

EDWARDS, Trustee, v. WOODBURY and others.

(Circuit Court, D. Minnesota. June, 1880.)

1. MORTGAGOR AND MORTGAGEE — WASTE — STATUTE — CONTRACT. — A statutory provision that a mortgagor may continue to use the mortgaged premises during the period allowed for redemption in the same manner as they have been previously used may be waived by contract.

Motion for Injunction.

Bigelow, Flandrau & Clark, for motion.

W. E. Hale, contra.

McCrary, C. J., (*orally*.) I have considered this case upon the motion for an injunction. This is a case in which there has been a decree of foreclosure upon a mortgage. The prayer is that the court will enjoin the removal of earth and sand from the premises, on the ground that it is an impairment of the security. The premises are about six acres, within the corporate limits of the city of Minneapolis. The defendant is engaged in making brick, and for that purpose is taking earth and sand, and removing it from the surface of the premises. It appears that he has been in that business for some years, and was so engaged at the time of the giving of the mortgage. No attempt was made by the mortgagee to interfere with him prior to the time of the sale under the foreclosure, but the purchaser at that sale, the present complainant, now insists that he has a right to stop this use of the premises. That cutting away earth and removing it from the surface of the soil is waste at common law, is very clear, and I should have no difficulty with this case had it not been for the statute of Minnesota, which provides as follows: "Section 296. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on application of the purchaser or judgment creditor; but it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use

it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family, while he occupies the property."

This property was used as a brick-yard prior to the foreclosure of the mortgage, and for several years previously. I should be inclined to the opinion, though not entirely clear upon the subject, that under that statute the party might continue to use the land as a brick-yard, and to take the earth from the surface, even though it might impair the security, were it not for a clause in the mortgage itself, to which I will call attention.

The mortgage provides that the mortgagor shall keep the premises "free from all taxes and assessments whatever, and shall not do, or permit to be done, in, about, or upon the premises, anything that may in anywise tend to weaken, damage, or diminish the security." My conclusion is that this statute does not prevent parties from agreeing or stipulating in the mortgage that nothing shall be done to impair the security. The statute furnishes a rule which would apply in the absence of a contract, but does not prevent the parties from making their own agreement. Here is a plain and unequivocal stipulation that the mortgagor shall not do anything to impair the security of the mortgage. In my judgment the statute does not deny to the purchaser at the sale the benefits of the stipulation. The proofs make it clear that the removal of earth from these premises does impair, to a greater or less extent, the security of this purchaser. The mortgage debt is evidently about as much as the property is worth. It is manifest that cutting and carrying away the surface of the earth is an injury to the property.

An injunction will be allowed.

Cox, Trustee, v. PALMER and others.

(Circuit Court, D. Minnesota. June, 1880.)

1. MORTGAGE—INTERLINEATION—BURDEN OF PROOF.—“If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution.”

In Equity. Suit to Foreclose Mortgage.

H. J. Horn, for plaintiff.

Rogers & Rogers, for defendant.

McCARY, C. J. This cause has been argued and submitted upon the merits. It is a suit brought to foreclose a mortgage. Upon the face of the mortgage there appears an interlineation, the words “block 19” being interlined upon the face of the instrument. Without these words the property described could not be located. They are, therefore, material, and the question is whether they were inserted before the execution of the mortgage or afterwards. This question must be decided upon the proof, and in view of the law applicable to such cases. The mortgage was twice recorded. The words in question do not appear in the *first* record, but do appear in the second. Several years intervened between the first and second recording. It is contended by the defendants that the interlineation was made after the first recording, and without authority, while the plaintiff insists that the words were in the instrument as originally executed, and were omitted by the recorder in copying the same upon the record. The only testimony offered by the defendants is that of Henry H. Finley, one of the defendants, and who is the person who drew the mortgage. He testifies that the words “block 19”