19/11

Margaret S. McNair + others - appellants

v.

John O'Fallon, executor of John Mullanphy, + others (A)

September 1842 - #50 - St. Louis

Lawless + Webb - Attys.

Widow and Heirs
of Aly McNair
appellants
Ezekiel Widow
& heirs of
Jno. Mullaupes Dec
appellees

Supreme Court
McChaney

And now at this day Comes the said appellants by their Solicitor and say that in the record and proceeding in the cause there is error in this Court that in the record aforesaid it appears that the decree [illegible] favor of said appellants [illegible] by the [illegible] of the land it ought to have been for said appellants as same appears by the record aforesaid and said appellants pray that for the error aforesaid and others in said record the said decree be reversed and said appellants restored to all things which they have lost by reason of said decree

Cam[illegible]
Sol for appt

Widow & Heirs
of Alex. McNair Dec'd
appts

Executor Widow &
Heirs of John Mullanks
Appellees

Copy of Evidence

Cowly
Sol Lapp

Filed Sept.r 19th 1812
Jno. Ruland Clk

Margaret S McClain & others

v

Wm O Fallen & others

The appellees come by their attorneys and say there is no error in the decree rendered by the said St Louis Court of Common Pleas in manner & form as the said Appellants have above alledged

A R Gamble

for Appellees

Margaret S McClain
& others

v

John A Talbot & others

Joinder in Error

Filed Sept 22d 1842
Jn.o Ruland clk

Margaret S. McNair &al
vs.
John O. Fallon &al } appeal from the St. Louis Court of Common Pleas.

This was a bill in chancery filed by Margaret S. McNair the Widow & administratrix of Alexander Nair & the heirs of the said McNair, against the defendants, the executor & heirs and devisees of John Mullanphy dec'd:

It is alleged in the bill, that Alexander McNair, being indebted to John Mullanphy, on the 26th. Jany 1820. executed to him his bond for the sum of $5000 payable one year after date, and to secure the payment of the said sum, McNair & his wife executed to Mullanphy a mortgage in fee on the following described parcels of land & lot in the County & City of St. Louis; viz a lot of ground about 6 miles north of St. Louis 2 arpens in front & forty in depth, also a tract adjoining the last mentioned parcel on the north, 7 arpens in front & forty in depth, both bounded on the east by the Mississippi river & formerly owned by Antoine Morine; also a lot in the City of St. Louis on main street 150 feet deep bounded on the east by main street & on the North by a lot formerly owned by Patrick Lee.

On the 30th. Novr. 1820 McNair executed another bond to Mullanphy, in the penal sum of $1000, conditioned for the payment of $500 one year after date. To secure the payment of this bond, the tracts of land above described were again mort-

gaged by a deed executed by McNair on the 16th Decbr 1820.

By a deed bearing date 17th April 1821 McNair & wife Mortgaged in fee to Mullanphy for the purpose of securing the payment of another sum of $3.951 with interest, many other lots in the City of St. Louis and ~~St Charles~~ Town of St Charles and Lands in the Counties of St Louis and Jefferson.

Mullanphy on the 18th day of August 1823 commenced an action of debt against McNair on the bond for the sum of $5.600 and recovered judgment against him on the 2nd day of July 1824. On this judgment an execution was issued returnable to the October Term 1824 of the St Louis Circuit Court, under ~~this execution~~ which The sheriff seized all the property that was mortgaged to secure the debt for which the judgment was rendered, and also all the property situate in St Louis County and City mortgaged on the 17th day of April 1821 to secure the payment of the debt of $3.951. At the sale Mullanphy became the purchaser of all the property included in both Mortgages for the sum of $2700, except one lot 38 feet wide & 120 feet deep ~~included~~ described in the last Mortgage which was purchased by Robert Rankin for eighty dollars.

It is also alleged in the bill, that ~~Mullanphy~~ Mullanphy attended the sale in person, bid for each piece of property as it was offered, and for the purpose of intimidating purchasing and causing a diminished sacrifice of it in on his own favour, proclaimed to the bystanders that he had heavy ~~Mortgages~~ incumbrances on all the property, and exposed to their view papers which he said were Mortgages.

In consequence of such conduct many persons were deterred from purchasing the property and the same with the exception aforesaid was knocked down to Mullanphy.

After this sale, on the 13th Decbr 1824 Mullanphy filed his petition in the St Louis Circuit Court against McNair & his wife to foreclose their equity of redemption to all the lands & lots included in the third or last Mortgage situate in St Louis County. On this, such proceedings were had, that a judgment was entered in these words; that is The said Alexander McNair and Margaret S. his wife do not well and truly pay and satisfy to the said John Mullanphy or his legal representatives the sum of five thousand five hundred & sixty four dollars and twenty two cents, the debt & interest in the petition mentioned, with legal interest on the sum of Three thousand nine hundred & fifty one dollars, together with his costs and charges on or before the third day of November next (1825), then the ~~the~~ Sheriff of St Louis County is required & commanded to sell on the said third day of November next the mortgaged premises in the petition mentioned. No steps, have since been taken to carry into effect this judgment. The first two mortgages were never foreclosed otherwise than by the sale above mentioned, after which Mullanphy took and retained possession of all the property he purchased at the sale until his death, which occurred on the 18th day of September 1833 having made a will & appointed John O. Fallon one of his executors. McNair died on the 18th day of March 1826. The bill charges that the Mortgage debts have been paid or might have been paid out of the rents & profits of the land & lots purchased by Mullanphy and prays for an account, & for permission to redeem.

Upon filing the bill, the judge of the ~~[illegible]~~ St. Louis circuit Court being a party to the cause, it was sent to the Court of Common Pleas.

Robert Rankin who was made a party admitted in his answer that he was present at the sale on the 6th Oct. 1824, & became the purchaser of a lot as charged, for which he received a deed from the Sheriff. He did not know that McNair set up any claim to the lot, that he purchased in good faith & has paid the purchase money. The answer of Rankin being excepted to, for not responding to that part of the bill in which oppressive conduct is charged against Mullanphy at the sale & for not stating the value of the property sold; and the exceptions being sustained; he further answered, that he was at the sale, that Mullanphy was present, and proclaimed to the by-standers, that whoever purchased any part of the property offered would purchase a law suit, that he held a mortgage on the property for a large amount: that when he Rankin bid for the lot he purchased, Mullanphy warned him not to bid, that he was buying a law suit. He cannot state the value of the property purchased by Mullanphy, but his opinion then was & still is, that Mullanphy purchased or caused it for much less than its real value & for much less than it would have sold for, but for his interference & threats.

The answer of the executor and heirs of Mullanphy to the bill admits the recovery of the judgment on the bond for $5.500 on the 2nd July 1824 the award of execution on the same on

20th August, returnable to the October 1824. That under said execution on the 6th Oct the Sheriff sold all the property included in the two Mortgages except that in the Counties of St. Charles & Jefferson, and that Mullanphy became the purchaser for $3700 of all the same, save that sold to Rankin. That on the 16th Oct. the sheriff executed a deed to Mullanphy for the property purchased by him. That neither Mullanphy before his death nor his representatives since have attempted any further to enforce said judgment. They know nothing of the conduct of Mullanphy at the sale. That as to the Mortgages mentioned in the bill they suppose they were executed as they appear. They do not know when Mullanphy entered into possession of the property or any part of it or what rents he received. That they were at some expense in defending suit against part of the property in which B. Ames and others claiming the same by title paramount to McGrain, prevailed. To this answer a replication was filed & on the hearing evidence in relation to the conduct of Mullanphy at the sale and as to the value of the property was introduced: the exhibits were ~~read~~ also read in evidence: the court entered a decree dismissing the bill from which the complainants appealed to this Court.

Many points were made in the argument of this cause, to all of which we shall not advert, deeming it unnecessary, but will confine ourselves to the most important & those in which the merits of the cause are involved.

The first question made, was, whether an equity of redemption could, before the revised laws of 1825, be sold on an execution at law? This question has been twice argued very elaborately in this court, and it must be confessed, is not without its embarrassment. It may be admitted that in England, there cannot be a sale of an equity of redemption upon a Mortgage for a term of years. But if we consult the decisions of the American courts, authorities entitled to great respect are to be found in support of either side of the question, and this contrariety of views must in a great measure be attributed to the different lights in which a Mortgage is viewed by courts of law and equity. The severe features of the ancient common law in relation to mortgages have been relaxed, and the opinion that a mortgage is a mere security for a debt has been steadily gaining ground in Courts of law. This is the equity view of the subject, and Chancellor Kent remarks, that Courts of law have by a gradual and almost insensible progress adopted the equity views of this subject, which are founded in justice & accord with the true intent and inherent nature of every such transaction, and he continues, that in this country the rule has very extensively prevailed, that an equity of redemption was vendible as real property on an execution at law. In the case of the King vs. St. Michaels, Doug. Lord Mansfield declared it would be an insult to common sense to say the Mortgagor is not the real owner of the mortgaged property. Lord Hardwicke in the

case of Cashborn vs. Inglis 1 Atk. 603, said an equity of redemption had always been considered as an estate in the land, for it might be devised, granted or entailed with remainders & such entail & remainders might be barred by fine and recovery, and therefore it could not be considered as a mere right only but must be taken to be such an estate, whereof there might be a seizin. That the person, therefore entitled to the equity of redemption, was considered as the owner of the land. A husband may be tenant by the curtesy of an equity of redemption. To perfect this right four things are necessary, marriage, issue, death of the wife and seizin in fact; and as to the latter requisite it is laid down, that an equity of redemption was not to be considered as a mere right only, but must be taken to be such an estate, whereof there might be a seizin. The chancellor in the case of Waters vs. Stewart 1 Cainey cases in error. 47. holds that a mortgage is merely a lien, until it is foreclosed, or the possession acquired by the mortgagee, that the mortgagor, until either of these events occur is the beneficial owner, he takes the rents and profits without any account, he is a freeholder qualified to vote as such & he is deemed the owner of a landed estate within the English settlement laws. Judge Spencer in the same case remarks, that when a statute speaks of a seizin an equitable seizen may be as well intended as a legal one, and the term is applicable to both. He could perceive no substantial objection to the sale of an equity of redemption under an

execution at law. Chancellor Kent says in the same case, if the mortgagor is to be regarded, as respects his own acts and the acts of the world ~~as~~ the ~~owner~~ owner subject only to the lien of the mortgage, it is neither unreasonable nor improper that courts of law, should treat the land as his under the same limitations. There is no more inconvenience in subjecting the land to execution because there is a ~~lien~~ mortgage upon it, than there is, when a prior judgment has bound it. The vendee in both cases, will purchase subject to the lien & he can calculate the value deducting the incumbrance as correctly in the one case as in the other. In the case of Jackson vs Parker J. Cowen. it was held that one in possession of land under a contract of purchase has a real estate in the land which is bound by a judgment in a court of record, and that his interest might be sold under an execution at law. Jackson vs. Scott 18 J.R. 94. In the case from Cowen, it was held that possession was an interest in lands subject to the lien of a judgment and might be sold under an execution. The interest of a party in possession is not a mere equity, like the interest of a mortgagor out of possession. The cases above cited ~~are from~~ were decided in New York in which state lands tenements and real estate are subject to sale under execution. Real estate includes every possible interest in land except a mere chattel interest. The term estate is very comprehensive and signifies

the quantity of interest which a person has, from absolute ownership down to naked possession: It is the possession of land which renders them valuable & the quantity of interest is determined by the duration & extent of the right of possession. A mere equity cannot be ~~equity~~ sold, but an equitable interest coupled with the possession may be sold on execution. The interest of a mortgagor or mortgagee in possession is bound by a judgment, & may be sold, but out of possession neither has an interest upon which the lien of a judgment can attach. Jackson vs Parker Pet.

The statute in force here, under which the sale now the subject of consideration took place, ~~was~~ is in these words: "all lands, tenements and hereditaments Whatsoever within this territory, where no sufficient personal estate can be found shall be liable to be seized and sold upon judgment and execution obtained". This act was passed in the year 1807. The act of Jany 11th 1822 made judgments a lien on the real estate of the person against whom the same were rendered. It seems, that in subjecting real estate to the lien of a judgment it was designed, that it should be sold on execution, for the lien of a judgment may always be enforced by execution: Then if real estate could be sold under an execution, our law was similar

to that of New York under which the case of Waters vs. Stewart above cited arose, in which it was held that an equity of redemption might be sold by an execution at law.

It is a sound moral principle, that every species of property owned by a debtor should be subject to the payment of his just debts. At the date of the act above referred to, subjecting lands, ~~tenements~~ to sale under execution, nearly all the titles to in the territory were equitable, the fee was in the Government, and had passed to but few. There was no court of equity as contradestinguished from a court of law, Courts of equity were not organized until the year 1811. Geyers dig. 105. As considerable estates might be mortgaged for small debts, it would follow ~~that~~ if the equity of redemption could not be sold under execution, that creditors would be deprived of one of the resources for the payment of their debts. There is no doubt, that by the common law, equitable interests in lands might be subjected to the payment of debts by suitable proceedings in a Court of equity. The doubt was whether they should be liable to execution at law. Then there being no Court of equity here as contra distinguished from a court of law, all equitable interests in lands would be freed from the payment of debts. An exemption we cannot think contemplated by the legislative power. In Pennsylvania when law and equity are blended in their system of jurisprudence, and equity as contradistinguished from law is unknown at least in

the administration of justice, it is a well settled principle, that, a judgment is a lien upon every kind of equitable interest in land, and that such interests could be sold by executions at law. Barkhuff vs. Anderson. 3. Bin. 8. Such seems to have been the system of jurisprudence in this territory from 1804 until 1811. And if during that time equitable estates might be sold under execution, and the terms lands, tenements and hereditaments comprehended such interests, The mere creation of a Court of equity afterwards would not restrain their signification to legal estates only.

Again, the 66th section of the act concerning judicial proceedings Geyers Dig. 267 in force at the time of the sale now under discussion, directed, that the sheriff after a sale on execution, should give the buyer a deed duly executed and acknowledged in court, for what is sold, which deed shall recite the execution, purchase & consideration & shall be effectual for passing to the purchaser all the estate and interest which the debtor had or might lawfully part with in the lands at the time the judgment was obtained. If all the estate and interest which the debtor could part with passed by the Sheriffs deed, then all his interest and estate was sold, for surely it was not the intention of the legislative power that the purchaser should have a deed for more than he purchased, that he should take an interest for which he paid no consideration. The section which directs, that lands tenements and hereditaments may be sold under execution, should be taken together with that prescribing the effect of the sheriffs deed without regard to the order

in which they stand, and their joint application is, that all the estate and interest of a debtor in lands, tenements and hereditaments which he may lawfully part with, shall be sold under execution. It may be said, that the terms estate and interest mean legal and not equitable estates. We have before observed that at the date of the act now under consideration almost all the titles in this territory were equitable in the common law sense of that term, but independently of this consideration, on what principle are these terms to be held applicable only to legal estates? If a word or term by itself includes several species or kinds, each of which can only be designated by a descriptive epithet, if that word or term is used without an epithet shewing that a particular species or kind was intended, then it is to be understood as comprehending all the varieties included in it. This is the natural construction of language. In the case of Waters vs Stevens before cited, we have seen, that Judge Spencer held that when a statute speaks of a seizin an equitable seizin may be as well intended as a legal one. The term is applicable to both. To the same effect Chancellor Kent in the same case remarks, the word seizin in a statute is frequently construed to apply to an equitable as well as a strict legal seizin. The application is always according to the subject matter and to give the statute complete effect. Now what was there, then in existence to limit the construction of the terms estate and interests to mere legal estates? These words were introduced in the year 1807 before the organization of a court of equity, and at the time of their intro-

duction, it was necessary to construe them as including equitable estates in order to effect the intention of the law makers which was to subject all land tenement, & hereditaments whatsoever to sale on execution, and having this signification when first placed on the Statute book, neither the organization of a court of equity afterwards, nor the introduction of the Common law, would restrain their import.

The next question we shall examine, is, whether a mortgagee could institute a suit at law, to recover the debt secured by the mortgage, take out execution and sell the equity of redemption of the property mortgaged to secure the debt for which suit was brought? In an examination of the books, cases are found in which such proceedings have been tolerated. I say tolerated, for no case can be produced, in which the question arose between mortgagor and mortgagee, that has received the authoritative sanction of a Court. The confusion and embarrassment consequent upon such a step, would decline any court, to give it, its countenance. What is the sense of the thing when the mortgagee under execution sells the equity of redemption of the property mortgaged to satisfy the debt? It is an admission, that it is worth something over and above the mortgage debt, if not, why sell, what object can the mortgagee have unless it is to unite the legal & equitable estates and thereby defeat a redemption. If the mere equity of redemption is sold, that is the mortgagors interest after satisfaction of the mort-

gage debt, and the mortgagee becomes the purchaser, whatever sum he pays for the equity of redemption will belong to the mortgagor, for as the mere equity is sold, he by becoming the purchaser, admits the mortgaged property is worth more than his debt - by the sum bid, and consequently the debt is extinguished; and the sum bid will belong to the mortgagor: So in fact it is nothing but a new mode of foreclosure. But suppose a third person becomes the purchaser (and it is a singular view of auction, where particular
over one person can become a purchaser) what is the consequence? Say that he bids the amount of the mortgage debt, that amount is paid by the Sheriff to the Mortgagee, his debt is thereby satisfied & the purchaser holds the property freed from the mortgage debt, and although he has bid the amount of the mortgage debt over and above it yet the Mortgagor receives nothing and his equity is entirely sacrificed. To make this matter plain let us suppose a case: A has a debt of £500 secured by mortgage on property worth £1000, he sues at law for his debt, takes out execution and levies it on the equity of redemption of the mortgaged property, at the sale B. becomes the purchaser for £600, that is B is willing to pay £500 for the property after paying the mortgage debt. The Sheriff takes B's £500 hands it over to A, A's debt is ~~then~~ then paid, the Mortgage is extinguished and B takes the land freed from the mortgage debt, so in fact gets it for £500 when he bid a Thousand, so the equity of redemption is sacrificed and the mortgagor loses £500. The same consequences though not to a like extent when a purchaser bids up for the equity of redemption than the ~~sum~~ debt. The case of Tice vs Annin 2 J. C.R. would remedy this, by compelling the Mortgagee to assign his debt and mortgage to the Mortgagor and thereby substitute him for the Mortgagee by which he can ~~recover~~ compel the purchaser to pay him the amount of the Mortgage debt. But that very case, shews there are circumstances under which this cannot be done and so the mortgagor will be remediless. I do not consider the case of Tice and Annin as warranting such a mode of proceedure. In the case of Jackson vs. Hull 10 J.R. the question did not arise, for it was a controversy between the Mortgagee & the purchaser of the equity of redemption. It was held in the case of Goose vs. McReary 2 Blackford ~~it was held~~ that by such a manner of proceeding the mortgage was waived and it was to be deemed to a foreclosure, as the whole estate was deemed to have been sold. The case of Lyster vs. Holland 1 Ves. Jun. decided by Lord Thurlow, contains something in relation to this subject, and although that cause went off on another point, yet the propriety of such a proceeding was very much doubted by the chancellor. Was there ever an instance of such a proceeding as this? It was a new thing to him that this case obtains in mortgages.

But we will not rest our opin-

in on the considerations above stated. The cases above cited all occured, when there were no statutory provisions on the subject of the foreclosure of Mortgages, especially provisions of a character beneficial to the Mortgagor and which guarded and protected his equity of redemption against too speedy a foreclosure. Hence in those States when such provisions obtain, it has been held that such sales are void. In Massachusetts when the effect of such a course of procedure was to reduce the length of time to which the Mortgagor was entitled to redeem the sale was declared inoperative. In the case of Atkins vs. Sawyer 1. Pick. when a Mortgagee had caused a sale to be made of the equity of redemption on execution for the purpose of paying the debt secured by the Mortgage, the Court said, if the sale of the equity be operative, its operation will be repugnant to the statute regulating the foreclosure of Mortgages, it enables a Mortgagee at his will and pleasure to reduce the Mortgagors right of redemption from three years to one, thus depriving him of an important advantage secured to him by the statute. In Kentucky when similar statutory provisions prevail, the like doctrine obtains. 7. Dana Goring vs. Shriver.

The statute of 1807 concerning the foreclosure of Mortgages in force when the sale took place which is now the subject of consideration, conferred on the Mortgagor rights of some importance, of which he was deprived by selling his equity of redemption

as the exist of the mortgage for the mortgage debt. That Statute in proceedings ~~of foreclosure~~ to foreclose, required twenty days service of procep before the return day, whereas in ordinary proceedings at law ~~fifteen days~~ service fifteen days before the return term was sufficient. Moreover, the statute directed, that the sale of the mortgaged premises should be at least nine months from the commencement of the proceps of foreclosure. The statute, in declaring that the sale should be post-poned at least nine months from the commencement of the exist did not intend, that that should be the precise period at which the sale should take place, but from the manner in which it is worded, it is clear the Court had a discretion, and might and no doubt would upon shewing sufficient cause extend the time. All that was required was that the sale should not take place in less than nine months, if that time was prolonged by the Court there was nothing in the Statute to prevent it. In proceedings to foreclose mortgages in England, nothing was more usual than to extend from time to time the right to redeem. In the ordinary course of proceedings lands might be sold in less than nine months and this actually occurred in this cause. The method of proceeding adopted by the mortgagee deprived the mortgagor of advantages secured to him by law, we are therefore of opinion the sale was void.

The determination of this point, establishes the right to redeem the land included in the first mortgage. It remains to be ascertained whether the complainants have a right to redeem that included in the third. It seems strange that we should be called upon to decide this question, when there is a solemn admission by Mullanphy on record that this right exists. There is a decree of foreclosure in evidence, that unless A. McNair pay to John Mullanphy the sum of $5464.22 on or before the 3rd day of Nov. 1823 that the mortgaged premises be sold. Mullanphy before his death nor the defendants since have not caused this decree into effect, it is unreversed and is still binding, and is a solemn admission of McNair's right of redemption. That judgment or decree is an estoppel, and the defendants are precluded from denying its justice and validity: In the case of Offutt vs. Johnson decided at this term of the Court after a review of all the authorities, it was held, that to make a judgment a bar, in cases where an attempt is made to litigate a second time a matter on which a court of competent jurisdiction had pronounced its sentence, it was not requisite to plead the former judgment in order to make it an estoppel, but it was sufficient if it was given in evidence, and that its force & conclusiveness were the same when given in evidence as when pleaded. And we are gratified to state that the conclusion to which the Court came in that case meets with the concurrence of Professor Greenleaf, a jurist whose learning and abilities have every where commanded the admiration and respect of the profession. Greenleaf in evidence § 667. But had it been determined otherwise the rule requiring a judgment to be pleaded in order to constitute an estoppel, was never extended to cases in which the party relying on the judgment, was precluded by the form of proceeding from pleading it. If he is denied that opportunity by the mode of proceeding, he may shew it in evidence & it will in general have the same effect as pleaded. Howard vs. Mitchell 14. Mass. R. Parker Ord. 1.

The determination of the two last points settles this controversy so far as the representatives of Mullanphy are concerned: To what extent and in what manner O'Fallon & Rankin may be affected we give no opinion, nor in alluding to them do we mean to intimate that they will be affected by the decree which will be pronounced in this cause. We have mentioned them merely, that it may not be supposed they were overlooked. Nothing having been said in the argument in relation to the liability of the property held by them to redemption we have deemed it most advisable not to question

(56.) 57.

McNair & al
vs. &
O'Fallon & al

Opinion

Scott

20 pages
20 pages

Filed Sept. 4. 1843.
H. L. Boon clk

20
to be determined in the court to which the cause will
be remanded

Decree reversed
& cause remanded.
W. Scott

If an Eq of Red be saleable; It must be levied on as such.
vid Con. Digest. p 518. – § 105.

1 Pow. note 1. p 255 – 7 Pick 51.

4 Pick 140 8 East. Scott v Scholz.

If saleable at Law – An Eq of Red could not be sold on a Judgt obtained on Mortgage Debt –

vid Perry v Banker 8 Ves. 527 – 10 John 482.

1 Pick 352. 3. Sc. Atkins v Sawyer –

4 Pick 133 4 Sc. Crane v Marshall –

4 Pick 253. Cushing v Harden.

Shottenkerk v Wheeler 3 J C Rep 279.

As to the Election of Mortgagee to sue on Bond he thereby waives his right agt the Mortg.° property

3. J C R. 330. Dunkly v Van Beuren.

Mortgagee cannot become the purchaser on Debt. Mortgaged at Judgt at Law at his own sale – If so the Mortgagor may still redeem.

4 Henning & Munford p 101. Dabney v Green.

Tice v Annan 2 J C R. 127. – 1 Pick 354. – Pow. 1001.

Mortgagee is regarded quasi Trustee at least to Mortgagor after forfeiture – at

1 Mad. Ch. 512: 1 Pow 330. & part of note M to p 330 – 1 Peters Sup Co. Rep 441 Conrad v Atlantic Co. 1 Mo. Rep case of Car & Holbrook – 2 Merivalle p 259. 60. 13 John R. 555 8 Cowen 378.

As to the Hostile attitude Mortgagee bears to Mortgagor, that does not invade the principle any other than that of Creditor v Debtor – but as every Creditor on simple contract has his remedy, so the Mortgagee has his remedy which is as necessary to be pursued, as the Creditor on specialty must pursue the ac

tion prescribed for him —.

It is contended, that if Mullanphy purchased any Interest Interest, It was the Eq. of Red. of McNair & not Mrs McNair whose Equity of Red. arising on her Contract as as well as that of Alex. McNair & it is not for the Defendants deny the ability of Mrs McNair to make Contract on Bond & Mortgage in both of which She joined.

If mortgagee could Evade the remedy pointed out by the Statute, ~~he might~~ It would nullify the act of 1807. & the Mortgagee then become his own purchaser — & the Consequences of oppression would be apparent. —

2 I C R. p 30.

If the Doctrine of Merger be called in in aid of the title of Mortgagee on the hypothesis that he could purchase — the Courts of Equity apply it according to the intention of the Mortgagee — purchaser to be determined by his own acts &c in this case. We refer to the petition of foreclosure of Mortg. of 17 April 1821. to show his admission of Existence of Mortgage & thereby the Eq of Red in Mr & Mrs McNair

vid 10 John. 482. — in case of James v Morgan 4 Wend 246

Fraud may be inferred from fiduciary relations as the relation of Mortgagor & Mortgagee when Mortgagee departs from the prescribed boundaries given him by Statute to recover his Debt

2 Sch & Lefroy p 673 — 1 Story Eq Com. 198. Sections 188. 190. — 18 Ves 483. — 2 Story 200. 244. ~~2 Sug~~
2 I C R. 30. — 5 Gill & Joh 75. — Pow. 124 note 2

From fact of interference at Sale.

Sug. 127.

As to inadequacy of price 14 Ves 240

Evidence of Dent. Evans. & all the Circumstances

(56)

Buf

McNeil & other

v

O'Fallon & other

E W Nabb

St. John vs. Turner

2. Vernon 418

3 Ves. Jun 22

2 84

2 Ves. 450

filed Sept 4. 1843.

H. L. Boon clk

M S McNair & others } In Chancery on appeal from St Louis Court
v
John O Fallon & others } of Com. pleas.

The Bill in this Case prays for Equity of Redemption in certain lands mortgaged in fee to John Mullanphy by Alexander McNair & wife made on the 26 Jany 1820 — 16 Novr 1820 and 17 April 1821 — The two first mortgages embrace the same parcels of Land — that of 16 Novr 1820 after reciting the mortgage Deed of 26 Jany 1820 & the joint bond made by McNair & wife — secures the payment of 500 dollars on a penal bond for $1000 =
The Deed of Mortgage of 17 April 1821 embrace other & distinct lands making the greater part of real Estate was also sold on the Judgment on mortgaged bond of $500 in first mortgage of 26 Jany 1820 on the 6 Oct 1824 — On the 13 Decr 1824 after said Sale Mullanphy filed a petition to foreclose the mortgage of 1821 making McNair & wife Defendant on which mortgage was a decree of Sale & no other proceedings thereon are of record.

This Bill also prays account of rents & profits from Novr 1824 when Mullanphy & Rankin become possessor thereof under their respective Deeds from the Sheriff under said Sale — & also such other relief as the Complainants may be entitled to —

The points relied on are viz

1 An Equity of Redemption on the 6 Oct 1824 was the only interest to which McNair & wife were entitled & which at that time could not be the subject of levy & of sale on a fi fa at Law =

2. If an Eq of Red at that time was saleable on fi fa at Law, It could not legally apply in this Case — Because the fi fa was on a Judgt at Law obtained on the mortgaged Debt.

3. If saleable on fi fa, John Mullanphy, mortgagee, could not become a purchaser at the Sale =

4. The Conduct of Mullanphy at the sale was oppressive & fraudulent, & thereby by denying competition of bidders & thereby & otherwise depreciate the value of McNair Interest & property —

1. An Equity of Red. was the only Interest to which Mr Nair & wife were Entitled on the 6 Oct 1824, which Interest neither then was nor Could be sold under the Statutory provisions of Missouri, nor at Com. Law. on fi fa on general Judgt =

1. As to the Interest of Mr Nair & wife on 6 Oct 1824.

vid Record the Sevd Mortgages at pages 46 – 51. 79:

vid return of Sheriff – p. 73 =

vid p. 76. as to the Judgt –

vid return of Sheriff on Judgt 5300. – p 77:8:

vid p. 79 as to the proceedings at Law:

2. At Common Law an Eq of Red. not saleable at Com Law:

vid 1 Pow. p 258. note K. – 1 Mad Ch. p 522. –

4 Kent 160. – 1 Pick 399.

3. An Eq of Red is an Estate derived from every Contract of Mortgage & possesses the inseperable incident of foreclosure. which must be had through a Judicial Decree

4 Kent 135 = 1 Pow 116 = 2 J C R. 100

4. And before foreclosure no act of Mortgagee can affect in any way this right of Redemption in Mortgagor

vid Wilson v Troup 7 J C R. 37. 8. – 9 Cow. 358. 60 - 61. 71. 89. 90. 91 –

5. An Equity of Red. being a mere Creature of Equity is an Estate & Int. sui generis – & can only be construed, understood & enforced by a power residing in a Court Exercising Chancery power.

vid Toub. 227 = 4 Kent 163. – 1 Mad Ch 451.

3 Bin p 8.

6. An Eq of Red being thus a creature of Equity partakes of & is in fact & a Trust Estate – if not Express – certainly a Constructive Trust. – which could only be sold under Statutory provisions. where the Com Law. is recognized –

1. In England a Trust Estate not saleable before 29 Chas.

2. – 8 East. 482 = 24 Law Lib 278. – 1 Vesey. case of Lysler v Dolland

1 Pow. on Mort. p 255. note K.

If Trust Estate be not saleable at Com Law. And in England only by Statute of 29. Charles 2. — An Eq. of Red. being as aforesaid peculiar Trust Estate, was not Embraced in the provisions of 29 of Chas. because the words "lands tenements & hereditaments" &c. did not contemplate "an Equity of Redemption." for the want of the words "Equitable Interest" were not Embraced — Showing by the absence of the word "Equity" nothing can be implied ~~by Statutes~~ in a Statutory provision — 8 Peters 491=

vid Saunders U & T. p 191. also note + for the words of Statute of Chas 2. — 1 Pow. 257. note — 1 Ves. 431.

7 Pick 51. — 13 Peters 294 — 5 Harris & Johnson 315:

An Equity of Red of Redemption could not have been contemplated by the Legislature of the Territorial Government.

vid Guyer Dig. Title Judicial proceeding Sec. 63. 66

vid do — p 307. title mortgages being an Express provision for sale of Mortgaged Estates —

This Statute must be strictly pursued by the party mortgagee ~~and~~ while there existed no Ch. power in yet the Court Law Court was intend to be the forum for the remedy which can not change or affect the principle in Equity. to wit that "once a mortgage always a Mortgage". Being such there arises an incident of foreclosure which must be deposed of before the right of mortgagor can be released or annihilated either by Special Contract. or Judicial Sentence — consequently the power was given to the Com Law. Courts through which to obtain relief — clearly showing that though a remedy is in a Court of Com Law, yet it may be Come the Vehicle of effecting it 1 Dallas 211

vid Lawsat on Equity — p. 41. 44

13 Peters Rep 294. —

13 John Rep. 551. — 102. — 11 Mass. 165: — 9 Cow. 182:

It is admitted by the Court below. That this was an Anglo. American Mortgage — If so. — the Interest is purely Equitable & is contra-distinguished from legal interest & being so could not be affected by affording a remedy in a Court

of Com Law being imparted to It —

This view arises from several acts of Congress relating to judiciary powers in Territory of Louisiana — then Territory of Missouri — then State

vid 2 Story p 938: sec 13:

975. sec 1. ch 99.

3. 1255. p Issued 4 June 1812.

1603. pass^d 29 April 1816 p 1603.

Also in Guyers Digs several titles of mortgage & other titles showing a distinction betw Law & Equity.

also the introduction of Eq of pow in 1811.

p 124. Title Com Law =

Thus the whole system of Legislation in Congress & the Territory shows from the Commenc^t to Act 1839. That there is a negation to sale of Equitable rights —

vid also the reasoning of the Court by Ld Ellenborough in Scott v Scholey. 8 East. which shows the injustice of other doctrine o: also note K. in Pow. 255.

It was objected in argument below that no other creditor than mortgagee could enforce payt. of his Debts.

To the fallacy of such reasoning I refer the Court to 1 Guyers Digs — Title Mortgages —

1 Pow note B. 261 — 13 Law Lib 108.

As to the policy of protecting the rights of mortgagor ags^t mortgage a

vid Sudgd. p 128. 1 John CR. p. 30:

Compare the Statutes of Missouri with the provisions of 29 Charles 2. — (vid Sound v & T note x. — Guyers Digs Title Jud. pr. sec 63. 66 —) & decisions in other States whose Statutes contain like provisions

vid Hardins rep. p 19: 1 Saxton 304. —

If an Eq of Red be real Estate — a Judgt would be a lien on it & an innocent purchaser might be affected ~~thereby~~

1 ICR 55 — (vid Hart. v Reeves 5 Hayw. p 58 — which I cannot find & but by reference)

Margaret S McClain
admrx of Alexander
McClain & others Heirs of
said McClain — Appellants

vs

John C Ballow admr of
John Mullanphy dec'd
& others exors & Heirs of said
Mullanphy — Appellees

This is an appeal from a decree of the St Louis Court of Common Pleas in Chancery

The bill was filed by the appellants to redeem certain property upon which John Mullanphy in his life time held certain mortgages and which he had purchased at Sheriff's sale.

The material facts are these
McClain in his life time executed to Mullanphy the following bonds & mortgages

1. A Bond for $500 dated Jan. 26. 1820 payable at 1 year with 10 per cent int.

To secure this sum he executed a mortgage on 3 pieces of property as follows

1 a tract of 2 by 40 arpens bounded East by Mississippi River

2/3 a tract of 7 by 40 arpens adjoining the first

1/3 a lot in the City on Main Street bounded South by Crop Street East by Main Street N by lot of Patrick Lee.

2 A Bond for $1000 dated 30th Nov 1820 conditioned for the payment of $500 with 10 pr ct Interest at one year

To secure this bond he executed on the 16 Decr 1820
a mortgage on the same property mentioned above

3 A Bond for $3951 dated 17 April 1821. Int at 10 pct
To secure this sum and interest he executed
a mortgage upon the following property
1. a lot in St Louis 25 feet French measure in front
on Main Street by 75 feet deep bounded East by
Main Street South by McNair. This lot lies im-
mediately north of that mentioned as No 3 in
first mortgage
2. a lot on the hill bounded on one side by Valois
on another by Papin being of the usual size
of a town lot acquired from Chouteau &c
3 a lot bounded East by lot of Ester South by St
Pierre North by Cross Street acquired from Cathe-
rine Dodge
4 a lot 30 feet by 170 deep bounded on North
by Cross Street East by lot of Cartenille West
by Laderoute South by Charleville

5: a lot on the hill in St Charles

6 a lot in St Charles

7 a tract of 640 acres of land in St Louis
County on Merrimack River

8 a tract of 800 acres on the Negro fork
in the County of Jefferson—
The Bill states a recovery at law on the
bond secured by the first mortgage. The judg-
ment being on the 2 July 1824

On this judgment execution issued and the mortgaged property was sold on the 6 October 1824 Mullanphy becoming the purchaser of the property sold except the fourth lot in the third mortgage which was purchased by Robert Rankin.

The bill charges that Mullanphy purchased all the property covered by the first and second mortgages for $1850 and so much of the property covered by the third mortgage as he purchased for $850

The bill charges that the purchase by Mullanphy was at a great undervalue and that the sale was affected by representations made by Mullanphy that he held large mortgages on the property which deterred other persons from bidding.

The answer sets up the judgment and Sheriffs sale and insists upon them as vesting title in Mullanphy, and as to the alleged representations of Mullanphy at the sale, while the defendants declare their ignorance of any such representations the answer insists that according to the statements of the bill such representations were true.

An amended bill makes John O Fallon in his own right a defendant stating that he had become a purchaser of a part of the property embraced in the first mortgage. O Fallons answer states that Benjamin Rush being the owner of an undivided interest in the two first tracts of land in the first

mortgage mentioned filed his petition against the representatives of Mullanphy for partition and that on that petition proceedings were had which resulted in a sale of the first tract as being not susceptible of division and a purchase by Ames who conveys to O Fallon The second tract was divided and the part allotted to Ames on partition was conveyed to O Fallon. O Fallon avers that he purchased of Ames and paid his money without notice of any claim of the complainants.

~~Replications being filed the parties proceeded to hearing.~~

The bill also stated that Mullanphy after his purchase proceeded to foreclose the third mortgage and after obtaining a decree of foreclosure proceeded no further with it.

Replications being filed the parties proceeded to hearing.

On the hearing the Complainants read in evidence the three mortgages -

They then gave in evidence a transcript of the writ on the bond secured by the first mortgage which transcript terminated with the Sheriffs return to the execution on which the sale was made at which the purchase was made by Mullanphy. No further attempt was made to enforce the collection of this debt from Mr Chouteau.

The Complainants next gave in evidence the Sheriffs deed to Mullanphy - Some argument was founded on the language of this

deed but it is not thought of any importance to notice either the phraseology of the deed or the argument upon it.

The Complainants then went into evidence by witnesses and although the testimony taken is voluminous it may all be resolved into a few points.

1. The value of the property and the inadequacy of the price paid by Mullanphy.

2 The conduct of Mullanphy at the sale deterring other persons from bidding

3 The poverty of McClain's family after the sale

4 The friendly relations subsisting between Mullanphy & McClain before the sale, which the Complainants Counsel say enabled Mullanphy to loan McClain money and obtain encumbrances on his property.

5. The purpose of Mullanphy to have McClain's property.

On the point of inadequacy of price it will be seen that the testimony abundantly shows that at the time of this sale, the value of property was at the greatest state of depression ~~in~~ which has ever existed here. The bubble which had been blown during the years from 1816 to 1820 had bursted and had overwhelmed the land speculators, in universal bankruptcy. Real estate

had fallen almost to a nominal price. There were but a very small number of persons who could become purchasers and they purchased what are now considered vast fortunes for inconsiderable sums.

It is also apparent from the evidence that at all sales the judgment creditors whose claims were equal to the value of the property, purchased the same at merely nominal prices upon the calculation universally made that the creditor would bid the property to the amount of his judgment. The evidence also shews beyond all doubt that there was not as great a sacrifice in the sale of this property as occurred in the sale of other property at the same time. and it also clearly appears that the whole of the property embraced in these mortgages would not upon any proper calculation of its value have satisfied the encumbrances. see the testimony of Charles Mulliken — Daniel Hough — John R Walker John Simonds — James I Purdy — William C Carr — H S Geyer — Jesse G Tindall — Peter Tindall —

On the 2d point of evidence as to the conduct of Mullanphy at the sale, the testimony of Frederick Dent and Augustus H Evans is relied upon to shew improper conduct. The substance of their testimony is that Mullanphy attended the sale and bid for the property — at the time of the sale he gave notice of the mortgage he held — he [redacted] spoke angrily to Rankin

who commenced bidding for a lot and declared to him that if he purchased he would buy a law suit

Dent says that the effect was to prevent him from bidding Evans says the language and deportment of Mullanphy were calculated to deter persons from bidding

3 The poverty of McClains family after the sale while it may furnish ground for sympathy has no relevancy to any question arising in the case

4 The friendly relations alledged to exist between Mullanphy and McClain are attempted to be used as proof of imporetion by Mullanphy in his subsequent conduct, but there is no evidence tending to shew that he did not lend McClain all the money for which the mortgages were given - or that he claimed of him any usurious interest - or that he took any advantage of his necessity - or that he oppressed him in any secret bargain or exaction - All he did was done openly, in the enforcement of his clear legal rights

5 The purpose of Mullanphy to have McClains property - For this the testimony of Isaac A Letcher is relied on who repeats a remark of Mullanphy made to him with a view to caution him against a loss to which he was exposing himself.

On the case as argued in the Court below the Complainants counsel relied upon many positions of law which are believed to be fully answered in the following

Points for appellees

1. That McCharis interest in the property being an equity of redemption was subject to be sold on judgment and execution at law.

The act of July 1807 Geyers digest 266 Sec 63 authorises the sale of lands tenements and hereditaments - the 66 Sec of same law declares the effect of the sale when made - it is to pass "all the estate and interest which the defendant had in the property at the date of the judgment" and which he might lawfully convey -

As the language of this law is very comprehensive and would certainly embrace interests in real property of every description many authorities have been cited to shew - 1 That by the Common law an equity of redemption was not subject to execution - 2d that in the construction of statutes in countries where the Common law prevailed the words "lands tenements and hereditaments" do not embrace equities of redemption in lands -

To these authorities we reply 1 That our Statute was passed when the Spanish law was in force and when lands subject to mortgage were liable to be sold for the payment of debts ~~2d that~~ and therefore in the construction of the 63 Sec the words lands tenements and hereditaments will be held to embrace equities of redemption 4 Martins R 397 - 3 Martin 574 -

2 If the Common law were the basis of our jurisprudence at the date of the act still the 63 & 66 Sections taken together shew the purpose of the lawmakers to be, to subject every interest in land to sale on Execution which the debtor could pass by his own conveyance.

Whether then the Spanish or Common law be the system the act subjects equities of Redemption to sale on this process

There was when this act was passed no distinction between legal and equitable estates and no distinct jurisdiction over each different interest, and in such case as in Pennsylvania 3 Binney 8. the judgment would bind and the execution would sell an equity of redemption.

Again. at the time of the sale all property embraced by the term real estate was bound by a judgment and consequently liable to sale acts of 1822 page 93 Sec 61 ~~4 Cowen 80~~ and an equity of redemption is embraced in these words 1 Caines cases 47 4 Cowen 80

2 Point. In some of the United States the Courts have held equities of redemption subject to sale on Execution at law by the Construction of their legislative acts while in others a contrary construction has been given to similar acts, but in all cases the acts seem to have had no stronger words than those in the 63 Sec of our law, and in no case approach in strength to the words employed in the 66 Sec of that law:

So in New York 1. Caines cases 47. 4 J R 41. 7 John R 278. 11 John R 538. 19 John R 325. 5 John Ch R 452 cum multis aliis

So in Maryland 4 Cranch 456. 496. 5 Har & John 312

So in Massachusetts 1 Pick 355. 1 Powell in note to 254(a)

So in Connecticut 1 Day 93.

3 Point

The equity of redemption may be sold on judgment & Execution for the mortgage debt.

Tice vs Annan 2 John Ch R 125:

The cases in Tice vs Annin and in Atkins vs Sawyer 7 Pick 355 state that there are difficulties in such sales but it will be seen on examination that they are technical difficulties merely - and it will be seen that these difficulties are to be met in different modes - See 2 Blackford R 243 in which the Court holds that the whole title passes upon such sale free from the mortgage - apply the doctine of merger as the remedy and many of the difficulties disappear 2 Cowen 246

4 Point The mortgagee may be the purchaser at such sale.

The only objection made to his being the purchaser is, that he maintains a fiduciary relation to the mortgagor - Many authorities have been cited to prove that the mortgagee is a trustee and others to prove that a Trustee cannot purchase the trust property.

It will be seen on examination of these authorities that the mere expressions used by Courts that the mortgagee is a trustee were not designed to ~~embrace~~ declare the relation between mortgagor and mortgagee to be that which exists between a trustee for sale & and his cestui que trust.

It is most clear that no such relation exists between mortgagee and the mortgaged property as exists between trustee and for sale and the trust property which relation prohibits a purchase by the trustee.

5- The evidence taken to shew misconduct of Mrs Murphy at the sale shews no misrepresentation of facts - no artifices - nothing but declarations which were true - And there is nothing to shew that any advantage was gained by him - On the contrary the whole evidence shews that the whole property was not worth half the value of the incumbrances. And it is certain that no further effort has been made to enforce the debts On Mr Hair

6 A claim is set up to redeem by Mrs McHair as widow entitled to dower

It does not appear when the marriage between Mr Hair and the Complainant took place.

At the time of this sale, a sale on Execution divested dower Geyers Digest title dower. This is independent of the fact that she executed the mortgage

If the sale was valid at all it passed her dower.

W R Gamble
atto

(57)

/331/

McCain
vs
Mullanphy

Appellees Brief
B R Gamble

filed Sept 4. 1843.
H. L. Boon clk

McNair &al.
vs.
Mullanphys heirs &al } Sup Court

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1 Equity of redemption passed by Sheriffs sale on the judgment on the Bond,

Geyers Digest 266-7 Sec. 63, 64, 66

Edward S Corn, 855 } Acts of Assembly of 1821-2 page 93 Sec. 61 as to liens of judgments on "real estate"

(Sec. 3)

3 Mis. Rep. 492
4 Mis. Rep. 319, 380 } that mortgage in Missouri is not the same thing as in England.

3 Martin's Rep (old Series) 574
4 Martin " " 397
5 Martin " " 634 } to show that under Spanish laws, which formerly were the law here, an equity of equity of redemption, could be sold on execution; & the last case was a judgment in favor of the mortgagee on the mortgage debt. And under those laws there was no distinction of estates into equitable and legal.

1 Caine's Cases in error 46 that equity of redemption can be sold on pst & exi.

4 John Rep 41
6 John Rep 290
7 John Rep 278
11 John Rep 538
19 John Rep 325
5 John Chy Rep 454
2 Cowen Rep 195 } These New York cases show that mortgagor is held to be the owner substantially that wife has dower in the equity of redemption, &c.

Customs was to sell equity of redemption here always, words "lands and tenements &c." were used to comprehend all interest in lands. See territorial laws passim.

1 V. C. R 51 equity vendible on exn on principles peculiar to mortgages.

1 Day's Rep. 93. That equity of redemption can be taken on execution in Connecticut.

9 Cranch 456 - 485-6 that the same is true as to attachment in Maryland under the words "lands & tenements." See 5 Harr. & John. 551.

13 Peters, Rep. 294 That in many of the States the mortgagor is viewed in a Court of law as owner, &c.

1 Shep. Touch. 91 defining tenements and hereditaments. Note 2. also.

Saunders on Uses 186. } equity of redemption is not a trust.
Lewin on Trusts 216 }

2 That mortgagee can sell on judgment on the mortgage debt & buy himself see following authorities.

2 John. Chy. Rep. 125 Fice vs. Annin. In this case the Chancellor holds the sale valid, & decrees accordingly; and intimates as the proper remedy, that on application in time he will enjoin such a proceeding.

10 John. Rep. 481
2 Halsted's Rep. 409
3 Martin's Rep. 574

The following were cited by appellants on this head

{ 4 Hen. & Mun. 101
7 Dana 65

(1 Pick. Rep. 351

Neither the first & last of these cases were decided on the ground that an equity of redemption cannot be sold on a judgment on the mortgage debt. A judge in each case intimates his opinion to that effect; the second turns on the local laws of Kentucky.

6 Mis. Rep. 273. A mortgagee can sell under a power.

III The mortgagee has a right to buy at the Sheriffs sale, & he is not trustee in any such sense as to prevent his bidding, particularly in this country.

3 Powell on Mortgages 1154a

1 Powell " " 122, 127a.

IIII An equity of redemption does not of necessity remain till foreclosure; but it may be extinguished by payment, or release, or by sale of it to mortgagee.

1 Powell 307 { 3 John. Chy. Rep. 56
6 John. Chy. Rep 417
5 John. Chy. Rep. 35, 214
2 Cowen's Rep 246

These cases show that where the legal & equitable interests meet, there is a merger, as to so much of the property as is put in that

situation,

IV Mullanphy's conduct was not fraudulent, so as to invalidate the sale.

1 His suing when interest on his debts was in arrear several years is no indication of fraudulent intent,

2 Neither is his waiting several years after the mortgaged property ceased to be good security for the debts from its great depreciation; which depreciation commenced in 1820 & came to its height in fall of 1821 by the breaking of the Bank of Missouri,

3 Nor could he have had any motive to cheat or oppress as the mortgaged property, in 1822, 1823, 1824, & 1825, was not of sufficient value that if sold at full prices at private sale, it would not have brought sufficient to pay half of the mortgage debt. See testimony of J. N. Walker, Wm C. Carr D. Haugh, Wm. Mullanphy Peter Lindell, Jesse B. Lindell &c.

4 The attachment with Rankin proved by Evans & Dent indicates no fraud. They had just before quarrelled w Evans

States at a public sale, & it was renewed on the occasion of McNair's sale. Besides, he had a motive not to pay high commissions.

5 His conduct at the sale was not fraudulent. He gave a notice of the fact of his incumbrance.

6. His remarks to Letcher, warning him not to build on the lot indicated no fraud. If he wished to cheat, why did he not let Letcher build, & then hold his house on his mortgage?

7 McNair lived some 15 or 18 months after this sale. If he was so much wronged, why did he not move to set it aside, or file his Bill, while the facts were fresh, & witnesses alive & able to remember what took place?

8 Seventeen years elapsed after that sale before this suit was brought, and this laches in McNair, & his wife & children, will render the Court indisposed to rake up these matters.

3 Mis. Rep. 176
8 Cowen 384
10 Peters Rep ~~472~~ 473
4 Dana Rep. ~~[illegible]~~, 441

V

Mullanphy's heirs are not estopped from denying an outstanding equity, by the record of foreclosure.

This record refers only to the last mortgage, at any rate and does not embrace the three most valuable pieces of land.

The object of this foreclosure was probably to get at the lot that Rankin bought; and to do this it was necessary under the act to proceed against McNair alone.

VII

Margaret S. McNair the widow has no right to redeem

1 Her right was relinquished by executing & acknowledging the mortgages.

2 The Sheriff's deed divested her right

Gryn's Digest 161 Sec 1
Edward's Compilation 399 164 Sec 5
509

3 And she has lain by and is guilty of laches, 15 years after her husband's death & 8 years after Mullanphy's death.

Acknowledgment of mortgage sufficient
4 Leigh's Rep 498.

VII Rankin's answer is not evidence against his ~~co~~ defendants

5 John. Rep. 412. 426

VIII The evidence which was excluded below was rightly excluded. This evidence was of the sayings of McNair & of common report.

These two last points cannot be taken advantage of under the assignment of errors which is general,

IX McNair was not wronged in any manner by the proceeding & purchase of Mullanplee; for the property was not worth half enough to pay the debts, & the Bonds have never been pressed for the residue of the debts & after this lapse of time cannot be; nor has any resort been had to the several pieces of property included in the mortgages, which do not lie in ~~this~~ the Davis county.

The prices below affixed to the several pieces of property sold on execution are higher than could have been got for the same property, if sold at private sale in 1824. And it is to be remarked that the complainants witnesses do not appear to be qualified to judge of prices at that time, while the defendants witnesses are proved to be among the best judges from actual

dealings at the time & familiarity with prices & sales.

Lands in 1st. & 2d. Mortgage

1 2 by 40 arpts bounded east by Mississippi in Mor- in tract some 4 miles north of St. Louis. — $181

2 7 by 40 arpents situate by side of foregoing in same marine tract; take both of these at 5 dolls an arpt — $1800.

See testimony of J. H. Walker
J. G. Lindell
Jno. Simonds Jr.
H. S. Geyer

The title to a portion of above failed

3 Lot bounded South by Spruce Street East by main Street about 100 or 120 ft front on which is white house on cross St. & old French house on corner — 2000

See testimony of Chas Mullekin
D. Haugh
J. J. Purdy
W. C. Clair
H. S. Geyer &
J. G. Lindell

Lands in 3d. Mortgage

4 Lot 25 on main St. by 75 deep, adjoining the foregoing — 300.

Same witnesses

5 Lot by Joseph Papin & Valois & by 40 arpt lots, a house lot 60 ft front: without buildings.

Letcher says in 1820 or 1821 he agreed to give $2000 for it, how or what he was to pay or when does not appear: but in 1824 the following piece must have been several times the value — 1500

6 Lot bounded east by Esther & north by Cross Street.

No value is put by any of the witnesses on this lot, I think it is 60 feet wide. 5 mills a foot would have been large price according to general state of things

See Mulliken testimony as to Lawless. hence which is nearer this than any other that is valued. } 400,

7 Lot sold to Rankin 38 feet on a cross Street by 170 deep. This is on the same cross Street with the lot numbered three above. The testimony that applies to that, applies also to this } 300

8 640 acres on the Merrimack. — 1280

J. H. Walker

As to the point that the marriage was under the Spanish laws, & that she has an interest in the community & a right to redeem, I answer

1 That the record does not show she was married before the American laws were passed; viz. before an act was

was passed giving dower &c. & thus repealing the law of community.

2 That even if she was married then & the Spanish law was as it is said by Lawless to be, yet the record shows that the lands were acquired since the first act giving dower was passed. See Hempstead's Digest page 132 See 6, 7, 15, 16, &c. So that there was no community then. Of course her only right was what the act gave her, that is, dower.

Edwards compilation 128

4 Martin's Rep O.S. p. 649 648

3. Even were there a community the property of it, was by Spanish law & American law liable for the debts of the community. The lands have been sold for debts of the community.

4 She has also conveyed away her right by joining in the deed without any redemption reserved.

5. No such pretence as community has been set up in the Bill & there can be no relief on a case not presented in the Bill.

J. Spalding
Atty for appellees

1842 Sept. 24

Supreme Court

Margaret S. McNair
dal. vs.
Mullanphy's heirs &
others

Brief of appellees.

J. Spalding atty

filed Sept 4. 1843.
H. L. Boon clk

The Bill in this case prays a redemption of the mortgaged premises embraced in the three following mortgages jointly executed by A. M Nair & wife to John Mullarphy to secure the several sums of money therein respectively named viz

1 — One dated 26 Jany 1820 to secure payt of the joint writing obligatory of even date to be paid on the 26 day of Jany 1821 ~~for~~ $ 5500 at 10 per Ct.

2 — One other dated 16 Decr 1820. in which and recited the Lands in first deed — Debt, & the Covenants and then undertaken to Convey the same lands to Secure payt of a penal bond of A. M Nair to said Mullarphy dated Novr 1820. conditioned to pay 500 on the 16 Dec 1821 — & like Interest

3.d One other & third mortgage conveying all the residue of his lands of M N. to said Mullarphy which had not been previously mortgaged to him to secure payt of 3591. without any bond or note — in which Mr & M Nair joined — all said mortgages are in fee — & in the two last Deeds are Covenants of Redemption

The Bill prays for an account of the rents & profits of said mortgaged premises, into which Mullarphy and Defendant are admitted to have gone into possession on 1st Nov. 1824

On the 22. day of March 1819. the said M Nair and wife had executed their first Deed of Mortgage to said Mullarphy to secure payt of $ 4000 at 10 per Cent. payable on the 19. March 1820., being the same property embraced now occupied by Wm A Biddle —

On the 18 day of Augst 1823. A. M Nair was sued by John Mullarphy to recover the Money on

the joint obligation of A. M. N. & wife for $5500 to which Sheriff returned Non Est — an alias was issued to Feby T 1824 to which No return was made —

At June 1824 a plea of N. Est factum without oath as required by Statute — Guyer Dig p 250, sub Sec. 2 to sec 23. on his signature — but appear to have been signed by Counsel —

On the same day Judgt by default was entered against A M Nair for $7338 —

On the same day, viz 2 of June 1824. a motion was made to set aside Judgt by Default — And on the 10 day of June 1824. the motion was overruled —

On the 20 Augt. 1824. fi fa with Ca Sa was made returnable to first monday of Oct 1824, to which Sheriff returns, that he has made out of the lands & Tenements of A M Nair by sale on the 6 Oct 1824. the sum of $2780 And that John Mullanphy became the entire purchaser of all; but one lot sold to Robt Rankin for 80 dolls. — No return to Ca Sa. No suit appears to have been Entered against A M N.

On the 13 Decr 1824. after said Sale & the deeds of Sheff to Mullanphy & Rankin, Mullanphy filed his petition of foreclosure against A M N. & wife to foreclose the property embraced in the Deed of mortgage, dated 17. April 1821. to secure payt of the sum of $3951. — in which proceeding of foreclosure A. M. N. & Wife were summoned to appear on the first day monday of Feby T. 1825 — to shew cause &c to which Sheff returns service on A M Nair & wife 8 March 1825. vid Record p. 73: —

At the March T. 1825. on the 2d day of April 1825., they appeared, craved oyer &c and 17 May 1825. — Judgt by Default was obtained by Default An order of sale was made if M N & wife did not pay the sum of 5564. on or before the third Monday

of Novr 1825. the Sheff was to sell the mortgaged premises - vid 64. —

No other proceedings were had & there does not appear that the order was carried into effect:

In March 1826. A McNair, about 3 months after, A McNair died leaving his family of seven Children of whom the eldest then living was about 15 yrs - the youngest a babe and left his family in poverty =

It is admitted that the Sale of 6 Oct 1824. was made on Execution for Judgt on the writing obligatory for $5500. =

On the Deed of Mortgage of date 19 March 1819. being the premises now occupied by Mrs B; Mullanphy filed his petition of foreclosure on the c day of — the same having fallen due & remain due from 19 March 1820. and caused the same to be sold on Decree of foreclosure on 4 day of Oct 1824. two days before the Sale on the 6 day of Oct 1824. — John Mullanphy was in possession about 11 mos before the Sale, which was made for $1000.

It has been proven by Testimony of Dort, Evans & Answer of Rankin's Answer, that the Conduct of Mullanphy at the Sale on the 6 of Oct 1824 was such as to deter bidders from purchasing & thereby through his Conduct, Management & undue Influence as Mortgage Creditor to become the almost the only bidder & purchaser at said Sale —

It is also in proof, ~~that~~ after these Sales, McNair was reduced to poverty — from Testimony of Dr Lane

It is also proven that Mr Nair had regarded Mullanphy in the nearest intimacy and in the language of Gardner one of the Witnesses. "Mr Nair had as much confidence in Mullanphy as one Man can have in Another. — vid Test of Lane & Gardner —

It is also proven that after these Sales, Mr Nair through the Sympathy of his friends was appointed Indian Agent which took him from Home greater part of his time, & that his Salary was not more than sufficient to defray the Expenses of his family — It is admitted that M S M Nair in due form of Law Administered

The Defence in this case is title under the Sheriffs Deed to Mullanphy & Rankin for the propy purchased at said Sale of 6 Oct 1824.

The Complainants made replication —

On behalf of the Complainants It is contended that no title in law or Equity passed by said Deeds — ~~and~~ ~~only~~ upon the following points:

1° — The only Interest A Mr Nair had in the mortgaged premises in question on the 6 day of Oct 1824 was an Eq of Red which at that time was not the Subject of Sale on fi fa under a Judgment at Law:

2 = That an Equity of Red cannot be sold to Satisfy the Mortgaged Debt on Judgt on bond secured by the Mortgage Deed. —

3 If an Eq of Red be Saleable to satisfy the mortgaged Debt on fi fa. at Law, We Contend that Mullanphy, the mortgagee Could not become the purchaser at such Sale on fi fa at Law under Judgt on the Mortg Debt

4. The Deeds of the Sheriff to Mullanphy & Rankin for the property purchased by them at the Sale on the 6 day of Oct 1824. were void — Because of the Conduct of Mullanphy at said Sale was such as the Court of Equity will declare fraudulent.

5. That M S M Wair one of the Complainants being joint obligor & Co. Mortgagor — And widow has the right of Redemption

Evidence in Transcript

Dent. p. 96

Wherry. 100

Gardner 101.

Letcher 103.

Evans. 105.

Amd Ans of Rankin 94.

Lane. 94.

Walkers Test. 113. corroborates Dent.

1 Deed of Mort. 46

2 Deed of Mort. 51.

3 Deed of Mort. 55.

4 Transcript of Sec 64

Sheff return — 73.

Sales of the Land viz

2 by 40 arpts on Miss — 80.

7 by 40. do — do. 1000.

3 Merrimack. 640. — 640

4 Delaseus Lot on Main St. — 650

5. 25 by 75 Schlatter. do 100.

6. Hill lot on Bain. — 40

7 Lot bound by Esther

8 Rankins lot 80

M S McNair & others vs John O Fallon & others } In Sup. Court July T 1843. on appeal of Dismissal from the Court of Com Pleas, St Louis:

On behalf of Complainants, It is contended, - That the Dismissal of the Bill in this Case was Erroneous & rely upon the following points -

1. That the only interest vested in A McNair at date of sale, viz 6 Oct 1824, under fi fa was an Equity of Redemption, which at that time was not liable to levy, or sale under a fi fa on a general Judgment at Law. =

2. Admitting an Equity of Red at that time under a fi fa, It could not be sold on a Judgment for the Debt to which the Mortgage was Collateral Security =

3. That a mortgagee could not according to Equity become the purchaser under fi fa of the mortgaged premises, on a Judgment at Law on the Bond, to which the Mortgage was Collateral =

4. That the Sale by the Sheriff in this Case was null & void, because of the undue influence and illegal interference of Mullanphy at the Sale.

5. That M S McNair one of the Complainants in this Bill, being joint obligor and Co Mortgagor with A McNair - And now his widow has the right of Redemption in the Mortgaged premises -

6 That the acknowledgement by her in the two first deeds of mortgage are insufficient in Law to divest her right of Dower.

1 Gen proposition

As to the first general point. That the only Interest A M Nair at the date of the Sale viz on 6 Oct 1824., under the fa fa. on a Judgment at Law was an equity of Red. which at that was not liable to levy, or Sale under such Execution =

Origin

The protection extended to the Mortgagor in Equity originated in the oppression & unconscientious bargains over the Debtor from his necessitous Circumstances –

Coote 4 Kent 158.

1 The origin – with the rights of property and the free alienation – and after doomsday, the doctrine of mortgages became embarrassed by the feudal System:

2. It were good, in analogy to that which that the law of Early Christianity which forbade Jew to make profit of Jew – that forfeiture of his property followed Christians to loan money or usury &c

Incident

In every contract of mortgage, arises the incident of Eq of Red. which becomes vested in the mortgagor on failure of payt on the day limited, to which Eq of Red there is the inseperable incident of foreclosure –

1 Coote 1 – 4 Kent 135: 1 Pow 116. – Henry v Davis 7 J C R p 43: Lansing v Goelet 9 Cow. 351. 371: 1 Tuck Com p 101 102 104 – 110

Different Views

The different views Courts of Law. And Equity take relative to the respective rights & Interests of Mortgagors & Mortgagees –

1. In Law. at the Execution of the Deed of Land in fee – The mortgagor is regarded as having a Conditional fee simple in the property, Subject to be divested by payment.

1 Pow. 157 a – 1 Tucker 109. 10.

1 Pow 157. 1 Tuck 109. 10

In Equity, the mortgagee is regarded as the owner in fee of the mortgaged property and so continues until his Eq of Red is foreclosed by Judicial Decree –

1 Pow 250 – notes A & F. = 4 Kent 159. & 160 cites Lyster & Doland. 1 Ves 431.

Before foreclosure after forfeiture, the mo act of the mortgagee can in any restrain, affect or diminish the Eq of Red in mortgagor

Fonbl. 490 cites Demarest v. Wynkoop. 3 J C R 145. = 3 Pow. 963 note 1 = Wilson v Troup. 7 J C R 37 = Clark v Henry. 2 Cowen. 327. 31: = Lansing v Goelet 9 Cow. 358 – 60 = 90 = 91 – 13 Mass 307 =

An Equity of Red is An Interest or Estate in the mortgagor, ~~[illegible]~~ generis, and a mere Creature of Equity unknown to the Com Law; and Can be only understood construed & enforced –

1. It is an unquestionable branch of the Com Law of England – Lassal 18 1 Mad 550 6 Mass 14

2. A right merely Equitable may be made the ground work of recovery in Cents of Com Law.

Gary 308 Lass. p 43. 44 1 Pow 335. Fonb. 227. 344 § 5. 4 Kent 163. Mad Ch 451. – 1 Story § 80 = Hershaw v Thompson 4 J C Rep. 612 – 3 Bin 8 1 Mo Rep 240.

Such is it peculiarly that not even Consent of parties in Cases of Mortgages Can place the right of Red beyond the power of Chancery. – Because contrary to Natural Justice

1 Pow 117. 2 J C R 30.

If after forfeiture the mortgaged premises be purchased before foreclosure. Either at Law or Equity, the purchaser only buys an Eq of Redemption

1 Pow 124a note. — McClure v Monroe 2 McCord 423 = Wilson v Troup 2 Cow 195.

In every nation of whose Judicial System, we have any knowledge & Especially where the Com Law prevails, Equity forms and becomes from necessity a constituent of the proper Administration of Justice

vid Lass. 153. — vid Rear & Holbook 1 Mo.

vid Guy. Dig. 308 = 6 Mun 143 1 Mad. 550.

If mortgagee had obtained possn by Eject which he could — Because the introduction of the Com Law gave it — how could he bring him to Acct without power of Chany. — for his is considered in the light of a bailiff &

1 Tuck 122.

The whole spirit of Legislation both Congress & Territorial prove, that the principles & doctrines of the Com Law were regarded in this State as the rule of action in Our Courts — & is presumed — 4 Black 89: vid title mortgages § 162. — Ejectment. Jud proceed. — Guy D. 5.

The trial by Jury —

vid 3 art of the Treaty of Cession Guy D. 21. =

vid Sec 10 of the org Law of the Territory Guy. p. 34.

vid Sec 3. Guy. p. 38. — also § 3. Guy. p. 35.

vid Sc 8. 10: Cl. p. 113 — as to lien of Decrees — vid p 116 § 21. 22. 23

Wherever technical words are used, the Legislature applies their legal or Equitable import

2 Pow note Z 603 = 3 Mad Ch. 35. — 5 Ves. 476

Having shewn that an Eq of Red is an Estate in Eq unknown to the Com Law, It cannot be the Subject matter of Sale on fa fa at Law without a Statutory provision =

Not Saleable at Com Law. –

1 Pow. note K. p 255: = 4 Kent 160 = Bedlam v Tucker. 1 Pick 399 = 1 Pick 351. Edwards. v Hughes 9 Wheat. 489 = 2 Ohio Rep. 264 = 4 Mo Rep 62.

2. – An Eq of Red only Saleable by Statute, which must be by Express, negative terms – nothing by implication or Construction:

8 Peters 691. = Bogert. v Perry. 1 I C R 55. ~~4 Mo 62~~ = 3 Dev & Bal. 154

In England land, or real Estate was first made saleable, by the Statute of Edw 1:

2 Pow. 599. –

Nor in any of the Mi States but by Statute: not in Missouri =

vid Guy. Dig p 264. Sec 59. = 266 § 62. as to goods – Sec 63. – 64. as to Lands.

3 Hayw 3 Hay. p 66 on rehearing

In N. York, It has been decided in the Case of Waters v Stewart 1 Cain Cas. 47. that an Eq of Red is saleable as Real Estate:

1. By the Colonial Statute of George 2. – the policy & spirit of which Law was for Commer-

= cial purposes to convert every species of prop-
erty into personalty, or to make it saleable under fa-

In that case the Court assumed the au-
thority of judicial Legislation - if the construc-
tion, in England & in every State the US. be
regarded as authority:

1 In England -

vid 2 Pow. p. 602. as to the Construction
of Statute 26 Henry 8 c 3. =

vid Coote as to the Construction 13.
Eliz - p. 51. 2. 3 & 4:

8 East -

Before the Statute of 29. Chas. 2., a direct
Trust was not saleable.

1 Pow. 287. note 1. - Coote 51. 2. 3 4.

An Eq of Red. not Even Embraced in 29 Chas.
2: - and because the word "Equitable Interests" -

1 Ves. 431.

It is a trust Estate not contemplated
in the Statute - being a Trust Created by the Ope-
ration of Law - or an implied, or Construction
Trust: -

Coote 330 - Jackson v DeLancy. 13. Johns Rep. 555
556. = Crane v Marsh 4 Picker 136: - 1 Peters 441.
1 Mo Rep. Saund UT 191. - 1 Pow 257. note

To demonstrate that an Eq of Red as such
an Int. as must be unknown to the Com Law;

1. An heir may plead Fal rein Descent.
Coote 55.

2 It is regarded as Equitable Assets and subject to the payt of all Debts without distinction Com Dig 55 = Pow 369 = 2 Atk. 290.

3. In order to make even a Direct Trust Estate, there must be in the Statute the word "use" or some term expressive of an Eq. Interest.

If the Language in 29. Char 2. do not Embrace ~~an Eq of Red~~ Direct Trust — a fortiori, the 63 & 66. Sections cannot Embrace a ~~Direct Trust~~ Eq of Red — much less an Eq. of Red.

1. All the words contained in the 29. Ch. 2. are Embraced in the 63. 66. Sect.

vid Saund U & T. 189. — 92:

~~Harden 19~~. Saxton 304: — 11 Hayw.

2. In the terms used in 63 & 66. they are legal technical terms & must be construed according to their legal import: vs. word Lawfully

Pow 606. 8.

Compare the phraseology of the 29 Ch: with that of 63. 66 Sections =

Saund U & T. 189. 92.

Allen. v Burgess Bibb

1 The whole scope of the Legislative Enactments warn the title Jud^e proceedgs = relates to realty.

And the terms used, being legal & technical must refer to legal; Estates =

vid 2. Pow. 606. 8 = for the Explanation of certain technical words. vs "goods" &c.

In the case of Waters & Stewart, the Decision was based on the "words "real Estate" as latitudinary enough to embrace an Eq of Red.

In the first I shall contend that these words real Estate do not Embrace Eq of Red.

Hardin Rep. p 19. vid Russel & Van Stinson & Vance 3 Hay. 56

If the Court believe that real Estate Embrace Trusts & Ht can only be by Express provisions of Statute And in the absence of such words real Estate, Neither Direct Trusts, nor Eq of Red will pass

1 Tuck p. 257 for the lang of 3 Henry. 8 =

3 Haywood p 1 to 10 – Danforth v. Lowry & Waugh 3 Hay. 62. 63 – 13 Peters 294: Van Ness v Hyatt. 1 ICR. p. 55. Bogart v Perry. –

To sustain the views presented by Judge Barbour in 13 Peters. –

Vid acts of Miss 1825. p 43. Rev Cod p 256 § 17. Rev Cod. p 262 § 59. what real Estate Means: Rev Cod. 51. § 6. where an Equity is made Distinct & in 7 sec. to Show that it was regarded as an Estate sui generis from the use of the Words Such &c vid Statute 1839 § 43. § 2. –

It was gravely Contended that these Statutes were merely Declaratives –

Vid 1 Tuck Com. p 12. cite 2. Cran. 272. 276. 5 Rand 511

~~As to the meaning of the term Hereditament.~~

Fonb 266 1 John CR 55 ~~Sand de S T note x.~~

Admitting the full force of the Decision in Waters v Stewart. It has no Application to this Case. And only settles that if an Eq of Red of mortgagor in possession is liable on f. fa.

1. The basis of that Decision on 4 press. Statute is that before it can be liable, the mortgagor must be regarded at the law as the real Owner, as well as in Equity, of the Land. vid 1 Cowen.

1 Joh CR. p 55.

2. It was also decided on the Construction given to the 5 Geo. 2. called the Colonial Statute. And the usuage Colonial from that Statute.

Waters & S. p 65.

3. Because the words "Real Estate" were incorporated in that Statute which are not in Missouri Statutes.

If the Construction Contended for in N.Y. be law, It is impossible on that principle to Exclude the Dowress.

He also mistakes in saying that the Engl. Decisions have made an Eq of Term of Years as bound by f. Fa.

8 East. 1 Ves 431

4. Because in the case at Bar. Mullanphy was the mortgage Creditor. & in that Case Stewart was an alien Judgt Creditor, who may after issue Execution call upon the Mortgagee to foreclose. or the Mortgagor to redeem & if not. He may himself represent the Mortgagor

5 The views of the Court are that a Judgt is a lien on an Eq of Red, which follows, if as they say it is real Estate Not so vid 5 Hay p 53

Hurt v Reeves 5 Hay p 548

If we examine the reasons why an Equity of Red cannot be liable on feria facias, we will see that any other construction, without a Statutory provision, will break down the settled principles of Equity & destroy the jurisdictions of Eq & Law.

1 It was not till [illegible] that Equities of Red as such were regarded in Equity; as any Interest to be protected — ~~And if~~ and the same principles of Natural Justice which originated them defined their property relations.

2. It does not come within the definition of property real, personal or mixed at Com Law.

3 Its being an inseparable incident to Mortgage, which is a mere Collateral Security to the Debt, cannot be severed except by foreclosure — or some Statutory provision

3 Ormsby v Phelps 4 Dana 233

4 If saleable It must be levied on, advertised sold and described as such. &

1 Pow 255 note 1. 13 John 551 1837. — 102.
Am Dig 105. 519. 7 Pick 51. — 11 John 373. 11 Mass 163

5 A mortgage in Equity is nothing more than a lien & may be Enforced in Chancery —

1 Pow 261. 1 Mad 522. 1 Pow 257. 261 note 13

6 Such is the peculiar nature of this Estate, that wherever they are recognized there is in Every System of Jurisprudence Special Enactment for Its foreclosure or Sale which must be pursued —

Dunkly v Van Buren 3 J C R 330

If the right of Red can be destroyed by Ex — what becomes of the provisions of 1837 — 1st before Mortgage can foreclose, — there is a condition pre Cedent &c

7 The reason of this rule arises in Case of Bar — If Mullanphy be sustained in this Court in

his present position as purchaser under a Com Judgt at Law, He commits a fraud upon Mr Nair by evading his Express Covenants of Red to Mr Nair in first & second Deeds

Vid Thim 45. 51. Record

8

It has been & will again be argued to this Court that by sustaining the views of the Complainants, the great principles of moral justice will be invaded — In other words It is policy of American Legislation to make a Mans Debts payable out of all kinds of property

We say so — But if the Legislature fails its force the remedy is easy. —

1 As in Lands. — Stock — Money &c

9. It is also peculiar — The cause An Eq of Red as such cannot pass or be aliened by Bargain & Sale Lease or Release. — But By assignt or Grant.

1 Pow 307.

10. In this Case — A Mr Nair had parted with all his Interest in the property Embraced in first Mortgage & only mortgaged his Eq of Red.

Crane v March 4 Pick 134.

If the principle of An Eq of Red be recognized at all, the act of the party by his petition on 13 Oct 1825. admits the Existence of that Eq in Mr Nair & wife —

Vid Transfer — Coote 564.

A purchaser under a void Decree in possession of Land is a Stranger & Cannot protect himself agt Annual Eq of R. 20 Wend 260.

As to merger.

1 Tucker. 262 not §

It has been & will probably be argued to this Court, that en as much as an Eq of Red possess the properties of real Estate as to alienation, — being inheritable — devisable. —

3 Hay p 67-8.

2 gen proposition.

Admitting the Saleability of an Eq of Red on fi fa at Law at that time, It could not be sold on a Judgt for the Debt to which the Mortgage was collateral Security =

1 If saleable for mortgaged Debt, the great principle of Equity, which originated & now protects the Eq of Red from usurious Contracts & power of Mortgagee would reduce the ~~condition of~~ the Mortgagor to the place or Condition of the Com Law principles of an Estate on Condition —

1 Pow. note 1. p 254. — 4 Kent 183. 4 H & M. 101. — Crane v March. 5 Pick 133 = Shottenkirk v Wheeler. 3 ICR. 378. — Jackson v Hull 10 John Rep. 482. James v Morey. 246. 86. 301. 2 — 4 Wend. 1 Pick 133. 4. 5. 6. — Goring v Shrieve 7 Dana 65. 220.

2. If permitted, a mortgage would be foreclosed by com Law Judgt & Execution & placed upon the level of simple Contract Debts & thus deprive him of his Eq of Red & the time of nine months given by the Statute.

Vid Title Mortgages 1807. § 3.

Duckly v Van Buren 3 ICR 330

3 It would be in the power of Mortgagee to force the Eq of Red out of Mortgagor without any other Consideration than Mortgage Debt.

Sugd 304

4 Where a Creditor takes a Chattel in pledge; He cannot Execute other property of Debtor till the pledge is returned, or otherwise disposed of by foreclosure. which shows the Reason of the necessity of Special Statutes

Cleveley v Bracket. 8 Mass 152.

3 gen^l proposition —

If mortgagee sue at Law on mortg. Debt & sell the mortgaged premises on fa fa — the right of Red. remains with Mortgagor. Since Mortgagee cannot purchase at his own.

1 Pow 407 note 1. 330 part of note NN 4 H & M 101. — 4 Kent 183.

Pow 407.

Shotterkink v Wheeler 3 ICR 279. Atkins v Sawyer 1 Pick 351.

2 Sugd 127. 2 Dessaussen Zystra v — 1 Mo Rep.

Pow 1001

1. Because He is a Trustee & cannot purchase

1 Pow 330 note NN 689. — 2 Story Eq §§ 981. 1015. 1016. 1013. — 1 Mad Ch 512. — 1 Atkin 605. 6.

Jackson v DeLancy 13 John 535. 555.

1 Peters 441. 373. — 1 Mo Rep 243. — Gallatin v Cunningham 377. 8. — Kane v Blodgood 7 ICR 124.

The relation of Trustee & Eastern Gen T. being Established Ch Kent, decided that any sale & purchase by Trustee was per se fraud

Trustee 330 Pow 689 a

Davoue v Fanning 2 ICR 258.

If Millonphy be permitted to purchase, at this sale, He commits a plain fraud through the forms of Law upon McNair, for in his Deed of Th. Dd. He covenants for McNair to redeem as well that Mort. as the one 22 April & thereby eludes his Express Cov^t.

4 Kent 157. 8. 1 Vern 190. 7.

Moreover if he purchase, He cannot obtain the land for to that He is already entitled — & would become both seller & purchaser of his own Interests — & if he be said to purchase possession

He is in law entitled to that as his legal right — And if an Eq of Red. He buys subject to Mortg. Debt. And to make a valid Sale, there must be a Consideration over the Mortgaged Debt — otherwise He could defeat all Claims of other Jugt Creditors — Sugd 304. Tice v Anna. 2 D(R 129. 30.

Moreover Rankin was a purchaser of the Mortgaged prop. And could only buy an Eq of Red — He has now the right of redemption —

If there Mullan phy could thus purchase under a fi fa — He could also after that Sale call upon Rankin to redeem or loose his purchase — or not at his pleasure — Can this be Countenanced in Law or Equity —

4 Gen proposition

The Deeds to I Mullanphy & Rankin are Void, because the Conduct of Mullanphy at the Sale are Void such as to make the Sale void & was fraudulent in Equity.

Valid

The first great principle pervading all Contracts, that they be bona fide & for valuable Consideration but at public & private Sales.

Mort

Especially in Case of Mort. Contracts into which the Courts of Eq look with Jealousy & the Conduct of the Mortgagee is Scrutinized –

4 Kent 157. – 2 Sugd. 127. – Hobd v Gillespie 2 Ill 30. 7 Ves. 273.

In Equity the mortgaged property is regarded as a pledge for money loaned & if by any undue Influence He the mortgagee possess himself other than a fair bona & valuable Sale Either from Mortgagor or by Judicial process; It is a fraud in Equity

Fraud in Equity may be presumed.

1 Story Sec 188 – 190 – page 200

1. Atkins 352 – 1 Story p 200 – Butcher v Butch 1 V & B 98

Gallatin v Cunningham 8 Cow p 370 = – 4 Dess ass. 684.

1 From the circumstances & Condition of the party Contracting

1 Story p 198 – § 190 = 239. 244. New Con 365.

2. From the nature & circumstances of the transaction

1 Story p 199 New Contr 358

Fraud is constructive & the ground upon which Courts of Equity interfere in cases of this Sort. is not upon any notion of Damage to the Individuals but from Considerations of public policy
1 Story §§ 261

1 From some peculiar Confidential or fiduciary relation below the parties –
1 Story §§ 308 – 8 Cow 361.

As to Confidence — 1 Story §§ 309. 318. 319. 321. 322. 323. – Mortgagee Trust 2 Story 1015 1013. – Web v Rock. 2 Sch & Lef 655. – Gibbons v Cred 2 Sch & Lef p 218 221. = Barrow v. Rhinelander 1 J C R 555
4 Dessausseur p 679 682. 683 695. 696 – 7

From inadequacy price & the circumstances of the parties –
4 Dessausseur p. 686. 7. 90 94.

From the Conduct of Mullanphy at the Sale –

1. The relation of Mortgagor & Mortgagee any act or Influence by which the Value was diminished is fraud.

5 Gr propn

That M S McNair one of the Complainants being joint obligor & Co mortgagor — also the widow of A McNair has in herself the right of Red —

At S McNair as Surviving obligor is liable — to pay the mortgage Debt — & as Co mortgagor under this liability she is entitled to relief as Security or otherwise to look to the mortgaged premises —

vid The Mortg: Deed Covenants &c.
vid Transcript of petition & proceeding of foreclosure of Mortg Deed dated p 64.

In the first case all these cases of mortg were made after Coverture & the Husband became seised before their Execution. and M S McNair is presumed to have her Dower Interest so far vested before any indebtedness to McNair — that to divest her — there must be an alienation not by way of Security or Mortgage — Her joining in the mortgages she only intended to pledge her Interest —

1 Bland Ch Rep 227 — 2 Pas 701 note

If Mullanphy had foreclosed these Mortgage by petition & joined her as Co Mortgagor Defendant, her ~~Hus~~ Interest would have been divested, not by reason of her acknowledgement in Deed, but by the force of the foreclosure — which not being done — her right of redemption survives both as Co Mortgagor and as Dowress.

divested by foreclosure

McNair was never sued for the Debt — but was proceeded agst as Co Mortgagor after the Sale, which quoad her makes her a Mortgagor with the incidental

of redemption =

Deny of Dow by Statute

But It will be Contended That She is divested of her right of Dower under the Statute of 1815. Guy p. 162.

Assume fact that the Sale was legal

The Court will perceive the Gentleman assume the fact that this Sale was fair & legal.

In argument I will admit It & State It could not under the Circumstances of this Case bar Mr S McNair right of Red.

1. The act of 1815 is virtually repealed by the Act 1817. & the 5 sec. refers to an Insolvency from which She is saved by the proviso.

Insolvency

2. If the Court believe there is any sufficient Evid of Insolvency. The Statute provides that where the property is mortgaged It must be under a Decree of foreclosure. for an Execution can not operate, Since the Equity of Red may be sufficient when Sold to remove Insolvency.

1 Tucker p 76

3 This Insolvency was brought about by the management of Mullanphy. And if Mrs McNair think proper now to interpose & disembarrass the Estate by redemption, It would be inequitous that a Mullanphy should avail himself of his wrong to defeat Creditors.

1 Peters 338 9

Dower is favoured in Law & Equity

1 Dallas 417. 2 P Wm 703. Preced in Ch. 28 29. 28 Cro Car. 301.

But by the Statutes of this the wife is Endowed of an Equitable Int. Guy Dig 174 § 6.

The fact of her joining in the Mortgage Deeds was her intention only to pledge & not to alien or Bar herself of Dower — And if the Court believe this Mortgage Contr. She is presumed to have Executed them only with an Expectation of Redemption.

2. Pow 732. note B. 738. 7. — 2 Pow. 688. note 1.

2 Hals. 392. 401. — Peabody v Patten 2 Pick 519.

4 Kent 44 — 2 Halst 409.

A Dowress may redeem. Coote 540 — 1 Bland 228.

2 Pow 688. 9

An Eq of Red is Indivisible

Gibson v Crehore. 3 Pick 181. Gibson v. Crehore. 5 Picker 152. — 2 H & M. 322 — Pow 392. 708

4 Kent 163.

Wherever It is held that a wife is not Entitled to Dower on a Mortg. by Husband, — It relates to Mortgages before Coverture

1 Bro Ch Rep.

Dower Interest Excludes all Judgts or other liens, because the title relates back to the marriage & Seisin of the Husband

1 Story 585. Sulliff v. Forgey. p 96. 4 Kent. 50.

Lamb. p 82. Fitz N B 150. 1 Inst. $\frac{46}{96}$ 4 Rep. 65.

1 Root 228 —

As Co-mortgagor M S M Nair can redeem
Because the right of Red. given to her by Ex Miss Cert.
& as her right incident to Every Mortgage Contr has never
been foreclosed

1 ICR p. 45

The Statute of 1815 if admitted to divest the Wife of
Dower was intended to operate where the Wife did not
join –

Dmt.

Wiley

As to the Tender of Money – Sufficient if in the
Bill –

Slapp v Philips 7 Dana 300

As to rents & profits

4 Kent 166. 1 Bibb 192. 5.

As to Improvements

Moore v Cable 1 ICR p 387.

As to Limitation

Same 386.

filed Sept 4. 1843.
H. L. Boon Clk

6 general proposition – The acknowledgement in the Deeds of Mortgage dated
is insufficient in Law

1 Hick 267.

Supreme Court

Mr Nair & others
vs.
Millan[illegible]y's heirs
& others

The defendants by their counsel pray a rehearing of this case for the following reasons viz:

1 That the Rate is one of magnitude as regards the property in dispute.

2nd That it is of still greater importance as regards the principles to be settled by its decision.

3rd The point whether a mortgagee can purchase at Sheriff's sale on judgment and execution obtained by him upon the mortgage debt, has never before perhaps been agitated in Missouri. It is apprehended that there are many other instances of such sales, supposed good at the time, which have been acted upon by all the parties concerned as valid titles: to overturn which by establishing a right of redemption, after so long a lapse of time, & so great changes in the value of property would operate immense hardships & frequently great injustice: we feel,

would be accompanied by all the evils of an ex post facto law. Such judgments being in the language of the court "void", not only does the mortgagee fail to acquire title, but all the bona fide holders for value under him are in no better situation. All estates therefore that have been acquired after any such purchase, by conveyance from the mortgagee or his heirs or devisees are nullities.

It is respectfully submitted to the Court as worthy of consideration, whether under the condition of things in this State, a decision on this point that such sales are not absolutely void, but subject to be reviewed in equity, if proper circumstances require it, would not be equally consistent with the authorities. The establishment of such a doctrine if not otherwise indeed, is certainly to be desired for the repose of society, & the security & stability of possessions. And the greater force is given to these considerations, by the circumstance that the past legal history of Missouri is mostly that of a transi-

tion state, from loose, irregular legislation, to a more accurate & well defined system; with reference to which it would seem the part of wisdom to exercise the judicial discretion in the most liberal and comprehensive manner. In comparatively early times, things were carelessly done. The particular forms of acquiring & transmitting property were not very rigorously attended to. In pursuing upon these all transactions, all the forbearance that can be shown by the judiciary is undoubtedly called for.

Not to extend this course of observations it is suggested whether in this view of the case, another hearing should not be granted.

4 Upon this point of the appeal it is submitted that this is not a proceeding at law but a suit in Chancery, in which Court in order to attain the ends of justice, the most solemn instruments & even judgments do not prevent an inquiry into the circumstances composing the equity of the case. It seems certain from the above that the suit to foreclose was not brought for the very purpose of

securing to the Mair a right of redemption and that therefore if it does have that effect, it has it contrary to the intention of the parties.

Even supposing this judgment to operate as an estoppel, yet there are strong reasons in equity for considering the right of redemption as for the benefit of Mallamphy. Suppose a mortgage on one piece of property: that the mortgagor conveys to a third person all his interest in the land subject to the mortgage: & that then the mortgagee undertakes to foreclose under the act of 1807 "concerning mortgages." He must of course make the mortgagor & him only a party: though he has not a particle of interest in the land. And in entering the decree it will be that the mortgagor may redeem till the sale: or rather the decree need not state this for the act itself says that the sale shall be postponed nine months at least from the filing of the petition "within which "period the mortgagor may, on pay-

"part of the debt interest & costs secured
"the property". These are the words of the
Statute under which the judgment in
question was obtained, and whether
the mortgagor's right to redeem was
incorporated in the decree or not,
makes no difference. The words of the
decree giving him that right, do not
enlarge or alter that right, but
mean the same thing, that the
words used in the act mean. What
then, in the case supposed, are the
rights of the mortgagor? The Statute
says he may redeem. But he has
sold and conveyed all his right
& interest in the property, & with
that the right of redemption. Yet the
Statute says he may redeem, & the
decree entered in the words of the
act authorizes him to redeem. Now
it seems to me that the only sensible
meaning to be put on these words
in the case supposed, is, that in
the mortgagor's name, any person

to whom the mortgagee's right in whole or in part has been assigned, may pay the redemption money. But suppose the mortgageor, notwithstanding he has no interest, does in fact pay to the Sheriff, the redemption money. Does that act draw back the title, from his assignee, & make null his conveyance? Certainly not. Such redemption would be for the benefit of the person to whom he had conveyed.

1 Territorial Laws page 182

3 Mis. Reports page 319.

In the present case, the sale by the Sheriff, not being on a judgment obtained on the mortgage-debt, passed all the interest of Mr Nair the mortgageor, to Mullanphy & Rankin. After that, no right of redemption remained in Mr Nair, but was passed to his assignees. His representatives now come forward, & having no interest, claim the right of paying the mortgage

money, & having back the land, when that right has been sold & passed away to Mullanphy & Rankin; & they claim this under the words of the decree of foreclosure, which words are substantially the words of the act itself, and if they give the right to the heir to redeem for his own benefit, then the words of the act must be held to preserve that right to the mortgagor in all cases. It is supposed that the Court will not put such a construction on the act, as it would, in all cases, preserve to the mortgagor the right of redeeming on his own account, although he had previously parted with all interest in the equity of redemption, and thus would, in effect, deny to the mortgagor the power to alienate the equity of redemption.

Now Mullanphy had a right after the purchase by Rankin & Rankin, either

that right before, & especially, shall give the right, to a person whose name, is required to be used in the proceeding as defendant, merely because the law requires its use formally as the representative of a class of interests.

The instances are not uncommon where in a statutes, words are used descriptive of individuals, which are to be held as designating persons representing the rights of such individuals as assignees or grantees.

See Rev. Code 256 Sec 26. This Section provides that when real estate is levied on, the Sheriff shall subdivide for the purpose of sale &c. but that if the defendant in the execution desire the whole of any tract or lot to be sold together, it shall be so sold. Suppose the case which frequently occurs, of a judgment obtained which is a lien on the defendant's land; subsequently to which he sells & parts with all his interest in the same land, & it is then set up for sale on the judgment & execution, can the defendant insist that the whole tract

shall be sold in the lump, to the sacrifice of the interest of the real owner? and yet the law in so many words, says that he can. It is supposed, however, that no Court would take the law literally, but would consider and act upon the meaning; and would hold that the defendant's assignees or alienees would in such case have the right of causing the land to be sold by subdivisions.

So in the 57th. Section of the same act the purchaser in certain cases is authorized to apply for an order on the Sheriff to make a deed. This word purchaser, I apprehend, comprehends all those who represent his interests.

Upon the whole, it is submitted, that the judgment of foreclosure has no other effect & means nothing further, than that the mortgage is redeemable: but that if redemption is made, the property is redeemed for the benefit of those who had previously argued the equity of redemption from the mortgagor. If this is the result the complainants have no right in equity to be heard.

as the court will not listen to a mere voluntary offer to redeem for others, who do not wish such redemption; and it is not necessary, nor called for to go interfere the estoppel, if it be one, as to bar the equitable rights of Mullanphy, & took the injustice of cutting off all the title which he acquired for valuable consideration at the Sheriff's sale.

It is further to be considered that under the effect given to the judgment of foreclosure by the opinion of the Court, all the amount bid by Mullanphy for the equity of redemption is utterly lost. That amount went to reduce the judgment on which the bonds in the third mortgage were sold; & yet, Mullanphy has got nothing, for the mortgagor has the same right to redeem that he had before the sale. That is, the attempt of the mortgagee to foreclose in the mode pointed out by statute, in case the mortgagor's right has been transferred,

restity the mortgagor to his former rights & clothes him anew with the right of redemption.

On this point a rehearing is the more to be desired, as in the discussion already had before the Court, the counsel were chiefly occupied on the other questions, and due consideration, perhaps, was not given to this. The counsel for the defendants hope, in case of another argument to place the question of estoppel, as presented here, in a new light, from considerations drawn from the phraseology of the decree, from the enactments governing the proceeding, & from the equities of the parties, some of which considerations are already adverted to.

J. Spalding
Solr. for Defts

(56)

Supreme Court

McNair & others
v.
Multanphys heirs
& representatives &
al.

Petition for re-
hearing

V. Spalding Solr.

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H. L. Boon Clk.