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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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ROBERTSON *v.* CAMPBELL AND WHEELER.

Friday, October 24th, 1800.

What shall be considered as a mortgage, and not a conditional sale?

[Whether the particular transaction constituted a mortgage, or conditional sale, must always depend on the whole circumstances of the contract, and is not confined to mere written evidence of it.*

An agreement to set the profits of the mortgaged subject against the interest of the money lent, is usurious, if they exceed the legal rate of interest.†

On an agreement to remit part of a debt, on condition the residue is paid within a certain time, the condition must be strictly performed.

Compensation, in equity, is the interest of the money, and not the profits which might have been made from it, by speculation.]

This was an appeal from a decree of the High Court of Chancery. The bill states, that the plaintiff's brother was sued in Philadelphia, for 240,000 lbs. tobacco. That the plaintiff and Shore and M'Connico, became his security to Wilson, the creditor, for payment thereof. That the plaintiff conveyed property to Shore and M'Connico, as counter-security. That payments were made, which reduced the debt to 70,000 lbs. tobacco, and £200 sterling on a protested bill. For which balance, suit was brought, judgment obtained, and an appeal taken to the General Court, where the judgment was affirmed in October, 1787. That the plaintiff sold ten negroes, at vendue, and applied the amount to the discharge of the judgment, at which time the defendants advanced the plaintiff 20,000 lbs. tobacco, worth 22s. per cwt., which was likewise applied in payment of the judgment. That, for this advance, the plaintiff delivered the defendants two slaves (shoe-makers

*The great question is, whether the parties meant *a purchase, and fixed a price therefor;* or meant a *loan of money*, and a *security or pledge*, for re-payment. If the former, it was a conditional sale; as in *Chapman's adm'x.* v. *Turner*, 1 Call, 280. If the latter, it was a mortgage, carrying with it the right to redeem; as in *Ross* v. *Norvell*, 1 Wash. 14, and 2 Call, 421; *King* v. *Newman*, 2 Mun. 40. In *King* v. *Newman*, also, the deed, though absolute on its face, was held a mortgage, because by evidence *dehors* it was proved to admit of redemption.

Other cases, where deeds apparently absolute were held to be mortgages—*Dabney, &c.* v. *Green*, 4 H. & M. 101; *Bird* v. *Wilkinson*, 4 Leigh, 266; *Breckenridge* v. *Auld, &c.* 1 Rob. 148.

Other cases of *conditional sale—Kroesen* v. *Seevers, &c.* 5 Leigh, 434; *Leavell* v. *Robinson*, 2 Leigh, 161; *Moss* v. *Green*, 10 Leigh, 251; *Strider* v. *Reid's admr.* 2 Grattan, 38; and *Conway's ex'rs.* v. *Alexander*, 7 Cra. 218—2 Cond. R. 479.

Case where absolute deed of conveyance was encountered by bond, which was held to be a conditional defeasance—*Forkner* v. *Stuart*, 6 Gratt. 197. And

Case where the Judges were divided on the question, whether the instrument was *a mortgage* or a *conditional sale:* but all concurred in not allowing the borrower to redeem. *Roberts' adm'r.* v. *Cocke*, 1 Rand. 121.

†Accordant *Raynolds* v *Carter*, 12 Leigh, 166.

by trade) as a security; and the defendants were to have the profits of them, for the use of the tobacco lent. That their profits were 20s. per week. That the deed was drawn by the defendant Campbell; and is, in form, an absolute conveyance, the plaintiff believes, although intended only as a security. That, afterwards, the defendants, with the plaintiff's consent, sold a female slave and children, for 4,520 lbs. tobacco; and applied it towards re-payment of the loan; leaving [422] a balance then due of 15,750 lbs. tobacco, besides interest. That, on the day of the sale of the slaves, 30,135 lbs. tobacco, and £207 sterling, was the balance due Wilson: who agreed, in consideration of the hardships the plaintiff labored under, that if the plaintiff paid the defendants the said balance by the day of , he would remit of the damages, on the affirmance of the judgment. Whereupon, the plaintiff sold his blacksmith, but fell short of payment 2,560 lbs. tobacco, and £38 8s. With which payment, however, the defendants appeared satisfied, as by a statement of the judgments in Wheeler's writing, which does not mention the damages. That the plaintiff hoped the profits of the shoe-makers would have been applied to the discharge of this balance; especially as the debt was assigned by Wilson to the defendants. That the defendants have issued execution against the plaintiff for tobacco, and will not remit the damages as Wilson had promised. Therefore, the bill prays that an account may be taken of what is due on the judgments, and of the hire and profits of the slaves; that the damages may be remitted; and the defendants injoined from further proceedings; and for general relief.

The answer admits the judgment; but denying that the 20,000 lbs. tobacco was advanced on mortgage, insists that the defendants bought the shoe-makers absolutely, at 16,000 lbs. tobacco, and the woman and children at 4,000. Refers to the bill of sale: admits the promise to the plaintiff, that, if he repaid the tobacco in the course of the season, they would return the slaves; but insists that this was no part of the original contract; and that they had positively refused to advance the tobacco on mortgage. That, if the slaves had died, they would have been the defendants' loss. That the defendants purchased with reluctance, and only to serve the plaintiff. Admits the agreement to release the damages, and to take, in lieu thereof, 5 per cent. provided the tobacco debt was fully discharged on or before the first of May, 1788, [423] and the sterling money debt, on or before the first of July, 1788; but states, that no part of the sterling debt was paid

until January, 1789: Admits that the defendants are entitled to the benefit of the judgments; and alleges, that the complainant is indebted to them, on other accounts.

A witness says, that some time after he had heard, from the plaintiff, that he had let the defendants have the use of the shoe-makers for an advance of 20,000 lbs. tobacco, the deponent was in conversation with the defendant Campbell, who observed to him, that it was a kind of property he did not wish to lay his money out in; which conveyed to the deponent an idea, that Robertson had a right of redemption, but there were no words respecting the instrument of writing, which secured their services. That the deponent's reason for thinking the bargain advantageous, was, that the plaintiff said, they produced £50 per annum.

Another witness says, that he was present at the bargain. That the plaintiff was to let the defendants have the use of the shoe-makers for an advance of 20,000 lbs. of tobacco. That he considered the plaintiff, notwithstanding the bill of sale, as having the right to redeem. That the value of the use of the slaves was estimated at 20s. per week, or £52 per annum. That, he understood the woman and children were to be sold in order to pay part of the balance due upon Wilson's judgment; but understood afterwards, that the plaintiff had consented, that the proceeds should be applied towards re-payment of the 20,000 lbs. That the deponent being informed by the defendant Campbell, that the defendants were about to issue execution upon the judgments, he observed to them that as the balance was small, it was hard to exact damages; whereupon, Campbell observed, that Robertson and Scott were indebted to him, and he knew not how else to recover the money. That, in January, 1789, the plaintiff paid, through
[424] J. Barret, £270 on account of the judgment on the sterling debt. To a question put by the defendants, whether it was an absolute sale, he answered that the defendants did object to any but a positive conveyance, and possession of the negroes; although the deponent supposed, that was owing to the embarrassed situation of the plaintiff's affairs; that he does not recollect that any time of redemption was specified, but the defendants were to have the use of the negroes till that took place.

Barret says, that being indebted to Archibald Robertson, he gave his bond to the defendants on the 10th of January, 1789, for £300 with interest, which he understood, the defendants received, as a payment from Archibald Robertson, on some account.

A fourth witness says, that the defendants, when they paid for the slaves, made a memorandum in their day book that the plaintiff was to return the price paid for them in six months; and they, in the mean time, were to have the hire or value of their labor. That, the absolute right, as per bill of sale, in and to the said property, if the plaintiff failed so to do, was uniformly declared to be vested in the defendants. At least, the defendants said so.

A fifth witness says, that Shore and M'Connico discharged 20,000 lbs. tobacco on account of Wilson's judgment, by the sale of the shoe-makers to the defendants. That, therefore, he does not think they or Robertson would have been affected by their deaths. That, the defendants refused to take a mortgage, through fear of a Chancery suit.

Several witnesses prove the value of the slaves, and their yearly profits.

The bill of sale was as follows:

"Know all men by these presents, that I, William Robertson, in and for consideration of the quantity of twenty thousand weight of Petersburg crop tobacco, to me in [425] hand paid and satisfied, the receipt whereof is hereby acknowledged, have this day bargained, sold and delivered unto James Campbell and Luke Wheeler, four negroes, to wit: Frank White and David White, shoe-makers by trade; Fanny, and her child at the breast. And I do hereby warrant and defend the property in the before-mentioned negroes, and their future increase, unto the said Campbell and Wheeler, their heirs and assigns forever, against all manner of persons whatsoever claiming, or who may hereafter claim, the same. As witness, &c."

The Court of Chancery decreed in favor of the defendants, and Robertson appealed to this Court.

WICKHAM, for the appellant.

Although the conveyance was absolute, yet the consideration was a loan; and the conveyance was intended merely to secure the re-payment of the money. The evidence of M'Connico is conclusive as to this, and his deposition is strengthened by other testimony in the cause. If this evidence had been part of the bill of sale, there would have been no doubt; and the defendants' apprehensions of a suit in Chancery, which prevented its being inserted, rather strengthens the case. It may, perhaps, be said, that there was no covenant to redeem, or to re-pay the money; but, that would apply to most cases

of mortgage; and the plaintiff would still have owed the money, like the case of a lost pawn. Co. Litt. 89; [Anony.] Salk. 552. Besides *Ross* v. *Norvell*, 1 Wash. 14, is decisive on the subject. The hire of the slaves was to go against the interest of the money; which is a mortgage expressly.

But the contract was usurious. For, it was, as before stated, a contract for a loan; and the hire of the slaves was worth more than the interest of the money. *Lowe* v. *Waller*, [426] 2 Dougl. [736.] The contingency was merely colourable; which is not sufficient to take it out of the statute. 5 Co. 69, Burton's Case. Ibid. Clayton's Case, [*Richards* qui tam. v. *Brown*,] Cowp. 770.

Wheeler's statement says, that the damages stand conditional; and, if the profits had been rightly applied, nothing was due at the end of the year 1791.

The decree is, therefore, erroneous upon all the points, and ought to be reversed.

CALL, contra.

It was not a mortgage; because the sale was absolute, and the plaintiff had only a power of re-paying the money by way of re-purchase. 2 Fonbl. Treat. Eq. 263, [2 Am. ed.;] 1 Pow. on Mort. 156. In which respect it is less strong than the case of *Chapman* v. *Turner*, 1 Call 280, in this Court: where one gave an instrument of writing to another, stating that he had received £30, and had put a slave as a security into the hands of the other; who, if the money was not paid on or before a certain day, was to have the slave for £30. This was held to be no mortgage, but a conditional sale, and irredeemble. Such a construction is more reasonable, in the present case, because the defendants had no other security for the money; and, if the slaves had died, the debt would have been irretrievably lost.

There is no pretence for saying that the contract was usurious; because the sale was absolute, and, but a mere indulgence to re-purchase allowed. Besides, the defendants did not loan any thing to the plaintiff; and, consequently, there could be no usury. For, in order to constitute usury, there must be a borrowing and a lending.

The plaintiff not having paid the lesser sum in time, the defendants were entitled to the whole debt, and to the 10 per [427] cent. damages also. This is the constant rule. For, unless the money is paid in time, the condition is forfeited, and the debtor has no equity or conscience on his side.

But, the present case is stronger, because there was an express stipulation to that effect.

The defendants are entitled to interest on the 10 per cent. damages; because, it is a judgment; which is an ascertained sum. And Robertson and Scott's debt ought to be deducted, because the plaintiff was bound for it.

If the plaintiff were even entitled to redeem (which is denied) yet he would not have any right to an account of profits, because it was agreed, that they should go against the interest. At any rate, he would only have been entitled to the profits actually received, and not to such, as might have been made, by the greatest care. For, the defendants would not have been bound to use extraordinary attention: and the plaintiff might have put an end to the loss by payment of the money. 2 Pow. on Mortg. 272. Besides, those who come into equity for an account, must take it as they find it.

HAY, on the same side. There is a striking difference between a mortgage and a conditional sale. Pow. on Mortg. 37; 2 Fonb. Treat. Eq. 263; [*Barrell* v. *Sabine*,] 1 Vern. 268, and *Chapman* v. *Turner*, in this Court. Robertson's right, in the present case, was only that of a conditional sale. For, the deed was absolute; and, he had only a right to repurchase. Although parol evidence may be received to explain an absolute deed, yet a mortgage will not readily be presumed against an absolute conveyance. 2 Fonb. Treat. Eq. 263. The answer denies, that it was a mortgage; and, Pow. on Mortg. 50, shews that the answer may be used to prove the nature of the agreement. The answer will prevail against a single witness, although positive, which M'Connico is not; for, he only states his opinion. There was no disproportion in the price; but, if there was, that is nothing in a conditional sale. 1 Vern. 268. The property was delivered in the present case; which differs it from that of *Ross* v. *Norvell*, 1 Wash. 17. There was no loan; for none is proved: and, it is not [428] likely, that the defendants, who were merchants, would wish to lend, when they could have made greater profit on it, in the course of their business.

If tobacco had risen, the defendants could not have insisted on a loan; and, therefore, the right would not have been reciprocal. Com. Dig. 299.

The condition for remitting the damages, was not complied with; and, therefore, the plaintiff has no claim to it. 2 Pow. on Contr. 213. Because, the contract could not continue, as the term for performance was past.

WICKHAM, in reply.

The case of *Chapman* v. *Turner*, is not like this. For, there the whole case was reduced to writing, and nothing concealed; which was a strong circumstance in favor of the purchaser. Besides, the full value was given in that case; but, not in this. 1 Pow. on Mortg. 156, was the case of a rent charge: and, the exception proves the rule.

Cur. adv. vult.

PENDLETON, President. The first question in this case is, whether the transaction, between the parties, respecting the two negro shoe-makers put into the possession of the appellees for 16,000 lbs. tobacco, is to be considered as a mortgage, or conditional sale?

That there is a difference between those modes of transfer, and that they produce different consequences, is certain. In the case of a mortgage, the estate is at all times redeemable, until a decree of foreclosure passes, or a dereliction of the right to redeem is presumed, from the length of time. In the other case of a conditional purchase, the time of performing the condition must be strictly observed. These rules are seldom controverted; but, the questions have generally been, to [429] which class the transaction discussed belonged? And, this must always depend on the whole circumstances of the contract; and, is not confined to the mere written evidence of it.

In *Chapman* v. *Turner*, 1 Call, 280, the writing imported to be a mortgage, drawn by Chapman, an over-match for Turner, an uninformed planter, but the circumstances stated in the report of that case, abundantly shew, that a purchase was the intention of the parties, and not the loan of money: which Turner constantly refused; and purchased and paid his money under an agreement, only, that the slaves should be restored, on re-payment of the money, without interest, at the next Hanover Court.

Chapman did not then, or during his life, offer to return the money; but his widow after his death, and when the slave, who was a female, had two or three children, tendered the money, and demanded a redemption by her suit: which was justly determined against her.

On the other hand, in *Ross* v. *Norvell*, 1 Wash. 14, although the bill of sale was absolute, as in the present case, yet, on the circumstances, it was decreed to be a mortgage, and Norvell let into a redemption upon the usual terms.

It must often happen, in disquisitions of this sort, that there will be difficulty in drawing the line between those two sorts of conveyances. 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 re-payment, intended?

The former was the case in *Chapman* v. *Turner:* the latter in *Ross* v. *Norvell.* Then, what is the present case? And what commenced the treaty between the parties? We hear not a word of purchasing slaves, nor any consideration had of the price, for which Robertson was willing to part with the property. On the contrary, Wilson states, that the 20,000 lbs. tobacco was the estimated value of the four slaves; importing, that the estimate was made, for the purpose of considering, whether they were a sufficient security? The real agreement was, that they should be a security only; that the woman and child should be sold, and the produce applied to discharge the debt; and, for the balance, that the two shoemakers should remain with Campbell and Wheeler, and their profits applied to discharge the interest, until the balance should be re-paid. [430]

Why then was the absolute bill of sale taken? The appellees furnish the answer: That it was the justice of this Court allowing redemption in case of a mortgage: An attempt, which the Chancery has constantly repelled, wherever it appeared that the real contract was a mortgage, and which, this Court have no difficulty in frustrating, upon the present occasion; allowing a redemption of the slaves, upon the usual terms; that is to say, that Robertson shall be charged with the principal and interest, and any other just demand, which Campbell and Wheeler may have against him; and they to be accountable for the profits, really made by them, and no farther; unless in the case of gross negligence to employ them.

The objection that Campbell and Wheeler risked the lives of the slaves, since they could not have recovered their money, if the slaves had died, was truly said to be, only another state of the question; which would, upon the evidence, have been decided in the same way.

The agreement to set the profits against the interest, since, on any view of the subject, they will appear greatly to exceed the legal rate of interest, is so far usurious and void; and the account is to be taken on the usual terms, where the mort-

gagee is in possession; to charge the profits against principal and interest.

The remaining question respects the damages recovered upon the affirmance of the common law judgment in tobacco, which, in April, 1788, were agreed to be remitted, on condition that the balance, with interest, was paid by the next month: or, as the appellees explain it, during the season.

That the rule is, as stated by the counsel, "that on an agreement to remit part of a debt, on condition the residue is paid within a certain time, the condition must be strictly performed,"* is unquestionable; but surely the creditor may, by his consent, enlarge the time: which appears to have been done in the present case. This intention of keeping up the strictness, expressed by Wilson, was to be a *stimulus* to Robertson, to exert himself, in raising the money in time; and the creditors, discovering that he had done so, and probably made sacrifices to effect it, as it appears he did of £30 in Barrett's bond, and he says he did in the sale of a valuable blacksmith, meant not to insist on a forfeiture, although he had not fully completed the payment. Accordingly, we find, that as to the money on demand, they wholly remitted the damages, although the balance was not paid until November, 1794; and as to the tobacco, no damages are charged, but the balance with interest only, in August, 1791; which amounted, then, to no more than 3,051 lbs., of the value of £34 6s. 5d. In the same account, they state the damages of 10,837 lbs. tobacco, to stand conditionally: Intended, no doubt, to keep up the stimulus for payment of the balance; as they never could mean to make Robertson pay that enormous penalty, for his default, in paying less than a third of the sum: Or, if they did, a Court of Equity would sit to very little purpose, if they did not relieve against it, upon making just compensation.
[432] That compensation, in equity, is fixed at the interest of the money, in cases of this sort; and not the profit, which they might have made, with the tobacco, by speculation in a basket of earthenware, or otherwise. Indeed, it appears that, in a conversation afterwards with a friend, who intimated that it was hard to insist upon it, Mr. Campbell seemed to concede that it was; and then, as well as in his answer, said, that his view was, to cover, by that means, a doubtful debt, due from Robertson and Scott. That debt he will be allowed, in

[* As to the consideration, see *Heathcote* v. *Crookshanks*, 2 T. R. 24; *Fitch* v. *Sutton*, 5 East. 230; *Cumber* v. *Wane*, 1 Stra. 426; *Pinnell's* Case, 5 Co. 117; and *Irman* v. *Griswold*, 1 Cowen's R. 199.]

the account to be taken under the mortgage, which will remove the objection; and we think the damages ought to be wholly remitted, as they were in the case of the money, under the same circumstances.

The decree is to be reversed with costs; and one, to the following effect, entered:

"The Court is of opinion, that although the writing, in the proceedings mentioned, purported to be an absolute bill of sale, yet, as the real intention of the parties, at the time of the contract, was a loan of the 20,000 lbs. tobacco, and that the four slaves should be pledged, as a security for the re-payment, the same ought to be considered as a mortgage, and the appellant let into a redemption of the two slaves, remaining unsold, upon the usual terms of his being made chargeable for the 16,000 lbs. tobacco and interest, and any other just debt,* for which he may be liable to the appellees: against which, he is to be allowed the profits really made of the slaves, by the appellees; and no further, except for the time in which they may have grossly neglected to employ them. That the appellant ought to be relieved against the damages, on the tobacco, recovered by the judgment at common law, upon payment of the balance of principal and interest; and, consequently, that the said decree is erroneous: Therefore, it is considered, that the same be reversed, &c. And the Court proceeding [433] to make such a decree as the High Court of Chancery ought to have made, it is decreed and ordered, that an account be taken between the parties according to the principles of this decree; and that upon payment of the balance, if any, which shall be found due to the appellees, and the costs in Chancery, they shall deliver the slaves, if living, to the appellant; to be held as of his former property therein; and, if a balance shall be found due to the appellant, that the appellees be decreed to pay the same to him.†

[* See *Baxter* v. *Manning*, 1 Vern. 244; *Shuttleworth* v. *Laycock*, Ibid. 245; and *Colquhoun* v. *Atkinsons*, 6 Munf. 550.

[† See *Danby* et al. v. *Green*, 4 H. & M. 101; *King* v. *Newman*, 2 Munf. 40; *Pennington* v. *Hanby* et al., 4 Mun. 140; and the opinion of the Judges in *Roberts' adm'r* v. *Cocke, ex'r*, 1 Rand. 121.]