Kaufman* v. *Crawford*, 9 Watts & S. (Pa.), 234; *Heth* v. *Richmond R. R. Co.*, 4 Gratt., (Va.), 482; *Barksdale v. Finney*, Id., 338; *Turner* v. *Pettigrew*, 9 Humph. (Tenn.), 438; *Blaisdell* v. *Stevens*, 16 Vt., 179; *Moffat* v. *McDonald*, 11 Humph. (Tenn.), 457; *Bonner* v. *Mullins*, 4 Rich. (S. C.) Eq., 30; *Sollee* v. *Croft*, 7 Id., 84; *Martin* v. *Greer*, 1 Ga. Dec., 109; *Cheshier* v. *Cheshier*, 3 Ired. (N. C.), Eq., 569; *Garrett* v. *Garrett*, 1 Strobh. (S. C.) Eq., 96: *Murray* v. *Lylburn*, 2 Johns. (N. Y.) Ch., 441; *Brothers* v. *Porter*, 6 B. Mon. (Ky.), 106; *Yerger* v. *Jones*, 16 How., 36; as to investment of surplus, see *Bagemore* v. *Davis*, 55 Ga., 504.

[5] CITED. *Michoud* v. *Girod*, 4 How., 556.

to the origin and consideration thereof, he will be deemed to have constructive notice thereof.[6]

A co-proprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.

A purchaser by a deed of quit claim without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey.[7]

A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof.

Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court.[8]

The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court.[9]

Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice.

Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record, that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly.

There is no principle of the common law which forbids individuals from associating together to purchase lands of the United States on joint account at a public sale.

THIS was an appeal from the Circuit Court of the United States for the district of Ohio, sitting as a court of equity.

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[6] APPLIED. *Villalonga* v. *Hicks*, 13 So. Car., 168.

[7] DISTINGUISHED. *Griswold* v. *Bragg*, 19 Blatch., 97; s. c. 6 Fed. Rep., 346; *White* v. *McGarry*, 2 Flipp., 574. CITED. *May* v. *Le Claire*, 11 Wall, 232; *Villa* v. *Rodriguez*, 12 Id., 339; *Dickerson v. Colgrove*, 10 Otto, 584; *Fox* v. *Hall*, 74 Mo., 316.

[8] It is impossible to lay down any general rule as to what constitutes multifariousness; but every case is governed by its own circumstances, and the court must exercise a sound discretion in the matter. *Gaines* v. *Chew*, 2 How., 619. Thus, in the case cited it was held that a bill filed against the executors of an estate, and all those who purchased from them, was not, for that reason alone, multifarious. See generally *Payne* v. *Hook*, 7 Wall, 426; *Stark* v. *Starr*, 4 Otto, 477; *Dial* v. *Reynolds*, 6 Id., 340; *West* v. *Randall*, 2 Mason, 181; *Nourse* v. *Allen*, 4 Blatchf., 376; *Horman Patent Manufacturing Co.* v. *Brooklyn City, R. R. Co.*, 15 Id., 444; *Beatty* v. *Hinckley*, 17 Id., 398; *Gaines* v. *Mausseaux*, 1 Woods, 118; *Haines* v. *Carpenter*, Id., 362; *Kilgour* v. *Gas Light Co.*, 2 Id., 145; *Copen* v. *Flesher*, 1 Bond, 440; *McLeon* v. *Lafayette Bank*, 3 McLean, 415; *Turner* v. *Amer. Baptist &c. Union*, 5 Id., 345; *Lawrence* v. *Bowman*, McAll., 419; *Gillespie* v. *Cummings*, 3 Sawy., 259; *Baker* v. *City of Portland*, 5 Id., 566; *Sheldon* v. *Keokuk &c. Co.*, 10 Biss., 473; *DeWolf* v. *Sprague Manuf. Co.*, 49 Conn., 298.

[9] ADHERED TO. *Barney* v. *Latham*, 13 Otto, 215; s. c. 2 Morr. Tr., 649; *Crocker* v. *Dillon*, 133 Mass., 102; *Mining Debris case*, 8 Sawy., 636–638.

The record was very voluminous, consisting of nearly eight hundred printed pages. The acts and declarations of the parties were given in evidence, running through a period of twenty years; and the case being an appeal from the decree of the Circuit Court, as a court of equity, all this matter was brought up to the Supreme Court. It is impossible, therefore, to put into this statement all the circumstances which had a bearing upon the point in issue, which was, whether a trust did or did not continue in a valuable body of land. The leading incidents in the history of the case are these:—

In the summer of 1817, two distinct companies were formed at Cincinnati for the purpose of purchasing lands at the public sales of the United States, to be shortly held at Wooster, in the state of Ohio; the object being to lay out and establish a town in the reserve of twelve miles square on the Miami of Lake Erie, since called the Maumee river.

One company, called the Piatt Company, was composed of the following persons: John H. Piatt, William M. Worthington, Gorham A. Worth, and Robert Piatt, the plaintiff in the suit below, and now defendant in error.

The other company was called the Baum Company and composed of the following persons: Martin Baum, Jacob Burnett, William C. Schenck, William Barr, William Oliver, (one of the plaintiffs in error,) Andrew Mack and Jesse Hunt.

What the articles of agreement were between the members of the Piatt Company the record did not show.

On the 7th of June, 1817, the Baum Company entered into the following articles of agreement—Mack being admitted to half a share, the whole interest was divided into thirteen parts, whereof Mack held one-thirteenth and each of the other persons two-thirteenths:—

"We, the undersigned, agree to enter into a partnership for the purpose of purchasing lands and lots at the public sales to be held at Wooster, on the seventh and fifteenth of July next; and for the purpose of effecting the said purchases, we agree to borrow, at the Office of Discount and Deposit at Cincinnati, the sum of eight thousand dollars, for which sum, and for all purchases made by our agents, either at the public sales or otherwise, we hold ourselves *jointly and [*335 equally liable. And we do further agree that William C. Schenck, William Barr, and William Oliver shall be our agents to explore the lands and make the purchases. And we do agree to confirm and comply with any contracts that our agents aforesaid may make on our account. And it is further agreed that our said agents shall be authorized to take in

any other partner or partners that they may see proper, on such terms as they may esteem advantageous. And it is further agreed that in consideration of the services to be performed by the agents above, their expenses, incident to making the purchases aforesaid, shall be defrayed by the other individuals comprising the company.

"In witness whereof we have hereunto set our hands and seals, at Cincinnati, this the seventh day of June, eighteen hundred and seventeen.

"MARTIN BAUM, [SEAL.]
JESSE HUNT, [SEAL.]
J. BURNET, [SEAL.]
W. C. SCHENCK, [SEAL.]
W. BARR, [SEAL.]
WILLIAM OLIVER. [SEAL.]"

The Piatt Company appointed Robert Piatt its agent.

On the 23d of June, 1817, Worthington, John H. Piatt, and Worth addressed a letter of instructions to Robert Piatt, their agent, directing him how to proceed, and enclosing $4,000 to make the first payment on the lots of land which he might purchase.

The agents having made their selections, met at Wooster to attend the sales, and then ascertained that they had each selected the following tracts, viz.: 1, 2, 3, 4, 86, and 87. In consequence of this, the following agreement was entered into, viz.:

"We, the undersigned, agree, on behalf of the companies we represent, to wit: William C. Schenck, of Warren county, Ohio, and William Oliver, of Cincinnati, Ohio, for themselves, and for Jacob Burnet, Martin Baum, Jesse Hunt, William Barr, and Andrew Mack, all of Hamilton county, Ohio; and Robert Piatt, of Boon county, Kentucky, for himself, and for William M. Worthington, John H. Piatt, and Gorham A. Worth, all of Hamilton county, Ohio, to purchase at the public sales, in July, 1817, at Wooster, lots numbered 1, 2, 3, and 4, at, and including, the mouth of Swan creek, in township No. 3, in the United States reserve, at the foot of the rapids of the Miami of the Lakes, for the joint benefit of both companies; that is, one company to have one-half interest in the whole, and the other company to have the other half; each company paying one-half of the purchase money. It is further agreed that Robert Piatt, in behalf of his company and the company of Schenck and Oliver, shall be the bidder for

lots Nos. 1 and 2, and William Oliver for lots Nos. 3 and 4, they being the above four lots at the mouth of Swan creek.

*"In witness whereof, the parties have hereunto interchangeably set their hands and seals, this 17th day of July, 1817. [*336

W. C. SCHENCK, [SEAL.]
WILLIAM OLIVER, [SEAL.]
ROBERT PIATT. [SEAL.]"

And afterwards the following:

"The undersigned have agreed to purchase, for the joint benefit of their companies, lots or tracts of land numbered 86 and 87, opposite the mouth of Swan creek, on the same principles that lots numbered 1, 2, 3, and 4, at the mouth of Swan creek, were purchased, as per agreement between William C. Schenck and William Oliver, for themselves and others, and Robert Piatt, for himself and others, bearing date 17th July, 1817.

ROBERT PIATT, [SEAL.]
WILLIAM OLIVER. [SEAL.]"

On the 18th of July, 1817, in conformity with the above agreements, William Oliver bid in lots Nos. 3 and 4, and on the 19th of July, Robert Piatt bid in tracts 1, 2, 86 and 87. The original certificates for the tracts bid in by Oliver, were made out in his name, and for the tracts bid in by Piatt, in the names of himself, John H. Piatt, Worth, and Worthington, in conformity with the letter of instructions addressed to him on the 23d of June.

On the 21st of July, 1817, Robert Piatt bid in, for the separate account of the Piatt company, the following other tracts, viz.:

North-west quarter-section 2, township 3.
South-west quarter-section 2, township 3.
South-west quarter-section 3, township 3.
North-west quarter-section 3, township 3.
South-east quarter-section 3, township 3.

The first instalment of the purchase money for which was paid by the Piatt company.

On the 4th of August, 1817, Robert Piatt settled an account with the Piatt company, giving them credit for the four thousand dollars above mentioned, and charging them with one-half of the instalments which had been paid upon Nos. 1, 2, 3, and 4, and with the whole of the instalments which had been paid upon Nos. 86 and 87, and upon the five quarter-sections.

After the return of the agents to Cincinnati, a meeting of both companies was held; the acts of the agents at Wooster

were ratified, and the two companies were, in respect to their joint purchases, consolidated in a new company called the Port Lawrence Company. Martin Baum was appointed trustee, for the purpose of carrying out a resolution of the company that a town should be laid out upon a part of the land. It was further agreed that Oliver should be appointed an agent to lay out the town and make sale of the lots; and he was *337] directed, in performing this duty, to call to his *assistance William C. Schenck, another of the original members of the Baum Company.

Each of the companies purchased other lands upon its own private account.

On the 14th of August, 1817, Oliver executed a bond to Baum in the penal sum of twenty thousand dollars, the condition of which was as follows:

"Whereas, the above named Martin Baum hath this day constituted and appointed the before-bound William Oliver his agent, with power to lay out a town at the mouth of Swan creek, on the Miami of the Lakes, and hath authorized the said William to sell and dispose of the lots in said town, agreeably to a letter of instructions, and to receive payment for the same from the purchasers, and to execute and deliver certificates, in the nature of title bonds, for the lots by him sold. Now the condition of the above obligation is such, that if the said William Oliver shall in all things well and truly execute the trust reposed in him by the said Martin Baum, and shall render a true account of his proceedings, when required, and shall faithfully pay over to the said Martin all moneys by him received for or on account of sales made in the town to be laid off by him, as aforesaid, when thereto required, then, and in such case, the above obligation shall cease and determine, otherwise remain in full force and virtue."

On the same day, Baum executed a power of attorney to Oliver, as follows:

"Know all men by these presents, that I, Martin Baum, of Cincinnati, in the state of Ohio, for divers good causes and considerations me thereunto moving, have made, constituted, and appointed, and by these presents do make, constitute and appoint William Oliver, of said place, my true and lawful attorney, for me and in my name, to sell and dispose of the lots in a town to be laid off at Swan creek, on the Miami of the Lakes, agreeably to a letter of instructions therewith delivered, and to receive payment for the same from the purchasers, and to execute and deliver certificates, in the nature of title-bonds, for the lots by him sold, and to all lawful acts requisite for effecting the premises, hereby ratifying and con-

firming all that my said attorney shall lawfully do therein by virtue hereof. In testimony whereof," &c., &c.

On the same day Baum delivered to Oliver a letter and a set of instructions. The letter is as follows:

Cincinnati, August 14*th*, 1817.

"SIR:—You will observe by the power of attorney this day handed to you, that you are appointed an agent to lay out a town at the mouth of Swan creek, on the Miami of Lake Erie. Your appointment is for one year, commencing this day; for which services so rendered, you are entitled to receive from the proprietors twelve hundred dollars. And the proprietors of the lands lying in that *country, but which is [*338 a distinct concern from the above, have agreed to allow you three hundred dollars for attending to their separate business.

"Your obedient servant,

"MR. W. OLIVER." MARTIN BAUM."

The instructions were as follows:

"*Cincinnati*, 14*th August*, 1817.

"DEAR SIR:—As agent for the proprietors of the land recently purchased at Swan creek, you will, immediately upon the receipt of these instructions, proceed to that place, and commence the laying off a town. General Schenck, who accompanies you, will assist in the survey of the ground, in determining the site, and in the arrangement and formation of the plat. In running the streets, and in the division of the lots, it is not the wish of the proprietors that interest or convenience should be sacrificed to form; that the growth of the place should be retarded by a useless adherence to any particular figure, or to any fanciful uniformity of squares. The number of lots to be laid off may be from three to five hundred, and, with the exception of water lots and fractional sections, of about sixty feet in front, and one hundred and twenty feet in depth. The principal or central street should be at least one hundred and sixty feet wide; others from eighty to a hundred; the alleys from twelve to fifteen. Let there be three lots, each of one hundred and twenty feet square, set off for public uses, churches, schools, &c.; and one, of two hundred and forty feet square, for court-house and jail. There should also be reserved one or two suitable lots out of the town for burying grounds. It is not, however, the intention of the proprietors to tie the agent down to any specific number of feet and inches in the width of the streets or size of the lots, but they leave to him the exercise of his own judgment,

and recommend to him the use of that sound discretion which his better knowledge of the ground, and his practical information, will enable him to display, to the interest and advantage of all concerned.

"As soon as the surveys have been made, and a plat of the town formed, it is necessary that a copy of them should be immediately forwarded to the proprietors, as also a notice of the time of sale, which, if, practicable, should correspond with the time of holding the treaty with the Indians; and on this subject it is necessary that the agent should obtain the earliest information. In the disposition and arrangements of the lots for sale, let one-third of the whole number taken in different sections of the town be reserved for the use and benefit of the proprietors, or for future disposal.

"The terms of sale, one-fourth down, and the residue in three equal annual instalments, with interest from date, if not punctually paid; subject, however, to such variations as the judgment of the agent may dictate, or particular circumstances require. An immediate correspondence is to be opened *339] by the agent with Martin *Baum, Esq., of this city, who will act as trustee for the proprietors, and any information given to him in relation to the business of the agency, the sale of lots, and the progress of the town, that may be thought of any consequence to the interests of the proprietors, or that may be required by the trustee. It is the intention of the proprietors to give public notice of the time of the sale, and it is necessary that this notice should be as general and as widely spread as possible; the agent will, therefore, immediately, upon the times being fixed, forward the proper advertisement to Detroit, Buffalo, Albany, New York, Philadelphia, Pittsburg, Chillicothe, and to the trustee in this city, for publication. The instructions of the trustee are, in all respects, to be regarded as coming from the proprietors themselves.

"Wishing you a safe and pleasant journey, and an easy and prosperous management of the trust committed to your care, we remain, with great respect, &c., your obedient servant,

MARTIN BAUM,
Trustee of the Proprietors.

"To Major WM. OLIVER."

In another part of the record, the same paper is found, with a few and unimportant variations, but the names of these persons are signed to it, viz., Barr, Mack, Burnet, Worthington, Hunt, John H. Piatt, Worth and Baum.

The agents proceeded to lay out a town, and on the 20th

September, 1817, offered the lots for sale, according to the following advertisement:

"*Terms of sale.*

"Terms of sale of lots in the town of Port Lawrence: One-fourth down; the balance in three equal annual instalments, with interest from the date of purchase, if not punctually paid; and if the whole amount of the purchase money is not paid when the last instalment becomes due, the lots now purchased shall revert to the proprietors of Port Lawrence. The undersigned reserve the privilege of one bid on each lot offered.

"W. C. SCHENCK,
WILLIAM OLIVER, Agents.

"*Miami Rapids, Sept.* 20, 1817."

At the sale, seventy-nine lots were sold. Two of them, viz., Nos. 223 and 224, were purchased by Oliver himself, with the assent, as he alleged in his answer, of the company, and of Martin Baum, the trustee.

On the 5th of October, 1817, Schenck gave to Oliver the following receipt:

"*Miami Rapids, Oct.* 5, 1817.

"Received from William Oliver, agent, eight hundred and fifty-five dollars and thirty-three cents, the proceeds of sales of lots in the *town of Port Lawrence, for which [*340 I am accountable to Martin Baum of Cincinnati.

"$855.33. (Signed duplicates.) W. C. SCHENCK."

In January, 1818, Oliver went to Port Lawrence, and spent the winter there. In May, 1818, he returned to Cincinnati, about which time he was elected cashier of the Miami Exporting Company, and entered upon the duties of his office on the 1st of July, 1818.

On the 14th of August, 1818, Oliver, as it was alleged by him in his answer to the bill, sold and transferred one half of his interest in the Baum Company, and also in the Port Lawrence Company, to Steele & Lytle, they assuming all outstanding liabilities; and in an early part of the ensuing spring, the remaining half of his interest in both companies to Embree & Williams.

On the 19th of September, 1818, Oliver and Worthington made a division of the lots in the town of Port Lawrence, between Martin Baum and John H. Piatt, these persons representing their respective companies. One hundred and fifty-seven lots were assigned to Piatt, and one hundred and fifty-eight to Baum.

On the 24th of April, 1820, Congress passed an act, entitled "An act making further provision for the sale of the public lands," changing the mode of selling lands from credit to cash, and reducing the price from two dollars to one dollar and twenty-five cents per acre. The effect of this law, and of the general embarrassment in the business of the country which occurred about this period, was, as it was alleged in the answer to the bill, to depress the prospects of the companies before mentioned, and the pecuniary condition of the individual members thereof, to such an extent that they resolved to abandon the lands, and forfeit them to the United States, rather than pay the instalments which were still due. But before this was done, the intention was changed by another act of Congress.

On the 2d of March, 1821, Congress passed "An act for the relief of the purchasers of public lands prior to the first day of July, 1820," which allowed a purchaser to file a relinquishment of the land so purchased, upon which the whole purchase money had not been paid, and apply the sums which had already been paid for such land, to the completion of payments which might be due upon any other land.

On the 15th of September, 1821, Oliver transferred to Baum the certificates of Nos. 3 and 4, which he had bid for at the public sale, as heretofore described; and on the 17th of September, John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington, united in transferring to Baum the certificates Nos. 1, 2, 86, and 87, which they had bid for at the sale; and by the same instrument the last-mentioned parties also transferred to Baum the certificates for the five quarter-sections, which it has already been stated the Piatt Com-
*341] pany purchased on their own private account, at the *public sale. Both transfers were absolute, to Martin Baum, his heirs and assigns, for ever.

On the 27th of September, 1821, Baum, to whom the certificates had thus been assigned, filed by Micajah T. Williams, his attorney in fact, a relinquishment of tracts Nos. 1 and 2, and requested that the proceeds of former instalments might be applied to the completion of the payments still due upon 3, 4, 86, 87, and the five quarter-sections. The consequence of this transaction was, that as Nos. 1 and 2 had been bought at a much higher price than the other tracts, the credit acquired on the books of the government by their relinquishment was more than enough to complete the payments for all the other lands mentioned above, and a surplus existed, in the form of land-scrip, which might either have been sold or applied to a payment for other lands. Four hundred and seventy-four

dollars and fifty-nine cents of this scrip belonged to the Piatt Company, and was applied by the Baum Company in payment for lands which that company had purchased. The following is the account:

Lands surrendered.		*Lands not surrendered.*	
Tract No. 1.		Swan Creek, 3,	$607 35¾
Amt. paid on it,	$1,015 05½	" " 4,	271 73½
Tract No. 2.		" " 86,	373 31¾
Amt. paid on it,	3,802 50	" " 87,	149 96¾
		5 quarter-sections,	1,248 00

On the 27th of September, 1821, Oliver made a memorandum, or addressed a letter to some person, stating several particulars which he had attended to at Maumee, directing the land to be run out, counsel to be employed, &c., &c.

On the 20th of January, 1822, Baum presented a petition to Congress representing that he had laid out a town upon tracts Nos. 1 and 2, and sold a number of lots to persons to whom he was bound to give a title; that in consequence of the late law of Congress, reducing the price of public lands, he had been obliged to surrender them; and praying that Congress would authorize an immediate sale of those two tracts of land, so as to give him an opportunity to re-purchase them at a fair price, and thus be enabled to fulfil his engagements to those who had purchased of him.

On the 10th of September, 1822, Baum gave to Oliver the following certificate:

"*Cincinnati, Sept.* 10, 1822.

"It is hereby certified, that there is due William Oliver, from the Port Lawrence Company, two hundred and thirteen dollars and seven cents, which the said Oliver refunded, by request of the company, to purchasers of lots in Port Lawrence, the title of which has been relinquished to the United States by the company; it being the *amount [*342 due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington.

"MARTIN BAUM,

"Agent for the Port Lawrence Land Company."

On the 25th of December, 1822, Baum addressed a letter to Hon. E. A. Brown, Washington City, enclosing his petition, to be again presented, and saying, amongst other things, "though it is signed by myself only, still others have an interest in it, to wit, Jacob Burnet, William Steele, M. T. Williams, S. R. Miller, John Rowan, of Kentucky; but, for the

sake of convenience, all the lands of the company were transferred to me. The petition gives a true statement of facts; the grounds why those tracts were surrendered to the United States; the injurious operation of the law of Congress (called the relief law) in the case; and the just claim which (I think) I and my associates have on the government for redress," &c., &c.

In January, 1823, Baum came into arrangements with some of those who had purchased town-lots, and to whom he was unable to give a title, agreeing for himself and his associates to re-purchase the lots and refund the money which he had received on them.

On the 3d of February, 1823, Oliver addressed the following letter to Robert Piatt, which was received by him:

"*Cincinnati, February 3d*, 1823.

"DEAR SIR:—I have been anxious to see you in relation to the Port Lawrence business, and was on the eve of setting off yesterday for your house, but have concluded to write, requesting the favor of your attention to the matter. In consequence of the company's securing the Port Lawrence property, they are liable to the purchasers for the money received for lots; and as some of my friends in Detroit were disposed to bear pretty hard on me for advising them to purchase, I authorized Colonel Hunt to redeem the certificates of sale from those who had purchased by my advice. The payments made in this way were upwards of $400. M. Baum's company have refunded their proportion, but my claim ($213.07, which is from the 10th of last September, 1822) against you is unsatisfied; and as we are at a loss to know the particular interest of the members of your company, I must ask the favor of your stating the present proprietors, and their respective interests in the concern. Please say when it will be convenient for you to arrange your proportion, as also to request Mr. Grandon to pay on his share or shares. Respectfully, your obedient servant, WILL. OLIVER.

"R. PIATT, Esq."

On the 6th of February, 1823, Baum addressed another letter to Mr. Brown upon the subject of his petition, representing that the case was a ruinous one to him and his associates, &c., &c.

*343] On the 3d of June, 1823, Oliver exhibited an account against *"Martin Baum and his associates," running from 1818 to June, 1823, and bringing them in debt to Oliver in the sum of $1835.47.

On the 27th of August, 1823, Baum mortgaged to Oliver tracts Nos. 3, 4, 86, and 87, to secure the payment of the above sum of $1835.47 with interest from the 1st of September, 1823. The payment was to be made on or before the 1st of January, 1824.

On the 31st of January, 1824, Baum addressed a letter to the proprietors of the Maumee and Sandusky Land Company, accompanied by an account between himself and the proprietors of Port Lawrence. The letter was as follows:

"*Cincinnati*, 31*st January*, 1824.

"To the Proprietors of the Maumee and Sandusky Land Co.

"DEAR SIR:—Enclosed, I hand you a statement of the Port Lawrence land speculation, by which you can see how that business stands, to wit, a balance due me by the company of upwards of $4755, and is daily increasing with interest. Suits have been commenced against me for the restoration of the money which was paid the company for lots, and the amount of improvements made thereon, as well as for damages. I was obliged to borrow money to compromise and quiet those claims, for fear of incurring heavy damages, great expenses, and much trouble, and probably a total loss of the company's property by sales, or judgments and executions. The lands have consequently been mortgaged for the money borrowed, and unless it is shortly refunded, the lands may yet be sold under the mortgage; it is therefore necessary that the proprietors pay to me their respective quotas, to save their lands from sale. I am extremely anxious to close this business, and therefore propose that I will exonerate you from paying any more money, if you will sell and convey me your interest in all those lands. But, lest you should think that I wish to make speculation out of you, if you will exonerate me from paying any more, I will sell you my interest in these lands, and will thank you to accept the latter proposition. It is needless to go into an explanation, as the account will do it of itself; and my proposition will satisfy you as to the prospects of gain. Please inform me soon what course you intend to pursue. Yours, respectfully,

"MARTIN BAUM."

One of these letters appears to have been directed to Mr. Robert Piatt, and another to W. M. Worthington, Esq.

On the 23d of April, 1824, Baum authorized and empowered Major William Oliver to lease, let, and rent all the lands, in and out-lots, houses, and other property which he owned, or of which he had the control, situate and being within the United

States reservation on the Maumee river for the then present season; and also to collect all rents which might be then due on all or any of the said property.

*344] *On the 28th of August, 1824, Baum addressed a letter to G. A. Worth, Esq., a part of which is as follows:

"*Cincinnati*, 28*th August*, 1824.

"DEAR SIR:—Your favor of the 10th April last came duly to hand—contents noticed. The land speculation has truly been an unfortunate business, and no one can be more tired of it than I am; for it's me who has to stand the brunt of the company—suits, judgments, executions, with all its attendant vexations. First, our agents were crazy in making purchases at such high rates—then the madness of Congress in reducing the price of the public lands—change of times—scarcity of money—the impossibility of managing that species of property where so many are concerned; the change of sentiments of persons in holding real estate; in fact all and every thing has operated against such speculations; and were I relieved of that concern, an immense burden would be taken off my shoulders, &c., &c."

On the 21st of September, 1825, Baum gave to Oliver the following power:

"*Cincinnati*, 21*st Sept.*, 1825.

"I have and hereby authorize and empower Major William Oliver to lease, let, and rent all the lands, in and out-lots, houses, and other property which I own, or of which I have the control, situate, lying, and being within the United States reservation, on the Maumee river, for the ensuing season; and also to collect all rents or other moneys due me in and about the town of Maumee and Port Lawrence.

MARTIN BAUM."

On the 5th of October, 1825, Oliver commenced proceedings in attachment in Michigan, by making the following affidavit:

"Martin Baum, agent for John H. Piatt, (since deceased,) Robert Piatt, G. A. Worth, and William M. Worthington, to William Oliver, debtor, for the sum of two hundred and thirteen $\frac{7}{100}$ dollars, being the amount refunded to purchasers of the lots in Port Lawrence, by request of said Baum, with interest from the 10th day of September, 1822.

"*Michigan, Monroe county, ss.:*

"I, William Oliver, of lawful age, do solemnly swear that

the sum mentioned in the above account is justly due from the persons therein named; that they do not reside within the territory of Michigan, and that he has reason to fear, unless an attachment issues upon the property of the persons above named, his debt cannot be recovered. WILL. OLIVER.

"Sworn this 5th day of October, 1825, before me,

"PETER P. FERRY, Justice of the Peace."

On the 7th of October, 1825, an order was filed in the office of the clerk of Monroe county court, for an attachment against the *rights and credits, moneys and effects, goods [*345 and chattels, lands and tenements of the parties above named. The writ was issued on the same day.

On the 15th of October, 1825, an attachment was laid upon the

South-west quarter of section 2, township 3.

North-west quarter of section 3, township 3.

South-west quarter of section 3.

South-west quarter of section 4.

The three first of these were included in the original purchase by Piatt and subsequent transfer to Baum. The fourth belonged to some other transaction and is not involved in this case. The whole four were appraised, collectively, at $1,200.

The suit went on, no one appearing for the defendants, until October, 1826, when it appearing that notice to defendants in attachment had been published nine months, judgment was entered against them, a *fieri facias* issued, and, on the 5th of April, 1828, the property was sold to Charles Noble for $241.60, who on the same day conveyed it to Oliver.

Having traced out the proceedings under the attachment to their consummation, it is necessary to go back to the year 1825.

On the 13th of October, 1825, Oliver filed a bill in the Supreme Court of the territory of Michigan, sitting as a court of chancery, to foreclose the mortgage which had been given by Baum on the 27th of August, 1823. Baum being a non-resident, a notice to him to appear was published for nine weeks successively in a newspaper published at Monroe.

On the 7th of December, 1827, the bill was taken *pro confesso*, and on the 5th of September, 1828, the court decreed that the property should be sold, which was accordingly done. Oliver became the purchaser, and received a deed from the register, who had been directed to make the sale.

To return again to the chronological order of events.

Congress having made a donation of land to the University of Michigan, the trustees of that institution resolved, on the

25th of June, 1827, to accept of No. 1 in lieu of a section, in the expectation that in the event that lot No. 2 should revert to the United States, then the same should be considered a part of the section to which they were entitled under the act, and requested the chairman to advertise the Treasury Department thereof.

On the 20th of July, 1827, Baum addressed a long letter to the commissioner of the General Land-office, giving a history of the Port Lawrence Company, and expressing a desire to re-possess Nos. 1 and 2. He then says, "It has been hinted that the trustees of the Seminary Lands of the Michigan Territory have had sufficient influence to delay the sale, with a view to get the privilege of locating these two tracts for that purpose. If this is the fact, I protest against such an ar-
*346] rangement. They have no claim to them whatever, but *mine is a strong one, and I am determined to pursue it in every possible way till I obtain justice."

In August, 1827, Oliver went to Detroit to ascertain if the tracts 1 and 2 could be obtained from the university, but nothing was then done.

On the 18th of October, 1827, Charles Noble wrote to Benjamin H. Piatt, one of the heirs of John H. Piatt, who had died, and enclosed him a copy of the proceedings in the attachment at the suit of Oliver.

On the 18th of February, 1828, Piatt acknowledged the receipt of this letter, and desired further information.

On the 1st of April, 1828, Noble replied, and enclosed a copy of the advertisement of the auditor for the sale of the three quarter-sections of land as before mentioned. The sale was to take place on the 5th of April, 1828.

On the 12th of August, 1828, Oliver opened a negotiation with the University of Michigan, proposing to give other lands in exchange for Nos. 1 and 2, which was prosecuted without success for some time.

On the 1st of September, 1828, Charles W. Whipple, the assistant-register of Michigan, executed to Oliver a deed for Nos. 3, 4, 86, (excepting sixty acres, which Baum had sold to Prentiss and Tromley in 1823,) and 87. The deed recited the proceedings for a foreclosure of the mortgage, and conveyed the property to Oliver, his heirs and assigns for ever.

On the 13th of January, 1830, Congress passed an act, entitled "An act to authorize the exchange of certain lots of land between the University of Michigan and Martin Baum and others."

On the 16th of August, 1830, Oliver (called in the proceedings of the board the agent of Martin Baum and others)

appeared before the trustees of the university on the subject of the exchange of lands, which subject was discussed from time to time.

In December, 1830, Oliver (having previously received an assignment of the final certificates from Baum) obtained patents for the following:

Lot No. 3.
Lot No. 4.
North-west quarter of section 3.
South-west quarter of section 3.
South-east quarter of section 3.
South-west quarter of section 2.

Being the whole of the five quarter-sections originally purchased by the Piatt Company, except the north-west quarter of section 2.

On the 7th of February, 1831, an exchange took place between Oliver and the university; the negotiation therefor having resulted in an agreement. Oliver ceded to the trustees—

Lot No. 3, except ten acres reserved.
*Lot No. 4. [*347
The north-west quarter of section 3.
The south-west quarter of section 3; and
The south-west quarter of section 2.

The university deeded to Oliver lots Nos. 1 and 2, and authorized the President of the United States to issue a patent or patents to the said William Oliver.

On the 4th of March, 1831, a patent was issued to Oliver for these lots Nos. 1 and 2.

On the 16th of May, 1831, Oliver sold to Baum and Micajah T. Williams each one undivided third part of lots Nos. 1, 2, 86, and 87, excepting sixty acres of No. 86, which had been sold by Baum to Prentiss and Tromley. Each of the two parties was to pay $1555. The necessary provision was made for laying out a town on the property where Port Lawrence was formerly laid out, making partition, &c. The 8th article was as follows: "The parties agree to admit a fourth person as a proprietor—a man of enterprise and character—on equal terms with themselves, on his establishing himself permanently at Port Lawrence, and devoting himself to the improvement of the place."

On the 19th of September, 1832, under the article just mentioned, Stephen B. Comstock was admitted to have an undivided fourth part.

On the 22d of October 1833, Oliver re-purchased from

Baum's heirs (for he had died before this time) the whole of Baum's interest under the contract of the 16th May, 1831.

On the 8th of May, 1834, Oliver and Williams sold to Edward Bissell one-fourth part of lots Nos. 1 and 2, for $7000.

On the 23d of May, 1834, Oliver sold to Williams an undivided moiety of 86 and 87.

On the 17th of October, 1834, Oliver sold to Pratt and Taylor one undivided sixteenth part of Nos. 1 and 2, for $4000. They were also to erect a warehouse, two dwelling-houses, and arrange for a line of steamboats to stop at Toledo, as the town was now called. And on the same day, he sold to Smith and Macy another undivided sixteenth, on the same terms.

On the 30th of June, 1835, Oliver sold a portion of the property to Lynde and Raymond, for $13,000; in September, 1835, another portion to Lot Clark, for $1000, and in January, 1836, another portion to Philander Raymond, for $22,000.

On the 21st of April, 1836, Robert Piatt, the appellee in the present case, filed his bill of complaint in the Circuit Court of the United States for the district of Ohio, against Oliver and others. But before narrating the proceedings under this bill, it is proper to close the history of the transactions of the parties by stating that on the 5th of May, 1837, Oliver received
*348] a deed from the trustees of the University of Michigan for the property which he had given to *them in exchange as previously related. The property thus conveyed to Oliver consisted of tracts Nos. 3 and 4, the south-west quarter of section No. 2, the north-west quarter of section No. 3, and the south-west quarter of section No. 3. The consideration was $5000, and the sale was stated in the deed to be made "pursuant to a contract entered into between the said trustees and the said William Oliver, on the twenty-fourth and twenty-fifth days of October, 1834."

To return to the bill, which was filed in 1836. It made Oliver and Williams and a number of other persons, who were the representatives of the original parties, respondents, most of whom appeared. After the pleas, which were filed by the defendants, were overruled, an amended bill was filed.

These bills recite the formation of the Piatt and Baum Companies; their union in the Port Lawrence Company under the circumstances already related; the acceptance of the trust by Baum; the assignment to him of the certificates of purchase the appointment of Oliver as agent; his acceptance thereof; the instructions, bond, and power of attorney; the laying out of the town; the sales of lots, for which the respondents are called upon to account; the relinquishment of Nos. 1 and 2; the application of the credits arising therefrom to the comple-

tion of the payments due upon the other tracts; the understanding of the parties that Nos. 1 and 2 should be repurchased for the benefit of all concerned, whenever it should be possible to do so; the application to Congress; the death of John H. Piatt, in 1822; the formation, some short time thereafter, of a fraudulent combination and confederacy between Baum, as trustee, and Oliver and Williams, as agents, for the purpose of cheating the members of the Piatt Company out of their entire interest and claims; that in pursuance of this fraudulent combination Baum issued to Oliver the certificate of debt; that the complainant resided at a short distance from Cincinnati; that about that time, and prior, and long subsequently thereto, he was during some part of nearly every week in Cincinnati in company with said Baum and Oliver, or one of them; that they knew the complainant to be a man of property, well able and willing to pay his just debts; that neither Baum nor Oliver ever gave him the slightest information that any such certificate had been given; that he had received a letter from Oliver, dated on the 3d of February, 1823; that the mortgage given by Baum to Oliver was without authority, and fraudulent and void; that the assignment of the certificates for the quarter-sections was also fraudulent and void; the circumstances under which the exchange of lands took place with the University of Michigan; the circumstances also under which Williams became interested; that the proceedings in Michigan were *coram non judice* and void; that if they vested a title in Oliver, it was to constitute him a trustee for the complainant with others, and that Oliver and Williams were acting with a sole view *to benefit themselves at the expense [*349
of the complainant and the other co-proprietors.

The bill then enumerates the original parties who were dead, states their representatives and the assignees of the living, and prays that they may all be made defendants.

It then prays for an injunction, a receiver, &c., &c.

Most of the parties answered, but a notice of Oliver's and Williams's will be sufficient.

Oliver's answer admitted the formation of the Baum Company, of the Port Lawrence Company, but denied that after the sales any agreement was made to unite the interests in the several tracts; the appointment of Baum as the trustee of the Port Lawrence Company, but denied that the object of the trust was fully stated in the bill; alleged that Baum was authorized to sell and dispose of any of the property on speculation, or for payment of claims against the company, &c.; that Baum had also a right to dispose of the quarter-sections to pay the debts of the Piatt Company; admitted the instruc-

tions, except some of the signatures; the laying out of the town; the power of attorney from Baum; the letter from Baum fixing the appointment for one year, and the compensation therefor; the sale of lots in the town; alleged that he surrendered up the agency to Baum at the time of his appointment as cashier of the Miami Exporting Company, and that he then closed up his accounts; that his subsequent acts as temporary agent were only to accommodate Baum; that he and Baum had erected a warehouse on one of the lots which he had purchased at the sale, which circumstance drew him often to the town; that he had transferred one-half of his interest in the Baum Company to Steele and Lytle, in 1818, and the remaining half to Embree and Williams in 1819; admitted the relinquishment; denied the intention to re-purchase; that Baum authorized to negotiate with the university, but that he did so in his own right and upon his own account; alleged that the certificate of debt and mortgage were given upon *bona fide* considerations; that the members of the Piatt Company, and especially the complainant, were repeatedly urged to satisfy the claims and release the lands; that he, the respondent, bid the full value for the lands, and more than they would have been sold for to others for cash; that the assignment of the certificates was in good faith; explained the reasons which led to an exchange of land with the university; that he purchased back from the university the lands which he had conveyed to it, long after all agency for the companies or for Baum was ended and settled up; denied all fraud and combination; admitted that he had united Baum and Williams in the subsequent attempt to build up a town, and relied upon the lapse of time, the defaults, laches, and acquiescence of the complainant and the statutes of limitation, in bar of the claim set up in the bill. The respondent, moreover, admitted or explained a number of papers respecting *which he had been interrogated, and then prayed that his answer might be considered as a cross-bill.

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The answer of Williams admitted the formation of the Baum Company, the subsequent formation of the Port Lawrence Company; averred that in the spring of 1819, Embree, the partner of the respondent, whilst the respondent was absent in Illinois, purchased from Oliver an interest of one-thirteenth in the Baum Company; admitted the relinquishment to the United States of Nos. 1 and 2, which was made by the respondent himself; that the proceeds of the large number of tracts standing in the name of Baum, and thus relinquished, were ascertained in gross, and a credit entered to that amount on the lands retained; that the proceeds of tracts Nos. 1 and

2, were $4,817.55½, and the amount due to the United States, on tracts 3, 4, 86, 87, was $1,372.36, and upon the five quarter-sections $1,248; averred that he did not know what became of the balance of $474.60, except that John H. Piatt and Baum arranged it to their mutual satisfaction; denied that there was any agreement, understanding, or intention, amongst the members of the Port Lawrence Company, to re-purchase tracts 1 and 2; averred that after the relinquishment the members of the Port Lawrence Company abandoned Baum, and left him to settle the liabilities of the company as he could; denied all knowledge or belief that the complainant or Baum attended the public sales in 1827 with the intention of re-purchasing said tracts for the benefit of the company, but on the contrary intended to purchase them on account of other persons; denied all knowledge or belief that Oliver was authorized by Baum to open a negotiation with the trustees of the Michigan University; averred that in May, 1831, Oliver offered to sell to the respondent one-fourth of tracts 1 and 2, 86 and 87, except sixty acres of 86, for a specified sum, and at the same time offered another fourth each to Martin Baum and Jacob Burnet, which offer the respondent accepted, taking one-third instead of one-fourth, as Burnet declined becoming interested; and in 1832, the respondent purchased an additional sixth from Oliver, which purchases together gave him an interest of one-half, for which he received a deed in fee-simple from Oliver and wife; averred that at the time of paying the purchase money and receiving the deeds, he had no notice or knowledge of any right, title, claim, demand, or interest, of the complainant, or the Port Lawrence Company, or any of the members thereof, nor had he any notice, knowledge, information, suspicion, or belief, of any fraud, or breach of trust, or other transactions, matters or things, affecting the titles of said lands, but maintained that he purchased the same *bona fide*, in good faith, and for a full and fair consideration actually paid.

To all these answers a general replication was filed.

In December, 1840, the bill was taken as conferred by all the defendants who had failed to plead, demur, or answer, and the cause *came on for hearing upon the [*351 bills, answers, replications, testimony and exhibits, when the court passed the following decree:

"The court do here find that the law and equity of the case are with the complainant; but because the court here are not fully advised as to the exact nature and extent of the relief to which the complainant is entitled, so as to enable them to render up a final decree in the premises, it is therefore adjudged, ordered, and decreed, that this cause be, and the same is

hereby, referred to Aaron F. Perry, as special master commissioner, who is hereby instructed to make out, and report to us at our next term, an amount of the sales made in whole or in part of tracts one, two, three, four, eighty-six, eighty-seven, and the five quarter-sections, designating the date and amount of sales in each tract, title made, moneys received and due, and also an account of all moneys expended, either in the purchase or improvement of each tract, by the defendants Williams and Oliver, or either of them, including compensation for the agency exercised in the general management of the property, and such other matters of fact and calculations as either party may deem necessary, in order to a just and equitable decree in the premises; and for that purpose he is hereby invested with power to demand the production of any books, papers, and accounts in possession of either of the parties, to examine them, if necessary under oath, touching any particular matter or thing connected with the matters in contest, to examine and take the deposition of witnesses, to withdraw any exhibit or paper now on file with the clerk, giving a receipt therefor, and perform every act necessary to a proper adjustment of the accounts and transactions of the parties. He is hereby required to deliver to each party demanding the same. a copy of his report, twenty days previous to the next term of this court, until which time this cause is continued."

In addition to the points upon which the master was directed in the decree to report, the solicitor for the complainant stated twenty-five others, and the respondent fourteen, as matters of fact and calculation which they respectively deemed necessary.

On the 3d of July, 1841, the master presented a very voluminous report, occupying nearly five hundred pages of the printed record.

To this report the complainant filed twenty-one exceptions, and the defendants ten. They related chiefly to matters of detail and account, which it would be difficult to understand unless the whole report were here inserted.

In July, 1842, other parties were made in place of those who had died; and John Rowan, a citizen of Kentucky, filed his answer voluntarily, claiming an interest of six-thirteenths in the Baum Company.

At the same term the court referred the case to Edward D. Mansfield, master, to report the deduction of title as claimed by each of the parties.

*352] *On the 22d of July, 1842, the master, in conformity with the above reference, reported the deduction and then condition of the several titles.

At the same term, additional parties were made, to repre-

sent the dead, and the case was again referred to Mansfield, with the following instructions, viz.: "To state separate accounts of the compensation which, under all the circumstances, ought to be made to the said William Oliver and to the said Micajah T. Williams for their services; and also an account for expenses in the procurement, management, and improvement, in the value of the trust property, consisting of tracts 1, 2, 86, 87, and the ten acres in No. 3; and that the said master also restate separate accounts touching the moneys or other proceeds arising to said Oliver and Williams, from sales made prior to the filing of the bill, of any parts of said trust property; and also of the account of said Oliver against the Port Lawrence or Piatt Company, for advances not heretofore reimbursed.

In estimating services, expenses, &c., the master is to have reference to the advantage derived from said expenses and services, &c., as well to tracts Nos. 3 and 4, and the half-section No. 3, and south-west quarter-section No. 2, township 3, as to the tracts before named. And that in performing this order, the master, besides having reference to the papers, depositions, &c., now on file, may take further testimony, or further examine the parties if he deems it necessary.

On the 27th of July, 1842, the master filed a report, entering minutely into the several matters of account, to which four of the defendants took four exceptions.

On the 29th of July, fresh parties were made in the place of some more who had died, and the master made two additional reports, to which Oliver and Williams took twelve exceptions.

On the 30th of July, the court pronounced the following final decree:

"1st. That Philip Grandin and Hannah C. Grandin his wife, Mary P. Ewing, Egbert T. Smith and Sarah R. Smith his wife, Nathaniel G. Pendleton, William J. Van Horn and Margaret Van Horn his wife, John Spencer and Susan Spencer his wife, Samuel Perry, as administrator of Martin Baum, deceased, Jacob Burnet, the administrator of William C. Schenck, deceased, William J. Van Horn, as administrator of William Barr, deceased, having been duly served with process requiring them to appear and answer the complainant's bills, and they not having appeared, plead, demurred to, or answered the same, as required by the rules of this court, the said bills, and the matters therein contained, are hereby, as against them respectively, declared to be taken as confessed.

"2d. That the rights of the defendants, Isaac Dunn, the unknown heirs of William Steele, deceased, Alexander Find-

ley and Ann Ellen Findley his wife, Woodhull S. Schenck, Andrew Mack, Israel T. *Canby, and Gorham A. Worth, who are not inhabitants of the state of Ohio, or found within the district of Ohio and jurisdiction of this honorable court, if any they or either of them have, or hath, in and to the lands and premises in question, be, and the same are hereby, reserved to them respectively, in as full and ample a manner as if this decree had never been rendered.

"3d. That Eleanor Baum, Egbert T. Schenck, Elizabeth Schenck, James F. Schenck, jun., Susan Louisa Pendleton, Martha Pendleton, George Hunt Pendleton, Elliott Hunt Pendleton, Ann Pierce Pendleton, Nathaniel Pendleton, Mary Barr, William W. Barr, and David Barr, the infants, defendants, are hereby respectively allowed six months after attaining majority, to show cause, if any he, she, or they, hath or have against this decree.

"4th. And the court further decree, that all *bona fide* sales, interests, and undivided interests, in and to lots in the town of Toledo, in the ten acres of tract number three, and in the lots 86 and 87, made by the said Oliver and Williams, before the filing of the original bill in this case, together with the sixty acres sold by Martin Baum to Tromley and Prentiss in tract 86, be, and the same are hereby, ratified and confirmed; and as to any of said sales not yet perfected by conveyances, and as to which the outstanding claims upon the purchasers have been reported on, it is decreed that the same inure to the said Oliver and Williams, and they are empowered to receive the amounts due thereon to their own use, and to convey the land to the purchasers. And all donations, appropriations, and dedications of any parts of said several tracts of land for any public use heretofore made, be, and the same are hereby, confirmed to the original purpose of the donation, appropriation, or dedication. And inasmuch as Benjamin S. Brown, to whom, by the resolution of the proprietors, on the 17th September, 1837, the lots Nos. 109, 110, 111, were to be conveyed for the purpose of the appropriation of those lots, has departed this life, it is ordered, with the assent of the parties to this suit, in interest, that Richard Mott be, and he is hereby, appointed trustee, instead of said Brown, to carry out said appropriation. And the partition heretofore made between the said Oliver and Williams, and their assignees of interests, be, and the same is hereby, ratified and confirmed to the respective parties thereto, according to the original intent of the same; and it is further decreed, that the lease made by the said Williams to Garret D. Palmer, on the 24th November, 1840, be, and the same is hereby, confirmed; and the rents

accruing and to accrue on said lease, since the 1st day of July, 1842, inure to the benefit of the parties in interest, as settled by this decree.

"5th. That the said Oliver and Williams hold the legal title to the following tracts of land mentioned in the pleadings, not otherwise disposed of in this decree, that is to say: tracts 1 and 2, 86, 87, and ten acres of tract 3, in trust, for themselves and the other *members of the Port Lawrence Company, so-called, and those now holding and representing their interests, as tenants in common, in the proportions affixed to their names, that is to say, dividing the whole into 2832 parts, then the said trust is— [*354

For Alexander H. Ewing - - - - -	989 6-10 parts.
John Rowan - - - - - - - -	496 6-10
Robert Piatt - - - - - - - -	219 5-10
John G. Worthington - - - - -	219 5-10
William Oliver - - - - - - -	165 5-10
Micajah T. Williams - - - - -	82 8-10
the heirs of William M. Worthington	219 5-10
the heirs of John H. Piatt - -	439 parts.

For the said heirs of J. H. Piatt, being Benjamin M. Piatt, Abraham S. Piatt, Hannah C. Grandin wife of Philip Grandin, each one-fouth part of the said 439 parts, and for the heirs of Francis Dunn the other fourth, viz.: John P. Dunn, Jacob P. Dunn, George Dunn, Strange S. Dunn, Hannah M. Tousey wife of George Tousey, Sarah Jane Layton wife of William Layton, each one-seventh of said fourth; and Francis E. Smith, and Adam C. Smith, each one-fourteenth of said fourth.

"6th. And the court do further order, adjudge and decree, that the said Oliver and Williams do, within five months from the date of this decree, by deeds, with special covenants, to be prepared by each of said parties for their respective interests, convey to each of said parties, in fee-simple, the undivided proportion of said trust-estate affixed to his or her name as aforesaid, together with the undivided interests in the same proportions in the wharves, ferries, &c., heretofore reserved for the use of the said Oliver and Williams in their former conveyances; and also the same proportions of all public edifices, materials, and advantages heretofore reserved to the said Oliver and Williams, saving to the said Oliver and Williams the hotel materials; and also, in the same proportions, the interests remaining in the said Oliver and Williams in and to the following common and other property, that is to say: lots numbered 109, 110, 111, 119, 120, 121, 162, and 163, in the town of Toledo, and any others in which there is any such

interest in said Oliver and Williams, they, the said Oliver and Williams, retaining in themselves only the proportions pertaining to them and ascertained as aforesaid. And it is further decreed, that the said Oliver and Williams permit the said parties respectively, to enter into the possession and enjoyment of their said portion of said estate as tenants in common. And it is further ordered and decreed, that the said Oliver and Williams, do, within the said sixty days, transfer to the said parties respectively, without recourse, in the same proportions, the demand on the books of said Oliver and Williams against Andrew Palmer, as agent, now amounting, according to the report of the master, to the sum of $5,568.79; and the like demand against
*355] Edward Bissell, now amounting, according to said report, to the sum *of $2,427.35; and also the like demand against Stephen B. Comstock, now amounting, according to said report, to the sum of $976.62; the said three sums being reported as due from the said Palmer, Bissell, and Comstock, of moneys which came to their hands as agents connected with the sale of lots and improvements in said town of Toledo.

"7th. It is further ordered and decreed, in respect of the moneys heretofore received by the said Oliver and Williams, or either of them, from sales, rents, or otherwise, arising from either of said tracts of land, which is not allowed to the said Oliver and Williams for compensation for their services, or for expenses on account of said trust property, that there remains in their hands, as said trustees, the sum of $2,237.35; which said sum is held by them in trust for themselves and the other parties, in the same proportions hereinbefore found and decreed as to the said trust lands; and apportioning the same according to said rule, the parties will be entitled to the following sums:

To said Alexander H. Ewing	$781 76
John Rowan	392 35
Robert Piatt	173 40
John G. Worthington	173 40
William Oliver	130 78
Micajah F. Williams	65 39
Alice Worthington, executrix and trustee of Wm. M. W.	173 40
heirs of John H. Piatt	346 80

"And of the share of the said John H. Piatt, the following are the portions of his heirs, that is to say,

To Benjamin M. Piatt	$86 70
Abraham S. Piatt	86 70

Hannah C. Grandin	86 70
John P. Dunn	12 33
Jacob P. Dunn	12 33
George Dunn	12 33
Strange S. Dunn	12 33
Hannah M. Tousey	12 33
Sarah Jane Layton	12 33
Francis E. Smith	6 16
Adam C. Smith	6 16

"And the court order and decree, that the said Oliver and Williams pay, within five months from the date of this decree, the said several sums, except those opposite their own names, with interest; and in default thereof, that execution issue therefor, as at law.

"8th. That the said William Oliver, having held the legal title to the south-east quarter of section 3, township 3, in the said reserve, as trustee, in trust for the complainant and the other members of the Piatt Company, on the 25th day of July, 1835, at the time he sold *and conveyed the same to William J. Daniels, for the sum of $1,000, whereby [*356 the said complainant and the other members of said company, their heirs or legal representatives, became, and are now entitled to their proportionate shares of the avails of said sale, with the interest which has accrued thereon, amounting, in the aggregate, to $1,420; that is to say, each are entitled to the proportionate shares of said avails annexed to their names respectively, viz:

The complainant, one-eighth part,	$177 50
Alexander H. Ewing, three-eighth parts,	532 50
John G. Worthington, one-eighth part,	177 50
Alice Worthington, as executrix and trustee of Wm. M. Worthington, dec'd, one-eighth part,	177 50
The heirs of J. H. Piatt, dec'd, two-eighth parts,	355 00

That is to say, of the share of the said John H. Piatt, his heirs are entitled as follows, to wit:

Benjamin M. Piatt the sum of	88 75
Abraham S. Piatt	88 75
Hannah C. Grandin,	88 75
John P. Dunn	12 68
Jacob P. Dunn	12 68
George Dunn	12 68
Strange S. Dunn	12 68
Hannah M. Tousey	12 68
Sarah Jane Layton	12 68
Francis E. Smith	6 34
Adam C. Smith	6 34

"It is therefore further decreed, that the said defendant, Oliver, do, within five months from this date, pay to the complainant and the heirs and legal representatives of the original proprietors of the Piatt Company the above sums, annexed to their respective names, with interest from this date, or that executions issue therefor as on judgments at law.

"9th. That Mary P. Ewing, in her own right, and the said Alexander H. Ewing, in right of his wife, the said Mary P. Ewing, being invested with the legal title to the north-west quarter of section 2, township 3, in said reserve, as trustee, in trust for the complainant and those now holding and representing their interest in the Piatt Company; that is to say, in trust for the persons, and in the proportions annexed to their respective names, as follows:

The complainant, one-eighth part, - -	20 acres.
Alexander H. Ewing, three-eighth parts, -	60
John G. Worthington, one-eighth part, -	20
Alice Worthington, executrix, and trustee of Wm. M. Worthington, dec'd, one-eighth part,	20
Heirs of John H. Piatt, dec'd, two-eighth parts,	40
That is to say,	
*257] Benjamin M. Piatt - - - - - -	10
Abraham S. Piatt - - - - - -	10
Hannah C. Grandin, wife of Philip Grandin, -	10
John P. Dunn - - - - - - -	$1\frac{3}{7}$
Jacob P. Dunn - - - - - - -	$1\frac{3}{7}$
George Dunn - - - - - - -	$1\frac{3}{7}$
Strange S. Dunn - - - - - - -	$1\frac{3}{7}$
Hannah M. Tousey, wife of George Tousey,	$1\frac{3}{7}$
Sarah Jane Layton, wife of Gm. Layton, -	$1\frac{3}{7}$
Francis E. Smith - - - - - - -	$\frac{5}{7}$
Adam C. Smith - - - - - - -	$\frac{5}{7}$

"It is therefore further decreed, that the said Alexander H. Ewing and Mary P. Ewing his wife, do, within sixty days from the date of this decree, by deed, with special covenants, (to be prepared by each of said parties for their respective interests,) convey to the said parties in fee-simple, except the said John G. Worthington, to whom a conveyance of his proportion has already been made, the undivided proportion of said trust-estate affixed to his or her name as aforesaid; they, the said Alexander H. Ewing and Mary P. Ewing, retaining in themselves the proportion pertaining to them as ascertained as aforesaid. And it is further decreed, that the said Alexander H. Ewing and Mary P. Ewing permit the said parties

respectively to enter into the possession and enjoyment of their said portions of said estate as tenants in common.

"10th. As to the account on file and reported upon by the master, for advances made by Martin Baum for the Port Lawrence Company, the court find that the amount of the same, with interest to this time, is $2063.96, which is chargeable upon the said trust estate; and the court further find that the said claim is now held by the defendant, Alexander H. Ewing, and should be apportioned to the several interests in said property, except the proportion of the said Oliver and Williams, which has been satisfied. The proportions of said demand remaining to be satisfied are as follows, to wit:

John Rowan to pay - - - -	$360 08
John H. Piatt's heirs to pay - - -	320 38
Robert Piatt to pay - - - -	160 19
J. G. Worthington to pay - - -	160 19
Wm. M. Worthington's heirs to pay -	169 19
Alexander H. Ewing's share - - -	721 29
William Oliver's share - - - -	120 36
M. T. Williams's share - - - -	60 18

"And thereupon the court further decree, that the said John Rowan, the heirs of John H. Piatt, according to their portions ascertained in this decree, Robert Piatt, John G. Worthington, the heirs of Wm. M. Worthington, shall each pay the proportion of said account affixed to their names, with accruing interest, within five months, or in default, that execution issue against each for his or her proportion.

*"11th. As to the claim set up by Robert C. Schenck's [*358 answer to lot No. 1 in the original plat of Port Lawrence, which was sold to William C. Schenck, and for which Martin Baum, trustee, in his lifetime issued a certificate to Egbert T. Smith, who afterwards assigned the same to the said Robert C. Schenck, who now holds it in his own right, the bill is dismissed, without any prejudice to his, the said Schenck's right, and he has leave to withdraw from the files of this court his answer and other papers relating thereto.

"12th. As to the costs in this suit, it is ordered, that the costs of this suit be paid by the defendants, according to their several interests ascertained by this decree, within four months, into the hands of the clerk, one docket-fee only to be taxed, and that to the complainant; and in default of payment, execution may issue as by law. And the court allow to Master Perry the sum of $618 for his services and expenses, to be taxed in the costs—of which there has been paid to him $50 by the defendant, A. H. Ewing, and $50 by the said Robert Piatt; the balance of the allowance only to be paid said Perry,

and the said Ewing and Piatt to be credited with their said advances. And the court allow to the Master Mansfield, to be taxed, the sum of $75, for his services in this case."

From this decree an appeal brought the case up to this court.

Stanberry and *Ewing*, for the appellant.
Pirtle and *Scott*, for the appellees.

The printed briefs in the case occupied nearly one hundred pages. It is difficult to give a condensed statement of the arguments of the counsel, because many of them were founded upon matters of evidence, which it was impossible to embrace in the foregoing statement of the case.

Stanberry divided his argument into the following heads, under each of which he referred to various portions of the record.

1. The formation of Port Lawrence Company.

After narrating its history, he said:

The Port Lawrence Company was strictly an association of companies, rather than of individuals; each of its constituent companies continued its separate existence, and held separate estate; the union only extended to the property held in common; the eleven members of the new company entered into no new arrangement, changing the quantum of interest of the members of its constituent companies. All that was settled, in that respect, was, that each company should contribute one half to capital and expenses, and own one half of the stock, leaving each company to adjust the interests of its respective members in its moiety of the concern.

In every sense, this was a partnership, not simply a tenantcy in common. The capital was real estate, not acquired for
*359] division among the owners, but for speculation. It was to be laid out in a *city, requiring further advances from the partners in the way of expenditures, and to be sold, in parcels, for the common profit.

The Baum Company, in their articles, call themselves a partnership.

See letter of instructions of Piatt Company, in which they say their object is to buy for sale and profit, for their common benefit.

The modern authorities are full to the point, that, in the estimation of a court of equity, real estate, held as partnership assets, is considered as personal estate.

Mr. Justice Story, in his Commentaries on Equity, vol. 1,

page 624, in treating of partnership property, says: "A court of equity considers the real estate, to all intents and purposes, as personal estate, and subjects it to all the equitable rights and liens of the partners which would apply to it if it were personal estate. And this doctrine not only prevails as between the partners themselves and their creditors, but (as it should seem) between the representatives of the partners also. So that real estate, held in fee for the partnership, and as a part of its funds, will, upon the death of one partner, belong, in equity, not to the heirs at law, but to the personal representatives," &c.

Mr. *Stanberry* then quoted Collyer on Partnership, 76, and 7 Con. Eng. Ch., 215; 5 Id., 383; 8 Ohio, 364.

2. Operations and state of the Port Lawrence Company, from its organization until September, 1821.

The history of the company was traced from year to year.

3. General allegation of fraud, and the transactions subsequent to relinquishment.

We have, first, the general allegation of fraudulent combination between Baum, Oliver, and Williams, to cheat the Piatt Company out of their five quarter-sections, and their moiety of the Port Lawrence Company lands. The rules of pleading in equity do not admit this general allegation of fraud, but require the facts which constitute it to be averred, that issue may be taken on them. In answer to such general allegation, a general denial is sufficient. *White* v. *Hall*, 12 Ves., 323.

The time of this combination is laid in the early part of the year 1822. The allegation is first made in 1836, years after the death of Baum. It therefore affects the dead as well as the living. It is, besides, an allegation of breach of trust, as well as fraud. The sort of proof which is required to make out such a case, is well stated by Mr. Justice Story, in *Prevost* v. *Gratz*, 6 Wheat., 498:

"Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

*Baum lived many years after this transaction, and during his life it was not questioned. He is not here [*360 to answer for himself, and those who represent him, and have had the custody of his papers, make common cause with the complainant. (See A. H. Ewing's answer, p. 81, and his deposition, p. 361.)

It is very proper in such a case, where fraud and breach of trust are imputed to the dead, and attempted to be raised upon presumptions from conduct, to look to the character of the deceased.

The whole case shows that Baum was esteemed by all parties a man of the strictest honor, and had the fullest confidence of his associates.

4. Oliver's agency.

The bill alleges that, on the 14th August, 1817, Baum, with the advice and consent of the company, appointed Oliver agent to lay out the town, (with Schenck's assistance,) and to attend to the concerns of the company; which agency Oliver accepted, and has continued such agent ever since.

Oliver answers that he was appointed agent August 14, 1817; that his appointment was for one year; that about the month of May, 1818, he was elected cashier of the Miami Exporting Company, a bank at Cincinnati; that he entered upon his duties of cashier about the 1st of July, 1818, and considering these duties incompatible with his Port Lawrence agency, before entering on his duties as cashier, he resigned his agency to Baum, settled his accounts, and delivered to Baum all moneys and papers relating thereto.

On the 14th August, 1818, Oliver sold half his interest in Port Lawrence Company to Steele and Lytle, they assuming all liabilities; and in March, 1819, he sold, in like manner, the other half to Embree and Williams.

The allegation of the continuing agency of Oliver is met by the direct denial of the answers, which allege that, as originally constituted, it was to continue but one year, and actually terminated in less than a year, on the 4th July, 1818.

Next, and what is much more satisfactory, we have the express limitation of the agency to the period of one year, and the salary of $1,200, in the letter of Baum to Oliver, of August 14, 1817; the testimony of Gano, that Oliver's whole time from July, 1818, for the succeeding four years, was directed to his duties as cashier; the allowance of the salary down to July 4, 1818, and no longer; the total absence of evidence of any renewal of the appointment of agent, or the payment of any salary after that date, and the special power given by Baum to Oliver, on the 1st September, 1825, to collect money due to Baum on the Port Lawrence concern.

It well appears, therefore, that Oliver's relation to Port Lawrence Company, as agent, ceased on the 4th July, 1818, and that his relation as partner ceased in the month of March, 1819, when he sold his remaining interest, without recourse, to Embree and Williams. *From that time

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his only relation to this company was as a purchaser of lots in Port Lawrence.

But if his relation as agent continued, there was nothing in that to prevent his purchase of the lands of the company, in payment or collection of a *bona fide* debt

5. The certificate of $213.07.

The bill alleges that this was a false certificate, purporting to have been given to Oliver by Baum, for moneys refunded by Oliver to purchasers of lots in Port Lawrence; that the transactions in respect to it were secret; that instead of making personal demand of the plaintiff and other members of the Piatt Company, Oliver fraudulently attached three of their five quarter-sections, and purchased them under that proceeding.

(Mr. *Stanberry* here referred to many parts of the record, to show that the debt was just; that personal demands were made for payment from the plaintiff and other members of the Piatt Company; and that the transaction was not a secret one.)

Three objections are taken in the bill to the proceedings in attachment under this certificate of debt.

1st. That Michigan had no jurisdiction.

2d. That certificate was not a valid claim.

3d. That the proceedings were fraudulent.

The court below decided against their validity, upon another ground, viz., that the estate of the parties to the attachment could not be reached by that process.

See the Michigan statute as to attachments, which embraces all "rights, credits, moneys and effects, goods and chattels, lands and tenements." Laws of Michigan Territory, Chap. 23, No. 189, Cong. Law Lib., 399.

Baum was a party, and he held the final certificate showing full payment. The debt was still due, primarily from him, as the acting partner, and was raised by advances at his request, in discharge of his personal covenants. The land attached was a fund he held as indemnity against those advances. He certainly had an estate, a right. Subordinate to his estate or lien on these lands, the members of Piatt Company had a right in these lands; they were entitled to them after the debts were discharged; their interest was simply an equity of redemption.

It seems to us a startling doctrine, upon a bill filed in another jurisdiction, collaterally, to hold these attachment proceedings a nullity. The court of Michigan had exclusive jurisdiction of the territory in which these lands were situate. That was decided in the Circuit Court. The court in Michigan specially ordered a sale of these lands, (210,) and now it is claimed that the whole proceeding is void, not simply voida-

ble on writ of error, but absolutely null; and this, too, by a court of another jurisdiction, in a collateral proceeding.

*362] *The proceeding differs wholly from the ordinary sale of lands on execution, in which the judgment of the court is one thing, and the proceeding by execution quite another, and carried on by the party.

This is a proceeding *in rem*, in which the court acts upon the thing, and takes, specially, jurisdiction of it.

We think the authorities cited in the Circuit Court do not sustain this doctrine.

Cases relied on in Circuit Court. *Piatt et al.* v. *Law et al.*, 9 Cranch, 496.

The questions of the validity of the sale of an equity of redemption in lands, under the attachment law of Maryland, was raised; and it appeared that question had not been decided by the Supreme Court of Maryland. The statute of Maryland, of 1715, chap. 40, makes "goods and chattels, credits, &c.," liable to attachment. The statute of 1795, chap. 56, in "lands, tenements, goods, chattels, and credits."

This court, in the above case, held that the decree of the court of Maryland, if it did not fix the law as to the attachment, at least, fixed the fate of the lands attached beyond reversal, p. 496.

One judge doubted if the attachment act, making the equitable interest tangible, did also make it subject to execution. The court was of opinion that the condemnation gave the court power to issue final process of execution, p. 496.

Haven v. *Law*, 2 N. H., 13, was a case of pledge of personalty; and it was held that the interest of the owner could not be seized in attachment. The court say such an interest is made liable in some of the states by statute.

It appears from the case of *Kitteridge* v. *Bellows*, 7 N. H., 899, that an equity of redemption in lands is subject to attachment, even in that state.

Badlam v. *Tucker*, 1 Pick. (Mass.), 399. The court say it is only by statute that equities or rights to redeem are subject to attachment by ordinary process, and no statute, in Massachusetts, has authorized the attachment of such interest in personal property.

See Revised Statutes of Massachusetts of 1836, chap. 90, sect. 23 and 24. The attachment in that state is ordinary mesne process, and execution upon it by statute provision only goes against such interests as are subject to execution at law.

Jackson ex dem. Ireland v. *Hull*, 20 Johns. (N. Y.), 81, cited

by Circuit Court to show that an equity of redemption cannot be attached.

It was a sale under judgment and execution of the equity of redemption of mortgagor. Held that the equity of redemption did pass by the sale; and it appearing the sale did not satisfy the judgment, (which was on the mortgage debt,) it was held that the purchaser *took, subject to [*363 the remainder due on the judgment. See *Waters et al.* v. *Stewart*, 1 Cai. (N. Y.), Cas., 67, to same point.

6. The mortgage.

On the 27th August, 1823, Baum, for the consideration of $1,835.47, conveys to Oliver, in fee, tracts 3, 4, 86 and 87, except sixty acres off upper end of 86, sold to Tromley and Prentiss. Baum covenants that he is the true owner, and hath full power to sell, and with general warranty. The condition is, that upon payment of $1,835.47, "the sum due Oliver from Baum and his associates, in the purchase of said property," on or before the 1st January, 1824, with interest from September 1, 1823, the mortgage to be void.

The bill alleges that this mortgage was a fraudulent, secret contrivance to cheat the owners out of their property.

That the pretence that there was $1,835.47 due to Oliver was false.

That Baum had no power to sell, mortgage, or in any manner to convey any lands, except 1 and 2.

(Mr. *Stanberry* here examined the record and contended that there was nothing fraudulent or secret about it; that the debt was justly due, and that Baum had full power to sell or mortgage. With regard to Baum's powers, he said:)

It is, then, not disputed that there was no written appointment, power of attorney, or declaration of the powers or trust vested in Baum. He was made the agent or trustee for the six tracts—all the lands of Port Lawrence Company. At the time of his appointment, the certificates of title stood in the names of the agents who made the purchase at Wooster. It is admitted, by the amended bill, that it was then agreed that all the certificates should be assigned to him; but it is alleged in the same bill that the assignments were made just prior to the relinquishment in 1821. The answers are express, that all the tracts were assigned in 1817, and the subsequent and more formal assignments were made necessary on the relinquishment.

The nature of the business required that the title should be vested in Baum—

1st. To prevent difficulties from deaths in a company of

eleven members, thereby embarrassing the transfer of title to a multitude of purchasers.

2d. Baum sold with his personal covenants to make title, which necessarily implied that the title was in him.

He had power to sell all the lands, on speculation, or for the debts of the company.

The bill alleges that no power of sale or mortgage was given as to any other lands than 1 and 2.

*364] *The answers are responsive, and expressly allege the contrary; and there is nothing contradictory in the proof.

We have so far considered Baum's powers as originally granted; but at the date of the mortgage they stand on different ground.

A power originally conferred, even by writing, may be enlarged subsequently, and this enlargement be proved by parol. Story Eq., 97.

It is admitted that the title to the unrelinquished lands was formally transferred to Baum in September, 1821.

The bill alleges that this transfer was for the sole purpose of the relinquishment and appropriation to the unrelinquished lands.

This allegation is denied by the answers, and no proof to contradict.

The complainant introduces Baum's letters to Brown of 1822 and 1823, which state that all the lands were transferred to him for convenience of sale and conveyance.

Clothing a person with apparent ownership and right to sell, implies that the apparent is the real authority. Story on Agency, 108.

Now had Baum power to mortgage for the debts of the company?

1st. On bill and answer that power must be taken to have been expressly given in the beginning, and consequently existed in August, 1823, the date of the mortgage.

2d. But it is necessarily implied, at that time, the title was in him, without limitation. He had incurred liabilities for the company, and there was no other fund provided for the debts but these lands. He might even sell them—for a power to raise money out of an estate authorizes a sale. 1 Atk., 421.

3d. It is further implied by acquiescence. Story on Agency, 60. In January, 1823, Baum sells thirty acres to Prentiss and thirty acres to Tromley, of which the company are notified by the circular of 1824, and to which no objection is made.

So, too, the acquiescence in this mortgage, notified to the company by the same circular.

4th. But the powers of Baum are greatly enlarged when we

regard his true character—not an agent, but the managing partner of a partnership in real estate—the "*præpositus negotiis societatis*"—holding all the title—managing all the business —incurring, by his personal covenants, the primary liabilities.

5th. Besides this power of disposal over the assets, as managing partner, he stands in another relation to these lands after his advances.

At the time of the mortgage, his debt against the partnership, for advances and liabilities, amounted to $4,755.25. Wyllis Trust., 164; *Lambert* v. *Bainton*, 1 Ch. Cas., 199; *Dove* v. *Langston*, Plowd., 186, (at top); *Chalmer* v. *Bradley*, 1 Jac. & W., 51.

*These cases are to the point, that a trustee, to sell, becomes in effect the owner, by advancing to the value. [*365

There may be a question, whether this doctrine applies, in its full force, to realty as well as personalty. *Lambert* v. *Bainton* was real estate, and the lord keeper there held the doctrine.

In *Chalmer* v. *Bradley*, which was also a case of real estate, the Master of the Rolls says he is aware of a distinction between personal and real estate; nevertheless, he seems disposed to act upon the analogy.

We maintain that the doctrine applies, in all its force, to the case at bar, for the shares in this real estate partnership, carefully separated as they were from the title, and cognisable only in equity, are uniformly treated in this court as personalty.

Baum, then, might have held this land as his own. He might have sold it; instead of which he mortgages it, and with great regard for the interests of his delinquent associates.

Several objections are taken to the proceedings by which the mortgage was foreclosed: First, that they were carried on secretly. The bill alleges that the plaintiff had no knowledge of the mortgage or the proceedings until after Oliver had obtained the patents, (which was in December, 1830,) except only through Baum's circular of January, 1824.

Oliver answers, that when the debt secured by the mortgage became due, he applied to the different members of the company, and especially to the plaintiff, for payment, but in vain. That during the pendency of proceedings under the mortgage, the members of the company were cognisant thereof; that he advised the plaintiff of the proceedings, and urged him to pay the debt, or his proportion of it, to prevent the necessity of a sale, but the plaintiff paid no attention to the request.

There is not a particle of proof of the alleged secrecy, nor do these proceedings show any anxious haste to acquire this property, but quite the contrary.

Oliver submits to a postponement of payment of four months. He delays the commencement of legal proceedings for upwards of two years, and delays a sale for five years; in the mean time endeavoring in vain to get his money from his debtors.

The next objection to these proceedings, and the one on which most reliance was placed by the Circuit Court, is the want of parties. It is said the different members of the Port Lawrence Company, or those representing their interests, ought to have been made parties. We maintain this objection would not have been fatal if made by demurrer, or at the hearing in the court in Michigan. The title was in Baum alone. He fully represented all the members of the company. Even if he stood in the mere relation of a trustee, it is doubt-
*366] ful if this objection would have prevailed. *Campbell* v. **Watson*, 8 Ohio, 498; 11 Ves., 443; 3 P. Wms., 92; Story Eq. Pl., 145.

But his true standing was that of acting partner, with the title to all the assets. The other members of the company were dormant partners, and by the rules of chancery practice need not to have been made parties defendant. *Lloyd* v. *Archbowle*, 2 Taunt., 324; *Ex parte Norfolk*, 19 Ves., 455.

But if Oliver acquired no title to the three quarter-sections by the attachment, nor to the other tracts by the chancery proceedings under the mortgage, yet he did acquire the legal title to all these lands, by the subsequent assignment of the certificates to him by Baum, and the granting of the patents.

7. Assignment of final certificates by Baum to Oliver.

In December, 1828, Baum assigned to Oliver the final certificates for tracts 3 and 4, and the three quarter-sections, purchased under the attachment; and in December, 1829, the final certificates for tracts 86 and 87; and in August, 1830, the final certificate for another of the quarter-sections. Under which assignments, Oliver obtained patents in December, 1830, for all but tracts 86 and 87.

(Mr. *Stanberry* here examined the charge that this assignment was fraudulent.)

In the opinion of the court below, it seems to be intimated that Baum's whole power of sale and transfer was exhausted by the mortgage. However that may be in the execution of strict specified powers, it is supposed the doctrine does not apply to the case at bar. Here the title was in Baum, without any express limitation or declaration of trust. It was not a power carried out from the estate, but the whole estate was vested. Doug., 292, 293, *Perkins* v. *Walker*, 1 Vern., 97; that a mortgage is not an exhaustion of a power of sale.

Besides, the transfer was not the exercise of any new power, but the confirmation of the first act; the ratification of Oliver's title under the mortgage, after his purchase at a judicial sale. Baum might have made an absolute sale to Oliver in the first place, instead of which he mortgages the land, obtains further time, and puts Oliver to the necessity of a purchase under judicial proceedings, at a public sale, open to competition. He then makes the transfer of the certificates; a very proper act, and such an one as a court of equity would have compelled him to do; such an act, therefore, as in conscience he was bound to perform.

Here, as well as in every part of this case, in which a question is raised as to Baum's powers, his true situation must not be forgotten. He was not merely an agent or trustee, but a joint owner, and the acting partner; invested with the title to all the assets, having made advances, and incurred personal liabilities, to their full value.

Under these proceedings and transfers, Oliver acquired the legal *title to the four quarter-sections, and [*367 the lands included in the mortgage, by patents issued to him in December, 1830. The plaintiff comes to be relieved, and to impeach the transactions under which that title was obtained. From first to last he has been under no disability. He pretends to have been ignorant of these transactions, but his full and current knowledge of them is established by the answers. In fact he admits notice upon the emanation of the patents.

Now if there was good faith in these transactions, it is out of the question to ask this court to disturb a legal title upon any of the grounds of irregularity or want of power, which are alleged. This is especially so when the laches of the plaintiff is taken into the account.

The case of *Bergen* v. *Bennett*, 1 Cai. (N. Y.), 1, is very much in point here. That was the case of a purchase by a trustee; a mortgagee with power to sell; sixteen years afterwards the mortgagor brought his bill to redeem. Kent, Justice, whilst he acknowledges the incapacity of the trustee to purchase, holds the title good, simply by the acquiescence. He states the distinction between the case of a bill brought against the trustee to set aside his legal title, and a bill brought by him to complete his purchase, and that equity would not interfere, as of course in the former case. He says, "the *cestui que trust* must come in a reasonable time to set aside the sale, or he will not be heard; and that what shall be termed a reasonable time, is not susceptible of a definite rule, but must in a degree depend upon the circumstances of the particular case,

and be guided by the sound discretion of the court. In this case the *cestui que trust* comes after sixteen years, finding it a gaining bargain, and being all that time under no disability." The learned judge then goes on to enumerate several cases of much shorter acquiescence, which were held barred.

Gregory v. *Gregory*, 1 Coop. Ch. Cas., 201, was a purchase by a trustee from *cestui que trust*, at an undervalue. The Master of the Rolls said he would have set it aside if the application had been made in a reasonable time, but a delay of eighteen years was too great.

Chalmer v. *Bradley*, 1 Jac. & W., 51, is to the same point, as to the effect of acquiescence in a breach of trust.

But this being a partnership, requiring regular contributions to meet liabilities, refusal or neglect to contribute works a forfeiture, and implies acquiescence, under circumstances less strong than in ordinary cases.

Prendergast v. *Tuston*, Younge & Coll. Ch., 98, decided in the English chancery in 1841, was the case of a mining partnership, in which a delay of nine years to meet contributions was held fatal to the plaintiff.

*368] The bill alleges that the plaintiff was always willing to contribute *his proportion, but was never called upon. The answers deny this allegation, and set out repeated and earnest requests, and total disregard of them.

How then stands the case of the plaintiff? He had engaged in a partnership adventure in real estate; debts were contracted by the acting partner, who was primarily liable upon his personal covenants. That acting partner is also deeply harassed with his own individual liabilities. The plaintiff is under no disability, is a man of property, is fully advised of the condition of affairs, and deliberately, for a series of years, abandons the property and the acting partner. In process of time, after the property has changed hands and greatly appreciated by the labor of others, he comes into a court of equity for relief. Is it not clear that but for this unexpected increase in value, we should never have heard of this case?

8. Exchange with the Michigan University.

If the court should be against the appellants on all the foregoing points, and be of opinion that Oliver held tracts 3, 4, 86, and 87 for the Port Lawrence Company, and the quarter-sections in trust for the Piatt Company, we claim next, that the decree was erroneous in giving to these *cestuis* tracts 1 and 2, instead of making the value of the lands exchanged a charge on 1 and 2.

These tracts, several years after the relinquishment, had been granted by Congress to the University of Michigan, and

were acquired from the trustees by Oliver, in exchange for tracts 3, (except ten acres in north-east corner,) 4, and the three quarter-sections purchased under the attachment. The journal of the trustees is exhibited to show the negotiation.

This part of the decree is attempted to be sustained on two grounds: that Oliver made the exchange as agent for the Port Lawrence Company, in conformity with an understanding formed at the time of the relinquishment to re-purchase these tracts: or if not, that as they were acquired with the lands of the Port Lawrence and Piatt Companies, a trust results for their use.

First, as to the alleged intention to re-purchase, and the exchange by Oliver in conformity to it.

The original and amended bills both allege that at the time of the relinquishment of 1 and 2, it was understood and agreed by the parties, that when at any time they should be offered for sale by the United States, they should be re-purchased for the benefit of all concerned.

The answer of Oliver expressly denies such understanding or intention, and states that he (Oliver) often conversed with members of the company on the subject of the relinquishment.

The answer of Williams is, that he was a member of the Port Lawrence Company at the time of the relinquishment, intimately acquainted with all its concerns and the views of its members, and never heard of such intention, then or afterwards.

*(Mr. *Stanberry* here examined the evidence touching [*369 this point.)

It is therefore quite clear, that there was no agreement on the part of the company to re-purchase tracts 1 and 2; that the subsequent acts and declarations of Baum were upon his own motion, and the motive was to secure himself first, and his associates ultimately, from loss. If he had then succeeded in the re-acquisition, his old associates might have had the election to come in or not, for they gave him no authority to bind them to new speculations.

However it might have been at the time of the memorial, yet in 1828, when the negotiation for the exchange was begun with the university, the idea of re-purchase for the old Port Lawrence Company is absurd, for at that date a majority of its members were dead or gone to distant parts, and the remainder had for seven years abandoned the concern.

There was then no agreement to bind the consciences of Oliver or Baum, and nothing in their relations of trustee or agent, if those relations continued, to disable them from acquiring these lands upon their own account.

When 1 and 2 were relinquished, the subject-matter of the trust and agency in regard to those tracts was ended. There was no pre-emption right in the company—no tenant right of renewal—no advantage obtained by reason of the trust.

"If, from being in possession, trustees have an opportunity of renewing the leasehold, such renewal can only be for their *cestuis que trust;* but where the old lease and all the trusts respecting it are determined, and there is no tenant right of renewal, the former trustee is *quoad hoc* trustee no longer. The fiduciary relation ceases for want of an object, and there is no ground for excluding the *quondam* trustee from being a purchaser." Hov. on Frauds, 481, 482.

So, during the continuance of a lease, the trustee may purchase the reversion in fee, though by this means he debars the *cestui que trust* of a chance of renewal. Id., 482.

Next, as to the claim that a trust results in 1 and 2 for the owners of the tracts which Oliver gave for them in the exchange.

The first objection to this claim is founded on its multifariousness. Here is trust property belonging exclusively to the Piatt Company, and other trust property belonging exclusively to the Port Lawrence Company, all of which has been applied by Oliver in the purchase of tracts 1 and 2, and which trust property was afterwards reclaimed by Oliver. This bill seeks relief for these independent *cestuis que trust* by demanding for each company its share in 1 and 2, and also its original fund afterwards regained by Oliver.

This makes such a case of multifariousness as would compel the court *sua sponte*, at the hearing, to refuse relief. 1 Story Eq. Pl., 224, n. 2; 10 Ohio, 459; *Campbell* v. *McKay*, 1 Mylne & C., 603.

There are other insuperable objections to this resulting trust in 1 and 2. *It was formerly doubted whether trust moneys could be followed into land, so as to operate even as a lien, in exclusion of other creditors. It is now settled that the lands may be charged with the trust fund, and that is ordinarily the sort of relief given to the *cestui*. Hov. on Frauds, 468, 471; *Wallace* v. *Duffield*, 2 Serg. & R. (Pa.), 521.

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In some cases a trust in the land so purchased results to the *cestui*, but the case at bar is not of that class, because,

1st. Where in the misappropriation of a trust fund it has been confused with any other fund, the uniform rule is, simply to make the trust fund a charge on the new acquisition. *Crop* v. *Norton*, 2 Atk., 75. The only limitation upon the

doctrine as established by Lord Hardwicke in *Crop* v. *Norton*, that a trust never results, except where all the money is paid by one person, is, that where the joint advance is in conformity with an agreement of purchase a trust will result. *Wray* v. *Steele*, 2 Ves. & B., 388; *Bottsford* v. *Burr*, 2 Johns. (N. Y.), Ch. 410.

2d. Another objection to a resulting trust in tracts 1 and 2 is, that they were acquired in part by the individual funds of Oliver.

Under the mortgage proceedings and the subsequent assignment of the certificates, Oliver acquired, at the least, the interest of Baum in tracts 3 and 4, which tracts formed a part of the consideration for tracts 1 and 2.

Where land is purchased partly with trust and partly with individual funds, the trust fund so applied is simply a charge on the land, and affects the title no further. Willis on Trustees, 64; 1 Hov. on Frauds, 471, 472; *Lewis* v. *Maddocks*, 8 Ves., 159; s. c. 17 Id., 47.

3d. Oliver was not a strict trustee. He did not stand towards his *cestuis* in any one of the common fiduciary relations. He believed himself to be the sole owner of the fund with which he purchased 1 and 2.

Where land is purchased with a trust fund, but the party is not in a strict fiduciary relation, and acts under a belief of his right to the fund, the rule in equity is, to make the trust fund or its value a charge simply. *Savage* v. *Carroll*, 1 Ball & B., 265; *Perry* v. *Philips*, 4 Ves., 108; *Cox* v. *Paxton*, 17 Id., 329.

4th. Oliver has re-acquired the very lands, the identical trust fund which he is said to have misappropriated in the exchange for 1 and 2. There is therefore no necessity for following the original fund into the new acquisition, either in the way of charge or resulting trust, for the original fund is here undiminished, and by giving it them the *cestuis* are in *statu quo*.

5th. Another objection to giving the *cestuis* 1 and 2, is the difficulty of apportioning their respective interests in the new acquisition.

We know that the parties to the exchange considered 1 and 2 as equal in value to 3, 4, and the three-quarter sections, but what relative *value they affixed to 3, 4, [*371
and the three-quarter sections, we do not know. Undoubtedly they had their own views of this relative value, and these views may have been very dissimilar. How can the court fix that relative value, and say what proportion in the new acquisition represents the distinct funds vested in it? In the ordi-

nary case of a sale of lands, where the agreement settles all terms but the price, a court of chancery has never yet attempted to fix a price for the parties by the opinion of third persons. Even where the contract provides that the price shall be fixed by arbitration, a court of chancery will not compel the delinquent party to choose his arbitrator or even appoint arbitrators for them.

6th. The vast increase in the value of 1 and 2 since the purchase by Oliver, an increase brought about, in a great measure, by the combined efforts of Oliver and Williams, forbids a resulting trust.

This property, at the time of its purchase, was worth only about $5000. At the time of the filing of the bill it had advanced one hundred fold in value, mainly by the constant exertions of the appellants.

But if a trust did result, we claim that the decree is very far from establishing the true proportions of the parties in 1 and 2.

As to tracts 3, 4, 86 and 87, notwithstanding the proceedings in chancery, and the assignments of the certificates to be holden invalid, Oliver yet had title to them; his mortgage remained; by that he had the equitable estate. He subsequently obtained the legal title, in trust for all persons interested in the property. He sells the property for cash, and the *cestuis que trust* may affirm or disaffirm the sale. If they affirm it, how will equity compel him to apply the purchase money?

1st. To the expenses of the sale. 2d. To satisfy the mortgage in full. 3d. The residue to the mortgagors.

But if, instead of making this application, he lay out the money in other land, and if the court find they can pursue the money into the land, not merely as a charge upon it, but to raise a resulting trust in the land itself, then the land will be applied just as the money which bought it would have been applied, and in the same proportions.

If the mortgaged premises were exchanged for land, without the intermediate sale and re-investment, the same consequences would follow.

If it be found that Oliver should share, in equal proportion with the other persons interested, the profits of the bargain he has made, then we take the value of the property sold as the basis of our estimate, and it gives this result:

Lots 3, 4, 86, and 87, estimated by Hunt & Conant,	$2357 50
Mortgage, (deducting all corrections claimed,) with interest to 1830, - - - - - - - -	2218 00
Interest of P. L. Company, - - - - -	$139 50

*If the court should be of opinion that equity ought not to give Oliver, the mortgagee, any share in the profits of his own bargain, nor any compensation for time, trouble, and expenses in making it, then the proportions would be settled thus:

Value of 1 and 2 in 1830, (Hunt & Conant,) -	$4030 00
Paid by Piatt Company, or Oliver, as the court shall find in another branch of the case, by the three quarter-sections, worth at same time, (Hunt & Conant,)	1120 00
	3010 00
Oliver's interest in the mortgaged premises, -	2218 00
Interest of Port Lawrence Company, - - -	$792 00

Oliver's expenses, services, &c., if allowed, would, of course, be deducted ratably from the respective interests.

9. We claim, if a trust is established in 1 and 2, that it was erroneous to allow the share conveyed by Burnett to Mary P. Ewing to be set up against Oliver, being $\frac{1}{13}$ of Baum Company's shares.

Baum conveyed the lands included in the mortgage to Oliver, with covenants of warranty.

Assets descended, upon the death of Baum, to his heirs. With part of the assets so descended, *i. e.* the amount due to Baum from the members of the Port Lawrence Company, for advances, Mary P. Ewing, one of his children and heirs, requires from Burnett title to an interest in the lands covered by the warranty of her father. The decree defeats the title to these lands, and allows the heir to recover upon the footing of the adverse interest so acquired.

We maintain she is estopped. Co. Litt., 325.

10. We claim, lastly, that the decree is erroneous as against Williams, who well maintains the ground of a *bona fide* purchaser, without notice.

The bill alleges notice, by Williams, of all the fraudulent combinations and transactions imputed to Baum and Oliver.

These allegations are met with full and unequivocal denials in the answer, which sets forth all the particulars required for the defence of a purchaser without notice.

There is not a particle of proof to impeach this answer, or to show that Williams had any knowledge of the fraudulent acts attempted to be made out against Oliver and Baum. He purchased an interest in the Port Lawrence Company in March, 1819. He was the agent to make the relinquishment of 1 and 2 in September, 1821, and does not appear again in the case until May, 1831, when he makes his first purchase from

Oliver. He finds Oliver invested with the legal title to 1 and 2, which had been relinquished ten years before.

It is said Williams was one of the *cestuis* whose property *373] was wrongfully conveyed by their trustee, Baum; that he must be presumed *to have knowledge that Baum had no authority to sell or mortgage the property.

In the first place, we do not see, if this be so, how it affects his title to tracts 1 and 2. The trust, as to them, ceased at the relinquishment. Ten years after, he finds Oliver invested with the legal title, and then purchases from him.

Will it be said that the recitals in the patent to Oliver for tracts 1 and 2 affect him with notice?

The patent issued to Oliver on the 4th March, 1831, and recites, that, under the provisions of the act of Congress of January 13, 1830, "to authorize the exchange of certain lots of land between the University and Martin Baum and others," the University had transferred 1 and 2 to Oliver, as the assignee of Baum.

In point of fact, Oliver was not the assignee of Baum, of tracts 1 and 2. No one pretends that this recital is not a mistake; nor can it be said the recitals in the act of Congress notified Williams that the phrase "Martin Baum and others" meant Martin Baum and the other members of the Old Port Lawrence Company. The most conclusive argument to show it implies no such notice, is found in the testimony of Judge Burnett, who, like Williams, was a member of that company, and, being in the Senate of the United States, voted for the law, and had no idea that "Martin Baum and others" included the company.

As to the other tracts, Oliver held the patents without any recitals. Williams knew a part of them had once belonged to the Port Lawrence Company, but he knew nothing to impeach Oliver's title.

Pirtle, for appellees, denied that this was a case of partnership, and commented on the authorities referred to by Mr. *Stanberry*, which, he contended, did not justify the position. He then traced the history of the transaction, beginning with the purchase at the public sale, and said, that courts will not enforce agreements in fraud of the law, or against public policy, is true. That an agreement not to bid at a sheriff's sale or at an auction of an executor would be against public policy, has been decided. The doctrine on this subject was thoroughly examined in the case of *Jones* v. *Caswell*, 3 Johns. (N. Y.), Cas., 29; 1 McLean, 300, 302; 2 Id., 276, *et seq.*; 1 Story Eq., 290. But this doctrine has no application to this

case. To apply it now, even if there were fraud, would be very much like a plea to an action of trover that the plaintiff had obtained the property in question of a stranger by deceitful practices, which would be absurd. This suit is not to enforce a contract. The contract had been completed years before the matters charged against the defendants.

There is nothing corrupt in such an agreement as that made by the parties in the instance stated in the plea. Nothing is more common than for several persons to join in a purchase of lands or other *valuable property at auction [*374 sales. There was no more harm in forming the Port Lawrence Company than there was in forming the Baum and Piatt Companies. There was no agreement that one, for a certain price, should not bid against the other, but that certain tracts, desired by both, should be purchased for both.

This was a great sale, advertised over the union, at which great numbers of persons were collected from different quarters. It was not like a neighborhood sale of chattels by an officer, and there was no danger of injury to the government or of the misleading of any man's confidence. The United States had fixed a minimum price on these lands. There was strong competition; and a price so large was given for the lands, that the Port Lawrence Company were compelled to relinquish the site of the town to the government. So the effect, at any rate, was not to cheat the country.

It would be a flagrant encouragement of fraud to say, that because Oliver and Piatt had formed such a partnership for their respective companies as that in 1817, Oliver and Williams (who bought of Oliver and thus came into the Port Lawrence Company) might in 1836 cheat all the others of the company out of their shares in the Port Lawrence lands.

It is contended that Baum did remain a trustee and agent for the Port Lawrence Company in respect to Nos. 1 and 2, after the surrender to the United States, as well as in respect to the other property of that company, and of the lands owned separately by the Baum Company and by the Piatt Company. That he was agent and trustee as to all the other lands, except 1 and 2, is perfectly apparent; and that Oliver acted for him, that he acted only through Oliver for all the time, is just as apparent upon this record. Baum never was on these lands—never was in that region of the country—all was intrusted to Oliver. Some temporary business was done by another Mr. Oliver, but under the instruction and assistance of this appellant. The duty of surrendering the lots was done by Williams, but this was a single act.

Oliver could not stand on any better ground than Baum,

whether he knew what Baum's powers were or not; or whether he acted as the sub-agent of Baum, or merely as his friend and for his accommodation, or not. If he acted as a volunteer, he could claim nothing of Baum or the company; but his claim must be upon the ground that his acts were at the instance of one or the other. He cannot, then, separate himself from the character of agent. He was acting for the company, not for Baum alone. He stood, then, as the company's fiduciary, and was bound to know how Baum stood to the company. Baum continued to be the agent and trustee for the other lands. This is undeniable. It is only said his agency may have terminated some time afterwards. He was just as much agent and trustee for the lots 1 and 2 after the relinquishment as before. The intention to reclaim them was mani-
*375] fested by his petitions to *Congress. These petitions are dated 30th January, 1822; the lands were relinquished 27th September, 1821. In his letter to Mr. Brown he says, "though the petition is signed by myself only, still others have an interest in it, to wit: Jacob Burnet, William Steele, M. T. Williams, J. R. Miller, and John Rowan, of Kentucky; but for the sake of convenience, all the lands by the company were transferred to me;" and after having referred to the argument in the petition he says, it will show "the just claim which, I think, I and my associates have on the government for redress." What was that redress? Why, that Congress should allow them to purchase the lots 1 and 2, so that they might build up the town laid off there, and in which they had sold lots.

By his associates, he meant to include the Port Lawrence Company; and although he does not name them all in this letter, he names J. H. Piatt and M. Worthington in the postscript; showing that he was not acting for himself and the persons first named only.

In his letter to Mr. Brown, of the 6th of February, 1823, he speaks of the case on which he is petitioning, as "a ruinous one to me and my associates, and has resulted so from the acts of Congress more than other causes;" and he says, "all the tracts stood in my name, in order to render it more convenient to sell and convey."

The possession of these lots, Nos. 1 and 2, on which the town was laid out, was not by any means given up when the surrender was made of the title to the United States, but it was held by Baum until the patent issued to Oliver, as far as it appears in this record. (Mr. *Pirtle* referred to a great many parts of the record to establish this.)

The attachment in Michigan could give Oliver no title, for

several reasons. 1. No attachment would lie, because a mere equity, uncertain in its character, subject, according to the statements of Oliver, to balances due to Baum, could not be attached, and so the court had not jurisdiction. The old statutes of Pennsylvania are very general on the subject of foreign attachment; yet it has been held, that an attachment would not lie against executors, 2 Dall., 73; nor against money collected by a sheriff, 1 Id., 355. "A claim resting in damages and depending on a possibility only, is not attachable by foreign attachment." "For the same reason, foreign attachment lies not of a claim in covenant, because it sounds merely in damages." Serg. Attach. 76. "A legacy cannot be attached in the hands of the executor by foreign attachment, because it is uncertain whether, after debts paid, the executor may have assets to discharge it." Serg. Attach., 86. The statute of 1794, of Massachusetts, provides, that any creditor entitled to an action against his debtor, "having any goods, effects, or credits so intrusted or deposited in the hands of others," &c., may cause not only the goods and estate of the debtor, "to be attached in his own hands or *possession, &c., but also all his goods, effects, and credits so intrusted and deposited." In the case of *Picquet* v. *Swan et al.*, 4 Mason, 446, Mr. Justice Story says, "It is an extraordinary process, and from its nature can afford but a very imperfect administration of rights and remedies as to the litigant parties. Nor, as far as my limited experience has gone, has it enabled me to say, that in complicated transactions, where various and conflicting rights have been brought forward for controversy, the result has in a general view been such as entitled it to peculiar public favor on account of its advancement of public justice," &c. In 7 Mass. 274, the Supreme Court, in exposition of this statute remarks, that "pecuniary legacies in the hands of an executor are not goods or effects; and it is equally clear, that in no proper sense can they be denominated credits." See also 1 Pick. (Mass.), 399. These opinions go to show how this statute of Michigan should be construed. [*376

2. But if the court had jurisdiction, this was an improper procedure against the Piatt Company. The debt, if any, was against the Port Lawrence Company, and it was not in the power of Baum or of Oliver to fix it on the Piatt Company alone. There was no debt of the Piatt Company.

3. This attachment was evidently sued out for the purpose of getting hold of the lands; and not merely for the purpose of making the money pretended to be due. These lands were of much greater value at the time of the attachment than is pretended. The three sections attached were valued at the

time, by the commissioners appointed for the purpose, to $1,200. The sum pretended to be due, was $213.07. Piatt and Oliver lived near each other; Piatt was a man of wealth, at any rate of very competent means, and was weekly in the city where Oliver lived. It was much more convenient to Oliver, if he knew this demand to be just, to have made his money by coercion, or otherwise, in his own neighborhood, than to proceed in a wilderness and remote region—hundreds of miles off.

It is a principle of universal justice, that a party shall not be affected by the judgment of a court, who has not been party to the suit in which it is made. Who was the party that was to be warned to pay the money due on the mortgage, by the decree nisi? not Baum: for Oliver would not have received it of him; but the parties owing the debt, the Port Lawrence Company. Who was expected to defend the suit? not Baum; whose property was to be sold? the property of the Port Lawrence Company; and to be sold to their agent upon their agent's suit! It would be strange indeed, if they were not necessary parties in such judicial performances as this. The doctrine of necessary parties is stated in so many books, it would fatigue the court to cite them. See Story Eq. Pl., 187; 4 Pet., 202.

*377] Had a third person, ignorant of the rights of the company, purchased *the property under this decree, he might have held, just as he might have held under a purchase from Baum without notice. But Oliver's purchase was nothing. The assignment from Baum afterwards was nothing.

This purchase was on the 1st of September, 1828, and a few weeks before, on the 12th of August, a negotiation was commenced with the Michigan University, by Oliver, for the exchange of lots 1 and 2 for other lands in the neighborhood.

Oliver says he made the proposition for himself; but the records of the university show that he made it in behalf of "Baum and others." Baum had been struggling with the government for these lots 1 and 2, for several years, and the act of Congress passed for the benefit of Baum and others, and not for the benefit of Oliver. The government had been made to understand that Baum and his associates had suffered great loss in the purchase of the lots 1 and 2, which they had been compelled to relinquish after having laid out a town, and sold lots, &c. The deed from the university to Oliver purports to be made to carry into effect the act of Congress; and the patent that issued to Oliver purports to be issued "to carry into effect the intent of the aforesaid act, of the 13th January, 1830." The application of Oliver to the university for the

exchange in behalf of Martin Baum and others, was calculated to delude the members of the Port Lawrence Company; and the act of Congress, purporting to be for their benefit, and to carry out, in substance, what Baum had been asking of the government for eight years, was directly calculated to quiet their anxiety, and mislead them.

(Mr. *Pirtle* here referred to many parts of the evidence to show that Oliver had created an impression that he was acting for Baum and others.)

Suppose there was no combination between these parties, or any of them, and that the other members of the company were not necessary parties to the suit, yet Oliver, according to his statement, was a mere volunteer; he had made the payments to purchasers, by which his demand was created, because they were his friends and old associates, and he had obtained the mortgage from Baum, with a knowledge that Baum held the title for a special object only; and how can he be allowed to hold the property under such circumstances? The assignments by Baum to him are all of a piece with the sale under the decree. What court ever supported a transfer by an agent and trustee, of all the subject of the agency and trusteeship, to his friend, or sub-agent, under pretence of paying debts? The assignments were made by Baum to enable Oliver to seize the Port Lawrence property. The foreclosure of the mortgage had been made for that purpose. Thus the matter was fixed up between them to take all, in and out of Port Lawrence, and let the *cestuis que trust* lose all the money paid out for all the land, all *paid to Oliver, [*378 to Baum, and to everybody else; and a balance, the whole of Baum's account rendered, and two-thirds of Oliver's, still outstanding!

The lots 1 and 2 having been obtained with the lands of the Port Lawrence Company, by such means, and by persons standing in the relation in which Baum and Oliver stood, and in which Williams also stood, must be held in trust for the Port Lawrence Company. Williams was one of that company, and was bound to have notice of the manner in which Baum held, and the relation in which Oliver stood; and his denials amount to nothing. I need not trouble this court with reference to authority to support the general doctrine, that a fiduciary cannot hold for himself the subject purchased with the funds intrusted. There are some qualifications of the rule. But why should there be any here? This is not a case where so much money has been laid out in lands by one who held money in trust, either to lay it out in lands, or for any other purpose; that money has no ear-mark, does not make a

difficulty here. It is not a case, either, where justice cannot be rendered to the parties purchasing the land, if any thing further than a specific lien were given on the land purchased. But this is a case where the lands exchanged have been improperly obtained, and applied to the exclusive use of parties standing in a relation to compel them, in good faith, to divide the lands acquired, taking to themselves a sufficient compensation. It is not necessary that there shall be a direct violation of a formal trust, to allow the parties, claiming to have the benefit of the purchase, that privilege. *Docker* v. *Somes*, 2 Mylne & K., 655; 4 Kent. Com., 306; *Holt* v. *Holt*, 1 Ch. Cas., 19; *Walley* v. *Walley*, 1 Vern., 484; *Palmer* v. *Young*, Id., 276; *Lane* v. *Dighton*, Amb., 409; 1 Bro. Ch., 232; 2 Id., 287; *Phillips* v. *Crammond*, 2 Wash. C. C., 441; *Holeridge* v. *Gillespie*, 2 Johns. (N. Y.), Ch., 33. This case is very similar in its principles to the cases of a renewed lease, procured by an executor or guardian, when he shall be a trus tee of the new lease; and of a surrender by one partner and a new lease taken to himself, where his partners shall hold him as a trustee, as in some of the cases just cited. The doctrine contended for has been uniform, from the decision of Lord Keeper Bridgman, in *Holt* v. *Holt*, says Chancellor Kent, to the present time.

Scott, on the same side, for appellees.

This cause is brought before this court by appeal from a decree of the Circuit Court of the United States, seventh circuit, and district of Ohio; and in its discussion we shall assume the following positions:

1. At the time lots 3 and 4, (except ten acres, part of lot 3, reserved,) and the three quarter-sections in the bill named, *379] were transferred by William Oliver to the trustees of the Michigan University, *in exchange for lots 1 and 2, said Oliver was the trustee, and Robert Piatt, the original complainant, and others, the *cestuis que trust* of the lands then given in exchange for lots 1 and 2—of the ten acres reserved, part of lot 3; of lot 86, (except sixty acres, parts thereof sold to Prentiss and Tromley;) of lot 87, and the south-east quarter of section 3, of township 3—all in the twelve miles reservation, at the foot of the rapids of the Miami of Lake Erie.

2. When Oliver received conveyances from the trustees of the Michigan University (and assignments of the original first certificates from Baum, and obtained a patent therefor) of lots 1 and 2, in exchange for the three quarter-sections of land which belonged to the Piatt Company, and for part of lot 3 and lot 4, which belonged to the Port Lawrence Company, he

became invested with the legal title to said lots 1 and 2, as trustee in trust for said Piatt and Port Lawrence Companies, from whom the consideration given for said lots 1 and 2 proceeded.

3. M. T. Williams is not an innocent *bona fide* purchaser. He is affected with notice at and prior to the respective periods in which he received conveyances from Oliver, of portions of the lands in question, and therefore holds the same as trustee, for the uses and purposes originally designed. 1 Phill. Ev., 410, 411; Com. Dig., tit. *Evidence*, B. 5; Plowd., 234, 430, 434; 2 Serg. &. R. (Pa.), 507; Gilb. Ev., 87; 1 Salk., 285; *Marchioness of Anandale* v. *Harris*, 2 P. Wms., 432; *Shelby* v. *Wright*, Willis, 11; Com. Dig., tit. *Estoppel*, A. 2.

4. Oliver as agent, and Oliver and Williams as trustees, are bound to account with and pay to the original complainant, Robert Piatt, his just proportion of the money and notes received by them on the sales of lots in Port Lawrence and Toledo, and lands adjacent, and to convey to him his just proportion of such parts thereof as remain unsold.

5. Oliver and Williams have no just cause to complain of the decree which has been rendered against them in the Circuit Court, as ample and more than liberal justice has been awarded to them, even if their conduct in the premises had been entirely untainted by fraud or a fraudulent design, and they had been merely acting under an entirely innocent but mistaken view of their legal rights. But it is respectfully submitted, that Robert Piatt, the heirs of Martin Baum, and the other defendants in interest, have just cause to complain of that decree.

The answers of all the defendants, except Oliver and Williams, to the amended bill of the original complainant, Robert Piatt, are in the nature of cross-bills, and respectively ask for similar relief, as respected him or themselves, to that prayed for by the complainant, Robert Piatt.

It was therefore proper for the court, in rendering the decree, to *adjust and settle the interests and claims of all the parties to the record. [*380

I. (Mr. *Scott* related the formation of the Port Lawrence Company.)

The partnership thus formed was neither universal nor general, but limited and confined to the objects set forth in the instructions, &c., given to Oliver, and the facts to which we shall refer, from which the rights, duties, and obligations of Baum, the trustee, and Oliver, the agent, are to be ascertained.

It is conceded that Baum continued to act as trustee until

his death. That Baum's powers were restricted to a general oversight of the company's business, and the execution of conveyances of the lots and lands when sold, we also infer from the following facts:

Baum, in his letter to Brown, 25th December, 1822, says: "For the sake of convenience, all the lands, by the company, were transferred to me." In his letter to the same, February 6th, 1823, he also says: "All the tracts stood in my name, in order to render it more convenient to sell and convey;" and in his letter to the commissioner of the General Land Office, July 20th, 1827, he says: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent, for the purpose of managing and conveying them in case of sales." All the certificates, for the purposes aforesaid, were assigned to Baum.

Oliver, as agent, with the assistance of Schenck, proceeded to lay out the town, advertised a sale of lots, and sold a number of lots. His instructions confined him to the sale of a certain portion of the lots, fixed the terms of sale, and required him to give certificates of purchase, in the nature of title-bonds, for a conveyance by Baum, the trustee. He was to open an immediate correspondence with Baum relative to the interests of the company, and was informed, that any instructions he might thereafter receive from Baum, the trustee, were to be considered as coming directly from the proprietors themselves. This is all shown by his instructions, his bond to Baum, and power of attorney from Baum.

The letter given by Baum to Oliver, notifying him of his appointment, which relates particularly to the salary he was to receive, would seem to restrict his agency to one year; but his appointment by the company was without limit as to time. His appointment being without limit as to time, the law presumes a continuance of his agency. (See Stark. Ev., 46, 50, 51, cited.) Oliver insists that he never acted as agent of the Port Lawrence Company after his resignation, in May or June, 1818. But the following facts and circumstances show that his agency extended beyond that period, and that he still stands in that relation to the company.

(Mr. *Scott* here referred to numerous parts of the record.)

We thus deem the agency of Oliver, from August, 1817, the date of his original appointment, down to the 20th June, 1834, established; *the consequences resulting from which agency will be examined hereafter.

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Oliver was one of the original proprietors of Port Lawrence; and, although he may have transferred his interest in the company to others, in 1818 and 1819, as he alleges in his

answer, yet all the liabilities against said company had accrued prior to said transfers. These transfers did not discharge him from the liability to persons who had claims growing out of purchases made prior to his transfers, which liabilities have not yet been entirely satisfied. (See Collyer Partn., 4, 105; and Story Partn., § 358.) No settlement among the original proprietors or their legal representatives or assignees has ever been made; his relation, therefore, to the company, as one of the original partners, still remains, and the consequences of this relation will also be examined during the progress of the cause.

The pressure of the times and other causes rendered it indispensably necessary for the company to avail themselves of the benefit of the act of Congress for the relief of purchasers of the public lands prior to the 1st day of July, 1820, by the relinquishment of lots 1 and 2, and the application of the money paid thereon to the payment of the purchase money of other lands bought by them. The amount paid on tracts 1 and 2 was $4,817.55½. The balance due on lots 3, 4, 86 and 87, was $1,402.36½; and the balance due by the Piatt Company, for their five quarter-sections, was $1,248. In order to facilitate, therefore, the application of the moneys paid on said lots 1 and 2, the original first certificates of the purchase of said lots 1, 2, 3, 4, 86 and 87, and the five quarter-sections, were all assigned to Baum.

M. T. Williams, as agent, made the relinquishment of said tracts 1 and 2, and applied the moneys arising therefrom to the discharge of the balances due on the lands retained, September 27, 1821, and the surplus remaining after such payment was $949.21, one-half of which, viz., $474.60½, belonged to the Piatt Company. This balance, by arrangement between the parties, was applied to the payment of lands which had been purchased by the Maumee and Sandusky Company, and which was to be accounted for as part of the Piatt Company's portion of the liabilities of the Port Lawrence Company.

All the defendants, except Oliver and Williams, distinctly admit that the five quarter-sections were assigned to Baum for the purposes above named, and that no consideration moved, or was intended to move, from Baum to the Piatt Company, as an inducement to said assignments. Neither Oliver nor Williams deny that the assignments were made for the above purposes. The assignments being thus made for the above purposes, those purposes being accomplished, a trust resulted to the Piatt Company in said five quarter-sections. See *Jackson* v. *Mills*, 13 Johns. (N. Y.), 463; *Boyd* v. *Lane*, 1 Johns. (N. Y.) *Ch., 582; *Wallace* v. *Duffield*, 2 [*382

Serg. & R. (Pa.), 521; *Foote* v. *Calden*, 3 Johns. (N. Y.), 216; *Trustees of the Methodist Episcopal Church* v. *Jacques*, 1 Johns. (N. Y.) Ch., 450; *Botsford* v. *Burr*, 2 Id., 405; *Huston* v. *Hamilton*, 2 Binn. (Pa.), 387; *Deg* v. *Deg*, 2 P. Wms., 412.

(Mr. *Scott* then referred to various parts of the record to show that when lots 1 and 2 were relinquished, it was done with an understanding and determination, among the original proprietors, to re-purchase them, and go forward with the enterprise of building up a town; and then argued, from the following propositions, that Oliver intended to defraud his associates.)

1. In order to place himself in a situation in which he might secure to himself a part or the whole of the five quarter-sections belonging to the Piatt Company, Oliver procured from M. Baum the certificate dated September 10, 1822.

The giving of that certificate did not fall within the scope of Baum's authority as trustee. See Story Partn., § 111.

The accounts between the partners could not be split up, as contemplated by that certificate, so as to render one partner liable in his individual capacity for claims against the whole of the partners.

At the time that certificate was given, nothing was due from the Piatt Company to the Port Lawrence Company, but, on the contrary, the sum of $191 was due from the latter to the former. No suit at law could be maintained by Oliver, the agent, for the recovery of the amount of said certificate, it being fraudulent and void; and if a just demand, it was due from the Port Lawrence Company, and not the Piatt Company, and a suit could not be maintained on it against the Piatt Company. See Story Partn., §§ 234, 235, 236, and 128; *Jackson* v. *Rawlins*, 2 Vern., 95; *Maddox* v. *Jackson*, 3 Atk., 406; *Anon.*, 2 Freem., 27.

2. Oliver's letter to R. Piatt, February 3, 1823.

3. No demand for payment of said certificate was ever made upon the Piatt Company, or any of its members; nor was there ever any legal proceedings instituted against them where they resided.

4. The very fact of instituting legal proceedings in a foreign jurisdiction, against the property of the Piatt Company, at a point situated more than two hundred and fifty miles from the residence of any of the members of the Piatt Company, and which point could only be reached by passing through a dense and uninhabited wilderness, whilst most of those members resided in the immediate neighborhood of Oliver, furnishes strong evidence of a fraudulent and ulterior design on the

part of Mr. Oliver to secure to himself the property of the Piatt Company.

5. At October term of the County Court of Monroe county, Michigan Territory, 1825, Oliver sued out a writ of foreign attachment on the aforesaid certificate, against Martin Baum, Robert Piatt, *George A. Worth, and William M. Worthington, survivors of Martin Baum, John H. Piatt, (deceased,) Robert Piatt, George A. Worth, and William M. Worthington, late joint partners. The manner in which this attachment was sued out would seem to furnish conclusive evidence of a fraudulent intent. George A. Worth never was a partner, nor had any interest in the Piatt Company; nor were Martin Baum, John H. Piatt, (deceased,) Robert Piatt, George A. Worth, William M. Worthington, late joint partners. The three quarter-sections on which the attachment was levied did not belong to the persons named in the attachment, but to the representatives of John H. Piatt, (deceased,) Robert Piatt, Gorham A. Worth, and William M. Worthington. This is not like the case where process has been served on an individual by a wrong name, in which case he has an opportunity of appearing in court and pleading the misnomer in abatement. In attachment, the proceedings being *in rem*, if the property on which the attachment be levied belong not to the defendants named in the writ, it is respectfully submitted that the court has no jurisdiction in the case. Even if the notice which seems to have been given of the pendency of the attachment had by accident reached the members of the Piatt Company, they could not have supposed that they were the persons intended. The plaintiff, in all such cases, proceeds at his peril. *Kilbourn* v. *Woodworth*, 5 Johns. (N. Y.) Ch., 40; *Fisher* v. *Lane*, 3 Wils., 297; *Phelps* v. *Holkirk*, 1 Dall., 261; *Kibby* v. *Kibby*, Kirby (Conn.), 119; *Buchanan* v. *Bucker*, 9 East, 192; *S. P. Robertson* v. *Ex'rs of Ward*, 8 Johns. (N. Y.); and *Fenton* v. *Garlick*, Id. 152; also, Manuscript F, p. 6. [*383

At the time of the levy, judgment, and sale, under the attachment, the legal title to the three quarter-sections levied on remained in the United States; the evidence of the equitable title was vested in Baum; and the only claim which the Piatt Company had was a mere resulting trust, not subject to be levied on under attachment or execution; and, consequently, the whole proceedings under the attachment, the conveyance to Noble, and by him to Oliver, were absolutely null and void. *Lessee of Abraham's heirs* v. *Will et al.;* 6 Ohio, 164; 2 Pow. Mortg., p. 457, A; Co. Litt. 35, A; MS.

p. 7, &c.; and the opinion and authorities cited by his honor Judge McLean, in giving his opinion in this case, pp. 20, 21.

Oliver's title to the three quarter-sections purchased under the attachment was not strengthened by taking assignments of the original first certificates of purchase from Baum, nor by the attainment of patents under them; for by having notice of the trust, he himself became the trustee to the Piatt Company. See *Lucas* v. *Mitchell*, 3 Marsh. (Ky.), 244; MS. letter G, p. 9. The procuring an assignment of the original first certificate of purchase of the fourth quarter-section from
*384] Baum, and obtaining a patent under it, he having notice of the *trust, constituted him a trustee to the Piatt Company for that quarter-section.

6. On the 27th day of August, 1823, Oliver fraudulently, and in violation of the great confidence reposed in him by Baum, the trustee, obtained from him a mortgage of all the property belonging to the Port Lawrence Company. This mortgage was obtained in order to secure Oliver for his proportion of the moneys for the purchase and improvements of lots 223 and 224, in Port Lawrence; the amount contracted to be paid to B. F. Stickney, for lots and improvements in Port Lawrence which he surrendered; and the amount charged for his (Oliver's) services and expenses in settling with Stickney, and transacting other business for the company, to the entire exclusion of the interests of Baum, and all the other proprietors and creditors of the Port Lawrence Company.

Baum, as trustee, had no authority to execute the mortgage, as his powers were limited, from his own showing, to that of executing conveyances for the lots or lands, in case of sales of lots by the agent, Oliver, or of the lands by order of the *cestuis que trust* themselves. Story Partn. §§ 111 and 101, commencing on p. 156; and Manuscript, p. 20, letter M. Oliver could not sell the lands to himself, and it is clear that no sale was made to him by the *cestuis que trust*.

The mortgage is fraudulent, as it related to Baum, and given to rid himself of the importunity of Oliver.

No notice of the existence of this mortgage seems ever to have been given to the members of the Port Lawrence Company, by Oliver.

In October, 1825, Oliver filed his bill in the Supreme Court of Michigan Territory, sitting as a court of chancery, against Baum, praying a decree for payment of the moneys due on said mortgage, by a short day, to be named; and, in default thereof, that Baum, and all claiming under him, might be forebound of and from all equity of redemption, of, in, and to, the mortgage premises, and might deliver over to the plaintiff

all patents, deeds, demises, and writings, whatever, relating to said premises. In 1828, it was decreed that the defendant redeem the mortgage premises by payment to the complainant of $2305.96 and costs, by the 1st of July next thereafter, or, in default thereof, that the mortgage premises be sold. The mortgage premises were afterwards sold to Oliver, by the assistant register, for the sum of $618.56, and a deed made to Oliver.

The proceedings, decree, and sale, under the mortgage, were they valid, have not extinguished the rights of the *cestuis que trust* of Baum, they not having been made parties to the suit. See 4th section of an act of the territory of Michigan, approved April 12, 1827, page 204, directing the mode of procedure in chancery; *Gore* v. *Stackpole*, 1 Dowl. P. C., 1831; 3 Pow. Mort. 978 a, in note; *Haines et al.* v. *Beach et al.*, 3 Johns. (N. Y.), Ch. 459; **Draper* v. *The Earl of Clarendon*, 2 Vern. 517; *Godfrey* v. *Chadwell*, Id. 601; *Moret* v. *Westiene*, Id., 663; *Hobert* v. *Abbott*, 2 P. Wms., 643; *Tell* v. *Brown*, 2 Bro., 276; *Polk* v. *Clinton*, 12 Ves., 48, 59; *The Bishop of Winchester* v. *Beaver*, 3 Id., 314; Same v. *Paine*, 11 Id., 19, 198; *Shannon* v. *Cox*, 3 Ch., 46; *Needler* v. *Deeble*, 1 Ch. Cas., 299; *Monday* v. *Monday*, 4 Ves. & B., 223; *Calvery* v. *Phelps et al.*, 6 Madd., 228; MS. letter H, p. 9. [*385

7. A part of the debt, to secure which the mortgage was given, was due from Oliver himself; only a part of the debt was at all justly due by the company, as the rents of the warehouse, as before stated, should have been deducted therefrom.

If it were not intended by Baum and Oliver that the repurchase of lots 1 and 2 should inure to the benefit of the Port Lawrence Company, then the following facts and circumstances furnish additional evidence of a fraudulent intention:

8. Baum's letter to the commissioner of the General Land Office, dated January 20, 1827.

9. Oliver's negotiation with the trustees of the University of Michigan Territory.

10. The several acts of Congress above referred to, authorizing the exchange of lands by the University of Michigan Territory, with Oliver, for lots 1 and 2, and the issuing of the patent to Oliver for said tracts. 6 Laws U. S., 550.

11. The assignments by Baum to Oliver of the original first certificates of purchase of the mortgage premises and the four quarter-sections. The procurement of those assignments did not better the condition of Oliver. See *Freeman* v. *Barnes*, and *Dihton* v. *Greenville*, 1 Vent., 82; Id., 239, and 1 Sid., 460; *Focus* v. *Salsbury*, Hard., 400; *Bowles* v. *Stewart*, 1 Sho. & L., 228; *Keneday* v. *Daily*, Id., 379; *Lord Portsmouth* v.

Vincent, cited in *Lord Ponflet* v. *Wardson*, 2 Ves., 476; *Thynne* v. *Carey*, W. Jones, 416; *Kennoul* v. *Greeville*, 1 Ch. Cas., 295; *Bovey* v. *Smith*, 18th Dec., 1676; *Salesbury* v. *Bagot*, Lord Not. MSS., 2, Swanst., 610, and MS. letter I, p. 12.

12. The contract between Oliver, Baum, and Williams.

13. The change of the name of the town of Port Lawrence, which was established by the proprietors in 1817, to that of Toledo, in 1835, long subsequent to the death of Baum.

14. The sale of shares, and town-lots, and tracts of land, belonging to the Port Lawrence Company, in violation of the trust and confidence reposed in him by the proprietors of that company.

15. The enormous amount of money recklessly and most injudiciously expended, under the plea of improvements, without the authority or concurrence of the owners, viz., $42,813.41.

16. The pleas interposed by Oliver and Williams, in order to prevent a disclosure of their frauds, and to bar the proprietors from asserting their rights.

*386] *17. After the rendition of the interlocutory decree, when Oliver and Williams were compelled to render an account, the enormous and unconscionable demands made by them, before the master, for compensation for their services in an abortive attempt to wrest the property from its rightful owners, in order to swallow up the large amount of money in their hands belonging to their *cestuis que trust*, furnishes conclusive evidence of their fraudulent designs.

We have thus traced the course of Mr. Oliver from 1817, the time at which he became a member of the Port Lawrence Company, and was appointed the agent to manage its concerns, and the course of M. T. Williams from 1819, when he became a proprietor in the Port Lawrence Company, down to a period subsequent to the exchange of lands made by Oliver with the trustees of the University of Michigan Territory, for lots 1 and 2; and we therefore respectfully submit, that we have clearly established the position with which we set out, namely, "that at the time lots 3 and 4 (except ten acres, part of lot 3 reserved) and the three quarter-sections, in the bill named, were transferred by William Oliver to the trustees of the Michigan University, in exchange for lots 1 and 2, said Oliver was the trustee, and Robert Piatt the original complainant, and others, the *cestuis que trust* of the lands then given in exchange for lots 1 and 2—of the ten acres reserved, part of lot 3—of lots 86 (except sixty acres, parts thereof sold to Prentiss and Tromley)—of lot 87, and the south-east quar-

ter of section 3, of township 3, all in the twelve-miles reservation at the foot of the rapids of the Miami of Lake Erie.

At the time of the exchange, the parties stood related to each other as follows: Oliver was the trustee and the Piatt Company were the *cestuis que trust* of the four quarter-sections, and Oliver was also the trustee, and the Port Lawrence Company were the *cestuis que trust* of lots 3, 4, 86 and 87, (except sixty acres, parts of 86, sold to Prentiss and Tromley.)

II. When Oliver received conveyances from the trustees of the Michigan University (and assignments of the original first certificates from Baum, and obtained a patent therefor) of lots 1 and 2, in exchange for the three quarter-sections of land which belonged to the Piatt Company, and for part of lots 3 and 4 which belonged to the Port Lawrence Company, he became invested with the legal title to said lots 1 and 2, as trustee in trust for said Piatt and Port Lawrence Companies, from whom the consideration given for said lots 1 and 2 proceeded.

1. The relation in which Oliver stood connected with the Port Lawrence Company, as an original proprietor, partner, and agent, many of the accounts and claims against which remained unadjusted and unsatisfied at the time of the exchange, he could not, consistently with the principles of equity, acquire property for his own use, the obtaining of which would defeat the very object of the *original [*387 association. (See *Parkhurst* v. *Alexander*, 1 Johns. (N. Y.) Ch., 394; *Green* v. *Winter*, Id., 26; *Evertson* v. *Tappan*, 5 Johns. (N. Y.), 497; *Halley* v. *Manlius*, 7 Johns. (N. Y.) Ch., 174; *Mathews* v. *Degaud*, 3 Desaus. (S. C.), 28; *Anderson* v. *Stark*, Hen. & M. (Va.), 245; *Hudson* v. *Hudson*, 5 Munf. (Va.), 180; *Mosley's administrator* v. *Buck & Brander*, 3 Id., 232; *Buck & Brander* v. *Copeland*, 2 Call. (Va.), 218; *Prevost* v. *Gratz*, 1 Pet., 373; *Hart* v. *Tenyke*, 2 Johns. (N. Y.), Ch., 62, 104; *White* v. *Brown*, 2 Car. Law R., 429; *Howel* v. *Baker*, 4 Johns. (N. Y.), Ch., 118; *McClenneghan* v. *Henderson*, 2 Marsh, 329; *Van Horn* v. *Fonda*, 5 Johns. (N. Y.), Ch., 388; *Holdridge* v. *Gillispee*, 2 Id., 30, 252; *Reyden* v. *Jones*, 1 Hawk. (N. C.), 497; *Conway* v. *Greene*, 1 Har. & J. (Md.), 151; Mathews, 389; 2 Sim. & Stu., 49, 50; 1 Wils. Ch. Cas., 1; 10 Ves., 428, 429; 6 Id., 625; *Lucas* v. *Mitchel*, 3 Marsh. (Ky.), 244; Hon. J. McLean's opinion in this case, and the authorities cited by him, p. 31; MS. letter E, p. 3, and letter G, p. 9.)

2. As the entire consideration given for lots 1 and 2 proceeded not from Oliver, but from the Port Lawrence and Piatt Companies, a trust resulted to them in the lands thus acquired

with their means. (See the authorities relating to resulting trusts, and trusts arising by operation of law, hereinbefore referred to, MS. letter D, p. 2.)

We have now, we submit, demonstrated the original complainant, Robert Piatt's, right to a decree against Oliver and Williams, for his just proportion of lots 1, 2, 86, 87, of the ten acres reserved in 3, and the one quarter-section named in the bill remaining unsold, and for his just proportion of the moneys, &c., remaining in their hands, arising from the sales to others of part of the lots and lands in question.

3. M. T. Williams is not an innocent *bona fide* purchaser. He is affected with notice at and prior to the respective periods in which he received conveyances from Oliver, of portions of the lands in question, and therefore holds the same as trustee, for the uses and purposes originally designed. 1 Phill. Ev., 410, 411; Com. Dig. tit. *Evidence*, b. 5; Plowd., 234, 430, 434; 2 Serg. & R. (Pa.), 507; Gilb. Ev., 87; 1 Salk., 285; *Marchioness of Anandale* v. *Harris*, 2 P. Wms., 432; *Shelby* v. *Wright*, Willis, 11; Com. Dig. tit. *Estoppel*, A, 2; MS. letter K, p. 16.

4. Oliver as agent, and Oliver and Williams as trustees, are bound to account with and pay to the original complainant, Robert Piatt, his just proportion of the money and notes received by them on the sale of lots in Port Lawrence and Toledo and lands adjacent, and to convey to him his just proportion of the lots remaining unsold.

Ewing, for appellants, in reply and conclusion, divided his argument into different heads, and directed his attention chiefly to the facts in the case.

*388] *1. The agency of Oliver.

This commenced on 14th August, 1817, by three papers of that date: 1. Power of attorney. 2. Letter of instructions. 3. Letter limiting it to one year.

The account presented by Oliver to Baum, referred to in the answer, is now a file in the cause, and is also inserted *in extenso*, in the master's report. By this it appears, taking the date as our guide, that Oliver was paid his salary down to the 4th day of July, 1818. To this the sum allowed him also conforms. He entered into the service of the company on the 14th of August, 1817. He was allowed a salary of $1200 a year. He was paid on settlement $1070, which would be the amount due him on the day the item bears date. The same paper shows a full settlement and payment by him of all the funds in his hands, and a balance overpaid by him was placed to his credit on the private books of Baum, and passed

by Baum to his own credit as against the company. All the papers relating to this settlement, which are referred to in the answer of Oliver, as delivered over to Baum, are found in bundle A, of papers accompanying the master's report numbered in blue ink from 374 to 382. Among them is an account of Baum with the Port Lawrence Company, showing a final settlement with Oliver, and charging separately to each of the two companies whose union constituted the Port Lawrence Company, its half of the amount found due to Maj. Oliver, and paid over by them to Baum. On a simple view of these facts it is difficult to perceive how it can be contended for a moment that the agency in which Oliver was engaged in 1817, was a perdurable, continuing agency. It expired by its express limitation at the end of one year—so says the answer of Oliver—so says the letter of Baum, accompanying the power. The answer states that before the year expired, in the beginning of July, 1818, the agency was ended by mutual consent, the accounts of the agency closed, and all the papers relative thereto surrendered. The file above referred to, from Nos. 374 to 382, (original papers,) shows conclusively the same fact. See Story's Agency, 499.

There was no agency on the part of Oliver from July 4, 1817, until after the relinquishment in September, 1821, and this will be considered under the seventh head.

2. Oliver a partner.

It is said by the other side that he was a partner. But he sold out his shares in 1818 and 1819, and both his vendees were acknowledged as partners. At the time of these sales, the partnership was not indebted. It is true, he could not have exonerated himself from liability to those persons to whom lots had been sold. He was bound to make his contract with them good. But he was not a party to the relinquishment in 1821, and it may be doubted whether he would have been liable in equity, to the other partners, for a debt created by the relinquishment. The funds obtained by it from the *United States were applied to the payment for [*389
other lands, instead of going to cancel the obligations outstanding to purchasers of lots.

3. The nature of the partnership and the powers of Baum to and at the time of the relinquishment.

The company was a *quasi* corporation, represented by a head or committee. The books are full of such cases. When these associations are legal, they are recognised both at law and in equity. One is called in Vesey the "fruit club," and the court said it was sufficient to make the "committee" parties, and not necessary to include all the members of the club.

So in the *Covent Garden* case. Baum had all the title, and in consequence of his own extensive powers, granted a power to Oliver. We must judge of Baum's powers by his acts. The certificates were held by him. It is said that this power ceased when 1 and 2 were relinquished. But at that time a large debt existed. Seventy-nine covenants of Baum were all broken, and a debt of more than $4,000 created at the instant of relinquishment. The avails, amounting to $4,817.55, were applied to other lands, and those lands ought to have been placed in the hands of Baum as a security for his liabilities. The partnership was not over; the debts had to be paid. The bill says that Baum had no power to sell, but the answer asserts that he had, and this is confirmed by the evidence. In 1821, at the relinquishment, Baum had the title. All covenants were made by him in his own name, or by Oliver in the name of Baum; and these covenants, such as the sale to Tromley and Prentiss, were acquiesced in. He was liable for all the improvements on 1 and 2, and it was natural that the certificates for the lands which had been fully paid for, should be placed in his hands. The court below say that no debts existed; but this is an error. It is said that the defendants (except Oliver) admit that the transfer of the certificates was made to Baum only to enable him to perfect the title. This is admitted by one of the nominal defendants, but the active prosecutor, who has admitted $100,000 into his own pocket. It does not bind us. There was no necessity for such a transfer to enable Baum to complete the title, (for the script was receivable for any lands within the district,) without reference to their being owned by the same man who held the script. The only good reason that can be given is, that it was done to secure Baum. This claim was not made until he died. How does it happen that the title to the quarter-sections was suffered to remain in Baum for fourteen years, unless it had been placed in his hands as security. Equity would have kept it there, if an effort had been made to take it away. The security was scarcely sufficient, because the lands had been bought at $2, and the price of lands reduced to $1.25 per acre. The interpretation which must be given to these acts of the parties concerned is, "we mean to pay you, but if we do not, there is an adequate fund;" of course, the property
*390] *was subject to sale by Baum to pay debts, and he had a right to pay a debt due to himself as well as one due to another person.

4. Fraudulent combination between Baum and Oliver.

It is charged that as early as 1821 there was a plan laid by these two men to defraud the other members of the Port

Lawrence Company of this property; and that such combination was carried on for six succeeding years, until 1828, when, at last, they got possession in the name of Oliver by virtue of a sale in chancery.

The cost of these tracts at the sale in 1817 was less than $1,800; their value from 1822 to 1828 was less than 1,000. It is taxing the credulity of men greatly indeed to ask them to believe, that for the possession of wild land such as this, so remote from his residence and so little attractive as it then was, Baum would combine with Oliver or any one else, and by a long train of artifice and fraud, continued and practised for a series of years, pursue this as the great and absorbing object of his life.

But if the motive were adequate, and the supposition not contradicted by probability, the evidence in the case wholly repels such a conclusion.

Baum was not the man who would engage in such a dishonest combination. He was not in a condition to do it, if he had been base enough for the purpose. His state of mind at the time was such as wholly precludes the idea. On these points there is abundant evidence, to some of which I will refer.

(Mr. *Ewing* here referred to various parts of the record.) It appears, then, that there were seventy-nine outstanding covenants by Baum, some as small as $15, some as large as $1,000, but all vexatious. He was the only person troubled about them, and had been, during all his previous life, a nervously punctual man. Some of the witnesses say, "they feared for his intellect." In this condition he applied to Oliver, a young man whom he had taken by the hand and who was familiar with the subject. The first measure of relief was to buy up the small vexatious claims. Ten were bought up for $231. The people there all knew Oliver—he had been out in the north-western campaign. Baum paid these claims: that is the fraud; and paid them through Oliver: that is the combination. Was it wrong in Oliver to do this? His conduct is consistent with the best as well as with the worst motives. Baum is now dead, and his son-in-law, to whom his papers descended, now comes here to fasten fraud upon him. He wished to refund the money which Oliver had thus advanced, but not being able to do so, gave him a certificate, acknowledging the debt.

5. The certificate of $213.07.

The complainant, for the purpose of making out a case of fraudulent concealment and sinister purpose upon the part of Major Oliver, avers, that though he, the complainant, lives, and lived at that time, on the Ohio river, within forty miles

of Cincinnati, and was weekly *in the city, where Baum and the defendant resided, he never knew any thing of the alleged indebtedness until he received a letter from Major Oliver, some time in 1823; and that this was all the knowledge he had upon the subject, for the order never was presented to him to be paid or rejected, until suit was brought upon it, in attachment in Michigan.

In reply to these allegations, the defendant, Oliver, answers, and "denies that there was any fraud or unfairness in said certificate for $213.07, dated September 10th, 1822, mentioned in the bill; and he says, that the same was justly due to him from the Piatt Company, for one-half the amount previously advanced by him, at the request of Baum, to reimburse purchasers of lots in Port Lawrence, for which an account was rendered to said Baum at the time, with the vouchers therefor. This defendant has not in his possession the means of re-stating that account, but believes that the exhibit Q, attached to complainant's bill, contains a true statement of that matter, and that the item of $426.14 on the debit side of that account shows the lots for the refunding the purchase money of which said certificate was given in part, being the half thereof, due from said Piatt Company; and that said defendant repeatedly, at different times, in 1822 and afterwards, requested said complainant to refund to him the amount of said certificate, which the said complainant always avoided or refused to do; and this respondent distinctly told the complainant, that he would attach said quarter-section to satisfy said debt, unless it was otherwise paid; and defendant repeatedly requested payment of the same both before and after his letter to complainant of February 3d, 1823, referred to in the bill, and even offered to surrender up or release to said complainant said land after he had acquired the title, if said complainant would pay said debt of defendant."

This statement in the answer is responsive to the bill, and therefore evidence in the case; it shows an early and repeated request on the part of Major Oliver to the complainant to pay him in behalf of his company what was justly due to him. It shows that the complainant evaded or glanced off every attempt on the part of this creditor to converse with him about the matter, until at last Oliver felt it was necessary to act, or submit to the loss of what he had advanced. He, therefore, on the 3d of February, 1823, five months after the date of the certificate, enclosed a letter to the complainant, in which he states to him the reasons why he incurred the liability, and the fact that the one-half due by the Baum Company had been paid him. It is obvious from the letter,

that he recognizes the complainant, since the death of J. H. Piatt, as the head of the Piatt Company, and he requests him to use his influence with the administrators of John H. Piatt to pay their proportion, and advise him of the names of the members of the Piatt Company as then existing, and their several interests.

*In the argument in the court below, we thought this account could not be re-opened for examination. [*392 It was a statement of a partnership account by the acting partner, communicated to all concerned, and acquiesced in by them for twelve years; especially after the trustee was dead, and his papers were in the hands of an interested party; and more especially, that those who claimed collaterally, who had no custody of these accounts or power over them, ought not to be called upon, under such circumstances, to vouch the account or forfeit their right. We thought that, explained or unexplained, the account was binding on the parties, so far as third persons were concerned. The learned judge held otherwise, and this error, as we respectfully contend it is, combined with important mistakes in point of fact, lies at the foundation of the decision below. (Mr. *Ewing* here went into an elaborate examination of the record for the purpose of showing that the account was correct.)

6. The mortgage.

In the month of August, 1823, Oliver stated an account of payments made by himself and Baum for lots 223 and 224, and also an exact account, confirmed by original vouchers, of all the expenditures in improving the lots. He credits Baum with one-half the expenses, borne by himself, for which he had from time to time advanced money to Oliver. He charges also what he had paid to Benjamin F. Stickney for his advances and improvements upon his lot, as compromised pending his suit, and the whole account, amounting to $1,835.47, was presented to Baum for liquidation. Baum, being without funds of the company, and owing to his own pecuniary embarrassments, which then pressed heavily upon him, unable himself to advance anything, mortgaged the property of the company which remained in his hands to Oliver, and by his circular of January 31st, 1824, informed the individual members of the company of what he had done and the state of their indebtedness, and earnestly solicited them to make some provision or put it in his power to provide for the payment, so that the property might be made available to cover their liabilities, which, he assures them, is the most that can possibly be expected. The other members of the company, who had placed Baum in the front of difficulty and trouble, turned

a deaf ear to his suggestions and remonstrances: they did not even deign to answer his letter. The complainant, who resided but forty miles from Cincinnati, and who was in the city weekly, did not even call to examine the account, to inquire into the state of affairs, or speak a single word of cheering or encouragement to his partner and agent, who was left to bear, himself, their accumulated burden of misfortune and loss.

It seems to me that there was openness and publicity enough upon the part of Baum in this and all his other acts to secure even a man of doubtful character from the imputation of fraud, design, or concealment. And in the case of the *393] mortgage he had magnanimously *cast out of the account all that applied to himself—his own payments to the company for the lots—his expenditures on their improvement, and contented himself as well as he could to suffer the loss, so that those who had trusted to him, and relied upon his good faith, should come by no injury.

Proceedings upon this mortgage were not commenced by Oliver until about twelve months after the money fell due. In the mean time, he avers in his answer, which, though responsive to no special allegation, is clearly so to the general scope and tenor of the bill, that he used every effort to collect this money of the parties, and especially, that he repeatedly applied for that purpose to the complainant. I do not however conceive this to be a matter of great importance. The indisputable fact is shown by the letter of Baum to all the partners, in 1824, that they all knew that such mortgage had been given to pay the debts of the company, and that, if the money were not paid, the property would be proceeded against by the mortgagee in due course of law. There is, therefore, no ground to complain of secrecy or concealment, and the question arises solely upon the legality of the transfer, including the execution of the mortgage, the proceedings in chancery under it, the decree, the purchase, and the final assignment of the certificates by Baum to Oliver after the sale. These are questions of great importance, and merit a careful consideration.

The right of Baum to sell and convey rests on two grounds:

1st. Because the property was personalty in his hands as acting partner.

2d. As trustee of the real estate vested in him for the payment of debts.

1st. It was personalty.

It is objected, that the land in this case cannot be considered as personalty, on the authority of the case where land connected with a factory was drawn into question. But

there the land was not the subject-matter of the trade. Portions of the freehold in a mine have been severed and sold. It is true, that in the case before us there was no authority to re-invest. But in principle, why should this make a difference? The land here was bought to sell again, and partnership debts were contracted. What good reason can be given, why it should not vest in the acting partner in the same manner as goods?

2d. But Baum was a trustee.

Having the title in himself, without any expressed restriction, he is presumed to hold it for all the purposes to which equity would apply it, and his act was confirmed by acquiescence in the sales to Prentiss and Tromley, and in this mortgage for twelve years. It is objected that an unreasonable amount of property was mortgaged. But the debt was $1,835.47, and the first cost of the tracts mortgaged *was $1,679.14, and their value had been reduced by the [*394 act of Congress reducing the price of public lands, to $1,049.14; estimated in proportion. It was the duty of Baum to audit accounts and to sell and convey property to pay debts. A mortgage by him, and a decree of foreclosure against him, are equivalent to his deed of bargain and sale. We hold that the sale under the mortgage gave to Oliver all the title of Baum, and a right to a patent. But if not, if there be anything irregular or imperfect in the pursuit of our right, it is cured by the assignment of the certificates and the patent. How stands the case? Oliver has the legal title, and he is called upon to surrender it. He has got it in payment of a debt, fairly, from a person having power to settle the debt and convey the land. But this trustee, so empowered, took two steps instead of one. He first mortgaged, then assigned. In law, his mere assignment is good enough. Can this difficulty as to mode affect us in equity? There is no reason why this legal title, so acquired, should be now disturbed. The complainant had full notice of the mortgage, and of the suit thereon. He stood by: suffered the suit upon the mortgage to proceed without coming in and making himself a party, as he might have done; suffered the sale to be made without objection; the certificates to be assigned and the patent to issue; suffered Oliver to enter upon the property, expend his time, and talents, and money, upon it; and we now claim that it is too late for him to go into chancery. 3 Ves., 170.

The complainant should have made his election without waiting for future developments. It is not a statutory bar that interposes, but acquiescence.

(Mr. *Ewing* here went into calculations to show the value of the property then, and until 1832.)

Up to the issuing of the patents in 1830, the value of the property did not change. Suppose this bill had been filed in 1832. No chancellor could have acted on the future use which Oliver might make of the property. But that further use, and the enhanced value of the property, blends itself everywhere with the opinion of the court below, and is made to give a character to past transactions.

1st. There is an impression that the tracts purchased under the mortgage and the attachment were of great value; but, according to the evidence, the whole property, at any time from 1822 to 1830, was not worth, in cash, $1,200.

2d. In making Oliver's exchange with the Michigan University re-act upon and affect his purchase of the other tracts.

3d. It fixes upon Oliver a knowledge of the contingent future. The bill to foreclose and the attachment were in 1825, and it is supposed that Oliver's design in acquiring the other tracts was to repossess 1 and 2; but at that time 1 and 2 belonged to the United States, and there was no prospect that any thing but money would *ever purchase them. The university did not select until June 25th, 1827.

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7. Oliver's agency after the relinquishment.

At Baum's request he paid with his own money debts of the Port Lawrence Company; and the vouchers show great accuracy and strict justice. Did this disable him from recovering the money so paid?

8. Agreement to re-purchase.

The evidence shows an intention on the part of Baum to re-purchase, but there was no contract or understanding to that effect. Nor does any evidence show how he proposed to carry out his design, whether with his own money or a fund raised by contribution.

9. Suppose Baum had purchased and paid his money, would the members of the Port Lawrence Company have been bound to contribute? or would any trust have resulted to them? or if Piatt had made the purchase, could Baum have held any part of the property? Neither of the parties ought to have purchased for the benefit of their old partners. There would have been absent persons, insolvent estates, infants, femes covert, all to unite in the expenses and incur the hazard of what counsel would have called a reckless and extravagant expenditure to build up a city. The purchase required capacity, consent, contribution, and also situation and ability, to

join in its management. The negotiation with the United States entirely failed.

10. The exchange for 1 and 2, and resulting trust.

It is contended that a trust results to the Port Lawrence Company on two grounds:

1st. That the purchase was for Baum and his associates, who were the Port Lawrence Company. This is charged in the bill and denied in the answer; and the record shows that Oliver is sometimes spoken of, in the records of the university, as acting for himself, and sometimes for others. It was probably an error of Mr. Wing, and corrected by Oliver as soon as discovered.

2d. That a trust resulted, because the sale on the attachment passed no title to Oliver, and therefore the quarter-sections still belonged to the Piatt Company; and because the sale under the mortgage passed no title except that of Baum himself, therefore, with that exception, the tracts 3 and 4 belonged to the Port Lawrence Company; and that Oliver having exchanged 3 and 4 and the quarter-sections for 1 and 2, a trust results therein to the Port Lawrence Company, and to the Piatt Company.

But a member of the Port Lawrence Company has joined with a member of the Piatt Company, and filed this bill. That the partners in the different companies happen to be the same individuals, does not help the case; it is a joinder of different claims in the same bill, which becomes multifarious. If so, the difficulty lies deeper than mere pleading; for without such joinder the party cannot *present this multifarious case. [*396

No such case has ever been sustained. If there had been an agreement between these two companies that their land should be so exchanged, and they had vested the title in Oliver for the purpose, the bill would lie. But there was no such agreement, and no trust assumed on the part of Oliver. He purchased the two tracts of land at judicial sales, was in possession, claimed title, and made the exchange for himself. The books, we believe, show no case in which the separate funds of several individuals can be followed into a joint investment, so as to raise a trust in the property. (See the authorities referred to by Mr. *Stanberry*.)

The vast enhancement of the value of the fund with which 1 and 2 were purchased, by applying to it the labor and skill of Oliver and Williams; the time, and efforts, and skill of Oliver, in bringing about the exchange, should be considered as a fund which helped to pay for 1 and 2 as fully as so much cash. The property has thus been made to be worth more than an hundred fold as much as it was at the time of the

exchange. And this is all to be restored if the court hold both, or either of the parties claiming, to be entitled to it.

11. Estoppel.

Baum conveyed the lands included in the mortgage to Oliver, with covenants of warranty. Assets descended to his heirs, who are estopped. Co. Litt., 325.

12. Williams is a *bona fide* purchaser without notice.

(See this head discussed at the concludion of Mr. *Stanberry's* argument.)

Mr. Justice STORY delivered the opinion of the court.

This is the case of an appeal from the decree of the Circuit Court of the district of Ohio, sitting in equity,—rendered in favor of the original plaintiff, and it is brought to this court by the original defendants, who are now the appellants. The record is exceedingly voluminous, and the facts and proceedings complicated and perplexed by a variety of details. A general outline of the leading facts is given in the printed opinion of the court below, with which we have been favored; and those facts cannot be more succinctly stated than they are in that summary—we shall therefore avail ourselves of it upon the present occasion. It is as follows: "In the summer of 1817, the complainant, in connection with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this state —and the complainant was appointed the agent of the company, to attend the sale for that purpose.

"Another association consisting of Martin Baum, Jesse
*397] Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver, *and Andrew Mack, was formed for the same object—and William Oliver and William C. Schenck were appointed its agents to attend the sale.

"Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and the agents agreed that they would purchase tracts 1. 2, 3, and 4, at, and including the mouth of Swan creek, in the United States reserve, at the foot of the rapids of the Miami; and also Nos. 86 and 87 on the other side of the river, opposite the mouth of Swan creek, for the joint benefit of both companies; each company to have one-half of the lands purchased, and to pay at the same rate. Nos. 86 and 87 were bid off by Oliver, and the certificates of purchase issued to him. The other tracts were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him.

"At the same sale, the complainant, in behalf of his company, purchased the north-west quarter of section 2, township 3, the south-west quarter of the same section, the north-west quarter of section 3, township 3, and also the south-east and south-west quarters of the same section, in said reserve; and one-fourth of the purchase money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land.

"On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Piatt Company, the other the Baum Company; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with a view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company.

"On the 14th August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title-bonds, to the purchasers; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and and also the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town, the sale of the lots, &c. By the conditions of sale, one-fourth of the purchase money was to be paid down, and the residue in three equal annual payments.

"At the sale of lots, the sum of $855.33 was received by Schenck, for which he was to become accountable to Baum.

"At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterwards conveyed to Baum, and they erected a warehouse and other improvements on them.

*"In August, 1818, he sold one-half of his interest in the Port Lawrence Company to William Steele and [*398
William Lytle; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner Embre.

"By the reduction of the price of the public lands, and the pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States tracts 1 and 2, having agreed to pay for the same about $20,000; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt Companies respectively. In pursuance of this object, the five quarter-sections purchased

by the Piatt Company were assigned to Baum, the 17th September, 1821; and on the same day, tracts numbered 1, 2, 86, and 87, purchased in the name of the Piatt Company for the Port Lawrence Company; and also tracts 3 and 4, purchased by Oliver for the same company, were assigned to Baum. It is alleged that these tracts had been previously assigned to Baum, of which there is no evidence.

"On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished to the United States, tracts 1 and 2. On these tracts there had been paid the sum of $4817.55: $1372.34 of this sum were applied to complete the payments on tracts 3, 4, 86, and 87, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained $3445.21. Of this sum, one-half belonged to the Piatt Company: $1248 were applied to complete the payment on the five quarter-sections, which left a balance of $474.60 still due to the Piatt Company; but which was applied in payment of lands held by the Baum Company.

"After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and also damages for their improvements.

"On the 10th September, 1822, Baum gave to Oliver a certificate, which stated there was due him, by the Port Lawrence Company, the sum of $213.02, which he refunded to purchasers of lots, by the request of the company, 'it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington.'

"And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of $1835.47; to secure the payment of which, Baum executed to him a mortgage on tracts 3, 4, 86, and 87. The payment was to be made, with interest, on or before the 1st of January, 1824.

*399] "The 7th October, 1825, Oliver caused an attachment to be *issued by the clerk of Monroe county, in the Michigan Territory, against Baum and the members of the Piatt Company, on the certificate of indebtment given by Baum. This attachment was levied on four of the five quarter-sections owned by the Piatt Company, and such proceedings were had on the attachment, as to obtain an order of sale of the property attached; three of the quarters were sold, by

the auditors appointed, for the sum of $241.60, to Noble, the agent of Oliver. Noble, shortly afterwards, conveyed these tracts to his principal.

"A bill to foreclose the mortgage given to Oliver was filed by him in the Supreme Court of Michigan, the 13th of October, 1825. And a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the chancery court, to Oliver, the 1st September, 1828, for $618.56.

"By the act of 20th May, 1826, the Secretary of the Treasury was authorized to select, for the benefit of the University of the Michigan Territory, a certain number of acres of the public lands within the territory, and he selected tracts 1 and 2, which had been relinquished.

"In the summer of 1828, as appears from the report of the committee of the trustees of the university, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts 1 and 2, on which the town of Port Lawrence had been laid out.

"A law of Congress was passed, authorizing the exchange, the 13th January, 1830. Previous to this, Baum assigned to Oliver the final certificates for the tracts he purchased under the attachment, and also under the decree of foreclosure; and one of the quarter-sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the university tracts numbered 3 and 4, except ten acres reserved of number 3, and the north-west quarter of section 2, township 3, and also the north-west and south-west quarters of section 3, township 3, he received an assignment from the university of their right to tracts 1 and 2, for which patents were issued in the name of Oliver.

"After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one-third in tracts 1 and 2, 86, and 87. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number 3. On the 23d May, 1834, he conveyed to him an undivided half of tracts 86 and 87, except sixty acres which had been sold to Prentiss and Tromley; and on the —— day of November, he conveyed to him 'one undivided half of lots 1 and 2, on which Port Lawrence was laid out,' together 'with a like interest in all sales and improvements thereunto belonging.'

*"Oliver, Baum, and Williams, agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts.

"Some years after this, Oliver purchased from the Michigan University the tracts of land he conveyed to it in exchange for tracts 1 and 2.

"Of the Piatt Company, John H. Piatt is deceased, and his administrators and heirs are made parties to this suit. William M. Worthington assigned one-half his interest in the Port Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant.

"Of the Baum Company, Martin Baum, Jesse Hunt, William C. Schenck, and William Barr, are deceased."

Such is a general outline of the leading facts. There are others which may be required to be adverted to in the progress of this opinion; but there are many details which must necessarily be passed over in silence, as they would tend to embarrass the discussion of the main questions in the cause, and obscure rather than illustrate the merits thereof.

The object of the bill is to subject the tracts No. 1 and No. 2, now constituting the site of the town of Toledo, formerly known as Port Lawrence, to the rights of the Port Lawrence Company, composed, as we have seen, of the Piatt Company and the Baum Company, and those who claim under them, now in the possession of Oliver and Williams, under a title derived from the grant of the Michigan University, upon the ground that a trust has attached to those tracts in favor of the Piatt and Port Lawrence Companies, under the circumstances which will be presently stated. These circumstances are, that the lands given in exchange to the Michigan University, for tracts No. 1 and No. 2, under the negotiation with the university, were, at the time, the property of the Piatt and Port Lawrence Companies, as *cestuis que trust* thereof; that the facts were at the time well known to Baum, and Oliver, and Williams, and consequently that the trust by operation of law attached thereto in the hands of those parties.[1] To this conclusion several objections have been taken by the counsel for the appellants. In the first place, that no such trust attached to the lands so given in exchange to the Michigan University, at the time of the transfer, and consequently none

[1] CITED. *Doe* v. *Eslava*, 9 How., 447.

to tracts Nos. 1 and 2, taken in the exchange. In the second place, that if it did, as Oliver afterwards re-purchased the exchanged lands from the university, and Oliver and Williams under him now hold some parts thereof, the trust is revived, and has re-attached *to these lands, and thus [*401 has displaced any supposed trust upon tracts No. 1 and No. 2, at least *pro tanto*. In the next place, that Oliver and Williams are purchasers without notice of the trust, or of any misapplication of the trust property by the trustee.

Before proceeding to the considerations applicable to the first and third points, it may be well to dispose of that which grows out of the second point, as it involves a most important principle in equity jurisprudence. It is a clearly established principle in that jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent re-purchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and by a re-purchase of the trust fund to charge the loss or deterioration in value, if any such there had been, in the mean time, to the account of the *cestui que trust*—whereas the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, in such case, to take the new or the original fund is, therefore, (as has been already suggested,) exclusively given to the *cestui que trust*, and is given to him for the wisest purposes and upon the soundest public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. Many cases on this subject will be found collected in the ele-

mentary writers. (See 2 Sugden on Vendors, chap. 14, § 3, p. 148, &c., 9th edit.; 2 Story Eq. Jurisp., § 1258 to § 1265, 3d edit.; Com. Dig. Chancery, 4 W. 25, to 4 W. 28;) and the rule will be found fully discussed and recognized in *Ryall* v. *Ryall*, 1 Atk., 59; *Lane* v. *Dighton*, Amb., 409; *Lench* v. *Lench*, 10 Ves., 511; and *Docker* v. *Somes*, 2 Myl. & K., 655; in many of its important bearings. Lord Ellenborough, in the case of *Taylor* v. *Plumer*, 3 Mau. & S., 562, examined and confirmed the doctrine in its application to cases at law, and cited and approved the decisions in equity; so that it is plain upon authority, and the *same would be equally true upon principle, that if the tracts Nos. 1 and 2 were purchased with the trust fund belonging to the Piatt and Port Lawrence Companies, the latter are at full liberty to follow the same into the hands of any persons not being *bona fide* purchasers for a valuable consideration without notice, and the circumstance that there has since been a re-purchase of the original trust property by Oliver, does not in any manner affect, or control, or vary, the right or option of the *cestuis que trust*. The case is not like that put at the bar, where a part of the funds of the *cestuis que trust* have been mixed up with other funds exclusively belonging to the trustee in the new purchase or investment. In such a case there may be ground to hold the trust funds in charge *pro tanto* therein. Here, the whole consideration of the purchase was a fund wholly and exclusively belonging to the *cestuis que trust*, if they have made out any title at all, which we shall hereafter consider.

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Let us then proceed to the consideration of the other questions above stated. And the first is, whether at the time of the exchange with the Michigan University, the lands given in exchange for tracts Nos. 1 and 2, were, in the hands of the party or parties making that exchange, affected with any trust such as has been already suggested? And this leads us to the consideration of the antecedent state of facts between the parties to this record.

We have seen that the original purchase of tracts Nos. 1, 2, 3, and 4, and Nos. 86 and 87, was made for the account and benefit of the Port Lawrence Company; and the object of the purchase was to lay out a town thereon, and to sell the lots to purchasers. Baum was appointed a trustee and agent for this purpose, and he was to make sale of the lots and conduct the other affairs of the agency. With the consent of the company, in August, 1817, he employed Oliver as a sub-agent, who received instructions from the company in relation to the plan of the town (which he was to lay out in conjunction with Wm. C. Schenck) and the sale of the lots. This agency

of Oliver, under Baum, was originally (as it should seem) limited to one year, but it was certainly continued, if not for all, at least for some purposes, to a much later period. In August, 1818, Oliver sold one-half of his interest in the Port Lawrence Company to Steele and Lytle, and in March, 1819, he sold the residue to the defendant Williams, and his partner Embre. And these facts are most important to be borne in mind, since they clearly establish that Oliver, as an original proprietor, and Williams, as a derivative proprietor, under Oliver, in the Port Lawrence Company, had full and complete notice of the nature and objects of the original purchase by that company, and of the trust and agency of Baum in accomplishing those objects. In truth, the laying out of a town on those tracts, and the sale of the lots, seems to have been an enterprise always cherished by some of the company with uncommon solicitude and sanguine expectations of profit.

*In consequence of the reduction of the price of the public lands by Congress, and the pressure of the times, [*403 the Port Lawrence Company found themselves compelled, in 1821, to relinquish a part of their tracts to the government. For this purpose they assigned all the four tracts to Baum, in September, 1821; and the Piatt Company at the same time assigned to Baum their five quarter-sections; and he, through the defendant, Williams, thereupon relinquished tracts Nos. 1 and 2, to the United States, and the return purchase money was applied *pro tanto* to complete the payments due on the other tracts, (Nos. 3 and 4, and Nos. 86 and 87,) and the residue was applied partly to pay the balance due on the five quarter-sections, purchased by the Piatt Company, and partly to pay a balance due on other lands purchased by the Baum Company.

Pausing here, for a moment, it is apparent that the original trust created in tracts Nos. 1 and 2, under the agency and assignment to Baum, for the benefit of the Port Lawrence Company, was, by this relinquishment to the government, entirely displaced and extinguished. These tracts afterwards, in the summer of 1828, under the act of 20th of May, 1826, were selected by the Secretary of the Treasury for the Michigan University, and certainly came into the possession of the latter discharged of the trust. Still, however, it is obvious from the papers in the cause, that in the intermediate time between the relinquishment of these tracts and the grant thereof to the university, the original plan of establishing a town on the site, remained a favorite project of Baum as agent of the Port Lawrence Company, and he made strenuous efforts by applications to Congress, and to the General Land-office, to

re-acquire the title thereof, not for himself alone, but, as his applications and letters show, on behalf of himself and his associates. He constantly held himself out as acting for the benefit of the concern; and there is every reason to suppose, that some, if not all, of his associates were lulled into security, and contemplated, if he should be successful, to resume the original plan. This may serve in some measure to explain their inactivity, and to show that they continued to place unlimited confidence in Baum, that all his proceedings would be for their benefit, and not for his own sole advantage. Baum petitioned Congress on the subject as early as January, 1822, and in his letter to Mr. Brown, (a senator in Congress,) of the 25th of December, 1822, enclosing a duplicate of his petition, he says: "Enclosed is the petition signed by myself only, still others have an interest in it;" and he names in the letter, and its postscript, Williams, Piatt, and others. In another letter to the same senator, dated the 6th of February, 1823, he says: "The tracts purchased by myself and associates in that quarter; those retained and relinquished can be ascertained in the Land-office." In another letter addressed to the commissioner of the General Land-office, as late as the 27th of July, 1827, he says: "In consequence of the President's proclamation, announcing *the sales of lands, I attended, at Delaware, on the 9th instant, but was much disappointed to find there instructions of the General Land-office, to withhold from sale all lands situate north of the line which divided the state of Ohio and the Michigan Territory, for I went there for the express purpose of re-purchasing tracts Nos. 1 and 2, in the Maumee reservation, which I formerly owned and which I have relinquished." He adds: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent for the purpose of managing and conveying them in case of sales." In the same letter he protests against the trustees of the Michigan University having a grant of these tracts, as they have no claim to the same, and that he has a strong claim upon the government.

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To repel the inferences deducible from these facts, it is said, that the testimony of Carneal establishes that Piatt attended that very sale at Delaware for the purpose of buying these tracts, not for the Port Lawrence Company, but for another company consisting of Colston, Carneal, and himself; and that Baum also attended on his own account, and not for the Port Lawrence Company. Of transactions of this nature, after such a lapse of time, it is perhaps not easy to ascertain all the facts which then regulated the conduct of the parties,

when they depend upon the frail recollections of witnesses. It is quite possible that the circumstances might have been explained, and nothing have been intended by either party really injurious to the interests of the Port Lawrence Company. But as no sale took place of these tracts upon that occasion, the only effect which can be properly attributed to the testimony, admitting it in its fullest latitude, is, that it weakens our confidence in Piatt's own conduct, and diminishes the force of the inference as to Baum's then acting as an agent for the Port Lawrence Company. But the written statements of Baum in the letters above cited are evidence of his intentions and acts, of a far higher character, which the lapse of time has not obscured or varied, and those letters are, as to himself, most conclusive to show, that he did not deem himself as acting for his own interest alone, but for that of his associates also, in his whole proceedings to re-acquire those tracts.

As soon as the Michigan University had obtained a title to tracts Nos. 1 and 2, (in the summer of 1828,) Oliver, avowedly on behalf of Baum, made an application to the trustees of that university for an exchange of those tracts for other tracts in the vicinity. These negotiations were begun as early as the 12th of August, 1828, and various propositions were made and negotiations were had by the trustees and Oliver, as agent of Baum, between that time and the 4th of January, 1831, when the consent of Congress having been obtained for the exchange, by an act approved on the 13th of January, 1830, the university agreed to make the exchange: and accordingly, by their deed, dated the 7th day of February, 1803, did *convey their right and title to tracts Nos. 1 and 2 to Oliver in fee-simple, in consideration of receiving [*405 a deed from Oliver of certain tracts, containing seven hundred and sixty-seven and a half acres, viz.: the whole of tracts Nos. 3 and 4, the south-west quarter of section 2, and the west half of section 3; the tracts being part of the purchase of the Port Lawrence Company, and the quarter and half sections being part of the purchase of the Piatt Company, in 1817. We thus trace the trust property home to the Michigan University, as obtained by a conveyance from and under Baum and Oliver in pursuance of a negotiation, avowedly made by Oliver on behalf and as agent of Baum, as the sole consideration of the grant of Nos. 1 and 2 to Oliver by the university.

And this conducts us to the consideration of that which is the main hinge on which the present case turns; that is, whether the tracts, so conveyed by Oliver to the university,

were at the time affected with the trust in favor of the Piatt and Port Lawrence Companies, with which they were originally chargeable in the hands of Baum. This necessarily involves a review of the title of Oliver to the tracts (the three quarter-sections) belonging to the Piatt Company under the attachment proceedings in Michigan, and also of his title under the mortgage of tracts Nos. 3 and 4, and Nos. 86 and 87, belonging to the Port Lawrence Company, and the foreclosure thereof,—in connection with the subsequent acts of Baum and Oliver in the premises. Unless the title thus derived is beyond all legal exception (*omni exceptione major*) as an adverse and unimpeachable title, it is plain, that the original trust attached at the time of the exchange to the tracts so conveyed, and consequently (as has been already suggested) it was, at the option of the *cestuis que trust*, transferable and transferred to tracts Nos. 1 and 2. For it is in our judgment beyond all question, that Oliver at the time of the exchange had full notice of the trust and title originally invested in Baum, and that his acts in making the exchange are to be deemed the acts of Baum, and affected by the same considerations as if personally transacted by Baum himself, and were designed by mutual consent to promote the contemplated objects and interests of both.

And, first, let us review the procedings under the attachment. In September, 1822, Baum gave a certificate to Oliver, stating that a debt of $213.02 was due to him from the Port Lawrence Company for money refunded to purchasers of lots at the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and Wm. M. Worthington." These persons constituted the Piatt Company; and consequently the claim thus asserted was a sub-division of a debt confessedly due from the Port Lawrence Company, in which the Piatt Company had a moiety of the interest only. Whether Baum had, in virtue of his general agency, the right to give such a certificate, thus severing a joint debt, so as to be binding upon the Piatt Company, *alone, without their consent, and whether this certificate was *bona fide* given under justifiable circumstances, it is unnecessary to consider, although the transaction is certainly open to some observation in point of authority as well as propriety in the then unliquidated concerns of the Port Lawrence Company. Assuming, however, the transaction to have been perfectly correct and binding in all respects, let us examine the subsequent proceedings consequent thereon. Upon this certificate Oliver, in October, 1823, instituted a suit by attachment in Monroe county, in the territory of

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Michigan, against Baum, Robert Piatt, G. A. Worth, and William Worthington, (John H. Piatt being then deceased,) alleging them to be joint partners and survivors, and all residing out of the territory—upon which four of the quarter-sections of land owned by the Piatt Company in that county were attached. At the October term, 1826, of the same court, judgment was obtained by default against all the defendants, no appearance having been entered for them; and upon the execution issuing thereon, three of the four sections (those which were afterwards conveyed to the Michigan University) were sold, and bid off by an agent of Oliver, and were afterwards conveyed by him to Oliver. Of this suit there is no pretence to say, that any of the defendants, except Baum, had any notice, if indeed he had any, although some of them resided in the same state where Oliver resided, and one of them in a neighboring state, at no great distance, who was known to be a man of large property. The other members of the Port Lawrence Company were not made parties to the suit. It was brought in a distant territory, almost then a wilderness, more than two hundred miles from the residence of the defendants; and if it had been the design of Oliver to procure a judgment against the parties, without any notice to them, which should be obligatory upon them, and to give Oliver a good title to the lands at a comparatively trivial price, better means could scarcely have been devised to accomplish the purpose. For the institution and consummation of this suit behind the backs and without the knowledge of the parties in interest, no better excuse can now be found than that Oliver did not choose to institute a suit against them at home, as it might give them offence and break up some former ties of acquaintance. How far such an excuse is admissible we do not stop to inquire. It rather tends to cast a shade upon the transaction than to vindicate it. But what was the title thus acquired, supposing all the proceedings to be *bona fide?* It was a mere naked title in equity to the tracts, the title to which still remained in the United States; and the legal title could not be consummated, unless the certificates of the purchase and payments for the tracts were first surrendered to the United States. Those certificates were then in the hands of Baum, as trustee of the Piatt Company; and he had no right under the circumstances to assign or surrender those certificates to Oliver to enable him to make his title available at law, without the express consent *of the Piatt Company. If he had refused, Oliver could not have obtained them, unless upon a bill in equity to which all the proprietors should be made parties, and in which they would [*407

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have been at full liberty to examine into the validity and merits of the original claim of Oliver, on which his attachment was founded, and also into the regularity and *bona fides* of the transactions in and under the suit. Yet Baum, in December, 1828, assigned and surrendered up these certificates to Oliver, and thus enabled him to consummate his title and reduce it to a legal title, by obtaining a patent, without any such consent; and in so doing he was guilty of a manifest breach of trust, of which Oliver cannot now be permitted to pretend ignorance. It is also a fact of no small significance, that the surrender of these certificates was contemporaneous with the surrender to Oliver of the certificates of tracts Nos. 3 and 4; and subsequently, in December, 1829, a like surrender of Nos. 86 and 87, belonging to the Port Lawrence Company, under the foreclosure of the mortgage, which we shall have occasion to review; and that all this was done pending the negotiations with the Michigan University by Oliver on behalf of Baum for the exchange.

This view of the matter releases us from no small doubt and difficulty in relation to an argument pressed at the bar with great earnestness; and that is, whether such an equity was attachable and vendible under the attachment law of Michigan. There is great difficulty in maintaining the affirmative, for the reasons stated in the opinion of the learned judge in the court below; and especially if, as has been suggested, the act is but a transcript of an act of New Jersey, and the courts of that state have, as has been asserted at the bar, held no such equity attachable.

Then, as to the mortgage and the proceedings under it. The mortgage was given upon tracts Nos. 3 and 4, and Nos. 86 and 87, by Baum to Oliver, in August, 1823, upon an account then adjusted between him and Oliver against the Port Lawrence Company (and which does not appear ever to have been examined or sanctioned by the company itself) for a balance of $1,835.47, then supposed to be due to him for money paid and services rendered by him as agent of the company. In October, 1825, a bill was filed in the Supreme Court of Michigan (within which these tracts were situate) to foreclose the mortgage; and such proceedings were had upon this suit, that, in September, 1828, the tracts were sold, and at the sale bought by Oliver for the sum of $618.56, and a deed of conveyance thereof was accordingly made to him. To this suit Baum alone was made a party; none of the other proprietors of the Port Lawrence Company being made parties, although Oliver knew perfectly well who they were, and that Baum was merely their trustee, and that they were the *cestuis*

que trust, possessing the beneficial interest in the premises. Under such circumstances, to allow the foreclosure to stand, so as to conclude the rights of the *cestuis que trust*, would be a violation of *all the doctrines of courts of [*408 equity upon this subject. The decree must be treated, as to them, as wholly inoperative and void.

But there is another view of the matter, which is conclusive. The mortgage was of a mere equity, the legal title being still outstanding in the United States; and supposing that this equity could have been foreclosed in such a suit, (which, considering the defect of the real parties in interest, it clearly could not,) still it was a naked equity, which could be made available to obtain a legal title from the United States, only by an assignment and surrender of the certificates of the purchase and payments, then held by Baum for the benefit and use of the Port Lawrence Company. And here, again, the same considerations apply, which have been already suggested. Oliver could not obtain an assignment and surrender of those certificates, except by a bill in equity against Baum to which the other proprietors in the Port Lawrence Company must have been made parties, as they were necessary parties; and thus the whole merit of the mortgage and foreclosure must have been brought directly before the court for adjudication. Yet Baum, without any consultation with or assent of those proprietors, assigned and surrendered the certificates of those tracts also to Oliver, and thus enabled him to obtain a patent therefor from the United States, in subversion of their rights and his duty. This was a gross breach of trust, and was done (let it be repeated) in December, 1828 and 1829, pending the negotiations with the Michigan University, obviously for the purpose of enabling Oliver in his, Baum's, name, and on his behalf, to consummate the exchange. And, finally, when the negotiation was consummated by means of these very certificates, Oliver, with the consent of Baum, was enabled to obtain a patent therefor, on the 4th of March, 1831.

Very soon after the patent was so obtained, viz., on the 16th of May, 1831, we find that Baum, Oliver, and Williams, entered into a written agreement, by which Oliver purported to sell, in fee-simple, to Baum and Williams, each one-third part of the tracts Nos. 1 and 2, and Nos. 86 and 87, with the exception of sixty acres out of No. 86; and they were to receive a quit-claim deed therefor from him accordingly, for the sum of $1,555 for each third part. The parties farther agreed to lay out a town upon the old site, with some change of the plan, and to bring the lots into the market for sale;

and they were to contribute to the charges and expenses according to their respective interests. After the death of Baum, Oliver purchased his share of the tracts from his heirs; and by certain deeds of quit-claim, executed in December, 1832, in May, 1834, and in November, 1834, Oliver conveyed one-half of the premises to Williams.

Now, looking at these transactions together, it seems almost impossible to escape from the conclusion, that Baum and Oliver had a mutual interest in the negotiation with the Michigan University; that it was not only carried on in the *409] name of Baum, and apparently for his account, but that Oliver acted as his agent throughout; that the *deed from the university was made directly to Oliver, with the consent of Baum; that the assignment and surrender of all the certificates by Baum to Oliver, was for the express purpose of enabling Oliver to complete the bargain with the university; and that the agreement between Baum, Oliver, and Williams, which followed almost immediately upon the grant of the patent, was made in pursuance of a prior understanding between all the parties, and was but a consummation of the objects originally contemplated by Baum and Oliver, from the period of their first negotiation with the university down to the time of the execution of that agreement. And all this was done by Baum and Oliver, without the knowledge, or consent, or approbation, of the Piatt and Port Lawrence Companies, and was never sanctioned by them. Under such circumstances, what is the true duty of a court of equity? It is, to hold the parties engaged in these transactions, with full notice of the title and the trust in Baum, bound by that trust, and to enforce that trust against the tracts Nos. 1 and 2, so far as they remain in their hands unaffected by the rights of purchasers under them, *bona fide* for a valuable consideration, without notice. In our judgment, no reasoning can make the proposition more clear than a simple recital of the facts, and the statement of the general doctrine of equity jurisprudence that the *cestuis que trust* have an option to follow their property, or its proceeds, into any other property into which it has been converted by a breach of the trust, subject only to the rights of such purchasers as have been just referred to. Indeed, the question, as against Baum and Oliver, seems absolutely closed by the state of the evidence; and their intimate knowledge of the whole concern requires neither illustration nor commentary.

Let us, then, proceed to the consideration of the case as to Williams. It is said that he stands in the predicament of a *bona fide* purchaser for a valuable consideration, without

notice; and if he does, he is certainly entitled to protection. Williams, in his answer, asserts himself to be such a purchaser, but it is difficult to maintain that averment in its just legal sense, looking to all the circumstances of the case. In 1819, he became a purchaser of one-half of the interest of Oliver in the Port Lawrence Company, and, as such, he could not fail to know that tracts Nos. 1 and 2, 3 and 4, and Nos. 86 and 87, belonged to that company; and he has never ceased to be a member of that company. In 1821, he was employed by Baum, the acknowledged trustee and agent of the company, to surrender tracts Nos. 1 and 2 to the government of the United States; and through him the relinquishment took place. He says that he did not know of the negotiation between Oliver and the university, for an exchange of the lands, until after its consummation, and never heard of the details of said negotiations, nor what lands were given in exchange, except parts of tracts Nos. 3 and 4. Now, these very tracts belonged to the Port Lawrence Company, so that he was necessarily *put upon the inquiry by what means Baum had parted with them, and Oliver had become possessed of them. Besides, in his negotiation and surrender of tracts Nos. 1 and 2 to the government, and the apportionment of the funds arising from the relinquished lands, first to the remaining lands of the Port Lawrence Company, and then to the lands respectively purchased by the Piatt and Baum Companies, he necessarily became acquainted with the relative interests of all these companies therein. The origin and title of the Michigan University to the tracts Nos. 1 and 2, and the exchange thereof with Oliver, were matters of public notoriety, and proclaimed in the acts of Congress under which the exchange was made. The deed from the university to Oliver recited the material facts respecting the lands given in exchange, and referred to the records of the antecedent negotiations; and the patent itself, from the government, of tracts Nos. 1 and 2, referred to the deed of Oliver to the university, of the lands given in exchange; so that it is most manifest that Williams, as a proprietor in the Port Lawrence Company, and as agent thereof in the relinquishment above referred to, and as a purchaser under Oliver, not only had the most ample means of knowing the nature and character and extent of the title of Oliver to the lands under consideration, but he was positively put upon inquiry in relation to the whole matter. If, under such circumstances, he chose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to avail him against the rights of the *cestuis que trust*. If we add

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to this the fact that within two months after the patent was obtained by Oliver, he and Baum united in an agreement with Oliver, by which each was to take a third part in the tracts Nos. 1 and 2, and Nos. 86 and 87, (these tracts never having been relinquished by the Port Lawrence Company to the government,) to be laid out as a town, and the lots sold on joint account, it would seem almost incredible that he should not have made some inquiries on the subject. And the only reasonable conclusion seems to be, that he was in as full possession of all the facts as were his partners Oliver and Baum. Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest, in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.

And here, in our judgment, the merits of the case would seem to be brought to a close. But certain objections *411] have been made to *the right of the plaintiff to maintain the bill upon other collateral grounds. In the court below an objection was taken, by way of plea, that the original agreement of the Piatt and Baum companies, in regard to the purchases of these tracts at the public sale in 1817, was an illegal combination in fraud of the rights of the United States, and therefore it makes the whole purchase an utter nullity. This objection was fully answered in the opinion of the Circuit Court, in which, on this point, we fully concur. It has been abandoned by the learned counsel here; and, indeed, in our opinion, properly abandoned, as unmaintainable in point of fact as well as law.

Another objection is to the lapse of time. The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Now, until 1831, no final overt act was done by Baum in violation of his duty as trustee; and the first and great breach of that duty, on his part, was the surrender of the certificates of the tracts to Oliver at different periods between 1828 and 1831.

At what particular period the subsequent acts of Baum, Oliver, and Williams, became first known to the plaintiff and the other proprietors of the Piatt and Port Lawrence companies having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most probably not exceeding eight or ten. That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly conusant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires.

Another objection urged at the argument is, that the bill is multifarious in uniting the trust property owned by the Piatt Company and the Port Lawrence Company in one bill, as the interests of each are separate and distinct in the tracts conveyed by Oliver to the Michigan University. We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint. It was well observed by Lord Cottenham in *Campbell* v. *Mackay*, 1 Myl. & C., 603, and the same doctrine was affirmed in this court in *Gaines and wife* v. *Relf and Chew*, 2 How., 619, 642, that it is *impracticable to [*412 lay down any rule, as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court.(*a*) But, if the objection were tenable, (as we are of opinion it is not,) it would be quite too late to insist upon it. The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper

(*a*) See also Story Eq. Pl. §§ 530—540, and the authorities there cited. *Attorney-General* v. *Cradock*, 3 Myl. & C., 85.

to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. *A fortiori* an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity.[1] There is no pretence to say, that such is the predicament of the present cause in this court.

Another objection taken at the argument is, that Baum's heirs cannot insist upon any title to the property in question, because they are bound by the warranty of their ancestor in the conveyance thereof to Oliver. But this objection has no foundation whatsoever in law, whether the warranty be lineal or collateral; for the heirs here do not claim any title to the property by descent, but simply by purchase; and it is only to cases of descent that the doctrine of warranty applies. For this it is sufficient to cite Litt. sect. 735; Co. Litt. 365; Com. Dig. *Guaranty*, I, 2, and Bac. Abridgement, *Warranty*, G, H, I, L. The fact, therefore, that assets descended upon Mary P. Ewing, one of the children and heirs of Baum, can have no influence upon the right of her husband or herself to enter the land in controversy by purchase, however it might repel their right to take it by descent.

Another objection suggested at the argument was the difficulty of apportioning the respective interests of the *cestuis que trust*, in the tracts Nos. 1 and 2. But this difficulty has been overcome; and it constitutes no matter of difference between the Piatt and the Port Lawrence Companies, so far as their own interests are concerned, as distinguished from that of Oliver and Williams.

As to the report of the master and the exceptions thereto in the court below, although those exceptions were not formally overruled or allowed; yet it is plain that in the final decree *413] they were all disposed of, some being allowed and others disallowed; and no argument *has been addressed to us upon the present occasion, which points out any specific errors, which require correction beyond those which have been already incidentally hinted at.

We pass over some other objections, which were suggested at the argument, without remark, as this opinion has already been protracted to an unusual length. We need only say, that we see nothing in those objections which requires us to reform the decree of the court below.

[1] QUOTED. *Wode* v. *Pulsifer*, 54 Vt., 71.

Upon the whole, the decree of the Circuit Court is affirmed, with costs.

WASHINGTON BRIDGE COMPANY, APPELLANT, *v.* WILLIAM STEWART, JAMES STEWART, AND JOHN GLENN.

After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal.[1]

The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law.[2]

An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties.

THIS was an appeal from the Circuit Court of the United States, for the District of Columbia, held in and for the county of Washington, sitting as a court of equity.

The same case was before the court at January term, 1840, and the decree of the court below affirmed by the Supreme Court, but in consequence of the court being equally divided, no opinion was given, and no report of the case published. It now came up on an allegation that it was improperly brought up before, as the decree, from which the appeal was taken, was said not to be a final decree.

The case was this:

The Washington Bridge Company were the owners of a bridge across the Potomac river, under a charter granted in 1808. In February, 1831, a large part of the bridge was broken up and carried away by the ice and flood; and in April, the president and directors called for an instalment of ten dollars per share from the stockholders, for the purpose of repairing it. The defendants in error did not pay, and their shares were forfeited on the 21st of June, 1832, under the 8th section of the charter.

On the 14th of July, 1832, Congress passed an act to purchase the bridge, and appropriated $20,000 for that pur-

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[1] FOLLOWED. *Whyte* v. *Gibbes*, 20 How., 542. CITED. *Bank of the United States* v. *Moss*, 6 How., 38; *Peck* v. *Sanderson*, 18 Id., 42; *Williams* v. *Bruffy*, 12 Otto, 255; s. c. 1 Morr. Tr., 414; *Holmes* v. *Oregon &c. R. R Co.*, 9 Fed. Rep., 238; s. c. 7 Sawy., 392; *Ogle* v. *Turpin*, 8 Bradw. (Ill.), 455; *Adams Co. v. B. & M. R. R. Co.*, 55 Iowa, 98. And see *Insurance Co.* v. *Boon*, 5 Otto, 143; *Renick* v. *Ludington*, 10 W. Va., 537, 540.

[2] FOLLOWED. *Noonan* v. *Bradley*, 12 Wall., 129; *Tyler* v. *Magwire*, 17 Id., 283. CITED. *French* v. *Hay*, 22 Wall., 246.