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It is not necessary to recite the contract *in hæc verba*, but if it be recited, the recital must be strictly accurate. If the instrument be declared on, according to its legal effect, that effect must be truly stated. If there be a failure in the one respect, or the other, an exception, for the variance, may be taken, and the plaintiff cannot give the instrument in evidence. The plea of *non assumpsit* denies the contract; and an instrument, not conforming to the declaration, either in words, where it is recited, or according to its legal effect, where the legal effect is stated, although proved to be the act of the defendant, is not the same act, and therefore, does not maintain the issue on his part.

In this case, the legal effect of the promissory note is stated; and that effect, on a note, having no day of payment, would be, that it was payable immediately. This declaration goes on that idea, and avers a promise to pay, when required. A note payable sixty days after date, is a note different from one payable immediately, *and would not support the issue, *218] had *non assumpsit* been pleaded, and issue joined on this plea.

Now, what difference is produced by the default of the defendant? He confesses the note stated in the declaration, but he confesses no other note. The necessity, then, of showing a note conforming to the declaration, is precisely as strong on executing a writ of inquiry, as on trying the issue. No reason is perceived why a variance which would be fatal in the one case, would not be equally fatal in the other.

The cases cited by the plaintiff's counsel have been considered, but they do not come up to this. They are not cases where the legal effect of the written instrument, offered on executing the writ of inquiry, has differed from that of the instrument stated in the declaration.

The court is also of opinion, that the production of the note, on executing the writ of inquiry, was necessary. The default dispenses with the proof of the note, but not with its production. In England, damages have, in some circumstances, been assessed without a jury, but it is not stated, that those damages have been assessed, without a view of the note. The practice of this country is, to require that the note should be produced, or its absence accounted for, and the rule is a safe one.

Judgment affirmed.

CONWAY'S Executors and Devises v. ALEXANDER. (a)

Conditional sale.—Mortgage.—Equity of redemption.

If A. advance money to B., and B. thereupon convey land to trustees, in trust to convey the same to A. in fee, in case B. should fail to repay the money and interest on a certain day; and if B. fail to repay the money on the day limited, and thereupon, the trustees convey the land to A.; B. has no equity of redemption.¹

THIS was an appeal from the Circuit Court for the district of Columbia, sitting in chancery, at Alexandria.

(a) March 7th, 1812. Present, all the judges.

¹To make an instrument, in the nature of a mortgage, a conditional sale, the intention of the parties, at the time of contracting, must be clearly proved, or necessarily implied

from the circumstances. *Wheeland v. Swartz*, 1 Yeates 579. In a doubtful case, it will be construed as a mortgage, rather than a conditional sale. *Matthews v. Sheehan*, 69

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*Walter S. Alexander, the appellee, son and residuary devisee of Robert Alexander, deceased, filed his bill in equity against the executors and devisees of Richard Conway, deceased, to be permitted to redeem a certain tract of land, which his father, Robert Alexander, had, in the year 1788, conveyed to certain trustees, by a deed which the complainant contended was a mortgage; which land the trustees had conveyed to W. Lyles, who had conveyed the same to the said Richard Conway. The deed was by indenture, dated March 20th, 1788, between Robert Alexander of the first part, W. Lyles of the second part, and certain trustees of the third part, whereby Robert Alexander (after reciting his title to an undivided moiety of 400 acres of land, holden in common with Charles Alexander), in consideration of 800*l.* paid to him by W. Lyles, and in consideration of the covenants to be performed by the trustees, bargained, granted and sold, aliened and confirmed to W. Lyles, in fee, twenty acres, being part of the said undivided moiety; and to the trustees, the residue of the moiety, except part thereof conveyed to B. Dade on the 1st of January 1788; which residue was supposed to contain 140 acres: To have and to hold the 20 acres to W. Lyles, his heirs and assigns, to his and their use for ever; and the said residue of the said moiety to the trustees and the majority of them, and the survivors and survivor of them, in trust as follows, to wit: "To convey the said residue of the said moiety, except as before excepted, unto him the said W. Lyles, his heirs and assigns for ever, by good and sufficient deeds in law for that purpose, at any reasonable time after the first day of July, which shall be in the year 1790, unless the said Robert Alexander, his heirs, executors or administrators, shall pay, or cause to be paid, to the said W. Lyles, his heirs, executors or administrators, the sum of 700*l.* current money of Virginia, in gold or silver coin, with lawful interest thereupon, from the date hereof, on or before the first day of July, which shall be in the year of our Lord 1790. And if the said Robert Alexander, his heirs, executors, or administrators, shall pay, or cause to be paid, to the said W. Lyles, his heirs, executors or administrators, the said sum of 700*l.*, current money of Virginia, in gold or silver coin, with lawful interest thereupon, *at any [*220 time on or before the said first day of July, which shall be in the year 1790, in trust, immediately upon the payment being made, to reconvey to him the said Robert Alexander, and his heirs for ever, by good and sufficient deeds in law, all the title which by virtue of these presents passeth to them the said (trustees) or any of them, of, in and to the said residue of the said moiety, except as before excepted, herein before granted and confirmed unto them." Robert Alexander then covenanted that he had good title in fee-simple to the land conveyed; and that the 20 acres should be laid off in a certain situation contiguous to other land of Lyles, and by certain metes

N. Y. 585. What was intended as security for a loan, cannot be converted into a conditional sale, by the form of the transaction; and an agreement to make it such, in default of payment at the day, will be relieved against. *Kunkle v. Wolfersberger*, 6 Watts 126; *Kerr v. Gilmore*, Id. 405; *Rankin v. Mortimere*, 7 Id. 372; *Brown v. Nickle*, 6 Penn. St. 390. And for that purpose, extraneous evidence is admis-

sible, to inform the court of any material fact known to the parties when the deed was executed; and this, on the ground, that to insist on what was really a mortgage, as a sale, is, in equity, a fraud, which cannot be successfully practised, under the shelter of any written paper, however precise and complete they may appear to be. *Russell v. Southard*, 12 How. 147; *Babcock v. Wyman*, 19 Id. 299.

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and bounds therein described. The trustees then covenanted, that they would well and truly execute the trusts reposed in them, by reconveying the land to Robert Alexander, if he should pay the money, and interest, on or before the 1st of July 1790; or by conveying it to Lyles, if Robert Alexander should not pay it by that day. Robert Alexander then covenanted with Lyles, that he would make further assurance, &c., both as to the 20 acres, and as to the residue of the moiety, if the trustees should convey it to him. He then covenanted to warrant the 20 acres to Lyles against the claims and demands of all persons whomsoever. This deed did not contain any covenant on the part of Alexander to pay the 700*l*.

On the 19th of July 1790, the trustees, by deed of that date, reciting the deed of the 20th of March 1788, and that Lyles had represented that R. Alexander had not paid the money, and had required them to execute the trust, conveyed the residue of the undivided moiety in fee to Lyles, in consideration of the covenants, agreements and trusts in the former deed contained on their part to be performed, and in consideration of 700*l*. mentioned in the said former deed to have been paid by Lyles to Alexander.

On the 23d of August 1790, Lyles, by deed of that date (after reciting the title of Robert Alexander to the undivided moiety of the 400 acres of land, and his deed of the 20th of March 1788, to Lyles and the trustees, and that Alexander failed to pay the 700*l*. on the 1st of July 1790, and that the *221] trustees, by their *deed of the 19th of July 1790, had conveyed the land in question to Lyles), in consideration of 900*l*. paid him by Richard Conway, conveyed the 20 acres, and the residue of the undivided moiety of the 400 acres, and all his right, title, interest, use, trust, property, claim, and demand, in and to the same, by force of the said indenture, and all deeds, evidences and writings in any manner or way touching the same, and the right and privilege of prosecuting in the name of Lyles (if at any time judged necessary by Conway, his heirs or assigns), any actions at law for the breach of any of the covenants in the said indenture contained: To have and to hold, all and singular the premises thereby granted, with the appurtenances, and all the estate, right, title, use, trust, interest, property, claim and demand of him the said W. Lyles thereto, by force and virtue of the aforesaid indentures to Conway, his heirs and assigns, to his and their use for ever: with a special warranty against the claims of Lyles and his heirs and assigns only.

On the 17th of January 1793, Robert Alexander made his will, and after devising specifically a number of tracts of land, and moieties of tracts, by name and description, to his son Robert, devised all the rest and residue of his estate, real and personal, to his son Walter, the complainant. Robert Alexander, the testator, died in February 1793. The land in question was not specifically devised by his will, and Walter, the complainant, obtained title under the will to several other tracts not specifically devised. The complainant became of full age in November 1803, and brought this suit in 1807.

The deposition of W. Lyles was taken on the part of the defendants. He testified, that Robert Alexander was not indebted to him, at the time of the contract for the land. No part of the money was advanced by him, as a loan to be secured by mortgage. He was no lender of money, and would not have lent Alexander the money on mortgage. Alexander was

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generally reputed not punctual in paying his debts, and rather too fond of law, and at the time of the contract for the land, was confined in jail for a large debt, and sent several times to Lyles, and urged him to buy the land. Lyles then *resided on land adjoining the 20 acres; and his house [*222 was very near the line. He wanted the addition of about 20 acres, and was not anxious to have any more. Alexander was more willing to sell his whole residue of the moiety of 400 acres, than to sell a part, his object being to raise a considerable sum, to pay the debt for which he was in prison. It was agreed, that the 20 acres should be sold absolutely, and the residue should be sold conditionally, as otherwise Lyles would not advance the money. The 20 acres were purchased absolutely, to suit the convenience of Lyles, and the residue was purchased conditionally, to suit Alexander. Lyles was determined to advance no money on any bargain which should make it necessary to go into court to get it back. The condition was understood by both to be, that if he paid the money by the time limited, the trustees were to reconvey the land to Alexander, but otherwise, they were to convey it to Lyles in fee-simple, and he was to have the land thereafter absolutely, to his own use for ever. He sold it, as soon as he could, after he left Alexandria, to get back his money. He received from Conway 900*l.*, at the date of the conveyance, or a few days after. Alexander never made any claim upon Lyles for any part of the land, and never expressed to him any dissatisfaction with the sale, although he saw him frequently afterwards. Alexander was not in confinement, when the trustees made their deed to Lyles. No part of the land was cultivated, and no formal possession delivered.

The deposition of Charles Lee, Esq., who drew the deeds of the 20th of March 1788, and the 19th of July 1790, stated, that Lyles consulted him about the bargain with Alexander, and represented that Alexander wanted a considerable sum of money, to pay a debt which was pressing, and offered to sell some land, but would not sell the whole of it absolutely, but was willing to sell part of it absolutely, and the residue was to be conveyed to trustees, in trust, to convey the fee to Lyles, if a certain sum of money was not paid by a certain day; and if it was, the trustees were to reconvey to Alexander. The deponent was asked, if such a contract was lawful, or would be deemed in law only a mortgage; and gave it as his opinion, that the parties might make such a contract, and that it could not be considered a mortgage. Lyles intimated, that if that was not very clear, he *would [*223 not have anything to do in the business. That he would not, on any terms, make a bargain with Alexander, if he should be obliged to go into a court of equity about it, which might be the case, if there should be a mortgage; that Alexander was well known to be troublesome and fond of law. The deponent was requested to draw such instruments as would place the contract in the state of a conditional purchase of a part of the land, and with this view, he drew the writing. He is certain, that Lyles consulted him as to the nature and effect of the contract, and did not intend to have a deed in the nature of a mortgage, but of absolute sale of a part, and of a conditional sale of the other part of the land, and such was the deponent's intention, when he drew the deed. That he afterwards drew a deed of conveyance from the trustees to Lyles, to carry into effect their trust, and delivered it to Lyles, to carry to the trustees. Lyles informed him, that one

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of the trustees refused to execute the deed, unless Alexander would signify his consent, and asked, whether a verbal consent would not do. The deponent sketched a note in writing for Alexander to sign, signifying his consent, and was afterwards informed, that the trustees were satisfied, and did execute the deed, but he does not know whether Alexander gave his consent. Lyles was not easy in his pecuniary affairs, and he never knew him lend a large sum upon mortgage. Alexander was a bad manager of his estate, was generally needy of money, and not punctual in payment of his debts, though his landed estate was really of great value.

The answer of the executors did not admit the deed to be a mortgage, and stated that Conway began to make expensive and permanent improvements on the land, in the summer of 1791; that Alexander had an opportunity of seeing part of them, and probably did see them, and made no objection as they believe.

It appeared in evidence, that the land had lately been sold for more than \$20,000; but that it was very poor, much broken by gullies, and exhausted, when Conway began his improvements. There was also evidence tending to show, that it was then worth more than he gave for it.

The court below being of opinion, that the deed was *to be con-
*224] sidered as a mortgage, directed an account to be taken of the value of the permanent improvements, and the original sum advanced by Lyles, and interest, and of the rents and profits, which being done, it appeared, that the complainant would have to pay the sum of \$4943 to redeem the land; and the court accordingly decreed a release upon the payment of that sum. From this decree, the defendants appealed to this court.

C. Lee, for the appellants.—The only question is, whether this is a case of mortgage. The bill does not state fraud or oppression.

1. As to the deed itself. The question is, whether it be a defeasible purchase, or a redeemable mortgage? It sets forth the consideration of 800*l.* as one entire sum. There was no prior debt due to Lyles. That allegation of the bill is disproved; and unless there was an old debt, or an actual loan, there could be no mortgage. It may as well be a mortgage of the 20 acres, as of the residue. If both contracts were not actual purchases, the parties would have required different instruments. All instruments are to have a reasonable construction, according to the intent of the parties. One distinguishing mark of a mortgage is a covenant for the repayment of the money; but this deed contains no such covenant; it was purposely omitted, that it might not be a mortgage. The whole question is, as to the intention of the parties. Lyles had no personal remedy; if the land should fall in value, it was his loss; if there had been a valuable house upon the land, which had been destroyed by fire, it would have been the loss of Lyles. It was not reasonable, that Alexander should have the chance of gain, but not of loss. It was in his power to compel Lyles to take the land, by neglecting to pay the money on the day. Another circumstance showing the intention of the parties is, that Alexander covenanted to make further assurance, if required, whenever the trustees should have conveyed the land
*225] to Lyles. *It was not intended as a security for money to Lyles, but a mere right in Alexander to repurchase, until a certain day. A court of equity cannot change the agreements of parties.

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In the case of *Tasburgh v. Ecklin*, 4 Bro. Parl. Ca. 142, cited in Powell on Mortgages 174, there had been a bill to foreclose, which clearly showed the intention of the purchaser to consider it as a mortgage. But the House of Lords decided it to be an irredeemable purchase, and not a mortgage. That was an assignment, by lease and release, of a reversion, expectant on a lease for years, of which 43 were yet to come, in consideration of 200*l.*, paid by Sir John Eustace to Charles Tasburgh, in trust for John Tasburgh, dated in 1681. In the indenture of release, there was a proviso, that if Sir John Eustace should pay Charles Tasburgh, at the end of five years, 200*l.* with interest, it should be lawful to him to re-enter and enjoy in his former right; but if he should fail to pay, within the time limited, the estate of Charles should be absolute, as well in equity as in law, and that Sir John and his heirs should be for ever debarred from all right and relief in equity, against the tenor of the said release; and Sir John did thereby, for himself and his heirs, release to Charles Tasburgh, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid; and there was no covenant in the deed for the repayment of the money, or the interest, by the grantor, as is usual in mortgages. After the five years, John Tasburgh exhibited a bill, in 1687, against Sir John Eustace, praying payment at a certain day, or that the conditional estate of Charles (in case it should be adjudged a defeasible or redeemable estate), should be made absolute, and that Sir John might be foreclosed of all equity of redemption. This bill was taken for confessed, and a decree in December 1688, that he should be foreclosed, unless payment were made of principal, interest and costs, before December 1689. Sir John acquiesced under this decree for eighteen years, when he died. John Tasburgh died in 1691, and Henry Tasburgh succeeded to his estate, and in 1722, demised *the premises to McNamara. In 1723, the heirs of Sir John Eustace exhibited a bill, alleging that the decree for foreclosure had been obtained by surprise, fraud and imposition, and praying it might be reviewed and reversed, which was done by the court of chancery in Ireland, who decreed that Henry Tasburgh should release to the heirs of Sir John, upon payment of the principal, interest and costs. From this decree, Henry Tasburgh appealed to the House of Lords, who reversed it and dismissed the bill. The principle upon which this case was decided by the House of Lords is supposed by Powell to be, that the contract was to be considered as a conditional purchase, and not a mortgage.

And in the case of *Barrell v. Sabine*, 1 Vern. 268, the Lord Keeper said, "he thought, that where there was a clause or provision to repurchase, the time limited ought to be precisely observed." In the case of *Chapman v. Turner*, 1 Call 192, Judge PENDLETON, in delivering his opinion, said, "As on the one hand, the chancellor would not permit a real mortgage to be made irredeemable, by the act of the scrivener, so, neither on the other, will he suffer real conditional or defeasible sales to be changed into mortgages by the like acts. The real intention of the parties governs him. In a defeasible purchase, the condition must be strictly performed at the day, or no relief will be granted; because it does not admit of compensation for the risk. If the thing perishes the next day, it must be the loss of the purchaser, he having no covenant, or even implied promise, to return the money in that event; and we are taught by a maxim in equity, that in these casual

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cases, eventual loss or gain must accrue to, or fall on him who runs the risk.

In the present case, both parties confided in the trustees. Their deed, after the failure of Alexander to pay the ready money, was as valid, as if he himself had then released all equity of redemption, or had made an absolute deed to Lyles.

2. As to the evidence in the case. It appears, that *the trustees *227] refused to execute the deed, until they had the consent of Alexander. A writing was drawn for him to sign, signifying his assent. The trustees executed the deed : the probability is, that they had his assent in writing. He knew that the deed had been executed, and he acquiesced : he saw the expensive improvements made by Conway, and he was silent. Conway continued making substantial and permanent improvements for seventeen years, without keeping any account either of the cost of his improvements, the expenses of cultivation, or the value of the crops. It has now become impossible to account : justice cannot now be done. In 2 Eq. Cas. Abr. 599, it is said, that "equity will not enlarge the time for the mortgagor to redeem, after six years' acquiescence under a forfeiture by his own consent, especially, if there be any improvement on the estate." And again, "there shall be no redemption, after long possession, settlements made, and estate improved." In the case of *Hollingsworth v. Fry* (4 Dall. 345), Judge PATERSON, in delivering his opinion, said, that the time of payment was material—a cardinal point ; and the party ought not to be suffered to lie by and take the chance of the rise of value.

Lyles's giving a special warranty only, is no evidence that he considered it as a mortgage. The boundary was unsettled, and then in a course of litigation, which was a sufficient reason for his not giving a general warranty. And that Alexander did not consider it as a mortgage is evident, from the circumstance, that he did not mention this land in his will, although he specified almost every tract of land in which he had any interest, especially, that part of this very tract which he had previously contracted to sell to Baldwin Dade.

This deed, therefore, was neither a mortgage *per se*, nor was it the intention or understanding of either of the parties that it should be so considered ; but conveyed a good, absolute, and indefeasible estate, both at law and in equity, to W. Lyles, and his heirs and assigns.

Taylor, contra, admitted the distinction between an agreement to repurchase, *and a mortgage. But in this case, if it be not a mortgage, it *228] was a most unconscionable bargain. The evidence shows that, at the time of the bargain, other land less advantageously situated, and not better in quality, was worth three or four times the price which Lyles paid for this.

As to the question of mortgage. "Every contract for the receiving of money, by the conveyance of a real estate to the lender, not made in contemplation of an eventual arrangement of property, is, in equity, deemed a mortgage." *Mellor v. Lees*, 2 Atk. 495. And all provisos and stipulations between the parties, tending to alter, in any subsequent event, the original nature of the mortgaged interest, or prevent the redemption of the estate pledged, upon payment of the money borrowed, with interest, are void. For

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were any such agreements suffered to prevail, they would put it in the power of every mortgagee to take advantage of the necessities of the mortgagor, by inserting restrictive clauses to prevent a redemption of the estate pledged, unless upon terms injurious to the latter. In equity, therefore, the right of redemption is considered as inseparably incident to every contract founded on a mortgage, and can no more be restrained, than the power of tenant in fee-simple to alien generally, or of tenant in tail, to suffer a recovery; it being a maxim in equity, that the same estate or interest cannot be a mortgage, at one time, and at another time, cease to be so." Powell on Mortgages 146. Nor will an agreement to make the conveyance absolute, upon payment of a further sum, if the money lent be not paid at the day appointed, alter the case; such stipulations being deemed unconscionable; because a man ought not to have interest for his money, and a collateral advantage besides; nor may he clog the redemption by any bye agreement. *Willet v. Winnell*, 1 Vern. 488; Powell 152.

Powell, in concluding his observations upon the case *Tasburgh v. Ecklin*, p. 183, says, "But in all these cases, where the equity of redemption is rebutted by agreements of this kind, and the transaction is considered as a conditional purchase, the intention of the parties at the time of contracting must, I apprehend, be clearly proved, or necessarily implied from the circumstances *attending it; otherwise, the general rule will not be [*229 departed from."

It is not necessary, to constitute a mortgage, that it should contain a covenant for the repayment of the money; *Lawley v. Hooper*, 3 Atk. 280; where the Lord Chancellor says, that all Welsh mortgages are without this covenant, and so are most copyhold mortgages. So, in case of *King v. King*, 3 P. Wms. 358, it was decided, that every mortgage, although there be no covenant nor bond to pay the money, implies a loan, and every loan a debt; as in the case of the mortgage of a ship, which was taken at sea, although there was no covenant to pay the money, yet the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. And the Lord Chancellor said, it was so in the case of Welsh mortgages, where no day certain is appointed for the payment, but the matter left at large. The case of *Howell v. Price*, 1 P. Wms. 291, was upon a Welsh mortgage, viz., conveyance in fee of an estate in Wales, worth 52*l.* per annum, under a proviso, to be void, if the mortgagor, his heirs or assigns should pay to the mortgagee, or his heirs, 300*l.* on any Michaelmas day, giving six months notice, and the mortgagee to have the rent which should then be in arrear; but there was no bond or covenant to pay the money. Yet it was decreed that it was a debt, which the executors should pay. The case of *Ross v. Norvell*, 1 Wash. 14, shows that a covenant to pay is not essential.

A deed of trust is a modern invention by which the equity of redemption is supposed to be foreclosed, without the aid of a court of chancery. But the present differs from the modern deed of trust. In that, there is a public sale, and the surplus is paid to the mortgagor, which, if the sale is fairly and judiciously made, may be considered as the fair value of his equity of redemption. Yet the efficacy of such a sale as that, to pass an irredeemable estate, is doubted. Powell 19. But here, the trustees were the mere instruments to convey; they had no powers to do anything but convey, upon the payment or non-payment of the money. Here was no provision made, to ascer-

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tain the value of the equity of redemption, or to mitigate the severity of the contract. The intervention of the trustees did not alter the case, *or
*230] make it more or less a mortgage, than it would have been without them.

It is, in effect, the same as if the deed had been directly from Alexander to Lyles, with a proviso that it should be void, if Alexander should pay the money on the day appointed. Such a deed would unquestionably have been considered as a mortgage. It has been shown above, that a covenant to pay was not necessary; and a covenant for further assurance is usual in mortgages, and is, therefore, no evidence that this conveyance is not to be considered a mortgage.

If, then, it is to be considered as a mortgage upon the face of the instrument, is the extrinsic evidence so clear, as to rebut the equity of redemption? Why was there a distinction made between the conveyance of the 20 acres and that of the 140? Why were the 20 conveyed to Lyles, and the 140 to the trustees? The answer apparent upon the face of the transaction, and expressly avowed by Lyles himself, in his deposition, is, that Lyles did not want to purchase, and Alexander did not want to sell, more than 20 acres. Lyles says, that the 20 acres were conveyed absolutely, to suit his convenience, and the residue was conveyed to the trustees, to suit Alexander. As to the 140 acres, then, Lyles did not wish to purchase them, nor Alexander to sell them. If a sale and disposition of the land were not the object of the transaction, it could be nothing but a loan of money by Lyles, and a security upon the land by Alexander. This was evidently the substance of the negotiation. And wherever there is a loan of money upon the security of land, however the transaction may be disguised by the writings, it is substantially a mortgage. Lyles, indeed, admits his object to have been a loan of money, but says his intention was to have the means of getting back his money, without going into a court of chancery; that is, he wished to loan his money, upon a real security, without allowing his debtor the right of redemption. It was an attempt to do that which courts of equity have uniformly discountenanced; to devise a mode to defeat the equity of redemption, where the transaction was really a loan of money upon a mortgage.

*It is said, Lyles had no personal remedy against Alexander,
*231] because there was no covenant to repay the money. But the authorities already cited show, that wherever the transaction is really a loan, and the security is inadequate, there is a personal remedy. That Lyles considered the land as a security only, is evident, from the circumstance that he received from Conway only his principal and interest, and assigned to Conway his right and title only, together with the title-papers, and expressly assigned all his right of action against Alexander.

There is no evidence of acquiescence on the part of Robert Alexander, in the idea, that this was an absolute sale. He died in January 1793: Mr. Lyles himself states, that he does not know whether Alexander knew of the deed of the 19th July 1790. Conway's agreement with Charles Alexander respecting a division of part of the land which they held in common, was in April 1791. No improvements could have been made before that date. One of the witnesses states, that he began to ditch the land in March 1791. It is probable, he meant March 1792. If so, there were only ten months in which Alexander could have seen any improvement on the land; and what

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he did see, was not inconsistent with the nature of the estate of a mortgagee in fee, in possession. The buildings, &c., were not erected, until after Alexander's death. The digging of a ditch, and erecting of a post and rail fence, upon a part of the land, was not decisive evidence that Conway claimed an irredeemable estate; and there is no evidence, that even that small improvement was seen by Alexander. It is only stated by the witnesses, that he might have seen it, at a distance, as he passed along the road from his house to Alexandria. The complainant did not become of full age, until November 1803, and brought suit in 1807. His guardian did not know the nature of Conway's title. The length of time is no bar to the complainant, because he has been under a legal disability. Powell 407-8, 411-12.

It is said, that Robert Alexander did not specify this land in his will, although he mentioned that part of the tract which was in the possession of Baldwin Dade; *and from this circumstance an inference is drawn, [*232 that he considered it as an absolute sale, and not a mortgage. But the reason why he mentioned that part of the land which was in possession of B. Dade was, that he devised it to his son Robert; and it will be perceived by his will, that he specified everything by name, which he devised to Robert, but nothing which he devised to Walter, the complainant; for after making specific devises to Robert, he says, "I give to my son Walter, and his heirs, for ever, all the rest and residue of my estate, both real and personal." So that, if his not specifying this land be evidence, that he thought he had no interest in it, his not specifying the half of his estate which he intended for his son Walter, is evidence that he thought he had no interest therein. No such inference can be drawn from his silence as to this land, which would not apply to one-half of his estate.

There is no evidence of Alexander's understanding of this transaction. His circumstances were embarrassed, up to the very time of his death, so that he never had it in his power to make an offer to redeem. It is evident from the deed itself, that he expected to be able to redeem, in about two years from the date of that instrument; and the insertion of such a clause was evidently intended for his benefit, and shows that he did not wish to sell. He was in prison for debt: his object was to get money to relieve him from confinement; and the stipulation for a time of payment, is evidence that he meant to borrow. There is no evidence, that this was not a negotiation for a loan of money. Mr. Lyles, in his deposition, does not say that the money was not advanced by him as a loan; but says, it was "not advanced as a loan, to be secured by mortgage;" and that he would not have loaned him money "on any mortgage by him." That he "was determined to advance no money on any bargain which should make it necessary to go into court to get it back." That he sold the land as soon as he could, after he left Virginia, "for the purpose of getting back his money." All this shows that he had no objection to lend the money, but he wished to get real security, without an equity of redemption. And it appears, he employed counsel to devise a plan for that purpose; a *purpose [*233 which is never countenanced in a court of equity.

The case of *Chapman v. Turner*, which has been cited, was a contract respecting personal property, and depended upon its own peculiar circumstances, none of which resemble the present. The case of *Tasburgh v. Ecklin*, was a sale or mortgage of a reversion. There had been a decree of fore-

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closure, and a long acquiescence under it. It does not appear, upon what grounds the House of Lords refused to review that decree; whether it was because it had been so long acquiesced under, or whether upon the construction of the original conveyance. But the decision of the court of chancery in Ireland was clearly upon the ground of its being a mortgage.

In the case of *Robertson v. Campbell and Wheeler*, 2 Call 428, Judge PENDLETON, in delivering the opinion of the court of appeals of Virginia, says, "It must often happen, in disquisitions of this sort, that there will be a difficulty in drawing a line between these two sorts of conveyances" (mortgage and conditional sale). "The great desideratum, which this court has made the ground of their decision is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed? Or, whether the object was the loan of money and a security, or pledge, for the repayment, intended?" The cases cited from 2 Eq. Cas. Abr., only show, that a court of chancery will not decree a redemption, after a forfeiture by consent of the mortgagor, and improvements by the mortgagor, and acquiescence by the mortgagor.

Upon the whole, then, this case appears to have been originally a loan of money, upon real security, with an attempt to defeat the equity of redemption; and not a real bargain, with a view to the purchase of the land. The want of a covenant to repay the money, does not alter the nature of the original transaction, and the same evidence which appears in this case, would *234] have *supported a personal action by Lyles against Alexander, upon the loan of the money, in case the title of the land had failed, or it had by any other means become an inadequate security.

Jones, in reply.—It must be admitted, that it was competent for the parties to make a conditional sale, and the only question is, whether they have done so. The depositions of Mr. Lyles and Mr. Lee show, that it was their intention to make a conditional purchase, and not a mortgage. If the instrument does not create a conditional sale, it must have been the mistake of the person who drew the deed.

It is true, that no covenant in a mortgage can clog the equity of redemption. But if the transaction be not a mortgage, that principle does not apply. Wherever a deed is as collateral security, there must be a personal remedy. And it is no mortgage, unless it contain a personal obligation, or show it to be a loan. In the present deed, there is no recital, acknowledging a debt, and no covenant to pay; but the money is expressly acknowledged to be received as purchase-money. It was entirely within the discretion of Alexander, to pay the money or not, at the time.

The evidence justifies the inference, that the deed from the trustees to Lyles was made with the consent of Alexander; and being by consent, it is equivalent to a foreclosure by a court of equity. Even if it were a mortgage, originally, it might, by subsequent assent, become absolute. And if, at the time of the release of the equity of redemption, a note be given that the releasor should have the lands conveyed to him, upon payment of what was given for the lands, within a year, such payment having been neglected for several years, there shall be no redemption. *Endsworth v. Griffith*, 2 Eq. Cas. Abr. 595, § 6.

In all the cases cited to show that a covenant to pay the money is not

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necessary in a mortgage, there is some other circumstance, showing a loan of money, or designating *the instrument to be a mortgage. But in the present case, there is no such circumstance. [*235

March 14th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed, dated the 20th of March 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March 1788, is between Robert Alexander, of the first part, William Lyles, of the second part, and Robert T. Hooe, Robert Muire and John Allison, of the third part. Robert Alexander, after reciting that he was seised of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of 800*l.* paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs and assigns for ever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles, at any reasonable time after the first day of July 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of 700*l.*, with interest from the said 20th of March 1788. And if the said Robert Alexander shall pay the said William Lyles, on or before that day, the said sum of 700*l.*, with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants, that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of 700*l.*; and to reconvey to Robert Alexander, in the *event of payment. [*236 Robert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th of July 1790, the trustees, by a deed, in which the trust is recited, and that Robert Alexander has failed to pay the said sum of 700*l.*, convey the said land in fee to William Lyles. On the 23d of August 1790, William Lyles, in consideration of 900*l.*, conveyed the said 20 acres of land, and 140 acres of land, to Richard Conway with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed, Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense. In January or February 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained

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his age of twenty-one years, in November 1803, brought his bill to redeem, in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is, whether Robert Alexander, by his deed of March 1788, made a conditional sale of the property conveyed, by that deed, to trustees, which sale became absolute by the non-payment of 700*l.*, with interest on the 1st of July 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed?

*237] To deny the power of two individuals, capable of *acting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, or, in other words, to make a sale, with a reservation to the vendor, of a right to repurchase the same land, at a fixed price, and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited, either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description, to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason, the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money, or an actual sale?

In this case, the form of the deed is not, in itself, conclusive, either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms, will not affect the case. But it must exist, in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is, certainly, not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law, for the recovery of the money, certainly, could not have been sustained; and if, to a bill in chancery, praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered, that this was a sale and not a mortgage, clear *238] proof to *the contrary must have been produced, to justify a decree against him.

That the conveyance is made to trustees, is not a circumstance of much weight. It manifests an intention in the drawer of the instrument, to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose, than to entitle William Lyles to a conveyance, subsequent to the non-payment of the 700*l.*, on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced, and to be repaid. It is also

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a circumstance which, though light, is not to be entirely disregarded, that the 20 acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as, at least, possible, that a division might be useless.

Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage. It is certain, that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete, that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a *syllable in the [*239 cause, intimating a proposition to borrow money, or to mortgage property. . No expression is proved to have ever fallen from Robert Alexander, before or after the transaction, respecting a loan or a mortgage. He does not appear to have imagined, that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource.

To this circumstance, the court attaches much importance. Had there been any treaty—any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice, that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete, that Lyles did not intend to take a mortgage. But it is insisted, that he intended to take a security for money, and to avoid the equity of redemption; an intention which a court of chancery will invariably defeat. His not being in the practice of lending money, is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion, that Robert Alexander himself did not so understand it. In this view of the case, the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles, without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage, he would *naturally have resisted the conveyance, and it is probable, that the trustees would have declined making it. This probability is [*240

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very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it, until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion, that this assent was given.

It is also a very material circumstance, that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander: they passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court. The sale, on the part of Alexander, was not completely voluntary. He was in jail, and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional, implies an expectation to redeem.

*241] A conditional sale made in such a situation, at a price bearing no proportion to the value of the property, would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at 5*l.* per acre conditionally, which, in fact, were worth 15*l.*, or 20*l.*, or 50*l.* per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause. But the testimony on this point is too uncertain and conflicting, to prevail against the strong proof of intending a sale and purchase, which was stated.

The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different, at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for 5*l.* per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others, unsuccessfully; that it was valued by several persons, at a price

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not much above what he gave ; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful, to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court, that the decree of the circuit court is erroneous, and ought to be reversed, and that the cause be remanded to that court, with directions to dismiss the bill.

Decree reversed.

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Negligence of postmaster.

Where issue is taken upon the neglect of a postmaster himself, it is not competent to give in evidence, the neglect of his assistant.

Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case ; and his liability then will only result from his own neglect, in not properly superintending the discharge of their duties in his office.

In order to make a postmaster liable for negligence, it must appear, that the loss or injury sustained by the plaintiff was the consequence of the negligence.

Parol evidence cannot be given, that one set of written instructions from the postmaster-general, superseded another set of written instructions.

Dunlop v. Munroe, 1 Cr. C. C. 536, affirmed.

ERROR to the Circuit Court for the district of Columbia, sitting at Washington, in an action wherein James and John Dunlop were plaintiffs, and Thomas Munroe, the deputy postmaster at Washington, was defendant. The declaration, after having been several times amended, contained nine counts.

1. The first count was as follows : Thomas Munroe, late of Washington county, gentleman, was attached to answer unto James Dunlop and John Dunlop, in a plea of trespass on the case, &c., whereupon, the said James and John, by Francis S. Key, their attorney, complain, that whereas, by the laws of the United States of America, relative to the post-office establishment of the United States, and of the post-roads within the United States, it was enacted, that there should be established, at the seat of the government of the United States, a general post-office, under the direction of a postmaster-general, and that post-offices should be established, and that postmasters should be appointed, by the said postmaster-general, at all such places as should appear to him expedient, on the post-roads which then were, or might thereafter be established, and the carriage of the mail on all such post-roads provided for ; and that every postmaster, so appointed by the said postmaster-general, should keep an office, in which one or more persons should attend for the purpose of performing the duties thereof ; and a post-road was directed to be established from Passamaquoddy, in the district of Maine, to St. Mary's, in Georgia, within the said United States ; and the city of Philadelphia, in the state of Pennsylvania, and the city of Washington, in the district of Columbia, and the town of Petersburg, in the state of Virginia, were places through which the said post-road was directed by law to pass. And whereas, in pursuance of the said laws, a general post-office was

(a) March 9th, 1812. Present, all the judges.