

NOTES

EJECTMENT AS A POSSESSORY REMEDY AVAILABLE TO A MORTGAGEE ON DEFAULT.—With the advent of the economic depression, lawyers generally have in many instances been forced to recognize that in order to give complete relief to their mortgagee clients whose mortgages are in default, they must pursue remedies with respect to the real estate pledged to secure payment of the mortgages, having two objectives, namely, the acquisition of title to the mortgaged property and obtaining possession thereof.

The former objective ordinarily is accomplished by familiar and well-established foreclosure proceedings, while the latter heretofore has usually been attained either by proceedings for the appointment of a receiver of rents for the property during the pendency of the foreclosure proceedings and as part thereof, or by a writ of assistance after the completion of the foreclosure proceedings.

Another remedy is available for the acquisition of possession to mortgaged properties, namely, ejectment. This remedy apparently has been used very rarely in the past and even now is used not to any great extent.

The common law remedy of ejectment was evolved originally for the purpose of restoring to the holders of estates for years the land from which they had been disseised and permitting them to recover damages for such disseisin. Being thus limited in its purpose, it is interesting to trace briefly the development of this remedy as a means of trying the title to land and hence the right to possession thereto on the part of persons other than lessees. At first the claimant would make a formal entry on the land and lease to another, who upon being discovered on the land by the person in possession, was actually ejected or considered that to have been done, and then he brought his action against the one in possession. The right of the claimant's lessee to possession being dependent on the claimant's title, this was then in issue and determined. For the purpose of assuring an actual ejection, the casual ejection was introduced. He, the casual ejector, without waiting for the actual possessor to eject the claimant's lessee, did so, and the issue was thus precipitated. Since this worked a hardship on the

actual possessor of the land, who frequently had no notice of the litigation, the casual ejector was required to notify the actual possessor of the pendency of the litigation and an opportunity was given to defend suit. Finally, as a condition to his being granted leave to defend, the actual possessor was required to admit at the trial the lease from the claimant to his lessee, the lessee's entry and possession and his ouster, thus leaving as the only issue to be litigated, the question of title. Thus, the action of ejectment was developed as a remedy to try the title to land and hence its corollary, the right of possession thereto, including damages for the dispossession therefrom.

Having in mind, therefore, the common law conception that a mortgage on realty was a conveyance thereof, absolute in form defeasible only on the performance of a condition subsequent, namely, the payment of the debt due thereon, and having as one of its incidents the right to possession, it is readily seen that the use of ejectment proceedings at common law for the recovery of possession by the mortgagee of the mortgaged premises was a logical development of this remedy. Since, of course, the mortgagee's title was derived from the possessor of the realty or his predecessor in title or landlord, the question of title was not in issue, and the ejectment action was used for the purpose of the recovery by the mortgagee of possession of the real estate.

One of the earliest cases in New Jersey discussing this subject and one often cited is that of *Sanderson v. Price*.¹ Unfortunately, the majority opinion is not reported, but inasmuch as the decision and the dissenting opinion recognize the basic right of a mortgagee to maintain an ejectment action after default in performance of the conditions of the mortgage, differing only as to the time from which the mortgagee can recover mesne profits from the tenant, the case is authority for the availability of this remedy. Incidentally, a note to the case² referring to other litigation between the above parties indicates the change from the common law rule which permitted a mortgagee to maintain ejectment even prior to default.

The subject was again considered by the Court of Errors and Ap-

1. 21 N.J.L. 637 (E. & A. 1846).

2. At 21 N.J.L. 646.

peals in *Shields v. Lozear*.³ The common law rule is stated to be that a mortgage created an immediate fee simple estate, with an immediate right to enter on the mortgaged premises, subject to the payment of the mortgage on the due date. It is further pointed out that under *Sanderson v. Price, supra*, the right of entry was postponed and possession remained in the mortgagor until the condition of the mortgage was broken by default in the payment of the mortgage money.

Numerous other decisions recognize the right of a mortgagee on default by the mortgagor to maintain an ejectment action, such as *Stewart v. Fairchild-Baldwin*,⁴ where it is said, “. . . after default the mortgagee can take possession or obtain possession by ejectment of the mortgaged premises . . .”; *Bermes v. Kelly*,⁵ which held, “At default a mortgagee becomes entitled to possession of the mortgaged premises”; and *New York Trust Co. v. Shelburne, Inc.*,⁶ which quotes the above and parts of said decisions with approval, as well as other cases.⁷

Finally, the right to maintain this action is inferentially recognized by statute,⁸ which gives the mortgagor a right to redeem by paying the amount due to the mortgagee, or into Court, pending an ejectment or foreclosure suit.

It next becomes pertinent to inquire as to the effect of foreclosure proceedings on the maintenance of this possessory action.

In *Hart v. Stockton*,⁹ a tenant in possession of the mortgaged premises attempted to resist an action in ejectment after a Sheriff's sale in foreclosure proceedings, on the ground that there had been irregularities therein, that these proceedings were void, and that in filing the foreclosure bill and proceedings therein, the plaintiff divested herself of the right of possession upon which to base ejectment. It was determined by the Supreme Court that whether or not there were irregularities in

3. 34 N.J.L. 496 (E. & A. 1869).

4. 91 N.J.Eq. 86, 108 Atl. 301 (E. & A. 1919)

5. 108 N.J.Eq. 289, 154 Atl. 860 (Ch. 1931).

6. 110 N.J.Eq. 187, 159 Atl. 522 (Ch. 1932).

7. *Hinck v. Cohn*, 86 N.J.L. 615, 92 Atl. 378 (E. & A. 1914); *Del-New Co. v. James*, 111 N.J.L. 157, 167 Atl. 747 (Sup. Ct. 1933); *Hart v. Stockton*, 12 N.J.L. 322 (Sup. Ct. 1831); *Price v. Armstrong*, 14 N.J.Eq. 41 (Ch. 1861).

8. Rev. St. 1937, 2:65-9; 3 C.S. (1910) 3408.

9. 12 N.J.L. 322 (Sup. Ct. 1831).

the conduct of the foreclosure proceeding was irrelevant because "there is nothing in the nature of these proceedings (foreclosure) which divests, or suspends, the legal estate and right of possession (of the mortgagee) until a sale takes place" and that "a mortgagee may bring ejectment pending a bill to foreclose".

A later decision by the Court of Errors and Appeals, *Hinck v. Cohn*,¹⁰ confirmed this decision, holding that the decree of foreclosure and sale did not deprive the mortgagee of the right to possession of the mortgaged premises upon default in the performance of the condition of the mortgage.

Mindful of the statute,¹¹ providing in substance that to collect a debt secured by a bond and mortgage the mortgage must first be foreclosed, it is necessary to determine whether or not the commencement and completion of the foreclosure proceeding is a condition precedent to the maintenance of an ejectment action for the recovery by the mortgagee of possession of the mortgaged premises.

Chief Justice Beasley considered this problem in *Mershon v. Castree*,¹² and decided that the proceeding to obtain possession of the mortgaged premises was not a proceeding to collect the debt, being for the purpose of securing and protecting the pledge.¹³

The pursuit of this remedy discloses certain advantages and disadvantages when compared with the alternative relief granted by receivership proceedings during the foreclosure.

Ejectment may be maintained at any time after default and against anyone in possession, whose right of possession is inferior to the mortgage, including the owner and any junior encumbrancer in possession, whereas receivership ordinarily is not available as against the owner in possession.

To maintain ejectment merely a default must be shown, but receivership proceedings in addition require proof that the pledge is inadequate security for the amount due and that the obligor on the bond cannot be made to respond in a deficiency action.

10. 86 N.J.L. 615, 92 Atl. 378 (E. & A. 1914).

11. Rev. St. 1937, 2:65-2.

12. 57 N.J.L. 484, 31 Atl. 602 (Sup. Ct. 1895).

13. Citing as an authority 15 AMER. & ENG. ENCYCL. L., *title* Mortgages, p. 817.

The service of a notice demanding possession, or the service of a summons and complaint in ejectment, either of which is accomplished at a small expense and requires comparatively little time and effort to effect, ordinarily prevents the owner from collecting the rents and frequently precipitates an adjustment of the defaults on the mortgage, whereas applications for rent receivership require an examination of the title, preparation of a foreclosure bill, petition, order to show cause and order appointing receiver, the expense of an appraisal, a possible argument as to the market value and the solvency of the obligor on the bond, and at least five days' notice prior to the entry of the order appointing the receiver.

Finally, it is necessary that the bill of complaint in foreclosure be filed prior to the application for the appointment of a receiver, this proceeding being considered a relief granted incidental to the cause. It follows, therefore, that the foreclosure cause must be kept active and alive and that it be prosecuted and ultimately concluded, for, otherwise, it would be subject to dismissal for lack of prosecution, in which event the receiver's authority would expire. Yet, as long as defaults continue with respect to the mortgage, the mortgagee in possession as a result of ejectment proceedings is not required to institute a foreclosure proceeding. For one reason or another, as, for example, the mortgagee's belief that the proper application of the income from the property will result in the payment of interest and tax arrears with respect thereto, and the consequent avoidance of foreclosure proceedings, the mortgagee may prefer not to incur the expense of a foreclosure proceeding, and pursuing his remedy in ejectment relieves him of the necessity of doing so.

On the other hand, if occupants of the mortgaged premises refuse to attorn after a demand for possession in ejectment, while the mortgagee can recover for mesne profits from the time of service of the demand for possession, since the damages are unliquidated, it is probable that it would be necessary to impanel a jury to determine the issue of damages with the consequent expense and delay, whereas, of course, immediately on the service of the order appointing a receiver the tenants are required to pay this rent accruing thereafter, which is determined, to the receiver.

In addition, if, as the result of a demand for possession the occu-

pants of the mortgaged premises do not surrender possession to the mortgagee, the time required for the preparation and service of the summons and complaint in ejectment, together with the period allowed for filing an answer and, if necessary, the striking out of the answer, is greater than that required for the preliminaries to the appointment of a rent receiver.

A comparison of proceedings for possession by writ of assistance after the completion of the foreclosure proceeding as against ejectment at that time shows that the time required for and the expense incurred in each of these is about the same, but that writ of assistance proceedings are considerably more detailed and involved.

The frequent use of this proceeding by the writer has resulted in the establishment of a course of procedure, some remarks on which might be helpful to a practitioner contemplating its use.

A notice is prepared and served on the occupants containing a demand for possession of the mortgaged premises or the part occupied by the tenant, a reference to the mortgage and a detailed statement of the defaults. It might be pointed out, incidentally, that a demand for possession is not required precedent to the filing and service of the complaint in ejectment, the mortgagor, or those holding possession under him being considered tenants at will or at sufferance,¹⁴ although for practical reasons mentioned hereafter it is advisable to precede the actual commencement of suit with such a demand.

The result of this is that the tenant either attorns to the mortgagee, in which event no further action is required and the desired result is attained with very little effort or expense, or thus becoming aware of the conflicting claims for rent, he refuses to pay either claimant and the next step is to commence an action in ejectment. The attornment of the person in possession, which is the acknowledgment that he holds possession under the mortgagee, is accomplished by an oral or written agreement by the possessor to pay rent to the mortgagee, or, preferably by his payment of rent to the mortgagee. The complaint is not especially complicated, containing allegations as to the mortgagee, the defaults and the fact of having demanded possession. Experience has shown that

14. *Hart v. Stockton*, *supra*, note 7; *Den v. Wade*, 20 N.J.L. 291 (Sup. Ct. 1844); *Howell v. Schenck*, 24 N.J.L. 89 (Sup. Ct. 1853).

ordinarily no answer to the ejectment is filed, but, if so, it is practically without exception sham or frivolous and can be stricken on motion and a summary judgment entered. Having in mind the expense and delay incident to recovering *mesne profits*, it is probably better practice, and it can, of course, be done, to waive these damages and costs and enter a summary judgment when striking out the answer. A writ of possession then issues to the Sheriff of the county and he places the mortgagee in possession. It must be noted that this remedy is equally effective as against the owner, or any subsequent encumbrances in possession.

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POWER OF THE LEGISLATURE TO PUNISH FOR CONTEMPT. — The power to punish for contempt was an inherent and component authority of the High Court of Parliament in England, where the King with his nobles dispensed all kinds of justice, including the making of laws.¹ It is obvious that in a constitutional government with separation of powers, if this power is carried over at all, it cannot have the broad scope accorded to it in its former setting.²

The legislatures of the United States and the several states are not courts of judicature. They are law-making bodies, and their powers are limited by their respective constitutions to that purpose only.³ But this does not mean that they shall not possess and exercise those auxiliary and incidental powers found necessary to the proper performance of their function under a constitutional government, and to be implied from those expressly granted.

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1. *Kilbourn v. Thompson*, 103 U.S. 168, 184-6 (1881).

2. *Ibidem*. *McGrain v. Daugherty*, 273 U.S. 135, 164 (1927); *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Anderson v. Dunn*, 6 Wheat. (U.S.) 204, 5 Law Ed. 242 (1821). Annotation—79 Law Ed. 809. *Marshall v. Gordon*, 243 U.S. 521 (1917).

3. United States Constitution, Articles I, II, III. New Jersey Constitution (1844) Article III. *Supra*, note 1. *In re Hague*, 104 N.J.Eq. 31, 144 Atl. 546 (Chan. 1929), *aff'd*, 104 N.J.Eq. 369, 145 Atl. 618 (E. & A. 1929). *In re Gunn*, 50 Kan. 155, 32 Pac. 470 (1893). *Anderson v. Dunn*, *supra*, note 2.