Russell v. Southard, 53 U.S. 139 (1851)

Syllabus **Case**

U.S. Supreme Court

Russell v. Southard, 53 U.S. 12 How. 139 139 (1851)

Russell v. Southard

53 U.S. (12 How.) 139

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF KENTUCKY

Syllabus

When the question before a court of equity is whether a deed which purports upon its face to be an absolute deed was in reality a deed or a mortgage, extraneous evidence is admissible to show that it was only a mortgage.

Upon such a question as this, depending upon the general principles of equity jurisprudence, this Court does not hold itself bound by the decisions of the highest court of the state in which the land in question was, but will be governed by its own view of those principles.

The decisions of the courts of Kentucky examined.

Such evidence is admissible when it is alleged and proved that a loan on security was really intended and the defendant sets up the loan as a payment of purchase money and the conveyance as a sale.

In examining the question whether the transaction was a sale or mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale.

In the present case, the Court decides from the evidence that the consideration was grossly inadequate; that he was a stranger, without friends or other resources there than the land in question; that it is true he offered to sell, but there is no evidence to show that he offered to sell for the amount of money which he actually received.

The papers executed between the parties show a conditional sale, but in doubtful cases the court leans to the conclusion that the reality was a mortgage, and not a sale.

The absence of a personal obligation by the grantor to repay the money furnishes no conclusive test to determine whether the conveyance was a mortgage or a conditional sale.

Nor do the facts that the grantor endeavored to obtain the relinquishment of his wife's dower, and actually surrendered the paper under which he had the right to reclaim his land, amount to a bar of his claim under the circumstances of this case.

Three years after the transaction, the grantor received one hundred dollars from the grantee upon the ground of an arithmetical error, and signed a release of all further demands. But apart from other considerations bearing upon the purchase of an equity of redemption, in the present case it was the duty of the grantee to correct errors, and consequently he paid nothing for the equity of redemption.

Where there was a long lapse of time and the original mortgagee had been dead for many years, an account of rents and profits and of interest upon the money loaned will be decreed to commence from the filing of the bill.

Where there were purchasers during the intermediate time and the record did not enable this Court to determine upon their rights, the case will be remanded to the circuit court for its adjudication thereon.

A motion made in this Court after the decision of the case here to set aside the decree and remand the case to the circuit court for further preparation and proof upon the ground that new and material evidence has been discovered since the trial of the case in that court cannot be sustained.

Affidavits of newly discovered testimony cannot be received. This Court must affirm or reverse upon the case as it appears upon the record.

The established chancery practice is so, and if it were not, the Act of Congress passed on

March 3, 1803, would be decisive of the question.

This was a bill filed by Russell, the appellant, to redeem what he called a mortgage, and the question in the case was whether it was a mortgage or conditional sale. The facts are set forth in the opinion of the Court. Upon the trial, the circuit court dismissed the bill, and Russell appealed to this Court.

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MR. JUSTICE CURTIS delivered the opinion of the Court.

On 24 September, 1827, Russell the complainant, conveyed, by an absolute deed in fee simple, to James Southard,

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deceased, whose brother and devisee, Daniel R. Southard, is the principal party defendant in this bill, a farm, containing two hundred and sixteen acres, situated about two miles from the City of Louisville.

At the time the deed was delivered and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows:

"Gilbert C. Russell has sold and this day absolutely conveyed to James Southard said Russell's farm near Louisville, and the tract of land belonging to said farm, containing two hundred and sixteen acres, and the possession thereof actually delivered on the following terms, for the sum of $4,929.81 1/2 cents, which has been paid and fully discharged by the said Southard, as follows, *viz.,* first two thousand dollars, money of the United States, paid in hand; secondly, the transfer of a certain claim in suit in the Jefferson Circuit Court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of $1,558.87 1/2; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of $1,270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown &c., and James C. Johnston &c., as aforesaid without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston &c., or either, and to take all risk of collection upon himself, and make the best of said claim he can."

"The said James Southard agrees to resell and convey to the said Russell the said farm and two hundred and sixteen acres of land, for the sum of forty-nine hundred and twenty-nine

two hundred and sixteen acres of land, for the sum of forty-nine hundred and twenty-nine [dollars] 81 1/2 cents, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs &c., that if the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that then this agreement shall be at an end, and null and void; and the wife of said Russell shall relinquish her dower within a reasonable time as per agreement of this date. This agreement of resale by the said James Southard to the said Russell is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of $4,929.81 1/2, and interest thereon from this date as aforesaid. And this agreement is to be valid and obligatory only upon the said James

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Southard upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell."

"In witness whereof the parties aforesaid, have hereunto set their hands and seals, at Louisville, Kentucky, on 24 September, 1827."

"GILBERT C. RUSSELL [SEAL]"

"JAMES SOUTHARD [SEAL]"

"Witness present, signed in duplicate:"

"J. C. JOHNSON"

The first question is whether this transaction was a mortgage, or a sale.

It is insisted on behalf of the defendants that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to their contents. But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority. To insist on what was really a mortgage as a sale is in equity a fraud, which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be. In *Conway v. Alexander,* 7 Cranch 238, C.J. Marshall says:

"Having made these observations on the deed itself, the Court will proceed to examine those extrinsic circumstances, which are to determine whether it was a sale or a mortgage,"

and in *Morris v. Nixon,* 1 How. 126, it is stated:

"The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face."

These views are supported by many authorities. *Maxwell v. Montacute,* Pr. in Ch. 526; *Dixon v. Parker,* 2 Ves.Sr. 225; *Prince v. Bearden,* 1 A.K.Marsh. 170; Oldham v. Halley, 2 J.J.Marsh. 114; Whittick v. Kane, 1 Paige 202; *Taylor v. Luther,* 2 Sumn. 232; *Flagg v. Mann, id.,* 538; *Overton v. Bigelow,* 3 Yerg. 513; *Brainerd v. Brainerd,* 15 Conn. 575; *Wright v. Bates,* 13 Vt. 341; *McIntyre v. Humphries,* 1 Hoffm. 331; 4 Kent 143, note A., and 2 Greenl. Cruise 86, n.

It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this Court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this Court must be governed by its own views of those principles. *Robinson v.*

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Campbell, 3 Wheat. 212; *United States v. Howland,* 4 Wheat. 108; *Boyle v. Zacharie,* 6 Pet. 658; *Swift v. Tyson,* 16 Pet. 1; *Foxcroft v. Mallett,* 4 How. 379. But we do not perceive that the rule held in Kentucky differs from that above laid down. That rule, as stated in *Thomas v. McCormack,* 9 Dana 109, is that oral evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation and some proof of fraud or mistake in the execution of the conveyance or some vice in the consideration.

But the inquiry still remains what amounts to an allegation of fraud, or of some vice in the consideration -- and it is the doctrine of this Court that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage, and we know of no court which has stated this doctrine with more distinctness, than the Court of Appeals of the State of Kentucky. In *Edrington v. Harper,* 3 J.J.Marsh. 355, that court declared:

"The fact that the real transaction between the parties was a borrowing and lending, will,

whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised."

We proceed then to examine this case by the light of all the evidence, oral and written, contained in the record.

The deed and memorandum certainly import a sale; the question is if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed?

In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. *Conway v. Alexander,* 7 Cranch 241; *Morris v. Nixon,* 1 How. 126; *Vernon v. Bethell,* 2 Eden, 110; *Oldham v. Halley,* 2 J.J.Marsh. 114; *Edrington v. Harper,* 3 *id.* 354.

Upon this important fact the evidence leaves the Court in no doubt. The farm, containing 216 acres, was about two miles from Louisville, and abutted on one of the principal highways

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leading to that city. A dwellinghouse, estimated to have cost from $10,000 to $12,000, was on the land.

In May, 1826, about 16 months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of $12,960. Some attempt is made to show by the testimony of Mr. Thurston that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural condition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted, and considering the price paid by Russell and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property. The consideration for the alleged sale was $2,000 in cash, and the assignment of two claims then in suit, amounting, with

the interest computed thereon, to $2,829.81, not finally reduced to money by Russell till October, 1830, upwards of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate, and therefore we must take along with us in our investigations the fact that there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court compared with the facts above indicated, but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price.

It appears that Russell had entrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there except this farm and in immediate and pressing want of about $2,000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies "Russell

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was anxious to sell; indeed he was importunate that I should purchase." And a letter is produced by the defendant, D. R. Southard, written to James Southward by Wing, containing a proposal for a sale. The letter is as follows:

"Sunday, Noon"

"Sir: Having had some conversation in relation to Col. Russell's plantation, I will take the liberty of submitting for your consideration, 1st, how much will you give for the place, crops, stock, utensils, and implements, or how much without the same, to be paid as follows: in one-sixth cash in hand, the balance in one, two, three, four, and five equal annual installments, which may be extinguished at any time with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation."

"Respectfully, yours, J. W. WING"

"Mr. SOUTHARD"

"N.B. Please leave an answer for me at Allan's, say this evening."

"Yours &c.,"

"J. W. W."

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase; nor is any sum of money mentioned in this letter of Wing; but, bearing in mind Russell's necessity to have $2,000 in cash, the offer to take one-sixth cash and the balance in one, two, three, four, and five annual installments indicates that Russel then expected about $12,000 for the property, and had that sum in view as the price when these terms were proposed. This offer to sell differs so widely from the terms of the written memorandum that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, $13,000 or $14,000, and that he should consider it a sacrifice at $10,000; but no proposal was made to give, or take, any price for the farm. That some time after, Southard told him he had advanced Russell between $4,000 and $5,000 on the place, but that, in case he owned the place, it would cost him $10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing

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directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that

"James Southard and Gilbert C. Russell I think on the same day, presented the agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell and my distinct impression is that Russell was to pay the money in four months, and take back the farm."

The intelligence and accuracy, as well as the fairness of this witness, are not controverted, and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the Court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the

offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out with great minuteness a case of an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendant's counsel, as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defense a conditional sale; but it cannot be doubted that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten that the same language which truly describes a real sale may also be employed to cut off the right of redemption in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids, and that in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. *Conway v. Alexander,* 7 Cranch 218;

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Flagg v. Mann, 2 Sumn. 533; *Secrest v. Turner,* 2 J.J.Marsh. 471; *Edrington v. Harper,* 3 *id.* 354; *Crane v. Bonnell,* 1 Green 264; *Robertson v. Campbell,* 2 Call. 421; *Poindexter v. McCannon,* 1 Dev.Eq. 373.

It is true Russell must have given his assent to this form of the memorandum, but the distress for money under which he then was places him in the same condition as other borrowers in numerous cases reported in the books who have submitted to the dictation of the lender under the pressure of their wants, and a court of equity does not consider a consent thus obtained to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon v. Bethell,* 2 Eden 113, "are not, truly speaking, free men, but to answer a present emergency will submit to any terms that the crafty may

men, but to answer a present emergency will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage. *Floyer v. Lavington,* 1 P.Wms. 268; *Lawley v. Hooper,* 3 Atk. 278; *Scott v. Fields,* 7 Watts. 360; *Flagg v. Mann,* 2 Sumn. 533; *Ancaster v. Mayer,* 1 Bro.C.C. 464. And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown v. Dewey,* 1 Sandf.Ch. 57, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor. *Ancaster v. Mayer,* 1 Bro.C.C. 464; 2 Greenl.Cruise 82 n, 3. But we do not think it necessary to determine either of these questions, because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled that an action of assumpsit will lie. *Tilson v. Warwick Gas-Light Co.,* 4 Barn. & C. 968; *Yates v. Aston,* 4 Ad. & El.N.S. 182; *Burnett v. Lynch,* 5 Barn. & C. 589; *Elder v. Rouse,* 15 Wend. 218.

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Some reliance was placed on the facts that in August, 1830, the plaintiff wrote a letter to his wife requesting her to release her dower, and that, in October, 1830, Russell surrendered the written memorandum, under circumstances which will be presently stated. It is urged that these acts show he understood the original transaction was not a mortgage. But the utmost effect justly attributable to these acts is that Russell thought he then had no further claim to the property, and this belief may as well have arisen from the terms of the memorandum, as from his knowledge that a sale was intended. In our judgment, however, these acts, taken in connection with other facts proved, do not tend to support the defendants' case. Russell had, by his written contract to procure the release of his wife's dower, subjected himself to pay liquidated damages to the extent of three thousand dollars, and he might desire to escape from this liability by having his wife release her right, even if he then believed he had a right to redeem and expected to redeem, for in that event, such

he then believed he had a right to redeem and expected to redeem, for in that event, such release could do neither him nor his wife any harm. But on the other hand, if he then thought he had no such right, it would be a balancing of disadvantages to have such a release made, and the question would be whether the right of dower was more important than the liability to damages. And as to the surrender of the written memorandum in October following, it appears from the testimony of Colonel Woolley, that Russell even after this surrender, thought he had a just right of redemption, though he undoubtedly believed that it was greatly embarrassed, if not lost, by his failure to pay on the stipulated day and by his relinquishment of the written memorandum.

The conclusion at which we have arrived on this part of the case is that the transaction was in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it and declare the conveyance of the land to be a mortgage.

Being of opinion that this was in its origin a mortgage, the next inquiry is whether the right of redemption has been extinguished. In October, 1830, Russell was temporarily in Louisville, and while there called on Southard and informed him there was a mistake of one hundred dollars in the computation of the amount due on the claims assigned to him. Southard insisted it was the mistake of W. Pope, who, he said, was Russell's agent, and that he, Southard, was not liable to make it good. He also set up a claim that he had a right to redeem, or, as D. R. Southard says, "repurchase" the farm. This also Southard denied. It does not appear from any proofs what further negotiations, if any, took place between the parties, but

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the result was that on the payment by Southard of one hundred dollars, Russell wrote and signed the following receipt on the back of the written memorandum, which he surrendered to Southard:

"Received, 6 Oct., 1830, of James Southard, by the hand of Daniel Southard, one hundred dollars, which makes the two debts of Brown and Johnston, with the $2,000, amount to the sum of $4,929.81 1/2, and nothing but the act of God shall prevent the relinquishment of dower of Mrs. Russell being deposited in the Clerk's office by the 1st of January next. This is in full of all demands upon J. Southard."

"[Signed] GILBERT C. RUSSELL [Seal]"

A mortgagee in possession may take a release of the equity of redemption. *Hicks v. Cook,* 4 Dow P.C. 6; *Hicks v. Hicks,* 2 Gill & J. 85. But such a transaction is to be scrutinized, to see

Dow P.C. 6; *Hicks v. Hicks,* 2 Gil. & J. 65. But such a transaction is to be scrutinized, to see whether any undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skillful to take advantage of the necessities of the borrower. Strong language is used in some of the cases on this subject. It was declared by Lord Redesdale in *Webb v. Rorke,* 2 Sch. & L. 673, that

"courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his encumbrance, the mortgagee has purchased for less than others would have given."

And Chancellor Kent, in *Holdridge v. Gillespie,* 2 Johns.Ch. 34, says, "the fairness and the value must distinctly appear." *Wrixon v. Colter,* 1 Ridg. 295; *St. John v. Turner,* 2 Vern. 418. But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely by taken as fixing an abstract rule. We think that inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially, if the latter be in needy circumstances, the purchase by the former of the equity of redemption, is to be carefully scrutinized, when fraud is charged, and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property, all that anyone would have been willing to give.

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We do not deem it for the benefit of mortgagors that such a rule should exist.

In this case it is unnecessary to rely on such a rule. For by his own showing, in his answer, it is clear that Daniel R. Southard, as the agent of his brother, either paid no consideration whatever for the extinguishment of the equity, or at the utmost only one hundred dollars. We think nothing was paid for it, and that the surrender of this right, claimed by Russell and denied by Southard, was insisted on as a condition for the correction of an actual mistake, which Southard was justly obliged to correct, without any condition, and we do not hesitate to declare, that a release of this equity, obtained by the mortgagee in possession, under a denial by him of the existence of the right to redeem, for no consideration at all, or as a condition for the correction of a mistake which in equity he was bound to correct, the written defeasance having been purposely so prepared as apparently to cut off the right of redemption prior to the time when the equity was released, cannot

stand in a court of equity.

Indeed, if it were not for Russell's subsequent acquiescence, of which we shall speak hereafter, the question would not admit of a moment's doubt. Though this acquiescence is not without effect upon the complainant's rights, as will presently be seen, yet we do not think, that under the special circumstances, it ought to operate as a bar, to prevent redemption. The absence of all valuable consideration for the surrender of the equity, and the circumstances of distress under which it was made and which, so far as appears, continued to exist down to the filing of the bill, coupled with the conviction, which we think Russell mistakenly entertained, that his rights were probably destroyed, must prevent us from allowing the lapse of time to be a positive bar.

The inquiry then arises on what terms is the redemption to be decreed.

An account of the rents and profits is ordinarily an incident to a decree for redemption against a mortgagee in possession. But it is not an inseparable incident. This right to an account may be extinguished by a release or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim as renders it unfair for him to insist on an account extending over the whole period of possession and unjust towards the mortgagee to order such an account. A mortgagee in possession is deemed by a court of equity a trustee, but there is no other than a constructive trust, raised by implication for the purpose of a remedy to prevent injustice; *Kane v. Bloodgood,* 7 Johns.Ch. 111, and it would be contrary to the fundamental principles of equity to imply a trust the execution of

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which might work injustice. And accordingly it will be found that in such cases courts of equity have refused to order accounts against *quasi*-trustees.

Thus, in *Downer v. Fortescue,* 3 Atk. 130, Lord Hardwicke, speaking of the case of an heir in possession under a legal title which he is obliged by a decree to surrender to one having an equitable title, says the court will order an account from the time the title accrued unless upon special circumstances, as

"when there hath been any default, or laches, in the plaintiff in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill."

So in *Pettiward v. Prescott,* 7 Ves. 541, a case of constructive trust, Sir William Grant restrained the account of the rents and profits to the time of filing the bill, on account of the

lapse of nearly twenty years; and similar cases may be found referred to in *Drummond v. Duke of St. Albans,* 5 Ves. 433, and note 3 to page 339; and in *Roosevelt v. Post,* 1 Edw. 579. Indeed in *Acherly v. Roe,* 5 Ves. 565, where there was a trust created of a term, for the purpose of raising a sum of money, and the *cestui que trust* had been long in possession without objection, Lord Chancellor Loughborough refused even to carry the account back to the filing of the bill, upon the special circumstances of that case. This Court, in *Green v. Biddle,* 8 Wheat. 78, gave its sanction to the rule as laid down by Lord Hardwicke, and declared it to be fully supported by the authorities.

This bill was filed after the lapse of nineteen years and eight months from the time the loan became payable. James Southard, the original mortgagee, had then been dead many years. More than sixteen years had elapsed since the defeasance was surrendered; and though we are satisfied Russell was under great embarrassments, and though we are of opinion he himself believed his right to redeem was probably extinguished by the terms of the defeasance, and its surrender, yet his neglect to look into and assert his rights, must not be allowed to subject the defendants to the risk of injustice. The defendants, and James Southard, have treated the property as their own, and have improved its condition. There is no suggestion of waste in the bill. The value of the land has greatly appreciated, from the growth of the neighboring city, and though we think James Southard designed to take an unconscientious advantage of Russell and that the defendant, D. R. Southard, obtained the surrender of the defeasance, under such circumstances as rendered it constructively fraudulent, yet neither of them appears to have concealed any facts from Russell or to have done anything to prevent him from exhibiting his real case to counsel. To such a case, the language of the Vice-Chancellor in *Bowes v. East London*

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W. W. Co., 3 Madd. 384, exactly applies.

"The plaintiff ought to have looked into his rights, and as by his negligence to obtain information concerning them and to assert them the lessees may have been led to expenditure on the premises the benefits of which they will lose, I shall not direct an account beyond the filing of the bill."

To this extent his acquiescence must be taken to have concluded his right, and we shall direct that the account of the interest due upon the money loaned, and of the rents and profits of the farm, commence at the date of the filing of the bill.

We can perceive no ground for charging Southard with the money received from the insurance company on account of the destruction of the house. He was in possession,

claiming to be the absolute owner of the farm and its appurtenances. He obtained the policy to cover his interest, and paid the premium. If there were any equities against him arising out of the receipt of this money, they would be in favor of the underwriters, and not of the mortgagor. *Carpenter v. Providence Washington Ins. Co.,* 16 Pet. 501.

It remains only to advert to the cases of the defendants, who claim as purchasers under D. R. Southard. The questions arising therein were not argued by counsel, and upon looking into that part of the record, we find some of them not capable of being fully settled upon the facts therein disclosed.

It was probably understood by counsel that these questions would remain for consideration in the court below if the case should be remanded.

Samuel D. Tompkins claims to have been a purchaser for valuable consideration of thirty acres of this land and to have received a deed of conveyance thereof and paid a part of the consideration money without notice of Russell's title and before the institution of this suit. He also claims to have made permanent and valuable improvements on the land purchased by him, but whether before or since the institution of this suit does not appear. William H. Pope, as the executor and trustee of his father, William Pope, claims that his father in his lifetime purchased at a sale on four executions against Southard another part of these lands, and that Southard omitted to redeem the land by paying what was due on three of the executions, and a suit is shown by the record to be pending in the Court of Appeals of Kentucky wherein Russel's right to redeem is in contestation.

Matilda Burks, the widow of James Burks, deceased, and John Burks, one of the sons of James, and William L. Thompson, as guardian of other children of James, and James Guthrie, assignee of J. R. Trunstall, the husband of a daughter of James,

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claim a lien on these lands by virtue of a mortgage thereof executed by Daniel R. Southard, and Southard insists that Guthrie has been paid; it is not ascertained whether the debts intended to be secured on these lands are or are not fully secured upon other lands of Daniel R. Southard which are embraced in the same mortgage. In this posture of the cause, it is not practicable for the Court to pass finally upon the rights of these parties, and the cause will therefore be remanded, without deciding upon the existence or extent of the right of either of them as a purchaser.

A decree is to be entered reversing the decree of the court below with costs, declaring that the conveyance from Russell the complainant to James Southard was a mortgage and

that Russell is entitled to redeem the same, and remanding the cause to the circuit court with directions to proceed therein in conformity with the opinion of this Court and as the principles of equity shall require.

Order

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky and was argued by counsel. On consideration whereof it is the opinion of this Court that the conveyance by Gilbert C. Russell the complainant, to James Southard, and dated 24 September, 1827, as set out in the transcript of the record, was a mortgage, and that said Russell is entitled to redeem the same. Wherefore it is now here ordered, adjudged, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein in conformity to the opinion of this Court and as to law and justice may appertain.

After the opinion of the Court was pronounced, a motion was made on behalf of the appellees for a rehearing and to remand the cause to the circuit court for further preparation and proof upon the ground that new and material evidence had been discovered since the case was heard and decided in that court.

Sundry affidavits were filed, showing the nature of the evidence which was said to have been discovered.

The opinion of the Court upon this motion was delivered by MR. CHIEF JUSTICE TANEY.

The decree of the circuit court in this case was reversed during the present term and a decree entered in favor of the appellant.

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A motion is now made in behalf of Daniel R. Southard, one of the appellees, to set aside the decree in this Court and to remand the case to the circuit court for further preparation and proof upon the ground that new and material evidence has been discovered since the case was heard and decided in that court. In support of this motion, affidavits have been filed stating the evidence newly discovered and that it was unknown to him when the case was heard in the court below.

It is very clear that affidavits of newly discovered testimony cannot be received for such a purpose. This Court must affirm or reverse upon the case as it appears in the record. We

purpose. This Court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this Court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. *Eden v. Earl Bute,* 1 Bro.P.C. 465; 3 *id.* 546; *Studwell v. Palmer,* 5 Paige 166.

Indeed, if the established chancery practice had been otherwise, the Act of Congress of March 3, 1803, expressly prohibits the introduction of new evidence, in this Court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes.

The motion is therefore overruled.