Brief as #6
WRIGHT UPIEL
to Trusts

JOAB BERNARD, TRUSTEE OF ANNE CARSON;

ANNE CARSON AND JOHN B. CARSON, HER HUSBAND,

Vs.

JOHN B. CLARK AND OTHERS.

STATEMENT OF THE CASE.

In 1823, WM. STOKES duly made and published his last will and testament, at the city of St. Louis, Mo., and shortly thereafter died. The disposition of his estate by that instrument was as follows:

"I give, devise and bequeath unto John O'Fallon all my personal estate upon trust, to dispose of the same as he, in his discretion, shall think fit. *Also, I give and bequeath unto him all my real estate upon trust, without making any forced sale or sacrifice thereof, to convert the same into money, and place into securities of the United States, and to apply the interest and such part of the principal as may be necessary in the support, maintenance and education of my daughter Anne (who was thirteen years old on the 12th day of May last), until she arrives at the age of twenty-one years, and then to pay and deliver to her the whole amount thereof, and all accumulations thereon. In case my daughter shall marry before twenty-one, with the consent of my Executor, he may deliver to her such portion of the principal he may think fit—to and for her own use and benefit.* In case she dies, leaving a child or children, then the property to belong to such child or children; but in case of her death before twenty-one, without having any child or children, then I give the same to my Executor, to and for his absolute use and benefit. I hereby nominate, constitute and appoint the said John O'Fallon, Executor of this my last will, and Guardian of my daughter."

After probate, O'Fallon qualified as Executor, undertook the execution of the trust created by the will, and became Guardian of the daughter.

In 1825, two suits were brought in the United States District Court for the District of Missouri, against John O'Fallon as

Executor of William Stokes, deceased, upon an indebtedness of the Testator, and judgments were recovered against him as Executor in such suits. The executions commanded the Marshal, "*that of the goods and chattles, lands and tenements, which were of* "*the said William Stokes, deceased, at the time of his death in the* "*hands of the said Executor, to be administered in your District,* "*you cause to be made the debt, damages and cost aforesaid, &c.;*" and in virtue thereof, the Marshal levied upon many tracts of land, of which the said William Stokes died seized, and among the rest a tract of nine hundred arpens, lying on the river Des Peres, in St. Louis county. At the sale, 7th September, 1825, under these executions, O'Fallon (who was at the time Executor of the will, Guardian of the daughter, and Trustee for the execution of the trusts created by the will,) became the purchaser of the tract nine hundred arpens, and other lands sold, and received the Marshal's deed therefor, in his own name. The Marshal's deed to him recites the judgments, and copies the executions and advertisement in conformity with law.

On the 31st day of May, 826, John O'Fallon conveys this tract of nine hundred arpens to Alphonso Wettmore, by deed, in the following words:

"Has granted, bargained and sold, and do hereby grant, bargain and sell unto him, the said Alphonso Wettmore, his heirs and assigns forever, *all the right, title, interest, property and estate, to a certain tract or parcel of land situate on the river Des Pere, containing nine hundred arpens, which said John O'Fallon, party of the first part, purchased on the seventh of September last, at Marshal's sale, as the property of the late William Stokes, who has purchased the same on the 23d day of June,* 1819, *of Alexander McNair and Margarette his wife, as will be seen by reference to the instrument of conveyance, recorded in book H, page* 379, *bounded, &c.*

"And the said John O'Fallon of the first part, for himself, his heirs and assigns, doth covenant with the said Alphonso Wettmore, his heirs and assigns, *that he will warrant and defend against all legal claims under him, the said O'Fallon, but will warrant against no other claim.*"

On the 26th November, 1827, Wettmore mortgages this tract to Bernard Pratte & Co., describing it in the mortgage as follows, "a certain tract or piece of land, situate on the river Des "Peres, in the county of St. Louis, containing nine hundred

"arpens, being the same purchased by said Wettmore of John "O'Fallon, on the 31st day of May, 1826."

On the 3d October, 1829, Alphonso Wettmore and wife make an absolute deed of the property previously mortgaged, to Bernard Pratte & Co., with the same description, "being the "same purchased by the said Alphonso Wettmore of John "O'Fallon, on the 31st of May, 1826."

On the 13th day of August, 1838, Bernard Pratte & Co., by a quit claim deed, convey the tract to George Clark. After a description of the property, the deed says, "the above tract of "land was conveyed by Alphonso Wettmore and Mary his wife, "by deed, dated 3d October, A. D. 1829, and recorded in book "P, page 312 and 313, to Bernard Pratte & Co."

On the 1st August, 1845, George Clark, by two deeds, conveys away the tract, the northern moiety, in consideration of one dollar, to John D. B. and Joseph J. Clark, his sons, and the other moiety to Joseph James, each deed reciting the deed from Bernard Pratte & Co. to George Clark, and declaring the tract to be the same land described in that deed, in record at book and page of the Recorder's Office.

Anne Stokes, the daughter, intermarried with Wm. Smith in 1829, and on the 25th January, 1834, during the life of her husband, O'Fallon releases to Anne Smith the estate conveyed to him in trust for her benefit, by the will of her father.

This instrumet recites that William Stokes, in 1823, made his last will, and thereby, among other things, "devised all his real "estate to John O'Fallon upon trust that the said O'Fallon "should, without making forced sale or sacrifice thereof, convert "the same into money, and should place the same in securities "of the United States, and should apply the interest and such "part of the principal as might be necessary, in the support, "maintenance and education of his daughter Anne, until she "should arrive at the age of twenty-one years; and that he "should then pay and deliver to her the whole amount thereof, "and all accumulations thereon," and then proceeds as follows: "And whereas, the said John O'Fallon, Trustee as aforesaid, "declined selling the said real estate devised to him in trust as "aforesaid, because advantageous sales thereof could not be

"made, and the title to a large portion thereof, still remains "vested in said O'Fallon, as such Trustee; and whereas, the said "Anne, daughter of the said William Stokes, hath, since the "death of the said William Stokes, intermarried with William "Smith, of the city of St. Louis, and hath attained to the age of "twenty-one years: Now, therefore, in consideration of the "premises, &c., the said John O'Fallon hath bargained, sold, "aliened, enfeoffed and conveyed, and by those presents doth "bargain, sell, alien, enfeoff and convey, to the said Anne Smith "and her heirs, *all the real estate* of which the said William "Stokes died seized, or to which he had any claim, either in law "or equity, and which was, by the said William Stokes devised "to the said John O'Fallon in trust as aforesaid, wherever the "said real estate may be situated. To have and to hold the said "real estate to the said Anne Smith and her heirs forever, but "without any recourse or claim upon the said John O'Fallon or "his heirs of the title to any part if said real estate should fail."

In the year 1842 William Smith, husband of Anne, departed his life.

In the year 1843, Anne intermarried with John B. Carson, and in contemplation of that event, by ante nuptial articles, all the estate of Anne, "*whether in possession or expectancy, and whether* "*legal or equitable, and wherever situated,*" was conveyed *to John O'Fallon* and Joab Bernard in trust, for her sole and separate use. The articles bear date 28th September, 1843, and was signed by the said Anne, her intended husband, John B. Carson, and by both the Trustees.

In these articles it said "*the said property is not herein particu-* "*larly described*, owing to the difficulty of getting accurate and "particular descriptions thereof now immediately. The follow- "ing portion thereof is, however, described, but it is hereby "expressly meant that the description of the portion hereinafter "described and the not particularly describing the remainder, "shall not operate to invalidate or prevent the conveyance of "such remainder to said (Trustees) for the purpose of these "presents."

On the 29th November, A. D. 1855, John O'Fallon released to Anne Carson the estate and property conveyed to him as Trustee

by said articles. In this release he recites a former one made in 1852, (which is said to be lost or mislaid,) and confirms it.

The several conveyances above mentioned are all of record, and were placed on record shortly after execution.

John O'Fallon qualified as Executor of the will in 1823, and as Testamentary Guardian of Anne in the same year. As Executor, he, from time to time, adjusted his accounts with the Probate Court, and was discharged from further accounting to that tribunal in November, 1831, a few months after Anne became of age. His accounts as Testamentary Guardian ceased about the same period.

In no portion of his accounting, either as Executor or Guardian, is there any item of money paid or received on account of the purchase or sale of the nine hundred arpen tract.

OPINION OF U. WRIGHT.

THE question submitted to me on the case made, is, Whether the land in controversy can be subjected to the trust, as against the present claimants and occupants thereof?

I. *It is the settled doctrine of Courts of Equity, in England and America, established by a series of decisions, that O'Fallon, as Executor, or Trustee, or Guardian, had no legal capacity to purchase, for his own benefit, at the Marshal's sale, any land of which the Testator died seized, covered by the trust his will created.*

The disqualification rests upon a solid reason—the antagonism between duty and interest—and that is a perpetual antagonism. At the Marshal's sale, *duty* to his beneficiary, as Trustee, as Executor, as Testamentary Guardian, demanded the highest price for the trust estate, while his *interest* prompted him to procure that estate, as purchaser, at the lowest. His incapacity to buy for himself arises from a principle in ethics taken from the Lord's prayer. Courts of Equity will not permit fiduciaries when dealing with a trust, to put themselves in the way of "temptation." Hence the incapacity to take for themselves is

absolute. No fairness of price—no publicity or openness of sale—no competition of eager bidders, can give sanction or validity to the purchase. The trust, at the option of the beneficiary, survives the sale.

The rule of disqualification is not only absolute—it is unversal. There is no exceptional case. Nor is the rule varied by reason of any distinction as to the character of the sale—whether moved by the fiduciary or by a proceeding adversary. Wherever and whenever the antagonism exists, the incapacity rests also. The rule is independent of the form of the proceeding.

The *amount* of authority in support of the proposition is a mere question of industry.

In England, since the time of Eldin, the rule is not an open question. [See ex parte Lacy, 6 Vesey 655; ex parte Hughes, 6 Vesey 617; 8 Vesey 337; 10 Vesey 385; ex parte Bennett, Morse *v.* Royal, 12 Vesey 355; Lowther *v.* Lowther, 13 Vesey; Coles *v.* Tricolbick, 9 Vesey 234.

In this country since the cases of Davoue *v.* Fanning, 2 John, Ch. R. 252, and Michoud and al. *v.* Girod and al., 4 Howard 503, the question is not open. In 3 Howard 333, Oliver and al. *v.* Piatt, the rule formed the basis of the decision; but in Michoud and al., *v.* Girod and al., the rule itself was considered, illustrated and maintained, as a fundamental principle of equity jurisdiction. The Supreme Court of the United States, in full bench, were unanimous, and the opinion of the Court delivered by Justice Wayne, is distinguished for its learning and ability.

In that case the Executors were empowered by the will to sell the estate for the benefit of heirs and legatees—themselves being a part of the heirs and legatees—the sale was open, and made by the Court; the purchase was through a third person; and much reliance, (in support of the sale), was placed on the power to sell, given to the Executor by the will, and on their interest in the estate as heirs and legatees. But the sale was set aside.

Compbell *v.* Pensylvania, Lef. Jr. Co., 2 Wharton 53, 63; Leisenz *v.* Black, 5 Watts 303, 304; 15 Pickering 24, 31; 5 Metcalf 462, 467; 1 Gilman 615, 625; Boyd *v.* Hawkins, 2 Devereux, Equity; Wornly *v.* Wornly, 8 Wheaton 422, 441; Torrey *v.* Bank of Orleans, 9 Paige; Van Epps *v.* Van Epps; 9 Paige 238; 3

3 Sandford 61; Wade *v.* Harper, 3 Yerger 383; 7 Smedes & Marshall 410; show that the rule is recognized and adopted in every equitable jurisdiction in this country.

In our own State the rule has obtained from the beginning, 12 Mo. R. 109; 13 Mo. R. 178; 20 Mo. R. 539.

The result of the rule is that while no stranger can interfere, the beneficiary has the exclusive election to determine whether the Trust shall attach to the estate purchased by the Fiduciary.

II. The sale of O'Fallon to Wettmore, was a violation of the trust which attached to the estate in his hands—"*and the beneficiary has a right to follow that property into whosoever hands she may find it, not being a bona fide purchaser for a valuable consideration, without notice.*"

Oliver & William *v.* Piat, 3 Howard 333, is a case in which the rule is clearly stated and rigorously enforced:

"The purchaser of a trust estate, with notice of the trust, stands in the shoes of the original trustee, upon a trust implied by the principles of equity, which justly looks upon such a purchase as a fraud upon the *cestui qui trust*, and counteracts its effects by considering the purchaser as substituted to all the obligations of the original trustee."

2 Tucker's Commentaries 446 (side page); 16 Vesey 249; 1 Sch. & Leaf. 262.

III. *Wettmore, Pratt & Co., Clark and his sons, the present occupants and claimants of the trust estate—each and all were purchasers with notice of the Trust.*

A knowledge of all the *facts* that constitute a Trust, is knowledge of the Trust.

"Notice of the *facts* from which the law draws the inference of fraud, is sufficient to charge the purchaser, whether he was conversant of a fraudulent design in the trustee or not."

2 vol. Tucker's Commentaries 446.

"What is sufficient to put the party upon inquiry, is notice, and therefore in all cases where a purchaser cannot make out a title but by a deed, which leads him to the real fact, whether by description of the parties, recital, or otherwise, he will be deemed conversant thereof—for it was gross negligence (*crasser negligentia*) that he did not seek for, and examine such deed; and for the same reason, if a purchaser has notice of a deed, he is bound by

all its contents. So if a man purchases under limitations in a deed, which make it necessary in that transaction to look into the deed, and it contains recitals of subjects and encumbrances on the land, he is bound by them, for he must be presumed to have seen the whole, and to have taken notice of everything in it affecting his purchase."

Sugden 544, 545; 2 vol. Tucker 444, (side page) title Trusts.

"So, too, where in the title papers under which he claims, there is a recital of the existence of an encumbrance, he is bound to take notice of it."—*Ib.*

"So where upon the face of the title papers the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof."

3 Howard 333, U. S. Court.

"No principle is better established than that a purchaser must look to every part of the title which is essential to its validity."

In the case of Picot vs. Page, decided by the Supreme Court of Missouri at its last sitting, October term, 1857, (not yet reported) the Court reaffirmed these principles, and added: "In "the case of Neesom vs. Clarkson, 2 Hare 173, the Court says "that every purchaser is presumed to have investigated and "known his vendor's title, and if nothing more were proved in "this case than the mere fact that the purchaser took a convey- "ance, and upon inspecting the title which was assumed to be "conveyed to him, it appears that it was one which, in truth, "gave no title to the *vendor*, the Court would consider the onus "thrown on the purchaser, why he had not inquired into that title "with a view to his protection? *It appears to be indispensably* "*necessary that such should be the law of this Court*, for otherwise a "purchaser might take a title, shutting his eyes to a defect in it, "and then, on the ground of absence of *actual* knowledge, "require the Court to pronounce a judgment in his favor against "the right of the party justly entitled to the estate, when "nothing but wilful blinness or culpable negligence could have "prevented him from knowing the real state of the title."

"When men are guilty of gross neglect—when, by shutting their eyes, they fail to see that which will secure them from all deception, it is not the province of Courts to release them from the consequences of such conduct. The very instrument under which Strother and his assignees claim, referred them to the records, in order that they might know what land they obtained. Without that reference it could not be known."

These principles are decisive of the question under consideration. The deed of O'Fallon to Wettmore refers the purchaser to the source of the title—"*it was the property of the late Wm. Stokes, "purchased on the 7th September last*, (1825) *at the Marshal's sale.*" The deed of the Marshal referred to, and of record, discloses the judgment and the executions, the executor, and, of necessity, the will of Stokes and the trusts created by it. Thus, notice of every fact necessary in law to create the trust, is brought home to the purchaser. It is "wilful blindness" if he did not see them. Every subsequent purchase refers, by recital or description or reference, to this origin, and independent of recitals, descriptions or reference, no subsequent purchaser could know what his title was without going to this source, and none could go thither without learning "*the absence of title in his vendor.*"

This point is too clear for further elaboration.

But there is another decisive ground which denies to Wettmore and his assigns, the character of bona fide purchasers for a valuable consideration without notice, and that is the character of deed made by O'Fallon.

It is a cautious instrument. O'Fallon covenants "*that he will only warrant and* defend against *all legal claims under him, the said O'Fallon,*" and to give emphasis to the intimation of defect of title, he adds—"but will warrant against *no other claim.*"

In Oliver & Williams vs. Piatt, previously cited, Judge Story, in delivering the opinion of the whole Court, says: "Another "significant circumstance is, that this very agreement contained "a stipulation that Oliver should give a quit claim deed only for "the tracts; and the subsequent deeds given by Oliver to him "accordingly, were drawn up without covenants of warranty, "*except against persons claiming under Oliver, or his heirs and* "*assigns.* In legal effect, therefore, they did convey no more "than Oliver's right, title and interest in the property; and under "such circumstances it is difficult to conceive how he can claim "protection as a *bona fide* purchaser, for a valuable consideration "without notice, against any title paramount to that of Oliver, "which attached itself as an unextinguished trust to the tracts."
3 Howard 410.

What the "stipulations" were between O'Fallon and Wettmore prior to the deed, does not appear, nor can any stress lie there. The deed itself is the most solemn stipulation, and the granting part *purports* to convey *only* "*the right, title, interest, property and* "*estate which O'Fallon purchased at the Marshal's sale, on 7th* "*September last.*" The legal effect of this deed conveyed *only that right*, without touching "the paramount right which attached itself as an unextinguished trust to the tract." It is not too much to say that the "legal effect" of that deed *gave notice of* "*the paramount right.*"

IV. It cannot be pretended that the deed of O'Fallon to Wettmore *was an execution* of the *power to sell created by the will*, for

1. It expressly ignores that idea. O'Fallon sells *only* what he *bought at the Marshal's sale.*

2. He declined to exercise the power to sell and reinvest in United States securities, "because no advantageous sale could be made."

3. His accounts as Executor and Testamentary Guardian are silent as to any moneys advanced for the purchase of the trust estate, or any moneys received for trust estate sold.

4. In his character as Trustee, no allusion is made to the transaction.

V. *The Statute of Limitations* (*which Equity enforces by analogy*) *is no defence against the beneficiary, Anne Carson, for she is within its exceptions.*

By the Statute of this State (Missouri) prior to the act of 1847, (commonly known as the Lucas Statute,) limitation was final at "*twenty years after the right of action accrued, saving to infants,* "*married women, &c., twenty years after disabilities removed, within* "*which to bring their several actions.*"

By the Lucas act passed in 1847, the period was shortened "*to* "*ten years, saving to infants, married women, &c., ten years after* "*disabilities removed, within which to bring their several actions.*"

First, she is not barred by the Lucas act, for two reasons:

1. The Supreme Court of this State has decided in 14 V. M. R. 517, that this act is only *prospective* in its operation, not applying to *any right of action accrued before its passage.*

2. Anne Carson was a married woman at the time of the passage of this act, and is now, so that she is expressly embraced within its exceptions.

Second, she is not barred by the previous statutes of twenty years.

By the terms of the trust created by the will of her father, her *right of action to recover the trust estate could not accrue until she became of age.* Until that period arrived, she could not, even against her Trustee, demand a deed. If she married before reaching majority, with the consent of her Testamentary Guardian, the Trustee might, at his option, "if he thought fit," deliver to her "such portion" as he pleased; but no right of action, in law or equity, accrued to her *anterior to her coming of age.*

She became of age in May, 1831, and prior to that, in 1829, she married William Smith, who died in 1842, so that when her right of action accrued, she was under the disability of *coverture.*

Our own Supreme Court has often decided that while disabilities shall not be accumulated, yet every disability existing at the time of the right of action accrued must expire before beginning to compute the years allowed after disabilities removed.

The disability of coverture existing at the time her right of action accrued, terminated in the year 1842, so that her right of action is not barred till 1862.

I have taken the earliest possible period at which her right of action to any specific portion of the Trust estate could be held to arise. It is doubtful whether any Court will make its origin so early. She did not obtain a deed of release from the Trustee till 1834, and her right of action prior to that period would have been *for a conveyance of the estate* from him. She could not bring ejectment against a stranger. The philosophy of the law of limitation is, that one entitled specificially to the possession of a certain estate,—seeing an adversary in possession, and having the right at law to eject him, by suit, fails to do so for such a length of time as to imply an abandonment of claim to the property.

Possession in the adversary, and a legal capacity to eject him by suit, are the essential ideas of the law of limitation.

It does not appear from the statement of the case, when the adversary possession began. Unless there was possession adverse

to her, when she became of age, or received the release of O'Fallon, she was under no obligation to sue—or rather had no right to sue. Paper violation of her estate, without entry upon it, would give no cause of action, in the sense of the Statute of Limitations. Taking the worst aspect of the case against her, she is not barred by limitations.

I have not treated the trust, after the Marshal's sale, as an *express* trust,—continuing and subsisting, so as to defeat all limitation. I have put the case upon a Trust *implied*, against which the statute of limitation by analogy will be enforced in Equity.

VI. *She is not bound* by *lapse of time.*

In Oliver & *al.* v. Piatt, 3 Howard, previously cited, Story says: "The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; *and time begins to run against a trust only from the time when it is openly disavowed by the trustee*, who insists upon an adverse right and interest, *which is fully and unequivocally* made known to the *cestui qui trust.*" 3 Howard 411.

In the case of Mechoud et al. vs. Girod et al., 4 Howard 561, Wayne delivering the opinion of the same Court, says—"In general, length of time is no bar to a trust clearly established to have once existed; and, where fraud is imputed and proved, length of time ought not to exclude relief.—Provost vs. Gratz, 6 Wheaton 481. Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title, as would bar him if his title were solely at law, he will be barred in Equity, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle *expedit reipublicæ ut sit finis litium;* although the statutes of limitation do not apply to any equitable demand, Courts of Equity adopt them; or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. 10 Vesey 467; 1 Cox 149. Still, within what time a constructive trust will be barred, must depend upon the circumstances of the case. Boone vs. Chiles, 10 Peters 177. There is no rule in Equity which excludes the consideration of circumstances; and, in a case of actual fraud, we believe no case can be found in the

books, in which a Court of Equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

That *this* "trust is clearly established to have once existed," is beyond debate. When "it was openly disavowed by the trustee" —"when *he fully and unequivocally made known to the cestui que "trust*—the 'adverse right and interest'"—does not appear.

In 1834, he executes a release to her of "*all the* estate of which "her father died seized, conveyed to him in trust by the will" —declaring that he had declined to sell any of the real estate, because no advantageous sales were practicable.

Nine years after, in 1843, in contemplation of marriage with her present husband, he again became her Trustee, in conjunction with Bernard; and at that period she remains in such ignorance of her estate, as that a schedule cannot be made of it in the articles, and he executes the paper which recites that ignorance. The estate of Stokes, as I gather from the Marshal's deed and the marriage articles, was large—embracing many tracts of land —situate in several counties, besides city lots. As late as 1843, she is unadvised as to the estate received from her father's will through the release of her trustee.

The facts show much reliance and confidence in the fidelity of her Trustee and Guardian, but small information of her estate; and "no unequivocal and full disclosures" "of adversary rights," set up by him to the Trust estate.

I arrive at the conclusion that her right to recover the land is established by the facts embodied in the statement.

URIEL WRIGHT.

January 5th, 1858.