9FED.CAS.—64

Case No. 5,160.

FURBISH v. SEARS.

[2 Cliff. 454.][1]

Circuit Court, D. Massachusetts. May Term, 1865.

MORTGAGES—PURPOSE OF THE SECURITY—POWER TO SELL—FORECLOSURE.

1. Where a mortgage for the security of certain payments, as well as for the performance of a certain specified agreement further provided that it should also become security for the performance of a certain other agreement, if the mortgagor should elect to perform the second agreement, *held,* that after election and notice by the mortgagor, such mortgage became security for the performance of the second agreement, as effectually as if the same had been set forth in the mortgage.

2. By the conditions of the mortgage, it was stipulated "that on nonpayment of certain instalments, the mortgagee was authorized to sell the mortgaged property at auction, giving thirty days' notice, the proceeds to be applied to the payment of the instalments overdue and unpaid; and if at any time after such disposal of the mortgaged estate, any other instalments shall become due, and remain unpaid ninety days, the agreement shall become null and void, and no further obligatory in any way on either party." *Held,* that the power to sell was merely cumulative, and did not debar the party from foreclosing the mortgage.

[Cited in Lockett v. Hill. Case No. 8,443; Same v. Hoge, Id. 8,444.]

This was a writ of entry for the foreclosure of a mortgage, and the case came before the court upon an agreed statement of facts. The following abstract from the statement Is sufficient for an understanding of the case: The demandant [D. H. Furbish] and one J. B. Cahoon were the proprietors of certain letters-patent on a machine, or on an improvement on a machine, for sowing seed and fertilizing material broadcast On the 15th of January, 1860, they entered into an agreement with the defendant [Willard Sears] and one Warren Sparrow, by which they contracted, in consideration of $5,000, to sell to said defendant and Sparrow a certain number of machines made, and to be made, and delivered, as in said contract specified. The agreement was to continue in operation for six years, and was to embrace any and all improvements made on the invention within that period; it was also to include the exclusive right of manufacturing a certain description of machines for a certain territory, as therein described. The conditions were that the purchasers were to keep an account of machines manufactured by or under them, and to pay a certain sum for each machine so made within that territory. The purchasers also covenanted to furnish security by mortgage on real estate in Massachusetts, to the amount of $5,000, for the faithful performance of the unexecuted parts of the agreement. The agreed statement also showed that on the 17th of January, 1860, the defendant executed to the demandant the mortgage on which this suit was founded, in order, to secure the faithful performance of the agreement In the agreement was the following stipulation: "In case the party of the first part, on or before the 1st day of May next, shall elect to purchase the patent right

for a certain territory, as specified by another agreement between the parties, of even date herewith, this agreement is to be cancelled, and all payments made under the same, are to be applied to, and constitute a part of, the payments stipulated for by such agreement, and the security of $5,000 above provided for is to stand as security for the performance of such agreement." Such "another agreement," it must be observed, described as "of even date herewith," bore date on the following, and not on the same day, as the agreement in which it was thus referred to and described; but the court said that they had both been duly executed before the execution of the mortgage deed; and from the reciprocal references in each to the other, the identity of the second, as the one referred to in the first, was established beyond controversy. The court understood the counsel of the tenant as conceding that proposition, and as assuming that the court would adjudge that the second agreement, was the one referred to in the mortgage. It was provided in the first agreement that the second agreement should not become operative unless the party of the second part should, on or before the 1st of May then next, elect that it should be so, and give written notice of such election; in that event, it was covenanted that ";another contract, of even date herewith between said parties, shall be void, and the payment of $5,000 cash, to be made under the other agreement, shall be taken as the cash payment provided for by this agreement; and the security of $5,000, to be given by the party of the second part to the party of the first part, shall be held by them as security for the faithful performance of this agreement."

C. T. & T. H. Russell, for demandant.

John S. Abbott, for tenant.

CLIFFORD, Circuit Justice. Undoubtedly it is competent for the court to look at the situation of the parties, and the surrounding circumstances, in order to ascertain the true intent and meaning of a written instrument. Wilson v. Troup, 2 Cow. 200; Barreda v. Silsbee, 21 How. [62 U. S.] 147.

Viewed in the light of that principle, I have no doubt that the mortgage, after the party of the second part made the election and gave the notice, became a security for the faithful performance of the second agreement lust as effectually as if the same had been fully set forth in the mortgage deed; or, in other words, it is a mortgage to secure the conditions and stipulations of the second agreement. Among the conditions and stipulations, was one for the payment of certain semi annual instalments of $2,000, annexed to which is the following condition: "provided in case two of such semi-annual instalments shall be due and remain unpaid, said party of the first part is hereby fully authorized and empowered to sell at public auction said security," giving thirty day's previous notice, &c, as therein required, the proceeds therefrom to be applied to the payment of the instalments overdue and unpaid. But the instrument further provides that, "if at any time after such disposal of the mortgage security, any other instalment shall become due, and remain unpaid ninety days from the date it becomes due and payable, the agreement shall become null and void, and no further obligatory in any way on either party."

The second proposition of the tenant is, that by the true construction of the agreement if he paid the $5,000 in advance, and gave up the mortgaged property, he was to be relieved from all further liability on the contract Consequently he insists that judgment should' be entered for the tenant inasmuch as he has paid $5,000, and the demandant may appropriate the mortgage security under the power of sale. The authority conferred however is an authority to sell the mortgage security, and it is very doubtful whether it can be lawfully exercised without selling the debt as well as the land; but it is unnecessary to decide that point, as I am clearly of the opinion that the power to sell, in this case, is only a cumulative power, and does not deprive the party from foreclosing the mortgage in the usual manner. 1 Hill. Mortg. (3d Ed.) 129; Walton v. Cody, 1 Wis. 420; Burdick v. McVanner, 2 Denio. 170; Shaw v. Norfolk Co. R. Co., 5 Gray, 181; Eaton v. Whiting, 3 Pick. 491. The parties agree that there has been a breach of the condition of the mortgage, if it secures the second contract.

Pursuant to the agreement of the parties, a conditional judgment for possession is to be entered for the demandant, according to the law of the state and the practice of this court. Unless the parties otherwise agree, the cause must be referred to an assessor to determine the amount of the conditional judgment.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]