WARREN COTTON OIL & MANUFACTURING COMPANY *v.* SULLIVAN.

Opinion delivered October 14, 1929.

1. MORTGAGES—RIGHT OF REDEMPTION.—A purchaser of land at execution sale under a judgment lien, subject to a prior mortgage, became owner of the debtor's equity of redemption, and succeeded to the debtor's right to redeem the land from foreclosure of such mortgage to which the purchaser was not a party.
2. MORTGAGES—RIGHT OF JUNIOR LIENOR TO REDEEM.—Where land subject to a mortgage is sold under execution against the mortgagor, the purchaser succeeds to the rights of the mortgagor in such sense as to be entitled to redeem from a foreclosure sale, to which he was not a party, unaffected by any transaction between the mortgagor and the mortgagee subsequent to the judgment.
3. MORTGAGES—RIGHT TO REDEEM.—Where real estate is sold on execution, and is afterwards sold on the foreclosure of a prior mortgage, the purchaser at the execution sale, if not made a party to the foreclosure proceedings, may redeem and treat the deed made on foreclosure as a mortgage, and the purchaser on foreclosure sale as the mortgagee in possession.
4. MORTGAGES—MERGER.—Where a judgment creditor purchased the land at execution sale, subject to a prior mortgage, and subse-

quently acquired the mortgagee's rights, it thereby acquired a complete title to the land, and was entitled to possession.

5. APPEAL AND ERROR—HARMLESS ERROR.—Transfer of an action of ejectment to equity was harmless where the facts were undisputed, and the decision must have been the same in either court.

Appeal from Cleveland Chancery Court; *H. R. Lucas,* Chancellor; reversed.

STATEMENT OF FACTS.

Appellant, Warren Cotton Oil & Manufacturing Company, instituted this action in the circuit court against L. L. Sullivan and John L. Sullivan to recover possession of a tract of land comprising 401 acres, more or less.

Appellees set up facts which, they claimed, constituted equities between them and the appellant, and asked that the cause be transferred to the chancery court. A motion to transfer to equity was granted, over the objection and exceptions of appellant. Appellant filed a motion in the chancery court to transfer the cause back to the circuit court, and saved its exceptions to the ruling of the court in refusing to grant the same.

The material facts proved in the chancery court are as follows: On December 3, 1923, L. L. Sullivan, the owner of the lands in controversy, executed a mortgage on them to the Bank of Rison to secure an indebtedness of $2,687, evidenced by a promissory note bearing eight per cent. interest from date, which he owed to the Bank of Rison. On March 31, 1923, appellant obtained a judgment before a justice of the peace against appellee L. L. Sullivan for $274.18, with interest at ten per cent. per annum. An execution was issued and returned *nulla bona* on said judgment. On March 20, 1924, appellant caused a transcript of said judgment to be filed in the office of the circuit clerk of Cleveland County, in which the lands in controversy are situated, and in all respects complied with the statute regulating such practice. On the 29th day of December, 1925, appellant caused an execution to be issued out of the office of the circuit clerk of Cleveland County on the transcript of said judgment,

and the same was levied by the sheriff upon the lands involved in this action as the property of said appellee. The sheriff sold the lands under the execution on the 27th day of February, 1926, after due notice as prescribed by statute, and appellant became the purchaser at said execution sale. The lands were not redeemed from the execution sale, and on the 13th day of April, 1927, the sheriff of Cleveland County executed and delivered his execution deed to said lands to appellant.

On the 24th day of February, 1926, the Bank of Rison brought suit in equity in Cleveland County to foreclose its mortgage on said lands, and duly obtained a decree of foreclosure on the 14th day of June, 1926, but appellant was not made a party to the suit. A decree of foreclosure was entered of record for the sum of $2,485.39, with interest from the 23d day of February, 1926, and the property was ordered sold by a commissioner of the court to satisfy said judgment and decree. The Bank of Rison became the purchaser under the foreclosure decree for the amount of its debt and interest, and the sale was duly approved and confirmed by the chancery court. On November 12, 1926, the bank conveyed said land by quitclaim deed to John L. Sullivan. On the same day John L. Sullivan executed a mortgage on said land to said bank to secure an indebtedness evidenced by note of the same date for $2,687, due one year after date, with interest at the rate of eight per cent. per annum from date until paid. Appellee John L. Sullivan then took possession of said lands, and has been in possession ever since.

On the 2d day of June, 1927, said Bank of Rison, for and in consideration of the sum of $2,805.05, paid by appellant, transferred to said appellant, without recourse, the deed of trust executed to it by John L. Sullivan under date of November 12, 1926, and duly recorded the mortgage in the mortgage records of Cleveland County. The amount paid said bank by said appellant was the amount necessary to redeem said lands from the mort-

gage executed to said bank by appellee L. L. Sullivan in 1923.

The chancellor found that the assignment to appellant by the Bank of Rison of the mortgage executed to it by John L. Sullivan did not have the effect of redeeming said lands from said mortgage; that the present action is not an attempt to effect a redemption from said mortgage, but is a suit in ejectment; that the suit was started before the maturity of the note of John L. Sullivan to the bank, and cannot be treated as an action to foreclose the mortgage which was executed on the 12th day of November, 1926; that said John L. Sullivan is the owner and entitled to the possession of said lands, subject to the lien of the mortgage executed to said bank on the 12th day of November, 1926, which was transferred to appellant on the 2d day of June, 1927.

The present suit was commenced on the 29th of September, 1927. The case is here on appeal.

D. A. Bradham and *Duval L. Purkins,* for appellant.

Clary & Ball, W. D. Jones, John E. Hooker and *T. M. Hooker,* for appellee.

HART, C. J., (after stating the facts). The record shows that appellant obtained judgment against appellee L. L. Sullivan, before a justice of the peace, and, after a return of *nulla bona* on an execution issued by the justice, the transcript of the judgment was filed in the office of the circuit clerk in the county where the lands in controversy are situated. The judgment obtained before the justice of the peace, and filed in the office of the circuit clerk, was a junior lien to a mortgage executed by the owner of the lands to the Bank of Rison. An execution was issued by the circuit clerk upon the transcript of the justice judgment, and levied on the lands in controversy. The lands were sold by the sheriff, and bid in by appellant. When appellant purchased the lands at the execution sale, he acquired title thereto subject to the mortgage which appellee had executed on said lands to the Bank of Rison. In other words, appellant

acquired the equity of redemption in the lands purchased at the execution sale, and held the lands subject to the mortgage of the Bank of Rison. The judgment of appellant was a junior lien, and therefore subject to the mortgage of the Bank of Rison. Having purchased the lands at the execution sale, appellant became the owner of the equity of redemption and succeeded to the rights of appellees to redeem the lands from the mortgage of the Bank of Rison. *Turner* v. *Watkins,* 31 Ark. 429; *Cohn* v. *Hoffman,* 56 Ark. 119, 19 S. W. 233; and *Dalton* v. *Brown,* 130 Ark. 200, 197 S. W. 32.

The same principle was decided in *Smith* v. *Simpson,* 129 Ark. 275, 195 S. W. 1067, where the court held that the purchaser under foreclosure proceedings instituted by the junior mortgagee has the right to redeem from the first mortgage.

As we have already seen, appellant became the owner of the equity of redemption by purchase at the sheriff's sale; and, not having been made a party to the foreclosure proceedings against appellee instituted by the Bank of Rison, it is difficult to see how its right to redeem could be affected by the foreclosure proceedings. In *Cohn* v. *Hoffman,* 56 Ark. 119, 19 S. W. 233, it was held that an execution purchaser of a mortgagor's interest in land is entitled to redeem upon payment of the mortgage debt, and cannot be required to pay any other debts of the mortgagor not a charge upon the premises when the judgment lien attached.

This is in application of the general rule laid down in *Jackson* v. *Weaver,* 138 Ind. 539, 38 N. E. 166, so that, when appellant became the owner of the equity of redemption of appellees by purchase at the sheriff's sale, not having been a party to the suit of the bank to foreclose its mortgage, the decree in that case in no wise affected its rights. Its title could not be divested in a foreclosure proceeding to which it was not a party.

In 42 C. J. 361, it is said that, where lands subject to a mortgage are sold in execution against the mortgagor,

the purchaser succeeds to the rights of the mortgagor in such sense as to be entitled to redeem from the mortgage, unaffected by any transaction between the mortgagor and the mortgagee subsequent to the judgment. The case of *Cowling* v. *Britt,* 114 Ark. 175, 169 S. W. 783, is cited in support of the text.

The reason for the rule is that, if the purchaser of the equity of redemption of the mortgagor could be compelled to pay all subsequent liens without his consent, the mortgagee could deprive him of the value of his judgment lien by extending credit to the mortgagor, and judgment debtor after the lien of the judgment had attached. This would greatly lessen the value of a judgment lien, and would necessarily impair the rights of the judgment creditor and the purchaser at the execution sale.

In 19 R. C. L., par. 456, page 640, it is said that the purchaser of the equity of redemption sold under execution has the right to redeem, and, where real estate is sold on execution and is afterwards sold on the foreclosure of a prior mortgage, the purchaser at the execution sale, if not made a party to the foreclosure proceedings, may redeem and treat the deed made on foreclosure as a mortgage, and the purchaser on foreclosure sale as the mortgagee in possession. Among the cases cited in support of the rule is that of *Insley* v. *United States,* 150 U. S. 512.

In the application of this general rule to the undisputed facts in the present case, it is clear that the Bank of Rison and appellees, as the mortgagors, could not, by any action or agreement, affect the rights of appellant by foreclosure proceedings had subsequent to the purchase at the execution sale by appellant of the equity of redemption of appellee L. L. Sullivan in the lands in question. Otherwise, as we have already seen, the Bank of Rison, as mortgagee, and appellees as mortgagors could, by agreement, deprive appellant of a valuable right which it had secured by purchase at the execution

sale. If the value of the equity of redemption which had become vested in appellant could be lessened or impaired by subsequent foreclosure proceedings to which appellant was not a party, it is very clear that it would thus be deprived of a valuable property right. By its purchase at the execution sale, appellant acquired the title to the lands in controversy, subject to the mortgage of the Bank of Rison. It had the right to redeem from this mortgage; and, when the mortgage was assigned to it by the Bank of Rison, appellant acquired a complete title to the lands in controversy, and was entitled to the possession thereof. The Bank of Rison could not have executed a quitclaim deed to appellee divesting appellant out of the title which it had already acquired.

In this view of the matter it does not make any difference whether the case was tried in law or in equity. The facts are undisputed, and the decision must be the same in either court. *Shapard* v. *Lesser,* 127 Ark. 590, 193 S. W. 262, 3 A. L. R. 247. Therefore the decree will be reversed, and the cause will be remanded with directions to grant the prayer of appellant for possession of the lands, and for such other relief as in equity it is entitled to. It is so ordered.