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COLLECTION OF RENTS BY A MORTGAGEE IN PENNSYLVANIA

HAROLD S. IRWIN*

The recent case of *Peoples-Pittsburgh Trust Co. v. Henshaw*¹ brings again to the fore the problem of the rights and remedies of a mortgagee of realty in Pennsylvania as to collection of rents from the mortgaged property. This situation has become of increasing importance in recent years as more and more mortgagees seek to resort to the expedient of collecting rents rather than to foreclose on the mortgage or to seek judgment on the bond and consequent sale of the realty. When a forced sale of the realty is likely to produce enough to pay all costs and principal and interest of the mortgage debt, there is but little incentive to assume the obligations inherent in the collection of rent from the mortgaged premises. When foreclosure or sale on the bond means purchasing of the property by the mortgagee and a long-term effort to recoup the debt by leasing or sale, with the risk of further losses inherent in complete ownership thus thrust upon the mortgagee, the alternative of seeking to collect rents from the mortgaged property, either already subject to leases or capable of being leased at a reasonable return, frequently presents an attractive choice. It is the purpose of this paper to discuss the rights and remedies of a mortgagee who makes this latter choice and to suggest several of the duties assumed by such rent collection.

PRELIMINARY PROBLEMS

A. Is default in payment of the mortgage debt a necessary prerequisite to collection of rents?

A discussion of the problem of whether or not a default in complying with the terms of the mortgage obligation is a necessary prerequisite to the effective assertion of a right to collect rent from the mortgaged property, requires first an understanding of the mortgage theory in Pennsylvania. It is not our purpose to discuss in detail the decisions in this state dealing with the question of whether legal title to the land passes to the mortgagee under a mortgage or whether the mortgagee gets merely a lien upon the property. This has been done very satisfac-

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¹141 Pa. Super. 585, 15 A(2d) 711 (1940), opinion by Keller, P.J. In this article the terms "lessor" and "lessee" are used without regard to whether the parties are the original contracting parties or their assignees.

torily by Professor William H. Lloyd in his article, "The Mortgage Theory of Pennsylvania."² Suffice it to say here that most of the cases state that legal title does pass as between the parties, that it is a conveyance "so far as it is necessary to enforce it as a security." Hence we find the statement, oft repeated, that since legal title passes to the mortgagee, he has the right to possession of the mortgaged property prior to any default by the mortgagor and can enforce this right by ejectment the moment after the mortgage is given.³ Based on this theory as to the mortgagee's right to possession prior to default, he could collect rents prior to default on the mortgage obligation. But in recent years the persisting reluctance⁴ to carry the legal title theory to this extreme has caused both Supreme and Superior courts of Pennsylvania to emphasize that *in modern practice*⁵ the right is to be exercised only after a default has occurred but neither court has flatly so held. For example, it is stated in *Miners Savings Bank v. Thomas*,⁶ "It is settled in this State that *on default by a mortgagor. . .*" In *Randal v. Jersey Investment Co.*,⁷ it was said that a mortgage may be treated as a conveyance whenever the mortgagee deems it necessary so to do in order to enable him to speedily and effectively recover the amount "*then due*" on the bond. It was also said that the mortgagee could enforce a clause conveying the rents to him "*if the owner is in default.*"

True, in no one of the recent cases has an attempt been made to assert any right of possession prior to default and hence the emphasis on default is *dicta* merely. While the question is largely an academic one, since assertion of the right to immediate possession prior to default promises little gain to the mortgagee, yet the threat of a possible loss of possession although no default has occurred remains in our law and is rather disquieting. On occasion, the right might be highly beneficial to the mortgagee in a falling realty market, where the mortgagor is allowing the property to depreciate and is using "his substance in riotous living," making a later default almost inevitable. But merely because it might be beneficial to a mortgagee is no sufficient reason why the right should exist contrary to the intent of the parties to the mortgage relation. It is to be hoped that our courts, if met by the precise issue, will hold that the intention of the parties to the contract, based on the modern as well as ancient practice in Pennsylvania not to assert a possessory right before default, forbids any such right and that a contract giving the right to possession before default is essential rather than a contract provision to the con-

²(1924) 73 UNIVERSITY OF PENN'A LAW REVIEW 43.

³See cases cited in *Bulger v. Wilderman and Pleet*, 101 Pa. Super. 168 (1930); such as *Youngman v. Elmira RR. Co.*, 65 Pa. 278 (1870); *Soper v. Guernsey*, 71 Pa. 219 (1872), and *Tryon v. Munson*, 77 Pa. 250 (1875).

⁴See *Guthrie v. Kahle*, 46 Pa. 331 (1864).

⁵These words are italicized in the Peoples case, *supra*, note 1.

⁶140 Pa. Super. 5, 12 A.(2d) 810 (1940). Italics added.

⁷306 Pa. 1, 158 Atl. 865 (1932), italics added. See also *Erny v. Sauer*, 234 Pa. 330, 83 Atl. 205 (1912) and *Harper v. Consolidated Rubber Co.*, 284 Pa. 444, 131 Atl. 356 (1925).

trary. This would at least cause joy in publishing ranks for mortgage forms would have to be changed to give this right to the mortgagee. Certainly an asserted right to collect rents prior to default is inconsistent with the mortgage contract. How may a mortgagee be permitted to collect rents and appropriate them to a debt that is not yet due? How can he enforce even partial payment now when by its terms the debt does not fall due until some time later? We believe it correct to conclude, therefore, that where the right to collect rents otherwise would exist, such right cannot be asserted until after a default by virtue of which some part of the debt is presently due and payable.

B. Of what effect is the presence in the mortgage of a clause including "rents" or "appurtenances"?

Many mortgage forms include in that portion of the form dealing with the description of the mortgaged property, a clause reciting that the land is transferred "together with the rents, issues and profits thereof." Another frequent clause is one reciting that it is "together with . . . privileges, hereditaments and appurtenances" and many, with that conservatism that dates back to the time when the scrivener was paid so much per word, include both of these clauses. Some forms, with the economy of words emphasis of more recent years, omit all such clauses. Are these clauses surplusage? Do they state anything more than the law would state in their absence? Can a court properly say that the intention of the normal mortgagor varies with the inclusion or exclusion of one of these clauses? To give any effect to the presence or absence of one of these clauses would be to make the law as formalistic as it was in the days of the Normans and is not in keeping with the tendency of the times as shown by the Short Form of Deed Act, etc.

But do our courts agree with this conclusion? A New Jersey case⁸ states with reference to a "rents, issues and profits" clause, "These words add nothing to the security of the mortgage debt. They mean nothing more than the law allows; that is, rents, after default, upon the mortgagee taking possession." That this should be the conclusion in Pennsylvania since the Act of 1909⁹ seems inescapable. The courts concede that as between the parties a mortgage is both in form and in effect a conveyance. This act states:

"All deeds or instruments in writing for conveying or releasing land hereafter executed, granting or conveying lands, unless an exception or reservation be made therein, shall be construed to include all the estate, right, title, interest, property, claim, and demand whatsoever,

⁸Myers v. Brown, 92 N.J. Eq. 348, 112 Atl. 844 (1921). See also Freedman's Saving Co. v. Shepherd, 127 U.S. 494 (1887), therein cited.

⁹April 1, 1909, P.L. 91, Sec. 2, amended by Act of April 30, 1925, P.L. 404, Sec. 2, 21 PS 3.

of the grantor or grantors, in law, equity or otherwise howsoever, of, in, and to the same, and every part thereof, together with all and singular the improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof."

Clearly, then, these combined clauses are inserted by the law into every conveyance of land unless a reservation or exception requires the contrary. No such reservation or exception appears in the usual mortgage.

But this Act is overlooked in the *Randal* case¹⁰ and the Supreme Court states that the conclusion of the New Jersey court cited above that the words are practically meaningless "is not the law of this State." The case does not point out the precise legal effect produced by the presence of these words that would not have been produced were the words lacking. The case holds that where a lease is executed after the recording of the mortgage, payment of rent to the mortgagee, after default by the mortgagor, on demand of the mortgagee, is a good payment and the mortgagor may not again collect from the lessee. No case in Pennsylvania holds or intimates that such a clause is necessary to the mortgagee's right to collect rent. This right is based upon either the assignment of the lessor's reversion to the mortgagee or based upon the mortgagee's right of possession superior to that of a subsequent lessee. The *Peoples* case¹¹ also intimates at several points a possible effect of such a "rents, issues and profits" clause. The suggestion is made with apparent hesitancy and again no reason is given for the intimation that such a clause produces different legal consequences than where such is lacking. It is devoutly to be desired that these unsupported insinuations do not acquire the dignity of becoming part of our law.

LEASE PRIOR TO MORTGAGE

The priority of the lease over the mortgage is to be determined by the principles of the recording system, possession of property as notice of the possessor's rights therein and the provisions of the Act of 1905.¹² The usual situation of this character is where a lessee is in possession of the property at the time of execution of the mortgage. Here, the mortgagee has notice from the fact of possession of the rights of the lessee and the mortgage is taken subject thereto.

It is vital under the Pennsylvania law to distinguish between the cases of a lease prior to the mortgage and a lease made after the mortgage has been executed

¹⁰*Supra*, note 7, at page 6.

¹¹*Supra*, note 1, at page 592 and 593. *Cf.* Mertens's Estate, 18 D. & C. 310 (1932) and *Delehanty v. Holland Co.*, 82 Pitts. L.J. 537 (1934).

¹²Act of April 20, 1905, P.L. 239, Sec. 14, 12 PS 2585.

and recorded, insofar as collection of rents is concerned.¹³ This is true because the theory underlying the right to collect rents is different in the two situations and with the difference in underlying theory comes a difference in legal results.

Relatively few problems in regard to rent collection are met where the lease precedes the mortgage. Since the lessor when he delivers the mortgage has only a reversion subject to the superior possessory rights of the lessee, this is all that can be transferred to the mortgagee even under the "legal title as between the parties" theory used in Pennsylvania. Hence our cases hold that this reversion is transferred or assigned to the mortgagee. Being the assignee of the lessor's reversion, he acquires all the rights and remedies of an assignee of the reversion. The covenant of the lessee to pay rent is a covenant running with the land and the benefit of such covenant with the usual remedies for its enforcement passes to the mortgagee. On default by the mortgagor, the mortgagee as assignee of the reversion may demand payment of the rent to him, the mortgagee. Should the tenant refuse to so pay, the mortgagee has the usual remedies of a lessor to enforce payment, including assumpsit or distress. No consent by the lessee to the assignment, no recognition of the transfer, no agreement to pay rent to the mortgagee, is required to allow these remedies. The mortgagee can assert a right to actual possession only if the lessor-mortgagor could so assert. If there is a provision for reentry and termination of the lease on default in payment of rent, the mortgagee could assert this right including the right to confess judgment in ejectment or in assumpsit for rent on a warrant contained in the lease.¹⁴ Payment of the rent to the mortgagor before notice by the mortgagee to pay to him, even though in advance as per the terms of the lease, is a good payment. Payment after such notice would not be a good payment and the mortgagee could compel the lessee to make payment to him or require the mortgagor to account for such receipts.¹⁵ The mortgagee, as assignee, could collect rents accruing after the mortgage was delivered and before demand was made on the lessee, to the extent that they were unpaid when notice was given to the lessee, as well as rents accruing thereafter.¹⁶ But strangely and erroneously, *Kenwood v. Dordick*¹⁷ holds that the transferee of the reversion could not collect such arrearages of rent by distress. If the mortgaged land is sold on foreclosure

¹³*Peoples-Pittsburgh Trust Co. v. Henshaw*, *supra*, note 1. The failure to note this distinction must have been the cause of much chagrin to *amicus curiae* in that case.

¹⁴See *Youghiogheny-Pittsburgh Coal Co. v. Carlet*, 92 Pa. Super. 40 (1927).

¹⁵*Randal v. Jersey Investment Co.*, *supra*, note 7, and *Real Estate-L.T. & T. Co. v. Homer B. & L. Assoc.*, 138 Pa. Super. 563, 10 A.(2d) 786 (1939).

¹⁶In the *Peoples* case the already accrued rents that the mortgagee could collect on demand were not confined to those accruing after the mortgage was delivered. But it is axiomatic that an assignment of a reversion does not carry with it already accrued rents which are merely choses in action. See *Newbold v. Comfort*, 2 Clark (Pa.) 331 (1841) and *TIFFANY, LANDLORD AND TENANT*, (2nd Ed. 1910) 572. See also *Teal v. Walker*, 111 U.S. 242 (1883) frequently cited with approval by the Pennsylvania courts.

¹⁷104 Pa. Super. 12 (1932) relying upon *Lewis's Appeal*, 66 Pa. 312 (1870) but which does not so hold.

by the mortgagee, the purchaser takes subject to the superior rights of the lessee and would in turn become entitled to the rents after acknowledgment and delivery of the deed by the sheriff.¹⁸

MORTGAGE PRIOR TO LEASE

The priority of the mortgage over the lease is to be determined by the principles of the recording system, the provisions of the Act of 1905, etc.¹⁹ The usual situation of this character is where the mortgage has been recorded at the time the mortgagor, who has retained possession, makes the lease. Here the lessee has notice from the recordation of the mortgage of the rights of the mortgagee and the lease is taken subject thereto.

It is in this situation that most of the problems have arisen, some of which are as yet unanswered or answered in an unsatisfactory manner. The cases all agree that so long as the mortgagor retains possession, even though a default has occurred, and no demand for possession has been made by the mortgagee, the mortgagor may retain possession, taking the rents and profits thereof by his own occupancy or under leases made by him and need not account for these rents and profits to the mortgagee.²⁰ Leases made by the mortgagor are subject to the superior right of the mortgagee to assert his right to possession and oust the lessee, after default by the mortgagor.²¹ Since the mortgagee's right to possession is superior to that of the lessee, the lessee cannot prevent his ouster by a tender of rent to the mortgagee. The mortgagee may desire actual possession of the land or may wish to make a new lease to another at a higher rental. Should possession not be securable by peaceful means, the mortgagee could bring ejectment against the lessee²² and in this action should recover mesne profits from the time of demand.²³ It must be remembered that in this situation, the mortgagee is not the assignee of the reversion of the lessor since no such reversion existed when the mortgage was executed but arose only subsequently. Hence the mortgagee is not limited to securing possession only if and when the lessor could so secure it and no default in rent payment or breach of condition by the lessee is necessary. After securing possession by peaceful means, or by ejectment, the mortgagee could make new leases in

¹⁸Act of 1905, *supra*, note 12, Sec. 13. This act unnecessarily provides for a method whereby the purchaser can become the assignee of the reversion which he already is without adopting any such procedure.

¹⁹*Supra*, note 12 and text.

²⁰See Real Estate—L.T. & T. Co. v. Homer B. & L. Assoc., *supra*, note 15; Miners Savings Bank v. Thomas, *supra*, note 6; Randal v. Jersey Investment Co., *supra*, note 7; Shallcross v. Rankin, 82 F. (2d) 690 (1936).

²¹Peoples-Pittsburgh Trust Co. v. Henshaw, *supra*, note 1, at page 590.

²²*Ibid.*

²³For cases confining the mortgagee to mesne profits during the pendency of the action only, when action is against the mortgagor, see Polhill v. Brown, 10 S.E. 921 (Ga. 1890) and Stevens v. McCurdy, 52 S.E. 762 (Ga. 1905).

his own right and collect the rents thereon, subject of course to the termination of these leases by termination of the mortgagee's right of possession by payment or tender of the mortgage debt. Wisdom would dictate that such lessee secure the joinder of the mortgagor in making the lease. Where made by the mortgagee only, wisdom would dictate that the mortgagee-lessor protect himself against suit for breach of covenant on such lease-termination by payment or tender, by insertion of an appropriate clause, even though such clause may not be necessary.

When demand for payment of rent is made by the mortgagee to the mortgagor's lessee, after default by the mortgagor, he will comply therewith usually, since he has nothing to lose by conforming to the demand, such being a good payment as against the lessor, and has something to lose by refusing to conform to the demand, being subject to ouster by ejectment or under the Act of 1905 after foreclosure. But should he refuse to pay the rent to the mortgagee, the latter cannot, in his own right, sue in assumpsit, distrain or enjoin the lessee from paying the rent to the lessor.²⁴ It may be that the mortgagee can secure the rent or its equivalent indirectly by demanding possession from the lessee on his refusal to pay the rent to the mortgagee, and on the lessee's refusal of possession, sue in ejectment including a claim for mesne profits therein or suing the lessee directly in trespass. No case has been found in Pennsylvania deciding the liability of the lessee for mesne profits in such circumstances but the existing general rules would seem to permit it.^{24a}

The theory on which the courts refuse to permit assumpsit or distraint in this situation is that no privity exists between the mortgagee and lessee, either of contract or of estate.²⁵ The *Peoples* case suggests that a *direction* by the mortgagor-lessor to the mortgagee would permit distraint or assumpsit.²⁶ No decision on this point is cited or has been found by us. Such a direction would usually be readily procurable by the mortgagee since it might avoid foreclosure and payments received would be a credit on the mortgage. Such a direction or authority to collect might well be supported as an agency authority to the mortgagee. As an agency power given as additional security for the mortgage debt, such an agency should be irrevocable by the mortgagor-lessor until the debt is paid or tendered.²⁷ As an agency power, a written direction should not be required but if treated as a transfer of the mortgagor's reversionary rights under the lease, it might require a signed writing as an interest in land.

²⁴Peoples case, *supra*, note 1. The refusal of the injunction was the specific holding in this case.

^{24a}Tenant liable for mesne profits, *Burke v. Willard*, 249 Mass. 313, 144 N.E. 223 (1924).

²⁵Peoples case, *supra* note 1, at page 591.

²⁶*Id.* at page 591.

²⁷See section 139, RESTATEMENT OF AGENCY (1933) and *Bingham v. Secure B. & L. Ass'n*, 26 Dist. (Pa.) 173 (1916).

If such lessee pays the rent on demand to the mortgagee, the payment is good against his lessor, the mortgagor. On this point the cases all agree. But if after paying one or more installments of rent, the lessee should then fail or refuse to pay further installments, may the mortgagee distrain or sue in assumpsit for such rent? On this issue the recent cases of *Peoples-Pittsburgh Trust Co. v. Henshaw*²⁸ and *Brown v. Aiken*²⁹ seem to be in direct and irreconcilable conflict. In the *Peoples* case, the court said, speaking of actual payment of rent by the lessee to the mortgagee on a lease made after the mortgage, ". . . and such payment being equivalent to an attornment . . . thereafter the mortgagee can enforce the lease by distraint or action for rent, in the right, however, of the mortgagor. . . ." Following this statement, which is merely *dictum*, the reason is given for not allowing distraint or action where the lessee refuses to pay any rent at all to the mortgagee. The reason given, quoting the case of *Teal v. Walker*,³⁰ is that no privity of estate or contract exists and hence he cannot proceed by distress or action. In the *Brown* case, also speaking of actual payment of rent by the lessee to the mortgagee on a lease made after the mortgage, it is said, "The acceptance of rents and profits under a lease by a mortgagee in possession does not affect or alter the tenant's relationship to the parties. There is *neither privity of estate nor privity of contract created by this act between the tenant and the mortgagee in possession.*" (Italics added.) It seems to follow inevitably that the Supreme Court is saying that neither distraint nor action would be available to the mortgagee since no relationship justifying it is established by such payment and acceptance of rent. The Superior Court's *dictum* is contradictory to the statement in the *Brown* case. Nor does the statement that he could sue or distrain "in the right of the mortgagor" justify the *dictum* since the Superior Court opinion shows that this means merely that the mortgagee must account for such rent as a "quasi-trustee."

In the situation where no rent is collected from the lessee by the prior mortgagee, a foreclosure of the mortgage or sale of the property on a judgment secured on the debt, will result in the purchaser of the property, be he the mortgagee or a third person, taking free of the inferior lease, if such purchaser chooses to exercise the option to be free of it. While we are still in a critical mood, we might mention that the statement in the *Peoples* case to the effect that the lease is "extinguished" by such sale is not correct.³¹ If this were true, the purchaser would have no option to hold the lessee to the lease if it were a favorable one. But he does have such an option, indubitably.³² If the purchaser chooses to affirm the lease or renounce

²⁸*Supra*, note 1. *Bulger v. Wilderman and Pleet*, *supra*, note 3, and *Girard Trust Co. v. Dempsey*, 129 Pa. Super. 471, 196 Atl. 593 (1938) contain this same *dictum*.

²⁹66 Pa. Atl. 441 (1938).

³⁰*Supra*, note 16.

³¹See page 590 of the *Peoples* case, *supra*, note 1.

³²*Brown v. Aiken*, *supra*, note 29, at page 572; *Curry v. Bacharach Quality Shops*, 271 Pa. 364, 117 Atl. 435 (1921). Where the mortgage made prior to the lease is assigned to the mortgagor, his covenant of quiet enjoyment precludes a right to eject the subsequent lessee, *Morris v. Connellan*, 25 D. & C. 459 (1935).

his paramount right to possession, he becomes the assignee of the reversion of the lessor, with all the rights and remedies thereto appertaining and subject also to his liabilities.³³ Collection of rents after the acknowledgment and delivery of the sheriff's deed constitutes such affirmance or renouncing.³⁴

If rent is collected on such inferior lease before sale, does this act as a new lease between mortgagee and lessee, or create a new tenancy from year to year or in any way impede the right of the mortgagee to assert his superior right of possession, either before or after sale of the property on the mortgage? While the temptation to discuss "attornment" or "the equivalent of an attornment," etc., etc., as discussed in the recent *Randal, Brown and Peoples* cases, is well-nigh irresistible, limits of space as well as the dictates of prudence compel us to omit such discussion. The answer is definite and precise in our cases, that such rent collection in no way creates any privity of estate or contract between mortgagee and lessee, in no way cuts down or restricts the pre-existing rights of the mortgagee, gives no new rights to the lessee and does not prevent repudiation of the lease and assertion of the right of possession by the mortgagee or purchaser at the sale on the mortgage.³⁵ On this issue, there is respectable authority to show that the Pennsylvania view is logically and practically incorrect and that such rent acceptance should at least create a periodic tenancy by implication between mortgagee and lessee, subject of course to termination of the mortgagee's interest by payment or tender by the mortgagor.³⁶ The reason given in the Pennsylvania cases for its view that no new lease is created by implication is that to so hold would impede the collection of the mortgage and would be destructive to the security of mortgages.³⁷

It is clear that where the lease is made after the mortgage the mortgagee on demand for payment of rent acquires no right to rents that have accrued prior to such demand but only to rents accruing thereafter. This is true because the mortgagee has no right to possession, on which right his collection of rents is justified, until he asserts the right to possession by demanding rent.³⁸ In this the law is different where the lease is made prior to the mortgage where the assignment of reversion theory applies.³⁹

Receivership of a corporate lessee was held not to affect this right to demand

³³Curry case, *supra*, note 32.

³⁴*Ibid.*

³⁵See *Brown v. Aiken*, *supra*, note 29; *Girard Trust Co. v. Dempsey*, *supra*, note 28; *Toub v. Tessler*, 18 D. & C. 220 (1932).

³⁶See, for example, *Brown v. Storey*, 1 Mann. & G. 117, 133 Eng. Rep. 270 (1840); *Rogers v. Humphreys*, 4 Ad. & El. 299, 111 Eng. Rep. 799 (1835) and *Gartside v. Outley*, 58 Ill. 210 (1871).

³⁷*Brown v. Aiken*, *supra*, note 29; *Girard Trust Co. v. Dempsey*, *supra*, note 28.

³⁸*Miners Savings Bank v. Thomas*, *supra*, note 6; *Real Estate-L.T. & T. Co. v. Homer B. & L. Ass'n*, *supra*, note 15; *Shallcross v. Rankin*, *supra*, note 20.

³⁹*Supra*, notes 16 and 17 and text.

rents by the mortgagee and on demand the receiver will hold such rent for the mortgagee in preference to general creditors.⁴⁰ In *Pattan v. Citizens Mortgage Co.*⁴¹ receivers in possession of the corporate mortgagor's property collected rents after default. The court held that since possession could not be taken or demanded by the mortgagee because of the court possession, rents collected by the receiver should be applied to the mortgage debt as if demand had been made for rents.

In *Merten's Estate*⁴² an executor petitioned for permission to collect rents from mortgaged realty and the mortgagees objected, claiming that right for themselves. The court held that there was nothing in the general provisions of Section 14 of the Fiduciaries Act of 1917 which in any way affected or impaired the lien of the mortgage given during lifetime or that affected the rights of the mortgagees thereunder. Since the right of the decedent was subject to the superior right of the mortgagee to collect the rents, the executor's right was also so subject. Properly then, the death of the mortgagor has no effect on the right of a mortgagee to collect rent.

In *Miners Savings Bank v. Thomas*⁴³ demand for rent was made on the lessee after the service on him of an attachment execution by a judgment creditor of the mortgagor. It was held that the attachment had the effect of an equitable assignment, gave the attaching creditor no greater rights than those of the judgment debtor, and that all rents accruing after demand by the mortgagee were properly payable to him, the attachment binding only the rent accruing prior to demand by the mortgagee. Incidentally, this case, where the mortgage had a "rents, issues and profits" clause, reaches the same conclusion as the condemned New Jersey case⁴⁴ in which the clause was said to be mere surplusage.

A holder of a second mortgage would seem not to have legal title to the land, could not be an assignee of the reversion nor have a right of possession based upon legal title since such title has passed to the first mortgagee. But notwithstanding this theoretical difficulty, second mortgagees are permitted to assert the same right to collect rents as are first mortgagees. Such right is, of course, inferior to that of the first mortgagee and can be exercised only when the first mortgagee is asserting no right to collect rents.⁴⁵

The mortgagee who asserts a right to collect rent from lessees of the mortgagor thereby goes into what may be called "constructive" possession of the mort-

⁴⁰Shallcross v. Rankin, *supra*, note 20.

⁴¹21 D. & C. 84 (1934). See also to the same effect on bankruptcy of mortgagor, even without a "rents, issues and profits" clause, *Bindseil v. Liberty Trust Co.*, 248 Fed. 112 (1917).

⁴²*Supra*, note 11.

⁴³*Supra*, note 6.

⁴⁴*Supra*, note 8 and text.

⁴⁵See Randal case, *supra*, note 7 and Shallcross case, *supra*, note 20.

gaged property. But where the mortgagor merely directs the lessees to pay rent to the mortgagee, the mortgagor retaining sole control over the property, this does not constitute a taking of possession by the mortgagee with the duties of such.⁴⁶ This being true, it is to be wondered why more mortgagees do not adopt this expedient in collecting rents.

DUTIES OF MORTGAGEES COLLECTING RENT

Where the mortgagee does assume such possession and control by collection of rents, he becomes at least a "constructive" possessor of the property and takes upon himself certain duties. The paramount duty is the duty to account to the mortgagor for the rents received by him as "quasi-trustee." It is not our purpose to discuss generally this duty to account, his duty to pay taxes, etc.⁴⁷ His duty is said to be that of a "provident owner" of the property so long as he retains possession and control of the property through its rents and profits.⁴⁸ Until he surrenders possession and control to the mortgagor he is under a duty to use reasonable skill and diligence in keeping the property productive by leases or otherwise and will be chargeable with the income that such diligence would have produced.⁴⁹

An interesting question that seems untouched by any Pennsylvania case is whether the mortgagee by virtue of being an assignee of the reversion in the one instance or by virtue of asserting the right of possession and control in the other, assumes the duties of the lessor to the lessee. Normally the assignee of the lessor's reversion, for example, assumes the duties of the lessor which run with the land, such as the duty to furnish heat to a lessee of an apartment or the duty to insure quiet enjoyment of the leased premises.⁵⁰ Do these duties automatically devolve upon the mortgagee where the lease precedes his mortgage, he being an assignee of the reversion? The conclusion seems inevitable that such should not be the case until he asserts his rights as assignee by demand for rent and should cease as soon as he relinquishes the rights of an assignee of the reversion. But while he is asserting his right to the benefits of an assignee there would seem to be good reason for imposing on him the reciprocal duties of an assignee. The same conclusion seems just and equitable where the mortgage precedes the lease—he assumes the duties of the lessor by asserting the right to collect the rent, and such duties cease

⁴⁶Fidelity Title and Trust Co. v. Garrett, 327 Pa. 305, 194 Atl. 398 (1937).

⁴⁷See *The Pennsylvania Mortgagee in Possession* by Ronald A. Anderson, 11 TEMPLE L. Q. 491 (1937).

⁴⁸Commonwealth Trust Co. Case, 331 Pa. 569, 1 A. (2d) 662 (1938).

⁴⁹Givens v. M'Calmont, 4 Watts 460 (1835) and Mellon v. Lemmon, 111 Pa. 56, 2 Atl. 56 (1885).

⁵⁰See 35 C.J. p. 1215. In *Cargill v. Thompson*, 59 N.W. 638 (Minn. 1894) where the mortgagee was collecting rent, he was held not to be liable on a covenant of the lessor to furnish water power. But it was there said that such mortgagee gets neither the benefits nor the burdens of covenants. Pennsylvania has held that he does get the benefits, hence this case would be of no value as authority in this state.

when he surrenders possession and control to the lessor. But in this instance, statements of our courts, made entirely without regard to the present problem, might be used to refute this equitable conclusion. We refer to the recent Supreme Court cases saying that collection of rent by the mortgagee "is not an attornment," "has no effect on the relations of the parties," creates "no privity of contract or estate" between mortgagee and lessee.⁵¹ We confidently predict, however, that our courts will confine the force of these expressions to the precise situations with reference to which they were expressed and will not extend their significance to situations to which they are quite inappropriate and misleading.

One further possible duty of a mortgagee who assumes possession and control of the realty by the collection of rents therefrom has been intimated by several recent cases. The lessor of realty owes certain duties in regard to the condition of leased premises to persons using such realty. For example, the lessor of realty is under a duty to persons using the sidewalks of leased property to use reasonable care to see that such sidewalks are reasonably safe for use by pedestrians at the time the lessee enters into possession, notwithstanding that the duty of reasonable care is placed usually on the one in actual occupancy and control.⁵² Does the mortgagee by asserting the right of possession by collection of rents assume such duty to third persons? So long as he is getting the benefits of ownership by collection of rents, such duties should properly be imposed upon the mortgagee and not upon the mortgagor. This is the intimation in recent cases⁵³ although no fact situation has as yet arisen that would impose liability upon the lessor and therefore upon the mortgagee in possession by collection of rents.

A mortgagee of realty may collect rent on leases made by the mortgagor but expert legal advice is required to distinguish between his rights where the lease precedes the mortgage and where the mortgage precedes the lease and mortgagees must ponder well whether the benefits thereof outweigh the liabilities that may be incurred thereby.

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⁵¹See, for example, *Brown v. Aiken*, *supra*, note 29.

⁵²*Levin v. Phila.*, 277 Pa. 560, 121 Atl. 331 (1923) and *Binder v. Phila.*, 302 Pa. 378, 153 Atl. 725 (1931).

⁵³See *Dubin v. Phila.*, 34 D. & C. 61 (1938) and *Sansotta v. Pittsburgh*, 330 Pa. 199, 199 Atl. 164 (1938).