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Subscription price \$4.50 per year

80 cents per number

Canadian subscription price \$5.00 per year; Foreign, \$5.25 per year

Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

THE MORTGAGEE'S RIGHT TO RENTS AFTER DEFAULT

DESPITE his favored position in the hierarchy of creditors, the mortgagee has not been spared the perplexities which have attended debt collection during the past decade. Foreclosure and sale of the mortgaged property in an atmosphere of declining land values has frequently yielded less than the secured debt. Bankruptcy has provided a refuge for many defaulting mortgagors, while others have resorted to "milking"¹ the pledged asset in order to buy off threatening creditors. Rents often represent the only liquid asset which a mortgagee can reach to supplement or to avoid levying immediately upon the shrinking value that the pledged security still retains. The right to rents uniformly has been held to follow possession of the mortgaged

1. "Milking" has become a standard term denoting spoliation of the mortgaged property, rent reductions and lease cancellations granted by the mortgagor for a cash consideration, and prepayments of rent—all devices by which the hard-pressed mortgagor saps the value from the pledged assets.

premises. But since courts have become increasingly reluctant to recognize any inherent right to possession in the mortgagee, devices such as rent pledges, rent assignments, and receivership clauses have been drafted into mortgage instruments. Most jurisdictions, however, have hesitated to give effect to these protective devices. The rights of the mortgagee vary widely from state to state,² and decisions conflict even within a single jurisdiction. Though the distinction between so-called "title"³ and "lien"⁴ states does not seem to control, vestiges of this historical dichotomy still appear in the theories upon which the mortgagee's right to collect rent is predicated.⁵ It is proposed to consider here the various devices available to the mortgagee for applying rents to his debt and their relative efficacy in realizing upon the pledged asset.

RENT CLAUSES

The great majority of states today follow the lien theory,⁶ and even those still clinging to the title doctrine have modified by statute the mortgagee's right to possession.⁷ Consequently, mortgagees who have failed to secure

2. Not only have courts reached conflicting conclusions from the same set of operative facts, but identical conclusions have been based upon completely different theories. See discussion in Berick, *The Mortgagee's Right to Rents* (1934) 8 U. OF CIN. L. REV. 250.

3. At common law, the mortgage conveyed to the mortgagee a legal title defeasible upon complete fulfillment of the secured obligation. The mortgagee after default was entitled to enter into possession peaceably or evict the mortgagor by ejectment in order to satisfy his debt. Since rents were held to follow possession, the mortgagee of leased premises was enabled, without any stipulation as to rentals, to seize the property conveyed and apply accruing rents to his debt. See Berick, *The Mortgagee's Right to Rents* (1934) 8 U. OF CIN. L. REV. 250.

4. Courts of equity developed the "lien" theory under which title remains in the mortgagor, and the mortgage is a mere security for the debt, conveying to the mortgagee only the "right to a lien." In the absence of stipulation to the contrary, the right to rents remain in the mortgagor until after a valid foreclosure sale and actual delivery of the referee's deed. See 2 WILTSIE, MORTGAGE FORECLOSURE (5th ed. 1939) § 560.

5. This terminology retains little validity today in explaining the varying effects which courts have given the mortgagee's claim to rents. See Sturges and Clark, *Legal Theory and Real Property Mortgages* (1928) 37 YALE L. J. 691.

6. As examples of vigorous recent pronouncements of title doctrines, see *Peoples-Pittsburgh Trust Co. v. Henshaw*, 15 A. (2d) 711 (Pa. Super. Ct. 1940); *Randal v. Jersey Mortgage Investment Co.*, 306 Pa. 1, 158 Atl. 865 (1931); cf. *Teal v. Walker*, 111 U. S. 242 (1884). The "title" states are: Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia. All other states follow the "lien" theory. 2 WILTSIE, MORTGAGE FORECLOSURE (5th ed. 1939) § 827.

7. The limited acknowledgment often accorded the "title" theory even in "title" states is exemplified by the Tennessee court's pronouncement: "While in theory, the rule prevails in Tennessee that a mortgagee takes legal title and is entitled to possession, in practice the doctrine is only applied where necessary to protect the mortgagee's security." *Lieberman, Loveman and Cohn v. Knight*, 153 Tenn. 268, 279, 283 S. W. 450, 453 (1925).

a rent pledge generally can have rents applied to their debts only by petitioning a court of equity for a rent receiver.⁸ But in view of difficulties in proving the propriety of an equity receiver,⁹ most mortgages seek to spell out the mortgagee's right to rents.¹⁰ Yet clauses designed to effect an automatic accrual of rents to the mortgagee upon default have universally been denied that effect.¹¹ Since these clauses do not seem to be innately unreasonable or unconscionable, judicial refusal to carry out their clear and obvious intent appears to be based upon some extraneous justification. Some courts have found authority for outlawing rent pledges altogether in statutes banning ejectment,¹² confirming possession in the mortgagor,¹³ or declaring mortgages to be liens.¹⁴

Where statutory aid is lacking, courts frequently resort to the rationale that, since the clause imposes no duty upon the mortgagee to collect rents, to grant these clauses the effect of automatic accrual would both deprive the mortgagor of the right to use the rents and give him no assurance that they would actually be collected and applied to his debt.¹⁵ This argument

8. In "title" states an equity rent receiver may generally be procured immediately upon default; whereas in "lien" states an equity rent receiver is frequently not available until after foreclosure.

9. A petition for an equity rent receiver will generally be granted only upon a sufficient showing of waste, inadequacy of security, and the mortgagor's insolvency. See p. 1438 *infra*.

10. Rent clauses take three forms: (1) Conveyances of the property together with all rents, income, and profits, and empowering the mortgagee to take possession and collect rents upon default; (2) Assignments of the rents effective upon default with power to enter and collect rents; (3) Provisions authorizing the appointment of a receiver to collect rents and apply them to the secured debt.

11. *Dow v. Memphis & L. R. Ry.*, 124 U. S. 652 (1888); *Moncrieff v. Hare*, 38 Colo. 221, 87 Pac. 1082 (1906); *Mississippi Valley & W. Ry. v. United States Express Co.*, 81 Ill. 534 (1876); *New York Security and Trust Co. v. Saratoga Gas and Electric Co.*, 159 N. Y. 137, 53 N. E. 758 (1899); *Dick and Reuteman Co. v. Jem Realty Co.*, 225 Wis. 428, 274 N. W. 416 (1937).

12. *Massachusetts Mutual Life Insurance Co. v. Sutton*, 278 Mich. 457, 270 N. W. 748 (1936); *Wagar v. Stone*, 36 Mich. 364 (1877).

13. *Teal v. Walker*, 111 U. S. 242 (1884); *Couper v. Shirley*, 75 Fed. 168 (C. C. A. 9th, 1896); *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706 (1898); *cf. Buell v. Buckingham & Co.*, 16 Iowa 284 (1864). See also UNIFORM REAL ESTATE MORTGAGE ACT, § 2, pt. 1. For a comparison of these statutes, see *Smith v. Grilk*, 64 N. D. 163, 250 N. W. 787 (1933).

14. OKLA. STAT. (Harlow 1931) §§ 9491, 10909, 10940, 10945, 10946; *Rives v. Mincks Hotel Co.*, 167 Okla. 500, 30 P. (2d) 911 (1934). A few states have utilized statutory declarations of this nature to limit rent pledges to such income from the property as is needed to prevent "waste" [*Nusbaum v. Shapero*, 249 Mich. 252, 228 N. W. 785 (1930); *Mutual Benefit Life Ins. Co. v. Canby Investment Co.*, 190 Minn. 144, 251 N. W. 129 (1933); see also *Carey and Smith, Studies in Realty Mortgage Foreclosures: III. Receiverships* (1933) 27 ILL. L. REV. 717]; but have barred the pledging of income to pay principle or interest. *Flower v. King*, 189 Minn. 461, 250 N. W. 43 (1933).

15. See, *e.g.*, *Matter of Kidd*, 161 Misc. 631, 292 N. Y. Supp. 888 (Surr. Ct. 1936).

obviously lacks realism. It does not seem likely that a mortgagee after default would fail to apply rents to a debt if they were made available to him. Courts furthermore fear that if they permit an automatic accrual, logic would require imposing a constructive trust upon rents collected and expended by the mortgagor after default.¹⁶ But the inequity of subsequently imposing a constructive trust might be avoided by requiring a mortgagor in default to remit the net rents to the mortgagee and to render periodical accountings of legitimate expense.

The real basis for the court's refusal to give effect to rent clauses is probably to be found in the traditional policy of protecting the mortgagor's possession. The gradual shift of the mortgagee's status from that of a holder of legal title to that of a secured creditor has divested the mortgagee of any inherent claim to possession. And as a creditor, many courts feel that he should not be allowed to invade an owner's sacred right to possession by any method short of foreclosure and sale. But the ultimate benefit of denying a mortgagee's claim to rent accrues not so often to the mortgagor as to his general creditors. Defaulting mortgagors are usually insolvent and besieged by unsecured claimants, the most persistent of whom are likely to be paid off from rents arising from the mortgagor's possession. Hence the effect of judicial policy is apt to resolve itself into a denial prior to foreclosure of the mortgagee's precedence over general creditors to which his contracted security should entitle him.

Even where the right to pledge or assign rents has been upheld, courts require some action on the part of the mortgagee after default to reduce the rents to possession.¹⁷ This requirement of action tantamount to the assumption of possession arises as a corollary to the construction of the rent pledge as an inchoate or executory pledge.¹⁸ The requisite action may consist of physical entry into possession and actual collection of rents,¹⁹ formal demand

16. The conventional argument is expressed in *Prudential Insurance Co. v. Liberdar Holding Corp.*, 74 F. (2d) 50, 51 (C. C. A. 2d, 1934); *cf.* *Westinghouse Electric and Manufacturing Co. v. Weikel*, 110 N. J. Eq. 347, 160 Atl. 48 (1932).

17. *Shallcross v. Rankin*, 82 F. (2d) 690 (C. C. A. 3d, 1936); *Bank of America National Trust and Savings Association v. Bank of Amador County*, 135 Cal. App. 714, 28 P. (2d) 86 (1933); *Penn Mutual Life Insurance Co. v. Larsen*, 178 Ga. 255, 173 S. E. 125 (1934); *First Trust Joint Stock Land Bank v. Ingels*, 217 Iowa 705, 251 N. W. 630 (1933); *Fahnestock v. Clark Henry Corp.*, 151 Misc. 593, 272 N. Y. Supp. 49 (Sup. Ct. 1934); *Connecticut Mutual Life Insurance Co. v. Shelly Seed Corp.*, 46 Ohio App. 548, 189 N. E. 654 (1933).

18. It is the practice in Iowa to record mortgages containing rent pledges both as chattel mortgages and real estate mortgages. *Lincoln Joint Stock Land Bank v. Barlow*, 217 Iowa 323, 251 N. W. 501 (1933). A rent clause has occasionally been referred to as an equitable chattel mortgage on after-acquired property. *Connecticut Mutual Life Insurance Co. v. Shelly Seed Corp.*, 46 Ohio App. 548, 189 N. E. 654 (1933).

19. 2 JONES, MORTGAGES (8th ed. 1928) §978. *Stevens v. McCurdy*, 124 Ga. 456, 52 S. E. 762 (1905).

upon the mortgagor for possession and rejection,²⁰ or securing the appointment of a receiver.²¹

The requirement of physical entrance into possession is essentially the same as the common law imposed on the mortgagee in the absence of a rent pledge.²² This requirement apparently reflects the traditional judicial hesitancy to permit the severance of rents from possession.²³ Courts are in substantial agreement that where the terminology of a pledge or conveyance is used, possession must be shown to perfect the mortgagee's right to rents, and, even where words of assignment are used, most courts hold that an assignment in a mortgage is intended only as security and not as an absolute assignment.²⁴

Unrealistic consequences ensue in jurisdictions which stress the formal distinction between pledges and assignments of rent.²⁵ A pledge is regarded as a bailment requiring delivery of possession, actual or constructive, to effect the transaction.²⁶ Assignment, on the other hand, is deemed a transfer of title giving the mortgagee an absolute right to rents upon default, without the condition that he obtain possession of the premises.²⁷ Courts which achieve different results based on this distinction seem to place an inordinately high premium upon the phraseology of the instrument. If the rents are available in the one case without the requirement of obtaining possession, no policy ground is perceivable for denying them in the other.

The same distinction arises in another guise when assignments of rent made in instruments ancillary to the mortgage are held effective after default

20. Long Island Bond and Mortgage Guarantee Co. v. Brown, 171 Misc. 15, 11 N. Y. S. (2d) 793 (Sup. Ct. 1939). See p. 1431 *infra*.

21. The effect of receivership clauses will be considered separately. See p. 1438 *infra*.

22. Fink and Sons Co. v. John Huss Co., 16 N. J. Misc. 31, 195 Atl. 816 (Monmouth Cty. Sup. Ct. 1938).

23. It is frequently asserted that retention of possession is the test of the right to rents. See, *e.g.*, Metropolitan Life Insurance Co. v. Begin, 59 Ohio App. 5, 16 N. E. (2d) 1015 (1938). Possession, however, is a concept susceptible to a variety of interpretations.

24. Freedman's Saving and Trust Co. v. Shepherd, 127 U. S. 494 (1888); *In re* Banner, 149 Fed. 936 (S. D. N. Y. 1907); Hall v. Goldsworthy, 136 Kan. 247, 14 P. (2d) 659 (1932); Sullivan v. Rosson, 223 N. Y. 217, 119 N. E. 405, 4 A. L. R. 1400, 1405 (1918); Simon v. State Mutual Life Assurance Co., 126 S. W. (2d) 682 (Tex. Civ. App. 1939).

25. Michigan courts have relied upon a statute validating rent assignment clauses to hold that such a clause transfers title upon default. MICH. COMP. LAWS (1929) §§ 13498, 13499. *Abrin v. Equitable Trust Co.*, 271 Mich. 535, 261 N. W. 85 (1935); *Security Trust Co. v. Sloman*, 252 Mich. 266, 233 N. W. 216 (1930).

26. *Colonial Trust Co. v. Stone Harbor Electric Light and Power Co.*, 280 Fed. 245 (D. N. J. 1922); *Myers v. Brown*, 92 N. J. Eq. 348, 112 Atl. 844 (1921).

27. *New Jersey National Bank & Trust Co. v. Morris*, 108 N. J. Eq. 412, 155 Atl. 782 (1931); *Paramount Building & Loan Association v. Sacks*, 107 N. J. Eq. 328, 152 Atl. 457 (1930).

without an assumption of possession by the mortgagee.²⁸ Some courts hold that a subsequent agreement respecting possession or rents will be enforced according to its terms, even though controverting the general statutory policy of maintaining the mortgagor in possession until a foreclosure sale.²⁹ Agreements made after default are generally effective as assignments *in praesenti* on the theory that title to the rents passes at the time the instrument is executed.³⁰ But there is considerable diversity of opinion as to the effect to be accorded separate rent assignments executed simultaneously with the mortgage, or subsequently but before default. By regarding such assignments as mortgages on after-acquired property, they may be held effective without action after default.³¹ But the main current of opinion favors requiring the mortgagee to take possession before holding such assignments absolute.

Separate lease assignments may prove an effective device in certain jurisdictions for achieving the automatic accrual of rents upon default which courts deny in the case of rent pledges and assignments.³² A separate assignment of "leases previously made or to be made" which was executed contemporaneously with the mortgage has been held operative without action after default notwithstanding a statute confirming possession and the right to rents of the mortgaged property in the mortgagor.³³ Notice to the tenant

28. *Harris v. Lesster*, 35 App. Div. 462, 54 N. Y. Supp. 864 (1st Dep't 1898); *cf.* *Farmers' Trust Co. v. Prudden*, 84 Minn. 126, 86 N. W. 887 (1901).

29. *Massachusetts Mutual Life Insurance Co. v. Sutton*, 278 Mich. 457, 270 N. W. 748 (1936); *Reichert v. Guaranty Trust Co.*, 261 Mich. 315, 246 N. W. 132 (1933); *Rabourn v. Benz*, 217 S. W. 49 (Mo. 1919); *Douglass v. Thompson*, 35 Nev. 196, 127 Pac. 561 (1912); *Brundage v. Home Savings & Loan Association*, 11 Wash. 277, 39 Pac. 666 (1895). A separate agreement providing that the rents shall be collected by the mortgagee and applied to the payment of the debt while the mortgagor remains in possession, is thus recognized in several jurisdictions. *Lebensburger v. Scofield*, 155 Fed. 85 (C. C. A. 6th, 1907); *Sollie v. Outlaw*, 210 Ala. 419, 98 So. 127 (1923); *Goodwin v. Keney*, 49 Conn. 563 (1882); *Bolton v. Starr*, 223 Ill. App. 39 (1921); *Dailey v. Doherty*, 237 Mass. 365, 129 N. E. 678 (1921); *White v. Wagner*, 31 Misc. 403, 65 N. Y. Supp. 541 (Sup. Ct. 1900).

30. *Fox v. Detroit Trust Co.*, 285 Mich. 669, 281 N. W. 399 (1938); *Netzeband v. Knickmeyer-Fleer Realty and Investment Co.*, 103 S. W. (2d) 520 (St. Louis Ct. of App. Mo. 1937); *cf.* *Fisher v. Norman Apartments, Inc.*, 101 Colo. 173, 72 P. (2d) 1092 (1937), (1938) 47 YALE L. J. 1000.

31. *Simon v. State Mutual Life Assurance Co.*, 126 S. W. (2d) 682 (Tex. Civ. App. 1939) is one of the few cases indicating that a separate rent assignment executed prior to default may possibly, by analogy to a chattel mortgage on after-acquired property, be held absolute upon default without further action by the mortgagee. *Contra: In re Berdick*, 56 F. (2d) 288 (S. D. N. Y. 1931).

32. In *Franzen v. Kinney Co., Inc.*, 218 Wis. 53, 259 N. W. 850 (1935) a lease assignment executed simultaneously with the execution of the mortgage was held to become absolute upon notice by the mortgagee to the tenant after default. See Note (1935) 19 MARQ. L. REV. 262.

33. *Fargo Building & Loan Association v. Rice*, 66 N. D. 100, 262 N. W. 345 (1935).

of the assignment and default is generally required in such cases, however, to protect the tenant against double rent liability.³⁴

The requirement that a mortgagee obtain possession in order to apply rents to his debt usually entails the further requirement that he enter only with the consent of the mortgagor.³⁵ In New York, a mortgagee who entered and collected rents under the authority of an assignment clause without the consent of the mortgagor was deprived of the rents so collected and held liable for damages as a trespasser.³⁶ Since a mortgagee, even without a rent clause, can always enter into possession with the consent of the mortgagor, the effect of such holdings apparently is to render nugatory the consent embodied in the mortgage.

Nonetheless, decisions in New York³⁷ and in the federal courts³⁸ have suggested a procedure short of receivership that would achieve the requisite possession against an antagonistic mortgagor. A recent New York case³⁹ held that where the mortgagee had made a formal demand and had been refused possession, under a clause that carefully spelled out the mortgagee's

34. Failure to give notice to the tenant was apparently the only reason that a lease assignment made prior to default was held not absolute upon default. *Buildings Development Co. v. B/G Sandwich Shops, Inc.*, 278 Ill. App. 126 (1934). It should be noted, however, that the Illinois court in this case was applying Wisconsin law.

35. The consent is usually express, although consent has occasionally been implied from prolonged acquiescence. *Cameron v. Ah Quong*, 175 Cal. 377, 165 Pac. 960 (1917); *Cory v. Santa Ynez Land & Improvement Co.*, 151 Cal. 778, 91 Pac. 647 (1907). *Comment* (1935) 35 *COL. L. REV.* 1248.

36. *Dime Savings Bank v. Altman*, 246 App. Div. 823, 291 N. Y. Supp. 417 (2d Dep't 1936), *aff'd*, 275 N. Y. 62, 9 N. E. (2d) 788 (1937), 50 *HARV. L. REV.* 1322, 7 *BROOKLYN L. REV.* 115; *Steinberg v. Lincoln Savings Bank*, N. Y. L. J., Aug. 1, 1935, at 335. For a general discussion of rent assignments in New York, see Abelow, *An Historical Analysis of Assignments of Rent in New York* (1936) 6 *BROOKLYN L. REV.* 25.

37. *Dime Savings Bank v. Altman*, 246 App. Div. 823, 291 N. Y. Supp. 417 (1936); *Schmalzl v. Peretta*, 243 App. Div. 580, 276 N. Y. Supp. 224 (2d Dep't 1934); *Fahnestock v. Clark Henry Corp.*, 151 Misc. 593, 272 N. Y. Supp. 49 (Sup. Ct. 1934); *Katz v. Goodman*, 136 Misc. 166, 238 N. Y. Supp. 700 (2d Dep't 1929); *148th St. Realty Co. v. Conrad*, 125 Misc. 142, 210 N. Y. Supp. 400 (2d Dep't 1925); *cf.* *Grannis-Blair Audit Co. v. Maddux*, 167 Tenn. 297, 69 S. W. (2d) 238 (1934). But New York courts until recently have failed to find the proper procedure evidenced in the facts of the particular cases before them. *Prudential Savings Bank v. Madewell Homes Corp.*, 241 App. Div. 771, 270 N. Y. Supp. 556 (2d Dep't 1934); *Empire Trust Co. v. Kermacoe Realty Co.*, 149 Misc. 66, 266 N. Y. Supp. 685 (Sup. Ct. 1933); *Dime Savings Bank v. Fox*, 147 Misc. 24, 264 N. Y. Supp. 262 (Mun. Ct. of N. Y. 1933); *Emigrant Industrial Savings Bank v. North American Radio Corp.*, 140 Misc. 639, 251 N. Y. Supp. 542 (Mun. Ct. of N. Y. 1931).

38. *Freedman's Saving and Trust Co. v. Shepherd*, 127 U. S. 494 (1888); *Sage v. Memphis & Little Rock Ry.*, 125 U. S. 361 (1888); *Dow v. Memphis & L. R. Ry.*, 124 U. S. 652 (1888); *In re Brose*, 254 Fed. 664 (C. C. A. 2d, 1918); *In re Israelson*, 230 Fed. 1000 (S. D. N. Y. 1916).

39. *Long Island Bond & Mortgage Guarantee Co. v. Brown*, 171 Misc. 15, 11 N. Y. S. (2d) 793 (Sup. Ct. 1939).

right to possession, the court would construe this as constructive possession rendering the assignment absolute. This recognition of the expressed intent of the parties, if approved in other courts, would afford a greater degree of protection for mortgagees, and would enable both mortgagors and mortgagees to avoid the expenses of receivership. It also would permit a mortgagee to delay foreclosure until market conditions had improved with the assurance that the rents would not be milked by the mortgagor or secured by a receiver of a junior mortgagee.

THE MORTGAGEE IN POSSESSION

The difficulties discussed above can easily be circumvented if the mortgagee can persuade the mortgagor to surrender possession voluntarily under some form of extension or possession agreement. Where such an agreement is possible, it is advisable to spell out in detail the various rights and duties which each party assumes under the transfer. In this way the transfer can be rendered mutually more acceptable, and the parties can minimize the necessity of a court's subsequently supplying unspecified and unintended conditions.

In the absence of such an agreement the mortgagee's status is governed by common law principles. A mortgagee upon entering into possession assumes a new legal relation with three classes of persons: (1) the mortgagor; (2) the mortgagor's tenant; (3) the junior lienors and general creditors of the mortgagor.⁴⁰

As against the mortgagor, the mortgagee's right to rents due and accrued attaches at the moment of entry.⁴¹ In entering possession⁴² the mortgagee assumes extensive responsibilities analogous to those of outright ownership, and this extensive authority measures the scope of obligations imposed upon him. The mortgagee is held accountable to the mortgagor for applying net

40. The relations of the mortgagee in possession with junior lienors, and general creditors of the mortgagee are discussed in connection with receiverships, p. 1442 *infra*.

41. There is a conflict in decisions as to whether the entry of the mortgagee, to give him the rights of a mortgagee in possession must be made under the mortgage or whether entry under some other right will suffice. *Harrington v. Feddersen*, 208 Iowa 564, 226 N. W. 110 (1929); *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765 (1888). See also 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1215. The weight of authority favors requiring the mortgagee to take possession as mortgagee. *Robinson v. Smith*, 128 S. W. (2d) 27 (Tex. Comm. App. 1939), *aff'd*, 130 S. W. (2d) 381 (Tex. Civ. App. 1939).

42. The determinative criterion of possession is not the collection of rents [*Bank of America National Trust & Savings Association v. Bank of Amador County*, 135 Cal. App. 714, 28 P. (2d) 86 (1933); *Stephens Investment Co. v. Berry Schools*, 188 Ga. 132, 3 S. E. (2d) 68 (1939)], however, nor even occupation; it is rather the exercise of management and control over the mortgaged property. *Ireland v. United States Mortgage and Trust Co.*, 72 App. Div. 95, 76 N. Y. Supp. 177 (1st Dep't 1902), *aff'd*, 175 N. Y. 491, 67 N. E. 1083 (1903); *cf. Whitley v. Barnett*, 151 Iowa 487, 131 N. W. 704 (1911).

rents to the secured debt so as to reduce the amount which the mortgagor must pay to redeem the property.⁴³ The standard of accountability which he must meet is expressed in various ways. But whether labeled a "constructive trustee,"⁴⁴ a "quasi-trustee,"⁴⁵ or a "pledgee in possession,"⁴⁶ his duty is substantially that of the reasonable owner — "to manage the property in a reasonably prudent and careful manner so as to keep it in a good state of preservation and productivity."⁴⁷ The reasonableness of the mortgagee's action must be tested in light of general economic conditions, the character of the premises,⁴⁸ the likely duration of his possession, and the extent of the mortgagor's residual interest.⁴⁹

The strictness with which this standard is administered determines in large part the utility of this device for realizing upon the secured debt. On the one hand, adequate protection against depletion of the value of his property must be afforded the mortgagor. Unrestrained mortgagees in possession are as likely to let the mortgaged premises fall into disrepair as are beleaguered mortgagors. On the other hand, the effectiveness of this device will be impaired if the mortgagee is threatened with too great a potential liability. The mortgagee's responsibility is generally limited to the rents actually received, or to those which might have been received by the use of reasonable diligence.⁵⁰ Only where the mortgagee is unable to make an accounting, or has negligently or willfully mismanaged the property will he be held liable for the full reasonable rental value of the premises.⁵¹ A mort-

43. The proper procedure for a redemptioner desiring to effectuate his equity is to bring an action to redeem. *Siegel v. Atterbury*, 254 App. Div. 514, 5 N. Y. S. (2d) 372 (1st Dep't 1938); *Becker v. McCrea*, 193 N. Y. 423, 86 N. E. 463 (1908). Upon redemption, the holder of the equity can require a complete accounting from the mortgagee in possession. *Dime Savings Bank of Hartford v. Bragaw*, 125 Conn. 281, 4 A. (2d) 924 (1939). It is doubtful in most jurisdictions whether the redemptioner can claim an accounting except by a bill to redeem.

44. *Real Estate-Land Title and Trust Co. v. Homer Building and Loan Association*, 138 Pa. Super. 563, 10 A. (2d) 786 (1940); *Travis v. Schonwald*, 131 S. W. (2d) 827 (Tex. Civ. App. 1939).

45. *Peoples-Pittsburgh Trust Co. v. Henshaw*, 15 A. (2d) 711 (Pa. Super. Ct. 1940).

46. *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203 (1891).

47. *Bomar v. Smith*, 195 S. W. 964, 966 (Tex. Civ. App. 1917).

48. *Hays v. Christiansen*, 105 Neb. 586, 181 N. W. 379 (1921).

49. Comment, *Rights and Duties of a Mortgagee in Possession* (1935) 35 *Col. L. Rev.* 1248.

50. *Denham v. Lack*, 139 S. W. (2d) 243 (Ark. 1940); *Williams Realty and Loan Co. v. Simmons*, 3 S. E. (2d) 580 (Ga. 1939); *Pioneer Building and Loan Association v. Compton*, 138 S. W. (2d) 884 (Tex. Civ. App. 1940).

51. The fact that the rents received are less than the full rental value does not *ipso facto* demonstrate negligence. *Pioneer Building and Loan Association v. Cowan*, 123 S. W. (2d) 726 (Tex. Civ. App. 1939). A mortgagee may reduce rent in order to retain a tenant, and is not liable for occasional periods of vacancy during which he has made a reasonable effort to re-let the property. *Chapman v. Cooney*, 25 R. I. 657, 57 *Atl.* 928 (1904). See 2 JONES, *MORTGAGES* (8th ed. 1928) § 1438; 2 WILTSIE, *MORTGAGE FORE-*

gagee, failing expressly to stipulate otherwise, ordinarily may claim no compensation for his services in managing the property and collecting the rents.⁵²

A mortgagee is entitled to retain possession until the principal and interest of his debt have been satisfied,⁵³ or until a prior mortgagee asserts a superior claim to possession, provided he is not dispossessed for mismanagement.⁵⁴ But he may surrender possession voluntarily at any time,⁵⁵ although he is not generally allowed to substitute a receiver prior to foreclosure.⁵⁶

Mortgagees, as a rule, are not allowed to collect rents from mortgagors in actual possession.⁵⁷ Where a defaulting mortgagor desires to retain possession, however, a contract may be executed in the form of a lease, under which the mortgagor, reciting a surrender of possession to the mortgagee, promises to pay a stipulated rental in return for the mortgagee's promise to postpone foreclosure. Courts recognize such instruments to the extent of granting a judgment against the mortgagor for unpaid rents,⁵⁸ but refuse to permit the mortgagee to dispossess the mortgagor by summary proceeding for nonpayment of rents.⁵⁹

The legal relations between the mortgagee and the tenant of the mortgagor are largely determined by whether the lease precedes or succeeds the exe-

CLOSURE (5th ed. 1939) § 1238. But a mortgagee is liable for excessive leniency with tenants [*Carroll v. Tomlinson*, 192 Ill. 398, 61 N. E. 484 (1901)], preventable injury to property [*Baumgard v. Bowman*, 31 Ohio App. 266, 167 N. E. 166 (1928)] and penalties for nonpayment of taxes [*Moshier v. Norton*, 100 Ill. 63 (1881)]. Insurance premiums [*Land Finance Corp. v. Giorgio*, 245 App. Div. 836, 280 N. Y. Supp. 924 (2d Dep't 1935)], taxes [*Wise v. Layman*, 197 Ind. 393, 150 N. E. 368 (1926)] and expense for necessary repairs [*Burns v. Williams*, 147 Ark. 608, 228 S. W. 726 (1921)] must be paid by the mortgagee and may be credited against the rents.

52. *Kinhead v. Peet*, 153 Iowa 199, 132 N. W. 1095 (1911); *Pennsylvania Co. for Insurance on Lives v. Powers*, 122 N. J. Eq. 370, 194 Atl. 86 (1937). *Contra*: *Barry v. Dow*, 240 Mass. 419, 134 N. E. 367 (1922).

53. *In re Lindsay*, 12 F. Supp. 625 (N. D. Iowa 1935). See also 2 JONES, MORTGAGES (8th ed. 1928) § 887.

54. *Zajic v. Sikora Realty Corp.*, 252 App. Div. 343, 299 N. Y. Supp. 227 (2d Dep't 1937).

55. *Moskow v. Fine*, 292 Mass. 233, 198 N. E. 150 (1935).

56. *Hays v. Christiansen*, 105 Neb. 586, 181 N. W. 379 (1921); *Colonial Life Insurance Co. v. Anson Realty Co.*, 111 N. J. Eq. 267, 162 Atl. 111 (1932).

57. *Lawyers Title and Guaranty Co. v. Tausig*, 149 Misc. 594, 268 N. Y. Supp. 815 (Mun. Ct. of N. Y., 1933). *Contra*: *Long Island Bond and Mortgage Guaranty Co. v. Brown*, 171 Misc. 15, 11 N. Y. S. (2d) 793 (Sup. Ct. 1939).

58. *Grosvenor v. Holland*, 158 Misc. 925, 288 N. Y. Supp. 105 (County Ct. 1936).

59. This distinction evidences the general judicial reluctance to permit a creditor to dispossess the owner by means short of foreclosure. See *Lawyers Title & Guaranty Co. v. Tausig*, 149 Misc. 594, 268 N. Y. Supp. 815 (Mun. Ct. of N. Y. 1933). Mortgagors must be careful of the language in which such instruments are phrased, however, for where a conveyance in satisfaction of the debt is recited, courts may construe them as extinguishing all future interest of the mortgagor in the land, and regard him purely a tenant of his erstwhile mortgagee. *In re Ruckman*, 13 F. Supp. 992 (E. D. Ill. 1936).

cution of the mortgage. This distinction emerges from common law concepts of property. The mortgage after lease is deemed a transfer of the reversion carrying rent as an incident to it and creating a privity of estate between the mortgagee and tenant.⁶⁰ On the basis of this privity the mortgagee after default is able in a few states to assume the role of landlord by simple notice to the lessee to pay future rents to him.⁶¹ Such notice without entry is regarded a sufficient assumption of possession to entitle the mortgagee to the rents without attornment by the lessee.⁶² This result finds justification in the fact that a mortgagee who lends money in reliance upon a lease and the rents accruing thereunder should be protected in applying the rents to his debt. The tenant is protected in paying rents to the lessor prior to notice, but thereafter he does so at the peril of being called upon to pay them again to the mortgagee.⁶³ Since the mortgagee has stepped into the shoes of the lessor, however, his right to actual possession is inferior to that of the prior tenant, and the tenancy cannot be disturbed by ejectment, foreclosure, or sale for the duration of its term.⁶⁴

Different legal consequences follow where the lease succeeds the execution of the mortgage. A subsequent tenant is said to occupy the mortgagor's position and can hold no rights superior to those held by the mortgagor. A mortgage transfers no reversion against subsequent tenants and there is said to be no privity of estate or contract between the mortgagee and lessee, out of which the conventional landlord-tenant relation can arise.⁶⁵ At common law and in a few states, the mortgagee, upon default, has a right to possession, can disavow the lease, treat the tenant as a trespasser and resort to a suit in ejectment to evict him.⁶⁶

60. 2 JONES, MORTGAGES (8th ed. 1928) § 979.

61. This right is only recognized in the few states which still adhere closely to common law doctrines. See, for example, *Kenwood v. Dordick*, 104 Pa. Super. 12, 159 Atl. 84 (1932).

62. 4 Anne c. 16 §§ 9, 10 (1705). *Shallcross v. Rankin*, 82 F. (2d) 690 (C. C. A. 3d, 1936); *Sherrod v. King*, 226 Ala. 522, 147 So. 600 (1933); *Noble v. Brooks*, 224 Mass. 288, 112 N. E. 649 (1916); *Burden v. Thayer*, 44 Mass. 76 (1841); *Bulger v. Wilderman*, 101 Pa. Super. 168 (1931), 80 U. OF PA. L. REV. 269. See also 2 JONES, MORTGAGES (8th ed. 1928) § 979; Comment, *The Mortgagee's Right to Rent After Bankruptcy* (1932) 45 HARV. L. REV. 901.

63. *Lingerfelt v. Gibson*, 161 Tenn. 477, 32 S. W. (2d) 1047 (1930). Apparently so long as a tenant complies with the provisions of his lease, he will not be required to pay rent a second time. *Baltimore Markets v. Real Estate Land Title and Trust Co.*, 120 Pa. Super. 40, 181 Atl. 850 (1935).

64. *American Freehold Land Mortgage Co. v. Turner*, 95 Ala. 272, 11 So. 211 (1891).

65. This conventional common law doctrine still finds acceptance in a number of states. *Bank of Moundville v. Walsh*, 216 Ala. 116, 112 So. 438 (1927); *Beach v. Beach Hotel Corp.*, 113 Conn. 716, 168 Atl. 785 (1933); *Winnisimmet Trust Co. v. Libby*, 247 Mass. 560, 142 N. E. 772 (1924).

66. *Zimmern v. People's Bank of Mobile*, 203 Ala. 21, 81 So. 811 (1919); *West Side Trust and Savings Bank v. Lepoten*, 358 Ill. 631, 193 N. E. 462 (1934); *Mayor of Ha-*

Where the mortgagee elects to retain the tenant in actual possession, he may notify the tenant to pay rents to him, and the tenant must comply or vacate the premises.⁶⁷ Compliance by the tenant in the face of threatened eviction is not regarded as disloyalty to the lessor, since the tenant is thereby simply recognizing a superior title which the lessor himself created.⁶⁸ In doctrinal terms, payment by the tenant constitutes the necessary attornment;⁶⁹ and a new tenancy is thereby established which runs from year to year.⁷⁰ This result is necessary, since entry by the mortgagee is deemed an eviction by title paramount which terminates the old lease and the tenant's liability under it.⁷¹ Under the new lease which arises from an express or implied attornment, the mortgagee is equipped with all the legal devices for extracting rent from a tenant that are held by a conventional landlord.⁷²

If the tenant refuses to attorn, however, the mortgagee's remedy is to foreclose, take possession of the property, if possible to do so peaceably, or sue in ejectment.⁷³ A mortgagee generally has no right to rent until he has obtained possession, and in no states can he obtain possession merely by notifying the tenant to pay. Courts of equity have likewise relied upon this rationale in refusing mortgagees injunctive relief.⁷⁴ Consequently, prior

gerstown v. Groh, 101 Md. 560, 61 Atl. 467 (1905); *Brown v. Aiken*, 329 Pa. 566, 198 Atl. 441 (1938). See also 2 JONES, MORTGAGES (8th ed. 1928) § 982; Comment, *Ejectment as a Possessory Remedy to a Mortgagee on Default* (1939) 4 U. OF NEWARK L. REV. 183; Note (1931) 80 U. OF PA. L. REV. 269. But the prior mortgagee cannot distrain for rents, sue in forceable detainer, nor bring an action for rent or for use and occupation against the tenant, since these remedies are reserved exclusively to the landlord. *Burke v. Willard*, 243 Mass. 547, 137 N. E. 744 (1923).

67. *New York Life Insurance Co. v. Simplex Products Corp.*, 135 Ohio St. 501, 21 N. E. (2d) 585 (1939).

68. *Del-New Co. v. James*, 111 N. J. L. 157, 167 Atl. 747 (1933); *Bulger v. Wilderman*, 101 Pa. Super. 168 (1930); *Kimball v. Lockwood*, 6 R. I. 138 (1859).

69. *Jetzinger v. Consumers Stores*, 268 Ill. App. 482 (1932); *Hemminger v. Klaprath*, 189 Atl. 363 (N. J. 1937); *Reich v. Fordon*, 234 App. Div. 110, 254 N. Y. Supp. 453 (1st Dep't 1931); *Randal v. Jersey Mortgage Investment Co.*, 306 Pa. 1, 158 Atl. 865 (1932).

70. *West Side Trust and Savings Bank v. Lepoten*, 358 Ill. 631, 193 N. E. 462 (1934); *Brown v. Aiken*, 329 Pa. 566, 198 Atl. 441 (1938). Missouri provides by statute that the new tenancy shall run from month to month. MO. STAT. ANN. (1929) § 2584. *Roosevelt Hotel Corp. v. Williams*, 227 Mo. App. 1063, 56 S. W. (2d) 801 (1933). See also *Berick, The Mortgagee's Right to Rents* (1934) 8 U. OF CIX. L. REV. 250.

71. *Highland Trust Co. v. Slotnick*, 289 Mass. 119, 193 N. E. 831 (1935); *International Paper Co. v. Priscilla Co.*, 281 Mass. 22, 183 N. E. 58 (1932); *Burlington Building and Loan Association v. Ayers*, 108 Vt. 504, 189 Atl. 907 (1937). See also 2 JONES, MORTGAGES (8th ed. 1928) § 982.

72. *Manhattan Co. v. Nieberg*, 164 Misc. 618, 298 N. Y. Supp. 539 (Mun. Ct. of N. Y. 1936). Under the new lease, the mortgagee in possession is likewise subject to the landlord's liability. *Moss v. Grove Hall Savings Bank*, 290 Mass. 520, 195 N. E. 762 (1935) (mortgagee in possession held liable for damages resulting from leak in roof).

73. 2 JONES, MORTGAGES (8th ed. 1928) §§ 980, 981.

74. *Peoples-Pittsburgh Trust Co. v. Henshaw*, 15 A. (2d) 711 (Pa. Super. Ct. 1940).

to foreclosure, if the mortgagor's tenant is belligerent, the mortgagee has a right with no adequate means of enforcing it.⁷⁵ Ejectment, even where permitted, may be valueless because a foreclosure suit will be consummated before a cumbersome suit in ejectment can be decided.⁷⁶ A few courts indicate that the owner of mortgaged property will be held liable to the mortgagee for rents received after notice, less reasonable expenses on the property.⁷⁷ But such a claim is illusory against an insolvent mortgagor. The mortgagee is thus left to his chances of having a receiver appointed.

In most states, a subsequent tenant remains obligated to the mortgagor until the foreclosure sale and, in many instances, until the statutory period for redemption has run.⁷⁸ Eviction as a rule occurs only where the tenant is joined as a defendant in the foreclosure suit.⁷⁹ Where he is not so joined, the sale merely operates to transfer his duty to pay rent to the purchaser of the property.⁸⁰ Voluntary attornment to the mortgagee prior to foreclosure is legally impossible because the mortgagee has no right to possession upon which to base an attornment.⁸¹ But where a mortgagor has voluntarily placed a mortgagee in possession, the mortgagee is entitled as quasi-trustee of the lessor to enforce his right to rents and to oust a non-paying tenant by summary proceeding.⁸²

A problem of considerable importance is the extent to which a mortgagee entering possession is bound by rent reductions, prepayments of rent, and

75. *Burke v. Willard*, 243 Mass. 547, 137 N. E. 744 (1923).

76. See Notes (1932) 45 HARV. L. REV. 901, 903, (1931) 80 U. OF PA. L. REV. 269, 274.

77. *Randal v. Jersey Mortgage Investment Co.*, 306 Pa. 1, 158 Atl. 865 (1932).

78. *Bennos v. Waderlow*, 291 Mich. 595, 289 N. W. 267 (1939); *cf.* *Local Realty Board v. Lindquist*, 96 Utah 297, 85 P. (2d) 770 (1938). See also Comment, *Remedies Against "Milking" of Property by Mortgagors* (1933) 46 HARV. L. REV. 491.

79. *Markantonis v. Madlan Realty Corp.*, 262 N. Y. 354, 186 N. E. 862 (1933); *Knickerbocker Oil Corp. v. Richfield Oil Corp.*, 234 App. Div. 199, 254 N. Y. Supp. 506 (2d Dep't 1931); *Curry v. Bacharach Quality Shops, Inc.*, 271 Pa. 364, 117 Atl. 435 (1921); *Virges v. Gregory Co.*, 97 Wash. 333, 166 Pac. 610 (1917). *Contra*: *Hecht v. Dettman*, 56 Iowa 679, 7 N. W. 495 (1881). Decisions conflict as to the time at which the eviction of a tenant occurs. New York holds that only the actual sale on foreclosure where the tenant is joined therein constitutes eviction. *Metropolitan Life Insurance Co. v. Childs Co.*, 230 N. Y. 285, 130 N. E. 295, 14 A. L. R. 658, 664 (1921); *Capone v. Hinck*, 163 Misc. 47, 296 N. Y. Supp. 346 (Mun. Ct. of N. Y. 1937). Michigan, on the other hand, follows the rule that the filing of a foreclosure by a prior mortgagee is an eviction, even if the lessee is not a party to the foreclosure. *Dolese v. Bellows-Claude Neon Co.*, 261 Mich. 57, 245 N. W. 569 (1932), (1933) 32 MICH. L. REV. 119.

80. *Wilson v. Wilson*, 220 Iowa 878, 263 N. W. 830 (1935); *Tabor State Bank v. Jacobs*, 53 S. D. 635, 222 N. W. 141 (1928); *cf.* *Local Realty Co. v. Lindquist*, 96 Utah 297, 85 P. (2d) 770 (1938). *Contra*: *New York Life Insurance Co. v. Simplex Products Corp.*, 135 Ohio St. 501, 21 N. E. (2d) 585 (1939).

81. *Hogsett v. Ellis*, 17 Mich. 351 (1868). See also 2 JONES, MORTGAGES (8th ed. 1928) § 983.

82. *Goodnow v. Pope*, 31 Misc. 475, 64 N. Y. Supp. 394 (App. Term 1900). As to the mortgagee's rights under a lease assignment, see note 27 *supra*.

lease cancellations effected by the mortgagor for a cash consideration. Such agreements are standard devices by which hard-pressed mortgagors pocket the future earning capacity of the debt security and deliver to the assuming mortgagee the empty shell of the pledged asset. Courts are torn between preserving the mortgagor's powers of ownership, protecting a tenant who has entered into such an agreement in good faith, and safeguarding the mortgagee against these impairments of his security.

Collusive agreements effected in anticipation of foreclosure with the intent of defrauding the mortgagee are generally set aside.⁸³ But practical difficulties of proving fraud and collusion usually render this relief ineffectual. More adequate protection against rent reductions and prepayments of rent is found in the right of the mortgagee, in states still adhering to common law doctrines to disaffirm subsequent leases and demand the reasonable value of use and occupation from the tenant retaining possession.⁸⁴ Such action, however, creates the reciprocal privilege in the tenant to vacate the premises,⁸⁵ entailing a period of vacancy until the mortgagee secures a new lessee — at a possibly reduced rental. A mortgagee may thus still lose the benefits of favorable leases on the property. While mortgagees may not disaffirm a prior lease, courts are likely to abrogate subsequent agreements for the prepayment of rents to the mortgagor and hold a tenant liable to the mortgagee under the original terms of the lease.⁸⁶ Reasonable rent reductions, if effected before default,⁸⁷ are often held binding upon mortgagees.

In states which regard the mortgage as only a lien upon the pledged premises, mortgagees fare less well. The payment of rent in advance is construed as the purchase of a leasehold,⁸⁸ rendering the tenant immune to claims by the mortgagee prior to the foreclosure suit. Likewise, rent reductions are regarded a matter of the owner's prerogative.

Lease cancellations by mortgagors pose an even more perplexing problem for mortgagees. The impairment of a mortgagee's security is obvious, particularly where a loan has been made in reliance upon a prior lease. Yet where such releases are executed prior to default, mortgagees find them-

83. *Cassady v. Williams*, 234 Ala. 299, 174 So. 485 (1937); *Boteler v. Leber*, 112 N. J. Eq. 441, 164 Atl. 572 (1933); *Nerwal Realty Corp. v. 9th Avenue-31st Street Corp.*, 154 Misc. 565, 278 N. Y. Supp. 766 (Sup. Ct. 1935); *Gaynor v. Blewett*, 82 Wis. 313, 52 N. W. 313 (1892).

84. *Belleville Savings Bank v. Souris*, 266 Ill. App. 565 (1932); *Bank of Manhattan Trust Co. v. 571 Park Avenue Corp.*, 263 N. Y. 57, 188 N. E. 156 (1933); *State ex rel. Coker v. District Ct. of Tulsa County*, 159 Okla. 10, 11 P. (2d) 495 (1932).

85. Even where mortgagees have attempted to avoid an eviction by resort to devices such as quitclaim deeds executed during the redemption period, courts have still regarded the sale an eviction entitling the lessee to vacate. *Dolese v. Bellows-Claude Neon Co.*, 261 Mich. 57, 245 N. W. 569 (1932).

86. *Colter Realty Co. v. Primer Realty Corp.*, N. Y. L. J., p. 2837, col. 1 (App. Div., 1st Dep't, June 25, 1941); *Boteler v. Leber*, 112 N. J. Eq. 441, 164 Atl. 572 (1933).

87. *Kenney v. 149 North Avenue Corp.*, 115 N. J. Eq. 314, 170 Atl. 822 (1934).

88. *Grether v. Nick*, 193 Wis. 503, 215 N. W. 571 (1927); *cf. Zimmermann v. Walgreen Co.*, 215 Wis. 491, 255 N. W. 534 (1934).

selves virtually without judicial assistance.⁸⁹ Even where a lease is surrendered after default, resort to courts frequently proves abortive.⁹⁰ It has been suggested⁹¹ that lease cancellation might be enjoined as constituting a species of waste. While functional justification for such a remedy seems apparent, its application would probably be limited to prior leases on grounds that a mortgagee holds no reversionary interest in subsequent leases, and that entrance by a mortgagee constitutes an eviction, entitling a subsequent tenant to avoid the lease and vacate. Moreover, since injunctive relief is generally restricted to specific threatened action, a series of suits might prove necessary to accord mortgagees any substantial protection. This shortcoming might be avoided, however, by a court more attentive to the scope of protection needed here. It would seem consistent with the judicial policy of preventing spoliation of property to extend more effective protection to mortgagees against lease destruction by unscrupulous mortgagors.

RENT RECEIVERSHIPS

Where a mortgagee is unable to secure possession of the mortgaged property, or is unwilling to assume the responsibilities that possession entails, rents may frequently be procured by applying to a court of equity for a rent receiver. While the traditional equity receivership has been conditioned upon a showing of inadequate security, insolvency on the part of the mortgagor,⁹² or waste,⁹³ these factors assume less importance in many juris-

89. See, for example, *Magnolia Petroleum Co. v. State Building and Loan Association*, 199 Ark. 19, 132 S. W. (2d) 837 (1939).

90. *Moran v. Pittsburgh C. & St. L. Ry.*, 32 Fed. 878 (C. C. S. D. Ohio 1887). Some courts have indicated that such agreements will be abrogated as fraudulent conveyances where a mortgagee assembles the requisite proof of collusion and intentional fraud. *Bank of Manhattan Trust Co. v. 571 Park Avenue Corp.*, 263 N. Y. 57, 188 N. E. 156 (1933). But few mortgagees, in practice, can acquire sufficient proof to avail themselves of this relief. In a few title states, courts have evidenced a willingness to nullify lease cancellations effected after default, without a showing of collusion, on the theory that execution of such agreements is beyond the power of the mortgagor and tenant. *First National Bank of Chicago v. Gordon*, 287 Ill. App. 83, 4 N. E. (2d) 504 (1936). In such jurisdictions, a mortgagee must act promptly to avoid the charge of laches, since courts are reluctant to force tenants to pay rent for benefits never received.

91. See Comment, *Remedies Against "Milking" of Property by Mortgagors* (1933) 46 HARV. L. REV. 491.

92. Courts which recognize inadequacy and insolvency as grounds for appointing an equity receiver place varying degrees of stress upon these two factors. While New York and Iowa apparently favor a showing of inadequacy over insolvency [*First Trust Joint Stock Land Bank v. Jansen*, 217 Iowa 439, 251 N. W. 711 (1933); *Cohn v. Bartlett*, 182 App. Div. 245, 169 N. Y. Supp. 604 (1st Dep't 1918)], most courts require both to be demonstrated. *Totten v. Harlowe*, 90 F. (2d) 377 (App. D. C. 1937); *Equitable Life Assurance Soc. of United States v. McCartney*, 20 F. Supp. 37 (E. D. Ill. 1937); *Erwin v. West*, 105 Colo. 71, 99 P. (2d) 201 (1939); *Land Title & Trust Co. v. Kellogg*, 73 N. J. Eq. 524, 68 Atl. 80 (1907).

93. In Wisconsin and Minnesota, demonstration of waste is a *sine qua non* for the appointment of a rent receiver. *Marshall & Illsley Bank v. Cady*, 76 Minn. 112, 78 N. W.

dictions where receiverships have become statutory,⁹⁴ or where clauses in mortgages expressly waiving these requisites are recognized.⁹⁵ While it is clear that a receiver will *not* be appointed where the anticipated liquidated value of the property exceeds the amount of the debt,⁹⁶ it is not certain that a receiver *will* be appointed where the liquidated value falls short of the debt. Mortgagees can claim no absolute right to a receiver, and cannot bind a court by stipulations in the mortgage instrument.⁹⁷ While the appointment of a receiver is not dependent upon the mortgage's covering rents,⁹⁸ the presence of rent assignment and receivership clauses in the mortgage increases the likelihood that a receiver will be appointed.⁹⁹ Within the bounds of these generalizations exist widely varying requirements, tests and criteria for determining the propriety of appointing a receiver in the particular case. Some courts, hostile to impairing the mortgagor's rights of ownership, or fearful of converting the court into a debt collection agency for indigent mortgagees,¹⁰⁰ rigidly restrict the use of receiverships, other jurisdictions grant receiverships almost as a matter of course.

978 (1899); *Crosby v. Keilman*, 206 Wis. 252, 239 N. W. 431 (1931). The fact that the pledged asset is inadequate security, or that the mortgagor is insolvent is deemed irrelevant, since the mortgagee is assumed to have foreseen these risks when he made the loan. The rigor of this requirement, however, is somewhat lessened by defining "waste" to include "threatened waste." *Dick & Reuteman Co. v. Hunholz*, 213 Wis. 499, 252 N. W. 180 (1934). In this way, the insolvency and inadequacy tests may, in practice, be incorporated into the requisite showing of waste.

94. For a complete list of the receivership statutes, see Comment, *Power of First Mortgagee to Secure Rents Without Foreclosing* (1933) 43 *YALE L. J.* 107, 111, n. 27. Where statutes provide that a receiver may be appointed in case of inadequacy, insolvency, or waste, the tendency of courts is to deny appointment purely on the basis of a receivership clause in the mortgage instrument. *Garretson Inv. Co. v. Arndt*, 144 Cal. 64, 77 Pac. 770 (1904). *Contra*: *Watts' Adm'r v. Smith*, 250 Ky. 617, 63 S. W. (2d) 796 (1933).

95. Where rents have been assigned, the equitable factors occasionally assume less significance. See cases cited in 2 *WILTSIE, MORTGAGE FORECLOSURE* (5th ed. 1939) § 561. A few courts grant receiverships where the mortgage assigns the rents regardless of the adequacy of the security. *Ortengren v. Rice*, 104 Ill. App. 428 (1902). In such jurisdictions, the equitable requisites are reserved for situations where the rents are not pledged. *Trustees of Schools of Tp. No. 27 v. Thompson*, 298 Ill. App. 386, 19 N. E. (2d) 219 (1939).

96. *Aetna Life Ins. Co. v. Broeker*, 166 Ind. 576, 77 N. E. 1092 (1906); *Rogers v. Southern Pine Lumber Co.*, 21 Tex. Civ. App. 48, 51 S. W. 26 (1899). See also 2 *WILTSIE, MORTGAGE FORECLOSURE* (5th ed. 1939) §§ 562, 569. Illinois courts have indicated, however, that where the mortgage contains a rent clause, a receiver will be appointed regardless of the adequacy of the security. *Ortengren v. Rice*, 104 Ill. App. 428 (1902).

97. *Straus v. Barbee*, 262 Mich. 113, 247 N. W. 125 (1933).

98. *Chicago Title & Trust Co. v. Mack*, 347 Ill. 480, 180 N. E. 412 (1932). See Note (1933) 87 A. L. R. 1008.

99. *Martorano v. Spicola*, 110 Fla. 55, 148 So. 585 (1933); *Pizer v. Herzig*, 121 App. Div. 609, 106 N. Y. Supp. 370 (1st Dep't 1907). See Note (1919) 4 A. L. R. 1405.

100. See *Carey and Brabner-Smith, Studies in Realty Mortgage Foreclosures: III. Receiverships* (1933) 27 *ILL. L. REV.* 717.

In some states particular types of property are accorded special treatment. Where the property involved is a homestead or a farm, and the dispossession of the mortgagor would create great hardship without a corresponding benefit to the mortgagee, a receivership is frequently denied.¹⁰¹ But where special equities favor the mortgagee, the fact that the mortgaged property is a homestead does not necessarily prove an obstacle.¹⁰² Where the mortgagor conducts a business on the mortgaged premises, cases split on the propriety of appointing a receiver to take over the business.¹⁰³ If the rent element predominates among the component factors making up gross income, as is the case in apartment houses, a receivership may be more readily justified than in the case of hotels,¹⁰⁴ garages,¹⁰⁵ and parking lots,¹⁰⁶ where the rent factor may represent but a small fraction of receipts. Attempts to distinguish from gross income that portion earned by the mortgaged property can result in little more than an arbitrary estimate.

Where courts have granted a mortgagee's petition for a receivership, a problem arises as to which rents the receiver may collect. There is little controversy regarding rents accruing from the mortgaged property between the date of his appointment and the date of sale.¹⁰⁷ In some jurisdictions, however, his claim to rents relates back to the commencement of the foreclosure action,¹⁰⁸ or to the date of the petition for his appointment.¹⁰⁹ The receiver's right to back rents due and uncollected at the date of his appointment is less clear.¹¹⁰ The receiver's claim to these rents may prevail in some instances against the owner¹¹¹ and junior mortgagees,¹¹² but courts

101. *First Trust Co. v. Bauer*, 128 Neb. 725, 260 N. W. 194 (1935); *Crosby v. Keilman*, 206 Wis. 252, 239 N. W. 431 (1931); see *Rehberger v. Wegener*, 107 N. J. Eq. 391, 152 Atl. 700 (1930). *Contra*: *Rankin-Whitham State Bank v. Mulcahey*, 344 Ill. 99, 176 N. E. 366 (1931); *H. O. L. C. v. Benner*, 150 Kan. 108, 91 P. (2d) 9 (1939).

102. *Rehberger v. Wegener*, 107 N. J. Eq. 391, 152 Atl. 700 (1930). See also 2 WILKSIE, *MORTGAGE FORECLOSURE* (5th ed. 1939) § 574.

103. See Note (1935) 44 YALE L. J. 701.

104. *Fidelity Trust Co. v. Saginaw Hotels Co.*, 259 Mich. 254, 242 N. W. 906 (1932).

105. *Fairchild v. Gray*, 136 Misc. 704, 242 N. Y. Supp. 192 (County Ct. 1930).

106. *City Bank Farmers Trust Co. v. Mishol Realty Co.*, N. Y. L. J., Jan. 27, 1934, at 441, col. 5.

107. *Rankin-Whitham State Bank v. Mulcahey*, 344 Ill. 99, 176 N. E. 366 (1931); *Greenwich Savings Bank v. Samotas*, 17 N. Y. S. (2d) 772 (Mun. Ct. of N. Y., 1940).

108. *Greenleaf v. Bates*, 223 Iowa 274, 271 N. W. 614 (1937).

109. *First Trust Joint-Stock Land Bank of Chicago v. Jansen*, 217 Iowa 439, 251 N. W. 711 (1933).

110. See cases cited in (1933) 33 COL. L. REV. 1211, 1216, n. 41.

111. *Touroff v. Weeks*, 155 Misc. 577, 278 N. Y. Supp. 867 (City Ct. 1935); *cf.* *Watts' Adm'r v. Smith*, 250 Ky. 617, 63 S. W. (2d) 796 (1933). *Contra*: *New Order Bldg. & Loan Ass'n v. 222 Chancellor Ave.*, 106 N. J. Eq. 1, 149 Atl. 525 (1930).

112. *New York Life Ins. Co. v. Fulton Development Corp.*, 265 N. Y. 348, 193 N. E. 169 (1934). In New Jersey a prior mortgagee holding an assignment clause may have a receiver appointed who may collect back rents as against the claim of a junior lienor

are likely to accord preferential treatment to prior attaching creditors of the mortgagor.¹¹³ Rents collected in advance by the receiver for periods subsequent to the termination of the receivership must generally be paid over to the purchaser at the foreclosure sale.¹¹⁴ Some states bar collection of rents by a receiver during the redemption period,¹¹⁵ while others restrict his collection to this period exclusively.¹¹⁶

The right of a receiver to disavow leases reserving unduly low rentals and to demand the reasonable value of use and occupation from tenants in possession has attracted considerable attention during the last decade.¹¹⁷ While some courts in the past have construed the appointment of a receiver as an "equitable ejectment" and have permitted receivers to reject existing leases and demand a "fair and reasonable" rent from tenants,¹¹⁸ the present judicial trend has been towards restricting the lease rejection power to instances where fraud and collusion are shown.¹¹⁹ Although this policy has frequently had the effect of saddling mortgagees with unremunerative leases, it has at the same time afforded them a measure of protection against col-

in possession. *Paramount Bldg. & Loan Ass'n v. Sacks*, 107 N. J. Eq. 323, 152 Atl. 457 (1930).

113. *In re Barbizon Plaza*, 3 F. Supp. 415 (S. D. N. Y. 1933); *People's Trust Co. v. Goodell*, 134 Misc. 692, 236 N. Y. Supp. 549 (Sup. Ct. 1929).

114. *Equitable Life Ins. Co. v. Bowman*, 225 Mo. App. 855, 32 S. W. (2d) 126 (1930); *Cowen v. Arnold*, 58 Hun 437, 12 N. Y. Supp. 601 (1st Dep't 1890).

115. *Ginsberg v. Bennett*, 101 Colo. 121, 71 P. (2d) 419 (1937); *Aley v. Schroeder*, 144 Kan. 739, 62 P. (2d) 885 (1936); *Fredin v. Cascade Realty Co.*, 205 Minn. 256, 285 N. W. 615 (1939); *Local Realty Co. v. Lindquist*, 96 Utah 297, 85 P. (2d) 770 (1938), (1939) 52 HARV. L. REV. 843. *Contra*: *Equitable Life Ins. Co. v. McCartney*, 20 F. Supp. 37 (E. D. Ill. 1937), (1938) 26 ILL. BAR J. 251; *Petersen v. Jurras*, 2 Cal. (2d) 253, 40 P. (2d) 257 (1935); *Liss v. Harris*, 304 Ill. App. 173, 26 N. E. (2d) 133 (1940); *Prudential Ins. Co. v. Puckett*, 216 Iowa 406, 249 N. W. 142 (1933).

116. *First Trust Joint-Stock Land Bank v. Blount*, 223 Iowa 1339, 275 N. W. 64 (1937).

117. *State ex rel. Coker v. District Court of Tulsa County*, 159 Okla. 10, 11 P. (2d) 495 (1932); *Ottman v. Tilbury*, 204 Wis. 56, 234 N. W. 325 (1931). See (1933) 33 COL. L. REV. 1211. The problem frequently arises where tenants have purchased stock in a cooperative apartment venture and hold possession under proprietary leases reserving a nominal monthly maintenance assessment. The income derived from these assessments usually covers only operating costs, taxes and interest payments on the mortgage debt, with no provision for amortization. A receiver appointed after default on the mortgage thus receives little or no proceeds to apply to the principal of the debt. See, for example, *Schaffer v. 8100 Jefferson Ave. East Corp.*, 267 Mich. 437, 255 N. W. 324 (1934).

118. *Greenebaum Sons Bank & Trust Co. v. Kingsbury*, 248 Ill. App. 321 (1923); *Olive v. Levy*, 201 App. Div. 262, 194 N. Y. Supp. 88 (2d Dep't 1922).

119. *First Trust Joint-Stock Land Bank v. Cuthbert*, 215 Iowa 718, 246 N. W. 810 (1933); *Kenney v. 149 N. Avenue Corp.*, 115 N. J. Eq. 314, 170 Atl. 822 (1933); *Application of Miller*, 173 Misc. 347, 18 N. Y. S. (2d) 59 (Sup. Ct. 1940); *Prudence Co. v. 160 W. Seventy-Third St. Corp.*, 260 N. Y. 205, 183 N. E. 365 (1932); *Ottman v. Tilbury*, 204 Wis. 56, 234 N. W. 325 (1931). *Contra*: *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45 (1896); *State ex rel. Coker v. District Court of Tulsa County*, 159 Okla. 10, 11 P. (2d) 495 (1932).

lusive schemes¹²⁰ and has avoided setting up in the tenant a reciprocal privilege of rejecting leases favorable to the mortgagee.¹²¹

A closely allied problem is the right of a receiver to collect a "fair and reasonable" rent from a mortgagor in actual possession. Where courts have permitted receivers to demand rent from the mortgagor, the demand has not imposed an absolute obligation to pay, but has given the mortgagor the option of paying or vacating the premises.¹²² A New York case has reversed the previous practice in that state of permitting receivers generally to collect rents from mortgagors in possession.¹²³ In that case, however, the court relied heavily upon the fact that there were no rents, as such, to be collected and stressed the point that the receiver was appointed under a receivership clause, and not under the general equity jurisdiction of the court. While the fact that a receiver was appointed in the exercise of equitable powers will not create rents, as such, the court may nevertheless be willing in the future to distinguish the two on grounds that where the value of the property itself is sufficient to cover the debt, there is no need for compelling a mortgagor to supplement the security by rent payments, whereas, if the pledge is inadequate, the mortgagor may justifiably be required to furnish this additional security.

The mortgagee's quest for rents is further complicated where the same property secures mortgages of differing priority. Since junior mortgages convey merely the right to a lien upon the pledged asset,¹²⁴ a junior lienor seeking to apply current rents to his debt must rely upon a rent receivership, unless the mortgagor voluntarily relinquishes possession. Receivers are generally available to junior mortgagees, however, either by virtue of receivership clauses or by proof of inadequacy of the security¹²⁵ — which in their

120. See Comment, *Remedies Against "Milking" of Property by Mortgagors* (1933) 46 HARV. L. REV. 491; Note (1933) 33 COL. L. REV. 1211.

121. The ejection rationale upon which the receiver's unrestricted power to avoid leases was predicated would seem to entail the reciprocal privilege in the lessee of electing between attornment to the receiver and vacation of the premises. *Monro-King & Gremmels Realty Corp. v. 9th Avenue-31 Street Corp.*, 233 App. Div. 401, 253 N. Y. Supp. 303 (1st Dep't 1931); *Evans v. Orgel*, 221 Wis. 152, 266 N. W. 176 (1936). It has been contended, however, that it is not necessary to bestow upon the tenant this reciprocal privilege. See Tefft, *Receivers and Leases Subordinate to the Mortgage* (1934) 2 U. OF CHI. L. REV. 33.

122. Since the mortgagor's obligation arises from a court order and not from a lease, the proper remedy, where the mortgagor retains possession and fails to pay the prescribed rental, is a contempt proceeding and not a summary proceeding. *Title Guarantee & Trust Co. v. Feldon Realty Corp.*, 149 Misc. 206, 267 N. Y. Supp. 48 (Sup. Ct. 1933).

123. *Holmes v. Gravenhorst*, 263 N. Y. 148, 188 N. E. 285 (1933). See also 2 WILKSIE, *MORTGAGE FORECLOSURE* (5th ed. 1939) § 625; *Abelow, The Doctrine of Holmes v. Gravenhorst* (1934) 3 BROOKLYN L. REV. 212.

124. *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314 (1903).

125. *Wolkenstein v. Slonim*, 355 Ill. 306, 189 N. E. 312 (1934); *Zajic v. Sikora Realty Corp.*, 252 App. Div. 343, 299 N. Y. Supp. 227 (2d Dep't 1937).

case rarely presents a difficulty. The receiver does not act for lienors of the property generally,¹²⁶ but impounds rents solely for the benefit of the petitioning lienor,¹²⁷ unless the court so frames the appointing order as to require him to act for such other lienors,¹²⁸ or, upon application of another lienor, extends the receivership to cover such other liens.¹²⁹ Priority as to rents thus depends, not upon the seniority of the mortgages, but upon the sequence in which judicial aid is invoked.¹³⁰

A junior mortgagee's right to the rents collected by the receiver continues until the senior mortgagee asserts his superior claim.¹³¹ This action by the senior mortgagee may take various forms. While the commonest practice is a petition for extension of the receivership,¹³² courts have occasionally granted petitions for a new receiver,¹³³ or ordered possession to be surrendered to the mortgagee.¹³⁴ Rents thereafter accruing, as well as uncollected back rents,¹³⁵ are applied to the senior mortgagee's debt.

126. *Wolkenstein v. Slonim*, 355 Ill. 306, 189 N. E. 312 (1934), 2 U. OF CHI. L. REV. 149.

127. *In re New York State Railways*, 16 F. Supp. 717 (N. D. N. Y. 1936).

128. *Cross v. Will County National Bank*, 177 Ill. 33, 52 N. E. 322 (1898); *Fidelity Mortgage Co. v. Mahon*, 31 Ohio App. 151, 166 N. E. 207 (1929); see Note (1935) 95 A. L. R. 1051.

129. An interesting situation is created where the foreclosed mortgages are of equal priority. In this situation, it has been held that had the other mortgagee joined the petitioning mortgagee in bringing the foreclosure action, the receivership would have been for their mutual benefit. But since the other mortgagee failed to join in the receivership, the petitioning mortgagee was entitled to all funds collected by the receiver. *Collins v. Wallens*, 143 Misc. 329, 256 N. Y. Supp. 453 (Sup. Ct. 1932).

130. *Motor Finance Co. v. Wenzlaff*, 197 Iowa 314, 197 N. W. 60 (1924); *New York Life Ins. Co. v. Fulton Development Corp.*, 265 N. Y. 348, 193 N. E. 169 (1934). See also 2 WILTSIE, MORTGAGE FORECLOSURE (5th ed. 1939) § 584; Note (1935) 95 A. L. R. 1051. The distinction recognized in New Jersey between rent assignments and rent pledges dictates different results. A senior mortgagee whose instrument contains a rent assignment has a prior right to rents even though the junior mortgagee is in possession or has procured the appointment of a receiver. *Paramount Building & Loan Ass'n v. Sacks*, 107 N. J. Eq. 328, 152 Atl. 457 (1930). A senior mortgagee cannot long acquiesce in the junior mortgagee's collection of rents, however, or the court will deem his acquiescence a waiver of his rights. *Berman v. 145 Belmont Ave. Corp.*, 109 N. J. Eq. 256, 156 Atl. 830 (1931).

131. *In re Kings County Real Estate Corp.*, 67 F. (2d) 895 (C. C. A. 2d, 1933); *Norwood Savings Bank v. Romer*, 43 Ohio App. 224, 183 N. E. 45 (1932); *Wood v. Fetzer*, 19 S. W. (2d) 1113 (Tex. Ct. of Civ. App. 1929). But this rule does not apply where the senior mortgagee has been led by acts or inducements of the junior mortgagee to delay foreclosure or intervention. *Monica Realty Corp. v. 122 Fifth Ave. Corp.*, 264 N. Y. 52, 189 N. E. 778 (1934).

132. *Builders Bond & Mortgage Co. v. Wrobel*, 266 Ill. App. 325 (1932); *Putnam v. Henderson, Hull & Co.*, 49 App. Div. 361, 63 N. Y. Supp. 250 (1st Dep't 1900).

133. *Bagdad Traders, Inc. v. Shanske*, 137 Misc. 5, 244 N. Y. Supp. 165 (Sup. Ct. 1930).

134. *Wolkenstein v. Slonim*, 355 Ill. 306, 189 N. E. 312 (1934).

135. *New York Life Ins. Co. v. Fulton Development Corp.*, 265 N. Y. 348, 193 N. E. 169 (1934).

A question which has occasioned considerable litigation is whether a receiver owes to subsequently attaching lienors the duty to pay currently accruing taxes and assessments.¹³⁶ This liability, if permitted to accumulate, substantially impairs the rents available to succeeding claimants. Although appointing orders generally authorize receivers to pay these charges,¹³⁷ courts have interpreted such authorizations as permissive rather than mandatory.¹³⁸ Judicial sanction of the non-payment by receivers of accruing taxes is particularly detrimental to senior mortgagees,¹³⁹ since junior lienors are thus enabled to undermine the senior mortgagees' contracted priority even after their rights to rents have become vested.¹⁴⁰

Controversy also arises regarding the disposition to be made of surplus rents held by a senior mortgagee's receiver after satisfaction of the senior mortgage. There are two theories upon which a junior mortgagee's claim to this fund has been held to prevail against the mortgagor's residuary interest. The first is that the receiver, although appointed for the benefit of the senior mortgagee, holds rents *in custodia legis* for the benefit of all interested parties in order of their rank.¹⁴¹ The second is that the rents thus collected should be treated as if they constituted part of the surplus from sale of the property.¹⁴² While courts have not favored these characterizations of the rent fund for other purposes, many have, expressly or by implication,¹⁴³ accepted them in order to effectuate the junior lienor's claim.¹⁴⁴ The result seems justified, for by acknowledging his claim, the courts are, in effect, merely recognizing his seniority over the unsecured creditors of the mortgagor.¹⁴⁵

136. See Note (1934) 88 A. L. R. 1352.

137. That a receiver incurs certain risks in paying taxes has been demonstrated in *Belcher v. Aaron*, 8 Cal. (2d) 180, 64 P. (2d) 402 (1937). The court there held an improperly appointed receiver liable to the mortgagor for the full value of the rents collected, notwithstanding the fact that he had paid taxes out of the rents.

138. *Bagdad Traders, Inc. v. Shanske*, 137 Misc. 5, 244 N. Y. Supp. 165 (Sup. Ct. 1930).

139. Junior lienors in possession are generally accountable to senior mortgagees, but a senior mortgagee is not accountable to a junior mortgagee as such. *Hannon v. Kitay Realty Corp.*, 7 N. Y. S. (2d) 698 (Sup. Ct. 1938).

140. A bankruptcy trustee appointed under § 75 or § 77B of the Bankruptcy Act, however, is required by § 64(a) of the Act to pay accruing taxes. *Central States Life Ins. Co. v. Carlson*, 98 F. (2d) 102 (C. C. A. 10th, 1938); *Springfield v. Hotel Charles Co.*, 84 F. (2d) 589 (C. C. A. 1st, 1936).

141. *Atlantic City National Bank v. Wilson*, 108 N. J. Eq. 213, 154 Atl. 537 (1931).

142. *Desiderio v. Iadonisi*, 115 Conn. 652, 163 Atl. 254 (1932).

143. See, for example, *Vogel v. Nachemson*, 199 N. Y. 535, 92 N. E. 1105 (1910).

144. *Copelin v. Calkins*, 131 Ill. App. 149 (1907). *Contra*: *Stamp v. Eckhardt*, 204 Iowa 541, 215 N. W. 609 (1927).

145. New York courts have rejected both of these rationales as inconsistent with their view that a receiver is a representative only of the person upon whose petition he was appointed [*Woman's Hospital of New York v. 67th St. Realty Co.*, 240 App. Div. 33, 268 N. Y. Supp. 725 (1st Dep't 1934)], but by a devious application of the doctrine of marshalling assets they have granted the junior lienor indirectly what they feel they cannot give him directly. See 2 WILTSIE, MORTGAGE FORECLOSURE (5th ed. 1939) § 631;

The principal effect of the existence of junior lienors has been to precipitate foreclosure. Upon default, their slender margin of security frequently leaves them scant hope of realizing a full settlement of their debt. Hence junior mortgagees are apt to bring a foreclosure action to secure whatever increment the rents may afford. The burden is thus imposed upon senior mortgagees to come forward to assert their rights, lest their security be drained from under them. A few courts require junior mortgagees petitioning for a receiver to bring into court all senior and junior mortgagees.¹⁴⁶ The advantages of this practice are apparent. The senior mortgagee is saved the necessity of maintaining a constant vigilance to protect his prior claim to rents. And foreclosure may more readily be delayed until an improvement in the land market, since a speculative claim to rents no longer will lure junior lienors into precipitating a foreclosure. Furthermore, since all mortgagees may thus join in the receivership, any resulting surplus of rents may automatically be distributed to successive lienors according to their priority.

THE EFFECT OF BANKRUPTCY

Another factor which has considerably affected the mortgagee's claim to rent during the past decade is the intervention of bankruptcy. While foreclosures instituted prior to an adjudication of the mortgagor's bankruptcy are not dissolved,¹⁴⁷ foreclosures thereafter may be brought only with the consent of the bankruptcy court and under such conditions as it may impose.¹⁴⁸ Conflicts of jurisdiction are generally resolved by application of the rule that the court first taking jurisdiction over the subject matter retains control until it has exhausted its remedy.¹⁴⁹ This rule enables a receiver appointed by a state court prior to the mortgagor's bankruptcy to collect rents for the mortgagee during the pendency of the foreclosure regardless of the subsequent bankruptcy decree.¹⁵⁰ Likewise, a mortgagee who has already gained possession of the property is usually held not affected by a subsequent bankruptcy.¹⁵¹

Where bankruptcy has preceded default, a few courts have granted an automatic accrual to the mortgagee's benefit of rents collected by the trustee

Note (1935) 95 A. L. R. 1037. The senior mortgagee in satisfying his debt is compelled to utilize all the rents before resorting to the proceeds of the property—thus effecting an increase in the fund available to the junior lienor. If the senior mortgagee for any reason fails to exhaust the rents, the junior lienor will then be subrogated to his right to the rents. *Conroy v. Polstein*, 150 App. Div. 832, 135 N. Y. Supp. 419 (2d Dep't 1912).

146. *Bermes v. Kelley*, 108 N. J. Eq. 289, 154 Atl. 860 (1931); *cf. Mann v. Whitely*, 36 N. M. 1, 6 P. (2d) 468 (1931).

147. *Continental Bank & Trust Co. v. 19th & Walnut Streets Corp.*, 79 F. (2d) 234 (C. C. A. 3d, 1935).

148. *Investors Syndicate v. Smith*, 105 F. (2d) 611 (C. C. A. 9th, 1939).

149. *In re Standard Baths*, 85 F. (2d) 110 (C. C. A. 2d, 1936).

150. *In re Barbizon Plaza*, 3 F. Supp. 415 (S. D. N. Y. 1933); *Fairchild v. Gray*, 136 Misc. 704, 242 N. Y. Supp. 192 (County Ct. 1930).

151. *Fox v. Detroit Trust Co.*, 285 Mich. 669, 281 N. W. 399 (1938); *In re Burdick*, 56 F. (2d) 288 (S. D. N. Y. 1931).

in bankruptcy, on the theory that the trustee represents both secured and unsecured creditors;¹⁵² but most courts have regarded rents collected prior to a petition by the mortgagee as general assets distributable to unsecured creditors.¹⁵³ Hence mortgagees must, as a rule, petition the bankruptcy court for the relief desired.¹⁵⁴ In no case may a mortgagee be accorded greater rights than he would have enjoyed had bankruptcy not intervened.¹⁵⁵ While the mortgagee is usually entitled, under a rent clause, to a sequestration of rents as a matter of right,¹⁵⁶ leave to foreclose the mortgage or surrender of possession to the mortgagee are matters of the bankruptcy court's discretion. Although it is necessary for the bankruptcy court to have power, in the interest of creditors generally, to prevent an inconsiderate lienor from damaging the estate by instituting an untimely foreclosure,¹⁵⁷ it should exercise this power only when by postponement of the foreclosure a higher price is reasonably to be anticipated. Refusal on any other grounds to permit the mortgagee to foreclose would seem an unnecessary impairment of the mortgagee's priority over unsecured claimants.

Bankruptcy courts are usually reluctant to surrender possession of the mortgaged premises to the mortgagee. Justification for this policy lies in the fact that retention of possession by the court will avoid complaints from general creditors of mismanagement by the mortgagee, and at the same time afford adequate protection to the mortgagee's right to rents.¹⁵⁸ To reserve its control over the pledged premises, the court frequently attaches, as conditions to its consent to foreclosure, the provisos that a mortgagee shall not seek possession or apply for a receiver. Such restrictions would seem to fulfill the purposes of bankruptcy legislation without imposing any undue burden upon the mortgagee.

CONCLUSION

Mortgagees faced with the dilemma of either liquidating their pledged asset at prices far less than their secured debt, or accepting in satisfaction

152. *In re Wakey*, 50 F. (2d) 869 (C. C. A. 7th, 1931).

153. *Central States Life Ins. Co. v. Carlson*, 98 F. (2d) 102 (C. C. A. 10th, 1938); *In re Humeston*, 83 F. (2d) 187 (C. C. A. 2d, 1936); *Prudential Ins. Co. v. Liberdar Holding Corp.*, 74 F. (2d) 50 (C. C. A. 2d, 1934); *Badaracco v. Gatti Paper Stock Corp.*, 114 N. J. Eq. 551, 169 Atl. 281 (1933) (rent pledge). *Contra*: *Associated Co. v. Greenhut*, 66 F. (2d) 428 (C. C. A. 3d, 1933) (rent assignment).

154. The petition may request: (1) permission to foreclose; (2) consent to the appointment of a rent receiver; (3) surrender of possession of the property to the mortgagee; or (4) a sequestration to the mortgagee's benefit of rents to be collected by the trustee in bankruptcy. *Wolf v. De Wolf & Co., Inc.*, 53 F. (2d) 999 (C. C. A. 7th, 1931); *Mortgage Loan Co. v. Livingston*, 45 F. (2d) 28 (C. C. A. 8th, 1930).

155. *Investors Syndicate v. Smith*, 105 F. (2d) 611 (C. C. A. 9th, 1939).

156. *Central States Life Ins. Co. v. Carlson*, 98 F. (2d) 102 (C. C. A. 10th, 1938).

157. *In re Morris White Holding Co.*, 52 F. (2d) 499 (S. D. N. Y. 1931).

158. *Prudential Ins. Co. v. Liberdar Holding Corp.*, 74 F. (2d) 50 (C. C. A. 2d, 1934).

of their debt property which they do not want,¹⁵⁹ have relied increasingly upon the rents of the pledged realty. But the reluctance of courts to grant effect to rent clauses — evidenced in their resort to slippery legal concepts and technical constructions of the mortgage language — has, in very many instances, unduly hampered the mortgagee in effectuating his claim to rents by extra-judicial means. This trend has been accompanied by a corresponding leniency in the appointment of receivers.

The policy of requiring mortgagees to come into court to gain recognition of their rights to rent can be rationalized in two ways. In the first place, judicial reluctance to deprive the mortgagor of possession does not extend to the appointment of a receiver, since the receiver is regarded as an officer of the court, whose duty it is to protect the rights of both parties in interest.¹⁶⁰ Thus the mortgagor is safeguarded against the depredations of plundering mortgagees, while the income is held *in custodia legis* for application to possible deficiencies upon sale of the property. In the second place, receiverships afford a method of compensating for any unreasonable terms extracted by the mortgagee by reason of his superior bargaining power at the time the mortgage was executed. Through the receivership device, the procedure for realizing upon the mortgaged debt becomes formularized under strict judicial surveillance, and less stress is placed upon the particular terms of the mortgage. This also helps to protect the rights of an owner in his mortgaged property.

But while receivership affords greater mutual protection, it exacts from both parties a heavy price at a time when they can ill afford it.¹⁶¹ A mortgagee in possession collects the rents and administers the property without compensation, whereas a receiver deducts both his fee and administrative expenses from the rents before applying them to the mortgaged debt. Litigation expenses entailed in the procurement of the receiver increase the burden. Considerations of economy, particularly relevant where insolvency abounds, militate against this sweeping trend towards receiverships and favor cheaper, extra-judicial forms of debt satisfaction more carefully adapted to the particular case.¹⁶² Judicial encouragement of rent collection by the mortgagee in possession, with the adequate means available in present-day procedure for holding him to a reasonable standard of accountability, would make available a device better suited to the needs of modern debt liquidation.

159. In taking over the secured asset, mortgagees must assume all liens existing on that property. *Lawn View Building Corp. v. Weinstock*, 288 Ill. App. 320, 6 N. E. (2d) 276 (1937).

160. *Desiderio v. Iadonisi*, 115 Conn. 652, 163 Atl. 254 (1932); *Farmers' Saving Bank of Shelby v. Pomeroy*, 211 Iowa 337, 233 N. W. 483 (1930).

161. See Note (1934) 2 U. OF CHI. L. REV. 149.

162. For example, in *Wolkenstein v. Slonim*, 355 Ill. 306, 189 N. E. 312 (1934), one of the factors upon which the court's decision turned, was the fact that the mortgagee in possession could administer the property at 4% of the gross income, whereas a receivership would have cost 10% of the gross income.