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# Mortgages: Pledge of Rents and Profits: Power of Mortgagee to Collect Rent Before Foreclosure

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worth $12,000, the consideration for which was about $6,000, under *Young* v. *Miner, supra,* some relief ought to be granted whether technically by way of *recision* as pointed out by the majority as the proper remedy, or granted in the pending action following the dissenting justices' view. The case may very well have been sent back to the trial court for a finding as to the value of the premises.

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MORTGAGES—PLEDGE OF RENTS AND PROFITS—POWER OF MORTGAGEE TO COLLECT RENT BEFORE FORECLOSURE.—Plaintiff, mortgagee, seeks to collect rent installments from the tenant of the mortgaged premises basing his right thereto upon an assignment of the lease executed as collateral security with the mortgage. The assignment provided that the mortgagee might collect the rent if the mortgagor-landlord defaulted on the mortgage. Such default occurred. The mortgagee gave the tenant notice of the assignment, and thereafter the tenant paid the rent to the mortgagee. Subsequently the wife of the original mortgagor-landlord entered into an agreement with the tenant reducing the rent. The tenant paid such reduced rent to the mortgagee. The latter, however, seeks to collect the rent according to the original terms of the lease less the amount paid by the tenant under the agreement with the landlord, made after default in the mortgage payments had occurred. *Held:* The mortgagor and the tenant, having notice of the assignment, were powerless to modify the terms of the lease after default without the consent of the mortgagee. *Franzen* v. *G. R. Kinney Co., Inc.,* (Wis. 1935) 259 N.W. 850.

Unless a mortgagee has stipulated for a specific pledge of the rents and profits of the land as part of his security he has no claim on them until he takes possession *under his mortgage. Teal* v. *Walker,* 111 U. S. 242, 4 Sup. Ct. 420, 28 L. ed. 415 (1884); *Myers* v. *Brown,* 92 N. J. Eq. 348, 112 Atl. 844 (1921). Under a mortgage pledging rents and profits the benefit thereof does not pass to the mortgagee until the mortgagor has been dispossessed. *Grether* v. *Nick,* 193 Wis. 503, 213 N.W. 304, 55 A. L. R. 525 (1927); *Ottman* v. *Tilbury,* 204 Wis. 56, 234 N.W. 325 (1931). Dispossession in such situations is usually construed to mean the action of foreclosure and the appointment of a receiver. *Ransier* v. *Worrell,* 211 Iowa 606, 229 N.W. 663 (1930); *Pines* v. *Equitable Trust Co.,* 263 Mich. 458, 249 N.W. 32 (1934); see *Zimmerman* v. *Walgreen Co.,* 215 Wis. 491, 501, 255 N.W. 534, 539 (1934). A mortgagee, to be entitled to collect the rent, must have obtained actual possession of the premises, entered for the purpose of foreclosure, or procured the appointment of a receiver. *Byers* v. *Byers,* 65 Mich. 598, 32 N.W. 831 (1887); *First Joint Stock Land Bank of Chicago* v. *Beall,* 208 Iowa 1107, 225 N.W. 943 (1929). Some courts look with disfavor upon assignments of leases to mortgagees, and have a tendency to construe such methods of pledging rents and profits so that the mortgagee can collect only the rent which accrues after entry by the mortgagee. *Mass. Mut. Life Ins. Co.* v. *Ruetter,* 268 Mich. 175, 255 N. W. 754 (1934); *Smith* v. *Grilk* (N. D. 1934) 250 N.W. 787.

Whether there is a pledge of the rents and profits or not, a *dispossession* of the mortgagor or an *entry* by the mortgagee is a condition to collection of the rents by the latter, but if such *dispossession* or *entry* has taken place the mortgagee has the right to collect from the tenant and apply the rents on the mortgage debt. *Keeline* v. *Clark,* 132 Iowa 360, 106 N.W. 257 (1906); *Attwood* v. *Warner,* 92 Neb. 370, 138 N.W. 605 (1912); *Grether* v. *Nick, supra.* Unless there is waste, the mortgagee has no legal right to the rent even during foreclosure

proceedings. See *John Hancock Mutual Life Ins. Co.* v. *Meester,* 173 Minn. 18, 216 N.W. 329, 330 (1927); *Stamp* v. *Eclehardt,* 204 Iowa 541, 215 N.W. 609, 611 (1927). The mortgagee should petition for a receiver before attempting to collect the rent pledged. *Kooistra* v. *Gibford,* 201 Iowa 275, 207 N.W. 399 (1926). The Wisconsin court has said that a pledge of rents and profit could be enforced only by the interposition of the equity court and the appointment of a receiver. *Grether* v. *Nick, supra.*

In the instant case the court ruled that the parties intended the mortgagor to surrender all possessory rights upon a default in the mortgage payments, possession then vesting in the mortgagee. This is perhaps adequate as a description of the status of the parties but it is doubtful whether they really understood at the time that such a change in posession was taking place. The fact that the landlord-owner subsequently negotiated with the tenant as to the rent seems to indicate she did not consider that the possession had changed. She did, however, file an affidavit in support of the plaintiff's motion for a summary judgment in the action, which affidavit recited that the mortgagee was entitled to the rents according to the terms of the assignment. Thus the court advances the theory that the parties did intend that there should be an automatic entry or change in possession upon default, that the assignment carried out this intention and the affidavit was corroboration thereof. The mortgagee, in possession at the moment a default occurred was entitled to the rent. The decision reveals a unique method by which the mortgagee of leased premises may become the landlord with all the legal remedies incident to such a status, and this without appealing to the equity court to accomplish dispossession in the traditional manner.

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TORTS—LIABILITY FOR WRONGFUL DEATH.—Action brought by administrator of deceased victim, against the administrator of deceased tortfeasor. The plaintiff's intestate was injured in a collision between his automobile and one driven by the defendant's intestate. The defendant was dead upon entrance at the hospital; while the plaintiff died a few hours later. By a special verdict the defendant was found 85 per cent negligent and the plaintiff 15 per cent negligent. *Held,* No cause of action for wrongful death had arisen during the tortfeasor's life, and the statute relating to survival of actions operates only on causes of action which have come into being during the life of the wrongdoer. *Hegel* v. *George, et al.,* (Wis. 1935) 259 N.W. 862.

At common law no action would lie to recover damages for the wrongful death of a human being unless a statute so provided. *Baker* v. *Bolton,* 1 Campbell 493, 170 Eng. Rep. 1033 (1808). The wrongful causing of death was held to be a felony and no civil action could be based on it, as the civil wrong was considered to have merged with the felony and redress, if any, could be had only by a criminal prosecution. *Higgins* v. *Butcher,* Yel. 89, 80 Eng. Rep. 61 (1607). The right of action for a tortious wrong is personal and is destroyed by the death of either the wronged party or the wrongdoer. *Finley* v. *Chirney,* 20 Q.B.D. 494 (1888). There are few decisions contrary to the common law rule that without statute no action for wrongful death will lie. *Cross* v. *Guthery,* 2 Root (Conn.) 90, 1 Am. Dec. 61 (1794); *Plummer* v. *Webb,* 19 Fed. Cas. 894 (1825); *Ford* v. *Monroe,* 20 Wend. (N. Y.) 210 (1838). The right to recover for wrongful death has been incorporated into the Wisconsin statutes. WIS. STAT. (1933) §331.03. A distinction should be noted between the "wrongful death"