NOTES

EQUITY PLEADING—FORECLOSURE—LESSEE AS PARTY DEFENDANT.—A lease can only be terminated by the lessor by some act which amounts to an eviction but the filing of a bill to foreclose and the appointment of a rent receiver do not constitute an eviction. Undoubtedly a lease may be terminated by the foreclosure of a prior mortgage but to accomplish that end the lessee must be made a party defendant to the foreclosure proceedings; otherwise he is not bound by the decree.[1]

The rights of a tenant in possession of real estate, under a lease made prior to the execution of a mortgage on the same premises, can not be extinguished by a foreclosure of the mortgage.[2] A lease existing at the date of the mortgage is in no way invalidated by giving the mortgage. The mortgagee succeeds to the rights that the mortgagor had against the lessee.[3] A change of landlords only is effected. Instead of being the tenant of the mortgagor, the lessee becomes the tenant of the mortgagee, or of him who by his foreclosure has acquired the reversion.[4] But, if a mortgagee has no notice, actual or constructive, of a tenant's claim to a lease at the time the mortgage was executed, the fact that the lease has been made before the execution of the mortgage will not prevent the termination of the lease by the foreclosure of the mortgage.[5] The mortgagee has notice if the lease is recorded.[6] By statute, it is sometimes necessary that leases for long terms of years be recorded.[7] But even

1. The Grove Street Plaza Company had mortgaged premises owned by it to the Fidelity Union Title and Mortgage Co. and had thereafter leased a portion of the premises to the Walgreen Co. The mortgagor defaulted and foreclosure proceedings were instituted by the mortgagee, the defendant being appointed rent receiver. He distrained for rent and this bill was filed to enjoin the distress proceedings on the ground that the complainant's lease had been terminated by the appointment of a rent receiver. The lessee had not been made a party to the suit. Walgreen Co. v. Moore, 116 N. J. Eq. 348, 173 Atl. 587 (Ch. 1934).

2. Otis v. McMillan, 70 Ala. 46 (1881); Moss v. Gallimore, 79 Eng. Rep. 182 (K. B. 1779).

3. JONES, MORTGAGES par. 773.

4. F. Groos & Co. v. Chittim, 100 S. W. 1006 (Civil App. Tex., 1907).

5. Tropical Investment Co. v. Brown, 178 Cal. 575, 187 Pac. 133 (1920).

6. Enos v. Cook, 65 Cal. 175, 3 Pac. 632 (1884); Newman v. Gaul, 102 Conn. 425, 129 Atl. 221 (1925).

7. In New Jersey, "Every deed or other instrument in writing creating a leasehold estate in any lands, tenements, or heriditaments, for a term of years exceeding

when such a statute exists, the failure to record a lease does not have the effect of depriving the lessee of his term on a foreclosure sale under a mortgage junior to the lease if the purchaser at the foreclosure sale has actual notice of the lease before he receives a deed to the land;[8] moreover, the purchaser at the foreclosure sale takes subject to an unrecorded lease where he is given actual notice before full payment has been made although the contract to buy and a partial payment were made before such notice was received.[9] The mortgagee also has notice if the tenant is in possession of the premises.[10] The possession and occupation must be actual, open and visible, and it must not be equivocal, occasional, or for a special or temporary purpose.[11] Possession to operate as notice should be inconsistent with title,[12] and where the mortgagor is not in possession of the property, a mortgagee can not be considered to be a *bona fide* purchaser without notice, for since the mortgagor was not in

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ten years, which shall hereafter be made and executed shall be void and of no effect against a subsequent . . . mortgagee, not having notice thereof, unless such deed or instrument of writing shall be acknowledged or proved and recorded, or lodged for that purpose with the clerk of the Court of Common Pleas, or Register of Deeds, as the case may be, of the county in which such devised land, tenements and heriditaments are situated within fifteen days after signing and delivering the same." N. J. P. L. 1887, at 221; N. J. COMP. STAT., at 3086.

8. Wenz v. Pastene, 209 Mass. 359, 95 N. E. 793 (1911); City Bank v. Hocke, 153 N. Y. Supp. 731 (Sup. Ct. 1915).

9. Wenz v. Pastene, *supra* note 8; Dean v. Anderson, 34 N. J. Eq. 496 (Ch. 1881). Haughwort v. Murphy, 22 N. J. Eq. 531 (Ch. 1871). For "where notice is received before the purchase price has actually been paid, the completion of the purchase is a fraud on the prior holder of the title."

10. City Bank v. Hocke, *supra* note 8. "Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property and to all the world of the existence of any right which the person in possession is able to establish, and this applies where a statute requires a lease to be recorded and this has not been done."

11. Brown v. Volkening, 64 N. Y. 76 (1876). In Phelan v. Brady, 119 N
587, 23 N. E. 1109 (1890) the mortgagor had leased the premises to B a
had given a mortgage on it. B and her husband occupied two rooms on
This was held to be sufficient possession so as to defeat the mortgagee's
B in the foreclosure proceedings. In Wrede v. Cloud, 52 Iowa 371,
(1879) the tenant to whom A had leased certain premises had m
had locked the door and nailed up the windows leaving some furnit
Held, A's possession was sufficient to afford constructive notice of
taking a mortgage on the premises from a third party.

12. Staples v. Fenton, 5 Hun. 172 (N. Y. 1816).

possession, the mortgagee is put on notice that the people in possession might be lessees.[13]

The tenant who holds the premises under a lease prior to the mortgage under which a foreclosure suit and sale has been made, can not be ousted by a writ of assistance at the instance of a purchaser under the mortgage.[14] Nor is it even necessary for the tenant to resist in any way the motion for a writ of assistance.[15]

The right of a tenant to possession can not be taken away by statute, and any statutory provision which would allow the landlord, by giving a subsequent mortgage, to impair or in any wise repudiate the rights of the lessee would be unconstitutional.[16]

Although the authorities are not unanimous, the majority holding is that if the lessee who holds subsequent to a mortgage is not joined as a party in an action to foreclose the mortgage, a decree of foreclosure or a sale thereunder does not operate to terminate his tenancy.[17] A lessee is a proper party to the foreclosure proceedings in that his possession may be controlled by the decree, and a necessary party in the sense that his rights will not be affected if he is not joined.[18] If the lessee is made a

13. Baldwin v. Johnson, 1 N. J. Eq. 441 (Ch. 1831).

14. Thomas v. DeBaum, 14 N. J. Eq. 37 (Ch. 1861). The court held: "In giving to the complainant the full benefit of his decree, the court will not interfere nor attempt to settle possession by title paramount to that of the mortgagee or other parties in whose favor the decree was made. Where a lease is prior to a mortgage, the mortgagee necessarily takes title subject to the rights of the lessee."

15. In Enos v. Cook, *supra* note 6, the purchaser at the foreclosure sale had gone into possession. The tenant who held a lease prior to the mortgage brought an ejectment suit. The purchaser claimed that it was incumbent upon the tenant to resist the motion for a writ of assistance and his failure to appear and oppose the issuance of the writ estopped him from bringing the ejectment suit. The court in holding for the tenant said, "The mortgagee took with notice of the lease and the court was powerless to adjudicate the lessee's rights even though he had appeared in the action for the writ of assistance."

16. Taylor v. Bell, 129 Ala. 464, 29 S. W. 572 (1900). U. S. CONST., Art. 1, § 10: No state shall pass . . . any law impairing the obligation of contract.

17. Alford v. Carver, 31 Tex. Civ. App. 607, 72 S. W. 869 (1903); Wheat v. Brown, 3 Kans. App. 431, 43 Pac. 807 (1896); Rummer v. White, 60 Del. App. 247 (1895); Walgreen v. Moore, *supra* note 1; Sprague Nat. Bank v. Erie R. R., 48 N. Y. Supp. 65 (Sup. Ct. 1897) (citing N. J. law).

18. Newman v. Gaul, *supra* note 6; Snedecker v. Thompson, 56 N. Y. Supp. 775 (Sup. Ct. 1889). But an assignor of a leasehold interest is not a necessary party in a foreclosure suit, though he may be liable for rent on the original lease. Unity

party to the foreclosure action, his lease, being subsequent and subordinate to the mortgage, would be annulled, and his continuance in possession would be unlawful,[19] regardless of the terms of the lease.[20] The purchaser at the sheriff's sale, however, has the option of affirming or disaffirming the lease once the lessee has been joined.[21] If he disaffirms the lease, the lessee is removable by a writ of assistance and not by summary proceedings.[22]

If a lessee is not made a party to the foreclosure action, he is unaffected. But the purchaser, succeeding to all the rights, title and interest of the original landlord, becomes the landlord of the lessee with all the rights and remedies of the original landlord.[23] In the absence of statute, it is necessary that the lessee attorn to the mortgagee for there is no privity of contract originally between them and none resulted from the foreclosure and sale.[24]

The tenant can not be dispossessed by the purchaser at the foreclosure sale,[25] and can maintain an action for forceable entry against anyone who causes him to be ejected under a writ of assistance issued in the foreclosure proceedings.[26] *In Blauvelt v. Smith,*[27] where the tenant was not joined, a writ of assistance to put the purchaser into possession was refused, the court holding that such a writ could only issue against persons who are parties to the suit or who came into possession under a defendant party after the commencement of the suit.[28] But, where it appeared that the lessee had full knowledge of the foreclosure proceedings and concealed his interest, a writ of assistance issued against him at the instance of

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Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654 (Sup. Ct. 1903). And the holder of a mere license "X had permission to mine coal on the mortgagor's property" is not a lessee and therefore has no interest in the mortgaged property. Harbottle v. Central Coal & Coke Co., 134 Ark. 254, 203 S. W. 1044 (1918).

19. Iron and Metal Co. v. Levine, 157 N. Y. Supp. 227 (1916).
20. Oakes v. Alvridge, 46 Mo. App. 11 (1891).
21. Market Co. v. Lutz, 4 Phila. 322.
22. Commonwealth Mortgage Co. v. De Waltoff, 119 N. Y. Supp. 781 (1909).
23. Greenwald v. Schuster, 169 N. Y. Supp. 98 (1918).
24. Commonwealth Mortgage Co. v. De Waltoff, *supra* note 22.
25. Hirsch v. Livingston, 3 N. Y. Supp. (1874).
26. Brush v. Fowler, 36 Ill. 53 (1864).
27. Blauvelt v. Smith, 22 N. J. Eq. 31 (Ch. 1871).
28. Tenants of mortgaged premises entering *pendente lite* are not considered necessary parties. Ostrom v. McCann, 21 N. Y. 431 (1860).

one who had purchased under a decree of foreclosure, although he had not been joined.[29]

Foreclosure proceedings do not terminate the lease until there has been an actual sale and conveyance of the premises to the purchaser and an order of court confirming sale has issued. Until then, the rights of the mortgagor and lessee as landlord and tenant are not affected.[30]

While lessees are necessary parties to a foreclosure suit in order that any interest that they have in the premises may be terminated, it is also necessary that they be joined in order that an action for deficiency may not be barred.[31] This case is based on the Vail Act which provides that the procedure to collect a mortgage act shall be first to foreclose the mortgage and sell the mortgaged premises at a foreclosure sale, and if the premises do not then sell for a sum sufficient to satisfy the amount due on the mortgaged bond with interest and costs, then and in that case only may the mortgagee sue for a deficiency.[32] But nothing short of a complete exhaustion of the property and all interest therein must be had to satisfy the requirements of the statute.[33]

However, the question arises as to whether the mortgagee does decrease the deficiency by foreclosing against all the lessees. Property might become valuable if the leases were kept intact, but it is necessary to consider all possible purchasers and "the failure to make a tenant a party might effect the selling price of the property. A party desiring to bid at the sale would likely be deterred from bidding if there was someone in possession not bound by the decree; or if made a party did bid at all it would likely be in a less sum than he otherwise might."[34] Moreover, the New Jersey statute applies here by providing that the obligor can not object if the interests sold at the foreclosure sale are the same as those that were mortgaged. It therefore follows that, regardless of the loss, the obligee may suffer in some cases, the tenants must all be joined if the obligor is to be held for the deficiency.

29. Strong v. Smith, 68 N. J. Eq. 686, 60 Atl. 66 (Ch. 1903).

30. Giles v. Comstock, 4 N. Y. 270 (1850); Whalin v. White, 25 N. Y. 462 (1862).

31. Guardian Life Ins. Co. v. Lowenthal, 13 N. J. Misc. 849, 181 Atl. 897 (Sup. Ct. 1935).

32. N. J. P. L. 1933, at 172; 3 N. J. COMP. STAT., at 3421.

33. Deal Park Co. v. Bannard, 2 N. J. Misc. 194 (Sup. Ct. 1924). And, where the mortgagee fails to make tenants of the mortgaged premises defendants in the foreclosure suit, the court held that the security had not been exhausted and refused to allow a suit for the deficiency. Guardian Life Ins. Co. v. Lowenthal, *supra* note 31.

34. Gale v. Carter, 154 Ill. App. 478 (1910).