SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

OTTAWA, APRIL TERM, A. D. 1866.

FRANKLIN PARMELEE,
DAVID A. GAGE,
WALTER S. JOHNSON,
Appellants,

vs.

DANIEL LAWRENCE,
Appellee.

BRIEF AND POINTS FOR APPELLEE.

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Appeal from the Superior Court of Chicago.

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STATEMENT OF THE CASE.

On the 15th of September, 1856, the appellants and one Liberty Bigelow, who were then partners under the firm name of F. Parmelee & Co., in Chicago, borrowed from Daniel Lawrence, of Medford, Massachusetts, the sum of $50,000, wherewith to erect the buildings known as Garrett Block, in Chicago. (See deposition of Samuel Lawrence, Int. 5, p. 98 Abstract; Boyington's deposition, p. 105 Abstract; Bigelow's deposition, p. 103; also averments in the answer to Lawrence's cross-bill, p. 40, as to application for a loan; also admissions in the letters of Bigelow on pp. 102, 103, Abstract.)

In order to secure to Mr. Lawrence the repayment of the money, they gave him an absolute deed, purporting to convey to him and his heirs the property in fee, with an absolute cove-

nant of warranty, (for deed see p. 26 of Abstract); and took back articles of agreement of like date for the reconveyance of the property, at the end of five years. (For articles of agreement see p. 12 Abstract.) The articles contained a covenant by appellants and Bigelow to pay Lawrence $50,000 with semi-annual interest, at the rate of ten per cent. per annum, the principal to be paid in five equal annual instalments, from October 1st, 1856. And Lawrence therein covenanted, that upon receiving such payment, he would reconvey the property to the appellants and Bigelow. Appellants and Bigelow paid interest down to April 1st, 1861, (but none of the principal,) and from that time they made no further payment till long after filing their bill. (For proof, see Samuel Lawrence's deposition, p. 102 Abstract, answer to 11th interrogatory; Bigelow's deposition, p. 108, Abstract; answer to 4th interrogatory, etc., Parker's deposition, p. 110 Abstract.)

On August 4th, 1863, Bigelow, Gage & Parmelee, filed their bill in chancery, against Lawrence, setting up the articles of agreement, (but suppressing their cotemporaneous deed,) and claimed that the articles constituted a bargain and sale of real estate; that the relation of vendor and vendee existed between the parties; that Lawrence covenanted to convey to them the property for $50,000, and interest at ten per cent., free and clear of all incumbrances; they allege readiness, and offer to pay to Lawrence the full amount of principal and interest mentioned in the articles, upon Lawrence conveying to them the land, according to his covenant in the articles; that he was unable to make title to the land, and never had the fee thereof; that by the terms of said articles the whole sum of $50,000 with the interest thereon, excepting what they had paid, was due from them to Lawrence; that Lawrence had demanded the money of them, and was threatening, in case they did not pay, to eject them by suit at law, unless enjoined, etc., and that by reason of their covenants in the articles, they would be unable to successfully defend at law. The bill prayed an injunction against Lawrence, to restrain him from instituting any suit for the recovery of the money, or for the recovery of the premises, etc. The bill was sworn to by one of appellants. The injunction was accordingly issued, and served on Lawrence. (For original

bill of complaint, see p. 1 Abstract; and for articles see p. 12 Abstract.)

Lawrence filed his answer. (See p. 15 Abstract.) He insisted:

1st. That the relation of borrower and lender existed between appellants and him, and denied that the parties bore the relation of vendor and vendee, as alleged in the bill. He averred the loaning of the money by him to appellants, and the making of the deed in fee, etc., to him by appellants, and the giving back of the articles, and that this was a mortgage security. (For averments as to loan, etc., see bottom p. 21 Abstract; for deed, see p. 26 Abstract.)

He averred, that since receiving the conveyance in fee from them, with the covenant of warranty, etc., he had done or suffered no act or thing whereby the title had been impaired or incumbered.

2nd. He also claimed that appellants were estopped by their deed from questioning the title which they had conveyed to him, and offered to convey to them (upon receiving the money and interest, at ten per cent., as agreed in the articles,) just such title as they conveyed to him. (Abstract, p. 15, *et seq.*)

Lawrence, upon filing his answer, at the same time filed his cross-bill (see p. 30 Abstract,) against appellants, and the other parties therein, averring that the relation of borrower and lender existed between the parties, and asking a foreclosure of the mortgage and a decree for the payment of the principal, which had become due, together with interest remaining unpaid, at the rate of ten per cent., as had been agreed by said articles, and as had thereby been charged upon the land by way of security for the repayment of such interest and principal.

The cross-bill prayed, generally, such relief as was proper; for a decree for payment of the money, and in default, a sale of the land, etc. (See prayer, pp. 38 and 39 of Abstract.) The appellants and Bigelow answered the cross-bill, (see p. 40 Abstract), and by their answer claimed:

1st. That the relation of vendor and vendee of the land existed between the parties, as they had affirmed in their original bill.

2nd. That by reason of the form of the writings ultimately

signed by the parties, Lawrence was estopped from claiming that the transaction was a loan and mortgage and from denying that it was an agreement to sell them the land. (See p. 41 *et seq.* of Abstract.)

3rd. They further set up, by way of defense, (see p. 48 *et seq.*,) that if the court should be of opinion that the relation between the parties was that of borrower and lender, then the loan was upon an usurious rate of interest, and specifically claimed a forfeiture of threefold the usurious rate reserved; and they *here for the first time*, alleged that the rate of interest was twelve per cent., and not ten per cent., as they had theretofore, in the original bill alleged; and that *the entire agreement concerning the interest was in writing*, and appeared from the papers; and for the first time they allege that, in addition to the agreement in the articles, to pay ten per cent. interest, they also gave personal security to Lawrence in the shape of their bond, conditioned to deliver to him, on Oct. 1st, 1857, their notes, payable in six and twelve months, for such sum as the interest, at ten per cent. per annum, should amount to, on all money remaining unpaid on said Oct. 1st, and likewise, on each successive Oct. 1st, until the whole sum should be paid. (See p. 51 Abstract, and for bond itself, see p. 62 Abstract.)

They allege that they paid twelve per cent. interest, to April 1, 1861. Lawrence filed his exceptions to this answer, which were overruled, and thereupon he excepted to the ruling of the court. (See p. Record.) The proof was, that they gave such notes up to and inclusive of Oct. 1st, 1860, after which time they gave no further notes, and that they paid the ten per cent. and the two per cent. additional up to April 1, 1861; after that time all parties, as it appears, ignored and abandoned the two per cent. arrangement. (See Bigelow's dep., p. 109 Abstract.) There is no evidence of any notes given after Oct. 1, 1860. (See exhibits Nos. 4 and 5, p. 112 Abstract.) (For proof of this abandonment, see p 102 and 103 Abstract, letters dated Oct. 10, 1861, and Nov. 25, 1861, written by Bigelow, and the fact that no new notes were given or demanded, and no more interest whatever paid, after April, 1861, and no demand was ever made by Lawrence for the two per cent.)

SUPPLEMENTAL BILL.

On the 24th of Sept. 1864, Bigelow, Gage & Parmelee filed, in this cause, their supplemental bill, wherein they set up that, on the 12th day of August, 1864, at Boston, Mass., Bigelow had a settlement with Lawrence, of the moneys due Lawrence under the articles, and that Bigelow paid Lawrence $22,557, in full satisfaction of Bigelow's share, and that Lawrence then and there, without the knowledge or consent of the appellants, executed, under his hand and seal, and delivered to Bigelow, the following instrument. (See p. 76 Abstract.)

Received, Boston, August 12th, 1864, twenty-two thousand five hundred fifty-seven dollars, of Liberty Bigelow, in full payment of his portion of all money due me on Articles of Agreement between myself, him, (said B.) F. Parmelee, D. A. Gage and W. S. Johnson, dated September 15, 1856, and recorded in the recorder's office of Cook County, Illinois, October 17th, same year, in book 171 of Deeds, page 71; and I release and discharge said Bigelow, his property and estate. from all claims on account of the same.

If the property mentioned in the above articles has to be sold under any order of the Court at Chicago, the interest of said Bigelow in it is to be protected according to this settlement. Nothing herein contained shall in anywise affect my rights or demand against said Parmelee, Gage or Johnson, or their interest in said property.

[*U. S. Revenue Stamp.*] DANIEL LAWRENCE. [*Seal.*]

They claimed that, since their covenants in the articles were joint covenants, therefore this agreement and receipt to Bigelow was a satisfaction, in law and in fact, of all the moneys due Lawrence. They prayed the relief prayed in their original bill, and further, that their covenants in the articles be decreed to be discharged, and that they might be decreed discharged from all claims of Lawrence for money upon the articles, and that Lawrence reconvey, etc., and discharge all lien of record, etc. (See p. 76 Abstract, for prayer for answer.)

The answer of defendant Lawrence was required by the complainants without waiving his oath. Afterward, on Dec. 3rd, 1864, Lawrence filed his answer (see Abstract, p. 84 *et seq.*,) to the supplemental bill, under his oath, and denied that any such settlement was made as alleged, and absolutely denied that the seal on the receipt to Bigelow was his seal; or that he in any way authorized the putting on of a seal, and declared that the document was without seal when he signed it, and did not purport in any way to have a seal. He also set forth the cir-

cumstances accompanying his acceptance of the money from Bigelow, and the signing of the receipt to him, which showed that Bigelow, by false and fraudulent representations, had endeavored to induce him to give such an instrument as might, as Bigelow and his counsel supposed, work a release of all the parties against his (Lawrence's) intention. He denied that the instrument did operate to release appellants. He averred that he was ignorant of the rule of law in Illinois, respecting the operation of such a qualified discharge, and that Bigelow represented to him that it would not discharge his partners, or affect his rights against their interest in the land. He admitted the receipt of $22,557 as paid by Bigelow, under the admission of Bigelow that the transaction was a loan and mortgage, and under the claim of Bigelow, that this was his proportion as between him and his partners, and admitted the giving to Bigelow of a receipt, the same as the copy set out in the supplemental bill, exclusive of the seal. (See pp. 84—93 of Abstract.)

The facts relating to this so-called release, as they appear from the sworn answer of Lawrence, and from the testimony of the witnesses, are, that about the first part of August, 1864, Bigelow sought out Lawrence and had divers interviews with him in order to induce Lawrence, as Bigelow declared, to receive from him (see p. 121 Abstract, McAllister's testimony, corroborating also the sworn answer of Lawrence, which see, *passim*, p. 40 *et seq.*, Abstract,) such portion of the money borrowed by the appellants and Bigelow, together with his (Bigelow's) share of the interest remaining due, as justly belonged to him to pay, as between him and appellants; but to have Lawrence receive the money without prejudicing or affecting his rights or demands against the appellants, and without affecting his rights against their interest in the land held as security, Bigelow claiming to Lawrence that the transaction was a loan and mortgage, and that his share to be paid as between himself and his partners, was $22,557, and that Bigelow then offered to pay the money to Lawrence without prejudice to the rights of Lawrence against the other parties, or their interest in the land, if Lawrence would receive it, and save Bigelow harmless in respect of the residue, and protect his interest in the premises accordingly, in case the court should afterward order the land sold. (See McAllister's testimony on

cross-examination, p. 124, *et seq.*, Abstract; also, see sworn answer of Lawrence, p. 87 *et seq.*, Abstract.)

That Lawrence expressed his willingness to accede to these proposals, and on such conditions accepted the sum of $22,557 from Bigelow, on Aug. 12, 1864, and at Bigelow's request signed an instrument which Bigelow then and there represented to Lawrence that he could sign without in any way invalidating his claim to the residue of the money, or his security upon the land. (See Lawrence's sworn answer, p. 87 *et seq.*)

It also appears from the proof, that the so-called release was one of many instruments which had been successively drawn up by Bigelow and his counsel, between August 1st and 12th, and in the absence of Lawrence; that such instruments were absolute technical releases with seals, and purporting in the body thereof to be under seal; each in turn at different times had been presented to Lawrence by Bigelow to sign when he should receive the money; that Lawrence declined to sign any of them, upon the ground that they did not express the agreement between him and Bigelow upon which the money was to be accepted, *i. e.*, that his (L.'s) rights as against the other parties and their interest in the land should not be affected by the settlement with Bigelow. (See McAllister's cross-examination, p. 125; 10th cross-interrogatory and answer, *et seq.;* 15th cross-interrogatory, p. 125; 16th, 17th and 18th cross-interrogatories, p. 126; 22nd cross-interrogatory, p. 127 Abstract; Lawrence's sworn answer, p. 84, *et seq.*)

It appeared that the so-called release had a yellow seal (post-office paper cut diamond shape) upon it, before it was signed and while it was unsigned; that the seal was pasted to the paper and then handed to Bigelow; that Bigelow wrote upon it the word "*seal.*" (Abstract, p. 122.)

It further appeared that the release which was produced in evidence, had a yellow seal made of post-office paper cut diamond shape, and bore upon it the letters *s e a l* in the handwriting of one Chapman, (see Chapman's deposition, p. 141 Abstract, p. 143, *et passim;* see deposition of appellant's witness, Phillips, p. 120, corroborating Chapman,) who, as scribe for Bigelow, wrote the instrument, and who, after Lawrence signed it, and in his absence and without his consent or knowledge, and at the request of Bigelow, cut out the identical paper seal

which at the trial appeared upon the release produced by appellants, and pasted it upon the release, and wrote with his own hand the word "*seal*" on the yellow diamond, and identified the seal and paper produced as his handwriting. (Answer to 14th interrogatory, p. 143, *et passim;* see also examination by the Court, p. 160 Abstract.)

It was proved that the so-called release was signed and delivered in Boston, Mass., and the money paid in Boston, and also proved that the rule as to the construction of such qualified discharges laid down in the case of Solly *v.* Forbes, 2 Brod. and Bing., p. 36, is adopted in Massachusetts, as appears from the case of Wiggin *v.* Tudor, 23 Pick., pages 434—445; cases introduced in proof, under stipulation.

The case was heard before the Hon. John M. Wilson, upon the pleadings and proofs. The final decree was rendered on the 12th of January, 1866, and is printed at length in the Abstract, pages 162—171.

The Court decreed that Lawrence was entitled to the amount of unpaid principal with interest on the same at six per cent. after April 1st, 1861; that the payment of all the interest up to that time was a voluntary payment by appellants, and that they could not recover back the same, nor apply the same in reduction of the principal; ordered payment of the money, and a foreclosure sale in default; ordering that Bigelow's interest in the property be protected in case of sale. The Court found that the so-called release was only an agreement on the part of Lawrence not to further charge Bigelow; but under the circumstances did not operate to discharge the appellants.

The Court protected Johnson in accordance with the request of the appellants and Bigelow; it appearing that Johnson had sold out to the other partners and they had agreed to indemnify him.

The original complainants took an appeal, assigning errors as on page 172, *et seq.*, of Abstract. It was contended below, on the part of Lawrence, that he was entitled to ten per cent. interest from April 1st, 1861, on the principal; the amount Bigelow paid, it was admitted, might be treated as a payment on account, this being most favorable to appellants.

The appellee complains that the Court erred in allowing to the appellants a reduction of interest from ten to six per cent.,

for that, by law, upon the contract he was entitled to ten per cent., the rate tendered in the original bill; and because the fraud and oppression practiced by appellants in bringing the appellee into a court of equity upon a false ground of complaint, entitled them to no abatement from the contract rate of ten per cent. by reason of any equitable considerations.

Judge Wilson's opinion filed in the case, and referred to in the decree, is printed at the end of this brief, as it presents a comprehensive summary of the whole case.

The principal questions that arise in the case, are:

1st, Whether under the circumstances of this case, Lawrence is a mortgagee or a vendor of the land; and, in either case, whether he is not entitled to his decree.

2nd. Whether the appellants are entitled in equity to recover back the usurious interest already paid.

3rd. Whether the appellants should not pay interest at the rate of ten per cent. per annum from April 1, 1861.

4th. Whether, in equity, the so-called release of Bigelow discharged the appellants.

POINTS.

I. The deed of appellants of September 15, 1856, and the articles of agreement of the same date for the reconveyance of the land to appellants, *are a mortgage.*

The appellants and appellee met upon the footing of borrower and lender. The loan was actually made. The appellants admitted, down to the time they filed their bill, that the transaction was a loan and mortgage.

Delahay v. *McConnel*, 4 Scam. 157.
Coates v. *Woodworth*, 13 Ill. 654.
Miller v. *Thomas*, 14 Ill. 428.
Smith v. *Sackett*, 15 Ill. 528.
Davis v. *Hopkins*, 15 Ill. 519.
Williams v. *Bishop*, 15 Ill. 554.
Tillson v. *Moulton*, 23 Ill. 648.
Wyncoop v. *Cowing*, 21 Ill. 570.
Shaver v. *Woodward*, 28 Ill. 277.

The form in which the contract in this case was reduced to writing, is not inconsistent with a contract of loan and mortgage; therefore Lawrence is not estopped to insist that such was the character of the transaction.

See cases last above cited.

Hence Lawrence, being a mortgagee of the land, was entitled to a decree for foreclosure.

The form of the decree, however, in this case is not inconsistent with the relation of vendor and vendee, and it is decided in the case of *Smith* v. *Moore*, 26 Ill. 393, that a vendor of land is for some purposes to be treated as an equitable mortgagor. So that, even if the appellants' theory of the case, that Lawrence is a vendor of the land, were true, still he would be entitled to the decree for a sale of the premises, in case of non-payment by the vendees.

II. The appellants are estopped by their deed of Sept. 15, 1856, to allege such a want of title in Lawrence as would render him unable to perform his covenant to sell and convey them the land free and clear of incumbrances.

Hence, there was no error in the court deciding that, under the articles of agreement of Sept. 15, 1856, Lawrence was not bound to convey to the appellants any other or better title than he derived from the appellants; nor was there any error in the Court deciding that since Lawrence was a mortgagee of the land, it was a sufficient compliance with his contract for him to release to the grantors in the deed, or their assigns, such title as he obtained from them, with covenants against his own acts only.

The appellants contend that Lawrence agreed to convey to them a fee simple estate in all the land free from incumbrances; they then insist that they had only an estate for years in a part of the land, and that by their deed they conveyed to Lawrence only such estate as they had. It is only on such a construction of their deed as they now contend for, that they base the eighth and ninth assignment of errors.

It is easy to demonstrate that the deed and articles of agreement of Sept. 15, 1856, will bear no such construction as the appellants now insist upon.

The deed of appellants purports to convey the fee of the land to Lawrence, and contains a covenant of warranty; it does not purport to convey the right, title and interest of the grantors. A deed should be construed according to the intention of the parties as manifested by the entire instrument. Now here the subject-matter of the grant is the land itself, and not merely such title as the grantors had therein. The words of grant are, "have granted," etc., "and by these presents do grant bargain, sell, remise, release, convey, alien and confirm, unto said party of the second part and to his heirs and assigns, forever, all the following described lots, pieces or parcels of land," etc.; and the *habendum* is "to have and to hold *the said premises above bargained and described*, with appurtenances, unto the said party of the second part, his heirs and assigns forever." Thus by the *habendum*, Lawrence would take an estate in fee. (4 Greenlf. Cruise, 273, sec. 73—75; and 274, sec. 84.) The appellant's construction of the deed would render the *habendum* repugnant to the granting clause. But every deed, if possible, will be so construed as that all parts shall operate, and be harmonious. Neither in the granting clause, nor in the *habendum*, is there any limitation of the *duration of the estate*, hence the estate granted is a fee simple; it is in contemplation of law, an estate forever.

The covenants are as follows: "And the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that the said *above described premises* are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind soever, except the said lease and articles of agreement above-mentioned, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part shall and will warrant and forever defend."

Here the inquiry may be made as to what the word *premises* refers to as used in this deed. In each case where the grantors use the word they themselves define *the premises* to mean the land—the thing granted—thus in the *habendum*, they speak of

the "said premises *above bargained and granted*," so also in the covenants they speak of the *above described premises*, and the above *bargained premises*. Words should always be understood with reference to the *subject-matter* and the connection in which they are used. In this case the grantors used the word in such a connection that we can only understand by it the land itself; and this use of the word *premises* is most common in deeds.

2 Washburn on Real Prop. 641, and cases cited.
Mills v. *Catlin*, 22 Vt. 99.

If we refer now to the articles of agreement executed simultaneously with the deed in question, we shall find that our construction of this deed is verified by the recitals therein. In the articles, the parties who are the grantors in the deed, recite that the land therein described is the same *land conveyed by them to Lawrence*, "by deed bearing even date herewith;" by this recital alone they are estopped to say that they did not convey the *land itself* to Lawrence.

Douglass v. *Scott*, 5 Ohio, 104.
2 Smith's L. C. (Am. Ed.) 536.
Van Rensselaer v. *Kearney*, 11 Howard, 324 *et seq.*

But especially as to the force to be given to the words in the granting clause, the *habendum*, and the covenants in this deed, I desire to cite the Court to the case of *Mills* v. *Catlin*, 22 Vt. 99, as fully decisive of the point raised by the appellants.

The subject-matter of the grant in a deed may be considered in two aspects:

1. As respects the quantity of the the thing granted, *i. e.*, whether 1 or 100 acres, etc.

2. As respects the quality of the estate in the thing granted *i. e.*, whether an estate for years, or a fee simple, etc.

Now the rule of law is, that if the granting clause of the deed clearly defines a certain quantity of land, or a certain quality of estate, no subsequent language of the deed of doubtful import shall operate to diminish the one or the other.

Mills v. *Catlin*, 22 Vt. 99.
Ela v. *Card*, 2 N. H. 175.

And the rule of construction is, that if the granting clause, the *habendum*, and the covenants, can all be construed so as to be

coextensive and harmonious, they shall be so construed; that is to say, no such construction will be put upon a deed as will render any of its parts repugnant to, or inconsistent with any other part, if it can be avoided.

4 Greenleaf's Cruise, 275, sec. 85.

With these principles in mind, the construction of the deed in question is most plain.

A deed purporting to convey the whole title, though without warranty, estops the grantor and his privies, as to the legal title.

Carter v. *Chandron*, 21 Ala. 72.
2 Smith's L. C. (Am. Ed.) pp. 535 and 551.

The covenant of warranty estops the appellants to set up a title as against Lawrence.

Van Rensselaer v. *Kearney*, 11 Howard, 317, 322, citing many cases.
Kellogg v. *Wood*, 4 Paige Ch. 614.
4 Greenleaf's Cruise, 378, (side page) note to sec. 51.

But the appellants contend that the clause in the deed which is in substance as follows, to wit: "The said above described property being subject in this grant to the rents and conditions provided for and imposed in and by a certain lease made by James Crow and Thomas Crow, parties of the first part, and Theodorus Doty, and Daniel Andrews, parties of the second part therein, and bearing date the tenth day of October, 1853, recorded, etc.; and also to the payments to be made in and by certain articles of agreement, dated Aug. 1, 1855, between F. T. Flagler, of the first part, and F. Parmelee, of the second part therein, for the sale by said Flagler to said Parmelee, of part of the above described premises, recorded, etc.; which said lease and articles of agreement, and the money thereby required to be paid, are to be kept performed and paid by the said Liberty Bigelow, Walter S. Johnson, David A. Gage, and Franklin Parmelee, parties of the first part, or their heirs or administrators," makes the entire grant of the land, and makes the covenants of the deed subject to the Crow lease and the Flagler agreement.

Upon the principles and authorities already stated, this proposition of the appellants is repelled.

By the construction insisted upon by the appellants, this clause is an attempt to limit the duration of the estate of fee simple, already, as we have seen, granted by the granting clause, pointed by the *habendum*, and warranted in the quiet and peaceable possession of the grantee, and his heirs and assigns forever, by the covenant. And cotemporaneously the grantors *were to be*, and did become, by force of the agreement, of even date, *their own assigns.*

The fee simple is the entire and absolute interest and propperty in the thing granted, and when one has once granted it, he can make no further disposition of it. He may, however, grant it upon condition. (1 Greenleaf's Cruise, 55.) But he cannot, in a deed, grant the fee, and in the same deed say that he means thereby only to grant such estate as he has, or only an estate for years; *e. g.*, thus it is stated in Brook's Abr., that if a feoffment in fee be made to W. N., during the life of J. S., the words "during the life of J. S.," would be rejected because they were contrary to the fee.

4 Greenleaf's Cruise, (side page) 247, secs. 25, 26.

Even if it were doubtful upon this deed whether the grantors intended to grant the fee, or only an estate for years, in such a case the rule that the deed must be taken most strongly against the grantors, settles the doubt in favor of the fee.

4 Greenleaf's Cruise, 245.
2 Blk. Com. 380.

The true import of this clause is, that it is a mere recital of the condition of the title, to give point to the covenant of the grantors, inserted in this very clause, to pay the rents and keep the terms of the lease and the Flagler agreement, and also to give point to the exception in the covenant against incumbrances.

The position of the appellants, in this respect, is not even plausible. The clause cannot operate as an exception, or reservation, or limitation, or condition; and if not in one of these ways, then only as recital, as we have said.

An exception is a withdrawing by the grantor from the effect

of the grant some part of the thing itself which is *in esse* and included under the general terms of the grant, as one acre from a certain field, etc. 4 Greenlf. Cruise, (side page) 271, sec. 66. An exception cannot touch the quality of the estate.

A reservation is something made to the grantor, and is something created or reserved, issuing or coming out of the thing granted, and not a part of the thing itself, *e. g.*, it pertains to rents, easements, privileges, etc.; it does not touch the quality of the estate granted. 4 Greenlf. Cruise, chap. 25, sec. 1.

A fee may be granted upon a condition; and if we understand the appellants in their too profound analysis of this branch of the case, they contend that this clause operates as a condition, to wit, the estate is granted on the condition that the grantors or the grantee shall yield up the premises to the lessors in the Crow lease in 1874. If such be the force of the covenant of the grantors in this clause of the deed, *i. e.*, that they will yield up the premises to the lessors in 1874, the covenant would be void as repugnant to the grant. In such a case it would be impossible to give effect to the granting words which convey an estate *in perpetuum*, and at the same time to give effect to the covenant.

The covenant must yield to the granting clause, or the granting clause to the covenant; one is clearly repugnant to the other. The rule is, that where clauses are repugnant and incompatible, the earlier prevails.

Shep. Touch. 88.
2 Pars. on Cont. ~~26~~ 513, 515 ed.

"A condition repugnant to the nature of the estate to which it is annexed, is void in its creation." (2 Greenlf. Cruise, sec. 5.) A condition, says Cruise, cannot frustrate the grant precedent. (Ib. 5; 4 Kent's Com. sec. 131.)

So, where a lease was made to A, B & C, subject to this express condition that if C should demand any profits of the land, *or enter into the same during the life of A or B*, that then the estate limited to C should cease and be utterly void. It was resolved that this was a condition, and was void, being repugnant to the estate limited.

2 Greenlf. Cruise, 5.

The only other questions upon the deed, arise upon the covenants. The position of the appellants that the covenants are subject to the conditions and terms recited in the clause above referred to, is untenable.

Neither the Crow lease nor the Flagler agreement can be set up by the appellants as incumbrances, for the reason that the appellants, (grantors to Lawrence,) covenant, both in their deed and their articles of agreement, to perform all the terms and conditions of both the Flagler agreement and the Crow lease.

Watts v. *Wellman*, 2 N. H. 458.

Neither is it the law, as supposed by appellant's counsel, that a qualified covenant against incumbrances is a limitation of a covenant of warranty. The exception contained in the covenant against incumbrances, does not extend to the covenant of warranty.

Estabrook v. *Smith*, 6 Gray, 572.
Sumner v. *Williams*, 8 Mass. 214.
Howell v. *Richards*, 11 East, 633.

We have shown even if Lawrence is to be regarded as a vendor of the land, that his covenants are rebutted by the covenants of the appellants. But the deed and the Articles are to be read together in the light of the *fact* that the transaction was a loan of money, and that these two writings were intended as a contract for a mortgage security. In another part of this brief we have cited the authorities to show what are the rights of the parties to such a contract, in form absolute, but intended as a security merely. And the law attaches to this relation of mortgagor and mortgagee certain absolute rights and duties upon the part of the respective parties; and these are: the right of the borrower, upon paying the debt and interest, to receive back his land unimpaired by any act of the mortgagee, and the duty of the mortgagee to reconvey only the title thereto which he received as security.

2 Spence Eq., p. 618.

III. By the common law, parties were allowed to receive such rate of interest as was agreed upon in the contract of loan; and usury statutes are but limitations or restrictions of this

right. Such statutes are generally penal, and sometimes prohibitory in their character. In some instances they afford a remedy to the borrower to recover back usury already paid.

A statute merely penal, only operates upon the remedy; and must have been in force when the suit is brought, as well as when the contract was made. A statute not penal, but only of a prohibitory character, operates upon the contract; and where a usury statute, for its violation, does not declare the interest contract void, it only operates upon the prohibited excess reserved beyond the rate permitted; and if in force at the time the contract is made, fixes the rights of the parties, whether afterwards repealed or not.

1. The interest laws of Illinois in force in 1845, were penal in their character, and not prohibitory statutes. (Sec. 4.) They likewise gave the borrower a remedy to recover back threefold the usury paid, by action or bill, within two years. (Sec. 6.) The Act of 1849, standing alone, was prohibitory in its character, and not penal. This Act limited the contract rate for money loaned to ten per cent.; but while the penal provisions of the Act of 1845 yet remained in force, unrepealed, both Acts were construed to be *in pari materia*, leaving the penalty provided in the 4th section of the Act of 1845, still in force. (*Kinsey* v. *Nisley*, 23 Ill. 505.) By the interest Act of 1857, all of the penal provisions of the interest laws of 1845 were expressly repealed; thereby leaving the Act of 1849 alone to govern the rights of borrower and lender, in cases where the contract was made between 1849 and 1857, but upon which legal remedies were sought after 1857.

The case now presented for the consideration of the court, is of this class. The contract of loan was made in 1856. The rate reserved by contract, was twelve per cent. per annum The usury was paid until April 1st, 1861; and suit was brought in August, 1863. Had not the Act of 1857 repealed the penalties of the Act of 1845, the rule established in the case of *Kinsley* v. *Nisley*, would govern this case.

The penalties of the latter Act, although in force when the contract was made, created no vested right in the borrowers. These penalties were under the control of the legislature, and

their repeal before suit brought, deprived the borrowers of all benefit thereof in this case.

Seegar v. *Seegar*, 19 Ill. 121.
Yeaton v. *The United States*, 5 Cranch. 281—3.
Butler v. *Palmer*, 1 Hill, 330.

The question of usury in this case, is, therefore, to be governed by the Act of 1849, standing alone. That Act is not penal; but where there is a contract, it is prohibitory as to the excess thereby reserved beyond ten per cent. Where the defense of usury is made under this Act, and it appears that the consideration of the contract was money loaned, the lender is constructively entitled to recover, as the legal rate of interest, the rate agreed upon by the parties, not exceeding ten per cent. per annum.

Secs. 1 and 2, Act of January 30, 1849.
Matthias v. *Cook*, 31 Ill. 83.
Smith v. *Stoddard*, 10 Mich. 148.
Nichols v. *Stewart*, 21 Ill. 106.

This Act enters into the contract to prohibit the recovery of the excess, when the defense of usury is insisted upon by plea. The Act only reaches the unexecuted portion of the contract; it gives no remedy at law or in equity to the borrower to recover back usury already paid; nor can it be reclaimed by way of set-off, or otherwise, when voluntarily paid.

Hadden v. *Innes*, 24 Ill. 381.
Tompkins v. *Hill*, 28 Ill. 519.
Carter v. *Moses*.—Opinions of this court, April term, 1864, and April term, 1865.

It is not necessary to consider in this case, whether the appellants, under the sixth section of the interest law of 1845, could recover back the usury already paid, by action or bill, because they have filed no bill for that purpose; and more than two years had elapsed after the last payment of usury, before this suit was instituted.

2. Under the statutes of 1845 and 1849, the defense of usury was a mere privilege, and waived, if not specially pleaded. (*Smith* v. *Whitaker*, 23 Ill. 367, and cases there cited; and

Hadden v. *Innes*, 24 Ill. 381.) In actions upon contracts made since the statute of 1857, it is not necessary to plead specially the defense of usury. The statute of 1857 acts directly upon the usurious contract, limiting the amount of the *recovery to the principal sum due*, without regard to the form of pleading. It is prohibitory as well as penal; but it has no bearing in this case beyond its effect in *expressly* repealing the penalties enacted by previous statutes.

Upon these principles, had Lawrence been plaintiff in a suit at law, to recover damages for the breach of the contract of the appellees in not repaying the money loaned to them, he would have been entitled not only to retain the usury voluntarily paid; but also under the contract to have recovered interest at the rate of ten per cent. per annum from April 1, 1861.

Such was the rule understood to be established by this court in the case of *Matthias* v. *Cook*, where the contract was made while the statutes of 1845 and 1849 were in force, but upon which suit was not brought until after the penalties of the statute of 1845 had been repealed by the Act of 1857; and therefore of the same class as the case now before the court.

IV. In equity, the statutes against usury are enforced, but in subordination to the rule that he who seeks equity must offer to do equity. That court does not enforce the penalties unless expressly required by the statute to do so.

1. The borrower when seeking the aid of a court of equity, is limited to two modes of taking advantage of usury:

1st, To offer the amount actually due, with so much of the interest agreed upon as is not prohibited by the statute; and if all the interest is in effect declared void for usury, then to offer the amount due, with interest, at the rate fixed by law, as in cases where no rate is agreed upon by contract.

Ferguson v. *Sutphen*, 3 Gilm. 570.

2nd, To insist upon the penalties, when the statute permits this to be done in equity.

Int. Laws, 1845, sec. 6, chap. 54.

In regard to usurious contracts made in this State, and not governed exclusively by the Act of 1857, it is necessary in

equity as well as at law, that the question of usury should be raised by the pleadings. And where the borrower asks the aid of a court of equity merely to enforce the statutory penalties, and without offering to do equity, as in this case, that court will not allow him the benefit of the usury question. It will treat the question as not raised, and thereby leave the statute to operate upon the prohibited excess of interest reserved by the contract, as well as permit the lender to retain the benefit of the usury already voluntarily paid to him; thus leaving the borrower to stand as he would in a court of law.

2. In equity, the principles before stated will, *a fortiori*, govern in a case where the borrower, with the design of gaining an undue advantage over the lender, has knowingly attempted to pervert or conceal the true character of the contract.

Metropolitan Bank v. *Godfrey*, 23 Ill. 604.

The appellants conceived and exhibited their original bill in bad faith. In that bill, filed in August, 1863, and sworn to by one of them, they admitted the existence of the debt to Lawrence of $50,000, and that it drew interest at the rate of ten per cent., and that they had paid the interest to April, 1861; but they concealed from the court that the consideration of the debt was money loaned to them by Lawrence, to secure the repayment of which they had given him an absolute deed, with full covenants of warranty, and taken back a contract for reconveyance; they set forth only the contract of Lawrence to convey to them the land they had deeded to him; they thus colorably made it appear that Lawrence was their vendor, while he was in fact their mortgagee of the land; they then alleged that Lawrence never had title, and could not convey as he had agreed to do; that as soon as he could convey to them the title, free and clear, they were ready and willing to pay the debt and ten per cent. interest; they further alleged that they had expended a large sum for improvements on the land, but suppressed the fact that this was done with the money loaned them by Lawrence; and finally, they alleged that Lawrence was about to eject them from the land unless they paid the debt and interest.

In this bill the appellants made no claim in regard to usury, or to any agreement whereby more than ten per cent. had originally been reserved.

The bill, as framed, considered by the light of the evidence, was an adroit attempt to enable the appellants to keep the money borrowed, and expended on the land; and also to prevent Lawrence from resorting to the land taken by him as security for the loan.

Lawrence, in answering the bill, stated the true character of the contract between him and the appellants, and claimed to hold the land only as a mortgage security for money loaned; and insisted upon his right to foreclose.

To avail himself of the full benefit of the defense thus set up, he also filed his cross-bill praying foreclosure for the amount of the debt then long overdue, and asking interest at the rate of ten per cent.

The appellants, in answer to the cross-bill, substantially confessed that Lawrence was only a mortgagee, and then, for the first time, claimed that the loan was usurious, in that the rate originally reserved was twelve and not ten per cent. per annum; and that the extra two per cent. had been reserved in a separate instrument at the time the loan was made, and that they had paid interest accordingly, to the first day of April, 1861. The appellants then set forth the penal provisions (Sec. 4) of statute of 1845, and without making any offer to do equity, concluded this defense by insisting that if, upon an account taken, anything should be found due Lawrence, "then that the sums paid for interest under said corrupt and unlawful agreement, and all amounts forfeited by Lawrence ought to be applied in payment of such sum so found due, to the extent of the amount so paid and forfeited so aforesaid." Abstract p. 54

But the previous repeal of section 4 of the statute, 1845, put it out of the power of the court to enforce the statutory forfeiture pleaded and claimed by the appellants; and the appellants had no standing in equity to crave the favor of the court, because,

1st, They had not offered to do equity;

2nd. They had been guilty of bad faith toward Lawrence.

3. This case is distinguishable from the cases of *Heacock* *Swartout*, 28 Ill. 291, and *Cushman* v. *Stutphen*, decided April term, 1864, not yet reported, in which the court allowed the lender but six per cent.

In these cases it appears that the lender acted in bad faith, claiming absolute title to property only held by him as security, and *repudiating the existence of a contract of loan or the reservation by contract of any rate of interest whatever.* In none of these cases did the lender rely upon his contract, and when the relation of mortgagor and mortgagee was established by the borrower so as to give him a right to redeem, the court directed the accounts to be taken without reference to the existence of an interest agreement; on that subject taking the lender at his word, but yet compelling the borrower, as a condition of his redeeming, to do equity by paying interest at the rate fixed where there was no interest agreement.

4. This case as governed by the Act of 1849, is distinguishable from those cases decided in this court which are governed exclusively by the Act of 1857, because,

1st. The latter Act prohibits the lender from recovering any portion of the interest reserved in case of usury; and hence he can get no allowance of interest thereunder, except when the borrower is asking the aid of a court of equity, and on that account is compelled to do equity by paying the rate of interest fixed by law as in cases where there is no contract in relation to interest.

2nd. Under this Act it is not necessary to plead usury specially, and hence none of the consequences of failing to plead, or of improperly pleading, it can arise. The defense is not considered waived, however it may be made.

The principle is, that where the whole rate reserved is declared void for usury, there is no interest contract whatever between the parties; but where the rate contracted for is not in effect declared void, as it is not under the statute of 1849, the prohibition of the statute merely reaches the excess. The operation of usury statutes upon interest contracts is not permissive to enable parties to make the contract. In the absence of statutes the rate is whatever the parties agree upon.

5. After April 1, 1861, all the parties seem to have abandoned the agreement for the extra two per cent.; and not afterwards to have acted upon it, until the appellants availed themselves thereof to plead usury, more than two years after the last interest, legal or illegal, had been paid on the loan.

Interest at the rate of ten per cent. was specifically charged on the land, together with the principal sum loaned; the extra two per cent. was not thus secured. The two parcels of interest were treated separately and distinctly by the parties, and Lawrence has never claimed anything upon the extra interest agreement since the borrowers ceased to voluntarily pay interest upon it.

The appellants and Bigelow having neglected to pay anything upon the debt or interest for more than two years, filed their bill, complaining that Lawrence was about to proceed against the land to collect his debt, or threatened to eject them by legal process for their default, and enjoined him from taking such proceedings. Their position as complainants was not changed because they were made defendants in the cross-bill, which was technically grounded upon the defense set up to the original bill. A foreclosure was the legitimate consequence of the maintenance of that defense; and to avail himself of the fruits thereof, Lawrence filed the cross-bill. In the meantime, Lawrence was enjoined at the instance of the appellants from taking any other proceeding to collect his debt, except that open to him by a successful defense to the original bill and the consequent maintenance of a right of foreclosure, to be made available by means of his cross-bill.

Under the circumstances the court below should have given the appellee interest at the rate of ten per cent., instead of only six per cent. from April 1, 1861, to the time of the decree; and to that extent the decree should be modified.

V. The instrument pleaded as a release does not operate, in equity, to discharge the appellants from paying their share of the debt due Lawrence.

1. A court of equity will not construe an instrument as a release, merely because the word *release* is used in it; but where it is evident, from the language of the instrument, that it was not intended to operate as a technical release, it will be construed as only an agreement not to charge the person to

whom it is given, and will not be permitted to have the effect of a technical release.

1 Parsons on Cont. 28.
Kirby v. *Taylor*, 6 Johns. Ch. 242.
Claggett v. *Salmon*, 5 Gill and Johns, 351.

This is also the modern *rule at law*, especially where it can be gathered from the pleadings that the releasor does not seek satisfaction from the party discharged. The principle is, that the reservations contained in the instrument in question, save the rights of the appellants to go against Bigelow for contribution in case they are compelled to pay more than their share.

Solly v. *Forbes*, 2 Brod. and Bing. 36—46.
Willis v. *DeCastro*, 93 E. C. L. 215.
North v. *Wakefield*, 66 E. C. L. 536.
Wiggin v. *Tudor*, 23 Pick. 444.
Lysaght v. *Phillips*, 5 Duer, 116.
1 Pars. on Cont., pp. 28—29.

The so-called release in question, is not proven by the appellants to have been sealed with the knowledge or consent of Lawrence.

As to the question of fact whether the so-called release was sealed with the knowledge or consent of Lawrence, the following considerations will govern:

(1.) The appellants propound the release in their supplemental bill, and allege in legal effect that it was sealed with the knowledge and consent of Lawrence; and they ask Lawrence to answer this allegation under oath.

(2.) The burden of proof to make out the allegation in regard to the seal, is on the appellants—and herein

(*a.*) The answer of the defendant, called for on his oath emphatically and explicitly denies that the instrument was sealed with the knowledge or consent of Lawrence. This answer required the testimony of *two* witnesses to overcome it.

To overcome the answer, the appellants examined Phillips and McAllister; both swearing to the presence of *a* seal before the execution. It may be admitted that at this point, the legal preponderance of testimony was with the complainants.

But here the defendant introduced Chapman, whose testimony fully sustained the answer—he swearing positively to the putting on of the present seal, at Bigelow's request, after the so-called release was signed and delivered, and without the knowledge or consent of Lawrence.

(3.) Then bearing in mind that the burden of proof is upon the appellants to show *when* the seal was put on, we find that the testimony is *equally balanced* as to whether it was put on *before* Lawrence signed, or *afterwards*, without his knowledge. If this is so, the defendant Lawrence must prevail—even supposing the witnesses to be in direct conflict: but

(4.) Phillips sustains Chapman, and shows McAllister to be mistaken in a very important particular: McAllister swears that Bigelow in his presence wrote the word "seal," on the seal which McAllister saw on the instrument prior to its execution. Now Chapman swears to a distinct recollection of putting on *the seal* which is now on the instrument, *after* it had been signed by Lawrence, and also of writing the word "*seal*" on the same as it now appears; he also swears that the word seal is in his (Chapman's) handwriting.

In this matter, Phillips swears that he knows Chapman's handwriting, and that the word "*seal*," *now* upon the instrument, resembles Chapman's handwriting; and it is to be noted that McAllister does not himself *identify* the present seal as the one he saw on the instrument prior to its execution, nor does any witness testify that the handwriting on the seal produced looks like Bigelow's, and yet if it were Bigelow's it would have been easy to prove it; and McAllister, Bigelow's counsel and attorney, who testified on other points, would not have failed to identify this writing as the handwriting of Bigelow, if such had been the fact; and Phillips could have spoken to the same point, if such had been the fact; while Chapman swears distinctly that it is not Bigelow's handwriting.

Hence, it must be concluded—

1st, That McAllister was mistaken about the seal being on *prior* to the execution, or

2nd, That if all three witnesses remember correctly, it must be true that *the seal* which McAllister saw, was not the one *now* on the instrument. If this hypothesis be true, it is manifest that the *present seal* was put on at some time subsequent to the time McAllister saw the instrument with a seal upon it.

The material question then is, *when?* and the burden is on the appellants; but on this question there is no evidence except that of Chapman, the appellants' evidence all relating to the *first* seal.

(5.) The matters of fraud on Bigelow's part disclosed in the answer of Lawrence, help to strengthen the view that Bigelow, who had the possession of the release after McAllister first saw a seal on it, removed the seal before Lawrence signed the release, and then got Chapman to put on the present seal.

Hence, the appellants have failed to show the seal in Chapman's handwriting, to have been on the instrument before execution.

A release of one joint debtor in order to discharge all, where less than the amount due is paid, must be a technical release under *seal.*

Stewart v. *Eden*, 2 Caines' Rep. 121.
De Zeng v. *Bailey*, 9 Wend. 336.
Shaw v. *Pratt*, 22 Pick. 305.
1 Parsons on Cont. 162.

A receipt in full to one joint debtor, on payment of his half, is no release of the other debtor.

Rowley v. *Stoddard*, 7 Johns, 207.
McAllester v. *Sprague*, 34 Me. 296.

VI. There was no error in the refusal of the Court to dismiss the supplemental bill of the appellants, after the answer and replication were filed.

1. The appellee had the right to have the validity and effect of the release determined; and to interpose his defense to it, if

he had any. He could only do this by answer, and hence the supplemental bill was the only proper mode of bringing the instrument before the Court.

Story's Equity Pleadings, sec. 332, and authorities there cited.

2. To have entitled the appellants to dismiss their supplemental bill, they should also have offered to waive all benefit of the instrument set up as a release, except as a mere receipt for money paid.

3. The appellants were not injured by the refusal of the Court to dismiss the supplemental bill; they were not thereby compelled to maintain the issues made therein, and if they chose to do so, it was voluntary.

4. The supplemental bill, once filed by permission of the Court, is under its control and discretion.

VII. There was no error in treating the sworn answer of Lawrence to the supplemental bill as evidence, so far as responsive.

1. The complainants therein had the right to a discovery from Lawrence of the supplemental matter therein alleged; and not having therein expressly waived the oath of Lawrence, *he was bound* to treat the bill as requiring him to answer its allegations under oath. The statute requires that "every answer shall be verified by an oath or affirmation," etc.

Scates' Comp., p. 141, sec. 20.
Story's Equity Pleadings, sec. 874.

The original bill of complaint waived the oath of Lawrence only "as to the statements and charges herein (*i. e.* therein) contained." (See p. 9 Abstract.)

The oath was properly taken, and certified before a proper officer, and no objection was taken to the form thereof before the hearing.

Act of Feb. 21, 1861, (Myers' Ed. Laws of 1861, p. 175.)

Formal exceptions to evidence should be taken before the hearing.

Swift v. *Castle*, 23 Ill. 214.

2. The rule in such case is, that the answer is to be treated as evidence, so far as responsive.

Stouffer v. *Machen*, 16 Ill. 554.
Myers v. *Kinzie*, 26 Ill. 37.

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DECISION OF JUDGE WILSON.

This case involves the decision of equities between the parties, growing out of various complicated transactions set forth in an original bill filed by Bigelow, Gage and Parmelee vs. Lawrence, Aug. 4, A. D. 1863, and answer of Lawrence; cross-bill by Lawrence vs. complainants in original bill, and Walter S. Johnson, filed Oct. 6, A. D. 1863, and answers of all the defendants; supplemental bill by Bigelow, Gage and Parmelee, filed 24th of September, A. D. 1864, vs. Lawrence, and answer thereto.

To unriddle, so far as may be, the complications involved in the case, I shall adopt a historical statement of the facts as disclosed by the proof and exhibits.

It appears from the evidence, that in 1856 the original complainants and Johnson were desirous of obtaining a loan, for the purpose of building a block upon the lots described in articles of agreement between the parties, dated September 15, 1856, and also in deed of same date, from Bigelow, Gage, Parmelee, Johnson and wives, to Lawrence. That negotiations in behalf of the complainants in the original bill were had with Lawrence, and resulted in a loan by Lawrence to complainants of $50,000. To secure the payment of the money loaned, instead of giving a mortgage upon the property, Bigelow, Gege, Parmelee and Johnson, conveyed certain real estate to Lawrence, and he, by an agreement of the same date, agreed to re-convey upon the payment of the principal sum loaned, and interest, as specified in the agreement, and a bond of even date, as I construe the agreement of the parties, taking all the writings together. These instruments, taken together, constitute the agreement between the parties, and are to be construed together to ascertain the intention of the parties. The counsel for the complainants contend that Lawrence, by his covenant to convey, is bound to give them a better title than they gave to him. The covenant in the agreement is in these words: "*The party of the first part hereby covenants and agrees to sell, and by a good and sufficient deed, to convey and assure to the parties of the second part, free and clear of all incumbrances, all those pieces and parcels of land,*" etc. Upon such a covenant, standing alone, the covenantor would doubtless be bound to give a warrantee deed. But by a deed of the

complainants, of the same date, conveying the same land to Lawrence as security, it is provided that the grant in that deed is *subject* to the rents and conditions "provided for and imposed in a certain lease made by James Crow and Thomas Crow," dated Oct. 10, 1863, and to continue until the first day of May, 1874. The last payment, under the agreement, was to be made in October, 1861, more than twelve years before the expiration of the lease, and there was no right of purchase, under the lease, until its expiration in 1874. And, by the agreement, the complainants were to have the possession of the premises, so far as related to Lawrence—rent free, and to pay all taxes and assessments on the premises, and keep them insured for Lawrence's benefit until the last payment was due. This lease had been assigned to Parmelee, and was held by him for the use of Parmelee & Co. By its very terms, the legal title could not be obtained, even by Parmelee & Co., until more than twelve years after the last payment became due, and they could by their own act, or want of action, prevent Lawrence from keeping his covenant, as they now construe it.

Said deed to Lawrence conveys what purports to be the legal title to the same land, subject to the rents and conditions of the Crow lease; and the grantors covenant, that the premises are free and clear of all former and other grants, bargains, sales liens, taxes and incumbrances of what kind soever, except the Crow lease and certain articles of agreement, and, in addition to this, there is a covenant of quiet enjoyment, without condition or exception, by which they covenant for quiet and peaceable possession to Lawrence and his heirs and assigns, and that they will warrant and defend the premises against all and every person lawfully claiming or to claim the whole or any part thereof.

The grant is of the lots of land to the grantee, his heirs and assigns, for ever—a fee-simple estate, not the interest of the grantors in the lots. In the *habendum* clause the lots are referred to as the premises. Regarding the deed and articles of agreement as merely intended to secure a loan of money, they constitute a mortgage. The nature of the transaction, as evidenced by the instruments, favors this construction; but the proof on this point is conclusive. It was not a transaction between vendor and purchaser, except in form, but a contract

between borrower and lender, and in such cases it is immaterial in what form these papers are executed—whether by a mortgage with a defeasance, or by a simple deed of conveyance, and an agreement to re-convey by another instrument, as in this case. This doctrine is too familiar to require the citation of authorities. In the present case it is apparent that all that was intended by the deed and agreement, was to secure the loan and enable the complainants to obtain a re-conveyance of the property and estate, granted upon the payment of money. The assumption that Lawrence was, by the agreement, to re-convey a greater estate than the deed conveyed to him, would require much stronger and more emphatic language than the agreement contains, to support it; and no one, I apprehend, construing the instruments together, would arrive at such a conclusion. In the first place, as the complainants contend, Lawrence agreed to convey to them a fee-simple estate, free from incumbrances, to a portion of the property to which they had but an estate for years, when they conveyed to him: and, secondly, they insist that they conveyed only the estate they had. The terms of the deed will admit of no such construction. The complainants' deed, in the granting clause, as before stated, conveys the land in fee-simple, and the covenant for quiet enjoyment applies to all the lands and every part of them, and recognizes a fee-simple estate. I see no difficulty in giving effect to the condition as it is called. The words are, "the said above described property being subject in this grant to the rents and conditions provided for in a certain lease," etc. It is then provided that the rents and conditions shall be paid and performed by the complainants in the original bill. The object of the statement was to recite the condition of the property, in order to introduce the covenants for paying the rents and moneys due upon the Crow lease and the Flagler contract, and has no necessary connection with the other portions of the deed, describing the estate conveyed. In this respect the recital is important, as a proper introduction to the covenants of complainants to pay rent, etc., and as giving to Lawrence information in relation to their title.

But for the words "*subject in this grant*," it would be impossible to make even a plausible argument to sustain the position of the complainants. But a court should, if possible, give effect

to every part of an instrument, and not be astute to find repugnant and inconsistent provisions; and should especially avoid declaring any portion of an instrument void.

It is clear, if the recital or condition in relation to the Crow leases is to receive the construction contended for by the complainants, that it must be regarded as void, being, on their construction, repugnant to the clause defining the estate granted. The complainants grant an estate in fee simple to the whole of the property, and covenant for the quiet enjoyment of the grantee and his heirs and assigns, and in the same deed, as they will have it, insist that they only intend to convey an estate for years. It would be difficult to imagine a more palpable repugnancy, unless they contended that the grant in fee simple, with the recital or condition, conveyed no estate or title whatever. (*Baldwin's case*, 2 Coke, p. 23; 3 Pickering, pp. 272–7; 3 Cushing, p 419; 15 Pickering, p. 434.)

Even in this aspect of the case, there can be no pretense for contending that Lawrence is bound to give to the complainants any other title than he received. If he gave a deed in fee simple in form, with covenants against incumbrances, the complainant would be estopped to deny that he had such a title, or that they acquired it by virtue of his deed, his only title being under their deed in fee simple. (2 N. H., pp. 458–60; 11 N. H., p. 28.)

But these instruments constituting a mortgage, the Court can only regard it as such. "Once a mortgage always a mortgage," is a familiar maxim. As such, in equity, upon the payment of the money by the mortgagors, they are only entitled to a release from the mortgagee of all the interest he acquired in the premises from them, when the mortgagors, as in this case, retain the possession and use of the premises. (2 Spence Eq., p. 618.)

The claim in the original bill, for a deed in fee simple, and against incumbrances, and that defendant be enjoined till he obtains title in himself to justify such a deed, would result, as shown by the bill, in a perpetual injunction, and cancel forever a just debt of over $40,000 owed by the complainants to the defendants and this without default on the part of the defendant. The very defects on which their claim is predicted, existed in the title of the complainants at the time they conveyed to

the defendant what purported to be a fee simple estate in the land. The agreements by which a fee-simple estate could be obtained, being in possession of and under the sole control of the complainants, they would be enabled to retain possession of the mortgaged premises without paying the mortgage debt, and, as against the defendant, obtain a perfect title to the land conveyed by them to him in fee simple. I apprehend it will take several centuries in this progressive era, before a precedent will be found for such a decree. Nor will a court of equity decree a specific performance, as between parties, when, by a literal compliance with the stipulations of the parties, the party against whom the decree is sought could recover back by suit whatever could be obtained by the execution of such decree. To do so would needlessly multiply suits and encourage circuity of action.

The original bill is in the nature of a bill for specific performance, or, as the case now stands, to avoid specific performance by an indefinite postponement of relief. Upon the filing of the cross-bill by Lawrence, the complainants set up usury in the answer, and ask the enforcement of the penalties imposed by the interest act of 1845. They allege, and the proofs show, that a large amount of interest was paid to Lawrence, at the rate of 12 per cent. per annum. The last payment of interest was in April, 1861, as alleged and shown by proofs. Though the question of usury is raised by the answer to the cross-bill, it is in the nature of an amendment to the original bill, and a substantial part of the case, existing at the time the original bill was filed.

In this view of the case the complainants stand in the same position in a court of equity as they would do had they, in their original bill, stated the whole case, and set up usury, instead of making a partial statement of the case, and reserving the claim of usury until the defendant sets up the other facts of the case by cross-bill. If they had set up usury in the original bill, they would be compelled to pay the principal and legal interest, into court, or at least offer to do so, upon the amounts being ascertained. I am not aware that a party who makes a partial statement of his case, and afterwards amends, so as to obtain other relief, or makes a new claim to relief, in answer to a cross-bill, stands in any better position

than he would if he had stated his whole case in the first instance; and no authority has been cited sustaining such a position. Regarding the complainants in the same position in relation to the question as they would have been had they set up usury in the original bill, the same result follows in relation to usury as under the interest statute of 1849. (*Moses* v. *Carter*, April term 1864, and April term 1865.) Applying the rule in equity in this case, the interest statutes are referred to only to determine what is legal interest and what is usurious, but the penalties are never enforced, upon the principle that a party who seeks equitable relief must himself do or offer to do equity.

Now upon that question of usury I am not altogether clear what the force is of the decision of the Supreme Court. But one thing is very apparent,—that at the time the contract was made, the interest statutes of 1845 and 1849 were in force; and, inasmuch as the statute of 1849 only relates to a specific class of cases—that is, usury taken for the loan of money, (as I understand the rule,)—the statutes of 1845 and 1849 are to be construed together, and as relating to the same subject. As I understand, the Supreme Court has so decided.

Now suppose, as a proper way of testing it, that the statute of 1849, instead of being a separate statute, was a section of the statute of 1845; as I understand, in construing statutes *in pari materia*, they are to be construed as being sections of the same statute. The rule is well settled, that where there are general words covering a large class of cases and a specific provision in relation to subjects of a certain class,—that the general words do not apply to the particular specifications, but the particular class which is selected out, and in relation to which the specific provisions are made, has to be governed by the specific provisions, and not by the general rule. Now, apply this principle to this case, and regard the act of 1849 as a section added to the act of 1845. The general provisions of the act of 1845 relate to all classes of cases where usury may be received and taken; it covers the whole. The statute of 1849 only refers to usury taken for money loaned; therefore, money loaned is to be covered by the provisions of the act of 1849. That is the case, as I construe it. If so, then whatever provisions there are in the statute of 1849, regarding it as a portion of the statute of

1845, and construing them together, the only penalties, and the only relief which a party can have for usury, in case of money loaned, is the deduction of the usury. The Supreme Court have given that construction to it in the case of *Matthias* v. *Cooke*, 31 Illinois Reports, p. 80. They decided that the usurious interest might be deducted. That, then, is the construction of the Supreme Court in reference to the act of 1849 —that usurious interest should be deducted when it is pleaded or set up by way of a defense.

When the decree is drawn, I shall permit the parties to cite authorities by way of showing what decree the court should render, in the view which I have taken of the question.

Complainants filed supplemental bill, alleging that about the 12th of August, 1864, the complainant Bigelow had a settlement with the defendant in relation to said articles of agreement, and that Bigelow paid Lawrence $22,557, and that Lawrence executed, under his hand and seal, a release to Bigelow of his portion of all money due Lawrence on said articles of agreement, and asking that all the covenants in the articles of agreement be declared satisfied and discharged, and that Lawrence be decreed to reconvey to the complainants the premises conveyed to him by the complainants. To this defendant answers upon oath, denying that the paper called a release was sealed when he signed it, and in any event that the prayer of the complainants ought not to be granted.

The only remaining questions relate, 1st, to the *fact* of the release being under seal when signed; and, 2nd, to the rights of the parties in equity upon a release under seal of one of several joint obligors, when, from the instrument itself, it is apparent that it was not intended to release the other joint obligors.

In relation to the first question, the proof is very contradictory and unsatisfactory. The witnesses were all examined in open court, and there was nothing in their appearance or manner of testifying which would justify any one in saying they, or either of them, was unworthy of belief, or that any particular statement made by either of them is designedly false; and still some one of them must be mistaken. Lawrence, in his answer, swears it was not sealed when he signed it. No one of the witnesses was present when it was signed, and therefore cannot state the condition of the instrument at that time. Phillips swears that the present release, which he identifies, had

a yellow seal upon it while it was unsigned, and before Lawrence came into the office; that he cut out a seal with a pair of shears, and that Chapman affixed it to the paper, by mucilage, in his presence, and then handed it to Bigelow. Mr. McAllister swears that he was present when the same release was in the hands of Bigelow, unsigned, and with a yellow seal upon it, as described by Phillips, and that Bigelow, at his suggestion, and in his presence, wrote upon the seal the letters "*seal.*" The paper being identified as the same, this proof would be conclusive against the statement of Lawrence, if the identity of the seal was established. But this is not done. Mr. McAllister, who saw Bigelow write the letters "*seal,*" does not swear that the same letters on the seal of the instrument produced are those made by Bigelow in his presence, or that they are in the handwriting of Bigelow. All that these witnesses swear to may be true, and still the answer of Lawrence be true, as the seal might have been removed before signing. Besides, it would seem to be easy to identify the letters on the seal to be in Bigelow's handwriting if they were so. On the other hand, to sustain the statement of Lawrence, Mr. Chapman swears that he wrote the instrument at the request of Bigelow, and that on the day after, or later, Bigelow brought the release to him, as he thinks, with the signature of Lawrence to it, and requested him to put a seal upon it, which he did. That he wrote the letters "*seal,*" on the seal now upon the instrument identified as the release; and he swears that the letters "*seal,*" are in his handwriting. Phillips swears that the *e* and *a* look like Chapman's—the *s* and *l* do not, but that still he may have written them. No witness swears they are in the handwriting of Bigelow. If not, the present seal is not the one seen by McAllister, and there is no evidence that there was a seal upon the instrument when it was signed. The statement of McAllister, in relation to the time when he obtained possession of the instrument from Bigelow, is inconsistent with the statement of Chapman in relation to the time of sealing the release; but Chapman's identifying the seal by the letters on it, in his handwriting, to which he swears positively, and in relation to which he could hardly be mistaken, shows that the seal to which McAllister refers, was not the seal now upon the release. Lawrence swears there was no seal on the instrument when he signed it, and Chapman swears

that he put on this identical seal after it was signed, at the request of Bigelow.

Though technically the weight of testimony is against the complainants on this point, I am unwilling to decide a question supposed to be so important in its results, unless compelled to do so, upon the mere weight of testimony, when there is so much uncertainty, and the evidence is so contradictory. I apprehend the complainants entirely misapprehend the force and effect of this instrument in equity.

Assuming, for the sake of argument, that the release was sealed when it was signed, the question is, what is its force and effect in a court of equity? The discharge of one joint obligor by a simple release, under seal, or, as it is called, a technical release, is a discharge of all the obligors, both at law and in equity. This was expressly decided by Lord Hardwicke in *Bowen* v. *Swadlin*, 1 Atkins, p. 294, and there is no case, so far as I am advised, where a different rule has been adopted. But where the instrument is not a simple release, a court of equity will consider the instrument so as to give effect to the intention of the parties, and this is done even at law, when the plaintiff, in replying to the release pleaded, alleges that he only seeks to charge the parties not expressly released. (*North* v. *Wakefield*, 66 Eng. C. L., p. 536; *Willis* v. *De Castro*, 93 Eng. C. L., p. 215; 30 B. and C., p. 211.)

In the present case the instrument is not a technical release, and there can be no question in relation to the intention of the parties, for the language of the instrument is explicit and unambiguous. The words are, "if the property mentioned in the above articles has to be sold under an order of the court at Chicago, the interest of said Bigelow in it is to be protected, according to this settlement. Nothing herein contained shall in any wise affect my rights or demand against said Parmelee, Gage or Johnson, or their interest in said property." But, in addition to this, the attorney of Bigelow swears that he first wrote a technical release, which Lawrence refused to sign; that he then wrote the above clauses to satisfy Lawrence. There can be no question in relation to the intention of the parties, and I apprehend there is as little doubt that a court of equity can compel the specific performance of a contract or obligation, according to the intent of the parties, as shown by the obligation itself. A court will not construe an instrument as a release, merely because the

word "release" is used in it; but when it is evident, from the language of the instrument, that it was not intended to operate as a technical release, it will be construed as only an agreement not to charge the person or party to whom it is given. (*Solly* v. *Forbes*, 2 Brod. & B., p. 46; *Kirby* v. *Taylor*, 6 Johns. C., p. 242; *Clagett v. Salmon*, 5 Gill & J., p. 351.)

It would be indeed a strange anomally if, as contended by the complainants, a court, which has special and exclusive jurisdiction to compel the specific performance of obligations, had no power to enforce the obligation according to the intent of the parties, as it appears from the obligation itself; but, on the other hand, was compelled to decree a performance of the obligation palpably contrary to the intent of the parties, *and this in a case where the party asking this action on the part of the court voluntarily comes into a court of equity to obtain equitable relief.* When courts of equity become so hampered by decisions and precedents that they cannot enforce obligations according to the intent of the parties, as expressed by the obligations themselves, and by the same precedents to release men from their legal obligations and decree contrary to justice, equity and conscience, it will be high time to abolish such courts, or change their name. The doctrine in the case of *Bower* v. *Swadlin*, before cited, is confined to a technical release, as is evident by Lord Hardwicke's subsequent decision. In *Cole* v. *Gibson*, 10 Vesey, p. 503, he said that equity would restrain a general release to what was under consideration at the time; and decides in *Ramsay* v. *Hylton*, 2 Vesey, p. 204, that a recital in a general release is to have the same effect in equity. Chancellor Kent, in *Kirby* v. *Taylor*, speaking of the equitable doctrine on this subject, says; "A release is to be construed according to the intent and object of it," and that intent will control and limit its operation. This case was decided in 1822, and no court of equity, so far as I am advised, has since repudiated this doctrine, or established a different rule. On the other hand, this case is frequently cited, and always with approbation. (*Clagett* v. *Salmon*, 5 Gill & J.; *Lysaght* v. *Phillips*, 5 Duer, p. 116; Parsons on Contracts.