REUBEN L. LONG, JOHN S. PENRISE, AND AMELIA PENRISE, HIS WIFE, AND ALICE PENRISE, BY HER GUARDIAN, JOHN S. PENRISE, COMPLAINANTS AND APPELLANTS, *v.* JOHN O'FALLON.

Where an administrator sells property which had been conveyed to him for the purpose of securing a debt due to his intestate's estate, his failure to account for the proceeds amounts to a devastavit, and renders himself and his sureties upon his administration bond liable; but it does not entitle the heirs to claim the property from a purchaser in good faith for a valuable consideration.

Nor can the heirs, in such a case, claim land which has been taken up by the administrator as vacant land, and for which he obtained a patent from the United States, although such land was included in the conveyance to him.

Moreover, the facts necessary to sustain the plea of the statute of limitations are proved on the part of the defendant in this case, and no charge in the bill discloses a case of exception from its operation.

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

It was a bill filed by a part of the heirs of Gabriel Long, (Clara V. Long, one of the heirs, having been left out as a complainant, on account of her residence in Missouri, but made a defendant to an amended bill, after a demurrer had been sustained upon this ground,) under the following circumstances:

In 1799, the Spanish Government surveyed for Antoine Morin a tract of land, fronting on the Mississippi river, supposed to be sixteen arpens in front, having a depth of forty arpens, which, in February, 1809, was confirmed to his widow and heirs, he being then dead. The survey showing, however, that the tract contained more than 640 arpens, that quantity only was confirmed; and the commissioners directed another survey to be made, so as to throw off the surplus on the western side of the tract.

In October, 1809, the Morins conveyed the property to Elijah Smith, who, in September, 1812, conveyed it to Alexander McNair.

In 1817, the survey ordered by the board was made, but the surplus quantity was thrown off from the south side of the tract instead of the west, by which means fractional sections 26, 27, 33, 34, and 35, of townships 46, range 7 east, were reunited to the body of public lands.

In 1820, McNair, being indebted to Gabriel Long, mortgaged to him a tract of one hundred and twenty arpens of land, situated on the river Gingrass, and fronting on the river Mississippi, and bounded southwardly by land formerly owned by Clement B. Penrose, northwardly by the land of Joseph Morin, and westwardly by the land now or formerly owned by Joseph Brazeau, being the same land which he had purchased from

Elijah Smith. The land was three arpens in front, by forty in depth, and was nearly or quite identical with the land thrown out, as above mentioned.

In October, 1822, Gabriel Long died.

In December, 1822, Alexander McAllister took out letters of administration upon the estate of Long, and on the 19th of February, 1823, commenced suit to foreclose the mortgage against McNair, and obtained a decree of foreclosure in October, 1823, and an order to sell the mortgaged premises.

Although somewhat in advance of the chronological order of events, it is proper here to introduce the following admission of counsel, which was filed in the cause:

"It is admitted in this case that Catharine Dodge was the aunt of Mrs. McNair, wife of Alexander McNair. It is admitted that in the inventory of Alexander McAllister, filed by him as administrator of Gabriel Long, deceased, in the county court of St. Louis county, said McAllister charged himself with the following debts, as due to said Long's estate from Alexander McNair, viz: note on McNair, $1,889, drawing 10 per cent.; note on McNair, $100; debt on McNair, $340; in all, $2,329. That in the settlement of said McAllister, as such administrator, in said court, at the February term, 1828, he was credited by the same amounts charged against him in inventory, the same being desperate as he stated in said settlement."

It is admitted that Mrs. Long, wife of Gabriel Long, after his death, married Alexander McAllister; and after his death, she married Abel Rathbone Corbin, and she is still living.

To resume the thread of the narrative.

In March, 1824, Catharine Dodge took out a patent from the United States for fractional sections 34 and 26, making together a little upwards of 128 acres, and being a part of the land thrown out, as above mentioned, and included in the mortgage from McNair to Long.

In August, 1824, the sale of the mortgaged premises took place under a decree of the court, as above mentioned, when McAllister became the purchaser for the sum of one hundred and twenty dollars.

In September, 1824, Catharine Dodge united with McNair in executing a deed, by way of mortgage to McAllister, in order to secure the payment of two thousand six hundred and fifty dollars, admitted to be due from McNair to McAllister, as the administrator of Long. This deed gave to McAllister the power to sell the premises, viz: fractional sections 34 and 26.

In January, 1828, McAllister entered in his own right fractional sections 27, 33, and 35, containing in the whole about

nine acres, and being the residue of the lands thrown out by the survey.

On the 10th of August, 1828, Mrs. Dodge, in consideration of the debt due by McNair to McAllister, secured by the mortgage, above referred to, released to McAllister all her right, title, and interest, in the above premises.

In February, 1833, McAllister and wife conveyed to John O'Fallon, for the consideration of twelve hundred dollars, all that tract of land lying on or near the river Gingrass, in the county of St. Louis, being three arpens in front, by forty arpens, more or less, in depth, forming a superficies of one hundred and forty arpens, without recourse, however, to the grantors for any defect of title.

This was the same land which had been mortgaged by McNair, purchased by McAllister at public sale, and conveyed to him (in part) by Mrs. Dodge. O'Fallon had previously gone into possession of the premises, about the year 1830, under an agreement with McAllister.

In December, 1852, the heirs of Gabriel Long, residing in California and Mississippi, filed their bill against O'Fallon, on the equity side of the Circuit Court of the United States for Missouri. The bill alleged that McAllister, being administrator of Gabriel Long, and purchasing the mortgaged property, had thereby become a trustee for the use of the heirs; that the deed of conveyance, executed by Catharine Dodge, to secure debts due to McAllister and the estate of Long, enured to the benefit of the heirs of Long, as did also the patent for the three fractional sections taken out in his own name by McAllister; that he had never accounted with the heirs for the $120, which was the purchase money of the mortgaged property; that O'Fallon was a purchaser with notice, in fact and in law, and that the sale made to him by McAllister and wife was fraudulent in fact and in law; and that thereby O'Fallon became a trustee for the heirs of Long to the same extent that McAllister was bound to them.

The defendant, O'Fallon, filed his answer, in which, amongst other matters, he denied that he was a purchaser with notice, asserting, on the contrary, that when he purchased said real estate described in the two deeds made by said McAllister to this defendant—one in August, 1828, and the other in February, 1833—and paid the consideration expressed in said two deeds to said McAllister, this defendant had never heard the title of said McAllister, or his right to sell said real estate, questioned; said McAllister always claimed and treated it as his own, and in his own right. If this defendant has had any notice or intimation from any one that said McAllister's title

or right to sell said real estate was questioned or questionable, or that he held or claimed it only in trust for other parties, and not in his own individual right, this defendant would not have purchased said real estate, or had anything to do with it, and certainly this defendant would not have paid the consideration for said real estate that he did, if the title thereto, or right to sell, had been questioned or questionable; for the said price or consideration paid for said real estate to said McAllister, by this defendant, was equal to the cash value thereof at that time.

The defendant further alleged that he had been in continuous possession, in good faith, under his claim of title, for twenty years and upwards, next before the bill was filed, and set that up as a bar to the claim of the complainants.

After various proceedings in the case, it came up for argument in April, 1855, when the court dismissed the bill with costs.

The complainants appealed to this court.

It was argued by *Mr. Glover* for the appellants, and *Mr. Geyer* for the appellee.

The following notice of the points, on behalf of the appellants is taken from the brief of *Mr. Glover:*

1. The case of the appellants rests upon the doctrine of resulting trusts, aided by that of fiduciary relation. An administrator who purchases land under a judgment in favor of the intestate, holds it as a trustee. It must be intended that an administrator so purchasing, does so at the request and for the benefit of the heirs. He is a trustee for the heirs, and cannot divest himself of the trust.

And the *cestui que trust* may take the land at his election. Fellows *v.* Fellows, 4 Cowen, 698, 704, 706.

One Hedden purchased at an executor's sale part of the property sold, for the separate use of the executor's wife. The purchase was at public auction, and for a fair price.

Held that no fraud or unfairness need be shown, but that the sale was void at the pleasure of the persons interested, and if they said so the sale must be set aside. Davon *v.* Fanning, 2 J. Ch. R., 252.

We have been unable to find any one well-considered case to sustain the right of an executor to become the purchaser of property which he represents, or any portion of it, even at a fair price at public sale, without fraud. Michond *v.* Girod, 4 Howard, 557. This case states all the reasons of the rule.

Where lands in the hands of a party stand affected with a trust, and the person in whose hands they so stood has sold

them to a third person, the *cestui que trust* has the right to follow the lands into the hands of any one but an innocent purchaser. And the trustee cannot deprive him of this right. Oliver *v.* Piatt, 3 Howard, 401.

Meyer conveyed his property in trust to pay debts. Part of it was sold under an execution in the control of the trustee, and bought by him.

Held, the purchaser took in trust for the beneficiary. Harrison, administrator, et al., *v.* Mock et al., 10 Ala. R., 185.

If an agent discovers a defect in the title to the land of his principal, he cannot misuse it to acquire a title to it himself. Ringo *v.* Burnes, 10 Peters, 281.

Where the trustee aliens the land *pendente lite*, the *cestui que trust* may elect to take the land, or the money it sold for. Murray *v.* Lylburn, 2 J. Ch. R., 422.

The *cestui que trust* may affirm the sale, and take the property, or have a resale. Thorp et al. *v.* McCullum et al., 1 Gilman Ill. R., 614.

It seems the beneficiary has three courses he may pursue in his election. 1. He may set aside the purchase, and have a resale. 2. He may affirm it, and take the property as his own. 3. He may take the money.

That the *cestui que trust* has this election only shows that he owns the property.

2. That O'Fallon knew how McAllister came by the propty, and that he held it in trust for the persons interested in the estate of Gabriel Long; they having paid the purchase-money is manifest from the title-papers themselves.

3. The article of agreement between O'Fallon and McAllister, dated August 12, 1828, recites that on the 9th August, 1828, McAllister relinquished to O'Fallon the title procured from Mrs. Dodge in August, 1828. This date of the "9th" is a manifest mistake, because the deed of Mrs. Dodge, in August, 1828, was made 10th of August, and could not therefore have been recited by a conveyance on the 9th. Besides, this part of the instrument was no evidence against the plaintiffs. The agreement was valid to show a sale to O'Fallon on the 12th, but not evidence of the recited matter against the appellants.

4. On the sale to McAllister, in 1824, the property in dispute was held by him in trust. On the 10th August, 1828, after the release of Mrs. Dodge, the property in dispute was held by him in trust. And if he did, as recited in the instrument of August 12, 1828, sell the interest gotten of Mrs. Dodge, on the 10th, to O'Fallon, he had no power to divest the title of Long's heirs thereby.

5. The entries by McAllister, in January, 1828, were in fraud of the rights of the heirs of Long, and enured to their benefit.

It is impossible to conceive the ground on which the Circuit Court dismissed the bill, as to these entries. McAllister, who held the property as administrator, and who in this way learned of the defects in the title, went into the market and purchased up, *on his own mere motion*, an outstanding title to the trust estate. See Hoffman's Ch. R., 195; De Bevoix *v.* Sandford, 5 Vesey, 678; 3 Mer., 200; 13 Vesey, 601.

6. The property when vested in McAllister being in equity, the property of Long's heirs could only be sold by proceedings in the Probate Court, in conformity with the statute law. See Revised Code of Missouri, 1825, vol. 1, pp. 106, 40, 41.

7. The statute of limitations is not applicable to the case, or if it is, it did not begin to run till the deed to O'Fallon in 1833, which was the first repudiation of the trust by McAllister.

Mr. Geyer, for the defendant in error, made the following points:

I. The sale in August, 1824, under the decree of the St. Louis Circuit Court, was not a sale of any property belonging to the estate of Gabriel Long, nor was it a sale made by the administrator, nor under his direction or control; and therefore the purchase by the administrator was not a breach of any trust, nor did he become, in fact or law, a trustee for the heirs of Gabriel Long.

According to the laws of Missouri, Gabriel Long had no estate in the land embraced by the mortgage deed. The land was held as a security for the debt, and could be subject to sale only as the property of the mortgagor, and in the mode adopted by the administrator—by decree of a court—the sale to be made by the sheriff.

An administrator may buy goods of his intestate at sheriff's sale, (Haddix *v.* Haddix, 5 Lett., 204;) and so at an open and public sale, without fraud, an executor may purchase the property of his testator. Drayton *v.* Drayton, 1 Dessess., 567; Anderson *v.* Fox, 2 Hen. and M., 245; McKey *v.* Young, 4 Hen. and M., 430; Hudson *v.* Hudson, 5 Hen. and M., 180.

A person who had married a widow and administratrix, and was acting guardian of the minor heirs, was held to have a right to purchase the estate at full price at public sale directed by the court for the purpose of partition. McGuire *v.* McGowen, 4 Desaces, 486.

The case of Fillows *v.* Fillows (4 Cowen, 698, 704, 706) has

been cited as authority to sustain the position of the appellant, that an administrator, who purchases land under a judgment in favor of the intestate, holds it as a trustee for the heirs, and cannot divest himself of the trust; and there is a marginal note to that effect, but it is not warranted by the opinion. In that case, the complainants sued as administrators, and set up the interest in the property as such, against persons not heirs, who demurred to the bill on the ground that the complainants came in two capacities, a part of the property having been purchased by them at sheriff's sale, under a judgment in favor of their intestate. The court regarded the complainants as having averred substantially that they purchased as administrators, and it was not for the defendants to question their authority; and Judge Southerland said, "It is to be presumed, at this stage of the cause, that they purchased at the request and for the benefit of the heirs, and a court of equity would compel them to account to the estate."

The right of an executor or administrator to purchase on his own account the property of his testator or intestate, at a judicial sale under the order or process of a court, has been questioned; but there is no adjudged case, it is believed, in which it has been held that an executor or administrator may not purchase property of others at a public judicial sale, under a decree, judgment, or process, in favor of the testator or intestate, or of his personal representatives.

II. No estate or interest in the land in controversy was vested in the heirs of Gabriel Long by virtue of the tripartite deed of the 1st September, 1824, nor by the deed of Catherine Dodge to Alexander McAllister, of 10th of August, 1828.

The first of these deeds is a mortgage in trust for sale; under it, McAllister, as mortgagee, held the land to secure the debts due to the estate of Long, with power, in case of default in the payments stipulated for, to make sale absolutely, at public or private sale, of the land embraced; the proceeds to be applied first to the payment of the principal and interest of the debt, and the residue, if any, to be paid over to Mrs. Dodge—McAllister held the estate as trustee for Mrs. Dodge, subject to the debt due from McNair to Long's estate. The personal representatives of Long, not his heirs, held the security for the debt, and were entitled to enforce it.

Before the execution of the second deed, McAllister made a settlement of his accounts, as administrator of Gabriel Long's estate, and was credited with the amount of McNair's debts, as desperate, so that he was no longer charged therewith as administrator; but undoubtedly, if he afterwards received anything on account of that debt, by the sale of mortgaged prop-

erty or otherwise, he was bound to account for it as administrator, if received while he continued to act as such, or with his successor, if he had ceased to be administrator.

The land continued to be held as a security for the debt of McNair, when Mrs. Dodge conveyed to McAllister her right to redeem the land which she had purchased from the United States, and mortgaged by the deed of 1st of September, 1824. McNair's right to redeem, however, still remained until the sale made to O'Fallon.

There is no allegation or evidence that McAllister applied any of the assets of the estate of his intestate to the purchase of any part of the land in question, either at the sheriff's sale in 1824, or in consideration of the deeds of Mrs. Dodge in 1824 and 1828; the accounts of the administrator, McAllister, exhibit no charge against the estate for anything paid on account of the land.

At the time O'Fallon became the purchaser, McAllister held in his own right all the estate and interest of McNair and Mrs. Dodge in the land, subject only to the encumbrance created by the tripartite deed of 1st September, 1824, under which he had a complete power of disposition, but was bound to apply so much of the proceeds of any sale as was necessary to the payment of the debt of McNair to Long's estate. That is, at most, the land was subject to a mortgage to secure the debt to Long, which enured to the personal representative of Long, and not an estate held by McAllister in trust for the heirs.

If, therefore, the defendant, O'Fallon, could be regarded as holding the land precisely as it was held by McAllister, he could be required only to satisfy the debt due from McNair to Long's estate, or sell the land and apply the proceeds to the payment; but he does not hold the estate in the land in trust for the heirs of Long; the cause of action, if any, against him, is in the personal representative of Gabriel Long. And, even if the heirs might prosecute an action in a court of equity for a money demand, the interest of Alton Long was not assigned by his deed to Penrise; and the bill was properly dismissed, because the heirs are not the proper parties complainant, and because a part of them only are made parties.

The sale to O'Fallon having been fairly made, and a full consideration paid, the title vested in him discharged of the encumbrance in favor of the personal representative of Gabriel Long created by the deed of 1st September, 1824.

The sale was made after the last settlement by McAllister of his accounts as administrator with the County Court of St. Louis, and it does not appear whether he afterwards accounted for the proceeds of the sale or not. The bill contains no alle-

gation that he failed to account, and it was not put in issue in the cause. But it is clear that McAllister was authorized to make the sale to secure the money and make the conveyance, and there was no obligation on the part of the purchaser to see that he accounted for the proceeds as administrator of the estate of Long. Grant *v.* Hooke, 13 Sergt. and Rawle, 262; 2 Des., 378; Field *v.* Sheiffelin, 7 John. Ch. R., 160.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellants, a part of the heirs of Gabriel Long, deceased, instituted this suit in the Circuit Court against the defendant, to obtain a decree for a title to, and for an account for the rents and profits of, a parcel of land in St. Louis, Missouri.

The case made in the record is, that in 1820, Alexander McNair and wife executed a mortgage deed for the land in controversy to Gabriel Long, to secure a debt not then due. Before its payment, Long died, and Alexander McAllister was appointed to administer his estate. In 1823, this administrator obtained a decree in the Circuit Court of St. Louis county, for a foreclosure of the mortgage, and an order of sale, to be executed after a limited period. This order was executed in August, 1824, by a public sale of the property to McAllister, for a small portion of the debt.

The title of McNair before this sale had entirely failed. The Spanish concession and survey, under which he claimed the land, had been surveyed and located by the officers of the land office so as to exclude this parcel, and, in consequence, it was subdivided into five fractional sections, and was subject to sale as public land. At the date of the sale by the sheriff, two of these fractions, embracing the whole tract except nine acres, were claimed by Catherine Dodge, under a patent from the United States, and the remaining sections were patented to McAllister, as a purchaser, by entry at the land office in 1828.

In September, 1822, Catherine Dodge and McNair agreed to secure the debt due to the estate of Long, by a mortgage in favor of McAllister.

The debt was divided into three unequal instalments, which were to be paid within three years by McNair; and Mrs. Dodge conveyed her two fractional sections, in mortgage, with a power of sale in the event of a default, to secure the performance of the obligation.

McNair failed to make the payments, and in 1828 Mrs. Dodge released to McAllister her equity of redemption and her claim upon him for any surplus from the mortgage, for the consideration of one dollar.

In 1828, the defendant purchased the five fractional sections

from McAllister, for a fair price, and has been in the undisputed possession of the land since 1830. The defendant pleads the statute of limitations in bar of the recovery.

The opinion of the court is, that the conveyances of Mrs. Dodge to McAllister did not invest the heirs of Gabriel Long with an equitable estate, or a particular lien on the property described in them. Their primary object was to create a security, or a fund, for the payment of the debt of McNair, and to enable McAllister to dispose of the land in case of its nonpayment, at his discretion, for its discharge. The release executed in 1828 was not made to extinguish any portion of the debt, nor did it remove the obligation of McAllister to convert the security into pecuniary assets. His sale of the land was a legitimate exercise of the powers of an administrator and trustee, and his vendee was not obliged to look to the application of the purchase-money. (Tyrrell *v.* Morris, Dev. and Batt. Ch. R., 559.) His failure to account was a devastavit, for which he and his sureties are liable on their official bond at law; and probably, if the land had been retained by him, or any person claiming as a volunteer under him, a court of equity might have permitted the heirs to accept the property, instead of the debt due to the estate. But, in the present instance, the defendant is a purchaser in good faith, and is entitled to hold the property, exempt from the claims of the plaintiffs. (Rayner *v.* Pearsall, 3 John. Ch. R., 578.)

Nor can the title of the defendant to the three small fractional sections entered by McAllister at the land office, and which were purchased from him by the defendant after his patent from the United States had been issued, be successfully questioned by the plaintiffs. The estate conveyed to Long by McNair, in mortgage, was known to be without value in 1824. McAllister did not acquire by the sheriff's deed any interest in the land, or profit from his purchase. The land was then a part of the public domain, and subject to entry at the land office, under the laws of the United States. Without considering whether there was any relation between this administrator and these heirs, which precluded the former to purchase the land for his own account, under the principles of equity, we are satisfied that the heirs are not entitled to pursue their claim against a purchaser for value, who has not been guilty of fraud or collusion.

The facts necessary to sustain the plea of the statute of limitations are proved on the part of the defendant, and no charge in the bill discloses a case of exception from its operation. (Piatt *v.* Vattier and others, 9 Pet., 405.)

Decree of the Circuit Court affirmed.