HOME BUILDING & SAVINGS ASSOCIATION *v.* REDDING.

Opinion delivered July 9, 1928.

1. BUILDING AND LOAN ASSOCIATION—RATE OF INTEREST CHARGEABLE.—In determining the present value of anticipated payments in the foreclosure of a mortgage given by a borrower from a building and loan association, the contract, and not the legal, rate of interest should govern in estimating the present value of the principal and unmatured installments.
2. LIENS—EXCHANGE OF PROPERTY.—A mortgagee of land is not entitled to a lien on land exchanged for the land covered by the alleged mortgage.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; reversed on cross-appeal; affirmed on appeal.

STATEMENT BY THE COURT.

Appellant is attempting by this appeal to reach certain property, lot 5, block 3, Webber Place 2d Addition to the city of Texarkana, Arkansas, and $9,000 of notes given by H. E. Redding and wife to Dan Dewberry, now in the hands of appellee Smith, Dewberry's receiver, in exchange for a tract of land in block 10, in Witherspoon's Addition to said city, upon which appellant claims to have had a mortgage lien at the time of said exchange.

Redding and wife, as plaintiffs, brought suit in equity on April 4, 1927, against Dan Dewberry and wife for rescission of a contract of exchange or sale of certain property, alleging: That the defendants sold to the plaintiffs the tract of land in Witherspoon's Addition to the city of Texarkana, and in payment and exchange therefor took property of the plaintiffs, to-wit, the Webber Place lot and $9,000 of notes of the plaintiffs; that said trade was upon the condition that Dewberry should satisfy a certain mortgage held by the Citizens' Building & Loan Association of Texarkana upon the Witherspoon Addition property for $7,000; that Dewberry had failed to satisfy said mortgage, and that Dewberry had absconded. Prayed rescission of the transaction, and for restoration of the Webber Place lot and the $9,000 of notes.

D. E. Smith, as receiver of the estate of Dan Dewberry, answered the complaint, denying its allegations, and praying that rescission be denied. The receiver set up that the Citizens' Building & Loan Association of Texarkana and the Midland Savings & Loan Association of Denver, Colorado, and the Home Building & Savings Association of Fort Smith, Arkansas, claimed liens upon the Witherspoon Addition property, and prayed that said companies be brought in and their claims adjudicated.

The Citizens answered, setting up that it held a mortgage upon the Witherspoon Addition property to secure the payment of a loan of $7,000 obtained from the association by Dan Dewberry, and prayed foreclosure.

The Midland answered, setting up that it held a mortgage upon the Witherspoon Addition property to secure the payment of the sum of $8,000 obtained as a loan from the company by W. T. McCauley and wife, and prayed foreclosure.

The appellant, Home Building & Savings Association, filed its answer and cross-complaint on July 12, 1927, setting up a mortgage upon the Witherspoon Addition property to secure the payment of the sum of $6,000 obtained as a loan from the association by W. T. McCauley and wife, and prayed foreclosure. In its answer appellant joined in the prayer of Redding for rescission. Appellant prays that, if rescission is not granted, then that appellant "be subrogated to all rights and privileges of Dan Dewberry by virtue of its mortgage."

On July 13, 1927, the cause was tried as between the plaintiffs and defendant receiver and continued as to the Citizens' Company, the Midland Company and appellant, who were not ready for trial. The court found that plaintiffs' complaint for rescission was without equity, and dismissed it. The plaintiffs prayed an appeal, but did not perfect it, and it had become conclu-

sive at the time the appeal was granted herein on February 13, 1928.

The cause was submitted for trial as to the other parties on September 13, 1927, upon the question of priority of plaintiffs' claim to the Witherspoon Addition property by reason of their purchase, and also as to the question of the validity of the mortgages held by the three building and loan companies against that property. The deed from Dewberry and wife to the plaintiffs conveying the Witherspoon Addition property retaining a lien for the payment of the $9,000 notes given for part of the purchase price was introduced in evidence, and also a *lis pendens* notice filed by them in the recorder's office of the county on April 4, 1927.

There was also introduced in evidence the mortgage of Dan Dewberry and wife to the Citizens' Company, executed in July, 1926, and recorded on July 31. The mortgage to the Midland Company, dated October 1, 1926, signed by W. T. McCauley and wife, and recorded April 17, 1927. A prior certificate of record appears on the mortgage, but it was declared to be a forgery by the recorder, and McCauley testified also that the mortgage was a forgery.

The appellant, Home Building & Savings Association, introduced in evidence its mortgage, dated September 10, 1926, signed by W. T. McCauley and wife, and recorded May 3, 1927. A certificate of record of prior date also appears on the mortgage, but it was declared a forgery by the recorder. It appears also that Redding's deed from Dewberry was not put on record, but Redding brought his suit and filed his notice of *lis pendens* on April 4, 1927; that the Citizens' mortgage was duly filed and recorded on July 31, 1926; that the Midland Company's mortgage was filed April 17, 1927, and the mortgage of appellant, May 3, 1927.

The court held that the trade between them for the exchange of lands was valid, and sustained it; that the mortgage of the Citizens' Company was a paramount

lien upon the Witherspoon Addition property, and that the rights of Redding in that property were superior to all others, except the Citizens' Mortgage; that the mortgages of the Midland Company and the appellant, Home Building & Savings Company, were forgeries, and should be canceled, and that the $9,000 of notes of Redding and wife in the hands of the receiver should be credited with the amount of the Citizens' mortgage, leaving a balance due from Redding upon the notes of $1,911.87, and retained the cause for further consideration as to which of the particular notes should be canceled and delivered up; and decreed foreclosure and sale of the property in satisfaction of the Citizens' mortgage.

The court dismissed the cross-complaint of appellant for want of equity, and no judgment was rendered against D. E. Smith, receiver, in favor of appellant for the amount advanced upon its mortgage executed by McCauley, it not being found by the court to be the debt of Dewberry, and from this decree the appeal is prosecuted; and the Citizens' Building & Loan Association cross-appealed, complaining only of the method of calculation employed by the court in determining the amount for which it decreed a judgment and foreclosure in favor of the said Citizens' Company.

John D. Arbuckle, for appellant.

Frank S. Quinn and *Elmer L. Lincoln*, for appellee.

KIRBY, J., (after stating the facts). The Citizens' Association on its cross-appeal insists that the court erred in using the legal rate of 6 per cent. interest instead of the contract rate of 10 per cent. interest in determining the amount due it under its mortgage, and the contention must be sustained. In *Gate City B. & L. Assn.* v. *Frisby, ante,* p. 252, the court laid down the rule for determining the present value of anticipated payments in the foreclosure of a mortgage given by borrowers of building and loan associations, holding that the contract rate of interest should govern in estimating the present

value of the principal and unmatured installments, and this case is ruled by the decision therein. The decree on the cross-appeal must be reversed, and remanded with directions to determine the amount due by calculation of the present value of the principal notes and unmatured installments at the contract rate of 10 per cent. interest and for a foreclosure and sale of the property to satisfy the judgment.

Appellant insists that the court erred in refusing to grant a rescission of the contract of sale or exchange of property to the plaintiffs and also in refusing to decree a lien in appellant's favor upon the Webber Place Addition property, which was conveyed to Dewberry in the sale or trade with Redding, and upon the balance of the notes given by Redding for the purchase money.

In answer to the first contention, it will suffice to say that no appeal was taken by the Reddings from the decree refusing to grant them a rescission of the contract of exchange of the properties, and we cannot agree with appellant in its second contention that the court erred in not decreeing its claim a lien upon the Webber Place Addition property, which Dewberry received in the exchange from Mr. Redding, and upon the balance due on the purchase money notes given in such exchange.

Appellant does not allege that it paid any debt or discharged any obligation of Dewberry's, and rests its claim entirely upon the mortgage for relief, and insists upon a foreclosure thereof, and has no right to subrogation. 25 R. C. L., § 1, p. 1312. The proceeding upon appellant's part was for a foreclosure of its mortgage, and there was no allegation of any fraud perpetrated by Dewberry in procuring the loan that entitled appellant to the relief it insists upon here. *Alberson* v. *Klanke, ante,* p. 288.

There was no evidence whatever tending to show that the money procured from the appellant association by Dewberry had been used in the purchase of either of the pieces of property included in the trade or exchange, nor that any beneficial interest therein was

obtained by Dewberry through fraud practiced upon appellant company, nor, as already said, was there any allegation of any such fact, and the court did not err in refusing to fix a lien under appellant's mortgage against the property conveyed by the Reddings to Dewberry in exchange for the Witherspoon Addition property. No constructive trust, that could be enforced, arose by operation of law from this transaction in favor of appellant entitling it to subject the exchanged property to the payment of its claim under the mortgage, and the decree dismissing appellant's complaint for want of equity must be affirmed. It is so ordered.