This ends the case. With the lost files in the record, we should see that the court had the right to permit the parties to litigate before it as they did.

There is here no question of a restoration of lost records. This record has never been lost. It was not made until after the fire. The litigation was pending when that calamity occurred. What has been lost is part of the files which, when the time arrived to make up a record, would have been incorporated into it. What we have to consider is whether in the record as made their loss has been supplied. We think it has by the recorded acts of the parties and their stipulation.

JUDGMENT AFFIRMED.

STEPHEN *v.* BEALL ET UX.

1. Where one of four joint tenants makes a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the *whole* estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to foreclose the mortgage), to make the three who do not convey parties defendant to the bill.
2. It is settled doctrine that a married woman may charge her separate property for the payment of her husband's debt, by any instrument in writing in which she in terms plainly shows her purpose so to charge it; she describing the property specifically and executing the instrument of charge in the manner required by law.
3. Though equity will enforce in the most rigid manner good faith on the part of a trustee, and vigilantly watch any acquisition by him in his individual character, of property which has ever been the subject of his trust, yet where he has sold the trust property to another, that sale having been judicially confirmed after opposition by the *cestui que trust*, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchase *bonâ fide* and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee—the court will not decree the purchase fraudulent, the case being heard on the pleadings, and without any proofs taken.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Statement of the case.

4. The complainants in this case, who alleged fraud and relied on the trustee's possession of the trust property after an alleged sale of it, as evidence of it, not stating *when* the trustee came into possession—that is to say, how soon after his former sale—the court assumed the time to be thirteen years; this term having elapsed between the date of the sale by the trustee and the filing of the bill (or cross-bill, rather) to set it aside; the court acting on the presumption that the complainant stated the case as favorably as he could for himself, and would have mentioned the fact that the trustee had been in possession long before the bill was filed, if he had really been so.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

In the year 1849, by deed of bargain and sale, all in technical form, one Colburn conveyed to Mrs. Mary Bell and to her three children, John, Sarah, and Maria, by name, a piece of ground described, in the District of Columbia, with the appurtenances; the grant being "unto the said Mary, John, Sarah, and Maria, their heirs and assigns forever; to have and to hold the said described land and premises with the appurtenances unto them the said Mary (the mother), John, Sarah, and Maria, their heirs and assigns forever, to them and their sole use, benefit and behoof forever."

The mother subsequently married a man named Beall, and so became Mrs. Mary Beall.

In this state of things, the estate of one Magruder, in Maryland, being about to be sold by a certain Stephen, as trustee, under a decree of court there, Beall bought it, for $10,100, and in pursuance of the terms of sale as prescribed by the decree, paid to Stephen, the trustee, $1000 in cash, and gave to him his three notes, each for $3033.33⅓, secured by a deed executed by himself and wife, all with recitals of its history and purpose and with everything in or about it, in form, purporting to convey the *whole* of the tract of land which Colburn in 1849 had conveyed to her the said Mrs. Beall (while bearing the name of Bell), and to her three children. The children were not parties to the deed of trust.

The order of court for the sale of Magruder's property

directed that a deed should be given by Stephen, the trustee, only on the payment by the purchaser of all the purchase-money.

Beall, the husband, did not pay his three notes, and a resale by Stephen of the original property was directed by the court having jurisdiction of the matter. The proceeds were directed to be applied to discharge the three notes, and any surplus was to be paid to Beall. A resale by public auction was accordingly made on the 5th of May, 1859; the purchaser being one Crowley. The price, however, thus obtained was but $6478, thus leaving a debt due by Beall of $2622, exclusive of interest. The resale was reported to the court and was confirmed by it, after an opposition to it by Beall. To get satisfaction for the deficit of $2622 and interest Stephen, the trustee, now, June, 1871, filed a bill in the court below against Mr. and Mrs. Beall, praying an account of what was due to him on the notes and a sale of the property which had been conveyed to him by Mr. and Mrs. Beall in the deed of trust, or of so much of it as would satisfy what should be found due.

Mr. and Mrs. Beall answered. They set up that at the time of the execution of the deed of trust, the title to the lot was in Mrs. Beall (then Mrs. Bell), "jointly with her children," naming them; and "submitted that the lot could not now be sold without affecting their rights."

They submitted further, that Mrs. Beall could neither at law nor in equity pledge her separate estate for the payment of her husband's debt.

On a cross-bill filed by them, they averred that when the sale was made by Stephen as trustee, to Beall, Stephen misrepresented the value of the property, much exaggerating it, and promised to execute a valid deed to Beall for it, on receiving the $1000 and the notes.

They averred further, that Stephen was now in possession of the land of Magruder said to have been resold to Crowley; that the said resale was really made for Stephen, the trustee; and fraudulent, as being a purchase made by a trustee at his own sale. They did not in this cross-bill state

when Stephen came into possession of the property once held by him in trust, nor state any other thing to show how long after the "resale" it was. The cross-bill itself was sworn to February 28th, 1872.

Stephen, in answer to this cross-bill, denying his promise to execute any deed before the full purchase-money was actually paid, admitted that he was in possession of the land resold, but averred that the resale to Crowley was a *bonâ fide* sale; and that he Stephen was in possession by a *bonâ fide* purchase from Crowley, and for full consideration which had been paid by him. He denied all fraud in the said purchase by Crowley on the resale, and in his own purchase, and averred that his own purchase from Crowley was not thought of by either himself or Crowley, until after Crowley's purchase had been made; and, of course, that it was made without any fraudulent combination with Crowley. But he did not state the date when he came into possession of the property on his alleged purchase from Crowley.

No proofs being made, the case was heard on the pleadings.

The court below dismissed the bill, and Stephen appealed.

Mr. R. T. Merrick, for Mr. and Mrs. Beall, and in support of the decree below:

The bill was rightly dismissed, and this for several reasons:

1. It wanted necessary parties. The lot conveyed by Mr. and Mrs. Beall, had been conveyed to the latter (before her marriage with Beall) and to her children. The law of the District of Columbia, as it stood prior to 1857, was the old law of Maryland, which after the creation of the District still remained. By that law a joint tenancy was created. Every party was seized *per my* and *per tout*, as the old terms are; that is to say of the whole and of part. A conveyance by the mother though it may not have made a good title for the whole, did affect the whole. A sale under the deed of trust would have cast a cloud on the title of the children, and they should have been brought in, and if any decree

of sale was made it should have been with reference to their rights.

If the interest of the defendant requires the presence of new parties, he takes the objection of non-joinder, and the complainant is forced to amend, or his bill will be dismissed.*

2. The debt sought to be secured was the individual debt of the husband, Beall, and it was not competent for the wife, under the policy of the law made for her protection and under the provisions of the deed or deeds by which she held the property in connection with her children, to incumber that property for the security of her husband's debts. *Steffey* v. *Steffey*, in the Court of Appeals of Maryland,† and *Central Bank of Frederick* v. *Copeland*,‡ in the same court seem to show this.

3. That the price which Beall agreed to pay for the property was wholly excessive, is proved by what it brought on the resale; and that Stephen did promise to make a conveyance in fee simple to Beall, as soon as he got the money and secured notes, can hardly be doubted in view of the payment which the latter made of $1000 in money, and of the deed of trust given on his wife's estate. Why take cash and a security on a new estate, while the complete title in the old one is retained? If a deed in fee simple was not promised and intended, then this taking of cumulated securities shows that Stephen knew that the property had been sold to Beall at a grossly exaggerated value, and renders the allegation of fraud in this particular, as alleged in the cross-bill, the more probable.

But the great objection to the complainant's case, the *vulnus immedicabile*, remains. No doctrine is better settled in equity—none more wisely settled, or upon foundation more deeply laid in morality and in the admitted frailty of human nature—than that a trustee shall not purchase at his own sale. No contrivances, no indirections, will save

* Shields *v.* Barrow, 17 Howard, 145; Daniell's Chancery Practice, p. 240; note citing numerous cases.

† 19 Maryland, 5. ‡ 18 Id. 305.

him when he has done so. The intervention of third parties so far from assisting him does but make his case worse, since the intervention of others shows his consciousness of guilt.

It is here admitted that the trustee is in possession of the property which he professed to sell, or rather to resell. At what date he sold it we know. At what date he came into possession of it is a matter not at all disclosed. He may have come into possession at once. In such a case undoubtedly his possession would be convincing proof of a bad purpose when he made the sale. And his omission to state, in any way, in his answer to the cross-bill, *when* he did come into possession, so that a chancellor may see how soon, or how long after the sale, it was, infers as a necessity the conclusion that his possession followed hard upon his sale.

The court should perhaps put what Chancellor Kent calls the "sting of disability" into any such doings by a trustee, as ever getting into possession of property once sold by him in a fiduciary character. Such a rule is a safe rule, and the only safe rule.

But if a long lapse of time will repel all presumption of fraud, then certainly it lies upon a trustee to state clearly and to show that a long lapse of time has intervened. In this case the admitted possession by Stephen, as an individual, of the property sold by him as a trustee, puts upon him the burden of proof, even if the proof be nothing but his own answer. *That* proof he can surely give. The time when he came into possession is matter peculiarly within his own knowledge; and when, on that subject, he keeps silence, he is entitled to no favorable presumption. Those calling him to an account are entitled to every such; for it may well be that they don't know when he made his purchase.

It is not enough that he state that there was no fraud. Whether there was fraud or not may be a question of law. He swears therefore to matter of law. Let him state and swear to dates, and the court will decide whether there was or was not fraud.

Mr. T. T. Crittenden, contra, for Stephen, the appellant.

Opinion of the court.—Parties.

Mr. Justice HUNT delivered the opinion of the court.

The counsel for the appellee sustains the decree below dismissing the bill upon three grounds: 1st. Because the complainant failed to join the necessary parties defendant. 2d. Because a wife could not, at the date of the deed in question from Mrs. Beall, incumber her estate for the benefit of her husband. 3d. Because the complainant acted in bad faith.

We will consider the different grounds in their order.

1. As to the necessity of further parties defendant.

Mrs. Beall was the owner of one-fourth of the property referred to, and no more. This one-fourth she could convey, and no more. Whether the terms of her deed purported to convey this portion only, or the whole, is not important. She could not convey the remaining three-fourths, nor could the general language of her deed create a cloud upon the title of her children. The record showed exactly what title she had, and exactly what title the children had. No relief was asked against the children, and no claim made by the trustees that their rights were affected by the deed of their mother. The bill was filed against Mrs. Beall and her husband only, and judgment only asked against them. No judgment could be taken against the children or that would affect their estate, nor would a sale of their interest have any legal effect.*

If the grantees were tenants in common, it is not denied that Mrs. Beall could convey her portion or interest without affecting the rights of her cotenants, and that her deed in this case would effect that purpose. It is said, however, that as the law of Maryland stood in 1801, and was thence carried into the District of Columbia, the conveyance to Mrs. Beall and her children created a joint tenancy, and that being a joint tenant, her conveyance in 1857 did not bind her interest only, but affected, also, that of her cotenants.

* Ward *v.* Dewey, 16 New York, 519; Heywood *v.* City of Buffalo, 14 Id. 534; Cox *v.* Clift, 2 Comstock, 118; Story's Equity, § 700.

We cannot recognize this conclusion. We find the law on this point thus laid down, in Coke Littleton and in Bacon's Abridgment:

"If there be three joint tenants and one aliens his part, the other two are joint tenants of their parts that remain, and hold them in common with the alienee."*

"If one joint tenant bargains and sells his moiety, and dies before the deed is enrolled, yet the deed, being afterwards enrolled, shall work a severance *ab initio*, and support, by relation, the interest of the bargainee. But if one joint tenant bargains and sells all the lands, and before enrollment the other dies, his part shall survive, for the freehold not being out of him the jointure remains, and though afterwards the deed is enrolled, yet only a moiety shall pass, for the enrollment by relation cannot make the grant of any better effect than it would have been if it had taken effect immediately."†

It is laid down in the same authorities that if one joint tenant agree to alien, but do not, and die, this will not sever the joint tenancy, nor bind the survivor. But it is held in *Hinton* v. *Hinton*,‡ that in equity it may be enforced if the articles amount to an equitable severance of the jointure.

We think it clear upon these authorities that the attempted conveyance by Mrs. Beall of the entire premises had no effect upon the interest of her cotenants, conceding them to have been joint tenants. The law is well settled that no cloud is cast upon a title by a proceeding or claim, where the record through which title is to be made shows a defence to the claim.§ It would not be proper under such circumstances that the children should be parties defendants.‖

* Coke Littleton, 189; Bacon's Abridgment, title "Joint Tenants," E.

† Coke Littleton, 186, 186a; Bacon's Abridgment, title "Joint Tenant," I, 3.

‡ 2 Vesey, 634.

§ Ward *v.* Dewey, 16 New York, 519; Heywood *v.* City of Buffalo, 14 Id. 534; Cox *v.* Clift, 2 Comstock, 118; Story's Equity, § 700.

‖ See Reed *v.* Vanderheyden, 5 Cowen, 719; Bailey *v.* Inglee, 2 Paige, 278.

Opinion of the court.—Wife's power to charge her property.

We dismiss, then, as unfounded the argument of a want of parties defendant.

2. The dismissal of the bill is defended upon the further ground that the debt sought to be secured is the debt of the husband, and that it was not competent for the wife to incumber her individual property to secure her husband's debts.

In support of this argument *Steffy* v. *Steffy*,* in the Court of Appeals of Maryland, is cited; but that case does not bear upon the question. That was not the case of an attempt to incumber the separate property of the wife for the debt of the husband. It was a case in which both husband and wife had joined in an agreement to sell the lands of the wife. Upon a bill for specific performance the interest of the husband was adjudged to be bound, but the execution of a contract simply was held to be inoperative to convey the estate of or to bind the married woman under the statutes of Maryland.

Nor is *The Central Bank of Frederick* v. *Copeland*,† in the same court, and also cited, an authority to the point insisted upon. It was there held that a mortgage by a wife for her husband's debts, obtained from her by threats, and the exercise by the husband of an authority so excessive as to subjugate her will, was not binding upon her.

There is nothing in these authorities to indicate that the law of Maryland or of the District of Columbia on this subject is in any respect peculiar. The case rests upon and must be governed by the general principles applicable to the subject.

As to a wife's individual property generally, it is well settled that she may, by joining in a deed with her husband, convey any interest she has in real estate. Such a deed conveys the interest of both.‡

The doctrine that a married woman has the power to charge her separate estate with the payment of her husband's

* 19 Maryland, 5.

† 18 Id. 305.

‡ 1 Washburn on Real Property, *280.

debts, or any other debt contracted by her as principal or as surety, has been uniformly sustained for a long period of time.*

The question has been in respect to the manner in which the conceded power should be exercised, and in respect to the requisite evidence of its due execution. Whether the simple execution of an obligation by a married woman operates to charge her estate, or whether she must declare such to be her intention; whether an oral statement of such intention is sufficient, or whether it must be in writing; whether such intention must be manifested in the contract itself or may be separately manifested; whether a declaration of an intention to bind her separate property is sufficient, or whether the property intended to be charged must be specifically described, have been the subject of discussion at different times. But that a married woman, by an instrument in writing by which she expressly charges her separate property for the payment of a debt, which charge is contained in the instrument creating the debt, and where the property is specifically described, and which instrument is executed in the manner required by law, may create a valid charge upon such property, is agreed in all the books.

The instrument before us contains all these requisites, and we cannot doubt its validity. Whether the property is her separate estate or her individual property merely, the result is the same.

3. It was farther contended that the bad faith of the complainant should bar his recovery.

The defendants in a cross-bill allege fraud in the original sale to Mr. Beall, in that the complainant deceived and defrauded them by promising to execute a deed of the Magruder property, as soon as they made the purchase, and

* Hulme *v.* Tenant, 1 Brown's Chancery Cases, 16; Standford *v.* Marshall, 2 Atkyns, 69; Bullpin *v.* Clarke, 17 Vesey, 365; Jaques *v.* Methodist Episcopal Church, 17 Johnson, 548; Yale *v.* Dederer, 22 New York, 450; Same Case, 18 Id. 276; Corn Exchange Insurance Co. *v.* Babcock, 42 Id. 615; Story's Equity, § 1396, 1401a.

by misrepresentations of the value of the land. This is denied by the complainant in his answer to the cross-bill. It will be remembered also that the order of sale expressly prohibited the giving a deed until the whole purchase-money should be paid. Fraud is alleged again in that the purchase by Crowley at the resale was for the benefit of Stephen, the complainant, upon an agreement that the property should be transferred to him, and that the same had been conveyed to him. All fraud is denied in the answer. The alleged agreement or understanding between Crowley and the complainant Stephen is denied in all its parts. It is admitted by Stephen that subsequently, without any previous understanding, and in good faith, and for a fair price paid, the complainant purchased of Crowley the property bought by him at the resale. The interval between the purchase by Crowley at the resale and the purchase from him by the complainant does not appear. Crowley's purchase was made in May, 1859. In February, 1872, thirteen years having elapsed, it is alleged and admitted that a conveyance had been made by Crowley to the complainant. On the principle that every pleader states his case as favorably to him as he is able to do, we may assume that this time had mostly elapsed before the purchase was made by the complainant. No proofs were taken. The case was heard on bill and answer. It narrows itself down to this: there being no understanding or agreement between the purchaser at a public sale, and the trustee making the sale, there being no collusion between them, there being no fraud in fact, the duties of the trustee in respect to the sale being ended, and his doings confirmed by the court having the subject in charge, does the circumstance that years afterwards the trustee bought the property from the purchaser in good faith, and for a fair price paid to him, vitiate and annul the public sale to the purchaser?

If there was a fraud on the part of the complainant in making the sale, at which Crowley was the purchaser, it arose from an act, an intention, or an omission then done or existing. A subsequent purchase may afford evidence

that the original sale was made to permit that purchase, and that the end illustrates what the parties all the while intended. But to make a fraudulent sale it is necessary to go back to the acts, the intents, or the neglects existing at the time of the sale. It would seem to be a self-evident proposition that when it is conceded that a sale was in fact fair, honest, and just when made, that no unlawful act or intent then existed, that a fraudulent intent or an unjust dealing as to that time could not be imputed to the party from subsequent occurrences. It stands upon pleadings here that at the time of the sale the complainant had no understanding that he should ever have any interest in the property; in other words, Crowley bought it for himself and for his own exclusive benefit. There was no collusion, that is, the property was fairly sold and for all that could be obtained for it. The sale was reported to and confirmed by the court. This constituted a discharge of the duty of the trustee in making the sale. It is quite difficult to conceive that any subsequent facts (leaving these in full force) can establish that such a sale is fraudulent.

It is a general rule that a trustee cannot deal with the subject of his trust. If one acting as trustee for others becomes himself interested in the purchase, the *cestuis que trust* are entitled, of course, to have the sale set aside, unless the trustee had fairly divested himself of the character of trustee, and the fact that the purchase was made through the intervention of a third person makes no difference.*

We should be unwilling to weaken the obligation of good faith and fidelity required by the law of a trustee. We have frequently enforced such obligations in the most rigid manner. It would, however, be a great straining of a good principle to hold that a purchase by a trustee from the purchaser at a public sale, under the circumstances before us, is necessarily fraudulent.

There is a class of cases undoubtedly in which transfers

* Jewett *v.* Miller, 10 New York, 402; Slade *v.* Van Vechten, 11 Paige, 21; Van Epps *v.* Van Epps, 9 Id. 237; Bank of Orleans *v.* Torrey, 7 Hill, 260; Hawley *v.* Cramer, 4 Cowen, 717; Hill on Trustees, *536, *h.*

of property are adjudged to be fraudulent, although there be no actual fraud meditated by the parties. Such are the cases of an assignment by an insolvent debtor reserving portions of the assigned property for his own benefit, requiring releases from creditors as a condition of participating in the fund, and the like.

The case we are considering bears no resemblance to these cases. There is in a purchase by a trustee, nothing that of itself and necessarily vitiates the original sale. Whether culpable or commendable depends upon the circumstances of each case. It may be wrong, and it may be right. It may be approved by the parties interested and affirmed. It may be condemned by them and avoided. When it is found that the transaction is itself perfectly fair and honest, that the purchase was not contemplated at the original sale, but was first thought of years afterwards, and was then made for a full and fair consideration actually paid by the trustee, and after the fiduciary duty was at an end, we find no authority to justify us in pronouncing the original sale to have been fraudulent.

Upon the whole case the decree must be REVERSED, and the record remanded, with directions to enter a decree in conformity with this opinion, with leave to the parties to amend their pleadings if they shall be so advised.

REVERSAL AND REMAND ACCORDINGLY.

RAILROAD COMPANY *v.* POLLARD.

1. *Stokes* v. *Saltonstall* (13 Peters, 181) affirmed; and on a suit for injury to person, against a railway company carrying passengers, the doctrine again declared to be that if the passenger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury occur to him, this is *primâ facie* evidence of the carrier's liability.
2. Whether a passenger in a rail car, standing up in it, when getting into the station-house, at the close of the journey, but before an actual stoppage of the car, is guilty of negligence in the circumstances of the case, is a question of fact for the jury to decide under proper instructions.