

## HUGHES COMPANY v. CALLAHAN.

Opinion delivered May 5, 1930.

1. SUBROGATION—PAYMENT OF MORTGAGE.—One who paid a mortgage at the mortgagor's request, on the assurance of the mortgagor that there were no other liens or incumbrances and that he should have a first lien on the property, *held* not a "volunteer" as regards subrogation.
2. SUBROGATION—PAYMENT OF MORTGAGE.—One who paid a mortgage at the mortgagor's request, on the latter's assurance that there were no other liens or incumbrances on the property was properly subrogated to the rights of the mortgagee as against an intervening execution purchaser.

Appeal from Howard Chancery Court; *C. E. Johnson*, Chancellor; affirmed.

STATEMENT OF FACTS.

Appellee brought this suit against appellants *et al.*, seeking subrogation to the lien of a mortgage executed by one of the defendants, B. H. Graves, to the Conservative Loan Company and by it transferred to H. W. Schobacker, which appellee paid off at the request of Graves, the mortgagor, and received from Schobacker an acquittance acknowledging the payment of the mortgage and the release of the lien. On June 20, 1922, the defendant B. H. Graves, executed to the Conservative Loan Company a mortgage on the west half of section 8, township 9 S., range 28 W., containing 320 acres of land to secure a loan of \$3,500 made him by said company, payable October 1, 1928, with interest at 7 per cent. per annum payable annually. The amount of the loan was evidenced by one principal note of \$3,500 and the annual interest by coupon notes of \$245 each. Graves paid the interest notes as they became due. The notes and mortgage were assigned by the loan company to H. W. Schobacker, and owned and held by him when the principal note came due on October 1, 1928. On December 15, 1928, Graves, the mortgagor, executed and delivered to appellee, Callahan, a deed conveying all the land described in the mortgage for the consideration of \$1, other good and valuable consideration, "and the assumption by R. C. Callahan of a first mortgage to the Conservative Loan Company of \$3,500." Callahan in turn executed and delivered to Graves a contract agreeing to re-convey all the said land to Graves upon the payment of the debt and interest.

The instrument purporting to be a release in acknowledgment of the payment of the mortgage debt is dated November 15, 1928, some 30 days prior to the execution of the deed by Graves to Callahan. Appellee made the payment of the mortgage at the request of Graves, the mortgagor, upon an assurance that there were no other liens or incumbrances against the lands, but with-

out an examination of the record further than the abstract to ascertain whether such was the fact. Before the payment of this mortgage by the appellee, Hughes Company, appellant had filed a transcript of a judgment recovered before a justice of the peace against defendant Graves in the office of the clerk of the circuit court of Howard County, and had an execution issued therefrom and levied on 80 acres of the land in controversy, which was sold thereunder and purchased by the Hughes Company, and after the period of redemption had expired the sheriff executed and delivered to the company a deed to the north half northwest quarter of the land. The deed was executed and recorded on the 25th day of January, 1928.

The court subrogated Callahan, appellee, to the lien of the mortgage, which he paid off at the request of the mortgagor, found his right was superior and paramount to any right in the land owned or held by the Hughes Company under the sheriff's deed, and decreed a foreclosure of the mortgage for enforcement of appellee's right to payment, and from this decree the appeal is prosecuted.

*Feazel & Steel*, for appellant.

*McConnell & Jackson*, for appellee.

KIRBY, J., (after stating the facts). Appellants contend that the court erred in subrogating appellee to the rights of the holder of the mortgage upon its payment by him at the request of the mortgagor, because of his accepting a release of the mortgage instead of taking an assignment thereof.

The undisputed testimony shows that he furnished the money to pay off the mortgage at the request and for the benefit of the mortgagor upon his assurance that there were no other liens or incumbrances against the land, and that his advances and payment should be secured by a first lien thereon. He was not merely a volunteer therefore in the payment of the mortgage debt, the loan having been negotiated by the mortgage debtor for

the express purpose of paying it. *So. Cot. Oil Co. v. Hill Cot. Co.*, 108 Ark. 555; *Stephenson v. Grant*, 168 Ark. 927; *Rodman v. Sanders*, 44 Ark. 514; and 37 Cyc. p. 365, note p. 473.

It is true that he might have discovered appellant's execution deed by examination of the record, but he was not culpably negligent in failing to do so on account of the assurances given by the mortgagor; and if it had been discovered, his rights could have been protected as completely in making the loan as was intended should be done by requiring the transfer or assignment of the mortgage to him upon his payment of the mortgage debt upon the request of the mortgagor. The rights of the purchaser under the execution deed are not prejudiced by the decree allowing a subrogation of appellee to the rights of Schobacker, the holder of the mortgage, since as against the lien of such mortgage appellant's claim was without merit and subject thereto.

The court did not err therefore in decreeing a subrogation of appellee to the lien and rights of the holder of the mortgage, and a foreclosure thereof for satisfaction for the money advanced to pay off the mortgage indebtedness and the decree must be affirmed. It is so ordered.

---