

FIRST NATIONAL BANK *v.* RUSSELL.

Opinion delivered April 21, 1930.

1. EXCHANGE OF PROPERTY—CLEAR TITLE.—A contract for the exchange of property which requires to be furnished an abstract showing "a clear title" is complied with by furnishing an abstract showing a marketable title or one free from material defects.
2. EXCHANGE OF PROPERTY—MARKETABLE TITLE.—Whether a title shown by an abstract is a marketable one is a question of law for the court to determine.
3. DEEDS—SUFFICIENCY OF WORDS OF CONVEYANCE.—The operative words of a deed to land in Missouri, "do hereby grant and warrant," etc., were sufficient to convey title.
4. BILLS AND NOTES—ASSIGNMENT OF NOTE—PREMATURE COMMENCEMENT.—A suit by the assignee of a note against the assignors to recover the amount the assignee was compelled to credit upon the note upon the makers clearing the title to land was not premature because the corrected abstract was not submitted to the assignors first.
5. BILLS AND NOTES—ASSIGNMENT OF NOTE—RIGHTS OF ASSIGNEE.—A bank discounting a note without knowledge of the fact that the makers were entitled to a credit thereon in case the title to land exchanged was cleared up, being compelled to allow such credit, is entitled to recover the amount of such credit from the assignors.

Appeal from Sevier Circuit Court; *B. E. Isbell*, Judge; reversed.

STATEMENT BY THE COURT.

Appellees, Russell and wife, exchanged lands owned by them in California with the Thomases and their wives for lands situated in Wright County, Missouri, 40 acres in one tract and 68 acres in the other. Under the terms of the written contract, the Thomases agreed to and did execute, as an additional consideration for the exchange of the properties, a note for \$3,000 secured by a deed of trust to a trustee named therein conveying the California property. The note was payable in installments of \$50 per month, commencing May 15, 1928, and continuing until the whole amount was paid and bearing interest from March 15, 1928. The contract recited that the Thomases at the time were unable to furnish a clear title to the 40-acre tract of Missouri land being

exchanged, and the parties agreed, in the event that they were able during the life of the deed of trust to furnish clear title to the said tract, then appellees, the Russells, would credit the \$3,000 note with the sum of \$1,000. The condition of the title was to be evidenced by a written report of the McMurtrey-Blankenship Abstract Company of Hartville, Missouri, or its successors, the expense of the clearing to be borne by the appellees. The deeds, the \$3,000 note and the trust deed securing it were duly executed and delivered, and on November 8, 1928, appellee sold the note to appellant bank for \$2,300, a discount of \$265.91 less than the amount then due thereon, and executed and delivered to appellant bank with the note an assignment of the note and deed of trust. On January 8, 1929, the Thomases assigned all their rights under the original contract to appellant bank in consideration for its crediting their \$3,000 note, discounted and held by the bank, with the sum of \$1,000. Subsequent to the execution of the contract, the Thomases had proceeded to clear the title to the 40-acre tract of land, and met all the substantial objections pointed out in the abstract by appellee's attorney, and delivered the abstract of title to appellees. The bank, having had notice of the conditions and provisions of the contract from its being left with the cashier in escrow upon compliance with its terms in regard to perfecting the title and demand of the Thomases for credit on their note of \$1,000 as provided under the terms of the contract, indorsed the credit on the note discounted and held by it, and took an assignment of the contract from the Thomases.

The bank brought suit on the 10th day of January, 1929, against appellees for the \$1,000 so credited on the note, alleging that appellees had sold and transferred the note to appellant, and placed it beyond their power to comply with the contract, had breached same and were liable to appellant as assignee thereof.

Appellees defended on the ground that the Thomases had failed to comply with the terms of the contract, and,

having failed to furnish clear title to the 40 acres of land, were not entitled to the \$1,000 credit on the note and that appellant as assignee was entitled to no relief under the contract, even though it had given credit on the note to the Thomases.

The abstract of title to the 40 acres of land was introduced in evidence; the conflicting opinions of the attorneys who examined the abstract, and their testimony about the title as disclosed by it are also in the record. The principal, if not the only, question is whether the abstract shows such title to the lands as was in contemplation of the parties in making the contract for the exchange of the lands. Both parties asked for a directed verdict, the appellees asking some other instructions. The court submitted the question to the jury on two instructions, and it rendered a verdict for appellees, and from the judgment thereon this appeal is prosecuted.

Lake, Lake & Carlton, for appellant.

Abe Collins, for appellees.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not directing a verdict in its favor since there is no substantial conflict in the testimony, and we have concluded that the contention must be sustained. Appellees do not deny having discounted the Thomas note with appellant bank without disclosing to it any information of the contract binding them to the crediting of \$1,000 on the note upon the furnishing of an abstract by the Thomases showing a clear title to the 40-acre tract of Missouri land during the life of the deed of trust securing the payment of the note, nor that appellant bank duly entered the credit of \$1,000 claimed by the Thomases upon showing the clearing of the title to the 40-acre tract of land; their contention being that the crediting of such amount on the note was unwarranted, since the completed abstract did not show a clear title to the 40-acre tract of land within the meaning of their contract.

The abstract of title as first made was presented to appellees and their attorney, Mr. Jackson, who pointed out three alleged substantial defects in it, and refused to approve same. Other attorneys were employed by the Thomases to clear the defects in the title, one of which was done by a successful suit to quiet the title, the others were shown to be without merit because of curative statutes of the State of Missouri, and another by the execution of a deed from one of the parties grantor in one of the conveyances who lacked a few days of being of age when the first conveyance was made, which fact however did not appear in the abstract of title, there being nothing on the face of it indicating the minority of this grantor.

The Thomases were only bound under the contract to furnish an abstract showing a merchantable or marketable title to the 40-acre tract of land, the expression "clear title" in the contract meaning no more than that, one free from material defects. Since the abstract of title as corrected does not disclose any defect in the record title which could be cured only by parol proof or a title dependent upon parol proof, the question of whether the title is a marketable one was one of law for the court to determine—a question of legal construction. 27 R. C. L. 491; *Townsend v. Goodfellow*, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739; *Mead v. Altgeld*, 136 Ill. 298, 26 N. E. 388; note 52 A. L. R. 1462.

The court erroneously submitted the question to the jury. The record discloses that the objection (3d) made to the decree to quiet title did not arise out of the proceeding, but was attempted to be interposed by an affidavit disclosing that one of the heirs of the deceased grantor was a resident of the county where the suit was brought and constructive service duly had—an attempted collateral attack or showing that a judgment duly rendered upon constructive service was invalid. The question of this conveyance relative to its invalidity on account of the acknowledgment shown to have been taken

by a justice of the peace of the State of Arkansas, an officer not authorized to take acknowledgments under the statutes of Missouri, was probably cured any way by the curative statute of 1919.

The objection No. 1 to the abstract to entry No. 13 was that the conveyance from Ira Thomas and wife was not on a uniform blank as provided by the Missouri statute for a warranty deed. Appellee's attorney, however, stated in making this objection that he did not examine the opinions of the appellate court of Missouri to ascertain whether this was material or only a matter of form. The operative words in the deed are "do hereby grant and warrant to Clara R. Thomas, a widow, the real property described" and were sufficient to convey the title. 18 C. J. 178; *State v. Kelliher*, 49 Ore. 77, 88 Pac. 867; *Horton v. Murden*, 117 Ga. 72, 48 S. E. 786; *San Francisco, etc. R. Co. v. Oakland*, 43 Cal. 502; *McDill v. Meyer*, 94 Ark. 615, 128 S. W. 364.

The defects complained of in the other conveyances shown in the abstract were all cured by the statute of Missouri, § 368, Revised Statutes of Missouri, 1919, having been recorded more than a year prior to the commencement of the suit in the circuit court. 1 R. C. L. 292; 1 C. J. 877-78; note 19 A. L. R. 1080.

Appellee's attorney upon his last examination of the abstract abandoned his objection to entry No. 19, admitting it was sufficient.

Appellees contend that this suit was premature, having been brought before the corrected abstract was submitted to and passed upon by them, but they insist that the appellant's authority under the assignment of the note was broad enough to include the entering of the credit for the \$1,000 in the event the Thomases furnished clear title to the land, and it is unquestioned that the corrected abstract was furnished to appellant bank with a demand made for the credit of the \$1,000 on the note purchased by it from appellees, and that the credit was entered thereon by the bank before this suit was brought.

It could make no difference in appellee's liability under the circumstances of the case that suit was brought before presentation of the corrected abstract showing a clear title to the land in controversy since appellant was bound to enter the credit upon the making of such showing, and appellant could enter the credit on the note as appellees were bound to do, taking no risk in doing so, other than correctly deciding that the abstract presented showed the title clear in accordance with the contract.

The court having held that the abstract showed such title, appellees cannot escape their liability under the contract nor avoid the repayment of the amount credited on the note which was sold to or discounted with appellant bank without the disclosure of any right upon the part of the makers to a reduction of the amount of the note as made and paid for.

It follows that the court erred in not directing a verdict for said amount sued for, and the judgment is reversed, and the cause will be remanded with directions to enter a judgment in appellant's favor accordingly. It is so ordered.

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