DAKE *v.* WOODCOCK.

Opinion delivered March 24, 1930.

1. EXECUTORS AND ADMINISTRATORS—FORECLOSURE WITHOUT PROBATING CLAIM.—A suit to foreclose a mortgage may be brought without probating the claim against the estate of one of the makers of the note secured by the mortgage.
2. EXECUTORS AND ADMINISTRATORS—PARTIES TO FORECLOSURE.—In a suit to foreclose a deed of trust, the executor of the estate of deceased maker of the note secured was a necessary party for determination of the amount due on the note.
3. MORTGAGES—DEBT SECURED.—Where a husband and wife executed a note and mortgage conveying her land as security, and the husband, succeeding to her interest in the land by her will, thereafter executed a note for the payment of taxes, interest, etc., under an express agreement that the payment of the note was secured by the terms and conditions of the original deed of trust, there was no error in foreclosing the mortgage for payment of the second note.

Appeal from Garland Chancery Court; *W. R. Duffie*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a decree of foreclosure of a deed of trust. Appellees brought this suit on the 20th day of February, 1929, against appellants to foreclose a deed of trust given by Emily H. Dake and Charles Dake, her husband, to secure the payment of a note for $5,000, both executed on the 28th day of January,

1927, and also for a note for $533, executed by Charles Dake on the 24th day of June, 1928.

The complaint alleged the execution of the $5,000 note and deed of trust during the lifetime of Emily H. Dake, with a description of the real estate, record of the mortgage and its provisions, and that, after the execution of the note and deed of trust by Charles Dake and Emily H. Dake, his wife, she died in April, 1927, and her will was duly probated on the 28th day of June, 1927, and under its provisions, with the exception of the bequest of $5 made to her daughter, Emily Dake, devised and bequeathed her entire estate to her husband, defendant, Charles Dake, and that he thereupon became seized and possessed of the title in fee simple to the property subject to the mortgage or lien herein referred to. It further alleged that on June 4, 1928, Charles Dake procured an additional loan of $533 from appellees under and subject to the original terms and conditions of the deed of trust sued on, evidenced by a promissory note for that sum. Prayed judgment against Charles Dake, and Charles Dake, as executor, for the sum of both of the notes, that it be declared a first lien on the lands described and paramount to the lien held by Selim Mattar, who was also made a party, and that the lien be foreclosed and the property sold. A copy of the $5,000 note was filed as an exhibit.

Appellants demurred to the complaint, alleging the court was without jurisdiction, the insufficiency of the complaint in not stating facts sufficient to constitute a cause of action, misjoinder of parties defendant, and the misjoinder of causes of action. The demurrer was overruled, and exceptions saved.

An amendment was filed to the complaint alleging that on the 4th day of June, 1928, Charles Dake, joint maker of the original note sued on and joint mortgagor in the deed of trust given to secure same, under the will of Emily H. Dake, duly probated, became seized in fee simple of her estate and the property embraced in the mort-

gage, borrowed $533 under and subject to the original terms and conditions of the deed of trust, it being stipulated by the said Charles Dake, both on the face of the note given for said loan and on the margin of the record of the original deed of trust on the said date, "that said note was executed by the said Charles Dake for an additional loan made to him under the terms and conditions of said original deed of trust." It was further alleged that said note was given in payment of past due interest, insurance and taxes, which the mortgagee in said deed of trust covenanted and agreed to pay. Prayer for judgment as in the original complaint.

Answer was filed by Selim Mattar, in which he conceded that his mortgage was subject to the original mortgage, and there is no appeal by him.

The court rendered judgment against appellants, Charles Dake and Charles Dake, executor, etc., in the sum of $5,388, principal and interest due on the $5,000 note, and in the sum of $577.41, principal and interest due on the $533 note executed by Charles Dake on June 4, and $123.40 for taxes due on the mortgaged premises for the year 1928, paid by plaintiff under provision of the deed of trust, with interest from date of the decree; decreed a foreclosure of the mortgage and sale of the property barring all right and equities of redemption of the defendant, Charles Dake and Charles Dake, executor, etc.

O. H. Sumpter, for appellant.

C. T. Cotham, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in decreeing a foreclosure upon the mortgage and the rendition of the decree against the executor, the claim against the estate of Emily Dake not having been probated and being barred by the statute of nonclaim. The suit was properly brought for foreclosure of the lien against the property mortgaged or conveyed by the deed of trust without probation of a claim against the estate of one of the makers, deceased, of the secured note. No judgment was sought against the

estate of the decedent, but only foreclosure of the lien of the mortgage executed by the decedent as security therefor. *Hall* v. *Denckle,* 28 Ark. 506; *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 456, 252 S. W. 901.

There is no contention that the debt secured by the mortgage was barred by the statute of limitations, § 7408, C. & M. Digest. *Mueller* v. *Light,* 92 Ark. 522, 123 S. W. 646, 31 L. R. A. (N. S.) 1013.

The executor of the estate of deceased, maker of the note, was a necessary party to the suit for the determination of the amount due on the note for payment of which the lien was to be foreclosed. Under the allegations of the complaint, the money borrowed by Charles Dake, $533, was for payment of taxes, interest, etc., the payment of which was also secured under the terms of the mortgage, and, Charles Dake having succeeded to the ownership of the property mortgaged under the provisions of the will of his wife, and expressly agreed that the payment of the notes was secured by the terms and conditions of the original deed of trust, there was no error in foreclosing the lien of the mortgage for its payment.

We find no error in the record, and the decree is affirmed.