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APPOINTMENT OF RECEIVERS IN MORTGAGE FORECLOSURE ACTIONS

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THE timeliness of the above entitled subject is well illustrated by the fact that the writer was recently in attendance at the Calendar Branch of the Circuit Court of Milwaukee County, when more than two hundred motions relating to actions for the foreclosure of mortgages were set for disposition on that day, and the great majority of these motions related to the appointment of receivers. The drastic deflation in real estate values, together with other economic factors, that we please to term our depression, has lately thronged our courts with foreclosure actions, and a great portion of the available time of the courts is occupied with the hearing and disposition of the many motions which arise as an incident to every foreclosure.

As regards the mortgagor or his assignee in possession, by far the most important question that arises during the course of the foreclosure is the determination of whether a receiver will or will not be appointed over the premises, and this is so because of the fact that notwithstanding the theoretical considerations that support the appointment of receivers, the practical effect of such appointment is to instantly take from the mortgagor his right of possession and of the rents and profits, and to a great extent to obliterate his equity of redemption.

One might well suppose that in view of the great number of petition for this type of equitable relief, the principles governing its exercise would be well understood by the members of the bar and the bench, but one may find it a daily experience to attend at the courts during the disposal of many receivership motions without hearing more than a vague reference to the actual principles that are controlling. This state of affairs is not due in great part to the fault of either the bar or the bench, but may be ascribed to several causes. One of the most practical, although not perhaps theoretically sound reasons, for this condition, is that the great majority of motions for receivership are undefended by the mortgagors, since, they, knowing that they are in actual default as regards payments of principal or interest, feel that the foreclosure is a pure formality, and that whatever rights they may have will be safe-guarded for them by the law. There being a tremendous number of these default hearings, the court, as a matter of practical necessity, does not inquire more than generally into the merits of the petition, which in most instances is granted. Then too, up until very

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recently, the equitable principles governing the appointment of receivers were not very clearly stated in our Wisconsin cases, and this confused condition of our early law seems to have given rise to a lack of clarity on the subject in the daily hearing and defending of the petitions.

Further, it may be observed that aside from whatever incorrect understanding of the applicable principles may exist, there seems to have grown up a tendency on the part of the courts to uniformly grant, rather than deny, the appointment of receivers, because of the fact that the most frequent applicants for this relief have been the mortgage loan associations, whose membership is largely constituted of moderately circumstanced individuals. The conscious or unconcious thought in influencing this trend has been that our present exceptional economic conditions have resulted in exceptional circumstances which justify the pursuing of a course of action which benefits the greatest number. However humanitarian and praiseworthy this thought may be, from a legal and academic standpoint, nay and even from a standpoint of public policy, it is most regrettable, and this for two reasons. Firstly, it is at times such as this that our statutory equity of redemption to which a mortgagor is entitled, is most precious to him, and may indeed be his only hope of salvation; secondly, any policy of granting the appointment of a receiver with the thought in mind of adding to the security of, and lessening the loss of, the mortgagee, utterly disregards the fundamental equitable principle upon which all such appointments should be based, and is in direct contravention of the liberal and firmly rooted policy of this state as regards the theory of mortgages. The appointment of receivers without due regard to the sanctity of the interest of which the mortgagor is thereby deprived is a usurpation of legislative power by the courts, even though such action may be actuated by the most benevolent of motives as regards the welfare of the small investors in our mortgage loan associations.

The theory of the real estate mortgage, as it has long been firmly established in this state, is well known to every student of the law, and of itself, requires little statement. At the common law, a mortgage constituted a conveyance of title to the mortgagee, with an equitable right of redemption in the mortgagor. Thus, this type of mortgage was very similar in its incidents to our present mortgage on chattels, in that by virtue of the title which accrued to the mortgagee, he became entitled, under certain conditions, to the possession of the res and to the use and occupancy thereof. By virtue of the legal title accruing to a common law mortgagee, he became enabled to secure to himself, under certain conditions, the rents and profits of the res, and summary methods were placed at his disposal for securing possession. In fact, so great

were his rights that courts of equity usually denied him the appointment of a receiver, for the reason that his remedy was adequate without such relief.[1]

This common law theory still persists to some extent in England (where it has been modified by statute), and in some of our states. However, in Wisconsin we have what is known as the lien theory of real estate mortgages, namely that a mortgage conveys merely a lien to the mortgagee, and legal title to the res rests in the mortgagor until it is removed from him by foreclosure and sale as provided for in our statutes. The legal consequences resulting from this simple statement of the lien theory are many and far reaching, especially so as regards the appointment of receivers. Thus, we have carefully built up by judicial holding, a jealously guarded bulwark around the mortgagor's equity of redemption. Courts of equity scrutinize very carefully all shifts, subterfuges or devices which seek to lessen or obliterate this titular and possessive interest of the mortgagor. Every student of the law is familiar with those cases wherein rules of evidence are advisedly disregarded, and testimony is not only permitted but welcomed to show that a deed absolute is in reality but a mortgage. So zealously guarded is this right of the mortgagor that courts have decreed that any contract attempting to clog the equity of redemption will be disregarded by virtue of public policy.

Another necessary corollary to the lien theory is the fact that the legal title which remains by virtue thereof in the mortgagor carries with it the right to possession and the right to the rents and profits, and this right remains until title passes by judgment of foreclosure and sale. At this point, we may well pause and note that when a receiver is appointed who takes possession of the premises and collects the rents and profits, o most substantial portion of the mortgagor's equity of redemption has been taken from him, and indeed, it may be questioned whether anything remains to him that would not have remained to him under the common law theory of mortgages, since even under such a mortgage, he retained an equitable right of redemption up to a certain point.

This brings us squarely to the conclusion which has been arrived at in well reasoned cases, namely, that the appointment of a receiver is an extremely radical procedure, which to a very great extent, deprives the mortgagor of the benefits accruing to him by virtue of the lien theory, and is a remedy which, therefore, should be granted very reluc-

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[1] Sturch v. Young, 5 Beavan 557; Anderson v. Kemshead, 16 Beavan, 329; Cortleyou v. Hathaway, 11 N.J. Eq. 39; Frisbie v. Bateman, 24 N.J. Eq. 28; See also discussion in Schreiber v. Carey, 48 Wis. 208 at page 212.

tantly and very sparingly, and only after a case of necessity has been made out. This rule has been, in effect, stated and adhered to in our jurisdiction (See Grether v. Nick, 193 Wis. 503), and yet despite this fact one may on any motion day witness the wholesale appointment of receivers in our courts.

As a matter of fact, there is a respectable line of authority in jurisdictions where the mortgage is deemed a lien rather than a conveyance that holds that so inviolable is the right of the mortgagor to retain possession until the expiration of the redemption period, particularly where a homestead is involved, that a receiver should not under any ordinary circumstances be appointed.[2] This rule, however, has not been followed in Wisconsin, but we have adopted a rule that is almost as liberal.

For interesting discussions of the considerations governing the appointment of receivers, the following cases from various jurisdictions may well be referred to.

In the case of Larson vs. Orfield (1923 Minnesota), 193 N.W. 453, the court states that it has universally been the rule that the power of appointment of a receiver in a foreclosure action is to be exercised most carefully and cautiously.

Rochester vs. Bennett, (1925 Montana) 240 Pac. 384, adheres to this rule, and further states that this power should be exercised sparingly, and a strong showing of necessity should be made therefor.

For a late case wherein the liberal rule is very logically discussed, see Farm Mortgage Loan Co. vs. Pettet, (1924 N. D.) 200 N.W. 497, wherein it is stated that the mortgagor is entitled to the rents, uses and benefit of the mortgaged property until he expiration of he period of redemption, and the court should not, under ordinary circumstances, deprive the mortgagor thereof by the appointment of a receiver, and that the mortgagor's failure to pay taxes and interest does nit constitute such waste as to authorize the appointment of a receiver during the period of redemption.

See also an interesting statement of the rule contained in Justus vs. Fagerstrom, (1920 Minn.) 176 N.W. 645, where in reversing the action of the trial court, the opinion states that since, during the year allowed a mortgagor for redemption after foreclosure, he is normally entitled to the rents and profits of the land, a receivership will not be sustained unless upon a clear showing that it is necessary to prevent waste and preserve the property, and then only when the waste is of such a character as to endanger the adequacy of the security.

[2] Chadron Loan & Building Association v. Smith, 58 Nebr. 469, 78 N.W. 938, 7 L.R.A., N.S. 1001; Callahan v. Shaw, 19 Ia. 183, cited in Peters v. Bossmann, 180 Wis. 62.

See also Lick v. Strohm, (1925 Wash.) 236 Pac. 88.

We now approach the Wisconsin adjudications, and we find that up until a very recent date, although several cases had been decided involving the appointment of receivers, none of the opinions contained a clear or inclusive statement of the principles governing the granting of this relief. Thus, in the earliest case on this point, namely, Finch v. Houghton, 19 Wis. 149, the appointment of a receiver is upheld without any attempt at an inclusive discussion of fundamentals, but merely upon a showing that the mortgagor was insolvent, that the security was inadequate, and that there were certain unpaid taxes.

The case of Schreiber v. Carey, 48 Wis. 208, contains the first important discussions, and counsel furnished very thorough and voluminous briefs relating to the contrast between the common law theory of mortgages and the lien theory then obtaining in our state. However, counsel for the mortgagor chose to present the question to the court more in the light of whether or not a receiver could be appointed under any circumstances in our jurisdiction, and inasmuch as the case of Finch v. Houghton, supra, had already been decided, and there existed a considerable line of outside authority to the effect that this relief might be granted under certain circumstances, the court rested upon the doctrine of stare decisis, and affirmed the power to appoint receivers without any especial reference to the circumstances which would justify such appointment. In the statement of facts, it appeared that there was some question as to the solvency of the mortgagor; there was some dispute as to the adequacy of the security, and there were unpaid taxes and interest, so that the case is authority only to the point that a receiver may be appointed in foreclosure actions when a combination of circumstances such as the above exists.

The cases of Sales v. Lusk, 60 Wis. 490, is of importance only in that the court announces the principle that a receiver should not be appointed in a foreclosure action, "unless the facts establish a case which clearly invokes the exercise of the equitable power of the court to grant that relief; for the right to the rents and profits does not grow directly out of the relation of the parties, as a matter of strict right, but is founded upon equitable considerations which address themselves to the sound discretion of the court." The appointment of a receiver is then denied, because of the extremely inequitable conduct of the mortgagee, but we do find expressed the doctrine above stated in the quotations, which is very important, since it sketchily states the true rule which prevails today, and which seems to have been ignored in later cases.

The opinion found in Nash v. Meggett, 89 Wis. 486, is of considerable interest and importance in that it states the rule for the first time

that a provision in a mortgage, which expressly conveys and pledges the rents, issues and profits of the mortgaged premises, does not give to the mortgagee an absolute right to such rents as a matter of law, especially as to the possession, use and control of the homestead. We here find the inception of that liberal rule later announced that a contractual provision in the mortgage itself, pledging and conveying the rents and profits is of little importance or consequence, since such pledging of the rents and profits tends to deprive the mortgagor of his right of redemption, and will therefore be disregarded. Note also that some slight distinction is expressed by the court as to the homestead right of the mortgagor. This is a troublesome question which is treated in later cases, but which seems never to have been fully decided.

Winkler And Others vs. Magdeburg, 100 Wis. 421, treats of the question of the propriety of the appointment of a receiver in that particular case without any discussion of general considerations. The facts relied upon were the insolvency of the mortgagor, the inadequacy of the security, and the non-payment of taxes and certain insurance premiums. The court rests its decision upon Schreiber vs. Carey, supra, in confirming the appointment of the receiver, and states:

"The payment of taxes and the cost of insurance is necessary to preserve the property. Equity devolves it upon him who has the use. Not to pay them is waste. The failure of the defendant to pay the taxes and insurance was casting a burden on the mortgaged estate, which equity demanded that the mortgagors should discharge."

It is interesting to note that for the first time the factor of *waste* is touched upon as being germane to the question. Practically all of these older cases seem to attach great importance to the insolvency of the mortgagor and the inadequacy of the security, and it seems rather illogical that these circumstances should have been deemed sufficient to justify the intervention of equity. After all, (as is pointed out in a later case) is it the duty of equity to add to or increase a security which the mortgagee deemed adequate when he accepted it? Should the fact that the security has in the meantime depreciated, through normal factors require a court of equity to relieve the mortgagee from the consequences of his lack of foresight? It is undisputed that equity will not as a general rule relieve one from the consequences of a contract ill-advisedly entered into, so what justification is there in equity for taking from the estate of the mortgagor and adding to the estate of the mortgagee, where the mortgagee was in the dominating position at the time of the entering into of the contract, and then accepted the res as the primary security for the payment of his debt?

And as regards the insolvency of the mortgagor, it is not expected at the time of the granting of the mortgage that he will remain solvent,

in fact, his insolvency is the very condition to secure himself against which, the mortgagee requires the mortgage. The res is the primary fund for the payment of the debt. It is inconsistent to state that the insolvency of the mortgagor should justify the taking of a substantial portion of the equity of redemption from him for the benefit of the mortgagee, since it is only in the event of the insolvency of the mortgagor, or at least his financial embarrassment, that he will be obliged to rely upon his statutory equity of redemption, and the only time when it will be of any value to him. When he is solvent and not financially embarrassed, in most ordinary cases he will not default, and there will be no occasion to consider the appointment of a receiver. The greatest illogicality and injustice of adding the possession and rents and profits of the mortgaged premises to the security already available, merely upon a showing of insolvency or inadequancy of security, not contributed to by the mortgagor, becomes apparent when it is considered that such procedure takes from the mortgagor the very essence of the rights that he is entitled to by virtue of our judicial and legislative policy, and overrides and destroys rights which have required years for their building.

It has always been a perplexing question on the application for the appointment of a receiver whether the fact that the mortgaged premises consisted of a homestead should alter the determination of the court. Several of the cases herteofore cited had permitted the appointmnt of a receiver over a homestead without the question having been directly put in issue. Further, in practically all these cases, there has been included in the order appointing the receiver, a proviso permitting the defendant to occupy at least a portion of the homestead without the payment of rent.

In the case of Peters vs. Bossmann, 180 Wis. 62, the question of homestead is seemingly squarely presented. The opinion discloses that in an action for foreclosure, a receiver was appointed to collect the rents and profits of the property, including the homestead. The order, however, provided that the mortgagor and family might retain possession of, and occupy, the family residence. The mortgagor on the appeal objected to the receivership as to the homestead forty acres, upon the basis that the same was exempt during the period of redemption under the statute of exemptions. However as the court points out, the statute of exemptions of a homestead expressly excludes from its provisions mortgaged premises and premises subject to purchase money, mechanic's and labor liens. Therefore, it is stated, the question is not one of jurisdiction, but one of discretion.

"Courts of equity are reluctant to appoint a receiver to subject the rents and profits of the homestead to the payment of the mortgage

indebtedness. In some states, under somewhat different statutes, the courts have decided that they are without authority to do so. (Citing cases.) But in this state our court has held that it is a matter within the discretion of the trial court, and unless that discretion is improperly exercised, the order will not be disturbed * * *.

"In principle we can see no distinction between the right of the court to appoint a receiver to sequester the rents and profits in the case of a homestead than as to other mortgaged property. In neither case should the court appoint a receiver unless the facts establish a case which clearly invokes the exercise of the equitable power of the court to grant that relief."

This case was important from two standpoints. It recognized to a greater extent than any preceding decision the principle that a receiver should not be appointed unless the facts clearly established a case for the granting of that relief, and this in the light of later decisions is quite significant. It also established for the time being at least, that there is no distinction between the right of the court to appoint a receiver over a homestead and over other mortgaged premises. This served to dispel an impression that had always existed in the trial courts to the effect that the appointment of a receiver might more readily be granted over business property, and that the facts which were required to be shown need be less necessitous than would be required in the case of a homestead. It now became apparent that the appointment of receivers over business property could be procured only upon facts which would likewise justify the appointment of a receiver over a homestead, these facts being more clearly defined in a later case.

This case, Grether vs. Nick, 193 Wis. 503, is possibly a landmark in our law upon this subject. Its importance may be subdivided under two headings: (1) What circumstances justify the appointment of a receiver? (2) A receiver having been appointed, what rights accrue to him as regards rent paid in advance by a lessee to the mortgagor? The case really arises under the second question, but in the decision of this point it became necessary to restate the law applicable to the first.

The statement of facts discloses that the mortgage involved was executed on the second day of January, 1925. After that date, but before the commencement of the action of foreclosure, the mortgagor entered into a lease at a rental of $150 per month, the tenancy to commence on May 1, 1925, and secured a prepayment of rent on the basis of such lease, to the amount of $3,714.97. On December 7, 1925, a receiver was appointed, and was authorized, empowered and directed to collect and receive all rentals for said premises, as of the twentieth day of November, 1925. The receiver demanded rent from the lessees who refused to pay, and upon an order to show cause the court directed

the lessees to pay such rent a second time. In the consideration of these questions the court delved into the circumstances justifying the appointment of a receiver at length. They state as follows:

"There is some confusion in the authorities concerning the circumstances under which a receiver may be so appointed. This is especially true in jurisdictions where the title to the property remains in the mortgagor, as in this state. At common law the title to mortgaged premises passed to the mortgagee, but as a second mortgagee was not entitled to the possession as against the first mortgagee, the practice grew up of appointing a receiver to impound the rents and profits of mortgaged property for the benefit of the second mortgagee. (The court then refers to a citation in 19 R.C.L. 560, Section 369, to the effect that out of this enforcement of the rights of the second mortgagee, and out of the theory prevalent in some jurisdictions that the mortgagee is to be regarded as owner so far as is necessary to keep him secured, seems to have sprung the doctrine of so-called equitable lien on the rents and profits of mortgaged property which courts of equity enforce by impounding them for the benefit of the owner of the mortgage, when it appears that the property itself is in inadequate to pay the debt and the mortgagor is insolvent. And further that the prevailing rule is that inadequacy of security and insolvency of the mortgagor are not in themselves regarded as sufficient grounds to justify the appointment of a receiver in foreclosure proceedings.)

"Clearly upon principle and, we believe, upon the weight of authority in jurisdictions where the legal title to the mortgaged premises remains in the mortgagor (note, 7 L.R.A. N.S. 1001), *there is no warrant or authority for the appointment of a receiver in foreclosure proceedings merely because the security is inadequate or the mortgagor irresponsible.* The mortgagee has seen fit to loan money upon the security of the premises. The statutes relating to the foreclosure of mortgages provide the manner in which he may realize from the security upon which he was content to rely. *There is no principle which in morals justifies a court in adding to the security which the mortgagee accepted at the time of making the loan.* The mortgagee is, however, entitled to have that security preserved, and protected from waste and dissipation. Where the premises become the subject of waste, the well known jurisdiction of a court of equity to prevent waste is aroused, and under certain circumstances a court of equity may interfere to prevent waste, to the end that the security may be preserved in its original value. This a court of equity does by the well established practice of the appointment of a receiver to take possession and manage the mortgaged premises. When the receiver so takes possession, whether there is any foundation for ti in principle, it is well established that the rents and profits so collected by the receiver may be applied upon the mortgage indebtedness, even though such rents and profits have not been pledged as security for the mortgage debt by the terms of the contract between the parties. We do not attempt to vindicate this practice, but simply accept it as a thoroughly established principle of equity jurisprudence.

"But the appointment of the receiver in the first instance can be

justified only for the purpose of preventing waste in the exercise of the well established jurisdiction of courts of equity for that purpose. *It may be that this requirement is occasionally overlooked by the courts and may be misunderstood by the bar.* But a review of the cases in this court fails to reveal any case where a receiver has been appointed in foreclosure proceedings in the absence of circumstances amounting to waste. In this connection it should be noted that delinquent taxes and unpaid interest depreciate the value of the security and amount to waste." (Citing cases.)

Thus, we have for the first time in Wisconsin a definite, clear and unequivocal statement of the rule that inadequacy of security and insolvency of the mortgagor do not justify the appointment of a receiver, despite the intimations contained in the previous cases to the contrary, and that a receiver may be appointed for one purpose, and for one purpose only, and that, the prevention of waste. A few previous cases have hinted at waste as an important factor, but have rested mainly upon other considerations, while here, other considerations are entirely swept aside, and the true principle governing the appointment of a receiver is recognized and established.

In view of this decision and also in view of a later decision which will soon be referred to, there is no justification in morals or in law for the appointment of a receiver by any court with disregard of the true governing factor. The question wholly becomes, "Is the mortgagor committing waste, and if so, is it such waste that will justify a court of equity in the reluctant and sparing exercise of its discretion to appoint a receiver?" We cannot overlook the statement contained in the opinion, "that delinquent taxes and unpaid interest depreciate the value of the security and amount to waste," but it has always seemed to the writer that a court should not, upon a mere showing of unpaid taxes and/or interest, ipso facto, appoint a receiver. The court should further inquire into the circumstance of whether the alleged non-payment of taxes and interest has been such waste as would compel it to exercise its jurisprudence, and this seems especially true when one considers that non-payment of interest or taxes is by express provision in the mortgage constituted a default that will justify and permit the mortgagee to seize the entire security, and thus place the mortgagor in a position where he is forced to rely upon his equitable right of redemption. That is, it scarcely seems equitable that the very act which ordinarily constitutes a default and permits a foreclosure of the mortgage should operate to deprive the mortgagor of the rights which are secured to him in the event of such foreclosure. However this may be, this question is again treated in a later case which fully vindicates the opinions above expressed.

On the basis of their conclusions regarding the appointment of

receivers, the court in the Grether v. Nick case then arrived at the opinion that since a receiver was appointed only to prevent waste and not for the purpose of collecting rents and profits, or adding to the security of the mortgagee, a lessee, who had before the appointment of a receiver paid rent in advance, could not be required to pay it a second time to a receiver, subject of course to the eventual right of sale under the mortgage foreclosure.

However, on motion for rehearing it appeared that throughout the original opinion the court had assumed, due to failure of counsel to state otherwise, that the mortgage in question contained no clause pledging the rents and profits. As a matter of fact, the mortgage did contain such a clause, and the court accordingly requested counsel to brief the following three questions:

"1. What was the effect at common law of a mortgage pledging the rents and profits arising from lands mortgaged?

2. Is the rule in such respect at common law affected by the rule obtaining in this state that the mortgagor retains the title and right of possession of the land mortgaged?

3. Is such rule affected by the various statutes of this state regulating the rights of mortgagors and mortgagees providing for a period of redemption, etc?"

After receiving such briefs, further arguments of counsel were heard, and the court then arrived at some extremely important conclusions.

"It seems to be universally recognized that the right to rents and profits follows the legal title and the right of possession. At common law, and in some jurisdictions in this country, a mortgage operates to convey the legal title to the mortgagee with the right of possession upon breach of the covenants of the mortgage. Orginally this right of possession on the part of the mortgagee was enforced by ejectment, but this rule was changed by statute in England so that a mortgagee might have a receiver appointed whenever a condition of the mortgage was breached for some definite period of time. Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124. Even at common law the mortgagee was not entitled to collect the rents and profits until possession was taken, and his right to collect the rents and profits followed as a matter of course from the possession, whether or not rents and profits were pledged by the mortgage; but the rents and profits were to be applied in the discharge of the debt, and the mortgagee was required to account to the mortgagor for the same.

In jurisdictions where the mortgagor retains the legal title and right of possession, as here, it follows that the right to collect rents and profits remains in the mortgagor until he is deprived of possession in the manner provided by law, and this notwithstanding the fact that the mortgage may pledge the rents and profits. This must be true unless the clause pledging rents and profits should be construed as sufficient to

pass the legal title and right of possession to the mortgagee. *This has never been held in any jurisdiction, and should not be, as it would afford an easy way of evading the policy of our statutes which makes a mortgage a mere lein upon land, leaving the legal title and right of possession in the mortgagor.* It is plain in this jurisdiction that under a mortgage pledging rents and profits the benefit of such rents and profits does not inure to the mortgagee until possession has passed from the mortgagor. *Under the principles established here, the mortgagor may not be deprived of possession except under circumstances discussed in the former opinion.* In order to accomplish such dispossession the mortgagee must invoke the aid of a court of equity. Upon the application of the mortgagee the court may appoint a receiver to take possession of the premises to prevent waste and to collect rents and profits."

We now have, therefore, the further rule expressly stated that the presence of a clause in a mortgage pledging the rents and profits is of no practical effect, since to accord it the effect demanded would be to evade the policy of our statutes and deprive the mortgagor of the substantial part of his equity of redemption. It is now recognized that the appointment of a receiver who collects the rents and profits is a substantial deprival of such rights, and that therefore, such appointment should not be made excepting under circumstances which would justify the court in taking from the mortgagor these valuable rights.

The court then goes on to decide that in view of its already enunciated conclusions, the lessee will not be required to pay rent a second time to the receiver. It, however, bases this decision in part upon the circumstance that the moneys collected by the mortgagor as advance rentals had been expended toward the improvement of the premises, and that thus, the mortgagee had in reality secured the benefit of the same, and that it would be inequitable under these circumstances to oblige the lessee to pay rent a second time. This point would seem to leave an open field of inquiry in every case where a dispute arises between a receiver and a lessee who has prepaid rent, as to whether or not the prepaid rent has been used to the equitable advantage of the premises, and no doubt, up until a very recent date, such was the law.

However, the case of Ottman v. Cheney, 234 N.W. 325, ___. Wis. ___, is further decisive of this point. The statement of facts discloses that a lessee of mortgaged premises had paid rent in advance to the mortgagor shortly before the commencement of the action for foreclosure, but at a time when there was no default in the payments of either principal, interest, or taxes. Upon the commencement of the action, a receiver was appointed and attempted to again collect rent for the period following his appointment. The court in a well reasoned opinion points out that whereas the only legitimate reason for the appointment of a receiver is to prevent the commission of waste, the

legitimate objects to be accomplished in this case by the appointment of a receiver have been secured, since he is in a position to prevent waste, even though he does not collect rents and profits. The court says:

"It is often assumed that the purpose for which a receiver is appointed in foreclosure proceedings is to collect the rents and profits and thus add to the security of the mortgage. This assumption places the cart before the horse. The object is to prevent the commission of waste, to accomplish which the received is invested with the possession of the premises. As an incident merely of possession he is entitled to collect the rents and profits. Such rents and profits, however, when collected, belong neither to the mortgagee, nor to the receiver. They belong to the mortgagor."

This case abolishes entirely the consideration of whether the prepaid rent has been equitably employed in the improvement of the premises, and establishes the rule that where rent is prepaid at a time when there is no default in payment of principal, interest or taxes, the receiver cannot again collect the same, for the reason that he is not appointed to collect the rents and profits, but merely for the purpose of preventing waste. Thus, the old arguments of inadequacy of security and insolvency of mortgagor lose all of their force, since now a receiver is definitely appointed not to add to security or to give the mortgagee rents and profits, but merely to prevent waste if waste exists.

In this connection, it is interesting to note that the old case of Nash v. Meggett, 89, Wis. 486, states the principle that a provision in a mortgage conveying the rents, issues, and profits of the mortgaged premises does not give the mortgagee an absolute right to such rents and profits. This seems to have been entirely overlooked in the intermdiate decisions.

We have now arrived at the most recent and highly important case of Crosby et al. v. Keilman et al., 239 N.W. 431, __. Wis. ___. In this foreclosure action, it appeared that interest was unpaid on a past due first mortgage of $6,000 in the amount of $240, and that there was a second mortgage of $5,630, which had been reduced so that only $2,636 remained owing. The trial court found that the defendants had committed waste which materially reduced the value of the premises as security, and entered an order appointing a receiver. On appeal, the court held, in reserving the order appointing the receiver, that the action of the trial court was not in the sound exercise of discretion and established the following principles:

1. Waste that has reduced or lessened the value of the mortgaged premises and is relied upon for the appointment of a receiver must have reduced such value in excess of the amount by which the mortgage debts had been reduced.

"Unless it did so reduce their value, it may well be that the premises are better or more nearly adequate security for the debts than they would be had there been no waste, and no reduction of the debts."

In other words, since the second mortgage had been reduced in an amount of $3,000, it more than offset any waste contended for by the mortgagees. This negatives the inference that might be drawn from a portion of the opinion in Grether v. Nick, supra, to the effect that unpaid interest and taxes constitute waste justifying the appointment of a receiver as a matter of law, and without any further inquiry. It now definitely appears from the opinion in the Crosby Case that such non-payment, if small and unimportant, or if offset by a reduction in the mortgage debt, will not be sufficient to procure the appointment of a receiver. This is particularly significant in view of the great number of Building & Loan mortgages, where almost in all cases there has been a substantial reduction in the mortgage indebtedness.

The court restates the major portion of its opinion in the case of Grether v. Nick, quoted supra, regarding the insufficiency of inadequacy of security or irresponsibility of mortgagor as grounds for the appointment of a receiver, and reaffirms and reiterates the position taken in that case. The language of the court is illuminating in this respect:

"This seems to us to leave small claim to right in equity to oust the defendants from their homestead and cut off the time which the redemption statute allows them to retain possession of their home and farm after entry of judgment of foreclosure.

We are not unmindful that the appointment of a receiver is largely discretionary with the trial judge, and that there are statements in the affidavits that may have indicated to him that some of the acts of the defendants, which it would serve no good purpose to state, were aggravating and vindictive. But it is the mortgage holders, not the defendants, who are appealing to a court of equity for relief, and the function of that court is merely to protect their security as originally porcured, which, from the findings, of the trial court, does not appear to have been diminished by acts of the defendants. This is especially true as to the holder of the first mortgage, whose security is apparently ample, and the security of the hold of the second mortgage, if inadequate, is apparently less so than it was originally, apart from the general depreciation of farm values which has occurred since the mortgages in suit were executed, which is common knowledge and for which the defendants are not at all responsible."

The court incidentally establishes, as may be seen from the foregoing, that inadequacy of security arising from general depreciation of property values, for which the mortgagors are not responsible, is certainly not to be considered upon the application for relief.

The third and final principle enumerated in the case is found in the following quotation:

"But it may appropriately be said, that while it is true that a receiver for a homestead may be appointed upon sufficient cause therefor, it is also true that facts which justify the appointment of a receiver for premises not a homestead do not always warrant the appointment of one for a homestead. The hardship to the owner and his family in depriving him of possession of his homestead during the period of redemption may more than offset the slight advantage that possibility of reducing the mortgage debt by renting it would be to the holder of the mortgage, and make it appear to the conscience of the court inequitable and oppressive to oust the defendant from it and turn over possession of it to a receiver."

It may, therefore, be appropriately stated that literally the last word of the Wisconsin Supreme Court on this subject is aimed at the indiscriminate appointment of receivers over homesteads on small and trifling grounds, and is designed to further protect and bulwark the equity of redemption of the homestead owner. To the extent that the decision in Peters vs. Bossmann, supra, announces that there is no distinction in principle between the appointment of a receiver over a homestead and other mortgaged property, such decision must be considered overruled.

In viewing these later adjudications as contrasted to those of earlier date, one cannot but be impressed with the thought that the court has in every conceivable manner further secured the rights of the mortgagor. It is true that we do not follow the extreme rule which prohibits the appointment of a receiver under any circumstances where a homestead is involved, but we do enunciate the principle that the right of redemption of a mortgagor is inviolate, that the appointment of a receiver in effect deprives him of a substantial portion of this right, and that, therefore, this appointment should be made only upon a clear showing of circumstances justifying such action. These circumstances have at last been circumscribed and defined. They must amount to waste of no trifling nature, and such waste must be in excess of the amount by which the mortgage indebtedness has been reduced.

The point is firmly fixed that a receiver is not appointed for the primary purpose of collecting rents and profits, which should terminate the practice which has been growing by leaps and bounds of procuring the appointment of receivers, for the express purpose and no other, of securing the rents and profits. We see that so inviolate is the estate of the mortgagor that he may sell a leasehold therefrom, and obtain advance rentals therefor at a time when he is not in default. We must be, when we view these principles, forcibly impressed with the conviction that Wisconsin has maintained its liberal status as a state wherein

the rights of individuals are to be safeguarded, and more especially so, in hysterical times such as these when every effort is exerted to overthrow such property rights, and correspondingly, when such rights and safeguards are most precious and most valuable to those individuals to whom they are secured.