again into the Circuit Court here for Frederick County sitting as a Court of Equity as prayed the said Complainants and defendants by their solicitors aforesaid and the Judge of the Circuit Court for Frederick County aforesaid sitting as a Court of Equity. Thereupon at the term aforesaid and on the 18th day of March A.D. 1865 was filed in the said Court here and in the cause aforesaid the following opinion of the Court to wit.

The Bill in this cause filed by Lycurgus N. Phillips Executor of Noah Phillips late of Frederick County deceased against Isaac Pearson and others Against the Non residents mentioned in the Bill a decree pro confesso has been passed and against all others except Pearson an interlocutory decree has been taken. The Bill alleges that Isaac Wright one of the defendants being indebted to Noah Phillips in his life time in the sum of fourteen hundred dollars upon several promissory notes on the 7th day of April 1848 he together with his wife mortgaged the property in question to secure the payment of said Notes to the said Noah Phillips and on the 7th day of December 1848 said Wright and wife by deed conveyed the same property to Abraham Wolf who sold and conveyed parts of said land to several parties. That the defendant Pearson claims title to the mortgaged premises as purchaser either from Wolf or Wright and is now in possession thereof but has no deed for the same. The amended bill states that the defendant Pearson at the time he purchased the lands in question from Wolf or his agent Wright had actual notice of the Mortgage executed by Wright and wife and purchased the same with full knowledge of the Mortgage and the balance of debt due thereon and that since his purchase he has paid part thereof to Noah Phillips and admitted in writing signed by him the amount of the of the balance of the Mortgage debt as claimed to be due. The prayer is that the Mortgaged premises may be sold to pay the debt remaining due and for general relief. To the original and amended bill the defendant Pearson has answered admitting the facts in both to be true, but insisting that the paper writing purporting to be a Mortgage is void as to him it not being executed according to the acts of Assembly of the State and that therefore his purchase and possession cannot be decreed to be sold for the payment of the Mortgage debt.

It will be seen by examination of the Mortgage filed with the Bill that it was executed on the 7th day of April 1848 two years after the passage of the act of Assembly of 1846 Chapter 211 and that there is no endorsement of an affidavit by the Mortgagee that the Consideration set forth in the Mortgage was true and bona fide. It is clear then upon the statement of the originals bill that as to all persons other than the Mortgagor or the Mortgagee it is a void instrument and cannot affect the interest of a subsequent purchaser of the Mortgaged premises. But it is alleged in the amended bill and the fact is admitted by the answer that the defendant Pearson had actual notice of the existence of the Mortgage and that since his purchase he paid part of the money secured by it. There is no charge or pretense of fraud on the part of Pearson or any body else in the execution of the Mortgage and the Court is to look at the case free from any such ingredient. If this Mortgage had been properly executed as required by the act of 1846 there could be no doubt that the premises

purchased by the defendant Pearson would be liable for the indebtedness to be secured by it, and the Court have no hesitancy in passing a decree for the sale of it for that purpose. But can this Court without a pretence of fraud on the part of any party to the cause undertake to pass a decree for the sale of the property of a purchaser of the property intended to be Mortgaged because the purchaser had notice of the existence of an instrument void as to him and all the world except the maker of the instrument? If the enactment of the Legislature declares this instrument invalid nothing that Pearson could do or omit to do could make it stronger or more clear. This may be illustrated thus. Suppose two persons in the presence of a third the third one taking no part in the transaction should conclude a contract by parole for the sale and purchase of a farm: No agreement in writing no money paid and no possession delivered and afterwards the third party who witnessed all this should purchase the same farm from the party who had made the parole contract to sell and pay for it or be put into possession in pursuance of the contract and the first purchaser by parole in succession should assert his title to the property because the second purchaser had actual notice of the parole purchase and thus set aside the Statute of Frauds? There are cases to be found in the Books where the Courts of Chancery has relieved even though the Statute of Frauds has not been complied with. Thus if a testator intending to execute a will every thing being done except the execution and being at the point of death the witnesses were sent for to attest the execution and the heirs by force kept them back in such a case Equity would relieve, so a legacy charged in a void will would be enforced if the devisee or executor prevented it from being put in writing. In all these cases it is upon the ground of fraud that Courts interfere to give relief and not upon the mere fact that a party had notice of the existence of the void instrument of writing. Pearsons Mortgage and this instrument executed would make that a good and valid instrument which the law says shall be invalid and void. There is no fraud pretended or charged upon any of the parties to this cause. If Pearson had been guilty of fraud by which the defective execution of the Mortgage was brought about it might present a different question. But the case standing free from such charge or pretence the principles I have advanced cannot fail to be the object of the act of Assembly the Statute is framed not for the purpose of asserting the rights of parties against each other or protecting them from fraud but with a view to a purpose of public policy and in such cases no relief can be given in law or equity against the positive words of the act unless in case of fraud. No legal title ever passed under this Mortgage and against the policy of the law no equitable title can exist. The payment of part of the debt secured by the Mortgage by Pearson and his statement in writing filed with the bill can make no defence. If the farmer which he was not bound to pay it is not to be said he is for that reason bound to pay more in the same way. I have been referred to the case of Willard and others vs Ramsburg and others recently decided by the Court of Appeals as a case bearing strongly on the question. I confess I can see no similarity in the two cases. In the case referred to Peter Gunn executed the Mortgage of the same piece of land. The first one dated 21st day of August 1858 to Ramsburg and the second dated 24th day of August 1858 to Abraham Willard. The second Mortgage