Syllabus.

MAY v. LE CLAIRE.

1. Contracts entered into in a spirit of peace and for the settlement of unadjusted demands on both sides, will not, where executed by persons of intelligence, and under circumstances which indicate caution and a knowledge of what is done, be readily questioned in equity as in fact not fair; but, on the contrary, will be protected and enforced.
2. A purchaser by a deed of quit-claim simply, is not regarded as a *bonâ fide* purchaser without notice.
3. The knowledge of counsel in a particular transaction is notice to his client. And though the client may not actively participate in accomplishing a fraud, yet if he be looking on at what is done by another who is his confidential agent and professional adviser generally, and has been his agent and adviser in regard to a particular matter now called in question as fraudulently accomplished, and if, when all is accomplished the client take and profit by the fruits of all that has been done, he will be taken as affected with knowledge possessed by such his agent.
4. When a trustee abuses his trust—converting trust property into new forms —the *cestui que trust* has the option to take the original or the substituted property, and if either has passed into the hands of a *bonâ fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the right of the *cestui que trust*. The principle is that the wrong-doer shall derive no benefit from his wrong, and that profits which he makes belong to the *cestui que trust*. Equity will accordingly so mould and apply the remedy as to give them to him; giving, however, the party thus charged proper credits for money which *he* has paid, but which, if things had all been regularly transacted, the *cestui que trust* should have paid; making proper allowances for rent, interest, &c., and putting things on such a footing as under the circumstances does the most complete justice.
5. Hence, where a person who had improperly possessed himself of land and of personal securities which a complainant was entitled to have, and confused the personal securities by changing the form of them, died, leaving a will by which he devised his estate to numerous persons not within the jurisdiction of the court, but appointing executors who were within it, the court being unable to reach the devisees, and so to decree a conveyance of the land itself, gave a money decree against the executors embracing the value of the land, and also the sum realized from the securities. On the other hand, it gave the party thus charged credit for the payment of certain sums which *he* had paid in discharge of the complainant's debts, and which, if all things had been done properly, the complainant would have paid; making also proper allowances for rent, interest, &c., and directing an account before a master.

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6. Although, where there has been a contract for the acquisition of specific pieces of property, which is now incapable of performance, parties may sometimes be remitted from a court of equity to a court of law, yet they are never so remitted where the remedy at law is not as effectual and complete as a chancellor can make it.

THIS was an appeal from a decree of the Circuit Court of the United States for Iowa, dismissing a bill filed by one James May against the executors of Antoine Le Claire and others.

The evidence in the case showed apparently the following leading facts, viz.:

1st. That May and Le Claire had, previously to February 4th, 1859, been associated in business, and that they then had mutual claims against each other.

2d. That on that day May made to Le Claire a written offer of compromise, which, about two months afterward (March 8th, 1859), was accepted by Le Claire, in writing, which acceptance was witnessed by his attorney and counsel, John P. Cook, Esquire.

3d. That this compromise consisted in a settlement and cancellation of their mutual claims by an exchange of property *of unequal values*, whereby May was to be paid his claim against Le Claire by the difference in value between the property which he was to give and the value of the property which he was to receive, that difference being about $27,000.

That the particulars of the compromise were these:

May was to release all claims against Le Claire and convey to him, free from incumbrance, a farm called Rosebank, within twelve months; Le Claire was to release all claims against May and convey to him his interest as mortgagee in certain lands which he had sold to one Adrian H. Davenport; that is to say, to assign to May five notes of $5000 each, with the mortgage given by Davenport, and also to convey certain island and river-shore lands owned by Le Claire, below the town of Le Claire, in Iowa.

That at the date of the agreement the Rosebank farm, which May agreed to convey to Le Claire freed from its incumbrances, was incumbered—

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(*a*) By a mortgage to one Kettell, for $3125, payable November 1st, 1867.

(*b*) By a trust-deed to one Powers, to secure $6550, payable May 1st, 1858; overdue, therefore, like the mortgage, at the time of the compromise; this deed containing a clause authorizing Powers, the trustee, to sell the land if the amount was not paid at maturity.

4th. That in part performance of the contract on his part, May gave to Le Claire immediate possession of Rosebank, through his nephew and business agent (one Joseph A. Le Claire), and also executed and deposited with Cook & Sargent, bankers at Davenport, a deed, conveying the farm to Le Claire.

5th. That in part performance of the contract on his part, Antoine Le Claire also assigned to May the notes, mortgage, and collaterals of Davenport, and deposited them with Cook & Sargent. That this assignment was declared to be "in consideration of an amicable and full settlement between said May and myself of all matters of difference heretofore existing between us;" and was witnessed by Cook, already named, the attorney and counsel of Le Claire.

6th. That Le Claire, at the time and for a short time afterwards, was satisfied with the compromise, but afterwards became dissatisfied.

7th. That in the meantime, to wit, April 12th, 1859, Davenport offered in writing to make a settlement with May by paying him *part* of the liabilities of him, the said Davenport, which had already been assigned by Le Claire to May. That this offer was not accepted.

8th. That in the spring of 1859, May, in further execution of the contract on his part, entered into negotiations at Pittsburg, where he had once lived and was known, by which he was to obtain the means to enable him to remove the incumbrances now overdue upon the Rosebank farm; that the means thus provided were approved bankers' drafts. That while he was absent at Pittsburg Rosebank was advertised by Powers, the trustee, for sale, *on the 20th of July*, under the deed of trust, Cook urging this on and stating to

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Powers that the "compromise" was very unjust to Le Claire, who, he said, on the facts, truly understood, had owed May nothing on a settlement; that he, Cook, wished to break it up; feeling himself bound as the friend and attorney of Le Claire to protect him as far as possible against so gross an imposition. That on the day, and near the hour advertised for the sale of the farm, May and a Pittsburg friend called on Powers to make arrangements to pay the said incumbrances, and were informed by Powers that the drafts would be satisfactory and that the sale should not take place. That while May was thus in conversation with Powers, a note written by Cook was handed to Powers, who then stated that he was called out on other business, excused himself and went away; that on Powers thus withdrawing from the company of May, he joined Cook, and the two went to the court-house (without May's knowledge) and there sold the farm under the trust-deed at auction, subject to the mortgage, striking it off for $5000 to one Dessaint; a deed having been already prepared by Cook with a blank for the purchaser's name; now filled in with Dessaint's.

That previous to this sale, Cook had told Powers that he need not have bidders there; that it was unnecessary to bid against him (Cook) or Dessaint, who Cook said desired to purchase, and that if the property was struck off to either for less than the amount due both on the trust-deed (now $7400) and mortgage, he, Cook, would see both the debts paid in full. That the balance due on the trust-deed was thus afterwards paid, and that on the 28th of July, 1859, Powers sold to Cook the mortgage of May to Kettle, taking in payment Cook's own note for $3255.87, indorsed by Le Claire and one Ebenezer Cook, and that Cook sued May on the note in the Circuit Court of the United States for the Northern District of Illinois and obtained a judgment. That May complained to Powers, and to others, of the mode in which Rosebank had been sold, and that Powers promised to annul the sale on payment of the debt, and did in fact apparently make some efforts to induce Dessaint to give up

his bargain; which, however, Dessaint refused to do, saying that he had bought the farm to keep.

9th. That the said farm was now held by one Joseph A. Le Claire, *Junior*, by an apparently free and unincumbered title, as the assignee of Antoine Le Claire.

10th. That this had been accomplished by what the complainant called "a circle of conveyances," as 1st, a *quit claim* deed from Dessaint to Ebenezer Cook, dated July 27th, 1859; 2d, from Ebenezer Cook to one *George* L. Davenport, by deed dated December 16th, 1859; 3d, from George Davenport to Joseph A. Le Claire, *Junior*, by deed with special warranty only, dated January 23d, 1862, made in pursuance of a written contract of Antoine Le Claire with his nephew, Joseph A. Le Claire, Senior, dated November 21st, 1860, and in consideration of the payment, by the estate of Antoine, of two notes of E. Cook for $10,000, the payment of which was assumed, or alleged to have been assumed, by the said George Davenport.

This, in the complainant's language, "completed one circle of operations."

11th. That, on the other hand, Antoine Le Claire, on the 9th of March, 1860,—*one day* after the expiration of the twelve months within which May, by the terms of the compromise with Le Claire had bound himself to convey Rosebank unincumbered to him, Le Claire, offering to convey what he, on his part, was bound to convey, made a curt written demand on May for "a good and sufficient deed for Rosebank, and that all the incumbrances, judgments, and liens of every character be removed from said Rosebank, so that I get a clear, perfect, and unincumbered title therefor." [Rosebank, as the reader will remember, having at this time been sold some months before under the deed of trust.] That shortly, to wit, seventeen days afterwards, to wit, on the 27th of March, 1860, Le Claire entered into a written contract with Adrian Davenport, by which it was agreed that he, Le Claire, should resume title and possession of the property sold and conveyed by him to the said Davenport; that the notes given by Davenport should be

cancelled and he discharged from liability, and that, as a means to this end, Le Claire should proceed to foreclose his mortgage and buy in the property at the sale under the mortgage; it being agreed that if at the foreclosure sale the property should sell for more than the amount of the notes and interest, Davenport was to have the overplus; if for less, the notes were to be given up; that if Le Claire should acquire the title as proposed, he agreed to confirm the sales of certain parts of the property which Davenport had made; a map being referred to as showing the premises so sold. That Davenport assigned to Le Claire and placed in his hands notes of his vendees for part of the purchase-money, amounting, with interest, to about $16,000; Davenport stipulating that there were no offsets against any of the notes, except two of trifling amount, which were mentioned, and that if it should prove there were any valid offsets, he would pay the amount to Le Claire, and Le Claire agreeing that, upon the payment to him of the balance of the purchase-money by Davenport's vendees, he would convey to those holding title bonds from Davenport.

That, accordingly, in April, 1860, proceedings to foreclose the mortgage were instituted by the said John P. Cook; that to facilitate the proceedings, Davenport admitted the allegations of the bill, and a decree *pro confesso* was entered against him and subsequently liquidated at the sum of $41,708.32. That all this was done without notice to May; and that, under this decree, the mortgaged property was subsequently sold and conveyed by the sheriff to Le Claire for $20,000.

This completed what the counsel styled "the other circle of operations."

Thus by what the complainant styled "the joint effect of two parallel series of operations," Le Claire became possessed of both of the equivalents agreed to be exchanged between him and May, by the compromise of March 8, 1859, in payment of the admitted debt of about $27,000 from him to May; that is to say: Le Claire had paid his debt to May in full; he, or his relative, Le Claire, Junior, held Rosebank

by a free and unincumbered title; he still held the island and river-shore property below the town of Le Claire; and had got back all the Davenport property, which he agreed to convey, and did convey, to May.

May, on the contrary, had nothing as the result of the whole operations except a suit in chancery.

Still the great question of the case remained, whether what had occurred was the result, on the one hand, of Le Claire's superior attention and vigilance, within proper limits, and of an unembarrassed condition as to money; and on the other, of May's supineness, bad arrangements, and embarrassed condition; whether the combination of persons was purely accidental, or whether there was contrivance and design; in other words, whether each part was so connected with the whole, that, taken together, they furnished clear evidence that the result was contemplated from an early date, and that after the compromise had been made in good faith, and partially executed by both parties, the plan to break it up was conceived as an afterthought by J. P. Cook, a lawyer, and executed under his direction by Powers, Dessaint, Ebenezer Cook, the two Davenports, and the two J. A. De Claires, Senior and Junior?

Especially arose the question, how far had *Antoine Le Claire*, who the case rather showed was an old and perhaps illiterate half-breed Frenchman—part Indian—an interpreter in early times, who had grown rich by the growth of a large town, on land granted to him many years since by the bounty of the United States—how far had *he* originated the scheme, if it was one; or, if not originating it at all, how far was he to be affected by what was done by J. P. Cook and the others, assuming that what they did was a fraudulent scheme successfully carried out?

This was a matter depending largely on the *relations* subsisting between J. P. Cook, old Le Claire, and the various parties already named.

As to that matter, it appeared,

1. That Powers, the trustee who sold Rosebank, was a banker; that the firm of J. Cook & Sargent, which was com-

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posed of the *lawyer J. P. Cook*, his brother, Ebenezer Cook, and one Sargent, were also bankers; that Powers was in the habit of borrowing money from Cook & Sargent, and so under obligations to them pecuniarily.

2. That *Antoine Le Claire* had no lineal descendants; and that Joseph Le Claire was his nephew and business agent, occupied the same office with him, and, under the permission of Antoine Le Claire, was in the actual occupation of Rosebank, after the agreement of May and Le Claire, receiving the rents.

3. That George Davenport and Antoine Le Claire were intimate in their business relations, indorsers for each other, and both of them indorsers for Cook & Sargent to a considerable amount, and also indorsers for Ebenezer Cook.

4. That Dessaint was a Frenchman and an intimate friend of Le Claire, and in the habit of lending him money.

5. That Ebenezer Cook, Antoine Le Claire, George Davenport, and Dessaint, were associated in business as stockholders and directors of the State Bank.

6. That Cook & Sargent having failed, George Davenport was one of their assignees, and that Antoine Le Claire had appointed him by will one of his executors.

7. That John P. Cook was the agent and attorney of Le Claire; selected by him as the custodian of the papers relating to the matter in controversy; the subscribing witness, as already said, to the compromise agreement of March 8, 1859, and to the assignment to May, dated March 10, 1859; drew and dated the agreement, March 27, 1860, between Le Claire and Adrian Davenport, in regard to the Davenport mortgage; was one of the attorneys who, on the 24th day of April, 1860, commenced the action for Le Claire to foreclose the Davenport mortgage, and procured the decree; as attorney, held the collaterals until after Le Claire's death, and delivered them to the executor; as attorney of Le Claire, attended the sale of the mortgaged property under the decree in favor of *Le Claire* v. *Davenport*, and after Le Claire, the nephew, bid off the property, that he directed the deed to be made to Antoine Le Claire.

8. That at the time, 16th of December, 1860, when *Ebenezer* Cook (as already mentioned on p. 221), conveyed Rosebank to George Davenport, the judgment in favor of *John P.* Cook against May (mentioned on p. 220), was assigned to Davenport; the consideration, according to the statement of Davenport, having been that he agreed to pay a bill and note of Ebenezer Cook, on which he and Le Claire were liable as accommodation indorsers, both bill and note dated 20th October, 1859; maturing, respectively, three and four months from date, and both renewed by Davenport and Le Claire, Davenport admitting that Le Claire had paid at that time $1000 upon one of them.

9. That, in these money operations, the relations between some of the parties named, if not all, were quite confidential. For example: before their failure, Cook & Sargent, on the 21st of August, 1858, "in consideration of $70,000, executed to Antoine Le Claire a mortgage upon a large quantity of real estate." The mortgage recites that Le Claire had accepted various sums for their accommodation, and proposed to indorse and accept other and further sums for them, with the view of enabling them to borrow money on such acceptances. The condition was that they should pay these liabilities, and save Le Claire harmless. On the 22d of December, 1859, after their failure, they sold and assigned to Le Claire the banking-house of Cook, Sargent, Downey & Co., in Iowa City, and all the assets of that firm. The deed recites that Le Claire "had made and executed certain notes, drafts, and acceptances for the accommodation of Cook & Sargent, and was now liable to pay the same." No condition or trust was expressed. On the 12th of December, 1860, in consideration of $15,000, they assigned to George Davenport their interest in the assets of the firm of Cook, Sargent & Parker, of Florence, in the Territory of Nebraska, and covenanted that the interest thus transferred was worth $15,000. On the 2d of July, 1861, by a deed, absolute on its face, Le Claire conveyed to Dessaint a large number of tracts of land. An article of agreement, dated the 15th of the same month, recited, however, that the prior convey-

ance had been made in trust to enable Dessaint to sell and pay a debt of Le Claire to the Merchants' Branch of the State Bank of Iowa, and Dessaint stipulated that, after accomplishing this object and paying the expenses of the trust, he would reconvey to Le Claire.

Le Claire himself being dead, leaving a life interest in his estate to his wife, Marguerite (who with the George Davenport already named were found to be executors), and the remainder to collaterals, residents some abroad, May now filed this bill against both the executors, the two Cooks, Dessaint, Sargent, and such collateral devisees of Le Claire as he could reach (these being about half of those inheriting under the will), praying for specific performance, or alternatively for compensation in money, by way of substitution; and for such other relief as the court might see fit.

The case came here on a printed transcript of 612 pages; a confused mass of papers and record entries thrown together without regard to order or method. It appeared to have been originally made up by the clerk of the court below, or his deputy, for transmission to this court in twelve separate parcels, not inappropriately described in the clerk's certificate as a "bundle of papers." Many of the exhibits, together with certain accounts produced or identified by the witnesses, appeared in the transcript entirely separated from the depositions of which they formed a part, and without anything to connect them therewith.

Notwithstanding the character of the transcript the case was presented with clearness, and was elaborately argued by *Mr. J. A. Wills, for the appellant, and by Messrs. M. H. Carpenter and J. N. Rogers, contra:* Mr. Wills contending that it was not necessary to go into minute particular facts to infer fraud; that the case was one which it was impossible to view, even in outline, as a whole, without seeing a fraudulent contrivance—argued that the fraud being unkennelled, equity would certainly, in some form, grant relief; that if specific performance could not, in the complications which, with time, deaths, transfers of property, absence of parties

defendant, &c., be decreed, and if the fraudulent proceedings should thus of necessity have to stand, then that taking things, though fraudulent, on the base where the parties had put them, Le Claire's estate could be followed for the fruits of them in the hands of his executors, and so made to respond.

The counsel of the other side, asserting that the proof of fraud consisted only in an artful collocation of facts, and denying that fraud was proved, and especially that there was anything to show that, in this matter, Cook had acted as agent of Le Claire—so as to charge Le Claire's estate with a fraud committed *by attorney*—contended that the bill was defective in not bringing in all Le Claire's devisees; that specific performance was almost confessedly impracticable, and that if compensation in money was asked, the case became a claim for damages, and a case therefore for law, not for equity; that even if a case for equity, May had lost his rights by supineness in not paying off the overdue trust-deed incumbrance, time being of the essence of his contract to Powers under the trust-deed; but that if this was not so, and if he still asserted rights in Rosebank, he should file a bill to redeem.

Mr. Justice SWAYNE delivered the opinion of the court

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of Iowa. The record is in a singularly defective and confused condition. But the case has been fully argued upon the merits by the counsel upon both sides, and finding enough in the record, upon looking carefully through it, to enable us to dispose of the controversy between the parties satisfactorily to ourselves without further delay, we do not deem it necessary to reverse and remand the cause, as we might otherwise do, in order that the record may be corrected and by a further appeal be brought up in the proper condition.*

* Levy *v.* Arredondo and others, 12 Peters, 218; Mandeville *v.* Burt, 8 Id. 256; Harrison *v.* Nixon, 9 Id. 483; Finley *v.* Linn, 6 Cranch, 252; Lewis *v.* Darling, 16 Howard, 1.

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The case involves no legal question of any doubt or difficulty. Its determination depends wholly upon the facts. The testimony and exhibits are very voluminous. It could serve no useful purpose elaborately to analyze them and set forth the results in this opinion. We shall content ourselves with doing little more than to announce our conclusions. We shall not deem it necessary to give in detail the evidence upon which they are founded or the processes of argument by which they are supported.

The proposition submitted by May, of the 4th of February, 1859, its acceptance on the 8th of March following by Le Claire, since deceased, and the assent of May on the same day, constituted a valid contract. There was a large difference in value between what Le Claire was to give and what he was to receive. But we have found in the record nothing which raises a doubt that the arrangement was fair and just to both parties. Le Claire was a man of property and of experience in business. The date of the proposition and of its acceptance show that he took ample time to consider the subject. The acceptance was witnessed by John P. Cook, his counsel, and one of the defendants in this case. According to the face of the proposition it involved the settlement of unadjusted demands on both sides. It was made in a spirit of peace and compromise, and was accepted in a corresponding spirit. It is the duty of a court of equity to uphold such an agreement, to protect and enforce the rights of both parties under it, and to carry it out as far as the facts, which subsequently occurred, and the settled principles of our jurisprudence, will permit.

On the 10th of March Le Claire, in pursuance of the contract, indorsed to May the notes and mortgage of Adrian H. Davenport, and placed them, with certain collaterals which he had received from Davenport to secure the payment of the notes, in the hands of Cook & Sargent. At the same time May, also, in pursuance of the contract, executed to Le Claire a deed conveying the Rosebank farm, and placed it in the hands of the same depositaries. Cook & Sargent were to deliver to each party what the other had deposited

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for him as soon as May should have removed all incumbrances from the farm, which he was bound by the contract to do within a year from its date. When Le Claire made his deposit he took from Cook & Sargent a receipt stating its object and terms.

The firm of Cook & Sargent consisted of John P. Cook, Ebenezer Cook, his brother, and George B. Sargent. They were bankers. On the 21st of August, 1858, they executed to Le Claire a mortgage upon a large quantity of real estate. The consideration stated is $70,000. The mortgage recites that Le Claire had "accepted various sums for the accommodation of Cook & Sargent, and proposes to indorse and accept other and further sums for them, with the view of enabling them to borrow money on such acceptances." The condition was that they should pay these liabilities and save Le Claire harmless. Cook & Sargent subsequently failed. On the 22d of December, 1859, they sold and assigned to Le Claire the banking-house of Cook, Sargent, Downey & Co., in Iowa City, and all the assets, real, personal, and mixed, of that firm. The consideration stated is, that Le Claire "has made and executed certain notes, drafts, and acceptances for the accommodation of Cook & Sargent, and is now liable to pay the same." No condition or trust is expressed. On the 12th of December, 1860, Cook & Sargent assigned to the defendant, George L. Davenport, their interest in the assets of the firm of Cook, Sargent & Parker, of Florence, in the Territory of Nebraska, and covenanted that the interest thus transferred was worth the sum of $15,000. On the 2d of July, 1861, by a deed, absolute on its face, Le Claire conveyed to the defendant, Louis C. Dessaint, a large number of tracts of land. On the 15th of the same month an article of agreement was entered into between them, wherein it was recited that the prior conveyance had been made in trust to enable Dessaint to sell and pay a debt of Le Claire to the Merchants' Branch of the State Bank of Iowa, and Dessaint stipulated that, after accomplishing this object and paying the expenses of the trust, he would reconvey the residue of the lands to Le Claire. These transactions show

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the relations of the parties at the dates of their occurrence, and in that view are not without importance in this case.

The incumbrances on the Rosebank farm consisted of a deed of trust, executed by May to Charles Powers, since deceased, to secure a note of May to W. H. & A. T. Strippel, for $6550, payable, with interest, on the 1st of May, 1858; a mortgage to George F. Kettle to secure a note of May to him of $3125, with interest after due, payable on the 10th of November, 1857; and the liens of several judgments not necessary to be particularly specified. At the time the contract between May and Le Claire was entered into, Le Claire was well satisfied with the arrangement. Subsequently he became dissatisfied. John P. Cook afterwards denounced it, and declared that, as the friend and attorney of Le Claire, he considered it his duty "to protect Le Claire as far as possible against so gross an imposition." The most obvious and effectual way to accomplish that object was to sell the Rosebank farm under the deed of trust, and thus put it out of the power of May to fulfil his part of the contract, and this purpose those concerned in the scheme proceeded to carry out.

In this connection we lay out of view the important declarations of Powers, the trustee, as incompetent against the other parties.

On the 12th of April, 1859, Adrian H. Davenport, regarding May as the owner of his notes and mortgage, which Le Claire had assigned and deposited, as before stated, submitted to May a written offer for a settlement and compromise, which May declined.

On the 28th of July, 1859, John P. Cook bought from Powers the note and mortgage of May to Kettle, and gave in payment his note for $3255.87, indorsed by Le Claire and Ebenezer Cook. Cook, the assignee, sued May on the note in the Circuit Court of the United States for the Northern District of Illinois and recovered a judgment.

The day after May executed his deed to Le Claire he delivered possession of the Rosebank farm to Le Claire, and

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has not since had possession or any control over the premises, or any benefit from them.

On the 20th of July, 1859, Powers, the trustee, sold this property under the deed of trust. The evidence leaves no doubt in our minds that his conduct in making the sale was grossly fraudulent. He knew that May had arranged for funds more than sufficient to discharge the debt due to his *cestui que trusts*, which were ready to be paid over as soon as May could deliver to the lender, as security, two of the notes of Davenport. We are satisfied that, with ordinary candor and fair dealing on the part of Powers and the other parties implicated, the debt secured by the deed of trust could have been speedily discharged, and all the other incumbrances removed.

But such was not the object of Le Claire and his associates, of whom Powers was clearly one. In the midst of the negotiation between May and Powers at the banking-house of Powers, with funds present, and ready to be paid over by May on the condition stated, Powers, upon the receipt of a note from John P. Cook, left abruptly, under a false pretence, and made a surreptitious sale of the property to Dessaint for $5000. A deed was ready, with a blank for the name of the purchaser, and the blank was at once filled with the name of Dessaint. The consideration mentioned in the deed is the amount of his bid. The promises of Powers to annul the sale upon the payment of the debt were obviously false, and intended only to deceive and quiet May for the time being. Measures were taken to keep away competing bidders. The amount of the debt was $7400. Dessaint testifies that he bought under an agreement with Powers that he should pay the full amount of the debt; that Powers should procure to be assigned to him May's liability for the difference between the amount of the debt and the amount at which the property should be struck off to him; and that he paid the full amount of the debt to Powers. This feature of the transaction requires no comment. Whether Dessaint was privy to the other frauds of Powers or not, a subject upon which we can hardly entertain a doubt,

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he took the title in trust for May, and subject to all May's rights, as they were before the sale and conveyance were made by Powers.*

On the 27th of July, 1859, Dessaint conveyed by a deed of quit-claim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quit-claim deed, he cannot be regarded as a *bonâ fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.† Cook occupied the same relations to the property as Dessaint, his grantor.

Cook, on the 16th of December, 1860, conveyed to George L. Davenport. At the same time the judgment in favor of John P. Cook against May was assigned to the grantee. The conveyance and assignment were one transaction. The consideration, according to the testimony of Davenport, was that he agreed to pay a bill and note of Ebenezer Cook, on which he and Le Claire were liable as accommodation parties. The bill and note were dated on the 20th of October, 1859. They matured, respectively, three and four months from date. Both were renewed by Davenport and Le Claire. Davenport admits in his testimony that Le Claire paid at that time $1000 upon one of them.

On the 21st of November, 1860, Antoine Le Claire bound himself by a written contract to convey the property to his nephew, Joseph Le Claire. In this condition of things Antoine Le Claire died. He left no lineal heirs. By his will he gave the usufruct of his entire estate to his wife, the defendant, Maguerite Le Claire, during her life. The residue he gave, in undivided shares, to a large number of devisees. Only a few of them are parties to this litigation. Davenport testifies that Antoine Le Claire made a parol contract with him for the Rosebank farm, and, as the consideration of the purchase, agreed to pay the liabilities of Ebenezer Cook,

* Jeremy's Equity, 95. † Oliver *v.* Piatt and others, 3 Howard, 363.

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which Davenport had assumed, and that his estate has since paid them.

On the 23d of January, 1862, Davenport conveyed the premises to Joseph A. Le Claire, Jr., pursuant to directions from Joseph A. Le Claire, the vendee of Antoine Le Claire. The deed contains a covenant against all persons claiming under the grantor, and none other.

John P. Cook was the counsel of Le Claire in all his transactions touching this property. He knew everything that was done, and his knowledge was notice to his client.* But we are well satisfied, by the facts and circumstances developed in the evidence, that both he and George L. Davenport had full actual knowledge. After a careful consideration of the subject, we have found ourselves unable to come to any other conclusion. The testimony of Davenport is guarded and peculiar. Twice during his examination he declined to answer a question until time was allowed him to advise with his counsel. The proofs establish the frauds alleged in the bill.†

If Le Claire did not actively participate in the frauds perpetrated upon May, he coolly looked on, and deliberately gathered what others had sown for him. The result was that he acquired the Rosebank farm unincumbered, and put it out of the power of May to comply with his contract.

The year within which May was to convey the farm to Le Claire, unincumbered, expired on the 8th of March, 1860. On the next day Le Claire gave a formal written notice to May whereby he tendered performance on his part, and demanded performance by May. May was unable to fulfil, and Le Claire knew it. The notice was an idle ceremony.

The liabilities of Adrian H. Davenport, which Le Claire had assigned to May and deposited with Cook & Sargent, consisted of five notes of $7000 each, making an aggregate of $35,000, with interest. Le Claire withdrew them from the depositaries and cancelled the assignment. On the 27th

* Le Neve *v.* Le Neve, 2 White's Leading Cases in Equity, 23.

† Clark's Executors *v.* Van Reimsdyk, 9 Cranch, 153; S. C., 1 Gallison, 630; Jackson *v.* King, 4 Cowen, 220; Butler *v.* Haskell, 4 Dessausure, 684.

of March he entered into a new contract with Davenport, whereby it was stipulated as follows: Le Claire was to resume the title and possession of the property for which the notes and the mortgage securing them were given, provided the property could be relieved from the liens upon it, of judgments against Davenport. To this end Le Claire was to foreclose the mortgage, and if at the foreclosure sale the property should sell for more than the amount of the notes and interest, Davenport was to have the overplus. If it should bring less the notes were to be released. If Le Claire should acquire the title as proposed, he agreed to confirm the sales, which Davenport represented he had made, of certain portions of the property. A map was referred to as showing the premises so sold. Davenport assigned to Le Claire, and placed in his hands notes of the vendees for part of the purchase-money, amounting, with interest, to about $16,000. Davenport stipulated that there were no offsets against any of the notes, except two of trifling amount, which were mentioned, and that if it should prove there were any valid offsets, he would pay the amount to Le Claire. Le Claire agreed that, upon the payment to him of the balance of the purchase-money by Davenport's vendees, he would convey to those holding title-bonds from Davenport.

This agreement was carried out. A suit of foreclosure was instituted by Le Claire, and the property was sold to him for less than the amount due on the notes of Davenport. The property was thus divested of all incumbrances, and his original title was restored to him. John P. Cook, as the counsel of Le Claire, conducted the legal proceedings. May was not consulted about the agreement between Le Claire and Davenport, and was not a party to the foreclosure suit.

It has been suggested by the counsel for the appellees that if May still has the rights which he claims in respect to the Rosebank farm, he should file a bill to redeem, and having succeeded, should tender a conveyance of the property in performance of his contract with Le Claire instead

of prosecuting this suit. That course is unnecessary. Le Claire has already had the ownership, control, and full benefit of the property, and disposed of it as he thought proper. A court of equity can do no more than he did for himself. It is not pretended that there was any incumbrance upon the property when it was conveyed by George L. Davenport to Joseph A. Le Claire, Jr.

Upon the execution of the contract between May and Le Claire, Le Claire became in equity the owner of the farm. The effect of the element of fraud in his subsequent conduct is, that he must be regarded as constructively the trustee and agent of May in removing the incumbrances and acquiring the ownership and beneficial control of the property. Hence his estate is entitled to be credited with his advances and interest instead of the aggregate of the debts extinguished, and interest on that amount. Under the circumstances, time was not of the essence of the contract on the part of May, and when this liability has been accounted for to Le Claire's estate, the contract on May's part must be held to have been fully performed. May has had no benefit from this property since the date of his contract, and none from what he was to receive from Le Claire. On the contrary, he has been engaged in a long and expensive conflict for the assertion of his rights, and that contest is not yet terminated. Viewing the subject in the light of these facts, we think he is entitled to be credited with annual rent and interest from the time he parted with the possession of the farm to Le Claire.

At law, in many cases, if property be tortiously taken or converted, the tortfeasor may be sued in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there had been an implied contract. The plaintiff is not permitted to set up his tort to defeat the action, and the recovery of a judgment will bar a further action *ex delicto* by the plaintiff.* In the same class of cases where the converted prop-

* Putnam *v.* Wise, 1 Hill, 240, note; Hill *v.* Davis, 3 New Hampshire 384; Stockett *v.* Watkins's Administrator, 2 Gill & Johnson, 326, 342

erty has assumed altered forms by successive investments, the owner may follow it as far as he can trace it and sue at law for the substituted property, or he may hold the wrong-doer liable for appropriate damages.*

There are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner, the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a *bonâ fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the *cestui que trust*. The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mould and apply the remedy as to give them to him.

In cases of specific performance, to which category the one before us belongs, parties are sometimes remitted to a court of law. But this is never done where the remedy is not as effectual and complete there as the chancellor can make it. Equity sometimes takes jurisdiction on account of the parties, and sometimes on account of the relief proper to be administered.

The same considerations which invoke the jurisdiction may control the remedy.

In this case more than half the residuary devisees of Antoine Le Claire are not before us. We cannot, therefore, decree the conveyance of real estate, but his legal representatives are before us, and we can give a money decree against them, embracing the value of the land, which we might otherwise adjudge to be conveyed.† It is not necessary that the devisees should be parties to warrant such a judgment. The presence of the executors is sufficient for that purpose.

Adrian H. Davenport, as well as Le Claire, had full notice

* Taylor *v.* Plummer, 3 Maule & Selwyn, 562.

† Peabody et al. *v.* Tarbell, 2 Cushing, 233; Andrews *v.* Brown, 3 Id. 131; Fry on Specific Performance, 447, 457; 1 Story's Equity, §§ 788, 789.

of the rights of May in respect to the securities embraced in their compromise. All those securities, including the collaterals, belonged in equity to May from the time they were deposited with Cook & Sargent. Le Claire had no right to change their form or to dispose of them, as was done in carrying out the compromise agreement. It is within the power of this court, in the exercise of its equitable jurisdiction, to annul that arrangement, and hold Davenport and Le Claire's estate liable in all respects as if the compromise had not been made. But it is also in our power to confirm the transaction, and upon the principles of constructive trusts to give May its fruits instead of pursuing the effects themselves. This, as the case is presented in the record, we deem the proper course. Le Claire's estate must account for the proceeds of the $16,000 of notes, with interest from the time he received them. As we cannot require the land which he bought at the foreclosure sale to be conveyed, his estate must account for its present value. As he violated his agreement with May, and put it out of his power to give May in specie so large a portion of the consideration May was entitled to receive, May is not bound to take the other parcels of real estate mentioned in the contract and which Le Claire bound himself to convey, and it is within the scope of our jurisdiction to give May, in money, the present value of that property also instead of the property itself. We deem it proper, under the circumstances, to do so, and Le Claire's estate must account accordingly. The collection of the judgment against May upon his note to Kettle, recovered by Cook, must be perpetually enjoined.

An account must be taken by a master, wherein Le Claire's estate must be debited with the rent of the Rosebank farm annually and interest down to the time when the account is taken.

With the amount realized from the $16,000 of notes and interest to the same period.

With the value, at the same time, of the land bought in at the foreclosure sale by Le Claire, other than that pre

viously sold by Davenport, the title to which Le Claire took in trust for Davenport's vendees.

With the value, at the same time, of the other parcels of land mentioned in the agreement between Cook and Le Claire and which Le Claire bound himself to convey to May.

Le Claire's estate must be credited with the amount paid on account of the bill and note of Ebenezer Cook, with interest to the same time.

The balance in favor of May, with interest from that time, Le Claire's executors must be required to pay to May.

These conclusions will do justice to May without disturbing the interests of any third person outside of the sphere of Le Claire's estate.

DECREE REVERSED, and the cause remanded with directions to enter a decree and proceed IN CONFORMITY TO THIS OPINION.

Mr. Justice MILLER took no part in this judgment, having in the early stages of the case been counsel of May, below.

THE FANNIE.

1 A schooner meeting a steamer approaching her on a parallel line, with the difference of half a point in the courses of the two, *held*, in a collision case, upon the evidence, to have kept on her course, and therein to have done what she ought to have done.

2 A steamer approaching a sailing vessel is bound to keep out of her way, and to allow her a free and unobstructed passage. Whatever is necessary for this, it is her duty to do, and to avoid whatever obstructs or endangers the sailing vessel in her course. The obligation resting on the sailing vessel is passive rather than active, the duty to keep on her course. If, therefore, the sailing vessel does not change her course, so as to embarrass a steamer and render it impossible, or at least difficult, for her to avoid a collision, the steamer alone is answerable for the damages of a collision, if there is one.