DELONEY *v.* DILLARD.

Opinion delivered June 15, 1931.

1. MORTGAGES—DEED ABSOLUTE IN FORM.—Where, at the time of a sale of land, the vendor is indebted to the purchaser and continues to be indebted to him after the sale with right to call for reconveyance upon payment of the debt, a deed absolute on its face will in equity be construed as a mortgage.
2. MORTGAGES—EVIDENCE.—Evidence, oral or written, is admissible to show the real character of an absolute deed in form to be a mortgage.
3. MORTGAGES—BURDEN OF PROOF.—The law presumes that a deed absolute on its face is what it appears to be, and the burden is on the one claiming it to be a mortgage to overcome this presumption by clear, unequivocal and convincing evidence.
4. MORTGAGES—WEIGHT AND SUFFICIENCY OF EVIDENCE.—Evidence *held* to establish that a deed absolute in form was intended as a mortgage.
5. HOMESTEAD—PRIOR JUDGMENT LIEN.—The lien of a judgment on land will not be displaced by the judgment-debtor moving on the land and impressing it as a homestead after the lien of the judgment attached.
6. HUSBAND AND WIFE—WIFE'S ESTATE.—Where a debtor's estate in land was subject to be converted into personalty by a foreclosure sale under a mortgage, the debtor's wife could not, after a foreclosure and conversion of the estate into money, share in the surplus, if any, of the proceeds of sale, as against judgment creditors acquiring liens before her marriage.

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

STATEMENT OF FACTS.

T. J. Dillard and W. F. Dillard, judgment creditors of I. L. DeLoney, brought this suit in equity against I. L. DeLoney, Cecil DeLoney, and Hillie Davis to have an absolute deed to 112 acres of land, executed by I. L. DeLoney to Hillie Davis, declared to be a mortgage and to have the equity of redemption in said mortgage sold in satisfaction of their judgments.

On December 7, 1929, I. L. DeLoney executed a deed to the land in controversy in this suit to Hillie Davis for a consideration recited in the deed of $700. The deed was duly acknowledged on the same date. I. L. DeLoney

and Hillie Davis also executed on the 7th day of December, 1929, a written agreement, the body of which is as follows:

"Witnesseth: That it is agreed that at any time on or before October 15, 1930, the said Hillie Davis will execute and deliver to I. L. DeLoney, or to Cecil Byrd, a warranty deed free from any and all liens and incumbrances caused by him to the lands this day deeded to the said Hillie Davis by I. L. DeLoney, a copy of which is attached hereto and made a part of this contract as 'exhibit A' upon the payment to the said Hillie Davis the sum of $700 with 10 per cent. interest thereon from this date, and the further payment to the said Hillie Davis any taxes which he may pay on said lands.

"It is further agreed that the said I. L. DeLoney shall have and enjoy the possession of the said lands and receive the rents and profits thereof for and during the year 1930."

On the 4th of April, 1930, T. J. Dillard recovered judgment in the Howard Circuit Court against I. L. DeLoney for $518.46, with interest at the rate of 10 per cent. per annum from the date of the judgment. On the 14th day of April, 1930, W. F. Dillard recovered judgment in the Howard Circuit Court against I. L. DeLoney for $114.24, with interest at the rate of six per cent. from the date of the judgment. The record shows that no part of these judgments have been paid, and that the judgment creditors deposited in the registry of the chancery court the sum of $775.99, which was the full amount of the indebtedness alleged to be due by I. L. DeLoney to Hillie Davis. The land is situated in Howard County, Arkansas. Cecil DeLoney is the wife of I. L. DeLoney but was not married to him on December 7, 1929, when the deed and agreement above referred to were executed.

We copy from the testimony of I. L. DeLoney the following:

"Q. Did you ever pay or offer to pay Mr. Hillie Davis the $750 and interest on this land that you borrowed from him, according to the terms of your contract? A. No, sir, I haven't had it to pay. Q. You haven't paid it or offered to pay it, have you? A. I haven't had it to pay. Q. You can answer that question. Have you paid it? A. No, sir. Q. Have you offered to pay it? A. I guess not; no, sir."

Other facts will be stated or referred to in the opinion.

The chancellor found that the deed from I. L. DeLoney to Hillie Davis and the agreement copied in our statement of facts executed between said parties on the same day constituted a mortgage, and was of the opinion that the plaintiffs in this action were entitled to pay off said mortgage and sell the equity of redemption of I. L. DeLoney in said land in satisfaction of their judgments against him after first repaying themselves in the sum it took to discharge the mortgage of Hillie Davis. A decree was entered in favor of the plaintiffs in accordance with the findings of the chancellor; and to reverse that decree this appeal has been prosecuted.

James S. McConnell, for appellant.

Feazel & Steel, for appellee.

HART, C. J., (after stating the facts). It is a well settled principle of equity jurisprudence in this State that wherever at the time of sale a vendor of land is indebted to the purchaser and continues to be indebted to him after the sale with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be construed by a court of equity as a mortgage. Evidence, written or oral, is admissible to show the real character of the transaction. The law presumes that a deed absolute on its face is what it appears to be, and the burden is on the one claiming it to be a mortgage to overcome this presumption by clear, unequivocal and convincing evidence. *Harman* v. *May,* 40 Ark. 146; *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W.

1027; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Naill* v. *Kirby,* 16 Ark. 141; *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736; *Bolden* v. *Grayson,* 167 Ark. 180, 266 S. W. 975; *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663; and *Tribble* v. *Tribble,* 173 Ark. 561, 293 S. W. 705.

In the present case, the deed and agreement in question bore the same date; they relate to the same subject-matter; they were executed by the same parties, and the agreement by positive and direct expression refers to the deed as a part of it. Therefore, they can both be considered as one instrument in construing the contract between the parties and, when so construed, constitute a mortgage. *Vaugine* v. *Taylor,* 18 Ark. 65; *Belding* v. *Vaughan,* 108 Ark. 69, 157 S. W. 400, and cases cited; and *Mechanics' Lumber Co.* v. *Yates-American Machine Co.,* 181 Ark. 415, 26 S. W. (2d) 80.

When thus considered, it is plain that, when the two instruments are considered together as the parties covenanted and intended that they should be, they are a mortgage and should so be considered by a court of equity. This view is strengthened when we consider the testimony of I. L. DeLoney copied in our statement of facts. He was asked the direct question, whether he had ever paid Hillie Davis the $750 he had borrowed from him on the land. He replied that he did not because he had not had it to pay. There is nothing whatever in the record to contradict this evidence, and we think the chancery court correctly held that it was established by clear, convincing, and satisfactory evidence that the deed and agreement constituted an instrument which was a mortgage.

It is next insisted that the judgment creditors could not levy on the land because it constituted the homestead of I. L. DeLoney. Even if it could be said that I. L. DeLoney attempted to impress the land with the character of homestead, we do not think that could affect the lien of the judgment creditors because he did not attempt to occupy the land as a homestead until after

the recovery of the judgments against him by the plaintiffs in this action. The lien attached when they recovered their judgments against him because the land was situated in the same county where they recovered their judgments, and their liens could not be displaced by DeLoney moving on the land and impressing it as a homestead after the liens attached. *Simpson* v. *Biffle,* 63 Ark. 289, 38 S. W. 345; *Burgauer* v. *Parker,* 69 Ark. 109, 61 S. W. 381; and *Cazort & McGehee Co.* v. *Byars,* 104 Ark. 637, 150 S. W. 109.

J. L. Deloney executed the mortgage on the land before Cecil Deloney was married to him. Her husband's estate in the land was subject to be converted into personalty by a foreclosure sale under the mortgage. She could not, after a foreclosure and a conversion of the estate into money, share in the surplus, if any, of the proceeds of sale.

On the question of jurisdiction of the chancery court, but little need be said. The principle which underlies the doctrine herein applied is peculiarly one of equitable cognizance. The reason is that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title when the parties intended it to be security for a debt and therefore in reality a mortgage; and this is the view of the court in the cases above cited.

It follows that the decree of the chancery court must be affirmed.