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Mortgages--Receivers--Rents and Profits

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upon banks the duty of analyzing every check offered for deposit by a corporation, and investigating the purposes of the indorsements thereon. This we submit is placing too heavy a burden upon banks for what in most instances amounts to negligence and laxity upon the part of corporate officers and stockholders. The decision is moreover not in keeping with recent expressions of our courts.[23] The tendency has been to narrow the limits of liability of banks for fraudulent acts of trustees and agents in dealing with their principal's property. The Court does not appear to have given due heed to these warnings nor is the result reached conducive of practical law.

HENRY J. PLITKIN.

MORTGAGES—RECEIVERS—RENTS AND PROFITS.

The mortgagor is entitled to the rents and profits of the mortgaged premises after the institution of foreclosure proceedings and pending a sale therein.[1] This right is consistent with the equitable theory of mortgages adopted in this state[2] and the abolition by statute of the mortgagee's right to maintain ejectment upon the mortgagor's default.[3] There are, however, limitations to this right; for, having acquired jurisdiction over the property the court may appoint a receiver thereof to collect the rents and profits, and hold them for application on account of the debt, in the event of a deficiency.[4] Provision has been made for such appointment, by the legislature in specified instances,[5] but the courts of equity have long exercised the power independent of the provisions, and are not limited in its exercise to the cases there enumerated.[6] The intervention of equity to relieve from forfeiture, resulting in the drastic changes in the law of mortgages, was not designed to secure continued use of the property and drain of the profits, to the default-

[23] Whiting v. Hudson Trust Co., 234 N. Y. 394, 138 N. E. 33 (1923); Empire Trust Co. v. Cahan, 274 U. S. 473, 47 Sup. Ct. 661 (1927).

[1] Syracuse City Bank v. Tallman, 31 Barb. Ch. 201 (N. Y. 1857); Whalen v. White, 25 N. Y. 462 (1862); Rider v. Bagley, 84 N. Y. 461, 465 (1881); Wyckhoff v. Scofield, 98 N. Y. 475 (1885).

[2] Trimm v. Marsh, 54 N. Y. 599 (1874); Howell v. Leavitt, 95 N. Y. 617 (1884); Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75 (1908); Becker v. McCrea, 193 N. Y. 423, 86 N. E. 463 (1908).

[3] N. Y. C. P. A. §991.

[4] See cases *infra* note 7; as to application of rents, Syracuse City Bank v. Tallman, *supra* note 1; Cincinnati Nat. Bank v. Tilden, 22 N. Y. Supp. 11, *aff'd*, 140 N. Y. 620, 35 N. E. 891 (1893); Continental Ins. Co. v. Reeve, 149 App. Div. 835, 134 N. Y. Supp. 78 (2d Dept. 1912).

[5] N. Y. C. P. A. §974 (adopted from §713 of N. Y. C. C. P. which is discussed in Hollenbeck v. Donnell, *infra* note 6).

[6] Hollenbeck v. Donnell, 94 N. Y. 342 (1884).

ing mortgagor. The necessity, therefore, of conserving the security, when threatened with loss or impairment, or where the property appears inadequate to satisfy the debt, suggests the origin of the power to appoint receivers and the incentive which moves the court in its exercise.[7]

Upon appointment and qualification, the receiver becomes entitled to possession of the property [8] subject, however, to leases existing at the time of his appointment.[9] The rule generally adopted is that he is entitled to collect the rents accruing from the date of his appointment [10] and those which have accrued to the owner but remained unpaid at the time of appointment.[11] The right of tenants to assert offsets and defenses against receivers, which would be available in actions by the landlord, has led to considerable conflict.

A series of decisions have held that receivers are not bound by terms and conditions of leases executed subsequent to the mortgage, and have granted applications of receivers to compel attornment by tenants without regard to their rights under the lease.[12] The reason generally assigned, where this rule has been invoked, is that the lease being subsequent to the mortgage, the tenant takes with notice of the mortgagee's rights and the remedies accorded him in their enforcement.[13]

The question most frequently arises in cases where the tenant makes anticipated payments of rent, and upon appointment, the receiver makes application to have the court fix the reasonable value of use and occupation, and direct the occupier to attorn. Such was the case in *Home Life Insurance Company* v. *O'Sullivan*,[14] wherein the tenant had made a deposit with the owner of the equity, equal to a monthly installment of rent, which under the terms of the lease was to be applied to the last month's rent. The Court there denied the right to set off the deposit as against the receiver, reciting the

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[7] As to when applications will be granted, see 3 JONES, MORTGAGES (8th ed. 1928) §1931; 1 WILTSIE, MORTGAGE FORECLOSURE (4th ed. 1927) §557, and cases cited.

[8] Citizens Savings Bank v. Wilder, 11 App. Div. 63, 42 N. Y. Supp. 481 (2d Dept. 1896), and cases cited *supra* note 1.

[9] Burtaine v. Barr, 194 App. Div. 906, 184 N. Y. Supp. 796 (2d Dept. 1920).

[10] Wyckhoff v. Scofield, *supra* note 1, at 477; Argall v. Pitts *et al.*, 18 N. Y. 239, 243 (1879).

[11] Hollenbeck v. Donnell, *supra* note 6; Wyckhoff v. Scofield, supra note 1.

[12] Fletcher v. McKeon, 71 App. Div. 278, 75 N. Y. Supp. 817 (1st Dept. 1902); Derby v. Brandt, 99 App. Div. 257, 90 N. Y. Supp. 980 (1st Dept. 1904); Olive v. Levy, 201 App. Div. 262, 194 N. Y. Supp. 88 (2d Dept. 1922); Monro-King & Gremmels R. Corp. v. 9th Ave. 31st St. Corp., 233 App. Div. 401, 253 N. Y. Supp. 303 (1st Dept. 1931); Dow v. Nealis, 93 N. Y. Supp. 379 (1905).

[13] Fletcher v. McKeon, *ibid.* at 819, which is referred to in most cases wherein the rule has been applied.

[14] Home Life Insurance Co. v. O'Sullivan, 151 App. Div. 535, 136 N. Y. Supp. 105 (2d Dept. 1912).

rule above referred to. The same rule had been applied in an earlier case[15] where the Court enjoined the lessee who had paid rent for the term in advance, from interfering with the receiver in collecting rent from the subtenants. It was further suggested that to uphold the lessee would enable the mortgagor to defeat the mortgagee's remedy by leasing the property and receiving the rents in advance.[16]

The application of the rule would be simple if construed to mean that the appointment of a receiver terminated the tenant's obligations under the lease. He would then be free to negotiate with the receiver; or failing, to remove from the premises. That such is not the law, was clearly decided in the case of *Metropolitan Life Insurance Company* v. *Child's Company.*[17] In that case, the tenant was made a party to the foreclosure action and final judgment entered therein. The tenant removed from the premises; but before sale, the plaintiff vacated the judgment and discontinued the action as to the tenant. The plaintiff, after purchasing at the sale, sued the tenant for rent under the terms of the lease, and recovered. The Court held that until eviction, the tenant was liable and such eviction did not take place until the sale.[18]

The manifest inconsistency of the two rules places the tenant in a precarious situation. His rights under the lease may be disregarded upon the appointment of a receiver; but his obligations thereunder continue until the sale of the premises. In *Monro-King & Gremmels Realty Corporation* v. *9th Avenue-31st Street Corporation,* the Court attempted to reconcile the rules.[19] In that case, the lessee had paid the rent one year in advance. After some three months, an action of foreclosure was started and a receiver appointed. The tenant obtained an order requiring the mortgagor, mortgagee and receiver to show cause why an order should not be made permitting it to remove from the premises without further liability; the claim of the tenant being, that a demand by the receiver constituted a breach of the covenant of quiet enjoyment. At the same time, the receiver moved for an order requiring the tenant to attorn and to have the reasonable value of use and occupation fixed.

The tenant's motion was denied, and the motion of the receiver granted. After reciting the rules *supra,* the Court stated:[20]

> "But where, as in the case at bar, the receiver has elected to disaffirm the lease and has asked for the fixing of the reasonable rental of the premises and, in demanding payment

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[15] Fletcher v. McKeon, *supra* note 12.
[16] *Ibid.* at 281, N. Y. Supp. at 820.
[17] Metropolitan Life Ins. Co. v. Child's Co., 230 N. Y. 285, 130 N. E. 295 (1921).
[18] *Ibid.* at 289.
[19] Monro-King & Gremmels R. Corp. v. 9th Ave. 31st St. Corp., *supra* note 12.
[20] *Ibid.* at 307.

of the sum so fixed by the court, is compelling the tenant to pay twice for the privilege of occupying the property, the tenant forthwith has an option either to pay the reasonable rent or to vacate and surrender possession of the premises to the receiver. The tenant, however, is not entitled to a court order in this proceeding, releasing it from liability under the lease.

"We think that demands by the receiver wholly inconsistent with the lease, constitute a complete repudiation of the lease and permit the tenant to vacate before the date of the sale. The distinction between the *Metropolitan Life Insurance Company* v. *Child's Company, supra,* and the instant case, is to be found in the fact that in the instant case, the acts of disaffirmance of the lease have been performed by the receiver on behalf of the mortgagee; whereas, in the *Child's* case, the tenant, for its own convenience vacated the premises."

The decision evidences a recognition of the anomalous position of the tenant, and seeks to pursue a course which will work substantial justice between the parties; but the broad power thereby extended to receivers makes the likelihood of its adoption remote. The receiver cannot be said to be the agent for the mortgagee;[21] and it is questionable as to whether or not his election would be deemed binding on the mortgagee. The Court, furthermore, fails to take into consideration the possibility of redemption by the mortgagor before sale.

The situation has been somewhat clarified by the recent case of *Prudence Co.* v. *160 West Seventy-third Street Corp.*[22] There, the receiver made application to fix the rental value of premises occupied by various tenants under co-operative ownership agreements. The agreements provided for the payment of fixed maintenance charges which, concededly, were less than the rental value. In denying the application, the Court repudiated the cases which have sustained the receiver's right to demand rental value;[23] and held the rights of receiver subordinate to the lessee's, until a sale of the premises.

Lehman, *J.*, writing the opinion there states:[24]

"A mortgage is only a lien on the mortgaged real property. Title remains in the mortgagor and those claiming

[21] "A receiver is a ministerial officer of the Court and the scope of his duty is purely administrative. * * * He occupies a fiduciary relation, and the utmost good faith is required of him in his dealings with the property entrusted to him. He must act impartially in dealing with the parties to the controversy, and not to espouse the cause or interests of one party against the other." JONES, MORTGAGES, *supra* note 7, at §1951, citing cases.

[22] Prudence Co. v. 160 West Seventy-third Street Corporation, 260 N. Y. 205, 183 N. E. 365 (1932).

[23] *Ibid.* at 209, 210.

[24] *Ibid.* at 211.

under or through the mortgagor, until the lien is foreclosed. Foreclosure of the lien does not take place upon the commencement of a foreclosure action, but upon a sale under a judgment of foreclosure. Though, during the pendency of the action, a court of equity has power to issue interlocutory orders for the protection of an asserted lien, such orders must be auxiliary to the right to foreclose the lien, and cannot deprive any party of a title or a right, which though subordinate to the lien of the mortgage, survive and are valid until the lien is foreclosed by a sale under a judgment of foreclosure."

It would seem, in view of this decision, that tenants in possession of premises under foreclosure are similarly situated until a sale therein, whether the lease be prior or subsequent to the mortgage; or, if the latter, whether or not they have been made parties to the action. The rule has been uniform where the lease is prior to the mortgage, viz.: the lessee is protected where advance payments have been made in good faith, and is liable for rent accruing after the appointment of a receiver or then remaining unpaid.[25]

In light of the *Child's* case, the decision is unquestionably sound in theory and affords a more tenable position to the lessee. It is true that circumstances will arise wherein the mortgagee, through unavoidable delay in bringing the action to judgment and sale, will be deprived of a substantial measure of security. Such a situation does not justify the broad power of interference heretofore exercised.

How far the rule will be extended is not here conjectured. It should not, however, be seized upon to limit the remedies of the mortgagee, by application to cases beyond its purport.[26]

JOSEPH F. KELLY.

FINANCIAL MISREPRESENTATIONS AS GROUNDS FOR ANNULMENT OF MARRIAGE CONTRACT.

The plaintiff, who had been keeping company with the defendant for some time, in reply to her constant importunings for mar-

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[25] Isaacs v. Greenberg, 145 N. Y. Supp. 921 (1914).

[26] That the law in regard to the payment of rent during foreclosure proceedings has not been entirely settled by the decision in the Prudence case is evident from a reading of the decision in the case of Holmes v. Gravenhorst, decided by Steinbrink, *J.*, at Special Term, Kings County, under date of March 11, 1933, reported in Vol. 89 N. Y. L. J. at 1448. In that case the learned judge held that the decision in the Prudence case swept away completely the right of a court of equity to fix the occupational rent of premises pending the foreclosure proceedings tenanted by the owner of the fee.

The writer feels that the Court of Appeals in its decision in the Prudence case in no way intimated that it intended to do away with the power of a court of equity to fix the fair and reasonable value of premises occupied by the owner of the fee pending a foreclosure. It seems from a study of the Court of Appeals decision that no basis for such an inference can be there found.