

14713

No. _____

Supreme Court of Illinois

Peckham et al.

vs.

Haddock et al.

STATE OF ILLINOIS,

Apr 5, 1868

SUPREME COURT,

THIRD GRAND DIVISION.

Reported

No.

86

68

J. W. Middleton & Co. Stationers, 196 Lake St.

1864

Ballou

1864

Ballou

Supreme Court of Illinois
Third Grand Division
April Term 1864

Alfred G. Peckham et al }
Benjamin J. Hadduck et al }

Argument for Defendant in Error

II

It is claimed by Plff in Error that our Decree ought to have been overruled, because of certain allegations in the bill as to intent, & agreements not embodied in the written instrument which is the foundation of Plffs Claim -

For reply 1. Intentions not alleged to have been disclosed (see pages 7 & 8 of abstract) and not finding expression in the Contract of the parties, are of no more consequence than egg shells when the chickens are hatched.

2. Where there is an agreement in writing, contemporaneous, collateral agreements are excluded, if recited only in parol - The presumption is that the agreements referred to were by parol only, the contrary not being averred -

See 2 Gilen R. 66-400 & 29-15 Ill 508

3. Decree admits only matters relevant & well pleaded

Story Eq. Pl 545 2

III.

It is alleged that by "Speer purchase from Hickox," he became "in equity the principal debtor" - And therefore anything which could be done between Hickox mortgagor & Haddock mortgagee as to reviving liens, could be done between Hickox, & Speer the assignee of mortgagor and Haddock the mortgagee; the interest being in them alone, they could affect it as they please -

W. C. C. C.

I. The premises are incorrect. The case cited only shows that on transfer of the equity of redemption, the land, as between mortgagor and his assignee, becomes the primary fund for the payment of the debt - No priority of Contract was established here between Speer & Haddock by Speer purchase of the equity of redemption, nor was Hickox personal liability altered or diminished. The Mortgagor was still mortgagor & principal debtor.

II The Conclusion is a gross non sequitur, even admitting the premises true. If Speer was principal debtor Hickox of course was secondarily liable, & interested as such in the prolongation or revival of the lien or indebtedness. How then can it be said of Haddock & Speer "the interest was in them alone"?

But as much of the argument of Judge Gray and Mr. Tuley is based on what we believe to be a confused and incorrect statement of the relative positions and relations of the parties, Haddock, Speer & Hickox, we propose to devote a little space to a consideration of that subject.

1. What was Speer's position?

He had bought the land subject to the mortgage, which was then in existence, that is to say he became the owner of the equity of redemption only!

When his right to affect "the land" is spoken of therefore that term is to be limited simply to the equity of redemption

2. What was Haddock's position?

As mortgagor, he held the land upon a certain condition, ^{the performance of which} ~~he~~ was absolutely to divest him ipso facto of all interest. He had no general estate in "the land" no power to deal with, ~~least~~ or in any manner affect any other interest in the land than that specifically marked out, and ~~it being once extinct, he could no more revive than originally create it.~~ (We speak now of the position of the parties before any payments were made on the mortgage) —

3. What was Hicks's position?

He has still an interest in the land, viz: for his security & release from personal obligation — That this is so is evident from the cases cited by Judge Gray under his 5th Head — 9 Paige 446 — 10 Do 595 — 34 Maine 299.

A Priority of estate has been created between him as mortgagor & Haddock as mortgagee, which was not defeated by the transfer to Spear. That was a transfer not of his relation ^{to the estate} as mortgagor ~~to the estate~~, but of the remaining title, subject to the existing relations between him & the mortgagee.

Under these relations it was competent for each of the parties to deal only with that which belonged to him. Spear could deal with the land, subject to the mortgage — Haddock could deal with the mortgage so far as a transfer or extinguishment was concerned. But neither severally nor conjointly could they do anything to affect the estate of the mortgagor, without his presence or assent, (except to extinguish his liability by payment) —

The Case of in 23 Ill 657 cited by Judge Gay is therefore inapplicable, since the transaction in question was not an imperfect attempt of Speer to charge his estate in the land, nor of Haddock to deal with an existing estate held by him, but an effort of both to deal with & ~~then~~ ^{extinguish} recreate an ~~new~~ mortgage of an absent mortgage.

III

It is affirmed that Speer might elect to hold the note as a charge after payment, & "might take time to make his election".

True, but he did "elect" at the time to extinguish the debt & that election cannot be revoked.

Campbell & Carter 14 Ill 290,

Page 3 of Abstract

IV

It is said "the legal estate was in Haddock as trustee for Speer" "which trust Speer assigned to Thompson & Co." —
to reply.

I. The technical trust, if there was one, was for Hickox, not for Speer. It was from Hickox he received the estate, and although it is true upon the extinguish ^{reversion} of the mortgage interest to Hickox, it would come at once to Speer, yet Haddock was not bound to seek out or deal with subsequent purchasers, but might & should deal with & release to his grantor the real estate given trust.

II. If there were a trust & that for Speer, it was but a naked trust, for the reconveyance of an empty, shadowy estate, the essence of which had escaped - The assignee of such a trust could gain no right greater than that of his grantor, to wit: to transfer to or on the direction of the cestui que trust (Speer) - It comes not, nor did it purport to affect Speer's title obtained before the mortgage.

III. But we affirm & that in the alleged subject matter of transfer (the mortgage lien for Hickox first note) neither Harduck nor Speer had any claim or interest ~~therein~~ ~~or thereby~~ at the time mentioned. The only pretence for such claim is that the note not having been paid at maturity, the condition of the mortgage was broken, and the legal estate vested in Harduck & that this was not divested by payment.

It is not alleged in the bill that the mortgage was by its conditions forfeited by non payment of the note at maturity & the Court is aware it is common to make provision for delay of 30, 60 & even 90 days in the payment of sums so secured.

But admitting a forfeiture, we do not understand that the supposed consequences would follow as the law now stands, in this State or elsewhere. Certainly not in a Court of equity.

"A mortgage is an assignment on condition; the condition being performed the conveyance is void ab initio"
Wigram V.C. 3 Hare 405

"A mortgage is but a security for the payment of the debt, and when that is extinguished or paid, ~~it~~ it can never be resuscitated."

Anderson v Keff 11 S & R 223

"By payment the whole mortgage is extinct: as much

so as if released or cancelled of record. It ceases to operate either at law or in equity, and the whole title reverts in the mortgagor - To call it a mortgage would be an abuse of the word. It is no more than a blanky" — 5 Hill 276 -

The payment of the debt is the satisfaction of the mortgage, the release on the record the mere evidence of it. 17 Ills 43.

It is alleged that the ^{Decisions of} N.Y. Courts are of no authority here because they have "reduced a mortgage to a mere lien to" - We think stronger language cannot be found in N.Y. than in our own reports on this subject - Thus in 28 Ills 46 it is decided that the mere assignment of the note "ipso facto transfers the mortgage". Surely if the assignment of the note, without formal transf. of the mortgage estate nevertheless transfers it, payment of the note will extinguish it. In the same decision the debt is called the "principal thing" the mortgage the "incident" -

In 29 Ills 99 it is decided that the Statute of Limitations, barring the debt, cuts off the rights of mortgage in the premises.

This would be singular if non payment at maturity vested an indefeasible estate in the mortgagee.

But it is asked (In Tuley's arg^t 9) "Did not Haddock still hold the mortgage? If it was extinguished was any aliquot part extinguished? If so what?" -

We reply it was extinguished not as to any ^{specific} part of the land, as seems to be implied in the question, but it was extinguished as to a part of Haddock's mort

Mortgage
estate in the land, viz: as to the amount of the paid
note.

This is the precise question involved in the case
of Van Dant on Almon 23 Ill. 35 - where it is
held that a mortgage receiving successive instal-
-ments is equivalent to a series of correspondingly successive
mortgages. The case of 8 Blackf is
cited approving in which the above language is used.

The result therefore is that when Haddock
has received payment of the first note, from Spear
& canceled it with his consent, that debt & the mortgage
lien incident thereto, were dead forever more. Hickox
acquires a vested right by their act which they could
not revoke. The payment ipso facto destroys the mortgage
estate pro tanto. Whatever mortgage interest Haddock
hereafter has was limited to & measured by the remaining
indebtedness to wit: the other two notes -

VII.

It is claimed that admitting the debt paid & the
Mortgage canceled, it may be again used to secure
a debt.

We reply.

1. The opposite doctrine is precisely & clearly held
(being the main point involved) in 23 N.Y. 506 - 3 Allen 340

2. In all the cases cited other questions have
determined the decision - In some the mortgage was bought
by an innocent purchaser, without notice of payment - in
some the Court proceed on the conclusion that the debt

has never been in fact paid, but the form of securities
only changed - in ~~other~~ every other case the Mortgagor
was present, and gave virtually a new mortgage, redelivering
it

None of these cases present the element involved in this
- the absence of the mortgagor - while the purchaser
buys with full notice of payment - (we shall return again
to this point)

VII.

It is said Haddock & Spear are estopped to deny the valid-
ity of the lien -

we reply.

1. We cannot be estopped to demand & on
demand we simply refer to the Court the question whether
the facts disclose legally warrant a recovery. Must
the Court then stultify itself, by deciding a claim
lawful which is on its face unlawful? Where a
party's rights are only negative, & estoppel, and he can-
not get his case before the Court without disclosing
its defects he cannot recover.

2 L & R Raymond 1553 - 1 D.R. 95

2. There being no real, this must be claimed
as an estoppel in pais - but that always proceeds on
the ground of fraud. - No fraud, misrepresentation or even
mistake is here alleged - It is alleged that in the
bill (see page 8 of abstract) "that all the parties"
"acted upon the belief that Thompson had" by the transaction
refused to "acquire a lien on said premises" -

It is not admitted in the bill, that they did not legally acquire such lien - but the contrary is affirmed in argument. It is not alleged in the bill, nor does the Contract show that any agreement whatever was made as to the past, ~~to treat~~ or that the parties would treat the note, either as dead or alive. The bill simply sets forth the payment of the note, the attempted revival of it, the intention of the parties to revive it so as not to injure Hickox, then believing that they had done it, and upon those facts mutually known, without any allegation of mistake, accident, or fraud, the case is submitted to the Court to determine, according to law, what the rights the Plaintiff has in fact acquired.

We call the Courts attention to a part of the facts which have an important bearing on the law. The Plaintiff says "Nay, you are estopped"; we cannot understand the principle of the argument.

3. The whole transaction was a fraud on Hickox - "Where the facts are established fraud is a question of law" - what are the facts here? Hickox note is paid & cancelled - Afterwards the cancellation is effaced, an indorsement purporting to transfer it, as a living obligation is made upon it & it delivered to an assignee, & by him from him successive transfers always as described as "the judgment note of B. J. Hickox (see Abstract pages 4. 6. 7) from hand to hand until it reaches Peckham the present holder. And now "If only the papers that the parties executed are looked at, no question could arise" says Judge May (Argument Head VII)

Very true, for the paper as finally mediated by the parties show a prima facie liability, & from the beginning - of Hickox, on the note for its full amount. The evidence of payment protecting him has been fraudulently removed. How much more a forgery is it to create or alter, than to decreate a note - "To constitute a forgery it is not enough that a party may be wronged by the act"

Roscoe Chin Es. 508-2 Sts 747 -

While the Court is not to presume fraud neither can it indulge in any charitable presumptions either inconsistent with or not fairly derivable from the Contract itself - The question is not what they might have done legally, but what they did do and was that legal. Neither is it material to know whether they intended to release Hickox by legal remedies, but whether they did in fact put him in jeopardy of such proceedings -

If they intended to revive the mortgage lien & to restore his personal liability ^{only so far} as to constitute only that and it was still a tampering with the law which amounted to a fraud.

That they did thus intend is evident from the instrument & the facts. If they intended a lien on Speer's estate, that was easily given in a new note and mortgage - If they intended to make Speer a debtor & secure the debt by assignment of the old mortgage, that could have been done by a new note from Speer, and an appropriate assignment. If they intended to make Speer the debtor, on the old note & release Hickox, they might have left the evidence of Hickox discharged & expressly stated the primary

liability of Speer. But all these presumptions are studiously negatives of the Causative essence of every scintilla of evidence showing Hickox's Charge & the assignment of the note, as if valid at origin.

If the legal effect of the dealings of the parties ^{the instrument executed by them} was the restoration of a prima facie liability against Hickox, the Court cannot indulge in vague conjectures to uphold the validity of the transaction. "It not enough for the party to make out a possible intention favorable to his view he must show a reasonable certainty that the intention is such as he suggests."

3 Man & S 638

"Though the intent be clear" says Willes C.J. "it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them."
Wilkes R 332

Lord Kenyon says.

"If I were to indulge in conjecture & speculation as to any supposed intention of the parties not expressed in the deed I should have as little doubt as upon the words, but I disclaim proceeding upon any such ground. It is sufficient for me to say that the lease has not entered into the contract insisted on by the lease: the parties have made here on the construction of a solemn instrument in which their respective rights and duties are clearly prescribed, and we cannot substitute any other contract in lieu of that into which they have entered."
7. D. R 676 - 222 - 423.

The kindly suggestion of Counsel

that these parties "could not have intended to violate the law" that "they intended to revive the mortgage & omit the personal liability of Hickox" are purely gratuitous & have no shadow of foundation in the contract or acts of the parties.

If then the whole transaction as disclosed by the title was a fraud, the Court will debar plaintiff from recovery even at the instance of a participator crimineus.

.21 Mo 156.

And no equitable rights for any person can grow out of the transaction

4 Johns R. 598

VIII

Judge Gamp 7th proposition is an elaborate exposition of the proposition, that Speer by his Contract endorsed on the back of the note becomes liable for the sum named (\$671.87). This we admit. He was liable without any writing, upon its receipt. He further contends that this was the only debt regarded by the parties. If so why does Haddock transfer the "within note" & the security "incident thereto" & why does Speer agree to pay the "within note". It is immaterial whether the "within note" be regarded as the only debt, or as collateral security. The case is not altered.

VIII

The whole transaction is claimed as an equitable mortgage.

Such a mortgage is understood to arise, when the transaction between the parties while evidencing their intention, lacks formality or completeness. When the Court may by proceeding further in the same direction, render effectual that which the parties has attempted. Such are the cases cited of imperfectly executed conveyances agreements to make mortgages. Thus the Court could complete. Having the parties & subject matter in their jurisdiction - To apply the principle in this case would require the Court to compel, by decree a confirmation of the attempted revival of his mortgage & note. No other decree would make the case correspondent with those cited.

~~In the Court to decree that~~

IX

It is said the illegal intent of the parties will not prevent the Court creating an equitable mortgage from the facts disclosed.

If the transaction was fraudulent no rights can arise from it.

When an instrument may "consistently with the rules of law" & the expressed "intention of the parties" be upheld & effectuated by the Court, it should be done, but where as here the intention is unequivocal & the law clearly condemns it, there is no attenuation.

X

It is said the instrument discloses the intention to bind "the property" for the payment of "the debt" -

Has the instrument simply declared "the debt" & contained an agreement on Spens part to make "the land" liable for it, no litigation would have arisen. It would have been an "equitable mortgage". But the parties are not dealing with "the land" but with a supposed mortgage estate in it.

Spens assumes nothing whatever but a personal obligation - he agrees only to "pay the note" - "The land", that is, his estate in it, is in no wise referred to. Neither does the instrument disclose an intention on any body's part to create a new lien, but only to deal with a supposed old one. How then can the Court deem that Spens created or intended to create, as Claimer, an equitable mortgage on his estate in the land.

Haddock Cleary comes not create an equitable mortgage. He has no other estate than that precisely limited by his mortgage - He has no power to create a new, but only transfer the estate already created. He does not transfer the mortgage estate so far as relates this two notes; this is not Claimer - He comes therefore only transfer the "incident security" value or invalid, to the first note - This and nothing more he intended to do - If the transaction involving that note & the "incident security" was valid, then he transferred such note & security - if not, he transferred a legal blank. The parties do what they intended - It is for the Court to say whether the law will tolerate and enforce their doings.

The leading case of Hunt v Rosemount, decided by Judge Story in 3 Mason 307, and afterwards affirmed by the U.S. Supreme Court, in 17 Peters 1. was one in which the Plaintiff appealed to the Court for relief, on precisely this ground of equitable mortgage. The Court were fully satisfied of the intention of the parties to create a lien on the property involved, but inasmuch as they could not shut their eyes to the fact that the parties had also chosen the specific mode of perpetuating the lien, & that mode being insufficient to effect their object, the Court denied relief. Had they agreed on "a lien" in general terms or had the facts necessarily involved the conclusion that "a lien" was to be established, without going further, the Court might carry on & perfect their implied contract: but when that intention general lien ^{narrowed} ~~merged~~ into a specific kind of lien, the Court must cannot substitute another kind.

The same principle is involved in the doctrine of vendor liens, which are held discharged by taking a specific security & which do not revive even that taken prove ineffectual. So a mortgage for future advances, indefinite, may well secure specific sum, loaner afterwards made it - but a mortgage for a specific sum, all in fact advanced at the ~~same~~ time, cannot become the security for a different debt. No difference is between completing and altering indefinite, and altering a definite contract.

"It (the original mortgage) cannot become the incident of another principal, nor the shadow of another substance"

2 Selden 452 - 147

20 Ill. 169 - 1 Merivale 7 - 33 N.H. 530

XII

We have thus far followed for convenience the line of argument in the brief we have styled Judge Gay's. (the one not in pamphlet form) - In the pamphlet argument by Mr. Tuley, the same points are reiterated in different language. Without following precisely the line of his argument, we will consider some points, ~~not~~ ^{not} mentioned, or briefly referred to herein before.

It is a claim strongly put forth in both arguments that "a mortgage lien may be retained, while the personal liability ~~is~~ discharged", and that therefore it may be "reversed" in like manner and that such was the effect of the transaction in question i.e. the mortgage lien reversed, leaving out Hickox personal liability -

We reply.

1. It is only in a qualified sense, for and when the intention is clearly expressed, that the mortgage lien has ever been retained when the personal claim was gone. e.g. - when the mortgagor pays the debt, having transferred the equity of redemption. The general principle is that ~~the person~~ the conclusive presumption - unless the contrary be expressly agreed between the parties, that the personal obligation, and the mortgage fall together. Indeed our own Supreme Court has decided that "they cannot be separated" - 20 Ills 169.

In this case neither the intent of Spear, who paid the note, nor holding the equity of redemption & the indorsement of payment and cancellation on the note, since unequivocally the purpose of the parties to destroy the lien, Personal & mortgage. Nothing debuts it -

2. It does not follow that because a ^{Mortgage} lien may be retained the personally liability can being cancelled, it can therefore be revived, or originally created without personal debt. No case has been found that such a doctrine - A Mortgage is to secure a debt - which implies a debtor. The creditor may relinquish the claim against him & agree to proceed only against the land, but it is not clear that a mortgage can be created without a personal claim.

3. Hickox was the maker of the mortgage as well as the note. His presence was therefore as essential to a retention or revival of the mortgage lien, as to a revival of the debt - No case cites either an extinction of the personal liability of Mortgagor & retention of mortgage, except by agreement with him.

4. Admitting that Hickox mortgage can be revived without his presence, (which is absurd) without reviving his liability, no attempt to do so was here made. No dealings were had with the mortgage except incidentally through the note. That was the ^{primary} subject of the attempted revival, the principal object of transfer from party to party, as appears by the language incessantly used. They evidently did understand the law to be, as it is, that the mortgage is "appendant to" the "incident," the "shadow" of the debt - and that the "principal" must be recreated ~~that~~ to uphold the "incident" again - If they meant to revive the note without the debt it embodied, ^{a claim} they intended to make of the mortgage only the "shadow" of a "shadow", their rights therefore & the relief they are entitled to are equally "shadowy".

Comments are made in both arguments on the two cases cited by us, as decisive of this, viz: 23 N.Y. 556 & 3 Allen 340.

It is said of the first

1. That the N.Y. decisions on mortgages are not law here. We have already shown that our Courts have gone as far as theirs in reducing a mortgage from the dignity of an estate to that of a lien. But that question is not involved in the case in 23 N.Y. That case was decided upon the ground that the mortgage being created by deed, an agreement by parol to add to, or modify it was ineffectual. The same principle precisely a successor of our Court in Rhine v. Phelps & Allen 46 3 "The elementary principle of the law which forbids a contract being partly in parol & partly under seal forbids it."

In this ~~the~~ case as in the N.Y. case, the parties, according to this phase of Plff's argument, agree "by the indorsement," to insert the "new debt" into the "old mortgage" (see pamphlet p. 4) - and thus by simple contract create a specialty debt.

2. ~~The Statute of Frauds~~ has It is said (see pamphlet p. 3) that 'had the agreement been in writing the decision would have been different. We answer not unless a simple contract, is changed into a specialty, by transfer from parol to writing.

3. It is said that in that case it was only agreed that the mortgage should be "considered" a security for the new debt (see pamphlet p. 78)

We answer here there is not even that approach towards an agreement. It is "understood" that Ippen shall have 3 years to pay the note, but it is not even "understood" that a new debt is created to be "injected" into the old mortgage -

As to the second case 3^d Allen 340

1. It is said the note then was paid at maturity & the mortgage estate gone, & it is admitted that a subsequent agreement could not re-vest such estate in the mortgagee -

We do not regard it a question open to discussion that after payment & cancellation of the debt between mortgagor & mortgagee, their rights in the estate are the same, whether the debt were paid before or after maturity. The forfeiture if there be one is waived & the parties revert to their position at the law day.

2. It is said the case was at law. True it could not well be otherwise in Massachusetts. But does equity wholly ignore the distinctions of law. It supplies the deficiencies, mends the asperities, but does not trample upon the distinctions of law. It does not even temper, or stud to alleviate the rigors of the sternest rules of technical law, unless some superior equity constrains it. Where parties have contracted on equal terms, without fraud, between "equal equities the law will prevail." - We apprehend that the doctrine is equally sound, before the Chancellor as the Judge, that a mortgage can only be recreated by the same & formalities as it can be originally made - and so "image of brass & clay" half especially half paid, can be tolerated in either court -

XIIII

The plaintiff presents no claim for equitable relief. He does not ask nor show any ground for rescission, reformation, or specific performance of his Contract. He insists on its validity & sufficiency - There is in it neither fraud, omission, nor mistake -

He does not ask specific performance. There is nothing to perform - The parties produce an executed Contract.

He virtually asks foreclosure of the original mortgage upon the original indebtedness, while yet he shows that indebtedness & mortgage legally extinct.

The fact that he has loaned other money does not of itself entitle him to equitable relief. It does not appear that he would not have loaned him the money on personal security nor that he did not take other security than this. At least, knowing the facts, and undertaking to decide the law for himself, he cannot ask the Court to protect him against his foolishness, his mistake of law, not induced or contributed to either by omission, or active effort by either of the other parties. Nor can he require the Court to decide, for his relief from the consequences of his error that a dead mortgage is a living one - or otherwise to stultify itself -

XVV

"Putting ourselves into the condition of the parties," as suggested by the Court in 16 Ill. p 467 (Cited in Pamphlet p 1), what construction is to be put on the Contract.

Thompson desires to make make other a loan. Why not take a note & mortgage from him to secure it? Plainly because some other existing incumbrance, (since Haddock's) renders the security insufficient -

That intervening security must be antedated - Hickox note
paid & in Speer's possession is thought of. - If it can be
revised & re-circulated, it will relate back to the date of
the first mortgage & the purpose be effected. Can it be
done, they ask without Hickox's assent? The reply is easy.
He has absconded. No evidence of payment shall be
erased. He never knew it has been paid. It is
no business of his, if he does know it, so they argue.
But how about Haddock? Will he not assent? Certainly
not, to reinstate it, again, in advance of the two remaining
notes: but if to be proffered to them, of course he is indif-
ferent - So they "wrap it up" - They "change the indorse-
ment of payment" (see abstract p. 4) "so as to show only
a payment of interest on the other two notes" - they ~~take~~ pre-
pare an indorsement laborious, excluding the idea of
a former payment of the note transferring it to Thompson
as "purchaser & assignee" - the whole language
showing a conscious doubt of the ~~for~~ validity of
transaction and an effort to make up in "words"
what lacks in "substance" - They take it to Haddock
& get his signature - Speer also renders an agreement
to "pay the note" in three years - and Thompson departs
with the supposed note of Hickox & its "incident security"
antedating intervening circumstances, because it
relates back to the date of the mortgage, & having also
Speer's addition of his personal liability to secure -
against a failure to "realize" on the supposed mortgage
note.

It is true the supposed object of the transaction (the
antedating of the lien) is not alleged in the bill or
argument. But the ingenuity of the gentleman who
so ably wove a new mortgage from the singular trans-
action in question, is powerless to suggest any explana-
tion of the resort to a transaction proceeding so unusual &

if the purpose were only
circumstances to effect a simple present lien on the
premises. ^{Druggs. R. 277} The intention we suggest is the only one which
harmonizes with the acts, words, circumstances of the
parties. If that were the intention can the Court
pronounce it a lawful one? Could the object they
sought be thus attained?—

The Court cannot presume fraud ^{or illegality} but when the facts
warrant it, the Court cannot ignore it. It can not hold,
with the argument of Piff that since parties are "pre-
sumed to know the law", they must also be presumed never
to have intended to violate it. Nor can ~~the~~ ^{it} consider, as
they argue that ^{because} "the statute" must be explained before
the note can be enforced against ~~the~~ ^{as fraud is involved in the transaction} ~~the~~ ^{the} ~~note~~ ^{it} would be
a new head of Criminal law, that a forger might defend
upon the ground that the forging was badly done. Nor
could the Court regard, as the gentleman substantially
argue, the repentant explanations of the criminal, after
he is caught, that he did not intend to commit a
fraud, or prosecute the note, although he has indorsed
and circulated it as valid. Nor resort to fine spun
theories, or fanciful interpretations, to escape the in-
evitable Conclusion resulting from the facts.

If a Criminal Court, when all intentions
are in favorem vitae, could not relieve the parties
on their unexplained facts from the imputation of
fraud, shall this Court, in a Civil Case be more
lenient—

XVI

On the whole case therefore, we affirm.

1. The Plaintiff has no lien under the note of Hickox, & the mortgage attendant, because it is dead & the law forbids its revival (at least without Hickox assent)
2. He has no lien under Hickox mortgage, for a new debt of Speer.
 1. Because the agreement shows no such intention
 2. Because a new debt cannot be injected into an old mortgage
 3. Because the only mortgage estate Haddock then held was for the remaining five notes, he could not enlarge or alter it
3. He has no new express mortgage lien -
 1. Haddock could create none. He was only mortgagee
 2. Speer agreed to do nothing but pay the notes -
 3. The whole transaction relates to the Hickox mortgage in express terms. Nothing else was in their minds.
4. He has no implied lien from the transaction
There is nothing left to be implied, all is expressed, and all relates to a specific lien - that, alone, the one aimed to obtain, the other to transfer - the Contract had no wider scope.
5. He has no equity to a lien - against us.
 1. He got all he bargained for - If the law renders that a nullity, he cannot blame us - "Caveat emptor"
 2. He affirms by his bill & prayer for relief that he has a lien (see Abstract p. 10) he only asks the Court to affirm its validity & grant him a sale under it.
 3. No charge of unfairness, or wrong doing

Made against us.

4. There is here no simple state of facts suspending a lien, as in case of a vendor, no imperfect mortgage to be completed, no agreement for a mortgage to be enforced. The plaintiff stands or falls on the validity of what is already done - He submits himself to the judgment of the law - by that test, upon all the facts & the contract disclosed - let the judgment be pronounced

~~Wright & Towne~~

~~Attys for Dep. in Conn~~

James B. Thomas

Of Counsel for
Dep. in Conn

⁸⁶
Supreme Court of
Illinois

Alfred G Peckham
et al

vs
Benj. F. Haddock
et al

Argument for
Defendant in Error

G W Thomas

Filed May 14. 1864
L. L. Canfield

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

ALFRED G. PECKHAM AND OTHERS, <i>Plffs in Error,</i> <i>vs.</i>	} <i>Error to Circuit Court of Cook County.</i>
BENJAMIN F. HADDUCK AND OTHERS, <i>Def's in Error.</i>	

POINTS OF PLAINTIFF IN ERROR.

I.

As the demurrer admits the bill to be true, the demurrer was wrongfully sustained, as the bill shows that it was agreed (see page 3 of Abstract) *that the loan made by Thompson to Isaac Speer should be a lien upon the premises, which agreement binds in equity.*

2 Story's Equity, Sec. 1231.

Whether we can prove that agreement in compliance with the statute, of frauds or not, does not arise in this issue.

3 Gilman, 529.

II.

Isaac Speer, by his purchase from Hickey subject to the mortgage, stood in equity as the principal debtor.

Russell *vs.* Pistor, 3 Selden, 171.
Tripp *vs.* Vincent, 3 Barb. Chy. 613.
Weiner *vs.* Heintz, 17 Illinois, 259.
Halsey *vs.* Reed, 9 Paige, 446.

And therefore anything which could be done between Hickcox, mortgagor, and Hadduck, mortgagee, as to reviving liens, could be done by Speer, the assignee of mortgagor, and Hadduck, the mortgagee; *the interest being in them alone, they could effect it as they pleased.*

In Tillson *vs.* Moulton, 23 Illinois, at p. 657, the court say :

"But if this be not so, equity regards *substance rather than form*, and the substance of this transaction was, if complainant would secure the payment to Marston and save the land from the deed of trust, he should *be made secure by the land*. Tillson was dealing with a fund in which he had an interest, and had a perfect right to pledge it for any legitimate purpose. As it does not affect Moulton's interest injuriously, he has no right to complain. Tillson having, in good faith and for a most meritorious purpose, *undertaken to pledge this fund, a court of equity, disregarding the form in which it has been done, will enforce the lien so created.*"

See Tieman v. Poor 1 Gill of J. 216. - 27-8-9-30

III.

The lien or charge upon the land of the note had never been extinguished. It is true, Hickcox's personal liability was gone, and that Speer could not use it to the prejudice of Hadduck, but the extinguishment or merger of the lien or charge depended on Speer's election.

James vs. Morey, 2 Cowen, 246, 287, 305 to 309.

And he might take time to make the election. The transfer to Thompson is evidence that he elected to have no extinguishment or merger.

Same case.

Speer had the power to transfer the note for the purpose of securing Thompson (subject to the paramount lien of Hadduck for the other two notes) by a charge upon the land, and the transfer had that effect *under and by virtue of the mortgage itself*, without looking to the equities growing out of the acts of the parties, to support the lien or charge.

IV.

The legal estate was in Hadduck, as trustee, (after providing for his own security,) for Speer. "It is true that in discussions in courts of equity a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as

As to legal estate, especially
after Condition broken, which
is this case, being in Mortgage
See Kortright v. Cadz 21 N.Y. 343
Carroll v. Ballance 26 Ill. 9.

In New York now, a Mortgage is
reduced to a mere lien, defeated
by an unaccepted tender after
Condition broken -

Kortright v. Cadz 21 N.Y. 343

And this destroys the Case of
Stoddard v. Hart 23 N.Y. 556 cited
by Deft. as authority with us on
this question -

We ask the Court to bear
in mind that the statement
by Deft. in their brief, that the
note in controversy, was paid at
maturity is an error

See Abstract pp. 2. 3.

It was due May 10. 1856
and was paid June 7. 1856

security for the debt. This must be admitted to be true at law; and it is equally true in equity; for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a *trust estate*, and, according to the intention of the parties, as a qualified estate and security. When the debt is discharged there is a *resulting* trust for the mortgagor. It is therefore only *in a loose and general sense that it is sometimes called a lien, and then only in by way of contrast* to an estate absolute and indefeasible."

Conard *vs.* The Atlantic Ins. Co., 1 Peters, 441.

This trust then, the creature only of a court of equity, was what the parties were dealing with—a trust resulting to Speer—from the fact that there was a mortgage of which he had paid a portion; that fact operating upon Haddock's legal estate; which trust Speer assigned to Thompson as security by transferring to him the evidence of its existence and agreeing that he should have the benefit of the "incident security by trust deed or mortgage of Hickcox, the maker." See terms of transfer.

V.

An assignment of a paid mortgage as a security for a new loan is good, and revives the lien as between the parties to the transaction, though not as against third persons whose rights have intervened.

Purser *vs.* Anderson, 4 Edw's Chy. 17.
Bolles *vs.* Wade, 3 Green's Chy. 458.
De Cottes *vs.* Jeffers, 7 Florida, 284.
Beasley (N. J.) R. 575-23-4-540

Robinson v. Urquhart

It is only when the rights of third persons intervene that the security is defeated.

James *vs.* Johnson, 6 John. chy. 447.
Marwin *vs.* Vedder, 5 Cowen, 675.
Huginin *vs.* Starkweather, 5 Gil. 492.
Bonham *vs.* Galloway, 13 Illinois, 68.

Even the mortgagor himself, compelled to pay the debt after he has sold land subject to the mortgage, may foreclose.

Halsey *vs.* Reed, 9 Paige, 446.
Marsh *vs.* Pike, 10 do. 595.

May maintain a writ of entry in such case.

Kinnear

~~Kinnear~~ *vs.* Lowell, 34 Maine, 299

The Case of *Morrill v. Chase*
3 Allen 339 was at law -
The note was there paid at
or before its maturity - and
the Court held that the
subsequent assignment
could not revert the legal
title, which had been once
divested by a literal performance
of the Condition according
to its terms -

Why then should Deft
call that a case "identical
with the one at bar?"

V I .

Speer and Haddock *are estopped* to deny that that mortgage is in force, and so are all claiming under them not being *bona fide* purchasers without notice.

Wyncoop *vs.* Cowing, 21 Ills. 570, 584.
 Loomis *vs.* Stuyvesant, 10 Paige Ch'y. 490.
 Central B'k *vs.* Curtiss, 26 Conn. 533.
 Fay *vs.* Valentine, 12 Pick. 40.
 Trull *vs.* Skinner, 17 do 213, 215.
 Paul *vs.* Meek, 2 Young & J. 216.
 Bursley *vs.* Hamilton, 15 Pick. 40.
 Anthony *vs.* Ray, 28 Mo. 109, 113.
 Baker *vs.* Pratt, 15 Ills. 568.
 Wiles *vs.* Woodson, 5 Exchequer R 557.

Deception, concealment, a false belief in an assumed state of facts, are not essential to an *estoppel in pais* in all the above, (except the first.) The real facts which the parties were estopped to rely upon, were known.

In the case of Frost *vs.* Saratoga, M. I. Co., 5 Denio 154, defendant was estopped to rely upon a breach of warranty *known to both parties*, by making and collecting assessments on the premium note.

To the same effect are N. A. Building Ass'n. *vs.* Sutton, 35 Penn. 463.
 And the Howard Ins. Co. *vs.* Cornick, 24 Ills. 455.
 Redfield *vs.* Haight, 27 Conn. 31.
 Lawrence *vs.* McCalmont, 2 How'd. 452.
 Abrams *vs.* Pomeroy, 13 Ill. 133, 137-8.

The obligor of a bond, made for a specific purpose appearing on the face of the bond, who consents to an assignment of it as a security for a loan, is estopped from the defence he otherwise would have.

Lamoreux *vs.* Vischer, 2 Comstock 278.
 See also 15 New York, R. 473 and 575.
 7 Paige, 373; 7 Gray, 566.
 26 Wend 43; 27 Maine, 225.

A debtor having given bond with sureties for the prison liberties, which was *void in law and the facts all known*, who, with the consent and knowledge of one of his sureties, claims and exercises the right of being on the liberties by virtue of such bond, both he and that surety are estopped to allege its validity, though, as to the other surety, it is void, and this upon the ground "that to constitute such an estoppel, a party must have designedly made an admission inconsistent with the defence or claim which he proposes to set up, and that another party has, with his knowledge, so acted on that admission that he will be injured by allowing the admission to be disproved."

Hawes *vs.* Marchant, 1 Curtis' C. C. 144,

13 Wend 186

And "The doctrine of *estoppel in pais* is one which, so far at least as that term is concerned, has grown up chiefly within the last few years; but it is and always was a familiar principle in the law of contracts. It lies at the foundation of morals, and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon."

Strong *vs.* Ellsworth, 26 Vermont, 373.

So in valued policy where property is overvalued, there, being no fraud or concealment, insurers are estopped to inquire into the value on the trial.

Alsop *vs.* Conn. Ins. Co., Sumner, 451.
Borden *vs.* Hingham Ins. Co. 18 Pick. 523.

The vendor by deed is not estopped when he sues for the consideration money acknowledged in deed to be paid, though the recital does estop him to allege the invalidity of the deed. See

Taggart *vs.* Stanberg, 2 McLean, 543.
1 Philips Ev. Co. C & H. notes pt. 1, p. 384.
Wilkinson *vs.* Scott, 17 Mass. 249.

The recital in an unsealed instrument is as effectual as one by deed, for "they must be taken to be true, else the agreement would not have been executed."

21 Illinois, 584-

See *Dyer vs. Rich*, 1 Metcalf, 180, in which it was held, in an action of assumpsit upon a writing, reciting that plaintiff at the instance and request of defendant, "by her deed bearing even date herewith, sold, &c., as the consideration of the premises, the defendant was estopped, though in fact the deed was not made nor was the grantee a corporation.

Not necessary in this State that estoppel be pleaded.

15 Ills. 453, 460.

The estoppel is not against showing the facts, but the party is not allowed "to set up the facts as a defence."

5 Denio, 155.

V I I .

If only the papers that the parties executed are looked at, no question could arise. They show a valid, legal mortgage, properly transferred. It is only the extraneous facts which create the discussion. The intention of the parties is clear.

The court is not asked to give to the contract of the parties an effect contrary to their written contract, by proof of an intention, made out by extrinsic evidence; but the defence would have the court give an effect (or no effect) to the written contract, contrary to its tenor, and contrary to the actual intention, because of extrinsic facts.

The declared intention of the parties is, to *sell, assign, and transfer* the note and "*the incident security, by trust deed or mortgage,*" for what purpose? To secure the payment of \$6,671.87 (the amount of principal and interest up to and including that date,) *which Speer agrees to pay*; not according to the tenor and effect of the note, for it was past due and paid, *but in three years* from that date, with 10 per cent. interest, (the legal interest for loaned money.)

Speer undertakes, and makes, *not by the note*, but by the *endorsement*, a *new agreement*, as to the amount, the time, the interest, and the party to whom the payment was to be made. He creates an obligation for himself. He was not bound, at that time, to pay the note or any money. He, in consideration of the loan, we allege, promises to pay, and assumes to pay us the amount of that note, and one and a half month's interest (at 6 per cent.) from the time it became due, making in all \$6,671.87 in three years, with *ten per cent interest*. *There is sufficient in the endorsement, if the note was blotted out, to fix this liability upon Speer.*

Haddock and Speer then agree that the incident security, of trust deed or mortgage, should be by Haddock transferred to Thompson, and it was so transferred by Haddock. There was, in any view of the case, some interest in the property in Haddock. If, as we contend, the entire legal estate of the land was in Haddock as mortgagee, he transferred *it all* to Thompson, that he, Thompson, might be secured the payment of the \$6,671.87 by Speer in three years with 10 per cent. interest. If the payment of the note extinguished the estate of Haddock as mortgagee, so far as that note was concerned, *what was to prevent* Haddock (who held an estate as mortgage to secure the two other notes) and Speer agreeing to, and having Haddock transfer *that estate*, which he held to Thompson, as security for the *then undertaking* of Speer, with a proviso that Thompson should "not proceed *thereon* until I (Haddock) shall have had time and opportunity to collect my (Haddock's) said two next notes included in *same security*?"

Whatever estate Haddock had was clearly transferred to Thompson. Haddock assigns and transfers the incident security, by trust deed or mortgage, and provides in the transfer "that (Thompson) shall not proceed *thereon*" until he has had time and opportunity to collect his two notes "*included in same security* by trust deed or mortgage." It was clearly the intent of the parties, and the effect of the endorsement

was, to transfer the security—the trust deed or mortgage—and whatever estate Hadduck had in the land, to Thompson, to secure the performance by Speer, of his *then* promise to pay \$6,671.87 in three years; but with the further agreement, that Thompson should hold the mortgage and estate of Hadduck, transferred to him in trust, first, as security that Hadduck should be paid his two notes; secondly, as security for Speer's undertaking then entered into; and lastly, for Speer's benefit, when the two notes and \$6,671.87 were paid, to be conveyed or released to Speer.

The endorsement, *of itself*, contains an agreement to pay a debt, and an assignment of the trust deed or mortgage security, (which was originally given to secure the three notes,) as a security for the payment of that debt.

VIII.

The court will give to what the parties have done the effect of an equitable mortgage.

“Besides those mortgages which are created by formal instruments, and operate at law as well as in equity, there are others called *equitable*, which arise from some writing showing an intention of making a security;” “and any writing from which such an intention can be gathered will be sufficient to give the creditor a *right in equity* to a proper assurance by way of security, or a sale, or *foreclosure*.”

Roberts Chy. p. 170. 71 Law Library.

An equitable mortgage of land takes place when the mortgagor does not regularly convey the land, but *does some act* by which he manifests his *determination* to bind the same for the security of a debt he owes.

1 Bouvier's Inst. p. 349.

Equitable mortgages “are simply securities by which no legal interest in the property mortgaged passes to the creditor, and include not only mortgages of the equity of redemption, but also transactions in which property, or the evidences of property, come into the hands of the creditor upon a written or verbal, express or implied agreement that such property shall be answerable for the debt, as well as those transactions in which *the intention* or duty of creating a charge on property is held to arise from an express or implied contract to render that property liable.

Fisher on Mortgages, p. 51. 69 Law Library.

“Thus, a letter referring to inclosed particulars of title deeds, and alleging that these deeds were deposited to secure a debt, was held to

The Case of Tieman v. Poor
1 Gill & J. 216-27-8-9-30 is,
as we think, applicable in
principle to this. Real property
was vested in Trustees for the
Wife of Poor, subject to her control
& disposition. Tieman had
distained upon personal
property of Poor, for house rent
& Poor & Wife, to release from
this distress, mortgaged her
land to secure the debt,
without the aid of the Trustees
in whom was the legal title,
& without any privy examination
of her as the statute required.

The Court held that a valid
lien on her property was
thereby created —

create an equitable charge upon the estate comprised in the deeds, although, upon after inspection, nothing appeared to have been deposited but an *old paid off mortgage*."

Same, p. 54, citing 3 Mont. Dea. and De Gox, 129

There need not be a deposit of deeds to make an equitable mortgage.

Edwards vs. Moore, 38 E. C. L. 623.

In which last case an agreement by a party to collect and pay over certain rents of his own on a bill of exchange, was held to be an equitable mortgage.

An equitable mortgage "is a lien arising from the implied agreement of the parties, or the justice of the case."

Hilliard on Mortgage, p. 451.

In *Flagg vs. Maner*, 2 Sumner C. R. 527, the court, after remarking that the question in that case "must be examined with the enlarged views which are embraced by courts of equity in recognizing what may be called equitable mortgages," remark: "A court of law may be compelled, in many cases, to say that there is no mortgage, when a court of equity would not hesitate a moment in pronouncing that there is an equitable mortgage;" and cite

Kelleran vs. Brown, 4 Mass. 414.

In *Menude vs. Delaire*, 2 Dessau. 567, the court held that a paper which declared that a house and plantation in town "was mortgaged (to A.) in preference to all other creditors," was good as an equitable mortgage, and say "this court, which regards the substance only and not forms and circumstances, will give it all the efficacy of a mortgage."

See, also, where an informal instrument was held a mortgage.

3 Dessau. R. 74.

1 McCord, 119 and 134.

Where a warrant of attorney was given to confess a judgment on a feigned demise in ejectment (which is a useless instrument.—3 John. R. 270,) it was held to be a defective security, binding in equity.

Dale vs. Southwick, 2 Vernon, 151.

A letter was sent agreeing to make a mortgage—held an equitable mortgage from date of the letter.

3 Vesey, jr. 576, 582.

The following cases are also cited to the effect, where the intention appears to be to bind the property the court will give effect to the instrument as an equitable mortgage:

Elliott vs. Pell, 1 Paige Chy. 253.

16 Beavan, 259.

11 Vesey, jr. 397.

1 Vesey, jr. 162.

35 E. L. and E. 611.

9 Peters, 204.

In *Abbott v. Goffey / Mann* (Mich)
K. 178, a case upon an unsealed
instrument, where the Statute
requires a deed, signed, sealed and
attested by two witnesses, but intended
as a mortgage, the Court say p. 181
"The agreement in writing in this
Case is express in its terms; the
intention of the parties is most
manifest. The Contract is not to be
performed, but is executed. The meaning
and intention was to create a lien on
the land to secure the payment of a
pre-existing debt. The transaction
is not obnoxious to the objection that
parol evidence is necessary to establish
the claim, for the instrument itself
states its object. And however
much the policy of enforcing,
as an equitable mortgage, the
deposit of title deeds, with a parol
agreement, to perfect a legal
security, may have been questioned,
here no objection of that character
exists. The intention is evident,
and all the Court have to do
is to supply the legal deficiencies.

IX.

Nor is the objection that the parties intended to revive a mortgage lien a valid one against construing the transaction to be an equitable mortgage, if it would otherwise bear that construction.

"Where an agreement contains provisions which, by reason of some technical principle of law, cannot be carried into effect according to its literal import, it is the duty of a court of equity, for the sake of the intent, to give it that construction which the rules of law will tolerate, and the intention of the parties, to be collected from the whole instrument, will justify."

Daniels vs. Taggart, 1 Gill. and J. 345.

See, also, that a construction not according to literal import, but according to the object of the parties, will be adopted.

Russel vs. Coffin, 8 Pick. 143.
Story Contracts, sec. 638
Ford vs. Beech, 63, E. C. L. 852, 64.
Bradley vs. Fuller, 23 Pick. 1.
Hayden vs. Smith, 12 Met. 511.
Archibald vs. Thomas, 3 Cowen, 283.
Huginin vs. Starkweather, 5 Gilman, 492.

How to arrive at the intent of the parties
Coffing v. Taylor 16 Ill 467.
Stout v. Whitney X. 12 Ill 218

It is respectfully submitted, that the endorsement on the note shows an indebtedness of Speer, and an agreement to pay in 3 years, and that it was the manifest intention and determination (from the written endorsement) to make the same property liable to pay, and bind the same property which was bound by the mortgage given to secure said three notes. It would certainly be competent to show by parol, if necessary, what mortgage was originally given to secure the three notes. It is not necessary to consider the paid note as revived, or in existence, to be enabled to hold this an equitable mortgage. The endorsement on the back of the note contains within itself all the elements of an equitable mortgage, a debt, a promise to pay, and a clear intention to bind the land, and it is only necessary to refer to the note and mortgage mentioned in the endorsement, to see what land it was intended should be bound for and charged with the debt.

Hodges v. Horsfall 1 Russ & M. 116
as to showing identity of Mortgage
referred to by parol, if it were
necessary

The defence set up no equities as against this claim ; they rely upon a supposed defect in the endorsement. No one is injured by carrying in- to effect the intention of the parties to bind the property, The bill alleges (which is confessed by the demurrer) that Hadduck's two notes are paid, and upon the face of the bill, only Speer and his general assignee have any interest in resisting this bill. The bill avers that there was no intention to work a fraud on Hickcox, and no such thing was attempted. None of the parties supposed that Hickcox could be made liable; but Speer, in the endorsement, assumes an original liability.

Hadduck and Speer *held all the interest there was in the land, and had the power to make a charge upon the land ; they acted for a valuable consideration, a loan was made, and they intended to, and did charge, or attempt to charge, the land with the repayment of the money, and equity will give effect to that intention by giving an effect to the endorsement as a charge upon the land to the extent that the parties signing it had the power to bind the land at the time it was executed.*

See 2 Ball & Beattie, p. 40 and note.

BARKER & TULEY,
Atty's for Plaintiff in Error.

No 86

Peckham et al

^(vs)
Haddock et al

Brief Pff in Error

Baker & Tuley
Pff attys

"Chicago Post" Print.

BENJAMIN F. HADDOCK, ET AL.

) *cuit Court*

BRIEF FOR HADDOCK.

The plaintiff in error filed his bill in Chancery below, to which the defendants demurred for want of equity, and the demur was sustained. Said mortgage or lien is said to exist from these circumstances. One Hickox made a mortgage to the defendant Haddock to secure three notes of \$6,250 each, payable in one, two and three years, with annual interest, and dated May 10th, 1855. Subsequently Hickox conveyed the property to one Isaac Speer, subject to this mortgage. Upon

Filed Apr 26 1864
W. L. Haddock

in London

Benjamin F. Haddock and said Sp...

ISAAC SPEER."

1871.3 Sept. 2nd
1871.3 Sept. 2nd

cover. This argument is made without the opportunity of seeing the abstract of the case or the points filed in this court, and should any further reference to bill or facts be necessary we will refer to the same in an additional brief.

There are a few familiar principles clearly settled by authority, which will prevent the plaintiff's recovery.

First. A mortgage is but an incident; the debt is the principal, the payment of the debt is the extinguishment of the mortgage: 23 Ill. R. 33; 16 Ill. R. 472; 1 Ill. R. 231; 1 Hild. Mortgage Chapt. 11, page 113; 20 Ill. R. 169.

Second. A transfer of the debt without any reference to the mortgage, is an assignment of the mortgage which follows the debt wherever it goes: 20 Ill. R. 169; 23 Ill. R. 33; 4 John R. 169.

Third. A formal release or discharge of record is not necessary to release or discharge the mortgage, but is only evidence of such release or discharge: 20 Ill. R. 169; 3d Metc. R. 552; 2d Allen R. 118; 3 Allen R. 340.

Fourth. A release of a debt secured by a mortgage need not be under seal: 17 Ill. R. 33.

Fifth. The legal holder of the mortgage has three remedies which may all progress at the same time, namely: an action on the note; bill or proceeding to foreclose; and, an action of ejectment; and proof of payment of the note will defeat either.

Sixth. In prosecuting either you must produce the indebtedness secured by the mortgage.

Seventh. Our Supreme Court reversed a decree of foreclosure in equity because the indebtedness was not proved or accounted for before taking the decree: 20 Ill. R. 169.

Eighth. In *Morrill vs. Chase*, 3d Allen R. 339, a case identical with the one at bar, when, after the note had been paid, it was agreed that it should be kept alive—the Court uses this language: "But the difficulty of supporting such an agreement is

"this, that a conveyance of land in mortgage, is a conveyance by
 "a deed defeasible on a condition subsequent. By the perform-
 "ance of the condition, the title of the mortgage is defeated and
 "the mortgagor is in his former estate. The condition is saved
 "*and no release or discharge of the mortgage is necessary.*
 "Holman vs. Baily, 3 Mete. R. 55; 2 Allen R. 118. A re-issue
 "of the note for a valuable consideration could not afterwards
 "convey a title to the land in mortgage by deed, and the fact
 "that the parties stipulate that the mortgage continue in force
 "can not change the legal title." This case we have introduced
 somewhat out of its place in our argument, but as it fully sustains
 our defence, we shall again refer to it.

Ninth. The force of these authorities are felt by the other side,
 and they claim that inasmuch as Speer had acquired the fee of
 the land a different rule exists.

Let us for a moment inquire into Hickox's position; it is his
 note, and his mortgage:

If the land does not pay the debt he is primarily liable to make
 up the deficiency. He could be sued upon the note and can only
 be discharged by the payment of the debt.

If he pays it after having transferred the land he can in equity
 be substituted to the security of the mortgage: 1 Sand. R. 210;
 10 Paige R. 595.

Tenth. As to him it is conceded that the debt and mortgage
 are not restored, for he has never consented to their restoration.
 We say that this admission ends the case, for, as we shall show
 hereafter, the transaction was an effort to restore the Hickox
 mortgage and liability.

Eleventh. It follows from these considerations that the mort-
 gage being extinguished, can only be restored by what will make
 a valid new mortgage: 2 Seld. R. 449 and 147; 3 Allen R. 340.

In the first of these cases, Mead vs. York, the Court say that
 "the debt is the principal thing, the mortgage the shadow, when
 "the first is destroyed by payment, the latter vanishes.

"It can not be the incident of another principal or the shadow of another substance."

This language is very emphatic, but further on the Court say :

"As between *mortgagor* and mortgagee, it is possible the Courts would allow the parties to keep alive the mortgage by virtue of a subsequent agreement as security for other objects than those contemplated by the parties at the time of its creation, but not when the right of parties intervene. *My impression is that it could not be done in any case.*" This strong language of the Judge is fully sustained in a later case, *where no rights of other parties intervened*, and where every equity was in favor of upholding the lien ; *Stoddard vs. Hart*, 23d New York 556. In this case a mortgage was made to secure a bond of \$200, at the same time it was agreed by parol that if the party wished a further advance of \$200 he could have it, the mortgage should be security for the further advance. The additional \$200 was advanced and added to the bond. Subsequently the mortgager sold the land to a purchaser who knew all the facts, and it was held that there was no lien. We ask the Court carefully to read this case. So the case in 3d Allen 339, there was no intervening parties, and both cases distinctly settle the law, as we claim it. So *exparte Hooker* 1 Merville R. 7, is strictly in point, there the bankrupt made the agreement and the suit was against his assignees. The case has a further significance from the fact that the counsel sought to apply the doctrine of equitable mortgage. The Court say "that the doctrine of equitable mortgage has been too long established to be now disputed, but it may be said *it ought never to have been established*. I am still more dissatisfied with the principle upon which I have acted of extending the original doctrine so as to make the deposit a security for subsequent advances. *At all events this doctrine is not to be further enlarged,*" and 19 Vesey 478, hereinafter cited, is still stronger. In this country the doctrine of a mortgage by a deposit of title deeds has never been sustained.

In the case in 23d of New York and 3d of Allen, the doctrine of a mistake of law as hereinafter claimed by us is recognized and

admitted as conclusive against the complainants. In this connection it is proper to refer to the position taken upon the other side, that in this State the legal title is in the mortgagee even before default. We do not see that if this was so, that it could make any difference, but we do not understand such to be the law in this State. It is true that in 26 Ill. R. 17, it is said that before condition broken the mortgagee can enter, and cites as so holding, 23d Ill. R. 33; 3 Scam. R. 202.

The Court evidently meant after condition broken 3 Scam. is the case of a mechanic's lien and nothing more, and the case in the 23d Ill. R. is a proceeding in equity, and in the reasoning of the case Judge Breese says, *that after condition broken the mortgagee may bring ejectment*, so that in neither of the cases was the Court called upon to pass upon the question, and in neither of them have they so decided. On the contrary, in 25 Ill. R. 277, the Court decided (Caton, Judge) that a mortgage after condition broken, is not an outstanding title of which a stranger can take advantage so as to defeat a recovery in ejectment by the mortgagee. Nor can the mortgagee make, after he has entered into possession, new improvements, and get pay for them, 15 Ill. R. 381, so that even after breach and while in possession the mortgagee is not an owner.

Now let us see what the parties intended to do. They intended to restore the old mortgage and Hickox's note. What they intended to do can only be arrived at by the *writing itself*, which is the endorsement upon the back of the note. A court of equity will never make contracts for parties, but will only construe and enforce, if capable of enforcement, those which the parties themselves made. 24 Ill. R. 532.

We say first there is no ambiguity in the words of the endorsement, it must therefore be construed in the express words. Broom's legal maxims, 478, 430; 7 Clark and Fin. R. 815; 6 Tenn. R. 512, 519; 5 Scott R. 1037. *Shaw vs. Wilson*, 3 Taunt. R. 147. Nor can the Court make ambiguities to give the parties rights: Broom 478.

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Greenleaf C., 2 vol. p. 296: "Nor is any evidence de hors the
"instrument admissible for the purpose of arriving at the parties
"alleged intention." "Nor can the Court exclude any word if
"it will make sense with the words in it:" 12 Shep. R. 57, 60. 51

When the words clearly intimates the intention of the parties,
that intention will stand, though it gives the parties no rights:
34 Barb. R. 543; and the Court must take the words as they
find them: Broom 430; 7 Clark and Fin. 815; 24 Ill. R. 500.

Nor can the Court extend words by intendments. 1 East
R., 428.

This rule of law is recognized in equity. Spence, Eq., 546, 11
Sim. R., 525.

These principles result from the maxim that the courts do not
make contracts for parties.

Bearing in mind these landmarks, let us construe the endorse-
ment on the note. We say it is an effort, and nothing else, to
restore the old note and mortgage, for

First.—It is assignment of the note. Why an assignment of
the note if that is not the thing transferred? What is there of a
note but the liability of the maker? The obligation of Hickox
to pay a certain sum of money. Mark also it is "*the within
note.*"

Second. It assigns the collateral security that belongs to the
note.

The words are "*including the incidental security by trust deed
or mortgage of Hickox the maker.*" This settles that it is the
note—that it is Hickox's note, and Hickox's mortgage.

In this connexion let us say they do not stipulate or say that
the transaction gives a lien, or that these acts restore the mort-
gage; they simply give the incidental security *if there is any.*

Not pretending to determine whether there is any or not.

Third. It does not pretend to create a new lien or mortgage.

Fourth. Nor to decide that there is a lien.

Fifth. If it is not to revivify the old mortgage and note, why provide for the two remaining notes? They certainly would be ahead of a new mortgage. Under our laws the note first due is the first lien. 23 Illinois R., 35. 13 Ohio R., 240, and the note in question which had been paid was the first one due, and being an effort to restore took precedence unless stipulated otherwise.

Sixth. If they intended to create a new mortgage or lien, why not say so, instead of using language, to say the least, calculated to convey a different idea.

Seventh. Why endorse the agreement on the back of the old note? To this question there is but one answer, and that is the one we have given.

Eighth. Why refer to the old mortgage if this was not so?

Ninth. Why erase the payment endorsed on the old note? Men's actions mean something.

Tenth. The construction contended for by us gives sense and meaning to every word of the instrument; any other ignores part of the words, and gives a forced sense to others.

Our construction is in accordance with what we believe to be the intention of the parties, and yet we are asked in as much as that intention was illegal, or not, according to law, to say they intended to do something else, and to torture the words into meaning what no one believes they intended they should mean.

In other words we are to ignore the language and to make a new contract for the parties, and that in a case where there is no allegation in the *bill that the written instrument fails to carry out the intention of the parties, or that there was any mistake in the matter.*

Twelfth. But it is said that this deprives the complainants of a lien.

Can the Court for that reason make a new contract? or stultify the meaning of the one made by the parties themselves? or make an ambiguity? The authorities cited by us say they cannot.

We must therefore conclude the parties undertook to restore the old mortgage with all its incidents.

This they cannot do; they have mistaken the law, and for mistakes of law the courts will not afford relief. 2 Mason R., 366. 1 Peters' R., 9. 2 John, R., 61. 10 Barb. R., 15. 1 Gilm. R., 107. 13 Ill. R., 397. 18 Ill. R., 492. 16 Ill. R., 457. 3 Gilm. R., 107. 1 Gilm. R., 606. 23 New York, 556. 3 Allen, 340.

The principle here contended for and its application to the case at bar is recognixed in the 23d of New York and 3d of Allen, 340, cited by us above. The case in 3d Mason is the leading case upon this subject, and contains all the elements of this case. There they claimed: 1st. Hardship. 2d. Mistake. 3d. Irremediless. 4th. That by what they did both parties understood there was a lien, and undertook to create a lien, and that, therefore the Court should carry out that intention, and the question, like the one before us, was raised on demurrer.

That the Court may see the similarity of the allegations, we cite (342 p., 2 Mason's R. 9,) "*and that Rousaminire executed both powers with the belief and intention that they should give the plaintiff as full and perfect security as he could have by mortgage or bill of sale of the property, and the plaintiff so received it.*"

By demurring to the bill this was admitted. A very strong case is 18 Ill. R., 492, where one made a deed and another received it, intending it to be a quit claim deed, and was so informed by the justice drawing it. It was held equity could not relieve.

The reason of this rule is that, as Story says: "Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." 2 Mason R., 9.

The parties are not shown, or alleged to have been mistaken in fact, or in the words used, or in what they did, but were mistaken in the law, in the legal consequences of what they did. "This," says Skinner, "is a mistake of law for which equity affords no relief." 18 Ill. R., 492.

But it is contended that the defendants are estopped from saying that the mortgage has been paid.

The doctrine of estoppel has no application. The facts were known to both parties. They had equal means of knowledge. There is no claim in the bill that the defendants deceived the complainants, or that the complainants were in any manner deceived.

The rule of estoppel is either misrepresentation or willful silence by one having knowledge of the facts; or, secondly, that the actor, having no means of knowledge, was, by the conduct of the other induced to do what he otherwise would not have done. 10 Bar. R., 527. 7 Barb. Sup. C. R., 407. "If the truth is known to both parties, or they had equal means of knowledge, there can be no estoppel." 31 Penn. S. R., 331, and the cases there cited. 41 Maine, 227. 26 Ala. R., 612. 15 Penn S. R. 385. 17 Conn. R., 345, 355. 28 Maine R., 525. 2 Met. R., 423. 9 Ind., R., 323. 26 Ala. R., 612. 1 Seld. R., 395. 6 Seld. R., 402.

All estoppels are of two kinds, by *pais* or by deed. An estoppel by deed only exists in the case of a sealed instrument, and as there is no seal in this case this is an estoppel in *pais*, or *equitable* estoppel. 11 Bar. R., 530. In 6 Seld. R., 357, say the Court: "Equitable estoppels never take place unless the party seeking to avail himself of it has been *actually misled*." This doctrine thus laid down is clearly illustrated and enforced in 7 Bing. R., 601 (20 Engl. C. L., 269). In this case the defendant was sued on a warranty of a lease in these words: "*I warrant the horse sound of wind and limb at this time*." The horse at the time of the sale had a splint and was broken down in training, and this was talked over at the time of the sale. "Held

that the defects apparent at the time of the warranty not included in it." Now if this doctrine of estoppel applied, the defendant would have been estopped from showing that the buyer knew of the defects, and that what is known to both parties could not be either deceit or fraud. Any other doctrine would be unjust and unequitable. 2 Ohio S. R., 551, and the Judge in 11 Bar. R., 531, sums up the law in these words: "It is evident there can be no such fraud (which works an estoppel in pais) where the purchaser or other actor was, or ought to have been, acquainted with the subject of his action, or had the means of knowledge and neglected to avail himself of them." So. 17, S. & R., 383.

The case is still stronger put in 31 Penn. R., 335. "If, therefore, (says the Court) the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel." So. 1, Seld. R., 394. 12 Barb. R., 128. 15 Ala. R., 91. 14 Mo. R., 482. 20 Conn. R., 98 and 563. 7. Barb., 644 and 407. 3 Harrington R., 90. 6 Ad. & Ellis' R., 469. 10 Ad. & Ellis' R., 90. 26 Ala. R., 612. 41 Maine R., 221. 17 Conn. R., 345, 355. 28 Maine R., 535. 9 Ind. R., 323. 2 Metcalf R., 423. 6 Cush. R., 210.

So far as I can discover there is nothing in any of the authorities cited by the complainant that conflicts with this principle.

In this case, even if the doctrine of estoppel is applicable, there is nothing in the contract by which the parties can be estopped.

They do not agree that the mortgage is a security; they assign whatever there is of it, implying in the very words, a doubt whether there is any security. It may be likened to the case of a quit-claim deed which never feeds an estoppel.

But the facts appear from the complainant's own bill, if an estoppel was applicable, which we deny; he has waived it and can not claim its benefit: 4 Dana. R. 251; 2 Lord. Ray R. 1553; 1 Term. R.; 2 A. I. Mar. R. 143; 3 Dana R. 103.

Estoppels never apply to conclusions of law: 2 Comt. R. 19.

But it is contended that the Court will treat it as an equitable lien.

There is no allegation of any mistake in the paper, or that it

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failed to carry out the intention of the parties, nor does the bill seek in any manner to reofrm the contract.

It is, therefore, an executed contract, and no case can be found in America where there is an executed contract, that the Court has held it to mean anything else, or made out of it a different contract or lien than the parties themselves made, and the reason of this rule is that the Court can not make contracts for parties. 24 Ill. R. 523.

The case of the deposit of title-deeds is a purely English doctrine; has never been engrafted upon the American Jurisprudence, and the ground of the relief is that it is an agreement to make a mortgage.

And in regard to this class of cases, Greenleaf in his notes to Cruise (2 Greenl. C., 69, vol. 2., page 85,) says: "No case can be found in America where deposit of title-deeds held a lien;" and Lord Eldon says in addition to the case cited by us from Merriville Reports, in 19 Vesey R. 478, "that the doctrine of deposit of title-deeds should never have been decided to be a mortgage;" and he refused when such a deposit had been made, and they subsequently agreed that they might be held for future advances to extend the lien beyond the original loan.

The plaintiffs in error were guilty of fraud in erasing the evidence of payment.

A court will never afford relief to one of a party to a fraud.

The defendants represent the general creditors of Isaac Speer, and have superior equities to plaintiff. 3 Mason R. 307.

In conclusion we say that the plaintiff's having set forth a written contract, the Court can not regard anything else. 2 Gilm. R. 268 is conclusive upon this point. Having alleged one agreement the balance is to be excluded. That agreement we have shown to be illegal.

We entered this case believing that the judgment must be affirmed. Our argument, as we before remarked, is made without seeing the argument upon the other side, taking the points as they were made below.

WAITE & TOWNÉ,

Atty's for Appellee.

86

68

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1864.

ALFRED G. PECKHAM *et al.*

vs.

BENJAMIN F. HADDUCK *et al.*

ARGUMENT FOR PLAINTIFF IN ERROR.

BY

M. F. TULEY.

*Filed May 13. 1864.
L. Selous
OK.*

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

A P R I L T E R M , A . D . 1 8 6 4 .

ALFRED G. PECKHAM <i>et al.</i>	}	<i>Writ of Error.</i>
<i>vs.</i> BENJAMIN F. HADDUCK <i>et al.</i>		

ARGUMENT FOR PLAINTIFF IN ERROR.

IN this case the difficulty appears to be as to the construction to be given to the endorsement, and as to the intention of the parties.

“To arrive at it, we put ourselves, as well as we may, into their condition; examine their situation and circumstances; the character, condition and circumstances of the property or interests about which they contract; and so examine into the contract, its terms; and, when proper, the negotiations which led to it, and thus elicit and apprehend their true intent and meaning.”

16 Ills. p. 467, and cases cited.

Where construction is to be given to an instrument as it appears in the declaration, (in the bill in this case;) for a party should not demur, if the circumstances are improperly or imperfectly stated.

12 Illinois, 227.

The circumstances here were a mortgage of Hickcox to Hadduck, for the purchase money to secure 3 notes, due in 1, 2 and 3 years, for \$6,250 each.

Speer, before the first note became due, acquired by purchase all of Hickcox's interest in the land subject to the mortgage, and about one month after the first note became due, Speer paid it, and took, on the back of the note, a receipt for the payment of that note, and of the interest on the other two notes held by Hadduck.

He applies to Thompson for a loan, and agrees to give him security on this land.

They go to Hadduck, and then the *received payment* on the back of the note was erased, leaving the receipt so as to show payment of interest on the other two notes only. Then the following agreement was made on the back of the paid note, below the erased and altered receipt. See Abstract, p. 4.

"Received of Arch'd Thompson, as purchaser and assignee, the full amount of the within note, and interest from date, (the interest to 10th May on the other two notes being paid by I. Speer as above,) and in consideration of said purchase payment, I hereby sell, assign and transfer the within note to said Thompson, with all interest accrued or to accrue, including the incident security, by trust deed or mortgage, of Hickcox, the maker. *But it is understood that said Thompson is not to proceed thereon until I shall have had time and opportunity to collect my said two next notes included in same security by deed or mortgage.* It being understood that I. Speer, assignee of Hickcox (who also undersigns), is to have three years from date to pay this note, by his allowing or paying ten per cent. interest on the advance purchase money (amount on 10th May last, \$6,625; one and a half months more, to 25 June, is \$46,87, \$6,671 87-100), so advanced in purchase of this note by said Thompson, Chicago, June 24th, 1856.

(Signed) B. F. HADDUCK."

"And the said Speer hereby
 "agrees to pay the within note
 "and interest accrued, besides
 "ten per cent. hereafter, as
 "above.
 "Chicago, June 24, 1856.
 "(Signed) ISAAC SPEER."

The above is a true copy of the original endorsement.

What was the condition of the property? Haddock held the two notes, and a mortgage given nominally to secure the three notes. If the court should hold that a release is necessary where a note has been paid after maturity, then he held as mortgage so far as the two notes are concerned, and a naked legal estate as trustee so far as the paid note was concerned, for benefit of Speer.

Then there can be no doubt that the endorsement in such case, as both Speer and Haddock, the trustee and *cestui que trust*, joined in it, made that naked trust estate charged with the payment of the money mentioned in the endorsement.

If payment after the note became due extinguished the mortgage so far as the note was concerned, then Haddock held an estate as mortgagee for the payment of the two notes, and the remainder of the interest in the land was in Speer.

If the parties intended to extend the mortgage so held by Haddock as a security for the money, \$6.625, then *agreed to be paid by Speer* in 3 years, they could clearly do so.

There is nothing to prevent all parties in interest, if the agreement is in writing, agreeing that a mortgage given for two notes, shall be held as a mortgage for further advance then made. There can be no question, if the *agreement had been in writing* in the case of Stoddard vs. Hart, 23 New York, that the additional \$180 advanced should be secured by the mortgage, the decision would have been different, whether that written agreement was made at date of mortgage or at the date of the advance.

Is it not apparent, from the face of the endorsement, that the parties agreed that the mortgage should be security both for Haddock and for Thompson? Haddock, for his two notes to be paid first; and Thompson, for the \$6,625 which Speer then agreed to pay in three years. If this was not so, why make any endorsement? Why this provision in the endorsement?

"But it is understood that said Thompson shall not proceed thereon until I shall have had time and opportunity to collect my said next two notes included in the same security by deed or mortgage."

Thompson should not "proceed" thereon; should take no steps, not even after the three years, until Haddock had "time and opportunity" to collect his other two notes.

The Court's attention is now called to the fact that the endorsement creates a new debt from Speer to Haddock, in no way dependent on the old note or its existence, for if the note was *blotted out*, the endorsement of itself shows that "it is understood" that Speer was to have 3 years to pay \$6,671.87, with ten per cent. interest. The old note was \$6,250, and the interest 6 per cent.; the maker, Hickcox; the new obligation created by the *endorsement*, is \$6,671.87; and the interest 10 per cent.; the time when payable, 3 years from date of the endorsement; the maker is Speer.

It was this new debt which it was intended to secure the payment of, and not the old debt—the new debt of Speer, and not the old debt of Hickcox. It was money then loaned by Haddock, and not the purchase money originally specified in the note, which was the occasion for the writing of the endorsement and the creating of a new obligation and a new security.

If the parties intended to revive the old note and its lien on the land, and nothing more, why did they not deliver the note with the receipt of payment erased? Why make the endorsement at all? If the old note and the lien for its payment could not be revived, they should have been presumed to have known the law. The parties evidently considered that something more was needed to give Thompson a *security* for the money then loaned, and that it should be made to appear what interest Speer had in the land. They evidently knew that reviving the note as to Hickcox (if it could be done), would not make Speer liable, and would not make the

land liable; because Hickcox received no money in the transaction. They evidently thought *some kind of writing* was necessary, not only to show the whole debt (Speer's,) but also to show why Haddock and Speer agreed that the land should be bound for the payment of money then loaned to Speer.

This indorsement was then made, and so made *as to show that it was Speer's debt* which was to be secured, and that Speer owned the land. Speer, it will be recollected, *in the indorsement*, is called the "*assignee of Hickcox*."

The parties, of course, understood this to mean and to show that Speer had acquired Hickcox's equity of redemption in the land by the indorsement. *The parties evidently intended* to show, 1st, the amount of money which Speer was to pay; and 2d, the interest of Speer in the land.

The next thing they desired to do was to make the indorsement show that the land was bound for the payment of the money and interest by Speer in 3 years.

Because, if such was not their intention, and the intention was solely to revive the old note and its lien, there was no necessity, after erasing the proof of the payment, to write the indorsement in question below the receipt of interest of the other two notes on the back of the note. A simple transfer of the note would have been all that they would have done.

They had an object, which was, *to show that the land described in the Haddock mortgage was bound for the payment of the debt of Speer then created*, and was to be held for that purpose.

They intended to create a lien on the land *by the indorsement itself*. That, as well as to show it was Speer's debt, and that Speer was owner, was the intention of the parties in the execution of the writing on the back of the note.

Any writing showing an intention of making a security, any writing from which such an intention can be gathered,

creates an equitable mortgage. *The parties, Hadduck and Speer, had the power to charge this land. Did they intend to do this?* is the question. For, if they did so intend, the court will give effect to that intention, no matter how awkwardly or imperfectly the intention is expressed.

See 3 Mont. Dea. & D'Gox, 129.

1 Gill. & J. 216, 227-8, 930.

2 Ball & Beattie, p. 40 and note.

38 E. C. L. 623.

4 Mass, 444.

And other cases cited in plff's points.

But we contend that the *indorsement itself* was intended by the parties to constitute the new security, or equitable mortgage.

That an endorsement on an instrument may operate as a collateral and independent contract.

Addison on Contracts, p. 539.

Doe vs. Jones, 15 Meeson & W. 385.

Doe vs. Stone, 3 C. B. 177.

There is sufficient in the indorsement itself to constitute an equitable mortgage. Here was a loan of money; an agreement to pay a specific amount in 3 years, with 10 per cent. interest, and a clear attempt and intention to charge the land with the payment of the money.

The books are full of cases in which imperfect instruments are held to be equitable mortgages.

The court looks *to the intention to bind the property*; and if that can be gathered from the instrument, viewed in the light of the surrounding circumstances, it will give effect to that intention.

The defendants say, that the doctrine of equitable mortgages by the deposit of title deeds has never been adopted in this country. This is true as a general thing, although some states have admitted their validity.

We contend that there are equitable mortgages in which no title deeds are deposited; that it "may be constituted by any

writing from which the intention can be gathered ;" and that "it arises from any written instrument which contains *an express or implied* agreement that the property shall be answerable for the debt."

Miller on Equitable Mortgages, p. 2, (22 Law L.)
 Fisher on Mortgages, p. 51, (69 Law L.)
 And cases there cited.
 Edwards vs. Moor, 69 E. C. L. 623.
 3 Mont. Deacon & DeGox, 129.
 3 Dessau, 74.
 2 Vernon, 151.
 4 Mass. 444.
 1 Manning, (Mich.) 178.
 3 Vesey, jr. 576, 582.

The following cases are also cited to the effect, where the intention appears to be to bind the property, the court will give effect to the instrument as an equitable mortgage :

Elliott vs. Pell, 1 Paige Chy. 263.
 16 Beavan, 259.
 11 Vesey, jr. 397.
 1 Vesey, jr. 162.
 35 E. L. and E. 611.
 9 Peters, 204.

No case can be found in the books where the intention is expressed in the instrument, or where the intention to bind the property could be gathered from the instrument and the surrounding circumstances, in which any court has held that an equitable mortgage did not exist.

The case of Morrill vs. Chase, 3 Allen, 339, cited by defendants, was at law, and the court held that a subsequent assignment could not revest the *legal title*. We do not contend that the endorsement did interfere with the *legal title*, but that it did give a right in equity, to make this land pay the money loaned.

The case in 23 New York, Stoddard vs. Hart, 561, the court decide, "the defendant loaned \$200, and held a mortgage for that amount. He then advanced another sum, but there was no agreement to make another mortgage or to change in any respect the terms of the one already made. The additional sum was inserted in the bond with an understanding that the

mortgage should be "considered" as a security for that sum also; nor is there any pretence that any writing was to be executed creating a special security for the new advance.

The case of Stoddard vs. Hart is clearly decided upon the ground that there never was any agreement (neither written or parol) that the mortgage should be a security for the \$180 advanced; that it should be "considered" is not an agreement that it should be secured by the mortgage.

And in the case of Hunt vs. Rousmanier, 3 Mason, 294, so much relied on by the defence, the court says, p. 303: "It is material to state, (and I repeat it,) that the question is not ment for a court of equity ought to carry into effect an agree-whether a lien which has not been executed at all, or imperfectly executed by the parties. The bill states no such case"

III.

What was to prevent the parties reviving the old mortgage lien as a security for the new debt, from the date of the endorsement? It is said to revive the paid note, you revive Hickcock's liability, and that in law this was a fraud on him. Who were parties to this fraud? The defendants certainly were, if one was intended. Is there not sufficient in the paper—the endorsement itself, to show that there was no such intention?

A new debt was created; a personal liability fixed upon Speer; a legal, when before there was only an equitable liability; a new amount; a new rate of interest is agreed to be paid; the new debt is created by the endorsement; (written under the erasure of payment, which would of necessity have to be explained. The reference to Speer, as "*Assignee of Hickcox*," all tend to show that there was no such intention, and does not the endorsement of itself show that Speer, "assignee of Hickcox," whow as in equity bound to pay this note, recognised that fact, and becomes the debtor at law, by the new obligation contained in the endorsement.

But the argument is made, that if Hickcox's liability was not revived, there could not be any new lien. "The note was the substance, the mortgage 'the shadow,'" and that the one could exist without the other. Did not Hadduck still hold the mortgage? If it was extinguished, was any aliquot part extinguished? If so, what?

If Hadduck had then loaned Speer six thousand dollars, and taken Speer's *written agreement* that the mortgage then held by him (Hadduck) should be held as security for the new loan, would it not have been good in equity? Why then could not Hadduck, and Speer the mortgagee and the owner of the equity of redemption, both consenting, agree in writing, that the mortgage then held by Hadduck should not only be a security for Hadduck's two notes, but also for the money then loaned Speer? The loan made by Thompson, the debt of Speer, is the substance; and the intention apparent on the *endorsement itself* to bind the land, is the shadow; so that here we have shadow and substance, debt and *incident*, all in the endorsement itself; it only being necessary to refer to the mortgage to identify the land which the parties intended to bind for the payment of the loan.

But it is not true that a mortgage cannot exist without personal obligation. The land itself may only be bound for the payment of the money. The note may be destroyed, the mortgagor released, and yet the lien on the land retained.

Walker's Chancery, (Mich.) 478.
Tripp vs. Vincent, 3 Barb. Ch. 614.

If the parties, as the above cases show, can release the debt as a personal obligation, and still retain the lien of the mortgage, what should in equity prevent the parties, if they so desire, reviving the mortgage (without reviving the old debt) as a security for a new debt?

If a mortgagor can revive his debt and mortgage, as in 4 Edwards Ch. 17, and 1 Beasley, 540, is decided; and if the

mortgage may continue after the personal liability of the mortgagor is released, as in Walker's Chy. 478, and Barb. Chy. 614, is also decided, why may not the owner of the same estate in the land which the mortgagor had, revive the mortgage lien without attempting to revive the personal liability of the original debtor?

A court of equity regards the substance and not the form.

It is respectfully submitted, that the endorsement on the note shows an indebtedness of Speer, and an agreement to pay in 3 years, and *that it was the manifest intention and determination (from the written endorsement) to make the same property liable to pay, and bind the same property which was bound by the mortgage given to secure said three notes.* It would certainly be competent to show by parol, if necessary, (see Hodges vs. Russell, 1st Russ. and M. 16,) *what mortgage was originally given to secure the three notes.* It is not necessary to consider the paid note as revived, or in existence, to be enabled to hold this an equitable mortgage. *The endorsement on the back of the note contains within itself all the elements of an equitable mortgage: a debt, a promise to pay, and a clear intention to bind the land, and it is only necessary to refer to the note and mortgage mentioned in the endorsement, to see what land it was intended should be bound for and charged with the debt.*

The court will recollect that all the parties in interest in the land joined in this transaction, *and acted for a valuable consideration*; and shall it then be said by a court of equity that they could not charge this land with the payment of the money, or that the intention being to bind this land for the payment of the debt, a court of equity will not give effect to that intention, when no rights of third persons intervene?

I V.

An assignment of a paid mortgage as a security for a new loan is good, and revives the lien as between the parties to the transaction, though not as against third persons whose rights have intervened.

Purser vs. Anderson, 4 Edw's Chy. 17

Bolles vs. Wade, 3 Green's Chy. 454.

DeCottes vs. Jeffers, 7 Florida, 284.

Robinson vs. Wynhart, 1st Beasely (N. J.) R. 515, 23-4, 540.

It is only when the rights of third persons intervene that the security is defeated.

James vs. Johnson, 6 John. Chy. 447.

Marwin vs. Vedder, 5 Cowan, 675.

Huginin vs. Starkweather, 5 Gil. 492.

Bonham vs. Galloway, 13 Ills. 68.

We think we have shown that there was no intention of reviving Hickcox's liability, and so far as the *lien on the land* was concerned, Hickcox had no interest then nor since that time.

V.

Upon the question of estoppel, we desire to say that we think the estoppel arises, not because of fraud, wilful misrepresentations, want of knowledge, or because the truth was not known to both parties; but we say that the defendants ought in equity to be estopped, because *there was an agreement* that the payment of the money should be considered as never having happened; (See p. 5 of abstract;) and an agreement that, although it was true that the note was paid and the

lien gone, yet for the purpose of making this loan we will *cancel the evidence* of the fact of such payment, (which the parties then did,) and we mutually agree that it has never been paid, but is in full force and validity.

In 17 Pick. 215, an estoppel was held to arise in equity from the voluntary surrender of a defeasance. In this case, Speer voluntarily returned the note, and he and Haddock erased the evidence of its payment, and now they seek to set up that fact, the evidence of which they destroyed. They agreed that the note and mortgage should stand as if the note had never been paid; that although the note was paid and the lien gone, yet it should be an unpaid note, and an unextinguished lien. *We acted upon that agreement*—that admission; they got our money upon it, and are they not estopped in equity to say the note was paid and the lien extinguished? After having made an agreement—an admission—that a certain state of facts should exist—should be taken as true—would it not be inequitable to allow them to set up the falsity of them, after we had acted upon them and parted with our money?

Again, we say that the endorsement should be construed into an admission that the note and its lien were assignable instruments, and that we having acted upon that admission, the defendants are estopped from setting up its falsity.

Addison on Contracts, p. 840, and cases cited.

Where it appears from an instrument that the parties have agreed upon a certain admitted state of facts *as the basis upon which* they contract, the parties are estopped to aver to the contrary.

Young vs. Rainforth, 62 E. C. L. 336.
 Stroughill vs. Buck, 68 do. 781,
 Wiles vs. Woodson, 5 Exch. 557.
 Humble vs. Hunter, 14 E. C. L. 310.
 Addison on Contracts, p. 839 and cases
 cited under "Estoppel."

Are not the defendants estopped to deny that Hadduck was assignor; that the note and lien were assignable; that they are of some value; and also estopped to deny that there is a lien?

The endorsement asserts that there is a lien when it states: "*But it is understood that said Thompson shall not proceed thereon.*" Does not this show that the parties understood that Thompson should have a right to "proceed" against the land after Hadduck had collected his two notes? Will not a court of equity say that this is tantamount to an agreement that Thompson might proceed against the land as soon as Hadduck "had time and opportunity" to collect his two notes?

Hadduck and Speer *held all the interest there was in the land, and had the power to make a charge upon the land; they acted for a valuable consideration, a loan was made, and they intended to, and did charge, or attempt to charge, the land with the re-payment of the money, and equity will give effect to that intention by giving an effect to the endorsement as a charge upon the land to the extent that the parties signing it had the power to bind the land at the time it was executed.*

See 2 Ball and Beattie, p. 40 and note.

The defence set up no equities as against this claim; they rely upon a supposed defect in the endorsement. No one is injured by carrying into effect the intention of the parties to bind the property. The bill alleges (which is confessed by the demurrer) that Hadduck's two notes are paid, and upon the face of the bill only Speer and his assignee have any interest in resisting this bill.

The amount involved in this case is now about \$11,000, which will be irretrievably lost unless this lien can be sustained. Speer has made a voluntary conveyance, (is a bank-

rupt,) and great injustice will be done if the decision of the court below is affirmed.

We submit the cause, believing that it will receive the consideration demanded by the importance of the principles of equity involved in it.

Respectfully,

BARKER & TULEY,
For Plaintiff.

Alfred G. Peckham

et al

vs

Benjamin F. Haddock

Circuit Court—Opinion of Judge Williams.

In the Circuit Court yesterday, Judge Williams rendered an able decision, which we give verbatim below, in the case of Alfred G. Peckham *et al.*, vs. Benjamin F. Haddock *et al.* The case involves a large amount of money as well as a novel question, making it of importance to the public generally. The opinion itself contains a statement of the facts necessary to its intelligent perusal. Here follows the decision:

Alfred G. Peckham *et al.*, vs. Benjamin F. Haddock *et al.*—The facts in this case are simple and few. Haddock, one of the defendants, being possessed of certain real estate, sold it to Hickox and took from him three notes payable in one, two and three years, secured by mortgage on the same premises. Hickox sold the property to Speer, subject to the mortgage. The first note was not paid until some time after its maturity, when Speer paid it, and the payment was endorsed upon the note. Subsequent to the payment of the note an arrangement was made by Speer and Haddock, with one of the complainants, Thompson, by which Thompson was to advance to Speer \$6,671 87 for three years, and as security for said advance Thompson was to have a lien upon the mortgaged premises for that sum by virtue of a certain written agreement endorsed on the back of the note, which is as follows (having first changed the endorsement of payment so as to show only a payment of interest on the other notes):

"Received of Archibald Thompson, as purchaser and assignee, the full amount of the within note and interest from date, (the interest to the 11th of May on the other two notes being paid by I. Speer as above), and in consideration of said purchase payment I hereby sell, assign and transfer the within note to said Thompson, with all interest accrued, or to accrue, including the incident security by trust, deed or mortgage of Hickox the maker. But it is understood that said Thompson is not to proceed thereon until I shall have had time and opportunity to collect my said two next notes included in same security by deed or mortgage. It being understood that I, Speer, assignee of Hickox, (who also undersigns), is to have three years from date to pay this note, by his allowing or paying ten per cent. interest on the advance purchase money (amount on the 10th of May last \$6,325-1 and 1/2 months more to the 25th of June is \$43 87 - \$6,671 87) so advanced in purchase of this note by said Thompson, Chicago June 25th, 1856, Benjamin F. Haddock and said Speer hereby agree to pay the within note and interest accrued besides ten per cent. hereafter as above.

"Chicago, June 24, 1856. ISAAC SPEER."

Filed April 26, 1864
L. Leland
Clerk

Thompson conveyed his interest in the notes and mortgages to Fitch, and Fitch conveyed to Peckham, who now claims a lien upon the land for the amount of the note. The defendants demur to the bill.

Complainants contend that the demurrer must be overruled, because they alleged that the agreement was for a lien upon the property, and that the statute of fraud not having been set up, said agreement would be good even if created in a parol merely, and should be enforced by a court of equity.

There might be force in this argument, were it not that the bill not only set up that the lien was to be created, but set forth the particular way in which it was to be done. The agreement was reduced to writing, and is fully set out in the bill, and by the ordinary rules of evidence, all contemporaneous parol testimony is to be excluded. If by force of this written instrument, a lien was created upon the property, then the complainants may come into court to enforce it. If no such lien was created by the writing, then none can exist. If this indictment gives to the complainants a mortgage or lien, the demurrer must be overruled; if it does not, then it must be sustained, for every allegation as to the intentions of the parties must be construed with reference to the method in which those intentions were carried into effect.

The question is not so much what the parties intended to do, but what they did. What construction does the law place upon their agreement?

There is an aspect of this case in which the complainants may be regarded as possessing the strongest claim to the favorable judgment of the Court. Thompson advanced his money upon the faith of a lien. All the parties to the agreement supposed he was obtaining a lien. Had it not been for this expected lien Thompson would not, in all probability, have parted with a dollar of his money.

Having advanced his money upon such a confidence, ought a court of equity now to deny to him what all the parties intended he should have?

On the other hand it must be admitted that the

Court of Chancery must in ascertaining the intentions of parties to agreements confine themselves, like courts of law, in the absence of fraud or mistake of fact, to instruments which the parties have executed. If they have failed to express their intentions, and there has been no fraud or mistake of fact, a court of equity may reform the agreement, but until it is reformed it must bind the parties. In this case there are no allegations of fraud or mistake. All the parties to this instrument knew just what they were signing. Every fact in relation to the whole transaction was totally within the knowledge of each. Each one knew that the note had been paid after its maturity, that after having been so paid in the absence of the maker, the evidence of payment was erased, and an agreement endorsed upon the note such as is set forth in the bill.

The complainants contend that these facts being admitted, there was a lien created upon the property. This the defendants deny.

The complainants say that the note, not having been paid until after its maturity, the legal estate in the property had become vested in the mortgagee (Haddock), and could only have been divested by a conveyance that he held such a legal estate as a trustee for the mortgagor; that although the note had been paid, and the personal liability of the maker extinguished, yet it could, by the consent of Speer & Haddock, have been regarded as an existing note, and Haddock as the trustee for the holder; that with reference to the note, in its relation to the mortgaged property, Speer, having bought the property, subject to the incumbrance, was to be regarded as the principal upon the note, and Hickox as the surety, and the note was only revived as to the property; that when the note, so revived, came into the hands of Thompson, he, by virtue of the agreement upon

the note, held it as a subsisting obligation, and Haddock held the legal title to the mortgaged property as Thompson's trustee to the extent of his interest in the note.

The defendants claim that when the note was paid it was dead; that the mortgage *pro tanto* was extinguished, the mortgage being only an incident to the debt, and living only while it lived, and that neither note nor mortgage could be re-ascituated or be made to possess any legal vitality.

These questions must be determined in view of the principles applicable to mortgages. What, therefore, is the nature of the estate of the mortgagee, after the condition is broken? For what purpose does he hold the legal title? In what respect is he to be considered as trustee for the mortgagor.

Story says (2 Es. In. § 1,015): "It was formerly contended that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back into his own possession by the payment of the debt or other discharge of the condition. But it is now firmly established that the mortgagor has an estate in the land in equity in the nature of a trust estate, which may be granted, divided and entailed.

This trust estate is altogether peculiar in its character, differing in many respects from an ordinary trust estate. Its nature is particularly described in the case of *Cholmondeley vs. Clinton*, (2 Jacob & Walker's Rep. 1 to 189,) by Sir Thomas Plumer. It is said in that case that the mortgagee has no right to either the legal or equitable estate further than to secure the repayment of the money due him.

Chancellor Kent says that the equity doctrine is that the mortgage is a mere security for the debt and only a chattel interest, and that until a decree of foreclosure, the mortgagee continues the real owner of the fee, and the estate of the mortgagee is not subject to execution.

In *Edwards vs. Farmers' Fire and Life Ins. Co.*, (21 Wend. 484) Judge Cowen says, that the mortgagee is considered the absolute owner after default before foreclosure, only to afford an additional remedy for the non-payment of the money, that it is a mere fiction to coerce payment, and that the law overrides the exact law day, and gives the mortgagor the right to pay until foreclosure.

There is no question that if the bond or note was paid upon the law day, the payment would discharge the mortgage, and no recourse beyond would be necessary.

Why should it be any different in case the payment is not made until one day after the law day, provided the payment is then accepted. It seems to me that the better reason is in favor of the rule that payment of the bond or note after the law day and before foreclosure, if accepted, amounts to a discharge of the mortgage and releases the same equally with a payment on that day.

Very many of the American authorities, if not the weight of authority, is in favor of this position. 20th Maine, 117. *Hilliard on Mort.* 134, 137, 215.

But regarding the mortgagee as a trustee, he holds in trust for the mortgagor, and upon payment of the mortgage money, is bound to recover to him. Admitting the mortgage money to be paid, can he hold as a trustee for any other person than the mortgagor, and can he be obliged to convey to any other person? It is a trust raised only by implication, and as has been stated in some of the cases already cited *ad generis*. I think the position assumed by Judge Cowen is the most sensible view which can be taken of this anomalous relation, and that the mortgagee can be regarded as holding the title only by a legal fiction, and to afford an additional remedy for non-payment of the mortgage money.

This view seems to me to be the most consonant with the relation of mortgagor and mortgagee, as those relations are now defined by courts of equity. The equitable doctrine in reference to mortgages has been constantly engrafting itself upon our legal tribunals, during the last two hundred years, until for almost every purpose the mortgage is considered only as a lien or security for the payment of the debt, and the mortgagee as holding a chattel interest and personal estate descending to the personal representatives as assets.

Upon a careful examination of the authorities, I cannot bring myself to the conclusion that where mortgage money is paid, and accepted by the mortgagee after the day of payment, that is, after *law day*, the mortgage becomes so far a trustee, that he can hold the legal title as security for any new or different contract. If, therefore, the note which the mortgage was given to secure, was paid, and the money accepted by the mortgagee, even after the *law day*, the mortgagee could not hold the legal title as security for any new loan, even if the note was again issued. The note having been paid, as the bill shows, it was no longer to be regarded as possessing any vitality. It was for all purposes dead, and *pro tanto* extinguished. I think the cases in 2d Allen, 329, (Merrill vs. Chase,) and 23d New York, 556, (Stoddard vs. Hart,) sustain this view. It is true the facts are not entirely similar to the case at bar, but in the view which I have previously expressed as to the mortgagee's interest, the principles I consider applicable to this case.

Had the complainant Thompson parted with his money under an agreement from Spear and Badduck that he should have a specific lien upon the mortgaged property, and that they would execute the papers in accordance with that agreement, the contract exonerated, and the statute of funds not being interposed, this demurrer would not lie.

But the contract set up in the bill was an executed, not an executory contract. It was a note which had been paid; all understood this. It was a note of which Hickox was the maker, yet Hickox was not present when the note was transferred to Thompson. I do not think there was any real intention to defraud Hickox, but that the intention was only to enforce the note against the property. Yet the facts were all understood, and each of the parties to the transaction acted in view of them.

Thompson knew that he was obtaining only the "incident" security of the mortgage: for the endorsement of the note expressly stated that. If, therefore, Thompson bought a note which was of no value, and to which, because it had no value, there was in fact no incident security, he cannot come into Court to ask the specific performance of any contract. The contract is performed. He has just what he bargained for, neither more nor less. I think this case comes fully within the reason of the case of Hunt vs. Ronsmanere's executors. Here, as there, the papers are just what the parties intended. See 1st Peters.

But it is said that the defendants are estopped from setting up the fact that this note was paid, for they, in all their dealings with Thompson, acted upon the admission and understanding that the note was a subsisting and valid instrument. I do not so understand the doctrine of estoppel *in pais*. 3 Hill, 313. Dezel vs. Odell, 219, 221, 223. 6 Seiden, 406. 31 Penn, 234.

I am free to admit that I have reluctantly come to the conclusion that the complainant's bill presents no case for the interference of this court.

It seems hard that effect should not be given to the mutual intentions of the parties. Sitting here as chancellor, I would most willingly carry out such intentions, did I not feel myself prevented from doing so by the rules of law. The written contract of the parties must be in law regarded as the only expression of the intentions of the parties, and that written contract shows that Spear and Badduck gave, and Thompson received, security which was of no legal value. It is not the first time in which men have advanced their money on worthless security, and it will not be the last.

The cause has been argued with great ingenuity on the part of the counsel for complainant, and in view of the hardships of the complainant's case, it will not be to me a cause of regret, if the counsel should convince the Supreme Court that this Court has mistaken the law applicable to this case.

The demurrer will be sustained.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

Supreme COURT,

Third grand division of term
April Term, A. D. 1864.

Edward G. Beckham
Dennis M. Fitch
and Archibald Thompson

VS.

Benjamin F. Haduck
Isaac Speer
Thomas Speer &
Buckner S. Lewis

The Clerk of said Court will issue a ^{writ of error} ~~Summons~~ in the above cause, directed to the Sheriff of
~~Cook~~ County, in a plea of
returnable at the April Term of said Court, A. D. 1864,
to the damage of the Plaintiff [of _____] Dollars.

Barker & Tuley
Plaintiffs Attorney.

To _____ Esq., Clerk.
Chicago, 185 .

G. D. No.

Term A. D. 185 .

A. G. Peckham et al

vs.

B F Haduck et al

PRÆCIPE.

Filed this fifth day of
January 1864.
L. Seland Clerk.

Baiker & Teiley
Courts and Plaintiffs Attorney .

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable Erastus S. Williams Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the first Monday, (being the seventh day) of September in the year of our Lord One Thousand Eight Hundred and Sixty Three and of the Independence of the said United States the Eighty Eighth

Present, Honorable Erastus S. Williams Judge of the 7th Judicial Circuit }
of the State of Illinois. }

Joseph Knox States Attorney.

J. S. Hammond Sheriff of Cook County.

Attest, William L. Church Clerk.

Be it remembered, that heretofore to wit: on the Twenty Ninth day of November in the year of our Lord One Thousand Eight Hundred and Sixty two Alfred G. Peckham, Dennis M. Fitch and Archibald Thompson by their Attorneys Barker and Tuley filed in said Court their certain Bill of Complaint and Bond for Costs, which are respectively in the words and figures following to wit:

State of Illinois } In the Circuit Court
County of Cook } of Cook County.
In Chancery

To the Hon. George Manion, Judge of said Court, in Chancery sitting.

Humblly complaining shew unto your

(2)

Honor your orators Alfred G. Peckham and
Dennis M. Fitch of New York and Archibald
Thompson of Massachusetts, that on or about the
10th day of May A.D. 1855 Benjamin F.
Haddock (whom your Orators pray may be made
defendant to this bill) being seized in his demone
as of fee of the following described parts and parcels
of Lot No One (1) in Block Forty One (41) in
the Original Town of Chicago in the County of
Cook and State of Illinois, known and described
as the North East Quarter of said Lot One (1)
and ten (10) feet fronting East on Wells Street &
extending back one equal width to the West line
of said Lot One (1) off the entire North end of the
South half of said Lot One (1), he the said
Haddock then and there sold and conveyed
the same by deed duly executed, acknowledged
and recorded to one Benjamin F. Hickox in
fee for the sum of Twenty Five Thousand
dollars, of which the said Hickox paid to the
said Haddock the sum of Six Thousand
Two Hundred and Fifty dollars cash in hand
and to secure the payment of the residue thereof
the said Hickox then and there made and
delivered to the said Haddock his three promissory
notes in writing, by each of which the said
Hickox promised to pay to the said Haddock
or order the sum of Six Thousand Two Hun
dred and fifty dollars with interest dated on

2-
the said 10th day of May A D 1855 and payable
in one, two and three years after date respectively.
That to secure the payment of the said promissory
notes the said Nickox by his certain mortgage
deed duly executed, acknowledged and recorded
then and there mortgaged the said premises to the
said Waddock in fee.

That afterwards and before and at the time of
the making of the loan and agreement hereinafter
mentioned all the estate of the said Nickox in
the premises aforesaid came to and became and
was vested in Isaac Speer (whom your orators
pray may be made defendant in this bill)
subject to the payment of the mortgage aforesaid
which the said Speer assumed to pay.

That on or about the 7th day of June A D
1856 at said County of Cook the said Isaac
Speer paid to the said Waddock the amount both
of principal and interest due upon the said
promissory Note which became due in one year
after date and also the interest due upon the
other two of said promissory notes which had
accrued up to the 10th day of May A D 1856
a receipt of which payment was by the said
Waddock endorsed upon the said promissory
note which became due in one year after date
and the same was then and by said Waddock
delivered so endorsed to the said Speer.

(3)

4
That on or about the 24th day of June AD 1856
at said County the said Speer applied to your
Orator Thompson for a loan of ^{money} and as security
for the payment thereof offered to your Orator
Thompson a lien upon said mortgaged premises
and then and there promised and agreed to and
with your Orator Thompson, that he the said
Speer and the said Haddock would give to
your orator Thompson such lien upon said
mortgaged premises and in pursuance of such
promise and agreement it was then and there
agreed by and between your Orator Thompson
and the said Speer and the said Haddock
that he the said Thompson should lend to
the said Speer the sum of Six Thousand
Six Hundred and Seventy One dollars and Eighty
Seven cents for a term of three years upon
interest at the rate of ten per centum per annum
and that as security for the repayment of
said loan with interest as aforesaid, that
your Orator Thompson should have a lien
upon said mortgaged premises subject to the
terms of the endorsement hereinafter copied, then
and there made by the said Speer and Haddock
upon the said promissory Note, which had been
paid by said Speer as aforesaid and thereupon
your Orator Thompson then and there loaned to
the said Speer the sum of Six Thousand Six

3
hundred and seventy one dollars and eighty seven cents upon security to him the said Thompson by the said Speer & Haddock then and there given in the manner following, that is to say, that the said Haddock being then still the holder of the said two promissory notes which remained unpaid and of the said mortgage and the said Speer then and there having in his possession the said promissory note which he had paid as aforesaid, the endorsement of payment thereof thereon was so changed by or under the direction of the said Speer and Haddock or one of them with the consent and approbation of the other of them as to show only a payment of the interest on the other two of said promissory notes up to the 10th day of May A D 1856 as aforesaid and then a further endorsement was by them the said Speer and Haddock or under their direction or of one of them made upon the same note below such receipt of payment of interest and signed by the said Speer and Haddock in the words and figures following that is to say:

Received of Arch^d Thompson as purchaser and assignee the full amount of the within note & interest from date (the interest to 10 May on the other 2 notes being paid by J Speer as above) and in consideration of said purchase payment.

5

6

I hereby sell, assign and transfer the within note to said Thompson with all interest accrued or to accrue including the incident security by Trust Deed or Mortgage of Hickox the maker. But it is understood, that said Thompson is not to proceed thereon until I shall have had time and opportunity to collect my said two next notes included in same security by deed or mortgage. It being understood, that I Speer Assignee of Hickox (who also undersigns) is to have three years from date to pay this note by his allowing or paying ten per cent interest on the advance purchase money (amount on 10th May last \$6625. 18 1/2 month more to 25 June is 46. 87 - \$6671 ⁸⁷/₁₀₀) so advanced in purchase of this note by said Thompson. Chicago June 24th 1856" (Signed) Benj. F. Waddock "and said Speer hereby agrees to pay the within note and interest accrued besides ten per cent hereafter as above. Chicago June 24th 1856" (Signed) Isaac Speer " And the said Speer & Waddock then and there delivered the same note with said endorsement thereon to the said Thompson as security for the payment of the said loan and interest as in said last endorsement mentioned and specified and then and there agreed with your Orator Thompson, that the same should be a lien and charge upon the said mortgaged

premises should be charged with the payment of the paid money so loaned, notwithstanding the fact, that the paid note had been once paid by the paid Speer as aforesaid, which said fact they the paid Speer and Haddock then and there agreed with your Orator Thompson, should be as between themselves and so far as their own rights and interests were concerned or effected thereby considered as never having happened. And your Orators further show to your Honor that the paid Hickox had before the making of the paid loan as aforesaid absconded from and left the paid City and County and gone to parts unknown and has never returned. And your Orators further show to your Honor, that your Orator Thompson on or about the 30th day of May A D 1857 signed and sealed his certain deed in the words and figures following "In consideration of the sum of One dollar to me paid by Dennis M Fitch of the City of New York I, Archibald Thompson, the owner of the judgment note hereto annexed bearing date Chicago May 10th 1855 for Six Thousand Two Hundred & Fifty dollars made by Benjamin F Hickox payable one year after date to Benjamin F Haddock or order and by the said Benjamin F Haddock assigned to me do hereby sell, assign and transfer to the paid

8 Dennis M Fitch the paid judgment note and the warrant of Attorney to confess judgment there to annexed and bearing even date therewith and all my right and interest therein and in any and all securities by deed, mortgage or otherwise col, lateral thereto and authorize and empower the said Dennis M Fitch at his charge and expense to take all legal means for the collection of the money due thereon and secured thereby with the interest, subject however to and in accordance with the terms and provisions of the receipt or instrument of assignment made by the said Benjamin F Maddock to me bearing date Chicago June 24th 1856 indorsed on the said judgment note. Witness my hand at the City of New York this thirtieth day of May in the year 1857" Witness Geo. Allen (signed) Archibald Thompson (S.S.) And your Orator, the said Thompson then and there delivered the said deed with the paid note taken by him as security as afore, said thereto annexed to your Orator Fitch for the purpose of transferring to your Orator Fitch all the rights and security therefor, that your Orator Thompson had in relation to the paid loan of money to said Spear. And your Orators further show to your Honor, that on or about the 5th day of October A.D 1857 your Orator Fitch signed and sealed his certain deed in the words and figures following

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"In consideration of the sum of One dollar to me paid by Alfred G Peckham of the City of New York, I, Dennis M Fitch the owner of the judgment note hereto annexed bearing date May 10th 1855 for Six Thousand Two Hundred and fifty dollars made by Benjamin F Nectox payable in one year after date to Benjamin F. Waddock, assigned to Archibald Thompson and by said Archibald Thompson assigned to me as by said several assignments hereto annexed more fully appears do hereby sell assign and transfer to the said Alfred G Peckham the said judgment note and the warrant of Attorney to confess judgment thereto annexed and bearing even date therewith and all my right and interest therein and in any and all securities by deed mortgage or otherwise collateral thereto and authorize and empower the said Alfred G Peckham at his charge and expense to take all legal means for the collection of the money due thereon and secured thereby with the interest subject however to and in accordance with the terms and provisions of the receipt or instrument of assignment made by the said Benjamin F Waddock to said Archibald Thompson bearing date Chicago June 24th 1856 endorsed on the said judgment note. Witness my hand at the City of New York this fifth day of October in the year 1857" Witness Wm. Van Duzer "Signed

Dennis M. Fitch {L S}

And your Orator the said Fitch then and there delivered the said deed last mentioned with the said note taken by your Orator Thompson as security as aforesaid thereto annexed and the said Deed from the said Thompson to the said Fitch to your Orator Peckham for the purpose of transferring to your orator Peckham all the rights and security therefor, that your Orator Thompson had in relation to said loan of money to said Speer and transferred to said Fitch as aforesaid And that your Orator Peckham is now the holder of the said note and deed and entitled to all the benefit thereof and money to be recovered thereon.

And your Orators further show to your Honor, that the other two of said promissory notes secured by said mortgage have been long since satisfied and paid in full.

And your Orators further show, that neither the said Speer or any other person has ever paid to either of your Orators or to any person for them or either of them any part of the said sum of money so loaned or any interest thereon and that the whole thereof remains due.

And your Orators further show to your Honor, that the intention and purpose of the said Speer and Waddock in the transactions in which they

6
were engaged as aforesaid with your Orator
Thompson was to give to your Orator Thompson
a lien upon said premises subject to the terms
of the before recited endorsement upon said note
as security for the repayment of the paid sum
of money so loaned by him to the paid Speer
And that your Orator Thompson also took said
note and endorsement with the intention and purpose
of thereby obtaining such lien as last mentioned
and that neither your Orator Thompson or the
said Haddock or the paid Speer had any
intention or purpose to revive or to attempt
to revive the paid note as a personal liability
against the paid Hickox or in any way to
affect him or his interests therewith. And that
all of the parties to this suit hereinbefore
mentioned in all of the transactions aforesaid
acted upon the belief, that your Orator Thompson
had acquired such lien and security. And
your Orators further show to your Honor, that
on or about the 13th day of October A.D. 1857
the paid Isaac Speer failed in business
and ever since has been and now is insolvent.
And your Orators further show to your Honor, that
the said Haddock has or claims some estate
or interest in the paid premises other than
that he claimed under said Mortgage but
your Orator charges, that the said Haddock

13

acquired such estate or interest since the making of the said loan and endorsement and subject thereto.

And your Orators further show to your Honor that Thomas Speer and Buckner & Morris (whom your orators pray may be made defendant to this Bill) have or claim some estate or interest in the said premises, but your orators charge, that such estate or interest was acquired by them since the making of the said loan and endorsement and that such estate or interest is claimed under voluntary conveyances from the said Isaac Speer and not for any valuable consideration and with notice of the rights of your orators.

And your orators further show to your Honor, that your Orator Peckham has often applied to the said Isaac Speer for payment of the said sum of money so loaned as afore, paid with the interest thereon according to the tenor and effect of said loan and endorsement and that your orators well hoped, that no disputes would have arisen touching the said money and interest, but that the same would have been paid and that the said Isaac Speer would have complied with the reasonable request of your orator Peckham as in conscience and equity he ought to have done.

7
But now so it is, may it please your Honor,
that the said defendants combining and
confederating together with divers other persons
at present to your Orators unknown, whose
names when discovered your Orators pray
that they may be at liberty to insert herein
with apt and proper words to charge them
as parties defendants herto and contriving
how to injure and wrong your Orator Peckham
in the premises do absolutely deny all lien and
claim of your orators Peckham upon said
premises for said sum of money so loaned
and interest and for such denial set up
a variety of unfounded pretences.

All which actings, doing and pretences of said
defendants are contrary to equity and good
conscience and tend to the manifest wrong and
injury of your Orator Peckham in the premises.
In consideration whereof and for as much as
your Orators are without remedy in the ordinary
course of proceedings at law and can only
have relief in a Court of equity where matters
of this nature are properly cognizable and relivable.
To the end therefore, that the said Benjamin F
Waddock, Isaac Speer, Thomas Speer and
Buckner S Morris and the rest of the con-
federates when discovered may without oath,
which your orators hereby waive, in accordance

with the provisions of the Statute in such case made and provided, full true and perfect answer make to all and singular the matters herein stated and charged and that an account may be taken of the amount due to your Orator Peckham on account of the said loan so made as afore, paid and that the said Isaac Speer may be decreed to pay what may be found due on taking such account together with the costs of this suit and that your Orator Peckham may be by the decree of the Honorable Court declared to have a lien prior to all liens or claims of any of said defendants upon said premises for the amount so found ^{to be} due and that the said premises and all the right, title and interest of any and all the parties to this suit therein may in default of such payment be sold under the decree of this Honorable Court for the satisfaction of the amount found to be due to your orator Peckham upon the taking of such account together with the costs of this suit or that your Orator Peckham may have such other relief or such further and other relief in the premises as the nature of this case shall require and to your Honor shall seem meet.

May it please your Honor to grant unto your Orators the Peoples Writ of summons

8
issuing out of and under the seal of this Court
according to the Statute in such case made
and provided, summoning the said Benjamin
F Haddock, Isaac Speer, Thomas Speer and
Buckner S Morris and each of them personally
to be and appear before this Honorable Court
on the first day of the next term thereof to
answer all and singular the premises and
to stand to, perform and abide by such order
and decree therein as to your Honor shall
seem meet and your Obedts will ever pray &c.

Barker & Tukey
Comptrols Solrs
Bailey & Gary
Of Counsel.

16
SECURITY FOR COSTS.—Chicago Tribune Print.

Alfred G Peckham
et al

vs.

Benjamin F Haddock
et al

CIRCUIT COURT OF COOK COUNTY.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this Court, in pursuance of the laws of this State.

Dated this 28th day
of November A. D. 1862

Barker & Tukey

Wm L Church
Clerk

16
Dont and several me remuer of
Buckner S Morris, Isaac Speer and Thomas Speer
three of the defendants to the Bill of Complaint

issuing out of and under the seal of this Court according to the Statute in such case made and provided, summoning the said Benjamin F. Haddock, Isaac Speer, Thomas Speer and Buckner S. Morris and each of them personally to be and appear before this Honorable Court on the first day of the next term thereof to answer all and singular the premises and

No.

vs.

BOND FOR COSTS.

Filed this

day of

A. D. 1863

Clerk.

And afterwards to wit: on the 5th day of January A D 1863, Buckner S. Morris, Isaac Speer and Thomas Speer filed their certain Demurrer in the said Court, which is in the words and figures following to wit:

State of Illinois
Cook County

In the Circuit Court
of Cook County.

Of the January Term 1863

Joint and several the Demurrer of
Buckner S. Morris, Isaac Speer and Thomas Speer
three of the defendants to the Bill of Complaint

17 of Alfred G Peckham, Dennis M Fitch and
Archibald Thompson, Complainants.

These defendants severally and respectively by protestation not confessing or acknowledging all or any of the matters and things in the said Complainants bill to be true, in such manner and form as the same are therein set forth and alleged do severally demur thereto and for cause of demurrer show, that the said Complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereof sought and prayed for, from or against these defendants. Wherefore these defendants demand severally the judgment of this Honorable Court, whether they or either of them shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained and pray to be hence dismissed with their reasonable costs in this behalf sustained.

Walker & Thomas

Sols for Defts & J Speer & Morris

at the January Term of said Court, to wit:
And afterwards to wit: on the 5th day of January in the year last aforesaid the following among other proceedings were had in said Court and entered of record to wit:

9
Alfred G Peckham
Dennis M Fitch &
Archibald Thompson

vs

Benjamin F Haddock
Isaac Speer, Thomas Speer
and Buckner S Morris

Bill

On motion of Waite and Towne of Counsel, no objection being made thereto, it is ordered, that the rule for said Defendant Haddock to plead, answer or demur to the Complainants Bill of Complaint filed in said cause be extended fifteen days and the same hereby is extended accordingly.

And afterwards, to wit: on the 17th day of January in the year last aforesaid Benjamin F Haddock by Waite & Towne his Attorneys filed in said Court his certain Demurrer, in the words and figures following to wit:

State of Illinois }
Cook County } p. In the Circuit Court of
Cook County. In Chancery.

The demurrer of Benjamin F Haddock, one of the defendants to the Bill of Complaint of Alfred G Peckham, Dennis M Fitch and Archibald Thompson, Complainants.

18
This defendant by protestation, not confessing

or acknowledging all or any of the matters and or things in and by the said Bill set forth and complained of to be true, in manner and form as the same are therein set forth and alleged, says he is advised by his counsel, that there is no matter or thing in the said bill contained, good and sufficient in law, to call this defendant in question in this Honorable Court for the same, but that there is good cause for demurrer thereunto and therefore this defendant says, that the complainants said bill in case the allegations therein contained were true, which this defendant does in no sort admit, contains not any matter of equity, wherein this Court can ground any decree or give the complainants any relief or assistance as against him this defendant.

And for another and further cause of demurrer to the complainants said Bill of Complaint, this defendant says that said Bill of Complaint is demurrable for the want of the proper parties thereto, wherefor and for divers other errors and imperfections in the said Bill appearing, this defendant does demur in law thereunto and humbly demands the judgment of this Honorable Court, whether he shall be compelled to put in any further or other answer to the said Bill and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

Waite & Towne, Nuddrks Attys.

10
And afterwards to wit: at the July Term of said Court, to wit: on the 28th day of July A D 1863 the following among other proceedings were had in said Court and entered of record, to wit:

Alfred G Peckham, Dennis M Fitch
and Archibald Thompson

vs

Benjamin F Waddock, Isaac Speer,
Thomas Speer and Buckner S Morris

} Bill

This cause coming on this day to be heard upon the demurrer of the Defendants to the Complainants Bill of Complaint filed therein and Counsel having been heard as well in support of said demurrer as in opposition thereto and the Court not being sufficiently advised in the premises takes said demurrer under advisement.

And afterwards to wit: at the September Term of said Court, to wit: on the 15th day of September A D 1863 the following among other proceedings were had in said Court and entered of record to wit:

Alfred G Peckham, Dennis M Fitch
and Archibald Thompson

vs

Benjamin F Waddock, Isaac Speer
Thomas Speer and Buckner S Morris

} Bill

This day again come the said parties by their solicitors and the Court having had the demurrer of the said defendants to the Complainants Bill of Complaint filed in said cause under advisement and being now fully advised of and concerning the premises, doth find, that the Complainants said Bill of Complaint and the allegation thereof, are not sufficient to entitle the Complainant to the relief prayed for therein. Therefore it is ordered, adjudged and decreed, that the Complainants said Bill of Complaint be and the same hereby is dismissed out of this Court for want of equity at the cost of the Complainants to be taxed, to which ruling and decision of the Court in said cause the said Complainants by their counsel now here except.

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of all the papers on file and proceedings of record in a certain cause lately pending in said Court, on the Chancery side thereof, wherein Alfred G. Peckham et al were Complainants and Benjamin F. Haddock et al Defendants

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this seventh day of November A. D. 1863.



Wm L Church Clerk.

Alfred G. Peckham
 Edmund Fitch
 Archibald Thompson
 Jeffs in error

Benjamin F. Haddock
 Isaac Spear Thomas
 Spurr Buckner & Morris

error to Circuit Court of
 Cook & County

errors assigned

Now comes the said Alfred G. Peck
 Edmund Fitch and Archibald Thompson
 plaintiffs in error by Barker & Tuley their attorneys
 and solicitors and say that in the record and
 proceedings aforesaid there is manifest error
 in this

- 1st In sustaining said demurrers and each of them to Com-
 plainants bill
- 2^d In not overruling said demurrers and each of them
- 3^d In dismissing said Complainants bill
- 4th In decreeing that there was no equity in complain-
 ants bill
- 5th The decree should have been for complainants
 upon said demurrers -

Barker & Tuley Attor-
 Jeffs in error

And now comes the said defendants in error say
 there is no error in said record and proceedings &
 they ask that said judgment be affirmed & decrees
 costs on.

Made & sworn
 Atty for defendant in error

A. G. Peckham et al

vs.

B. F. Haddock et al

Record

Filed Jan'y 5. 1864.
 L. Leland
 Clk.

Abstract

In the Supreme Court of Illinois,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1864.

ALFRED G. PECKHAM,
DENNIS M. FITCH, and
ARCHIBALD THOMPSON,*Plaintiffs in Error,*

vs.

BENJAMIN F. HADDOCK,
ISAAC SPEER, THOMAS SPEER,
and BUCKNER S. MORRIS.*Error to Circuit Court of
Cook County.*

This was a proceeding in Chancery, upon bill filed by plaintiffs in error, to which the defendants filed general demurrers. The Court below sustained the demurrers and dismissed the bill for want of equity. The bill is set forth at large in this abstract.

A B S T R A C T.

Summons in usual form.

Security for costs.

Bill filed November 29th, A. D. 1862, and is as follows, to-wit:

Filed Apr 19, 1864

L. S. Clark

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. *In the Circuit Court of Cook County,*
In Chancery.

To the Hon. George Manniere, Judge of said Court.

In Chancery Sitting,

2

Humbly complaining, show unto your Honor, your Orators,
4 Alfred G. Peckham and Dennis M. Fitch, of New York, and Archibald Thompson, of Massachusetts, that on or about the 10th day of May, A. D. 1855, Benjamin F. Haddock (whom your Orators pray may be made defendant to this bill) being seized in his demense, as of fee, of the following described parts and parcels of lot No. one (1) in block forty-one (41), in the original Town of Chicago, in the County of Cook and State of Illinois, known and described as the north-east quarter of said lot one (1), and ten (10) feet fronting east on Wells Street, and extending back one equal width to the west line of said lot one (1), off the entire north end of the south half of said lot one (1). He, the said Haddock, then and there, sold and conveyed the same by deed, duly executed, acknowledged and recorded to one Benjamin F. Hickox in fee, for the sum of twenty-five thousand dollars, of which the said Hickox paid to the said Haddock the sum of six thousand two hundred and fifty dollars, cash in hand; and to secure the payment of the residue thereof, the said Hickox then and there made and delivered to the said Haddock, his three promisory notes in writing, by each of which the said Hickox promised to pay to the said Haddock or order, the sum of six thousand two hundred and fifty dollars, with interest, dated on the said 10th day of May, A. D. 1855, and payable in one, two and three years after date respectively. That to secure the payment of the said promisory notes, the said Hickox, by his certain Mortgage Deed, duly executed, acknowledged and recorded, then and there mortgaged the said premises to the said Haddock in fee.

That afterwards, and before, and at the time of the making of

“money (amount on 10th May last, \$6,625; one and a half months, “more, to 25 June, is \$46.87, \$6,671 $\frac{17}{100}$), so advanced in purchase of this note by said Thompson, Chicago, June 24th, 1856, “signed Benj. F. Haddock; and said Speer hereby agrees to pay “the within note, and interest accrued, besides ten per cent. hereafter “as above. Chicago, June 24th, 1856.” (Signed) “Isaac Speer.” And the said Speer and Haddock then and there delivered the same note, with said endorsement thereon, to the said Thompson, as security for the payment of the said loan and interest, as in said last endorsement, mentioned and specified, and then and there agreed with your Orator, Thompson, that the same should be a lien and charge upon the said mortgaged premises, and that the said mortgaged premises should be charged with the payment of the said money so loaned, notwithstanding the fact that the said note had been once paid by the said Speer, as aforesaid, which said fact they, the said Speer and Haddock, then and there agreed with your Orator, Thompson, should be, as between themselves, and so far as their own rights and interests were concerned or affected thereby, considered as never having happened.

And your Orators further show to your Honor that the said Hickox had, before the making of the said loan as aforesaid, absconded from and left the said city and county, and gone to parts unknown, and has never returned.

And your Orators further show to your Honor that your Orator, Thompson, on or about the 30th day of May, A. D. 1857, signed and sealed his certain deed in the words and figures following: “In consideration of the sum of one dollar, to me paid by Dennis M. Fitch, of the city of New York, I, Archibald Thompson, the “owner of the judgment note hereto annexed, bearing date, Chicago, “May 10th, 1855, for six thousand two hundred and fifty dollars, “made by Benjamin F. Hickox, payable, one year after date, to “Benjamin F. Haddock, or order, and by the said Benjamin F.

"Haddock assigned to me, do hereby sell, assign and transfer to the
 "said Dennis M. Fitch, the said judgment note, and the warrant of
 "attorney to confess judgment thereto annexed, and bearing even
 "date therewith, and all my right and interest therein, and in any
 "and all securities by deed, mortgage or otherwise collateral thereto,
 "and authorize and empower the said Dennis M. Fitch, at his charge
 "and expense to take all legal means for the collection of the money
 "due thereon, and secured thereby, with the interest, subject, how-
 "ever, to and in accordance with the terms and provisions of the
 "receipt or instrument of assignment, made by the said Benjamin
 "F. Haddock to me, bearing date Chicago, June 24th, 1856,
 "endorsed on the said judgment note. Witness my hand, at the
 "city of New York, this thirtieth day of May, in the year 1857."

Witness, "George Allen." (Signed) "Archibald Thompson, [L.s.]"
 And your Orator, the said Thompson, then and there delivered the
 said deed, with the said note taken by him as security as aforesaid
 thereto annexed, to your Orator, Fitch, for the purpose of transfer-
 ring to your Orator, Fitch, all the rights and security therefor that
 your Orator, Thompson, had in relation to the said loan of money
 to said Speer.

9 And your orators further show to your Honor, that on or about
 the 5th day of October, A. D. 1857, your Orator, Fitch, signed and
 sealed his certain deed, in the words and figures following: "In
 "consideration of the sum of one dollar, to me paid by Alfred G.
 "Peckham, of the city of New York, I, Dennis M. Fitch, the owner
 "of the Judgement note hereto annexed, bearing date May 10th,
 "1855, for six thousand two hundred and fifty dollars made by
 "Benjamin F. Hickox, payable in one year after date to Benjamin
 "F. Haddock, assigned to Archibald Thompson, and by said Archi-
 "bald Thompson assigned to me, as by said several assignments
 "hereto annexed more fully appears, do hereby sell, assign and transfer
 "to the said Alfred G. Peckham, the said judgment note, and the

“warrant of attorney to confess judgment thereto annexed, and bearing even date therewith, and all my right and interest therein, and in any and in all securities by deed, mortgage or otherwise collateral thereto, and authorize and empower the said Alfred G. Peckham, at his charge and expense to take all legal means for the collection of the money due thereon, and secured thereby, with the interest, subject however, to and in accordance with the terms and provisions of the receipt or instrument of assignment made by the said Benjamin F. Haddock to said Archibald Thompson, bearing date, Chicago, June 24th, 1856, endorsed on the said judgement note. Witness my hand at the city of New York, this fifth day of October, in the year 1857. “Witness, Wm. Van Duzen.” [Signed.] “Dennis H. Fitch. [L. s.]” And your Orator, the said Fitch, then and there delivered the said deed last mentioned, with the said note taken by your Orator Thompson, as security as aforesaid, thereto annexed, and the said deed from the said Thompson to the said Fitch, to your Orator Peckham, for the purpose of transferring to your Orator Peckham, all the rights, and security therefor, that your Orator Thompson, had in relation to said loan of money to said Speer, and transferred to said Fitch, as aforesaid, and that your Orator Peckham, is now the holder of the said note and deed, and entitled to all the benefit thereof, and money to be recovered thereon.

And your Orators further show to your Honor, that the other two of said promissory notes secured by said Mortgage have been long since satisfied and paid in full.

And your Orators further show, that neither the said Speer or any other person has ever paid to either of your Orators, or to any person for them or either of them, any part of the said sum of money so loaned, or any interest thereon, and that the whole thereof remains due.

And your Orators further show to your Honor that the intention

and purpose of the said Speer and Haddock in the transactions in which they were engaged as aforesaid with your Orator, Thompson, was to give to your Orator, Thompson, a lien upon said premises, subject to the terms of the before recited endorsement upon said note, as security for the repayment of the said sum of money so loaned by him to the said Speer, and that your Orator, Thompson, also took said note and endorsement with the intention and purpose of thereby obtaining such lien as last mentioned, and that neither your Orator, Thompson, or the said Haddock, or the said Speer had any intention or purpose to revive, or attempt to revive the said note as a personal liability against the said Hickox, or in any way to affect him or his interests therewith, and that all the parties to this suit hereinbefore mentioned in all of the transactions aforesaid, acted upon the belief that your Orator, Thompson, had acquired such lien and securities. And your Orators further show to your Honor, that on or about the 13th day of October, A. D. 1857, the said Isaac Speer failed in business, and ever since has been and now is insolvent.

And your Orators further show to your Honor that the said Haddock has or claims some estate or interest in the said premises other than that he claimed under said Mortgage, but your Orator charges that the said Haddock acquired such estate or interest since the making of the said loan and endorsement, and subject thereto.

And your Orators further show to your Honor, that Thomas Speer and Buckner S. Morris, (whom your Orators pray may be made defendant to this Bill,) have or claim some estate or interest in the said premises, but your Orators charge that such estate or interest was acquired by them since the making of the said loan and endorsement, and that such estate or interest is claimed under voluntary conveyances from the said Isaac Speer, and not for any valuable consideration, and with notice of the rights of your Orators.

And your Orators further show to your Honor, that your Orator, Peckham, has often applied to the said Isaac Speer for pay-

ment of the said sum of money so loaned as aforesaid, with the interest thereon according to the tenor and effect of said loan and endorsement, and that your Orators well hoped that no disputes would have arisen touching the said money and interest, but that the same would have been paid, and that the said Isaac Speer would have complied with the reasonable request of your Orator, Peckham, as in conscience and equity he ought to have done.

But now so it is, may it please your Honor, that the said defendants combining and confederating together, and with divers other persons at present to your Orators unknown, whose names, when discovered, your Orators pray that they may be at liberty to insert herein, with apt and proper words, to charge them as parties defendants hereto, and contriving how to injure and wrong your Orator, Peckham, in the premises, do absolutely deny all lien and claim of your Orator, Peckham, upon said premises for said sum of money so loaned and interest, and for such denial set up a variety of unfounded pretences.

All of which actings, doings and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orator, Peckham, in the premises. In consideration whereof, and for as much as your Orators are without remedy in the ordinary course of proceedings at law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable.

To the end therefore that the said Benjamin F. Haddock, Isaac Speer, Thomas Speer and Buckner S. Morris and the rest of the confederates, when discovered, may without oath, which Orators hereby waive in accordance with the provisions of the statute in such case made and provided, full, true and perfect answer make to all and singular the matters herein stated and charged, and that an account may be taken of the amount due to your Orator, Peckham, on account of the said loan so made as aforesaid, and that the said Isaac Speer

15
11

may be decreed to pay what may be found to be due on taking such account, together with the costs of this suit, and that your Orator, Peckham, may be by the decree of this Honorable Court, declared to have a lien prior to all liens or claims of any of said defendants upon said premises for the amount so found to be due, and that the said premises, and all the right, title and interest of any and all the parties to this suit therein, may, in default of such payment, be sold under the decree of this Honorable Court for the satisfaction of the amount found to be due to your Orator, Peckham, upon the taking of such account, together with the costs of this suit, and that your Orator, Peckham, may have such other relief or such further and other relief in the premises as the nature of this case shall require, and to your Honor shall seem meet.

16 May it please your Honor to grant unto your Orators, the People's writ of summons, issueing out of and under the seal of this Court, according to the statute, in such cases made and provided, summoning the said Benjamin F. Haddock, Isaac Speer, Thomas Speer and Buckner S. Morris, and each of them personally, to be and appear before this Honorable Court on the first day of the next term thereof to answer all and singular the premises, and to stand to, perform and abide by such order and decree therein as to your Honor shall seem meet, and your Orators will ever pray, &c.

BARKER & TULY, *Complainants' Solicitors,*
BAILY & GARY, *of Counsel.*

17 January 5th, 1863, defendants, Isaac Speer, Thomas Speer and Buckner S. Morris, filed their general demurrer to said bill, and for cause of demurrer show that "complainants have not in or by their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for, from or against these defendants," and demand severally judgment, &c.

January 28th, 1863, defendant, Haddock, files his demurrer and says the said bill "contains not any matter of equity wherein this court can ground any decree, or give the complainants any relief or assistance as against him, the defendant," and for other cause says that the bill is demurrable "for the want of proper parties thereto." 19

July 17th, 1863, cause coming to be heard on demurrer and counsel having been heard in support of, and in opposition to demurrers, the Court takes the same under advisement.

Sept. 14th, A. D. 1863, the following decree was entered:

This day again come the said parties, by their solicitors, and the Court having had the demurrer of the said defendants to the complainants' bill of complaint, filed in said cause, under advisement, and being now fully advised of and concerning the premises, doth find that the complainants' said bill of complaint, and the allegations thereof are not sufficient to entitle the complainant to the relief prayed for therein. Therefore it is ordered, adjudged and decreed that the complainants' said bill of complaint be, and the same hereby is dismissed out of this Court for want of equity, at the cost of the complainants, to be taxed, to which ruling and decision of the Court in said cause, the said complainants, by their counsel, now here except. 21

ERRORS ASSIGNED.

The Court below erred:

In sustaining said demurrers, and each of them, to complainants' bill. 1

- 2 In not overruling said demurrers, and each of them.
- 3 In dismissing said complainants' bill.
- 4 In decreeing that there was no equity in complainants' bill.
- 5 The decree should have been for complainants upon said demurrers.

BARKER & TULEY, *for Plaintiffs in Error.*