

JANE SAUNDERS, Appellant, v. IRENE A. GANT,  
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,  
MONTSERRADO COUNTY.

Decided January 14, 1930.

1. Whenever a conveyance, assignment or other instrument transferring an estate is originally intended between the parties as a security for money, whether this intention appears from the same instrument or any other, it is held as a mortgage and consequently is redeemable upon a performance of the conditions.
2. A deed absolute in form will be regarded merely as a mortgage if at the time of the conveyance they entered into a separate agreement for the reconveyance of the property.
3. If a person makes an acknowledgment of a tenancy through mistake or ignorance, he is not estopped from disputing the lessor's title.

In a suit in equity, petitioning for the right of equity of redemption in the foreclosure of a mortgage, judgment was given for the petitioner, now appellee. On appeal to this Court, *affirmed*.

*Barclay & Barclay* for appellant. *Dixon and Brownell* for appellee.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the Court.

This was a petition for the right of equity of redemption in the foreclosure of a mortgage entered in the Equity Division of the First Judicial Circuit, Montserrat County, February term, 1929, by Irene A. Gant, petitioner, against Jane Saunders, respondent.

The history of the case is as follows: In the year 1924 petitioner obtained from respondent a sum of money, amounting to £140:0:0, equal to six hundred seventy-two dollars, to enable her, the said petitioner, to visit the United States of America for the benefit of her health.

It was agreed between the parties that the amount was to be refunded within one calendar year with interest at the rate of ten percent per annum, and as security for the payment of the said amount with interest as aforesaid, petitioner executed a warranty deed by which she transferred to respondent Lot No. 150 in the City of Monrovia with all the buildings and appurtenances thereto belonging; and on the same date entered into an agreement with respondent of the following tenor:

“The party of the first part, (Irene A. Gant) in consideration of a loan to her of one hundred and forty pounds sterling at ten percent interest per annum, has hereby transferred to the party of the second part (Jane Saunders) her premises situated in the City of Monrovia, County of Montserrado and Republic of Liberia, bearing in the authentic record of said City the number 150, as security for the payment within one calendar year of the said one hundred and forty pounds sterling with interest aforesaid. The party of the second part thereby agrees that should the said party of the first part, in one calendar year from date hereof pay or cause to be paid to her the said party of the second part the said sum of £140:0:0: sterling with interest as above stipulated, that she will retransfer or cause to be transferred to the said party of the first part the said premises, and thereby relinquish all claims or title thereto, which a deed today executed by the said party of the first part gives to her.

“It is hereby mutually agreed that in the event the said £140:0:0: with ten percent interest per annum is not paid within the time above specified, then it shall be the right and privilege of the party of the second part to retain and keep forever the right and title to lot number 150 with the buildings thereon.”

The petitioner shortly after the transaction proceeded to America where she remained for four years, having as her agent in Liberia Anthony Barclay, Esq., Counsellor-

at-law, who appears in the case at bar, as counsel for respondent.

At the expiration of the time stated in the agreement, the loan not having been refunded, respondent took possession of the premises, same being handed over to her on her demand by the agent of the petitioner. In the meanwhile, petitioner had written several letters to appellant acknowledging her default and requesting respondent to inform her on what condition she would reconvey the said premises to her, the said petitioner.

At the instance of petitioner, certain parties approached the respondent to ascertain if she would accept the money due by petitioner, but respondent refused to treat with them. It would seem, however, that the time specified in the agreement for the payment of the loan had expired when this was done. Respondent having taken possession of the premises as aforesaid, proceeded to collect the rents which amounted approximately to £84:0:0 per annum. Respondent also sold to one Baker half the lot for £40:0:0. She also, it is charged, pulled down the kitchen which was situated on said premises and converted the materials to her own use.

On the return of petitioner to Liberia in the month of September, 1929, she called upon respondent and offered to refund the loan with ten percent interest, but respondent refused to accept the money and to make delivery of the premises to petitioner, whereupon petitioner entered this suit in the Equity Division of said Circuit Court.

The case was heard at the May term of said Court, His Honor Judge James H. Dent presiding by assignment; judgment was entered in favor of petitioner as follows:

1. The Court adjudges and decrees that the mortgage which is now in dispute between petitioner and respondent, the subject of the petition, is sustained. The Court further decrees that the transfer herein referred to is cancelled and stands cancelled, and the

agreement herewith filed be reformed by inclusion therein of a clause securing to petitioner the right of equity of redemption; and the petitioner is commanded to tender and the respondent to accept the amount of mortgage in performance of said contract as thus reformed.

2. That so soon as the amount of the mortgage and the lawful charges which amount petitioner is ready to pay, shall have been refunded, said respondent be and she is hereby commanded to reconvey in fee simple the lot no. 150 mortgaged to respondent.
3. The Court further decrees and commands that the said respondent pay over to the petitioner the amount of two hundred dollars being the amount paid by one Levi James Baker to the respondent for half of lot no. 150.
4. The Court further decrees and commands that the said respondent will pay three hundred and thirty-six pounds for the four years' rent received by said respondent, at the rate of seven pounds per month.
5. The Court further decrees and commands that respondent pay over to the petitioner the sum of twenty-five pounds for the kitchen which was detached from the premises by the said respondent without the consent of petitioner. Making a sum total of \$1,939.00 with \$1.00 being the Government Tax fee and all cost in this suit.

The respondent, being dissatisfied with said decree, has brought the case to this Court for review and final determination. The bill of exceptions contains ten points, mainly exceptions to rulings of the court on objections made to questions asked during the trial of the case. We will consider only the first and tenth points.

The first point is set out as follows: "Because as soon as the case was called and announcements made, your Honour, without hearing the law points, ruled that the case would be tried and decided on its merits; and further

that the court considered the transaction between the respondent and petitioner to be a mortgage.”

The only law points raised in the pleading were those raised in the first and second count of petitioner’s reply to respondent’s answer, viz.: (1) That the answer is bad and defective for duplicity, and (2) Also because the answer is bad and defective in that it refers to a certain agreement entered into between petitioner and respondent without making profert of said agreement, which should have been decided in favor of respondent. Respondent, in our opinion, suffers no injury by the neglect of the court to consider said points.

This brings us to a consideration of the transaction between the parties and the nature and quality of the deed executed by the petitioner in favor of respondent.

On reviewing the records we found that the deed in question was a warranty deed transferring the title to said premises to respondent accompanied by an agreement signed by the parties in which it is stated that said warranty deed is given as security for the payment of the sum advanced by respondent to petitioner.

Counsel for petitioner set up in their brief that the court below was justified in not hearing any argument on the question of whether or not the transaction was intended as a mortgage, as that fact is clearly proven on the face of the agreement. On the other hand, it is contended by counsel for respondent, that the transaction was not a mortgage, but a conditional sale, as the right to re-purchase was optional and created no obligation on the part of the grantor to do so.

We will here consider the nature and quality of the deed and agreement of the case at bar and construe the law bearing on the case.

Justice Story in his work, *Equity Jurisprudence*, makes the following observations with regard to a mortgage (vol. 2, 8th ed., § 1018):

“As to what constitutes a mortgage, there is no dif-

ficulty whatever in courts of equity, although there may be technical embarrassments in courts of law. The particular form of words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof."

He also cited a number of cases in which it was held that every conveyance which in fact, whatever it may be in form, is a security for a debt, contemporaneous or antecedent, is in equity a mortgage.

It seems that the intention of the parties need not appear on the face of the instrument; it may be manifested by a separate instrument executed as part of the same transaction. In such a case the two instruments are construed together, and the conveyance held to constitute a mortgage. 19 R.C.L. 246, § 9.

It would seem always that a deed absolute in form will be regarded merely as a mortgage if at the time of the conveyance the parties enter into a separate agreement that the deed was designed to operate as a mortgage. For example, an absolute conveyance coupled with an agreement that it shall be void if a certain debt is paid within a year; and if the condition is not duly performed, the whole title rests absolutely at law in the mortgagee. It follows from the above reasoning that the said court below did not err in construing the deed in question to be a mortgage.

We will now consider the mortgage remedy in the event of default. In England and in most of the American states a bill of foreclosure is deemed the exclusive and appropriate remedy, and the courts of equity will not re-

fuse, except in special cases, to decree a compulsory sale, and this has been the rule followed in our courts.

We may here observe, however, that this is the first case in which an absolute conveyance coupled with an agreement to reconvey on certain conditions stipulated in the agreement has been brought before this Court, as it has been considered by most persons to constitute an absolute sale without the right of equity of redemption. It has been urged that this Court should not disturb a long standing custom, which may unsettle a number of estates.

There is a difference between a mortgage of land and mortgages or pledges of personal property in regard to the right of the mortgagee after default of the mortgagor. In the latter case, there is no necessity to bring an action of foreclosure, but the mortgagee upon due notice may sell the personal property, and title from the sale will be *bona fide*, and will rest absolutely in the purchaser. But in mortgages of land there is a right to an equity of redemption after foreclosure, if the right is exercised within a reasonable time. So inseparable, says Justice Story, is the equity of redemption from a mortgage, it cannot be disannexed even by an express agreement of the parties. If, therefore, it should be expressly stipulated that unless the money be paid on a particular day or by a particular person the estate should be irredeemable, the stipulation would be utterly void. 2 Story, Equity Jurisprudence (8th ed.), § 1019.

The Revised Statutes of Liberia (§ 1392) provide that every mortgage of real estate containing therein a power to the mortgagee to sell the mortgaged premises upon default being made in any condition of such mortgage, the mortgagee may sell same by giving thirty days' notice of such sale.

This statute is, in our opinion, contrary to the principles of equity of nearly the whole civilized world and against world policy. In England and in most of the states of America some time is allowed after foreclosure to allow

a party to exercise the right of equity of redemption. While the maxim "once a mortgage always a mortgage" has been modified in modern practice, still the mortgagor is allowed from three months to a year to exercise the right of equity of redemption. We are of the opinion that when the mortgage deed contains a power to the mortgagee to sell on default, the mortgagor must be allowed six months to exercise the right of equity of redemption; otherwise the time should be extended to one year.

It follows that appellee is entitled to recover, but before concluding our observations we will pay some attention to an objection offered by appellant's counsel against the bringing of this suit, because he alleges "appellee is estopped from denying appellant's title to said property."

The doctrine that a tenant cannot dispute his landlord's title, while undoubtedly true in principle, is yet subject to certain exceptions. For instance, it has been held that if a person makes an acknowledgment of a tenancy, through mistake or ignorance he will not be estopped from disputing the lessor's title. Appellee, laboring under a misapprehension that the title to the property had passed to the appellant and receiving notice to remove her effects, instructed her agent to pay rent for a room in the building in which to store said effects. She having throughout acted under a mistaken opinion of the law is not now estopped to deny appellant's title to the property in dispute.

Coming to the decree of the judge of the court below, we find that the evidence in the case clearly proved the following facts: After appellee's default, appellant took possession of the property, collected the rents for four years; refused to consider all offers of appellee or her representatives to refund the loan; took down the two kitchens on the lot, and converted the materials to her own use; and sold half the lot to one Levi Baker, receiving and retaining the money.

The action of appellant in refusing to entertain offers of appellee to refund the loan with the interest, compels us to grant unto petitioner relief of the following tenor:

1. That the transfer deed herein referred to is cancelled and the agreement herewith filed is reformed by inclusion therein of the clause securing to petitioner the right of equity of redemption and the petitioner is commanded to tender and respondent to accept the amount of mortgage in performance of said contract, as thus reformed.

2. That so soon as the amount of the mortgage and the other lawful charges (which petitioner now tenders) shall have been refunded, said respondent is commanded to reconvey in fee simple the lot no. 150 hereinbefore mentioned as mortgaged to respondent.

3. That respondent be required to pay to petitioner the amount of two hundred dollars being the amount paid by one Levi James Baker to the respondent for one half lot no. 150.

4. That respondent pay over to the petitioner the amount of three hundred thirty-six pounds sterling for the four years' rent received by said respondent, at the rate of seven pounds per month.

5. The Court further decrees that the respondent pay over to the petitioner the sum of twenty-five pounds sterling for the kitchens which were detached from the premises by the said respondent without the consent of the petitioner and the materials which the respondent converted to her own personal use and benefit, making a sum total of one thousand nine hundred thirty-nine dollars and eighty cents or four hundred and two pounds thirteen shillings and four pence. Respondent to pay all costs of the action. And it is hereby so ordered.

*Affirmed.*