West, Roger P. vs. Wayne, William

April 1831 1st D. Randolph

113/1

23 Contract. Reversed; Relief granted for fraudulent conveyance

Santa Fe; Trade; Merchandise; Mortgage; Land; Slaves; Fraud

Circuit Transcript Oversize 1/6

State of Missouri
County of Randolph ss.

Pleas at Randolph Courthouse in the County of Randolph and State aforesaid on the 12th day of November 1830 before the Honorable David Todd Judge of the Circuit Court of said County.

Be it remembered that heretofore to wit on the day and year last aforesaid at the Court and before the judge aforesaid the following proceedings were had:

" Roger P. West Complt.
vs
Chy.
" William L. Wayne.

The complainant by his attorney filed the following notice. " Mr William L Wayne: Dr Sir You are hereby notified to produce at the trial of a bill of Injunction now pending in the Randolph Circuit Court where in I am complainant, and you are defendant the original Mortgage executed by yourself to Lamme and Brother for three negroes viz. one negro woman one negro boy & one negro girl dated 9th of May 1828 20 august 1830. Roger P. West.

Upon which said notice is the following return endorsed, " This day Thomas C Maupin personally appeared before me and made oath that he delivered a true copy of the within notice to the within named William L Wayne on the 26th of August 1830

Thos. C Maupin Sheriff of Boone

State of Missouri County of Boone: Sworn
to and subscribed before me a justice of
the Peace in said County the day and date
above,
Jesse J. Wood J.P.

And afterwards towit, at a Circuit Court
began and held at the place aforesaid on
the seventh day of March in the year 1831.
before the Honorable John F Ryland judge
of the Circuit Court of said County, the follow
ing further proceedings were had in the cause
and between the parties aforesaid, "The defendant
by his attorney filed the deposition of Hybert
L Brink which is in the following words
& figures towit, "No 1." "Depositions of Wit
"nesses produced Sworn and examined on
"the twenty sixth day of February in the year
" of our Lord eighteen hundred and thirty one
" between the hours of ten o'clock in the forenoon
" and three of the Clock in the afternoon of that
" day, at the house of James Turner Senior in
" the County of Boone in the State of Missouri
" before me Silas Riggs a justice of the Peace
" within and for the County aforesaid in a certain
" cause now depending in the Circuit Court of
" the County of Randolph in the State of Missouri
" between Roger B. West complainant, and
" William L Wayne defendant, on the part
" of the defendant, Hybert L Brink of lawful
" age being produced Sworn and examined
" on the part of the defendant, deposeth and
" saith, Question by the defendant, Is Was
" there or was there not a bill of sale executed

" and given to me from Eleanor Wayne for three
" Negroes. towit, one Woman named Susan
" one boy named George and one girl named
" Caps and on the sixth day of May 1828.
" Answer There Was
" Question by the defendants. Was you a subs
" cribing witness to the bill of sale before
" alluded to? Answer. I Was Hybert L Bink
Sworn and subscribed to before me on the
day at the place and within the hours first afor
esaid Silas Riggs justice of the Peace

I. Silas Riggs a justice of the Peace within
and for the County of Boone in the State of Miss
ouri do hereby certify that Hybert L Bink
the deponent was by me sworn to testify the
Whole truth of his knowledge touching the
matter in controversy aforesaid that he was
examined and his examination reduced
to writing and by him subscribed in my
presence on the day between the hours and at
the place in that behalf first aforesaid
Silas Riggs. J.P.

State of Missouri
County of Randolph }

I Robert Wilson clerk of the
Circuit Court of the County of Randolph aforesaid
hereby certify that the foregoing is a true and perfect
transcript of the said notice and deposition as the
same now remain in my office, That said notice
should have been included in the transcript of the
record and proceedings in the above cause filed on

the 21st day of March 1831. in the office of the clerk of the Supreme Court, in the first judicial district, that this is the same cause which Best the complainant has taken to the said Supreme Court, by appeal from this Court, That the foregoing deposition of Hybert L Brink is the same that is given in the transcript filed 21st March as aforesaid and should have been marked deposition No 4. in that transcript that the depositions Marked No 1 No 2 No 3. the deposition of Hybert L Brink which should have been Marked No 4. and deposition Marked No 5. are all the depositions filed in said cause and are the depositions mentioned in the bill of exceptions Marked No 1 No 2 No 3 No 4 & No 5.

In testimony whereof I have hereunto set my hand and affixed my private seal their being no seal of office provided at office this first day of April eynteen hundred and thirty one

Robert Wilson clerk

Filed April 6th 1831.
G. Bynum clk

In the Supreme Court
First Judicial District
April Term 1831

Roger P West
vs
William S Wayne

And the said West comes here in the first day of our said Supreme Court and saith that in the record and proceedings in this case there is manifest error, In this that the decree in this cause is in favour of said Wayne and against said West whereas it should have been in favour of said West and against said Wayne

Whereupon the said West prays that the decree in this cause be reversed and held for naught. And that our said Supreme Court do proceed to examine the record and proceedings aforesaid and correct the errors aforesaid and render a decree in favour of him the said West. And that said Wayne do pay the costs

Givens for
West

Rogers & West

vs

Cross

Williams & Wayne

Filed 5. April 1831

G. Bynum clk

William L Wayne
at
Roger O. West

And the said William L Wayne says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid and he likewise prays that the Court now here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid be in all things affirmed &c

Davis Lolis
for Defendant

William L. Wayne
ads
Roger P. West

Joinder in
Error
Davis
Sol, for Deft

Filed 5 April 1831
G. Bynum clk

West
vs
Wayne

Appeal from the the Circuit Court of Randolph County

Chancery

This is an appeal from the Circuit Court in which the bill states that in the year 1828 West the complainant and Wayne the respondent with many others settled themselves out with outfits of goods for the State trade that after they had left the jurisdiction of the State somewhere on the Arkansas River West wishing to return home sold his goods to the amount of $1100 to Wayne That West refused to sell his goods to Wayne unless he would give such security as West had given to those of whom he bought the goods which security was a mortgage on land and negroes Whereon Wayne told him that he possessed land and negroes in this State in the County of Boone that the contract was then closed and Wayne gave a Mortgage to West to secure the payment of the money for a negroe Woman and several children and one quarter Section of land lying in the County of Boone the Bill then avers that these representations of Wayne induced him to sell his goods as above stated That West then started back home that after having travelled some miles he met a company of traders going to the State that they informed the company that he had done that some of that company who knew Wayne told him that he would lose his money that Wayne owned neither negroes nor land That he West was advised by some of the company that Wayne was in fact worth nothing and was insolvent and he West had he had better go back and take his goods or go on to the State and get his pay there West went back and told Wayne what he had been informed by West did not deny

the truth of the report West then demanded his goods to be delivered up to him alleging a fraud had been practised on him ~~West~~ Wayne refused to receive the contract ~~[illegible]~~ unless West would give him his note or bond for $100 West alleges that that transaction both plaintiff in a country where no Civil law exists and not having it in his power to relieve himself otherwise than by force and seeing the extreme probability of losing the money and goods he did to save himself from that loss give to ~~West~~ Wayne his bond for $100 for the consideration of getting the goods back again and that he did then get his goods back again. ~~He~~ he further alleges that ~~West~~ has been sued on the bond in a Court of law and that Judgment has been rendered against him and execution is threatened &c the bill prays that the Judgment may be perpetually enjoined

Wayne answers the bill and admits that on the the Arkansas River he did buy the goods of the Complainant to the amount alleged and that he then made his note for the payment of the same to the Complainant he then denies that he ever gave the Complainant any Mortgage on any of his property by description either real or personal he says he admits that the note he gave for the payment of the money for the goods contained a clause by which he did acknowledge his property generally to be bound for the payment of the money and denies positively that either land or negroes were named in the said instrument and he says he never made any other writing save as above

The defendant admits that he may have represented to the Complainant that he was the owner of some slaves or negroes but he denies that he represented to him that he was the owner of any land at that time ~~nor~~ he admits he owned no land and insists that he did then own some negroes and does yet own some negroes he denies the Complainant ever charged him with being insolvent and says he was not insolvent then nor is he yet insolvent

The defendant says he admits that on the next day after the purchase of the goods was made the Complainant became dissatisfied with the sale of the goods and came back and requested him to rescind the contract and to give up the goods and that the defendant was unwilling to do so unless the Complainant would give him $100 for his contract and his trouble which sum the Complainant agreed to give and gave the bond and note to secure the payment of the money then the goods were delivered to the Complainant he ~~denies that and~~ says that he never used any means or acts to induce the Complainant to sell the goods to him other than as above set forth and says he made no declarations relating thereto that was not strictly true

The Complainant put in a replication and the cause was heard on the bill and answer and on the evidence which is in substance as follows that the defendant owned no land nor negroes except the one half of a small negroe boy — that otherwise he was worth little or nothing at the time he ~~took~~ bought the goods and made the instrument to secure the payment of the money and that he had Mortgaged a negroe woman and children to one Lamme & Company for $600 worth of goods for his outfit on the teaching expedition and that these same negroes belonged to his mother at the time

Upon this ~~that~~ evedence the Court heard the Cause dissolved the injunction & dismissed the bill The error assigned is a general one The ground relied on by the appellant to reverse the decree of dismissal and to sustain the relief he asks for is that the appellee acted oppressively towards him & took undue advantage of the condition of the Complainant in obtaining the bond for the $100 and that he committed a fraud in pretending he had sufficient substance to secure the payment of the price of the goods when in fact he was worth little or nothing that ~~the Court~~ Wayne committed a fraud in executing a a mortgage of property which he did not own whereby the Complainant was deceived

The Complainants right to relief is resisted on the ground that the bond was freely entered into without any duress or undue advantage used to ~~obtain~~ obtain it and secondarily that if the complainant could have any relief the defence should have been made at Law and the complainant having failed to do so he is now too late We will first examine the complainants right to relief on the ground of undue advantage hardship oppression and fraud suggestions for the Complainant has cited several Authorities which do in our opinion sustain his ground for relief either in a court of Law or equity The first to be examined is -

is that of Livingston Wilson 4 J R. 485c This was a case when a revenue officer seized goods unlawfully and after the unlawfulness was ascertained by him he refused to deliver them up unless the owner would pay him £2. 11s The Court held an action of assumpsit would lie to recover the money back a part of the reason given for the decision is that although the party might have sued the revenue officer yet might want his goods and was not bound to wait the tedious process of the law It is laid down in B & N.P. 132 That a person pawned plate and when he came to redeem the pawnbroker refused to give up the plate unless the owner would give him £10 over and above the legal interest which he refused but said he would give £4. this was refused he then paid the £10 took his goods and it was held an action lay to recover it back on the ground that the owner was not bound to wait till he could get the goods by law as he might be in great need of them See also to this point 6 Johnson Ch R. 210 and 1 Bay R. 470 2 Bay 213 These cases shew that even at law in cases of hardship and extortion the Court will give the party relief though he might have redressed himself by due course of law but the party is not bound to resort to that course It is the province of Courts of Chancery to relieve against fraud duress hardship and oppression Let us see if in this case ~~There~~ there was any fraud ~~any~~ hardship ~~and~~ or oppression The defendant bought of the complainant $1100 worth of goods representing himself to own property to a considerable value sufficient to ~~[illegible]~~ pay

induce the complainant to believe that a mortgage of that property to him would secure the payment of the money When in truth this matter was totally untrue the evidence is that he only owned the one half of little negroe boy and otherwise was worth little or nothing and beside that the very negroes he pretended to own were already mortgaged for a large sum of money nearly equal to their value Now if the negroes had been mortgaged the suppression of that fact was fraudulent

When West sold his goods and took the mortgage he had no means of ascertaining the truth of the representations he was far removed from the place where the property was and Wayne having obtained the goods by fraud at first ~~this fraud in the first instance~~ he uses this advantage so obtained by fraud to keep the goods or to compel the complainant to submit to the risk of a total loss of the money or to give the bond and herein consists the oppression This oppression exercised in a county where no legal means of redress exists growing out of a fraud and a deep one too of the defendant will in the opinion of this Court form a clear claim to relief We have examined the authorities of the defendant on this point and cannot see that they have sufficient strength to enable him to resist the claim for relief

Mr Davis for the defendant next contends that if there could be any relief the defence should have been made at law ~~and~~ or other words the defence ~~is~~ might have been

made at law and that opportunity being neglected is totally lost To sustain this point we are referred to the nature of the transaction and it is said that duress of a mans goods is no ground in law or equity to set aside a bond and also that a fraudulent act is cognizable in law as well as in equity Now it is true that where the defence is purely legal it must be made at law and cannot be made in equity unless the party can shew a good excuse why he did not make it ~~in equity~~ at law

It is believed by the Court that where the transaction is founded in fraud the relief is in both courts in some instances but if the Court of of law does adjudicate the ~~matter~~ point there is for ever an end of the matter here no defence was made at law and the party was not bound to make his defence there this doctrine we think is supported by the Current of Authorities but a part of this transaction was fraudulent and the balance oppressive ~~Courts of law do not sell debtors under for oppressive considerations or conduct but the relief is in equity If this is true then a part of this defence is not in law but in equity alone~~

and it is by no means clear that a Court of law could according to its mode of proceeding give the relief asked for and in doubtful cases ~~courts of chancery~~ of this character Courts of Chancer will entertain jurisdiction The decree of the Circuit Court is reversed and this Court proceeding ~~to give such decree as the Court below ought to have given decreed that the Judgment ate~~

~~Law be perpetually enjoined and the defendant is decreed to pay all costs in both courts both at Law and in Chancery~~

~~M. M. Gerke~~
~~G. Tompkins~~
~~R. Wash~~

The Cause is sent back to the Circuit Court with direction to reinstate the Cause and to enjoin the Judgment at Law perpetually and to proceed in conformity to this Opinion the Complainant is allowed his costs in this court

M. M. Gerke
G. Tompkins
R. Wash

To be printed.

Next
on 5/3 opinion
Wayne

Filed 11. April 1831.
G. Bynum Clk

To be printed

RG 600
Supreme Court of Missouri
Case Files

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1

Number of Items _____

State of Missouri, } Sct.
County of Howard, }

The State of Missouri, to the Sheriff of the County of ~~Howard~~ Boone, *Greeting:*

WHEREAS Roger P. West

recovered against William L. Wayne

at our ~~Circuit~~ Supreme Court, before our judges thereof, his costs and charges by him about the prosecution of his appeal from the Circuit Court for the County of Randolph in that behalf laid out and expended.

which to the said Roger P. West

were adjudged, as appears to us of record: These are, therefore, to command you, that of the goods and chattels, lands and tenements of the said William L. Wayne

in your bailiwick, you cause to be made the aforesaid

costs, and that you have the same before the judges of our said court on the first Monday of December next, to render to the said Roger P. West

the costs aforesaid. And for want of sufficient goods and chattels, lands and tenements whereon to levy and make the same, we command you to take the said William L. Wayne if he be found in your bailiwick, and him safely keep, so that you may have his body before the same judges on the said first Monday of December to satisfy the said Roger P. West

of the aforesaid costs, and that you certify to our judges how you execute this writ; and have you then there this writ.

WITNESS *Gray Bynum*, Clerk of our said Court, at office this eighth day of July in the year of our Lord one thousand eight hundred and ~~twenty~~ thirty one and of the Independence of the United States the ~~forty~~ fifty sixth.

Gray Bynum Clerk.

Came to hand
the 14th 1831
Thos L Maupin
Sheriff of BC

Notice of the
Execution
July 29th 1831
Thos L Maupin
Sheriff of BC
Fees $1.00

This Execution returned not satisfied by consent of the plaintiffs attorney

Decbr 3rd 1831

Thos Marvin
Sheriff of B C

Supreme Court
December term 1831.

Roger P. West
vs $\frac{S}{3}$ Execution.
William L. Mayne

Judgment signed at April term 1831.

Costs

Clerk Supreme Court	$3.27½
Attorney Fiscus	3.00
Tax on Execution	" 62½
Clerk Circuit Court for Transcript	$11.58
	$18.48

Gray Byrnes clerk

In the Supreme Court
April Term 1831

Roger P West
vs ⊏ In error
Wm L Wayne

The matter relied upon for relief in this case could not have been pleaded at law. I admit that duress and fraud are both pleadable at law. But in the case at bar the bond was not obtained by fraud or duress. It is true the goods were obtained by fraud, but that fraud surely would not vitiate bond. That kind of fraud which may be pleaded to a bond is fraud in obtaining the execution, and fraud which led to the execution could be relied only in chancery for which see the case of Thomas vs Thomas (Littell 62) Neither would a plea of duress meet this case, the goods at the time West executed the note were not the goods of West, he had sold them to Wayne, and although there was fraud in the sale yet the goods belonged to Wayne until West should regain them by process of law or the consent of Wayne. The books do not call this duress, they say that such bonds are obtained by oppression, and by taking an unfair advantage of the party's situation, Duress of goods is a threat to injure or destroy one's property, and this the books say is not sufficient to avoid a

man's aid (see Chitty on Contracts 55) In this case there was no threat to injure the goods of West nor was there any danger that the goods would be destroyed, This description of duress of goods does not meet the facts of the case at bar, and the only duress pleadable at law is duress of the person, and in this case there was no duress of the person, Then suppose a plea of duress put in, the term duress would be defined as above and the facts of this case would be inadmissible under such plea. And therefore I think it clear that there was no defense at law see Powell on Contracts 2nd part 149 to 160 & 6 J.C.R. 210

But under the state of the plea dings in this case the effect of the trial at law can not come up. The statute has expressly said (see 2 Laws Mo 647 - sec 46) "that on appeals in chancery the court above shall take into consideration such facts only as appear by the record to be the facts upon the sentence or decree appealed from was formed," The statute also says that this court shall decide no question except such as have been acted upon by the court below Now in the case under consideration, this court can not see from the facts in the record that the court below acted upon the question of jurisdiction, It is true that the bill mentions the suit at law for the purpose of obtaining an injunction, but the answer does not relie upon the trial at law, and that matter can not be

in issue. The grounds upon which a trial at law in which the party could have defended is considered a bar to relief in equity, is a former trial, If a party may sue in law or equity and he brings suit at law and is defeated, and then sues in chancery. the defendant must plead the former trial, so I apprehend if a party has had an opportunity to defend at law and such opportunity would amount to a bar against relief in equity, the party should plead it or relie upon it in his answer

But independent of all this the law is well settled that a defendant, whose defence is at law or in equity has his election in what court to seek redress, One party by commencing a suit in one court can not deprive the other of a right which he before had, that is to have his cause tried in that court which he supposes will do him most ample justice. This point is expressly so decided in the following cases Morrison vs Hart 2 Bibb 5, Clay vs Fry 3 Bibb 249, Moffett vs White 1 Littell 325 Most of the cases read to show that if a party ~~had~~ failed to defend at law, he would not be relieved in equity, an cases of which chancery had not original jurisdiction

The case of Caawallan vs Alchuron 1 Mo R 660 is one of this description, — the last paragraph says there was no ground for the exercise of chancery jurisdiction

Gwins For
West.

A considerable portion of Mr Davis ~~B~~ supplemental Brief relates to the merits of the case. I understood the court to say that they did not wish to hear from me on that subject, if in this I misunderstood the court I wish yet to be heard

Tho J Gwins

The case of Ewing vs Miller 1 Mo R decides that fraud in the consideration of a note may be pleaded at law in this case the fraud is in obtaining to goods, and the consideration of the note, is the receiving of the goods. in this there is no fraud

Roger P West.
vs
Wm L Wayne
Supplemental
Brief for West

Where the party could have defended at law but neglect it chancery will not relieve, except in cases of fraud accident or trust peculiarly within the province of a court of equity. or where the defence could not have been made at law McVeeker vs Wolcott 4 John R 532-3

Where a deft makes his defence at law and it be overruled

he may then apply to Chancery, and if the defence at law be overruled, the defendant is not barred a plea at law, but may lie by and apply to a court of equity, King vs Baldwin 17 John 389 Where an unconscientious advantage has been taken of the party's situation, a court of equity will relieve, although the circumstances do not amount to fraud in the contemplation of a court of ~~equity~~ law Lyon vs Sackmage 14 John 501

The court have said that when a party applies to make his defence at law, and he is told his defence is in equity, when he applies to a court of equity, that court shall not tell him his defence was at law, and for aught that appears to this court, the defence was offered at law (which is the fact) and overruled, and this is a strong argument in favour of the ~~party~~ position that the deed of a former head should be shewn in the answer, and then the complt, in the answer, and then the complt, could show that he had been refused his defence at law

West

U. S.

Wayne

Supplemental

Brief for West

Roger B. West
vs
William L. Wayne

Supplemental Brief

It is contended that the bond of a party cannot be avoided upon account of Duress of goods, but it must be to the person. See Chitty on Contracts page 54 where all the authorities are referred to. Heard, 605 Roys Maxims 19 — B. N. C. 172 — 2 Starkie Ev. 483 — 15 John 259 — 6 East 140 — 9 East. 417 note Bacons Abr. Title Duress which shews that bonds given for Duress of goods is binding and all the above authorities establish that position —.

The court is referred to the case of Cowan vs Price 1 Bibb 175 to show that Wayne need not set out in his answer that West could have made his defence at law, for the reason that sufficient appeared in the bill of the complaint, and whatever appears by the one need not be pleaded by the other, it being confessed. The above case likewise refers to Cunningham vs Caldwell, Heard 123 and say the same decision was there made although not appearant in the printed decision of the case.

In the case of Lansing vs Eddy 1
John Ch. Rep 49, upon an application
to the Chancellor to stay proceedings to
sell under an execution at law, the
Chancellor refused the injunction because
the bill set out that part of the consider-
ation of the not sued on at law
was usurious, and thereby disclosed a
matter which might have been plead
at law. Then it would be, as is
now conceived, unnecessary to set forth
matter in an answer or plea, that a
Chancellor would in the bill notice, upon an applica-
tion for the exercise of his extraordinary
power. If the bill itself contains mat-
ter in its face which shows that the
proper place for relief was in the
action at law, and that full defence
might have been made there and shows
no excuse for such omission, No necessity
is now seen why the defendant should
again repeat it in his answer, in order
to introduce proof of the fact, for it
is already presented in the bill by the
confession of the Complainant and it
is unnecessary to introduce evidence of
a matter already in issue by confession.

(1 John Ch R 465)

The case of Barker vs Elkins & Simpson
is to the same effect the complainant
presented his bill and in the face of
the same set out such circumstances
as, shewed that his remedy was complete
at law, and not having sought to
it in the court of law, the Chancellor
refused the injunction — See 3 John Ch
Reports 398 That the Chancellor would not grant
relief when a party suffered a judgement to pass

It seems to me that this case must be
nothing more than a dumb to the goods
if there was fraud in the original transaction
for although the bond sued on was executed
for no other purpose than to obtain the
possession of the goods, yet the party
was then acquainted with all the circumstan-
ces and it could not thus amount to a di-
rect fraud. So that if the original
transaction was fraudulent the ownership
of the goods was never transferred by
the sale. And as dumb to goods is no
where a good reason for avoiding a bond
(except in S. Carolina) and having always
been decided so in England and America
a party cannot be relieved against a bond
entered into for fear of loss of goods
This as a general rule prevails with few
exceptions than almost any other. There is
no Middle ground as was contended

and denominated oppression.

Cases of oppression can only arise out of an improper exercise of legal power; where an officer clothed with authority has under colour of his office distressed an individual by making him pay money or execute a bond as was the case cited from New-York, the party would be relieved, not on the grounds of fraud or duress, but from being illegally oppressed. Oppression, necessarily presupposes power therefore a private individual cannot oppress another; it must be duress or fraud; and there is no reason for such an argument in this case, it cannot apply.

In this case what are the reasons assigned by the Complaint in his bill for wishing to set aside his bond? That the defendant had his goods in possession and that he feared he would never get one cent for them, and in the words of the bill, he executed this bond for the $100 in order to regain the possession of his goods; Then was it not from his own showing a fear of the loss of his goods alone which induced him to execute the bond. And as such fear, is no excuse for executing a bond, consequently, he never can be relieved in law or equity

Davis Sol
for Deft

It is not denied that in Kentucky the doctrine, that when courts of law and Equity have concurrent jurisdiction a party may [illegible] by, till Judgment goes agt him and then prosecute his suit in Chancery

But it is confidently believed that this doctrine established in N York at a time too when the jurisdiction of the two Courts were well ascertained by the modern British decisions, and unforseen adhered to ever since is sufficient to govern this Court in the establishment of the rule in this State

That fraud in the consideration of a bond or note is a good defence at law see 1 Mo. Rep. Ewing v Miller the doctrine is believed to be the best it being supported by the case from 1 John Cas. 491.

Roger B Brett
vs
William L. Wayne

Supplemental
Bill of
Defendant
Davis Col

Roger P. Nest
vs
William L Wayne

Supreme Court First
Judicial District
April Term 1831.

This is a suit in chancery commenced by Nest against Wayne at the March Term of the Randolph Circuit Court 1830, for the purpose of injoining proceedings at law, upon a judgment obtained by Wayne against Nest at the same term of the Circuit Court for said County. The complainant sets out in his bill that he and the defendant, amongst others, left this State some time in the spring of 1828 with a view of trading with the Spaniards in New-Mexico, that they all had goods, wares and merchandise, for that purpose, that some distance on their journey the complainant wishing to return home, sold his goods &c to the defendant, for $1100 and left the company for Missouri, that the defendant had executed a Mortgage to the complainant for lands and Negroes before he, the complainant, would sell, in order to secure the purchase money of the goods to the complainant, that afterwards he returned, on hearing that the defendant was insolvent and demanded his goods &c from the defendant, that the defendant refused to give them up unless he would give him one hundred dollars, and that he thereupon executed his bond to the defend

bill, fraud vitiating contracts in law as well as in equity, it would be too late after suffering judgment to go against him at law, to come into a court of chancery to seek redress. That fraud is as well cognizable at law as in equity see Chitty on Contracts page 222. Harris Chan, 16. 1 John Cas 3 Bla, Comment, 431.

493- And it is a doctrine as well settled as any in the books that a party will not be redressed in equity where he had a remedy at law and neglected to avail himself of it. See 1 Mo. Rep. 659. 1 John Chan, Rep 49. — Do 466. — 1 John Cases 499 to 501, 1 Bibb. 173. Hardin 123. 1 Marshal 312. 1 Soulb Equi 144.

But it is believed that neither the law nor equity, has ever relieved a party coming into Court, under circumstances similar to those set out in the complainants bill. There are cases reported in some of the books, in which, it is laid down to be the law, that where a custom-house officer, or other officer, under colour of his office, oppressed persons whose goods they had on deposit, and extorted more than was legally due by the statute for the fees or commission, that there a party may sue and recover, if he has been compelled to pay more than was due by law before he could get his goods from

the person whose possession they were in.
(These cases turn upon the grounds that
the law should not be made an engine
of oppression, and that the party whose
goods were unjustly detained, had not
the exercise of his own free will, for his
immediate necessities might require that
he should have his goods before the tar-
dy process of the law would give them
to him, and that therefore he was under
an absolute compulsion to pay the excess
to obtain the possession of his property
, and ~~that therefore~~ he could bring his ac-
tion for money had and received and
recover the amount unjustly extorted
from him. But what are the facts of
this case? The complainant makes an ab-
solute sale of his goods for $1100, takes the
defendants bond for the payment of the
same, and delivers over the goods to the
defendant, some days after becomes dissatisfied
goes, back to the defendant and applies
for a recantation of the bargain, and
after due deliberation and consultation
executes his bond for the payment of $100
dollars to the defendant upon the con-
sideration that he would rescind the con-
tract, and redeliver him the goods he had
purchased. It is difficult to conceive what
would be the use of bonds the most solemn
acts of men lives if such a defence could

be set up to bonds executed without any duress or compulsion, either of person or property, but executed freely and deliberately. Chancery will relieve a party whose necessities have been taken advantage of, and who had no room for the exercise of his discretion: but if in this case the complainant owned the defendant nothing, for which he could oppress him or compel him into an unfair bargain, he had no power over him in any way whatever, and all he did was of his own free will, in which case neither law nor equity will interfear with the contracts of men. See Powil on Contracts 2 Vol. 163. 2 John. Ch. Rep. 60. Ford 606 Edwards v Kearsly It is likewise declared to be the law, that where a party will ratify an act which is wrong in itself by his subsequent conduct, that equity will not relieve him. 2 Powl. Contr. 161 to 163.

It is contended by the complainant that the acknowledgment of the defendant in his answer, that he was the owner of negroes at the time he purchased the goods of the complainant, when in fact these negroes were mortgaged, to another amounts to a falsehood, and therefore destroys the whole answer of the defendant, the legal ownership of the property being in the Mortgagee.

It will first be shewn that the legal title is in the Mortgagor of all mortgaged property, at least before forfeiture. And secondly

that this point is impertinent to the matter in issue between the parties, and not at all relied upon by the complainant in his bill. First, A Mortgage has always been viewed as a mere collateral security for the payment of money, and is not held to vest a property in the Mortgagee further than a mere lien to secure the payment of money. And although it is said to have been the ancient Common law, that after the time for the payment of the money had elapsed, the estate became absolutely vested in the mortgagee, yet it is now clearly settled that to almost all purposes known to the law, the mortgagor even after forfeiture is still possessed of the legal title and is the legal owner of the mortgaged property. That the mortgagor in possession is the legal owner see 2 Mo. Rep. 172 Smith and Milly. Powil on Mort, [redacted] 22.
=3.. Douglass 632-3. 11 John Rep. 534. 1 John, 590
4 John. 42. 7 John 278. 6 John 290. 3 John-
Cases 329. Harg. & Butler's Anno, on Coke Note 1
208. b. 1 Bibb 528.

The widow of the mortgagor shall have her dower in the mortgaged estate and damages from the death of her husband 6 John 294 Hitchcock v Harrington. 7 John 278. A mortgage is nothing but a security for a debt and any thing

which transfers or extinguishes the debt transfers or extinguishes the mortgage as an incident 2 Marshal 109 Hawkins heirs vs King. A Mortgagee in possession of slaves will have to account to the Mortgagor for their hire Hardin, page 7 Reed vs Landsdale, 3 Bibb 18 Field, v Becker &c 1 Bibb 198 Ballinger v Morley.

The Mortgagors estate will be taken under execution and sold, while mortgagees cannot 7 John 278 Collins v Torry 11 John 534 Runyan v Mersereau.

The estate of the Mortgagee, is nothing but a chattle and at his death goes to his legal representatives and not to the heir at law, even of a mortgage in fee of land See 3 Bibb 18, and 3 John Ch Rep. 145 the cases above cited. After noticing to what purposes the mortgagor is the legal owner of the property mortgaged while in possession and before forfeiture, when the question is directly brought up between the parties and those claiming under them, it will hardly be contended that the mortgagor is not the legal owner between him and a mere stranger who claims no right at all under the one or the other, and when the question is no way legally brought up between those claiming rights. See 6 John, 294 Index 7 John. Ch. Rep. 176. But, secondly, the question of a prior mortgage has no relation to any point

in issue between the parties. It is not in any wise connected with any point relied upon by the complainant in his bill. The charge relied on is that the defendant executed a mortgage to the complainant and that he, the complainant would not enter into the contract until the defendant executed the same kind of security to him, that he had to give for his goods when he purchased them, to wit, a mortgage on land and negroes, and that is the only inducement charged in the bill, moving to the original contract. It is not charged that the declarations of the defendant, that he was the owner of negroes, were any inducement to the sale of the goods, by the complainant, and therefore cannot be drawn incidentally into the issue of this cause. See 2 Bibb 7.- 2 Mo. Rep. 112 M Knight et al vs Bright

Davis atty
for Defts

Roger P. West
vs. In Equity
William L. Wayne

Defendants brief

Davis

Solicitor Deft

In the Supreme Court
First Judicial District
April Term 1831

Roger P. West — Plff in Appeal
vs
William L. Wayne — Deft

This was a suit in chancery. The facts of the case are shortly these.

In the spring of the year 1828 West the complainant in the court below, and Wayne the defendant, with many others left this country with goods for Santa Fe. On this way West became dissatisfied with the business, and sold his goods to Wayne. West refused to sell his goods, without security in this country. Wayne then told him that he owned negroes in Boon county in this state, and executed a mortgage to West upon certain negroes, and the sale was closed. West then left that company on his return home. After travelling a few miles he met another company of Santa Fe traders, and was informed by some of that company that Wayne had imposed him that Wayne had no other negroes or other property — that Wayne was insolvent, and advised West to return to the first company and take back his goods or he would lose them altogether. West did return and inform Wayne of what he had heard. Wayne did not deny but he had imposed upon West, but refused to give

up the goods, West then told him if he would give security that the goods would be given for when the company should arrive in Santa Fe, that he West was perfectly willing for Wayne to keep the goods, Wayne refused this also West then for the purpose of regaining possession of his goods executed a note to Wayne for $100, The goods were then returned to West Some time after ~~was~~ the note became due Wayne sued West on the note and recovered judgment, West then filed his bill in chancery to be relieved against the judgment. On the final hearing the bill was dismissed and West appealed to this court. And now the question is was the note for $100 executed under such circumstances as will authorize a court of chancery to interfere.

Two questions present themselves

1st Were West's goods obtained by fraud & imposition

2 If obtained by fraud, was the note obtained by duress

The second point I will consider first Let it be taken for granted that Wayne represented to West that he owned certain negroes and mortgaged them to West,— that West sold his goods upon the faith of such representation When in truth Wayne owned no negroes and West upon ascertaining that fact, demanded a return of his goods, which Wayne refused and that then West for the purpose of getting possession of his goods executed the note for $100

I shall contend that the note was at under such circumstances as would authorize a court of chancery to interfere and restrain against the note.

It will be contended that a note obtained by duress is void, The note in this case was not obtained by duress in the common, meaning of the term, but the books lay down a particular kind of duress — distress by circumstances, I shall prove by unquestionable authority that a note or bond procured by taking an unfair advantage of the maker's situation may be avoided, The reason given is this, In all valid contracts the consent of all parties should be free and unrestrained,

The first case which I shall notice is the case of Irving vs Wilson 4 T. R. 485, In this case the defendants were revenue officers and had seized certain property for want of a permit, & shortly after the seizure the owner came up and exhibited his permit, & demanded his property, The officers refused to give up the property without the owner would pay him a certain sum of money, The owner paid it and recovered back his property, and then brought a pumpet for the money, and the action was sustained, The court said that the defendants took an unfair advantage of the plaintiff's situation, This case it is true was to recover back money paid, and the case at bar is to resist the payment of a bond for money, If money paid may be recovered back surely a promise to pay is not more binding than actual payment,

It is said in Powell on contracts 2nd part 159 that in cases of this nature courts of equity and courts of law are assumpsit administer the same measure of ~~damages~~ justice. In the second vol of Starkie's Evidence p 110 & note (6) it is said that obtaining goods under such circumstances amounts to duress

In Butler N.P. 132 is the following case. A man pawned his plate and when he came to redeem it the pawnbroker required £10 more than legal interest which the owner refused to give, but finding that the pawnbroker would not give up the plate with it, the owner paid the £10, and then brought assumpsit for it, and the action was sustained. The court said that he might have such immediate use for his plate that he could not wait the tedious process of the law. The case at bar is much stronger than any I have found. In the case from Butler the party might have sued, In the case from 4 T.R. the party might have called in the aid of the law and recovered his property with damages, but in the case at bar, the parties were in a country where no law was in force. It was unsafe to trust the defendant a single day). As he had proved his want of principle in getting possession of the goods he might reasonably be expected to convey them away to avoid a recovery back. In fact I know of no other way which could have been pursued.

malys to take the goods which the law allows no man to do

In 6 Johns Ch Rep 210 is the following case McDonald the plaintiff in an attachment against Nelson was proceeding to sell the property of Nelson, McDonald refused an hours delay — refused to receive any thing but specie in satisfaction of the execution, Nelson was absent, his property was selling for nothing, In order to stop the sale the the father of Nelson executed a mortgage to McDonald for a large amount. and the court ordered the mortgage to be given up, the court said McDonald took an unfair advantage of Nelsons situation — that the mortgage was obtained by oppression

The case of Gasportas vs Jennings 1 Bay Rep 470 is in point, Some French Privateers captured a quantity of Rum, and brought it into Charleston where it was ordered to be sold by the French consul as a lawful ~~sale~~ prize. The defendant had previously laid in his claim to the rum but the claim was not allowed, At the sale the defendant became the purchasers and executed the note for the purchase money, and when sued upon the note they pleaded the above facts and this plea was sustained. The court said the note was obtained by duress of goods. — that the party would have been unsafe in trusting to the captors for damages, as they perhaps were worth nothing or might never again be seen.

I would also mention the case of Collins vs Westbury 2 Bay Rep 213 In that case the plaintiff attached the negroes of the defendant while defendant was on his way removing to the state of Georgia. The defendant to free his negroes from the attachment, compro-

missed with the plaintiff and gave the bond sued on, The court held it was duress of goods and granted relief against the bond,

In Powell on Contracts 2 Part 153 it is said although a party may be said freely to elect this hard bargain offered in preference to his then situation, yet equity will relieve where he was compelled by circumstances to submit to it,

From all the authorities it may be safely laid down as law, That when the goods of any one are obtained by unfair means, and the owner under the circumstances of the case has no legal means of regaining them, or can not wait the tedious process of the law, and obligation given for the purpose of obtaining the possession of such goods may be avoided in a court of chancery. Then the only question now remaining to be considered is this

2nd Were the goods in this case obtained by unfair and fraudulent means?

It will be necessary in the first place to examine the bill answer and depositions and ascertain what are the facts of the case,

There is perhaps no principle of chancery practice better settled than this. That all allegations in the bill which are charged to be within the knowledge of the defendant, or which from their nature must be presumed to be within his knowledge and not denied by the answer are to be considered as admitted,

An answer too should be direct and positive, see 1 Harrison Chy 222 and the case of The Methodist Church vs Jaques 1 Johns Chy Rep 76 & Smith vs Larkin 5 Johns Chy Rep 248

The defendant must deny or admit all the facts
stated in the bill with all their material circum-
stances (See Methodist Church vs Jaques 1 John
Ch Rep 76) and avoid denial in many cases
will not do 1 Hoffman's Ch 222 It is admitted
that a denial in an answer can not be outweighed & set by two witnesses, or one witness
corroborating circumstances, but in such cases
the denial in the answer must be positive (See
Sullivan vs Bates 1 Dillon 421) On the subject of
insufficient and evasive answers see the learned
opinion of Chancellor Kent in the case of the
Methodist Church vs Jaques 1 John Ch R 76

Appellee now notices the charges in the bill not
noticed or denied by the answer The bill charges
that West refused to sell his goods as well as his
mortgage on land and negroes, which is not
denied by the answer. The bill charges that
West told Wayne that he West was willing that
Wayne should keep the goods if Wayne would
give security to pay for them when the company
they should arrive in Canada, which Wayne
refused to do. And this is not denied,

The bill charges that West when he returned to
demand his goods he told Wayne he had been
informed that he Wayne had mortgaged or
negroes, and that West would never get one cent
for his goods which the answer does not deny.

I will now show in what the answer is evasive
The bill charges that Wayne told West that he owned negroes and executed a mortgage or lien to West on a negro woman and several children in Boon county in this State, the answer denies ever having executed a mortgage on any property by description. Now the negroes may have been mortgaged by name and yet not be described. The answer says. By a clause in the note to West, Wayne acknowledged his property generally to be bound for the payment of said note As the mortgage is not produced & not produced it should be taken most strongly against the party failing to produce it, then we may understand that the clause in said note did give to West a valid lien upon all of the defendants property. A mortgage may be good without naming the property mortgaged. for which see Starling vs Blair 4 Bibb 288

The answer admits that Wayne told West he owned negroes, and says that he gave West a mortgage or lien upon said negroes And says he had negroes at that time but does not say what description of negroes or whether they were in Boon county or not,

The answer says Wayne then owned negroes and at the time of answering owned negroes, Now it is proved by the deposition of James E Fenton, that all the negroes at the time of answering owned by Wayne he got by his wife long after the transaction upon which this suit is founded.

This shows the evasive nature of the answer, and what is more important it shows the disposition of Wayne to evade the charges in the bill and to keep aard the circumstances of this transaction, and to skulk behind general denials. I am aware that I am not now arguing an exception to the answer in this case, But it is very justly said in Hammond's bly Digest 422 that the credit given to an answer is to be governed by its fairness in meeting all the charges in the bill, By this rule the answer of Wayne in this case is intitled to but little weight, It is intimated by the answer that West became dissatisfied with his bargain and for that reason wished his goods again. Now this is absolutely false, West refused in the first place to sell with out mortgage security, West said he was informed in the second company of Traders that Wayne had imposed upon him, and this is supported by the testimony of of Peter Kerney, West told Wayne what he had learned in the second company, Wayne did not deny the truth of, West then told Wayne that all he wanted was security, this Wayne refused to give, And yet Wayne would wish to be understood to say that it was a common rice bargain, Let it be remembered that with the exception of certain negroes Wayne was worth nothing. The proof is satisfactory that West bought his good back because he feared he would lose all.

Having thus noticed the bill and answer and depositions I shall proceed to show that the goods in this case were obtained by fraud

It is charged in the bill, that when West returned to request his goods back he told Wayne that he West had been informed in the second company that he Wayne had neither land or negroes and that he West would never get one cent for his goods, and that he was advised to take back his goods, and that Wayne did not deny the fact that he had imposed upon West, This is not denied by the answer, and as it must necessarily be within Wayne's knowledge it must be taken as admitted, Then allowing for a moment that in the original sale there was nothing unfair, Yet I will contend that the note was obtained by fraud, The parties are in a country where the aid of the law could not be had, Wayne tells West that he owned certain negroes and executes to West a mortgage for said negroes, and upon the faith of this West sells his goods to Wayne, West is informed that said negroes do not belong to Wayne he communicates this intelligence to Wayne Wayne does not pretend to deny the imposition but suffers West to believe that he will lose his goods altogether, conceals the fact that his intelligence was untrue, and by taking advantage of West situation exacts a $100 note for a rue bargain, To put a plain case Suppose Genl. Owen of this town should make a large purchase upon the faith of his property, and should then procure others to

say that he did not own the property, and that he would never pay one cent of the purchase money, And when he is informed of this, admit the imposition, but refuse to give up the property bought or give security, and exact a note as a consideration of the compromise No one would doubt but this was direct fraud

The answer admits that Wayne represented that he owned certain negroes, and that he gave West a lien upon his property, Now if in fact Wayne did not own any negroes, surely the goods were obtained by fraud; I will here beg leave to refer to a preceding part of this brief as to the insufficiency of the answer and the credit due to an evasive answer, The answer says Wayne had negroes at the time of the sale to him but it does not say where they were, it does not then meet the allegation in the bill fairly, and I humbly conceive the proof in the cause is sufficient, to overturn such an answer,

The exposition of James E Fenton proves that the only negroes which Wayne could have owned at that time were a negro woman named Susan, a negro boy named George and a negro girl named Cassandra, The exposition of Mrs Elenor Wayne proves that in the winter and spring of the years 1828, those negroes with the exception of one half of George belonged to herself It is also proved that Wayne left this country early in May 1828. & in June of the same year was near the Arkansas river on the route to

to Santa Fe, then the property right to said negroes was not in Wayne when he left this county

David D Lamme in his deposition confirms the deposition of Mrs Wayne, He says that in the fall 1828 he learned that said negroes belonged to Mrs Wayne, that he went to see Wayne about the matter and when at Waynes house he ascertained that the negroes belonged to Mrs Wayne, and this information how he believes he got from Wayne Mrs Wayne and a certain Amos Mowrey, Several deponents say that the negroes were always considered the property of Mrs Wayne. This it is true is not direct testimony, but it is the opinion of the neighbours, and entitled to some weight as corroborating circumstances. But admitting that Wayne was the owner before he started to Santa Fe, Yet it is proved they were mortgaged to D Lamme & Brothers, for over $700, And it is proved by the deposition of James D Denton that the negroes were worth about $600. The question then occurs, Is it not fraudulent to mortgage property on which there is a previous mortgage for more than its value, I would here remark that the bill charges that Wayne executed to West a mortgage upon a negro woman and several children, The answer says Wayne did West he owned negroes and executed a lien upon all his property, which amounts to a lien upon the negroes as they were mentioned, Let it then be taken as admitted that Wayne did execute to West a mortgage (or lien

of your phase) for certain negroes

In considering this part of the case I shall contend

1 That the mortgagee is the legal owner
2 That the mortgagee is the legal owner before for future
3 Although the mortgagor may be the legal owner yet he is not the full owner,

1st The mortgagee is the legal owner

In Powel on Mortgages the mortgagee is declared to be the legal owner on the following pages, Page 7, 8, 141, 245, 709, 721, 1149

See also Powel on Mortgages as to the following points, A mortgagee may maintain ejectment (208-9), A mortgagee may maintain trover or detinue (1139) A mortgagee may sworn his interest in the mortgaged premises (437) The wife of the mortgagor can not be endowed of the equity of redemption (717, 731,) A mortgage works a severance of a joint tenancy (1105) A mortgagee can not dispose of his interest without writing under the statute of frauds (1117) Morgagee may assign his interest (217) Mortgagee must reconvey to revest the property in the Mortgagor (271-2). Mortgagee is a purchaser Reech vs Hall 1 Douglass (22), Mortgagee whether in or out of possession is the legal owner Westerfield vs Dale 7 T.R. 312, . Mortgagee is the legal owner 2 Thomas' Coke 39-40 note (3) and Sugden's law of vendors 185,. The equity of redemption says my Lord Hale is an equitable right 2 Thomas' Coke 239-40 note (3), If the mortgagee is not the legal owner there must be a great many typographical errors

In Kentucky the mortgagee has been accorded to be the legal owner in the following cases, Dougherty vs Kirchival 1 Mar. (53,) Bedford vs Duly 1 Mar (222) Patterson vs Carneal 3 Mar: (621) Hughes vs Graves 1 Littell ~~173~~ (318-9) Bank of Kentucky vs Vance 4 Littell 173, The mortgagor can not maintain ejectment Dougherty vs Kirchival 1 Mar (53) No title vest in a second mortgagee Hume vs Breck 4 Littell 284, It has also been accorded in New York that the mortgagee is the legal owner. Jackson vs Chase 2 Johns (87,) Jackson vs Duvois 4 Johns 216, In the case Moss vs Gallimore 1 Douglass 282-3 the counsel were proceeding to argue that the mortgage was a sale, that the mortgagee was the legal owner, and that the mortgagor had but an equitable title, but were stopped by Lord Mansfield, His Lordship said that there was no doubt about that matter — that the mortgagee was the legal owner, and had the legal title to the rent

In the case of Wisherfield vs Dale 7 TR 312. Lord Kenyon said that the mortgagee whether in or out of possession was the legal owner His Lordship said that some learned Judge had said that a mortgagee out of possession was not liable to covenants running with the land, but with great difference to so high authority he said he doubted it. And well might he doubt it The case referred to seems to bear upon the question whether the mortgagee is in possession or not. and seem to conceal that if in possession he would be liable

Now I humbly conceive that possession has nothing to do with the interest conveyed by the mortgage. If the mortgagee be not in possession that fact under some statutes may be fraudulent as against creditors, It would seem indeed most strange that he who holds a deed for land, and suffers another to remain upon it as tenant at will, thereby loses his legal title. According to this notion a mortgagee out of possession is not the legal owner, yet he may institute his suit at law and obtain possession and then he is the legal owner, It would seem a little singular that the possession of the mortgagor which may be determined at the will of the mortgagee should vest the legal title in the mortgagor.

I am aware of the fact that this court in the case of Melly vs Smith have decided that an instrument of writing in the nature of a mortgage did not vest the legal title in the quasi mortgagee, That case was twice before this court (see 2 Mo Rep (36 + 171) The first case was expressly decided upon the particular meaning of that instrument without touching the question about the ownership of mortgaged property in cases of common mortgages, The judge who delivered the opinion in the second case says he is constrained to affirm the former opinion of court in that case. And I understand from this that the second case is decided upon the same grounds that the first was. The court said the convenants are to be considered a part of the mortgage, (if we

may called so). And the covenant of indefeasible possession was inconsistent with the idea of legal ownership. and on account of the covenants the mortgagee gave to Smith was a mere lien upon the property. The whole of these two opinions seem to say negatively at least that without the covenants then the mortgagee would have been the legal owner

It will be admitted on all hands that at common law before the influence of courts of equity the mortgagee was the legal owner. And we readily admit that in the contemplation of a court of equity the mortgagor is the legal owner, But I cannot admit from this that the mortgagor is in fact the legal owner, not even in a court of equity, It only means that a court of equity when enforcing a party's equitable right will contemplate the mortgagor the legal owner

Before forfeiture the mortgagor could defeat the legal title of the mortgagee. by complying with the condition, and after forfeiture a court of equity only enabled the party do what he could have done before forfeiture without its aid, that is to defeat the legal title of the mortgagee, At common law after forfeiture the property was gone forever, and when chancery was applied to for relief, the court had to lay some kind of foundation for its interference to relieve a party against his own contract, And this they did by considering the mortgagor the legal owner

Now there is a direct contradiction in the terms used In a court of equity the mortgagor has the legal title, If, when a party open his cause in a court of equity, his before equitable title, by some magic becomes converted into a legal title, he should be dismissed and sent to a court of law with his legal title, unless perhaps it could fall from grace and the title only remain legal while in a court of chancery. All the difficulty about the legal title to mortgaged property grew out of the mere circumstance of a court of equity considering the mortgagor the legal owner for the purpose of granting relief. If at common law the mortgage transferred and vested in the Mortgagee the legal title, how could the interference of a court of equity affect the mortgage or restrain or limit the mortgage in vesting the legal title, If the mortgagor has the legal title why go into a court of chancery. — Why intertain a bill to redeem, if the mortgagor has the legal title the is nothing to redeem, Take a mortgagor in possession, it is said he is the legal owner, the mortgagee brings ejectment, — the mortgagor is turned out upon the strenght of the mortgagee legal title, but the mortgagor takes shelter in a court of equity and says here I have I have the legal title, This would be utter absurdity Nothing in the law is better settled than that ejectment can be supported by the legal title only, Yet the mortgagee may maintain ejectment, but the mortgagor can not,

the mortgagee may maintain trover or action,
The mortgagee has as full perfect and complete
controul of the mortgaged property before redem-
ption as the owner in fee simple, If the legal
title remain in the mortgagor a decree fore
closing his right to redeem can not transfer
the legal title to the mortgagee, Personal
property may be sold without foreclosure, Hart
vs Ten Eyck 2 Johns Chy Rep 100. In such case
if the mortgagee sell he must have title, and
how came he by it unless it came by the mortga-
ge. The courts of New York have gone great
lengths in deciding that the mortgagor is the
legal owner, Chancellor Kent in the case of
Titus vs Nelson 5 Johns Chy Rep 456 admits
that the courts of that state have gone further
on this subject than was warranted by the com-
mon law. And expressly says the doctrine of
making the mortgagor the legal owner originated
in that court, and was sustained by
the court of Appeals because it was a reason-
able doctrine, The decisions of the New York
Courts are not authority here, the common law
is in force by express statute and is binding upon
this court, But even in New York it has
been decided that the mortgagee is the legal
owner and may convey by deed Jackson vs Chase
2 Johns 87, And in the case of Jackson vs Duboys
4 Johns 216 it is expressly said that although
in a court of equity a mortgagee has but a
chattel yet he has he the legal title and a main-
tain ejectment, Now the legal title can not

can not be in the mortgagee and mortgagor both at the same time,

When all the cases come to be examined this will be found to be the law, The mortgagee is the legal owner every where, even in a court of equity, If it were not so a court of equity would not hear the case, that what is meant by the mortgagor is the legal owner, is only this, the courts of equity will consider the mortgagor the legal owner as between the mortgagor and mortgagee when the former affirms par a redemption of his property. And also that is said in the books must be considered as said in relation to the consideration of a court of equity, If not so understood every author on this subject contradicts himself, for it was not be understood that legal title can be in the mortgagor and mortgagee at the same time, All that courts of equity designed to do was to enable the mortgagor to redeem, this they might have done without considering the mortgagor the legal owner,

But in giving the first opinion on this subject the court said (I mean) for the purpose of granting relief, we will consider the mortgagor the legal owner, and from this fiction has arisen the seeming contradiction in the books about the legal ownership of mortgaged property. It is true we are now in a court of equity, but this is not a bill to redeem and the question as to the ownership of mortgaged property come in collaterally and must be argued at large.

2nd I shall now in the second place contend that although the mortgagor may be the legal owner before forfeiture after forfeiture yet before forfeiture the mortgagee is the legal owner,

At common law before the influence of courts of equity the mortgagee was the legal owner, but the mortgagor could defeat the legal title of the mortgagee by complying with the condition at any time before forfeiture, but if he failed to do this his ~~title~~ right was gone forever, Courts of equity then interposed and enabled the mortgagor to do that after forfeiture which he could have done at law before forfeiture — that is defeat the legal title of the mortgagee, When once forfeiture, there was no necessity for the aid of a court of chancery, and its jurisdiction — and not attach — chancery has nothing to do in the case,

Therefore we find it laid down in Powell on Mortgages (225) that before forfeiture the estate of the mortgagee is the same that it was at common law before the influence of courts of equity, Now no lawyer would have the face to contend that at common law before the influence of courts of equity the mortgagor was the legal owner, In this case the mortgagee was not forfeited (see Amos Marney deposition No (3), that between man and man to obtain credit upon the faith of property which is mortgaged to its full value, there can be no doubt, If Wayne succeeds it will be upon the technical ground

that he is the legal owner in the <u>cognizance</u>
of a court of equity. If the courts of chancery
had never interfered and the intent of the
mortgagor and mortgagee had remained as
they were at common law, now would con-
tend that the mortgagor was the legal
owner, Then the authority last cited is in proof
that before foreclosure the estate of the mort
gagee is as it was at common law before the
interference of courts of equity. This authority
is direct and positive and how the counsel for
Wayne by their ingenuity would get round it
I cannot divine

3rd II In the 3rd place I will now contend that although
the mortgagor may be the legal owner yet he
is not the <u>full owner</u> and that Wayne ob-
tained the goods by fraud.

From all the cases it
may be easily seen that the mortgagee at last has
some interest or property in the thing
mortgaged, In the case at bar Wayne represented
that he owned negroes and effected a mortgage
to Nott for seven negroes, Upon the faith of such
representation and mortgage Nott sold his goods
to Wayne, At that time there was a previous mort-
gage on the negroes for more than their value, Now
the question is, was not this fraudulent,

Contracts are to be interpreted according to
their usual and popular meaning. — The common
understanding must govern, If I tell a man
that such a tract of land belongs to me he
will understand that I own the whole interest,

Suppose a man tells a man that he owns a certain tract of land, and upon the faith of this representation I borrow $1000, of him, and the fact of the case was that A with 99 others owned the land as tenants in common or joint tenants, Now the representation is true in one sense of the word, a joint tenant is the owner of all the land, Yet it would not be seriously contended that this was not fraud, Or suppose one man tells another that he owns certain property, and upon the faith of that representation the other sells to him property to a certain amount, When he the owned the property as trustee, Now he is the owner and the legal owner, Yet this would be imposition.

Now then stands the case at bar, Wayne says he owns certain property and mortgages the same to Bell, Upon the faith of this sells his goods to Wayne, When in truth Wayne has previously mortgaged his property for more than its value, Now admitting that the mortgagor is the legal owner, yet it will be granted that the mortgagee has some interest in the property itself, What portion of the property is vested in the mortgagee or what is the nature of that interest is immaterial, When a man says he is the owner, he is understood to mean that he has the entire interest — that he is the full owner, It cannot be denied but that the mortgagee has some interest in the mortgaged property. Give him if you please the equitable interest, and settle

the conduct of Wayne is fraudulent. For instance suppose a man buys largely upon the faith of a tract of land which he says he owns. and when the case comes out, he is indeed the legal owner, but another holds his title bond for the land and his paid the purchase money

In the case at bar Wayne had previously mortgaged his negroes (if in-and they belonged to him), for their full value and gave to West a second mortgage, and yet contends that all is fair.

By a statute of this state (see Laws of Mo vol 1st 290) it is enacted among other things, that if any person shall execute any instrument of writing in any manner effecting any property real or personal, having previously mortgaged the same without reciting the first mortgage shall be indicted as a violator of the criminal laws of the land and upon conviction shall be fined not exceeding $5.000, and be imprisoned not exceeding five years and moreover be liable to the party injured in double damages

And shall it be said that an act for which the criminal laws of the state will punish a man with fine + imprisonment and double damages, shall be regarded in a court of equity as fair and upright.— in a court of equity where every thing is determined according to justice and to right.

Givens For West

Roger P. West
vs In Error
William L. Wayne

West's Brief