to render final judgment for defendant; in fact, it would have been error for it not to have done so.[22] The federal rule laid down in the *Slocum* case,[23] is based on the right of trial by jury guaranteed by the 7th Amendment to the United State Constitution; it is said that when a verdict is set aside the issues are left undetermined, and until they are determined in a jury trial no judgment on the merits can be given. In a persuasive dissent written by Hughes, J., and concurred in by Holmes, Lurton, and Pitney, JJ., the view is expressed that the rendition of final judgment by the reviewing court would not be a violation of the 7th Amendment since the court would be deciding a question of law, not of fact, that is, whether there was sufficient evidence to go to the jury. In a later case[24] the Supreme Court sustained the rule of the *Slocum* case without a dissent. The Ohio Supreme Court finds no constitutional difficulty in rendering final judgment,[25] relying on an argument similar to that expressed in the dissenting opinion in the *Slocum* case. Moreover, the Ohio courts are authorized by statute to render final judgment in such cases. H. M. M.

REAL PROPERTY

Real Property — Termination of a Lease by Foreclosure of Prior Mortgage

In 1926, Kenyon Painter executed a mortgage to the plaintiff, the New York Life Insurance Company, and in 1931 leased the premises for a seventy-month term to the Simplex Products Corporation, defendant in the case at bar. The defendant paid rent to Painter until September, 1933, when by agreement payment of part of the rent was made to the plaintiff while the remainder was paid to the Union Trust Company, which held a mortgage on the residue of the leased property. In December, 1934, the plaintiff brought an action to foreclose his mortgage, but failed to join the defendant-lessee as a party. Plaintiff

dict, the reviewing court can render final judgment rather than remand the case for a new trial if it holds that there was not sufficient evidence to go to the jury. *Baltim. & Carol. Line* v. *Redman*, 55 Sup. Ct. 890. Note 45 Yale L.J. 166 (1935) 21 Ia. L. Rev. 117 (1936).

[22] *Majoros* v. *Cleve. Inter. Rd. Co.*, 127 Ohio St. 255, 187 N.E. 857 (1933); *Greyhound Lines* v. *Martin*, 127 Ohio St. 499, 189 N.E. 244, 14 Ohio L. Abs. 327 (1934); *Lakeside Hosp.* v. *Kover*, 131 Ohio St. 333, 2 N.E. (2d) 857, 6 Ohio Op. 54 (1936).

[23] See note 21, *supra*.

[24] *Pederson* v. *Del., L. & W. R. Co.*, note 21, *supra*.

[25] *Keller* v. *Stark Elec. Ry. Co.*, 102 Ohio St. 114, 130 N.E. 508, 12 Ohio App. 326 (1921); *Ellis and Morton* v. *Ohio Life Ins. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, 1 Hand. 97, 12 Ohio Dec. Rep. 47, 1 Hand. 119, 12 Ohio Dec. Rep. 58 (1855).

[26] G.C. sec. 12223-38.

subsequently bought in at a foreclosure sale. The defendant thereafter continued paying the rent to the plaintiff until June, 1935. The present action was brought for the collection of rent for the months of December, 1935, to May, 1936, inclusive. Saying that the purchase of the property at the foreclosure sale operated to terminate the lease and that the subsequent monthly payments of the rent created a periodic tenancy, the Supreme Court of Ohio held that the defendant was liable for the rent only for the periods of occupancy.[1]

Assuming that the lessee is made a party to the foreclosure proceedings and that there is no subsequent attornment, all jurisdictions seem to be agreed that the foreclosure of a prior mortgage will terminate a subsequent lease where there is no statute to the contrary.[2] And this rule applies as effectively where the mortgagee-purchaser attempts to treat the lease as continuing, bringing action for the collection of rent,[3] as where he desires the lease terminated.[4] The theory is that the purchaser at a foreclosure sale of a prior mortgage does not take the reversionary interest of the mortgagor. The transfer of interest is regarded as occurring as of the time when the mortgage was executed, and the enforcement of that mortgage operates to extinguish subsequent encumberances on the property.[5] It is to be noted that, although the bases for this rule is apparently the protection of the interests of the prior mortgage, it is held, nevertheless, to operate to his disadvantage in denying him the right to receive rent which accrues after the sale.

There is a marked split in the decisions where the lessee is not joined as a party to the foreclosure, the majority rule being that the lease in such event is not terminated.[6] The theory underlying this doctrine is that for the decree of foreclosure to operate as against one who has an interest in the property such as a lessee, it is necessary that he be joined as a party.[7] In the jurisdictions where this rule operates, it is applied as readily for the advantage of the purchaser at the foreclosure sale where

[1] *New York Life Insurance Co.* v. *Simplex Products Corporation*, 135 Ohio St. 501, 21 N.E. (2d) 585, 14 Ohio Op. 396 (1939).

[2] *Peters* v. *Elkins*, 14 Ohio Reports 344 (1846); *Dolese* v. *Bellows-Claude-Neon Co.*, 261 Mich. 57, 245 N.W. 569 (1932); *Walgreen Co.* v. *Moore*, 116 N. J. Eq. 348, 173 Atl. 587 (1934).

[3] *Peters* v. *Elkins*, *supra*.

[4] *Downard* v. *Graff*, 40 Iowa 597 (1875).

[5] TIFFANY, (1 ed. 1910) LANDLORD AND TENANT, p. 1118.

[6] *Walgreen* v. *Moore*, *supra*; *Metropolitan Life Insurance Co.* v. *Childs*, 230 N. Y. 285, 130 N.E. 295, 14 A.L.R. 658 (1921); *Gale* v. *Carter*, 154 Ill. App. 478, 164 Ill. App. 545 (1910); *Dundee Naval Stores Co.* v. *McDowell*, 65 Fla. 15, 61 So. 108, Ann. Cas. 1915 A, 384 (1913). However many jurisdictions hold that the failure to join the lessee does not operate to preserve the lease. *Dolese* v. *Bellows-Claude-Neon Co.*, *supra*; *McDermott* v. *Burke*, *et al.*, 16 Cal. 580 (1860); *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 90 Fed. 379 (1898); 14 A.L.R. 664.

[7] 42 C.J., p. 59.

he wishes to treat the lease as continuing[8] as for the benefit of the lessee desiring to prevent ouster.[9] To uphold the mortgagee-purchaser's right to collect the rent where the lessee is not joined in the foreclosure, these jurisdictions treat the reversion of the mortgagor as passing to the mortgagee-purchaser.[10]

In the case of *Nunn* v. *Hutchison*[11] the Court of Appeals of Summit County, at the suit of a lessee, enjoined the sheriff from disturbing lessee's possession by a writ of possession because the lessee was not made a party to the mortgage foreclosure. This case was relied upon by the plaintiff in the case at bar as indicating that Ohio required the lessee to be made a party to the foreclosure proceedings in order to terminate the lease. It may be noted, however, that the parties' rights in the property were not passed upon in the *Nunn* case, the court relying upon the principle that: "Writ of possession can be used only against parties to foreclosure suit."[12] This decision seems consistent with the underlying theory of the majority doctrine, in that it protects the lessee where his rights have not been passed upon in the foreclosure proceedings. The inconsistency arises in jurisdictions where the mortgagee-purchaser is permitted to rely on this rule as a basis for the continuation of the lease. In these jurisdictions the mortgagee, by intentionally excluding the lessee as a party to the foreclosure, may obtain the benefits of the lease over the lessee's objection by the operation of a rule which exists for the benefit of the lessee and to protect his interests.

All of the authorities are agreed that even after the termination of the lease by foreclosure sale under a prior mortgage, the lessee by recognizing (*i.e.* "attorning" to) the purchaser, and the latter by accepting the lessee as his tenant, may create the relationship of landlord and tenant. The attornment may be made expressly or by implication, as in the payment and acceptance of rent.[13] A conflict exists as to whether the original lease governs the tenancy or whether a new tenancy is created, the terms of which are determined by the facts surrounding the attornment. Most courts hold that the lessee's acknowledgment of the mortgagee as landlord creates a tenancy at will which may mature into a periodic tenancy upon the periodic payment of the rent.[14] Behind this is the conception that the reversionary interest fails to pass to the mort-

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[8] *Ellveay Newspaper Workers, etc.* v. *Wagner Market Co.,* 110 N.J.L. 577, 166 Atl. 332 (1933); *Metrolopitan Life Insurance Co.* v. *Childs, supra.*

[9] *Brush* v. *Fowler,* 36 Ill. 53, 85 Am. Dec. 382 (1864).

[10] *Metropolitan Life Insurance Co.* v. *Childs, supra*; *Ellveay Newspaper Workers, etc.* v. *Wagner Market Co., supra.*

[11] 1 Ohio L. Abs. 283 (1922).

[12] Syllabus 3, *Nunn* v. *Hutchison, supra.*

[13] TIFFANY, (1 ed. 1910) LANDLORD AND TENANT, p. 411.

[14] *Gartside* v. *Outley,* 58 Ill. 210, 11 Am. Rep. 59 (1871); *Burke* v. *Willard,* 243 Mass. 547, 137 N.E. 744 (1923).

gagee-purchaser. These courts hold that, since this reversion of the mortgagor is not acquired by the purchaser at the mortgage foreclosure sale, there is no privity of estate or contract between the purchaser and the mortgagor's lessee.[15] Unless in some manner the mortgagee-purchaser acquires the reversionary interest of the mortgagor upon foreclosure, there seems to be no legal foundation for regarding the old lease as continuing. New York, New Jersey, and Texas have held that the attornment by payment of rent binds the leasee for the term of the original lease.[16] But these are jurisdictions which treat the reversionary interest of the mortgagor as passing to the purchaser when the lessee is not made a party to the foreclosure.

We may approach the problem raised by the principal case from the points of view of two separate groups of jurisdictions. First, consider the minority jurisdictions which hold that the foreclosure sale operates to terminate the lease, regardless of the failure to make the lessee a party to the foreclosure.[17] In treating the mortgagor's reversionary interest as not passing to the mortgagee-purchaser even where there is a subsequent attornment, these courts are consistent in their approach and afford a reliable rule for predicting the effect of a foreclosure sale on titles and interests. On the other hand, it may be noted that in the principal case the defendant-lessee is enabled to take advantage of a situation which he had not contemplated when entering into the lease or at any time thereafter, and to benefit by a rule which is based upon the protection of the prior mortgagee as against junior encumbrancers. The plaintiff-mortgagee evidently proceeded with the foreclosure of his mortgage believing that he would continue to receive the rentals for the remainder of the lessee's term, and the lessee by his continued monthly payments indicated that he regarded the lease as continuing after the foreclosure. Had the mortgagee known that the foreclosure sale would operate to terminate the lease, he might well have refrained from foreclosing the mortgage, accepting the monthly payments of rent until the term had expired.

Would a more desirable decision have been reached in the majority jurisdictions which hold that the lease is not terminated when the lessee is not made a party to the foreclosure?[18] The plaintiff would have prevailed in any of these jurisdictions, but it may be questioned whether the decision should turn on the failure of the mortgagee to make the

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[15] *McFarland Real Estate Co.* v. *Joseph Gerardi Hotel Co.*, 202 Mo. 597 (1906).

[16] *Kelly* v. *Osborne*, 172 App. Div. 6, 157 N.Y.S. 1100 (1916); *Ellveay Newspaper Workers, etc.* v. *Wagner Market Co., supra; Peck and Hills Furniture Co.* v. *Long*, 68 S.W. (2d) 288 (Texas, 1934).

[17] *Supra*, note 5. As a result of the decisions in *Peters* v. *Elkins, supra*, and in the case at bar, it is apparent that Ohio may be included in this group of jurisdictions.

[18] *Supra*, note 5.

lessee a party to the foreclosure proceedings, since such application again involves employing a rule which has its basis in the protection of the rights of the party against whose interest it is utilized. Hardship might be worked against the lessee as in the case of *Metropolitan Life Insurance Company* v. *Childs*[19] where the lessee, in reliance upon a foreclosure proceeding to which he was made a party, vacated the premises, only to find later that the mortgagee had withdrawn his name as a party to the foreclosure shortly before the actual sale.

In *Curry* v. *Bacharach Quality Shops Inc.*,[20] the Supreme Court of Pennsylvania held that by force of the operation of a statute[21] of that state, the purchaser at a mortgage foreclosure had the option of affirming or disaffirming a subsequent lease, but, having once affirmed the lease he stood in the position of assignee of the reversion and could not subsequently disavow the lease. By statute[22] the interests of the lessee are also protected so that he cannot be dispossessed unless the mortgagee-purchaser makes him a party to the foreclosure (*scire facias* in Pennsylvania).[23] The Pennsylvania solution appears to the writer to be a happy one. It is definite in that it confers upon one party, the purchaser, the right and obligation of determining whether or not the lease shall continue in effect; and at the same time it protects the lessee from eviction where he has not been notified of the disaffirmance of the lease.

D. A. W.

TORTS

TORTS — FORMS OF ACTION — TRESPASS — BATTERY OR NEGLIGENCE

A sheriff was pursuing an escaping misdemeanant who had previously been arrested by him. While engaged in the pursuit the sheriff fired several shots intending to frighten the misdemeanant into stopping; one of the bullets struck the plaintiff, a bystander in the public street. The Court of Appeals for the Third District held the sheriff liable to such person saying that the sheriff "commits an act of trespass against the person so injured."[1]

At early common law an action in trespass could be maintained whenever the injury was direct and with force. Hence, an action could be maintained in trespass if the plaintiff could prove that the defendant

[19] *Supra*, note 5.
[20] 271 Pa. 364, 117 Atl. 435 (1921).
[21] 12 P.S., Sec. 2611 (1836).
[22] 12 P.S., Sec. 309 (1901).
[23] *Nevil* v. *Heinke*, 22 Pa. Super. 614 (1903).
[1] *Young* v. *Kelly*, 60 Ohio App. 382, 21 N.E. (2d) 602 (1938).