on and so forth. Here, as under all of our preceding heads, the illustrations might be multiplied indefinitely without materially strengthening the moral, which is that a "chaos of thought and passion all confused" has inspired the enactment of Sunday laws, stimulates their enforcement, and manifests itself in every judicial attempt to either justify, explain or apply them.

Baltimore, Md., October 20, 1892.

ANNOTATIONS.

DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,
R. C. MCMURTRIE, LL.D,
Assisted by
SYDNEY G. FISHER, JOHN DOUGLASS BROWN, JR.,
HOWARD W. PAGE, ROBERT P. BRADFORD.

MULLEN, TRUSTEE OF SIMPSON v. DOYLE AND GREEN, APPELLANTS.[1] SUPREME COURT OF PENNSYLVANIA.

Constructive Trusts—Trustee Purchasing Trust Property at Sheriff's Sale—Withholding Information from cestui que trust.

When property of a *cestui que trust* is taken from the control of the trustee and sold at sheriff's sale, the trustee is not incapacitated by his fiduciary position to become the purchaser. But the sheriff's seizure does not release the trustee from his character, and his right to purchase depends on the discharge of his full duty as trustee, which includes the communication of any information which may possibly be utilized by the *cestui que trust.*

On appeal from a decree for plaintiff upon a bill filed to have a certain piece of real estate declared to belong to a trust estate.

From the findings of the master the following facts appeared:

STATEMENT OF THE CASE.

In 1874, R. F. Simpson and wife, by deed duly executed, constituted Patrick Doyle trustee of certain real

[1] Reported in Ad. Reps. Leg. Int. Supplement, Vol. XLIX, p. 38, March 14, 1892.

estate, including the property in question. In 1879, the mortgagee, who held a mortgage of $40,000 against it, foreclosed and sold the property. Just before the sale, which was entirely hostile to and beyond the control of the trustee Doyle, the trustee went to counsel of the mortgagee and asked for time. Counsel replied that the mortgagee did not wish to own the property, that if somebody would come forward within a very limited time and pay up all that was necessary (including counsel fee) to cut down the incumbrance to the principal of the mortgage ($40,000), the mortgagee, counsel felt sure, would be glad to have such person take the property off their hands. There was no agreement of any sort other than this. The mortgagee bought in the property, and afterward Doyle, the trustee, raised sufficient money to pay the mortgagee all the money due down to the $40,000 mortgage, and took title from the mortgagee's agent in the name of one John I. Green, who gave a purchase money mortgage for $40,000. A declaration of trust by Green in favor of Simpson had been drawn, but did not appear to have been executed. There was an executed declaration of trust by Green in favor of Doyle. Simpson knew nothing of this until after suit, nor did he know of the negotiation between the trustee Doyle and the counsel for the mortgagee. He believed, however, that Green held the title, and that the property would come back to himself after the debts were paid. This was what his counsel, O'Bryne, had told him in Doyle's presence.

The bill, filed in 1885, alleged *inter alia*, (8) that the sale of 1879 had been procured by Doyle upon an express agreement to purchase the property with funds of the trust estate, or upon the security of the title, and to reconvey to the trust estate as soon as the advances were repaid. There was also the further allegation (9) that Doyle was under a legal incapacity to deal with the title to be produced at the sheriff's sale, because he was the actual trustee of the title divested by the sale.

A final account, filed by Doyle in March, 1885, was the first notice to Simpson that the title was held adversely to the trust.

The master recommended a decree of conveyance by Green, and charged Doyle with rent since the sheriff's sale, and refused to allow credits for commissions paid for collecting rent. Exceptions were filed by appellants, which were dismissed, and a decree entered by the Court.[1]

The assignments of error specified, that the Court erred (1) in holding that the failure to communicate to the *cestui que trust* the statement of mortgagee's counsel, recited above, rendered the purchase invalid; (7) in decreeing a conveyance; (8) in charging Doyle with rents received since the sheriff's sale, and refusing to allow him credit for commissions paid real estate agent for collecting rents; and (9) in not dismissing the bill.

Frank P. Prichard and Samuel Gustine Thompson, for appellants. *Robert H. Neilson and Geo. Tucker Bispham*, for appellee.

ABSTRACTS FROM OPINION.

MITCHELL, J. Though there was no express agreement to purchase for the trust, there is evidence satisfactory to the master and the Court below that Simpson believed such was to be the case, and that the conduct of Doyle aided in producing that belief. The master finds expressly that Simpson was told by O'Byrne in Doyle's presence that Green would take the title as trustee, that a declaration of trust by Green in favor of Simpson's wife and family was prepared by counsel, and Simpson supposed it was executed, that the declaration of trust for Doyle was not put on record, that Simpson did not know of it until it was produced before the examiner in this suit, and that the first adverse act of Doyle to put Simpson upon notice and inquiry was the failure to include the rents of the property in the account filed in 1885. But aside from, and in addition to all this, the undisputed fact is, that Doyle did not communicate to his *cestui que trust* the terms upon which the property could be regained after the sale. While it is clear that no agreement was made by the counsel for the mortgagee, it is equally clear that he expressed a belief as

[1] See opinion of Pennypacker, J., 47 Leg. Int., 48.

to his client's willingness to make certain terms which proved to be correct, and was subsequently carried out by his client. This option, prospect, opportunity, whatever it may be called, however far short of an agreement, was still an advantage to which the *cestui que trust* was entitled. It practically gave the party who knew of it a chance to become the purchaser on a credit of forty thousand dollars to be left in mortgage on the property, and on a cash outlay of only eight or nine thousand, while outside bidders were, so far as they knew, required to purchase for cash in full. Of this chance Doyle took advantage. It may be that even with knowledge of it Simpson could not have profited by it. But, according to the master's report, there was still some other trust property which might possibly have been sold or mortgaged for enough to save this, or in other ways he might have raised the money necessary. Whether he could or not is unimportant, he was entitled to an opportunity to try. The withholding of such opportunity was a failure of his full duty as trustee, that, irrespective of intent and of any actual fraud, prevented Doyle from acquiring the title for himself as against his *cestui que trust.*

Decree affirmed at cost of appellants.

PURCHASES BY TRUSTEES AT SALES UNDER ADVERSE PROCEEDINGS.

The well-known Rumford Market case (1726) enunciated a principle adopted by courts of equity for the purpose of eliminating from the fiduciary relation the element of selfishness, and, therefore, the object of strong and bitter assault. Briefly stated, it is that a trustee or other fiduciary shall enter into no transaction affecting the subject matter of the trust whereby he may be personally benefited. The observance of this principle is secured by means of the doctrine of constructive trusts, whereby the estate of the *cestui que trust* derives all the advantage (Robbins *v.* Butler, 24 Ill., 432; Herrick *v.* Miller, 123 Ind., 304; Denholm *v.* McKay, 148 Mass., 434; Heager's Ex'rs (Pa) 15 S. & R., 16; Green *v.* Sargent, 23 Vt., 466). The cases in which its application has been invoked may so far as purchasing the property is concerned, and for convenience of treatment, be grouped under three heads.

(1) Where the trustee purchases the property which forms the subject of the trust directly from his *cestui que trust.*

(2) Where the trustee purchases at a sale made in the interests of the estate, either by himself in vir-

tue of a power to do so or by order of a court of equity and under its supervision.

(3) Where the trustee purchases at a sale made in the interests and under the control of those who are seeking the satisfaction of their claims, which may be called a sale under adversary proceedings.

In all of the above cases equity protects the interests of the *cestuis que trustent* by considering that the trustee has acted for the benefit of the estate.

(*a*) Of the first class it is only necessary to say a word, since the rule laid down in the leading case of Fox *v.* Mackreth, (4 Bro. P. C., 258; 1 Lead. Cas. Eq., 115) decided in 1788, has since been invariably followed: a trustee cannot purchase from his *cestui que trust* unless it satisfactorily appears to the Court that the connection between them has been dissolved and that all knowledge of the value of the property acquired by the trustee has been communicated to his vendor. In Cowee *v.* Cornell, a case wherein undue influence was charged, the Court, after stating that fraud was not generally to be presumed, delivered this very comprehensive statement of the rule under consideration: "Wherever the relation between the contracting parties appears to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side, from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or on the other, from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the transaction is presumed void and it is incumbent upon the stronger party to show affirmatively that all was open, fair and well understood" (75 N. Y., 91; see also Brown *v.* Cowell, 116 Mass., 461; McClure *v.* Lewis, 72 Mo., 315; Waldrop *v.* Leaman, 30 S. C., 428; Wright *v.* Campbell, 27 Ark., 637).

In this class of cases it will be observed that equity deals with the transaction on the theory of constructive fraud rather than of constructive trusts and the validity of the purchase rests on the ability of the trustee to rebut the presumption thus cast upon it.

(*b*) Cases in the second class are governed by a different rule.

"A trustee purchasing the trust property is liable to have the purchase set aside if within a reasonable time the *cestui que trust* chooses to say he is dissatisfied with it" (Campbell *v.* Walker, 5 Ves., 678, 680). Both of these rules seek to protect the interests of the *cestui que trust* and the difference grows out of the fact that in the second class of cases the *consent* of the *cestui que trust* to the transaction has been neither sought nor given. Where they contract together the *cestui que trust* of course consents, and the Chancellor can only insist that the reality of that consent be established. Where, however, the trustee acts without even the knowledge of the *cestui que trust* the latter, when he discovers the purchaser, is in the position of being approached for his consent and he is then at liberty to actively dissent and thus invalidate the whole transaction.

In some of the early cases reliance was placed by counsel on a qualification of the old Roman rule *tutor rem pupilli emere non potest*, to the effect that the validity of his purchase at public auction could

not be questioned provided the trustee brought *palam et bona fide* and not *per interpositam personam.* But Lord ELDON demonstrated that the manner of the purchase was of no importance, nor was even the question of profit an element for consideration, since the object of the rule was to prevent fraud which might be perpetrated and which could so easily be concealed. It is certain that the position of the trustee gives him a coign of vantage. He has full opportunity, indeed it is his business to acquire a complete knowledge of the value and circumstances of the property which he administers for another. He might in a given case resist the temptation to use this for his own benefit; but to secure the *cestui que trust* the rule must needs admit of no relaxation. "If the trustee can buy in an honest case he may in a case having that appearance, but which from the infirmity of human testimony may be grossly otherwise" (*Ex parte* Bennett, 10 Ves., 385). The Court, therefore, very wisely refrains from any inquiry into the transaction itself.

In this country the general rule has received almost universal approval and sanction.

Of purchases made by the trustee at his own sale the leading case of Davoue *v.* Fanning is a good example. An executor with power to sell for the payment of legacies exposed the property of his testator for sale at public auction, and by previous arrangement it was purchased for his wife, who was also beneficially interested in the proceeds. The sale was *bona fide* and for a fair price, but upon a bill filed by another beneficiary under the will Chancellor KENT ordered a resale of the property on the ground that as the executor's interest interfered with his duty the case fell within the rule, that if a trustee acting for others sells an estate and becomes himself interested in the purchase the *cestui que trust* is entitled as a matter of course to have that purchase set aside (Johns. Ch., 252; see also Dyer *v.* Shurtleff, 112 Mass., 165; Lewis *v.* Welch, 47 Minn., 193; Chandler *v.* Moulton, 33 Vt., 245; McNeil *v.* Gates, 41 Ark., 264; Roberts *v.* Roberts, 65 N. C., 27; Jamison *v.* Glasscock, 29 Mo., 191).

Purchases at a public sale, judicially ordered and conducted, are governed by the same rule. An executor, in Louisiana, purchased the property of his testator at a public sale, ordered by a judge of a Probate Court upon his petition. He attempted to sustain the validity of his purchase on the ground that the sale was under the supervision of a court of equity, and there could be no opportunity to commit a fraud. The Court was of opinion that any inquiry into the facts of the case, with a view to establish the trustee's honesty, was unnecessary, since the executor was clearly within the rule which was framed to dispense with just such an investigation (Michoud *v.* Girod, 4 How., 503; James *v.* James, 55 Ala., 525; Caldwell *v.* Caldwell, 45 Ohio, 512; Mercer *v.* Newsom, 23 Ga.; Hoit *v.* Webb, 36 N. H., 158).

Nor is a trustee allowed to purchase for others. The rule aims to prevent him from using to the prejudice of the *cestui que trust,* any information which it is his duty to acquire, and it is too delicate to hold that he will not be tempted to so use it if allowed to bid for an-

other. (The distinction is too thin to form a safe rule of justice, per Lord Eldon in *Ex parte* Bennet, 10 Ves., 385; also Piatt *v.* Longworth, 27 Ohio, 159; Davoue *v.* Fanning, 2 Johns, Ch., 252.)

Tennessee, however, while sanctioning the application of the rule to trustees, purchasing at their own sales, has made an exception of the case of a purchase at a sale judicially ordered and conducted. The question arose in a case wherein a subsequent purchaser, from a guardian who had purchased the property of his wards at a sale ordered and conducted by a court of equity, upon an application for a partition resisted the enforcement of his contract on the ground that the guardian's title was invalid. The Court, however, laid down the rule which has never been deviated from that the guardian may purchase the property of his ward sold under an order of a court of competent jurisdiction for his benefit, and, if it be manifest that he has acted fairly with the utmost good faith and the transaction is free from any imputation of a design on his part to gain a benefit to himself to the prejudice of the interest of his ward, such a purchase is valid (Blackmore *v.* Shelby, 8 Hump., 439). As will be noticed, the objection here did not come from the *cestui que* trust, and the Court, in its remarks, exceeded the necessities of the case. But the exception has become established (*Ex parte* Crump, 16 Lea, 732).

The case of a guardian purchasing at a judicial sale for the benefit of the ward, is clearly within the spirit of the maxim, *emptor emit quam minimo potest vendor vendit quam maximo potest*, which does not suffer any person to purchase property for himself who is at all interested on behalf of others in preventing a depreciation of the amount for which it may be sold. And to rest the disqualification of the guardian as a purchaser solely on the evil influence which he may exert over the conduct of the sale is merely *hærere in cortice*. See also Downs *v.* Rickards, 4 Del. Ch., 416.

In Texas and Missouri executors and administrators are forbidden by Statute to purchase the estate of their decedents; but in South Carolina, after much fluctuation in the courts, the right to purchase, at any sale, was given them by an Act of 1839, 11 Stat., 94, the provisions of which are incorporated in section 1974, Gen. Stat. The evil is obviated somewhat by charging them with the full value of the property without reference to the amount bid at the sale (Huger *v.* Huger, 9 Rich. Eq., 217).

The exceptions so far noted are partial, but there remains to be considered an exception, which embraces all classes of fiduciaries, and which prevails in three States —Alabama, South Carolina and Texas. A trustee, who is at the same time beneficially interested in the property which forms the subject matter of the trust, can purchase it at public sale, and his title will be sustained. The only effect of the fiduciary relation is seen in the jealous care with which the Court examines all the proceedings relative to the sale not satisfied until convincing proof is given that it was fairly conducted and the full price given. The reason assigned for this departure from the rule, is that otherwise a trustee would often be obliged to witness the sacrifice of property which, in

a sense, was already his own, and besides, as in the case of family property, he might wish to preserve it from the hands of strangers, a sentiment in every way commendable and not to be discouraged (Brannan *v.* Oliver, 2 Stew., 47; Payne *v.* Turner, 36 Ala., 623; Penny *v.* Jackson, 85 Ala., 67).

The same exception would probably be allowed in the case of a preferred creditor, who accepts the position of trustee for the payment of debts, but not in a case where the deed of trust provides for the payment of the creditors ratably, for it is then presumed that he has waived his lien, and whatever he does must enure to the benefit of all (Harrison *v.* Mock, 10 Ala., 185).

In South Carolina this exception does not extend to a trustee's purchase at his own sale, but there is a strong inclination to apply it in cases of judicial sales, conducted by an officer of the Court (Anderson *v.* Butler, 31 S. C., 183).

Texas sides with Alabama. Certain property was transferred to a creditor in trust to secure a loan, and by the terms of the deed he was given a power of sale. The debt remaining unpaid, the trustee exposed the property for sale at public auction, and became the purchaser. In a suit to set aside the sale he proved his entire integrity, and the Court refused to interfere (Scott *v.* Mann, 33 Tex., 725; see also Bohn *v.* Davis, 75 Tex., 24).

Both in Texas and Alabama, however, this exception to a salutary rule is regretted by the Court, and is only now allowed because long established.

It may be advisable that a trustee in such a condition should be allowed to purchase but there does not seem to be any necessity for making his case an exception. The rule ought rather to be strictly enforced, and then upon application to the Court by the trustee for leave to purchase, the fact that he is beneficially interested could be judged sufficient reason for allowing him to bid. See Cadwalader's App., 64 Pa., 293; Froneberger *v.* Lewis, 79 N. C., 426, 435.

(*c*) The third class, in which is numbered the principal case, also comprises cases where the sale is public, but with the difference that the sale is instigated by creditors and others whose interests are adverse to those of the *cestui que trust.*

In England and generally through out this country it has not been considered that this fact puts the trustee upon so altered a footing that the rule should be relaxed for his benefit. It has, on the contrary, been supposed that in such cases there is afforded as much opportunity to the trustee to betray the interests of his *cestui que trust* by a treacherous use of the information which he may have gained as in cases where he is connected with the conduct of the sale. The same consequence, therefore, attends a trustee's purchase here as in cases where the sale is either his own or ordered and conducted by a court of equity in the interest of the *cestui que trust*, the latter may, if he chooses, avoid it. Or, as it has been expressed, "a trustee who holds the legal title for the use of another will not be permitted to deal with the property for his own benefit, and it makes no difference in his favor that he acquires it at a judicial sale under a superior title:" Roberts *v.* Mosley, 64 Mo., 207.

Wherever the question has arisen,

with the exceptions already noted, the universal rule is that no person can be allowed to purchase an interest in property where he has a duty to perform inconsistent with the character of purchaser on his own account. And in all the States, except Pennsylvania, and, in the case of administrators, Missouri, it is considered that even at a sale under adversary proceedings there exists such an inconsistency. The rule has been applied to an attorney, Cunningham *v.* Jones, 37 Kan., 477; a commissioner of court, Price's Admr. *v.* Thompson, 84 Ky., 219; creditor-assignees, Houston *v.* Crutchfield, 22 Ala., 76; Janes *v.* Throckmorton, 57 Cal., 368; Bellamy *v.* Bellamy, 6 Fla., 62, 114; Freeman *v.* Harwood, 49 Me., 195; King *v.* Remington, 36 Minn., 15; administrators, Welch *v.* McGrath, 59 Iowa, 519; Dugas *v.* Gilbeau, 15 La. Ann., 581; Froneberger *v.* Lewis, 79 N. C., 426; even where the sale is made under execution in their favor, issued before they accepted the office, Martin *v.* Wyncoop, 12 Ind., 266; executor, Fleming *v.* Foran, 12 Ga., 594; Marshall *v.* Carson, 38 N. J. Eq., 250; guardian, Downs *v.* Rickards, 4 Del. Ch., 416; and to trustees proper, Wells *v.* Francis, 7 Col., 396; Bell *v.* Webb, 2 Gill., 163; Joor *v.* Williams, 38 Miss., 546; Roberts *v.* Mosely, 64 Mo., 507; Van Epps *v.* Van Epps, 9 Paige Ch., 237; Jewett *v.* Miller, 10 N. Y., 402; Newcombe *v.* Brooks, 16 W. Va., 32.

The Supreme Court of Pennsylvania has again and again sanctioned the principle that a trustee ought not to be permitted to place himself in a position where he will be subjected to a conflict between duty and self-interest. But it has at the same time insisted that at a sale under adversary proceedings there is no opportunity for self-interest to tempt a trustee to fail in his duty. The reason for this conclusion is given in Fisk *v.* Sarber, 6 W. and S., 18, where the question was, whether the assignee of an insolvent debtor could purchase the latter's property at a sheriff's sale under a mortgage. The property in question, part of that which had been transferred, had been mortgaged to a certain bank, and the interest was so far in arrears that it was doubtful if the property would bring enough to pay both principal and interest. It was understood between Fisk and the bank that if he should be the highest bidder at a price not less than $250.00 below the amount of the principal debt, the bank would extend the time of payment for five years and grant other indulgences At the sale under the mortgage Fisk did bid in the property, and it was decided that his fiduciary character did not prevent his becoming a valid purchaser. The property had been taken out of the trustee's hands and placed beyond his control and influence, *so that he had no duty to perform in regard to it.*

The case was really decided on the authority of a dictum in Prevost *v.* Gratz, 1 P. C. C. Rep., 364, but the Court, per KENNEDY, J., justified the decision on the hypothesis that when the property of the *cestui que trust* is in *gremio legis* the trustee becomes *functus officio*. This decision was followed in Chorpenning's Appeal, 32 Pa., 315, and Lusk's Appeal, 103 Pa., 152, in the latter of which, however, the fact that the trustees were purchasing to protect their own interests was strongly emphasized.

The freedom allowed by the re-

laxation has been much limited by two decisions which make it a condition of the validity of the trustee's title that he has not either allowed the sale, having other funds of the estate in his hands or occa sioned it by his act or procurement. Frank's App., 14 Pa., 531; Parshall's App., 65 Pa., 224.

Mullen *v.* Doyle is a still further limitation in that it hampers the trustee with the burden of disclosing to the *cestui que trust all information which may possibly be of use to him.* Inasmuch as this course rejects the hypothesis upon which Fisk *v.* Sarber proceeded the authority of that case may be considered to be weakened to the point of breaking.

The present position would seem to be that taken by Tennessee, namely, the real danger of abuse lies in the control which the trustee or other fiduciary may exercise over the conduct of the sale. Relieve him of this power and his attempts to betray the interests of his *cestui que trust* by using for his own benefit any information which he may derive from his position as trustee will invariably be detected.

In this class of cases Missouri makes an exception in favor of administrators. At a foreclosure sale made by order of the Circuit Court an administrator purchased the property of his decedent. It was argued that the statute which forbids such purchases rendered his title open to objection, but the Court construed the statute to apply only to probate sales, nor was the purchaser here in any sense a fiduciary. An administrator has no concern with or power of disposition over the real estate of his decedent, and to such a sale as this having no duty to perform he came as a stranger. Dillinger *v.* Kelly, 84 Mo., 261; Briant *v.* Jackson, 99 Mo., 585. Where, however, the administrator is obliged by statute, as he is in Pennsylvania, if he finds that the realty is to be taken for the payment of debts, to have the proceedings stayed until he himself can make the sale it is probable that he would be considered a trustee and his case would then be governed by the rule applicable to trustees purchasing at their own sales, for there could be no sale under adversary proceedings, Meanor *v.* Hamilton, 27 Pa., 137.

By way of general criticism it may be said that in cases where the purchaser occupies a position which opens to him means of information only thus accessible any exception to the rule which closes the door to temptation seems at variance with the teachings of experience. The duty of one who occupies such a fiduciary position obliges him to communicate all information and exert all the care and industry necessary that the estate may be disposed of as advantageously as possible for the *cestui que trust.* It is a dangerous delusion to believe that it is within the power of a court of equity to compel an unwilling trustee to disclose evidence of an unfaithfulness which is the secret of his own heart. The trustee's connection with the sale is not the main reason for the prohibition. "What possible difference can it make in reason and principle in what manner or by whom the sale is made of that which the trustee holds when his duty in his trust relations is to make the property bring its highest price in the protection of the interests of the *cestui que trust.* His duty remains the same; he stands concerned for the

time being as would be the owner of the property in appreciating it." Marshall *v.* Carson, 38 N. J. Eq. 256. Any relaxation is poisonous in its consequences. To prohibit a trustee from purchasing at his own sale merely incites him the more to bring about a sale by another. It is only a substitution of temptations.

There are two cases which, perhaps, deserve mention for to the extent to which dicta are authority they are decisions in favor of the trustee's right to purchase at a sale under adversary proceedings. They are, Barber *v.* Bowen, 47 Minn., 118, and Allen *v.* Gillette, 127 U. S., 589.

In the former, an administrator by order of court sold a part of the property of his decedent in order to discharge certain allowed claims. The guardian of the decedent's minor heirs became the purchaser. The Court cited the few authorities favoring the trustee's right to purchase at a public sale made by another, but the decision in favor of the guardian rested on the circumstance that his fiduciary character did not extend to the property in question since it never was part of the ward's estate, and obviously never would be. In the latter case, which came from Texas, an executor, who was also trustee of the estate of his testator in its entirety, for a two-fold object, first, payment of debts, and then the common benefit of all the heirs and devisees, purchased the undivided share of one of the latter. This share had been mortgaged to secure a loan, and was purchased at a sale in foreclosure of the mortgage. There are dicta in the case in favor of the trustee's right to purchase at a sale under adversary proceedings, but the decision in favor of the executors rested on a misapprehension of the decisions of the Supreme Court of Texas, "which are our guides in this case." Those cited are cases of purchases by mortgagees at foreclosure sales; and as had been pointed out Texas makes these an exception on the ground of beneficial interest in the purchaser.

There are, however, two methods by which the trustee may acquire an indefeasible title at public sale, even when he is the vendor.

(1) He may by a new contract with his *cestui que trust* divest himself of the character of trustee, but even that transaction will be watched with infinite and the most guarded jealousy since the Court can never be sure that the trustee when entering into the new contract has communicated to the *cestui que trust* all the information which as trustee he may have obtained. *Ex parte* Lacey, 6 Ves., 325.

(2) He may file a bill asking for leave of the Court to become a bidder, and in a proper case the Court will give him permission. "But the power is a delicate one and should always be cautiously exercised, the sale itself being watched with jealousy." Dundas's App., 64 Pa., 325.

There is no good reason for the difference which prevails on this, so important a subject. All are agreed that a trustee must not make any profit from his administration and the failure to insist upon a rigid observance of the rule arises from a misconception of its spirit.

"The rule is intended to secure to the *cestui que trust* the *chance* of any advantage," and it is the existence of this chance, however doubtful, which precludes the trustee from retaining the property.

ROBERT P. BRADFORD.