Case No. 6,055.

HARDS ET AL. V. CONNECTICUT MUT. LIFE INS. CO. ET AL.

{8 Biss. 234; 6 Reporter, 420; 2 Chi. Law J. 18; 26 Pittsb. Leg. J. 32.}[1]

Circuit Court, N. D. Illinois. June, 1878.

MORTGAGE—FORECLOSURE—TIME FOR REDEMPTION—FOREIGN INSURANCE COMPANT—INVESTMENT—PUBLIC POLICY—MECHANIC'S LIEN—LIS PENDENS.

1. After a decree of this court foreclosing a mortgage, an objection that it does not give the time allowed for redemption by the Illinois statutes cannot be urged by creditors of the mortgagor except in connection with an offer to redeem.
2. Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state.
3. After bill of foreclosure filed by mortgagee, it is not within the power of the mortgagor pending the suit, by contract with a mechanic without the consent of the mortgagee, to create an in cumbrance upon the property which can in anywise affect the rights of the mortgagee, as they may be declared by final decree.

In equity. On bill and demurrer. In June, 1872, defendant filed a bill in this court to foreclose a mortgage for $20,000, executed by Sprague, in 1867, upon certain real estate in Chicago. March 17, 1874, a decree was entered giving the relief asked, ordering a sale and giving the mortgagor six months time within which to pay the mortgage debt. The mortgagor failing to comply, the property was sold in November, 1874, Greene becoming the purchaser in the interest of the company. In January, 1875, a deed was made to the purchaser. The present bill was filed in January, 1875, praying a reversal of the foreclosure decree. It appears that in September, 1873, Sprague, the mortgagor, contracted with complainants to do certain plastering and carpenter work on the mortgaged premises. {William G.} Hards, in December, 1873, filed his petition in a state court for a mechanic's lien, and in November, 1874, amended his petition, making Greene and the insurance company defendants. In May, 1874, the other complainants filed a petition for a mechanic's lien in the same court against the same parties. The company and Greene pleaded the decree of this court in bar, and as against Hards they specially pleaded the limitation of six months prescribed by the mechanic's lien statute of this state. The bill here filed alleges that the insurance company were aware of the work, etc., being done, but had failed to make complainants parties to the foreclosure suit, and that the latter were ignorant of the pendency of that suit, and that the insurance company was forbidden by the laws of Illino is from taking the mortgage of 1867. The defendants demurred.

Herbert, Quick & Miller, for complainants.

Isham & Lincoln, for defendants.

HARLAN, Circuit Justice (orally, after stating the facts). Counsel for complainants insist that the decree in the foreclosure suit was erroneous, in that it did not give the time

for redemption allowed by the statutes of Illinois. Brine v. Hartford Fire Ins. Co., 96 U. S. 627. Touching this objection, it is sufficient to say that the creditors of the mortgagor cannot urge that objection except in connection with an offer to redeem the property by paying the mortgage debt. No such offer is here made. Complainants' counsel also insist that the mortgage of 1867 was void upon the ground that a foreign insurance company could not at that date, consistently with the settled public policy of Illinois, take a mortgage upon real estate in this state. Waiving any consideration of the question as to complainants' rightat this late day to urge such an objection, the mortgagor himself making no such point, it is clear that the mortgage was not void upon any such ground. After a thorough examination of all the authorities cited, the court is satisfied that neither at the time of the mortgage nor at any time since, has it been against the public policy of this state for insurance companies, created by the laws of other states, to invest their assets in mortgages upon real estate in Illinois. The cases of Carrol v. City of East St Louis, 67 HI. 568, Starkweather v. American Bible Soc., 72 Ill. 50, and United States Trust Co. v. Lee, 73 Ill. 142, cited by complainants' counsel in support of his objection, do not embrace a case like this. Nothing is to be found in either of those cases which justifies the statement that the supreme court of Illinois has decided that insurance companies incorporated by the laws of other states may not take mortgages on real estate in Illinois if authorized by their own charter so to do. On the contrary, by a statute passed in 1869, domestic life insurance companies are required to invest a portion of their capital in certain specified securities, among which are mortgages of real estate. The same statute forbids any foreign life insurance company from transacting business in this state until it has also an equivalent capital invested in like manner. This statute, it is true, was passed after the mortgage in question was taken, but the reasonable presumption is that it would not have been passed had there been any such public policy as that assumed by complainants' counsel.

By the mechanic's lien law of the state, the lien of the mechanic must be asserted by petition within six months from the time his claim matures as against the in cumbrancer. Hards did not file his petition within that time as against the insurance company, and, therefore, his claim, in any event is by the express terms of the statute, barred. Dunphy v. Riddle, 86 Ill. 22. But there is, also,

a fatal objection to both claims upon another ground. It arises out of the doctrine of lis pendens Upon default by the mortgagor, the mortgagee had a Tight to foreclose. This court, having acquired jurisdiction of the parties and the subject matter in the foreclosure suit, it was not with in the power of the mortgagor pending that suit, by contract with a mechanic, and without the consent of the mortgagee, to create an in cumbrance upon the property which could in anywise affect the rights of the mortgagee as they might be declared by final decree. This was substantially held by the supreme court of Illinois in Davis v. Connecticut Mut Life Ins. Co., 84 Ill. 508.

In that case the mortgagor, after the decree of sale, but before sale, made a contract with a mechanic. It was held that such a contract did not create an incumbrance upon the property as against the mortgagee, whose rights were settled and fixed by the final decree. The contract here was prior to the decree, but the reason, upon which the doctrine of lis pendens rests, applies to all such contracts made by the mortgagor, after the institution of a suit to foreclose. If the mechanics, by force of the statutes, acquired a prior lien, not with standing the pendency of the foreclosure suit, then, according to established rules, they were not affected by the final decree. If, however, they did not acquire a prior lien, but only one subordinate to that of the mortgage, then clearly they could not disturb the decree rendered here, nor have it set aside or modified, except by offering to redeem by paying the mortgage debt.

In reference to the doctrine of estoppel, there is no room for its application in this case. The mere knowledge of the insurance company and its agents that the complainants were doing work and furnishing materials upon the mortgaged premises, could not, In the absence of any assurance on the part of the company that their claim would be recognized not with standing the for closure proceedings, stop the company from insisting upon its rights under the foreclosure decree. The mechanics were bound to take notice of the suits pending in this court, and could not by any subsequent combination with the mortgagor defeat the full operation of the decree which this court rendered.

Demurrer sustained.

HARDY Ex parte. See Case No. 1,420.

[1] {Reported By Josiah H. Bisssell, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 32, contains only a partial report.}