

BROWNE v. MERCHANTS' NATIONAL BANK OF FORT SMITH.

4-3080

Opinion delivered July 10, 1933.

1. ALTERATION OF INSTRUMENTS—EFFECT.—An alteration of a note, innocently made to carry out the maker's intention, will not defeat a recovery on the note.
2. MORTGAGES—TRANSFER OF NOTE.—Payment of an officer's indebtedness to the company after the company had transferred a mortgage note given by the officer's wife to secure such indebtedness would not affect the rights of the transferee of the note and mortgage.
3. MORTGAGES—TRANSFER OF NOTE.—A mortgage was properly treated as duly assigned where the note which it secured was properly assigned by indorsement of the payee.
4. MORTGAGES—CONSIDERATION.—Evidence *held* to sustain a finding that a wife executed a mortgage and note for a valuable consideration.

Appeal from Sebastian Chancery Court, Ft. Smith District; *C. M. Wofford*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This is a mortgage foreclosure suit instituted by appellee, Merchants' National Bank of Fort Smith, against appellant, Sadie Browne, wherein a foreclosure was directed. The material facts are to the following effect:

On November 14, 1926, Sadie Browne executed a note of even date for the sum of \$25,000 and delivered the same to her husband, Fred Browne, to be delivered to the Browne-Hinton Wholesale Grocery Company of Ft. Smith. On the following date, November 15, 1926, Sadie Browne made, executed, acknowledged and delivered a mortgage deed to secure the due and prompt payment of a \$25,000 note executed at the same time. This mortgage was executed in favor of the Browne-Hinton Wholesale Grocery Company, and was on the date of its execution filed for record in Sebastian County. The property conveyed in this mortgage was the separate property of Sadie Browne and the homestead of Sadie Browne and her husband, Fred Browne. On the dates of the execution of the mortgage and note just recited, Fred Browne was the president of the Browne-Hinton Wholesale Grocery Company, and had been for a number of years prior thereto. At the time of the execution of the mortgage and note Fred Browne admitted an indebtedness to the Browne-Hinton Grocery Company in a sum in excess of \$85,000. The mortgage executed by Sadie Browne in behalf of the Browne-Hinton Wholesale Grocery Company contained the following clause:

"The foregoing conveyance is on condition: That, whereas, the said mortgagor is justly indebted to the said mortgagee in the sum of \$25,000 evidenced by one promissory note of even date, due January 1, 1928. Now, if the said mortgagor shall pay or cause the said note to be paid, with interest according to the tenor and effect thereof, and all other indebtedness of the mortgagor to the mortgagee, then this instrument shall be null and void."

After the execution and delivery of the note and mortgage to the Browne-Hinton Wholesale Grocery Com-

pany, it changed its name to the Browne-Brun Wholesale Grocery Company, which company continued in business in Ft. Smith until April, 1932, when it became insolvent and passed into the hands of the bankruptcy courts for distribution. The trustee in bankruptcy became a party to this suit, and filed a cross-complaint against Fred Browne wherein the trustee recovered judgment for a large sum of money, from which no appeal has been prosecuted.

In January, 1931, and long prior thereto, the Browne-Brun Wholesale Grocery Company owed the Merchants' National Bank of Ft. Smith a large sum of money. On January 27, 1931, this indebtedness aggregated more than \$15,000 and the bank insisted upon the grocery company giving additional security for the loan. This controversy culminated in the grocery company, by its president, Fred Browne, transferring to the bank the Sadie Browne note. At the time this transfer was executed certain blanks in the note had not been filled in; therefore, prior to its delivery, Fred Browne filled in the blank places and made the note payable to the Browne-Brun Wholesale Grocery Company and thereupon delivered it to the bank. A letter was written by Fred Browne transmitting the note, which contained the following clause: "Inclosed find \$25,000 note which is secured by mortgage which is on record in the clerk's office. The mortgage was executed by my wife since the home was purchased in her name and remains the same."

Admittedly, on the date this note was delivered to the bank, Fred Browne's indebtedness to the wholesale grocery company was in excess of \$85,000. This note had been held by the wholesale grocery company since its execution in 1926 as security for the debt of Fred Browne.

The testimony on behalf of appellant tended to establish the following facts:

That the note which Sadie Browne had executed to the wholesale grocery company in 1926 had been materially altered without her knowledge or consent; that the indebtedness of Fred Browne to the wholesale gro-

cery company for which this mortgage and note had been pledged as security was paid and satisfied by Fred Browne on February 20, 1931; that no assignment of the mortgage had been effected from the Browne-Brun Wholesale Grocery Company to the bank; that the pledge had been made by appellant to the grocery company for the specific purpose of securing the debt of her husband and was effected without consideration to her.

The chancellor, after hearing a voluminous amount of testimony, determined the issues in favor of the appellee as against Sadie Browne, and directed a foreclosure of the mortgage, from which decree this appeal is prosecuted.

*Cravens & Cravens, C. R. Barry and Hardin & Barton*, for appellant.

*Daily & Woods and Geo. W. Dodd*, for appellees.

JOHNSON, C. J., (after stating the facts). It is first contended on behalf of appellant that the note executed by her on November 14, 1926, was materially altered before its delivery to the bank. Whatever alteration was effected in this note was done by Fred Browne, the husband of Sadie Browne, and innocently done. This note had been delivered by Sadie Browne to her husband, Fred Browne, for the use and benefit of the wholesale grocery company, of which he was president and general manager, to secure the debt of her husband to the grocery company in a sum in excess of \$85,000. The title and beneficial interest in this note, of course, passed to the grocery company; it had the right to transfer and assign the security to whomsoever it chose. Any alteration made in the note by Fred Browne was innocently done.

In the case of *McConnon v. Browne*, 169 Ark. 954, 277 S. W. 539, this court said:

“The distinction between the effect of an innocent and fraudulent alteration is not recognized in all of the authorities, but we think that, according to the weight of authority, there is such a distinction, and that the true rule is that, unless the alteration was fraudulently

made, the obligee is not barred from his right of action on the original debt."

The alterations made in this note by Fred Browne effectually carried out the intent of the maker at the time of its execution. At any rate, it cannot be said that Fred Browne had any intention of defrauding his wife, the wholesale grocery company or the bank in effectuating this alteration. There can be no question under the uncontradicted facts in this case but that this alteration was effected by Fred Browne to carry out the intention of the parties at the time this mortgage and note were executed.

It is next contended on behalf of appellant that the indebtedness of Fred Browne to the wholesale grocery company was paid and satisfied by Fred Browne on February 20, 1931. On this question it suffices to say that the trustee in bankruptcy made Fred Browne a party to this suit alleging an indebtedness of Fred Browne in a very large sum. No defense was interposed by Fred Browne to this cross-complaint. The chancellor found that Fred Browne was indebted to the wholesale grocery company in a sum in excess of \$16,000. No appeal has been prosecuted by Fred Browne from this judgment of the court. This judgment was a part of the original indebtedness of Fred Browne to the wholesale grocery company. In addition to this, it is admitted by all that on the date this note and mortgage was transferred to the bank that Fred Browne was owing to the grocery company more than \$85,000. If Fred Browne effected the payment of his indebtedness to the wholesale grocery company after that time, it could not and should not impair the rights of the bank to the security held. The bank took a vested interest in this note and mortgage on January 27, 1931, and no subsequent contract between Fred Browne and the wholesale grocery company could impair it.

It is next contended on behalf of appellant that no assignment of the mortgage from the wholesale grocery company to the bank was effected. A complete answer to this argument is found in the letter from Fred Browne, president and manager of the wholesale grocery com-

pany, to the bank wherein the note was delivered to the bank. The note which was inclosed in this letter bore the blank indorsement of Fred Browne and also the indorsement of the grocery company by its president and manager, Fred Browne. "Equity regards that as done which ought to have been done."

This court held in the early case of *Richardson & May v. Hamlett and Wife*, 33 Ark. 237, quoting from the syllabus:

"An agreement between the vendor and vendee, that the latter shall execute to the former a mortgage upon the land to secure payment of the purchase money will give the vendor or his assignee the same rights in equity as if the mortgage had been executed."

This rule has been consistently followed by this court in all subsequent cases. We conclude therefore that the chancellor was correct in treating the mortgage in the instant case as duly transferred to the bank.

It is next contended on behalf of appellant that the pledge had been made by appellant to the grocery company for the specific purpose of securing the debt of her husband and was effected without consideration to her. Neither can we agree to this contention. The chancellor was warranted in finding that the debt to the grocery company was the joint obligation of Sadie Browne and her husband, Fred Browne. First, Sadie Browne acknowledged in the mortgage deed that she was indebted to the grocery company in the sum of \$25,000. Secondly, the testimony shows that she bought much merchandise in person from the grocery company; and that it was charged to her and her husband's account on the books of the company. At any rate, she executed and delivered the note and mortgage to the wholesale grocery company for a valuable consideration. On January 27, 1931, when the note and mortgage were transferred to the bank, the wholesale grocery company had a perfect and lawful right to transfer and deliver same to any third person. Appellant knew or should have known that this transfer might be accomplished. In other words, appellant knew or should have known that she was putting it in the power of the wholesale grocery company to trans-

fer and deliver this mortgage and note to some third party, and after this is accomplished it does not lie in her mouth to say that this event could not be foreseen by her. In any view of the situation, appellant is estopped in a court of equity to assert a superior right to appellee.

No errors appearing, the decree is in all things affirmed.

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