

**Gear Vs. Pariah**

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**SooperKanoon Citation :** [sooperkanoon.com/79993](http://sooperkanoon.com/79993)

**Court :** US Supreme Court

**Decided On :** 1847

**Appeal No. :** 46 U.S. 168

**Appellant :** Gear

**Respondent :** Pariah

**Judgement :**

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**Gear v. Pariah**

**46 U.S. (5 How.) 168**

*APPEAL FROM THE JUDGMENT OF THE SUPREME*

*COURT OF THE TERRITORY OF WISCONSIN*

## **SYLLABUS**

In this case, the pleadings and proofs show that a mortgage executed by the debtor to the creditor was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover.

As it did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue, the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment.

Parish filed a bill in the District Court of Iowa County, Territory of Wisconsin, for the purpose of compelling Gear to enter satisfaction of a certain mortgage executed by the former to him or to reconvey the premises therein, charging that it had been fully paid and satisfied, and for the purpose also of a perpetual stay of

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a certain judgment confessed, and entered up in favor of Gear against Parish.

The mortgage was executed on 27 April, 1836, and was given to secure the payment of \$4,200, four months after date, and the bill charged that the whole amount, with interest thereon, had been paid on 1 August thereafter, and a receipt taken for the same, that Gear had refused to deliver up and cancel the said mortgage or reassign the premises unless the complainant would pay in addition the amount of a certain judgment that had been obtained against him and which, he charged, was given for part and parcel of the money secured by the mortgage, and of course satisfied with it.

The defendant in his answer set up that previously to the execution of the mortgage the parties had been engaged in extensive business transactions with each other, that he had at different times advanced large sums of money to and incurred many liabilities for the complainant, and that the mortgage in question was given to secure the payment of such an amount as complainant would be found indebted in on the final adjustment of their accounts. That no settlement had taken place or balance been struck between them, but that defendant had subsequently ascertained that the sum of \$1,562.38 was justly due him, over and above the amount secured by the mortgage. That this demand was placed in the hands of an attorney for collection, whereupon the complainant confessed the judgment in question, with a stay of execution for six months.

The defendant further answered and admitted that the mortgage had been fully paid and satisfied, but denied that he had refused to reconvey the mortgaged premises. On the contrary, he had executed and delivered to the complainant a lease of all his right and title to the premises, and which had been accepted as satisfactory.

The complainant put in a replication, and the parties went to their proofs.

There were but two witnesses examined, one of them present at the execution of the mortgage, the other at the giving of the judgment.

Hamilton, who was present at the execution of the mortgage, states that he was at Galena in the spring of 1836, when the parties were engaged in closing their business; that the amount on book due Gear exceeded \$3,000, besides other charges and accounts outstanding, the amount of which was not then ascertained. That it was agreed a mortgage of \$4,200 should be given, which, as was supposed by both parties, might be sufficient to cover the whole of the indebtedness, but that a settlement was to be made thereafter and the exact balance ascertained, and to be adjusted accordingly, whether it should exceed or fall short of the sum specified in the mortgage. Neither party was to be concluded as to the amount; that was to depend upon the final adjustment of the accounts.

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Mr. Turney, the attorney who gave the judgment for Parish, states that he was consulted by him at the time a suit was threatened for the recovery of this balance, claimed as due over and above the mortgage; that at the request of Parish, he had an interview with the attorney of Gear on the subject, when it was agreed that if judgment was confessed for the amount claimed, the mortgage should be given up and cancelled, and all errors corrected, if any, on ascertaining the balance between the parties; that the judgment was given with this understanding.

Upon this state of the pleadings and proofs, the district court decreed that the injunction which had been previously issued enjoining the defendant, Gear, from

collecting his judgment against Parish should be made perpetual and that the complainant recover his costs of suit.

On an appeal to the supreme court of the territory by the defendant, the decree was affirmed with costs. The case was brought here on an appeal from that decree.

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MR. JUSTICE NELSON delivered the opinion of the Court.

We are unable to discover any foundation for the decree of the court below. The pleadings and proofs narrowed the question down to the simple inquiry as to the force and effect of the judgment between the parties, which had been rendered upon confession. The answer appears to have removed all further complaint about the refusal of Gear to cancel the mortgage and disencumber the premises, as the subject is not carried into, nor made a part of, the decree. That is confined to the order enjoining the defendant, his agents and attorneys, perpetually from collecting the judgment.

The sole question, therefore, is whether or not, upon the pleadings and proofs, the appellant is justly entitled to enforce the payment of this money.

The bill of complaint admits, and the answer reiterates the admission, that the mortgage was executed to secure the payment of an unadjusted balance of accounts arising out of extended business transactions. The exact sum being, at the time, unascertained, an amount was agreed upon, and carried into the mortgage, supposed to be large enough to cover any balance that might be found due.

Neither party was to be concluded by the mortgage, or the amount agreed upon. The actual indebtedness was to depend upon a future settlement of the accounts.

The proofs confirm this view, and further establish, that the judgment was confessed voluntarily and advisedly, for a balance ascertained, and claimed by

Gear to be due over and above the mortgage; and that the only reservation made, at the time, was the privilege of correcting errors in the adjustment of the accounts, if any should be made to appear thereafter.

The judgment was not given, as in the case of the mortgage, for an unascertained balance, and therefore a security, simply, for whatever sum the plaintiff might thereafter show to remain due and unpaid. A specific sum was claimed, as the true balance of the accounts, and a suit threatened. The judgment was confessed for this sum, subject to the right of Parish to reduce the amount. Failing or omitting to do this, the whole amount was collectable. The burden lay upon him to show the errors, if any; that he assumed, according to the vary terms upon which he consented to confess the judgment; and as no errors were shown, or are even pretended, in the case before us, it is clear the plaintiff is entitled to the whole amount of his judgment and to execution for the same; and that the court below erred in entertaining the bill and awarding the injunction.

We shall therefore

*Reverse the decree of the court below with costs and remit the proceedings with direction to dissolve the injunction and dismiss the bill with costs of suit.*

## **ORDER**

This cause came on to be heard on the transcript of the record

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from the Supreme Court for the Territory of Wisconsin, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this Court, that the decree of the said supreme court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said supreme court, with directions to that court to dissolve the injunction in this case, and to dismiss the bill of the complainant with costs of suit.

