that he is feeble minded, has the mentality of a child eight years of age, and therefore what he says should be regarded with the same degree of charity and forgiveness as that would be shown such a young child under the circumstances. If Mr. Hogan's idea is correct, then what will the Court say as to his recollection of the circumstances surrounding the execution of the instrument in question, and what will Mr. Hogan expect this Court to do when he says his testimony and his mentality indicates such a condition, when this is rebutted by a solemn instrument in writing, by the testimony of Mr. Powell and by the testimony of Mrs. Powell, whose reputation is in no wise questioned, and therefore must be good.

The burden in this case is upon the complainant to show "beyond all reasonably controversy that a mistake was made", and until such has been so shown the written instrument must remain the sole expositor of the intent and agreement of the parties. So strong has been the language of our Court in fixing the burden of proof that it has gone to the extent of saying,- "While the Courts may feel a great wrong has been done, they cannot grant no relief by reason of uncertainty." The Supreme Court of this State has repeatedly held that they cannot, and will not interfere with the contracts of parties, regardless of how they benefit one and injure the other, unless there shall be established fraud in the consumation and execution of the said written

instrument, and that fraud shown by evidence which would convince the Court to a certainty that the instrumentdoes not speak the intent of both parties.

We feel sure that this Court is going to read the evidence carefully, together with the briefs as submitted, the authorities cited and that it is needless to prolong this brief and argument. We therefore respectfully submit this brief, together with the one heretofore filed for the Court's final determination.

Respectfully submitted,

Gordon Wrayton & Seigle

SOLICITORS FOR RESPONDENTS.

GORDON, EDINGTON & LEIGH
ATTORNEYS AT LAW
1011-15 MERCHANTS NATIONAL BANK BUILDING
MOBILE, ALABAMA

ROBT. E. GORDON
DAVID H. EDINGTON
NORVELLE R. LEIGH, JR.

March 8, 1930

Judge F. W. Hare,
Monroeville,
Alabama.

Dear Judge:-

We herewith hand you reply brief, in re: Bishop vs. Powell.

If you will recall, we filed our original brief on the day of submission, and in view of the fact that Mr. Hogan is attempting to introduce an new theory in the case, we have attempted to differentiate in this brief this case from those which he cites in support of his new theory. We are this day mailing Mr. Hogan a copy of this brief, so that he may answer same if he sees proper.

We would appreciate if you would look at the file and see whether or not the same shows a re-filing of the demurrers to the complainant's bill of complaint as last amended and also a re-filing of respondent's answers to the bill of complaint as last amended. This was all done on the day of submission, and if we are correct in our recollection, you made annotations thereof on your docket, but we have not had an opportunity to see whether the papers themselves have been marked re-file in accordance with the agreement at said time.

If you visited our City on this date for the purpose of enjoying the beauty of our azaleas, we trust that you were not disappointed and that your wife thoroughly enjoyed

the visit.

With best wishes,

Very sincerely yours,

GORDON, EDINGTON & LEIGH

By Ann Edington

REG/L
enc.

HOWARD BISHOP, Complainant,	)	
-vs-	)	IN THE CIRCUIT COURT OF
LAURA POWELL, et al., Respondents.	)	BALDWIN COUNTY, ALABAMA.

SUPPLEMENTAL BRIEF FOR COMPLAINANTS

The second brief for the respondents is just as fallacious as their first brief. We realize that the court is perhaps more able to discover these fallacies than we are. And the only excuse we have for writing this supplemental brief is the hope that thereby we may lighten the labors of the court in examining this case.

The introductory paragraph of the respondents' reply brief concludes with this assertion, viz: "Therefore - there is but one issue, - was the instrument in question intended as a deed or was it intended as a mortgage." This is an ambiguous and inaccurate statement of the issue, as the writer understands the case. It is ambiguous in that it seems to confuse two distinct situations; one, where a deed is executed, intended to be such by both parties, but intended by both parties also to operate as a mortgage; the other, where the grantor believing a writing to be in fact a mortgage, signs it in reliance upon the fraudulent misrepresentations of the grantees that it was a mortgage when the latter knew it to be a deed. It is not clear which situation the quoted statement is intended

to describe. Besides, this statement is inaccurate. For the complainant testified he never intended to execute the deed in question; but that he was induced to sign it through the fraudulent misrepresentations of R. F. Powell, the agent for Ola and Laura A. Powell. So that the real issue is whether or not the respondents induced the complainant to execute the instrument in question through the fraud of R. F. Powell, the agent of the other respondents.

Then the question arises: Upon whom does the burden of proof rest on this issue. The bill of complaint itself shows that prior to the execution of the instrument in question the complainant had executed a mortgage upon a portion of his land which had been assigned to Ola Powell, and that he had executed another mortgage upon all of his lands to Laura A. Powell. The bill of complaint therefore shows that the deed complained of as a matter of fact, operated to convey complainant's equity of redemption to the mortgagees. The authorities clearly establish that the burden rests upon the mortgagee who has acquired the equity of redemption from the mortgagor, to show that the transaction was free from fraud, was not oppressive, was fair and was on an adequate consideration. It seems too plain for argument that the facts of the case at bar bring it clearly within the operation of the cases cited in the original brief for the complainant.

In the reply brief on page 3 it is said: "There is no allegation that Bishop ever conveyed or ever intended to convey his equity of redemption to the respondents". As pointed out

hereinabove the allegations of the bill very clearly show that, as a matter of fact Bishop did convey his equity of redemption to the respondents. It is true, however, the bill does allege that Bishop never intended to convey his equity of redemption and that this conveyance was procured by the fraud of the respondents.

The determination of the question, whether the mortgagor has conveyed his equity of redemption to the mortgagee, depends not upon what the mortgagor intended, nor what he understood. It depends upon what, as a matter of fact he has done. It is pure sophistry to argue that although Bishop, the mortgagor, has conveyed his equity of redemption to his mortgagees, yet because he did not intend to make such a conveyance, because he was procured to make such a conveyance by the fraud of the mortgagees, he is excluded from the operation of the beneficent principles laid down in Shaw vs. Lacy. The rule invoked was intended to cover just such cases.

The bill of complaint as last amended shows that the complainant executed an absolute conveyance of his equity of redemption to the mortgagees. It also shows that this conveyance was procured by the fraud of R. F. Powell acting as the agent for Ola and Laura A. Powell, daughter and wife, respectively, R. F. Powell falsely represented to the complainant that this deed was in fact a mortgage. The prayer of the bill is that this deed be reformed so that the same shall be a mortgage payable to the said R. F. Powell one year after said 12th day of October, 1917, and that your Honor will ascertain the indebtedness secured by said mortgage, and to whom payable and that a reasonable time

may be fixed in which the complainant may exercise his equity of redemption. And then the complainant also asks for general relief in the usual form. Under this prayer for general relief the court may grant any relief to which the complainant is entitled under the allegations of his bill and the evidence. Under a general prayer for relief, with or without a special prayer, the court will award such relief as may be made out or is consistent with the case. Wohlert vs. Wohlert 114 So. 906, 217 Ala. 96.

The respondents further argue that "from the testimony of Mr. Bishop, himself, that there was nothing said or done, directly or inferentially which would suggest or support the theory that the respondents purchased Mr. Bishop's equity of redemption -". But the respondents cannot disregard the testimony of their own witnesses in regard to this transaction. In considering this question the court has before it all the testimony on the case. The allegations of the bill and the testimony all show that, as a matter of fact, the complainant, mortgagor, conveyed his equity of redemption to the respondents, mortgagees. In determining who has the burden of proof the intention of the complainant cuts no figure. The controlling question is, what was done by the parties. We submit therefore, that the burden of proof rests upon the respondents to show that the transaction under investigation is fair, was not oppressive, was free from fraud and was upon an adequate consideration. We submit further that they not only have failed to carry this burden, but that the evidence convincingly shows that the transaction was fraudulent, that it was oppressive and that it was not upon an adequate

consideration.

Hereinabove we have stated the issue in this case as we understand it, and have pointed out the difference between this statement and the statement of the issue contained in the respondents' reply brief. We think, however, that this difference in the statement of the issue makes no difference in regard to the burden of proof. Whichever statement of the issue is adopted by the court, the burden of proof rests upon the respondents. The burden of proof is governed by the circumstance that the transaction was had between the mortgagor and the mortgagees. And whether the issue is simply whether the deed in question was intended to be a mortgage or a deed, or whether the issue is, was the execution of the deed procured through the fraudulent representations of the agent of the respondents, in either event, the writing was executed by the mortgagor in favor of the mortgagees. The burden of proof on either issue rests upon the respondents.

Respectfully submitted,

Jesse F. Hagan

Solicitor for Complainant

IN THE CIRCUIT COURT OF BALDWIN COUNTY ALABAMA

AT BAY MINETTE.

HOWARD BISHOP, Complainant,
vs.
R. F. POWELL, OLA POWELL and LAURA A. POWELL, Respondents.

APPEARANCES:

Mr. Jesse F. Hogan, Attorney at Law, Mobile, Alabama, appeared as counsel for the Complainant.

Messrs. Gordon, Edington and Leigh (by Mr. R.A.Gordon), Attorneys at Law, Mobile, Alabama, appeared as counsel for the Respondents.

Mr. Thomas W. Richerson, Register, appeared on behalf of the Court.

STIPULATION.

It is stipulated and agreed between counsel for the respective parties, that the signatures of the witnesses to their testimony, would be waived.

TRANSCRIPT OF TESTIMONY TAKEN BEFORE THE HON. THOS. W. RICHERSON, REGISTER OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, AT MOBILE, ALABAMA, ON THE 17th DAY OF JULY, 1930, BEGINNING AT 2 O'CLOCK P.M..

The witnesses were sworn by the Register and put under the rule.

HOWARD BISHOP, the first witness called, on being first sworn by the Register, testified as follows:

DIRECT EXAMINATION by MR. HOGAN:

My name is Howard Bishop, the complainant in this case. In 1917 I had an agreement with Mr. Powell to borrow $600.00 from him, which included two prior mortgages on my land, but I never did get but $515.00.

In my best judgment, my land, that is the seventy six acres, the land which I own individually, was worth $25.00 to $30.00 an acre. About sixteen or seventeen acres of this tract of land had been cleared.

Q. What was the value of the estate land, per acre?

MR. GORDON: I object to the question upon the ground that it is not shown that the gentleman is familiar with the values, or that he knows the reasonable market of land such as this in that location, and at that time.

Ans. It was worth about $25.00 an acre.

I have lived in that vacinity ever since I was a small boy, seven or eight years old, and I have been a farmer and dealing with land ever since I have been a man, and I am fifty three years old now.

I remember when Mr. Powell took possession of my land. That was the next thing after the World War ended.

Q. What the fair rental value of the seventy six acre tract of land at the time Mr. Powell took possession of it?

MR. GORDON: I object to the question upon the ground that it calls for irrelevant, incompetent and immaterial testimony, and not shown that this witness is familiar with the reasonable rental values of land such as this, at the time inquired about.

I know the rental value of farming lands inthat community. The rental value of farming lands in that community, is about three dollars ($3.00). I know the value of farming land in that community at that time and I was acquainted with these lands. The fair rental value of the cleared land on my tract was $3.00 an acre per year. The fair rental value of the uncleared land for pasturage was about a dollar a year, per acre.

Q. What was the rental value of the estate lands,per acre?

MR. GORDON: I object to that, because it is not shown that Powell ever went into possession of them.

Q. What is the fair rental value of the estate land?

MR. GORDON: I object to that, upon the ground that it is not shown Mr. Powell is in possession.

MR. RICHERSON: This particular thing is what we want to find out, and not the other. Go ahead and find out whether he got the other yet.

THE WITNESS: Mr. Powell went into possession of the estate land, and he went into possession since he got the mortgage.

A fair rental value of the estate land was a dollar per acre, per year. It was worth as much as the other, per acre.

Mr. Powell has rented out the cleared land on my tract of land. He rented it to Frank Lay, "Old man" Horton, and Dan Thompson, and George Johnson. I know that Mr. Powell has leased these lands for turpentine purposes, since he took possession of them. I do not know how much money he got for these turpentine leases. Mr. Powell has cut timber off of these lands. He has sold still wood and cord wood and paper wood, and he has carried wood to his own home, and stove wood, and everything. That still wood was used for a turpentine still. My brother had a part of the field the year of the War, and the next spring Mr. Powell took charge of it and he has had possession of it ever since.

Q. State whether, or not, three dollars an acre has been the fair rental value per year, of that cleared land, all during Mr. Powell's possession?

Ans. Well, I think so.

MR. GORDON: I move to rule out the answer.

Q. Is that your best judgment, that it was worth $3.00 per acre, all during Mr. Powell's possession?

Ans. Yes sir.

Mr. Powell has cleared about five acres of my land and he moved the fence out and made it a little bigger, so as to include about twenty acres. He did not put any other improvements on the land. When Mr. Powell did that, I got George Lay and told him to stop, that I did not want them to cut my timber and did not want them to put up the fence, but they kept right on and Mr. Powell said he was going to put it up anyhow.

Q. How much damage has Mr. Powell done to your lands, by reason of the destruction of your timber?

MR. GORDON: I object to the question upon the ground that it calls for irrelevant, incompetent and immaterial testimony, and the Court does not ask for that.

THE COURT: I think the Court says how much is due, and I sustain objection. Exception.

CROSS EXAMINATION by MR. GORDON:

I am the brother of March Bishop, and Harold Bishop. I knew N. G. McKenzie during the year 1916. I never did lease or give to N. G. McKenzie, the turpentine lease on January the 11th 1916, to the property described in the Bill of Complaint. I did not know a thing at all, about it. The Marlow Turpentine Company turpentined this land. I think I signed a lease to him. That was a long time before Mr. Powell got a mortgage on the land. I do not remember what date it was. I ain't keeping up with that part, at all. I don't remember what he paid me per cut, for it. I do not know whether that lease was ever recorded. If it was made it covered the lands in question. I do not remember what I got per cut. I do not know how many cuts there were on this particular land. I do not know the particular years that the Marlow Turpentine Company operated that land, under this lease. I cannot testify whether the Marlow Turpentine Company was operating the turpentine orchard on this land at the time that Mr. Powell took it over, or not. I do not know whether the Marlow Turpentine Company paid me anything, or not. If I did lease it to them, they might have paid me. I do not know whether they did, or not. I do not remember a thing about that now. I was not keeping up with it. I do not remember leasing to N. G. McKenzie, any turpentine rights, at all. I do not remember whether that N. G. McKenzie presented a lease of the lands in question to Roland Edmundson, or not. I do think that I leased to J. U.Schmidt, or gave him a mineral lease to the land in question, executed before P. J. K. -, but it has been so long ago, that I do not remember much about it.

Harold Bishop and I were farming the land in question on shares, at the time I executed the papers to Powell. I do not know what he made on there and I do not know what I got. I was in possession of it when I made the mortgage, and after that mortgage Harold Bishop farmed it a year on shares with me, and next spring, Mr. Powell took it. The mortgage was to run twelve months.

I did not testify on my examination in June, in this cause, that the mortgage was to run six months. I said it was

to run twelve months. I called him up in six months and he paid me and settled with me.

I do not know who cultivated the land the next year, but I believe it was Henderson. I think at that time, there was about sixteen acres cleared. The rest of the land which was not cleared was just out in the woods. The land on the outside of the field and which was not cleared, was used by the general public, as a pasture, just as the cows had been using it all of the time before. I never kept track of the land, and don't know who had it any year, but I just know the man that rented it all the way through. I don't know what year Mr. Powell cleared any of this land. He cleared about four years, I reckon. Frank Lay told me that Mr. Powell paid him $10.00 an acre to have the land cleared. Frank Lay told me that this year, but I don't know when the land was cleared. Mr. Powell put a good woven wire fence around the land that was already cleared, including the four acres which he cleared. The State put one side and the end, - the State furnished wire for the side of the public road and across the end. George Lay and Frank Lay, first one and another, put them up. I reckon Mr. Powell employed the people to put the fence up. I do not know whether the State or County furnished that wire. There were four rolls of wire at $8.00 a roll. My mother had a piece cut out long before she died, and he just got a few more to go with that, I do not know how many.

I don't know whether anybody had any land rented over there around that land during the time from 1919 on down. Nobody ever paid me $3.00 an acre for that land. I never rented any of it out. Hub Gables pays $3.00 ayear rental, or more. He rents from Fritz Genther. I am on the norteast quarter of section 25, township 6 south, range 2 east. My little sister Hattie owns that land. Judge Stapleton bought the land adjoining her place. I do not know what he paid for it. It is all piney woods land. I do not know whether it is better land or as good a land as mine. I do not know when Judge Stapleton bought that land. I do not know how much of that land I am cultivating that is owned by Judge Stapleton, but I judge, about two acres. I do not know who it belongs to. I did not rent it from anybody. Judge Stapleton

did not give me permission to go on there. I just cleared it up and farmed it. I do not know whose land it is. Nobody gave me permission. I did notknow whose land it was, at that time. I know it by the Bartley land. We transferred it from one to another. I am not paying any rent for it. A fellow by the name of Clay cleared up that land and me and him farmed it together. I am a brother of Harold Bishop. I know the piece of property that Harold Bishop bought from E. A. Sheldon, forty acres, in 1926. That land is located, I cannot tell you exactly, but about across a forty, as near as I can get at it. That was forty acres.

Q. What did he pay for it?

MR. HOGAN: I object to the question upon the ground that it calls for irrelevant, incompetent and immaterial testimony.

NOTE: This question was not answered.

I do not know whether it is the same kindof land that I have got, or not. It is a heavier land than mine, a heavier soil. I do not know that it is any better soil than mine, but it is heavier and got a lot of gravel on it, and hills and hollows in it. Mine did not have any hills and hollows. I would not say that that land is as good a land as mine. That is, as good as one forty of mine, - not for farming.

Q. Is it half as good as yours?

MR. HOGAN: I object to the question, on the ground that it calls for irrelevant, incompetent and immaterial testimony.

NOTE: This question was not answered.

Q. Is your land worth more than this that your brother bought from Mr. Sheldon?

MR. HOGAN: I object to the question upon the ground that it calls for irrelevant, incompetent and immaterial and illegal testimony.

Ans. That land that my brother bought was just a tax title land. The land I am talking about belonging to Harold Bishop, was a tax title, and the land I am claiming, - I have a warranted good title. I had a waranty deed to this land before I gave it to Mr. Powell and the mortgage. I had the deed recorded. At the time of this transaction in question, I owed Mr. Thompson $150.00 on a car. There was no interest

due at the time, I think. I do not remember borrowing any money on a mortgage, from Laura A. Powell. I do not remember of ever mortgaging this land to Laura A. Powell on August the 30th,1917, acknowledged before Alex J. Melville, for $125.00, and which mortgage is recorded in Mortgage Book 17, page 481. It has been so long ago it has dropped out of my memory, entirely. I do not remember anything about that mortgage, but I counted it in that $515.00, - everything was counted in. I do not know about how much I owed Mr. Thompson or Laura A. Powell before the last transaction, which is the one in question. I remember that first mortgage and Thompson, and the other one I do not remember.

I do not know the items that constitute the $515.00. I know that is all I kept track of up to that time. I kept that down in my head and remembered it as I got it. I do not know where I was when Mr. Powell got the last paper from me. I was at the boat when he got this last mortgage, as I called it. He gave the hands their money for me, but I do not know anything about the amount , how much they got at that time. I do not remember how the thing was, but most of it, but Grove got all of the material for the boat. He would not let me have the money, but he went and got Grove to get it. I do not remember how much Mr. Powell paid Cook for me. I kept that all in my head until I got about $515.00, then I kept that in my head. I know $515.00 was all I got. I do not remember what he paid Grove for me. I do not know how much he paid me in cash. I think he paid Cook something for me. I do not know whether he paid it in check or cash. I do not remember what I agreed to pay Cook to finish that boat.

I do not remember whether I owed Cook $550.00 at the time I took this matter up with Powell, or not. I remember a little something about Mr. Powell getting the amount reduced. I do not know what he got it reduced from down to, or how much balance it was. I do not know whether it was reduced from $550.00 to $250.00, or not. All of that stuff went out of my head. I do not know whether Mr. Powell advanced me $25.00 to come over to Mobile and buy something, or not. I know he got the stuff and I know I got most of it in actual money, but I do not know how much

money I got in dabs, that way, and he paid me in such little dabs. He would not pay me all in cash. He paid me a little every now and then to pay Grove and get the stuff, and I kept that in my head the best I could, until I got to $515.00 and if I got over $515.00 and all of that other stuff, I did not try to keep track of it. I did not pay Grove nothing. He just got Grove to get the stuff for my boat. I do not know what he paid for it.

I know Captain Lawrence. Mr. Powell did not pay him $25.00 for me, to finish the boat. The boat never was finished. If Captain Lawrence worked on the boat, I do not remember it. He might have alled it working on the boat. He never worked on the boat, but he put it overboard and lashed the boat in the water. I do not know whether Mr. Powell paid for that, or not. I do not remember whether I authorized him to pay it, or not. There was never one thing but what was counted in. It was all counted in.

RE-DIRECT EXAMINATION by MR. HOGAN:

I do not know the name of the man to whom I gave the mineral lease, but I remember that P. J. Cooney came around there to see about getting a lease for mineral and I gave him the lease. I do not know wheter I gave it or whether my mother and father gave it, as it was so many years ago. He did not pay me any money for that lease. He never did pay anybody anything for that lease. Nobody was expected to get anything out of it.

Mr. Powell furnished wire to go across the north side of forty acres of land. The rest of the wire was furnished by the State or the County. Mr. Powell said the rest of the wire was furnished by the County or the State. At the time I signed the mortgage to Mr. Powell, which, about six months later, I found out was the deed, I knew the items of my indebtedness to Mr. Powell, and I knew what those items amounted to, and I remember still what those items amounted to. I do not remember the items now, of what I got from Mr. Powell. The total amount I got from Mr. Powell, was $515.00.

RE-CROSS EXAMINATION by MR. GORDON:

I donot remember whether I swore, in my testimony, on the original taking before the session in this cause, that I never did owe Mr. Powell $125.00 on a mortgage.

RE-RE-DIRECT EXAMINATION:

I cannot read enough to tell anything about anything. I do not remember the last time I paid taxes on that land, but it was in 1916, or since then.

THE WITNESS WAS THEREUPON EXCUSED.

A. D. TAYLOR, the next witness called, testified as follows:

DIRECT EXAMINATION by MR. HOGAN.

My name is A. D. Taylor. I have known the seventy six acre tract of land which Mr. Howard Bishop claims to own in Baldwin County, and which Mr. Powell claims an interest in, for twenty or thirty years. I have been dealing with timber lands during all of that time. I remember when Mr. Powell went into possession of this land, although I do not remember the year.

I do not know how many acres of it was cleared at the time he went into possession of it, but I guess around fifteen or eighteen acres, something like that. Cultivable land in that vacinity rents for about $3.00 an acre, per year. That was the fair rental value of the cultivated land in the Howell-Bishop tract at the time Mr. Powell took possession of it. Mr. Powell has cut some timber on that land, but I could not tell you how much he has cut. I cut some wood on that land for Mr. Powell. I have cut probably two or three cords, something like that, maybe four cords, - I do not remember just what it was, because I never kept any record of it.

CROSS-EXAMINATION by MR. GORDON.

When you rent land you pay $3.00 an acre without the house. That is the rental value of land over there. There could have been more or less than fifteen or eighteen acres of cleared land. I figure there must be around twenty acres in cultivation over there now. To the best of my knowledge, I figure Mr. Powell cleared about five (5) acres. The reasonable price for clearing land, is $10.00 an acre. I could not tell you what year he cleared that in, but I cleared three acres of the land, myself, or had it cleared myself, but I do not remember the date . There is a woven wire fence around the northwest side. I think Mr. Powell had that put up. On the east side there is a barb wire fence. That was over on the east side, and I am not sure whether there is a woven or just a plain wire fence on the south side. I do not know who put that up. I do not remember how long that woven wire fence has been there. I am not familiar with values of fences and what it costs to put up a fence. I do not know what it costs.

As far as I know, Mr. Bishop was in possession of this land just before Mr. Powell took possession of it. That was turpentined by the Marlow Turpentine Company after the War. I do not remember whether that was before or after Mr. Powell took possession. I livedjust adjoining this land for eight years. I am not living there now. It has been, I guess, three years since I have lived there. Of course, I have lived right in the neighborhood there, all of my life. I have lived in six or seven miles of this land,all of my life. I was born and raised right there in six miles of the land. The rest of the land is out in the woods. Anybody's cattle can range on it. It is open land and there is no fence around it. I never knew of anybody paying any rent on open land, without it was fenced, for a pasture, and this is not fenced for a pasture. There is no fence around it.

RE DIRECT EXAMINATION by MR. HOGAN.

I was informed that the State furnished the wire for that west and north fence through. The section line goes through there. The field is all in one clearing, and they have got a section line directly through the field, and Mr. Powell told me that the State furnished the wire there for that fence to be put

through there.

RE CROSS EXAMINATION by MR. GORDON.

The year before I left there I had a son-in-law in my employ. I do not know that he rented this land from Mr. Powell. He never has cultivated that land. I know, for a fact, he never cultivated that piece of land. He did not have any land near there. My son-in-law never did live over there, at all. My son-in-law, Mitchell, never lived on that tract of land, at all. I do not know whether he made a contract with Mr. Powell to rent it, or not. As far as him renting any land from Mr. Powell, he has not rented any land or cultivated any land that he rented. He cultivated a little land that I had rented. I had the land rented and I let my son-in-law have an acre. That is all he used. I paid, as well as I can remember, a hundred dollars a year rent for the field, for around twenty acres. There is no house on that tract, at all, - no house on it when I had the renting of it. There is no house on it now. I was living on another piece of Mr. Powell's that had a house on it, and when I was renting this other land there was no house on it, but I got the house and land for a hundred dollars. I had the benefit of the house for a hundred dollars a year. The reasonable rent for the house, by itself, rented for $5.00 a month.

RE-RE-DIRECT EXAMINATION by MR. HOGAN.

I did not pay $5.00 for the house, myself, but that was what the house rented for. I know people that lived in the house, that paid $5.00 for the house. He was supposed to put the house in and if I could rent the house I got the benefit of $5.00 a month rent for the house on this land. He charged me a hundred dollars a year for the house and the land, with the understanding that if I could rent the house for $5.00 a month, he would give me the benefit of the rent on the house on this land, and if I did not rent the house, I paid him a hundred dollars anyway, for this land, and I had the privilege of renting the house for $5.00 a month. In other words, I was to pay him the hundred dollars for the land whether I rented the house, or not. That was just my good luck if I rented the house for $5.00 a month, and I would get a

reduction off the rent on the land. I never did use the house. I do not think I ever rented the house. I never lived in the house a minute in my life, not in the house that was included with this field. That house is just across the road from the Howard-Bishop land. If I rented the house, he would give me credit on the rent for that amount, $5.00 a month, that is, $60.00, leaving the land $40.00, that is, if I could rent the house for $60.00, I was to pay a hundred dollars for the land, whether I rented the house, or not, but if I could rent the house I would get credit for the $60.00, but I did not rent the house and never did move in the place.

THE WITNESS WAS THEREUPON EXCUSED.

GEORGE LAY, the next witness called, testified as follows:

DIRECT EXAMINATION by MR. HOGAN.

My name is George Lay. I know the land that Howard Bishop owns in Baldwin County, and which Mr. Powell claims an interest in. I have been knowing that land for twenty years. There is some of that land cleared. There looks to be twenty acres inthe piece that is cleared, but I never measured it. I remember the occasion when Mr. Powell went into possession of that land, although I do not remember the date. Mr. Powell has been in possession of it ever since. He has been renting the land and leasing the timber ever since. When Mr. Powell went into possession of the land, the same amount was cleared then, as now, except between four and five acres, which Mr. Powell had subsequently cleared. I know the rental value of that land today. If I was going to rent that land, the cleared land would be worth around $3.00 or $4.00 per acre, per year. During all of the time that Mr. Powell had possession of that land, the fair rental value would be three or four dollars per acre. Mr. Powell had some wood cut on

that land. I cut some for him. I do not really know how much I cut. I could not answer that question. Nobody told me to keep track of it. I cut stove wood on it for Mr. Gunnison. I do not know whether Mr. Gunnison had a contract or lease with Mr. Powell, or not. I do not know anything about that. I do not really know how much wood I cut for Mr. Gunnison. Mr. Powell had some timber cut off of that land, but I do not know how much. Mr. Powell also had it turpentined. He had it leased to a turpentine Company. He has had it turpentined ever since he went into possession of it, as far as I know. All the improvements Mr. Powell put on that land, was the fence. Of course, he put that on it. He has put all the fencing there is on it, or had it done, - fenced the land as he cleared it. As far as I know, he told me what was fenced on the road was furnished by the County, that is, the wire along each side of the section line road, which meant in 19, and on the piece he got from Harold. I do not really know how much putting up that fence increased the value of that land.

CROSS-EXAMINATION by MR. GORDON.

I am a brother-in-law of Mr. Bishop. I do not know how many acres of land were cleared on this tract in 1919. I do not know how many acres were cleared in 1917. I do not know how many acres were cleared in 1920. I could not say how many acres were cleared in 1925. I think there was about fourteen or fifteen acres in there that my brother-in-law cultivated, that is, just by looking at it. Clearing land improves it. It improves land a good deal by clearing it. That land over there is good for cattle to feed on and sheep and other stock. I have never paid rent on any open land. My cattle run on this land. The cattle over there usually run on that and all other open land. Land like that, where it is open, has no rental value for pasture. I have never rented any land in my life. I always owned land. Mr. Horton, I guess, pays about that value from Mr. Powell. I do not know exactly what he pays Mr. Powell. My best judgment is he is paying about a rate of $3.00 per acre for it. There is twenty acres of that Powell tract, that is, land that is cleared. I remember when Mr. Powell rented this land. Mr. Taylor lived on Mr. Powell's place,

over there on the northwest corner of the land. There was a house on the land. That house went with the land, what Mr. Powell rented. I do not know what he paid him for the house and land. Mr. Taylor lived in the house. I do not know how long he lived in the house, but some six or seven years. I knew he was living in Mr. Powell's house at the time.

That new fence improved the value of that property. You cannot make a farm without a fence. I do not know that I would say clearing land would double its value. I would say Mr. Howard Bishop would have some twelve or fifteen acres in that tract, but I would not say exactly. He has been in possession of his part of it. He claims he owns three or four parts of the Bishop estate land. He has been in possession of it ever since he owned it. All the Bishop heirs have an interest in there, or own the land jointly. I do not know that Mr. Powell has ever done anything on any particular part of the land belonging to the Bishop Estate. Nobody lives on the Bishop Estate land now. I do not know whether anybody ever has lived on that part of that land. None of the Bishop Estate land has ever been cultivated, that I know of. None of it has been rented, only for turpentine reasons. My brother, Howard Bishop, rents from his sister. He lives on her place and cultivates his sister's land. The house that Mr. Taylor lived in is across the forty from this Bishop land. The "old place" house is on that land too. I do not know what that rented for.

RE-DIRECT EXAMINATION by MR. HOGAN.

Mr. Powell has leased, for turpentine purposes, his interest in the Bishop Estate land. It has all been leased. The "old place" house was the house that was leased with the Howard-Bishop land. This was the house that was leased to Mr. Taylor, but this was not the house that Mr. Taylor lived in. This house was right across the section line from the Howard-Bishop land, and Mr. Taylor's house was right across the forty, right north of the Howard Bishop land.

RE-CROSS EXAMINATION by MR. GORDON.

Q. Didn't you buy a piece of land right near this and adjoining this, in 1917?

MR. HOGAN: I object to the question upon the ground that it calls for irrelevant, incompetent and immaterial testimony.

Ans. No, I did not buy it. My wife bought it. I could not tell you exactly what she paid for it. I do not know whether she paid $10.00 an acre for it, or not. She bought it from Howard Bishop. I do not know what she paid for it. My best judgment would be $25.00 or $30.00 an acre. That is my judgment, but I do not know what she paid for it. That deed was recorded and she bought it from Howard Bishop in 1917 and it is in section 30. I do not know whether the deed stated the consideration, or not, but I judge it did, but I do not know that it did.

THE WITNESS WAS THEREUPON EXCUSED.

C E R T I F I C A T E.

I, C. A. Strain, an Official Court Reporter, hereby certify that the foregoing fifteen (15) pages of typewriting, contain a true and correct transcript of the testimony given at Mobile, Alabama, July 17th, 1930, in the case of Howard Bishop vs. R. F. Powell, et el., before the Hon. Thos. W. Richerson, Register of the Circuit Court of Baldwin County, Alabama, as set forth in the said transcript.

Signed at Mobile, Alabama, this, the 20th day of September, 1930.

C. A. Strain
Official Court Reporter.

Stenodic $16.00

HOWARD BISHOP, Complainant, vs. R. F. POWELL, et al, Respondents.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN EQUITY.

BRIEF ON BEHALF OF RESPONDENTS

This cause is based upon the alleged mistake on the part of the Complainant and the fraud on the part of R. F. Powell, one of the Respondents, and seeks to have a deed, absolute on its face, to be declared a mortgage. This is the averment of the bill of complaint as well as the prayer thereof. The Respondents deny that said instrument was ever intended as a mortgage, but to the contrary it was intended to be a deed, and is a deed. This being the issue in the case, we respectfully submit the following authorities bearing upon such issues:

The first authority which we will cite is that of Hertzler vs. Stevens, 119 Alabama, and on page 333, and in which decision the following language is found:

> "In Campbell v. Hatchett, 55 Ala. 551, it was said: 'The court, in the exercise of its jurisdiction (to reform written instruments on account of mistake or fraud in their execution) proceeds with the utmost caution, as it involves the invasion of a salutary rule of evidence prevailing at law and in equity. In all cases, unless the mistake is admitted, it must be proved by clear, exact, and satisfactory evidence, that

> the mistake exists - that the writing deviates from the intention and understanding of both parties at the time of its execution - or the court will decline to interfere.'"
>
> "In Guilmartin v. Urquhart, 82 Ala. 571, the court said: 'To authorize the reformation of a contract which has been reduced to writing and signed, the proof must be clear, exact and satisfactory - first, that the writing does not express the intention of the parties - that on which their two minds had agreed: and, second, what it was the parties intended the writing should express.'"
>
> "The burden in such cases is always on the complainant to show by evidence that is clear, exact, convincing and satisfactory, that the written contract does not express the true agreement between the parties. - - If the proof 'is uncertain in any material respect, it will be held insufficient; and while the courts may feel a great wrong has been done, they can grant no relief by reason of uncertainty.'"
>
> "The authorities," says Mr. Pomeroy, "all require that the parol evidence of the mistake, and of the alleged modification, must be most clear and convincing, - - - or else the mistake must be admitted by the opposite party; and the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error."
>
> "Until beyond reasonable controversy, the mistake is made to appear, the writing must remain the sole expositor of the intent and agreement of the parties."

In the case of Moore vs. Tate, 114 Alabama and on page 584, the same statements of law, both as to evidence and degree of proof is laid down as in the case supra. And after quoting the exact language from Pomeroy as used above, this decision goes further and says:

> "The same degree of proof is declared in Story

Equity Jurisprudence."

In the case of Hand vs. Cox, 164 Alabama and on page 330, we find the following language:

> "In the cases of this kind, where equity will grant the affirmative relief of reformation, it requires that the evidence shall place beyond reasonable controversy the fact that such a mistake was made, and, until this is done, the writing must remain the sole expositor of the intent and agreement of the parties."

In the case of Kyle vs. Haley, 190 Alabama and on page 553, is the following language:

> "The bill in this case was filed for the purpose of having a conveyance, which is absolute on its face, declared to be a mortgage and to redeem. In a case like this - where the instrument is absolutely in form, and not in form conditional - to obtain relief, the complainant must satisfy the Court by at least a clear preponderance of the evidence that a mortgage was intended and clearly understood by the grantee as well as the grantor."

Then to follow this up with a case which has quite a bearing upon the issues in this case, and which is Knaus vs. Dreher, 84 Alabama, page 319, we quote the following language:

> "Cases of this class have been very often before this Court, and it has been unifromly held that such claim may be established by parol proof, if sufficiently strong and clear to meet the requirements of the rule. But to entitle a complainant to relief in such cases, the testimony must be clear, consistent, strong and convincing. It has sometimes been said it must be stringent."
>
> "The oral testimony in the case before us is in lamentable conflict. Conflict, not alone as to the main inquiry, whether it was agreed that the conveyance should operate only as a mortgage, but as to the attendant facts which, if believed, tend

> collaterally to fortify or weaken the testimony bearing directly on the main question. It is difficult to credit this discrepancy to honest mistake, or imperfect memory. Only the parties to the conveyance testify to any actual knowledge, whether there was an agreement before the deed was executed that it should only operate as a mortgage, and their testimony is in direct conflict."*** Looking alone at the oral testimony, it is doubtful if it be sufficiently 'clear, consistent and convincing' to overcome the presumptions which are raised by the absolute conveyance. *** The intendment growing out of Dreher's absolute deed to Knaus makes a strong prima facie case, and the corroboration furnished by the uncontroverted facts recited above, reduces the probative force of the complainant's testimony far below the requisite standard. The bill ought to have been dismissed."

As will be shown by the testimony in this case, the complainant and two other respondents are the only witnesses who testify upon the question of whether or not any agreement was had that the instrument in question should be a mortgage. The complainant, the only witness testifying to such facts in his behalf, testified directly that he had never executed any other instrument purporting to be a mortgage to the respondents or either of them, when subsequent to such testimony, respondents introduced the original papers showing that he had executed such mortgages. And then complainant, to verify what respondents had testified as to other mortgages being executed, amends his complaint alleging such to be a fact. So we have the complainant denying the very allegations of his bill, his own bill contradicting his testimony, and his own bill, while so contradicting his own testimony, corroborating the testimony of the two respond-

ents, Mr. and Mrs. Powell, who testified their own behalf and who introduced the original documents referred to. So we respectfully submit that under the ~~fair~~ opinion, in the last above cited case, the complainant has woefully failed to meet his burden of proof, and that the original instrument, as introduced in the form of a deed, stands as the true and expressed intention and understanding of the parties.

Then quoting from the case of Rodgers vs. Burt, 157 Alabama, page 104, is the follow:

> "Conceding that the parties stand on an equal footing as to interest, and according to all the witnesses truthfulness and honesty of purpose, the conclusion most favorable to complainant is that he regarded the transaction as a mortgage, while the respondents regarded it as an absolute sale. 'We have said the concurring intention of both the parties determine the character of the transaction, and, when ascertained, must prevail. It is not the intention of the one, dissociated from the intention of the other, which is to be ascertained. The mutual assent of the parties is essential to the completion of a contract. The ascertainment of different intentions and different understandings does not make a case in which equity will construe the transaction to be a mortgage.'"

It will be remembered that two of the respondents, Mr. and Mrs. Powell, testified clearly and concisely as to the facts ~~warranting~~ surrounding the transaction leading up to the execution of instrument in question. They state that they declined to lend Mr. Bishop any more money, already having two mortgages on the property, while Mr. Bishop denies in his testimony that he executed any of the mortgages, then

amends his complaint alleging that he did execute other mortgages, and such other mortgages actually being introduced in evidence. Respondents' testimony is therefore corroborated by documentary evidence, while complainant's testimony is even contradicted by his own bill of complaint as last amended. It will be further noted by the uncontradicted evidence that Mr. Powell immediately recorded the deed, that he went into possession of the land under the deed, moving the complainant's brother off of same, he assessed the property as that of the respondents', paid the taxes thereon as such, made improvements thereon which were visible to the world at large, and the complainant quit assessing his property at that particular time when it was alleged that the deed was made, and has never made any complaint as to the respondents' going into and keeping possession of the said property. Then further than this, the complainant has sought to impeach the reputation of Mr. Powell, but not one derrogatory word has been uttered or testified to as to Mrs. Powell.

Then it will be further noted that the witnesses who testified against Mr. Powell's reputation limited their conclusions, and one of them testified directly that he would believe Mr. Powell and that he had been in the employ of Mr. Powell for some long time, and as to this latter, there was evidence of a little ill-will toward Mr. Powell, by reason of the fact that Mr. Powell had taken his mules,

We have paraphrased the last paragraph of the above decision and not quoted it verbatim.

To show the weakness of complainant's testimony, we quote from same as follows; on page two of said deposition is the following language:

> "He saw that I was in trouble and he said that he would like to help me, and I told him I would be glad to have a little help; so in a short while after that he came down with a mortgage and said, I brought this mortgage down for you to sign this mortgage and let you have the money."

Then on page nine of said deposition and on cross-examination, he said:

> "I do not know how he knew that I was in the hole and wanted some money for a boat. He had been down there talking to this man, I guess. He said, all told, he would loan me the $600.00 on it. That was all I wanted to borrow."

Then on the bottom of page fourteen, in response to a question touching his financial matters he said:

> "I have always had a little money."

And then on the next page he says:

> "I already had it for years."

And then further testifying he could not tell how much he had at all.

Then at the bottom of page fifteen, he says:

> "I might have had four or five hundred, or seven hundred."

Then on page sixteen, he testified:

> "I don't think I had any money when I was talking to him. I don't remember how long it was after I had that talk with Mr. Powell, before I had the four or five hundred."

As to the instrument itself, the complainant testified on page three of said deposition, as follows:

> "Mr. Powell did not read the mortgage over to me. He never read it. Nobody else there read it to me. I did not know what was in that paper. I only supposed it to be a mortgage calling for $600.00, payable in twelve months."

Then on page six of said deposition, in direct response to a question propounded by Mr. Hogan asking about whether the Notary Public asked him whether or not, knowing the contents of the instrument, he executed, etc., and if Mr. Powell asked him anything about that, the witness replied:

> "I don't remember whether he did or not."

It will be found on page eight that this witness testified:

> "It is not a fact that subsequent thereto, and at the time he agreed to take up the Thompson mortgage I made another mortgage to him for $125.00. It is not a fact that I made any such mortgage. I state, as a fact, that there was only one mortgage. That mortgage was for $600.00, all told, the mortgage, taxes, and he had an abstract made, too."

In this connection we call the Court's attention to the mortgage for $125.00 made by the complainant to Laura A. Powell, and offered in evidence, marked Exhibit "B", bearing date of August 30th, 1917, and which mortgage was at that time recorded, and the acknowledgment taken before Alex J. Melville.

It will be observed that it is averred in the bill

of complaint that it was at the complainant's instance, and a part of the agreement in this transaction, that the said Powell should take up the Thompson mortgage, and by reference to page three of the deposition, the complainant states:

> "I did not have any arrangement with Mr. Powell about that, with reference to the Thompson mortgage; only he just agreed, himself, to take it up. He took that mortgage up - that is, I suppose he took it up."

On page eighteen of said deposition complainant testifies as follows:

> "I do not remember what Mr. Powell said to me when he took the acknowledgment. I don't remember whether I asked him to read that paper to me or not. I just thought it was all right. I just trusted to Mr. Powell that the thing was to be a mortgage and that it was just all right, - that there wasn't going to be nothing crooked about it."

We respectfully submit, even though there were no testimony on behalf of the respondents absolutely contradicting the above assertions by the complainant, that the complainant has not met the burden of proof as is required.

The presumption of law is that the instrument in question, and which has been introduced in evidence, speaks the truth, and we respectfully submit that this presumption has not been overcome by the vague and indefinite testimony of the complainant. And when this is met by the clear and concise statements of facts touching this transaction by Mr. and Mrs. Powell, supported by the exhibits in the form

of other deeds and of mortgages, and coupled with the fact that the complainant has not paid any taxes, nor assessed said property since the date of the said deed, and that the respondents have been in actual possession, have assessed and paid taxes thereon, then we respectfully submit that the respondents have more than met their burden of proof, and are entitled to a decree.

We feel sure that the complainant remembers the mortgage for $125.00 as introduced in evidence, and executed by him in favor of Mrs. Powell, and that this is the instrument he has in mind. He only remembers signing one mortgage, so he testifies, yet there are two introduced in this cause, and then one deed.

We therefore respectfully submit that said bill of complaint should be dismissed and the complainant taxed with the costs thereof.

Respectfully submitted,

_____

HOWARD BISHOP, Complainant,	)	
	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA.
	)	
LAURA A. POWELL, ET ALS, Respondents.	)	IN EQUITY

BRIEF IN SUPPORT OF DEMURRERS AS FILED BY THE RESPONDENTS TO THE BILL OF COMPLAINT AS LAST AMENDED.

In order for a bill to be sufficient to have a deed, absolute on its face, declared to be a mortgage, it is necessary that certain averments of facts should be embraced in said bill in order to give it equity.

In the first place it is essential that the bill should show that it was the clear understanding and intention of both parties to the instrument, and especially the grantee, that the said instrument should be a mortgage, as is clearly shown by the case of Reeves vs. Abercrombie, 108 Ala., and on page 537, where it is said:

"Such must have been the clear and certain intention of the grantee as well as the grantor."

In reading the bill of complaint we find that Laura A. Powell and Ola Powell had no conversation with the complainant at all, but the averments are that R. F. Powell acting for and on behalf of himself only had the transaction, the bill showing by express allegation, fifth paragraph, that- "Complainant further avers that the said R. F. Powell was duly authorized to procure the execution of said deed as agent of the said Laura A. Powell, etc." From this averment of the bill, so far as these respondents are concerned, it is shown

to be their intention that a deed should be executed, and that the said R. F. Powell had no authority, as their agent, to accept anything else but a deed. In other words, there is no averment to show that R. F. Powell was acting as the agent of the other respondents, but to the contrary the natural inference would be that he was acting for Bishop. We do not dispute the authorities heretofore cited by Mr. Hogan, to the effect that the principal under certain circumstances is bound by the agent in such matters, nor do we have any complaint with the decisions as cited by him on this point. Our contention is that Mr. Hogan has not averred sufficient facts in his bill to show that the authorities which he cited are applicable. If the Court will read the authorities cited on this point by Mr. Hogan, it will be easily seen how they can be differentiatedfrom this particular case, and how the averments of fact present quite a different aspect in the premises. From all that appears in the bill it may be that Bishop sought out Mr. Powell as his agent, and this would be the natural inference to draw from same. Bishop did not owe Powell anything at the time, but some third party held a mortgage and he wanted to be saved from that mortgage and made his appeal to Mr. Powell. Mr. Powell went to other parties, the bill showing the other parties authorized him to take a deed, and he comes back and takes a deed in conformity with his alleged authority; and where can it be said that as an agent for the other respondents he can fasten upon them any act of fraud?

Another essential averment of the bill, in order that it might not be subject to demurrer, is that the respondents were given an opportunity to correct the mistake prior to the filing of the suit. In the case of Block vs. Stone, 33 Ala., and on page 327, it was said that the complainant- "must ask for correction or show some excuse why not." So far as this bill is concerned, there is nothing to show that the respondents, Laura A. Powell and Ola Powell, knew anything about complainant's greivance, or alleged greivance, until the suit was filed against them.

Another absolutely essential averment of the bill, in order that it might not be subject to demurrer, was that there was a continuing debt to be secured, before a deed, absolute on its face should be declared a mortgage. Quoting again from Reeves vs. Abercrombie, supra, and on page 539-

> "The absolutely certain thing which the cases establish is, that if there is no continuing debt to be secured there can be no mortgage."

Is there any awerment in the bill which would indicate a continuing debt? The complainant confesses that he does not know the amount which he claims to be owing, or the amount which he received, nor does he state that he at any time borrowed from Laura A. Powell and Ola Powell any money directly or through R. F. Powell as their agent. There is no evidence of any debt alleged to have been given, no note, no memorandum thereof, but we find as the only averment which the complainant himself said would show such debt was that something was said by Mr. Powell about the complainant's having twelve months within which to repay the loan. It might well have been that Mr.

Powell told him that he would sell back to him in twelve months, but there is no averment that he even said this, or anything, in the capacity of agent for the other respondents.

Take the language of Kraus vs. Dreaher, 84 Ala., and on page 320 --

"To establish the proposition that the conveyance absolute in form, was in intention and in effect only a mortgage-security, there must be a continuing binding debt from the mortgagor to the mortgagee to upholding it; a debt in its fullest sense. Not a mere privilege reserved in the grantor to pay or not at his election, but a debt which the grantee can enforce as a debt, and for its collection may foreclose the conveyance as a mortgage."

From the above authorities, we respectfully submit, that it will be seen that the bill is subject to the demurrers as filed by Laura A. Powell and Ola Powell.

The same reasons we respectfully submit on the part of R. F. Powell, and add the additional as to him. If he has practiced deception upon the complainant, the complainant would have a full and adequate remedy at law as against him. Certainly he could not correct the instrument involved, as no rights thereunder vested in him, nor can he give to the complainant the relief prayed for. The bill shows upon its face that no title to the property is vested in him, neither is there any averment that he holds any equitable interest therein. We therefore respectfully submit that the case of Abraham vs. Hall, 59 Ala., and on page 390, is decisive of this question. This case says - "The general rule of pleading is, that persons having no interest in the suit, and against whom no decree can be had are improperly made defendants."

Certainly this Court could not enter a decree declaring that this instrument should be reformed so as to make it a mortgage payable to the said R. F. Powell, for that would be inequitable to the parties who actually put up the purchase money, and this is the only relief prayed for as to this particular respondent.

We respectfully submit the demurrers should be sustained.

Gordon, Douglas & Leigh

SOLICITORS FOR RESPONDENTS

HOWARD BISHOP,

Complainant,

-vs-

LAURA POWELL, et al.,

Respondents.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

BRIEF FOR COMPLAINANT

The evidence discloses that C. A. Thompson upon towit, the 9th day of March, 1917, transferred to Miss Ola Powell a mortgage and note made by Howard Bishop, the Complainant, upon towit, the 3rd day of November, 1915. See Respondent's Exhibit "A". This mortgage was to secure an indebtedness of $150.00. See Respondent's Exhibit "E". The Complainant also executed a mortgage dated the 30th day of August, 1917, to Laura A. Powell to secure an indebtedness of $125.00. See Respondent's Exhibit "B".

The mortgage thus transferred to Miss Ola Powell was upon the Northwest quarter of the Northwest quarter and the Southeast quarter of the Northwest quarter (except four acres in the extreme Southwest corner sold to Isaac King) in Section 30, Township 6 South, Range 3 East, Baldwin County, Alabama. See Respondent's Exhibit "E". While the said mortgage made to Laura A. Powell included not only the lands above described, but also all "right, title and interest" of the complainant "as heir in the Mary Ann Bishop estate consisting of 210 acres, more or less, in Section 19, Township 6 South, Range 3 East, Baldwin County, Alabama. See Respondent's Exhibit "B".

After the execution of the foregoing mortgages and upon towit, the 12th day of October, 1917, the complainant conveyed to Laura A. Powell and daughter Ola Powell by a warranty deed the the following described lands, viz: All of the Northwest quarter of the Northwest quarter and all of the Southeast quarter of the

of the northwest quarter of Section 30 in Township 6 South, Range 3 East, except four acres in the southwest corner of said South east quarter sold to Isaac King; also all of Howarx Bishop's interest in the Mary Ann Bishop and William Bishop estate, said land being a one-seventh interest in the east half of the northeast quarter of the Northwest quarter and the south half of the northwest quarter of Section 19; also the east half of the Northwest quarter of the Southwest quarter and the northeast quarter of the southwest quarter, and the west half of the Northwest quarter of the Southeast quarter, and an undivied one-half interest in the southeast quarter of the Southwest quarter, all in section 19, Township 6 South, Range 3 East, said Mary Ann Bishop and William Bishop estate containing 210 acres, more or less, all of said lands being in Baldwin County, Alabama. See Respondent's Exhibit "C".

It will be observed that when the complainant executed said deed he had only an equity of redemption in the lands so conveyed. The legal title thereto was held by Laura A. Powell and Ola Powell to secure a total indebtedness of $275.00.

It should also be observed that the respondent, R. F. Powell, acted as the agent of his wife, the said Laura A. Powell and of his daughter, Ola Powell in said transactions with the complainant. See the deposition of R. F. Powell. Page 1.

The authorities clearly establish that, where a mortgagor conveys his equity of redemption to the mortgagee, and the conveyance is afterwards attacked by the mortgagor, the burden of proof rests upon the mortgagee to show by clear and convincing

evidence

that the conveyance was free from fraud, oppression or undue advantage. "Equity looks with jealous eye upon such transactions" Shaw vs. Lacey 199 Ala. 450, 74 So. 933. "Such transactions will be sustained only when supported by a sufficient consideration and there is an absence of fraud, oppression and undue advantage." (ib) In such transactions equity "will not permit a mortgagee to use his position of superiority to oppress the debtor or drive an unconscionable bargain, or take any undue advantage." Pearsall vs. Hyde, 189 Ala. 86, 66 So. 665. "Equity looks with a jealous eye upon sale of equity of redemption to the mortgagee and requires them to be established by the clearest and most convincing proof. Locke's Exr. vs. Palmer 26 Ala. 312, 324. "Although equity will scan a transaction with watchfullness, it will still be upheld unless procured by fraud, actual or constructive, including any unconscionable advantage or undue influence, or on a consideration which is wholly inadequate Stoutz vs. Rouse 84 Ala. 309, 4 So. 170. <u>In these cases the burden of proof rests upon the mortgagee.</u> Shaw vs. Lacey (supra).

In the case of Goree vs. Clements 94 Ala. 337, 10 So.966, the following language was used, viz: "The expression sometimes used that a release must be for an adequate consideration is thus defined by Field, J. in Peugh vs. Davis 90 U.S. 332 (24 L.ed,775): 'That is to say it must be for a consideration which would be reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.' It may be conceded that if there is an absence of actual fraud and undue advantage, gross inadequacy of consideration - 'marked undervaluation of the property'- will of itself avoid an absolute or

unconditional release. Also if the circumstances are merely suspicious casting a shadow over the fairness of the acquisition of the equity of redemption, but not rising to the dignity of proof, a consideration so unreasonable that a party not unduly influenced, free to act according to his own volition and judgment, would not surrender the property for the price paid, may suffice to vitiate the release'"

In the case of Pearsall vs. Hyde, supra, the following language is used, viz: "Although expressed in varying language the principle found in the books is the same to the effect that a court of equity scrutinizes closely and with jealous care a transacti between mortgagor and mortgagee whereby the mortgagee acquires from the mortgagor his equity of redemption and will not permit the mortgagee to use his position of superiority to oppress the debtor or drive an unconscionable bargain, or take any undue advantage. If it appears that such has been the case a court of equity will set aside the transfer and permit a redemption. If there has been paid any consideration other than the settlement of the mortgage indebtedness a court of equity upon setting aside the deed may hold the deed to be a mortgage for security of the sum or consideration so paid, or may require its payment as a condition precedent to redemption. But in declaring such a deed to be a mortgage in such cases the court does so only for the protection of the grantee and merely as a convenient and effective method of enforcing the equitable maxim 'He who seeks equity must do equity' and the principles involved in those cases where the

bill is filed solely to declare a deed a mortgage as pursuant to the real intention of the parties has no application".

The respondents have cited the case of Hertzler vs. Stephens 119 Ala. 333, 24 So. 521, as requiring the complainant, in a suit to reform a contract, to prove his case by clear, exact and satisfactory evidence. This is unquestionably the rule where the parties dealt at arms length and neither has a position of superiority over the other. But this rule is not applicable to a deed from a mortgagor conveying an equity of redemption to the mortgagee. In such cases the burden is upon the mortgagee to show that the transaction is fair and free from fraud, oppression or undue advantage and that the consideration is not grossly inadequate.

Likewise the case of Moore vs. Tate, 114 Ala. 584, 21 So. 820 lays down the general rule set out in said case of Hertzler vs. Stephens. This case likewise does not deal with a transaction between a mortgagor and mortgagee. It is therefore not in point in the case at bar.

The respondents also cite the case of Hand vs. Cox, 164 Ala. 348, 51 So. 519 to the general rule in this language: "In order to reform an instrument for mutual mistake or for mistake and fraud the evidence must show the mistake beyond reasonable controversy". This case is likewise subject to the criticism that the rule laid down therein does not apply to a case where a mortgagor has conveyed his equity of redemption to the mortgagee.

In the case of Kyle vs. Hayley 190 Ala. 553 67 So. 449 cited by the respondents, the suit was brought to declare a deed absolute on its face to be a mortgage. It was held that the complainant must satisfy the court by a clear preponderance of the evidence that both parties clearly understood that a mortgage was intended. The Supreme Court of Alabama has clearly pointed out in the case of Pearsall vs. Hyde, supra, that the last mentioned rule is not applicable to cases where a mortgagor has conveyed his equity of redemption to the mortgagee. Similarly the case of Knaus vs. Dreher 84 Ala. 319, 4 So. 289, was where a suit was brought to declare an absolute deed to be a mortgage. The case of Rogers vs. Burt 157 Ala. 104 47 So. 226 belongs to the same class. But the rule applied in these cases cannot be imposed in the case at bar. For the subject matter of the instant case is a deed by a mortgagor conveying his equity of redemption to the mortgagee.

It is seen therefore that none of the cases cited by the solicitors for the respondents are applicable to the facts of the case now before the court. None of the cases thus cited dealt with the conveyance of an equity of redemption by a mortgagor to the mortgagee. The fact that distinguishes this case from the authorities cited in behalf of the respondents is that the subject matter of this case is a deed from a mortgagor conveying his equity of redemption to the mortgagee.

The evidence shows that the complainant is an illiterate man, being barely able to write his own name and only able to read a little. See deposition of Howard Bishop page 3. Furthermore, he is an ignorant man. He had no idea of the selling value of the land conveyed by his deed to Ola Powell and Laura A. Powell. See deposition of Howard Bishop page 19. The deposition of this witness furnishes intrinsic evidence that the mentality of this witness, at most, is not more than that of an eight or ten year old child.

On the other hand, R. F. Powell, who handled these transactions as the agent of Ola Powell and Laura A. Powell, being the father of one and the husband of the other, was a man of considerable business ability and experience. He was engaged in the business of lending money. Such a business either attracts people of sharp wits or it tends to sharpen the wits of its devotees above the average. It does not seem, however, to develope their sense of justice and fairness. Furthermore, Mr. Powell felt himself competent to draft a contract between Howard Bishop and Domi Cook in regard to the completion of a boat the former was building for himself. See deposition of R. F. Powell page 5. He drafted the deed which is the subject of this enquiry. See deposition of R. F. Powell page 6. Besides, his deposition itself furnishes intrinsic evidence that he is a man of considerable ability.

In an enquiry of this kind the reputation of the parties and the witnesses is of considerable importance. Let us see what the reputation of Mr. Powell is in the community in which he lives.

Mr. E. B. Gaston, one of the leading citizens of Fairhope, says that he is acquainted with Mr. Powell and has known him about thirty-three years; that he knows Mr. Powell's general reputation is bad; that his reputation for truth and veracity is bad and that he would not believe Mr. Powell on oath if he were testifying in a matter in which he was personally interested.

Mr. Jack Titus, who also resides at Fairhope, testifies that the general reputation of Mr. Powell is not so good and that from what he has heard from many sources he would not believe Mr. Powell on oath if he were testifying concerning a matter in which he was personally interested.

Another witness, Dr. R. A. Hail, of Robertsdale, has known Mr. Powell for twenty-eight or twenty-nine years and that he knows the general reputation of Mr. Powell in the community in which he lives. He testifies that his reputation is bad; that his moral reputation is fairly good, but his business reputation is seriously bad. This witness also testifies that the reputation of Mr. Powell for truth and veracity is bad and that he has heard people say that they would not believe hom on oath. This witness also testifies that he would not believe Mr. Powell on oath; that he does not believe he would swear the truth.

Another witness, T. J. Lowell, testified that he knows R. F. Powell and has known him ever since he has been in Fairhope, over twenty years. The witness testifies that he knows Mr. Powell's general reuptation in the community in which he lives and that he knows his reputation for truth and veracity. He also testified

that Mr. Powell's reputation for truth and veracity is bad and that he would not believe Mr. Powell on oath in a case in which he was personally interested. It is to be noted that this witness testified that he would ordinarily believe Mr. Powell and that it was a bitter pill to be called on to testify against his truth and veracity.

Mr. Charles Lowell also testified that he had known Mr. Powell ever since he had been in Fairhope; that he knew Mr. Powell's reputation for truth and veracity and that his reputation for truth and veracity in a transaction in which he is personally interested is bad; that he would not believe him on oath in a matter in which he was personally interested.

Dan Thompson, another witness for the complainant, testified that he knows Mr. Powell; that he had known him for two years. That he did not know his general reputation in the community in which he lives, but that he did know what people said about him with reference to truth and veracity and that people said "He would defraud and not tell the truth".

Six witnesses have been produced by the complainant who have testified that Mr. Powell's reputation for truth and veracity in the community in which he lives, is bad. The court will consider the reluctance with which men give such testimony. Even personal enemies, as a rule, are especially reluctant to give such testimony. We submit therefore that the testimony of these character witnesses is especially significant and sufficiently evidences the nature of Mr. Powell's business transactions as being grasping, oppressive, and seeking to take undue advantage of those with whom he dealt.

Another important general consideration is the value of the land. Mr. Bishop did not know the value of his land. He testified, however, that Mr. Powell had actually received $125.00 per year as rent for the 76 acre tract. See deposition of Howard Bishop page 5. This was not denied by Mr. Powell, although he heard Mr. Bishop testify and gave his testimony subsequent thereto. Deposition of R. F. Powell page 10. And from common experience we know that the rental value, as a rule, is not less than 10% of the selling price. On this basis the value of the 76 acre tract would be around $1250.00. Taking Mr. Powell's estimate, the value of the complainant's interest in the estate lands at $10.00 per acre would have been $300.00. According to these calculations the actual value of the land acquired by Mr. Powell was $1550.00.

If we consider the testimony of Mr. Powell, only, the consideration paid by him was grossly inadequate. He testified that the land with a good title would have been worth $10.00 per acre, in cash. Deposition of R. F. Powell page 16. That would have amounted to $760.00 for the 76 acre tract and $300.00 for Mr. Bishop's interest in the estate lands, making a total of $1060.00. Upon the basis of these figures it is clear that the consideration paid by Mr. Powell was grossly inadequate.

The discrepancy is even more shocking if we consider Mr. Lay's estimate of value. Twenty acres of the 76 acre tract had been cleared. This witness estimated the value of the cleared lands to be $50.00 per acre. Twenty acres of cleared land would have been worth about $1,000.00. The other lands were estimated by this witness to be worth about $20.00 per acre. The remainder

of the 76 acre tract on this basis would have been worth $1120.00. while complainant's share in the Bishop estate would have been approximately $600.00. In short, for $600.00 the respondents acquuired lands that were actually worth $2720.00. See deposition of George Lay page 24.

The inadequacy of the estimate made by Mr. Powell appears from one circumstance. Twenty acres of the 76 acre tract were cleared at the time of the transaction complained of. Mr. Powell testified that it would cost at least $25.00 per acre to clrar the land. Deposition of Mr. Powell page 27. On this basis the cleared land alone was worth more than Mr. Powell paid for the entire tract of land.

The respondents will urge that Mr. Lay is the brother-in-law of Howard Bishop as a circumstance affecting his credibility. But his insterest in the transaction is much less than that of Mr. Powell. On this basis alone, Mr. Lay's testimony is entitled to the greater credit. But when we consider Mr. Powell's bad reputation for truth and veracity, his apparent under estimation of the value of the lands in question, then his testimony should be entirely disregarded. Besides, the depositions of Mr. Lay and Howard Bishop both bear witness to the evident sincerity of the witness. Mr. Bishop admitted complete ignorance of the value of his land. Mr. Lay displayed no eagerness to testify on this subject. His testimony was clearly an attempt to express his best judgment.

When we come to examine the circumstances surrounding this transaction we find from the testimony of Mr. Powell that the complainant was in necessitous circumstances. He wanted to borrow some money to build a boat. He wanted to secure this additional money by a mortgage on the same land already mortgaged to Ola Powell and Laura A. Powell. Deposition of R. F. Powell page 3. He had already begin the construction of a boat and owed Domi Cook, who was working on the boat, the sum of $550.00 for his labor. Deposition of R. F. Powell page 4. Mr. Bishop wanted to borrow enough money to pay this debt and finish the boat. (ib). All of his property was mortgaged to the wife and daughter of Mr. Powell for the inconsequential sum of $275.00. This ignorant, simple man was helplessly in the power of Mr. Powell.

We will briefly review the steps by which control over the complainant's property was secured by the respondents. In the first place Ola Powell purchased the mortgage given by Mr. Bishop on the the 76 acre tract in Section 30, Township 6 South, Range 3 East, to Thompson securing an indebtedness of $150.00. This was on the 9th day of March, 1917, Approximately five months later, upon to-wit: the 30th day of August, 1917, the complainant made another mortgage to Laura A. Powell to secure an indebtedness of $125.00, this indebtedness to fall due on September 1st, 1917. In other words, this mortgage only ran for about sixty days. The significant fact is, however, that this mortgage covered not only the 76 acre tract,already under mortgage to Ola Powell, but it included also all of Mr. Bishop's right, title and interest as heir in the Mary Ann Bishop estate consisting of 210 acres,

more or less, in Section 19 same Township and Range. The deed conveying complainant's equity of redemption to Laura A. Powell and Ola Powell was made on the 12th day of October, 1917, just about a month and thirteen days after the execution of the mortgage to Laura A, Powell, and before it matured. It should be noted that this deed describes not only the 76 acre tract, and not only the interest of the grantor in the Mary Ann Bishop estate, but it included also his interest in the William Bishop estate. Mr. Powell, the agent for the grantee, was not willing to run any risk of a dispute as to what was included in the Mary Ann Bishop and William Bishop estates, but proceeded to describe this land definitely. As a matter of fact this writing was suppoed to include only the land Mr. Bishop owned individually. Nothing was said about the estate lands. Deposition of Howard Bishop page 4.

The first transaction of Ola Powell with the complainant seemed innocent enough. She merely took over the mortgage for $150.00 held by C. A. Thompson. But from this beginning the respondents advanced step by step until like the tantacles of an octopus they completely enveloped this simple-minded man; he was in their power and helpless to protect his interests.

We come now to the examination of the testimony in regard to the execution of the deed which is sought to be cancelled in this proceeding. Howard Bishop testified that Mr. Powell saw that he was in trouble and said that he would like to help the complainant. The complainant was in trouble and accepted this offer of help. A little while later Mr. Powell brought a paper to the complainant saying: "I brought this mortgage down for you to sign this morning and let you have the money". The complainant

did not read this writing and cannot read enough to understand a document of that kind. He can just read his name - he can read but very little. Neither Mr. Powell nor anyone else read the instrument over to the complainant, who did not know what was in the writing. He supposed it to be a mortgage payable in twelve months and securing the payment of an indebtedness of $600.00. Howard Bishop's deposition pages 2-4.

At the time of this conversation there was nobody with Mr. Powell. There was noone present but Mr. Powell, the complainant and Domi Cook. The latter is now dead. Deposition of Howard Bishop page 3. Mr. Powell agrees with Mr. Bishop upon this point. For he testified that when Mr. Bishop signed the deed they were down at the boat and that only the two Cooks were present, Domi Cook and his brother John Cook, both of whom are dead. Deposition of R. F. Powell page 6.

Mr. Powell, of course, denies that he represented that this writing was a mortgage. But we find that shortly after the transaction Mr. Powell told Mr. Lay, a brother-in-law of the complainant, that "Any time that Howard would pay him back the money and the interest that he could get his land back. He said that he had a mortgage on Howard Bishop's land. Deposition of George Lay, page 20.

Mrs. Powell admits that she was not present when the deed was signed and delivered. Mrs. Powell, however, says that on a preceding day she was present when Mr. Powell agreed to buy the complainant's land for $600.00 and that nothing was then said about a mortgage.

The only direct testimony about the execution and delivery of the deed is the testimony of the complainant and R. F. Powell. The testimony of these two witnesses is in direct conflict. The testimony of the complainant is corroborated by the testimony of George Lay, who had a conversation with Mr. Powell after the execution of the deed, in which the latter admitted that he had a mortgage on Howard Bishop's land. We have already discussed certain testimony and circumstances bearing on the credibility of R. F. Powell. We shall now call the attention of the court to another circumstance appearing from his testimony. Mr. Powell testified that in 1919 he had a contract with Baldwin County, Alabama, to build a road South from Stapleton about eight miles, the contract amounting to about $8,000.00 and that he needed to use some security with the bank to borrow some money with which to carry out that contract, and that he had made a contract with his wife whereby he bought her interest in all that land, and since then he has owned a one-half interest in it and Ola Powell (Malcolm) owns the other half. Deposition of R. F. Powell page 17. The witness testified that a deed conveying this interest to him is of record. The consideration expressed in the deed was $1.00 and other good and valuable considerations. The principal consideration was a piece of bay front property on Mobile bay in North Seacliffe consisting of nine acres of land. Deposition of R. F. Powell pages 17 and 18. Mrs. Powell likewise testified that in 1919 she sold this land to Mr. Powell; that there was no money consideration. She just traded it for some Seacliff property consisting of several

acres which fronted on the bay, although she does not know what this frontage is, but she made this conveyance to Mr. Powell for the purpose of enabling him to get credit on his road contract. This was the first bite on the cherry. Mr. Powell testified at a subsequent date, after he had read the testimony of complainant's witnesses. Upon this subsequent examination this witness testified as follows, viz: "The land was not mine. It belonged to my wife and daughter. My wife never did convey that land to me. I testified the other day that she did, but I was mistaken in regard to it". The witness does not explain how he came to make such a great mistake. He does not explain how he refreshed his recollection. It is very strange, however, that after having testified elaborately as to the circumstances and motives of a transfer of these lands by his wife to him that he had made a mistake. Apparently, all of this testimony, including circumstances and motives, was the product of a vivid imagination. It appears that his wife made a mistake also. When two witnesses make the same mistake, that is a very cogent circumstance to show that they have prepared their testimony together and have conspired to testify alike. In this connection, however, we cannot be certain whether Mrs. Powell conveyed her interest to R. F. Powell, or not. We do not know which testimony is true. Certainly upon one occasion or the other, the witness, R. F. Powell, testified either mistakenly or falsely. A witness, however, who can be so egregiously mistaken on one proposition is not worthy of much credence on any other disputed point.

We submit, therefore, that the testimony of R. F. Powell and Laura A. Powell has been so impeached that no credence can be given to either of them as to what took place in their transaction with Howard Bishop when the deed complained of was signed.

The conduct of the complainant shows that he never understood that this transaction constituted a sale of his property. As soon as he discovered that the respondent claimed to have a deed, he at once took steps to have it cancelled. R. F. Powell admitted that he got a letter from Mr. Mitchell, representing the complainant, in 1918, stating that this transaction should have been a mortgage. Deposition of Howard Bishop page 9. Mr. Powell's recollection about the date of this letter is quite positive and definite. It should be observed, however, that when he was asked if he had this letter he said: "I have the letter in my car". But when he was sent out to get the letter, upon his return he said "I have the letter, but find I haven't it here. I will attach it to my deposition marking it Exhibit "G". It should be observed that the letter is not attached to his deposition. It appears that Mr. Powell is just as positive when he is wrong as when he is right. Nevertheless, it is clear he received Mr. Mitchell's letter, and received it very soon after the transaction complained of.

The original bill of complaint was filed on June 28th, 1918, in the Circuit Court of Baldwin County. It appears clear, therefore, that the complainant has always understood that he was executing a mortgage instead of a deed when he executed the writing which is under investigation in this suit.

But even if we were to consider only the testimony of R. F. Powell, we would be driven unescapably to the conclusion that this transaction was highly oppressive. In the first place Mr. Powell asserted that Mr. Bishop's title to the land was defective. Deposition of R. F. Powell page 3. It does not appear that anyone was asserting a hostile title, nor is there any evidence that it was in fact defective, except Mr. Powell's unsupported assertion. At any rate, Mr. Powell told the complainant that because of his defective title he would not recommend his wife and daughter to lend Mr. Bishop any more money on the land, except for the purpose of perfecting his title. Then it is said the complainant offered to sell the land for $900.00. Mr. Powell beat the price down to $600.00 on account of the alleged defect in the title. Mr. Powell says that the complainant declined to accept $600.00, saying that he owed a man named Cook $550.00 for work on his boat; and that after paying off the two mortgages amounting to $275.00 he would not have left enough money to pay off Cook, let alone to finish the boat. Then according to Mr. Powell the complainant came back two or three days later, at any rate a few days later, and said that Cook would take less than $550.00 for his claim and asked the witness to go down and talk with Cook, saying that whatever Cook knocked off of his bill would be taken off the $900.00 price that complainant had put on the land. The witness went down to see Cook, and Cook offered to knock off $150.00. This was not enough, so no trade was made. Then

two or three days later the complainant again came and said that Cook would make another reduction. So the witness went again to see Cook, and the latter agreed to take $250.00 if he should receive $50.00 cash. It thus appears that, according to the testimony of A. F. Powell the complainant gravitated around Powell, who had some money to lend, just like a junebug fluttering around a bright light at night, and finally he weakened so that he fell into the light. Mr. Powell used the alleged defect in the title to beat down the price of the land, and then he imposed upon the complainant's necessitous situation until he accepted Mr. Powell's offer.

Furthermore, Mr. Powell was not through with Domi Cook, yet. Mr. Bishop was originally indebted to Domi Cook in the sum of $550.00. The latter agreed to reduce his claim to $250.00 for a cash settlement. But before the trade was closed Domi Cook became sick and agreed to accept $200.00 in full settlement of the claim instead of $250.00. When this agreement with Cook was made Mr. Powell gave him a check for $150.00. On that day he did not pay Howard Bishop anything. He further testified "Later I paid him $50.00. I do not remember just how or where this money was paid. I know that I did pay it. I do not know that I have anything in hand - receipt or check - but I think I can find the check". Howard Bishop testified that Mr. Powell did not pay him anything in cash. It is submitted therefore that there is no evidence that Mr. Powell ever paid this $50.00 to anybody, but that he kept this $50.00, himself, and that the actual sum for this deed was not $600.00, but was in fact not more than $550.00. Deposition of A. F. Powell page 14.

Hereinabove we have referred to Mr. Powell's oppressive conduct, according to his own testimony, in beating down the price of the Bishop lands because of the alleged defective title. Mr. Powell claimed to be unwilling to lend any more money upon the land, except to perfect the title. He was willing, however, to buy the land. As a rule, men are more willing to lend money on a defective title than they are to buy it. It is certain that if Mr. Powell bought this land from Mr. Bishop he bought it at a price that was well within the limits of safety. His conduct in resisting this litigation indicates that he believed he had a splendid bargain; otherwise he would have been willing to reconvey the land to Mr. Bishop upon being repaid the amount of his indebtedness and expenditures. But when he received a letter from Mr. Mitchell requesting a statement of the indebtedness, then Mr. Powell took the position that there was no indebtedness; that the land was his and he declined to furnish such a statement. This position was the result of Mr. Powell's knowledge that he had a good bargain at the expense of Mr. Bishop.

We submit therefore that the evidence not only fails to show by clear, satisfactory and convincing proof that the deed executed by Howard Bishop to Ola Powell and Laura A. Powell was free from fraud, oppression and unfairness. But on the otherhand the evidence does show that this deed was secured by fraud, that it was oppressive and that it was procured through unfair dealing. And furthermore, the consideration was not adequate.

In the argument in behalf of the respondents, much stress is laid on the fact that Mr. Bishop had forgotten the second mortgage made by him; the one to Laura A. Powell. When his testimony was taken approximately twelve years had elapsed since the execution of this mortgage. The fact that he had forgotten it is merely a mark of his mental weakness. It bears out the assertion made hereinabove that his mentality is that of a child eight or ten years old. For it cannot be supposed that his testimony in this respect was willfully false. There was no advantage to accrue to him to testify otherwise than/the truth. As a matter of fact, in this litigation it was to his advantage to have remembered this mortgage. For the execution of it brings this case clearly within the operation of the principle laid down in those cases cited hereinabove where a mortgagor has conveyed his equity of redemption to the mortgagee. It is plainly a case where the witness had honestly forgotten what had occurred. It is a circumstance evidencing the ease with which Mr. Powell could have imposed upon him because of his mental weakness.

On examination of Mr. Bishop he testified that when he discovered that Mr. Powell claimed to have a deed to his land, he employed Mr. John E. Mitchell to get a statement from Mr. Powell of the indebtedness, and that he authorized his attorney to ascertain the indebtedness due on account of this transaction. On his cross examination an effort was made to ascertain whether at the time Mr. Bishop had money enough to pay this indebtedness. It appears that Mr. Bishop had sold for $1200.00 the boat upon which he was working when he signed the deed. Deposition of Howard Bishop

page 20. As a matter of fact, it is entirely immaterial whether Mr. Bishop had the money with which to pay this indebtedness, or not. Mr. Powell denied there was any indebtedness and refused to give the requested statement.

We submit therefore that this deed should be cancelled, and that a reference should be ordered to ascertain the amount of the indebtedness together with interest; that this amount should be credited with the fair rental value of these lands for the entire period for which they have been in the possession of R. F. Powell as the agent of Ola Powell and Laura A. Powell, and also with the value of the turpentine taken by them from these lands. This should all be ascertained by a reference to be held by the Register.

Respectfully submitted,

Jesse F Heyer

HOWARD BISHOP, Complainant,	)	
-vs-	)	IN THE CIRCUIT COURT OF
LAURA A. POWELL, et al., Respondents.	)	BALDWIN COUNTY, ALABAMA.
	)	NO._____

COMPLAINANT'S BRIEF ON DEMURRERS TO BILL OF COMPLAINT AS LAST AMENDED

The purpose of this suit is not to have a deed intentionally executed as such, declared to be a mortgage. Certain principles are applicable to such proceedings. For example, that the continuing existence of a debt be shown. But this suit is brought to cancel a deed because of the fraud of the agent of the grantees which induced the execution of the instrument. In this proceeding it is not necessary to show the existence of a debt; the existence or non existence of a debt is wholly incidental in this case, and it is important only as indicating what equity should be done by the Complainant as a condition precedent to relief. In many cases there is no debt to begin with, and yet the jurisdiction of the court to cancel a deed or a mortgage for fraud is well established. As, for example. where a grantor should execute a deed while rightfully relying upon a false representation that he was signing merely a recommendation of good character. Such a deed would be cancelled because of the fraudulent representation. So in the case at

bar, the deed should be cancelled because of the fraud that induced its execution. The Complainant should not, however, thereby escape the payment of his just debts, and so he shouldbe required under his offer to do equity, to execute a mortgage in accordance with his original agreement with R. F. Powell.

Therefore, it is clearly seen that the principle set out in the case of Reeves vs. Abercrombie, 108 Ala. 537, 19 So. 41, is wholly inapplicable. This principle is only applicable to cases where a deed is executed knowingly, but with the intention that its purpose is to secure a debt.

It is true that the Bill contains a prayer that the deed be reformed so that it shall be a mortgage payable to R. F. Powell one year after the 12th day of October, 1917. But the Bill also prays for general relief. Under this prayer the Complainant may be granted any relief consistent with the case made out by the Bill. Wohlert vs. Wohlert, 114 Southern 906. Cancelling the deed and then requiring the Complainant to give a mortgage to R. F. Powell in accordance with the averments of the Bill under his offer to do equity, is substantially the same relief as to reform the deed so that it shall be a mortgage.

There is another view that may be taken of this case. The Bill avers the existance of an indebtedness from the Complainant to the Respondent, R. F. Powell, in the sum of $600.00, and that Complainant agreed to give a mortgage ,to the said R. F. Powell to secure this debt, payable one year after its date. Now, the deed

may be regarded as creating a trust to secure said indebtedness. A deed of trust is not an infrequent form of security. The writer does not regard this construction of the transaction as necessary to the case, but believes that the general principles underlying the cancellation of a deed or mortgage for fraud are applicable to this case, regardless of whether any indebtedness in favor of the grantees exists, or not. It is well established that equity has jurisdiction to reform a written instrument, not only where there has been a mutual mistake on the the part of both parties, but as well where there has been a mistake on the part of one of the parties and fraud on the other.

Hand vs. Cox, 51 So. 519,
,Hammer vs. Lange, 56 So.572,
Holland Blow Star Co.vs.Barclay,69 So.118,
2 Story's Equity Jurisprudence,356,Sec.976,
34 Cyc.920.

The fraud of R. F. Powell in procuring the execution of said deed is clearly averred in the Bill of Complaint. It is alleged therein that On towit, said 12th day of October, 1917, the said R.F. Powell presented to Complainant a certain written instrument which the said Powell represented to be a mortgage as agreed upon by the Complainant and the said R. F. Powell on said lands. It was alleged tha

"The Complainant was indebted to R. F. Powell in the sum of $600.00, and that it was understood and agreed between the Complainant and the said R. F. Powell that the Complainant should secure said indebtedness by a mortgage on the property described in the Bill of Complaint, payable one year from said 12th day of October, 1917, that on said date the said R. F. Powell presented to the Complainant a certain written instrument which the said Powell represented to be a mortgage, as agreed upon by the Complainant and the said R. F. Powell on said land in the sum of $600.00 payable twelve months after date". That the Complainant "is unable to read and write and tha he relied upon the representation of the said R. F. Powell that said instrument was a mortgage as hereinabove described, and that the Complainant had no knowledge that said instrument was other than the said R.F. Powell represented it to be,and that Complainant signed said paper under the bona fide belief that it was said mortgage."

It is also alleged that, as a matter of fact, said instrument was a deed from the Plaintiff to Ola Powell and Laura A. Powell, the wife and daughter of said R. F. Powell, respectively. It is further averred that the said R. F. Powell was duly authorized to procure the execution of said deed as the agent of the said Laura A. Powell and Ola Powell; or that after the execution of said deed the said Laura A. Powell and Ola Powell accepted it and ratified the act of the said R. F. Powell in procuring the execution of said deed; or that said R. F. Powell was acting on his own account and procured the execution of said deed to said grantees for the purpose of defrauding the Complainant and hindering him in the enforcement of his rights in the premises.

The said Laura A. Powell and Ola Powell cannot set up as a defense that they did not actually participate in the fraud of their agent. In both Law and Equity they are responsible therefor, so long as they stand as grantees and beneficiaries under the fraudulent deed.

Logan vs. Chastang,91 So.867,
Rowland vs. Hester,90 So.910,
Hartley vs.Frederick,191 Ala.175,67 So.983,
Fowler vs.Ala. Iron & Steel Co.66 So.672.

In the case of Logan vs. Chastang, supra, it appears that Logan, as the agent for J. H. Reichert, procured the Chastangs to execute the deed in controversy, falsely and fraudulently representing to them that it was an agreement to the effect that Logan was to recover and clear up the title to the tract which the Chastangs had inherited from their father, and on which they, or some of them,

resided at the time, and that the land recovered was to be divided between the Chastangs and Logan, half and half. The deed was executed in favor of the said J. H. Reichert. The Chastangs denied that they knew Reichert in the transaction, or that they intended to make any agreement with, or conveyance to him. The defense on the part of Reichert was, that Logan was his agent, and that he did not actually participate in the fraud imputed to his agent, that the Chastangs were fully well aware of the contents of the deed, and that they thoroughlly understood the transaction.

So far as agency is concerned, that case is identical in principle with the case at bar. The Complainant sets up that he did not know Laura A. Powell and Ola Powell in the transaction, and he denies that he intended to make any agreement with, or conveyance to them. The only difference between the two cases is as to the fact misrepresented by the agent. In the case at bar the agent represented that the instrument in question was a mortgage, when as a matter of fact it was a deed. In the Chastang case Logan represented that the deed was an agreement that he was to recover and clear up the title to certain lands. This difference does not change the principles applicable to the two cases. And so with the case at bar, it does not avail the defendants Laura A. Powell and Ola Powell, that they did not actually participate in the fraud imputed to their agent. In both Law and Equity they are responsible therefor so long as they stand as grantees and beneficiaries under the fraudulent deed.

In the case of Fowler vs. Ala. Iron & Steel Co., it appeared that Samuel F. Fowler was the agent for another who furnished the purchase money to buy certain lands. Samuel F. Fowler took a conveyance in favor of Samuel O. Fowler, his infant son. He falsely, stated to his principal, however, that the conveyance had been taken in his own name and he executed a conveyance of said lands to his principal. Many years later, the fraud was discovered and a suit was brought against Samuel O. Fowler to quiet the title of the Principal. The court granted relief and said:

"On the former appeal in this case it was held 'that the deed procured by Fowler to his infant son would be considered as to Crawford and his successors in interest as the confederated breaking up and repudiation of the trust reposed in the former with the result that the son became by construction of law a trustee for the Complainant, a Trustee exmalefici o'. It follows as declared of a similar situation by the Supreme Court of the U.S. in McIntire vs. Pryor, 173 U.S. 38,52, 19 Sup. Ct. 352, 43 L.ed. 606, that Samuel O. Fowler is as fully chargeable with the fraud and deceit practiced upon Beers and his successors in title as if Samuel O. Fowler has committed them personally."

Another point taken by the demurrers of the Respondent is, that the Complainant did not priorto filing suit demand of the Respondent the correction of the deed. It may be true that, where a mistake has occurred innocently tne Complainant must request a correction by the other party before filing suit. Such a case was Black vs. Stone Co. 33 Ala. 327, which is relied upon by the Respondents. This rule does not apply where the mistake occurred through the fraud of the Respondent. Then no notice prior to filing suit is required. The suit itself is sufficient notice.

Where fraud intervenes notice or demand for a correction is only material as affecting the question of costs.

Strickland vs. Strickland,90 So.345,
Morgan vs. Gaiter,80 So.876,
Singletarry vs. Varnum,75 So.890,
King vs. Livingston Mfg. Co.68 So.897,
Perry vs. Boyd, 28 So.711.

And finally the demurrers assigned by R. F. Powell raised the proposition that he is not a proper party to the suit. As stated in the brief of the Respondents, "The general rule of pleading is that persons having no interest in the suit and against whom no decree can be had, are improperly made defendants." Abraham vs. Hall, 59 Ala. 390. But in the case at bar a decree can and should be rendered against R. F. Powell. The rule also is that, where an agent has been guilty of fraud he is a proper party and may be charged with the costs of the suit..

Messer-Moore Ins. & Real Estet Ci. v.Trotwood Lark Land Co. 54 So.228,
21 Corpus Juris,Sec. 267,
2 Corpus Juris 902, Sec.606.

Where the injury complained of results not from mere nonfeasance or ommission of duty by the agent,but from his positive misfeasance the agent is personally liable to the third person; the actual perpetrator of the positive wrong not being permitted to relieve himself by showing that the wrong was done while he was acting in the course of his employment as agent for another. In all such cases he is personally liable, whether he did the wrong

intentionally or ignorantly, by authority of his principal; for a principal cannot confer on his agent any authority to commit a tort upon the rights or property of another. An agent will be held personally liable to third persons for all damages sustained by them in consequence of any fraudulent or malicious acts committed by him or on behalf of his principal, and in an action against the agent for fraud, the fact that he derived no personal profit or benefit therefrom, is immaterial. Messer-Moore Ins. & Realty Co. vs. Trotwood Park Land Co., supra.

In the case at bar the Complainant is entitled to recover from the said R. F. Powell the costs of this proceeding. In addition to that, he is entitled to recover from him such damages as he may have sustained by reason of R. F. Powell's fraudulent representations. These damages are in addition to his right to have the conveyance cancelled.

The Bill shows that the Complainant agreed to give a mortgage to the said R. F. Powell as security for a certain indebtedness running from the Complainant to the said R. F. Powell. As a matter of equity and as a condition precedent to receiving relief, the complainant should be required, and must offer to do equity, by executing a mortgage to said R. F. Powell in accordance with their agreement. It is clear that in order to adjust the equities between Laura A. Powell, Ola Powell and the said R. F. Powell it is necessary to have the said R. F. Powell before the court. If he used the money of the said Laura A. Powell and Ola Powell he

should be required to reimburse them, and if necessary for their security to transfer to them the mortgage to be executed by the Complainant to the said R. F. Powell. It is therefore clear that R. F. Powell is a proper party to this suit.

It is apparent from the foregoing argument that the Respondents have misconceived the purpose of this suit. It is not to declare a deed, intentionally given to secure a debt, to be a mortgage, but it is brought to cancel a deed, the execution of which was induced by fraud, and which is goverened by the principles applicable to the latter proceeding rather than those applicable to the former. In addition the respondents also ask that there be applied to this case priciples which are only applicable to a case involving the execution of a deed through mutual mistake. Such a case is different from a case involving a deed executed through fraud, and also different from a case to declare a deed to be a mortgage.

We submit therefore, that the case made by the Bill has equity, and is sufficient to authorize the relief prayed for.

Respectfully submitted,

Jesse F. Hogan

Howard Bishop,

Complainant.

vs.

Laura A.Powell, et als

Respondents.

In the Circuit Court,

Baldwin County,Alabama,

In Equity.

DECREE ON DEMURRERS.

This cause coming on to be heard is submitted for decree on demurrer of Respondents to the Bill of Complaint as last amended, said Amended bill being filed herein on the 15th day of April 1926, and upon consideration by the Court is of the opinion that said demurrers should be overrulled.

It is therefore ordered, adjudged and decreed by the Court that said demurrers , and each of them,be,and they are, hereby,overruled.

Respondents are allowed thirty days from from the filing of this decree within which to make full answer to the Bill

Done at Chambers at Montroeville, Alabama,this the 9th day of Febuary, 1929.

F. .Hare, Judge.

- -

The State of Alabama, Circuit Court In Equity.
Baldwin County.

I.T. .Richerson,Register of said Court of said County, Alabama, do hereby certify that the above is a full,true and correct copy of the decree rendered by said Court on the 9th day of Febuary,1929.as appears of record in said Court.

T. W. Richerson

Register.

Copy

Howard Bishop,

vs.

Laura A. Powell et al.

Filed Feb 15th, 1929.

T.W. Richerson, Register.

Mobile, Alabama,

October 23, 1930.

HOWARD BISHOP,	)	
	)	
Complainant	)	IN THE CIRCUIT COURT OF
	)	
vs.	)	BALDWIN COUNTY, ALABAMA.
	)	
LAURA POWELL, ET AL,	)	IN EQUITY.
	)	
Respondents.	)	

Judge F. W. Hare,
Monroeville, Alabama.

Dear Judge:

We presume that the Register has already or will, within a few days, hand you his report upon the reference ordered by you in the above said cause, and we are so firmly convinced of our position that the theory or doctrine of law, as invoked by complaint for complainant, has no application to this case, that we presume to address you further upon same.

That you may more clearly see the point that we are attempting to make, we will start back with the beginning of this case. In the original bill of complaint, as filed by Mr. John E. Mitchell, and in the third paragraph, is the following language - "and it was agreed by the complainant and the said R. F. Powell that the amount advanced by the said Powell would take up the Thompson mortgage, and the amount which the said Powell had loaned to complainant was to be secured by a mortgage from complainant to the said

R. F. Powell." Then in the fifth paragraph of the same bill of complaint, it is alleged - "it was understood and agreed between the complainant and the said R. F. Powell that the mortgage to the said Powell was to be in the sum of said $600.00 on the property described, and that complainant was to have twelve months from that date within which to repay the mortgage, the mortgage being for the purpose of securing a loan of $600.00 for twelve months." Then in the seventh paragraph, it will be found that the complainant has ascertained that the said instrument that the said Powell represented to complainant to be a mortgage is, in fact, a deed, and complainant further avers that said deed was obtained by the said Powell by a fraudulent representation as to its contents."

Then the prayer in said bill is as follows:

"Complainant further prays that upom the final hearing of this cause, your Honor will enter a decree declaring said instrument above referred to to be a mortgage, and allow complainant twelve months from the 12th day of October, 1917, within which to exercise his equity of redemption."

Demurrers were sustained to this bill of complaint and then same was amended by Rickarby & Frazer, as attorneys for complainant, but there is no variation or change in the above quoted averments, and the prayer of said amended bill was as follows:

"Your Honor will enter a decree declaring said instrument above mentioned to be a mortgage and order a reference to determine the amount due thereunder, if any, and will allow complainant to redeem the said premises, etc."

Then this bill was subsequently amended by Judge Hogan, as solicitor for complainant, and he made no change in the above quoted portions of the original bill, as will be seen by reference to the second, third and fourth paragraphs, and that the prayer be that - "On the final hearing of this cause, will enter a decree cancelling said instrument as described in the fifth and sixth paragraphs hereof, etc; or if this should not be the proper relief, that your Honor will enter a decree declaring said instrument to be a mortgage, and ascertain the indebtedness secured thereby and to whom payable, and fix a reasonable time in which the complainant may exercise his equity of redemption."

Then after testimony had been taken in said cause, the complaint again amended his bill of complaint; "to conform to the evidence" by alleging that after the Thompson mortgage, the complainant borrowed an additional sum of $125.00 from the respondents, and also an additional sum on October 12, 1917, and then avers - "that he further agreed with the said R. F. Powell that he would execute a mortgage to take up the Thompson mortgage and the mortgage held by Laura Powell, and an additional sum loaned to the

complainant on said deed, said mortgage to be upon complainant's real estate in Baldwin County, etc."

Then further in the third paragraph, he avers - "but it was understood and agreed between the complainant and the said R. F. Powell that the mortgage to the said Powell, as set out in the second paragraph hereof, was to be in the sum of $600.00 on the property above described for the purpose of securing the indebtedness from the complainant to the said R. F. Powell, and that complainant was to have twelve months, from said 12th day of October, 1917, in which to pay said mortgage."

The prayer was not changed, at all, so with the averments as above stated, bill of complaint and the prayer thereof, the only averments were that the instrument was intended as a mortgage, and at no time, to be considered as a deed, as bill averred the time of the indebtedness, the time for which it was to run and leaving nothing for inference, that the complainant simply intended to mortgage his property and at no time to make a deed conveying either his equity of redemption or right of redemption."

Then in answer to this bill of complaint, and the prayer thereof, the respondents denied that the instrument was fraudulent, that the parties respondent had taken any advantage of the complainant, and that the instrument was a deed absolute on its face.

Then what is the issue in this case, and what is the prayer in this case? Simply that no deed was ever intended to be executed by the complainant according to the original and amended bills of complaint, but rather that a mortgage was intended to be executed, while on the part of the respondents, it was contended that a deed was intended to be executed, that the complainant knew what he was executing, and that the instrument, as recorded, expressed the intention of both parties.

Counsel for complainant argued at great length and cited authorities to the proposition that the respondents bought the equity of redemption in the mortgaged property from complaint, and that, therefore, the burden was upon the respondents, to show that the transaction was free from fraud or oppression and undue advantage, and that a sufficient consideration was paid. In support of this, counsel cites the case of Shaw vs. Lacey, 199 Ala. page 450.

Now we ask the Court to look the bill of complaint, original or amended, over carefully, and see if there is ever an averment made that the respondents were buying the equity of redemption of the complainant. In order for this question to have arisen, the bill must have averred that the complainant did execute a deed to the respondents and this deed conveyed his equity of redemption. And the burden upon his part would have been

to have shown such a deed to have been executed. Then, if the bill of complaint does not state a set of facts showing that the complainant had conveyed his equity of redemption, and the respondents had bought his equity of redemption, then the principles of law, as laid down in the above case, would not be applicable. But to the contrary, the bill specifically states that the complainant intended to execute a mortgage, but through the fraud of one of the respondents, he inadvertently executed a deed, so, therefore, the question is one entirely different from that settled in the above said case.

Take the statement of facts in the above cited case, and it will be found that the complaint itself states that there was an outstanding mortgage and that it was agreed that a deed should be executed for the purpose of letting the mortgagee use it as collateral to borrow money on, and that it would be considered just as security for the debt, and when the debt was paid off, the land would be deeded back to the original mortgagor, and that this was done with the knowledge and consent of both parties, and the Justice of Peace who prepared the deed and to bring it more patented under the law, as announced in the above decision, the respondents stated in his answer - "that the deed was executed in satisfaction of the debt." This admission or allegation in the answer conclusively shows, so far as the respondent was concerned, that it was a deed conveying the mortgagor's equity of re-

demption, and therefore, the burden would be upon the vendee to show adequate consideration and that the transaction was free from fraud and oppression. There can be no analogy, whatever, between the case adjudicated in the decision of Shaw vs. Lacey, supra, and this case, where the complainant denies a deed was ever intended to be executed and makes no averment of any fact which would tend to show that he executed a deed for the purpose of conveying his equity of redemption. The instant case contains the averment that a mortgage was intended to be executed, through misrepresentation, a deed was executed and the prayer is that the deed be declared a mortgage.

Now go a step further and take the testimony of complainant, himself, and see what he says as to the situation, and to quote from his testimony, we find the following - "So in a short while after he came down with a mortgage and said, 'I brought this mortgage down for you to sign this mortgage and let you have the money'. ** He said, all told, he would loan me the $600.00 on it. That was all I wanted to borrow. *** Mr. Powell did not read the mortgage over. I never read it. Nobody else there read it to me. I did not know what was in that paper. I only supposed it to be a mortgage calling for $600.00, payable in twelve months." It is not a fact that subsequent thereto and at the time he agreed to take up the Thompson mortgage, I made another mortgage to him for $125.00. It is not a fact that I made any such mortgage. I stated, as a fact, that there was only one mort-

That mortgage was for $600.00, all told, the mortgage and taxes, and he had an abstract made, too. *** I just trusted to Mr. Powell that the thing was to be a mortgage and that it was just all right, -- that there was not going to be nothing crooked about it."

So that the Court will see that both from the testimony of the complainant, the averments in the bill of complaint, and the prayer of the bill, that the complainant did not intend for this issue to be tried upon the theory that he had conveyed his equity of redemption, but to the contrary, that all he intended to sign was a mortgage, all that he ever agreed to sign was a mortgage, and that it was through the misrepresentation of Mr. Powell that he signed anything else but a mortgage, and he now prays that said instrument will be declared a mortgage, the amount of the mortgage indebtedness be ascertained and he be allowed to redeem the said property from such a mortgage.

We feel that we have presented clearly the difference between the issue involved in the present case and that involved in the case of Shaw vs. Lacey, supra, and to support our theory, we shall quote from a case, and which is a leading case, showing the law as to having a deed, absolute on its face, declared a mortgage, and then the case of Shaw vs. Lacey, supra, drawing the dis-

tinction between such a case and where a deed has been executed, so alleged in the complaint and so admitted by the respondents conveying the equity of redemption. Now in the case of Kyle vs. Haley, 190 Ala. and on page 553, is the following language:

> "The bill in this case was filed for the purpose of having a conveyance, which is absolute on its face, declared to be a mortgage, and to redeem. In a case like this--where the instrument, absolute in form--not in form conditional--to obtain relief, the complainant must satisfy the Court by at least a clear preponderande of the evidence that a mortgage was intended and clearly understood by the grantee as well as the grantor."

Then to show the degree of evidence necessary, and where the burden of proof is, we quote from the leading case of Knaus vs. Dreher, 84 Ala. page 319, as follows:

> "But to entitle the complainant to relief in such cases, the testimony must be clear, consistent, strong and convincing. It has sometimes been said that it must be stringent."

Then to quote from the case of Shaw vs. Lacey, 199 Ala. and on page 452:

> "We have examined all of the evidence in this case with critical care, and in view of the Principles stated, we are constrained to the conclusion that the respondent has not met the burden of proof in vindication of his purchase of complainant's equity of redemption in the mortgaged property, and that complainant is entitled to the relief prayed.

> The contrary conclusion of the chancellor is evidently founded on a misapplication to this case of the rules of law that cover the impeachment of original transactions which are absolute in form, by parol proof that they are intended to be mortgages only. But that is a different case and is ruled by different principles."

We, therefore, respectfully submit that the complainant has sought relief upon a different basis from that contemplated by your Honor in considering the case, and that the complainant has utterly failed to prove the allegations of his bill of complaint or show himself entitled to the specific relief prayed.

We apologize for trespassing upon your time to this extent, but are so imbued with the idea that our position is correct that we could not resist. We are mailing a copy of this to Judge Hogan.

Very respectfully yours,

GORDON, EDINGTON & LEIGH

By

REG/L

Copy to Judge Hogan

Bishop
of
Parnell

Brief

HOWARD BISHOP

-vs-

LAURA A. POWELL

and OLA POWELL

IN THE CIRCUIT COURT-EQUITY SIDE.

STATE OF ALABAMA. BALDWIN COUNTY.

TESTIMONY AT REFERENCE HELD BY REGISTER ON JULY 23RD., 1930.

WITNESSES:

FRANK B. NIHART

JUDGE. W. D. STAPLETON.

P. A. PARKER

G. W. JOHNSON

R. F. POWELL, ONE OF THE RESPONDENTS IN THIS CASE

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