of articles which the corporation was under contract to furnish, thus in some instances making a slight profit on the transaction, and at all events avoiding damages for breach of contract. They have also been allowed to work up such raw material and partly manufactured materials as they had on hand into finished products, in the belief that they could thus be better disposed of. In a few instances they have been allowed to provide the raw material, and fill orders received from old customers of the corporation of undoubted solvency, in the belief that in that way the good will of the corporation, which seemed to be a valuable asset, might be preserved, and the opportunity of selling the entire plant, with such good will, at a favorable price, be greatly increased. This was done with the assent of most of the resident creditors; certainly with the expressed dissent of none. Inasmuch as some of the nonresident creditors now question the advisability of such action, it would be appropriate, in advance of the hearing before the master, to provide for a hearing by the court of the question whether such business should continue, all parties interested having the opportunity to be present and submit their views. In this particular case, however, such proceeding is not now necessary. The various items of work which have been undertaken from time to time by the receivers have been practically now completed. There is in contemplation no further effort to carry on the business. Satisfactory arrangements have been made whereby the premises now occupied will be vacated, certainly by the 1st of May, and probably by the 1st of April, and it is the expectation of the receivers to be able to wind up their business and present their accounts on or before that date.

4. Some of the nonresident creditors insist that their position is different from that of others, by reason of the circumstance that the contracts out of which their claims arose were made in this state, and, therefore, that they, equally with the resident creditors, were entitled to avail of process of the state courts by attachment, etc., at the moment when this court took the res into its possession. This same question has been presented recently to this court in two receiverships, but it was not decided, for the reason that no opposition was made to the claim of nonresident creditors thus situated. Objection was not made in these cases, for the reason that the New York assets were abundantly sufficient to pay all claims filed here, including those of nonresidents holding New York contracts, and leave a considerable surplus for transmission to the state of which the corporation was a citizen, and where its affairs were being wound up. This particular question is prematurely raised at this stage of the case. Creditors who believe that they are entitled to share in the distribution may file their claims with the receivers, and, whether the same be allowed or disallowed, they will have the same opportunity as all the other creditors to overhaul the receivers' account, to present their own claims before the master, and to object to the allowance of any other claims, as they may be advised.

GRAPE CREEK COAL CO. v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 365.

RES JUDICATA—FORECLOSURE—REVERSAL AFTER SALE.

A foreclosure sale was had pending an appeal without supersedeas from the foreclosure decree. The decree was thereafter reversed, whereupon the court below in part reversed its decree, but confirmed the sale, and required the purchasers to pay an additional sum in cash upon their bid, which was done. The mortgagor did not appeal from the latter decree, nor assign any errors questioning the confirmation of the sale upon an appeal taken by another party, to which it also was a party. *Held*, that the validity of the sale was res judicata, so that the mortgagor could not maintain a subsequent suit to set it aside.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The bill in this case was filed by the Grape Creek Coal Company for the purpose of setting aside the sale made under the decree of foreclosure which was reversed by this court in Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 24 U. S. App. 38, 12 C. C. A. 350, and 63 Fed. 891. In that case, this appellant, being the mortgagor, was the principal respondent. The appellees here, who were respondents below, besides the Farmers' Loan & Trust Company, the trustee in the mortgage, are Joseph J. Asche, P. J. Cronan, and A. D. Irving, who, being themselves holders of bonds secured by the mortgage, and acting as a committee for other holders of the bonds, became the purchasers of the property at the decretal sale. The sale was made and reported to the court before the appeal was taken, which was done without the execution of a supersedeas bond. Pending the appeal, on November 2, 1893, the circuit court entered a decree approving the sale, and granting a deficiency judgment, and, on December 18th ensuing, required the purchasers to pay to the master $15,000, in addition to the sum of $10,000, paid at the time of the sale. By a supplemental return, the fact of the sale was brought into the record, but this court, as its opinion shows, refused to consider what should be the effect of reversing the decree of foreclosure on the rights or title of the purchasers at the sale. The mandate having gone down, the parties filed a stipulation to the effect that Asche, Cronan, and Irving were, at the time the decree was entered and when the sale was made, holders in their own right of bonds secured by the foreclosed mortgage, and made the purchase for themselves and for a large number of holders of the bonds, whom, as a committee, they represented; that they paid upon the purchase, in cash, $25,000 ($10,000 at the time of sale, and $15,000 under a later order of the court), of which sum $13,650 had been paid to the bondholders, and the remainder disbursed by order of the court; and that the sale under the decree "was fairly conducted, and the purchase made by said purchasers was made in good faith, except as it may be influenced by the facts recited in this stipulation." Thereupon, on September 12, 1894, the court entered an order or decree reversing its prior decrees and judgments in the particulars inconsistent with the opinion of this court, and in all other respects approved, ratified, and confirmed them. That decree, brought here upon the appeal of the Farmers' Loan & Trust Company, this court, on January 26, 1895, affirmed. 13 C. C. A. 87, 65 Fed. 717. To the bill in this case, which was filed on December 20, 1894, a plea was interposed, reciting the facts stated above, and setting up the decree of September 12, 1894, as a prior and final adjudication that the sale was valid and should stand. That plea the court sustained, and, the appellant declining to amend, ordered the bill dismissed. Error is assigned upon the sustaining of the plea, and upon the dismissal of the bill.

C. H. Remy and J. B. Mann, for appellant.

Herbert B. Turner and William Burry, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The contention of the appellant is that the purchasers at the foreclosure sale, having purchased for themselves and other holders of bonds secured by the trust deed upon which the decree of foreclosure was predicated, were not innocent purchasers, but were in privity with the Farmers' Loan & Trust Company, the trustee in the deed, upon whose complaint the decree was rendered; and, consequently, that the reversal of the decree ipso facto annulled the sale and the order of court by which it had been confirmed. Robinson v. Manufacturing Co., 67 Fed. 189; Kingsbury v. Stoltz, 23 Ill. App. 413; Freem. Judgm. § 482; Railroad Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10; Ballard v. Searls, 130 U. S. 50, 9 Sup. Ct. 418. Whether that was the effect of the reversal of the decree was a question which, by a motion for restitution, or in any appropriate mode, the appellant had the right to submit, and, upon an agreed statement of the pertinent facts outside of the record, did join in submitting, to the circuit court for decision. That court, reversing the original decree only in part, reaffirmed the sale, and directed the master to execute a deed to the purchasers. If that action was not a full compliance with the mandate of this court, or was for any reason erroneous, the remedy was either by another appeal or by an application to this court to enforce compliance with its mandate. The appellant sought relief in neither form, and in the appeal prosecuted by the Farmers' Loan & Trust Company, to which it was a party, assigned no cross error. It is estopped by the record. The matter is res judicata.

It is no objection to the force of the estoppel that the purchasers at the sale were not formal parties to the record when the decree of September 12th, reconfirming the sale, was entered. It is essential to the theory of the bill that the purchasers, being in privity with and represented in the suit by the complainant, the trustee in the deed by which their bonds were secured, acquired no better title than if they had been parties by name. Under the conditions and reservations of the decree, by virtue of which the sale was made, they had been required to pay an additional cash sum upon their bid, and had complied with the order; and even if, prior to the sale, they were strangers to the suit, it would seem clear that, by purchasing at the sale, they came under the power of the court, for the purposes of all orders touching their rights in the property until the sale should be consummated by a deed executed by the order or with the approval of the court. Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Stuart v. Gay, 127 U. S. 518, 8 Sup. Ct. 1279.

The decree below is affirmed.

KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO. v. JACOBUS.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 355.

INSURANCE—REINSTATEMENT OF POLICY HOLDER.

By a resolution of the board of directors of a beneficial association, properly passed, provision was made for the reinstatement of policy holders in default for more than 30 days by furnishing a certificate of good health and a medical examination which should prove satisfactory to the company. J., being in default for that length of time, forwarded to the company such a certificate and examination with the required assessment, but the medical director refused to pass on the examination, because of its "not being accompanied by an application," J. being informed that his new examination came too late to reinstate his policy, as same had been canceled, and that a new policy would have to be issued, for which a blank application was inclosed. J. acquiesced, and made the new application, by which he agreed that no liability was assumed by the company until the policy should be actually issued. J. died before the application was acted on. *Held* that, as the certificate and examination for reinstatement were unobjectionable, the lapsed policy was revived thereby as effectually as if a certificate of reinstatement had been issued, and J., by making the new application, was not precluded from asserting that there had been a reinstatement.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This suit was brought by Pauline Jacobus, the widow of Oscar I. Jacobus, a citizen of Wisconsin, against the Knights Templars' & Masons' Life Indemnity Company, a corporation of Illinois, to compel the latter to issue and pay a policy or certificate of insurance upon the life of her husband. The averments of the bill and answer need not be stated, because the hearing was upon an agreed statement of facts and a stipulation that the pleadings, if found at variance, should be considered as amended so as to correspond to the agreed statement.

The essential facts were these: The Knights Templars' & Masons' Life Indemnity Company was organized under the act of the general assembly of the state of Illinois, approved June 18, 1883 (1 Starr & C. Ann. St. p. 1348, § 123), whereby it is required that the incorporators sign and acknowledge a certificate of association, in which shall be stated "the object of incorporation, with its plan of doing business clearly and fully defined," which certificate shall be submitted to the auditor of public accounts, who, if he finds it "sufficient and satisfactory," must indorse his approval, and file the certificate and approval in the office of the secretary of state. In the year 1889, Oscar I. Jacobus, who had permitted a prior membership to lapse, became again a member under certificate of membership or life insurance policy No. 7,448, by which, on conditions and warranties stated, the company promised to pay $5,000 to the widow, children, or heirs of the member, unless he should have directed otherwise. On the back of the policy was printed the "constitution" of the company, of which the sixth article, concerning assessments, is as follows:

"Section 1. Upon notice and satisfactory proof of the death of a member (should it be necessary to make an assessment), the company, or such person as the board may direct, shall send by mail, to the last recorded post-office address of every member, a notice containing the name and residence of the deceased member, and the amount due from the member to whom said assessment is sent. The party sending such notice may employ a suitable person, persons, or corporation, in any town or city, who may act in serving such notices either personally or by mail. A notice so sent or served shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment required.

"Sec. 2. Should any one fail to forward, as indicated in the notice, the amount thus due, for a period of ten days after the date of said notice, he shall forfeit

his membership and all benefits arising therefrom. Any one having thus forfeited his membership may be reinstated, he being alive, within thirty days after the date of said notice, by the payment of all arrearages, and may be reinstated to membership subsequent to the thirty days, upon such terms as the board of directors may fix.

"Sec. 3. Any member may make a deposit in advance, for the payment of his assessments, which money shall be used for no other purpose by the company; and, in case of the member's death before it is so needed, the unused balance shall be paid back with the policy."

On October 13, 1891, the board of directors of the company, acting within its power, passed the following resolutions: "Resolved, that no policy holder of this company, who is over the age of 56 years (excepting the holder of a limited term policy), who is delinquent more than thirty days in the payment of any assessment or annual due, shall be reinstated to membership; and, further, that no policy holder who is under the age of 56 years, at the time of his being thirty days delinquent, shall be reinstated without first having furnished a certificate of good health signed by himself, and also a medical examination which shall prove satisfactory to this company, the acceptance of which new medical examination shall be governed by the same rules as apply to an original application for membership, and also by the payment of all arrearages: provided, that any holder of a limited term policy may be reinstated upon the same terms as herein stipulated for life policy holders under the age of 56 years."

On March 3, 1893, notice of an assessment was mailed to and received in due course by Oscar I. Jacobus; but he neglected to respond, and, the assessment remaining unpaid, on March 14, 1893, the following letter (unessential parts omitted) was sent him:

"Chicago, Ill., March 14, 1893.

"O. I. Jacobus, Edgerton, Wis.—Dear Sir and Bro.: A notice of assessment No. 82, amounting to six dollars, was mailed to your address March 3, 1893, with the ten days' grace provided in the policy. This assessment still remains unpaid. Article 6, section 2, of the constitution, printed on the back of your policy, reads as follows: [See supra.] Under this article, it can be paid, if you are living, any time prior to 30 days from the date of the original notice. Until such payment is made, you are carrying your own risk in case of death. Your receipt is now at this office, and will be mailed to you, and your policy reinstated upon receipt of the amount due, as hereinabove stated. We desire you to remain with us, and assure you our best efforts will be put forth to secure the greatest benefit to our policy holders at the least expense. Please let us hear from you on receipt of this, as to your wishes in the matter.

"Respectfully, W. H. Gray, General Manager."

No response to that letter having been received, and the assessment not having been paid, on April 3, 1893, the certificate of membership, policy No. 7,248, was formally canceled on the books of the company, and on the same day the following letter was sent to Jacobus:

"Chicago, April 3, 1893.

"O. I. Jacobus, Edgerton, Wis.—Dear Sir and Bro.: Your policy has been canceled for nonpayment. By a resolution of the board of directors, governing reinstatements of persons under fifty-six years of age, you will now be required to furnish a new medical examination satisfactory to the company, and sign the certificate of good health as per the inclosed forms. If it is your pleasure to reinstate your policy, give this your prompt attention. In addition, if the policy is reinstated, you will be required to pay $18.00, the amount delinquent at this date. * * * With best wishes, and trusting to hear from you at an early date, I am,

"Yours, respectfully, W. H. Gray, General Manager."

To that letter Jacobus made no response until April 27, 1893, when he mailed a letter, which was received the next day by the general manager of the company, inclosing a "P. O. order for $18.00 and medical examination," for which he asked a receipt. The medical examiner's report, it is agreed, "was carefully, skillfully, and honestly made, and was true." It was made by Dr. James A. Lord, at the request of Oscar I. Jacobus, upon a printed blank sent to

Jacobus by the defendant, inclosed in the letter of April 8, 1893, the regular custom of the company in admitting persons to membership or reinstating lapsed members under new medical examination being to allow the applicant to be examined by his local physician, and to refer the application and the examination so made to the company's medical director, whose duty it was to examine such application and medical examination, and pass upon the same, before a new certificate of membership could issue, or a lapsed certificate of membership be reinstated. Whether Jacobus knew this custom, there is no evidence, except the inferences, if any, to be drawn from his several memberships in and communications and correspondence with the company as in the statement of facts set forth. In this instance the examination was forwarded from the home office of the company in Chicago to its only medical director, Dr. J. L. White, at his office in Bloomington, "in accordance with such custom, very soon after it was received by the defendant"; but, by reason of its "not being accompanied by an application," it was not examined or passed upon by White, and the company had not issued any new policy or certificate of membership to Jacobus before his death.

No further communication passed between the parties until May 3, 1893, when the company, acting by its general manager, mailed to Jacobus the following letter:

"Chicago, May 3, 1893.

"O. I. Jacobus, Esq., Edgerton, Wis.—Dear Sir: Your new examination received at this office, but too late to accept same and reinstate your policy, as same has been canceled off the company's books. However, we will issue you a new policy, which is the best we can now do for you, for the sum of what one assessment would amount to, or $6.00. I inclose herewith a blank application for that purpose, which you may fill out carefully on the members' side, sign same, and forward it to this office. Your examination of recent date will answer if attended to immediately. In the meantime we hold your remittance of $18.00 at this office, subject to your order or the above. With best wishes, I am,

"Yours, respectfully, W. H. Gray, Genl. Mgr."

This letter, with the inclosed printed blank application, Jacobus received the next day, and, "having duly filled up and signed" the application, inclosed it in the following letter, which on May 5, 1893, he mailed to the company:

"Edgerton, Wis., May 5th, 1893.

"W. H. Gray, Genl. Manager, 1303 Masonic Temple, Chicago—Dear Sir: Inclosed please find application filled out as per your letter of the 3rd inst.; if anything left from remittance, place it to my credit.

"Yours, Resp., O. I. Jacobus."

The letter and application were received by the company the next day. In the printed part of the application, preceding the signature of the applicant, is the following expression: "I further understand and agree that no liability whatever is assumed by the company under any circumstances, until after the policy or membership hereby applied for has actually been issued at the home office by the officers of the company." The answers of Jacobus to questions in the application and the certificate of health at the end thereof were truthful and correct so far as he knew. For several months prior thereto he was in apparent good health, without premonitions of disease, and continued so until the evening of May 6, 1893, when he became ill, and on the 10th died, after an unsuccessful attempt by surgery to relieve him of a stricture of the intestines. He was at his death under 56 years of age.

Clark Varnum, for appellant.

John S. Cooper (S. M. Millard and C. P. Abbey, of counsel), for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.