MOULTON *v.* SIDLE *et al.*

(*Circuit Court, D. Minnesota, Fourth Division.* November 13, 1892.)

1. MORTGAGES—FORECLOSURE—NOTICE TO OCCUPANT.
Rev. St. Minn. 1878, c. 81, tit. 1, § 5, enacts that, when a mortgage is foreclosed by notice and advertisement in a newspaper, "a copy of such notice shall be served in like manner as summons in civil actions in the district court, * * * on the person in possession of the mortgaged premises, if the same are actually occupied." *Held*, that where there was no actual occupancy, within the meaning of the law, but mere acts of ownership, the statutory notice was not required.

2. SAME—WHAT CONSTITUTES OCCUPANCY.
The purchaser of land, having mortgaged it to secure balance of purchase money, entered upon it, and planted some fruit trees. There was no dwelling upon the land, but across the street was another tract owned by her, on which there was a house inhabited by laborers, who worked at intervals on the land in question. *Held*, that there was no such actual occupancy thereof as to require notice of foreclosure proceedings to be given, under said statute, to the "person in possession."

In Equity. Bill by Martha A. Moulton against Henry G. Sidle and others to redeem mortgaged premises foreclosed under a power of sale contained in the mortgage. Bill dismissed.

Seldon Bacon, for complainant.

J. W. Lawrence, for defendants.

NELSON, District Judge. This suit was commenced December 30, 1890, and is brought to redeem a tract of land mortgaged in April, 1878, by the complainant and her husband, to the defendant H. G. Sidle. It is set up as a defense that the mortgage was foreclosed under the power of sale therein by advertisement in 1880, and the time for redemption has long since expired; that the complainant abandoned the property ever since the foreclosure of the mortgage, and never claimed the possession or occupation of the same until it had largely increased in value.

FACTS FOUND.

The facts in this case are:

On April 1, 1878, H. G. Sidle owned the land, about 9 acres, involved in this controversy, and on that day he and his wife conveyed the same to the complainant for the consideration of $880, and at the same time the complainant and husband gave their two certain joint and several promissory notes to the said H. G. Sidle for the purchase price,—one for $440, and interest thereon at 10 per cent. per annum until paid, maturing six months after date thereof; and the other for the sum of $440, and interest thereon at the rate of 10 per cent. per annum until paid, maturing one year after the date thereof. These notes were payable at the First National Bank of Minneapolis, and were secured by a mortgage upon the property, executed by the complainant and her husband, and duly recorded. Default was made in payment of the principal and interest by the complainant and her husband, and no taxes were paid upon the property by them, and pursuant to the statute, under the power of sale, the proceedings to foreclose the mortgage were taken as they appear in the defendants' Exhibit No. 6, and a record thereof was duly made. The foreclosure proceeding was commenced September 4, 1880. No notice of the proceeding was served on the complainant or any person. The property mortgaged was sold October 23, 1880, for the sum of $1,170, the amount due

on the mortgage, and interest, and the costs and expenses of the foreclosure. The mortgagee, H. G. Sidle, was the purchaser at the sheriff's sale; and one year after the sale expired October 23, 1881, and no payment of any sum has ever been made. On January 5, 1882, H. G. Sidle and wife, claiming ownership, entered into a contract with Daniel B. Tompkins, and another contract with Clarence H. Tompkins, wherein they agreed to sell and convey the property to them for the consideration of $2,085. The Tompkins agreed to sell the property to John T. Williamson, and, having discharged of record their contracts with Sidle, the latter and his wife, at their request, executed a contract whereby the property was agreed to be conveyed to Williamson for the consideration of $2,085. Williamson shortly afterwards died, and his estate was distributed by a decree of the probate court of Hennepin county, and on August 1, 1887, pursuant to such decree, H. G. Sidle and wife conveyed the property to Jesse E. Williamson and John Thayer Williamson, in the proportions in which they were entitled to the same, for the consideration named, of $2,085.

At the time of the conveyance to Mrs. Moulton, April 1, 1878, she entered upon the land and planted trees for a nursery, and at the time the foreclosure proceedings were instituted there were about 50,000 small fruit trees growing, covering about one quarter of the land. The nine acres were fenced, but there was no dwelling house on the land. Across the street, on a cultivated tract of 20 acres owned by the complainant, there was a dwelling used as a boarding house for laborers, and some of these men once or twice a month would work on this 9-acre tract, and during September, 1880, were working on the land several days; what particular days do not appear. On July 8, 1881, the complainant abandoned her residence in Minneapolis, and went to Denver, Colo., where she lived until 1887, and then went to Chicago, living in that city 22 months, when she went to live in Nashville, Miss., where she now resides, and is a citizen thereof. The complainant and her husband, after their removal to Colorado, and up to the time of the commencement of this suit, visited Minneapolis, but paid no attention to the property, and paid no portion of the amount due thereon, principal or interest, nor any taxes, or claimed any interest in the land. At the time of the sheriff's sale, in 1880, the property was worth not to exceed $880, and had increased so that at the time of the hearing it was worth $12,000 or 15,000.

CONCLUSIONS.

It is claimed that the foreclosure proceeding is void for the reason that no notice under the statute was served upon Mrs. Moulton, the mortgagor and owner of the premises in 1880. Gen. St. Minn. 1878, c. 81, tit. 1, p. 842, § 5, enacts that, when a mortgage is foreclosed by notice and advertisement in a newspaper under the statute, "in all cases, a copy of such notice shall be served, in like manner as summons in civil actions in the district court, [Gen. St. Minn. 1878, p. 715, § 59, sub. 4,] * * * on the person in possession of the mortgaged premises, if the same are actually occupied." The object of the statute may be, as stated by counsel, to give the owner of the mortgaged premises notice of the steps that are taken to foreclose the mortgage. That may be true, and, if there is a person *in pedis possessio*, such notice must be served upon him, "not for his benefit solely, but for the owner, as well as others interested in the land."

The evidence in this case fails to show that the mortgaged premises were actually occupied, within the meaning of the law, so as to entitle

the complainant to notice. Acts of ownership, without actual occupancy, are not sufficient to put in operation the statutory provision in regard to notice. The bill is dismissed, with costs, and a decree accordingly will be entered.

TILLEY *et ux.* *v.* AMERICAN BLDG. & LOAN ASS'N.

(Circuit Court, W. D. Arkansas. October 31, 1892.)

1. BUILDING AND LOAN ASSOCIATIONS—LOANS TO MEMBERS ON STOCK—USURY.
T. subscribed for 600 shares of stock in the American Building & Loan Association, having its business headquarters at Minneapolis, Minn. By his contract and by the by-laws of the association he was to pay $360 per month as dues on the 600 shares of stock, or $4,320 per year, or $38,880 in nine years. Desiring an advancement or loan on his stock, he made an application to the association to advance him $30,000 on his stock, which was done. By the contract he was to pay 6 per cent. interest per annum on the same. In considering the question as to whether the loan was a usurious one under the laws of Arkansas, payments to be made by T. on account of his stock are not to be considered as interest on the $30,000 borrowed, and not to be computed as such, since such payments are not made for the use of the money borrowed, but in order to acquire an interest in the nature of a partnership interest in the property of the association.

2. EQUITY—RELIEF AGAINST UNCONSCIONABLE STIPULATIONS—PENALTY OR LIQUIDATED DAMAGES.
If a contract is either founded in fraud, imposition, mistake, or when it works a hardship, or is harsh upon a party to it because it gives the other party to it an undue advantage, in a suit to enforce it, when a defendant comes into court and asks affirmative relief, such relief as is in harmony with equity and good conscience may be afforded him, when the contract is in the nature of a partnership, because the defendant in effect prays a dissolution of the partnership, and the court will ascertain the true interests of the parties, and will make such a decree as is just and right, upon the ground that a court of equity will take every one's act according to conscience, and will not suffer undue advantage to be taken of the strict terms of the law, or of positive rules, and will refuse to enforce the contract. Or, if the court can consider the amount named in the contract as a penalty, rather than liquidated damages, when the payment of money is the principal object of the contract, and the amount named is only accessory thereto, it will afford such relief as is just and proper, when full compensation can be readily ascertained.

3. SAME.
When the sum named in an agreement is to secure the performance of a collateral object, to wit, the payment of money, and that is the principal object, and the sum named is only collateral thereto, and the real damages would be disproportionate to the sum named, and such real damages can be readily ascertained, then a court of equity will consider the sum named as a penalty, and will afford such relief as in equity and good conscience is appropriate, considering the real injury sustained.

4. SAME.
Courts of equity will not permit parties to fix a sum specified in a contract as liquidated damages by naming it as such, and thus prevent the court from considering it as a penalty.

(Syllabus by the Court.)

In Equity. Suit by J. L. Tilley and Vesta Tilley, his wife, against the American Building & Loan Association, to cancel a bond and mortgage executed by plaintiffs to defendant. Defendant filed an answer and a cross bill asking a decree for the amount claimed to be due to it, and foreclosure of the mortgage. Decree for defendant for the amount advanced by it on the bond and mortgage and foreclosure of the mortgage therefor, and for cancellation of the remaining part of the contract.