ROSE *v.* ROSE.

Opinion delivered October 19, 1931.

1. MORTGAGES—PAYMENT—BURDEN OF PROOF.—A mortgagee suing on the notes and mortgage, which were in possession of one of the mortgagors, *held* to have the burden of proving his allegation that the notes were surrendered by mistake and to overcome the presumption of payment on the mortgagor's possession of past-due notes and mortgage.
2. LIMITATION OF ACTIONS—BURDEN OF PROOF.—The burden of proof was on the plaintiff suing on notes to establish that they were not barred by limitations, which had been pleaded as a defense.
3. LIMITATIONS OF ACTIONS—SUFFICIENCY OF EVIDENCE.—Evidence *held* insufficient to establish a part payment that would stop the running of the statute of limitations.

Appeal from Columbia Chancery Court; *J. Y. Stevens,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought suit to foreclose a mortgage executed by James Rose and L. E. Rose on the 29th day of December, 1915, to secure the payment of four promissory notes of $350 each, executed the same day, one due January 1, 1917, and one each January 1st thereafter, with interest at the rate of 10 per cent., it was alleged.

The complaint alleged the conditions and terms of the mortgage, that no payment had been made "upon

said indebtedness'' except the following amounts; $75 November, 1917, various amounts in the months of November for the following years to 1926, except 1920, '22 and '24, with an amount of $35 August 15, 1929. The absence from the State of defendant, James Rose, was alleged, his heirs were made parties, the amount due with interest was alleged, and also "that the original notes mentioned herein, together with the original mortgage, were under a mistake of fact delivered to L. E. Rose Colvin, but the same have not been paid, and the amount hereinbefore shown is now due the plaintiff thereon; that the plaintiff, Frank Rose, Sr., is entitled to judgment against the defendant, L. E. Rose Colvin, in said sum, and is also entitled to a lien on all of the above-described lands by virtue of said mortgage to secure payment of said indebtedness."

A foreclosure of the mortgage was prayed. A guardian *ad litem* was appointed to defend for the two minors, who denied specifically on information and belief all the material allegations of the complaint. Other defendants, Joe Rose and others of his children, filed separate answers, likewise denying all the material allegations of the complaint. They alleged further that their father had absented himself from the State for years, and that their mother had lived on the land and cultivated it during his absence, occupying it as a homestead with the children, paying the taxes and making improvements thereon for 12 years, etc.

Appellee, L. E. Rose, denied the allegations of the complaint, the execution of the mortgage and notes on information and belief, so as to require proof of the allegations; denied that there had been paid upon the indebtedness the amounts alleged in the complaint, and that any amount was due under the mortgage; "that she and James Rose, or either of them, owed the plaintiff any sum whatever, * * * she denies that any notes, as alleged in the fourth paragraph of plaintiff's complaint, together with a mortgage as alleged in said paragraph, were ever delivered to defendant by mistake in fact."

All the defendants pleaded the statute of limitations. No testimony was introduced conducing to show that the notes and mortgage attempted to be foreclosed were delivered to L. E. Rose Colvin under a mistake of fact, as alleged in the complaint, or that they had not been paid, except as the testimony attempting to show the notes were unpaid might indicate, nor was there any explanation made or attempted to be made of how the notes and mortgage came into her possession if they had not been paid. The testimony does not show definitely when the partial payments were made, nor that they were indorsed upon the notes when made.

H. A. Bryan, the husband of Mary Rose Bryan, one of the defendants, the daughter of James Rose and the granddaughter of the plaintiff, whose testimony was objected to as incompetent on that account, was the chief witness claiming to have transacted most of the business for plaintiff and appellee, Mrs. Colvin, and explained the payments by appellee as follows: James Rose owed the Bodcaw Bank $600, and had given a mortgage on some personal property to secure its payment. When it became due, he said that plaintiff told Mrs. Colvin if she would pay the $600 due the bank, he would credit the land note with the amount she paid on the note, and he then went to the Bodcaw Bank and paid the note off. The notes and mortgage herein had been assigned to the witness and Mr. Souter, who held them while the notes were in the bank, and when it was paid off this mortgage and notes were returned to Mrs. Rose. The witness said he had not seen the mortgage and notes sued on lately, did not know where they were at the time the suit was brought, and did not know who did have them. Said the day he got the $600 from the Bodcaw Bank, "Mrs. Rose gave him $175 additional to pay off the note at the Bank of Taylor. "I know that the plaintiff and Mrs. Rose agreed that Mr. Rose was to pay off the $600, and then he was to give Mrs. Rose additional time and she was to pay the money back to him." Said he did not know the date, nor the month nor the year the credits were made

on the notes, but that the amounts shown were paid at different times.

From the decree dismissing the complaint, this appeal is prosecuted.

McKay & Smith, for appellant.

Henry Stevens, for appellee.

KIRBY, J., (after stating the facts). The principal question herein is one of fact, and a careful examination of the testimony does not disclose that the finding of the chancellor is contrary to the preponderance of the evidence. The complaint alleges that the mortgage and notes securing it were through a mistake of fact delivered to the appellee, the mortgagor and maker of the notes, and that they had not been paid; but no testimony was introduced attempting to explain how the notes and mortgage came into the possession of the mortgagor and maker, if they had not been paid, and the burden was upon appellant to prove his allegation of mistake, which he failed to discharge, and to overcome the presumption of payment attendant upon the possession of the past-due obligation in the hands of the maker. *Hollenberg* v. *Lane,* 47 Ark. 399, 1 S. W. 687; *Excelsior Mfg. Co.* v. *Owens,* 58 Ark. 556, 25 S. W. 868.

The notes and mortgage sued upon were not introduced in evidence, but others of different terms were introduced, the evidence tending to prove their execution, etc. The burden was on the plaintiff to show that the notes were not barred by the statute of limitations which was pleaded as a defense thereto. The notes were barred long since, according to their terms and date of execution, unless by partial payments the bar of the statute was removed, and the proof does not definitely show the fact of any partial payments on any of the particular notes or that such payments were credited thereon. The $600 that plaintiff paid at the bank and agreed to credit on the mortgage indebtedness when it was repaid by appellee, Mrs. Colvin, was not a charge against the lands mortgaged, and its payment could not constitute a partial payment on such mortgage indebtedness. *Alston* v. *State*

Bank, 9 Ark. 459; *Watkins* v. *Martin,* 69 Ark. 311, 65 S. W. 103; *Simpson* v. *Brown-Des Noyes Shoe Co.,* 70 Ark. 598, 70 S. W. 305; *Armstead* v. *Brook,* 18 Ark. 521; *State Bank* v. *Woody,* 10 Ark. 631; *Desha Bank & Trust Co.* v. *Quilling,* 118 Ark. 118, 176 S. W. 132, L. R. A. 1915E, 794.

It is insisted that H. A. Bryan was an incompetent witness, he being the husband of one of the defendants, a granddaughter of the plaintiff, and that the court erred in allowing the introduction of his testimony. This contention appears to be meritorious, but it is not necessary to pass upon the question, since we have already found from an examination of the whole testimony that the chancellor's finding is not contrary to the preponderance of the evidence.

The decree is accordingly affirmed.