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MORTGAGES-MORTGAGEE'S RIGHTS AGAINST TENANT WHO OCCUPIES PREMISES UNDER SUBSEQUENT LEASE BY MORTGAGOR

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MORTGAGES—MORTGAGEE'S RIGHTS AGAINST TENANT WHO OCCUPIES PREMISES UNDER SUBSEQUENT LEASE BY MORTGAGOR—It is the purpose of this comment to discuss possible rights of the mortgagee or the purchaser at foreclosure sale, who stands in the place of the mortgagee, in dealing with a tenant of the mortgagor who holds under a lease *subsequent* to execution of the mortgage. Only the law of those states in which the lien theory of mortgages is in force will be considered. The problem can best be illustrated by a hypothetical case. Suppose that *A*, owner in fee of Blackacre, gives a mortgage of Blackacre to *B;* one year later, he leases Blackacre to *C* for a term of 10 years. Six months later, the mortgage is in default, and *B* commences foreclosure proceedings which culminate in a decree of foreclosure and a sale by the sheriff. At the sheriff's sale, either *B*, the mortgagee, or *D*, a third party, purchases the property. We deal with the relationship between *B* or *D* on one hand and *C* on the other.

[46] Austin v. Southern Pacific Co., 50 Cal. App. (2d) 292, 123 P.(2d) 39 (1942); Berryman v. Pullman Co., (D.C. Mo. 1942) 48 F. Supp. 542; Hargis v. Wabash R. Co., (C.C.A. 7th, 1947) 163 F.(2d) 608; Williams v. Atchison, Topeka & Santa Fe Ry. Co., 356 Mo. 967, 204 S.W.(2d) 693 (1947); Ramsey v. Chesapeake & Ohio R., (D.C. Ohio 1948) 75 F. Supp. 740; Hicks v. Thompson, (Tex. Civ. App. 1948) 207 S.W.(2d) 1000.

[47] Kelly v. Nashville, Chattanooga & St. Louis Ry., (D.C. Tenn. 1948) 75 F. Supp. 737. Summary judgment was withdrawn, however, on showing that submission to the N.R.A.B. was subsequent to commencing the court action and that the N.R.A.B. had declined to hear the case on this ground. (D.C. Tenn. 1948) 15 C.C.H. LAB. CAS. ¶64, 746.

A. *Before Foreclosure*

So long as there has been no default in payment, the mortgagor has a right to lease the property and to collect all rents due under the lease.[1] Unless there is a provision in the mortgage giving the mortgagee the right to collect rents, he has no lien on them and cannot require the tenant to pay them to him.[2] Even if the mortgage is in default it would seem that some affirmative action must be taken by the mortgagee to enable him to realize any benefit from the lease.[3] The most common remedy is an action to foreclose in which the court is asked to appoint a receiver.[4]

B. *During a Statutory Period of Redemption*

After the mortgage has been foreclosed, many states, by statute, give the mortgagor a specified length of time in which he may redeem from the foreclosure sale,[5] and until this period has expired, the purchaser will not be entitled to an absolute deed. It is the better view that a subsequent lease remains in effect for the duration of the redemption period.[6] In *Virges v. Gregory Co.*[7] the court reached this result on the ground that termination of a subsequent lease by foreclosure and sale would be unfair to the mortgagor, who might find on redemption that he had lost a valuable lease.

If the tenant is bound by the lease for the redemption period, the mortgagee will be interested in whether he may compel the tenant to pay rent to him during this time. Generally, the mortgagor is entitled to possession and to rent during the period of redemption.[8] The mortgagor's right to rent is clear unless the mortgagee's security can be shown to be insufficient, and it has been held that this right con-

[1] 2 WILTSE, MORTGAGE FORECLOSURE, 5th ed., §560 (1939); In re Dooner & Smith, (D.C. N.J. 1917) 243 F. 984, affd., (C.C.A. 3d, 1917) 248 F. 112.

[2] Syracuse City Bk. v. Tallman, 31 Barb. (N.Y.) 201 (1857); Equitable Life Ins. Co. v. Rood, 205 Iowa 1273, 218 N.W. 42 (1928).

[3] Parker v. Coe, 200 Iowa 862, 205 N.W. 505 (1925); Am. Freehold Land Mtge. Co. v. Turner, 95 Ala. 272, 11 S. 211 (1891).

[4] Equitable Life Ins. Co. v. Rood, 205 Iowa 1273, 218 N.W. 42 (1928); but note that there is authority denying appointment of a receiver where the tenant in good faith has prepaid the rent to the mortgagor. Smith v. Cushatt, 199 Iowa 690, 202 N.W. 548 (1925).

[5] 2 GLENN, MORTGAGES, §§228, 232 (1943). Where there is no such statute, a deed is absolute after sale.

[6] 8 WASH. L. REV. 184 (1934); Williard v. Campbell, 91 Mont. 493, 11 P. (2d) 782 (1932).

[7] 97 Wash. 333, 166 P. 610 (1917).

[8] Traer v. Fowler, (C.C.A. 8th, 1906) 144 F. 810; Bennos v. Waderlow, 291 Mich. 595, 289 N.W. 267 (1939); Am. Trust Co. v. Mich. Trust Co., 263 Mich. 337, 248 N.W. 829 (1933); Dailey v. Abbott, 40 Ark. 275 (1883); Kaston v. Paxton, 46 Ore. 308, 80 P. 209 (1905).

tinues even though rents have been pledged for payment of the mortgage.[9] This result is seemingly based either on the premise that "possession" by the mortgagor gives him the right to rents, or on the theory that ownership of the equity of redemption is enough to entitle the owner to them.[10] In jurisdictions that give possession and rents to the mortgagor during the redemption period, the purchaser at the foreclosure sale is considered to have a "lien" on the premises for the amount of his bid and is entitled to interest on this amount during the period of redemption.[11] The courts here seem to use the word "lien" to denote that if the mortgagor does not redeem, the interest the purchaser acquires at the sale relates back to the time of the sale, cutting off intervening incumbrances.

Several states, by statute, provide that the purchaser is entitled to rents during the period of redemption,[12] but in the majority of such states, the purchaser or mortgagee is required to account to the mortgagor for all rents received and to apply them to the mortgage debt.[13] In the absence of such a statute, the only way a mortgagee may feel reasonably assured of deriving any benefit from rents from the subsequent lease is to provide specifically in the mortgage that on default all rents shall inure to the benefit of the mortgagee or purchaser. There is authority that such a clause is valid and enforceable,[14] but in some cases such provisions have not been accorded recognition. In *Capitol Bldg. & Loan Assn. v. Ross*[15] it was held that an attempt by the mortgagor to waive the right to rents during the period of redemption was invalid because of its conflict with provisions of the redemption statute.

[9] In re Dooner & Smith, (D.C. N.J. 1917) 243 F. 984, affd., (C.C.A. 3d, 1917) 248 F. 112.

[10] Ibid.

[11] Traer v. Fowler, (C.C.A. 8th, 1906) 144 F. 810.

[12] Most of these statutes are similar. See Mont. Rev. Codes, §9448 (1935): "Who entitled to rents and profits. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof." See also Cal. Code Civ. Proc., §707 (1941); Wash. (Rem.)Rev. Stat. Ann. §602 (1932); Utah Rev. Stat., tit. §104-37-37 (1943). Such statutes have been interpreted as substituting the purchaser as landlord in place of the original owner. Blodgett Loan Co. v. Hansen, 86 Mont. 406, 284 P. 140 (1930); Title Ins. & Trust Co. v. Pfenninghausen, 57 Cal. App. 655, 207 P. 927 (1922).

[13] Local Realty Co. v. Lindquist, 96 Utah 297, 85 P. (2d) 770 (1938); Virges v. Gregory Co., 97 Wash. 333, 166 P. 610 (1917); Petersen v. Jurras, 2 Cal. (2d) 253, 40 P. (2d) 257 (1935). Contra, Ulivarri v. Lovelace, 39 N. Mex. 36, 38 P. (2d) 1114 (1934): the purchaser obtained legal title on sale, leaving the mortgagor only an equity of redemption. Thus the purchaser was not held accountable for rents collected.

[14] Hakes v. North, 199 Iowa 995, 203 N.W. 238 (1925); Trulock v. Donahue, 85 Iowa 748, 52 N.W. 537 (1892); Bennos v. Waderlow, 291 Mich. 595, 289 N.W. 267 (1939).

[15] 134 Kan. 441, 7 P. (2d) 86 (1932); see also In re Dooner & Smith, (D.C. N.J. 1917) 243 F. 984, affd., (C.C.A. 3d, 1917) 248 F. 112.

The court stated that these statutes were meant to insure rents to the mortgagor to enable him to redeem, and hence could not be waived. Even in jurisdictions which will enforce a clause pledging rents, the mortgagee must give notice to mortgagor and tenant that he demands them; otherwise he cannot claim them.[16]

C. *After the Period of Redemption has Expired*

1. *Right to Possession*

When the deed acquired at the sheriff's sale has become absolute, the purchaser, whether he is the mortgagee or a third party, will be vitally interested in his rights against the tenant under the subsequent lease. Most cases which have come before the courts are those in which the purchaser has endeavored to evict the tenant and acquire possession of the premises, and it seems certain that if the tenant has been made a party to the foreclosure action, his rights are adjudicated and foreclosed.[17] If the tenant does not appeal from the decree in the foreclosure action, he cannot resist the issuance of a writ of assistance to put the mortgagee or third party purchaser into possession.[18] Such a ruling would appear to be fair, since the tenant will be able to assert in the foreclosure action any equities which he may have against the mortgagee, such as a claim for improvements, and the court can award him damages against the mortgagor.[19]

If the mortgagee fails to join the tenant as a party to the foreclosure action, there is a conflict in the cases as to whether his rights are terminated at the end of the redemption period, with decisions on each side claiming to represent the majority view.[20] One line of authority holds that sale by the sheriff and execution of a deed which has become absolute put an end to the tenancy created by the mortgagor.[21] Therefore, if

[16] Parker v. Coe, 200 Iowa 862, 205 N.W. 505 (1925).

[17] Utility Realty Co. v. Dugan, 93 Misc. 510, 157 N.Y.S. 227 (1916).

[18] Sullivan v. Super. Ct. of Mendocino Co., 185 Cal. 133, 195 P. 1061 (1921).

[19] The tenant benefits in being a party to the action, since he can recover any awards in his favor from the proceeds of the mortgage sale if a surplus is realized.

[20] Am.-Italian Bldg. & Loan Assn. v. Liotta, 117 N.J.L. 467 at 471, 189 A. 118 (1937): "We have held, following the great weight of authority and the soundness thereof is not questioned, that unless a tenant is made a party defendant to the foreclosure suit his interest is unaffected thereby." See also 14 A.L.R. 664 (1921); 8 WASH. L. REV. 184 at 187 (1934). Contra, Roosevelt Hotel Corp. v. Williams, 227 Mo. App. 1063 at 1066, 56 S.W. (2d) 801 (1933): "It is the well-settled rule in this state and elsewhere that the foreclosure of leased premises, under a mortgage antedating the lease, nullifies and extinguishes the lease. . . ." (lessee not joined as a party); 2 JONES, MORTGAGES, 8th ed., §981 (776) (1928).

[21] McDermott v. Burke, 16 Cal. 580 (1860); Downard v. Groff, 40 Iowa 597 (1875); Hecht v. Dettman, 56 Iowa 679, 10 N.W. 241 (1881); N.Y. Life Ins. Co. v. Simplex Products Corp., 135 Ohio St. 501, 21 N.E. (2d) 585 (1939).

the purchaser wishes to continue as lessor, he must negotiate a new contract with the lessee, or in other words, have the lessee attorn to him.[22] In such jurisdictions, either the lessee or the purchaser may refuse to negotiate a new contract and may abandon the lease.

A leading case supporting this theory is *Western Union Telegraph Co. v. Ann Arbor R. Co.*,[23] in which the telegraph company sued to restrain the railroad company from interfering with its telegraph wires. The telegraph company operated its lines under a lease given by the mortgagor subsequent to execution of a mortgage of the entire railroad. The defendant claimed through the purchaser at the foreclosure sale following an action in which the telegraph company had not been a party. In spite of the great inconvenience and monetary loss to the telegraph company, the court held that it was a mere trespasser after foreclosure, against whom ejectment would lie without notice to quit. The basis of the decision was that there could be no privity of contract or estate between the lessee and the mortgagee;[24] when the mortgagee foreclosed, he was not bound to respect any rights the lessee might have acquired through the mortgagor; nor could he enforce any rights that the mortgagor might have had.

Other jurisdictions reach this same result[25] on the premise that foreclosure is actually an eviction of the tenant by title paramount;[26] when the land is mortgaged, the mortgagee acquires all the right of the mortgagor at the time the mortgage is executed, and nothing can be done to cut down the estate as it existed at this time.[27] The lease is said to be carved out of the equity of redemption as it existed at the time the mortgage was executed, and when it terminates, the lease that is a part of it must also terminate.[28] Another reason for this result, stated in *Downard v. Groff*,[29] is that the lessee stands in the position of the mortgagor, and when his rights are foreclosed, the lessee is also foreclosed. Of

[22] 2 JONES, MORTGAGES, 8th ed., §982 (777) (1928); Moran v. Pittsburgh, C. & St. L. Ry. Co., (C.C. Ohio 1887) 32 F. 878; Prudential Ins. Co. v. Zeidler, 233 Ala. 328, 171 S. 634 (1936); Reichert v. Bankson, 199 Ill. App. 95 (1916).

[23] (C.C.A. 6th, 1898) 90 F. 379.

[24] See also McDermott v. Burke, 16 Cal. 580 (1860); Roosevelt Hotel Corp. v. Williams, 227 Mo. App. 1063, 56 S.W. (2d) 801 (1933); Stone v. Hammons, 347 Mo. 129, 146 S.W. (2d) 606 (1941); Winnisimmet Trust, Inc. v. Libby, 234 Mass. 407, 125 N.E. 599 (1920); Teal v. Walker, 111 U.S. 242, 4 S.Ct. 420 (1884).

[25] McDermott v. Burke, 16 Cal. 580 (1860). Some courts hold the lease terminated and do not mention the nonjoinder. Hale v. Nashua & Lowell R.R., 60 N.H. 333 (1880); Jones v. Thomas, 8 Black (Ind.) 428 (1847).

[26] Moran v. Pittsburgh, C. & St. L. Ry. Co., (C.C. Ohio 1887) 32 F. 878.

[27] Smith v. Pritchett, 168 Md. 347, 178 A. 113 (1935).

[28] Reichert v. Bankson, 199 Ill. App. 95 (1916).

[29] 40 Iowa 597 (1875); see also Dolese v. Bellows-Claude Neon Co., 261 Mich. 57, 245 N.W. 569 (1932); Jones v. Thomas, 8 Black (Ind.) 428 (1847).

course, the tenant is no longer bound either, and the mortgagee will lose the benefits of the lease unless he can execute a new contract with the lessee.[30]

On the other hand, there is a large body of authority that holds failure to join a lessee in the foreclosure action prevents the decree (and expiration of the redemption period) from terminating the lease.[31] In *Wheat v. Brown*[32] the tenant under a subsequent lease was successful in maintaining his possession against the purchaser at the foreclosure sale, since the court found that the decree of sale could not terminate the rights of any parties except those actually before the court in the foreclosure proceeding. There is authority that if the tenant is not joined in the foreclosure suit, there has, in effect, been no eviction. Hence, as between the parties, the tenant is entitled to possession until in some affirmative way his rights have been terminated.[33] In *Dundee Naval Stores Co. v. McDowell*[34] the court stated that as the mortgagor had the right to lease the premises, and as the purchaser acquired his title only through the foreclosure proceeding, the lessee was entitled to be heard in that proceeding. Therefore, the only way in which the mortgage lien can be asserted against the lease is in a foreclosure action, and this is impossible unless the lessee is made a party to the action.

In support of the termination theory, it has been urged that property will not bring as high a price if the immediate right to possession is not guaranteed. But this depends on the facts of the case, as a valuable lease will often enhance the property value.[35] It would appear that the courts allowing possession to the lessee who has not been made a party to the foreclosure action have reached a sounder result. As the mortgagee knows that joinder of the lessee will assure the termination of his rights, while nonjoinder will allow the tenant to maintain possession,

[30] This explains why some courts do not consider the tenant a necessary party to the foreclosure action. McDermott v. Burke, 16 Cal. 580 (1860); Tyler v. Hamilton (C.C. Ore. 1894) 62 F. 187. But compare cases that consider the tenant a necessary party in that he is held entitled to redeem. Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 S. 108 (1913).

[31] Guardian Life Ins. Co. v. Lowenthal, 13 N.J. Misc. 849, 181 A. 897 (1935); Zimmerman v. Walgreen Co., 215 Wis. 491, 255 N.W. 534 (1934); Stellar Holding Corp. v. Berns, 143 Misc. 781, 257 N.Y.S. 369 (1932).

[32] 3 Kan. App. 431, 43 P. 807 (1896).

[33] Lockhart v. Ward Dewey & Co., 45 Tex. 227 (1876); Am.-Italian Bldg. & Loan Assn. v. Liotta, 117 N.J.L. 467, 189 A. 118 (1937).

[34] 65 Fla. 15, 61 S. 108 (1913).

[35] Guardian Life Ins. Co. v. Lowenthal, 13 N.J. Misc. 849, 181 A. 897 (1935); but compare Am.-Italian Bldg. & Loan Assn. v. Liotta, 117 N.J.L. 467 at 472, 189 A. 118 (1937): "But it is also true that both an advantageous or disadvantageous lease may deter certain class[es] of bidders. There may be those who are interested in the property for some particular or special purpose requiring immediate possession."

the mortgagee may act according to his best interests when the foreclosure suit is filed. The tenant should not be heard to complain, since he is doubly safeguarded; if he is made a party, he may assert any claims he may have; if not a party, he has the benefit of his contract in that he remains in possession. It is also interesting to speculate on whether the courts which hold that the tenant is not relieved from the terms of the lease if not joined would permit the tenant to intervene in the foreclosure action and ask to have the lease terminated.[36]

2. *Right to Rents*

Since there has been less litigation concerning rents, a more difficult question is raised when the mortgagee wishes to hold the tenant for rents falling due after the sheriff's deed has become absolute. Those states in which the lessee must yield possession to the purchaser will refuse to allow him the right to collect rents.[37] This result is natural in light of reasoning that there is no privity of contract between the mortgagee and tenant, for if the tenant's rights are terminated by foreclosure, it follows that he cannot be forced to remain in possession and comply with the obligations that bound him under his lease.

The question of joinder or nonjoinder of the lessee would again appear to be of prime importance. In New York, it seems clear that the lessee who has not been joined in the foreclosure proceedings remains liable for rents coming due under the lease. In the leading case of *Metropolitan Life Ins. Co. v. Childs Co.*,[38] where the court withdrew the lessee as a party to the foreclosure action and the property was sold subject to the lease, the mortgagee purchased and conveyed to the plaintiff, who demanded rent from the lessee. In awarding rents to the plaintiff on the theory that the tenant remained bound by the lease, the court held that the only way in which the tenant's obligations can be terminated is by eviction; if he is not joined in the foreclosure action,

[36] See Metropolitan Life Ins. v. Childs Co., 230 N.Y. 285, 130 N.E. 295 (1921). In this case the lessee had been made a party to the foreclosure action, and a judgment of foreclosure and sale had been served on him. The decree provided that the property be sold and the lessee forever barred from any interest in it. The mortgagee later moved to discontinue the action against the lessee, and despite the lessee's opposition to the motion, the property was sold subject to the lease.

[37] See Moran v. Pittsburgh, C. & St. L. R. Co., (C.C. Ohio 1887) 32 F. 878 at 886: " . . . as *no reversion* vests in the mortgagee under such circumstances, he cannot distrain or bring an action, either at law or in equity, for the rents payable by the tenant. . . ."; Dolese v. Bellows-Claude Neon Co., 261 Mich. 57, 245 N.W. 569 (1932); Roosevelt Hotel Corp. v. Williams, 227 Mo. App. 1063, 56 S.W. (2d) 801 (1933); Winnisimmet Trust, Inc. v. Libby, 234 Mass. 407, 125 N.E. 599 (1920); Teal v. Walker, 111 U.S. 242, 4 S.Ct. 420 (1884).

[38] 230 N.Y. 285, 130 N.E. 295 (1921). For discussion of this case see note 36, supra.

such an eviction can never take place. The basis of this result is that the interest actually passing at the foreclosure sale is the entire interest of the mortgagor at the time the mortgage was executed, less the leased estate. This gives the purchaser only a reversion as against the lessee, and he becomes the landlord in place of the mortgagor by operation of law. In effect, the relationship is the same as would result if the lease had been made prior to the mortgage. One must inquire as to the extent to which the New York court relied on a state statute in reaching its decision,[39] since Justice Andrews clearly stated that the court was of the opinion that the foreclosure sale was a grant of a reversion within the meaning of that statute. It is submitted that the court would have reached the same result without use of the statute, however. The statute deals with the remedy available to the grantee of a reversion and is used to bolster that part of the decision allowing the mortgagee to collect rents. Its use was unnecessary to support the doctrine that the interest sold at the sheriff's sale is the reversion of the mortgagor.

Prior to the decision in the *Childs* case, the case authority in New York was clear that a purchaser was bound by the lease when the lessee was not a party to the foreclosure suit,[40] and since the decision in the *Childs* case there has been little doubt that the tenant is bound to pay rent to the purchaser. Some of the later decisions quote the same statutory authority cited by Justice Andrews,[41] but other cases reach a like result without mentioning it;[42] this lends support to a conclusion that reliance on the statute is unnecessary.

It is to be noted that the rule in New York is reciprocal, and the purchaser is bound by all covenants in the lease favorable to the tenant,[43] thus suggesting that the purchaser cannot later foreclose against the lessee. The mortgagee must determine the result he wishes to achieve, for a joinder of the lessee as a party[44] or a disaffirmance of the

[39] 49 N.Y. Real Property Law (McKinney, 1945) §223: "Rights where property or lease is transferred. The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease . . . has the same remedies, by entry, or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent . . . as his grantor or lessor had, or would have had, if the reversion remained in him."

[40] Title Guarantee & Trust Co. v. Twenty-First St. & Fifth Ave. Corp., 110 Misc. 126, 180 N.Y.S. 358 (1920); Commonwealth Mtge. Co. v. DeWaltoff, 135 App. Div. 33, 119 N.Y.S. 781 (1909).

[41] Mutual Life Ins. Co. v. Gotham Silk Hosiery Co., Inc., 179 Misc. 557, 39 N.Y.S. (2d) 310 (1943), affd., 266 App. Div. 844, 43 N.Y.S. (2d) 514 (1943).

[42] Markantonis v. Madlan Realty Corp., 262 N.Y. 354, 186 N.E. 862 (1933); Dold Packing Corp. v. Kaplan, 37 N.Y.S. (2d) 390 (1942), affd., 39 N.Y.S. (2d) 776 (1943).

[43] Stellar Holding Corp v. Berns, 143 Misc. 781, 257 N.Y.S. 369 (1932).

[44] Utility Realty Co. v. Dugan, 93 Misc. 510, 157 N.Y.S. 227 (1916).

lease by a receiver[45] will amount to the eviction necessary to terminate the lease.

As in the cases dealing with possession, it would appear that the rule formulated by the New York decisions reaches a sounder result than those terminating leasehold interests upon foreclosure. The mortgagee is given an opportunity to take advantage of a lease that may enable him to realize the full amount of the mortgage lien. On the other hand, the tenant is protected in being afforded an opportunity to claim damages for a termination of the lease or to enforce the terms of his bargain. The only objection on the tenant's part might be that he desires to have the mortgagor only as his landlord. This objection should be considered insignificant, however; if this were the wish of the tenant, a provision should be inserted in the lease forbidding assignment. If such a provision is shown, the courts would be unlikely to allow an assignment by operation of law.[46] There seems to be no reason to release the tenant from the terms of his contract, since he is assured all the advantages that he has bargained for in being protected in his right to possession and enforcement of all covenants binding the landlord.

Outside New York there is little or no authority concerning rents in those jurisdictions which hold that nonjoinder of the tenant prevents termination of the lease. While it is uncertain what action these courts would take in a fact situation similar to that presented in the *Childs* case, they should reach a similar conclusion. It would be unthinkable to hold that foreclosure fails to give the purchaser possession, and on the other hand to rule that the tenant is not obligated to pay rents to someone. The mortgagor can no longer claim the rent, since his claims have been foreclosed, thus leaving only the purchaser, who now stands in his place, as the person to whom an accounting should be made.

There are intimations that other states will extend the nonjoinder doctrine to cover the rent situation as is done in New York. In *Wheat v. Brown*[47] the decision points out that while the tenant could not be evicted, if he failed to pay rent the purchaser would have a lien on crops grown on the land. Furthermore, statements that the lessee must observe all rights acquired by the purchaser may indicate a leaning to-

[45] Monroe-King & Gremmels Realty Corp. v. 9th Ave.-31st St. Corp., 233 App. Div. 401, 253 N.Y.S. 303 (1931).

[46] JONES, LANDLORD AND TENANT, §466 (1906): "An ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law."

[47] 3 Kan. App. 431, 43 P. 807 (1896).

ward the same result.[48] An eviction for breach of covenants may be the only remedy for obtaining possession in jurisdictions which follow the nonjoinder doctrine.

3. *Possible Protective Measures*

The mortgagee will wish to consider all possibilities that may aid in securing to him the benefits of valuable leases negotiated by the mortgagor. The first mode of action that might suggest itself would be to include in the mortgage an after-acquired property clause covering a future lease. Again, there is a sparsity of case authority to aid in determining if such a clause will achieve the desired result. In *Roosevelt Hotel Corp. v. Williams*[49] the mortgage included a provision pledging and assigning all rents accruing, to further secure mortgage bonds. After execution of the bonds, a lease was given for certain rooms in an office building on the mortgaged premises. The mortgage was foreclosed, and the purchaser tried to enforce the lease. The court held the provision assigning rents did not operate to aid the purchaser, as foreclosure extinguished the lease although the lessee had not been joined; hence no further rents could accrue under it. The case is authority for the proposition that a lease is not after-acquired property within the meaning of an after-acquired property clause. This case was decided, however, in a jurisdiction that expressly adheres to the termination on foreclosure theory. Other courts which adopt the same policy would probably reject an express assignment of the future lease by the mortgagor to the mortgagee, as well as the after-acquired property provision; if the lease is carved out of the equity of redemption, when it is extinguished all rights created under it must also terminate. The mortgagee would, in effect, extinguish his own claim to rents, which would actually be a part of the rights he had extinguished by his foreclosure action.

Another possibility is suggested by *Union Inv. Co. v. McDonough*,[50] where the mortgagor leased several rooms in a building on the mortgaged premises. Later he sold part of the land, but not the portion on which the building stood. Still later, the portion on which the building stood was sold subject to the lease. The mortgage was then foreclosed, and the court ordered the premises sold in parcels until the mortgage was satisfied, the sale to be held in the inverse order of alienation by the mortgagor. The purchaser at the foreclosure sale of the

[48] Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 S. 108 (1913).
[49] 227 Mo. App. 1063, 56 S.W. (2d) 801 (1933).
[50] 94 N.J.L. 130, 109 A. 301 (1920).

parcel on which the building was situated attempted to evict the lessee, but relief was denied on the ground that all the purchaser of this parcel had acquired from the mortgagor was a reversion. Since sale of the reversion in this parcel brought a sum sufficient to satisfy the mortgage lien, the tenant's rights remained unaffected.

This might suggest to the mortgagee a way in which he could benefit from the lease. If the court could be persuaded to order a sale of only that parcel of the premises representing the mortgagor's present interest, namely, the reversion and right to rents, the sale should leave the existing leasehold estate unaffected. The purchaser would then be in the position of the mortgagor and should be able to enforce all rights that the mortgagor may have had. Since the mortgagor could assign or convey these rights to a third party,[51] the same result could be reached by operation of law. Courts following the doctrine that nonjoinder leaves the rights of the lessee unaffected should have no trouble in reaching such a result if the tenant is not a party to the action. Indeed, in the *Childs* case the court did order a sale of the mortgaged premises subject to the lease, thus reaching the same result as that suggested above. The big problem facing the mortgagee would be in persuading the court to order the sale by parcels; this might be difficult in light of judicial statements that it is impossible for the court to order a sale subject to such a lease.[52]

D. Conclusion

In some states little can be done to assure the mortgagee any benefits unless he can enter into a new lease with the tenant. However, in other jurisdictions means are afforded the mortgagee by statute, by specific provisions in the mortgage, or by nonjoinder of the tenant to control in some measure the ultimate relationship of the parties. As has been pointed out, questions concerning rent may be of first impression in many of these states, but the result which the court would reach may be predicted with some accuracy from the cases dealing with possession by the lessee.

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[51] Land Mtge. Inv. & Agency Co. v. Turner, 95 Ala. 272, 11 S. 211 (1892).
[52] Sullivan v. Super. Ct. of Mendocino Co., 185 Cal. 133, 195 P. 1061 (1921).