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**INTO HARMS' WAY: NOW THAT
HARMS V. SPRAGUE HAS ESTABLISHED
THE LIEN THEORY OF MORTGAGES IN ILLINOIS,
DOES FORECLOSURE CUT OFF JUNIOR LEASE OR
CAN A MORTGAGEE ELECT TO PRESERVE THEM?**

*John J. Gearen**
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The mortgagee¹ of commercial real estate often regards the stream of income derived from leases of the property² to key tenants as an element of the collateral that is at least as valuable as the actual bricks and mortar.³ In the event of default⁴ by the mortgagor,⁵ the mortgagee will want to be certain that any subsequent rental payments by the tenant are applied first to the mortgage debt. In addition, if the mortgagee must ultimately foreclose on the property, the resulting sale will usually be easier and attract higher bids if the property is already leased to valuable tenants. On the other hand,

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1. Throughout this article, the party making a loan to the owner, to whom the owner grants a mortgage to secure the loan, will be called the mortgagee. In this context, the owner will be called the mortgagor. The property mortgaged will be called the property. The purchaser at any sale resulting from foreclosure of the mortgage will be called the purchaser.

This article discusses a factual sequence in which, subsequent to the mortgage loan, the owner enters into a lease. In this context, the owner will be called the landlord, and the lessee will be called the tenant. Note that the property leased may be all of the property, as it would be in a single-use industrial building, or only a portion of the property, as it would be in a shopping center or a large office building.

2. For a discussion of what constitutes "property," see *supra* note 1.

3. For an informative discussion of the economic issues involved in mortgaging commercial property, see E. HALPER, SHOPPING CENTER AND STORE LEASES 333-42 (1982); Anderson, *The Mortgagee Looks at the Commercial Lease*, 10 U. FLA. L. REV. 484 (1957); Hyde, *The Real Estate Lease as a Credit Instrument*, 20 BUS. LAW. 359, 389-91 (1965).

4. Generally, a mortgagor is in default upon a failure in the performance of any act or acts that are required by the mortgage. 4 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 16.192, at 462 (A. Casner ed. 1952) [hereinafter cited as AM. L. PROP.].

5. For a discussion of what constitutes a "mortgagor," see *supra* note 1.

there may arise situations where, upon default of the mortgagor, the mortgagee would prefer to avoid an existing lease. For example, the rents originally established under a long term lease may, in an inflationary period, fall far below current market rents. In such a case it would be to the mortgagee's advantage to relet the property at a higher rent. In either case, it is important to know whether a lease survives the mortgagor's default and a subsequent judicial foreclosure,⁶ and what means, if any, are available to the mortgagee to preserve or avoid that lease.

Unfortunately, in the commonly encountered situation where the mortgagor mortgages the property to the mortgagee and thereafter enters into a lease with a tenant,⁷ uncertainty exists in several states, including Illinois, regarding the rights of the respective parties.⁸ When the mortgagor defaults on the mortgage, and the mortgagee brings a foreclosure action and does not name the tenant in the foreclosure suit, what is the status of the tenant's lease? Is it "cut off" even though the tenant was not named in the foreclosure action? Or does it survive, with the mortgagee stepping into the shoes of the defaulting mortgagor as landlord? If the status of the tenant's lease is determined by whether the mortgagee names the tenant in the foreclosure suit, then the mortgagee has an "election" that is a powerful economic tool. The mortgagee can avoid an economically burdensome lease by naming the tenant in the foreclosure suit and the mortgagee can also retain an economically beneficial lease by not naming the tenant in the foreclosure suit.

A sophisticated mortgagee, however, knows that a carefully drafted mortgage and/or lease can circumvent the effect of state law. The mortgagee may agree not to disturb the possession of the tenant in the event of a default under the mortgage as long as the tenant is not in default under its lease.⁹ The tenant may agree to attorn to, that is, to re-affirm the existing lease with either the mortgagee or the purchaser at a foreclosure sale.¹⁰ Not all mortgagees, however, are alert or sophisticated enough to insist upon such agreements, and diligent enough to insist upon an agreement with *each* tenant whose lease postdates the mortgage. Mortgagees involved in interstate transactions may overestimate or minimize the importance of such contrac-

6. Judicial foreclosure involves a court proceeding at which the mortgagee presents evidence that the mortgagor is in default. The mortgagor may raise defenses to the foreclosure. The advantage of judicial foreclosure is that the court's supervision allows conclusive determination of the rights of the parties to the foreclosure. The disadvantage is that it tends to be complicated, time-consuming, and costly. See E. Rabin, *Fundamentals of Modern Real Property Law* 1167 (2d ed. 1982).

7. See *infra* notes 16, 17 and accompanying text.

8. See *infra* notes 90-101 and accompanying text.

9. This is commonly known as a "non-disturbance agreement." See *infra* note 262.

10. Attornment may be defined as "the act of a person who holds a leasehold interest in land, or estate for life or years, by which he agrees to become the tenant of a stranger who has acquired the fee in the land, or the remainder or reversion, or the right to the rent or services by which the tenant holds." BLACK'S LAW DICTIONARY 165 (5th ed. 1979); see *infra* note 249.

tual provisions when dealing with real estate collateral in an unfamiliar state. Thus, a basic understanding of a state's position on this issue may have significant commercial impact on a transaction.

It is not clear whether Illinois has adopted a so-called "cutoff"¹¹ or "election"¹² position. Although at least ten commentators have attempted to characterize Illinois as committed to one or the other,¹³ no systematic, in-depth analysis of the Illinois cases in their factual contexts has been published. In fact, the case law itself, dating back as far as 1864,¹⁴ is opaque. An analysis of this case law is long overdue.

Moreover, in the recent case of *Harms v. Sprague*,¹⁵ the Illinois Supreme Court announced a shift in the theory of mortgages underlying these cases. While the implications of *Harms* are not entirely certain, *Harms* appears to clear the way conceptually for Illinois to commit itself firmly to either a cutoff or election position. Thus, the time is ripe for a thorough review of Illinois precedent on the topic.

This article attempts to shed light on the ongoing debate in Illinois by analyzing the relevant opinions of the Illinois courts over the past dozen decades, concluding with the *Harms* opinion. First, the article will briefly explore the cutoff and election positions and how the courts have failed to acknowledge the conflict between the substantive property considerations advanced in favor of the cutoff position and the procedural considerations advanced in favor of the election position. Illinois will then be placed in this theoretical context. Next, the article will examine the key cases decided by Illinois courts, considering interpretations that would support arguments for Illinois' status as either a cutoff or an election state. The article concludes by pointing out that *Harms* clears the way for a definitive judicial statement on the Illinois position, and urges that both mortgagees and tenants draft their agreements with special care in anticipation of the impending developments.

I. BACKGROUND

This article focuses on the following situation: The mortgagor mortgages the property to the mortgagee and thereafter, as landlord, enters into a lease with the tenant.¹⁶ The mortgagor then defaults under the mortgage, and

11. See *infra* text accompanying notes 46-53.

12. See *infra* text accompanying notes 33-45.

13. See *infra* notes 97-101 and accompanying text.

14. The first case in Illinois to consider the issue was *Brush v. Fowler*, 36 Ill. 53 (1864).

15. 105 Ill. 2d 215, 473 N.E.2d 930 (1984).

16. This situation should be carefully distinguished from that in which a property owner first leases the property to a tenant and later mortgages it to the mortgagee. In the latter set of facts, the courts are unanimous: The lease survives both default under the mortgage and any subsequent judicial foreclosure, whether or not the tenant is joined as a party. See 4 AM. L. PROP., *supra* note 4, § 16.89; 2 L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY §§ 978-979 (8th ed. 1928); R. KRATOVIL & R. WERNER, REAL ESTATE LAW 294 (8th ed. 1983); Annot., 14 A.L.R. 664, 678 (1921).

subsequently, the mortgagee brings a foreclosure action against the mortgagor. The foreclosure proceeding determines all of the mortgagor's rights to the property, including the mortgagor's title, right to possession, and right of redemption.¹⁷ The precise question is whether, in Illinois, by doing nothing inconsistent with the tenant's leasehold interest prior to foreclosure,¹⁸ and by omitting to name the tenant as a party in the foreclosure action, the mortgagee (and through the mortgagee, the purchaser) may preserve the pre-existing lease and step into the shoes of the mortgagor as landlord. As the article will explain, the facts of the Illinois cases seldom present this question because most mortgagees have, in fact, taken actions inconsistent with the mortgagor's or the tenant's possessory interest prior to foreclosure. Thus, in Illinois the cutoff/election question has been modulated by special practical considerations. These considerations stem from the extra pre-foreclosure rights accorded to the mortgagee under the mortgage theory historically recognized by the Illinois courts.

Because the mortgage theory adopted in a given state carries important practical consequences, this article will explore the effect of a judicial foreclosure and how it differs depending on the mortgage theory adopted by the particular state involved as a prologue to discussing Illinois case law. In all states, judicial foreclosure serves at least two purposes. First, it allows the mortgagee to obtain judicial recognition of its title to and right to possession of the property. Second, it serves as a means of cutting off the equitable rights of redemption held by any other parties named in the suit which have an interest in the property.¹⁹ Individual states differ, however, in how they treat the interest of a tenant which is *not* named in the foreclosure suit, depending on the mortgage theory of the state. Some states have adopted the relatively recent theory that a mortgage transfers a "lien" to the mortgagee.²⁰ Other states have clung to the historical theory that a mortgage transfers "title" to the mortgagee.²¹ A few others, including Illinois, prior to *Harms*, have adopted some type of "intermediate" or hybrid theory.²²

A. Lien Theory States

In the so-called "lien theory" states,²³ under what now appears to be the

17. For a general discussion of foreclosure, see G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* §§ 311-345 (2d ed. 1970). The equitable right of redemption allows a defaulting mortgagor to recover ownership of land that it had previously forfeited by paying the debt.

18. For an example of an action inconsistent with a tenant's leasehold interest, see *infra* text accompanying note 64.

19. See *supra* note 17.

20. See *infra* text accompanying notes 23-53.

21. See *infra* text accompanying notes 54-74.

22. See *infra* notes 77-79 and accompanying text.

23. See 1 L. JONES, *supra* note 16, § 67, at 59; Campbell, *Some Aspects of the Landlord-Tenant-Mortgagee Relationship*, 8 A. LIFE INS. COUNS. PROC. 499, 505 (1943). Illinois now appears to be a lien theory state based on the recent decision of *Harms*, No. 59515, slip op.

majority position, the mortgage is held to transfer to the mortgagee a lien on the property.²⁴ If the debt is not paid, the mortgagee does not obtain title to, or possession of, the property until it has purchased the property at a sale pursuant to a judicial foreclosure.²⁵ Under the lien theory, the mortgagee receives only a security interest in the property, which in most material respects is no different from the security interest it would receive in non-real estate collateral securing a loan.²⁶

When the mortgagor subsequently leases the property to a tenant, the tenant receives possession for a term of years and the mortgagor retains the reversion.²⁷ This relationship is not changed by the mortgagor's default under the mortgage. The mortgagor retains title to the reversion and the tenant continues in possession.²⁸ It is only when the mortgagee forecloses upon its security interest that the purchaser at a subsequent sale gains title and the right to possession of the property.²⁹ If the tenant is named in the foreclosure suit, the tenant's interest in the property, including both the right to possession and the right to redeem, is completely cut off.³⁰ All lien theory states are in general agreement on the foregoing points.³¹ They diverge in how they treat a tenant that the mortgagee does not name as a party defendant in a foreclosure proceeding.³²

1. Election States

Election states are those mortgagee-oriented jurisdictions that hold that a tenant is a necessary party³³ to a foreclosure proceeding, and that the failure

(Ill. S. Ct. Nov. 30, 1984). The implications of the holding in the *Harms* case for the cutoff/election debate are not clear. See *infra* text accompanying notes 248-62.

24. See 4 AM. L. PROP., *supra* note 4, § 16.93, at 174-75; Campbell, *supra* note 23, at 504.

25. See 4 AM. L. PROP., *supra* note 4, § 16.93, at 174-75; G. OSBORNE, *supra* note 17, § 127, at 207-10.

26. See G. OSBORNE, *supra* note 17, § 127, at 208.

27. See 4 AM. L. PROP., *supra* note 4, § 16.93, at 175. A reversion is that future estate that a transferor/grantor retains when it transfers an estate that has a maximum conceptual duration shorter than the estate that the transferor/grantor had to start with. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 62 (1966); see also *Kough v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925) (explaining the operation of reversions in a landlord-tenant context).

28. See 4 AM. L. PROP., *supra* note 4, § 16.93, at 175; Campbell, *supra* note 23, at 507.

29. See 4 AM. L. PROP., *supra* note 4, § 16.39, at 175; Berick, *The Mortgagee's Right to Rents*, 8 U. CIN. L. REV. 250, 261-64 (1934); Campbell, *supra* note 23, at 507.

30. See Comment, *Mortgagee's Rights Against Tenant Who Occupies Premises Under Subsequent Lease by Mortgagor*, 47 MICH. L. REV. 993, 996 (1949) [hereinafter cited as Comment, *Mortgagee's Rights*].

31. See *id.*

32. See *id.*

33. A necessary party has been defined by Illinois courts as one who has a present and substantial interest in a matter in controversy such that no judgment can be entered without either affecting that interest or leaving the interest of those who are before the court in an

to name the tenant in the proceeding preserves the lease. This position is generally viewed as the majority rule,³⁴ and is known as the New York³⁵ or "election" position.

The concept of a necessary party to a foreclosure proceeding is straightforward. The foreclosing mortgagee has as its aim a court decree that title to the property is free of any junior interests, because bidders at the foreclosure sale will pay more for real estate that is free from title defects.³⁶ The court, while sharing this goal, is also concerned with requirements of due process, equity, and fairness, and the scope of its jurisdiction.³⁷ Hence the rule that not only the mortgagor, but all those holding an interest in the property junior to the mortgagee, must be joined as defendants in the foreclosure proceeding.³⁸ Failure to join a party necessary to the foreclosure renders the decree invalid and ineffective as to the unjoined party.³⁹ In the context of a judicial foreclosure, a necessary party may be defined as "one who is so vitally interested in the matter in dispute that a valid judgment or decree cannot be rendered without his presence."⁴⁰ Clearly, there is a case to be made for viewing as a necessary party a tenant in possession under a lease made subsequent to the mortgage.

The so-called "election" states hold that by omitting the tenant from the foreclosure proceeding, the mortgagee fails to establish its right to possession of the property as against the tenant.⁴¹ Thus, although the mortgagee may, by virtue of the foreclosure sale, obtain title to the property, it takes that title subject to the lease. The judicially effected transfer of title from the mortgagor to the mortgagee renders the mortgagee the new landlord to the tenant under the original lease, which survives for the remainder of its term.⁴²

inequitable position. *Keehner v. A. E. Staley Mfg. Co.*, 50 Ill. App. 3d 258, 267, 365 N.E.2d 275, 281 (5th Dist. 1977).

34. See G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 7.12, at 451 (1979); 3 R. POWELL, *LAW OF REAL PROPERTY* ¶ 463, at 696.64-.65 (1949 & Supp. 1984); 5 H. TIFFANY, *LAW OF REAL PROPERTY* § 1534, at 612 (1939); Annot., 14 A.L.R. 664 (1921). *But see* Campbell, *supra* note 23, at 527-28 (offering a state-by-state enumeration of election and cutoff jurisdictions, and questioning whether the majority are election states); Comment, *Mortgagee's Rights*, *supra* note 30, at 996 (observing that proponents of the cutoff position also claim to be in the majority).

35. New York's position is set forth in the frequently cited case of *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 130 N.E. 295 (1921). See Campbell, *supra* note 23, at 523-25; Comment, *The Effect of a Mortgage Foreclosure on a Lease Executed Subsequent to a Mortgage*, 17 WASH. L. REV. 37, 43-49 (1942) [hereinafter cited as Comment, *Effect of Mortgage Foreclosure*]; Annot., 14 A.L.R. 664, 672 (1921).

36. See 3 R. POWELL, *supra* note 34, ¶ 3.08, at 696.60.

37. See Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 42.

38. See *id.*

39. 5 H. TIFFANY, *supra* note 34, § 1534, at 608.

40. Note, *Remedies of Junior Lienors Omitted From Prior Foreclosure*, 88 U. PA. L. REV. 994, 996 (1940); see also *supra* note 32 (Illinois' definition of a necessary party).

41. See *supra* note 34.

42. See Campbell, *supra* note 23, at 527; Comment, *Mortgagee's Rights*, *supra* note 30, at 998.

Though the legal arguments advanced in favor of the election position are ostensibly procedural, their effect is to alter significantly the parties' substantive property rights.

The practical effect of the election doctrine is that the mortgagee can ultimately choose whether to avoid or affirm the lease by simply naming or omitting to name the tenant in the foreclosure proceeding.⁴³ The mortgagee, in effect, elects whether or not to continue the lease—hence, the "election" position.

In addition to the legal arguments advanced in favor of the election position, several policy arguments may also be marshalled. First, it is not unjust to bind the tenant to a lease that it entered into with open eyes at some earlier time. The tenant is probably no worse off with the mortgagee as its landlord than it was with the mortgagor as its landlord. To allow the tenant to avoid a lease that is no longer beneficial gives the tenant a windfall and increases the mortgagee's risk of foreclosing upon a substantially devalued piece of collateral.⁴⁴

Second, if each tenant is free to abandon the property following a foreclosure, then in a declining rental market the mortgagee will risk losing many leases at the same time. This will make the property significantly less valuable to the mortgagee as collateral. In the absence of attornment agreements or other contractual arrangements designed to shift or minimize this risk, the mortgagee's underwriting decision will be affected.⁴⁵ The mortgagee will either avoid making the loan or charge a higher price for it.

2. Cutoff States

Cutoff states are those states, generally considered in the minority,⁴⁶ that hold that a tenant's lease is automatically cut off upon foreclosure regardless of whether the tenant is named as a party in the foreclosure suit.⁴⁷ This position, also known as the California position,⁴⁸ is viewed as more tenant oriented because it takes away the mortgagee's election and treats the parties equally. Cutoff states appear to either de-emphasize, ignore, or implicitly deny the tenant's status as a necessary party.⁴⁹ Instead, they rely on sub-

43. See R. KRATOVIL & R. WERNER, *supra* note 16, at 295; G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 34, § 7.12, at 451-52.

44. See Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 46-47; Comment, *Mortgagee's Rights*, *supra* note 30, at 999.

45. As a practical matter, the mortgagee often is in a stronger bargaining position than the mortgagor. In that case, this higher cost will probably be passed on to the mortgagor. In turn, to the extent that the mortgagor is in a stronger bargaining position than the tenant, the increased cost will probably be passed on to the tenant in the form of higher rents. If so, then the tenant is ultimately the party that bears the cost of the mortgagee's lack of election.

46. See *supra* note 34.

47. See Comment, *Mortgagee's Rights*, *supra* note 30, at 996-97.

48. California's position is set forth in the frequently cited case of *McDermott v. Burke*, 16 Cal. 580 (1860). See Campbell, *supra* note 23, at 523.

49. See Annot., 14 A.L.R. 664, 668, 670 (1921).

stantive property law principles: The tenant's right to possession is derived from the mortgagor's; when the mortgagee extinguishes the mortgagor's right to possession, the tenant's right to possession fails as well.⁵⁰ There is no privity of estate or contract between the mortgagee and the tenant under a lease made subsequent to the mortgage. Thus, there is nothing to bind either party to the lease.⁵¹

Cutoff jurisdictions stress that the title of the property sold at a foreclosure sale must relate back to the date of the mortgage being foreclosed, a date before the lease existed. Otherwise, the mortgagor could subject the mortgagee's title to a disadvantageous lease.⁵²

In addition to the legal arguments advanced in favor of the cutoff position, several policy arguments also have been raised. First, it is argued that the cutoff position is fairer to both parties because it is neutral. Under an election system, the mortgagee has the option to preserve or avoid the lease, but the tenant has no such benefit. The tenant must passively await the mortgagee's pleasure. According to this argument, because lack of mutuality in the election position makes it inherently unjust, the cutoff position is preferred.⁵³

Second, the cutoff position is cleaner and more certain because it depends upon the simple operation of law rather than the will of the mortgagee. It avoids the questions that the election position must answer as to what the precise terms of the lease are and whether either party to the lease is in default.

To conclude, different types of arguments are advanced in favor of the election and cutoff positions. The election states emphasize the tenant's procedural rights, although the practical consequence, ironically, is a benefit conferred upon the mortgagee. The cutoff states, on the other hand, emphasize the substantive principles of property law. Neither the court decisions nor the commentators appropriately acknowledge the arguments for the opposing position or join the issues.

B. Title Theory States

Election and cutoff positions are also taken by states not subscribing to the lien theory of mortgages.⁵⁴ The rationale for each position is basically

50. See 4 AM. L. PROP., *supra* note 4, § 16.91, at 169; Campbell, *supra* note 23, at 509; Comment, *Mortgagee's Rights*, *supra* note 30, at 997-98.

51. See *infra* note 67 and accompanying text.

52. See Gard, *Lessee's Status After Foreclosure of a Prior Mortgage*, 1 KAN. CITY L. REV. 11, 12 (1933).

53. This argument may also be seen in a slightly different context. See Tefft, *Receivers and Leases Subordinate to the Mortgage*, 2 U. CHI. L. REV. 33, 42 (1934) (the author also marshals opposing arguments); see also G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 34, § 7.12, at 452 (election position confers bonus on mortgagee who does not name all interested parties to the foreclosure).

54. See R. KRATOVIL & R. WERNER, *MODERN MORTGAGE LAW & PRACTICE* 271 (2d ed. 1981); Comment *Mortgagee's Rights*, *supra* note 29, at 996; Annot., 14 A.L.R. 664, 668, 670

the same as in lien states. Special issues arise, however, in the so called "title" theory states that put the cutoff/election question in a different practical perspective. The key factor is that the time at which a lease is usually cut off in a title state is prior to judicial foreclosure and after the mortgagor's default. The time period after the mortgagor's default, and before the foreclosure proceeding is initiated, is subject to no judicial supervision. As a practical matter, the mortgagee and the tenant may respond to the mortgagor's default in many different ways. The resulting complex fact situations generate many practical and theoretical issues. In face of this complexity, judicial decisions are often ambiguous and, consequently, it is difficult to draw any clear principles from them.

In title theory states, consistent with historical common law principles, the mortgage actually transfers title to the mortgagee, and the mortgagor regains title to the property only by extinguishing the mortgage debt.⁵⁵ The right to possession, however, either by statute or by provision in the mortgage itself, remains in the mortgagor until default.⁵⁶ Prior to default, the mortgagor may lease the property to a tenant and the tenant will succeed to the mortgagor's right to possession for the term of the lease, with the mortgagor retaining the reversion of the equity of redemption.⁵⁷ Even though the mortgagor has parted with title, the mortgagor's possessory interest is held to be sufficient to constitute the subject matter of a lease.⁵⁸ Upon default, the mortgagor's—and therefore the tenant's—right to possession, passes to the mortgagee.⁵⁹

The right to possession, however, is not the same as possession itself. As long as the mortgagee does not act to enforce its rights and, instead, allows the mortgagor to remain in possession, the lease is undisturbed and the mortgagor is entitled to receive the rents for its own use.⁶⁰ Upon default, the mortgagee may choose to assert its right in a judicial foreclosure proceeding, as in a lien state.⁶¹ In that case, assuming the mortgagee does nothing to interfere with the mortgagor's or the tenant's possession, the tenant will continue to be liable to the mortgagor for rents under the existing

(1921). *But see* Campbell, *supra* note 23, at 527, where the author states, "[t]he courts following [the election] rule are, with the exception of New Jersey, lien theory states and hence freely disregard the doctrinal concepts of reversions and privity."

55. *See* G. OSBORNE, *supra* note 17, §§ 125-126, at 203-07; Campbell, *supra* note 23, at 504.

56. *See* R. KRATOVIL & R. WERNER, *supra* note 16, at 296; Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 38; Recent Decisions, *Mortgages—Right to Possession—Tenants*, 13 COLUM. L. REV. 553, 553 (1913) [hereinafter cited as Recent Decision, *Mortgages—Right to Possession*].

57. *See* G. OSBORNE, *supra* note 17, § 144, at 235-38.

58. *See* Rohrer v. Deatherage, 336 Ill. 450, 454-55, 168 N.E. 266, 268 (1929); Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 39.

59. *See* 2 L. JONES, *supra* note 16, § 982, at 371; G. OSBORNE, *supra* note 17, § 144, at 235; Comment, *The Mortgagee's Right to Rents after Default*, 50 YALE L.J. 1424, 1433 (1941) [hereinafter cited as Comment, *Right to Rents*].

60. *See* 2 L. JONES, *supra* note 16, § 975, at 356-58.

61. *See supra* note 59 and accompanying text.

lease.⁶² If the mortgagee names the tenant in the suit, the lease will, of course, be cut off at that time. If the mortgagee does not name the tenant, then there arises the same type of cutoff/election issue found in lien states.

This sequence of events, however, is highly unlikely, because in title states the mortgagee enjoys several *pre-foreclosure* methods of asserting its possessory rights not available in lien states, such as entry on condition broken and suit for eviction.⁶³ By asserting its right to possession against the mortgagor, the mortgagee becomes entitled to rents from the property.⁶⁴ At the same time, by entering the property or doing some act equivalent to entry, the mortgagee automatically terminates the lease that had existed between the mortgagor and the tenant.⁶⁵ Thus, the mortgagee obtains the right to rents from the property but not by virtue of the lease.⁶⁶ The post-default shifting of possessory rights from the mortgagor to the mortgagee creates neither privity of estate nor privity of contract between the mortgagee and the tenant.⁶⁷ They are as strangers to each other. The tenant cannot require an unwilling mortgagee to allow the tenant to continue in possession.⁶⁸ If the tenant refuses to vacate, the mortgagee may bring an action for eviction against the tenant in the same manner as it could against any trespasser occupying its land.⁶⁹ By the same token, once the mortgagee has exercised its right to possession in a manner inconsistent with the rights of the mortgagor, the tenant is free to walk away from the property; the mortgagee cannot require the tenant to stay under the terms of the lease.⁷⁰

The tenant and the mortgagee may, of course, come to an understanding and enter a new lease agreement, either express or implied, through an attornment and acceptance. To avoid eviction, for example, the tenant may pay the mortgagee rent. If the mortgagee chooses to accept it, in the absence of any special agreement, the courts will hold that a year-to-year tenancy⁷¹

62. See *supra* note 60 and accompanying text.

63. See *supra* note 59 and accompanying text.

64. See 4 AM. L. PROP., *supra* note 4, § 16.91, at 171; 2 L. JONES, *supra* note 16, § 982, at 369; 1 H. REEVE, THE LAW OF MORTGAGES AND FORECLOSURES IN ILLINOIS § 408a, at 468 (1932); Campbell, *supra* note 23, at 510, 514.

65. See 4 AM. L. PROP., *supra* note 4, § 16.91, at 169-70; Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 39.

66. See *supra* note 64 and accompanying text.

67. See 2 L. JONES, *supra* note 16, § 982, at 369; Berick, *supra* note 29, at 264; Campbell, *supra* note 23, at 510. For a criticism of the privity rationale, see 4 AM. L. PROP., *supra* note 4, § 16.91, at 170, 173-74.

68. "Where the mortgage precedes the lease the Lessee's rights can rise no higher than those of his landlord, the mortgagor It follows that if the mortgagee could take possession against the mortgagor, . . . he has the same right against a tenant of the mortgagor." G. OSBORNE, *supra* note 17, § 144, at 235.

69. See *supra* note 59.

70. See *supra* note 64.

71. A year-to-year tenancy, also known as a periodic tenancy from year to year, can either be created by express agreement of the parties or by implication from the acts of the parties.

is created.⁷² In addition to this type of recognition by the tenant of the mortgagee as landlord, the tenant may attorn to the mortgagee in other explicit or implicit ways. An attornment creates a new lease, the terms of which, in the absence of an agreement to the contrary, will usually be held to be identical to those of the lease previously in effect between the mortgagor and the tenant.⁷³ Alternatively, a lease may be created by estoppel.⁷⁴

The interplay between the tenant and the mortgagee in the period after default and before foreclosure greatly decreases the practical importance of the cutoff/election debate in title states. Seldom in a title state does a mortgagee sit idly by, as it is required to do in a lien state, and allow the mortgagor to collect rents from the tenant until foreclosure. Usually the mortgagee will take some pre-foreclosure steps to protect its security. It is unclear what actions of the mortgagee constitute an assertion of possessory rights inconsistent with the rights of possession of the tenant under its lease. It is also difficult to discern precisely what acts by a tenant amount to an attornment. Nonetheless, the courts generally correctly view the pre-foreclosure period as the arena in which the battle over the survival of the lease is fought. In all title states the rule in this arena is clear: any assertion by the mortgagee of its possessory rights against the mortgagor or the tenant cuts off the lease. As a practical matter, then, the mortgagee's failure to name the tenant in the foreclosure suit in title states will generally not preserve the lease, because the lease has often already been extinguished or replaced prior to foreclosure. Thus, title states ultimately will reach the same result as cutoff states in lien jurisdictions, although the underlying mechanics, timing, and reasoning differ.

C. *The Illinois Position*

Illinois initially adopted a title theory of mortgages.⁷⁵ Later, in 1900, the Illinois Supreme Court developed its own unique theory of mortgages in the seminal case of *Lightcap v. Bradley*.⁷⁶ This theory shares aspects of both

The tenancy continues from year to year until it is terminated by either party giving proper notice. See W. BURBY, HANDBOOK OF THE LAW ON REAL PROPERTY § 51, at 128 (1965).

72. See R. KRATOVIL & R. WERNER, *supra* note 54, at 269; G. OSBORNE, *supra* note 17, § 144, at 235; Berick, *supra* note 29, at 266; Campbell, *supra* note 23, at 510-11.

73. See G. OSBORNE, *supra* note 17, § 144, at 235; 1 H. TIFFANY, LANDLORD AND TENANT § 73(a)-(c) (1910); Comment, *The Effect on Leases of the Appointment of a Receiver Pending Foreclosure Proceedings*, 1 J. MAR. L.Q. 168, 170-71 (1936) [hereinafter cited as Comment, *Effect on Leases*].

74. Creation of a lease by estoppel will occur when a tenant pays rent and the mortgagee accepts the payment. The acceptance of rent by the mortgagee acts as an encouragement to, and an approval of, the tenant's actions. If the tenant later relies on the mortgagee's acceptance of rental payments, the mortgagee will be estopped from dispossessing the tenant. See, e.g., *McDermott v. Burke*, 16 Cal. 580 (1860); Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 42.

75. See *Barrett v. Hinkley*, 124 Ill. 32, 14 N.E. 863 (1888).

76. 186 Ill. 510, 58 N.E. 221 (1900); see *West Side Trust & Sav. Bank v. Lopoten*, 358 Ill. 631, 193 N.E. 462 (1934); *Rohrer v. Deatherage*, 336 Ill. 450, 168 N.E. 266 (1929).

lien and title theories, but cannot be properly categorized as either.⁷⁷ Accordingly, Illinois is characterized as having an "intermediate" or "hybrid" theory.⁷⁸ A few other states are grouped in this intermediate category, but the legal theories vary somewhat from state to state; thus, for practical purposes, *Lightcap* and its progeny have made Illinois unique.⁷⁹ Under *Lightcap*, a mortgage conveys "title" from the mortgagor to the mortgagee, but it is a narrow and qualified title, granted for the limited purpose of protecting the mortgagee's security interest in the property. "[T]he mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous and exists only between him and the mortgagor"⁸⁰ Because the mortgagor retains title as to the entire world except the mortgagee, the mortgagor may sell, lease, devise, encumber, or otherwise dispose of the property in any way it wishes, subject of course to the mortgage.⁸¹ The mortgagee, in contrast, has no such power over the property.⁸² Thus, for many practical purposes, the title held by the mortgagee functions as no more than a lien.⁸³ Unlike a mere lien, however, the title conveyed under the mortgage bestows on the mortgagee a special power:

For the purpose of protecting and enforcing his security the mortgagee may enter and hold possession by virtue of his title and take the rents and profits in payment of his mortgage debt. He may maintain the possessory action of ejectment on the strength of such title, but the purpose and effect of the action are not to establish or confirm title in him, but, on the contrary, to give him the rents and profits which [if siphoned away would] undermine and destroy his title.⁸⁴

Later cases in Illinois have held that the tenant of the mortgagor has the right of possession until default under the terms of the mortgage, but "[u]pon default in the condition of the mortgage the mortgagee has the right to possession against the mortgagor, his grantee, lessee or anyone claiming under him by any right."⁸⁵

For purposes of this article, then, upon default under the mortgage, the

77. See 1 H. REEVE, *supra* note 64, at 5.

78. A few other states have also developed some form of "intermediate" or "hybrid" position. These include New Jersey, North Carolina, and Ohio. See R. KRATOVIL & R. WERNER, *supra* note 54, at 296 n.2. While the practical effects of the theories adopted in these states may be similar, the actual legal theories underlying them may be quite different. See, e.g., G. OSBORNE, *supra* note 16, at 206-07 (comparing Ohio and Illinois). Hence, generalizations are difficult.

79. See *supra* note 78.

80. *Lightcap*, 186 Ill. at 522-23, 58 N.E. at 224.

81. *Id.* at 523, 58 N.E. at 223.

82. *Id.*

83. See 1 H. REEVE, *supra* note 64, §§ 9-12, at 13-18.

84. *Lightcap*, 186 Ill. at 520, 58 N.E. 221 at 223.

85. *Rohrer v. Deatherage*, 336 Ill. 450, 455, 168 N.E. 266, 268 (1929).

result in Illinois may be considered identical to that in title states.⁸⁶ At that point, the mortgagee obtains the right to possession, and the consequences are the same in Illinois as those discussed above in the context of title states.

To summarize, in Illinois, as in title states, the automatic transfer of the right of possession to the mortgagee upon default under the mortgage has created an ambiguous post-default/pre-foreclosure period in which the acts of the tenant or the mortgagee may terminate or create new landlord-tenant obligations. Judicial opinions have often been unclear as to the nature of the rights adjudicated by any ultimate foreclosure suit, that is, whether they exist under the original lease or some new landlord-tenant relationship. Clearly, if the court finds that the mortgagee has asserted pre-foreclosure possessory rights hostile to the tenant, the court will deem the old lease between the mortgagor and the tenant terminated and the cutoff/election issue will be moot. Likewise, an attornment, express or implied, will moot the cutoff/election issue. There does remain the situation, however uncommon, where the mortgagee has not interfered with the possessory rights of the tenant, and where the tenant has not attorned to the mortgagee. Under these circumstances, the issue of cutoff versus election would come to the fore even in Illinois and in title states. Unfortunately, such cases have been rarely litigated, and the more typical factual pattern in which the mortgagee has acted more aggressively and the tenant has responded accordingly, has complicated the task in Illinois and in title states of ascertaining whether a given judicial opinion asserts a cutoff or election position.

Lightcap and its progeny, however, are no longer controlling in Illinois. In its November 1984 term, the Illinois Supreme Court announced a shift to a lien theory in *Harms*,⁸⁷ giving official recognition to a growing judicial trend in the state. The *Harms* court explicitly departed from *Lightcap*'s mortgage theory.⁸⁸ As will be discussed more fully below,⁸⁹ *Harms* overrules *Lightcap* and establishes that a mortgagee in Illinois no longer enjoys the right to possess the property after a mortgage default. In the wake of *Harms*, a true cutoff/election case can be expected to come before the courts.

It is not at all clear how Illinois, as a new convert to the lien theory, will decide between cutoff and election. In its long history under the title and *Lightcap* theories of mortgages, Illinois has embodied in a single jurisdiction the underlying tension between the election and cutoff positions. On the one hand, there has been a clear line of cases emphasizing the tenant's status as

86. This conclusion is consistent with the treatment accorded title and intermediate states by several legal scholars and commentators who discuss both types of states together in contradistinction to lien states. See, e.g., 2 L. JONES, *supra* note 16, §§ 982-983; R. KRATOVIL & R. WERNER, *supra* note 16, at 295; G. OSBORNE, *supra* note 17, §§ 144-146.

87. See *supra* note 15 and accompanying text.

88. No. 59515, slip op. at 4-5.

89. See *infra* text accompanying notes 248-62.

a necessary party.⁹⁰ On the other hand, several cases have asserted that the tenant's possessory rights are derivative of those of the mortgagor, and fall when the mortgagee asserts its paramount right against the mortgagor.⁹¹ The language of the earliest decisions on this matter is further obscured because the decisions were handed down before *Lightcap*, when Illinois still espoused the title theory of mortgages.⁹²

This confused state of the law is by no means unique to Illinois. Many states appear to depart from what logic would dictate as a theoretically consistent position on the issue.⁹³ Several practical factors may help explain this state of affairs. First, the courts may be deciding the cases on the basis of where the equities lie. A careful reading of conflicting cases may show that the result reached depends on whether, for example, it was the tenant or the mortgagee who was trying to avoid the lease; whether the tenant was a farmer; or whether the local economy generally favored mortgagees or tenants. Second, many courts must also deal with their state's foreclosure statutes which may or may not have been intended to address the issue at hand.⁹⁴ Third, the courts may be addressing a procedural rather than a substantive issue, that is, they may be speaking to the proper remedy to be employed by the mortgagee against the tenant, rather than the actual rights of possession as between them.⁹⁵ Finally, many decisions are simply old, short, or obscurely written.

The great bulk of legal analysis of this issue undertaken by commentators was engendered by the economic displacements and new court rulings brought on by the Depression. At least ten articles on the subject appeared in law journals between 1931 and 1943.⁹⁶ These attempts to clarify various courts' positions have themselves led to conflicting and confusing results. In the ten articles or treatises written between 1913 and 1983 attempting to characterize Illinois law, three authors characterize Illinois as a cutoff state⁹⁷ and four

90. See *infra* text accompanying notes 102-34.

91. See *infra* text accompanying notes 135-247.

92. See *supra* note 75 and accompanying text.

93. See R. KRATOVIL & R. WERNER, *supra* note 54, at 270; Hyde, *supra* note 3, at 389-91; Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 45.

94. See, e.g., Metropolitan Life Ins. Co. v. Childs, 230 N.Y. 285, 130 N.E. 295 (1921); Gard, *supra* note 52, at 12-13; Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 44.

95. This is how one commentator sees Illinois judicial opinions. See Campbell, *supra* note 23, at 526 n. 47.

96. See, e.g., Berick, *supra* note 29; Campbell, *supra* note 23; Gard, *supra* note 52; Tefft, *supra* note 53; Comment, *Effect of Mortgage Foreclosures*, *supra* note 35; Comment, *Effect on Leases*, *supra* note 73; Comment, *Right to Rents*, *supra* note 59; Note, *The Mortgagee and the Tenants of the Mortgagor*, 1931 PA. B.A.Q. 1; Note, *Mortgagee's Right to Rent After Default*, 80 U. PA. L. REV. 269 (1931); Recent Cases, *Mortgages—Foreclosure—Effect Upon Subsequent Lease and Lessee*, 21 MINN. L. REV. 610 (1937) [hereinafter cited as Recent Case, *Mortgages—Foreclosure*].

97. See Gard, *supra* note 52, at 12; Comment, *Mortgagee's Rights*, *supra* note 30, at 997; Recent Decision, *Mortgages—Right to Possession*, *supra* note 56, at 533.

consider Illinois to be an election state.⁹⁸ One author views Illinois as a cutoff state that may be shifting to an election position;⁹⁹ another characterizes Illinois and Pennsylvania in a category by themselves;¹⁰⁰ and a third expresses doubt as to the Illinois position.¹⁰¹ Yet all of these authors cite the same handful of cases for their divergent positions.

Given the potentially far-reaching impact of *Harms* on this much discussed but little understood issue, it is an appropriate time to conduct an in-depth analysis of the key Illinois cases that address the rights of the mortgagee and the tenant under a lease subsequent to a mortgage upon default and/or foreclosure.

II. DISCUSSION OF ILLINOIS CASES

Illinois case law may be approached through two relatively distinct lines of cases. One set of cases addresses the tenant's status as a necessary party to a foreclosure suit. Although these cases are not conclusive, they suggest that Illinois has taken an election position. A second line of cases de-emphasizes or ignores the tenant's status as a necessary party and focuses instead on the parties' substantive property rights. The second line of cases may be read to support a cutoff position, but the cases typically involve complicated pre-foreclosure fact situations, limiting their precedential value. Also, there is ample room in some of the courts' ambiguous language to argue for an election position. All of these cases must, of course, be read through the pre-*Harms* lens of the title and *Lightcap* theories of mortgages.

A. The "Necessary Party" Line of Cases

Several Illinois cases hold that the tenant has an interest which is not extinguished if the mortgagee fails to name the tenant as a party in the foreclosure suit. In fact, a foreclosure decree obtained without naming the tenant will be reversed when an objection to this effect is raised in the course of the foreclosure proceeding.¹⁰² The precise nature of the tenant's post-foreclosure interest, however, is not clearly stated in these cases.

98. See R. KRATOVIL & R. WERNER, *supra* note 54, at 271; 5 H. TIFFANY, *supra* note 34, § 1534, at 612; Recent Case, *Mortgages—Foreclosure*, *supra* note 96, at 611; Annot., 14 A.L.R. 664, 664 (1921).

99. See Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 39-41.

100. See Campbell, *supra* note 23, at 525-26 n.47. After listing all of the cutoff states in one category and all of the election states in another, the author somewhat confusingly states that Illinois and Pennsylvania law "preserves lease until expiration of redemption period." *Id.* He continues, "in Illinois the cases are consistent in holding that the tenancy terminates because of a lack of privity between a mortgagee and a subordinate lessee, and failure to join the lessee appears to raise questions of a procedural rather than a substantive nature." *Id.*

101. See Hyde, *supra* note 3, at 390.

102. See *infra* text accompanying note 104.

1. *Brush v. Fowler*

In *Brush v. Fowler*,¹⁰³ the plaintiff was a tenant under a lease made subsequent to a mortgage. The mortgagor defaulted, and a foreclosure suit was brought. The tenant was neither joined in the suit nor named in the decree. Subsequently, the defendant, the purchaser at the foreclosure sale, ousted the tenant through the offices of the sheriff acting under the authority of the writ of assistance issued in conjunction with the foreclosure decree. The tenant responded by filing an action for forcible entry, seeking to recover possession of the property. The Illinois Supreme Court ruled in favor of the tenant. The court stated:

We understand the doctrine to be universally recognized, that no one can be injuriously affected by a judgment or decree of any Court who was not a party to such judgment or decree. The decree, therefore, and writ of assistance, were, as to [tenant], of no effect. *The former did not conclude his rights* nor could the latter be enforced against him¹⁰⁴

The court went on to suggest that the purchaser should instead have brought an action of forcible detainer against the tenant—an action in which, “from all that had been shown and proposed to be proved, he might recover the possession. The rights of [tenant] are not superior to those of [purchaser.]”¹⁰⁵ The purchaser, however, had “no right to dispossess [plaintiff] *by the mode he adopted*”¹⁰⁶

On first reading, *Brush* is essentially a procedural case: The purchaser used the wrong writ to enforce his right to possession, a right that was clearly paramount to the tenant’s. On closer examination, the court’s analysis raises the question of what precisely *was* the nature of the tenant’s “rights,” which were not concluded by the foreclosure decree. In *Brush*, the court implied that the tenant is something more than a trespasser until its rights have been concluded procedurally, because the tenant was actually able to recover possession from the purchaser after its wrongful ouster. A mere “trespasser” does not have such a right against the true owner. This point in *Brush* suggests that Illinois may be an election state.¹⁰⁷

The following statement by the *Brush* court, however, casts doubt as to whether the court was adopting either a cutoff or an election position: “If the [tenant] did attorn to [purchaser], if his tenancy had expired, and he held over wrongfully, the law, by its quiet and peaceful operation, afforded a complete remedy.”¹⁰⁸ It may be inferred from this language that the tenant

103. 36 Ill. 53 (1864).

104. *Id.* at 59 (emphasis added).

105. *Id.*

106. *Id.* at 60 (emphasis added).

107. *Brush* was so read in Annot., 14 A.L.R. 664, 667 (1921).

108. 36 Ill. at 60.

had attorned to the purchaser and that the purchaser dispossessed the tenant when he held over after the expiration of the lease established by attornment. If so, then the source of the tenant's interest would be its attornment to the purchaser, and the foreclosure decree would be irrelevant to its survival. It would follow that the *Brush* case simply involves the purchaser's use of an improper method of dispossessing a tenant with whom he had established a direct landlord-tenant relationship that had now passed into its holdover phase. The attornment evidently took place sometime prior to the foreclosure sale.¹⁰⁹ Thus, the important question of whether the mortgagee and the tenant would have been bound by the terms of the previously existing lease, was not addressed.

2. Richardson v. Hadsall

A case lending more weight to an election position is the 1883 Illinois Supreme Court case of *Richardson v. Hadsall*.¹¹⁰ In *Richardson*, the plaintiff died intestate, and his executor brought a bill to foreclose a mortgage granted to the plaintiff as mortgagee by the defendant as mortgagor. At issue was whether the mortgagor had paid the debt secured by the mortgage. A relative of the mortgagor (also named Richardson), who had not originally been named as a party to the foreclosure suit, attempted to testify that certain mortgage payments had been made. The mortgagee then amended its complaint to make him a co-defendant, thereby cutting off his testimony as an interested party. The admissibility of Richardson's evidence ultimately hinged on whether he was a necessary party to the foreclosure proceeding. The evidence showed that he had lived on the property for several years. The court inferred from this that he was a tenant in possession.¹¹¹ A tenant in possession, according to the court, is a necessary party to a foreclosure proceeding: "*He had an interest in the premises which the [foreclosure] decree would not cut off unless he was a party.*"¹¹² The court went on to hold that the writ of possession issued to any purchaser at a foreclosure sale "*could only issue against the defendants in the [foreclosure] bill, and those claiming under them, after the suit was commenced, hence the necessity of making all persons in possession of the premises parties to the bill, in order that they may be concluded by the decree, and the title divested, whatever it may be.*"¹¹³

Richardson certainly supports the assertion that Illinois is an election state,

109. The purchaser dispossessed the tenant promptly after the foreclosure sale, and in the period of time between the tenant's probable attornment and that dispossession, the lease had expired by its terms and a holdover period had ensued.

110. 106 Ill. 476 (1883).

111. *Id.* at 479.

112. *Id.* (emphasis added).

113. *Id.* at 479-80 (emphasis added).

and at least three commentators have so interpreted it.¹¹⁴ The implication is strong that the tenant's status as a necessary party mandates that unless it is named in the suit, its title, whatever it may be, will not be divested. Its interest in the premises will not be cut off by the foreclosure decree. Unfortunately, the court did not define what an unnamed tenant's "interest" or "title" encompasses. As to the tenant's "title," clearly no tenant has title in any technical sense, holding at most an estate for years. As for the tenant's "interest," it may be argued that it encompasses no more than the tenant's equitable right of redemption and not its right to possession. This argument is textually weak, however, because the court's language suggests that the tenant's pre-foreclosure interest—which included possession—would not be disturbed.

3. *Gale v. Carter*

A third case dealing with a tenant as a necessary party is *Gale v. Carter*.¹¹⁵ In *Gale*, one of the named defendants in a foreclosure suit objected at the time of the proceeding that a junior tenant in possession had not been made a party. The court issued its decree over this objection, and the defendant appealed. The appellate court found for the appellant, holding that it was reversible error for the trial court not to have required the tenant in possession to be joined as a defendant to the foreclosure action.¹¹⁶ The court quoted with approval the language cited above from *Richardson*.¹¹⁷ It also added another practical argument for naming a junior tenant: The failure to do so could affect the selling price of the property, because bidding at the foreclosure sale might be chilled if there were a party in possession not bound by the decree.¹¹⁸

The *Gale* decision, however, does not squarely support an election position because it was apparently the *mortgagee*, not the mortgagor, who put the tenant in possession.¹¹⁹ The mortgagee might have put the tenant in possession either by accepting an attornment from the existing tenant or by finding a new tenant. In either case, if the tenant's interest was derived from the mortgagee, *Gale* cannot be extended beyond its facts to apply to unnamed

114. See 5 H. TIFFANY, *supra* note 34, § 1534, at 612; Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 43 n.26; Annot., 14 A.L.R. 664, 665 (1921).

115. 154 Ill. App. 478 (1910).

116. *Id.* at 480-81.

117. *Id.* at 480.

118. *Id.* The court also stated that the trial court should have ordered the joinder of the tenant in possession sua sponte. *Id.* Failure by the court to take such action, however, would not seem to constitute reversible error because the nonjoinder of a tenant in possession generally may not be raised for the first time on appeal. See *Chicago Title & Trust Co. v. Herlin*, 229 Ill. App. 429, 20 N.E.2d 333 (1st Dist. 1939).

119. The court stated that the mortgagees should have amended their bill to make the tenant a party, "[n]otwithstanding [*mortgagees*'] claim that *they themselves* put the tenant in possession" 154 Ill. App. at 480 (emphasis added).

junior tenants under leases entered into with the mortgagor prior to the mortgagor's default.¹²⁰

4. Union Trust & Savings Bank v. Hall

In *Union Trust & Savings Bank v. Hall*,¹²¹ the mortgagee of a defaulted mortgage brought a foreclosure action against the mortgagor, Hall. As landlord, Hall had leased a portion of the premises to a hotel company as tenant. The mortgagee failed to name the tenant in the foreclosure proceeding, and the court denied the mortgagor's request that the tenant be joined. Of particular concern to the mortgagor was a dispute over the term of the lease. There was a factual question as to whether the tenant had properly exercised its option to renew the lease. If the option was not properly exercised then the tenant was a holdover tenant under a month-to-month lease. The mortgagor feared that failure to name the tenant in the suit would leave the disputed term unsettled, and bidders at the ensuing foreclosure sale would reduce their offers in light of the uncertainty.¹²²

On appeal, the mortgagor prevailed. The court ruled that the tenant should have been joined:

It is a general rule, not without exception, that all parties having interest in the property should be made parties to a proceeding foreclosing same. It is essentially desirable that this rule should be adhered to in cases where the rights of parties claiming an interest in the property are undetermined and the subject of dispute, and where additional litigation might become necessary to determine the conflicting claims, as in the present case.¹²³

The rights of the tenant and whether it was entitled to the lease extension, according to the court, were not and could not be determined in the decree, because the tenant was not a party to the suit.¹²⁴ The court stressed the financial hardship that the mortgagor could suffer if bidders at the foreclosure sale were unsure whether they were buying a building with a long-term or month-to-month major tenant.¹²⁵

120. One commentator has cited both *Gale* and *Richardson* as indicating that Illinois is joining "a growing trend toward what is referred to as the New York rule" or election position, the position favored by the author. See Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 43.

Another commentator has cited *Gale* as a case that, like those in some other states, has been improperly interpreted as supporting an election position. In fact, asserts the author, Illinois is among the states where there is real doubt that an election position prevails. See Hyde, *supra* note 3, at 390.

121. 202 Ill. App. 578 (4th Dist. 1916).

122. *Id.* at 579-81.

123. *Id.* at 581.

124. *Id.*

125. *Id.*

Union Trust stands as the clearest statement discussed thus far of an election position in Illinois. There was no pre-foreclosure action by the mortgagee to confuse the nature of the source of the tenant's possessory rights. Clearly, the tenant's rights derived from the original lease with the mortgagor. It may be argued that the opinion never explicitly stated that the lease was subsequent to the mortgage,¹²⁶ a point of ambiguity that detracts from the precedential strength of the case.¹²⁷ Nonetheless, on balance, a common sense reading of the facts is strongly in favor of a post-mortgage lease.¹²⁸

5. Silverstein v. Schak

Silverstein v. Schak,¹²⁹ a recent appellate court decision, appears to endorse the doctrine that a tenant is a necessary party to a foreclosure proceeding in Illinois. In this case, the tenant was trying to enforce a seven-year lease

126. The argument that the lease predated the mortgage is based on the fact that the court did not rely on the reasoning of either *Richardson* or *Gale* or cite either case in declaring that the tenant should have been joined. Instead, the court focused on the fact that an independent dispute existed over the term of the lease. *Id.* This fact is generally invoked as a ground for declaring a lessee or lienor senior to the foreclosing party to be essential to the proceeding. Usually the rights of senior lessees or lienholders are entirely unaffected by a foreclosure, and thus, the general practice is not to name them at all. In fact, it is generally stated that senior lienholders and lessees may *not* be made necessary parties. In this context it is significant that the court never referred to the tenant as a "necessary" party. An exception is made, however, and the court will grant a party's request to join even an unwilling senior interest holder, when the requesting party can show that the senior interest is unclear or disputed in some way. *See G. OSBORNE, supra* note 17, § 322. In the face of the clear precedent available to the courts in *Richardson* and *Gale*, one logical explanation for the *Union Trust* court's failure to rely on either case is that the two cases were inapposite, dealing with junior tenants as they did.

127. As stated earlier, the election/cutoff debate makes no sense in a pre-mortgage lease situation, because the lease always survives foreclosure. *See supra* note 16.

128. First, the court's failure to cite *Richardson* or *Gale* is not surprising in view of how sparingly any of the early appellate courts cited each other. It should be noted that the *Union Trust* court cited no cases at all on this issue.

Second, had the mortgage post-dated the lease, it may be expected that the court would have stated its principle as an *exception* to the general rule dispensing prior lessees as parties. The court, however, did just the opposite. *Union Trust*, 202 Ill. App. at 581.

Third, and most practically, certain facts of the case make it unlikely that the mortgage was subordinate to the lease. The mortgage was on a ground leasehold interest plus a complex multi-use building. There was probably a construction loan secured by a mortgage. The lease to the tenant was made "later" than certain conveyances, *id.* at 579-80, and therefore probably later than the construction. So, the construction mortgage would have been paramount to the lease. Any refinancing of that construction mortgage would probably also be paramount by subrogation. A point to the contrary is that there was not just one more mortgage but three, only the third of which was being foreclosed. On the other hand, the hotel lease had just a five-year term which had barely elapsed at the time of the suit. The third mortgage had matured, barring the very unlikely possibility that the third mortgagee subordinated its interest to the lease by agreement, and thus the entire term of the mortgage would have to have been less than five years for the lease to be paramount.

129. 107 Ill. App. 3d 641, 437 N.E.2d 1292 (2d Dist. 1982).

against the purchaser at a foreclosure sale. The mortgage agreement between the mortgagor and the mortgagee gave the mortgagee several rights upon default. These rights included the authority to enter and take exclusive possession of the property either before or after the foreclosure sale; the power to make, terminate, or modify existing or future leases; and the right to collect rents. Shortly after mortgaging the property, the mortgagor, as landlord, entered into a seven-year lease with the tenant. A few years later, the mortgagor defaulted on the mortgage, and the mortgagee commenced judicial foreclosure proceedings without naming the tenant as a party.¹³⁰

During the foreclosure proceedings, the mortgagee entered, operated, and managed the property, and began collecting rent from the tenant. The mortgagee, however, never entered into any written or oral lease agreement with the tenant. After the foreclosure decree was entered, the mortgagee sold the property to the purchaser. Subsequently, the purchaser tried to avoid the lease, and the tenant brought suit to enforce the lease for the remainder of the seven-year term.¹³¹

The tenant based its claim on its status as a necessary party, arguing that the mortgagee's failure to name it in the foreclosure proceeding meant that its right to possession under the lease was not affected. The court appeared to agree with the tenant's statement of the law. Citing *Richardson*, the court stated that "Illinois law does provide that ordinarily tenants in possession are necessary parties to a foreclosure action."¹³²

Despite the quoted passage, the court found against the tenant. The court held that the principle of necessary parties was not controlling under the facts of the case.¹³³ Instead, the court agreed with the purchaser's position that the lease had already been extinguished during the pre-foreclosure period by virtue of the mortgagee's entry for condition broken.¹³⁴

The logical inference from *Silverstein* is that if the mortgagee had refrained from acts amounting to an entry of the property, the lease would have survived to the foreclosure sale and thereafter because the tenant was not named in the suit. *Silverstein* represents a clear judicial reaffirmation of the principle that in Illinois the tenant is a necessary party to a foreclosure proceeding. Unfortunately, however, the court's statements in this regard were not necessary to the decision and remain as dicta.

To summarize, the line of cases from *Brush* to *Silverstein* appears to recognize the tenant as a necessary party to a foreclosure proceeding. No single case, however, combines all the statements of law and factual elements necessary to provide solid support for an election position. Each case suffers from some weakness that renders it problematic. The individual weaknesses disappear to some extent when the cases are read together. Nonetheless, the

130. *Id.* at 644, 437 N.E.2d at 1293-94.

131. *Id.*

132. *Id.* at 644, 437 N.E.2d at 1294.

133. *Id.*

134. *Id.* at 645-46, 437 N.E.2d at 1294-95.

Illinois courts have failed to define expressly the nature of an unnamed tenant's post-foreclosure interest and to resolve whether that interest derives from the original lease between the tenant and the mortgagor or from some other agreement.

B. *Substantive Property Rights Cases*

A second line of pre-*Harms* cases in Illinois de-emphasized or ignored completely those arguments addressing a tenant's procedural right to be named as a necessary party in a foreclosure suit. Instead, these cases concentrated on the substantive property rights of the parties. An obscure picture emerges from these cases. Taken individually, they contain ambiguous statements of law and fact or are distinguishable from the basic fact situation underlying the cutoff/election debate because they focus on the period after default but prior to foreclosure. Taken together, they often appear inconsistent, even in some instances when one case relies on the other case as authority. While these cases did not conclusively settle the cutoff/election question, they do illustrate that prior to *Harms*, for most practical purposes, leases in Illinois have not survived foreclosure.

1. *Gartside v. Outley*

Gartside v. Outley,¹³⁵ decided by the Illinois Supreme Court in 1871, has continued to the present as the seminal decision in the second line of Illinois cases. In *Gartside*, a junior tenant attempted to enforce its lease against the purchaser at a judicial foreclosure sale by bringing an ejectment action to recover possession. The mortgagor, a railroad, owned property subject to two mortgages in the form of deeds of trust. The mortgagor leased some of the property consisting of coal lands to the tenant under a lease that would terminate when the coal ran out. Subsequently, the mortgagor defaulted on the mortgages, and "surrendered"¹³⁶ the property to one Griswold (the mortgagee), who operated the railroad for the benefit of the trustees of the deeds of trust. The mortgagee received back rents from the tenant in possession. Later the mortgagee declared that the tenant had forfeited the lease by failing to comply with its terms. The tenant then surrendered possession of the leased property to the mortgagee and a new tenant was installed. Finally, the mortgagee filed for a judicial foreclosure, and the property was sold to the defendant as purchaser at the foreclosure sale.¹³⁷ The facts do not state whether the tenant was named in the foreclosure action.

On appeal, the tenant conceded that after the mortgagor went into default, its lease could not have any force as against the rights of the mortgagee.¹³⁸ This was because the lease was subsequent to the mortgages. The tenant

135. 58 Ill. 210 (1871).

136. *Id.* at 212.

137. *Id.* at 212-13.

138. *Id.* at 214.

argued, however, that because the mortgagee had accepted rent payments after the mortgage's "entry"¹³⁹ onto the property, the lease had been "set up . . . as against the mortgagee . . . for the entire period which the lease had to run."¹⁴⁰

The court agreed that the tenant's argument stated the controlling question in the case¹⁴¹ but ultimately rejected the tenant's position. The court's reasoning proceeded in the following steps. First, the court held that a lease made subsequent to a mortgage is terminated by any act of the mortgagee amounting to an entry after a default under the mortgage. The court apparently concluded that Griswold's operation of the railroad for the benefit of the mortgagee after the mortgagor's "surrender" of the property constituted an entry for condition broken.¹⁴² The court observed: "It is in the power of the mortgagee, on entry for condition broken, where the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant."¹⁴³ With respect to the latter option, "there must be some distinct act on the part of mortgagee that manifests the intention to recognize the lessee as his tenant."¹⁴⁴ The court stated that a mortgagee could not create a landlord-tenant relationship by merely *demanding* rents of the tenant.¹⁴⁵ If the mortgagee, however, "*receives* rents of the tenant, . . . the relation of landlord and tenant will be created between the parties."¹⁴⁶

The court then proceeded to the more difficult question. Under the facts of the case, given that the mortgagee's acceptance of rents after its entry for condition broken created a landlord-tenant relationship between the tenant and the mortgagee, what were its terms? Specifically, would the term of the lease be that of the entire period of the unexpired lease, or a shorter period?¹⁴⁷ The court again appeared to reason from the conclusion that the original lease was terminated by entry of the mortgagee.¹⁴⁸ Analogizing to the rule governing the term of a hold-over tenant, the court held that, after entry by the mortgagee, the mere receipt of rents by the mortgagee would only create a tenancy from year to year.¹⁴⁹ The court stated:

Upon principle, therefore, something more is required than the mere receipt of rents from the lessee, to make valid the lease for the unexpired term as against the mortgagee [I]t will require a

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 214-15.

143. *Id.* at 214.

144. *Id.*

145. *Id.*

146. *Id.* (emphasis added).

147. *Id.*

148. *See supra* note 142 and accompanying text.

149. 58 Ill. at 214.

special agreement, to make valid and to effectuate the extension of a lease executed by the mortgagor.¹⁵⁰

The court concluded that the mortgagee's receipt of rents, without more, created no more than a year-to-year tenancy.¹⁵¹ Hence, the tenant's possessory claims based on the original lease failed.¹⁵²

Gartside may be read as consistent with either an election or a cutoff position, because its facts do not really set up the basic cutoff/election pattern. In *Gartside*, the mortgagee's post-default/pre-foreclosure activity constituted an entry onto the property that automatically extinguished the lease. Thus, it became irrelevant whether the tenant was named in the judicial foreclosure and, indeed, the court did not even consider the fact in its opinion. For there to be a classic cutoff/election issue in a title state, the mortgagee must have refrained from any act that might be construed as a pre-foreclosure entry. In this way the original lease would survive until judicial foreclosure, thus making the issue of the tenant's joinder vital. The latter situation was simply not before the court in *Gartside*.

Despite *Gartside's* basic inapposition to the cutoff/election debate, advocates on both sides can fix upon certain principles in *Gartside* to support their positions. Proponents of the election position would note that the court consistently states that the mortgagee has an election either to evict or to recognize the tenant. The court's use of the word "election" would be inaccurate if the court meant only that the mortgagee has the power to evict the tenant, and that if it does not do so the two parties are free to act as they choose. The mortgagee could not in fact "elect to recognize the lessee"; the tenant would be free to go or stay.

Furthermore, in accord with the notion of enforcing the mortgagee's election, the court appeared to attach no importance to the tenant's choice in the matter. In order to avoid saddling the mortgagee with a lease that the mortgagee clearly could have repudiated, the court strained to discern the precise and unambiguous intent of the mortgagee as evidenced by "some *distinct act* on the part of the mortgagee."¹⁵³ In the end, the court rejected

150. *Id.* at 215. The court cited several authorities for the proposition that "if the mortgagee, instead of turning out the lessee, elects to take him as his tenant, the mortgagee does not, thereby, set up the tenancy for the entire unexpired term of the lease, but only from year to year." 58 Ill. at 215; see also 1 J. TAYLOR, THE AMERICAN LAW OF LANDLORD AND TENANT § 120, at 142 (9th ed. 1904), where it is stated:

[T]enants under leases made subsequent to a mortgage may be treated as trespassers by the mortgagee and ejected without notice. By giving notice to such a tenant to pay rent to him, a mortgagee does not make him a tenant; and such result will not be produced unless the tenant attorns to the mortgagee for the express purpose of creating a new tenancy between himself and the mortgagee.

151. 58 Ill. at 215.

152. As an additional basis for its decision, the court noted that as between the tenant and the purchaser it was very doubtful whether the tenant had any rights to assert at all, because the tenant had been put out of the property well before the foreclosure sale, and the purchaser had never received any bank rents of the tenant or in any other way recognized any right in the tenant under the lease. *Id.* at 216-17.

153. *Id.* at 214 (emphasis added).

the tenant's contention that the mortgagee had reaffirmed the pre-existing lease, and held for the mortgagee.

Finally, although the court rejected the tenant's contention, it did not say that the mortgagee could not have affirmed the existing lease. In fact, if the mortgagee does have a genuine election upon entry, it is to recognize the tenant as the lessee under the existing lease, not under a truncated version of that lease. Indeed, the court noted that the tenant could have established this election, even by estoppel, because of the mortgagee's conduct during the ensuing tenancy, but that the tenant did not do so in this case.¹⁵⁴ If so, then the *Gartside* court would be holding that the mortgagee might have exercised this election but did not. The court would be concluding that the existing landlord/tenant relationship had lapsed and none had replaced it, simply inferring the year to year tenancy, like the holdover tenancy from which it is drawn by analogy, from the acts of the parties.

But the cutoff proponents¹⁵⁵ have the stronger side of the argument. The *Gartside* court stated unequivocally that "the lease is terminated by the act of entry of the mortgagee."¹⁵⁶ The court thus advanced a basic substantive property law principle that an assertion of a paramount possessory right by the mortgagee against the mortgagor cuts off not only the mortgagor's right, but the tenant's derivative possessory right as well.

The logical consequence of this principle is that once the mortgagee has entered onto the property or committed some other act equivalent to entry, the mortgagee has only the power to evict the tenant. The court misused the word "election." The mortgagee cannot impose a lease of any kind upon the tenant. The mortgagee may demand rents, but the tenant must agree to pay them, and may instead surrender possession voluntarily. The mortgagee and the tenant are on an equal footing. Each is free to create any relationship the other will agree to, or to create no relationship at all. If the parties do create a relationship, the court will determine its terms by examining the parties' actions (the year to year tenancy), but it will not allow either to impose a relationship upon the other.¹⁵⁷

This reading of *Gartside* implies that even if the mortgagee has an election in the foreclosure proceeding, the mortgagee does not have that election at the point of the mortgagor's default when the right of possession first transfers to the mortgagee. By asserting its possessory right, the mortgagee would run the risk that the tenant will walk away.

154. *Id.*

155. See Gard, *supra* note 52, at 12; Annot., 14 A.L.R. 664, 672 (1921); Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 39 n.11.

156. 58 Ill. at 215.

157. The interpretation of *Gartside* as requiring a mutual agreement by the mortgagee and the tenant is also reached by Jones and Gard. See 2 L. JONES, *supra* note 16, § 978, at 362 n.30; Gard, *supra* note 52, at 11.

2. *Reed v. Bartlett* and *Bartlett v. Hitchcock*

*Reed v. Bartlett*¹⁵⁸ and *Bartlett v. Hitchcock*¹⁵⁹ grew out of the same set of facts and were decided by the same appellate court judge¹⁶⁰ within four months of each other in 1881 and 1882.¹⁶¹ Tenant Bartlett, the defendant, entered into a one-year lease with the landlord who had purchased the property subject to a mortgage containing a power of sale.¹⁶² The tenant paid the real estate taxes. The remainder of the rent was due in two installments. The first was due nine months into the lease and the second was due at the end of the lease term. The landlord defaulted under the mortgage and, about six months after the lease was signed, the mortgagee foreclosed by exercising its power of sale. The purchaser of the property at the foreclosure sale was one Hitchcock. He entered the property, informed the tenant that he had purchased it, and told him not to remove any fixtures, even though removal of fixtures was apparently permitted under the lease.¹⁶³ Later that month, the purchaser demanded that the tenant vacate the premises. The tenant, however, not only refused to leave but also refused to recognize the purchaser as landlord or pay him rent. When the ninth month under the lease had passed, the purchaser sued for the first rental installment. While that suit was pending, the purchaser sold the property to one Reed, who subsequently brought a separate suit for the second installment accruing under the same lease.¹⁶⁴

Reed v. Bartlett reached the appellate court first. The appellate court ruled that the plaintiff, the purchaser's successor, had no right to rents.¹⁶⁵ It reasoned that, after mortgaging the property, the mortgagor was left not with title, but merely the equity of redemption.¹⁶⁶ Thus, when the property was subsequently leased to the tenant, the tenant's estate for years¹⁶⁷ was carved out of the equity of redemption and not out of the fee.¹⁶⁸ When the mortgage was subsequently foreclosed, "the equity of redemption became extinguished and the reversion and the leasehold estate fell with it."¹⁶⁹ Hence, there was neither privity of estate nor contract between the purchaser and the tenant—as there would have been had the lease preceded the mortgage—

158. 9 Ill. App. 267 (2d Dist. 1881).

159. 10 Ill. App. 87 (2d Dist. 1881).

160. The judge's name was J. W. Ransted (or Ranstead).

161. The *Reed* opinion was filed on Nov. 2, 1881. The *Hitchcock* opinion was filed on Feb. 24, 1882. See *supra* notes 154-55.

162. 9 Ill. App. at 268. Illinois abolished foreclosure by power of sale in 1879 by statute. Act of May 7, 1879, 1879 Ill. Laws 211 (currently ILL. REV. STAT. ch. 110 15-101 (1983)). The mortgage in question was entered into in 1877, and was foreclosed in August 1879.

163. 9 Ill. App. at 268.

164. *Id.*

165. *Id.* at 271.

166. *Id.* at 270.

167. *Id.*

168. *Id.*

169. *Id.*

and no landlord-tenant relationship.¹⁷⁰ Unless the tenant attorned to the purchaser, which clearly had not been the case here, the purchaser would have no basis for an action to recover the rent which would have been due under the now defunct lease.¹⁷¹ But as the correlative consequence of the lack of a landlord-tenant relationship, the purchaser had the right to treat the tenant as a trespasser and could recover possession by ejectment without notice or under the forcible detainer statute.¹⁷² This, however, was not the remedy sought by the purchaser's successor as plaintiff.¹⁷³

Bartlett v. Hitchcock reached the appellate court a few months later. Here the plaintiff was Hitchcock, the original purchaser of the property at the foreclosure sale, suing for the first rental installment due under the lease. The trial court found for the purchaser, and the appellate court reversed.¹⁷⁴ The purchaser argued to the appellate court that because he purchased the property after the lease had been entered into, he should be viewed as an assignee of the reversion and therefore entitled to rents under the lease through privity of estate.¹⁷⁵

The court rejected this argument because the lease had been made *after* the mortgage.¹⁷⁶ The court stated that the title acquired at a foreclosure sale "relates back to the execution of the mortgage, and [purchaser] takes the title as *then* existing in the mortgagor, *divested* of sales, liens or leases made by the mortgagor"¹⁷⁷

Furthermore, the purchaser had no right to recover rent as such, since his single act of demanding rent from the tenant was not enough to create a landlord-tenant relationship.¹⁷⁸ Only if the tenant complied with the demand would the relationship come into being.¹⁷⁹ In order to create privity of contract or estate after a foreclosure sale, thus enabling the purchaser to recover rent, the parties must undertake some affirmative act evidencing their intention to "recognize the former lease as still subsisting, or a new holding under the same or different terms."¹⁸⁰ In the instant case, the purchaser had repudiated the lease.¹⁸¹ The court viewed the purchaser's forbidding the tenant to remove fixtures placed upon the property by the tenant (which, under the lease, the tenant had a right to remove at the end of the term) as a repudiation.¹⁸² In addition, the tenant had refused to attorn

170. *Id.*

171. *Id.* at 270-71.

172. *Id.* at 270.

173. *Id.* at 271.

174. 10 Ill. App. at 90.

175. *Id.* at 88.

176. *Id.* at 89.

177. *Id.* (emphasis added).

178. *Id.* (citing *Gartside*, 58 Ill. 210 (1871)).

179. *Id.*

180. *Id.* at 90. (citing *Gartside*, 58 Ill. 210 (1871)).

181. *Id.*

182. *Id.*

to the purchaser.¹⁸³ Under the circumstances, the tenant had become no more than a trespasser in possession and, therefore, the purchaser had no basis to sue for rents.¹⁸⁴ Finally, not only did the purchaser lack any basis for recovering rents under the original lease or under any claimed new lease, but the purchaser could not even avail himself of a statutory recovery from the tenant for the use and occupation of the land, since the purchaser failed to comply with the statutory requirement for written notice to vacate.¹⁸⁵

Reed and *Hitchcock* together articulate the key principles of law relied upon by courts in cutoff jurisdictions.¹⁸⁶ Both cases are consistent with *Gartside* in holding that once the mortgagee has entered the property, any subsequent attempt on its part to collect rents from the tenant may only be by virtue of a newly created landlord-tenant relationship—a relationship that the mortgagee may not unilaterally impose upon the tenant. On the other hand, the force of this principle is vitiated because the *Hitchcock* court also held that the mortgagee had repudiated the lease upon entry.

Both cases further resemble *Gartside* in that they do not constitute the fact situation that invokes the “true” cutoff/election issue. *Reed* and *Hitchcock* involved foreclosure by power of sale, not judicial foreclosure.¹⁸⁷ Imposing a cutoff rule for foreclosure by power of sale is not inconsistent with imposing an election rule for judicial foreclosure. In fact, it is apparently not uncommon for election states to impose a cutoff rule upon power of sale foreclosures.¹⁸⁸

The fact that the property was sold pursuant to a power of sale, however, has not deterred some commentators from citing *Reed* and *Hitchcock* as authority for the proposition that Illinois is a cutoff state.¹⁸⁹ They reason

183. *Id.*

184. *Id.*

185. *Id.*

186. See *supra* note 155 and accompanying text.

187. See *supra* note 163.

188. One commentator has found that there is unanimity among title and intermediate states that a lease is absolutely terminated by power of sale. The author notes a conflict of opinion, however, as to whether the same strict cutoff rule should apply in judicial foreclosure. See Gard, *supra* note 52, at 11-12.

Campbell's investigation has yielded the same results. He asserts that, although there is a lack of uniformity, it is a typical pattern for states to hold that a power of sale automatically cuts off a lease, while at the same time following an election position with respect to judicial foreclosures. See Campbell, *supra* note 23, at 522-23.

Taking a cutoff position for power of sale foreclosures and an election position for judicial foreclosures makes sense from a practical point of view. In a judicial foreclosure the court decrees which parties' interests have been extinguished. In this procedural context, a foreclosing mortgagee has a meaningful way to elect to preserve a lease—by omitting to name the tenant in the suit, or by naming the tenant but stating that the tenant's interest is not intended to be foreclosed, and that any purchaser at the foreclosure sale would take the property subject to that interest. In contrast, it is difficult to envision any meaningful way for the mortgagee to effect the same election in the course of the summary power of sale foreclosure.

189. See, e.g., Campbell, *supra* note 23, at 526; Gard, *supra* note 52, at 12; Comment, *Effect of Mortgage Foreclosure*, *supra* note 35, at 41.

that both title and the right to possession are transferred upon default in both foreclosure by power of sale and judicial foreclosure. Thus, because transfer occurs *prior* to foreclosure in either case, whether the foreclosure was judicial or by power of sale should not matter.¹⁹⁰ Nevertheless, the precedential weight of *Reed* and *Barlett* as “true” cutoff cases is not at all clear.

3. Reichert v. Bankson

*Reichert v. Bankson*¹⁹¹ was decided in 1916 by the appellate court. The plaintiff had purchased the property at a sale held pursuant to a judicial foreclosure proceeding. The defaulting mortgagor retained possession of the property through the foreclosure proceeding and until its right of redemption expired. During the redemption period the mortgagor rented a portion of the premises to the defendant/tenant. Upon expiration of the redemption period, the purchaser acquired the actual deed and demanded that the tenant pay to him the rent due under the lease. The appellate court defined the issue as follows:

[W]hether the purchaser of premises under a foreclosure sale and who has received a deed on the expiration of the period of redemption, has a right of action against a tenant in possession of said premises under a lease from the mortgagor made subsequent to the execution of the mortgage foreclosed, where no demand for possession of said premises has been made by such purchaser after receiving said deed, and where said tenant had not attorned to said purchaser as his tenant.¹⁹²

The appellate court ruled that the purchaser had no such right of action for rent.¹⁹³ The court recognized the rule that when property is leased subsequent to the mortgage, the purchaser of the property at a foreclosure sale comes in by title paramount to the lease, and is entitled to possession as against the tenant:¹⁹⁴

And as the tenant under a lease has no rights in the land as against the purchaser under a prior incumbrance, so such purchaser has, apart from statute, no rights as landlord against such tenant, unless the latter accepts a new lease from the purchaser, or, which is the same thing, attorns to him.¹⁹⁵

The court reaffirmed the concept advanced in *Hitchcock*¹⁹⁶ that the pur-

190. This position is argued in *Gard*, *supra* note 52, at 11-12.

191. 199 Ill. App. 95 (4th Dist. 1916).

192. *Id.* at 97.

193. *Id.*

194. *Id.* at 98.

195. *Id.*

196. *See supra* text accompanying note 177.

chaser's title relates back to the date of the lien under which the purchaser claims, that is, the date of the mortgage.¹⁹⁷ Thus, the purchaser is an absolute stranger to the tenant under a subsequent lease.¹⁹⁸ Because there is no privity between the mortgagee and the tenant, the purchaser has no right to demand the rent reserved by the lease.¹⁹⁹ The court then quoted with approval the portion of the *Reed* holding²⁰⁰ that stated that a tenant's lease is carved out of the equity of redemption, not out of the fee. Therefore, when that equity of redemption is extinguished, the leasehold estate falls with it.²⁰¹

In denying the purchaser recovery of the rent under the lease, the *Reichert* court did state that the purchaser had the right to eject any tenant who remained in possession after the mortgagor's interest was extinguished.²⁰² Furthermore, the purchaser would have a statutory right to recover for use and occupation of the property upon written demand to the tenant.²⁰³ The purchaser, however, had sought neither of these remedies.²⁰⁴

Reichert is the only case in which the mortgagor retained possession prior to foreclosure, one of the facts necessary to a true cutoff/election issue. The other crucial fact, that the tenant remain unnamed in the foreclosure suit, is also present. But the fact that the tenant was not joined by name in the suit is probably not enough, under the specific facts of *Reichert*, to set up a cutoff/election fact pattern. Early in the history of equitable foreclosures, it became settled that any person dealing with the mortgagor *after* the commencement of a foreclosure suit would be bound by the decree ultimately made in the action.²⁰⁵ This rule was established to eliminate the expense and inconvenience to the mortgagee that would result if the mortgagee were required repeatedly to implead new persons.²⁰⁶ The recording of a notice of foreclosure is generally an essential ingredient in the beginning of a foreclosure action.²⁰⁷ Thus, although the tenant was probably unnamed in the suit,

197. 199 Ill. App. at 98.

198. *Id.*

199. *Id.* at 99-100. The *Reichert* court quoted from *Hitchcock*:

[T]he single act of the mortgagee or the purchaser in demanding rent of such tenant, will not create the relation of landlord and tenant *when such demand has not been acted upon*, so as to enable such mortgagee or purchaser to recover rent *eo nomine*.

Id. at 100 (quoting *Hitchcock*, 10 Ill. App. at 89) (emphasis added). See also 1 L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 777, at 741 (2d ed. 1879), where it is stated: A mere notice by the mortgagee to the tenant to pay the rent to him, to which the tenant does not consent, or upon which he does not act, does not make the tenant liable to him in an action for rent, nor does a request by the mortgagor that he will pay to the mortgagee have this effect.

200. See *supra* text accompanying note 168.

201. 199 Ill. App. at 99.

202. *Id.* at 100.

203. *Id.*

204. *Id.*

205. 3 R. POWELL, *supra* note 34, ¶ 464, at 696.67-.68.

206. *Id.*

207. *Id.*

there is every reason to believe that the tenant would be bound by the decree, because it entered into the lease after the suit was begun. The court did not address this point. It simply treated the case as one involving the rights of a junior tenant versus a superior mortgagee, not as one involving the rights of a post-decree tenant and a purchaser. Its statement of Illinois law, however, whether or not properly applicable to the actual facts of the case, is consistent with a cutoff position. Two commentators have read *Reichert* as supporting Illinois' position as a cutoff state,²⁰⁸ and one has read it as pro-election.²⁰⁹ In view of the facts of the case, the precedential value of *Reichert* cannot be regarded as substantial.

4. Chicago City Bank & Trust Co. v. Walgreen Co.

In *Chicago City Bank & Trust Co. v. Walgreen Co.*,²¹⁰ a Depression era case, the mortgagee attempted to enforce a lease against an unwilling tenant. In this instance, the mortgagee prevailed on appeal. In *Walgreen*, the mortgagor mortgaged a building containing ten stores and twenty-four apartments to the plaintiff mortgagee as trustee under a deed of trust.²¹¹ The beneficiaries of the trust deed were the holders of certain notes from the mortgagor. Three years later, as landlord, the mortgagor leased part of the property to the tenant, Walgreen Company, as a drugstore.²¹² Two years after that, the mortgagor defaulted on the mortgage debt.²¹³ That same month the mortgagee filed a bill to foreclose the trust deed, and the appointment of a receiver was imminent. The mortgagor, unwilling to see a receiver appointed, negotiated a compromise with the mortgagee. According to the compromise, in lieu of the appointment of a receiver and pending the outcome of the foreclosure, the mortgagee (the trustee under the deed of trust) would take possession of the building from the mortgagor and collect the rents. Accordingly, the mortgagor formally surrendered possession to the mortgagee and executed an assignment of rents to the mortgagee by filling in and signing a pre-printed form on the back of the tenant's lease.²¹⁴ Through its agent, the mortgagee proceeded to manage the building and collect rents from the tenants. The mortgagee took no action to disturb the tenant's occupation of its store; the tenant remained in possession, continuing in business. The tenant, however, refused either to pay the rent due under the lease or to recognize the mortgagee as its landlord. The tenant agreed only to pay the reasonable value of the use and occupation of the premises.²¹⁵

The trial court found for the tenant, and the mortgagee appealed. On

208. See Comment, *Mortgagee's Rights*, *supra* note 30, at 997; Recent Case, *Mortgagees—Foreclosure*, *supra* note 96, at 610.

209. See Annot., 14 A.L.R. 664, 666 (1921).

210. 272 Ill. App. 434 (1st Dist. 1933).

211. *Id.* at 440.

212. *Id.* at 435.

213. *Id.* at 438.

214. *Id.* at 439.

215. *Id.* at 440-41.

appeal, the tenant argued that the mortgagee's actions amounted to an entry and taking possession of the property under paramount title derived from the trust deed.²¹⁶ The tenant asserted that, by operation of law, the mortgagee's entry terminated the lease and constituted an eviction of both the mortgagor and the tenant.²¹⁷ Because the tenant refused to attorn to the mortgagee, the mortgagee had no basis for enforcing the prior lease against the tenant.²¹⁸ The tenant cited *Gartside* in support of its position.²¹⁹

The mortgagee countered with two arguments. First, the mortgagee argued it was acting pursuant to the assignment of rents, and therefore stepped into the mortgagor's shoes. Thus, it could make use of any remedy available to the mortgagor.²²⁰ Second, the mortgagee argued that there was no constructive eviction of the tenant by operation of law or otherwise, because in Illinois there can be no constructive eviction without a surrender of the property.²²¹

The appellate court agreed with the mortgagee:

As we view the evidence, it sufficiently appears, especially when consideration is given to [mortgagor's] written assignment of the lease to [mortgagee] and the latter's acceptance thereof under the then existing conditions, that [mortgagee], as trustee for the holders of the mortgage notes, elected to consider the lease to [tenant] in full force and effect recognize [tenant] as its tenant.²²²

The court cited *Gartside* in support of its conclusion.²²³ It further noted that the mortgagee did nothing to disturb the tenant's possession and took immediate steps to collect rents from all the building's tenants, including Walgreen.²²⁴

Walgreen is the most problematic opinion in the *Gartside* line of cases. The difficulties in this case are illustrated by the fact that the tenant cited *Gartside* in support of its position while the court used *Gartside* to find against the tenant. It is curious that none of the commentators who have considered the cutoff/election issue in Illinois have discussed or even cited *Walgreen*. *Walgreen*, like *Gartside*, involves the post-default/pre-foreclosure period. The classic cutoff/election case, therefore, is not posed. The *Walgreen* decision, however, strongly supports election principles.

Walgreen, the tenant, was well represented. Its attorneys had obviously

216. *Id.* at 436.

217. *Id.*

218. *Id.*

219. *Id.* at 442.

220. *Id.* at 441.

221. *Id.* at 442. It is not precisely clear what point the mortgagee was making here, but the gist of its argument appears to be that the mortgagee's actions in managing the building and collecting rents did not amount to an "entry" sufficient to break the original lease.

222. *Id.*

223. *Id.*

224. *Id.* at 442-43.

read *Gartside* carefully. Immediately upon the mortgagee's notice to the tenant to pay rent for its benefit, the tenant refused to pay rent, repudiated the lease, and refused to attorn to the mortgagee. The tenant's arguments in court were exactly those ascribed to cutoff proponents in the *Gartside* discussion above. And yet, the court rejected those arguments and allowed the mortgagee to hold the tenant to the pre-existing lease, the result that election proponents in *Gartside* would have advised.

Neither the mortgagee's attorneys nor the court were quite as clearheaded as the tenant's attorneys. The mortgagee's attorneys stressed the importance of the assignment of rents to the mortgagee. The assignment read in some respects as though it were an outright assignment rather than a security assignment. It must have been a security assignment, however, because the assignment was granted "pending foreclosure," and thus, by exercising its redemption rights, the mortgagor could have terminated it.

The court itself attached appropriate weight to the assignment as indicating the intent of the mortgagee to keep the lease in full force and effect. But it also attached inappropriate weight to the assignment "*and the [mortgagee's] acceptance thereof under the circumstances . . .*"²²⁵ by suggesting that the mortgagee might be pursuing its rights under the assignment somehow independently of its status as a foreclosing mortgagee. This confusion detracts somewhat from the force of the court's opinion.

Nonetheless, there remains one ostensibly significant distinction between *Gartside* and *Walgreen*. That distinction relates to the mortgagee's entry. In *Gartside*, the mortgagee took physical possession of the property and operated the railroad on it. In *Walgreen*, the court said that the mortgagee managed and maintained the property, collected rents, and paid expenses, but never took physical possession. Because the *Gartside* court attached great importance to the fact that the mortgagee had entered the property, it is tempting to say that the difference in the opinions stems from this distinction in the facts.

This distinction, however, should make no difference. The right to possession would not be split between the mortgagor and the mortgagee. Once the mortgagee assumed the right to manage the property, the mortgagor would have no further right to possession except by redemption. The mortgagee took the rents and paid the expenses, taking on all the fruits and burdens of possession. Finally, by assuming the authority to manage and maintain the property, the mortgagee acquired the power to take possession of the property physically. Whether the mortgagee in fact did so should make no difference.

So, on facts essentially indistinguishable from *Gartside*, *Walgreen* unambiguously supports the election position. Furthermore, once the *Walgreen* court granted that a mortgagee may unilaterally elect to preserve a lease, even as against an unwilling tenant in a post-default/pre-foreclosure situa-

225. *Id.* at 442 (emphasis added).

tion, there is no reason why that lease would not continue for the entire duration of its term, unaffected by the foreclosure suit.

A number of factors, however, diminish *Walgreen's* precedential value. First, if the interpretation of *Gartside* discussed earlier is correct, the *Walgreen* court's reliance on *Gartside* appears to be misplaced. Second, whereas *Gartside* is a supreme court case, *Walgreen* is only an appellate court case. Finally, whereas *Gartside* is widely cited in later cases, *Walgreen* is cited neither in the cases nor in the commentaries. Later cases favor the cutoff position of *Gartside* with only occasional mention in dicta of the election position clearly chosen in *Walgreen*.

5. West Side Trust & Savings Bank v. Lopoten

*West Side Trust & Savings Bank v. Lopoten*²²⁶ is another case growing out of the Depression. In this Illinois Supreme Court case, the mortgagor, the owner of an apartment building, entered into a mortgage with the plaintiff/mortgagee in the form of a deed of trust. The trust deed conveyed not only the property, but also the rents. The mortgagee was authorized, in the event of default, to take possession of the property, to manage it, and to collect rents. When the mortgagor defaulted, the mortgagee took possession pursuant to the trust deed. It notified the tenants of the default and directed them to pay their rents only to the trustee's agent. The defendant tenant initially complied with this request, but later stopped paying rent. As a result, the mortgagee filed a complaint against the tenant in forcible detainer. Judgment was rendered for the tenant, and the appellate court affirmed. The Illinois Supreme Court granted certiorari.²²⁷

On appeal to the Illinois Supreme Court the mortgagee contended that it had the right to demand rents under the tenant's lease. According to the mortgagee, the tenant had attorned by paying rent after the mortgagor had defaulted on the mortgage and mortgagee had entered for condition broken and taken possession.²²⁸ The Illinois Supreme Court agreed.²²⁹ The court first reaffirmed that Illinois is an intermediate theory state, with the result that title and right to possession pass upon default from the mortgagor to the mortgagee.²³⁰ In asserting its right to possession, the court stated that the mortgagee has several remedies that it may pursue either simultaneously or successively until the indebtedness is satisfied.²³¹ One of those remedies is to enter and take possession of the property and collect rents. The rents would then be applied to the mortgage debt.²³² Citing *Gartside*, the court stated:

The mortgagee, on entry for condition broken, where the property

226. 358 Ill. 631, 193 N.E. 462 (1934).

227. *Id.* at 633-35, 193 N.E. at 463-64.

228. *Id.* at 635, 193 N.E. at 464.

229. *Id.* at 642, 193 N.E. at 466.

230. *Id.* at 639-40, 193 N.E. at 465.

231. *Id.* at 640, 193 N.E. at 466.

232. *Id.*

has been leased subsequent to the making of the mortgage, may treat the tenant as a trespasser and bring ejectment, even without notice, or he may elect to recognize the lessee as his tenant If the mortgagor's tenant, upon his notification of the mortgagee's desire to this effect, expressly or by implication recognizes him as his landlord, the tenant will thereupon cease to hold under the mortgagor and will hold under the mortgagee.²³³

The court stated that the mortgagee's acceptance of rent from the tenant creates a landlord-tenant relationship.²³⁴ The court concluded that "[t]he mortgagee's title being paramount, the tenant may attorn to him to avoid eviction, thus escaping liability to the lessor for rent subsequently accruing and become liable therefor to the mortgagee."²³⁵ Applying these principles to the facts before it, the court held that the tenant had, in fact, attorned to the mortgagee by paying rent for the months after the mortgagee took possession and before the tenant stopped those payments.²³⁶ Thus, the mortgagee, as landlord, had the right to evict the tenant for nonpayment of rents due under the lease.²³⁷

Lopoten, in its factual context, reaffirms *Gartside's* holding that the unilateral action of the mortgagee in electing to keep a tenant is not enough to create a new landlord-tenant relationship: The tenant must respond affirmatively by actually paying rent or otherwise attorning. Insofar as *Lopoten* is inconsistent with *Walgreen*, *Lopoten*, a Supreme Court case, controls. But *Lopoten*, like the other cases discussed thus far, can at best lend indirect support for the cutoff position. The original lease was terminated prior to foreclosure by the mortgagee. Subsequently, the tenant attorned by paying rent. This created privity between the mortgagee and the tenant prior to foreclosure, and thus a true cutoff/election issue was not presented.

Just as *Reed* and *Hitchcock* may be read as compatible with an election rule in a judicial foreclosure context, so too may *Lopoten*, because the original lease between the tenant and the mortgagor had died prior to any judicial foreclosure. As with the other opinions in the *Gartside* line of cases, *Lopoten's* facts prevent it from providing direct support for either a cutoff or an election position.

6. Silverstein v. Schak

Silverstein as discussed above,²³⁸ is the most recent in the "necessary party" line of cases.²³⁹ Appropriately, it also stands as the most recent

233. *Id.* at 641, 193 N.E. at 466 (citing 2 L. JONES, *supra* note 16, § 982).

234. 358 Ill. at 641, 193 N.E. at 466 (citing 2 L. JONES, *supra* note 16, § 981).

235. 358 Ill. at 641-42, 193 N.E. at 466 (citing 2 L. JONES, *supra* note 16, § 982).

236. 358 Ill. at 642, 193 N.E. at 466.

237. *Id.*

238. See *supra* text accompanying notes 129-34.

239. See *supra* text accompanying notes 102-34.

decision in the *Gartside* line of cases. *Silverstein* is the first Illinois opinion to bring together the two lines of cases, but unfortunately, the facts of *Silverstein* made it unnecessary for the court to reconcile them. Ultimately, *Silverstein*, like *Gartside* and its progeny, is not a true cutoff/election case at all.

The facts of *Silverstein* have been set out earlier in this article.²⁴⁰ To summarize them, shortly after mortgaging the property, the mortgagor, as landlord, entered into a seven-year lease with the tenant. The mortgagor defaulted under the mortgage and the mortgagee commenced foreclosure proceedings, without naming the tenant as a party. At the same time, the mortgagee entered and managed the property and began collecting rents as it was allowed to do under the terms of the mortgage. Although the tenant paid rent, the mortgagee did not enter into any written or oral lease agreement with it. After the property was sold at the foreclosure sale, the tenant sought to enforce the seven-year lease against the purchaser.²⁴¹

As discussed earlier,²⁴² although the court granted in *dicta* that the tenant was a necessary party to the foreclosure suit, the court went on to state that the mortgagee's failure to join the tenant as a party did not preserve the original lease in this case.²⁴³ The court reasoned that the lease had already been extinguished by the mortgagee's pre-foreclosure entry onto the property.²⁴⁴ The court's specific statement, however, leaned toward the election position: "Unless the mortgagee does recognize the lessee as a tenant *under the existing lease*, the mortgagee's entry onto the premises for condition broken terminates the existing lease between the mortgagor and the lessee"²⁴⁵ The court implied that had the mortgagee recognized the tenant under the original lease, the mortgagee could have entered the property and held the tenant to the existing lease, as in *Walgreen*.

Citing *Gartside*, however, the *Silverstein* court held that the tenant's rent payments to the mortgagee amounted to an attornment, and therefore a new landlord-tenant relationship had been established.²⁴⁶ Unfortunately for the tenant, in the absence of any special agreement reaffirming the original lease term, the tenancy created was only from year to year.²⁴⁷

Silverstein contains a fact pattern virtually identical in its essentials to *Gartside*. In the 111 years separating the two decisions, the Illinois courts did not change their position except to express a somewhat greater inclination toward the election position in a post-default/pre-foreclosure context. Nor were they ever presented with a fact pattern that required them to face

240. See *supra* text accompanying notes 130-31.

241. See *id.*

242. See *supra* text accompanying notes 132-34.

243. See *id.*

244. See *id.*

245. 107 Ill. App. 3d at 645, 437 N.E.2d at 1294 (emphasis added).

246. *Id.* at 645, 437 N.E.2d at 1295.

247. *Id.* (citing *Gartside*, 58 Ill. 210 (1871)).

squarely the cutoff/election issue. Such a situation would be one in which the mortgagee refrains from asserting any possessory rights after the mortgagor's default, permits the mortgagor and the tenant to continue undisturbed in their landlord-tenant relationship, and files a foreclosure suit against the mortgagor without naming the tenant as a defendant. *Silverstein*, like *Gartside*, contains logical elements upon which proponents of both the cutoff and election positions can lean. Thus, this most recent case continues the ambiguity in Illinois case law.

III. THE EFFECT OF *HARMS*

Harms, handed down by the Illinois Supreme Court in its November 1984 term,²⁴⁸ paves the way for a definitive decision in Illinois, ending six decades of confusion over the state's position on the cutoff/election debate. In *Harms* the court held that a mortgage transfers only a lien to the mortgagee, not "title" even in the qualified, narrow sense that title was deemed to have passed to the mortgagee under *Lightcap*.²⁴⁹

The issue in *Harms* was whether the execution of a mortgage by only one of two joint tenants would destroy the unity of title, and thereby sever the joint tenancy.²⁵⁰ Under *Lightcap*, a mortgage conveyed title as between the mortgagor and the mortgagee, so the granting of a mortgage would be enough to destroy the unity of title held by the two joint tenants. If the mortgage conveyed only a lien, however, unity of title as between the two joint tenants would be intact, and the joint tenancy would not be severed. In declaring Illinois to be a lien state, and thereby finding the joint tenancy preserved, the court cited five relatively recent Illinois appellate and supreme court decisions that it characterized as following the lien theory of mortgages. In one, the supreme court held that the mortgagee did not hold title to the property and therefore could not grant an easement by implication.²⁵¹ In another, the supreme court held that the mortgagor rather than the mortgagee is the title holder in the context of a condemnation proceeding.²⁵² In a third, the appellate court held that the mortgagee (actually the purchaser at a foreclosure sale) did not hold title during the redemption period; therefore, the court could extend the mortgagor's statutory period of redemption without injuring the purchaser.²⁵³ In approving this judicial trend, the *Harms* court discussed *Lightcap* and explicitly rejected the idea that a mortgage

248. See *supra* note 15 and accompanying text.

249. 105 Ill. 2d at 222, 473 N.E.2d at 933.

250. *Id.* at 219, 473 N.E.2d at 932. The unity of title is one of the "four unities" fundamental to both the creation and perpetuation of a joint tenancy. *Jackson v. O'Connell*, 23 Ill. 2d 52, 55, 177 N.E.2d 194, 195 (1961); see *Mattis, Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. L.J. 27, 52.

251. *Kling v. Ghilarducci*, 3 Ill. 2d 454, 121 N.E.2d 752 (1954).

252. *Department of Transp. v. New Century Eng'g & Dev. Corp.*, 97 Ill. 2d 343, 454 N.E.2d 635 (1983).

253. *Mutual Life Ins. Co. v. Chambers*, 88 Ill. App. 3d 952, 410 N.E.2d 962 (1st Dist. 1980).

conveys to the mortgagee anything more than a lien on the property.²⁵⁴ The *Harms* court stated that “[i]n Illinois the giving of a mortgage is not a separation of title, for the holder of the mortgage takes only a lien thereunder.”²⁵⁵ The court granted that the character of the “title” that, under *Lightcap*, had passed to the mortgagee was “unique and narrow” and that therefore “it was not a drastic departure” for the court to now characterize the execution of a mortgage as a “mere lien.”²⁵⁶ Nevertheless, the court found it necessary to break with *Lightcap* in reaching its holding.

In fact, on a careful reading, *Harms* appears to overrule *Lightcap* rather than distinguish it. Under *Lightcap*, “a title vests in the Mortgagee, but only for the protection of his interests.”²⁵⁷ Of course, the facts of *Harms* are clearly unrelated to those of the typical cutoff/election case. Only a fact situation actually involving a mortgagee’s post-default assertion of possessory rights would present the issue squarely. But the *Harms* court rejected even the slender title theory embodied in *Lightcap* without qualification, so it is hard to conceive that any later court will discern a purpose for preserving any sliver of title in the mortgagee.

Furthermore, under *Lightcap*, the mortgagee’s right to possession after a default under the mortgage was explicitly found to be “by virtue” and “on the strength” of the “title” held by the mortgagee.²⁵⁸ In Illinois, therefore, the sole rationale behind the mortgagee’s right to possession has been the “unique and narrow title” accorded the mortgagee in *Lightcap*. Now that *Lightcap* has been rejected, a court would have to construct a new rationale for that right to possession.²⁵⁹ It is most likely that under *Harms* the right to possession has disappeared, and that under future Illinois cases, there will no longer be any reason to accord a mortgagee any greater privileges than it would enjoy in any other lien state.

With the demise of the mortgagee’s pre-foreclosure possessory rights, the bargaining power of the tenant, the mortgagor, and the mortgagee has shifted to some degree. The law now affords the right to possession to the mortgagor and the tenant in the pre-foreclosure period. A mortgagee with adequate bargaining power may want to insist that the mortgagor grant it the traditional right of possession during the pre-foreclosure period, realizing that the law now provides otherwise, but trusting that such a grant would

254. 105 Ill. 2d at 222, 473 N.E.2d at 933.

255. *Id.* at 223, 473 N.E.2d at 933 (quoting with approval from *Kling v. Ghilarducci*, 3 Ill. 2d 454, 460, 121 N.E.2d 752, 756 (1954)).

256. *Id.* at 222, 473 N.E.2d at 933.

257. 186 Ill. at 522-23, 58 N.E. at 223 (emphasis added).

258. *Id.*; see *supra* text accompanying note 84.

259. For example, in defense of criticisms leveled at some of the inconsistencies in various intermediate states’ mortgage theories, Osborne states,

the real issue is not whether title is in the mortgagor or mortgagee but whether it is desirable or undesirable to accord to a mortgagee as a part of this security interest in the property the right to take possession at one time or another. If posed in this fashion there is something to be said in favor of permitting a mortgagee to take possession after his debtor has defaulted.

G. OSBORNE, *supra* note 17, § 126, at 206.

not be held contrary to public policy.²⁶⁰ A strong mortgagor, however, supported by the change in the law, may resist such a provision.

Furthermore, all the parties should be aware that in the absence of such contractual provisions effectively reestablishing the traditional pre-foreclosure relationships, the Illinois courts will no longer be concerned with the complicated ramifications of pre-foreclosure terminations of leases caused by a mortgagee's entry onto the property or the subtleties of whether a tenant has intentionally or inadvertently attorned. Instead, the courts will be confronted with "true" cutoff/election cases, and the long standing uncertainty on this issue finally will be resolved. To protect itself against the possibility that the courts will choose the cutoff position, leaving tenants simultaneously free to scatter in the wake of a foreclosure, the mortgagee may want to be especially careful to obtain an agreement from each tenant to attorn to the mortgagee, whether its lease is terminated post-foreclosure by law or pre-foreclosure by contract.²⁶¹ To protect itself against the possibility that the courts will choose the election position, allowing the mortgagee

260. Several contractual provisions are available to the mortgagee to circumvent the effect of state law. Each is itself a topic worthy of a separate article. The variety of provisions is limited only by the imagination and relative bargaining positions of the parties. For more detailed advice, see M. DEAN, F. NICHOLAS & R. CAPLAN, *COMMERCIAL REAL PROPERTY LEASE PRACTICE* (1976); E. HALPER, *supra* note 3; R. KRATOVIL & R. WERNER, *supra* note 54; M. MADISON & J. DWYER, *THE LAW OF REAL ESTATE FINANCING* ¶ 3.05 (1981); and Anderson, *supra* note 3; Hyde, *supra* note 3.

261. Ideally an attornment agreement is entered into by the tenant before the mortgagor defaults on the mortgage. It may be included in the lease itself or it may be in a separate agreement. It has been suggested that an attornment should be placed in a document separate from the lease. See, e.g., E. HALPER, *supra* note 3, at 342 (arguing that an attornment contained in the lease may lose its binding effect if the lease is extinguished in the course of a judicial foreclosure). In an attornment agreement, the tenant agrees in advance that, if the mortgagor defaults under the mortgage, the tenant will recognize the mortgagee or the purchaser at the foreclosure sale as its landlord under the terms and conditions set forth in the earlier lease. In essence, the tenant is agreeing to enter into a new lease, the provisions of which are the same as the old.

Another contractual device for preserving a lease is a subordination agreement. A lease superior to a mortgage is not cut off by judicial foreclosure, regardless of whether or not the tenant is named in the suit. See *supra* note 16. A mortgagee senior to a tenant may reverse the order of priority, putting the lease ahead of the mortgage in order to take advantage of this rule, and thus guarantee that a profitable lease will be preserved. This is done by an express provision in the mortgage or by a separate agreement in which the mortgagee subordinates the mortgage to a subsequent lease. See M. DEAN, F. NICHOLAS & R. CAPLAN, *supra* note 248, at 174; R. KRATOVIL & R. WERNER, *supra* note 54, at 485. There are, however, disadvantages to this approach. When a mortgagee subordinates its mortgage to a lease, thereby guaranteeing the preservation of the lease, it does so by sacrificing its option of cutting off the lease if the law changes at some later date to allow a mortgagee this option. In addition, if the provisions of the lease and the mortgage conflict—for example, with respect to the application of insurance and condemnation proceeds—after subordination, the lease terms will govern. See Hyde, *supra* note 3, at 393. Finally, a subordination clause in the mortgage may be countered by a provision in the lease whereby the tenant also unilaterally provides that the lease will be subordinate to any mortgage. See M. DEAN, F. NICHOLAS & R. CAPLAN, *supra* note 248, at 175-76; Anderson, *supra* note 3, at 494-95.

to select which tenants to keep, a tenant with sufficient bargaining power may insist on a non-disturbance agreement from the mortgagee²⁶² or, if the mortgagee refuses, on a contractual cutoff provision allowing the tenant to abandon the lease at the same time as the law accords the mortgagee its election.

IV. CONCLUSION

This article has attempted to analyze Illinois case law systematically in order to determine whether the state has adopted a cutoff or an election position with respect to the survival of a lease after a judicial foreclosure in which the mortgagee has not named the tenant as a party. One line of cases appears to have committed Illinois to an election position. These cases hold that, because the tenant is a necessary party, its interest in the property is unaffected by any foreclosure proceeding to which it has not been joined. The courts in Illinois have not, however, defined the nature of the tenant's interest, and most, if not all, of the opinions in this line of cases are distinguishable on their facts. A second line of cases has stressed the substantive property rights of the parties. These cases have dealt with fact situations *prior* to judicial foreclosure, and followed logically from the theory of mortgages set forth in *Lightcap*. These decisions held that upon a default under the mortgage, the mortgagee has at its disposal various means of asserting possessory rights and collecting rents, but the assertion of these rights may result in the mortgagee's inadvertently extinguishing existing leases. The second line of cases, with one significant and troubling exception, has espoused the basic principles relied upon by courts in cutoff jurisdictions

262. A non-disturbance agreement is made not for the benefit of the mortgagee, but for the benefit of the tenant. In a non-disturbance agreement, the mortgagee promises that in the event of default by the mortgagor under the mortgage, the mortgagee will recognize the tenant as lessee, and that as long as the tenant is not in violation of the lease, the mortgagee will not disaffirm the lease or disturb the tenant's possession or use after default. See E. HALPER, *supra* note 3, at 338-39; R. KRATOVIL & R. WERNER, *supra* note 54, at 486. The effect of a non-disturbance agreement in a cut-off state is the promise to create a new landlord-tenant relationship with the tenant under the same terms as the old lease. This promise may be made binding on the mortgagee's successors in interest such as the purchaser at the foreclosure sale. In an election state, the effect of the mortgagee's promise is that the mortgagee will not exercise its election to avoid the lease by naming the tenant in the foreclosure suit.

The mortgagee should protect itself by adding a provision to the non-disturbance agreement that limits the mortgagee's liability under the lease to the time period after foreclosure and prior to the sale of the property. Otherwise, the mortgagee may inadvertently assume liability for the pre-foreclosure acts of the mortgagor or the post-sale acts of the purchaser.

Non-disturbance and attornment agreements are clearly complementary, usually constituting a *quid pro quo*. Often a single document includes both agreements, along with an agreement by the tenant to subordinate its interest under the lease to the mortgagee's interest under the mortgage. As a result of the subordination of the lease to the mortgage, the terms of the mortgage will control.

None of the contractual arrangements discussed in this article is foolproof; their efficacy varies from state to state. Some provisions may be drafted in ways that create traps for the unwary. A detailed discussion of drafting provisions is beyond the scope of this article.

but has applied those principles to the period after default and before foreclosure. Thus, while not speaking definitively to the "true" cutoff/election issue, this line of cases had made Illinois a cutoff state for most practical purposes, because mortgagees have commonly taken steps to obtain rents prior to judicial foreclosure. Now that *Harms* has overruled *Lightcap*, adopting in its place a lien theory of mortgages, it is almost certain that mortgagees will lose their right to possession after default under the law. If so, any foreclosure case involving subordinate leases where the parties have not contracted otherwise will present squarely to the courts the choice of an election or cutoff position.

Faced with this choice, the courts have two distinct lines of cases upon which to draw. The arguments embodied in the substantive property law line of Illinois cases have been applied only in a pre-foreclosure context until now. Obviously, in this context, it has been more difficult for courts to accord the mortgagee an election, because the parties are not involved in a court proceeding, and it might therefore be unclear from the mortgagee's actions whether the mortgagee has elected to preserve a lease or terminate it. As the context shifts from pre-foreclosure to the foreclosure proceeding itself, the election position becomes less problematic because the court can easily ascertain the mortgagee's intent. This shift in context casts a more favorable light on the election position; nevertheless, the substantive property law line of cases still presents a viable option to Illinois courts. On the other hand, the courts may simply jump from the substantive to the procedural line of cases in favor of an election position. Ideally, the courts will acknowledge instead that the procedural arguments have substantive implications that directly conflict with the arguments made in the substantive property law line of cases, and will attempt to face the issues head-on and make a fully reasoned choice. In the meantime, as mortgagors, mortgagees, and tenants anticipate the impending collision, they should adjust their contractual arrangements to cope with the newly adopted lien theory of mortgages and protect themselves against the worst possible consequences of the courts' imminent choice between cutoff and election.

