MOORE ET AL. *vs.* MADDEN & WIFE.

Upon a bill in chancery, exhibiting an absolute deed of conveyance of real estate, signed by the defendants, but not sealed, and charging that the deed was not sealed through mistake, and praying the aid of chancery to compel the defendants to seal the deed the court cannot, upon proof that the deed was executed and delivered as a mortgage, to secure certain debts, the defeasance being a separate instrument of writing, decree a foreclosure of the mortgage and sale of the mortgaged property; because the decree is not in accordance with the specific prayer of the bill; nor do the facts stated in the bill warrant such a decree under the general prayer.

Appeal from the Chancery side of the Washington Circuit Court.

THIS was a bill in chancery, brought by John D. Moore, James Moore and David Moore against James W. Madden and Wife Clarrinda, in the Washington circuit court, and determined in June 1845, before Sneed, judge.

The substance of the bill, answers, and exhibits, upon which the cause was tried, is stated in the opinion of this court. The court below decreed that the instrument prayed by complainants to be perfected as a deed, was designed by the parties as a mortgage, that it be perfected, foreclosed, and the mortgaged property sold to satisfy the debts secured thereby. Defendants appealed.

MACLIN, for the appellants. The court cannot grant the relief prayed for: 1st, because the facts charged in the bill are denied by the defendants and are not proven by complainants: 2d, because the instrument was never designed as an absolute conveyance but as a mortgage—a mere security for the future payment of certain sums of money. This is charged by Madden, admitted by Trant, and although denied by the Moores so far as relates to themselves, but admitted that the transaction was by John D. Moore; and it is admitted upon the record that he did execute the defeasance.

As to the character of the instrument I refer the court to the following authorities. 2 *Story's Eq.* 282, *sect.* 1015. *ib.* 286, *sect.* 1018, 1019, 1020. 4 *Kent. Com.* 142, *Fonbl. B.* 2 *ch.* 3 *sec.* 4

Newcomb vs. Bonham, 1 *Vern.* 7-232. *Seton vs. Slade,* 7 *Vez.* 273. 4 *Kent Com.* 142, 143, 159. *Holdridge vs. Gillespie,* 2 *J. C. R.* 33, 34. *Com. Dig. Chancery* 4, 1-2, 2046. *Castelson vs. Lansing,* 1 *Cane's Cas. in Error* 209. *Johnson vs. Clark,* 5 *Ark. R.*

The instrument being intended as a mortgage, will the court decree it an absolute deed in fee? Most certainly not; and if not, the specific relief prayed for cannot be granted.

The second inquiry is what relief may be granted under the general prayer.

The court will not decree that it be perfected as a mortgage for two reasons: 1st, because the complainants utterly disclaim the instrument as a mortgage and absolutely deny that it was ever intended as such. I presume that no court would be warranted in granting a party relief which he disclaims and upon facts which he denies. It is clear that Madden thought he was executing a mortgage; and if the Moores thought, as they allege, that they were receiving an absolute deed, the court cannot interfere, because there was a mutual mistake, there being no agreement between the parties. Upon this point I refer the court to 1 *Story's Eq.* 149, *section* 134. The court cannot decree the instrument a mortgage because it is not consistent with the case made out by the complainant's bill. The bill itself is the foundation for the decree, and no relief can be granted unless warranted by the facts in the bill, whatever may be admitted by the answer in favor of the plaintiff of a nature or character differing therefrom. Upon this point I refer the court to the following authorities. *Story's Equity Pleading* 41, 2, 3, 4. *Mitford's Pleading. Wilkin vs. Wilkin,* 1 *J. C. R.* 117. *Ex'rs of Aman vs. Beardsley,* 2 *J. C. R.* 275. *Hurse vs. Mill,* 13 *Vez.* 119. *Palk vs. Clenton,* 12 *Ves.* 47, 65. 1 *Vez.* 426.

The authorities are conclusive upon the subject, and according to the last case cited, no amendment can be allowed other than for the purpose of adding proper parties, and varying the prayer to suit the facts contained in the bill. In this case no amendment can be allowed; because the specific relief prayed for is adapted to the case presented by the bill, and a prayer for any other purpose would be inapplicable to the bill and wholly unsupported by it.

All the parties are before the court and therefore the complainants cannot amend. I conceive that the only decree that can be pronounced is to dismiss the bill.

D. WALKER, contra. The errors assigned in this case may well be considered together, and amount in substance to this: that inasmuch as the bill prayed a specific relief, with a prayer of such other relief as the equity of the case required, the complainants were limited to the specific relief and none other.

Upon this subject we contend that if the chancellor should be of opinion that the specific relief asked for should not be granted, it becomes his duty to grant such relief as may be compatible with equity under the state of case presented by the pleadings and evidence. See *Story's Eq. Pl.* 40. 6 *Yearger* 21.

A prayer for general relief without any prayer for specific relief is sufficient. *Barton's Eq.* 40, 11 *Vez.* 371, and in the case of *Cook vs. Martin,* 2 *Atk. Lord Hardwick* is reported to have said that praying general relief is sufficient, and that he agreed in opinion with the distinguished jurist when he said the prayer of general relief was next best to the Lord's prayer. See 1 *Ark. Rep.* 31, *Dugan vs. Cureton.* 1 *Saund.* 17.

The complainants charge that they had advanced and paid out large sums of money for a certain tract of land, that by accident or mistake the deed had been executed without seal and prays that it may be perfected. The defendants in answer admit the advancement, but insist it was a loan; they further admit the instrument was intended to be sealed when executed, but when sealed it was in truth intended to be taken and held as a mortgage simply; and in their answer pray that it may be adjudged and taken as a mortgage, and the complainants to answer as to the facts and the amount due. They answer and set forth the amount; their answer thus drawn out is evidence for the complainants.

The case, thus standing upon the bill, answer and exhibits, was set down for hearing. The instrument was made as in the bill set

forth; the defendants admit it in answer: the instrument then is a deed.

The instrument then being sealed, the next enquiry is, shall an absolute title pass, or shall the instrument be taken and held as a mortgage. The answer with the exhibits might well have sustained it as such. 3 *Ark. Rep.* 364. Authorities however to this point, are useless, as the decree is in strict accordance with the relief indicated by the answer and the equity of the case. When equity once gets jurisdiction it retains it until the whole subject is disposed of. 1 *Ark. Rep.* 31. What wrong then has the defendant sustained? He got the money—the proof is abundant and positive, he admits it, and that the land was mortgaged for its payment, and offers to pay the money. The decree only gives day for payment, and directs, if the land be not already sold, to be sold for that purpose.

OLDHAM, J. did not sit in this case.

JOHNSON, C. J. This was a bill to perfect an instrument of writing charged to have been intended as an absolute conveyance in fee. It is alleged that, although the instrument has the word 'seals' written on the face of it, and is regularly acknowledged by Madden and wife, through an omission or mistake they failed to affix their seals or scrolls by way of seal, and that by means of which omission or neglect they failed to get a legal title to the lands therein described. That they never discovered the fact until about the 15th of February 1841, when they applied to Madden and wife to make them an absolute and legal title to the said land, and to deliver the possession, but they refused, and pretended that the said writing was a good and valid deed, and that it conveyed a legal title. The complainants then prayed for a writ of subpœna to bring the defendant, James W. Madden before the court, to answer the charges contained in the bill and also that a decree shall be entered against him to execute and deliver to them a good and valid title in fee simple to the land described in the writing set out in the bill and to let them into possession, they having paid the purchase

money, and for other and further relief. The defendants in their answer admit that they executed such a writing as that exhibited and set forth in the bill, but positively deny that they ever intended it is an absolute deed of conveyance, or that they ever pretended that such would or could be the effect of it. They admitted that it was their intention that the said writing should be under seal, and Madden himself also admitted that he refused to make the same a deed when subsequently requested to do so by the complainants. The defendants then charged that the said writing was intended by both parties, at the time of its execution, to be a deed of mortgage to secure the payment of certain debts due and owing by said defendant, James W. Madden to said complainants, and for certain other debts, for which the complainants or one of them was security. The defendants then charged that on the same day of the execution of the writing set forth in the bill, the complainants and himself executed a certain instrument by which it was agreed that on the payment of certain moneys therein specified by a day therein named, they the said complainants would relinquish the deed exhibited in the bill of complaint. At a late stage of the proceeding the record shows that both parties appeared by their solicitors and agreed over their respective signatures that the paper marked "Exhibit A," (meaning the said defeasance) appended to the defendant's answer was signed and delivered by John D. Moore in his life-time, and that he also signed the names of James Moore and David M. Moore, and that they shall be received in evidence to the same extent as though that fact were proven by the subscribing witnesses to said instrument. These are all the facts which we deem it material to state. Upon this state of case the question arises as to the correctness of the decree rendered by the circuit court.

The first point to be settled is the character of the contract entered into by the parties. The condition upon which the land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument; and if the deed be absolute in the first instance and the defeasance be executed subsequently it will relate back to the date of the principal

deed and connect itself with it, so as to render it a security in the nature of a mortgage. In equity, the character of the conveyance is determined by the clear and certain intention of the parties, and any agreement in the deed, or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the re-payment of money, will make it such and give to the mortgagor the right of redemption. A deed, absolute on the face of it and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake. See 4 *K. C. p.* 140, 1 and 2 and the cases there cited. The two instruments taken together would doubtless constitute a mortgage, and entitle the complainant to a decree of foreclosure in case the facts charged and the case made in the bill would justify such decree. We conceive that this court could not sustain the decree of foreclosure, because it is not consistent with the case made by the bill of complaint. The complainants, so far from charging it to be a mortgage, expressly and positively disclaim it and call upon the defendants to answer upon oath, and to say whether the instrument described in the bill was not intended as an absolute conveyance in fee. The relief prayed must depend upon the proper frame and structure of the bill; for the court will grant such relief only as the case stated will justify; and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby. Thus if a bill is brought for an annuity or rent charge of ten pounds per annum left under a will, and the counsel for the plaintiff pray at the bar that they may drop the demand of the annuity or rent charge and insist upon the land itself, the court will not grant it, for it is not agreeable to the case made by the bill. *Grimes vs. French,* 2 *Atk.* 141. *Dorner vs. Fortescue,* 3 *Atk.* 124, 132. It is not doubted but that the court may grant any relief to which the party complainant may show himself entitled under the

general prayer, in case it shall be consistent with the case made, that he will not be confined to the specific relief prayed. The usual course is for the plaintiff to make a special prayer for the particular relief, to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the court. The latter never can be properly and safely omitted; because, if the plaintiff should mistake the relief to which he is entitled in his special prayer, the court may yet afford him the relief to which he has a right under the prayer of general relief. The complainants did not ask for a foreclosure of a mortgage nor did they admit that the two instruments taken together would amount to a mortgage; but on the contrary they disclaimed the fact, and insisted throughout that the instrument exhibited in their bill was intended as an absolute deed in fee. It would be difficult to conceive of a case where the decree would be more directly at war with the case made by the bill than the one now before us. We are therefore clearly of opinion that the circuit court erred in pronouncing the decree in this case, and that consequently it ought to be reversed. Judgment reversed.