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MORTGAGEES IN POSSESSION

Eliminating Foreclosures and Receiverships in Illinois

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MORTGAGEES today, to a greater extent than at any time in the past, are up against the question of determining the better way to proceed in case of default by the mortgagor. The orthodox method of procedure in the past has been to commence foreclosure of the mortgage and to endeavor to secure the appointment of a receiver for the premises. During the last few years, however, mortgagees have been more and more exercising their right to take possession of the mortgaged estate in order to secure the fullest protection possible. Considerations underlying this change fully warrant it on principle, and its practical value is readily apparent. In the appointment of a receiver there is the delay of procuring authority to act which many times damages the rights of the parties interested; the receiver is an officer of the court and must have the sanction of a court order for his every official act; in order that the receiver properly present the matter to the court, it is usually necessary for him to employ an attorney, with additional heavy expense. Thus it will be seen that the additional immediate expenses incident to a receivership, inefficiency and lack of interest of the receiver, and delay in securing authority to act offer serious objections to receiverships.

A better method of procedure, in view of the foregoing facts, would be for the mortgagee under the mortgage or trust deed to take possession of the premises. This procedure has the sanction of the early common law and has been recognized in Illinois. It has the advantages of placing an interested party in possession of the premises who is able to care for the property without petitioning the court every time it is necessary to purchase a load of

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coal or lease an apartment. Since unnecessary expenses are thus eliminated, the proper share of the income from the property is available to be applied on the debt, thereby averting foreclosure proceedings.

In order to secure a more complete understanding of the relationship existing between the mortgagor and the mortgagee and their respective rights, it is advisable to trace the historical development of the relationship. At common law, a mortgage is defined as an estate created by a conveyance, absolute in its form, but intended to secure performance of some act, such as payment of money, by the grantor or some other person. Such conveyance is to become void if the act is performed agreeably to the terms prescribed.[2] In Illinois a mortgage has been defined as "any conveyance of an estate to secure a debt or the performance of some act, such as the payment of money or the furnishing of indemnity, subject to be defeated by the performance of the act agreed to be done."[3]

At common law, when the mortgage was executed, the entire legal estate passed at once to the mortgagee, and unless provided otherwise, the mortgagee could maintain ejectment either before or after default, treating the mortgagor as a trespasser if the latter refused to yield possession. If the mortgagor paid the money when due by the terms of the mortgage, the mortgagee's estate at once terminated and was forever gone. The mortgagor, was thus by operation of law remitted to his former estate. If the mortgagor failed to pay according to the terms of the mortgage, the entire legal estate passed to the mortgagee forever, the title becoming absolute and the mortgagor ceasing to have any interest whatever in the premises.[4]

In equity a mortgage of lands is regarded as a mere lien or security for the debt, the debt being considered

[2] 2 Bl. Com. 157.

[3] Fitch v. Wetherbee, 110 Ill. 475.

[4] Barrett et al. v. Hinckley, 124 Ill. 32; Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 868.

as the principal thing and the mortgage as accessory thereto. The debtor still has the right to redeem after the breach of the condition at law. Until foreclosure, the mortgagor, where equitable doctrines are followed, continues to be the real owner of the fee. His equity of redemption may be granted, devised, taken in execution, or may give rise to dower. It is regarded as the real and beneficial estate tantamount to the fee at law.[5] The common law rule was originally in force in Illinois. It was held that the mortgagee, as an incident to his ownership in fee, could enter before condition broken or bring ejectment unless the mortgage provided otherwise.[6] This rule was so harsh and unjust that the equitable doctrine gained favor, and the common law was considerably modified.

> It is a conceded fact that the equitable theory of a mortgage has, in process of time, made . . . material encroachments upon the legal theory which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. . . . Courts of law now regard the title of a mortgagee in fee, in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. . . . Hence the rule is well established at law as it is in equity, that the debt is the principal thing and the mortgage an incident.[7]

As a consequence of the trend above set out, it has been repeatedly held by the courts of Illinois, that a mortgagee is not entitled to take possession until there has been a breach of condition.[8] However, after breach

[5] Leonard v. City of Metropolis, 278 Ill. 287.

[6] Lightcap v. Bradley, 186 Ill. 510; Ortengren v. Rice, 104 Ill. App. 428.

[7] Barrett et al. v. Hinckley, 124 Ill. 32.

[8] Kransz v. Uedelhofen, 193 Ill. 477; Lightcap v. Bradley, 186 Ill. 510.

of condition the mortgagee has the same right as at common law to take possession.[9] He may file a bill in chancery for a foreclosure and sale, maintain ejectment for possession at law, proceed against the debtor personally, or make peaceable entry.[10] He may, immediately upon breach of condition,[11] bring his action in ejectment without giving any notice to the person in possession. An agreement, however, between the mortgagor and the mortgagee entitling the mortgagee to take possession prior to default will be recognized by the courts. In this connection, whenever the purpose and object of the mortgage require possession to be given to a person who is not entitled thereto by ordinary operation of law, such agreement will be implied from these circumstances.[12]

A greater proportion of the cases dealing with the rights of mortgagors and mortgagees, arise out of the old form of mortgages. There cannot be much doubt, however, that they apply equally to the rights of the parties under a deed of trust in the nature of a mortgage.

Within the limitations imposed by the mortgage or deed of trust and with reference to the subject of the trust, he [the trustee] may be said to represent both parties, but not in any such sense as to have power to waive their rights or to bind them by outside contracts. For some purposes, however, he may represent either party. He is bound to protect and preserve the subject of the trust, being authorized for that purpose to invoke the aid of the courts in a proper case, and he is not at liberty to deal with the property in such a manner as to gain any advantage for himself at the cost of the grantor or the beneficiary. . . . He is liable for any fraud or gross negligence or abuse of discretionary powers, or if he wastes

[9] Rohrer v. Deatherage, 336 Ill. 450.

[10] Vansant v. Allmon et al., 23 Ill. 26; Rohrer v. Deatherage, 336 Ill. 450.

[11] Lightcap v. Bradley, 186 Ill. 510; Barrett et al. v. Hinckley, 124 Ill. 32; Pollock et al. v. Maison et al., 41 Ill. 516; Jackson v. Warren, 32 Ill. 331; Carroll v. Ballance, 26 Ill. 9; Vansant v. Allmon et al., 23 Ill. 26.

[12] Tiedeman, An Elementary Treatise on the American Law of Real Property (3rd Ed.), sec. 244.

or loses the property, or fails to apply it or its proceeds according to the directions of the deed.[13]

The legal title is vested in the trustee as in the mortgagee.[14] Until there has been a default in the securities which are protected by the trust deed, he has no active duties. But he must use every reasonable means to protect the note holders according to the tenor of the instrument under which he acts. The parties may generally limit the liability imposed upon the trustee, but they cannot relieve him from a violation of his trust duty for acts done fraudulently or with wilful and gross negligence.[15]

A mortgagee may have the benefit of improvements made by the mortgagor, and he may also claim the benefit of any subsequently acquired title. When the mortgagor in possession, or anyone claiming under him, is about to commit waste to such an extent as may be calculated to render inadequate the security, the mortgagee may procure a restraining injunction. However, if the mortgagor has committed waste, the mortgagee may have an action on the case for damages, may maintain replevin for timber or fixtures removed from the premises, or may maintain an action for any part of the mortgaged estate wrongfully severed and converted into personalty.[16]

Ordinarily, the mortgagee may not claim the benefits of rents and income from the mortgaged premises until he has gained actual possession of the premises or taken an attornment from the lessee and accepted him as tenant. However, if the mortgage is so drawn as to pledge the rents and profits specifically as security, they become a primary security equally with the land, and the parties may agree that the mortgagee or trustee shall collect

[13] 41 C. J. 606, and cases there cited.

[14] Ware v. Schintz, 190 Ill. 189.

[15] Breed v. Baird, 139 Ill. App. 15; Brown v. Fidelity Trust Co., 250 Fed. 321.

[16] Dorr v. Dudderar, 88 Ill. 107; Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 851.

the same and apply them on the debt. Such a mortgage does not interfere with the equity of redemption.[17]

If the mortgagee is entitled to possession and brings an action to recover it, the mortgagor cannot defend on the ground that the mortgage was made in fraud of creditors. He cannot render his own conveyance of no force and effect. If the mortgagor, or his grantee or assignee, wrongfully refuses to surrender possession after demand, he is liable to the trustee in damages.

However, the mortgagee's mere right of entry after default does not of itself render the mortgagor liable for rents and profits.[18] So if the mortgagee wishes to avail himself of the rents and profits of the premises he will wish to take possession as soon as possible. Several avenues are open by which the mortgagee may enforce his right of entry.

As a usual thing, acquiring possession is not much of a problem, because the mortgagor, to eliminate receiver's fees and the expenses of a foreclosure, will readily yield possession to the mortgagee. If the latter rightfully gains possession after the debt accrues to him, he may continue in possession until the obligation is fully satisfied. In these circumstances he may also hold possession of the premises against everyone unless he acts fraudulently, is grossly incompetent or irresponsible, commits waste, or misapplies the rents and profits. His right to enter in any lawful manner may be presumed from the mortgage itself when there is no agreement to the contrary.[19]

In Illinois, the legal title to the presises is vested in the mortgagee after condition broken. The mortgagee therefore has the immediate right, upon such breach, to

[17] Bolton v. Starr, 223 Ill. App. 39; Townsend v. Wilson et al., 155 Ill. App. 303; Ortengren v. Rice, 104 Ill. App. 428; Forlouf v. Bowlin et al., 29 Ill. App. 471; Oakford v. Robinson, 48 Ill. App. 270.

[18] Forlouf v. Bowlin, 29 Ill. App. 471.

[19] Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 715; Peterson v. Lindskoog, 93 Ill. App. 276; Dickason v. Dawson, 85 Ill. 53; Nicholson v. Walker, 4 Ill. App. 404.

bring ejectment against the mortgagor. The mortgagee is also entitled to all the rights and remedies which the law gives to the owner of the fee and all rights of the mortgagor against the tenants.[20]

In addition to the right of the mortgagee to obtain possession of the premises by an action in ejectment, it is possible that the action of forcible entry and detainer may lie under the statutes as now provided. Since the last amendment to the statute in 1881 there has been no case directly in point covering the right to bring this action by a mortgagee. Jones says:

> This process is not applicable to the case of a mortgagee who has attempted to take possession under a mortgage for a breach of condition, and whose attempt has been repelled by force. Nor can a grantee in a deed intended as a mortgage maintain the action of forcible entry and detainer. . . .
>
> Neither a mortgagee who has not taken possession of the mortgaged premises, nor a purchaser at a sale under the power, can maintain this process for the purpose of obtaining possession of the property. The object of the statute is to give a speedy remedy to those who, being in possession of land, are unlawfully dispossessed by force, and not to permit questions of title to be tried by a summary process before an inferior tribunal.[21]

However, it has been held that where a mortgagor who gives a trust deed acknowledges that he is to be the tenant of the trustee and covenants that an action of forcible entry and detainer may be employed to dispossess him upon breach, if he fails to surrender possession immediately, such action will lie upon the happening of the contingency.[22] It is also true that under a

[20] Ladd v. Ladd, 252 Ill. 43; Rohrer v. Deatherage, 336 Ill. 450; In re Petition of Chicago Trust Company, 264 Ill. App. 106; Ware v. Schintz, 190 Ill. 189; Lightcap v. Bradley, 186 Ill. 510; Barrett v. Hinckley, 124 Ill. 32; McFall v. Kirkpatrick, 236 Ill. 281; Oldham v. Pfleger, 84 Ill. 102; Esker v. Hefferman, 195 U. S. 1.

[21] Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 892, and cases there cited.

[22] Chapin v. Billings, 91 Ill. 539.

lease which antedates the mortgage, forcible entry and detainer lies against a tenant who refuses to attorn to the mortgagee. The reason for this is that, after notice to the tenant of the mortgage and a demand made upon him by the mortgagee, the tenant is bound to recognize the mortgagee as having succeeded to the rights of the mortgagor. By the amendment of 1881 the scope of the action was broadened. The sixth clause of Section 2 of the present forcible entry and detainer act in Illinois reads in part as follows:

> The person entitled to the possession of lands or tenements may be restored thereto . . . when lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this state, or by virtue of any sale in any mortgage or deed of trust contained, and the grantor in possession, or party to such judgment or decree or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent.[23]

The action of forcible detainer may, therefore, be available, first, because the mortgagor is the grantor in possession; second, because, after condition broken, the legal title vests in the mortgagee who is the grantee entitled to such possession; and, third, because the grantee or mortgagee, being entitled to possession after default, stands in the same position as a grantee under a conveyance which is not a mortgage.

The Appellate Court in *Knox* v. *Hunter*[24] attempted to declare that if the plaintiff had not been in possession of the land or entitled to such possession prior to the institution of the action, he could not maintain forcible entry and detainer because of the presence of the words "may be restored thereto." The case of *Aurner* v. *Pierce*[25] was relied on by the court in its decision.

[23] Cahill's Ill. Rev. St. 1931, Ch. 57, sec. 2.
[24] 150 Ill. App. 392.
[25] 106 Ill. App. 206.

But this case was an action under the fifth clause and could not control the construction of the sixth clause, because in none of the conditions in the sixth clause could the person entitled to the benefit of the section be construed ever to have been in possession.

In the case of *Johnson Oil Refining Co.* v. *Gillam*[26] the court held that in a forcible entry and detainer case brought by a lessee against a lessor who refused to give possession in accordance with the lease, it was error to instruct the jury that the burden was on the plaintiff to prove that it was, at some time before the commencement of the suit, in actual possession of the real estate in question. The Appellate Court in its opinion examined the history of the development of Section 2 of the Forcible Entry and Detainer Act. That section from the very beginning contained the words "may be restored thereto." From time to time the legislature has amended the section to permit the use of the action by those merely entitled to possession, but who have never occupied the premises. But the words "restored thereto" remained unchanged. The Supreme Court has repeatedly construed statutes according to the intention of the legislature at the time the statute or amendment was enacted. That courts will avoid a construction which will render a provision of a statute meaningless was declared in *Truly Warner Company* v. *Royal Indemnity Company*.[27] Furthermore, a tenant holds possession under the grantor, and his rights are no greater than the rights of the grantor. In fact, in *Peters* v. *Balke*[28] the court in a lengthy opinion stated:

> In 1881 the Legislature further extended the benefits of this remedy to the grantee of land as against the grantor, who refuses to surrender possession. . . . Such deed must be introduced, not merely for the purpose of showing the extent of the possession, but for the purpose of showing the plaintiff's right to the possession. In this action of forcible entry

[26] 256 Ill. App. 531.
[27] 259 Ill. App. 485.
[28] 170 Ill. 304.

and detainer, the question of title, as between the plaintiff and the defendant or any one else, cannot be tried. As the right to possession only is involved in this action, and as its object is merely to secure possession of the premises in controversy, a judgment therein is not a bar to an action of ejectment between the same parties regarding the same premises. . . . [The] plaintiff cannot recover under the statute unless he offers in evidence a deed for the purpose of showing that he is a grantee entitled to possession. . . . It has also been held by this court, that the party entitled to the possession may bring suit, not only against the grantor who refuses to deliver up the possession, but also against anyone who obtains possession through or under the grantor and refuses to yield it. . . . Where a party was in possession of the land under the maker of the trust deed, . . . such party . . . was to be considered as a party to the trust deed within the meaning of clause 6, and that an action of forcible detainer would lie against such party by the purchaser at the trustee's sale, and that a demand upon such party is sufficient. . . . Where there is a tenancy at will, or by sufferance, such tenancy is terminated by demand for possession without any notice to quit.

It may be deduced from this opinion and from the fact that if the mortgagee is entitled to possession, the mortgagor is regarded as a tenant at will or a quasi tenant at will or by sufferance,[29] that the Illinois statute in regard to forcible entry and detainer is sufficiently broad to permit the use of this action by the mortgagee in his effort to secure possession of the mortgaged premises when he becomes entitled thereto.

The mortgagee's right to maintain the action against a tenant whose lease antedates the mortgage and who does not attorn to the mortgagee after condition broken is doubtful. But after attornment the action would lie.

In addition to the actions already mentioned for securing possession, the mortgagee should be entitled to an action

[29] 41 C. J. 603.

for use and occupation against the mortgagor and the tenants whose tenancies are subject to the mortgage after condition broken, and after notice and demand, in the event that the tenants fail to attorn to the mortgagee. The mortgagor and the tenants should be liable to the mortgagee for a reasonable rental for the period during which they occupied the premises thereafter.

Once the mortgagee is in possession, he owes the duty to account to the mortgagor for the rents and profits, less the amount paid for taxes and necessary repairs. A senior mortgagee must protect the junior mortgagee by applying all rents towards his own debt. He receives the rents and profits not in his own right but as trustee or agent for himself and the mortgagor. He cannot apply a surplus to the liquidation of any other debts due him from the mortgagor, except by consent of the mortgagor. The mortgagee may make valid leases although they will necessarily be terminated by the redemption of the mortgage unless authority to lease for a longer period be given. He is entitled to the necessary expenses of managing the estate.[30]

It has been held that if a second mortgagee is in possession, he must apply the rents first to the first mortgage debt. But on principle, it is difficult to understand why the first mortgagee would have a better claim to the rents than if the mortgagor were in possession.[31]

If the mortgagee in possession fails to obtain the highest rent possible by, for instance, refusing to lease to one offering the highest rent, he will be liable for this loss if a clear case of negligence or wilful disregard of mortgagor's interest can be shown. He is bound to keep the estate in good condition, but no allowance is made for unnecessary applications of funds. He cannot improve the estate and charge it to mortgagor. However,

[30] Strang et al. v. Allen, 44 Ill. 428; Moshier v. Norton, 100 Ill. 63; Holt et al. v. Rees et al., 46 Ill. 181.

[31] Crawford v. Munford, 29 Ill. App. 445; Tiedeman, An Elementary Treatise on the American Law of Real Property (3rd Ed.), sec. 245.

the fact that costs for proper maintenance exceed the income is no reason for not allowing them.[32]

The mortgagee in possession will be allowed reasonable counsel fees necessary for the collection of rents and profits, but not for suits between the mortgagee and mortgagor. Trust deeds usually provide for attorney's fees. The mortgagee must pay the taxes and assessments necessary, and if he pays delinquent taxes on the land he will be subrogated to the right of the state or municipality therefor. If he be compelled to pay a prior lien on the property in order to protect himself, he is entitled to recover the same out of the mortgaged property. He is not entitled to compensation except insofar as he has to pay out fees to others.[33]

The next important matter is the manner of distributing rents and profits received while the mortgagee is in possession of the premises. Various rules have been laid down as guides to the mortgagee. For example, Tiedeman says,

> In applying the rents and profits received from the estate, the mortgagee may first deduct therefrom the expenses incurred in the management of the mortgaged premises and then, he must apply the remainder to the liquidation of the interest and principal of the debt in that order. If in making the account, it is ascertained that in any one period determined by the time when the interest falls due, the rents and profits received are more than sufficient to cover the expenses and accrued interest, the balance is applied to principal, and the interest subsequently accruing is computed on the reduced principal. This is called making a rest, and rests will be made under such circumstances as often as the interest falls due.[34]

[32] Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 1438; Tiedeman, An Elementary Treatise on the American Law of Real Property (3rd Ed.), sec. 246; Roberts et al. v. Fleming et al., 53 Ill. 196; Halbert v. Turner, 233 Ill. 531.

[33] Strang et al. v. Allen, 44 Ill. 428; Moore v. Titman, 44 Ill. 367; Sharp v. Thompson, 100 Ill. 447; Pratt v. Pratt et al., 96 Ill. 184; Lidster v. Poole, 122 Ill. App. 227; Harper et al. v. Ely et al., 70 Ill. 581.

[34] Tiedeman, An Elementary Treatise on the American Law of Real Property (3rd Ed.), sec. 270.

Jones says that Chief Justice Shaw, in directing that an account be reformed by making annual rests, laid down the following rule:

"1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents and deduct the same from the gross rents and the balance will show the net rents to the end of the year. 3. Compute the interest on the note for one year and add to it the principal, and the aggregate will show the amount due thereon at the end of the year. 4. If the net annual rent exceeds the year's interest on the note, deduct that rent from the amount due, and the balance will show the amount due at the end of the year. 5. At the end of the second year go through the same process, taking the amount due at the beginning of the year as the new capital to compute the years' interest upon. So to the time of judgment."

Statements of substantially the same rule have frequently been made. The two essential points are: First, that when there is a surplus of rents in any year above the interest then due, a rest shall be made, and the balance remaining after discharging the interest shall be applied to reduce the principal, so that the mortgage shall not continue to draw interest for the face of it, when in fact, the mortgagee has in his hands money that should be applied to reduce the principal, and thereby make the interest less for the following year. Secondly, although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell the amount on which interest shall be paid for the following year, for that would result in the charging of interest on interest, which is not allowed, but the interest continues on the former principal until the receipts exceed the interest due. These are the principles upon which the mortgagee's interest account is everywhere made up; and the cases in which they are stated are many and in general accord. Where there has been no application of the rents and profits to the payment of the debt, the interest on the principal should be computed without annual rests and the mortgagor is entitled to interest on the rents. There should be no rest resulting in com-

pound interest. The account should be closed annually and a balance struck between debit and credit. If the balance is in favor of the mortgagor the amount thereof should be applied to a reduction of the principal.

Except for the first part of the rule, that if the annual rests shall be made and interest allowed on the surplus, great injustice would be done in many cases.[35] If the rents and profits exceed the sums properly chargeable for repairs and the care of the estate, so that there is a net surplus applicable to the payment of interest on the debt, annual rests in the computation of interest should be made. Semi-annual rests have been allowed where the rents and profits received quarterly were sufficient to pay the interest. But if there is nothing received from the property that is applicable from time to time to the payment of the accrued interest, no rests can be made. Annual rests are directed when the mortgagee is personally in possession, as well as when he receives rents from a tenant.

In taking the account between the mortgagee and the mortgagor the surplus of his receipts over his disbursements should be applied to the payment of the interest as it becomes due. . . . If in any year his disbursements exceeded his receipts the amount of the deficit should be added to the principal of the debt. Annual rests may be made, so that the mortgagor may be charged with interest for disbursements made by the mortgagee, but not so as to charge the debtor with compound interest either upon the mortgage or upon the advances. . . . According to the English decisions, if there is interest in arrear at the time the mortgagee takes possession, annual rests are not generally required until the interest in arrear is paid off or even until the whole mortgage debt is paid off.[36]

In the case of *Moshier* v. *Norton et al.*,[37] decided in 1881, the court upheld the account as prepared by the master in which the account was stated annually, and refused to recognize the contention that inasmuch as

[35] Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 1456.

[36] Jones, A Treatise on the Law of Mortgages of Real Property (8th Ed.), sec. 1457.

[37] 100 Ill. 63.

interest was in arrears at the time the mortgagee took possession that the mortgagee did not have to state his account annually but could wait until his entire debt was paid off. An examination of the case indicates that the master was inconsistent in his accounting. For a period of several years during which the mortgagee was in possession, the master computed the interest accrued and the rents received and applied the rent first in the payment of interest and then, on principal, and thereafter stated the account annually. The rent received each year was more than sufficient to pay the interest accrued and the general taxes. Therefore, it would seem that the case is not necessarily authority for requiring the mortgagee in possession to state his account annually in the event that the rents were not sufficient to pay the entire interest which has accrued, together with taxes. The present day problem seems to be more complicated than in 1881 because of the diverse ownership of the indebtedness secured by the trust deed. The various rules for stating an account have been set forth herein at length in order to show the wide divergence of the authorities. The main purpose of stating an account at intervals seems to be to apply as much of the income as is possible toward the payment of the principal of the indebtedness. It is a question whether or not a mortgagee in possession can add to the principal indebtedness the deficiency of receipts over disbursements and thereby become entitled to interest on such deficiency. Because of the varying conditions surrounding each particular case it is doubted that a general rule can be laid down as a guide to mortgagees in possession. Fortunately, most of the trust deeds provide the manner of applying rents and, where this is so, the mortgagee is safe in following the directions; in fact, if he does not, he may be personally liable because of the misapplication of funds which he has undertaken to administer.

One of the first things a mortgagee should do is to become acquainted with the terms and conditions of the

trust deed. The trust deed may restrict or amplify the general law with reference to the rights of the mortgagee in the instant trust deed. If he violates the terms and conditions of the particular trust deed he may become personally liable not only to the security holders, but also to the mortgagor. If, however, he follows the letter of the trust deed, where it speaks, and the common law as interpreted by the courts in Illinois, where it does not speak, the mortgagee will generally be protected, and in taking possession of the property he will greatly benefit the security holders.

The right of a mortgagee to continue in possession after foreclosure sale for the purpose of collecting rents and profits to apply toward the payment of the deficiency decree is not so well established in law as is the right to enter for condition broken. In several recent cases, chancellors have entered decrees approving distribution and sale, and have provided that the mortgagee continue in possession of the premises subject to accounting to the court for the rents received and the application made thereof. It would seem that it is as much within the jurisdiction of the court to continue the mortgagee in possession for the purpose of collecting rents to apply on the deficiency as to appoint a receiver for this purpose. Under the right of a mortgagee in possession to continue in possession until the entire debt is paid, and under the pledge to the mortgagee of the rents, issues, and profits as security for the payment of the indebtedness, it might even be said that the court is bound to recognize the right of the mortgagee to enter into possession for the purpose of collecting the deficiency, or to continue in possession until the debt is paid. Care should be exercised in incorporating in the decree as many of the provisions of the trust deed regarding the matter of the trustee's rights to possession as possible, in order that these rights might carry over after the trust deed has become merged in the decree.

Whether or not a mortgagee, or trustee, is authorized in Illinois to purchase the property at the foreclosure

sale on behalf of all of the security holders without presenting the securities at the time of the sale or making proof of the ownership thereof, is an interesting question for the consideration of those who are seeking a method to bring order out of the chaos that frequently exists in the case of large issues. Inasmuch as this question is not properly a part of the subject matter of this discussion, it should only be considered as a suggestion for further thought. In the case of a large hotel in Chicago this procedure was followed and apparently with success. Foreclosures could be handled with greater expedition, with smaller master's fees and without the necessity of a bondholders' protective committee and without the necessity of providing for non-depositing bondholders, if the mortgagee could and would purchase the property at the sale on behalf of all the bondholders and then continue to represent the security holders in accordance with their respective interests until such time as the property is redeemed or is sold by the trustee.

Fully to appreciate the extent that the courts have gone in protecting the rights of a mortgagee with reference to the possession of the property, we need but examine the decision of the Appellate Court in *In re Petition of Chicago Trust Company.*[38] In this well reasoned opinion the court upheld the right of a trustee under a first mortgage to take the possession of the property from a receiver appointed under a second mortgage. This recent decision removes all question of the present right of a mortgagee to take possession of property in case of condition broken and should remove all doubt of the efficacy of this remedy.

[38] 264 Ill. App. 106.